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The International Court of Justice Should Not Have the Power to Review Resolutions Adopted by the Security Council Under Chapter VII

I. Introduction

Chapter VII of the Charter of the United Nations (the 'Charter') forms the central pillar of the edifice intended to ensure that the world never revisits the horrors of the two World Wars of the previous century. It entrusts to the Security Council the responsibility for determining the existence of any threat to the peace, breach of the peace or act of aggression and for responding accordingly through a variety of means, including, if necessary, measures involving the use of force (Art. 42). Read in conjunction with Articles 2(4) and 2(7) this completes the attempt of the Charter to establish a virtual monopoly on the threat or use of force in international relations, save the limited exception for self defence (Art. 51.)

The International Court of Justice (the 'ICJ') was established as the principal judicial organ of the United Nations in order to settle legal disputes submitted to it by states in accordance with international law and to give advisory opinions on legal questions referred to it by authorised organs. Alongside the Security Council, it is the other organ of UN with the authority to issue binding orders, but its authority is predicated on the consent of the states involved, which can be rendered in advance through acceptance of compulsory jurisdiction of the court in accordance with Article 36(2) of the Statute of the ICJ.

This essay will argue that the ICJ should not have the power to review UN Security Council Resolutions under the aegis of Chapter VII. While arguments in favour of review may purport to be committed to the rule of law in international relations, it is in reality misconceived. It fails to understand why the Charter encompasses the decision-making procedure that it does for dealing with international security threats.

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Furthermore, it overlooks and neglects the real challenge to the rule of law facing the international community at present.

II. Preliminary Clarifications

Before embarking on a defence of this proposition, a few preliminary clarifications are in order. Firstly, the proposition reads: The ICJ *should* not have the power to review UN Security Council Resolutions under the aegis of Chapter VII. In the word 'should', this essay will read the implicit assumption that the ICJ does not have that power at present, thus the present argument concerns whether the ICJ should be given such a power through amendment or revision of the UN Charter. An alternative possible reading of the proposition, that would command some academic support, is that the ICJ already possesses an inherent, though as of yet unexercised power of judicial review that it could recognise through a *Marbury* v *Madison*[1] type decision.[2] During the United Nations Conference on International Organisations during which the Charter was drafted, the amendments proposed by Belgium to provide the Court with an explicit power of judicial review were rejected.[3] Since then the Court itself has stated explicitly that it 'does not possess powers of judicial review or appeal' in respect of decisions of the Security Council.[4]

The second preliminary point concerns the meaning conferred by the word 'review'. This essay will take 'review' to refer to 'direct' or 'principal' review – the power to examine a Resolution and "declare null and void those acts that it finds contrary to law".[5] It is accepted that the ICJ possesses what is sometimes described as a limited power of 'incidental review'. Security Council Resolutions form part of international law, and so in the discharge of its judicial function in contentious cases the ICJ may have to determine the applicability, effect and *validity* of a Security Council Resolution, as it would have to in respect of any particular rule of international law arising

1 *Marbury* v. *Madison* [1803] 5 U.S. (1 Cranch) 137.

2 The argument could then proceed that though the ICJ has a power to review Security Council resolutions generally, it should develop a doctrine to refrain from reviewing resolutions under the aegis of Chapter VII due to their intrinsically political nature, *qua Baker* v. *Carr* [1962] 369 U.S. 186. For an argument along such lines, see *M. David*, Passport to Justice: Internationalizing the Political Question Doctrine for Application in the World Court, Harvard International Law Review 40 (1999), p. 81.

3 *F. O. Vicuna/C. Pinto*, Peaceful Settlement of Disputes, Prospects for the 21st Century (Revised Report Prepared for the Centennial of the First International Peace Conference), in: *F. Kalshoven* (ed.), The Centennial of the First International Peace Conference, Reports and Conclusions, 2000, p. 389.

4 *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South-West Africa) notwithstanding Security Council Resolution 276 (1970)*, ICJ Reports 1971, at para. 89.

5 *K. Skubiszewksi*, The International Court of Justice and the Security Council, in: *V. Lowe/M. Fitzmaurice* (eds), Fifty Years of the International Court of Justice, 1996, p. 623.

in the case before it.[6] This may in certain circumstances involve determining whether a particular Resolution is *intra vires.*[7] Such a decision however will only be binding on the parties before the court. This incidental power can be distinguished from a general power of judicial review.[8]

It is also accepted that the ICJ may have the power to pronounce on the legality of Security Council Resolutions when rendering advisory opinions. Although advisory opinions may result in significant political and legal consequences, they are consultative and strictly non-binding.

Those caveats notwithstanding, it is submitted that the normative force of many of the arguments put forward in this essay may be transferable to the parallel issues alluded to in these preliminary points. Though the main argument here is that an explicit power of direct review should not be introduced, it also supports the contention that the ICJ should avoid pronouncing on the legality of Security Council Resolutions passed under Chapter VII in the course of contentious proceedings or when exercising its advisory opinion jurisdiction. Having cleared the ground to some extent, it is possible now to continue to consider the question in hand.

III. The Case for Review – The Rule of Law?

The end of the Cold War saw the deadlock that had hitherto virtually paralysed the Security Council lifted. Subsequent years heralded a significant increase in activity, both in the sense that the Security Council has been able to respond to a great number of situations around the world, and in terms of the diversity of its responses – it has passed Resolutions of a nature and breadth previously uncontemplated. In many eyes this was a welcome development which saw the Security Council finally fulfilling its destined role. Unsurprisingly though, much of the activity of Security Council courted fierce controversy. In broad terms, the political criticisms that have been levelled include that the Council have acted arbitrarily, selectively, in line with the priorities of the big powers, or on other occasions, that they have failed to act or acted ineffectively. There have also been allegations based more specifically on legal grounds: that the Council has acted beyond its powers, in abuse of its powers, or in contravention of international law.

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6 *D. Schweigman*, The Authority of the Security Council Under Chapter VII of the UN Charter: Legal Limits and the Role of the International Court of Justice, 2001, p. 270.

7 In the *Tadic* case, the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia was seised with the question as to whether it was able to determine the legality of its own establishment under a Chapter VII Security Council Resolution. It found that it did have such a power, basing it determination in part on the jurisprudence of the ICJ which allowed for an incidental jurisdiction in reviewing the actions of other UN organs, examining in particular the *Certain Expenses* case and the *Namibia* case. See *Prosecutor v Tadic*, Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia (Case No IT-94-1-AR72), 2 Oct. 1995.

8 *Case Concerning East Timor (Portugal v Australia)*, ICJ Reports 1995, Diss. Op. *Skubiszewski*, para. 86. See also *Schweigman* (fn. 6), p. 271.

In the *Genocide Convention* case,[9] in the course of a claim by Bosnia-Herzegovina suing the Federal Republic of Yugoslavia for acts of genocide, Bosnia-Herzegovina also requested that the ICJ consider the legal status and effect of Security Council Resolution 713 which imposed a mandatory arms embargo over the whole territory of the former Socialist Federal Republic of Yugoslavia, including Bosnia-Herzegovina. Questions raised included the effect of the Resolution on the inherent right of a state to defend itself and the effect on the right of state parties to the Genocide Convention to provide arms to a state for the purpose of self defence and preventing genocide. The ICJ decided that it could not consider the Resolution in the context of a request for provisional measures because it was not a necessary issue in determining the main subject of the dispute and because the question fell outside the scope of the Genocide Convention.

The question was brought to the fore most prominently in the *Lockerbie* case,[10] a drawn out case which remained on the role of the ICJ from November 1991 – September 2003. In 1991, the British and American governments suspected that two Libyan agents were responsible for the bombing of the Pan Am flight which exploded over Lockerbie, Scotland in 1988, and requested their extradition by Libya. In addition, a non-binding Security Council Resolution presented by the UK, the US and France urged compliance with the request. Libya believed the question to fall within the scope of the Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, 1971, which embodied the principle *aut dedere aut iudicare*, and thus declared their intention to prosecute, contending that there was therefore no obligation to extradite the suspects under the Montreal Convention. Libya instituted proceedings at the ICJ against the United Kingdom and the United States in order to determine that it had fulfilled its obligations under the Convention, and that the United Kingdom and the United States were in breach of their obligations to Libya as embodied in the Montreal Convention, and that they were under an obligation to cease and desist immediately from such breaches and desist from the use of force or threats and from all violations of the sovereignty, territorial integrity, and political independence of Libya. While the case was pending at the provisional measures stage, the Council further determined that non-extradition constituted a breach of the peace, and demanded that Libya extradite the suspects on the pain of sanctions which came into operation in April 1992 and were tightened the following year. The case proceeded through stages of preliminary objections and admissibility but was dropped by mutual agreement before it reached the merits stage, when it was agreed to try the suspects in a neutral third country.

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9 *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia (Serbia and Montenegro))*, ICJ Reports 1993.

10 *Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya* v. *United States)* ICJ Reports and *Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya* v. *United Kingdom)*, ICJ Reports.

More recently, aspects of the response of the Security Council to the terrorist attacks of 11 September 2001 have also generated considerable controversy in some quarters. One such example is the 'Listing Committee', established by Resolutions 1267 and 1390, which is responsible for compiling a list of individuals and entities concerning which states have certain obligations. Examples of the concerns raised include the contention that the Resolution is legislative in character and that the Committee established makes quasi-judicial determinations with potentially serious consequences for individuals without the necessary judicial and due process safeguards.

At first sight, the argument *for* introducing some form of judicial control over Resolutions of the Security Council seems both simple to state and logical. Firstly, the powers of the Security Council under Chapter VII of the Charter *are* subject to constraints imposed by international law – it is an intergovernmental organ deriving its powers from the UN Charter and must therefore abide by the terms of its constituent treaty. This imposes substantive limits on its actions at Article 24(2): 'In discharging these duties the Security Council shall act in accordance with the Purposes and Principles of the United Nations.' Some have argued that it is also limited by the peremptory norms of international law,[11] and possibly even general international law. Thus it could be argued, having established the legal limitation, that the rule of law requires that the Security Council should not be at liberty to act in breach of international law, and it would typically fall to the principal judicial organ of the United Nations, the ICJ, to enforce international law through judicial review – a principle well-known to national jurisdictions.[12] This essay will argue that, though conceptually attractive and perhaps on its face politically desirable, such an argument is based on certain fundamental misconceptions.

IV. Political decisions and the Legitimacy of the ICJ

> *Because the designers of the Charter appreciated that fashioning effective responses, case by case, to international security threats involved, perforce, complex political judgments, the Charter's contingencies, procedures and discretion for decision making were conceived very broadly.*[13]

An initial appraisal of the argument for review might conclude that it fails to appreciate the significance of the nature of decisions taken by the Security Council under Chapter VII; that as they are inherently politically-sensitive determinations they are not suited to judicial determination. Determining what a threat to international peace is and the appropriate response thereto is in some ways analogous to determinations as to what is in the interests of national security in the domestic forum. The tradi-

11 *Genocide Convention case*, Sep. Op. *Lauterpacht*, p. 440.

12 *E. de Wet*, The Chapter VII Powers of the United Nations Security Council, 2004.

13 *W. M. Reisman*, Reply to Correspondence, American Journal of International Law 87 (1993), p. 589.

tional position of the English courts regarding such questions was enunciated most clearly by *Lord Diplock* in the *GCHQ* case:

> *National security is the responsibility of the executive government; what action is needed to protect its interests is ... a matter upon which those upon whom the responsibility rests, and not the courts of justice, must have the last word. It is par excellence a non-justiciable question. The judicial process is totally inept to deal with the sort of problems which it involves.*[14]

However, though *Lord Diplock's* quote reflects the traditional position, the attitude of the English courts towards the doctrine of non-justiciability has evolved in the past two decades. There has been some overall erosion of the scope of the doctrine, but there has also emerged a clearer understanding of its conceptual underpinning. In analysing the doctrine as traditionally stated, one can identify two distinct ideas: *normative* non-justiciability and *institutional* non-justiciability.[15]

Normative non-justiciability refers to the idea that suitability for judicial determination is governed by the existence or absence of legal standards, or "the absence of judicially manageable and discoverable standards".[16] The existence of this concept in international law has been mooted in the past. It was applied by the Trial Chamber in *Tadic*[17] to conclude that the judgement as to whether there was an emergency in the former Yugoslavia as would justify the establishment of the ICTY under Chapter VII was, "certainly not a justiciable issue but one involving considerations of high policy and of a political nature".[18] However, that decision was reversed by the Appeals Chamber, considering the argument to be "unfounded in law",[19] and commentators have agreed that "the dichotomy between political (non-justiciable) disputes and legal disputes is an artificial one that is no longer valid in international law".[20] Thus, normative non-justiciability provides little useful justification in this context; as stated by Rosenne, "modern legal doctrine does not take kindly to the idea that the law cannot always provide an answer to any question properly put to it".[21]

The second idea encompassed in the doctrine of non-justiciability has featured more prominently in the development of the doctrine in English courts, and may prove more fruitful in the context of the present essay. *Institutional* non-justiciability refers to the notion of *propriety*, the idea that due to the nature of certain decisions, and the

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14 *Council of Civil Service Unions* v. *Minister for the Civil Service* [1985] A. C. 374.

15 See *A. Barak*, A Judge on Judging: The Role of a Supreme Court in a Democracy, Harvard Law Review 116 (2002), pp. 97–104.

16 *Baker* v. *Carr* [1962] 369 U.S. 186, 217.

17 See fn. 7.

18 Trial Chamber Decision on the Defence Motion on Jurisdiction, *Prosecutor v Tadic* (Case No. IT-94-1-T), 10 Aug. 1995, para. 23. The Trial Chamber did not distinguish normative and institutional non-justiciability, and they quoted the passage from *Baker* v. *Carr* encompassing both aspects of the doctrine. Nevertheless, a reliance on the normative version of the doctrine is evident in their reasoning.

19 Appeals Chamber Decision on the Tadic Jurisdictional Motion, *Prosecutor v Tadic* (Case No IT-94-1-AR72), 2 Oct. 1995, para. 24.

20 *Schweigman* (fn. 6), p. 264.

21 *S. Rosenne*, The Law and Practice of the International Court: 1920–1996, 1997, p. 1001.

relative expertise and legitimacy of the executive institutions involved in making them as compared with the judicial branch of government, it would be constitutionally improper for the latter to embark upon review of certain decisions of the former. Institutional non-justiciability is a doctrine rooted in the separation of powers. These notions of expertise and legitimacy are reflected in *Lord Hoffman's* discussion of national security in the *Rehman* case:

> *[T]he executive has access to special information and expertise in these matters ... also that such decisions, with serious potential results for the community, require a legitimacy which can be conferred only by entrusting them to the person responsible to the community through the democratic process ...*[22]

Applying this analysis to the international arena provides a clearer insight to the issues at stake. The argument proceeds on two bases – that the Security Council is the proper organ to make determinations concerning international peace and security *and* to have the final word on them, and that the ICJ does not at present possess the legitimacy to exercise authority over the Security Council when it acts in exercise of its Chapter VII powers. As stated by Judge *Kooijmans*:

> *The determination of a threat to the peace is a political judgment [...] and it is a political judgment based on facts in a field where the Council has been given primary responsibility. Asking the Court to subject this political decision to legal scrutiny is not inviting it to undertake an essentially judicial task ...*[23]

Thus even if the first premise of the argument for review is accepted, that the Security Council is legally limited and that there are norms governing the exercise of its powers, the justification for the ICJ not reviewing Chapter VII Resolutions stems from the relative expertise and legitimacy of the Council. Legitimacy in the English domestic system stems predominantly from democratic accountability – the executive government are elected and accountable to the electorate. The legitimacy of the Security Council derives from the political power vested in it by the international legal order.

Similarly, the subject-matter jurisdiction of a judicial body derives from its legitimacy within the polity in which it exists. In the United Kingdom as the judiciary are appointed and not answerable to the electorate, they tend to decide less politically controversial and sensitive cases than, for instance, the judiciary of the United States where there is greater democratic participation in the process of appointing judges. These are admittedly broad propositions from which it is difficult to draw a direct comparison, but it is certainly arguable that within the international order the legitimacy of the ICJ is reflected to an extent by the number of states that have accepted its compulsory jurisdiction – which at present stands at only 66.

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22 *Secretary of State for the Home Department* v. *Rehman* [2001] UKHL 47, [2003] 1 A. C. 153, *per Lord Hoffman.*

23 *P. H. Kooijmans*, The International Court of Justice: Where does it stand?, in: *A. S. Muller/ D. Raic/J. M. Thuranszky* (eds), The International Court of Justice: Its Future Roles after Fifty Years, 1997, p. 416.

V. The International Legal Order and the Security Council

The constitutional challenge lies in finding systemically appropriate control mechanisms that accommodate the need for efficient performance of the basic security functions of the world community with responsible power sharing.[24]

One flaw on the face of the argument made so far is the inexactness of the analogy – the doctrine of non-justiciability is a judicially-developed doctrine of restraint, while this essay is arguing that the ICJ should not have the power to even consider the legality of Security Council Resolutions passed under Chapter VII. In applying the doctrine of non-justiciability, the *court* determines in its discretion that it will not entertain the claim, on a consideration of the subject matter of the case before it, and not on the basis of the source of the power exercised. Indeed, in the *GCHQ* case the submission that decisions taken in exercise of the Royal Prerogative were immune from review was expressly rejected.[25] While it could be argued that all Chapter VII Resolutions concern sensitive security issues, the essential difference is that the position argued for here allows the Security Council to determine that a Resolution will be exempt from review by choosing a particular mode of operation. Certain Resolutions passed under Chapter VII, such as the establishment of a subsidiary organ or tribunal, may attach a lesser concern for secrecy and urgency, and thus may be more susceptible to review than others. It could be said that the argument made so far justifies a degree of judicial deference, but not necessarily total exemption from review. However, it will be argued that acknowledging this objection to the analogy does not detract from the argument. In fact, the *differences* between the international legal order and a national legal order are more instructive than the *analogy* in identifying the further misconceptions upon which the case for judicial review is premised.

Probing the conceptual distinction between applying a doctrine of non-justiciability and the complete absence of a power to review requires a further explanation as to why a legally-limited body, such as the Security Council, should be able to act without fetters. The answer lies in a realistic assessment of the effect of the existence of a judicial review jurisdiction over Chapter VII Resolutions. It is submitted that it could have both a symbolic value and a practical effect that would combine, not to strengthen the rule of law, but to undermine the authority of the Security Council, at a time when it rests on the less-than-stable edifice of an increasingly unipolar international legal order.

Having its decisions subject to the approval of another body, regardless of the prudence of the court and the deference shown in the standard of review applied, is sure to carry with it the symbolic significance of subordination. As stated by *Christopher Greenwood QC*, a generalised power of judicial review "could have a destabilising

24 *Reisman* (fn. 13).

25 More recently the Court of Appeal declared that exercise of the foreign affairs prerogative could be reviewable in principle if individual rights were at stake: *R. (on the application of Abbasi)* v. *Secretary of State for Foreign and Commonwealth Affairs* [2002] EWCA Civ. 1598, [2003] U.K.H.R.R. 76.

effect on the workings of Chapter VII of the Charter."[26] In addition to its symbolic significance, the practical effect of introducing review might be to invite an unavoidable element of uncertainty that could undermine the effectiveness of and the respect for Security Council decision making, "[t]hat would induce an element of uncertainty which could hang like a sword of Damocles over every sanctions regime on which the Council might decide."[27]

It is worth remembering that the reluctance to scrutinise political decisions displayed by English courts towards sensitive administrative decisions exists alongside an inability to review the decisions of the supreme political authority – the Queen in Parliament. Some might argue that the time has come to subject the decisions of Parliament to a constitutional review – a contention sure to provoke a heated debate in itself. However, to argue the same for the Security Council would be folly, because unlike Parliament, the authority of the Security Council is *not* an entrenched constitutional reality, the ultimate political fact. Perhaps one of the greatest dangers to the stability of the international order at the present time is the unipolar distribution of political power – something that domestic analogies based on the separation of powers may fail to account for. Unlike in the domestic arena, it is not simply a question of limiting the powers of an all-powerful executive, by asserting the competence of the judiciary. If there was a real risk that judicial review in the domestic setting could destabilise the state to the extent that it might lose its monopoly on the means of coercion, and result in the resort to unilateral action by individual citizens that the state was unable to control, then surely it would be quite clear that the rule of law would be better preserved by strengthening the central political institutions, rather than weakening them.

The Security Council, when it acts, acts deliberately, and its decisions are the result of deliberate choice and political compromise. Controversial resolutions such as the Lockerbie resolutions or the Listing Committee resolutions will rightly be the subject of sustained scrutiny and criticism in light of international law. However, they should be recognised as a manifestation of political power, that type of which the ICJ should not have the power to reverse. In short, it is misguided to believe that introducing judicial review will result in the Security Council acting in accordance with the rule of law, when responding to issues such as terrorism. In reality it could lead to a weakened Security Council, and greater recourse to unilateral or extra-Charter measures. As concluded by one scholar, "Direct judicial review could seriously impede the progress of international organisation as advanced by the more active role the Security Council has taken on in the post-Cold War world".[28]

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26 *C. Greenwood*, The Impact of Decisions and Resolutions of the Security Council on the International Court of Justice, in: *W. P. Heere* (ed.), International Law and The Hague's 750th Anniversary, *1999*, p. 81.

27 *Ibid.*, p. 87.

28 *B. Fassbender*, UN Security Council Reform and the Right of Veto: A Constitutional Perspective, 1998, p. 311.

VI. Conclusion

There are a number of propositions that this essay has not argued. It has not argued that the Security Council is above the law. It has not argued that Security Council is the perfect institution in constitution and structure to secure international peace and security. It has not argued that UN Charter as it stands is a perfect instrument. In refusing to countenance judicial review of Security Council Resolutions it has not laboured under any of these misconceptions. Rather, perhaps as *Churchill* said of democracy, it may that the international system that we have is the worst form of government, except all others that have been tried.