

The Security Council in Settlement of International Disputes as a World Adjudicator: Legal and Political Challenges

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Abstract: Security Council considered an indispensable body acting as the World's adjudicator is responsible for resolving disputes under the various Member States. Such obligations and duties come with their own sets of Pros and Cons. Better procedure is not a replacement for UN member states' desire to uphold their duties under the Charter in good faith, although routinizing procedure frequently makes it easier for nations to uphold their obligations. It is always far easier to follow a standard method than to request a deviation from it. The Council acting continually, as originally envisaged by Article 28(1) of the Charter, as opposed to only during times of emergency, would provide the most benefit in the long run. Its members would grow more cooperative and knowledgeable about the interconnection of the various elements of global peace and maintenance of peace would become a primary task for them. The article thus addresses the persistent questions surrounding the Security Council's role in resolving international conflicts, which present their own legal and political difficulties ranging from the character of resolutions to the Council's own act of initiating such problems.

Keywords: Security Council, UN Charter, International Court of Justice, Member States, Chapter VI.

1. INTRODUCTION

The reference of disputes to International political Institutions has been a regular practice as long as that of arbitration. It is presumed that the Security Council shall act upon a matter once a referral is either made by the State by virtue of Article 35 of the UN Charter or by the Secretary-General as mentioned under Article 99.¹ Such provisions are supplemented in Provisional Rules of Procedure of Security Council under Rule 6 which says that the Secretary-General shall make aware to all the representatives of Security Council communications of the State, organs of the United Nations or Secretary General any matters requiring the immediate consideration.² But it does not imply that it is the sole and necessary assumption therefore the scope and function of one of the most significant organs in the United Nations is not limited to such referrals alone. The Council has the right to take matters *suo moto* if it appears that there is a threat to peace or breach of peace in the international community as a whole. Being the guardian of maintaining international peace and security owing to its primary responsibility reposed under Article 24 of the Charter³

¹ UN Charter | United Nations, , <http://www.un.org/en/sections/un-charter/un-charter-full-text/> (last visited Mar 13, 2019).

² Provisional Rules of Procedure (S/96/Rev.7) | United Nations Security Council, , <https://www.un.org/securitycouncil/content/provisional-rules-procedure> (last visited Mar 21, 2019).

³ UN Charter | United Nations, *supra* note 1.

the Council shall perform the basic duties of calling upon parties to settle disputes by peaceful means, recommend appropriate measures to do so, and investigate into any dangerous matter or situation only to restore the necessary peaceful environment for the benefit of international communities.

Even with extended discretion it has been seen in various instances that the Council does not take matters at the first instance instead impatiently waits for the matter to be submitted through any other medium. The lack of initiative stems from Rules 6 and 7(2) of the Rules of Procedures that prioritize communications made from States and the lack of adequate procedures that could've monitored disputes only to report them to the Council at the first instance.

Not only does the act of taking initiative restricts a full-fledged working administration but the existing conflicting views on binding nature of its resolutions adds on to their limitations of exercising *suo moto* functions. The divergent views on the enforceability has given way to its own sets of interpretations of whether or not Resolutions being mere recommendary in nature or being bound by virtue of Article 25 of the Charter which explicitly mentions that the members of the United Nations shall agree to carry out the decisions of Security Council in accordance with the Charter.⁴

The paper therefore deals with the ongoing issues on the role of the Security Council in the settlement of international disputes with their own legal and political challenges ranging from its nature of resolutions to the Council's own act of taking initiative in such matters of international disputes.

2. ROLE OF SECURITY COUNCIL IN SETTLEMENT OF INTERNATIONAL DISPUTES

Chapter VI provides clear provisions on the procedures instituted by Parties where first of all parties seek a solution of their own choice under Article 33, thereafter the dispute is referred to the Council having the nature of threatening peace and security under Article 37. From a plain reading of Article 33, the wording "to seek a solution" is too vague as it does not specify whether the other Party is bound to comply with the so-called recommended means of settlement and whether a sanction shall be imposed in the event of its non-compliance.⁵ The importance of the provision lies not in the sanction but in the non-applicability of Article 37 dealing with taking recourse by referring the matter to the Council once all the possible means for settlement have been debilitated.⁶

The Council deals with a greater responsibility while determining a dispute or examining the question to be of a serious nature or not since this power has been conferred by virtue of Article 37 to take initiative for the settlement of disputes only if all the methods have been used by the States in the preceding provisions. Therefore, the procedures regulated under Article 37 is not *ex officio* but depend more on what the Parties want. Some scholars argue that the wording in Article 37 imposes a huge discretion upon the Council to act only if it deems to consider the dispute to be of a serious nature. But from a broader perspective, the Realists contend such determination to be in the form of greater responsibility made clear from the very inception of Article 24.

Chapter VI is the only provision that authorizes the Council to recommend a method of settlement but does not give them the power to act *ex-officio* because it has a pre-requisite condition of Parties approaching first once all their methods have been exhausted.⁷ If it is to be understood that the Council shall start acting only under the pretext of the Parties involved then it also gives them the liberty to withdraw their jurisdiction upon an agreement between themselves before any recommendation is made.

Article 34 speaks of another set of principles by which the Council acts on its own initiative when it deems it necessary. This comes as a form of an "investigation" that precedes the other articles signifying its authorization as *ex-officio* procedure, limited to its purpose of determining the fact whether or not it is likely to disrupt international peace and security.

If Article 34 is understood as an *ex officio* procedure then the investigation would include all the preliminary investigations done to come to the conclusion of a threat to peace or an act of aggression. Therefore, such a term

⁴ *Id.*

⁵ Hans Kelson, *The Settlement of Disputes by the Security Council*, 2 *Int'l L.Q.* 173(1948).

⁶ *Id.*

⁷ *Id.*

should be construed in a broader sense when the question of ambiguity arises.⁸ The same Article also calls for a special organ in the territory of the State or the situation concerning these matters to be investigated is of prime importance as the members show their acceptance of these decisions in adherence to Article 25 which stipulates that the “Member States to carry out decisions of the Security Council in accordance with the Charter.”⁹

Finally, Article VII mentions the measures taken by the Security Council after it has ascertained the existence of a threat to peace after which necessary recourse shall be taken.¹⁰ But the most decisive and controversial settlement procedure or provision was Article 94 which allows the Council to “make recommendations” on disputes arising between States from the judgment of the International Court of Justice.¹¹ This paragraph has no mention of the boundaries or limits within which the Council shall work or make recommendations accruing to the decision of the ICJ which the States previously refused to abide by. The Department of State at the hearings before the Committee on Foreign Relations of the United States Senate on the Charter of United Nations hinted towards the fact that Parties place political control on the Security Council once a recourse is taken by one of the Parties to Council in the event of non-compliance of ICJ orders carrying an effect of transforming a legal dispute into a political one.¹² Enforcing a recommendation as mentioned under Article 39 over ICJ orders thus provides a sanction on the States to act upon giving it political mileage on legal issues.

3. IMPACT OF SECURITY COUNCIL DECISIONS IN SETTLEMENT OF DISPUTES

The most important question crops up is whether the decisions by the Council should be taken to be binding or not considering the fact that they have assumed a quasi-legislative or a quasi-judicial status while deciding upon any relevant matter. Certainly, in the domain of international peace and security, the Council has assumed the primary responsibility to carry out its decisions in accordance with the Charter and if the States were to be given the right to challenge their decisions it would get extremely cumbersome and difficult to discharge its responsibilities.¹³ But considering from the other perspective, such a right gives the Council unregulated discretion without any normal legal safeguards. No judicial review of their decisions and no third-party settlement of disputes proves to be a matter of concern as the Council has never agreed to arbitration and the power to request Advisory opinion has been used only once in the Namibia case.¹⁴ In such cases not questioning the conclusive nature of these decisions goes beyond the understanding of the States and it can be seen under the Expenses case and Lockerbie case that to a certain extent, the States retained the right to challenge the presumption of legality in the final stages.

In the Expenses case, the Court stated, “When the Organisation takes action which warrants the assertion that it was appropriate for the fulfillment of one the stated purposes of the United Nations, the presumption is such action is not ultra vires the Organisation.”¹⁵

A similar presumption on prima facie validity subject to questioning its legality was reiterated in the Lockerbie case, ‘... The Court...considers that prima facie this obligation extends to the decision contained in Resolution 748..and the validity at this stage is to be presumed’¹⁶ thus implying that even after accepting the binding nature of Resolution 748, at its merit stage it is still open for questioning its legality.¹⁷

Given the stand of these Courts reserving the right to question the validity, the discussion on the grounds for review should be done on the basis of principle rather than practice. The grounds to be included as a test for its validity are.

3.1: Ultra Vires

⁸ Kelson, *supra* note 5.

⁹ UN Charter| United Nations, *supra* note 1.

¹⁰ Kelson, *supra* note 5.

¹¹ *Id.*

¹² *Id.*

¹³ D. Bowett, *The Impact of Security Council Decisions on Dispute Settlement Procedures*, 5 EUROPEAN JOURNAL OF INTERNATIONAL LAW 89–101 (1994).

¹⁴ *Id.*

¹⁵ Certain Expenses of the United Nations, ICJ Reports (1962) 151, at 168.

¹⁶ Libya vs United States of America, ICJ Reports(1992), 114.

¹⁷ Bowett, *supra* note 9.

Since states have undergone to accept decisions only in conformity with the Charter by virtue of Article 25¹⁸ any act or decision not in conformity would be taken to be ultra vires and a violation of the Charter making the decision non-binding in effect. The application of the ultra vires doctrine acts as one of the safeguards against the Council and all the Member States possessing a full right to apply this doctrine in the event of a violation of its legal right. The International Court of Justice upheld such limitation in its Advisory Opinion on Conditions of Admission to the United Nations where it 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”¹⁹ such observation made it clear that the Council on every occasion shall be strictly bound by the Treaty provisions alone and going beyond that realm would act as a clear ultra vires act regardless of being a political organ.²⁰ Also on various occasions, the Council uses States as a medium to act as an agent, delegating its decision-making powers. Such an act of delegation also acts ultra vires the Charter therefore unenforceable and invalid.

3.2: Audi Alteram Partem

Although the right to be heard is invoked in relation to judicial and quasi-judicial hearings and not before the sanctions of a political organ, nonetheless the act of imposing sanctions without the State being given the opportunity to be heard will be considered unfair and unjust.

3.3: Decision being outright defective

If there exists an error of law or outright infringes upon the State’s legal rights and responsibilities inconsistent with the facts provided in those cases the decisions shall be set aside to correct the defect.

As to the question of putting the Security Council’s decision under the radar of “judicial review”, the realists point out that the UN Charter hierarchical collective security scheme and does not impose any sort of “checks” on the Council’s decision as the only existing procedure acting as a “check” would be the provision of veto power available between the States that by itself halts the arbitrary activities of the political organ.²¹ Also, the Charter does not explicitly give the Court any right to “review” the Chapter VII determinations. On the other end of the spectrum, legalists put forward their claim by stating that the Court provides a legal check on the activities of the Council from overstepping its limits or going beyond the Charter itself.

The Realists question the competence of the judges and any existing rules that tend to draw such powers impliedly. They fear that giving them such powers will undermine the goodwill of the Charter which intends to accord primacy, power, and importance to such political bodies rather than unaccountable judges.²² They fear far-reaching consequences if the Court is involved in judging the legality of the Council’s decisions. Courts acting as umpire of the Council’s political games will be taken to be a risky measure that carries a tendency to blur the distinction between the proper roles of the Court and Council. But Liberalists strongly believes that judicial review has been seen as a “bulwark against authoritarianism” precisely changing the system of governance within the Council and United Nation.²³ At this point of conflict, greater emphasis should be placed on creating a balance between securing the cooperation of the members on one side and maintaining its individual supervisory roles so as to take into account the needs and aspirations of all member states where the question of judicial review need not arise.

4. RESOLUTIONS OF THE SECURITY COUNCIL BINDING OR NOT?

As per the nature of the Resolutions of the Security Council, the issue crops up regarding whether it is binding or not. Or what is the legal effect of the recommendation made by the Council? Some advocate the view that because the Council lacks any enforcement mechanism the resolutions are thus not legally binding but on the other hand, The Repertory of Practise of the United Nations Organs the reason for its establishment is that the records of the

¹⁸ UN Charter (full text) | United Nations, *supra* note 1.

¹⁹ Conditions of Admission to the United Nations, ICJ Reports(1948), 64.

²⁰ Bowett, *supra* note 9.

²¹ Judging the Security Council on JSTOR, , <https://www-jstor-org.ezproxy.nujs.ac.in/stable/2203749> (last visited Mar 21, 2019).

²² *Id.*

²³ *Id.*

cumulative practice of the States is evidence of customary international law in dealing with the relations amongst the States and other International Organisations.²⁴

Going by the term “resolution” under Chapter VI Article 39, the intention of the legislator can be understood as not binding but such understanding is in direct contravention to Article 25 which stipulates very clearly that members shall be obligated to carry out decisions of the Security Council in accordance of the Charter.²⁵ Going by this interpretation it can be said that the decisions of the Council are not mere recommendations but rather ‘decisions’ that carry a binding force to the State parties. The scholars argue on one hand that the recommendations under Article 34 can be binding to the State concerned but the same under Articles 36,37 and 38 are merely recommendatory in nature with a decision in its narrower sense, therefore not binding per se.²⁶ Comparing the same to Article 39 of the Charter, non-compliance to any of the recommendations calls for an enforcement action that has the tendency to disrupt the threat and peace. Such actions in pursuant to non-compliance imply that calls for so-called sanctions put the recommendations in the category of binding decisions.²⁷ The power to enforce a decision by means of an enforcement mechanism in the event of infringement upon the rights of any of the parties speaks volumes of conferring great importance on the Security Council not available to the other organs of the United Nations which is the International Court of Justice.

Talking about the validity of Resolutions, a majority of International Court of Justice members in Namibia advisory held that the language of the Security Council should be analyzed before making a conclusion on their binding effect in the context of interpreting Article 25 as not to limit the domain of binding decisions only under Chapter VII.²⁸ The members also regarded the resolutions as a form of legal declaration in accordance with Article 24 of the Charter.

The fundamental reason behind the confusion of considering resolutions as binding or not stems from ambiguity in the language of the resolutions and the absence of an authoritative source of the Security Council in such events.²⁹ For example, words like “urge” and “invites” give a sense of persuasion or a request rather than a commanding tone. Whereas, words like “call upon” and “endorses” a clear picture of its binding nature as was evident in Resolution 1701 in which the Council emphasized the word “decide” when establishing the arms embargo complying with Article 25 and indicating a binding intention.³⁰ Nonetheless, the crux of the resolution should rely not only on the general circumstances or its texts at the time of adoption but also should consider the fact that subsequent assessment of its conclusiveness shall be ultimately determined by the Council alone.³¹ While States may not be bound per se for certain non-binding Resolutions, it should be borne in mind that because the Council has pronounced decisions for the maintenance of peace and security, such decisions should be adhered to on the basis of good faith.

5. CONCLUSION

The debate regarding Resolutions being binding or not still continues. Chapter VII is also not taken to be the sole provision adoption of which shall create binding obligations. The use of clear mandates under the heading of Chapter VII and striking a balance between Chapters VI and VII has provided further clarity on the role of the UN Peacekeeping Force. As it was settled in the Namibia case that deliberation on such matters shall be made on a case-to-case basis the focus should nevertheless be shifted upon practical challenges concerning the initiation of the Council to take matters into its own hands which has in a number of cases been delayed and avoided. Certain measures such as the relaxation of Rules of Procedures which restricts the activities of the Council only after being communicated by the States as well as bringing in other kinds of procedures that aid in the initiative action of such a political organ.

Another plausible step includes establishing regional monitoring groups consisting of non-permanent members from every region encompassing as many members as possible to regulate a body with the primary responsibility of

²⁴ Ways and means for making the evidence of customary international law more readily available, , YEARBOOK OF THE INTERNATIONAL LAW COMMISSION 9.

²⁵ UN Charter (full text) | United Nations, *supra* note 1.

²⁶ Kelson, *supra* note 5.

²⁷ *Id.*

²⁸ Ways and means for making the evidence of customary international law more readily available, , YEARBOOK OF THE INTERNATIONAL LAW COMMISSION 9.

²⁹ Security Council Report, Special Research Report. 2008 No.1(2008)

³⁰ *Id.*

³¹ *Id.*

monitoring events in a particular region, collecting information likely to disrupt the peace and security of a nation, cooperating with the Secretary-General on these matters and providing a platform to discuss of its individual Nation's experience previously served in the Council as such measures would help reinvent and strengthen initiative process without being dependent till matters get worse.³²

Monitoring groups will have the ability to keep the Council uptight regarding the present situation and in case a crisis arises it shall be well equipped with necessary details and information. It is necessary for the council to inculcate such measures on a regular basis to so that they act promptly and increase cooperative spirit amongst the Nations as all can participate and work on the same page in a continuing process. It is also recommended that the Council should act on a regular basis and not only during the time of crisis to avoid backlog of matters that has the tendency to go beyond a permissible limit endangering peace and security.

6. REFERENCES

Book Sources

- [1] J.G Merills, International Dispute Settlement, Cambridge University Press (2017)
- [2] Peter Gallagher, Guide to Dispute Settlement, The Hague: Kluwer Law International (2002)

Web Sources

- [3] UN Charter | United Nations, , <http://www.un.org/en/sections/un-charter/un-charter-full-text/> (last visited Mar 13, 2019)
- [4] Provisional Rules of Procedure (S/96/Rev.7) | United Nations Security Council, Mar 21, 2019 <https://www.un.org/securitycouncil/content/provisional-rules-procedure>
- [5] Bowett D., The Impact of Security Council Decisions On Dispute Settlement Procedures, Vol. 5(1994), European Journal of International Law, Academia Online, 13 March 2019. <http://www.academia.edu/3607389>
- [6] Clyde Eagleton, The Jurisdiction of the Security Council Over Disputes, Vol. 40(1946), The American Journal of International Law, JSTOR, 14 March 2019. <https://www.jstor.org/stable/2193928>
- [7] Hans Kelson, The Settlement of Disputes by the Security Council, 2 Int'l L.Q. 173 (1948), International Law Quarterly, HeinOnline, 25 February 2019. <https://heinonline.org/HOL/License>
- [8] Louis B. Sohn, The Security Council's Role in the Settlement of International Disputes, Vol. 78(1984), The American Journal Of International Law, JSTOR, 14 March 2019. <https://www.jstor.org/stable/2193928>
- [9] Gray Christine, The Lockerbie Case Continues, The Cambridge Law Journal, Vol.57 (1998), JSTOR, 10 March 2019. <https://www.jstor.org/stable/2193928>
- [10] R.K. Dixit, Non-Member States and the Settlement of Disputes in the Security Council, The University of Toronto Law Journal, Vol. 12(1958) JSTOR, 1 March 2019. <https://www.jstor.org/stable/2193928>

Journal Sources

- [11] Conditions Of Admission to the United Nations, ICJ Reports(1948), 64.
- [12] Yearbook Of The International Law Commission, Ways and means for making the evidentiary customary international Law, Report of the International Law Commission, (2005).
- [13] Security Council Reports, Special Research Report, Vol. No. 1(2008).

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³² Louis B. Sohn, The Security Council's Role in the settlement of International Disputes, Vol. 78, Cambridge University Press, pp-402404(1984). 1092