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The UN Security Council' Judicial Work

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Abstract:
The international legal order which is founded on the principle of state consent, where states are obliged only by the norms which the state have participated in its development, or at least had the opportunity to influence this development. Therefore, the the United Nation Security Council (UNSC) legislative power will threaten the international legal order. However, Article 38 of the International Court of Justice (I.C.J) statute, which identifies the sources of international law, does not identify the UNSC as a legislature.
This article examined whether the Security Council has the power to assign responsibility, and about the legality of performing the role of investigator and judge at the same time.

Keywords: *Security Council, International Court of Justice, judicial work*

1. Introduction

The UNSC has practised controversial judicial and legislative powers in addition to its original power which was simply to restore international peace and security. It has done so on the assumption that terrorism is always a threat to international peace and security. The UNSC's new powers (legislative and judicial) can both be considered as an expansion in the UNSC's competence, and at the same time both contain legislative aspects.
It is argued that the UNSC is not an appropriate place for the exercise of judicial work, as its resolutions are not subject to monitoring and challenge. In addition, its resolution making process is not an efficient or appropriate process for evaluating the evidence and assigning responsibility.[i] This is an essential requirement for the exercise of judicial work. As an example, as well as evidence of this criticism, in the wake of the Madrid bombings on 3/11/2003, the UNSC charged the movement of EATA, in Resolution 1530 (2003); it then transpired that EATA was not responsible for those bombings. This raised many uncertainties about the ability of the Security Council to assign responsibility, and about the legality of performing the role of investigator and judge at the same time.[ii] There are also other reasons to believe that the UNSC is not suitable to exercise this kind of work. It, for example, has not been established and structured on the basis of the principle of the separation of powers,[iii] which is an important pillar of judiciary work. As an example, the UNSC in Resolution 1333 (2001) imposed a sanction against bin Laden, following an indictment from the USA, without a final ruling for the purposes of proving the *actus reus*. This is what can be described as a type of exercise of global judicial dictatorship, which surely was not envisaged by the framers of the UN Charte(UNC).

1.1. The UNSC Legislative and Judicial Power

It seems that some powers in terms of terrorism suppression have been transferred from states to the UNSC; at the same time the accountability which accompanied these powers has not been transferred.[iv] The UNSC is an international organization, and therefore ill-equipped to deal with individuals, and for imposing sanctions on individuals. This creates a gap in the means by which the rights of individuals and rule of law are secured.[v] By dealing with individuals, an overlap with the jurisdiction of the domestic authorities has occurred.[vi] In light of the absence of judicial review[vii]or legislative monitoring of the UNSC`s work - this may be seen as intended.[viii]
At the time the UNSC was formulating the UNC, its function - through the preparatory work and the UNC deliberations - was to deal with crises and it was not intended to resolve these crises; it was only asked to stabilize the situation, until it was solved by peaceful means.[ix]
It would seem that the argument of those who regard the UNSC as having acted *ultra vires* is the most convincing.[x] Where initially, the UNSC is obliged by international law and the UNC, the UNSC itself has not alleged that it is *ligibus solutus*. The UNSC is subject to international law. Even its discretionary powers should be exercised within legal limits, so it does not mean that the UNSC is *ligibus solutus.* In addition, the superiority which is conferred on the legal *intra vires* UNSCRs under Article 103 is only against the states' agreed obligation; therefore the UNSCR is obliged by the *jus cogens*, and customary law. Therefore, the UNSC is bound by the UNC, as the UNC is the constitutive instrument of UNSC. In addition the UNSC under Article 24 is bound by the UNC - especially its

principles and purposes. Any breach of the UNC, sees the UNSC acting as *ultra vires*; therefore the UNSCR should be in conformity with the UNC especially these principles and purposes. In addition, the UNC has not authorized the UNSC to exercise a judicial or legislative function, or any new power, as this is beyond the intention of those who drafted the UNC. It can also be said that the UNSC is not prepared or equipped to operate judicially or legislatively. In addition, the international legal order is set up on the principle of state consent, where states are bound only by norms only where they participated in the development of those norms, or at least had the opportunity to influence this development. Therefore, the UNSC legislative power will threaten the international legal order. The sources of legislation in international law are defined under Article 38 of the ICJ statute and this does not recognise the UNSC as a legislature in international law. This is true at least for the signatories to the ICJ statutes. The UNSC does not have the *kompetenz-kompetenz*, in order to amend its power. Even the evolutionary interpretation cannot give the UNSC a new power, especially if this evolutionary interpretation is based on subsequent practices by the UNSC itself. Additionally, the expanding interpretation of Chapter VII should not create new powers for the UNSC. Also using the positive concept (a broad meaning) of the peace, accordingly, expands the meaning of the threat in a way which is contrary to the law of international treaties (Vienna Convention). Under these broad meanings any action could be considered as a threat to international peace.[xi]

Additionally, even an evolutionary interpretation of the UNC cannot provide the UNSC with a new power; particularly if this evolutionary interpretation is created on the basis of subsequent practices by the UNSC itself. Similarly an expanded interpretation of Chapter VII should not produce new powers for the UNSC. In addition, using the positive peace concept will expand the scope of the threat concept; which is contrary to the law of international treaties (Articles 31, 32 of Vienna Convention). Under these broad concepts any act could be a threat to the international peace and security.

Importantly, the UNC Chapter VII in Article 39 - which is the gateway to using Chapter VII - mentions three conditions, one of which should be met, and all of these cases are very specific. It is also clear that the measures listed in Article 41 are all responses to specific cases, and therefore the UNSC is not authorised to address a general abstract phenomenon, such as terrorism, under the UNC Chapter VII. At the same time the UNSC cannot under the UNC Chapter VII adopt general abstract measures to address undetermined future events. Indeed terrorism is not always a threat to international peace. This is the case only if it is state sponsored, or the state turns a blind eye to it. On the contrary, terrorism should be addressed through domestic legal means. As for the claim that the UNSC's legislative power is established by Article 25 of the UNC, this is an unconvincing argument because UN member states accede to carrying out their obligations under UNSCRs only where these UNSCRs are *intra vires* and legal. Furthermore, UN member states authorised the UNSC only to keep the peace, under Article 24(1), and restricted this authorization by conformity with the UNC, under Article 24(2). Consequently when the UNSC legislates or expands its power, it acts *ultra vires*[xii] especially if this is in unconformity the UNC principles and purposes.[xiii] The legislation function is a breach of the UNC.[xiv] The UNSC is a law-enforcing body not a legislator.[xv]The function of the UNSC *"was to keep the peace, not to change the world order, that* [is why] *the Security Council was set up".*[xvi] It can be said that *"in many ways the SC acted, arguably for the first time, as a world government, rather than as peace enforcer*".[xvii]. *It is argued here that the legislative and judicial UNSCR under study is ultra vires, so its resulting obligation is void or at least avoidable. Under the absence of a mechanism to monitor or challenge the acts of the UNSC in the international law domain, it remains for member states only to exercise their right of last resort, or the right of auto-interpretation to refrain from its implementation. This is a necessary action to keep the international legal order, which is set up on the principle of consent and equality between states, and to maintain respect for the UN, which was originally founded on the idea of collective security.*

2. The Effect of Exceeding Legal Jurisdiction

With regard to the effect of exceeding legal jurisdiction of powers on the legal order, this expansion impacted on the principle of consent and equality in international law.[xviii] This principle is based on the equality of states according to Article 2 (1) of the UNC, where states are bound only by rules that have been approved, developed, or at least influenced by the states.[xix] The legislative authority of the UNSC affects the international legal order,[xx] and it is not supported by the UN institutional system.[xxi] In addition, the UNSC's legislative authority has been questioned by many states,[xxii] as it is considered an illegal dominance by the UNSC over international law-making.[xxiii] This threatens the prestige of the UNSC, and undermines the idea of collective security.[xxiv] Such a power also raises many problems including the difficulty of implementation, and lack of clarity.[xxv]

It is important to examine the effect of a conclusion that a resolution is *ultra vires* on the obligations imposed under that resolution. There is the point of view says that the *ultra vires* resolution leading to that obligation is void. It is, therefore, unable to produce effects such as UNSCR 713, which imposed an arms embargo on Bosnia which had previously facilitated the commission of the crime of genocide; it was considered void or avoidable and ineffective.[xxvi] Another point of view is that the *ultra vires* resolution means that obligation is voidable, because the international organizations decisions often have immediate legal effects. Accordingly, this "immediate effects" establish legal rights and legal positions, which cannot be ignored until this decision is declared as *ultra vires*. Therefore its effects cannot be considered void from the date of issuance, but its effects are valid until the time that it considered void; after that it should not have any effects.[xxvii] However, this brings uncertainty which undermines the effectiveness of organizations.[xxviii] Therefore, the best solution is to cease work by resolution within the objection period.[xxix] However "*there is little agreement on what are the legal effects of ultra vires resolutions of international organizations*".[xxx] It is worth stressing that there is a rebuttable presumption that the resolutions issued by international organizations are *prima facie* valid until proved that they are *ultra vires.*[xxxi] This presumption was confirmed by the ICJ in its *Advisory Opinion* in *Case of Certain Expenses,* which stated that:

"Member States retain their freedom of action. But when the Organization takes action which warrants the assertion that it was appropriate for the fulfilment of one of the stated purposes of the United Nations, the presumption is that such action is not ultra vires the Organization."[xxxii]

So if an *ultra vires* resolution is void, or at least avoidable, this leads to another question as to whether it is possible to challenge the rebuttable presumption that a resolution is valid and who is authorized to decide on invalidity? Challenging *ultra vires* UNSCRs before the ICJ, is impracticable[xxxiii], because the ICJ is unauthorised to review UNSCRs, in order to find the *ultra vires* character.[xxxiv] The ICJ, is not authorized to hear challenges against the *ultra vires* UNSCR directly, but only in the context of a dispute between states.[xxxv] In this case, the ICJ judgment has only an advisory value against the UNSC.[xxxvi] In addition, UNSCRs are imposed on the state, but their direct effects are on the targeted individual; therefore there is no incentive for a state to raise an objection. Elsewhere UNSCRs have been challenged by individuals before domestic courts, and regional courts,[xxxvii] and resort to these measures have increased recently; there is more direction in monitoring UNSC acts.[xxxviii] But frequently the national and regional courts refrain from reviewing the UNSCR for political reasons;[xxxix]

3. Hierarchical relationship between states and the UNSC

Here arises the question about the extent of mandatory resolutions of the legislative and judicial nature against States, within the domain of International Law, where the UNSC had exceeded its powers when it passed such resolutions. The basis of obligations in International Law, which organises the international community, is the will of the state. There is no hierarchical[xl] relationship between states and the UNSC,[xli] but the arrangement is a *vis`-a-vis´* relationship, where the states did not cede their sovereignty to join the UN, and where the international legal order is based on sovereign states. Therefore the conflict between the sovereignty of states and the functions of the UNSC, especially the legislative and judicial competence which already overrides its original competence,[xlii] undermines the basis of the international order.[xliii] In addition to this the UNSC acts on the basis that the states' consent is no longer necessary to enact the rules of International Law, but this is opposed by the states in the UNGA.[xliv] Meanwhile the basis of the states' obligation regarding the decisions of international organizations is its approval of the treaty establishing the organization, which sets out the jurisdiction of the interior bodies of this organization. Consequently, states are obliged to the decisions of such bodies in the organization as long as these bodies do not exceed their original jurisdiction. If this is exceeded, the decisions will be not binding.[xlv] Where it seems that the decision-making in international organizations always has been criticized, because of the absence of democracy, this has been increased with the issuance of the legislative and judicial character resolutions.[xlvi]

Based on what has already been discussed, there remains one possibility to review *ultra vires* UNSCs, which is by the state *per se*, where the state has the right to challenge *ultra vires* resolutions of the UN;[xlvii] under the so-called *the Right of Last Resort.*[xlviii] Where *"[t]he right 'of last resort' of member States to decide, for themselves, on whether an act has been ultra vires is difficult to reject despite the evident problems it causes to the credibility of the collective system"*.[xlix] It may establish the right to challenge the organization's resolutions on the basis of the state's inherent right of *auto-interpretation* of the international law;[l] the state's right to interpret the international law[li]. Because this *ultra vires* resolution is not binding,[lii] therefore the I.C.J. considered that UNSCR 713 is not binding against Bosnia.[liii] The Organisation of Islamic Cooperation (57 states)[liv] considered that UNSCR 713 was ineffective and the U.S. Congress requested its government's non-compliance.[lv] It was also used by the African Union (54 states), on the occasion of the sanctions on Libya.[lvi] Pursuant to this the I.C.J held that:

"[t]hat under the current circumstances, the Government of Bosnia and Herzegovina has the right to seek and receive support from other States in order to defend itself and its people, including by means of immediately obtaining military weapons, equipment and supplies."[lvii]

So in general each state has the right to supervise the organization in order to ensure that it is not being *ultra vires*, which protects the organization[lviii] otherwise the resolution's lack of legitimacy will put the organization at stake, thus destroying its effectiveness.[lix] This principle was localized by *President Judge Winiarski* in his *Dissenting Opinion in the Case of Certain Expenses* who stated that:

"A refusal to pay, as in the case before the Court, may be regarded by a Member State, loyal and indeed devoted to the Organization, as the only means of protesting against a resolution of the majority which, in its opinion, disregards the true meaning of the Charter and adopts in connection with it a decision which is legally invalid"[lx]

Thus, UNSCRs may be reviewed by states, and if it is found to be *ultra vires* the state can exercise its right of last resort or the *right of auto-interpretation*, and therefore refuse to apply the resolution as a result of breach of purposes and principles of the UNC.

4. Concluding Remarks

In its attempt to prevent terrorist attacks, the UNSC first imposed sanctions on states, and then on non-state actors, but it has now imposed them on individuals and private entities in domestic law. As discussed earlier, the effect of this is that such sanctions cannot easily be remedied or challenged by those they affect. Changes in the nature of sanctions have appeared, as they have shifted from a reaction to a specific event or state of affairs, to a comprehensive collaborative compulsory pro-active system of work, with long term global effects. Its purpose has shifted from restoring international peace and security to preventing the commission of terrorism as a domestic law measure. This led to the possibility that a sanction can be imposed on the basis of suspicion of possible future incidents. This violates all ordinary criminal justice standards, and so the UNSC has sought to avoid the imposition of the sanction under these standards by creating a parallel system of justice, based on the unacceptable argument that ordinary criminal justice standards are inadequate, and hinder the prevention of the crime of terrorism. In addition, the implementation of the sanction has been carried out involving controversial mechanisms.

The UNSC has practised controversial judicial and legislative powers in addition to its original power which was simply to restore international peace and security. It has done so on the assumption that terrorism is always a threat to international peace and security.

The UNSC's new powers (legislative and judicial) can both be considered as an expansion in the UNSC's competence, and at the same time both contain legislative aspects.

It can be concluded here that the argument of those who regard the UNSC as having acted *ultra vires* is convincing. Because the UNSC is obliged by international law and the UNC, which is its constitutive instrument, it is not *ligibus solutus*. The UNSC should exercise its discretionary powers within its legal boundaries. Moreover its superiority under Article 103 of the UNC only applies to legal *intra vires* UNSCRs; this superiority is only over member states' obligations under international agreements. Therefore, the UNSC is obliged by the *jus cogens*, and international customary law. Correspondingly the UNSC under Article 24 is obliged by the UNC, especially its principles and purposes. Any breach of the UNC sees the UNSC acting as *ultra vires;* therefore the UNSCR should be in conformity with the UNC specially its principles and purposes. Furthermore the UNC does not allow the UNSC to exercise a judicial or legislative power. Similarly it can be said that the UNSC is not prepared or equipped to exercise a judicial or legislative function.

Importantly, the UNC Chapter VII in Article 39 mentions specifically only three specific situations, "threats to the peace", "breaches of the peace" and "acts of aggression" and thus it implies that action can only legitimately be taken if one of these has occurred. Additionally it is clear that the measures listed in Article 41 are responses to concrete cases; consequently the UNSC is not authorised to address a general abstract phenomenon, such as terrorism, under the UNC Chapter VII. At the same time, the UNSC cannot, under the UNC Chapter VII, adopt general abstract measures to address unidentified future events. Terrorism is not always a threat to international peace. This is the case only if it is state sponsored, or if the state turns a blind eye to it. Otherwise, terrorism should be addressed through domestic legal means.

With regard to the argument, that the UNSC's legislative power was established under Article 25 of the UNC, this is an unconvincing argument, because UN member states accept to carry out their obligations under UNSCRs only if these UNSCRs are *intra vires* and legal. Moreover, UN member states authorised the UNSC to keep the peace, under Article 24(1), and restricted this authorization by conformity with the UNC, under Article 24(2). Subsequently when the UNSC expanded its power, it was acting *ultra vires* because the power of legislation is a breach of the UNC.

Because it turns out that these new powers are indeed new functions, it cannot, therefore, be justified except by an amendment to the UNC adopted by all member states. In regard to these powers the competence to deal with individuals has been transferred from member states to the UNSC, without transferring the accountability attached to this competence. This creates a gap in the means of ensuring access to justice, as well as creating an overlap with the competence of national authorities, including operating the sanctions system from the international law domain, while it is implemented in the national law domain, thus widening this gap.

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xxxiii. This will be addressed in details in Chapter Four under "Legal Remedy Absence in the International level".

xxxiv. According to Article 34(1) of I.C.J Statute.

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xxxvii. Like ECJ in terms of UK.

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xl. Legal hierarchy , is an expression to describe the relationship between the multi authorities that enact the legal rules, which is arranged in ascending, depending on the strength of the legal rule. Where it is imagined as the form of the pyramid, the constitutional legislator on the head, until the lowest degree where a director of a department puts an instructions for his staff.

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liv. Previously called "Organization of the Islamic Conference"

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