



Anuario Mexicano de Derecho
Internacional

ISSN: 1870-4654

amdi_ij@yahoo.com.mx

Universidad Nacional Autónoma de
México
México

de LA SERNA GALVÁN, Mónica Lourdes

INTERPRETATION OF ARTICLE 39 OF THE UN CHARTER (THREAT TO THE PEACE)
BY THE SECURITY COUNCIL. IS THE SECURITY COUNCIL A LEGISLATOR FOR THE
ENTIRE INTERNATIONAL COMMUNITY?

Anuario Mexicano de Derecho Internacional, vol. XI, 2011, pp. 147-185

Universidad Nacional Autónoma de México
Distrito Federal, México

Available in: <http://www.redalyc.org/articulo.oa?id=402740626006>

- How to cite
- Complete issue
- More information about this article
- Journal's homepage in redalyc.org



Scientific Information System

Network of Scientific Journals from Latin America, the Caribbean, Spain and Portugal

Non-profit academic project, developed under the open access initiative

INTERPRETATION OF ARTICLE 39 OF THE UN CHARTER (THREAT TO THE PEACE) BY THE SECURITY COUNCIL.

IS THE SECURITY COUNCIL A LEGISLATOR
FOR THE ENTIRE INTERNATIONAL COMMUNITY?*

*INTERPRETACIÓN DEL ARTÍCULO 39 DE LA CARTA
DE LAS NACIONES UNIDAS (AMENAZAS A LA PAZ)
POR EL CONSEJO DE SEGURIDAD. ¿ES EL CONSEJO DE
SEGURIDAD UN LEGISLADOR PARA TODA LA COMUNIDAD
INTERNACIONAL?*

Mónica Lourdes de la SERNA GALVÁN**

RESUMEN: El Consejo de Seguridad de las Naciones Unidas tiene la obligación y la facultad de determinar conforme al artículo 39 de la Carta de las Naciones Unidas “la existencia de toda amenaza a la paz, quebrantamiento de la paz o acto de agresión” (en este artículo únicamente se analizará el concepto de “amenaza a la paz”). Sin embargo, dicho documento no contiene expresamente los límites del Consejo de Seguridad para la interpretación de este concepto. De acuerdo con el autor, dicha interpretación debe ser realizada de conformidad con las reglas de la Convención de Viena sobre el derecho de los Tratados de 1969 y respetando los principios y propósitos de la Carta de las Naciones Unidas. **Palabras clave:** Amenaza, Paz, Artículo 39 de la Carta de las Naciones Unidas, Resoluciones 1373 y 1540, Consejo de Seguridad, Legislación Internacional.

ABSTRACT: *The Security Council of the United Nations has the obligation and the power to determine under Article 39 of the Charter of the United Nations “the existence of any threat to the peace, breach of peace or act of aggression” (in this article the author will only analyze the concept of “threat to the peace”). However, the Charter does not contain explicitly the limits to the Security Council for the interpretation of the concept. In accordance with the author, that interpretation must be undertaken in conformity with the rules of the Vienna Convention on the Law of Treaties of 1969 and in accordance with the principles and purposes of the United Nations Charter.*

Descriptors: *threat, peace, article 39 of the UN Charter, resolutions 1373 and 1540, Security Council, international legislation.*

RESUMÉ: *Le Conseil de sécurité des Nations Unies a l'obligation et le pouvoir de déterminer conformément à l'article 39 de la Charte des Nations Unies, “l'existence d'une menace contre la paix, rupture de la paix ou d'acte d'agression” (le présent article ne analyser pas le concept de «menace pour la paix»). Toutefois, ce document ne contient pas explicitement les limites du Conseil de sécurité pour l'interprétation du concept. Selon l'auteur, cette interprétation doit être entrepris conformément aux règles de la Convention de Vienne sur le droit des Traités de 1969 et en respectant les principes et buts de la Charte des Nations Unies.*

* Artículo recibido el 9 de diciembre de 2009 y aceptado para su publicación el 3 de septiembre de 2010.

** The author wishes to express her gratitude to Dr. De Hoogh for his advice and wants to express that the views in this article are those of the author in her personal capacity.

SUMARIO: I. *Introduction*. II. *Powers to Legislate of the Security Council*. III. *Interpretation of the Term "Threat to the Peace"*. IV. *Interpretation and Practice in the Application of the Charter*. V. *New Threats to International Peace?* VI. *Conclusions*.

I. INTRODUCTION

The Security Council in order to fulfill its obligations enjoys powers conferred by the UN Charter. Among these powers and in conformity with article 39 of the UN Charter, the Security Council shall determine the existence of any threat to the peace. Notwithstanding, as we will further analyze, there is no express provision in the UN Charter that establishes the limits of this power or suggests the form in which the Security Council has to interpret the term 'threat to the peace'.

Since 1990 (after the end of the Cold War), the Security Council through several resolutions, has been developing a broader definition of the term 'threat to the peace' covering civil wars, violations of human rights and terrorism, among others. However, through all the UN Charter there is also no definition of this term, so in order to determine an act as a threat to the peace an interpretation of this term has to be done in conformity with the general rules of interpretation stated in the Vienna Convention on the Law of Treaties.

In order to establish whether the Security Council has been interpreting article 39 of the UN Charter in conformity with the general rules established in the Vienna Convention, we will analyze the practice in which the Security Council has been determining what constitutes a threat to the peace through several resolutions.

As we will see, the Security Council had only determined as threats to the peace those acts related to specific situations in a specific territory. Notwithstanding, with Resolutions 1373 and 1540 the Security Council created resolutions in a general and abstract form that can be considered by some authors as an exercise of law-making process by the Security Council in which general obligations were imposed on all States in a context not limited to a particular country. These means, that in both resolutions the Security Council for the first time declared an abstract phenomenon (international terrorism) as a threat to international peace.

The powers of the Security Council cannot be unlimited, the Security Council has to act at least in accordance with the principles and objects of

the Charter and with the intentions of its drafters. However, we also have to take in consideration the new forms of attacks and problems that have been developing, specially the new mechanisms of attacks and the new non-state actors. An analysis among the new international problems and the form in which the Security Council has been determining threats to the peace will be the main goal of this article.

II. POWERS TO LEGISLATE OF THE SECURITY COUNCIL

The separation of powers is a form of government used by some democratic States, usually divided in three main branches, the executive, judicial and legislative powers. The last one (which is the only one that we will analyze in this article) is in charge of making the law. By law we understand “a set of rules that are enacted by an organ (normally a national legislature) of a state; these are mandatory throughout the territory of that state and deal with matters that are of more or less general concern to the persons and entities in that territory.”¹

In order to consider an act a rule of law some main characteristics need to be considered, “they are unilateral in form, they create or modify some elements of a legal norm, and the legal norm is general in nature, directed to indeterminate addresses and capable of repeated application in time.”² Manusuma in his book stated that the rules of law: (i) must apply equally to all persons or entities subject to it when applied in similar cases (a simple set of rules applicable to particular individuals cannot be qualified as law); (ii) have to be general in order to facilitate equality in practice, so they must be formulated in general and abstract terms, this means that the law cannot refer to particulars, groups or individuals, entities or States, or to any particular situation; as opposed to regulations or decisions that pertain to particular cases or situations; (iii) have to be known by those who must observe them; and (iv) should be stable and carry with them a measure of certainty. Furthermore, all actions of any authority must be

¹ Lavallo, Roberto, “A novel, if awkward, exercise in international law-making: Security Council resolution 1540 (2004)”, *Netherlands International Law Review*, LI, Vol. 51, Issue 03, December, 2004 (published online by Cambridge University Press 28 January, 2005), p. 412.

² Yemin, Edward, *Legislative powers in the United Nations and specialized agencies*, preface by Michel Virally, A. W., Leiden, Sijthoff, XVII, 1969, p. 6.

based on previously established rules; if an action is not based on an established rule consequently it is not obligatory.³

If a rule complies with all these requisites it has to be considered as legislation, however this term is in accordance with the legislative power of a State. In international law, there is only one specialized organization (ICAO the predecessor of the International Commission of Air Navigation (ICAN)) with legislative competence in its regulatory function and its amendments or regulations when adopted by a certain majority, are binding on all members, even for dissenting ones.⁴ This lack of practice led us to consider that in international organizations the legislative authority is more an exception than a rule.

To consider a term such as ‘international legislation’ within the United Nations (UN), we have to bear in mind that some authors in accordance with the International Court of Justice are of the view that “the UN does not contain a legislative organ as such, every norm of international law is based, at least in principle, upon the consent of all states bound by it – no state is to be bound by a rule of international law if it did not have at least the opportunity to influence the development of that norm”.⁵

1. *Powers of the Security Council*

The Security Council is the most dynamic organ in the organization with the greatest powers and functions established in Chapters V to VIII of the UN Charter. Since there is no specific provision establishing the limits of its powers, some authors have stated that “there are no international legal limits to the enforcement powers of the Security Council acting under Chapter VII of the United Nations Charter (UNC)”.⁶ Not-

³ Manusama in his article established some requirements for the concept of the rule of law. Manusama, Kenneth, “The principle of legality in the law and post cold war practice in the United Nations Security Council”, *Amsterdam.diss, Vrije Universiteit*, 2004, p. 20.

⁴ Erler, Jochen, “International legislation”, *The Canadian Yearbook of International Law*, written by C.B. Bourne, The University of British Columbia publications centre, vol. II, tome II, 1964, p. 159.

⁵ Elberling, Björn, “The ultra vires character of legislative action by the Security Council”, *International Organizations Law Review* 2, Leiden, the Netherlands, 2005, p. 351.

⁶ Oosthuizen, Gabriël, “Playing the devil’s advocate: The United Nations Security Council is unbound by law”, *Leiden Journal of International Law*, Leiden, the Netherlands, vol. 12, 1999, p. 549.

withstanding, some of these articles conferring powers to the Security Council can also be considered as limitations to their acts. For instance, article 1 of the UN Charter states, as one of the main purposes of the UN, “to maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace...”,⁷ but this article is also a limitation for the actions taken by the Security Council, since in accordance with article 24.2 of the UN Charter the Security Council must act in accordance with the purposes and principles of the UN and the provisions of the Charter,⁸ and for that reason the Security Council cannot go beyond the limits of the purposes and principles of the Charter (maintain international peace and security) and implement measures not in accordance with these limits.

Another example is article 2.4 of the UN Charter which states the prohibition of use of force by individual Member States, meaning that the only one who can imposed military and non military measures is the Security Council.⁹ However, in order to impose those measures the Security Council has to determine if an act is a threat or breach to the peace or an act of aggression in accordance with article 39. Without this determination the Security Council cannot impose military or non-military measures.

We also have to bear in mind that the decisions taken by the Security Council have a binding character, so they must be carried out by all Member States in accordance with article 25 of the UN Charter. This power of the Security Council is a requisite to maintain international peace and security, is the form in which the Security Council can oblige Member States to fulfill its duties, so the Security Council has to “use” this power in accordance with its main duties also established in the UN Charter.

⁷ Article 1.1 of the 1945 Charter of the United Nations. available at <http://www.un.org/en/documents/charter/> [hereinafter UN Charter].

⁸ See: Manusama Kenneth, *op.cit.*, p. 32; Oosthuizen, Gabriël, *op. cit.*, p. 551; Asada, Masahiko, “Security Council resolution 1540 to combat WMD terrorism: Effectiveness and legitimacy in international legislation”, *Journal of Conflict and Security Law*, Oxford University Press, 2009, p. 344 and 345 and Angelet, Nicolas, “International law limits to the Security Council”, in Gowler Law International, 2001, p. 74.

⁹ There are only two exceptions for the prohibition of the use of force: (i) article 51 of the UN Charter, the right of individual or collective self defense; and (ii) the authorization under Chapter VII permitted by the Security Council to take military measures to respond to “any threat to the peace, breach of the peace or act of aggression”.

Another relevant article is article 27 which set up the voting procedures in the Security Council, establishing that each member shall have one vote and decisions (not on procedural matters) shall be made by an affirmative vote of nine members including the concurring votes of the permanent ones. Although article 27(3) does not explicitly mention the ‘veto power’, the fact that substantial decisions require the concurring vote of all five permanent members to agree with the adoption of any resolution, makes it actually a power only conferred to these five permanent members. Since the Security Council while determining a threat to the peace is the only one who decides when to exercise or not its veto power, the permanent members have the duty to comply with its obligations, they “have to exercise their office in good faith, commensurate with their responsibility as members of the Council and bearing in mind the principles and purposes of the Organization”.¹⁰

Regarding Chapter VII, we have to consider some articles such as article 39 of the UN Charter which confers the Security Council the faculty to determine the existence of any threat to the peace, breach of the peace, or act of aggression. The Security Council in determining whether a situation can be considered a threat to the peace according to article 39, has a broad discretion, but this article will be further analyze.

Article 41 of the UN Charter also confers the Security Council the faculty of deciding the measures not involving the use of armed force that shall employ to give effect to its decisions. Although article 41 does not specify against whom the measures are directed to, these measures shall be applied to lead a certain State or States to put an end to the conduct determined by the Security Council as threat to the peace in conformity with article 39. The list of article 41 is not exhaustive, but this does not mean that any non-forcible measure is permissible under this article. As G. Oosthuizen had stated,¹¹ this requirement could be linked to the concepts of ‘good faith’ and ‘abuse of rights’, however the list contains only measures dealing with concrete situations, not norms of general and abstract applicability.¹²

¹⁰ Herndl, Kurt, “Reflections on the role, functions and procedures of the Security Council of the United Nations”, extract from the “*Recueil des cours*” (Hague Academy of International Law), vol. 206, 1987, pp. 316 and 317.

¹¹ Oosthuizen Gabriël, *op. cit.*, p. 554 and 555.

¹² Elberling Björn, *op. cit.*, p. 343 (The establishment of the *ad hoc* Tribunals for Rwanda and the former Yugoslavia did conform to this requirement.)

Article 42 refers to military action as measures that can be taken by the Security Council in case measures of article 41 are inadequate or have proved to be inadequate. The Security Council is the only organ with the power to take enforcement action that can involve military force, notwithstanding this power, a determination of article 39 has to be done before the Security Council determines to apply it.

Although there is no specific provision delimiting the powers of the Security Council, this does not mean that the Security Council is unbound by law,¹³ it is bound by international law and by *ius cogens* norms. This is one of the reasons that some scholars have disagreed with the ‘legislative powers’ of the Security Council, considering that the Council is not capable of legislating international law, and that the UN Charter does not give the Security Council expressly or implicitly this legislative authority. Even when Security Council resolutions have binding effect, they are not sources of general applicability and the Security Council may “act as a law-enforcing body, but not as a legislator,”¹⁴ and that the Council “cannot create legislation in the sense of binding, abstract and general legal rules”.¹⁵

2. The Security Council as legislator

After the Cold War the Security Council has been implementing several measures considered by some authors as of ‘legislative nature’. The Security Council started considering certain problems of concern to the international community as ‘threats to the peace’ such as the protection of civilians in civil wars, violations of human rights and state terrorism. For instance, the establishment of the United Nations Compensation Commission and the creation of the *ad hoc* criminal tribunals for the Former Yugoslavia and Rwanda (ICTY and ICTR), have been meant to be international legislation or legislative acts, since the establishment of judicial

¹³ Notwithstanding some authors such as: Szasz, Paul, “The Security Council starts legislating”, *American Journal of International Law*, 2002, vol. 96, no. 4; Álvarez, José, “Hegemonic international law revisited”, *American Journal of International Law*, October 2003, vol. 97,; and Tomuschat, Christian, “Obligations arising for states without or against their will”, 241, *Recueil des Cours*, The Hague 1993, do not totally agree with this affirmation. Oosthuizen, Gabriël, even consider the Security Council as unbound by law.

¹⁴ Angelet, Nicolas, *op. cit.*, p. 79.

¹⁵ Manusama, Kenneth, *op. cit.*, p. 7.

bodies is done by 'legislative acts' and do not consider specific situations.¹⁶ Notwithstanding, in these cases, the Security Council while creating these judicial bodies is not acting in a general and abstract form, the situations were not general but rather specific cases, the Security Council was not creating new law but enforcing the existing one while exercising its powers under Chapter VII in relation with article 39 of the UN Charter.¹⁷

Other similar cases are the imposition of disarmament obligations on Iraq, the determination of the Iraq-Kuwait border;¹⁸ and in general the imposition of economic sanctions that also have been meant to be international legislation or legislative acts.¹⁹ However in these cases, the Security Council once again was referring to specific situations and not to general acts, furthermore is also of special relevance to consider that it was imposing obligations to a specific State and not indiscriminately.

In all these cases, the resolutions were regarding concrete and not abstract measures, and as we have analyzed, the main characteristics of any legislation (even in an international scope) are the general and abstract character of the obligations imposed which are not linked to concrete situations. The Security Council can only issue decisions in response to particular situations or conducts,²⁰ such decisions are not wholly general. For a particular norm to be truly general in nature, it needs to be applicable to all persons or particular classes of persons (rather than to specified individuals), in all circumstances or in all situations where particular criteria have been satisfied. In other words, it should be composed of abstract legal positions.

¹⁶ Happold, Matthew, "Security Council resolution 1373 and the constitution of the United Nations", *Leiden Journal of International Law*, 2003, vol. 16, p. 596.

¹⁷ *Ibidem*, p. 603, footnote 60.

¹⁸ *Iraq – Kuwait*: In resolution 687 (1991) the Security Council has gone beyond its "executive" faculties. After having authorized the armed liberation of Kuwait, the Security Council enforces Iraq to: (i) eliminate weapons of mass destruction; (ii) delimitate the boundary between Iraq and Kuwait, and (iii) to pay compensation for the damages caused in the war.

¹⁹ See: Hulsroj, Peter, "The legal function of the Security Council", *Chinese Journal of International Law*, vol. 1, Oxford University Press, 2002.

²⁰ Happold, Matthew, *op. cit.*, p. 607. Referring to the imposition of disarmament and non-proliferation of weapons' obligations.

III. INTERPRETATION OF THE TERM “THREAT TO THE PEACE”

The starting point for rule-oriented interpretation can be found in the rules set out in articles 31 and 32 of the Vienna Convention on the Law of Treaties of 1969,²¹ and can “be seen as evidence, not only of the rules of interpretation that apply to the convention between its parties, but also of the rules that apply according to customary international law between states in general”.²² Article 31 paragraph 1 provides the principal rule of interpretation of a treaty: “A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.” The terms can be interpreted in two forms: i) ordinary meaning or conventional one: founded in a language used in a linguistic community, and ii) special meaning or non-conventional: the parties may have felt the necessity to introduce a new term in the treaty, or they agree to give another interpretation to the words already existent. This last situation is complicated and uncommon, because in that case they would have to prove the desire of giving a different meaning to an ordinary one.

In accordance with article 31 paragraph 2 of the Vienna Convention, in order to interpret a term in a treaty, the context is also of main relevance “it is obvious that the treaty must be read as a whole, and that its meaning is not to be determined merely upon particular phrases which, detached from the context, may be interpreted in more than one sense”,²³ so, in these regards we also have to take in consideration its preamble, annexes and any agreement or instrument related to the treaty in connection with its conclusion.²⁴ The context of a treaty is also related with its object and

²¹ Álvarez, José, “The legitimacy of international organizations”, *United Nations University Press*, editor, Veijo Heiskanen, New York, Contributors, Jean-Marc Coicaud, 2001, p. 115.

²² Linderfalk, Ulf, *On the interpretation of treaties, The modern international law as expressed in the 1969 Vienna Convention on the Law of the Treaties*, Springer, Lund University of Sweden, p. 7.

²³ Lord, McNair, *The law of treaties*, Oxford University Press, USA, 1986, p. 382. Referring to the advisory opinion of the Permanent Court in 1922 regarding the competence of the International Labour Organization.

²⁴ Article 31 paragraph 2 of the Vienna Convention on the Law of Treaties, 1969. available at: http://untreaty.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf [hereinafter Vienna Convention].

purpose and can be found in its preamble and in the treaty as a whole, so, while interpreting a term in a treaty, the object and purpose have to be analyzed in its context and not alone.

The conduct of the parties after the conclusion of a treaty is also an indicative of its intention, so in these regards, the subsequent agreements between the parties, subsequent practice in its application and relevant rules of international law applicable in the relations among the parties has also to be taken into account (article 31 paragraph 3).

After making an interpretation in accordance with article 31 and in case the interpretation done in leaves the meaning ambiguous or obscure or leads to absurd or unreasonable result, the rules of interpretation established in article 32, should apply (supplementary means) that includes: a) the preparatory works of the treaty and b) the circumstances of its conclusion (the above mentioned in order to confirm the meaning with the interpretation of article 31).

The preparatory works are “an omnibus expression which is used rather loosely to indicate all the documents, such as memoranda, minutes of conferences, and drafts of the treaty under negotiation, for the purpose of interpreting the treaty,”²⁵ in case the text of the treaty is not sufficiently clear in itself and in order to verify or confirm the meaning, looking backwards to the preparatory works can give us an idea of the aim of the drafters.²⁶ The circumstances in which a treaty was elaborated have also to be taken into consideration. We cannot avoid the form in which the treaty was made neither its circumstances which are of special relevance for any interpretation. By these means, we have to consider the language, the moment of its elaboration and all the special events that could influence the elaboration of a treaty in a determinate form.

Now on, we will move to the interpretation of resolutions which contrary to treaties, are of diverse nature, its circumstances and language used change from one to another, as well as its interpretation. No resolution is equal to another, so, in order to establish if a resolution can be interpreted by the same rules of interpretation of the treaties, we will now analyze the interpretation of resolutions based on the general rules enclosed in articles 31 and 32 of the Vienna Convention.

²⁵ Lord, McNair, *op. cit.*, p. 411.

²⁶ Vienna Convention, *op. cit.*, article 32.

In accordance with article 31 of the Vienna Convention, resolutions as well as treaties have to be done in good faith. Article 2 of the UN Charter establishes that “all Members shall fulfill in good faith the obligations assumed by them in accordance with the Charter”,²⁷ this article shall be applied not only to Member States but also to the UN organs in exercising their duties.

While interpreting a term in a resolution, we also have to apply the ordinary meaning of the word, but resolutions, contrary to treaties, are elaborated only by one party (the Security Council). So, in case the Security Council decides to give a special meaning to a resolution, it has to bear in mind the consequences that this will carry for the State and also for the whole international community. The Security Council is a political organ,²⁸ so in many cases some of its resolutions reflect more a political point of view rather than a legal one, but in any case, the ordinary and special meaning given by the Security Council has to prevail.²⁹

The context and circumstances have also to be taken into account. The term in the context of a resolution will not be comparable with anything in relation with a treaty, so in these regards, we only have to look in the context of the same resolution and if this is not sufficient (and it rarely will be), then we have to consider other methods to analyze the resolution (for example prior or subsequent resolutions).

The object and purpose of a resolution are reflected in the words of the same resolution, in its preamble and in the whole text. Although in some cases it is difficult to determine the object and purpose of a resolution in its terms then, as established in the Appeal Chamber in the Tadić Case,

²⁷ UN Charter, *op. cit.*, article 2.

²⁸ *Military and paramilitary activities in and against Nicaragua* (Nicaragua vs. USA), jurisdiction and admissibility, (1984). ICJ Rep. 392 at 435. (“The Council has functions of a political nature assigned to it...”) See also Judge Schwebel in its dissenting opinion “In short the Security Council is a political organ which acts for political reasons. It may take legal considerations into account, but unlike a court, it is not bound to apply them.” p. 290. Available at <http://www.icj-cij.org/docket/files/70/6523.pdf>.

²⁹ Tadić case: Made clear that the “threat to the peace is more a political concept. But [that] the determination that there exists such a threat is not totally unfettered discretion, as it has to remain, at the very least, within the Purposes and Principles of the Charter”. Appeals Chamber decision on the Tadić jurisdictional motion, Prosecutor v Dusko Tadic, Case Nr. IT-94-1-AR72, 2 October 1995, para. 27. [hereinafter Prosecutor v Dusko Tadic].

“one needs to look at all the circumstances of the adoption of a resolution in order to determine its object and purpose”.³⁰

As Wood had stated in his article, in some cases, and especially when the ordinary meaning is not clear in a resolution, the subsequent practice and relevant rules of resolutions are also relevant to find a correct interpretation of a term. The equivalent of a subsequent practice in resolutions would be a subsequent resolution of the Security Council, presidential statements or other formal acts regarding the interpretation or application of the resolution. The sanctions implemented by the Sanction Committees and their commentaries have also to be taken into account.

When the interpretation of a resolution cannot be done in accordance with the rules of article 31 of Vienna Convention, then, as in treaties, supplementary means of interpretation established by article 32 have to be considered.

The preparatory works of a resolution are all Security Council documents referred to in the resolution or referred to at the beginning of the meeting or series of meetings at which the resolution is adopted (reports of the Secretary General, letters requesting the holding of the meeting, drafts of the resolution, documents, amendments, etc.).

While drafting a resolution, the circumstances are of main relevance, especially for those resolutions which are considered to be more of a political than legal nature. The language used, the parties involved and also the manner in which conflicts were developed are quite important for the analysis of the circumstances. Other supplementary means of interpretation that can also be considered while interpreting a resolution are statements made by the Security Council before or after its adoption; legislation enacted in the various countries in implementing a resolution; writings of some authors, among others.

We also have to consider that the Security Council is a political organ and its resolutions are of the same nature, resolutions cannot be comparable to treaties, so it is necessary to interpret them in the context of the UN Charter which “becomes highly artificial, and indeed to some extent is simply not possible, to seek to apply all the Vienna Convention rules *mutatis mutandis* to SCRs”.³¹ We also have to consider that the circum-

³⁰ Wood, Michael, “The Interpretation of Security Council resolutions”, *Max Planck Yearbook of the United Nations Law*, vol. 2, 1998, p. 90.

³¹ *Ibidem*, p. 95.

stances of the adoption of these resolutions and its preparatory works may be of a greater relevance rather than in treaties.

1. *Interpretation of Article 39 “Threats to the Peace”*

In accordance with article 39 of the UN Charter, the Security Council shall determine any “threat to the peace, breach of the peace or act of aggression”.³² Notwithstanding, the main problem is that neither the terms ‘breach of the peace’ ‘act of aggression’ or ‘threat to the peace’ have been defined in the UN Charter. So, in these regards, an analysis of the form in which the Security Council has been interpreting this article has to be done and also if it achieved the requisites established in the Vienna Convention.

At the time when the UN Charter was draft the only problems known or imaginable by the drafters were military threats as constituting ‘threats to the peace’.³³ But the problems and circumstances changed through the years and after the Cold War the Security Council increased its activity, especially in framing Security Council resolutions in a broader form, implying that civil wars, lack of democracy and serious violations of international human rights law, among others constitute threats to the peace.

Some scholars have argued that the vague language in article 39 indicates that the Charter leaves the Security Council the broadest discretion in determining which situations can be classified as threats to the peace, “indeed, the fact that Article 39 grants the Council a great deal of discretion may not necessarily mean that it is *legibus solutus*”.³⁴ However, there is a general agreement that according with article 24 (2) of the Charter, the Security Council must act in accordance with the purposes and principles of the UN and the provisions of the Charter.

³² For the purpose of the present article we will only focus on the term ‘threat to the peace’.

³³ Cryer, Robert, “The Security Council and Article 39: A Threat to Coherence?”, *Journal of Conflict & Security Law*, vol. 1, number 2.

³⁴ Santori, Valeria, “The UN Security Council’s (broad) Interpretation of the Notion of the Threat to Peace in Counter-Terrorism”, in *Giuseppe Nesi (ed), International cooperation in counter-terrorism: the United Nations and regional organizations in the fight against terrorism*, Ashgate publishing limited, Great Britain, 2006, p. 102.

2. *Interpretation in Accordance with the Vienna Convention on the Law of Treaties*

A. *Interpretation under article 31 of the Vienna Convention*

The Vienna Convention applies only to treaties concluded by States after its entry into force. Although the UN is not a State and its Charter was signed before the entry into force of the Vienna Convention, the International Law Commission before elaborating its draft articles stated that “the law of treaties is not itself dependent on treaty, but is part of general customary international law”.³⁵ Furthermore, the Vienna Convention in its article 5 stated that it is applicable to treaties which are the constituent instrument of an international organization. In these regards, we can consider these rules as applicable to the UN Charter, so, “as a treaty, the Charter of the United Nations is to be interpreted in good faith, in accordance with the ordinary meaning to be given to its term in their context, and in the light of its object and purpose. Together with the context, any subsequent practice in the application of the treaty shall be taken into account”.³⁶

As we have seen and in accordance with article 31 of the Vienna Convention, the first place to begin while interpreting a treaty is in the ordinary or special meaning given to the terms by the parties. However, article 39 does not give a definition of the terms ‘threat’ neither ‘peace’. The term ‘threat to the peace’ is an abstract concept, so in determining its meaning an analysis of the ordinary meaning has to be made.

In analyzing both terms the most adequate place to start is looking through a common dictionary to find an ordinary meaning generally accepted by the community. The Oxford dictionary for instance defined the term threat as: “*1. a statement of an intention to inflict injury, damage, or other hostile action as retribution*”.³⁷

³⁵ Yearbook of the International Law Commission, 1959, vol. II, doc. A/4169, *The Work of the International Law Commission*. 6th edition, 2004. available at: [http://untreaty.un.org/ilc/publications/yearbooks/Ybkvolumes\(e\)/ILC_1959_v2_e.pdf](http://untreaty.un.org/ilc/publications/yearbooks/Ybkvolumes(e)/ILC_1959_v2_e.pdf).

³⁶ Talmon, Stefan, “The Security Council as world legislature”, *American Journal of International Law*, vol. 99, no. 1, 2005, p. 180.

³⁷ *Concise Oxford English Dictionary*, powered by Oxford Corpus, Edited by Catherine Soanes, Angus Stevenson, eleventh edition revised, Oxford University Press, Great Britain, 2008, p. 1501.

An *intention* implies that no action has been taken yet but an external manifestation of taking such action has been considered. This intention is *to inflict injury, damage or hostile action as retribution*. It is important to take into account in this definition the fact that the intention is to produce a harm.

Since Resolutions are legally binding for Member States a legal interpretation is also useful in these regards. The Black Law Dictionary has given to the term ‘threat’ the following meaning: “1. *A communicated intent to inflict harm or loss of another or on another’s property...* 2. *An indication of an approaching menace*”.³⁸

In accordance with the abovementioned dictionary a threat is *a communicated intent to produce harm or loss*. Again the term *intent* appears in this definition meaning “*the state of mind accompanying an act, especially a forbidden act*”.³⁹ As we have noticed, this term is vital for the interpretation of the term ‘threat’, the fact that no action has been taken yet makes it quite difficult to determine when a situation can be considered a real threat.

The term *communicated intent* means an external manifestation of a desire to act. This act is a harm or loss of another or another’s property. The term ‘harm’ means an “*injury, loss, damage; material or tangible detriment*”,⁴⁰ and is also in relation with the term *loss* that means “*an undesirable outcome of a risk; the disappearance or diminution of value*”.⁴¹

Regarding the second definition given by the Black’s dictionary “*an indication of an approaching menace*,” also considers an intent (not action taken yet) of a possible danger. Even when this definition is more accurate to the term ‘threat’ in the UN Charter, still is not very descriptive and precise to give the lines to consider an act a real ‘threat’, so we have to consider the term ‘threat’ in its context.

This term is also not defined through all the UN Charter. Article 1.1 refers “*to take effective collective measures for the prevention and removal of threats to the peace*,” article 2.4 refers to the obligation of Members States to “*refrain in their international relations from the threat or use*

³⁸ *Black’s law dictionary*, Garner, B. (editor in chief), eight edition, 1999, United States of America.

³⁹ *Idem*.

⁴⁰ *Idem*.

⁴¹ *Idem*.

of force” and article 99 also refers to “*the threaten of international peace and security*”. It also seems that the UN Charter is interpreting the term ‘threat’ as an intention to cause a harm or loss, but as we have mentioned before no definition of this term has been given.

In accordance with the definitions of the dictionaries, a ‘threat’ can be consider an intention to produce a harm, this intention has to be demonstrate by acts which are not always very clear (approaching menace).

Now on, we will address the definition of the term peace. Considering the Oxford dictionary by peace is meant the “*1. freedom from disturbance; tranquility. 2. freedom from or cessation of war*”.⁴²

In both definitions the word *freedom* comes from the word *free*’ that in accordance with the same dictionary means “*not under the control or in the power of another.*” In these regards, the term means that there is no disturbance by any third agent. The same can be said of the word tranquility that also means free of disturbance. Regarding the second definition given by the same dictionary *freedom from or cessation of war*, can be read as the end of hostilities or war that were taking or would take place.

In analyzing both definitions, we can conclude that the generally ordinary meaning understood by the term ‘peace’ is the cessation of hostilities or no disturbance or interference of a third agent (either a State, entity, person or group of persons).

However, it is also relevant to take into account the legal interpretation of the term ‘peace’ in a law dictionary. The Black’s Law dictionary define it very similar, “*a state of public tranquility; freedom from civil disturbance or hostility.*” This definition incorporates the term *public* as “*relating or belonging to an entire community, state or nation*” this means that the state of peace has to be in a community as a whole and not only in a determinate group of people. It is a general concept, applicable to a whole community or State.

Although the term ‘peace’ is not defined in the UN Charter it is enclosed in its preamble and in multiple articles. The preamble promotes to “*live together in peace with one another as good neighbors*”, and “*the strength to maintain international peace and security.*” Through many articles the reference to terms such as “*maintenance of international*

⁴² *Concise Oxford English Dictionary, cit.*, p. 1052.

peace and security”,⁴³ and “*peaceful settlement of disputes*”⁴⁴ are present suggesting that all of them are referring to an absence of hostilities and conflicts as a concept of ‘peace’.

Although this term is a very abstract concept, while analyzing the terms in a common and law dictionaries, the term ‘peace’ has only been considered in its negative aspect. However, as we will analyze later on, after many years in which the Security Council interpreted the term ‘peace’ in a negative sense (meaning only the absence of war) the Security Council by Presidential Statement S/23500 (1992) innovated in the interpretation of this term by incorporating a positive and more comprehensive and complex term. This Presidential Statement considered economic, social, humanitarian and ecological crises as threats to the peace, and established that the absence of war and military conflicts amongst States does not in itself ensure international peace and security.⁴⁵

Moreover, the General Assembly also wide the definition by determining that it also include any outside fomentation of civil war, effective regulation of weaponry, respect for human rights and the promotion of higher standards of living. By these means the General Assembly is determining that “the absence of war is one component in a positive or just peace recognized by the assembly”,⁴⁶ and with this started considering the term peace in its positive aspect.

We have to consider that the term ‘threat to the peace’ cannot be separated. An analysis of both terms has been done, so now we can infer that the meaning of the term as a whole is: *‘the intention to injury, damage or endanger the freedom of public disturbance or tranquility’*.

We have to bear in mind that the main object and purpose of the UN and therefore of the Security Council, in accordance with article 1.1 of the UN Charter, is the maintenance of international peace and security so, in these regards, the Security Council has to determine the concept of threat to the peace in conformity with the aims of the UN Charter. Furthermore, we also have to look to subsequent practice to see what the

⁴³ UN Charter, *op. cit.*, articles: 1.1, 2.6, 11.1, 11.2, 12.2, 15, 18, 23, 24, 43, 47, 48, 51, 54, 84, among others.

⁴⁴ *Ibidem*, articles: 2.3, Chapter VI.

⁴⁵ A further analysis of this Presidential Statement will be done later on.

⁴⁶ White, Nigel, *The United Nations system. Toward international justice*, United States of America, 2002, Lynne Rienner Publisher Inc., p. 49.

concept entails. In this case, one of the best ways is to consider the interpretation of article 39 done by the Security Council in other resolutions (as we will analyze later on).

B. Interpretation under article 32 of the Vienna Convention

As we have seen, the preparatory works are a subsidiary method of interpretation if the meaning is ambiguous. In accordance with Cryer there are two main factors to bear in mind, the first one is that not all the members of the UN were represented at the San Francisco conference and the second one is that the UN Charter preparatory works was concluded sixty years ago, since that day the problems and the form in which the UN Charter was implemented has been changing. Santori in her article established that in the final report of the Third Committee of the Third Commission of the San Francisco Conference, while dealing with Chapter VII, some States proposed to limit the Security Council's discretionary powers in article 39. Notwithstanding, the Committee decided to leave the Security Council the entire decision as to what constitutes the term 'threat to the peace'.

The circumstances and conditions in which the UN Charter was made and the language used during the preparatory works, in order to consider the aim of the drafters have also to be taken into account. Nowadays, the UN Charter has been implementing new situations different from those envisaged in the San Francisco Conference (terrorism, weapons of mass destruction, civil wars, among others). The Security Council has to consider the existence of some elements existing in a specific moment and in the words of Santori, "a threat to the peace should correspond to a real, concrete and specific emergency that the Council must address as quickly as possible".⁴⁷

IV. INTERPRETATION AND PRACTICE IN THE APPLICATION OF THE CHARTER

Now on, we will analyze through several resolutions, the way in which the Security Council has been interpreting the concept 'threat to the peace'.

⁴⁷ Santori, Valeria, *op. cit.*, p. 105.

We have to bear in mind that “resolutions are the primary indicators of Council’s intentions and are, through the voting records, a reflection of the level of political support that the decision enjoys”.⁴⁸ It is crucial for the analysis of this topic to observe if the Security Council has been considering a threat to the peace in a restrictive form (restricted to a military threat by one State against another) or if through the practice it has been widening this concept. Moreover it is also relevant to observe the way in which these resolutions were passed by the permanent members⁴⁹ in order to consider if there were objections or discussions while passing them and also if they have received enough support by Member States.⁵⁰

In determining a threat to the peace in conformity with article 39 of the UN Charter, the Security Council, in accordance with article 25 of the same document, is creating international obligations for its Member States binding them to its resolutions.⁵¹ Since a determination under article 39 is considered a pre-requisite for taking action under Chapter VII (to impose measures under article 41 and 42) it is fundamental that the Security Council while interpreting this article acts in conformity with the principles and purposes established in the Charter, so the Member States can properly fulfill its obligations.⁵²

It is also relevant to consider that it was after the Cold War that new challenges and conflicts arose and the Security Council in order to give

⁴⁸ Manusama, Kenneth, *op. cit.*, p. 9.

⁴⁹ Gazzini, Tarcisio, “The changing rules of the use of force in international law”, *Mellard Schill Students in International Law*, Manchester University Press, 2005, p. 35. “...perhaps more importantly, through the voting procedure, which prescribes not only a qualified majority, but also the absence of opposition from permanent members.”

⁵⁰ *Idem*. “A more effective form of guarantee may be assured from outside the organ, as all Member States could protest against the Security Council’s determination under Article 39 and even refuse to comply with mandatory economic enforcement measures, or decline to carry out military or non-mandatory economic enforcement measures, when the situation is not perceived as representing a genuine threat to the peace and security”.

⁵¹ Dinstein, Yoram, *War aggression and self-defence*, 2a. ed., Cambridge University Press, New York, 1994, p. 289: “...indisputably, decisions adopted by the Council under the aegis of Chapter VII, aimed at maintaining or restoring peace, are legally binding”.

⁵² Decision on the defense motion for interlocutory appeal on jurisdiction, (1995) 30, ILM. *Prosecutor vs. Tadic*. available at <http://www.un.org/icty/tadic/appeal/decision-e/51002.htm>, paras. 28 and 29.

the international community a solution started widening the interpretation of the term ‘threat to the peace’.

In order to study if the Security Council has the power conferred by the UN Charter to broad the term threat to the peace, an analysis of several resolutions (considered by the Security Council as threats to the peace) dividing them in three main categories (serious violations of human rights, lack of democracy and anti-terrorist interventions) will be addressed.

1. Serious violations of human rights as threat to the peace

Iraq. Resolution 688 (1991) was designed to address Saddam Hussein’s repression of the Kurdish population in northern Iraq, which led to the flight of up to a million civilians -many into the neighboring country Turkey.⁵³ The Security Council while issuing this Resolution condemned the repression of the Iraqi civilian population and stated that the consequences threaten international peace and security in the region and demanded the immediately end of this repression.⁵⁴

In this case, the Security Council while determining that ‘the magnitude repression of civilian population constituted a threat to international peace and security’ (internal conflict) is widening the concept of threat to the peace. Although the widespread of human rights violations were a factor to determine a threat to the peace, this Resolution was also adopted against the massive flow of refugees to neighboring countries, so this problem can be accepted more easily by States to constitute a threat to international peace than the former one.

The Security Council’s deliberations over the resolution indicate that most Member States perceived the relevant threat to international peace and security to be the “transboundary effects (flow of refugees across international frontiers) rather than the actual suppression of the kurds with-

⁵³ Welsh, Jennifer, “The Security Council and the humanitarian intervention”, in Lowe Vaughan, Roberts Adam, *et al.*, (eds.), *The United Nations Security Council and war*, New York, Oxford University Press, 2008, p. 538.

⁵⁴ UNSC resolution 688 (1991) dated on 5 April, 1991, par. 1 and 2, available at: <http://www.un.org/documents/scres.htm>.

in the borders of Iraq (some of them, like the representative of United States, seem this as an intervention in internal affairs)”.⁵⁵

Somalia. The situation in Somalia was so alarming that the Security Council passed seventeen resolutions from January 23, 1992 to November 4, 1994 regarding the humanitarian crisis in Somalia.⁵⁶ In Resolution 733 (1992) the Security Council determined that the rapid deterioration of the situation in Somalia and the heavy loss of human life and widespread material damage resulting from the civil war in the country and its consequences on stability and peace in the region constituted a threat to the peace.⁵⁷ However, it is important to notice that in this resolution the large flows of refugees were not mentioned by the Security Council as a possible justification of an internal conflict as a threat to the peace as mentioned in the case of Iraq. Moreover the Security Council did not precise the nature of the enforcement mechanisms to be used under Chapter VII.

Furthermore, in Security Council Resolution 794 (1992), after the imposition of an arms embargo, and since the situation deteriorated, the Security Council determined (but in this case with strong words) that the magnitude of the human tragedy caused by the conflict in Somalia, further exacerbated by the obstacles being created to the distribution of humanitarian assistance, constituted a threat to the peace.⁵⁸

This situation has been considered as unique, because it was the first time in which the Security Council authorized military action under Chapter VII without the consent of sovereign States. Notwithstanding, we have to bear in mind that one of the factors that made this situation unusual was the fact that there was no government that could act as an interlocutor at the UN for purposes of permitting a military action designed to facilitate humanitarian assistance.⁵⁹

Yugoslavia. In accordance with Security Council Resolution 713 (1991) the heavy loss of human life and material damage and the consequences for the countries in the region, in particular the border areas,

⁵⁵ Österdahl, Inger, *Threat to the peace. The interpretation by the Security Council of article 39 of the UN Charter*, Swedish Institute of International Law, Göteborg, vol. 13, 1998, p. 46.

⁵⁶ Welsh, Jennifer, *op. cit.*, p. 539.

⁵⁷ UNSC resolution 733, dated on 23 January, 1992, preamble par. 3 and 4, available at <http://www.un.org/documents/scres.htm>.

⁵⁸ *Ibidem*, preamble, par. 3.

⁵⁹ Welsh, Jennifer, *op. cit.*, p. 541.

caused by the continuation of the civil war between Croatia and control authorities of the Socialist Federal Republic of Yugoslavia (SFRY) constituted a threat to the peace, and an arms embargo was decided under Chapter VII covering the whole country for the purposes of establishing peace and stability in Yugoslavia.⁶⁰

Moreover, by Security Council Resolution 827 (1993) the Security Council (referring to Resolution 713 and all subsequent resolutions) determined that the widespread and flagrant violations of international humanitarian law existing within the territory of SFRY, especially in Bosnia and Herzegovina, constituted a threat to international peace and security.⁶¹ The Security Council again in Resolution 836 (1993) condemned the military attacks and determined that the serious violations of international humanitarian law constituted a threat to the peace.⁶² Regarding the discussions of the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia (ICTY), two approaches were considered: 1) various conflicts in isolation that would not constitute a threat to the peace; or 2) look at them as an entirety. In the decision taken by the same Chamber regarding the legality of the establishment of the tribunal under Chapter VII powers of the Security Council, they decided that even if the armed conflicts “...were considered merely as an ‘internal armed conflict’, it would still constitute a ‘threat to the peace’ according to the settled practice of the Security Council and the common understanding of the UN membership in general.”⁶³

Rwanda. The Security Council deeply concerned by the ongoing violence in Rwanda, the continuation of systematic and widespread killings of the civilian population (genocide by the Hutus of the Tutsis) and the impunity with which armed individuals have been able to operate, and recognizing this situation as unique, determined by Security Council Reso-

⁶⁰ UNSC resolution 713, dated on 25 September, 1991, preamble par. 3 and 4 and para. 6. available at <http://www.un.org/documents/scres.htm>

⁶¹ In this resolution the SC established the creation of the ICTY. UNSC resolution 827 dated on 25 May, 1993, preamble par. 3 and 4. available at: <http://www.un.org/documents/scres.htm>.

⁶² UNSC resolution 836, preamble para. 5 in relation with preamble para. 18. available at <http://www.un.org/documents/scres.htm>.

⁶³ *Prosecutor vs. Tadic*, op. cit., para. 30.

lutions 918 (1994)⁶⁴ and 929 (1994), that the magnitude of the humanitarian crisis in Rwanda constituted a threat to the peace in the region.⁶⁵ Although, the Security Council did not elaborate what was the real threat to the peace, it seems in view of the Security Council that the humanitarian crisis in Rwanda and the large-scale killings of civilians constituted a threat to the peace in the region, “however, it was clear that there was indeed a massive flow of refugees to the neighboring countries, primarily to Zaire (now the Democratic Republic of Congo), which may have a destabilizing effect on regional peace,”⁶⁶ so this conflict can also spread to the state of Burundi. Another important factor was that the Security Council was of the opinion that not bringing persons responsible for the killings to justice was a continued threat to the peace. Later on, by Security Council Resolution 955 (1994), in relation to its previous resolutions, the Security Council again determined that this situation continue to constitute a threat to the peace and took effective measures to bring to justice the persons responsible for these atrocities by establishing the International Criminal Tribunal for Rwanda (ICTR).

In this case, the Security Council considered as threat to the peace the killing of civilians on a genocidal scale in itself and also the fact that not bringing the persons responsible for such killings to justice constituted a continuing threat to the peace even if the actual killings stopped. The Security Council while determining serious violations of human rights as threat to the peace and by establishing *ad hoc* tribunals for the prosecution of the perpetrators of these crimes, arguing that these will facilitate the process of national reconciliation and maintain peace and security is: i) innovating by interpreting the term peace in a positive aspect, and ii) widening its faculties to interpret the term.

In accordance with Österdahl, the creation of these two *ad hoc* Tribunals may imply that the Security Council has begun a new line of practice, in which “peace” presupposes national reconciliation and that the persons responsible for serious violations of international humanitarian

⁶⁴ UNSC resolution 929, dated on 22 June, 1994 preamble par. 8, 9 and 10. available at <http://www.un.org/documents/scres.htm>.

⁶⁵ UNSC resolution 918, dated on 17 May 1994, preamble par. 5 and 18. See also UNSC resolution 925, dated on 8 June, 1994, preamble par. 7. available at <http://www.un.org/documents/scres.htm>.

⁶⁶ Österdahl, Inger, *op. cit.*, p. 59.

law are brought to justice”.⁶⁷ Also, by justifying its creation, the Security Council applied article 39 which establish the measures the Security Council may take ‘to maintain and restore international security’. It seems as if the Security Council thinks in terms of first restoring and then maintaining the restored peace.

2. Lack of democracy as threat to the peace

Haiti. The Security Council while condemning and responding against the overthrow of the first democratically elected President in Haiti, is for the first time considering that the lack of democracy constituted a threat to the peace. The Security Council by resolution 841 (1993) determined that the humanitarian crises including mass displacements of population, the non-reinstallation of the democratically elected President, and the contribution of this situation for Haitians fearing persecution and economic dislocation fleeing for refuge in neighboring states⁶⁸ threatened the international peace and security in the region.

This situation can be consider as an internal conflict in Haiti, but the fact that the Haitians are fleeing to neighboring countries make this conflict an international one making it possible to consider it by the Security Council as a threat to the peace. In view of the Security Council the lack of respect for the democratically elected President was the cause of the refugee flow, by these means the unique and exceptional circumstances and the continuation of this situation constituted a threat to the peace.

By Security Council Resolution 917 (1994), the Security Council reaffirmed its determination that in this unique case and with these special circumstances, the situation created by the failure of the military authorities in Haiti to fulfill their obligations under the Governors Island Agreement and to comply with relevant Security Council resolutions constitute a threat to peace and security in the region.⁶⁹ Contrary to Security Council Resolution 841(1993), in this case the Security Council did not refer to the problem of the flow of refugees. In accordance with the language

⁶⁷ *Ibidem*, p. 63.

⁶⁸ UNSC resolution 841 (1993), dated on 16 June, 1993, preamble par. 9, 10, 11 and 14, available at <http://www.un.org/documents/scres.htm>.

⁶⁹ UNSC resolution 917, dated on 6 May, 1994, preamble par. 13, available at <http://www.un.org/documents/scres.htm>.

of the Security Council resolutions, it was the lack of democracy which constitutes the threat to the peace.⁷⁰

In 1994, the Security Council again, determined that the situation in Haiti continues to constitute a threat to peace and security in the region.⁷¹ Two main problems remained: the fleeing of refugees to neighbor states and the deterioration of the humanitarian situation (systematic violations of civil liberties).

In accordance with Österdahl it seems that none of the circumstances by itself constitute a threat to the peace and security in the region, but it must be presumed that all the circumstances taken together constituted such a threat in view of the Security Council.⁷²

Angola. Since 1975, UNITA (National Union for the Total Independence of Angola) has been fighting in a civil war against the government forces of MPLA (Popular Movement for the Liberation of Angola). Furthermore, they refused to implement the peace negotiations process and did not respect the results of the democratic elections.

In 1993 the Security Council through Security Council Resolution 864 (1993), expressed its grave concern for the continuing deterioration of the political and military situation and notes its consternation for the deterioration of an already grave humanitarian situation, and determines that the situation in Angola constitutes a threat to international peace and security.⁷³

The Security Council perhaps based its resolution in the fact that all sides of the civil war (MPLA, FNLA [National Front of Liberation of Angola] and UNITA) had been supported from the outside.⁷⁴ But when the Security Council determined the situation as a threat to the peace the foreign support had ended. The Security Council did not specify what turns the Angola situation into a threat to the peace and only express "grave concern at the continuing deterioration of the political and mili-

⁷⁰ Österdahl, Inger, *op. cit.*, p. 68.

⁷¹ UNSC resolution 940, dated on 31 July, 1994, preamble par. 10. *available at:* <http://www.un.org/documents/scres.htm>

⁷² Österdahl, Inger, *op. cit.*, p. 69.

⁷³ UNSC resolution 864, dated on 15 September, 1993 preamble par. 3 and part. B, preamble par. 4. *available at:* <http://www.un.org/documents/scres.htm>.

⁷⁴ UNITA supported by: South Africa and Zaire; MPLA forces by: Soviet Union, the countries of Eastern Europe and Cuba; FNLA by: Zaire, US, Romania, North Korea and China.

tary situation".⁷⁵ It seems that the Security Council considered in this particular case as threat to the peace the political and military deterioration in the country.

3. *Antiterrorist interventions as threat to the peace*

Libya. The Security Council through its Security Council Resolution 731 (1992) condemned the destruction of the aircraft in Lockerbie and the resultant loss of hundreds of lives and deplores the fact that the Government of Libya did not responded to the requests of cooperation and urges the Libyan government to provide a full and effective response.

According with the Montreal Convention there is a principle of *aut dedere aut judicare* (a state on whose territory the suspects are found should either prosecute them or extradite them).⁷⁶ Libya refused to surrender the suspects, so the Security Council through Security Council Resolution 748 (1992), decided that the refusal of compliance by the Libyan government to demonstrate by concrete actions its renunciation of terrorism in particular its failure to comply with Security Council Resolution 731 was a threat to international peace and security.⁷⁷

The Security Council seems to: (i) presume Libya guilty of sponsoring terrorism and (ii) considered that the failure to comply with the surrender of the suspects (even when it was four years after the terrorist attack took place) continues to be a threat to the peace.

In view of Valeria Santori, it was not the acts of terrorism in itself but the failure of the Libyan government to demonstrate by concrete actions its renunciation of terrorism and in particular its continued failure to respond to Security Council Resolution 731 that constituted a threat to the peace.⁷⁸

Sudan. The Security Council by Resolution 1054 (1996) determined that the failure of compliance of Security Council Resolution 1044 (i) taking immediate action to extradite to Ethiopia for prosecution the three suspects of assassination of the President of Egypt in Ethiopia shelte-

⁷⁵ Österdahl, Inger, *op. cit.*, p. 58.

⁷⁶ *Ibidem*, p. 76

⁷⁷ UNSC resolution 748, dated on 31 March, 1992, preamble par. 7, available at: <http://www.un.org/documents/scres.htm>.

⁷⁸ Santori, Valeria, *op. cit.*, p. 92.

ring in Sudan, and (ii) desisting from engaging in activities of assisting, supporting and facilitating terrorist activities and from giving shelter and sanctuaries to terrorist elements,⁷⁹ constituted a threat to international peace and security.⁸⁰

In both cases (Libya and Sudan) the Security Council first adopted non-binding resolutions requesting in the former one the cooperation from Libya in establishing responsibilities for the terrorist acts and in the case of Sudan the extradition of the suspects. Then the Security Council adopted binding resolutions under Chapter VII but this time pointing the States' failure to comply with the former non-binding resolutions.

Afghanistan. Security Council Resolution 1214 (not acting under Chapter VII) considered a threat to the peace the continued Afghan conflict causing extensive human suffering, further destruction, refugee flows and other forcible displacement of large numbers of people, and condemned the use of Afghan territory, especially areas controlled by the Taliban, for the sheltering and training of terrorists and the planning of terrorist acts, and reiterating that the suppression of international terrorism is essential for the maintenance of international peace and security.⁸¹ The Security Council acting under Chapter VII issued Resolution 1267 determining that the failure of the Taliban authorities to respond to the demands in paragraph 13 of resolution 1214 (1998) constituted a threat to international peace and security, and recalled the obligation of the parties to extradite or prosecute terrorists.⁸²

These resolutions are different from the others resolutions since in these cases the Security Council "have not been motivated by the humanitarian situation, by the great suffering of the population or by the lack of respect by for human rights or democracy in the respective countries",⁸³ but by the failure of the States in complying with the Resolutions.

⁷⁹ UNSC resolution 1044, dated on 31 January, 1996, par. 4, available at <http://www.un.org/documents/scres.htm>.

⁸⁰ UNSC resolution 1054, preamble par. 10, available at <http://www.un.org/documents/scres.htm>.

⁸¹ UNSC resolution 1214, dated on 8 December, 1998, preamble par. 4 and 13, available at: <http://www.un.org/documents/scres.htm>.

⁸² UNSC resolution 1267, dated on 15 October, 1999, preamble par. 4 and 8, available at: <http://www.un.org/documents/scres.htm>.

⁸³ Österdahl, Inger, *op. cit.*, p. 75.

As we have noticed, the Security Council after the Cold War has been widening this concept by considering atypical situations as threats to the peace. In the case of human rights violations we have seen through several cases that the extreme magnitude of human suffering, the heavy loss of human life and violations of humanitarian law have been considered as threats to the peace. It seems that the Security Council in determining a threat to the peace in these resolutions (except for the case of Iraq) prefer to consider other humanitarian and human rights aspects rather than the flow of refugees, which can be easier identified as a threat to international peace, since this situation can internationalize an internal conflict.

Moreover, in the cases of Yugoslavia and Rwanda, the Security Council went further not only by restoring the peace but also by establishing two *ad hoc* tribunals suggesting that the maintenance of peace is also necessary.⁸⁴

In the case of lack of democracy as threat to the peace, the Security Council considered that the political and humanitarian situation were threats to the peace and condemns the attempts to overthrow the legitimate governments by force or *coup d'état* and the non-reinstallation of democratic Presidents. In these resolutions, since no reference is made to that conflict, the Security Council seems to consider the flows of refugees to neighboring states as a consequence of the lack of democracy.

Regarding the anti-terrorist interventions as lack to the peace, the Security Council seems to give more weight to the failure in complying the resolutions requesting extradition of the suspects or desisting from activities supporting their activities or sheltering them, than the acts of terrorism in itself.

So, as we have seen through several resolutions, the Security Council is widening the restrictive approach taken before the Cold War to interpret 'threat to the peace', considering also as threats, some conflicts such as serious violations of human rights, lack of democracy and anti-terrorist interventions.

⁸⁴ The term peace has been also broadened and considered in its positive aspect rather than the mere absence of war.

V. NEW THREATS TO INTERNATIONAL PEACE?

1. *Presidential Statement S/23500 (1992)*

The Presidential Statement of the Security Council of January 31, 1992, was the first intention to recognize “new favorable circumstances under which the Security Council has begun to fulfill more effectively its primary responsibility for the maintenance of international peace and security.”⁸⁵

The relevance of this Presidential Statement is the evolution from negative peace to a positive one, considering that “the absence of war and military conflicts amongst States does not in itself ensure international peace and security, the non-military sources of instability in the economic, social, humanitarian and ecological fields have become threats to peace and security”⁸⁶ and considered also that the proliferation of all weapons of mass destruction considered as constituting a threat to the international peace and security.⁸⁷

We have to take into account that this innovation was considered after the Cold War, during this phase the Security Council and the international community were considering new challenges (from interstate conflicts to more complex issues such as internal conflicts),⁸⁸ and in the search for peace all “member states expect the United Nations to play a central role at this crucial stage.”⁸⁹

The respect for human rights and fundamental freedoms as well as dealing with acts of international terrorism, were also important in this new phase of the UN. Also, from now on, and in certain circumstances and for specific weapons, Members States will have the obligation to fulfill their obligations in relation to arms control and disarmament to prevent

⁸⁵ Presidential Statement S/23500, dated on January 31, 1992, para. 3.

⁸⁶ *Ibidem*, par. 11.

⁸⁷ *Ibidem*, par. 21.

⁸⁸ Odello, Marco, “Commentary on the United Nations’ high level panel on threats, challenges and change”, *Journal of Conflict and Security Law*, vol. 10, number 2, Oxford University Press, 2005, pp. 231-262.

⁸⁹ Müller, Joachim, “Reforming the United Nations. New initiative and post efforts”, *Kluwer Law International*, vol. 1, published in co-operation with the United Nations, Leiden, 2006, p. 285.

the proliferation of weapons of mass destruction and avoid excessive and destabilizing accumulations and transfers of arms.⁹⁰

The relevance and importance of this Statement is that the Security Council is considering that non-military sources of instability in the social, economic, humanitarian and ecological fields could constitute threats to the peace passing from a negative to a more positive concept of peace.

2. Resolution 1373 (2001)

Two weeks after the 9/11 attacks, the Security Council unanimously adopted Resolution 1373 condemning the attacks perpetrated against the United States. The Security Council while drafting this Resolution took a new and different approach by reaffirming that “any act of international terrorism” constitute a threat to international peace and security.⁹¹ While determining this situation as a threat to the peace, the Security Council did not only consider the attacks of 9/11 but also that ‘any’ act of international terrorism constitute a threat to the peace, which seems to be intended to remain in force without any limitation in space and time.

Furthermore, this Resolution acting under Chapter VII (binding powers) decides that all States shall: a) prevent and suppress the financing of terrorist acts; b) criminalize the provision or collection to terrorist foundation activities; c) freeze assets or other economic resources of known terrorist individuals or entities; and d) prohibit their nationals or any persons or entities from making any funds, financial assets or economic resources available to persons participating or committing either directly or indirectly terrorist acts.⁹²

This Resolution is imposing on all States, even when some of them have no relation with the terrorist phenomenon, to take some measures that in many cases need the modification or reform of some of their national legislation. Even when many of these obligations imposed had al-

⁹⁰ AG/RES. 1179 (XXII-0/92) Cooperation for security and development in the hemisphere-regional contributions to global security. (resolution adopted at the eighth plenary session, Held on May 23, 1992) at: <http://www.summitsoftheamericas.org/Hemispheric%20Security/AGRes1179eng.htm>.

⁹¹ UNSC resolution 1373 dated on 28 September, 2001, pre. par. 4, available at: <http://www.un.org/documents/scres.htm>.

⁹² *Ibidem*, par. 1.

ready been included in earlier resolutions of the General Assembly and other obligations established in the same Resolution had been set out in the International Convention for the Suppression of the Financing of Terrorism,⁹³ the States have not freely bound themselves by any of those norms and do not feel the obligation to modify or reform its national legislation (sovereignty of States).

We also have to bear in mind that although this Resolution passed by unanimity,⁹⁴ without any Member State opposing to the text of the Resolution, the circumstances were different that from other resolutions. The immediacy in which it was taken and the gravity of the attacks perpetrated were two determinative factors that have to be taken into account. The Security Council needed to give an urgent response to these attacks and the international community was so consternated by those attacks that this resolution passed without further examination and consideration.⁹⁵

One of the problems that this Resolution entails for the international community is the fact that is the first one in which the Security Council is widening its content by establishing that ‘any’ act of international terrorism constitute a threat to the peace. In the past terrorist resolutions, “the Council reaffirmed that the suppression of international terrorism was essential for the maintenance of peace and security, but only acted in response to a particular situation.”⁹⁶ The problem of widening the term in this Resolution is that the Security Council is not only considering the 9/11 attacks as constituting acts of terrorism, but also “any” act of

⁹³ At that moment was not in force since it was only ratified by four States of the twenty-two needed. Sills, Joel, “The United Nations and the formation of global norms”, in Krasno, Jean (ed.), *The United Nations. Confronting the challenges of global society*, Lynne Rienner Publishers, 2004.

⁹⁴ As Lavallo established in his article, at the time the resolution was adopted, the world was concerned by the horrendous attacks, so not much, if any, negotiation preceded the adoption of the draft resolution which was sponsored by the United States. Furthermore, the preparatory works do not contain discussion of any aspect of the resolution. See: Lavallo, Roberto, *op. cit.* “Even supporters of such powers admit that Resolution 1373 could probably only have been passed in the immediate aftermath of September 11.” Elberling, Björn, *op. cit.*, p. 346.

⁹⁵ Hinojosa, Luis Miguel, “The legislative role of the Security Council in its fight against terrorism: legal, political and practical limits”, *International and Comparative Law Quarterly*, vol. 57, no. 2, 2008, p. 353. Resolution 1373 was approved in scarcely 48 hours and without an explanatory session for the vote.

⁹⁶ Happold, Matthew, *op. cit.*, p. 595.

international terrorism, even future ones. By these means, the Security Council is for the first time in its history creating international rules in abstract situations rather than in concrete cases. In accordance with the characteristics of legislation, the Security Council by creating this norm is acting as an international legislator.

Moreover, the second relevant problem is that the Security Council while drafting this Resolution did not define the terms ‘terrorism’, ‘terrorists’, ‘international terrorism’ or ‘terrorist acts’, with this lack of definitions the Security Council cannot determine that an act of terrorism is a threat to the peace without enunciating or defining what is understood by such an act. The international community would have uncertainty while considering an act as international terrorism, so in order to determine a threat to the peace the act has to be defined and understood by the community as such, by these means the Security Council cannot determine an undefined act as a threat to the peace.

Furthermore, the Security Council by imposing obligations and measures to all States without targeting a particular one is widening its powers, by declaring “an abstract phenomenon, international terrorism, to be *per se* a threat to international peace and security, since the notion of a threat to peace had in the past been related to the existence of a specific situation, located in a territorial area”.⁹⁷ Finally, the Security Council in this Resolution did not establish a period of time in which the measures have to be taken.

As we have seen “Resolution 1373’s scope ‘*rationae personarum, ratione loci and ratione temporis*’ appears to be essentially unlimited. It applies to any individual or other private entity directly or indirectly involved in terrorist acts, whenever and wherever committed, so long as the Council decides that the threat to the peace caused by terrorism has not ceased”.⁹⁸ Since this Resolution was created under Chapter VII it can be considered as a unilateral act imposing general, untemporal and abstract legal obligations to all Member States.

⁹⁷ Sossai Mirko, “UN SC Res. 1373 (2001) and international law-making: A transformation in the nature of the legal obligations for the fight against terrorism?”, *European Society of International Law*, 2004, p. 4 available at http://www.esil-sedi.eu/english/florence_agora_papers.html at 23 may, 2009.

⁹⁸ Santori, Valeria, *op. cit.*, p. 107.

3. Resolution 1540 (2004)

Resolution 1540 by determining that the proliferation of nuclear, chemical and biological weapons, as well as their means of delivery constitutes a threat to the peace and security⁹⁹ is also widening the interpretation of this concept. Some authors¹⁰⁰ have considered that this Resolution shows that Resolution 1373 can be seen as a model for further legislative activity by the Security Council and some of them consider it as an “alarming continuation of a trend in Security Council legislation”¹⁰¹ and by these means, it also can be consider as a subsequent practice of the Security Council approved by the States. But we have to bear in mind that Resolution 1540 was also passed by unanimity, notwithstanding, as the representative of Pakistan stated, this Resolution has been initiated by some permanent members of the Security Council and negotiated for five months by them.¹⁰²

One of the main purposes of this Resolution was to fill the gaps of some relevant treaties regarding these topics, for instance, the prevention from access by non-state actors, individuals and entities to weapons of mass destruction.¹⁰³ This Resolution imposed all States to take some measures¹⁰⁴ even when some of these measures are irrelevant and unnecessary for some States, since several of them do not control, sell or transport or even have any relation with weapons of mass destruction. On the other hand, some other States were not willing to comply with measures that were against their sovereignty, specifically those which have

⁹⁹ UNSC resolution 1540 (2004) dated on 28 April, 2004, preamble par. 1, available at: <http://www.un.org/documents/scres.htm>.

¹⁰⁰ Sossai, Mirko, *op. cit.*

¹⁰¹ Joyner, Daniel, “Non-proliferation law and the United Nations system: Resolution 1540 and the limits of the powers of the Security Council”, *Leiden Journal of International Law*, vol. 20, 2007, p. 490.

¹⁰² Lavallo, Roberto, *op. cit.*, p. 425, footnote 32.

¹⁰³ *Ibidem*, p. 416, footnote 8.

¹⁰⁴ (i) refrain from providing any form of support to non-state actors regarding the development, acquisition, manufacture, transport, transfer or use of nuclear, chemical or biological weapons; (ii) in accordance with their national procedures, adopt and enforce appropriate effective laws which prohibit any non-state actor to manufacture, acquire, among others, nuclear, chemical or biological weapons; and (iii) take and enforce effective measures to establish domestic controls to prevent the proliferation of nuclear, chemical or biological weapons.

to amend its national legislations,¹⁰⁵ notwithstanding they are obliged to fulfill Security Council binding resolutions.

The main problem is that as we have seen, the UN Charter is not expressly granting these kind of powers to the Security Council, so by imposing disarmament obligations to States, the Security Council is exceeding its powers.

Furthermore, this Resolution as well as Resolution 1373 is (i) not referring to any specific situation; since the proliferation of weapons of mass destruction is a broad concept and cannot be limited to a particular case; (ii) not locating the problem of the proliferation of weapons of mass destruction to any specific State or place, and furthermore (iii) is not determining any time limit. As well as in Resolution 1373, this Resolution was also taken under Chapter VII powers; by these means, it is binding for all Member States which have the obligation to fulfill the obligations enclosed in it.

As we have seen, after the Cold War the Security Council started using its Chapter VII powers to pass resolutions broadening the concept of threat to the peace. Notwithstanding, the difference between these previous resolutions and Resolutions 1373 and 1540 is that the Security Council in the previous ones (i) acted in response to a situation that had arisen in international relations; (ii) has characterized actions as enforcing international law; (iii) in each case the resolutions targeted a specific country; and (iv) the binding applicability of each resolution was either implicitly or explicitly of a temporary duration, and resolutions almost without exception made this fact clear.

Even when Resolution 1373 and 1540 cover different problems and were taken in different cases and circumstances, both of them have been considered as a new age of the Security Council. Since both Resolutions (i) not consider any specific situation, (i) do not determine any time limit, and (iii) do not apply to any individual or specific State, they are considered as a new form of international legislation by the Security Council.

¹⁰⁵ Lavalle, Roberto, *op. cit.*, note 1, p. 432. In the case of India for instance, its representative declared that they will not accept prescribed norms or standards, whatever their source, on matters within the jurisdiction of its Parliament, including national legislation, regulations or arrangements, which were not consistent with India's constitutional provisions and procedures or were contrary to India's national interests or infringed on its sovereignty.

We also have to consider that both Resolutions were taken in the urgency of the Security Council to take effective measures in a short period of time. Resolution 1373 was taken two weeks after the 9/11 attacks and it needed to take immediate effects bounding all States without the slow process of treaty ratification. In the case of Resolution 1540, it was also adopted as an urgent necessity to incorporate non-state actors and fill the gaps that have existed in the weapons of mass destruction treaties.¹⁰⁶

4. Implications of a broader interpretation of article 39 by the Security Council

The main characteristic of Resolutions 1373 and 1540 is that both of them reflect general and abstract norms created by the Security Council, nevertheless, there is no article in the UN Charter which specifically entitles the Security Council to create this kind of norms (legislative nature). While determining a binding decision it is vital that the organ that adopts it has competence to do so and the legal basis to have this power comes from the constituent treaty.

The UN is based on the respect for international law, its main object is the maintenance of international peace and security. Article 24 (2) establishes that “the SC shall act in accordance with the Purposes and Principles of the United Nations”, so the Security Council as organ of the UN is also bound by these principles and purposes.

Even when the Security Council enjoys broad powers enclosed in Chapter VII of the UN Charter, that does not mean that the Security Council is *legisbus solutus*,¹⁰⁷ it has to respect the objects and purposes of the UN Charter, “an organ is bound by the rules of the constitutive act delimiting its powers,”¹⁰⁸ otherwise States shall not be obliged to comply with those resolutions which are not in conformity with the provisions of the UN Charter.

¹⁰⁶ Asada, Masahiko, *op. cit.*, p. 315. This is one of the arguments used by Asada, M. to justify the urgency of this Resolution.

¹⁰⁷ “Neither the text nor the spirit of the Charter conceives the Security Council as *legisbus solutis* (unbound by law)”, Prosecutor vs. Tádic, *op. cit.*, p. 52, parag. 28.

¹⁰⁸ Olivier, Clémentine, “Human rights law and the international fight against terrorism: How do Security Council resolutions impact on state’s obligations under international human rights law? (Revisiting Security Council resolution 1373)”, *Nordic Journal of International Law*, vol. 73, 2004, p. 406.

Although there are other examples of Security Council Resolutions which alleged to constitute legislation (as we have seen), such as Resolution 687 imposing disarmament obligations on Iraq and Resolutions 827 and 955 establishing the ad hoc international criminal tribunals for Yugoslavia and Rwanda, these resolutions have (i) a temporary time limit, (ii) the measures taken were in order to maintain peace and security and (iii) should be seen as a special respond to a specific situation. There are also some other past resolutions which have been adopting decisions that deal with conflicts in general but the words of these resolutions were not formulated in compulsory terms ('call upon', 'urge', etc.) and cannot be consider as establishing new rules of international law.

The powers of the Security Council have to be exercised with respect to particular conflicts or situations, impose obligations or determinate measures to a specific State and shall be limited in time rather explicitly or implicitly. The Security Council can only react to particular threats,¹⁰⁹ it cannot legislate to prevent them from arising, it is the General Assembly the one that has the role of considering international peace and security generally and the Security Council in specific situations.¹¹⁰

One of the problems with the Security Council legislating is that usually resolutions represent only the views of the drafters, which means that only 15 of the 192 Member States (five of them having a dominant role and enjoying the veto power) take the decisions, which make the Security Council a totally inappropriate legislative and law-creating body, we have to take into account that the core principle in international law-making is the equality of States.

These two resolutions resemble a legislative power of the Security Council that at least is not specifically granted by the UN Charter and "once the Security Council starts imposing general and temporally undefined obligations on states, it is usurping a role that states have reserved for themselves".¹¹¹ On the other hand, there are some authors¹¹² that agree with the legislative capacity of the Security Council by determining that "this new tool will enhance the United Nations and benefit the world community, whose ability to create international law through

¹⁰⁹ Happold, Mathew, *op. cit.*, note 16, p. 605.

¹¹⁰ *Ibidem*, p. 600.

¹¹¹ Happold, Matthew, *op. cit.*, note 16, p. 610.

¹¹² Szasz, Paul, *op. cit.*, Álvarez, José, *op. cit.*, and Tomuschat, Christian, *op. cit.*

traditional processes has lagged behind the urgent requirements of the new millennium”.¹¹³ We do not share this opinion, neither do we consider that the intention of the drafters of the UN Charter was to grant ‘legislative powers’ to the Security Council, otherwise they would have made it clear. The UN Charter was created for the maintenance of the “classical principles of state sovereignty and sovereign equality in international law-making, and was consistent with the resulting idea that the consent of states to be bound underlies the validity of all the sources of international law, in the positivist tradition”.¹¹⁴

We share the opinion of Hinojosa Martínez, which established that the Security Council does not enjoy a general legislative competence on the basis of article 25 of the Charter.¹¹⁵ Even when States by joining the UN ‘agree to accept and carry out the decisions of the Security Council’, it is doubtful whether this article entitles the Security Council to enact international legislation. So, by these means, the Security Council while using its binding powers conferred by article 25 in conformity with article 39 and widening the term threat to the peace, is binding Member States to general and abstract norms of international law (legislation) and actually is exceeding its powers by legislating for the whole international community.

In accordance with the same author three limits have to be imposed to the Security Council while drafting a Resolution, the Security Council has to (i) be competent to adopt such Resolution; (ii) respect the norms of general international law, and (iii) respect the principle of sovereignty, limiting itself to adopt only measures which are indispensable for the maintenance of peace and security.¹¹⁶

Furthermore, the use of a ‘fast track’ to pass a resolution by alleging that the adoption of these kind of resolutions were urgent and necessary at that moment is not a justification that can be done.

¹¹³ Szasz, Paul, *op. cit.*, p. 905.

¹¹⁴ Joyner, Daniel, *op. cit.*, p. 514.

¹¹⁵ Hinojosa, Luis Miguel, *op. cit.*, p. 335.

¹¹⁶ *Ibidem*, p. 348.

VI. CONCLUSIONS

As we have seen, there is no single provision in the UN Charter that empowers the Security Council to enact abstract and general rules of law ('legislation') for the whole international community. Even when there is no specific article establishing the limits in its powers while determining a threat to the peace, the Security Council is not unbound by law and has the obligation to follow the rules of general international law, in particular *ius cogens*, as well as the purposes and principles of the UN.

In conformity with article 39 of the UN Charter, the Security Council while determining a threat to the peace has to follow the general rules of interpretation of treaties enclosed in Articles 31 and 32 of the Vienna Convention. Although the UN Charter was signed before the entry into force of the Vienna Convention and some may argue that it is not bound by these rules, they have been seen as evidence of customary international law between States and have to be considered in order to establish the broad or narrow powers of the Security Council while determining a threat to the peace.

Notwithstanding, Resolutions of the Security Council are different in nature from treaties, the interpretation of them has to be done following the same rules established in the Vienna Convention.

In determining a threat to the peace in accordance with article 39 of the UN Charter, even when after the Cold War new challenges and conflicts have been considered by the Security Council, we have to bear in mind that the Security Council is still bound by international law, *ius cogens* norms and principles and purposes of the UN Charter and it has the obligation to act in good faith and following the general rules established in the Vienna Convention.

As we have seen and in accordance with the ordinary meaning of the term 'threat to the peace' (given by dictionaries), the drafters of the UN Charter considered the term 'peace' in its negative aspect. However, as we have seen through several resolutions, the Security Council is widening the restrictive approach taken before the Cold War to interpret 'threat to the peace', considering also as threats, some conflicts such as serious violations of human rights, lack of democracy and anti-terrorist interventions.

By considering atypical situations such as human rights violations and the extreme magnitude of human suffering, the heavy loss of human life

and violations of humanitarian law as threats to the peace (Iraq, Somalia, Yugoslavia and Rwanda) the Security Council has been widening the concept of 'threat to the peace'.

Also, in the case of lack of democracy, the Security Council has been considering the political and humanitarian situations as threats to the peace and condemns the attempts to overthrow the legitimate governments by force or *coup d'état* and the non-reinstallation of democratic Presidents (Haiti). In this particular case, the Security Council also seems to consider the flows of refugees to neighboring states as a consequence of the lack of democracy.

Regarding the anti-terrorist interventions as lack of the peace, the Security Council seems to give more weight to the failure of members in complying the resolutions requesting extradition of the suspects or desisting from activities supporting their activities or sheltering them, than the acts of terrorism in itself.

However, it was with the Presidential Statement S/23500 that the Security Council stated the evolution from negative to positive peace considering that non-military sources of instability in the social, economical, humanitarian and ecological fields could constitute threats to the peace. Notwithstanding, and even with this Presidential Statement we have to consider the specific cases in which a real 'threat to the peace' can be considered in such situations.

The Security Council went broader by enacting resolutions without (i) referring to any specific situation, (ii) targeting an specific State and (iii) establishing a limit of time (like in Resolutions 1373 and 1540). The Security Council started creating general and abstract norms very close to qualify as legislation, however no article in the UN Charter entitles the Security Council to create this kind of norms. But even when there is no specific article limiting the Security Council powers to determine a threat to the peace, the Security Council is oblige to follow the rules of general international law as well as the purposes and principles enclosed in the UN Charter. By these means, the Security Council cannot impose unilateral acts of general, untemporal and abstract legal obligations to all Member States, since by issuing these kind of resolutions in those terms is elaborating 'international legislation' and this power is not confer in any article of the UN Charter.