

Evaluation of United Nations Security Council Resolutions by States

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Abstract

In UNs history, the Legality of Security Council Resolutions, in many cases, is challenged. Generally, these challenges are taken by States that affected Security Council decisions. With notice that States are the representative for implementation of SCR, they intervene their determination and interpretation in the way that implement SC Decisions. In some cases, domestic and regional courts evaluate the state action in implementation SCRs. Although these cases couldn't provide direct review on Resolutions, but affected in the way of implementation. Evaluation by States is probable and arises some concerns about decreased effectiveness of SC in the maintenance of international peace and security.

Keywords: power of evaluation, UN Charter, Security Council Resolutions, Judicial Review, European Union

1. Introduction

In an international legal system based on UN 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 and, accordingly, it can determine the existence of a threat to the peace or act of aggression,¹ 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.² To reach the goals, based on chapter VI of the charter, the Security Council recommends and decides 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 ³(De wet, 2004).

Even though vast powers are granted to the Security Council, admittedly it is not considered as an unlimited UNs organ.⁴ 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 of 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 of the Security Council decisions. But with lack of adequate review mechanism, States revolutions are possible. The States are representative for enforcement of organizational

¹ Art, 39 of Charter of United Nations

² Art, 39-42 of Charter of United Nations

³ 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. De wet Erika, (2003), The Chapter VII of the United Nations Security Council, Hart Publishing, North America, 2.

⁴ However, in accordance with 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 rights 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 may be. Those powers cannot, in any case, go beyond the limits of the jurisdiction of the Organization at large, not to mention other specific limitations or those which may derive from the internal division of power within the Organization."

Appeals Chamber Decision On The Tadic' Jurisdictional Motion, Prosecutor V. Dusko Tadic' A/k/A "Dule", Case No. IT-94-1-AR72, 2 Oct. 1995: 28

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, particularly United Nations and for special parts of its duties such as enforcement measures, is confronted with a negative attitude.⁵ This because of disobeying of the 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. 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.⁶ Definitely, this action by Swiss government was not under the Security Council Resolution.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 were resolved by negotiation (De wet and Nollkaemper, 2003, 11).⁸

Belgium also in this case, interpreted the Security Council sanctions⁹ which ordering the freezing of funds as not including the freezing of payment necessary for the functioning of embassies (Gowlland-Debbas et al., 2004, 52).

Some States also claimed that in order to implement 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.¹⁰ Of course, the sanction committee of resolution 1540 refers to this as inconsistent with the resolution (Tzanakopoulos, 2010, 118).¹¹

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's already in existence in their own domestic laws (Gowlland-Debbas et al., 2004, 69).¹²

The existence of jurisdiction for valuation by States over the United Nations measures is the result of lack of appropriate construction in the United Nations system itself, which has not provided the ground for authoritative control of the measures. In regard to the vast scope of the United Nations goals, the legality of the measures is presented in many cases.

Thus the question is if the States assess the decisions or measures of the Security Council illegal, do they have power of evaluation for themselves? And if so, what challenges they have? With notice the increase in claims in this regard in the European Courts, what approach is adopted by this institute and could establish appropriate judicial control on the Security Council decisions?

In response we should say: the States can challenge organization interpretations of their constitution, the decisions based on constitution may be regarded illegal by States and they determinate and evaluate these decisions.

⁵ 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."

⁶ This resolution, under chapter VII of the UN Charter, asks the member states to block properties of the Taliban, Bin Laden and Al-Qaeda and their related companies. SC Res 1267 15 October 1999, para1-4

⁷ The Security Council later adopted Resolution 1457 (2000) after that and applied humanitarian exemptions to that Resolution and for granting of exceptions required at least the consent of the relevant sanctions committee.

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

⁹ SC Res 889 15 December 1993

¹⁰ 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, para1-6

¹¹ UN Doc S/2006/257 (2006)

¹² Sc/Res (1737), 28 Sept 2001

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, the evaluation of each state on its interests is not binding on 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 a determination by their different internal organs, but the more effectiveness was evaluated by domestic courts. The domestic courts sometimes assess directly legality of a resolution and in some cases evaluates a resolution indirectly with state 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 claim by an individual and an entity based on Human Rights violations of the Security Council resolutions. The attitude of these courts in relation to international law and the European Union legal system creates a 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, first we deal with lack of adequate review mechanism in the United Nations, introduces States evaluation as a last resort and assess the States' challenges in their evaluation.

2. Lack of Systematic Judicial Review on Security Council Measures

The legality of the Security Council action has raised the issue of judicial review on Council actions. At first, judicial review is the necessity to determine wrongful of the Security Council's 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 ICJ, the principal judicial organ of the UN¹³, 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 court¹⁴ 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 personae* as well as *ratio materiae*.¹⁵

This fact that the subsidiary aspect of the examination of the legality of the Security Council Resolution 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.¹⁶

Things are seemingly even more straightforward when the court is in the advisory opinion. An 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 a 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).

The ICJ has followed similar lines, the court in the "Namibia" case (1970) States:

Undoubtedly, the court does not possess the powers of judicial review or appeal in respect of the decisions taken by the UN 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.¹⁷

This also has 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.¹⁸ 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 Nations Political organs. It can be said that the court may act to incidental review, but it

¹³ Art 92 UN Charter, Art 1 Statute of the international court of justice.

¹⁴ Art 31 (1) Statute of the international court of justice

¹⁵ Art 36 (1) (2) Statute of the international court of justice

¹⁶ ICJ Reports "Lockerbie" 1992, p. 114, ICJ Reports "Northern Cameroons" 1963, p. 33

¹⁷ Legal Consequences For States Of The Continued Presence Of South Africa In Namibia , Notwithstanding Security Council Resolution 276 (1970), advisory Opinion, ICJ Reports (1971), at 45#

¹⁸ Lockerbie, Preliminary Objections (Libya v. United Nations) sep. op.judge rezek at para 4

does not constitute an independent power of judicial review (Martenczuk, 1999, 527).

3. Evolution on the Security Council's Power by the States and Its Necessity

From the late 1990s, the council expanded its range of action and it came to take Chapter VII action of unprecedented breadth and form, 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.

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 its explicitly or implicitly in the Charter. The States must exercise these powers in accordance with the Charter¹⁹. 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.²⁰

Therefore, 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 the legal effects of such actions and article 25 remains silent (Bowett, 1994, 89-101).

Theoretically, it should be noted that the decisions of the Security Council in accordance with chapter VII of the Charter, similar to other rules, are interpretable by the States. From this view, States are representatives for implementation the decisions and it shall be accepted that sometimes the resolutions of the Security Council are in conflict with a preemptory norm of international law or human rights. In this situation States are not able to violate them with justifying a resolution comes into force, so it is necessary to demonstrate its illegality anyway. Therefore, evaluation by United Nations Member States is the last option to provide determination over the exercise of power by the Security Council.

Determination and interpretation authority in a body which is based on multilateral relations provide an equal situation for each state to concern the determination of validity of the other party enforcement. Although it seems illegal, States are highly desired 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 the form of a regional organization, second: the States, in their assessments, mostly act through their judicial organs rather than political and executive organs. Of course, these two rational consequences reduced the negative effects of assessment and interpretation of the States and created a more real impartial area.

4. Evaluation of Security Council Resolution by Domestic Courts

The power of evaluation is exercised through the political organ of the 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 called upon to evaluate them.

Of course, the States' response to the Council action is a result 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 of the lack of clear criteria in reviewing the legality of acts of international law's subjects, the judicial assessment of international measures, plays a limited role, it is impossible to precisely define what is legal or illegal. However, States by their internal 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.²¹ Mr Justice Zinn, however interpreted the measures under the

¹⁹ 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. ICJ Reports," Conditions of Admission of a state to membership in the United Nations"(Advisory Opinion) 1948,57, p. 64

²⁰ 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" #

²¹ *Abousfian Abdelrazik v. Minister of Foreign Affairs*, Federal Court of Canada, Judgment of 4 June 2009, 120-121-160. #

relevant Security Council Resolution 1822 (2008) not to be an obstacle to Abdelrazik's return to Canada, at government expense if required. He further orders that the person attend a hearing before the court, for the latter to satisfy itself that Abdelrazik had in fact returned to Canada. The Canadian court interpretation was 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 Nation Charter in complying with the court decision (Tzanakopoulos, 2011, 133).

Anyway, on the international law, the States cannot ignore its international obligations because of the obligation to respect the decisions of their domestic courts. In this case, States are forced disobeying of its international obligations or ignore its internal obligation on the constitution. The choice of each way can propose the responsibility of States on international law or on internal law.

If national courts were interested in the evaluation of a decision 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.²² 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 finally found that the court did not have jurisdiction to order the release.²³ A similar approach was taken by the US court of Appeals in *Ntakirutimana v Reno*,²⁴ 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 the United Nations' acts as a matter for the executive branch, not for the courts. The United States Supreme Court in this case did not have the position as a matter of international law, beside any review of the Security Council's action was not allowed.

With the notice we find that in the first decision apparently considered themselves 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.

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 as such - such effects could only be produced at the international level.

5. Conclusion

In the recent years, we witnessed an increase in the cases with the subject of examining the legality of the resolutions of the Security Council in order to control the Council and provide suitable guarantees and control on their power's 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.

Intervention of most of the States in performing international norms, particularly in the field of human rights is inevitable. States can reflect their assessment by entering into the content of a subject and internal court can also force the States to react against the actions of the charter which in their view are violating human rights. Of course, discussing the responsibility of the United Nations due to the measures taken by the Security Council in an international or domestic court is a dual subject which not only it challenges the legal subjects, but also it is not out of political aspects of the subject. Challenging actions of the Security Council through political or

²² *Milosevic v Netherland (Interlocutory Injunction)* KG 01/975(2001) 48 NILR 357

²³ *Milosevic v Netherland (Interlocutory Injunction)* KG 01/975(2001) 48 NILR 357,360-1(3)-(4)

²⁴ Judgment of 24 January 2000, 528 U.S. 1135, 120 S. Ct. 977.#

judicial institutes, directly or indirectly, leads to exercising assessment power, concerning violation of the international law by the States. Finally, the rational outcome of the international wrongful act by the subject of the international law will be their responsibility in that regard. States also criticized the actions of the Security Council collectively. Theoretically, there remain only two solutions: either this issue can be referred to the court for an advisory opinion or the States decide to neglect the resolutions of the Security Council. 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 the inefficiency of the Security Council in the maintenance of international peace and security.

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