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The International Court of Justice (ICJ) Should Have the Power to Review Resolutions Adopted by the Security Council Under Chapter VII

Kelsen described the sole responsibility of the UN Security Council in the framework of Chapter VII of the UN Charter as “not to restore law, but to restore peace, which is not necessarily identical with law”.¹ In his view, the Council acts within Chapter VII completely *legibus solutus* and should consequently not be subjected to judicial review; it is entirely exempted from adjudication.

Usually such legal notions discomfort lawyers stamped by the “Rechtsstaat” concept: It is hardly maintainable to declare the rule of law, which includes the ideas of separation of powers and checks and balances,² as an essential pillar of national constitutional theory and conceive at the same time the Security Council as the Hobbesian “Leviathan”, which is rejected as a state in diametrical opposition to the “rule of law”. To avoid contradictions, in the opinion of the so called “legalists”, the Security Council has to be subject to legal constraints and, consequently, its actions – even those under the aegis of Chapter VII – have to be reviewed by the International Court of Justice (“ICJ”) as the principal judicial organ of the United Nations.

To answer the question of whether the ICJ should have the power to review Security Council Resolutions adopted under the aegis of Chapter VII, the issue of whether the ICJ exceeds eventual legal constraints, itself, by exercising such a review must first be analysed. This question is the subject matter of the first section of this consid-

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1 *Hans Kelsen*, The law of the United Nations: A Critical Analysis of Its Fundamental Problems, 1951, p. 295.

2 For a summary of *Lockes* and *Montesquieu's* theories refuting *Hobbes*, see *Rudolf Weber-Fas*, Freiheit durch Gewaltenteilung – Montesquieu und der moderne Verfassungsstaat, JuS 2005, pp. 882–884.

eration. Such an action would be *ultra vires* either if the Security Council were not subject to any legal constraints (first subsection) or if the ICJ did not have the competence to engage in such a review (second subsection). In the second section, the question of whether judicial review is preferable to the situation in which the Court abstains from ruling on the legality of Council Resolutions is examined.

I. First Section:

A judicial review of Security Council Resolutions adopted under the aegis of Chapter VII as an *ultra vires* action on the part of the ICJ?

A judicial review of Security Council Resolutions by the ICJ on the basis of Chapter VII presumes, on the one hand, that these are subject to legal limitations and, on the other hand, that competence is vested to the ICJ to review them.

1. Legal constraints

At first, the question is whether the Council is subject to legal constraints when acting under Chapter VII.

a) Legal constraints on German public authority, Article 20(3) GG

Drawing from the scope of judicial review in Germany, the Basic Law for the Federal Republic ("GG") explicitly stipulates in Article 20(3) that "the legislature shall be bound by the constitutional order, the executive and the judiciary by law and justice" and provides through this a basis for an extensive judicial control of all the three branches of the public authority.

b) Legal constraints with respect to the UN, Art. 24(2) S. 1 Charter?

With respect to the United Nations, a similar obligation of the Council seems to be stated by Article 24(2) S. 1 of the Charter which dictates that it "shall act in accordance with the Purposes and Principles of the United Nations."

aa) Non-applicability of Article 24(2) S. 1 to Chapter VII

Despite this explicit provision, its applicability to Chapter VII is contested:³ As the Council is a political organ and not a "creature of law", it acts exclusively for political

3 *W. Micheal Reisman*, The Constitutional Crisis in the United Nations, *AJIL* 87 (1993), pp. 83–100, pp. 93, 94; *Benedetto Conforti*, Le Pouvoir discrétionnaire du Conseil de Sécurité en matière de constatation d'une menace contre la paix, d'une rupture de la paix ou d'un acte d'agression, in: *René-Jean Dupuy* (ed.), *Development of the role of the Security Council*, *Colloque*, July 21–23, 1992, 1993, pp. 51–60.

reasons and is not bound to apply legal considerations.⁴ The political nature of the organ is stressed by the veto right which confers to every permanent member the power to impede every Resolution exclusively for its own political interests.⁵ Furthermore, the founders of the Charter, in reaction to the weak position of the League of Nations Council, left consciously the “entire decision as to what constitutes a threat to peace”⁶ to the Security Council to ensure that it has the flexibility to take effective measures and, therefore, fulfil its primary responsibility for the maintenance of international peace and security.⁷ The determination assumes, thus, no material element: Whenever the required majority is achieved, there is also a “threat of peace even though there was no threat at all”.⁸ From the “realists” view, the Security Council truly seems to be conceived as the “Leviathan” – an omnipotent and legally-unbound authority at whose mercy and arbitrament the states have placed themselves to ensure peace and joint defence.

bb) The Security Council as the “new universal leviathan”?

Nevertheless, “the new universal leviathan did not emerge, and it is highly unlikely that it will emerge in the foreseeable future”.⁹ The veto seems to be an insurmount-

4 *Schwebel*, Diss. Op. in the Nicaragua Case, ICJ Reports 1984, pp. 259–265, p. 290, para. 60; for information about the Council as subject of international law, see *Dapo Akandé*, 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, ICLQ 47 (1997), pp. 309–343, p. 320.

5 See *Nils Meyer-Ohlendorf*, Gerichtliche Kontrolle des Sicherheitsrates der Vereinten Nationen durch den Internationalen Gerichtshof: kann der IGH die Rechtmäßigkeit von Zwangsmaßnahmen nach Kapitel VII UNO-Charta kontrollieren, 1st ed. (2000), pp. 40–41; *Bernd Graefrath*, Leave to the Court what belongs to the Court, The Libyan case, EJIL 4 (1993), pp. 184–205, concluding that the founders of the Charter did not take limitation into consideration as they thought that “the veto would suffice as a check and balance device against the plenitude” of its powers, p. 203.

6 *Meyer-Ohlendorf* (fn. 5), p. 44.

7 See *Serge Sur*, Sécurité collective et rétablissement de la paix : La Résolution 687 (3 avril 1991) dans l'affaire du golfe, in: Colloque, p. 18; see also the references at *Akandé* (fn. 4), p. 2, who resumes the so-called “realists” opinion: “opportunistic flexibility [is] the key to success”; *M. Alain Pellet*, Rapport introductif: Peut-on et doit-on contrôler les actions du Conseil de Sécurité, in: La Chapitre VII de la Charte des Nations Unies, colloque de Rennes, 1995, pp. 221–238, p. 235 “En dépit d'incertitudes du fait de la rédaction de cette disposition (art. 103) et de ses travaux préparatoires, on doit considérer que c'est bien une „superlégalité internationale “que les rédacteurs de la Charte ont voulu instaurer.”

8 *Meyer-Ohlendorf* (fn. 5), p. 85.

9 *Bardo Fassbender*, Review Essay: Quis judicabit? The Security Council, Its Powers and Its Legal Control, www.ejil.org/journal/Vol11/No1/br1.html; the end of Councils paralysis is taken as occasion to raise for the first time the question of limits and possible judicial review of the Councils Resolution; see the title of *Mohammed Bedjaoui*, Nouvel Ordre Mondial et contrôle de la légalité des actes du Conseil de Sécurité, 1994 and the introductions of *Bedjaoui oeuvre*, pp. 12–18; *Bernd Martenczuk*, Rechtsbindung und Rechtskontrolle des Sicherheitsrates, Die Überprüfung nichtmilitärischer Zwangsmaßnahmen durch den Internationalen Gerichtshof, 1996, pp. 19–21; *Michael Fraas*, Sicherheitsrat der Vereinten Nationen

able obstacle to a joint action of the international community of states, as demonstrated both by the situation of permanent paralysis that existed during the Cold War and by more recent examples like the Kosovo conflict. The most damaging factor with respect to the effectiveness of the Council, however, is the weak mechanism by which its decisions are implemented, in particular concerning coercive measures: As the UN does not possess its own armed forces, the execution depends entirely on the goodwill of its members.¹⁰ In view of this dependence, one could hardly characterise the Security Council as “Leviathan”. Finally, the states determine execution of Council decisions and thereby remain the “ultimate guardians” of the UN.¹¹ On account of this fact, “realists” conclude that any legal constraints would harm the Security Councils effectiveness by giving states legal arguments at hand which could be invoked against the execution of its Resolutions.¹²

cc) The Council’s adherence to the purposes and principles of the UN as the reason for its member’s allegiance

Certainly, the League of Nations failed, *inter alia*, because of the disloyalty of its members.¹³ But for what reasons do states comply with their obligations, given the fact that they have the power to do otherwise? The determinative factor of allegiance is neither a cost-benefit analysis, nor the expectation to be favoured with similar assistance in case of need, but the “political-moral pressure” which “depends to a considerable degree on the members’ conviction of the legality and legitimacy of the Council’s action”;¹⁴ the implementation is, *ergo*, assured when the Council succeeds in persuading the members of the legitimacy of its decisions. This, however, can only be achieved when the Security Council fulfils its task within the purposes and principles of the organisation stated at Articles 1 and 2: Even if the founders wanted to institute a powerful Security Council with tremendous discretionary power, they did so to attain the organisation’s ends. “Le Conseil de Sécurité est (...) crée par un traité, il ne tient sa légitimité et son existence même que du lui”.¹⁵ It follows that actions either pursuing aims other than those announced in Article 1 or infringing on the principles in Article 2 are not covered by the organisation’s competence and there-

und Internationalen Gerichtshof: Die Rechtmäßigkeitsprüfung von Beschlüssen des Sicherheitsrates der Vereinten Nationen im Rahmen des VII. Kapitels der Charter durch den IGH, 1998, p. 1; *Meyer-Ohlendorf* (fn. 5), pp. 1–5.

10 In particular “standby agreements” to provide the Council with armed forces accordingly Art. 43(3) never have been concluded, for details see *Knut Ipsen*, *Völkerrecht*, 5th ed. (2004), § 60 no 18–19, pp. 1114–1115; certainly, Arts. 25 and 103 obligate the members to carry out the Councils Resolutions, but if they do not cooperate voluntarily, it stays unexecuted, in this tenor, *Meyer-Ohlendorf* (fn.5), p. 228.

11 *Pellet* (fn. 5), p. 231.

12 See *Martenczuk* (fn. 9), p. 142.

13 *Ibid.*, pp. 138–139, who explains the non-loyalty of the members in the Abyssinia example.

14 *Ibid.*, p. 149 (Translation by the author).

15 *Pellet* (fn. 5), p. 232: “The Security Council is created by a treaty; it derives its legitimacy and even its existence exclusively from it.” (Translation by the author).

fore by states' consent.¹⁶ Even though one does not already admit a "right of last resort" to justify members' disobedience in such cases,¹⁷ it is highly probable that factual obedience will be then refused. In conclusion, the duty to act according to the Charter does not inhibit the Security Council, but it is the basis of – the reason for – its members allegiance.¹⁸

c) Conclusion

Even though the Security Council is not subject to such extensive legal constraints as German public authority, its dependence on the goodwill of its members to see its Resolutions implemented requires the specific limitations of the UN purposes and principles fixed in Articles 1 and 2 of the UN Charter.¹⁹

2. The International Court of Justice as an organ competent to engage in judicial review

The following examines whether the ICJ infringes on the UN's purposes and principles by exercising judicial review.

a) Judicial review in Germany

Again, beginning with the pertinent German provisions, it has to be mentioned that the competence of the Federal Constitutional Court of Germany ("BVerfG") enumerated in Article 93(1) GG is expansive for at least three reasons:

aa) Subject: every act of public authority

Firstly, in view that all three branches of the state are directly bound by the Constitution according to Article 20(3) GG, every act of public authority, even laws and constitutional amendments, are subjected to judicial review.

16 *Andreas Stein*, *Der Sicherheitsrat der Vereinten Nationen und die Rule of Law: Auslegung und Rechtsfortbildung des Begriffes der Friedensbedrohung bei humanitären Interventionen auf Grundlage des Kapitels VII der Charta der Vereinten Nationen*, 1999; otherwise the principle of consensus would be abandoned; *Meyer-Oblendorf* (fn. 5), p. 130.

17 See *Fraas* (fn. 9), p. 93.

18 *Bustamente*, *Certain Expenses*, ICJ Reports 1962, pp. 4–290, p. 288 et seq.: "La vraie raison de lobéissance des Etats Membre aux autorités de l'Organisation est la conformité des mandats de ses organes compétents au texte de la Charte."; similar *Andreas F. Bauer*, *Effektivität und Legitimität: Die Entwicklung der Friedenssicherung durch Zwang nach Kapitel VII der Charta der Vereinten Nationen unter besonderer Berücksichtigung der neueren Praxis des Sicherheitsrates*, 1996, p. 251.

19 To the concrete extent see the extensive analysis of *Meyer-Oblendorf* (fn. 5), pp. 37–147, particularly pp. 129–147; *Fraas* (fn. 9), pp. 73–86 "Because of the breadth and flexibility of the concept 'threat of peace', the Security Council has wide discretion. In this regard, judicial review is limited to a control of abuse. The Security Council's power of appreciation is limited by the principle of good faith, the sovereignty of member states, the principle of proportionality, the fundamental human rights and jus cogens"; (see its conclusion, p. 256); *Akandé* (fn. 4), pp. 317–325; General international law; jus cogens; human rights.

bb) Special proceedings to attack the compatibility with the Basic Law:
Abstract Regulation Control

Secondly, the Court is explicitly vested with the power to rule on the “formal or substantive compatibility of Federal law with the Basic Law”;²⁰ the crucial importance of the constitutionality of laws is also stressed by the Abstract Regulation Control. This special proceeding enables the executive branch of the federal and state governments, and one third of the members of the German legislative power – the so-called Bundestag – to challenge the constitutionality of a law even in situations in which there is no infringement of an individual constitutional right which is usually a condition of admissibility.

cc) “Letztentscheidungs- und Verwerfungskompetenz”

Thirdly, the GG attributes to the BVerfG the responsibility of authoritative interpretation and the ultimate power to declare a law or any other act of public authority null and void – the so-called “Letztentscheidungs- und Verwerfungskompetenz”.²¹ This makes the BVerfG superordinate to all three branches of the state.

b) Judicial review of the Security Council’s Resolutions by the ICJ as *ultra vires* action?

Concerning the ICJ’s competence, it has to be pointed out that neither the Charter nor the Statute of the Court contain any explicit provision that grants it the power to examine the conformity of Security Council Resolutions with the Charter.²²

aa) The rejection of the Belgian proposals as a refusal of judicial review powers?

In particular, no procedure comparable to the German Abstract Regulation Control has been initiated: Although Belgium intended to establish a procedure to refer disputes related to interpretation to the ICJ, its proposals were denied by the San Francisco conference.²³ From this rejection, it has been concluded that the founders of the Charter would withhold from the Court any judicial review of UN organs.

bb) Certain-Expenses advisory opinion

To supply such an opinion, the ICJ judgment in the *Certain-Expenses* advisory opinion is often quoted:

In the legal system of States, there is often some procedure for determining the validity of even a legislative or governmental act, but no analogous procedure is to be found in the structure of the United Nations. Proposals made during the drafting of the Charter to place

20 See, e.g., Art. 93(1) Nr. 2.

21 See § 78 S. 1 BVerfGG (Abstract Regulation Control); §§ 82(1), 78 S. 1 BVerfGG (Single Regulation Control); § 95(3) S. 1 BVerfGG (Constitutional Complaint).

22 *Bauer* (fn. 18), p. 232; *Stein* (fn. 16), p. 348; *Meyer-Ohlendorf* (fn. 5), p. 155.

23 For details, see *Stein* (fn. 16), pp. 349–350 with references, *inter alia*, to the pertinent UN documents.

*the ultimate authority to interpret the Charter in the International Court of Justice were not accepted; the opinion which the Court is in the course of rendering is an advisory opinion. As anticipated in 1945, therefore each organ must, in the first place, determine its own jurisdiction.*²⁴

But such a thesis could be based neither on the exact wording nor on the context of the entire judgment: As the wording “in the first place” leaves room for a second place, the Court only clarified the responsibility of each organ to determine its own competence in the first instance, but did not exclude a later review by another organ.²⁵ Furthermore, a refusal of its jurisdiction would hardly explain why the Court examined subsequently the conformity of the Resolutions with the Charter. That is why the quoted consideration cannot be interpreted as a refusal of any judicial review. The Court merely wanted to stress the absence of an established procedure and competence to authoritative interpretation.²⁶

cc) Namibia advisory opinion

The consideration in the *Namibia* advisory opinion has to be read the same way. Notwithstanding the fact that the Court declared,

*Undoubtedly, the Court does not possess powers of judicial review or appeal in respect of the decisions taken by the United Nations organs concerned.*²⁷

it examined the conformity of the General Assembly’s Resolutions with the Charter.²⁸

dd) Judicial review in contentious cases? – the Lockerbie case

Although these two decisions show the Court’s general tendency to examine the conformity of UN organs’ actions with the Charter, they did not permit a conclusion on an eventual decision related to a binding measure adopted under the aegis of Chapter VII and in contentious cases.²⁹ Clarification on this question was expected in the *Lockerbie* case:³⁰

24 Certain Expenses (fn. 18), ICJ Reports 1962, p. 168.

25 *Graefrath* (fn. 5), p. 201, *Bauer* (fn. 18), p. 238; *Stein* (fn. 16), p. 362; *Meyer-Oblendorf* (fn. 5), p. 175.

26 *Bauer* (fn. 18), p. 239; *Vera Gowlland-Debbas*, The Relationship between the International Court of Justice and the Security Council in the Light of the Lockerbie Case, *AJIL* 88 (1994), pp. 643–677, p. 664.

27 *Namibia*, ICJ Reports 1971, p. 45.

28 “However, in the exercise of its judicial function and since objections have been advanced the Court will consider these objections before any legal consequences arising from those resolutions.” (ICJ Reports 1971 (fn. 27), p. 45); similarly Judge *Pétren*, Sep. Op., ICJ Reports 1971, p. 131 “Je constate (...) que lavis devrait comprendre un examen de validité des résolutions en questions.”; see also *Meyer-Oblendorf* (fn. 5), p. 178.

29 *Stein* (fn. 16), p. 365.

30 As the Lockerbie case provoked a lively debate on the present essay’s subject, a multitude of resumé, interpretations and comments are available; see e.g.: *Jonathan A. Franck*, A Return to Lockerbie and the Montreal Convention in the wake of the September 11th Terrorist attacks: Ramifications of Past Security Council and International Court of Justice Action,

(1) Facts and judgment

Substantially, Libya argued that the request to extradite two of its nationals suspected of being responsible for the terrorist attack over Lockerbie, Scotland, would deprive it of its rights under the Montreal Convention.³¹ As this request was contained in Security Council Resolution 748 (1992) adopted under Chapter VII, the question of its judicial review was crucial. Nevertheless, the Court carefully avoided taking any position on this issue, but refused to grant the provisional remedy requested by Libya with an apodictic short and ambiguous order leaving room for a multitude of interpretations:

*Whereas the Court, while thus not at this stage called upon to determine the legal effect of Security Council resolution 748 (1992), considers that the rights claimed by Libya under the Montreal Convention cannot now be regarded as appropriate for protection by the indication of provisional measures.*³²

(2) Reception and interpretation

Due to the open wording of the judgment, it is interpreted by judicial review opponents as a refusal to rule on the merits of the case, and by judicial review proponents as a postponement thereof.³³ By analysing the separate and dissenting opinions, it becomes clearer that only one judge was completely opposed to judicial review,³⁴ whereas the other judges did not express opposition to it.³⁵

The following reasoning speaks in favour of a postponement, as well: As the Court stressed that the members' obligation to carry out decisions of the Security Council

Denv. J. Intl. & Poly 30 (2002), pp. 532–548; *Bernd Martenczuk*, The Security Council, the International Court and Judicial Review: What Lessons from Lockerbie, *EJIL* 10 (1999), pp. 517–547, pp. 519–525; *Jochen Herbst*, Rechtskontrolle des UN-Sicherheitsrates, 1999, pp. 31–55; *Gowlland-Debbas* (fn. 26), pp. 644–648; *Thomas M. Franck*, The “Powers of Appreciation,” Who is the Ultimate Guardian of UN Legality, *AJIL* 86 (1992), pp. 519–523, pp. 520–523; *Bauer* (fn. 18), pp. 242–243; *Stein* (fn. 16), pp. 365–371; *Meyer-Ohlendorf* (fn. 5), pp. 181–188; *Martenczuk* (fn. 9), pp. 21–24.

- 31 Art. 7 leaves the choice between extradition and prosecution of the suspects to the state in possession of a terrorist accused of acting abroad (*principle aut dedere aut judicare*).
- 32 ICJ Reports 1992, pp. 3–113, p. 15 para. 39.
- 33 Opponents argue that the Court will only determine the legal effect, not judge its validity, see *Giorgio Gaja*, Quale Conflitto fra obblighi negli affair relative allincidente aereo di Lockerbie, *Riv. Dir. Internaz.* 1992, p. 374, p. 376; *Elena Sciso*, Può la Corte internazionale di giustizia rilevare linvalidità di una decisione del Consiglio di sicurezza, *Riv. Dir. Internaz.* 1992, p. 369, pp. 373–374; proponents point out the wording “at this stage”, see, e.g., *Stein* (fn. 16), p. 368.
- 34 Judge *Weeramantry*, Diss. Op., ICJ Reports 1992 (fn. 32), p. 66: “It would appear that the Security Council and no other is the judge of the existence of the state affairs which brings Chapter VII into operation.”
- 35 Judge *Lachs*, Sep. Op., ICJ Reports 1992 (fn. 32), p. 27 stresses that the decision could not be understood as “an abdication of the Courts powers”; *Bedjaoui*, Diss. Op., *ibid.*, p. 41 and *Ajibola*, Diss. Op., *ibid.*, p. 91 reserved expressly the right to review the Resolution at the stage of the merit, for details see also *Stein* (fn. 16), pp. 368–369; *Bauer* (fn. 18), pp. 244–245; Unfortunately, the case was removed at the joint request of the parties on 10 September 2003.

according to Article 25 in conjunction with Article 103 of the Charter extends *prima facie* to the decision contained in Resolution 748 (1992),³⁶ it ruled on the validity of the concerned Resolution, but limited the extent of its examination to the stage of proceedings on provisional measures on a *prima facie* review.³⁷

ee) Judicial review by the ICJ: No explicit interdiction

According to this, neither the Charter's evolutionary history nor the ICJ jurisprudence could be invoked against the idea of judicial review: The absence of an established proceeding does not bar the Court from reviewing a UN organ's acts in the scope of advisory opinions according to Article 96 of the UN Charter in conjunction with Article 65 of the Statute of the Court or from an implicit judicial review in contentious cases.³⁸

ff) Incompatibility with the UN system?

Despite the absence of an explicit interdiction, judicial review will be excluded if it is incompatible with the UN system. The compatibility will be denied in situations in which establishing judicial review would institute a system of separation of powers and checks and balances and those concepts are not transferable to international organisations.³⁹

(1) Separation of powers – a concept not transferable to a system of international cooperation?

The doctrine of separation of powers has been developed to ensure individual freedom from the arbitrariness of the absolutist monarch. On account of the “*expérience éternelle que tout homme qui a du pouvoir est porté à en abuser*”,⁴⁰ the public authority must be divided into legislative, executive and judicial power, so that each power is able to control and check the other two. Certainly, the Council's competencies under Chapter VII are broad – the Council may intervene substantially in sovereign rights of the state concerned and there might be a need to protect a member from arbitrary decisions of the Council. Nevertheless, the organisation's purpose to maintain peace should not be attained by vesting to the Council absolute power independent from its members wills, but by instituting a forum of cooperation between completely sovereign states. Because cooperation necessarily presumes non-

36 ICJ Reports 1992 (fn. 28), p. 40, para. 42.

37 *Th. Franck* (fn. 30), p. 521; *Bauer* (fn. 18), p. 243.

38 For details, see *Herbst* (fn. 30), pp. 401–409; *Stein* (fn. 16), pp. 382–385; *Martenczuk* (fn. 9), pp. 73–77.

39 In particular, the rule of law is no general principle of international law in the sense of Art. 38(1) lit. c ICJ- Statute, *Herbst* (fn. 30), p. 389; *Martenczuk* (fn. 9), pp. 144–146, that is why the *Marbury v. Madison* analogie e.g. used by *Th. Franck* (fn. 30), pp. 519 misleads; see also Nicaragua, ICJ Reports 1984, pp. 395–528, p. 433 para. 92: “municipal-law concepts of separation of powers are not applicable to the relations among international institutions.”

40 *Montesquieu*: “the eternal experience that every man who has power is attempted to abuse it.”

subordination, non-hierarchy, and mutual consideration, *ergo* the counterparts of checks and balances. That is why the UN organs are not only difficult to relate to one of the three powers, but why the system of separation of powers does not fit into a system in which the states stay the “guardians” of the organisations and coordinate their actions only within a specific scope of tasks.

(2) judicial review in a system of cooperation

But with this it is not yet said that judicial review contradicts *per se* a system of cooperation: Cooperation is not excluded unless one organ does not retain the ultimate power to interpret the Charter authoritatively and declare acts of other organs null and void. Only by attributing to the ICJ such “Letztentscheidungs- und Verwerfungskompetenz”, would it be made superordinate to the Council and the Councils autonomy anchored in Article 7 as its competence to determine its own competence, its “*compétence-compétence*” – both determinative characteristics of a system of cooperation – would be infringed. But the ICJ is not vested with such a competence: Advisory opinions are non-binding by their very nature and, according to Article 59 of the Statute, decisions in contentious cases are binding only on the parties to the dispute. In absence of an *erga omnes*-effect, the Council has only to take the Court’s decision into consideration. That is why judicial review in the existing proceedings respects the organ’s autonomy as its “*compétence-compétence*” and does not institute a system of checks and balances. Moreover, if the Council deprived the Court of the power to review its Resolutions, the Court’s function as “principal judicial organ of the UN”⁴¹ would be harmed seriously and the Council would on its part offend its obligations both to cooperate and to take the ICJ function into consideration:

*It cannot be maintained that the resolutions of any organ of the UN are not subject to review: that would amount to declaring the pointlessness of the Charter or its absolute subordination to the judgement- always fallible- of the organs.*⁴²

It follows that judicial review is not only not excluded, but is also required by the ICJ function as the UN’s “principal judicial organ.”

II. Second Section: The ICJ should review Security Council Resolutions adopted under aegis of Chapter VII

The question is, furthermore, whether such non-binding dictum by the ICJ is preferable to the situation in which the Court abstains from making any statement.

One could hardly dispute the delegitimizing effect of a Court’s decision to negate the lawfulness of Security Council’s actions, which could render the fulfilment of its pri-

41 Art. 92 UN Charter.

42 *Bustamente*, Diss. Op., (fn. 18) p.288.

mary responsibility for the maintenance of peace and international security conferred to it by Article 24(1) more difficult or even impossible.⁴³

Otherwise, the execution and hereby effectiveness of Resolutions depends crucially on the goodwill of the members which depends, again, on their conviction of the legality of the Security Council's actions.

With the end of its paralysis after the Cold War, the Council's credibility is tarnished by the general suspicion that they apply "double standards" to enforce the interests of the one remaining superpower,⁴⁴ so that "the dominant role of the permanent five, the secrecy of the Council procedures, the lack of clearly delimited competence and the absence that we might call legal culture within the Council hardly justifies enthusiasm about its increased role in world affairs".⁴⁵ An attempt was made to close this credibility gap by proposing amendments to the Charter. The subject matter of the present consideration, however, focuses not on this attempt but on the question of whether judicial review is appropriate to increase the Council's credibility.

Firstly, it has to be stressed that opponents of judicial review compare the Security Council to a "world police" and refuse thereby judicial review, arguing that if the founders wanted to establish "au profit du Conseil de Sécurité un état de police, non un état de droit".⁴⁶

Nevertheless, police actions are not exempt from judicial review in municipal law systems, either. In Germany, for example, police actions could be the object of a so-called "Fortsetzungsfeststellungsklage", which allows the applicant to ask the court to ascertain whether a police measure was unlawful.⁴⁷ A similar proceeding at the UN-level would not limit the "world police's" actions in situations of immediate threat, but would help to develop guidelines for its future actions. Through this, the Council's measures would become more predictable and the suspicion to apply double standards could be moderated, if not put aside altogether. Dictum by the ICJ as an independent organ applying legal considerations without having an immediate in-

43 Sometimes already given as negative condition of admissibility, see e.g. Judge *Schwabe*, Diss. Op. (Lockerbie- preliminary objections), ICJ Reports 1998, p. 6; nevertheless, "primary" means not exclusive responsibility and from the default of an analogous provision to Art. 12, one can refuse this objection sometimes called "litispendance", see *Nicaragua*, ICJ Reports 1984, p. 434; ICJ-communicé of 26 Nov. 1986 "The Court is of the opinion that both proceedings could be pursued *pari passu*. Both organs can therefore perform their separate but complementary functions with respect to the same events."; *Aegean Sea Continental Shelf*, ICJ Reports 1976, pp. 3- 46, pp. 13-14; *Teheran hostage - Case*, ICJ Reports 1980, pp. 22-23; *Lockerbie, Ni Declaration*, ICJ Reports 1992, p. 22; *Stein* (fn. 16), p. 360.

44 See *Meyer-Ohlendorf* (fn. 5), p. 2.

45 *Martti Koskeniemi*, *The Police in the Temple Order; Justice and the UN: A dialectal view*, EJIL 6 (1995), pp. 325-349, p. 327.

46 *Serge Sur*, *La Résolution 687 du Conseil de Sécurité dans l'affaire du Golfe: Problèmes des rétablissement et de garantie de la paix*, AFDI 1991, pp. 25-97, p. 33; similarly *Kelsens* quotation in the introduction: the founders wanted to establish "in favour of the Security Council a police state, not a state founded on the rule of law" (translation by the author).

47 *Stein* (fn. 16), p. 388.

terest in the result might reinforce the Council's credibility in case of a "positive" judgment, confirming the conformity of the Council's actions with the purposes and principles of the Charter. Even a negative decision by the ICJ would have only a short-range negative effect on the Council's legitimacy: Since, before acting, the Council would take into consideration the judgements of the ICJ – an external and independent organ – the thesis that the Security Council is exploited exclusively to realise political interests of the permanent five would become more difficult to defend. Thus, cooperation between the ICJ and the Council is appropriate to remedy the suspicion that the Security Council abuses its power, and to increase its credibility – and, thus, its legitimacy – as a necessary condition of UN members' obedience.

Of course, "restore peace" is not identical to "restore law", but legality is not the enemy of peace, rather the opposite is true: Without legal constraints and the possibility of judicial review, the Security Council risks losing its legitimacy as happened to the League of Nations and could, through this, be damned to be as ineffective as the League was. To reinforce judicial review is to reinforce the UN's effectiveness. That is why the ICJ should have the power to review Security Council Resolutions adopted under Chapter VII.