Playing the Devil's Advocate: the United Nations Security Council is Unbound by Law

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Keywords: UN Security Council; enforcement powers; international legal limits; UN Charter; *ius cogens* and other possible limits.

Abstract: Playing the devil's advocate, it is argued that ultimately there are no international legal limits to the UN Security Council's enforcement powers. The argument is based on a brief analysis of various UN Charter provisions and the rejection of the *ius cogens* concept and other possible arguments for international legal limits. The conclusion reached is that the UN Security Council has unfettered powers when dealing with maintenance of international peace and security issues.

> Is it true of the Security Council, that:
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> [...] because the End of this Institution is the Peace and Defence of [...] all; and whosoever has the Right to the End, has the Right to the Means, it belongeth of Right [to him] to be Judge both of the Meanes [sic] of Peace and Defence; and also of the hindrances and disturbances of the same; and to do whatsoever he shall think necessary to be done [...]
>
> Martti Koskenniemi, quoting from Thomas Hobbes' *Leviathan*[1]

1. INTRODUCTION

The author has donned the robe of the devil's advocate's for this polemical piece, thus intending to utter half lies, sow doubt and cover up inconsistencies. It would be argued that ultimately there are no international legal limits to the enforcement powers of the Security Council (SC) acting under Chapter VII of the United Nations Charter (UNC).

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1. M. Koskenniemi, *The Police in the Temple: Order, Justice and the UN – A Dialectical View*, 6 EJIL 325, at 325 (1995).

12 Leiden Journal of International Law 549-563 (1999)

This rather theoretical quest is not of academic interest only. Since the arrival of the 'New World Order' and the accompanying new found vitality of the SC more or less a decade ago, many from especially the not so powerful member states of the world community have probably pondered the same thought. A few eyebrows were raised by recent SC or SC-authorised ventures. These include SC decisions relating to and flowing from Iraq's invasion of Kuwait, the Lockerbie saga, the intervention in Haiti to enforce democracy, the Somalia debacle, and the creation of the Rwandan and Yugoslavian tribunals.[2]

However, the devil's advocate has to acknowledge the conceptual and nightmarish maze the problem presents. Apart from the innumerable problems surrounding the intricate relationship between the various sources of international law and the international responsibility of international organisations and their organs, even the assumption that any entity can operate *legibus solutus*, unbound by law, is quite contentious. For the purposes of this piece, the crucial assumption is made that not every SC decision *per se* constitutes international law.[3]

The problem will be courted by firstly dissecting the UNC (Section 2). Secondly, the focus will shift to *ius cogens* (Section 3), after which, thirdly, other arguments put forward as possible limits to the power of the SC will be dealt with, including the concepts of 'abuse of rights' and 'good faith' (Section 4). Needless to say that based on the numerous assumptions made, the analysis will show that the SC, acting under Chapter VII of the UNC, could ultimately act *legibus solutus*.

The polemic would focus only on the possible legal, as opposed to procedural, financial and political limits to the powers of the SC.[4] Only binding Chapter VII UNC decisions of the SC (SC decisions), including those decisions authorising member states to use force to restore international peace and security[5], fall within the scope of this article.[6] Mandated actions undertaken by

2. *See* P. Malanczuk, Akehurst's Modern Introduction to International Law 395-425 and 425-428 (1997); M.N.Shaw, International Law 868-879 (1997); V. Gowland-Debbas, *Security Council Enforcement Action and Issues of State Responsibility*, 43 ICLQ 55 (1994); M. Koskenniemi, *The Place of Law in Collective Security: Reflections on the Recent Activity of the Security Council, in* A.J. Paolini, A.P. Jarvis & C. Reus-Smit (Eds.), Between Sovereignty and Global Governance: The United Nations, the State and Civil Society 37-40 and 46-49 (1998); D. Akando, *The International Court of Justice and the Security Council: Is There Room for Judicial Control of Decisions of the Political Organs of the United Nations?*, 46 ICLQ 309, at 314 (1997); and M. Bedjaoui, The New World Order and the Security Council: Testing the Legality of its Acts 37-53 (1994).
3. Otherwise it could be argued that every SC decision validly arrived at, constitutes international law, meaning in actual fact, that the SC could never breach international law.
4. Assuming that such distinctions are possible and useful.
5. *See* J.G. Gardam, *Legal Restraints on Security Council Military Enforcement Action*, 17 Michigan Journal of International Law 285 (1996) for references to the possible bases for such authorisation decisions and the possible legal consequences thereof for the UN and member states. For the purposes of this polemic it is assumed that the SC is responsible for the enforcement actions it authorised member states to

member states that stray beyond those SC authorisation decisions or the possible dereliction of duty implied by the SC issuing open-ended and vague authorisation decisions without controlling their execution, fall outside the ambit of this piece.[7] All other clarifications and assumptions will become apparent as the argument develops.

2. THE UN CHARTER

The UNC provisions briefly dissected below are simply those that are considered to be directly relevant to the problem at hand.[8]

2.1. Article 24

Article 24 is one of three articles setting out the functions and powers of the SC.[9] Articles 24(1) and (2) read as follows

> (1) In order to ensure prompt and effective action by the United Nations, its members confer on the Security Council primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf.
>
> (2) 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.

The crux is clear: the SC is given 'primary responsibility' for the maintenance of international peace and security. What is more, the most important powers for the maintenance of international peace and security were given exclusively to the SC. Articles 11(2) and 12(1), dealing with the General Assembly's (GA) powers, support this interpretation. In accordance with Article 25, the SC also has the exclusive right to make decisions binding on member states and to order binding sanctions against a state.[10]

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undertake. This polemic, for reasons of convenience, also does not distinguish between possible legal restraints derived from the *ius in bello* and the *ius ad bellum*, as did Gardam.

6. Where 'SC decisions' are referred to, resulting actions undertaken are meant to be included.
7. *See* J. Lobel & M. Ratner, *Bypassing the Security Council: Ambiguous Authorizations to Use Force, Cease-fires and the Iraqi Inspection Regime*, 93 AJIL 124 (1999) for a timely exploration of this problem.
8. Art. 2(2) will be discussed in Section 4. Unless otherwise indicated, all references to provisions are those of the UNC.
9. Another of these, Art. 25, will be dealt with later in Section 2.5.
10. J. Delbrück, *Article 24, in* B. Simma (Ed.), The Charter of the United Nations: A Commentary 397 (1994).

2.2. Article 1(1)

The UN's above referred to purposes are set out in Article 1 UNC. Of these, Article 1(1) is of direct importance

> To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, *and in conformity with the principles of justice and international law*, adjustment or settlement of international disputes or situations which might lead to a breach of the peace.[11]

It is striking that the emphasised words qualify only the peaceful "adjustment or settlement of international disputes or situations which might lead to a breach of the peace". Thus, read together with Article 24 the conclusion is rather simple: when the SC discharges its duties under its primary responsibility it need not act in conformity with international law or the principles of justice.

With reference to the collective measures mentioned in Article 1(1), the SC is responsible to take steps as provided in Chapter VII UNC if a state threatens or breaches the peace or commits an act of aggression. The adjustment or settlement of disputes or situations referred to are covered in Chapter VI UNC.

The *travaux préparatoires* shows that various proposals to qualify all the Article 1(1) measures with references to "justice" and/or "international law" were put forward at the San Francisco Conference in 1945. These and a proposal that "justice" be an independent UN purpose so that the UN could be prevented from imposing a "peace of expedience rather than a peace founded on justice", were obviously excluded from the final text.[12] About the proposal that Article 1(1) as a whole must conform with "the principles of justice and international law", Wolfrum notes the following:

> This motion, however, was rejected on the grounds that it might unduly limit the functions and powers of the SC. The view was expressed that it was important that the SC should have the power to bring about an end to hostilities without considering whether one side could legally have recourse to armed force.[13]

The omission of any reference to "justice" or "international law" speaks volumes. The majority of states gathered at San Francisco and the other conferences preceding it were simply not interested in curtailing the relevant powers of

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11. Emphasis added.
12. R. Wolfrum, *Article 1(1)*, *in* Simma, *supra* note 10, at 52 n. 27. *See also* Bedjaoui, *supra* note 2, at 29-31.
13. Wolfrum, *supra* note 12, at 52 n. 28. *See also* Judge Weeramantry's dissenting opinion in the Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libya *v.* United Kingdom; Libya *v.* United States of America), Provisional Measures, Order, 1992 ICJ Rep. 4, at 171-175.

the SC with such references. Those states joining after 1945 probably were and are quite aware of the clear meaning of Article 1(1). That some states may have joined the UN with the SC's powers curtailed by the Cold War ideological paralysis is of no relevance. Dissenting in the 1998 *Lockerbie* case, President Schwebel stated that the omission of "principles of justice and international law", "was deliberately so provided to ensure that the vital duty of preventing and removing threats to and breaches of the peace would not be limited by existing law".[14]

The SC could take action with respect to any situation that it determined constituted a threat to or a breach of the peace or an act of aggression, even with perfectly legal claims involved. The effectiveness of the UN would be hindered if principles of justice and international law were to be considered every time the UN is called upon to take "prompt and effective" collective measures to maintain international peace and security. Lastly, the concept 'collective security' alluded to in Article 1(1) also does not suggest otherwise, since it is based on UNC provisions, which in turn are an issue at the moment.

2.3. Article 2(7)

Article 2(7) deals with one of the principles in accordance with which the UN and its members must act when pursuing the purposes enumerated in Article 1. It reads that

> [n]othing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; *but this principle shall not prejudice the application of enforcement measures under Chapter VII.*[15]

Need anything more be said about Article 2(7) than to re-emphasise the emphasised part? The scope of the fundamental non-intervention principle is limited when enforcement measures by the SC in terms of Chapter VII are applied. Article 2(7) also says nothing about the SC having to act in accordance with international law – it merely directs the question back to an interpretation of Chapter VII.

14. Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libya *v.* United Kingdom; Libya *v.* United States of America), Preliminary Objections, Judgment, reproduced *in* 37 ILM 586 (1998), at 627.
15. Emphasis added.

2.4. Chapter VII

Chapter VII, entitled "Action with respect to threats to the peace, breaches of the peace, and acts of aggression", encompasses Articles 39 to 51. Article 39 is the gateway to the rest of the Chapter VII articles. The article reads

> The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.

The provision has obviously left the SC with mind-boggling powers of appreciation. As Frowein succinctly states

> The broadest and most indistinct concept in Art. 39, although certainly crucial for the purpose of the maintenance of peace, is that of threat to the peace. [...] Art. 39 makes the threat to the peace the threshold for its applicability. In this regard, a judgement of the SC which is based on a majority decision without the dissenting vote of a permanent member acquires decisive significance. [...] The Charter rests on the requirement that the SC, on the basis of its opportunity to make an assessment, will determine the existence of a threat to the peace which opens the route to large-scale intervention under Chapter VII.[16]

A "threat to the peace" is also not limited to hostilities between states. The practice of the SC provides us with numerous examples where the concept has been interpreted very broadly, applying even to situations within member states. Where the voting rule of Article 27(3) is adhered to, "threat to the peace" can be understood in a very broad manner.[17] In the *travaux préparatoires* mention is made of a number of proposals put forward to weaken the discretionary powers of the SC. These proposals included enhancing the competence of the GA and proposals to define some of the concepts in the Article, but these were all turned down.[18]

Before looking at Articles 41 and 42, it is assumed that the SC has to make an Article 39 determination before it could decide on Article 41 or 42 measures.[19] Turning to Article 41, it need only be highlighted that the SC has to decide on those measures not involving the use of force to give effect to its decisions. This requirement could be linked to the concepts of 'good faith' and

16. J.A. Frowein, *Article 39, in* Simma, *supra* note 10, at 610. *See also* H. Kelsen, The Law of the United Nations: A Critical Analysis of its Fundamental Problems 294 (1951) who concluded that "the purpose of the enforcement action under Article 39 is not to maintain or restore the law, but to maintain or restore peace, which is not necessarily identical with the law".
17. *See id.*, at 612.
18. *Id.*, at 607-608. *See also* Bedjaoui, *supra* note 2, at 30.
19. This assumption is food for many an opposing and more nuanced thought: *see* Frowein, *supra* note 16, at 608-616.

'abuse of rights' which will be analysed later. Article 42 partially reads as follows

> Should the Security Council consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security [...].

A clear precondition for the application of the Article is the SC's opinion that Article 41 measures either would be inadequate or have already proved to be inadequate. Clearly, such a decision is again preconditioned only on a SC decision in line with Article 27(3). A more important possible limitation is the reference to "action [...] as may be necessary". The English Charter text leaves some doubt about as to whether the measures must be necessary or may be necessary. The French text however states that the SC must decide whether the measures are necessary.[20]

Even assuming that the French text would prevail, it is again up to the SC alone to decide whether such measures are necessary. What may be necessary may be illegal. Furthermore, the argument that the term "necessary" gives expression to the principle of proportionality, assuming that it indeed is an international law principle, thereby serving as a limit to the discretionary acts of the SC, does not help an awful lot.[21] The proportionality principle in itself cannot prevent the SC from acting unbound by law – an illegal means could be proportionate to an illegal goal. Effectively, therefore, the only limit implied by the use of the term "necessary", is the voting pattern in the SC.

2.5. Article 25

Article 25 also concerns the functions and powers of the SC. The article states that the UN members "agree to accept and carry out the decisions of the Security Council in accordance with the present Charter."

The binding decision-making power of the SC is a prerequisite for it effectively maintaining international peace and security. Here, the question is whether the words "in accordance with the present Charter" qualify the obligation, or the SC decisions? If interpreted in the latter sense, member states would

20. It partly reads: "Si le Conseil estime que les mesures prévues à l'article 41 seraient inadéquates ou qu'elles se sont révélées telles, il peut entrependre, au moyen des forces aériennes, navales ou terrestres, toute action qu'il juge nécessaire au maintien ou au rétablissement de la paix et de la sécurité internationales." *See also* Frowein, *Article 42, in* Simma, *supra* note 10, at 631.

21. *See id.* and *see also* Delbrück, *Proportionality, in* R. Bernhardt (Ed.), EPIL, Vol. 3, at 1140 (1997) for an analysis of the principle. *But see* R. Higgins, Problems and Process: International Law and How We Use It 228-237 (1994) who doubts whether it could be seen as even a general principle of law. *See also* Gardam, *supra* note 5, at 307-312, who distinguishes between proportionality and necessity, both concepts which are found to be present in the UNC.

be bound by only those SC decisions they themselves determined conform to the Charter. According to Delbrück, the drafting history of the Charter as well as the prevailing opinion support this latter interpretation.[22]

But, this right to auto-interpretation by UN members is restrictively interpreted. Delbrück namely limits this right to formal matters. In other words, members could determine for themselves only whether the SC decisions were arrived at in accordance with the UNC's procedural rules. But, it is incomprehensible that UN members could be seen as having the right to assess for themselves whether the SC decisions are in accordance with substantive Charter provisions. These substantive decisions usually, or very often, involve the making of value judgments.[23]

The decision prior to and at the San Francisco Conference to grant the SC very wide discretionary powers and to give some of these decisions binding force[24] are indications that the right of members to assess SC decisions could not possibly have been intended. Such a right would make the UN system of maintaining international peace and security inoperative. It is also to be observed that the support given by the SC itself and the GA for the binding nature of Chapter VII decisions are quite impressive, especially as far as its decisions with respect to South Africa, Rhodesia and Namibia (then South West Africa) are concerned.[25] Thus, neither the UNC nor the UN's practice support anything but possibly the restrictive right to auto-interpretation.

Anyhow, does whether a SC decision was taken "in accordance with the present Charter" not merely beg the same question, namely whether the Charter itself actually provides that the SC must act in accordance with international law? The Article 25 rider does not read "in accordance with international law". In the context of the present Charter provision, even if members have the right to test the 'legality' of SC decisions, this 'legality' could only refer to the Charter provisions that are part and parcel of international law. The same can be said about Article 2(5), which states that the UN members shall give the UN "every assistance in any action it takes in accordance with the present Charter [...]".[26]

2.6. Article 103

The rather complex Article 103 is quite important for this contribution. The article reads that

22. J. Delbrück, *Article 25, in* Simma, *supra* note 10, at 413-414.
23. *Id.*
24. *Id.*, at 408-409.
25. *Id.*
26. *See* Frowein, *Article 2(5), in* Simma, *supra* note 10, at 129-130.

> [i]n 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.

The chief question raised by the article is whether there are international legal obligations having their basis outside the Charter that legally limits the Chapter VII powers of the SC.[27]

"[T]he obligations of the Members of the United Nations under the present Charter" include binding SC decisions.[28] Thus, in the event of a conflict, obligations arising from the provisions of Charter VII itself and from binding SC decisions in terms of that Chapter "shall prevail" over members' obligations "under any other international agreement".

If "any other international agreement" refers to only treaties, the door is left open for the possibility that, for example, customary international law could prevail over the Charter and thus serve as legal limit to the SC's powers. Seen in light of the terminology usually employed to refer to international law sources, the chosen wording is unambiguous: only other treaty obligations are referred to. Had the drafters intended otherwise, different terminology would have been used.[29]

Furthermore, Article 30 of the 1969 Vienna Convention on the Law of Treaties (VCLT) sets out the applicable principles to be followed in the event of a conflict between successive treaties: "[s]ubject to Article 103 of the [UNC], the rights and obligations of States parties to successive treaties relating to the same subject-matter shall be determined in accordance with the following paragraphs." Thus, the general interpretative principles used in the event of a conflicting treaty obligation are not relevant if a treaty to which a UN member is party conflicts with the UNC. The 1986 Vienna Convention on the Law of Treaties with and between International Organisations also states that "[...] in the event of a conflict between obligations under the [UNC] and obligations under a treaty, the obligations under the Charter shall prevail".[30] These references are not conclusive, but they surely create the impression that only treaties were meant with an "international agreement". The decision prior to the signing of the final Charter text to exclude a proposal, according to which all other obligations, including those arising under customary international law, were to be super-

27. The reverse side of 'obligation' will be understood as 'right'. *See* the distinction made by Judge Bedjaoui in a dissenting opinion between "rights" and "obligations" in the 1992 *Lockerbie* case, *supra* note 13, at 157. *See also* Gowlland-Debbas, *supra* note 2, at 87, who refers to some SC decisions mentioning "rights" and the obligations covered by Art. 103.
28. *See also* Bernhardt, *Article 103, in* Simma, *supra* note 10, at 1120.
29. In Art. 1(1) of the 1969 Vienna Convention on the Law of Treaties (VCLT) "international agreement" is part of the definition of a "treaty". *See* 8 ILM 679 (1969).
30. Art. 30(6) Vienna Convention on Treaties Between States and International Organizations or Between International Organizations, 25 ILM 543 (1986).

seded by the Charter, also supports the argument that only treaties are referred to.[31]

Leaving the analysis of other 'sources' for later, the next important question is whether binding SC decisions could override customary international law rights of UN members.[32] It is without a doubt within the power of the SC to do just that. The powers given to the SC in terms of for example Article 39, 41 and 42 are examples of this.[33] The SC measures ordered under Article 41 and 42 are known as so-called enforcement measures since they are ordered against the will of a state. In the case of Article 41 the transgressor state as well as, potentially, all other members could be bound by the SC's decision. In the case of the latter only the transgressor state could be bound.[34]

The conclusion regarding the effect of Article 103 is quite awkward. For, "obligations under any other international agreement" on the face of it refers to other treaty obligations, but after further analysis, customary international law is also included.[35]

3. *IUS COGENS*

Ius cogens is the name given to the basic principles of international law from which states are not allowed to derogate. The doctrine of *ius cogens* developed in the 1960s and found 'recognition' in Article 53 of the VCLT.[36] Article 53 of the VCLT reads as follows:

> A treaty is void, if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of states as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.

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31. Bernhardt, *supra* note 28, at 1118.
32. For current purposes, I will make nothing of the different effects that a binding SC decision may have between the rights of members causing a threat to or breach of the peace or act of aggression, and on those authorised or ordered to act against such a transgressor. *But see* Malanczuk, *supra* note 2, at 387-390; Frowein, *Article 42, in* Simma, *supra* note 10, at 632-635; and Gowland-Debbas, *supra* note 2, at 74-90.
33. *See* Frowein's analysis of Arts. 39, 41 and 42 *in* Simma, *supra* note 10; and Akando, *supra* note 2, at 318.
34. *See* Frowein, *Article 42, in* Simma, *supra* note 10, at 632; and Malanczuk, *supra* note 2, at 390.
35. That is, if customary international law is not included in Article 103 as such, but is introduced via Arts. 39, 41 and 42. Regardless, what is ultimately important is that customary international law could be overridden by SC decisions. *See* Malanczuk, *supra* note 2, at 46-48 for his views on the so-called consensual theory of the sources of international law.
36. J. Dugard, International Law: A South African Perspective 35 (1994). *See also* R. Jennings & A. Watts, Oppenheim's International Law. Peace: Introduction and Part I, Vol. I at 7-8 (1992) and the references in the related footnotes.

Had the author subscribed to the 'theoretical' view on the nature and importance of *ius cogens,* held by many writers, the polemic probably would have had to end here. For, assuming that such a norm would apply to international organisations, it appears as if it would certainly set a legal limit to the SC's power, simply by virtue of it occupying the top notch in the hierarchy of international legal norms. Consequently, it seems as if even without Article 103 UNC it would have set a limit to the SC's power.[37]

Although the author acknowledges the 'formal' recognition of *ius cogens*, its importance in the hurly-burly of 'practical' international law is regarded as being more or less negligible.[38] Not even the content of the concept is uncontroversial.[39] The devil's advocate considers that *ius cogens*, at least not at this stage in the development of international law, does not present a legal limit to the SC's enforcement powers.

4. OTHER POSSIBLE LEGAL LIMITS

This section will deal with the remaining possible legal limits to the SC's enforcement powers.

4.1. 'Abuse of rights' and/or 'good faith'

Article 2(2) UNC, setting out one of the Article 2 principles of the UN in accordance with which both the UN itself and its members are to act, reads that

> [a]ll Members, in order to ensure to all of them the rights and benefits resulting from membership, shall fulfil in good faith the obligations assumed by them in accordance with the present Charter.[40]

37. *See*, however, Judge Lauterpacht's separate opinion in the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina *v.* Yugoslavia (Serbia and Montenegro)), Request for Provisional Measures, Order, 1993 ICJ Rep. 4, at 440. *See also* G.R. Watson, *Constitutionalism, Judicial Review, and the World Court*, 34 AJIL 36-37 (1993), and Shaw, *The Security Council and the International Court of Justice: Judicial Drift and Judicial Function, in* S.M. Muller, D. Raič & J.M. Thuránszky (Eds.), The International Court of Justice: its Future Role after Fifty Years 229 (1997), who also explain the wording of Art. 103 UNC with regard to *ius cogens.*
38. *See* Malanzcuk, *supra* note 2, at 57-58, who refers to the fact that "[s]tate practice and international decisions have indeed been cautious in accepting the relevance of the concept"; He also mentions that France even refused to accept the 1969 VCLT because of the inclusion of Art. 53. Mention is also made of the procedural safeguard in Art. 66(a) the Western and Latin American states insisted upon before accepting Art. 53.
39. The prohibition on the use of force, genocide, slavery, racial discrimination, torture and piracy are often mentioned as examples, but even these are controversial. *See also* Malanzcuk, *supra* note 2, at 58, who notes that an agreement between the states at the preparatory work leading to the final VCLT text on which norms should be included were impossible.
40. *See* J.P. Müller, *Article 2(2), in* Simma, *supra* note 10, at 89, for a discussion of the subparagraph.

https://doi.org/10.1017/S0922156599000278 Published online by Cambridge University Press

A striking feature of this subparagraph is that it addresses only the UN members, in contradistinction with the general, opening sentence of Article 2 and other subparagraphs that address both the UN and its members or only the UN.

The clear intention was to distinguish, as far as the principles contained in Article 2 are concerned, between those provisions aimed at the UN and those aimed at the members. It thus seems to be the case that the SC, as an organ of the UN, need not act in good faith when undertaking enforcement measures!

Even should one be of the opinion that the SC cannot act in bad faith if its members act in good faith[41], the problem still remains. If, for example, to fulfil the Articles 39 and 42 purpose of maintaining international peace and security the SC members have to override international law, they act in good faith! The good faith principle cannot prevent the SC members from considering conditions relevant to its purposes. The same can be said about Articles 26 and 31(1) of the 1969 VCLT.[42]

Whether rooted in the UNC or not, the concepts of 'good faith' and 'abuse of rights' cannot be said to serve as legal limits on the SC's powers.[43] There is no agreement on the content of these concepts; as to whether these concepts are one and the same thing or whether one includes the other; and more importantly, what, if any, international law status these concepts have.[44]

For example, Gowlland-Debbas, referring to Article 39 UNC and the doctrine of abuse of rights, notes that

> as regards the Council's broad discretion under Article 39, one may invoke in this context the doctrine of abuse of rights arising from failure by states to exercise their rights in good faith and with due regard to the consequences (an obligation that can also be derived from Article 2(2) of the Charter).[45]

41. On the members' duty to act in good faith, *see* Conditions of Admission of a State to Membership in the United Nations (Article 4 of the Charter), Advisory Opinion of 28 May 1948, 1947/48 ICJ Rep. 57, at 63. The ICJ expressly referred to Article 2(2) and found that, in deciding on the admission of new members, the principle of good faith sets a limit to the discretion that members could exercise. The Court said the principle forbids a member to make its vote in a UN organ dependent on conditions that were not connected with the purpose of the Charter provision to be applied.
42. Art. 26 partly reads that "[e]very treaty in force [...] must be performed by [the parties] in good faith." Art. 31(1) states that a treaty must be "interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."
43. For my purposes, I will make nothing of the relevance or not of these concepts to states as opposed to the SC.
44. Apart from the references following below, *see also* M. Virally, *Good Faith in Public International Law*, 77 AJIL 130 (1983); A. D'Amato, *Good Faith*, *in* R. Bernhardt (Ed.), EPIL, Vol. 2, at 559 (1992); A. Kiss, *Abuse of Rights*, *in* R. Bernhardt (Ed.), EPIL, Vol. 1, at 4 (1992); A. Cassese, International Law in a Divided World 152 (1986); and Art. 300 of the 1982 United Nations Convention on the Law of the Sea.
45. V. Gowlland-Debbas, *The Relationship between the International Court of Justice and the Security Council in the Light of the Lockerbie Case*, 88 AJIL 663 (1994).

Disregarding the vagueness of the quoted part, what if the SC did pay due regard to the consequences before deciding on an enforcement measure? Jennings and Watts, analysing the doctrine of abuse of rights as a restraint on the freedom of action of states, note that it occurs when

> a state avails itself of its right in an arbitrary manner and in such a way as to inflict upon another state an injury which cannot be justified by a legitimate consideration of its own advantage.[46]

But what if the SC does not act in an arbitrary way, if it has a legitimate security consideration? As to good faith, the same writers say that abuse of rights is "possibly [...] implied in the frequent judicial affirmation of the obligation of states to act in good faith".[47] Abuse of rights itself is a general principle of law recognised by civilised states. But, the writers also note that "the extent of the application of the still controversial doctrine of the prohibition of abuse of rights is not at all certain".[48] Another concept and more uncertainty are introduced when it is stated that "'abuse of rights' may have some affinities with, although it is distinct from, the doctrine of *détournement de pouvoir*."[49] No indication of what this doctrine entails is given.[50]

Shaw refers to the "doctrines of good faith and abuse of rights [that] may have some relevance as constraints of a rather general nature" in discussing the broad discretionary powers of the SC in making an Article 39 determination.[51] Somewhere else the same writer discusses good faith in the context of the sources of international law as a general principle of law, agreeing with the ICJ that as a concept it is "not in itself a source of obligation where none would otherwise exist".[52] It is also noted that as a "background principle" it both informs and shapes the observance of existing rules of international law and constrains the manner in which those rules may legitimately be exercised.[53]

4.2. Other arguments

Albeit repetitive to a degree, the following needs to be emphasised. To have regard to 'the object and purpose' of the UN in search of an answer to the question whether there are international legal limits to the powers of the SC, is of no as-

46. *See* Jennings & Watts, *supra* note 36, at 407-408.
47. *Id.*, at 408.
48. *Id.*
49. *Id.*, at 408, n. 10. *See also* I. Brownlie, Principles of Public International Law 446-448 (1997).
50. *See also id.*, at 407, n. 1.
51. *See* Shaw, *supra* note 37, at 226.
52. *See* Shaw, *supra* note 2, at 81-82 and nn. The ICJ case referred to is the Border and Transborder Armed Actions, (Nicaragua *v.* Honduras), Judgment of 20 December 1988, 1988 ICJ Rep. 69, at 105. *See also* 82 n. 118 and 663 n. 7 for numerous references to case law.
53. *Id.*, at 82.

sistance. The main object and purpose of the UN is to maintain international peace and security – nothing in the UNC suggests that this purpose must be balanced with any other. An over-reliance on the object and purpose of the UN, as well as the functional and implied powers rules of interpretation, may actually lead to an even broader range of powers being ascribed to the SC.

To argue that since the UN, and therefore the SC, is a subject of international law and that as such it is bound by international law begs many a question. For interest's sake, it presupposes what the meaning of 'subject of international law' is, that such a subject could not legally act outside the law, and it avoids the glaring fact that the intention was to leave the SC unchecked. More to the point, the argument seemingly rests on another presupposition as well, which is invalid. It presupposes namely, that states could not legally create an international organisation with a body like the SC, which in certain circumstances could cross the frontiers of international law in order to maintain international peace and security.

An argument that the SC could not act illegally if its member states cast votes in accordance with international law, as one might suppose they must do, is also irrelevant – the distinction between the international personality of states and international organisations is based on such a possibility.[54]

5. CONCLUSION

Ultimately, then, there are no international legal limits to the SC's Chapter VII enforcement powers. For example, it is conceivable that the SC might not honour a people's right to self-determination since it could constitute a threat to or a breach of the peace. It is conceivable that the SC might ignore the violation, by its own or mandated forces who are attempting to reimpose international peace and security in a strategically vital part of the globe, of the fundamental human rights of those responsible for its serious destabilisation. It is conceivable that the SC might turn a blind eye to the actual non-compliance with the Geneva Conventions in a long drawn-out struggle against a pernicious aggressor. It is conceivable that the SC might underwrite an illegal secessionist claim because it will ensure regional peace. It is conceivable that the SC might block weapons supply to a people fighting against genocide. It is conceivable that the SC might impose sanctions that violate international human rights and humanitarian law.

When using 'international law limits', possible legal limits in as well as outside the UNC have been referred to. None of the UNC provisions discussed contradicts the argument put forward. The UNC's drafters clearly intended the SC to be left with absolute powers of appreciation in maintaining international

54. Could it be argued that to maintain and restore international peace and security is an international law duty incumbent on member states even if it means breaching other rules of international law?

peace and security. The SC's powers are nowhere curtailed by an implicit or explicit reference to international law.

Whether through Article 103 or otherwise, there is no international law rule or principle, of whatever nature, which the SC can not override. Clearly, the UNC, and thus the SC's powers, prevails over other treaties and also customary law. Even assuming that general principles of law are an independent source of obligations, that they fall within the meaning of an "international agreement", and then also assuming that for example good faith and abuse of rights form such principles, it still would not have made any difference to the outcome. These vague concepts can not prevent the SC from acting in the way it sees fit. In order for these concepts to be able to serve as legal limits, one also has to assume that a SC decision overriding existing international law *per se* is for example unreasonable, *mala fide*, arbitrary or disproportionate, which one cannot.

Let the author disrobe. The aim of this polemic is to, if there is a cat, throw it amongst the pigeons. Even if all SC decisions up till now comported with international law is the potential problem highlighted here not worth exploring much more comprehensively? Could anyone identify clear limits to the powers of the SC?

The flaws in the argument put forward are numerous, starting with the conceptual notion that the SC could legally act unbound by law. The lack of a thorough scrutiny of the decision-making dynamics in the SC, the practice of the SC, and the practice and *opinio iuris* of the member states of the UN relating to the problem posed, is obvious. In this regard, especially human rights and humanitarian law might be shown to be quite influential in the decision-making of SC member states and the SC. The outcome of such thorough studies would no doubt be debated endlessly, but that does not detract from the importance of the problem.