Ivana **Rajčić**, mag. iur.

Legal Control over Decisions Taken by the United Nations Organs and Judicial Review of the Security Council Decisions

UDK: 341.123.043
341.64:341.123

Summary

This paper examines various forms of legal control of decisions taken by the U.N. Organs and the role of the International Court of Justice. Firstly, it outlines the role of the U.N. Charter itself and the role of the international law in general. It also discusses the power of member states' consent as the (de)legitimator of the U.N. activity. It then goes on to review the procedures and processes via which the exercise of the powers of the U.N. organs can be challenged by the International Court of Justice and, in particular, discusses whether Security Council resolutions can be subjected to judicial review by the ICJ. Finally, the paper indicates prospects for future development towards greater control and limitation of powers of the U.N organs.

Key words: United Nations, International Court of Justice, legal control, judicial review, Security Council

1. Introduction

United Nations, brought into life within the environment of the Second World War and on the ruins of the League of Nations, has been one of the most influential international organizations since its beginnings. And although many try to refute it, it is undoubtedly true that it has solved many international crisis and prevented larger catastrophes. In fact, it is often submitted that the U.N. Charter and decisions of its organs, especially Security Council resolutions, make the constitution of the entire international community. After the Cold War period Security Council, free from the deadlock caused by veto power of its permanent members, spread its activity and made a significant amount of high-influential and binding decisions that even included use of force. Opinions are ambiguous. Some welcome the powerful international body that can act effectively and prevent wars and other atrocities and thus fulfil its role. Others are worried about a growing power of a body dominated by only few states without any control. This essay argues that decisions of the U.N. organs are subject to various forms of legal control and that International Court of Justice has a limited, but potentially growing power of judicial review of the Security Council acts. Also, it discusses justification for legal control of the U.N. organs and possible future outcomes.

2. Decisions taken by organs of the United Nations as subjects to legal control

It is often submitted that two categories of illegal acts committed by international organization exist-ones shared with states, and that is breach of international law, and the other specific for international organisations, and those are, for example, acts *ultra vires.*[1] The distinction between Security Council as a treaty-organ mostly controlled by political means and the other U.N. organs always regarded as having a legal dimension[2] must be acknowledged. But, while acknowledging this important distinction, there is no ground for conclusion that Security Council is free to completely disregard the Charter and deny the operation under international law.[3] However, it must be admitted that it was not anticipated and that it would not be politically workable that the Council, when confronted with situations under Chapter VII, must consider all possible rules of international law before using its powers and taking measures.[4] But, further the Council is from enforcement activities the more consideration must be given to the international law and principles of justice.[5] Security Council is not a *legibus solutus* and claiming that it operates outside the law would surely cause 'denying the relevance of the law to the governance of world affairs'.[6] In a present system there are many (de)legitimators of U.N. activities[7] and they will be critically discussed below.

3. The Charter of the United Nations acting as a limitation of its powers

U.N. Charter is a constitutive document of the United Nations, providing its structure, functions, competences and procedures. As such, it is the origin of the organization and the limit to its competence at the same time.[8] Legality and constitutionality of the activities of the UN organs, especially of the Security Council, should mainly be based on interpreting the Charter.[9] In the past, numerous disputes about powers and activities discussed in UN organs or before the ICJ have been argued at the level of interpretation of the Charter.[10] As some rightly point out,[11] it does not contain any provision concerning its interpretation in general. Every organ is bound to determine its own competences and there is no organ authorized to determine it for other organs. Some would call it the 'decentralized approach to Charter interpretation'. Nevertheless, it does not seem that the Charter precludes the examination of validity of U.N. political organs[12] or that it makes the Charter less binding for the U.N. and its organs.

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1 JUDITH G. GARDAM, 'Legal Restraints on Security Council Military Enforcement Action' 91996) 17 Mich.J.Int'l L. 285, 289

2 GARDAM(n 1) 299-300

3 ibid 303

4 ibid 305

5 TETSUO SATO, 'The Legitimacy of Security Council Activities under Chapter VII of the Charter after the End of Cold War' in Jean-Marc Coicaud and Veijo Heiskanen (eds), *The Legitimacy of International Organizations* (United Nations University Press, 2001) 323

6 ANDREA BIANCHI, 'Assessing the Effectiveness of the UN Security Council's Anti-Terrorism Measures: The Quest for Legitimacy and Cohesion' (2006) 17 E.J.I.L. 881, 885

7 SATO (n 5) 338

8 LUIS MIGUEL HINOJOSA MARTINEZ, 'The Legislative Role of the Security Council in its Fight against Terrorism: Legal, Political and Practical Limits' (2008) 57 I.C.L.Q. 339, 344

9 SATO (n 5) 329

10 ibid 310

11 ibid 311

12 BERND MARTENCZUK, ,Security Council, the International Court and Judicial Review: What Lessons from Lockerbie, (1999) 10 E.J.I.L. 517, 526

One should never forget that U.N. organs are intergovernmental organs deriving the powers from the Charter and thus abided by its terms which 'impose substantive limits on its actions'.[13] Actually, it is quite disturbing how the Council rarely indicates the Charter provision on which it has founded its acts.[14] Thus, it must be accentuated that the Council may not create obligations that have no basis in the Charter and that it does not have a 'blank-cheque' to act.[15] In fact, according to the *ultra vires* doctrine it should keep itself within the powers vested to it under the Charter, on which Member States have accorded.[16] Charter is considered to be the legal foundation of the Council's authority.[17]

In that regard, one must think of its provisions which expressly provide legal limitations. The most important one is contained in Article 24[18] which states that the 'Security Council shall act in accordance with the Purposes and Principles of the United Nations' and those are proclaimed in Articles 1 and 2.[19] Although there is certain weight in claims that Articles 1 and 2 laid down provisions which are too general and vague in its nature and thus inappropriate for deriving limitations to the Council's activities[20], the argument cannot be accepted. Even the same author in the same article claims that 'imprecision and vagueness are general features of law' and that 'constant and renewed attempts to clarify the meaning' should be made.[21] For many scholars, obligation to act in accordance with the purposes and principles of the Charter is thus regarded as a substantive limitation of the powers of the Security Council.[22] Above all mentioned, Article 25 of the Charter expressly pronounces that decisions of the Security Council which member states agreed to accept and carry out should be 'in accordance with the present Charter'.[23]

Evidently, the Security Council is not a sovereign organ and its powers are conferred on it by the state members and through the Charter,[24] however hard it is to identify the limits of those powers. And Security Council is 'after all, a treaty body dependent on treaty provisions'.[25] Member states did not intend to give it a *competence de la competence*.[26] Given the present dubious situation regarding judicial review, it is plausible to express a wish that the ICJ engages more extensively in the interpretation of the Charter.[27] Maybe the framework is too weak and the formal amendment would never happen, but it articulates certain main criteria and is a solid ground for judging the legality and constitutionality of U.N. measures.

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13 NATHAN RASIAH, 'University of Cambridge: The International Court of Justice Should Not Have the Power to Review UN Security Council Resolutions under the Aegis of Chapter VII, An Article Drawing, Inter Alia, from the Scope of Judicial Review in the United Kingdom International Law Competition' (2006) 2 CSLR 54, 57

14 Professor Sir DEREK W. BOWETT ‚Judicial and Political Functions of the Security Council and the International Court of Justice' in Hazel Fox (ed), *The Changing Constitution of the United Nations* (British Institute of Comparative and International Law, 1997) 79

15 ibid 82

16 ibid 86

17 MARTENCZUK (n 12) 536

18 Article 24(2) of the UN Charter

19 Articles 1 and 2 of the UN Charter

20 MARTENCZUK (n 12) 537

21 ibid 543

22 DAPO AKANDE, ' 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' (1997) 46 I.C.L.R. 309, 316

23 Article of the UN Charter 25

24 Akande (n 12) 315

25 GARDAM (n 1) 297

26 MARTENCZUK (n 12) 536

27 SATO (n 5) 339

4. Member States consent as legal control

It is undoubtedly one of the sources of legal control, but it is also possible to go really far by claiming that the 'Council's authority exclusively depends on its acceptance by the member states'[28] and that acceptance could only flourish if the Council does not put itself above the Charter.[29] Actually, state consent is considered as 'only origin of the obligations imposed by international legal system' and the Charter as being built on that 'cornerstone'.[30] To go even further, it is possible to claim that even the international legal order could be subverted if state consent was put aside and the creation of new international law could start.[31] Indeed the principle of sovereignty is the 'cornerstone of international law, a consensual legal order'.[32] And although there is a bigger distance between state consent and their obligations in the acts of the international organization than in the case of international treaties and customary international law, state consent should not be relativized[33] and organs should always act within the framework of their competences and not regarding the time which passed and its own creativity.[34] States are not obliged to comply with decisions that are brought *ultra vires* and they can use all the measures provided by the Charter to defend its sovereignty.[35] Organs should self-restrain itself because of the respect of the principle of sovereignty.[36]

To conclude, member states are legitimators of the U.N. activity, ones that should always question whether the measure is in accordance with the Charter and thus whether it is (un)lawful.[37] Some even claim that 'the ultimate test of the legitimacy of the SC's action remains the level of acceptance of its practice by the UN Member States'.[38] This is an argument that inevitably must be acknowledged by realists also. It is impossible for the U.N. to impose sanctions and collective enforcement measures without participation of sovereign states which actually bring decisions into reality. U.N. does not have any available means such as army, people and equipment to do it by itself. Some argue that the 'execution and effectiveness depend crucially on the goodwill of the members, which depends, in turn, on their conviction of the legality of the Council resolutions'.[39] In fact, it is even submitted that the implementation of the sanctions regime and the obligations laid down in resolutions regarding anti-terror measures of the Council has encountered enormous difficulties as a result of discrepancy between various domestic enforcement machineries and available resources, including occasional lack of political will.[40] In any event, states are under obligation to make sure that they do not violate international law.[41] It is even considered that it would make the implementation process stronger since the anti-terror measures would be

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28 MARTENCZUK (n 12) 536

29 ibid 535

30 MARTINEZ (n 8) 339

31 ibid 340, 344-345

32 ibid 348

33 ibid 354

34 ibid 355

35 ibid 355

36 ibid 348

37 SATO (n 5) 311

38 BIANCHI (n 6) 887

39 STEFANIE VALTA, 'University of Heidelberg: The International Court of Justice (ICJ) Should Have the Power to Review UN Security Council Resolutions Adopted under the Aegis of Chapter VII of the UN Charter - An Article Drawing, Inter Alia, from the Scope of Judicial Review in Germany International Law Competition' (2006) 2 CSLR 62, 69

40 BIANCHI (n 6) 903

41 ibid 904

perceived as legitimate.[42] Overall, state consent is a foundation of international legal order which, if attacked, could provide 'collapse of whole edifice'.[43]

5. International law and *ius cogens*

Being an international organization based on constitution created by the agreement of member states the U.N. is undoubtedly subject of international law and bound by it.[44] To that extent, its organs are subject of international law.[45] But, while it is possible to disregard ordinary norms of international law (*ius dispositivum*) if that was the intention of the member states evidenced in its constituent treaty[46], it peremptory norms (*ius cogens*) cannot be disregarded and the states also cannot derogate from that inherent limitation of any organization's powers.[47] Not only the peremptory norms are embodied in the U.N. Charter and they apply to treaty-based organs through the law of treaties, but they also have a direct and autonomous effect on decisions of the organs.[48] To put it more precisely, unilateral acts or measures or actions of international organisations are bound by peremptory norms as the organization itself.[49] Arguments that the Council, being classified as a political organ, is thus exempt from legal constraints, simply cannot be accepted.[50] Violation of *ius cogens* should be regarded as an attempt to establish a new legal regime[51] and acts contrary to it as *ultra vires*,[52] either by express clauses or by the manner of exercise of rights and duties.[53] It is certainly unacceptable to use Article 103 as a justification for violation of peremptory norms. Article states that Charter obligations prevail over obligations of members under other international treaties,[54] and those make only a part of international law. And even if the Charter obligations prevail over general international law, 'it would still be a treaty provision and hence be unable to prejudice the operation of ius cogens'.[55] Under general international law regime invalid acts should be considered void *ab initio* and such voidness is itself part of *ius cogens.*[56]

Not less important to discuss are possible means of challenging acts which violate peremptory norms. Protest is one of the most obvious. It is not a necessary requirement of course, but it may induce Security Council to reconsider its decision. Also, there is the refusal to carry out decisions since member states are also bound by *ius cogens* and thus actually obliged to refuse.[57] Obligation to carry out Council decisions under Article 25[58] cannot prevail over obligation of the Security Council to bring decisions that are in accordance with the Charter and thus with the *ius cogens*. And, last but not the least is the

42 ibid 917

43 MARTINEZ (n 8) 359

44 AKANDE (n 22) 320

45 ibid 320

46 MARTINEZ (n 8) 346

47 ALEXANDER ORAKHELASHVILI, 'The Impact of Peremptory Norms on the Interpretation and Application of United Nations Security Council Resolutions' (2005) 16 E.J.I.L. 59, :Martinez (n 8) 346

48 ibid 67

49 ORAKHELASHVILI (47) 69

50 ibid 61

51 ibid 63

52 ibid 68; MARTINEZ (n 8) 322

53 ORAKHELASHVILI (47) 68

54 Article 103 of the UN Charter

55 ORAKHELASHVILI (47) 69

56 ibid, 83

57 ibid 85

58 Article 25

power of judicial review by the ICJ. Although it is going to be discussed in details below, it is important to state that in 'effects of *ius cogens* it is not crucial, as it would have only a declaratory and not a constitutive effect in this context because absolute invalidity does not depend on institutional determinations'.[59] Overall, peremptory norms have special role in the international legal system and its violation could and should be 'morally and ethically repugnant in the eyes of international community'.[60]

There are some serious claims that the Security Council actions under Chapter VII of the Charter are not bound by general international law. And while it is possible to accept that point of the view since the Council does enjoy a wide discretion and is not required to examine the legal position of the parties in the dispute,[61] it is not possible to accept it regarding *ius cogens* under any circumstances. There is no weight in the argument that the Council is, when dealing with an international crisis, not obliged to examine whether one party has been a victim of an illegal use of force and thus legally using force which is otherwise forbidden under *ius cogens*.[62] If the Council is confronted with deciding in so many complex and hard situations about those crisis where he must determine about such vague concepts unknown before such as 'threat to international peace', it is not impossible to decide about illegality of use of force, especially having in mind there are some clear legal guidance on the topic. It is truly inconceivable to imagine Security Council violating prohibition of slavery or genocide justified by maintaining international peace and security. Interestingly, the same author smartly concludes that 'there is no contradiction between the rule of law and international peace and security'.[63]

Human rights law, traditionally regarded as international law, imposes limitations as well. It is true that 'the whole tenor of the Charter is to promote the protection of human rights'[64] and it would thus 'be anachronistic if the Security Council was empowered to violate them'.[65] Promotion and respect for human rights is one of the Purposes of the UN[66] which states are bound to accept under the Charter[67] and the obligation for its universal respect and observance is expressly proclaimed in Article 55 of the Charter.[68] But there is always a question about specificity, especially whether any human rights norms are peremptory. There is no need for discussing the nature of human rights theory, but we must make certain boundaries. Some rightly pointed out to the International Bill of Rights, given the fact that it was created and adopted by the U.N. activity. But clearly not every norm in it is *ius cogens*. So should we claim that it is the rights non-derogable under the treaties that make them peremptory? Since *ius cogens* cannot be made by simple stipulation under one of the treaties, we must accept that it is 'crucial whether a given right is 'derogable by nature: whether it protects the community interest beyond individual state interests'.[69] Following that approach, we must also reject that rights derogable under treaties could not be *ius cogens* and consequently avoid certain unjust results. Indeed, how could one claim that right to fair trial and due process or right to personal liberty are not peremptory, to name just a

59 ORAKHELASHVILI (47) 86
60 ibid 88
61 MARTENCZUK (n 12) 545
62 ibid 546
63 ibid 547
64 AKANDE (n 22) 323
65 ibid 323
66 Article 1
67 Article 24(2)
68 Article 55
69 ORAKHELASHVILI (47) 65

few. Question whether that criteria makes all human rights peremptory[70] should be left for another discussion. Generally, in the area of human rights so-called naming and shaming strategy can be very effective,[71] being understood as intensive public and media pressure.

There is another legal limit to the Council's discretionality-principle of proportionality and necessity. In fact, those 'twin requirements'[72] have long been determinants of the legitimacy of the use of force[73] and there is no reason to conclude that they are limited only to self-defence.[74] They should be regarded as general principles of law that govern all uses of force.[75] There are undoubtedly derived from the Charter[76], but they played a very modest role in practice[77]. Articles 39, 41 and 42, when read together, provide a yardstick for determining the application of proportionality,[78] regarding that Security Council may use force if measures taken under Article 41[79] would be inadequate or proved to be inadequate[80] and in order to 'restore international peace and security'.[81] The same articles provide treaty test for necessity which is mentioned explicitly.[82] Many times, its evaluation depends on political considerations without any legal control and with a high margin of appreciation.[83] Debate about whether principles of international law are legitimate sources of law is too complex and broad for this discussion. However, application of these principles to the use of force by Security Council is regarded as 'warranted by elementary considerations of humanity'.[84] After all, states have 'painstakingly' developed humanitarian principles and rules of conduct in armed conflict and it would be unacceptable to tolerate the Council operating outside those constraints.[85]

6. International Court of Justice and power of judicial review

Judicial review is regarded as probably the most important (de)legitimator of the Council's activities. Question of whether Security Council resolutions can be subjected to judicial review by the Court remains of 'crucial importance to the constitutional system of the United Nations'.[86] If its aim is to prevent abuse and ensure a proper exercise of power, it is one of two fundamental mechanisms for achieving that purpose at national level and thus potentially applied to the U.N. system, joint with the separation of powers. [87] Of course, power of judicial review has not been expressly given to the Court neither by the Charter nor by the Statute of the Court. However, this question could be approached based on the meaning of judicial review. Thus, if the judicial review is understood as 'a reference

[70] ibid 66
[71] BIANCHI (n 6) 911
[72] GARDAM (n 1) 305
[73] ibid 305
[74] ibid 305
[75] ibid 305
[76] ibid 307
[77] MARTINEZ (n 8) 349
[78] GARDAM (n 1) 307
[79] Article 41 of the UN Charter
[80] Article 42 of the UN Charter
[81] Article 39 of the UN Charter
[82] GARDAM (n 1) 310
[83] MARTINEZ (n 8) 349
[84] GARDAM 312
[85] GARDAM 319
[86] MARTENCZUK (n 12) 518
[87] SATO (n 5) 325

to specific means or procedures by which decisions of the U.N. political organs could be subjected to the scrutiny of the Court'[88] it could be claimed that the power of judicial review has not been vested to the Court. But, the Court has been expressly given a competence to rule in contentious cases and to give advisory opinions[89] and has exercised its power in numerous cases. Consequently, it is deemed that it has a significant power of 'incidental judicial review', especially when judging the legality of the Council's acts, when those are bearing on a case before the Court, however implicit it is.[90] However, some argue that it is nevertheless a very limited mechanism.[91] Of course, the drawbacks are obvious: competence of the Court depends on the acceptance of the parties, judgment has an *inter partes* effect only, it does not quash the act for all purposes and, finally, it cannot be predicted that it will actually tackle the question of validity or legality.[92] The same could be said for advisory opinions which do not have any binding force at all. But one must consider that it must be admitted that judgments of the Court are generally respected and there are small chances they would be taken lightly by the U.N. organs and international community.[93] If the Court really does pronounce that the Council's resolution is illegal, it would probably undermine the legitimacy of the Council decision and mobilise world opinion in support of certain cause(s).[94] It could serve to the states by giving them courage not to comply with the resolution and even lead the Council to reconsider its decision.[95] Reaction to the arms embargo in Bosnia is a good example of the potential effect.[96]

Anyhow, it is more beneficial and less dangerous to judge the legality of the Council's decision by one court in a centralized and orderly system than allowing the process to be upheld by every member states for itself[97] since it could lead to chaos and a complete legal and political uncertainty. It could even give member states an 'easy excuse for not complying with their obligations under the Charter'.[98] Actually, judicial review could prevent it by legitimizing the Council's decisions and thus legitimize the constitutional order and strengthen international law.[99] It could also enhance the effectiveness of the U.N. collective security system since its success is mostly based on 'espousal of ideas and principles', especially of acting under the rule of law, and not on threat of the U.N. use of force.[100]

One could ask why would judicial review, especially the so-called full-fledged one,[101] be unwelcome and regarded as inappropriate? It may be true that there is a 'risk of upsetting the delicate balance stuck by the Charter' and thus endangering the Council's responsibility to deal with the threats to international peace and security.[102] Or that the Council members which finally became free from the restraints of Cold War do not want their decisions been blocked again, but this time by the Court?[103] Although the Council is probably the only body in the international legal order that could prevent a major world conflict and

88 MARTENCZUK (n 12) 526

89 Article 94 and 96 of the UN Charter

90 MARTENCZUK (n 12) 527

91 SATO (n 5) 337

92 BOWETT (n 14) 77

93 MARTENCZUK (n 12) 528

94 AKANDE (n 22) 335

95 ibid 336

96 ibid 336

97 ibid 336

98 MARTENCZUK (n 12) 535

99 JOSE E. ALVAREZ, 'Judging the Security Council' (1996) 90 1 AJIL 1, 4

100 ibid 31

101 SATO (n 5) 339

102 RASIAH (n 13) 54

103 GEOFFREY R. WATSON, 'Constitutionalism, Judicial Review and the World Court' (1993) 34 Harv.Int'l L.J. 1,38

in fact has already successfully dealt with some serious international crisis, nothing can justify arbitrariness when human lives are at stake. And the Council is indeed dealing with human lives and basic human rights. The 'state of emergency argument' should also not be accepted no matter how exceptional and emergent the situation is. Chapter VII powers are themselves an exception so it would lead to the creation of 'exception of an already existing exception'.[104]

Significant concern could be the 'anti-majoritarian problem', manifested as 'the (i)legitimacy of unelected judges', although less obvious[105] and clearly more democratic than in the U.S. That is because no state is guaranteed a place, each judge has to be from different states and judges' tenure is time-limited.[106] Another valid concern is the question of the constitution of the U.N. Is the Charter primarily a treaty or a constitutive document and could it still, even not being an entire U.N. Constitution, be a 'viable starting-point for the Court's review of an act by another U.N. organ'?[107] Whatever the conclusion, it must not be forgotten that it is generally accepted that the international law binds the U.N. organs. Even more, peremptory norms are absolutely binding, without any exception. It is perfectly natural and logical that the same could form a solid ground for question arising before the ICJ in cases with potential judicial review effects. Anyhow, in current terms, even a more limited scope of review, the one which looks only to the text of the Charter and peremptory norms of the international law,[108] would be satisfactory.

Judicial role could also potentially serve as a 'checking function' of the Council,[109] which is another controversy about judicial review. The powers of the main U.N. organs were not allocated to them according to the traditional understanding of separation of powers in national legal orders[110] and the system of checks and balances was not built in or conceived by the drafters of the Charter or emerged in subsequent practice.[111] But the doctrine of separation of powers could be much easily transposed to the international system if a more simple and intuitive approach was adopted: 'power must not be concentrated in one entity and must be subject to some control'.[112] That is almost unimaginable without some degree of judicial involvement.[113] No matter how worried we are about the possible 'ineffectiveness' of the Council measure, too much of one power is never welcome because of gross potentiality of misuse. Constraint in the form of another power is necessary for democratic governance.

Could we accept the argument that decisions of the Council, being 'inherently politically sensitive determinations', are 'not suitable for judicial review'[114] and that Article 39 determinations are final and non-reviewable?[115] It was expressly stated by Judge Jennings[116] in Lockerbie, and also emphasized in Namibia case[117] that we cannot accept that point of

[104] BIANCHI (n 6) 891-892

[105] WATSON (n 103) 30

[106] ibid 31

[107] ibid 33

[108] ibid 38

[109] ibid 44

[110] BIANCHI (n 6) 910

[111] ibid 911

[112] ibid 911

[113] ibid 911

[114] RASIAH (n 13) 57

[115] AKANDE (n 22) 338

[116] Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United Kingdom) diss. Op. Judge ad hoc Jennings, 10

[117] Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory opinion, ICJ Reports (1971) 16

view. It is submitted that 'could not be reconciled with the Charter framework and practice[118] and that 'every dispute brought before the Court is justiciable'.[119] Maybe there are no clear legal standards or any guidance on the question of what constitutes 'threat to the peace' or 'breach of the peace'[120] but is it not the Court the one which should seek to find the meaning of concepts contained in constitutive and legal documents related to cases before it. Also, it must be accentuated that neither the Charter nor its drafting history provide evidence for the unlimited discretion of the Council under Article 39 and there was clearly no intention of member states to constitute a sort of world government in the form of the Council.[121] In addition to the argument it must be accepted that there is no rule which could prevent the Court from dealing with the same proceedings simultaneously with the Council and the fact that Article 12, which expressly prevents the General Assembly from parallel proceedings, supports the conclusion that it was not predicted to prevent the Court[122] since it would also be expressly proclaimed in the Charter.

The judicature of the Court gives some very good reasons to believe that the Court has some power of judicial review, however limited and undeveloped. There are three crucial cases that could support the view.

Decision in Lockerbie case concerning interim measures brought by Libya against United Kingdom and the United States[123] is sometimes regarded as 'the most important and jurisprudentially rich of any handed down by this Court since the end of the Cold War'[124] and as having 'more said than was absolutely necessary to deny the Libyan request for provisional measures'.[125] It is even compared to a famous decision of the U.S. Supreme Court, *Marbury v. Madison*. Since a complex analysis is required for comparison, suffice it to say that both decisions contain some additional judicial thinking focused on the potential of judicial review[126] and that both the U.S. Constitution and the U.N. Charter do not contain explicit provision for the role of these courts.[127] However, the U.S. Supreme Court did become an extremely powerful court with a very developed judicial review role that could have clear implications for potential future development of the ICJ. On the other hand, some describe the judgment in Lockerbie case as extremely cautious[128] and having, as a consequence, questions of judicial review of the Council resolutions dealt with only by implication or completely open.[129] And while the majority opinion avoided confrontation with the Council, the dissenting and concurring opinions suggest that the opposite is possible in the future.[130] Of course, it is completely different to contemplate about topic from the European point of view since it is an area where it is highly unusual for courts to practice judicial review if it is not expressly vested to them by the constitution or other legislative acts. Thus the European opinion is more inclined to the view that the Charter actually forbids

118 ORAKHELASHVILI (47) 62

119 MARTENCZUK (n 12) 529

120 AKANDE (n 22) 338

121 ibid 542

122 ibid 532

123 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), Request for the indication of Provisional Measures (**Order of 14 April 1992) ICJ Report 1992, 114**

124 THOMAS M. FRANCK, 'The "Powers of Appreciation": Who is the Ultimate Guardian of UN legality?' (1992) 86 AJIL 519, 519

125 ibid 519

126 ibid

127 ibid 520

128 MARTENCZUK (12) 525

129 ibid 525

130 WATSON (n103) 2-3

the judicial review.[131] Being that as it is, no one could deny that, especially regarding U.S. legal system, judicial review could exist without being expressly provided in constitution or legislature. And the Court and the U.N. as a whole have already creatively interpreted the Charter, creating doctrines and powers without an explicit Charter license.[132]

Also, what could be deemed as more important in searching for a justification of the judicial review is not a lack of express power, but a lack of express prohibition from exercising it.[133] In fact, in most countries where judicial review is not expressly forbidden it is actually exercised and declared so by the judges.[134] If it is not exercised it is usually when it is expressly forbidden.[135] It is perfectly logical since the judge is bound to choose the principle which has a higher status when confronted with two conflicting principles of law.[136] If the Court was asked to choose between the Security Council resolution and the Charter provision, it is bound to choose the Charter which is a 'higher law'.[137]

Some even claim that the Court adopted a rather limited power of judicial review in 1962 in *Certain Expenses* case endorsing a standard of a presumption of validity.[138] Indeed, the Court stated that 'when the Organization takes action which warrants the assertion that it was appropriate for the fulfilment of one of the stated purposes of the United Nations, the presumption is that such action is not ultra vires'.[139] That clearly indicates that the Court could consider the action of the Organization as *ultra vires* and possibly might decline to give effect to it.[140]

Another important case is *Namibia*[141]. Although being only an advisory opinion, the Court considered the validity of the acts of other U.N. organs, which is inconsistent with the view that it has no power of review.[142] As Judge Onyeama state in his dissenting opinion: 'I do not conceive it as compatible with the judicial function that the Court will proceed to state the consequences of acts whose validity is assumed, without itself testing the lawfulness of the origin of those acts'.[143] Judge de Castro, concurring, even expressed opinion that 'the Court, as a legal organ, cannot co-operate with a resolution which is clearly void, contrary to the rules of the Charter, or contrary to the principles of law'.[144]In fact, in the past the Court has been more daring with the teleological interpretation when giving advisory opinions, because it felt more free when confronted with an abstract question in a non-binding context.[145] Of course it is not implied that the Court would do the same in contentious cases, especially giving the fact that the organ's acts would be challenged without its consent.[146] That is why the decision in Lockerbie is even more important-it clearly shows that the Court is ready to exercise the power of judicial review even when it is not implicitly or explicitly

131 ibis 6

132 ALVAREZ (n 99) 15

133 AKANDE (n 22) 326

134 ibid 326

135 ibid 326

136 ibid 326

137 ibid 332

138 WATSON (n 103) 17

139 Certain Expenses case, 1962 I.C.J., 168

140 WATSON (n 103) 16

141 Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory opinion, ICJ Reports (1971) 16

142 WATSON (n 104) 20

143 Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory opinion, ICJ Reports (1971) 16, 143-144

144 Ibid, de castro, J., concurring, 180

145 ALVAREZ (n 99) 8

146 WATSON (n 103) 22

soaked by an organ of the U.N.[147] Direction points towards a broader acceptance of judicial review.[148]

In conclusion, judgements do not indicate that Security Council operates without any legal restraints. [149] On the contrary, it is surely not controlled exclusively by political means.[150] Judicial review could, in fact, 'signal a greater constitutionality of the international system for maintaining peace and security'.[151] It does not develop fully immediately after arrival, but 'incrementally, unannounced and, sometimes, unnoticed'.[152]

Also, it is perfectly plausible to develop constitutional role of the Court as a court of review when solving advisory and contentious cases and thus develop as the principal legal organ of the U.N., but with an equal, not superior status to the other organs.[153] The Court's decisions could thus at least be influential by its persuasiveness and expected to be respected.[154] In the present international legal order that would be a refreshing change and a good start for creating a more democratic and humanitarian international legal system with a more appropriate balance, if not separation of powers.

However, even if we accept that some form of limited judicial review exists in the U.N, system, it still does not mean that the doctrine of judicial supremacy exists or could potentially develop. In fact, the decision in *Lockerbie* case did not endorse it in a way that its decision would be binding and final on all states and U.N. organs in the future[155] but it does not mean that the member states could not create another solution in the future. Is it the 'Jeffersonian' doctrine according to which the decision of the Court must be respected only in the case that it solves but not necessarily in the future[156] more appropriate? Currently, and for the start, surely it is. Potentially, it might 'begin to resemble the limited judicial supremacy'[157] because the judgments could be 'highly persuasive' and thus eventually 'seen as final'.[158] It is the model that fits better with the 'decentralized system' of international law[159] and, more importantly, with the Charter and with the negotiating history.[160] Surely, it is less likely to provoke controversy among member states of the Council.[161] Undoubtedly, it is appealing to the developing countries[162] since they are gravely unrepresented in the Council.

There is another important remark that has to be made. The Court is not an only institution within U.N. umbrella that could perform a function of (de)legitimation of the Council's actions. In the future the other UN organs or organizations might act more courageous in seeking advisory opinions of what lies within their competence.[163] The General Assembly challenge of expenditures for the Council's Tribunal for war crimes in former Yugoslavia

147 ibid 27
148 ibid 27
149 GARDAM (n 1) 302
150 ibid 321
151 AKANDE (n 22) 312
152 ALVAREZ (n 99) 7
153 NIGEL D. WHITE, '*The Law of international organisations'* 2nd ed. (Manchester University Press, 2005) 210
154 ibid
155 WATSON (n 103) 28
156 ibid 39-40
157 ibid 42
158 ibid 43
159 ibid 42
160 ibid 43
161 ibid 43
162 ibid 44
163 ALVAREZ (n 99) 8

is a good example of (de)legitimating by a rival U.N. body.[164] The purpose could even be achieved by subsidiary organs establish by the Court Council itself, and it already occurred within Yugoslav war crimes Tribunal which have attempted to legitimize the Council's decision to establish it both by the trial and appellate chambers.[165] Although subsidiary bodies were surely not created for that purpose, they are surely more impartial and apolitical than the Council.[166] It is even submitted the indirect challenges are possible through *ad hoc* or other arbitrations , before other institutional fora and even before national courts.[167] It could even be argued that those are more neutral than the Court.[168] In any event, it is true that 'if the rule of law depends ultimately on the ICJ and its meagre caseload as "last-resort" defender", it is in trouble'.[169]

7. Prospects for future development

In a world which is so complex being fragmented and interconnected at the same time more than ever, it is hard to foresee anything with high amount of certainty. However, some basic premises could be derived. If the Court is to move towards greater power of judicial review, it certainly cannot be achieved only by strengthening its role by the Court itself . International legal system is dominated by states[170] and bigger changes could only be made by the states. In the U.N. system, that would require formal amendment of the Charter, but the same is hardly to expect in the near future because of the present disbalance of powers and interests. But one change could be expected and would certainly enhance judicial review process. Giving *locus standi* for private individuals to challenge the validity of acts , although achieved within EU legal system, is hardly to expect. But a much more realistic outcome would be the amendment which would allow member states to challenge to challenge the validity of the acts of UN organs before the Court.[171] Majority of the member states would agree much easier on the topic because it certainly gives them more powers in international arena and prevents biggest states of having too much power. It is true that present balance of powers within U.N. does not represent any more a real balance of power in the contemporary world and sooner or later international community, especially if confronted with strengthening of the Security Council, will try to make changes towards greater control and limitation of powers of the U.N.

8. Conclusion

Question of legal control of the decisions of U.N. organs and the ICJ role related to Security Council resolutions is evidently complex and dubious. This essay strongly supports the view that, although often implicit and limited in its essence, there are numerous forms of legal control with the potential for development. Reality of international relations does require fast and effective decision making by a powerful organ, but it also requires certain control imposed on it by another power. Legal control cannot and should not be exercised as a mere copy of national systems, but it should possess at least some power in order to protect the humanity of the possible arbitrariness and consequent violations of international

[164] ibid 10
[165] ibid 10
[166] ibid 11
[167] ibid 11-12
[168] ibid 12
[169] ibid 19
[170] WHITE (n 153) 216
[171] ibid

law and its basic principles which could endanger human rights and even human rights. When the stakes are so high, no power should be uncontrolled no matter how much the world sometimes desperately needs it. In present circumstances, any possible change could come by the ICJ itself if it decides to take the path of the more creative reasoning and bold judgements. More importantly, it could come from the consensus of member states which should recognize its inevitability and positive impacts it could have for international community.

Pravna kontrola odluka koje donose tijela Ujedinjenih naroda i sudska kontrola odluka Vijeća sigurnosti

Ovaj rad analizira različite oblike pravne kontrole akata koje donose organi Ujedinjenih naroda i ulogu Međunarodnog suda pravde. U prvom dijelu naglašena je uloga Povelje Ujedinjenih naroda i međunarodnog prava općenito. Također, u radu je raspravljena i ovlast pristanka država članica kao jednog od (de)legitimatora aktivnosti Ujedinjenih naroda. Nadalje, obrađuje se i postupak kojim se ovlasti organa Ujedinjenih naroda podvrgavaju kontroli Međunarodnog suda pravde te se pogotovo raspravlja o mogućnosti podvrgavanja rezolucija Vijeća sigurnosti sudskom nadzoru. Zaključno, u radu se naglašavaju izgledi za budući razvoj u smjeru veće kontrole i ograničenja ovlasti organa Ujedinjenih naroda.

Ključne riječi: Ujedinjeni narodi, Međunarodni sud pravde, pravna kontrola, sudski nadzor, Vijeće sigurnosti