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Declaration of Originality of Essay

I, Avneesh Kumar, hereby declare that this essay is my original work, which is free from any type of plagiarism. The essay has neither not been published anywhere else nor submitted for consideration at any other place. If any fact has been taken in the essay from any other work it has been duly acknowledged in the form of footnotes.

With this I request you to consider my entry for the Essay Competition.

Thanking You.

Yours Sincerely

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Security Council Resolutions and Violation of Human Rights: Bringing Accountability to Security Council

Abstract

From the time Security Council has developed the targeted sanctions regime, its resolutions have started to affect individuals indirectly. Under the resolutions of Security Council many individuals have been subjected to different forms of human rights violations. It has been alleged that the sanctions committees work under political pressure and their decisions are not impartial or independent. No institution can claim itself above rules of law, and the same is true about Security Council also. Whenever Security Council is passing a resolution it has to abide by the other provisions of the UN Charter and those norms of international law which have gained the status of peremptory norms. There seems to be no mechanism to review the resolutions of the Security Council presently, therefore it is needed that ICJ must be conferred some powers of such a review although on limited grounds. The Security Council is also required to bring changes in its internal mechanism, and it must create a more transparent and impartial system for listing and delisting of individuals. Finally I propose that Security Council is required to create a long terms policy to make its sanctions regime human rights friendly, which must include components like establishment of impartial institutions for listing and delisting, bringing transparency in the working of sanctions committee, active collaboration among different actors at national, regional and international level and detailed procedures to guide the discretion of different authorities involved in listing and delisting process.

Chapter 1

Introduction

Today, we live in a globalised world where national boundaries are becoming less and less relevant. As the interaction of states is increasing in international arena, the number of

international organisations is also increasing. In present time one of **the most pressing issues of international law is “how to bring accountability to international organisations?”** In the Declaration of the High-level Meeting of the General Assembly on the Rule of Law at the National and International Levels , it was observed:

“We recognize that the rule of law applies to all States equally, and to international organizations, including the United Nations and its principal organs and that respect for and promotion of the rule of law and justice should guide all of their activities. We also recognize that all persons, institutions and entities, public and private, including the State itself, are accountable to just, fair and equitable laws and are entitled without any discrimination to equal protection of the law¹.”

As Security Council is perhaps the most powerful organ of most important organisation of world, it is extremely important that Security Council must have accountability. Unrestrained and unguided power always leads to anarchy and destruction. The accountability of Security Council has become even a bigger concern from the time its resolutions have started to have direct implications for individuals and their human rights (the issue is discussed at greater length in Chapter 2 of this essay).

One thing I want to clear at the outset of this essay is that I have discussed the issue of accountability of Security Council from the point of international law, and not from the point of international relations or political influence².

In the past, many times the actions and omissions of the Security Council have been termed unlawful under international law, and it is felt that Security Council must work within legal restraints. Two important questions arise in this regard:

- 1) What are the legal restraints which are applicable on the conduct of Security Council?
Is the entire body of international law is applicable on Security Council or only some international legal instruments like UN Charter bind it?
- 2) Who would review the legality of resolutions of Security Council whether they are lawful or not under relevant provisions of international law?

¹ Declaration of the High-level Meeting of the General Assembly on the Rule of Law at the National and International Levels, <http://www.unrol.org/files/A-RES-67-1.pdf>

² Political influence may also be helpful in bringing accountability to international institutions but they are too much dependent on power of states, and smaller states cannot exert such influence, on the other hand the option of legal mechanism is available to every state regardless of its status in terms of political power, size, economy, etc. More importantly the issue of political influence is to be better discussed by political thinkers, not by legal scholars.

As far as the review of Security Council resolutions is concerned, there might be three possible forums for such a review, but the scope of the review powers is not clear, and there remain unanswered questions:

- 1) **International Court of Justice:** Whether ICJ was intended to be a reviewer of Security Council mechanisms? Can ICJ assume such a responsibility in the view of changing nature of Security Council Resolutions? To answer this question I would discuss drafting history of UN as well as relevant decisions of ICJ.
- 2) **National Courts:** Can national courts review a particular Security Council resolution or an implementing measure under it?
- 3) **Internal Mechanism of Security Council:** Can the internal mechanism under Security Council work as a full fledged review mechanism for Security Council resolutions? Here I would discuss the role of particular sanctions committees and related issues.

In this essay I have only discussed ICJ and Internal mechanism of Security Council as they are directly related to the accountability of Security Council. National courts may, although, be helpful in reducing the negative impact of Security Council resolutions but they don't have a direct role in bringing accountability to Security Council and therefore I have excluded them from discussion. I have discussed all these issues one by one in subsequent chapters, and in the end of every chapter I have tried to reach on relevant conclusions.

Chapter 2

How Security Council Resolutions can Violate Human Rights

Under the UN Charter the primary responsibility of maintenance of peace and security was bestowed upon the Security Council, and for that purpose wide powers were conferred upon the Security Council. Under chapter VII the Security Council can pass resolution prescribing non-military sanctions or even military measures against a nation as it is required to maintain and restore international peace and security. **At the time of formation of UN Charter it was anticipated by the original members that the powers under chapter VII would be used against states and not against individuals.** Indeed till 1990, the resolutions of the Security Council provided sanctions only against the nations.

In August 1990 when Iraq under the regime of Saddam Hussein invaded Kuwait³, and various economic sanctions were imposed upon the Iraq⁴. As a result of these sanctions for several years Iraq remained isolated from international trade, which affected Iraqi people very severely. **These sanctions lead to widespread hunger and crumbled down the healthcare system of Iraq, which lead to 1.7 million people's death in Iraq, including 750,000 children**⁵. These sanctions were criticised all over the world for their indiscriminate humanitarian effects on the people⁶. In response to such criticism the regime for smart sanction was developed.

Under the system of smart sanction or targeted sanction, only particular groups or individuals are targeted⁷. These smart sanctions may include measures like confiscation of property, ban on travel, arrest, detention, ban on trade and various other measures⁸. Sanctions Committee prepares a sanction list of banned groups and individuals. By such a regime of sanctions, it was thought that the general public of a nation would not suffer indiscriminate effects, and only the guilty individuals can be targeted. **In spite of obvious advantages of smart sanctions by reducing humanitarian impact, these sanctions have created their own problems like widespread violations of human rights, as individuals are directly targeted**⁹. Indeed under resolution 1452 the Security Council restricted the application of measures under previous resolution 1267 due to its widespread impact on individuals' human rights¹⁰.

It has been observed about the smart sanctions regime that “(there are) growing doubts about their legality, effectiveness and disproportionate impact on the rights of the affected parties”¹¹

³ History, 'Persian Gulf War' <http://www.history.com/topics/persian-gulf-war>

⁴ Global Policy Forum, 'Sanctions against Iraq' <http://www.globalpolicy.org/previous-issues-and-debate-on-iraq/sanctions-against-iraq.html>

⁵ Francis A Boyle, 'Legal Protection of Children in Armed Conflict' (2012) Illinois Public Law Research Paper No. 14-1, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2327262&download=yes

⁶ For more information: Stephen P Marks, 'Economic Sanctions as Human Rights Violation: Reconciling Political and Public Health Imperatives (1999) 89:10

http://www.essex.ac.uk/armedcon/story_id/Economic%20Sanctions%20as%20Human%20Rights%20Violations-%20Reconciling%20Political%20and%20Public%20Imperatives%20.pdf

⁷ Security Council Sanctions Committee: An Overview, <http://www.un.org/sc/committees/>

⁸ Smart Sanctions Targeted Sanctions, <http://www.seco.admin.ch/themen/00513/00620/00639/?lang=en>

⁹ Thomas J. Biersteker & Sue E. Eckert, 'Strengthening Targeted Sanctions Through Fair and Clear Procedures' (White Paper) pg 5 http://watsoninstitute.org/pub/Strengthening_Targeted_Sanctions.pdf

¹⁰ Resolution 1452, http://eurasiangroup.org/files/documents/oon_eng/1452_20_2002_20eng.pdf

¹¹ European Centre for Constitutional and Human Rights, 'Blacklisted: Targeted Sanctions, Preemptive Security and Fundamental Rights' (Special Report, 2010) page 6 para 3, <http://www.ecchr.de/index.php/ecchr-publications/articles/blacklisted-targeted-sanctions-preemptive-security-and-fundamental-rights.html>

The current smart sanctions regime of Security Council is highly prone to violate human rights and civil liberties for the following reason-

- **Lack of Transparency:** The functioning of the sanctions committees under Security Council has been highly non-transparent¹². Most of the times the sanctions committees meet in closed sessions, and detailed public record of their proceedings are generally not available¹³. Although, in the recent times the Security Council has taken some steps (discussed under Chapter 6 of this essay) to bring transparency in sanctions committees like creating the office of Ombudsman, creating the mechanism for reviewing sanction against a particular individual, but still their decision making process is an opaque one. **Public access to the committees' meetings or their records is still not allowed and even the annual reports of these committees to the Security Council do not provide substantial information about the working of these committees**¹⁴.
- **Unguided Power to National Authorities:** For the implementation of its resolutions the Security Council is necessarily dependent on the national authorities, but under its resolutions most of the times Security Council does not definite the exact scope of powers which is conferred upon the national authorities. Therefore, many times the national authorities take drastic measures under the pretext of implementing Security Council resolution.
- **No Effective Remedy against Listing:** Any legal instrument to maintain its sanctity and legitimacy, must provide of effective remedy¹⁵ against its indiscriminate effects. As a report observes **an effective remedy includes (i) an independent and impartial authority; (ii) the power to grant appropriate relief; and (iii) procedural guarantees such as accessibility for affected individuals**¹⁶. Although,

¹² Jeremy Matam Farrall, 'United Nations Sanctions and the Rule of Law' (Cambridge 2007)

http://books.google.co.in/books?id=4vCVDYufeMsC&pg=PA203&lpg=PA203&dq=lack+of+transparency+in+sanctions+committee&source=bl&ots=rJou9bxl_H&sig=X50UU8ABrSJUBqXqMsYHOKP0y8g&hl=en&sa=X&ei=WCdnU5O6HMuNrgeQ1YEw&ved=0CCwQ6AEwAA#v=onepage&q=lack%20of%20transparency%20in%20sanctions%20committee&f=false pg 202 citing Paul Conlon, United Nations Sanctions Management: A Case Study of the Iraq Sanctions Committee (Transnational Publisher, 2000) pg 33, 36.

¹³ Jeremy Matam Farrall, 'United Nations Sanctions and the Rule of Law' (Cambridge 2007) pg 203

http://books.google.co.in/books?id=4vCVDYufeMsC&pg=PA203&lpg=PA203&dq=lack+of+transparency+in+sanctions+committee&source=bl&ots=rJou9bxl_H&sig=X50UU8ABrSJUBqXqMsYHOKP0y8g&hl=en&sa=X&ei=WCdnU5O6HMuNrgeQ1YEw&ved=0CCwQ6AEwAA#v=onepage&q=lack%20of%20transparency%20in%20sanctions%20committee&f=false

¹⁴ Ibid, pg 204

¹⁵ Right to Effective Remedy is part of UDHR, art. 8 as well as art. 2(3) of ICCPR.

¹⁶ Thomas J. Biersteker & Sue E. Eckert, 'Strengthening Targeted Sanctions Through Fair and Clear Procedures' (White Paper) pg 44 http://watsoninstitute.org/pub/Strengthening_Targeted_Sanctions.pdf

individuals can apply to Ombudsman¹⁷ (Only for Al-Qaida sanction list) or Focal Point created under Security Council Resolution 1730¹⁸ (for all other sanction lists except under Al-Qaida Sanctions Committee), but the ultimate decision making power has remained in the hands of the sanctions committee, which is neither independent nor impartial. There is neither any mechanism to review the decision of sanctions committee nor any disclosure of the reasons for its decision¹⁹. Moreover all committees don't have a time frame to decide delisting requests, which further weakens the remedy.

Chapter 3

Legal Restraints on the Security Council

Under the UN Charter a very important responsibility (maintenance of Peace and Security) has been entrusted on the Security Council. Question arises which international legal instruments bind Security Council, keeping in mind its special status? Opinion in this regard has been highly divided among the international law scholars. Some scholars like Hans Kelsen²⁰ have argued that due to the special responsibility of maintenance of international Peace and Security there are no legal limitations on the Security Council. **Others argue that Security Council is subject to legal limitations which are imposed by UN Charter²¹ as well as general international law²².** It has been pointed out the Security Council is not a judicial body, but rather a political body, and hence (international) law plays only a minimal

¹⁷ Office of Ombudsperson, <http://www.un.org/en/sc/ombudsperson/>

¹⁸ Resolution 1730, <http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/Terrorism%20S%20RES%201730.pdf>

¹⁹ In the case of *Abdelrazik v. Canada (Minister of Foreign Affairs)*, 2009 FC 580, [2010] 1 F.C.R. 267, it was observed by Justice Zinn of Canadian Federal Court:

“I add my name to those who view the 1267 Committee regime as a denial of basic legal remedies and as untenable under the principles of international human rights. There is nothing in the listing or de-listing procedure that recognizes the principles of natural justice or that provides for basic procedural fairness”.

²⁰ Aziz Tuffi Saliba, *Is the Security Council legibus solutus? An Analysis of the Legal Restraints of the UNSC* (2012) 20:2 Michigan State International Law Review <http://digitalcommons.law.msu.edu/cgi/viewcontent.cgi?article=1085&context=ilr> pg 2 citing Hans Kelsen, *Law of the United Nations: A Critical Analysis of Its Fundamental Problems* (5th edn, 1966).

²¹ For more information see: Aziz Tuffi Saliba, *Is the Security Council legibus solutus? An Analysis of the Legal Restraints of the UNSC* (2012) 20:2 Michigan State International Law Review <http://digitalcommons.law.msu.edu/cgi/viewcontent.cgi?article=1085&context=ilr>

²² Rudiger Wolfrum, *Judicial Control of Security Council Decisions* (1st Draft, Draft Works, Yearbook of International Law 2013) http://www.idi-il.org/idiE/annuaireE/2013/Question1_Wolfrum.pdf pg 41, citing Mohammed Bedjaoui, *The New World Order and the Security Council: Testing the Legality of its Acts* (Martinus Nijhoff) 1994

role in its functioning²³. But, this argument is not completely true; when Security Council passes a resolution, it has a normative value under international law, which makes it clear that Security Council is, apart from a political organ, is also a norm creating body²⁴.

Before further discussing the issue it is better to note the **art. 103 of UN Charter**, which provides:

“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.”

This provision makes it clear that if there is any obligation cast by Security Council Resolution it would prevail over the obligation arising from any other treaty because State are obliged to carry out the resolutions of Security Council under art. 24 and 25 of UN Charter. It also fortifies the argument that Security Council has special status. If we assume that entire body of international law is applicable on the Security Council then it would conflict with the special status of Security Council, which is provided by art. 103 by giving predominance to Security Council resolutions. Therefore it seems that international law in general cannot create legal restraints on the power of the Security Council. But, simultaneously it does not mean that there are no inherent limitations on the powers of the Security Council. There are at least two exceptions to the special status and special powers of the Security Council, namely:

Firstly, the special status, functions and powers of the Security Council stem from the provisions of the UN Charter, therefore security council is necessarily bound by the other provisions of the UN Charter.

Mohamed Bedjaoui, the former judge of the International Court of Justice, writes, “**It is self-evident that an organ created by a treaty is subjected to that instrument in its very existence, its mission and its power**”²⁵.

²³ Rosalyn Higgins, ‘The Place of International Law in the Settlement of Disputes by the Security Council’ (1970) 64:1 The American Journal of International Law pg 1

http://heinonline.org/HOL/Page?handle=hein.journals/ajil64&div=5&g_sent=1&collection=journals#9

²⁴ Most of the public institutions have political as well as juridical components. See: Aziz Tuffi Saliba, Is the Security Council legibus solutus? An Analysis of the Legal Restraints of the UNSC (2012) 20:2 Michigan State International Law Review pg 403

<http://digitalcommons.law.msu.edu/cgi/viewcontent.cgi?article=1085&context=ilr>

²⁵ Ibid pg 403 citing Mohammed Bedjaoui, The New World Order and the Security Council: Testing the Legality of its Acts (Martinus Nijhoff) 1994

The Security Council is bound by the limitations which have been laid down under the UN Charter, expressly or impliedly. In this regard art. 24(2) of UN Charter expressly provides:

“In discharging these duties the Security Council shall act in accordance with the **Purposes and Principles** of the United Nations. The specific powers granted to the Security Council for the discharge of these duties are laid down in Chapters VI, VII, VIII, and XII.”

It is clear that no action of Security Council should go against the purposes and principles of United Nations Charter (defined under art. 1 and 2). One of the purposes of UN Charter under art. 1(3) is “To achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in **promoting and encouraging respect for human rights and for fundamental freedoms** for all without distinction as to race, sex, language, or religion”. Therefore, when applying targeted sanctions by its resolutions, the Security Council cannot provide for measures which lead to violation of fundamental rights.

Secondly, those provisions of international law which have gained the status of *jus cogens* or peremptory norms bind every actor in international law including Security Council. It has also been provided under art. 53 of Vienna Convention:

“A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law.”

Similarly, art 64 provides:

“If a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates”.

Peremptory norms are exception to the general rule that international law obligations are created by state consent²⁶, and therefore Security Council, which derives its power from UN Charter (essentially a treaty), cannot be assumed to possess a power to derogate from peremptory norms because peremptory norms cannot be derogated²⁷ by any treaty or agreement²⁸. Although, at times it might be a difficult task to ascertain

²⁶ Evan J. Criddle & Evan Fox-Decent, A Fiduciary Theory of Jus Cogens (2009) 34 Yale Journal of International Law pg 332 http://www.yale.edu/yjil/files_PDFs/vol34/Criddle_Fox-Decent.pdf

²⁷ Judge Lauterpatch in Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment of 11 July 1996, ICJ, observed that Jus cogens was superior to treaty as well customary law.

²⁸ Alfred Verdross, 'Jus Dispositivum and Jus Cogens in International Law' (1966) 60 American Journal of International Law pg 56, 59 http://heinonline.org/HOL/Page?handle=hein.journals/ajil60&div=11&g_sent=1&collection=journals#69 pg 56,

whether a particular norm is part of peremptory norms, but their uncertain scope itself cannot be a reason not to apply such norm. Moreover, there is some consensus that prohibition against violations of fundamental or basic human rights (like genocide, torture, slavery, etc) is part of *jus cogens*.

Chapter 4

The Authority of ICJ to Review the Security Council Resolution

It has been suggested by some scholars that ICJ can play a role in bringing “possible check on unbridled Security Council power”, but its legal basis is yet uncertain²⁹. Under the UN Charter or Statute of ICJ, there is no express provision which gives the ICJ authority to review the resolutions of Security Council. Under art. 96 of UN Charter, the Security Council, General Assembly, and other specialised agencies can ask for advice from the court, but even there is no power with the court to give any advisory opinion *suo motu*. In the past several times, the resolutions of Security Council have been questions before ICJ, but ICJ has refused to deal with them citing lack of Jurisdiction or some procedural reason.

At the time of the formation of United Nations at San Francisco Conference the issue of judicial review of Security Council decisions by ICJ (then PCIJ³⁰) was discussed at length. The Belgian made proposal, which provided:

“[a]ny state, party to a dispute brought before the Security Council, shall have the right to ask the Permanent Court of International Justice whether a recommendation or a decision made by the Council or proposed in it infringes on its essential rights. If the Court considers that such rights have been disregarded or are threatened, it is for the Council either to reconsider the question or to refer the dispute to the Assembly for decision”³¹.

The Belgian proposal was vehemently opposed by America, Britain, France and Soviet Union (all awaiting permanent members of Security Council) on the grounds that it would weaken

²⁹ Ken Roberts, 'Second-Guessing the Security Council: The International Court of Justice and Its Powers of Judicial Review' (1995) 7: 2 Pace International Law Review pg 284

<http://digitalcommons.pace.edu/cgi/viewcontent.cgi?article=1304&context=pilr>

³⁰ International Court of Justice: History, <http://www.icj-cij.org/court/index.php?p1=1&p2=1>

³¹ Ken Roberts, 'Second-Guessing the Security Council: The International Court of Justice and Its Powers of Judicial Review' (1995) 7: 2 Pace International Law Review pg 290

<http://digitalcommons.pace.edu/cgi/viewcontent.cgi?article=1304&context=pilr> citing Doc. 2, G/7(k)(1), 3 U.N.C.I.O. Docs. 335, 336 (1945).

the position of Security Council and create hindrance in the realisation of its functions³². In the end the proposal was withdrawn by Belgium³³. **Therefore, the drafting history UN indicates that framers of UN Charter negated the possibility of any judicial review of Security Council decisions by the ICJ.**

The issue of Judicial Review of judicial review was raised several times before ICJ, and its attitude has been reluctant to assume such power. The first time this issue came before the court in *Certain Expenses of the UN Case*, where court out-rightly rejected any possibility of judicial review by ICJ. I quote the much cited opinion of court:

“In the legal system of States, there is often some procedure for determining the validity of even a legislative or governmental act, but no analogous procedure is to be found in the structure of the United Nations. Proposals made during the drafting of the Charter to place the ultimate authority to interpret the Charter in the International Court of Justice were not accepted³⁴.”

The issue was again raised in the *Namibia* case. In this case due to the apartheid policies of South Africa in South West Africa (Namibia) the Mandate granted to South Africa to administer South West Africa was terminated by General Assembly Resolution 2145 (XXI)³⁵ and Security Council Resolution 276. But, questions were raised on the validity of Gen Ass Res 2145 (XXI) and indirectly on the validity of Security Council Resolution 276 by South Africa³⁶. ICJ responded to the question of review of those resolutions, as follows:

“Undoubtedly, the Court does not possess powers of judicial review or appeal in respect of the decisions taken by the United Nations organs concerned. The question of the validity or conformity with the Charter of General Assembly resolution 2145 (XXI) or of related Security Council resolutions does not form the subject of the request for advisory opinion. However, in the exercise of its judicial function and since objections have been advanced, the Court, in the course of its reasoning, will consider these objections before determining any legal consequences arising from those resolutions³⁷.”

Afterwards, the court opined that the decisions taken under Security Council Resolution 276 were in conformity with purposes and principles of UN Charter, and in accordance with art.

³² Ibid, citing Doc. 433, 111/2/15, 12 U.N.C.I.O. Docs. 47, 48 (1945).

³³ Ibid, citing Geoffrey Watson, *Constitutionalism, Judicial Review, and the World Court*, (1993) 34 Harvard International Law Journal.

³⁴ *Certain Expenses of the United Nations Advisory Opinion of 20 July 1962*, ICJ, <http://www.icj-cij.org/docket/files/49/5259.pdf> pg 21

³⁵ General Assembly Resolution 2145, <http://www.un.org/documents/ga/res/21/ares21.htm>

³⁶ *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion of 21 June 1971, ICJ, <http://www.icj-cij.org/docket/files/53/5595.pdf> pg 45

³⁷ Ibid, pg 45

24 and art. 25 of it. It seems that the approach of ICJ was self-contradictory because firstly it denied the existence of any judicial power, but afterwards it asserted its competence to judge whether a Security Council decision is in conformity with UN Charter or not “when it arises in the normal course of its judicial functions”³⁸.

It seems from this case that court might have limited power of judicial review to judge legality of Security Council resolution if it is in question, but only in those cases when an advisory opinion is asked from it. Legal basis of such a power is still not clear³⁹.

Once again some aspects of powers of Security Council, limitations on it, and court’s jurisdiction over it were discussed in the Lockerbie case⁴⁰. In his dissenting opinion, Judge Weeramantry opines that the Security Council has to act in accordance with principles of international law, and the court is not debarred from considering those matters which the Security Council has considered under Chap VII⁴¹. On the other hand President Schwebel (also in dissenting opinion) concluded that ICJ was not generally empowered to review the decisions of Security Council⁴². But, even in this case the majority did not establish that the court was empowered to review the decisions or resolutions of Security Council⁴³.

Therefore originally the court was not given any power of judicial review, and no such rule which empowers the court to review the resolutions of Security Council has emerged; it is at most in the process of evolving. Although, **there is growing international opinion that the court should have power of judicial review at least on the ground of violation of UN Charter and *Jus Cogens*.**

Chapter 5

Internal Mechanism of Security Council to Bring Accountability

³⁸ Ken Roberts, 'Second-Guessing the Security Council: The International Court of Justice and Its Powers of Judicial Review' (1995) 7: 2 Pace International Law Review pg 298

<http://digitalcommons.pace.edu/cgi/viewcontent.cgi?article=1304&context=pilr>

³⁹ Ibid, pg 299

⁴⁰ Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United States of America), Judgment of 27 February 1998.

⁴¹ Ibid, pg 9 <http://www.icj-cij.org/docket/files/89/7215.pdf>

⁴² Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie, Judgment of 27 February 1998, ICJ, pg 27 <http://www.icj-cij.org/docket/files/89/7251.pdf> pg

⁴³ Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie, Judgment of 27 February 1998, ICJ <http://www.icj-cij.org/docket/index.php?p1=3&p2=3&case=89&code=lus&p3=4>

An internal mechanism of Security Council to review particular measures or sanctions taken under particular resolutions can be helpful in bringing accountability. Indeed in the last several years Security Council has evolved such a mechanism but it cannot be regarded as truly transparent. Initially Security Council used to list or delist individuals in a very opaque way. But, as there were calls for transparency from the civil society all over the world, the Security Council has tried to establish definite procedures and some mechanism where an aggrieved individual can approach.

These changes are although welcome, but still the functioning of Security Council is not fully accountable, and the redressal mechanism established by it is not an effective one.

The Security Council has brought following reforms in its internal mechanism:

- **Identifying Information:** Under the Security Council resolution 1526, it was stressed that when the states are sending new names to the sanctions committee to be listed as associated with Al-Qaida, they should include identifying and background information which gives proof of their association with Al-Qaeda⁴⁴. When states are required to submit identifying information, the sanctions committee can take a better decision whether to list an individual or not. Further it was provided by Security Council Resolution that whenever a state proposes a name for sanction list it must provide statement of the case which must provide details, including:
 - i. specific information supporting a determination that the individual or entity meets the criteria above;
 - ii. the nature of the information; and
 - iii. supporting information or documents that can be provided;
- **Focal Point for Delisting:** Under Resolution 1730 (2006) a “Focal Point” was established to receive requests from individuals to delist them from targeted sanction lists⁴⁵. This was a major reform in the targeted sanctions regime as before this resolution there was no authority for an individual to approach if he/she been wrongly

⁴⁴ Resolution 1526, <http://www.treasury.gov/resource-center/sanctions/Documents/1526.pdf>

⁴⁵ Resolution 1730, <http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/Terrorism%20S%20RES%201730.pdf>

listed. The Focal Point will consult the designated government⁴⁶, government of nationality and residence of petitioner, and it would forward the response of these governments to the sanctions committee. The ultimate decision is taken by the Sanctions Committee only, and there is no fixed procedure to guide it.

- **Establishment of Office of Ombudsperson:** By Security Council Resolution 1904 the office of Ombudsperson was established to receive delisting requests from individuals listed under the Al-Qaeda Sanctions Committee list⁴⁷. The Ombudsperson is an independent and impartial authority, who will prepare a comprehensive report with regard to the request, taking in account all the relevant information provided by petitioner, relevant states and organisations. **Unfortunately the authority of Ombudsperson is confined to the Al-Qaeda sanctions committee, and, even there, it has been given only the power to investigate the matter and submit his report to the Sanctions Committee**⁴⁸. The ultimate decision will be taken by the Sanctions Committee only, which can overrule the finding of Ombudsperson by consensus.

It is clear by the preceding reforms that Security Council has taken some measures which reduce the chances of violation of human rights to some extent. But these suggestions are in no way sufficient to make the Security Council resolutions human rights sensitive. The working of the sanctions committee is still non-transparent, and it is highly susceptible to political influences. The Security Council must establish an independent and impartial authority which must be empowered not only to investigate but also to decide the matters of listing and delisting. By improving their internal mechanism and reducing the chances of violation of individual human rights, the resolutions of Security Council would command more respect in international community.

Chapter 6

Developing Long Term Strategy for Reconciliation of Sanctions Regime with Human Rights

⁴⁶ The government which listed the individual under a resolution or forwarded his name to the sanctions committee for being listed.

⁴⁷ Office of Ombudsperson, <http://www.un.org/en/sc/ombudsperson/>

⁴⁸ Ibid.

To bring accountability in Security Council and to make its resolutions human rights friendly is a tough task⁴⁹, which cannot be accomplished in short term. The Security Council must prepare a long term strategy for its targeted sanctions regime which must balance the concerns of security with human rights. Such a policy must consider thoroughly the impact of target sanctions on an individual if one has been wrongly listed, and it must also focus on creating a redressal mechanism for such individual.

It is neither feasible nor possible to provide all the facets of such a policy, but some of the most important components of such policy should be the following-

- **Defining Criteria for exercise of Powers under Resolutions:** When Security Council gives power to the Sanctions Committee or any nation to list an individual in sanctions list, it must clearly provide the scope for the exercise of such powers. It must be expressly provided that such powers must not be exercised so as to violate individual human rights, unless there is some grave emergency requiring the same. Arrest or detention must not be allowed to be made unless there is reasonable suspicion.
- **Increased transparency of Committee:** Today the Sanctions Committees work in a opaque fashion, which leaves scope for arbitrary exercise of power. **There the proceedings of the committee must be allowed to be attended by civil society organisations, unless existence of some special fact requires otherwise. Even the detailed report of proceedings, along with the conclusions reached by committee must be made publicly available to be accessed by general public.** Confidential or highly sensitive information might be reserved, but proper explanation must be provided in this regard.
- **Notifying the target of listing along with its reasons:** The individual who has been listed under the individual target regime must be informed about the listing, along with the reasons and the supporting material for listing. The individual must be afforded an opportunity to present his case for delisting by providing evidence and information in this regard.
- **Active Collaboration among Different Actors:** Such a policy must provide for active collaboration among different actors like national police or intelligence

⁴⁹ In the past many times the Security Council has not worked in an accountable manner. For more information: Security Council Report, 'Rule of Law: The Security Council and Accountability' (2013), http://www.securitycouncilreport.org/atf/cf/%7B65BF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/cross_cutting_report_1_rule_of_law_2013.pdf

authorities, civil society, regional organisations like NATO, regional investigative authorities (like Interpol) and other related actors. It must include, among other things, provisions for data sharing, joint investigations, cooperation during emergency etc.

- **Impartial Authority for Listing and Delisting:** The power to take decisions on the listing and delisting of individuals must be given to an independent and impartial authority. **Currently Ombudsperson is one such authority but it only possesses investigative powers⁵⁰, and decision making is still the domain of the Sanctions Committee.** It would be better to give Ombudsperson decision making powers or to establish some new authority which is equally independent and impartial.
- **Detailed Criteria for Listing and De-listing:** Detailed criteria for listing and delisting must be provided which must contain adequate safeguards against the abuse or misuse of powers while taking a decision on listing or delisting. Currently there is no concrete criterion⁵¹ which has to be followed by the Sanctions Committee, and it leaves unguarded discretion on Sanctions Committee to take decisions.
- **Provision of Compensation:** If any person was wrongly listed under Sanctions Committee list and he/she suffered grave violations of human rights (like internment or imprisonment for a long time) due to such listing, then there must be provision for compensation to such individual. The act of such internment would necessarily be committed by states (as Security Council has no prisons or police authorities for internment) therefore **question arises that who should be responsible for compensation?** The answer seems to be that when listing was done by State then the state should be responsible, and when listing is done by Sanctions Committee and the state merely acts on that basis then the Security Council must be responsible.
- **Exemption for Necessities:** The necessities of life (like subsistence allowance, bare minimum salary, unemployment allowance, etc) must be exempted when a measure (like to freeze the accounts or to stop all financial contributions) is proposed against a particular individual. **The reason for such proposed exemption is that the**

⁵⁰ Nicol Herbert, 'On the Long Road Towards Security Council Accountability: Assessing and Renewing the Ombudsperson' (Global Policy Forum, June 2011), <http://www.globalpolicy.org/security-council/index-of-countries-on-the-security-council-agenda/sanctions/50349-on-the-long-road-towards-security-council-accountability-assessing-and-renewing-the-ombudsperson.html?itemid=934>

⁵¹ There is call to create "specific normative frameworks, practices and discourse" to bringing accountability to Security Council and Sanctions Committee under it, see, Machiko Kanetake, 'Enhancing Community Accountability of the Security Council through Pluralistic Structure: The Case of the 1267 Committee' (2008) 12 Max Planck Yearbook of International Law pg 129 http://www.mpil.de/files/pdf3/mpunyb_03_kanetake_12.pdf

necessities of life are required for the subsistence of life, and there is hardly any chance that subsistence allowance (a meagre sum) would be contributed towards terrorist activities or other illegal activities. Moreover there might be dependents on the listed individuals, and stoppage of necessities might affect them.

Even this policy must be reviewed and revised at every 2 years taking in account different factors like the success of the policy, number of people wrongly listed, the time taken in the redressal of the grievances of wrongly listed people, and any other relevant factor. Suitable changes must again be made to make the policy more efficient and human rights friendly.

Chapter 7

Concluding Remarks

It has been stated by noted constitutional scholar A V Dicey: “Power corrupts and absolute power corrupts absolutely⁵²”. Security Council has enormous power with it, but it must be used with care and caution. As the regime of individual sanction is developed, individual human rights are at a high risk of violation. It is essential today that the Security Council must be subject to some checks and balances to preserve the human rights. Security Council must transform itself into a transparent and accountable institution.

I the end I provide the following suggestions:

Firstly, **International Court of Justice must be given some power to review the resolutions of Security Council. Although, this power must be exercised on limited grounds and it must be used by the ICJ sparingly. Violation of *jus cogens* and fundamental human rights must be one of the grounds of review.** ICJ has established itself as an independent and impartial institution, and therefore one can trust on its wisdom for the redressal for violation of individual human rights. Involvement of ICJ would bring confidence of international community as its decisions command greater respect than any other international institution.

Secondly, Security Council must strengthen its internal mechanism for listing and delisting. In spite of several improvements, the working of sanctions committee cannot be considered

⁵² A V Dicey, ‘An Introduction to the Study of Law of Constitution’ (10th edn, Universal Law Pub 2012)

transparent or free from political influence. **The task of listing and delisting individuals must be entrusted to separate body or institution within Security Council which must impartial and independent.** Such a body must receive the request for delisting (in case an individual has been wrongly listed) and decide over the request after considering the relevant evidence.

Thirdly, there must be a long term policy which must aim at bringing human rights framework within the Security Council. Such a policy must be framed after detailed consultations with the different actors like states, other international organisations (especially those working the field of human rights and humanitarian law), civil society groups, etc. This policy must include detailed procedures and norms, which are to be followed by Security Council and different Sanctions Committee under it. **Moreover such a policy must provide for different steps to minimise the human rights violations like collaboration with national and other international authorities (like Interpol), sharing of information about individuals, cooperation during investigations, etc.**

By following the above mentioned steps I sincerely believe that Security Council can establish itself as an institution which is accountable as per rule of law, and respectful towards the international human rights regime.