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## Evolution of Asset-Freezing through the UN Security Council

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### ABSTRACT

The UN Security Council (UNSC) carries out its task in maintaining and restoring international peace and security. However, it is argued that the Security Council evolved new ways to maintain international peace and security that differ from what was originally intended when the UN Charter adopted in 1945. The Development of Asset-freezing could be considered as an example of this evolution. This Article analyses the historic evolution of asset-freezing in the UN legal order by the UNSC to identify the changes in the nature of asset-freezing. This article argues that asset-freezing has been designed as a means to put pressure on states to abide by the orders of the UNSC for the purpose of maintaining international collective security.

**Keywords:** Asset-freezing, Chapter VII of the United Nations Charter, Security Council, Terrorism.

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### 1. Introduction

The United Nation has sought to tackle the issue of terrorism in a comprehensive progress at an international and regional level in order to establish rules of international law with regard to terrorism. In its attempt to prevent terrorist attacks, the UNSC first imposed asset-freezing on states, then on *de facto* states and on non-state actors, but it has now imposed it on individuals and private entities in domestic law. This article discusses the historical development of the United Nations Security Council's approach with regard to asset-freezing.

### 2. Methodology

The descriptive and analytical method is approached in order to shed lights on the development of the United Nations Security Council's approach with regard to asset-freezing. Both primary and secondary sources are used in addressing the main objectives of this article.

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### 3. Historical development of asset-freezing

The Security Council started dealing with international terrorism in the early 1990s. It is, therefore, necessary to discuss the issue of the asset-freezing by the Security Council, in the light of the economic sanctions that it imposes under Chapter VII of the United Nations Charter (hereinafter 'UN Charter').<sup>3</sup> This is because economic sanctions against states is the origin of asset-freezing as a tool to suppress international terrorism.<sup>4</sup> Asset-freezing was initially used in the form of economic sanctions under Art. 41 of the UN Charter, imposing such sanctions on the state as a whole, that is, the sum of the people in addition to the government.

It is understood that Chapter VII addresses the function of the UNSC and defines it as maintaining and restoring international peace and security. The UNSC can exercise this function by determining that there is one of three possible cases: (i) a 'threat to the peace', (ii) 'breach of the peace' or (iii) 'an act of aggression'. After that, the UNSC can make recommendations or use its powers under Arts. 41 and 42 of the UN Charter<sup>5</sup>. Arts. 42–51 address the use of military power to restore international peace and security, if Art. 41 measures have failed to do so.<sup>6</sup> Art. 41 grants the UNSC the power to 'decide what measures not involving the use of armed force are to be employed to give effect to its decisions ... These may include complete or partial interruption of economic relations and ...'.<sup>7</sup>

The asset-freezing imposed under economic sanctions before 1990 was imposed under Chapter VII only twice: (i) as a result of the Cold War and (ii) of the resulting balance of power. The world then adjusted to the policy of unilateralism by the end of the Cold War. Economic sanctions were imposed many times after 1990, for many reasons. In general, sanctions were imposed to stop occupation and the violation of human rights, to compel the surrender of suspected terrorists or to prevent genocide.<sup>8</sup>

The first time the UNSC used Chapter VII to impose economic sanctions relating to terrorism was against Libya<sup>9</sup> in the wake of the bombing of the Pan Am flight over Lockerbie in Scotland.<sup>10</sup> Subsequently, UNSCR No. 883 was adopted under Chapter VII,<sup>11</sup> where it was decided, in paragraph [3], to freeze all Libyan assets and funds belonging to the Libyan government and any public authority of Libya, whether these funds were owned or controlled, directly or indirectly. The most important point was stated in paragraph [16], where the UNSC decided that as soon as Libya had committed itself to the extradition of its citizens suspected of the crime, on receipt of the Secretary-General's report, which emphasised Libyan compliance with the obligations, all sanctions would be cancelled. This meant that these sanctions were temporary sanctions, and the cancellation of the sanctions lay in the hands of the punished side. Ultimately, once Libya had delivered its suspected citizens, the Secretary-General reported to the UNSC, and the sanctions were lifted immediately.<sup>12</sup>

Imposing sanctions under Art.41 usually preceded by UNSCR commits the member state to do, or refrain from doing, a particular action. In the event of a lack of commitment to what has been imposed

<sup>3</sup> UN Charter

<sup>4</sup> Michael Bothe, 'Security Council's Targeted Sanctions Against Presumed Terrorists: the Need to Comply with Human Rights Standards' 6(3) *Journal of International Criminal Justice* 541, p544.

<sup>5</sup> Art. 39

<sup>6</sup> Art. 42.

<sup>7</sup> Art. 41.

<sup>8</sup> Jorge Godinho, 'When Worlds Collide: Enforcing United Nations Security Council Asset Freezes in the EU Legal Order' 16 *European Law Journal* 67, p68; Also see Matthew Craven, 'Humanitarianism and the quest for smarter sanctions' 13 *European Journal of International Law* 43, p43.

<sup>9</sup> Jae-myong Koh, *Suppressing terrorist financing and money laundering* (Springer, New York 2006), p35.

<sup>10</sup> Pan American Flight 103 was bombed on 21 December 1988. The aircraft exploded over Lockerbie, killing all 243 passengers, the crew of 16 and 11 people from Lockerbie. For more details see Michael Plachta, 'The Lockerbie Case: The Role of the Security Council in Enforcing the Principle Aut Dedere Aut Judicare' 12 *European Journal of International Law*, pp125-126.

<sup>11</sup> UNSCR No.833.

<sup>12</sup> By 5 April 1999 the suspects had arrived in the Netherlands, for trial before a Scottish court, after more than a decade since the crime occurred; for more details see Plachta, p135 et seq; also see Anthony Aust, 'Lockerbie: The Other Case' 49 *International and Comparative Law Quarterly* 278, p295 et seq.

on the member state, the UNSC issues a resolution to impose these sanctions under Art.41 of the UN Charter, and these sanctions include asset-freezing.<sup>13</sup> Arts.41–42 of Chapter VII give the UNSC extensive powers. Because the articles mention various possible sanctions (such as ‘the interruption of economic relations’) as examples, rather than as an exhaustive list, the UNSC can decide on new sanctions every time. It is noteworthy that the international sanction is imposed when any state breaches a UNSC order that protects international peace and security, and this does not always mean a breach of international law.<sup>14</sup>

The UNSC has imposed economic sanctions under Chapter VII several times, but has faced severe criticism. The most important of which concerned effectiveness and lack of humanity.<sup>15</sup> Sanctions affect the people, not the decision-makers and, therefore, will have a limited effect in forcing the State to be bound by the will of the UNSC, at the same time causing great suffering to the people, especially the poor.<sup>16</sup> In Iraq, the sanctions were not able to force the Iraqi government to comply with UNSCRs. Compliance only occurred following military intervention, despite its destructive effects on the Iraqi people.<sup>17</sup> Similarly, in Afghanistan sanctions did not succeed in forcing the Taliban to hand over Osama bin Laden or to close terrorist-training camps.<sup>18</sup> This raised doubts about the effectiveness of these sanctions in achieving the desired goals.<sup>19</sup> It was in response to such criticisms that targeted sanctions were developed.<sup>20</sup>

#### 4. Transformation in the targets of asset-freezing

Two main transformations have occurred to asset-freezing in recent years. The first regards the target and the second is the nature of the asset-freezing.

Regarding the first transformation, because it has been argued that asset-freezing against states in general is inhumane,<sup>21</sup> where it destroys the infrastructure in a state and weakens the people’s quality of life. This contradicts the development objectives of the UN and led to criticism;<sup>22</sup> the UNSC has even been accused of genocide because of the use of collective sanctions.<sup>23</sup> In practice the freezing of assets belonging to the state has impacted the people only, which makes these sanctions less effective on the political will of the targeted states; in many cases it does not affect the leaders of these states or political decision-making.<sup>24</sup> Therefore, this has all led to a re-thinking of sanctions that can avoid this criticism.

In the mid-1990s, the targeting of certain states, such as Iraq and Libya, began to be more specific. The first step was through the targeting of non-state actors,<sup>25</sup> where smart or targeted sanctions were used for the first time against leading members of National Union for the Total Independence of Angola to exert pressure on political decision-makers without damage to the population. This was to comply with UNSCR.<sup>26</sup> After that, in the case of the Taliban movement, where the sanctions were imposed under UNSCR No. 1267 (1999) (when it controlled 95% of the total area of Afghanistan), it was almost against

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<sup>13</sup> Godinho, p69.

<sup>14</sup> Godinho, p69.

<sup>15</sup> Ibid, pp67-78.

<sup>16</sup> Bothe, p545.

<sup>17</sup> For more details see Craven, p43 et seq.; Mary Ellen O’Connell, ‘Debating the Law of Sanctions’ 13 *European Journal of International Law* 63, pp63-79.

<sup>18</sup> Godinho, p72.

<sup>19</sup> O’Connell, pp66-69.

<sup>20</sup> Bothe, p545.

<sup>21</sup> Godinho, pp67-78.

<sup>22</sup> Craven, p46.

<sup>23</sup> O’Connell, p63

<sup>24</sup> Craven, p46.

<sup>25</sup> Which can be defined as a movement with political construction which controls most of the territory of a state, such as UNITA or the Taliban.

<sup>26</sup> Andrea Bianchi, ‘Security Council’s Anti-Terror Resolutions and their Implementation by Member States: an Overview’ 4 *Journal of International Criminal Justice* 1044, p1046.

the state of Afghanistan as a whole.<sup>27</sup> However, the researcher believes that in general this was an acceptable development, because these non-state actors are *de facto* states.

However, what cannot be accepted, and can be considered an unnatural evolution – ‘a mutation’<sup>28</sup> – is the shift in the target of asset-freezing from states and non-state actors to targeting individuals and entities. This mutation began with UNSCR No. 1267 which targeted Taliban. This happened as the Taliban failed to hand over Osama bin Laden to US authorities on the basis of the indictment against him. Until this point, the situation was a natural development. However, following that, in UNSCR No. 1333 (adopted on 19 Dec 2000) paragraph [8(c)] the decision was taken ‘to freeze without delay funds and other financial assets of Osama bin Laden and individuals and entities associated with him as designated by the Committee, including those in the Al-Qaida organization’. At this point, the mutation started as the UNSC targeted individuals and entities associated with bin Laden. The targeting of individuals and entities subsequently expanded; the expansion was completed by the adoption of UNSR No. 1373 and its descendants, which required states to freeze the terrorist assets of both individuals and entities generally.

Accordingly, the issue of whether or not it complies with justice and human rights is questionable because the UNSC is not prepared to deal with individuals and entities. It is not its nature to deal with non-states; it is set up to deal with states and similar organizations only.<sup>29</sup> As such, the targeted persons do not have any kind of representation in the UNSC or UN. In addition, the basis upon which the UNSC builds its resolutions is a political basis, not a legal one. However, the people targeted by these new asset-freezing powers have no ability to exert political pressure, so have no means of participating in the process. There is also no way to challenge the resolutions of the UNSC with regard to asset-freezing.<sup>30</sup>

## 5. Transformation in the nature of asset-freezing

Concerning the change in the nature of asset-freezing, it has recently changed to an integrated work system. This change is evident in four main ways: (i) a shift in purpose to become a continuous preventive action; (ii) a shift in the basis upon which asset-freezing is imposed (‘separation from facts’); (iii) a shift in spatial jurisdiction; and (iv) a shift to operating outside the original context.

The first aspect and the most important change in the nature of asset-freezing is the change from international sanctions to a means of crime prevention. Therefore, it can be said that this is a shift in the purpose of asset-freezing, which illustrates a move from a means of putting pressure on states to a means of preventing persons from committing possible crimes.<sup>31</sup> In other words, they are now executively controlled measures intended for pre-emptive use.<sup>32</sup> The asset-freezing system was changed from reaction to action; it has become a proactive working system, no longer following the terrorist action – as a response to a particular terrorist act<sup>33</sup> – but a system that attempts to prevent acts of terrorism from occurring. Transformation to a preventative action to prevent the suspected terrorists from committing terrorist crimes means that it works continuously.<sup>34</sup>

Moreover, as mentioned, before this mutation asset-freezing targeted states, which were required to commit to a specific obligation. When the states committed to this obligation, usually the asset-

<sup>27</sup> Godinho, p72.

<sup>28</sup> Mutation used in this article originally borrowed its meaning from biology, where it can be defined as sudden and spontaneous changes in the cell, this will probably be harmful. See *A Dictionary of Science* (6 edn, Oxford University Press 2010). However, in the context of this article, mutation is used to mean a significant change in the nature of the concept, not in the context of normal development, that usually leads to unexpected results.

<sup>29</sup> Bothe, p541.

<sup>30</sup> Ibid p541.

<sup>31</sup> Godinho, p77. UNSCR No.1904.

<sup>32</sup> Cian C Murphy, *EU Counter-Terrorism Law: Pre-Emption and the Rule of Law* (Hart Publishing 2012), p47.

<sup>33</sup> Bianchi, p1047; Godinho, p82.

<sup>34</sup> Koh, p81; Godinho, pp72-73.

freezing was repealed immediately.<sup>35</sup> However, now, in the case of individuals, what is the obligation that must be adhered to?<sup>36</sup> This is important because asset-freezing can be based on the suspicion that assets may be used for terrorist purposes, but suspicion is a mental state of the investigating person. Accordingly, there is no obligation for the suspected person to commit to and, therefore, the suspected person cannot, or can only rarely, be delisted.

The shift in the purpose of asset-freezing to become a preventive measure led to another change. Previously, asset-freezing was based on a concrete incident (which amounted to a breach of international peace and security by the state),<sup>37</sup> but now it is based on the possibility that a person might commit a terrorist acts.<sup>38</sup> Simultaneously, another aspect of the transformation is that the concept of asset-freezing became disconnected from a specific terrorist act; this makes it a universal campaign, not related to a regional jurisdiction, in order to suppress terrorism anywhere. The UNSC decided this by considering terrorism as a threat to international peace and security.<sup>39</sup> This gave greater powers to the use of Chapter VII.<sup>40</sup>

A global campaign has been launched through the UNSC. Where prior to 11 September 2001, every case of international terrorism had been treated separately, after it introduced significant changes to the war on terrorism,<sup>41</sup> particularly in terms of asset-freezing. The UNSC called on states to engage in compulsory co-operation and participation in a global system to combat terrorism, through adopting effective measures and the financial controls contained in the resolutions.<sup>42</sup> It started enacting general obligations on states to freeze terrorist assets,<sup>43</sup> in order to develop a new global system of justice, because ordinary criminal justice was not sufficient as it restricts the states. In addition, the law of war is inappropriate because the enemy is amorphous or undefined.<sup>44</sup> In addition, asset-freezing has become part of the new world system, where it operates on two levels: (i) international co-operation, and (ii) legislative and executive legal structure in domestic law.<sup>45</sup>

As discussed, the affect of this is that such asset-freezing cannot easily be remedied or challenged by those they affect. Changes in the nature of asset-freezing has appeared, as it has shifted from a reaction to a specific event or state of affairs, to a comprehensive collaborative compulsory proactive system of work, with long-term global effects. Its purpose has shifted from restoring international peace and security to preventing the commission of terrorism as a domestic law measure. This led to the possibility that asset-freezing can be based on suspicion of possible future incidents. In addition, the implementation of asset-freezing has been carried out involving controversial mechanisms. The UNSC has practised controversial *quasi-judicial* and legislative powers in addition to its original power, which was simply to restore international peace and security. It has done so on the assumption that terrorism is always a threat to international peace and security. The UNSC's new powers (legislative and *quasi-judicial*) can both be considered an expansion in the UNSC's competence

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<sup>35</sup> Like the case of the sanctions against Libya, under UNSCR No.748.

<sup>36</sup> Godinho, p77; also see Peter L Fitzgerald, 'Managing smart sanctions against terrorism wisely' 36(4) *New English Law Review* 957, pp981-982.

<sup>37</sup> Under the UN Charter, Chapter VII.

<sup>38</sup> See UNSCR No.1267 also UNSCR No.1373.

<sup>39</sup> The UNSC in most of its resolutions on terrorism that were issued after the beginning of the 1990s, considered terrorism as a threat to international peace and security; particularly see UNSCR No.1373 and UNSCR No.1267 and their descendants.

<sup>40</sup> Where these powers came as examples, not exclusive, giving it extensive powers, due to the stretchable formula of Chapter VII of the Charter; Godinho, p69.

<sup>41</sup> Koh, p81.

<sup>42</sup> Kern Alexander, 'United States Financial Sanctions And International Terrorism (Part 2)' 17(5) *Journal of International Banking and Financial Law* 213, p9; Also the UNSC stressed in its UNSCR No.1617, on the obligation of states to implement the Forty Recommendations on combating money laundering and the nine recommendations on combating terrorism.

<sup>43</sup> Like UNSCR No.1373; Also UNSCR No.1390.

<sup>44</sup> Helena Kennedy, *Legal Conundrums in our Brave New World, Taking Liberties Terrorism and the Rule of Law* (Sweet & Maxwell, London, 2004), p11.

<sup>45</sup> Koh, pp90-91.; Also UNSCR No.1526 [20].

The final aspect of transformation in the nature of asset-freezing is the shift to implementation outside its original context of the “International Law Level” to the national level. Where the UNSC [stresses] that Security Council sanctions measures are often implemented under national law, including criminal law where applicable,<sup>46</sup> at the same time the UNSC declared that ‘the measures referred to in paragraph [1] of this Res<sup>47</sup> are preventative in nature and are not reliant upon criminal standards set out under national law’.<sup>48</sup> Therefore, the current situation is that asset-freezing is operated from the international law domain by the UNSC’s committees, but it is also implemented in the domestic law domain. Thus, there is a difference in the legal standard between the operating level and the implementation level. This produces procedural problems that, in turn, affect the mechanics of justice within the framework of domestic law. At this point it could be claimed that applying a measure within a given legal domain, and at the same time denying the applicability of the legal safeguards related to this domain (essentially human rights protections), are contrary to the rule of law. Consequently, applying asset-freezing in domestic law and, at the same time, demanding that it is not subject to ordinary justice safeguards and standards cause damage to the human rights protection mechanisms.

All of this has led to the crystallization of an international terrorism prevention operation, beginning with pre-emptive measures, until after the trial and execution of the sentence. With regard to UNSCR No. 1267 and its descendants, asset-freezing is related to listed persons, without any link to any spatial jurisdiction (this is especially the case following UNSCR No.1390), because terrorism has become a global phenomenon.<sup>49</sup> Asset-freezing in UNSCR No.1373, and its descendants, has global affects as it imposes a general abstract obligation on all states.<sup>50</sup>

## 6. Concluding remarks

In conclusion, freezing the assets of designated persons and entities means that the asset-freezing operates in a legal order (international law) that is different from the legal order in which it is imposed (national law). There are substantial differences in legal concepts, mechanisms, procedures, accountability systems and legal safeguards between these two legal orders. Because of these differences, a gap has been created between the levels of operation and implementation. This gap affects the domestic legal order, especially in terms of the legal remedies of human rights and legal safeguards.

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<sup>46</sup> UNSCR No.1699.

<sup>47</sup> [1] which refers to the obligation to freeze assets.

<sup>48</sup> UNSCR No.1904.

<sup>49</sup> Koh, p99; Bianchi, p1046.

<sup>50</sup> Koh, p84.

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