

## The Legality of the Security Council Powers Expansion

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### Abstract

*This article will be examining the new powers to be exercised by the United Nation Security Council (UNSC) whilst suppressing terrorism through the Freezing Orders( FO), by exercising judicial and legislative powers. In addition, the effects of this new expansion will be examined, where the intention of the UNSC to expand its powers has become very clear in recent years, especially following the end of the Cold War. However legal questions regarding this expansion became more urgent recently. This article will discuss the question of the ultra vires acts of the UNSC in its efforts to freeze suspected terrorists' assets in order to suppress terrorism. In its recent FO resolutions, the UNSC has expanded its power in two different ways: by acting judicially and by acting legislatively. These two expansions in powers will be described, as will the relationship between them. Then the legality of this expansion will be examined, which will ultimately conclude that the UNSC has acted ultra vires.*

**Keywords:** Security Council, powers, International Court of Justice

### Introduction

Before debating this expansion, whilst examining the idea of the FO in the UNSC's work - a vital part of this article - a very important issue must be made manifest, which is the distinction between legality and constitutionality - "*the ultra vires*" - in the framework of the UN. An act of the UN is *ultra vires* if it exceeds the powers that are granted under its constitutive instrument the UN Charter (UNC), otherwise its act is considered as *intra vires*. In other words an *ultra vires* act is an unconstitutional act under a constitutive instrument (the UNC in the case of the UNSC); and the *intra vires* act is in conformity with the constitutive instrument. Legality refers to conformity with overall international law<sup>1</sup>. An act may therefore be an *intra vires* "constitutional" act and legal; there are no doubts about to the applicability of such acts. It may also be an *intra vires* "constitutional" act but illegal.<sup>2</sup> However, an *ultra vires* act is *always* illegal because, with respect to the organ itself, its constitutive instrument is the most vital legal piece of International Law. In this article, the *ultra vires* question will be examined.

In this article, the new powers of the UNSC, as exercised in the issue of FOs, will be examined in order to determine whether the UNSC has gone beyond its legal powers; is it - during the exercise of its power under Chapter VII of the UNC to impose the FO through its judicial or legislative acts - acting *ultra vires* ? The UNSC Going Beyond its Legal Power.

<sup>1</sup> Gabriël H. Oosthuizen, *Playing the Devil's Advocate : the United Nation Security Council is Unbound by Law*, Leiden Journal of International Law, 12(3)(1999), pp.549-563,550.

<sup>2</sup> Yoshio Kawashima, *Some Aspects of Illegal Acts of International Organizations*, (1968) Osaka University Law Review, 16, pp.13-35, 28. Also Antonios Tzanakopoulos, *Disobeying the Security Council Countermeasures against Wrongful Sanctions*,(Oxford Press, Oxford ,2011), p83.

### ***The Security Council's expanded powers***

The dispute over whether the UNSC can validly issue resolutions of judicial or legislative character, whilst suppressing terrorism. This is in order to determine whether the obligation to freeze the suspected terrorist assets is *ultra vires* or not. To address this issue, the UNSCRs under the UNC Chapter VII relating to suppressing terrorism will first be defined. Then, the conformity of these UNSCRs with the UNC will be examined. Ultimately it will be argued that the UNSC has expanded its power, by exercising legislative and judicial functions and that this new power is *ultra vires* the UNC.

The relevant UNSCRs, which have judicial or quasi-judicial character are UNSCR 1267 and its descendants, where the UNSC has frozen the assets of certain suspected persons in order to suppress terrorism. *So, what make these resolutions legal determinations or judicial judgments?* In other words, do these UNSCRs determine the applicability of a particular legal obligation on a particular individual or entity? According to the formal criterion, which is established on the principle of “separation of powers”, judicial decisions should be issued only by a court in its technical meaning. However, this criterion is not always appropriate,<sup>3</sup> especially with no clear separation of powers in the UN. In addition, the UNSC is not technically a court in the legal sense. In order to avoid the lack of depth of the formal criterion, a substantive criterion can be used. Under the substantive criterion a judgment is a binding legal determination based on a prior-enacted rule.<sup>4</sup> However, this does not fully apply in the case of a FO under UNSCR 1276 and its descendants, where there are no prior-enacted rules. This is understandable because when the UNSC exercises a new judicial power it includes a legislative act. When the UNSC enacts the rule which establishes its new judicial power it first creates a new power then it determines upon the basis of this new power.<sup>5</sup> So when the UNSC exercises its judicial power the prior-enacted rules are introduced in combination with the judging process. This is due to the use of UNSC’s legislative power for new purposes, which are not covered in previous legislations. This judicial determination is exercised under Article 39 of the UNC which explains what is considered to be a threat to peace.<sup>6</sup>

It is important to consider the legislative function of the UNSC where the relevant resolution is Resolution No.1373 and its descendants.<sup>7</sup> This resolution is a precedent in the field of international legislation,<sup>8</sup> although the idea of legislation in international law is broad.<sup>9</sup> However generally legislation creates a general abstract binding rule<sup>10</sup>, to govern future acts,<sup>11</sup> is not related to a particular case<sup>12</sup> and is not temporary.<sup>13</sup> Status of abstract means it is applicable to all cases meeting its conditions, so it can be applied to an unlimited number of cases.

<sup>3</sup> Alee Katar, *Encyclopaedia of the administrative judiciary*; part one,(Dar Althaqafa, 1<sup>st</sup> edition,2004),pp356-357.

<sup>4</sup> In details see; Katar, *ibid*, p358-362; Mahmud Al-Hafez, *The administrative judiciary in the Egyptian and comparative Law*,(Dar Alnahda Alarabea,1993),p22.

<sup>5</sup> Bjdrn Elberling, *The Ultra Vires Character of Legislative Action by the Security Council*, (2005) International Organizations Law Review 2, pp.337-360,340-341.

<sup>6</sup> For details see; Keith Harper, *Does the United Nations Security Council Have the Competence to Act as Court and Legislature?*, (1994), N.Y.U. J. INT'L L. & POL, 27(1), pp103-159,108-126.

<sup>7</sup> This UNSCR and its descendants are concerned with terrorism, and there are other resolutions under the legislative function but not related to the FO, such as 1540.

<sup>8</sup> Michael Fremuth & Jörn Griebel, *On the Security Council as a Legislator: A Blessing or a Curse for the International Community?*, Nordic Journal of International Law, 76(4) (2007), pp.339-362,341.

<sup>9</sup> It include agreements, customs, and general principles; see Fremuth and Griebel, *Op.cit*, p341.

<sup>10</sup> This qualification is based on the substantive criterion for discrimination legislation, as seen in the content of the norm, not the body which issued it; see Katar, *Op.cit*, p321. As well Stefan Talmon, *Notes and Comments the Security Council as a Legislature*, the Ameican Journal of International Law, 99(175)(2005), pp.175-193,176; Mónica Lourdes de la Serna Galván, *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.147-185,154; Elberling, *Op.cit*, p338.

<sup>11</sup> Fremuth and Griebel, *Op.cit*, p342.

<sup>12</sup> Galván, *Op.cit*, p154.

<sup>13</sup> Elberling, *Op.cit*, p338.

Its generality means it addresses all individuals or legal persons so it can be applied to an unlimited number of people.<sup>14</sup> The difference between national and international legislation is that the former addresses the domestic legal order of persons and the latter addresses states which either commit themselves<sup>15</sup> or apply the legislation to its citizens but, in either case, the direct addressee is the state<sup>16</sup>. What has been done in UNSCR No.1373 is that the UNSC plays the role of the global legislator<sup>17</sup> by enacting a general<sup>18</sup> abstract binding<sup>19</sup> rule. The UNSC's new judicial and legislative power - designed to suppress terrorism – are both related in terms of containing legislative action and being a form of expansion of powers.

The manner in which competence is determined via the UNC will now be clarified in order to determine whether the UNSC's acts are *ultra vires* or not? The basis of the UNSC's competence is the constitutive instrument of the organization (the UNC).<sup>20</sup> The distribution of competences under the UNC is a functional method, where an organ of the UN is given a function or mission to do, and is empowered to exercise any act to perform this function in accordance with the UNC.<sup>21</sup> Under the UNC, the UNSC's function is to maintain international peace and security.<sup>22</sup>

### ***The Legality of the UNSC's Expansion of Powers***

It is now worth examining the next question regarding possible expansion of the powers of the UNSC. The legality of this expansion must be addressed, in order to determine whether the resolutions that are based on this expansion are *ultra vires* or *intra vires*, thus affecting the resultant FO. Jurisprudence is divided into two schools of thought; the first considers that these decisions are *intra vires*, and the second considers them *ultra vires*.

### ***The Arguments for Declaring the UNSC's Acts Intra Vires***

the arguments for declaring the UNSC's acts *intra vires* is examined by many school of thoughts. One school of thought considers the UNSCRs that are the subject of this article to be *intra vires*. There are two main arguments that have been made to support this conclusion: the first is that the UNSC's powers have not been the subject of expansion at all, as the UNSCR's in question do not have the status of legislation. The second argument is based on the notion that the UNSC has unlimited powers. Each will be examined in turn.

The first argument denies that these UNSCRs have a legislative nature; those who subscribe to this argument believe that these decisions are peace-keeping not law-making or law-determining.<sup>23</sup> They are exercised under exceptional circumstances,<sup>24</sup> and their nature is not legislative. Where international law-making is based on the consent of the states, the organization is, therefore, unable to legislate for itself, and if this is legislation, it is state legislation not the organization's legislation.<sup>25</sup> The UNSC is not a legislator and it cannot make permanently binding rules without the state's aid in application.<sup>26</sup>

<sup>14</sup> Galván, *Op.cit*, p154; Fremuth and Griebel, *Op.cit*, p342; Matthew Happold, *Security Council Resolution 1373 and the Constitution of the United Nations*, Leiden Journal of International Law, 16 (2003), pp.593-610,597.

<sup>15</sup> Fremuth and Griebel, *Op.cit*, p342.

<sup>16</sup> *ibid*.

<sup>17</sup> E.J.Flynn, *The Security Council Counter-Terrorism Committee and Human Rights*, Human Rights Law Review 7(2)2007, pp371-384,376; Fremuth and Griebel, *Op.cit*, p348. Also Alan Boyle and Christine Chinkin, *The Making of International Law*, (Oxford, Oxford University Press, 2007) , p7.

<sup>18</sup> Fremuth and Griebel, *Op.cit*, p345.

<sup>19</sup> *ibid*, p343.

<sup>20</sup> Ingrid Detter, *Law Making by International Organization*, (Stockholm,P.A.Norsted & Soners Forlag ,1965), p23.

<sup>21</sup> Ebere Osieke, *The Legal Validity of Ultra Vires Decision of International Organizations*, the American Journal of international Law, 77(2)(Apr,1983),pp.239-256,240.

<sup>22</sup> According to Article 24 UNC.

<sup>23</sup> Eric Rosand, *The Security Council as "Global Legislator": Ultra Vires or Ultra Vires Innovative?*, Fordham International Law Journal, 28(3)2004,pp.542-590,557.

<sup>24</sup> Serge Sur, *International Law, Power, Security and Justice, essays on international law and resolution*, (Oxford, Hart Publishing Ltd, 2010), p143.

<sup>25</sup> G.M. Danilenko, *Law-Making in the International Community*, (Martinus Nijhoff Publishers, Netherlands, 1993), p7.

<sup>26</sup> Sur, *Op.cit*, p303.

In addition, the UNSC, with regard to these decisions, has not established a new rule, but it is asking the state to apply their domestic rule through the development of the best practice rules.<sup>27</sup> This argument is groundless. The aims of these UNSCRs may be peace-keeping, but they achieve this through general, abstract and binding rules under the UNC Chapter VII, making them legislation or judgments rather than voluntary best practice rules.

Regarding the second opinion, it cannot be denied that the arguments for expansion initially seem convincing. This school of thought sees these new powers within the broader framework of international law. This new power is intended for the purposes of organizing non-state actors - *public and private* - by expanding the concept of a threat to international peace, and giving a role to the UNSC, in reshaping international law, to becoming a legislator.<sup>28</sup> This school of jurisprudence establishes its argument through the idea that the UNSC, whilst exercising its power – under Chapter VII - is not bounded by any legal limitation.<sup>29</sup> Article 103 of the UNC prevails over every state's obligations under customary law and treaties and, therefore, the UNSC whilst exercising Chapter VII powers, is not governed by the law.<sup>30</sup> Even the principles and purposes of the UNC, which represents the spirit of the UN, do not bind the UNSC if it limits the options for the UNSC. This is evidenced by the prevailing of the UNSCR under Article 103 of the UNC.<sup>31</sup>

Some have argued that the UNSC does have the power to legislate, to impose general abstract obligations on states, where it is considered as a crisis management body in the UN. Thus, it has power for legislation under Chapter 7, and Articles 24 and 25 of the UNC,<sup>32</sup> where the working through the UNGA is very slow, compared with the resolutions of the UNSC.<sup>33</sup> In addition, its resolutions do not need consensus or ratification by states: this is the reason for using the UNSC to legislate in the first place. However, under this view, the UNSC is restricted to issuing legislation only if three conditions are satisfied: *first* that the reason to legislate is something which threatens international peace and security.<sup>34</sup> *second* that what is issued from the UNSC is consistent with the aims and goals of the UN, and *thirdly* that International Law is respected.<sup>35</sup> The first and second conditions not available in the UNSCR which are related to terrorism will be examined .

It is also argued by supporters of the *intra vires* view that what determines whether a situation is a threat to peace or not is a political question.<sup>36</sup> The UNSC is a “*political organ which acts for political reasons*”.<sup>37</sup> Its decisions reflect the political, not legal, point of view, and the meaning given by the UNSC for the resolution should always prevail.<sup>38</sup> This is devised with the intention of the UNC framers to grant the UNSC an unlimited power to keep the peace.<sup>39</sup>

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<sup>27</sup> *ibid*, p347

<sup>28</sup> Andrew Hudson, *Not a Great Asset: The UN Security Council's Counter-Terrorism Regime: Violating Human Rights*, Berkely Journal of International Law, Vol. 25(2) (2007), pp.101-125,101.

<sup>29</sup> Rosand, *Op.cit*, p559; Oosthuizen, *Op.cit*, p562.

<sup>30</sup> Rosand, *Op.cit*, p559; Galván, *Op.cit*, p150. also Oosthuizen, Gabriël, “*Playing the devil's advocate: The United Nations Security Council is unbound by law*”,(1999) Leiden Journal of International Law, Leiden 12, p.549, 562.

<sup>31</sup> Rosand, *Op.cit*, p556; Oosthuizen, *Op.cit*, p563.

<sup>32</sup> Ian Johnstone, *Op.cit*, p 299.

<sup>33</sup> Luis Miguel Hinojosa Martinez, *The legislative role of the Security Council in its fight against terrorism: legal, political and practical limits*, I.C.L.Q. 2008, 57(2), pp.333-359,352.

<sup>34</sup> Paul C. Szasz, *The Security Council Starts Legislating*, (2002), AJIL 96(4), pp901-905,903; Also Luis Miguel, *Op.cit*, p335.

<sup>35</sup> Luis Miguel, *Op.cit*, p335.

<sup>36</sup> Harper, *Op.cit*, p135.

<sup>37</sup> *Case Nicaragua vs. USA, I.C.J [1984]*, Judge Schwebel in its dissenting opinion, p290; Military and paramilitary activities in and against Nicaragua (*Nicaragua vs. USA*), jurisdiction and admissibility, (1984). ICJ Rep. 392 at 435. As well Galván, *Op.cit*, p157. Also Erika De Wet, *The Chapter VII Powers of the United Nations Security Council*, (Hart Publishing, Oxford, 2004), pp.135-136.

<sup>38</sup> Galván, *Op.cit*, p157. Also The UN, ICTY court in *Case Prosecutor v Dusko Tadic*, Case Nr. IT-94-1-AR72, 2 October 1995, Para [27], .

<sup>39</sup> Elias Davidsson, *Legal Boundaries to UN Sanctions*, IJHR 7(4)2003, pp1-50, p2.[Will be cited as Davidsson, *Legal Boundaries*,].

Another argument used by the supporters of the *intra vires* view is based on the consideration that, following the functional method of the distribution of competences in the UNC, “each UN organ is the judge of its own competence”.<sup>40</sup> This expansion is not new to the UNSCR. It has previously set up special criminal courts in Rwanda<sup>41</sup> and former Yugoslavia,<sup>42</sup> imposed disarmament on Iraq, identified the borders between Iraq and Kuwait,<sup>43</sup> applied the Geneva Convention to occupied Palestinian territories,<sup>44</sup> and imposed economic sanctions.<sup>45</sup> Because it is part of the evolutionary interpretation of Chapter VII of the UNC, this expansion is achieved through the creation of new competence, and it is just matter of interpretation of the UNC. Supporters of the *intra vires* view base their argument on two kinds of interpretation; evolutionary interpretation of the UNC and the expanding interpretation of Chapter VII.

The first is the evolutionary interpretation of the UNC. The UN was established in an era where the threat to international peace came from the states which owned weapons, but now the major threat to international peace is terrorism.<sup>46</sup> The UN is a living organization, co-existing over a long period, in a changing world and likewise the UNC should be interpreted in an evolutionary manner, where its later practices play a key role in this interpretation. This can be achieved by linking the objectives and principles of the UN with the later practices.<sup>47</sup> The objectives of the UNSC are to maintain peace meaning the non-proliferation of violence; therefore the UNSC should develop new methods to counter new threats,<sup>48</sup> and this is a normal development allowed under the UNC.<sup>49</sup>

The second is the expanding interpretation of Chapter VII, where the supporters of expansion see that the new power came within a broader understanding of the UNSC powers under Chapter VII.<sup>50</sup> The UNC does not define the term ‘threat to peace’; therefore a broad interpretation can be adopted by the UNSC to exercise legislative<sup>51</sup> and judicial powers, as it has broad discretionary powers to determine the threat, and the response measures.<sup>52</sup> The wording of Article 41 of the UNC is not exclusive.<sup>53</sup> It states “...this may include...” Because of that the UNSC could issue legislation,<sup>54</sup> and the generality of Article 41 wording - particularly the term “measures” - can include issuing decisions to address a general abstract phenomenon like terrorism, not just a particular case<sup>55</sup>. In addition the UNSC previously interpreted the threat to peace on the grounds that it was *inter-state*, but now its interpretation has turned into *intra-state*.<sup>56</sup> Although international law sources were specified under Article 38(1)<sup>57</sup> of the Statute of the International Court of Justice, these did not include the UNSCR. However, some of the supporters of expansion considered that the UNSCR is based on the UNC which is included within the “international conventions” according to Article 38(1) (a).

<sup>40</sup> The Advisory Opinion in *the Certain Expenses case*, [1962] ICJ REP. at 168. As well Rosand, *Op.cit*, p552; Also the same meaning in Susan Lamb, *Legal Limits to United Nations Security Council Powers, in The reality of international law: essays in honour of Ian Brownlie / edited by Guy S. Goodwin-Gill and Stefan Talmon*, Foreword by Sir Robert Jennings, (Oxford : Clarendon, 1999), p361,363; Osieke, *Op.cit*, pp241-242.

<sup>41</sup> UNSCR 995 (1994).

<sup>42</sup> UNSCR 827 (1993).

<sup>43</sup> UNSCR 687 (1991).

<sup>44</sup> UNSCR 1322 (2000).

<sup>45</sup> Talmon, *Op.cit*, p176.

<sup>46</sup> Rosand, *Op.cit*, p588-590; Elberling, *Op.cit*, p344.

<sup>47</sup> Elberling, *Op.cit*, p344.

<sup>48</sup> *ibid*; Rosand, *Op.cit*, p570, 578.

<sup>49</sup> Rosand, *Op.cit*, p570. Also Boyle and Chinkin, *Op.cit*, p109.

<sup>50</sup> Elberling, *Op.cit*, p337.

<sup>51</sup> Talmon, *Op.cit*, p180.

<sup>52</sup> De Wet, *Op.cit*, p133.

<sup>53</sup> Elberling, *Op.cit*, p342; Talmon, *Op.cit*, p180.

<sup>54</sup> Rosand, *Op.cit*, p555; Harper, *Op.cit*, p126,148-157.

<sup>55</sup> Talmon, *Op.cit*, p181

<sup>56</sup> Rosand, *Op.cit*, p554.

<sup>57</sup> Which is stated that “*The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply: (a). international conventions, whether general or particular, establishing rules expressly recognized by the contesting states; (b). international custom, as evidence of a general practice accepted as law; (c). the general principles of law recognized by civilized nations.*”

The UNSCR binding of the UN's member states under Article 25,<sup>58</sup> and the effectiveness of these resolutions, is dependent on the co-operation of states.<sup>59</sup> The UNSC looked to wider consultation in its subsequent resolutions.<sup>60</sup> Some believed that the UNSC should proceed under more guarantees to maintain its powers of expansion,<sup>61</sup> because this expansion is a powerful tool to safeguard peacekeeping through a proactive approach.<sup>62</sup> The UNSC cannot deal with all the terrorist organizations in the world, so legislation is the most appropriate way.<sup>63</sup> Thus, expanding the UNSC powers is welcomed on a pragmatic basis,<sup>64</sup> where this new resolution came to fill a gap in the international legal system.<sup>65</sup> Therefore, it can be said that the legislative decisions and judicial decisions are *intra vires* because the UNSC can decide new competences for itself, where “[f]or better or for worse, what the Council says is the law”.<sup>66</sup> Therefore, according to this logic, the UNSC is not formatted to be *ultra vires*; because it is above law and states must comply with the resolution, even if it is incompatible with the UNC.<sup>67</sup>

### ***The Arguments for Declaring the UNSC's Acts Ultra Vires***

In this section the arguments for declaring the acts of the UNSC *ultra vires* will be examined. Several arguments can be put forward to support the conclusion that the UNSC has acted *ultra vires*. First, even the UNSC itself did not claim to be above the law but very much the opposite.<sup>68</sup> Their argument was based on the view that the state is not bound by a legal rule unless it has the opportunity to participate in the development of, or at least influence, this rule.<sup>69</sup> Thus, “more generally, no Parliament in the world community. That is to say, there exists no corporate organ formally empowered to enact laws directly binding on international legal subjects”.<sup>70</sup> This principle has been supported by the ICJ.<sup>71</sup> If there is a legislative authority in the UN it is, perhaps, better to be the UNGA rather than the UNSC<sup>72</sup>-which was rejected by the founders<sup>73</sup>- because of its task of developing international law.<sup>74</sup> So it is worthwhile to fill the international law gaps with the participation of all member states, not by the UNSC, which represents the will of its members only.<sup>75</sup> It is known in International Law that international organizations cannot make legal rules. This is an exclusive competence of states, which obliges itself willingly through agreements, customary law, or the recognition of general principles of law. It is also considered that interpreting Article 25 of the UNC as giving the UNSC the power to legislate goes beyond the intentions of the framers of the UNC. In the international legal order, international law is made willingly by the consent of states, so the legislative power of the UNSC is a violation of this rule. The fact that the UNSC is more effective, less time-consuming compared to the UNGA,<sup>76</sup> has no effect on the UNSCR's legitimacy.

<sup>58</sup> For more see ; Rosalyn Higgins, *The Advisory Opinion on Namibia: Which UN Resolutions are Binding Under Article 25 of the Charter*, the International and Comparative Law Quarterly 21(2) (1972), pp.270-286

<sup>59</sup> Talmon, *Op.cit*, p193; Rosand, *Op.cit*, p552.

<sup>60</sup> Talmon, *Op.cit*, p188.

<sup>61</sup> For more see; Rosand, *Op.cit*, pp. 578-587.

<sup>62</sup> Talmon, *Op.cit*, p192.

<sup>63</sup> *ibid*.

<sup>64</sup> Rosand, *Op.cit*, pp.546-550.

<sup>65</sup> *ibid*, p551.

<sup>66</sup> Martti Koskenniemi, 'The Police in the Temple: Order, Justice and the UN: A Dialectical View', EJIL, vol 6 (1995), pp.325-348,327.

<sup>67</sup> De Wet, *Op.cit*, p377.

<sup>68</sup> Tzanakopoulos, *Op.cit*, p75.

<sup>69</sup> Galván, *Op.cit*, p150; Elberling, *Op.cit*, p351. Also Gerry Simpson, *Great Powers and Outlaw States Unequal Sovereigns in the International Legal Order* (Cambridge, Cambridge University Press, 2004),p28.

<sup>70</sup> ICTY, PROSECUTOR v. DUSKO TADIC a/k/a "DULE", Decision on the Defence Motion For Interlocutory Appeal on Jurisdiction, Parra [43], 2 Oct 1995, Also see Boyle and Chinkin, *Op.cit*, p108

<sup>71</sup> Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States), [1986] ICJ Rep. 12, Para. 269.

<sup>72</sup> Elberling, *Op.cit*, p343; Harper, *Op.cit*, p157; Also Boyle and Chinkin, *Op.cit*, pp.108-109.

<sup>73</sup> Fremuth and Griebel, *Op.cit*, p349

<sup>74</sup> Article 13(1)(a) UNC.

<sup>75</sup> Rosand, *Op.cit*, p575, with more references.

<sup>76</sup> *ibid*, p575.

The UNSC is ill-equipped to legislate<sup>77</sup>, or in terms of political representation,<sup>78</sup> is not subject to accountability,<sup>79</sup> lacks transparency, and its resolutions are politically motivated.<sup>80</sup> It is also not formatted to work as a judge. Because it is a political entity, it is not impartial.<sup>81</sup>

The argument that the UNSC is not bound by law so it can expand its competence is unacceptable.<sup>82</sup> The UNSC was established under the UNC, and this should be respected by the UNSC.<sup>83</sup> It is legally bound by what was stated in the UNC according to Article 24 of the UNC,<sup>84</sup> in particular its objectives and principles;<sup>85</sup> “*the Charter had to be considered in its entirety and if the Security Council violated its principles and purposes it would be acting ultra vires*”.<sup>86</sup> Some believe that the UNC is a principle, thus its international interpretative documents and treaties are part of the UNC.<sup>87</sup> But there is another opinion that sees that:

“[t]he history of the United Nations Charter thus corroborates the view that a clear limitation on the plenitude of the Security Council's powers is that those powers must be exercised in accordance with the well-established principles of international law. It is true this limitation must be restrictively interpreted and is confined only to the principles and objects which appear in Chapter I of the Charter”.<sup>88</sup>

It should exercise its powers under its constitutive instrument, and any violation of or conflict with this constitutive instrument makes its acts *ultra vires*.<sup>89</sup> There is nothing in the UNC which allows the UNSC to proceed as a legislative<sup>90</sup> or judicial function. As the UN is subject to international law,<sup>91</sup> so it is bound by this law, especially the *ius cogens* rule;<sup>92</sup> therefore the UNSC is bound,<sup>93</sup> unless stated otherwise in the UNC,<sup>94</sup> as “*neither text nor the spirit of the charter conceives of the Security Council as a legibus solutus (unbound by law)*”.<sup>95</sup> Accepting the contrary argument means that international law has no importance in international politics.<sup>96</sup> The UNSC works within the international legal system and it is subject to this system's principles and provisions.<sup>97</sup> Article 38 of the Statute of the International Court of Justice - which limits the sources of international law - is part of this international law, which does not recognize the UNSC as a legislator.<sup>98</sup>

<sup>77</sup> Galván, *Op.cit*, p153.

<sup>78</sup> Rosand, *Op.cit*, p573; Elberling, *Op.cit*, p348.

<sup>79</sup> Rosand, *Op.cit*, p573; Hudson, *Op.cit*, p124-125.

<sup>80</sup> Elberling, *Op.cit*, p348. Andrea Bianchi, *Op.cit*, p 1071.

<sup>81</sup> Harper, *Op.cit*, pp.132-133. Elberling, *Op.cit*, p348.

<sup>82</sup> Helen Keller and Andreas Fischer, *The UN Anti-terror Sanctions Regime under Pressure*, Human Rights Law Review 9(2009), pp. 257-266,262.

<sup>83</sup> Davidsson, *Legal Boundaries*, p15.

<sup>84</sup> Galván, *Op.cit*, p159; Dapo Akande, *The International Court of Justice and the Security Council: is there Room for Judicial Control of Decision of the Political Organs of the United Nations?*, International and Comparative Law Quarterly, v49, pp309-343,317. Tzanakopoulos, *Op.cit*, p69.

<sup>85</sup> Elberling, *Op.cit*, p341; Dapo Akande, *Op.cit*, p317; Galván, *Op.cit*, pp.148-149. Also De Wet, *Op.cit*, p370.

<sup>86</sup> Norwegian representative in the drafting of the UNC - San Francisco Conference, Doc.555. III/1/27. 11 U.N.C.I.O. Docs., 378 (24 May 1945), p379; cited in Dapo Akande, *Op.cit*, p319.

<sup>87</sup> Davidsson, *Legal Boundaries*, p15; Vera Gowlland-Debbas, *Security Council Enforcement Action and Issue of State Responsibility*, International and Comparative Law Quarterly, 43(1994), pp 55-98,91. Also Tzanakopoulos, *Op.cit*, p69.

<sup>88</sup> I.C.J., Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (*Libyan Arab Jamahiriya v. United Kingdom*), a dissenting Opinion by Judge Weeramantry, p66.

<sup>89</sup> Dapo Akande, *Op.cit*, p319. He uses “illegal” ; Kawashima, *Op.cit*, p16; Davidsson, *Legal Boundaries*, p16.

<sup>90</sup> Galván, *Op.cit*, p184; Fremuth and Griebel, *Op.cit*, p341.

<sup>91</sup> So it is capable of possessing both rights and duties; Davidsson, *Legal Boundaries*, p 2.

<sup>92</sup> Galván, *Op.cit*, p153. Also De Wet, *Op.cit*, p370.

<sup>93</sup> Elberling, *Op.cit*, p341; Galván, *Op.cit*, p159.

<sup>94</sup> According to Article 1(1) ;UNC; Dapo Akande, *Op.cit*, p317

<sup>95</sup> Prosecutor v. Tadic, *Op.cit*, Para 28.

<sup>96</sup> Keller and Fischer, *Op.cit*, p262.

<sup>97</sup> Davidsson, *Legal Boundaries*, p 4.

<sup>98</sup> Galván, *Op.cit*, p184.

The view that the UNSC has the *kompetenz-kompetenz*<sup>99</sup> of its own acts is unacceptable, because it is a departure from the principle of “*Nemo Debet Esse Judex In Propria Causa*”.<sup>100</sup> In addition, the argument that the UNSC has a discretionary power is not incompatible with being bound by the UNC and the international law;<sup>101</sup> where the discretionary power can be exercised within the defined powers in the law; for example, identifying three criteria for the applicability of Article 39 shows that the discretion is not absolute or without legal limits.<sup>102</sup> In addition, the UNSC must act in good faith,<sup>103</sup> which is a general principle of international law.<sup>104</sup>

The argument of the supporters of expansion is that the UNSCR under Chapter VII is bound to the states under Article 25,<sup>105</sup> and it prevails on all its obligations under international law under Article 103.<sup>106</sup> Therefore that the UNSC is not bound by the UNC and international law when it acts under Chapter VII<sup>107</sup> is a groundless argument, because the states agree to carry out the UNSCR under Article 103, as long as this UNSCR is in conformity with the UNC;<sup>108</sup> as Article 25 says “[i]n accordance with the present Charter.”<sup>109</sup> Therefore that only the UNSCR is *intra vires*<sup>110</sup> and legal<sup>111</sup> is binding under Article 25, this does not relieve the UNSC of its remaining obligations under the UNC.<sup>112</sup> Under Article 24 (1) states have granted to the UNSC the authority to maintain peace on their behalf, but Article 24(2) states that it should “act in accordance with the Purposes and Principles of the United Nations”. If the UNSC does that, the member states “agree to accept and carry out the decision” under Article 25. Only this decision will prevail in case of conflict with “their obligations under any other international agreement”,<sup>113</sup> under Article 103 of the UNC. So it can be said that “[t]his principle of the conditional link between the duty to accept institutional decisions and the conformity of those decisions with the Charter is enshrined in Article 25, which, although referring explicitly to the Security Council,”.<sup>114</sup> Thus, “no act of the Security Council is exempt from scrutiny as to whether or not that act is in conformity with the Purposes and Principles of the United Nation”.<sup>115</sup> In other words, the UNSC performs its duty within the purposes and principles, which are set out in Articles 1 and 2 of the UNC according to Article 24(1) which is not limited to peacekeeping, but reflects human rights and humanitarianism.<sup>116</sup>

The superiority of UNSCRs under Article 103 of the UNC does not authorise the UNSC to breach international law. Its object is to resolve conflicts between legal obligations if there are any conflicts; if there are no conflicts, states are bound by all its international obligations, including human rights and the UNC obligations. This superiority is not on all international legal norms, it is only against the agreement obligations, if these obligations are conflict with the UNSCRs.

<sup>99</sup> From German means “the competence to determine its competence”.

<sup>100</sup> No one should be made a judge in his own case; Osieke, *Op.cit*, p241; Fremuth and Griebel, *Op.cit*, p350.

<sup>101</sup> Elberling, *Op.cit*, p341. Galván, *Op.cit*, p153.

<sup>102</sup> De Wet, *Op.cit*, p136.

<sup>103</sup> Galván, *Op.cit*, pp.152, 184; Davidsson, *Legal Boundaries*, p 23. As well De Wet, *Op.cit*, p370.

<sup>104</sup> Elias Davidsson, *The Security Council's Obligation of Good Faith*, Florida Journal of International Law, vol. XV (4) (2003), pp.541-573,543.

<sup>105</sup> That stated “*The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter.*”

<sup>106</sup> That stated “*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.*”

<sup>107</sup> Keller and Fischer, *Op.cit*, p261.

<sup>108</sup> Boyle and Chinkin, *Op.cit*, p230.

<sup>109</sup> De Wet, *Op.cit*, p276.

<sup>110</sup> Osieke, *Op.cit*, p182; Susan Lamb, *Op.cit*, pp366-67.

<sup>111</sup> Elberling, *Op.cit*, p342

<sup>112</sup> Galván, *Op.cit*, p151.

<sup>113</sup> Article 103 UNC

<sup>114</sup> *I.C.J, Certain Expenses of the United Nations , Dissenting Opinion of Judge Bustamante (translation)*, p304, available at <<http://www.icj-cij.org/docket/files/49/5279.pdf>>.

<sup>115</sup> The adverse consequences of economic sanctions on the enjoyment of human rights Working paper prepared by Mr Marc Bossuyt , Para 23, in *Economic and Social Council UN( Doc. E/CN.4/Sub.2/2000/33)* ,21 June 2000,

<sup>116</sup> Davidsson, *Legal Boundaries*, p17, 15; Keller and Fischer, *Op.cit*, p261.

Article 103 of the UNC stated 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.*” [Emphasis added]. Therefore UNSCR obligations should not prevail over customary international law obligations, and obligations under *jus cogens*. In addition, this superiority is possessed only by UNSCRs in conformity with the UNC.<sup>117</sup> However, UN member states have granted the UNSC - whilst keeping peace- “*to act on their behalf*” under Article 24(1). Where States are bound by international law, therefore the UNSC is also bound, under the grounds that *nemo dat quod non habet*.<sup>118</sup> In addition, this mandate can be amended only with the consent of the UN member states.<sup>119</sup>

There is a response to the supporters’ argument that the UNSC, when acting under Chapter VII is unrestricted, according to expanded or evolutionary interpretation. The opponents argue that the expanded or evolutionary interpretation is limited, and should not create new competences.<sup>120</sup> In addition, if the subsequent practices which are relied upon in this interpretation are those of that organ itself, this is invalid for the purposes of the evolutionary interpretation.<sup>121</sup> Even in relation to the new types of threat, the UNSC is still bound by the UNC and international law, especially human rights and *jus cogens*.<sup>122</sup> What is more, expanding the peace concept is a positive concept, not a negative concept. Where “*there are two aspects of peace ... negative peace which is the absence of violence, absence of war – and positive peace which is the integration of human society*”.<sup>123</sup> Accordingly, expanding the meaning of the threat is contrary to Articles 31 and 32 of the *Vienna Convention on the Law of Treaties*,<sup>124</sup> where the positive concept of peace makes any internal problem a threat to international peace.<sup>125</sup> In the UNC, though, “*the primary place ascribed to international peace and security is natural, since the fulfilment of the other purposes will be dependent upon the attainment of that basic condition. These purposes are broad indeed, but neither they nor the powers conferred to effectuate them are unlimited*”.<sup>126</sup>

### Conclusion

Article 39 states that the UNSC “shall determine the existence of any *threat to the peace, breach of the peace, or act of aggression* and shall make recommendations or shall decide what measures shall be taken in accordance with Articles 41 and 42” [emphasis added]. Thus another argument is that because Article 39 of the UNC lists these three criteria the UNSC should establish that at least one of these is satisfied, in order to practice peacekeeping measures under Article 41 of the UNC. All these criteria indicate a concrete situation. It cannot be understood that it might indicate an abstract phenomenon such as terrorism.<sup>127</sup> In addition to Article 32 of the UNC refers to the “*party to a dispute*”; therefore it is concrete situation.<sup>128</sup> Furthermore, the drafting of Article 41 demonstrates that the measures are for use in a concrete situation.<sup>129</sup> The argument is therefore that in UNSCR 1373 the UNSC went beyond its powers, by enacting general abstract obligations, as a response to an abstract phenomenon,<sup>130</sup> non-temporary,<sup>131</sup> to address a future events<sup>132</sup> and this is contrary to Articles 39 and 41.<sup>133</sup> In addition, to say that Resolution No.

<sup>117</sup> De Wet, *Op.cit*, p377.

<sup>118</sup> Which mean “no one gives what he does not have”, and this is applicable in international law. See Martin Dixon, *Textbook on international law*, (2007, The sixth edition, Oxford University Press, Oxford), p161.

<sup>119</sup> Davidsson, *Legal Boundaries*, p5. Tzanakopoulos, *Op.cit*, p71.

<sup>120</sup> Elberling, *Op.cit*, p351.

<sup>121</sup> *ibid*, p 345.

<sup>122</sup> Galván, *Op.cit*, p184. Also De Wet, *Op.cit*, p370.

<sup>123</sup> Johan Galtung, An Editorial, (1964) *Journal of Peace Research*, 1(1), p2.

<sup>124</sup> Galván, *Op.cit*, p184; Happold, *Op.cit*, p600. And see De Wet, *Op.cit*, p138 -144.

<sup>125</sup> De Wet, *Op.cit*, p144. As well Happold, *Op.cit*, p600.

<sup>126</sup> *I.C.J, Case of Certain Expenses*, Advisory Opinion of 20 July 1962, p 168,

<sup>127</sup> Elberling, *Op.cit*, p342; Galván, *Op.cit*, pp.152,154.

<sup>128</sup> Elberling, *Op.cit*, pp.342-343; Fremuth and Griebel, *Op.cit*, p349; Happold, *Op.cit*, p599.

<sup>129</sup> Elberling, *Op.cit*, p343; Galván, *Op.cit*, p152.

<sup>130</sup> Galván, *Op.cit*, p148; Happold, *Op.cit*, p607.

<sup>131</sup> Galván, *Op.cit*, p185; Happold, *Op.cit*, pp.598-599.

<sup>132</sup> De Wet, *Op.cit*, p172. Also Fremuth and Griebel, *Op.cit*, p340.

<sup>133</sup> Rosand, *Op.cit*, pp567- 568; Fremuth and Griebel, *Op.cit*, p350; Happold, *Op.cit*, p597, 599.

1373 is not a new expansion and that the UNSC had previous experiences<sup>134</sup> is not accurate. The situations, which are alleged to be previous experiences, were addressing a concrete situation unlike resolution No. 1373.<sup>135</sup> Furthermore, here the UNSC did not establish a new law, but used the existing laws.<sup>136</sup>

However, it is maintained that terrorism is always a threat to international peace and security, unless it is under state patronage or at least the state turns a blind eye. In any other cases, terrorism is not a threat to international peace and security unless it has an impact on international relations, and this criterion has been repeated in most of Chapter VII's UNSCR.<sup>137</sup> For example, in the Lockerbie case, the accused were members of the Libyan intelligence;<sup>138</sup> in the case of Somalia's collapse, this had an impact on regional peace.<sup>139</sup> Therefore the UNSC has no power to deal with terrorism under the UNC Chapter VII, unless it affects the international relationship between states. Rather it should address, within the framework of domestic legal means, for the achievement of criminal justice, because terrorism as a crime is not distinguishable from other crimes, in terms of its impact on international peace and security. This will lead to the probability of extending the UNSC's powers to any other crime or any area of law, just by its willingness. The commission of a crime by a citizen of a state, against citizens or interests of another, does not mean that the relationship between the two states - international peace and security - is threatened or in danger; therefore considering terrorism simply as a threat to international peace and security is questionable.

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<sup>134</sup> The establishment of criminal courts(resolutions 827,955), establish compensation committees and so on.

<sup>135</sup> Rosand, *Op.cit*, pp.567-568; Galván, *Op.cit*, pp.153-154.

<sup>136</sup> Galván, *Op.cit*, p154; Happold, *Op.cit*, p596.

<sup>137</sup> De Wet, *Op.cit*, p150.

<sup>138</sup> *ibid*, p167.

<sup>139</sup> *ibid*, p158.