

# Determination of United Nations Security Council Resolutions by States

Malihe Behfar<sup>1</sup> & Hassan Savari<sup>2</sup>

<sup>1</sup> Department of Public & International Law, College of Law and Political, Science and Research Branch, Islamic Azad University, Tehran, Iran

<sup>2</sup> Faculty of Law, Tarbiat Modares University, Tehran, Iran

Correspondence: Malihe Behfar, Department of Public & International Law, College of Law and Political, Science and Research Branch, Islamic Azad University, Tehran, Iran. E-mail: malihebehfar@yahoo.com

Received: September 24, 2016 Accepted: October 23, 2016 Online Published: November 30, 2016

doi:10.5539/jpl.v9n10p156

URL: <http://dx.doi.org/10.5539/jpl.v9n10p156>

## Abstract

In United Nations history, the legality of Security Council Resolutions, in many cases, is challenged. Generally these challenges take by states that affected Security Councils decisions. With notice that states are the representative for implementation of Security Council Resolutions, they intervene their determination and interpretation in the way that implement Security Council Decisions. In some cases, domestic and regional courts determine the state action in implementation Security Council Resolutions. Although this cases couldn't provide direct review on Resolutions but affected by way of implementation. Determination by states is probable and arises some concerns about decrease effectiveness of Security Council in maintenance of international peace and security.

**Keywords:** power of determination, United Nations Charter, Security Council Resolutions, judicial review

## 1. Introduction

In international legal system based on United Nations charter, the Security Council is the primary custodian of the maintenance of international peace and security. This way, the charter considered vast powers for the Security Council, accordingly, and it can determine the existence of a threat to the peace, breach of the peace or act of aggression, (Art 39 of Charter of). then it decides on what measures to be taken and in order to ensure its decisions, the Security Council resorts to political, economic or even military means. (Art 39-42 of Charter of the United Nations) To reach the goals, based on chapter VI of the Charter, the Security Council recommends and decide what measures shall be taken within the chapter VII of the Charter. What provoked more criticisms, are the resolutions decided by Security Council based on chapter VII. In the years since the Gulf War, the Security Council resorted to Chapter VII on a regular basis and adopted a wide variety of enforcement measures in the process. (Note 1)

From the late 1990s on, the Council expanded its range of action and it came to take Chapter VII action of unprecedented breadth and form and responding to a range of situations that beyond classical interstate conflicts. It established comprehensive civil and military missions in Kosovo and East Timor as well as a series of massive peacekeeping and peace-enforcement operations, especially in Africa. It enacted sanctions in an increasing number of cases and initiated the use of quasi-legislative acts, setting general rules for member states detached from particular conflict situations.

Even though vast powers are granted to Security Council, admittedly it is not considered as an unlimited United Nations organ. (Note 2) The text and spirit of the charter does not recognize the Security Council as an authority with infinite jurisdiction. Granting permission to the Security Council by states to make binding decisions doesn't mean that the Security Council can go beyond its jurisdiction directly or indirectly. In this regard legality of Security Council resolutions in some cases have been challenged. These resolutions contested by one or some states. These challenges arise judicial review on the Security Council decisions. But with lack of adequate review mechanism, states Determination is possible. The states are representative for enforcement of organization decisions. Therefore they qualified themselves the power of determination and Act against the decisions of the Security Council to determine the legal status of their own.

Despite of recognition of the evaluation by states in international law, the exercise of this power in international organization particular United Nations and for special part of its duties such as enforcement measures, is confronted with a negative attitude. (Note 3) This because disobeying by states could undermine the Security Council effective function. However the practice confirms the states have even interpreted the Security Council decision based on Article 41 and 42 of the Charter.

The Security Council counted on the member states cooperation in conducting its duties the states' interpretation and assessment can affect the way of implementing the Security Council's order but states consider a constructional margin for themselves on this ground, and in many cases they go into determination of the Security Council's decisions.

There are principal restrictions on the right of the states to assess their own legal status and applying such power by the states entails some risks as well. Definitely, determination by each state, on its interests, is not binding for other subjects of the international law. States cannot be legislators in this regard. They can oblige themselves by unilateral actions but these obligations just bound the creators and the states are not able to make a binding force for their own evaluation. In some cases the way of determination and evaluation of a state, causes the international responsibility of the states. The states act in determination by their different internal organs but the more effectiveness was evaluation by domestic courts. The domestic courts sometimes assesse directly legality of a resolution and in some cases evaluates a resolution indirectly with states measures in follow on Security Council decisions. European Union Courts such as the European Court of Justice and the European Court of Human Rights have employed a lot on this subject following claims by individual and entity based on Human Rights violations by Security Council resolutions. The attitude of these courts in relation to international law and European Union legal system create different approach in this regard. In general, these courts have denied the judicial review on Security Council resolutions for themselves and only revoked the measures of member states on enforcement of resolution

In this paper, at first we deal with lack of adequate review mechanism in United Nations, introduces States evaluation as a last resort and assess the states challenges in their determination.

## 2. Lack of Adequate Judicial Review on Security Council Measures

The legality of Security Council actions has raised the issue of judicial review on Council actions. At first, judicial review is necessity to determine illegal security council action by a court. Absence of competent courts to assess the international responsibility is not a new matter in the international law and at the present the limit number of modern judicial and arbitration entities does not tackle this problem. The International Court of Justice, the principal judicial organ of the United Nations (Art 92 United Nations Charter, Art 1 Statute of the International Court of Justice), which would be the most obvious first port of call, does not have the power to adjudicate contentious cases where any party is anything other than a state.

Organizations cannot be a party to the judicial proceedings in the court and to discuss such issue it requires that the legality of Resolution of the Security Council shall be presented in the dispute between states as secondary and subsidiary. This means that the court cannot have a general competence to enforce the laws between the states. this relies on the fact that the states consent on the competence of the court is created as **ratio persona** as well as **ratio materiae**.(Art 31(1) Statute of the International Court of Justice)

This fact that subsidiary aspect of examination of legality of the Resolution of the Security Council depends on the dispute between states and their wish to put this issue under the court's competence, instead to make it a rule and regulation, presents it as an exceptional case. (Lokerbie" ICJ Reports, 1992, p. 114, "Northern Cameroons" ICJ Reports, 1963, p. 33)

Things are seemingly even more straightforward when the court is in advisory opinion. Advisory opinion is merely offering legal advice for the benefit of the requesting UN organ. It may provide well represent the Court participation in the activities of the organization but it cannot be considered to constitute judicial determination. The advisory opinions do not have binding force on political organs of the United Nations but have generally been respected due to the judicial authority and impartiality of the court. (Martenczuk, 1999, 12)

International Court of Justice have followed similar lines, the court in the "Namibia" case (1970) states:

Undoubtedly, the Court does not possess powers of judicial review or appeal in respect of the decisions taken by the United Nations organs concerned. However, in the exercise of its judicial function and since objections have been advanced the Court, in the course of its reasoning, will consider these objections before determining any legal consequences arising from those resolutions.(Legal consequences for states of the continued presence of south Africa in Namibia, Notwithstanding security Council Resolution 276(1970), advisory Opinion, ICJ

Reports 1971, p. 45.)

This also have been the Courts approach in the "Lockerbie" cases, where the lack of a power of judicial review was not even mentioned as a possible objection to the jurisdiction of the Court.(Lockerbie, Preliminary Objections(Libya v. United Nations) sep. op.judge rezek, para 4) Neither the Charter nor the jurisprudence of the Court would support the claim that the Court is prevented from examining the validity of decisions of the United Nation political organs. It can be said that the Court may act to incidental review but it does not constitute an independent power of judicial review.(Martenczuk, 1999,527)

### **3. Determination of Security Council Resolution by States Organs**

In many cases, passing a resolution exceeding Security Council powers is a justification for inconsistency with that resolution and The Council enjoys powers only insofar as they are conferred on it explicitly or implicitly in the Charter. The states must exercise these powers in accordance with the Charter . (Note 4) in this regard the article 25 of the Charter is a key article, according to which the member states of the United Nations undertake to carry out the decisions of the Council" in accordance with the ...Charter". Therefore only decisions taken in accordance with the Charter acquire binding force. (Note 5)

Therefor the resolutions "Ultra Vires" are of no legal effect and cannot oblige the states, but nonetheless, there is no specific rule in the Charter on legal effects of such actions and article 25 remains silent.(Bowett, 1994,89-101)

Determination and interpretation authority in a body which is based on multilateral relations provide equal situation for each states to concern the determination of validity of the other party enforcement. Although it seems illegal, states are highly desire to act against international organizations and this causes deep controversies. This has two consequences: first that states, due to attempt to maintain their position, basically try to act collectively, e.g. in form of a regional organization, second: the states, in their assessments, mostly act through their judicial organs rather than political and executive organs.

The power of determination is exercised through political organ of states or judicial organs. While political organs are the first point of contact with respect to the implementation of a Security Council Resolution, the judicial organs especially domestic courts may be call upon to evaluate them.

Of course, the states response to the Councils action results of their political views to a legal assessment.(Vonstaden, 2012, 1038) If the issue is examined from a legal perspective, the states response would be quite different.

Although, because the lack of clear criteria in reviewing the legality of measures of international law subjects, the judicial assessment of international decisions, plays a limited role. It is impossible to precisely define what is legal or illegal. However states by their domestic courts determine the Security Council Resolutions.

For instance, in Abdelrazik, Canada defended its denial of allowing or assisting one of its national to return to the country by relying on the fact that the person was listed by the 1267 Sanctions Committee and thus was subject to a travel ban and an asset freeze. Mr. Justice Zinn states:" however interpreted the measures under the relevant Security Council Resolution 1822(2008) not to be an obstacle to Abdelrazik's return to Canada, at government expense if required". He further order that the person attend a hearing before the court, for the latter to satisfy itself that Abdelrazik had in fact returned to Canada.(Federal Court of Canada, Abousfian Abdelrazik v. Minister of Foreign Affairs, Judgment of 4 June 2009, para 120-121-160.) The Canadian court interpretation was is not determinative of the position under international law. But the court forced the states to act in accordance with that interpretation. Therefore the Security Council may determine that Canada has acted in breach of the resolution and the United Nations Charter in complying with the court decision.(Tzanakopoulos' 2011, 133)

Any way on the international law, the states cannot ignore its international obligations because of the obligation to respect the decisions of domestic courts themselves. In these cases, states is forced disobeying of its international obligations or ignore its internal obligation on the constitution. The choice of each ways can propose the responsibility of states on international law or on domestic law.(De Wet, 2002, 1267)

If a national court were inter into determination of a decisions of the Security Council and to determine that either the decision as a whole or its application in a particular case would violate fundamental international human rights, the general consequences would be that courts refuse to apply these decisions. The precise consequences will depend on the circumstances of the case and more in particular on the nature of the claim that is put before the court.

In some cases, Security Council measures have been directly attacked by national courts. For instance, in 2001,

Slobodan Milosevic' applied to the president of The Hague District Court, seeking an order that the Netherland release him from custody. He based his application on the illegality of the establishment of the International criminal Tribunals for the Yugoslavia (ICTY). The court relied on the fact that the (ICTY) had already confirmed the legality of its establishment under international law, and found finally that the court did not have jurisdiction to order the release. (Milosevic v Netherland (Interlocutory Injunction) KG 01/975(2001) 48 NILR 357, 358-360) A similar approach was taken by the US court of Appeals in "Ntakirutimana v Reno", where the argument that the Security Council was not empowered under the Charter to establish the International Criminal Tribunal for Rwanda (ICTR) and thus the United States should not surrender him to the Tribunal was found to be outside the scope of judicial review. The court declined to discuss the merits of that argument, as it regarded the assessment of the legality of acts of the United Nations as a matter for the executive branch, not for the courts. The United States Supreme Court in this case did not take the position that as a matter of international law any review of the Security Council's action was not allowed.

With the notice we find that in the first decision apparently considered they to be in a position to review the legality of acts of the Security Council and other court have expressly denied the power to do so. (De Wet & Nollkaemper, 2013, 194)

Sometimes the domestic court determines a resolution on indirect way. States are under an international obligation to take all requisite domestic measures to ensure the implementation of Security Council Resolutions. Such domestic implementing measures are susceptible of being attacked in domestic courts, including in the particular instance European Courts and the European Court of Human Rights (ECtHR). The domestic court may be called upon not only to decide on the legality or the interpretation of the domestic measures, but also indirectly on the legality or the interpretation of the council measure. In such a case, courts may review the merits of that claim, and in particular whether there is sufficient evidence against that particular individual or organization. Also in this case, review would not have any consequences for other states or for the resolution and such effects could only be produced at the international level.

#### **4. Legal Assessment of Sanction Resolutions by the States**

In many cases, which the Security Council's resolutions attempted to put sanctions on individual and entity, the argument of violation of human rights by such resolutions has been represented which was used by states for determination of it. Which is the subject of evaluation is measures in follow of implementation Security Council resolutions by member states. In general, there is no possibility for claim directly against United Nations or Security Council in domestic courts but with the claim indirectly and against member states, the courts determine the legality of United Nations resolutions.

This can be seen in context of the implementation targeted sanction by the states against individual and group accused of collaborating with terrorism. For instance, when Sweden froze all the assets of Swedish national targeted by resolution 1267 (1999) continued to make payment of welfare benefits to these individuals under national law. (Note 6) Definitely, this action of Swiss government was not under the Security Council Resolution. (Note 7)

In addition, in "Lockerbie" case despite of supporting by United States and England of Security Council embargo, the Arab League threatened to stop abiding by the sanctions. This was followed by a threat of the entire membership of the Organization of African Unity (OAU) not to continue the sanctions after December 1998, unless the impasse over the Lockerbie incident was resolved by negotiation. (Note 8)

Belgium also in this case, interpreted Security Council sanctions (SC Res 889 15 December 1993) which ordering the freezing of funds as not including the freezing of payment necessary for the functioning of embassies. (Gowlland Debbas, 2004, 52)

Some states also claimed that in order to implementation resolution 1540 of the Security Council (2004), there is no need to enact specific legislation because the subjects presented in the resolution does not exist in their territories. (Note 9) Of course, the sanction committee of resolution 1540 refers to this as inconsistency with the resolution.

Some other states also commented on resolution 1373 (2001) of the Security Council that they are not required to adopt additional anti-terror regulations than what already in existence in their own domestic laws.

Of course, the states have not the power to order the Security Council or the sanction committee to omit persons' names from sanctions list and cannot provide effective judicial protection on international level. But they can decrease or increase the indirect effects from a resolution.

## 5. The Consequences of Determination in Security Council Resolutions

In legal system, illegality of an action causes its invalidity when it is nullified by an authorized organ and it won't exist from that time on. This consequence is unclear in regard with measures conducted by the international organizations, particularly those which are in conflict with fundamental instruments of the organization. About United Nations it shall be noted that the assessment by member states is lack of legal effect and the resolution is not null and void.

When the action of the Security Council is invalidated by an authorized organ, it is invalid and of no legal effect. Measures in contrary to peremptory norms (*jus cogens*) and resolutions which lead to violation of Human Rights can present the international responsibility of the organization. Due to the existence of legal personality for the international organizations, particularly the United Nations, international responsibility remains as one of its effects. International organizations as legal persons have duties and obligations under the international law and in the case of violation of international regulations they shall have international responsibility. But regarding the international law and the charter of UN, due to the lack of an authorized organ to supervise the resolutions of the security council, their invalidity can't be announced and recognized lack of legal effect. the determination of each state on its interests is not binding for other international law subjects. States cannot be legislators in this regard. They can oblige themselves by unilateral actions but these obligations bound the creators and the states are not able to make a binding force for their own determination.

## 6. Conclusion

In the recent years, we witnessed an increase in the cases with the subject of examining legality of the resolutions of the Security Council to control the Council and providing suitable guarantee and control on their power increase, but states assessment of the resolutions of the Security Council in today's non-centric system of international law is undeniable. This is the result of the existence of a gap in this field of the international law.

On the other hand, this leads to assessment of Security Council resolutions on the implementation of Security Council resolutions which could affect the state. Also the Security Council has not strong executive arm and must implemented its decisions through collaboration with states, At this stage the states act effectively and are examined the Security Council resolutions. The consequence of this is very important. Nobody wants a situation that the Security Council is unable to perform its duties in the pursuit of international peace and security. This can be directly distort the effectiveness of the Security council in maintaining international peace and security and the Security Council has placed at risk the accusation that the performance has been effective in achieving their goals.

Of course, discussing the determination of the United Nations measures in international or domestic court is a dual subject which not only it challenge the legal subjects, but also it is not out of political aspects of the subject. Neglecting the resolutions of the Security Council by the states on the pretext of human rights and humanitarian rights is on the one hand promising for accepting the doctrine of limitation of jurisdiction of the Security Council, and on the other hand it entails the concern for fragmentation in the international entities and inefficiency of the Security Council in maintenance of international peace and security.

## References

- Appeals Chamber Decision on the Tadic Jurisdictional Motion, Prosecutor v. Dusko Tadic/k/a "Dule", Case No. IT-94-1-AR72, 2 Oct. 1995.
- Bowett, D. (1994). The impact of security council decisions on dispute settlement prosecutors. *EJIL*, 5(1). <https://doi.org/10.1093/oxfordjournals.ejil.a035901>
- De wet, E. (2004). *The chapter VII of the United Nations Security Council*. hart Publishing, North America.
- De Wet, E., & Nollkaemper, A. (2002). Review of the Security Council Decisions by National Courts. *German YB Intl L*, 45.
- De wet, E., & Nollkaemper, A. (2003). *review of the security Council by member States*. Intersentia, Antwerp.
- Doehring, K. (1997). Unlawful Resolutions of the Security Council and their Legal Consequences. *1 Max Planck Yearbook of United Nations Law*.
- Federal Court of Canada, Abousfian Abdelrazik v. Minister of Foreign Affairs, Judgment of 4 June 2009.
- Gill, T. D. (1995). Legal and Some Political Limitations on the Power of the U.N. Security Council to Exercise its Enforcement Powers under Chapter VII of the Charter, *26 NYIL*.
- ICJ Reports "Certain expenses of the United Nations"(Advisory Opinions). (1962).

- ICJ Reports, "Reparation for injured Suffered in the service of the UN"(Advisory Opinion) 1949.
- ICJ Reports, "Reservation", 1951.
- ICJ Reports," Conditions of Admission of a states to membership in the United Nations"(Advisory Opinion) 1948.
- Legal Consequences for states of the continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security council Resolution 276(Advisory Opinion). (1971).
- Martenczuk, B. (1999). the security council. The international court and judicial review: what lessons from Lockerbie? *EJIL*, 10(3).
- Milosevic v Netherland(Interlocutory Injunction)KG 01/975(2001) 48 NILR 357.
- Ntakirutimana v Reno, Judgment of 24 January 2000, 528 U.S. 1135, 120 S. Ct. 977.
- Simma, B., Khan, D. E., Nolte, G., & Paulus, A. (2012). *The Charter of United Nations* (3rd ed.). Oxford University press.
- Tzanakopoulos, A. (2010). United Nations Sanctions in Domestic Courts: From Interpretation to Defiance in Abdelrazik v. Canada (Minister of Foreign Affairs). 8 *Journal of International Criminal Justice*. <https://doi.org/10.1093/jicj/mqq006>
- Tzanakopoulos, A. (2011). *Disobeying Security Council Countermeasures Against wrongful Sanctions*. Oxford University Press. <https://doi.org/10.1093/acprof:oso/9780199600762.001.0001>
- Vonstaden, A. (2012). Democratic Legitimacy of Judicial Review Beyond the State: Normative Subsidiary and Judicial Standards of Review.

## Notes

Note 1. These ranged from extensive economic embargoes to the authorization of member states and regional organizations to use force, the creation of Quasi-judicial organ, as well as the authorization of the civil administration of territories by the United Nations.

Note 2. However in accordance of the Charter, the core of Security Council power can explode but this power cannot go over the limitation from the norms of jus cogens, human right norms, humanitarian rights, principle and purposes of the Charter and limitation flowing from the charter structure . The Appeal Chamber in Tadic' affirms this. " the security council subjected to the certain constitutional limitation, however broad its powers under the constitution, those powers cannot, in any case, go beyond the limits of the jurisdiction of the Organization at large, not to mention other specific limitations or those which may derive from the internal division of power within the Organization."

Prosecutor v. Dusko Tadic'a/k/a "Dule", Case No. IT-94-1-AR72, 2 Oct. 1995.p.28.

Note 3. In this regard, The Article 24 (1) of the Charter affirms:" In order to ensure prompt and effective action by the United Nation, its Members confer on the security Council primary responsibility for the maintenance of international peace and security and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf." Art 103 of the Charter states that:" In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.

Note 4. The International Court of Justice stated that:" the political character of an organ cannot release it from the observance of the treaty provisions established by the charter when they constitute limitations on its powers or criteria for its judgment. To ascertain whether an organ has freedom of choice for its decision, reference must be made to the terms of its constitutions.," Conditions of Admission of a states to membership in the United Nations" ICJ reports,(Advisory Opinion) 1948,57,p. 64.

Note 5. Article 24 (2) of the Charter affirm this:" in discharging these duties the security council shall act in accordance with the purposes and principles of the united nations".

Note 6. This resolution, under Chapter VII of the UN Charter, asks the member states to block properties of Taliban, Bin laden and Al-Qaeda and their related companies. SC Res 1267 15 October 1999, para 4.

Note 7. The Security Council later adopted Resolution 1457 (200) after that and applied humanitarian exemptions to that Resolution and for granting of exceptions required at least the consent of the relevant sanctions committee.

Note 8. The OAU decision was announced at the conclusion of the OAU Summit in Ouagadougou on 10 June 1998 (see AHG/Dec XXXIV (1998)).

Note 9. The Security Council in this Resolution considered comprehensive and effective surveillance on proliferation of mass destructive weapons and attempted to criminalize terrorism and enact necessary rules to fight terrorism. This resolution requires all states to regulate effective national export controls by rules and regulations and by enacting national rules and regulations assure adherence to their international obligations resulted from non-proliferation treaties. SC Res 1540, 2004, paras 1-6.

### **Copyrights**

Copyright for this article is retained by the author(s), with first publication rights granted to the journal.

This is an open-access article distributed under the terms and conditions of the Creative Commons Attribution license (<http://creativecommons.org/licenses/by/4.0/>).