

LOCKERBIE AND BEYOND: WHERE DOES THE WORLD COURT GO FROM HERE?

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Art. 39 of the UN Charter authorises the Security Council to make a determination as to the existence of any threat to the peace, breach of peace or an act of aggression and to take measures to restore international peace and security. Other provision of chapter VII of the Charter make it clear that such measures include economic and diplomatic sanctions as well as the use of armed force.

These provisions clearly indicate that at the time of the inception of the UN, the Security Council was seen as the future peacckceper of the global community. This, however, is a role which the Council has proved woefully inadequate to fulfill, largely because of the superpower conflicts within the Council and frequent resort to their veto powers.

While this enforced paralysis had the unfortunate effect of rendering the prohibition of the threat or use of force in Art. 2(4) of the Charter a dead letter,¹ it has also prevented the Security Council from acting in excess of its authority. Indeed, it can be said that the Council has avoided acting in a manner inconsistent with its mandate by not acting at all.²

The post cold war years have, however, seen a radical change in this situation. Free from the East-West detente and hence the shackles of the veto, the Security Council has moved from forced inactivity to an increasingly reckless invocation of Art. 39. Thus, in the recent past, the Security Council has not only made Art. 39 determinations where the situation clearly called for it, such as in Kuwait,³ but also in instances where the threat to international peaces was far less apparent. A few recent examples are the Security Council resolutions on Somalia in 1992,⁴ the

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1 T.M. Franck, *Who Killed Art. 2(4)*, 64 A.J.I.L. 809, 810-11 [1970].

2 Michael Reisman therefore chooses to call the veto power "the functional check" to the powers of the Security Council. *see* W.M. Reisman, *The Constitutional Crisis in the United Nations*, 87 A.J.I.L. 83, 84 [1993].

3 Though even in the case of Kuwait, the Security Council is criticised as having overstepped its boundaries. *See* Reisman, *supra* n. 2 at 85.

4 SC. Res. 733 and SC Res. 794, UN SCOR, 47th sess., Res. & Dec. UN DOC S/INF/48 (1992), cited from F.L. Kirgis, *The Security Council's First Fifty Years*, 89 A J.I.L. 506, 513 [1995]. These resolutions recited the concern that the situation constituted a threat to peace and security but supported the finding only with a vague reference to be Somalian civil war and the peace and stability of the region.

economic sanctions imposed on Haiti in June, 1993,⁵ the resolutions prohibiting supply of arms and ammunitions to UNITA, the rebel force in the civil war in Angola.⁶

Concern over the Council's activism is further exacerbated by the fact that it is a relatively small body with enormous potential for affecting the vital interests of several states.⁷

As a result, there is today, a body of scholarly opinion advocating a means of "reviewing" the Council's actions. Some see the seeds of such review as having already been sown in the recent decision in the *Lockerbie case*.⁸

I. THE ICJ AND JUDICIAL REVIEW

While *Lockerbie* is frequently seen as being to the ICJ what *Marbury v. Madison* to the United States Supreme Court,⁹ this is not the first case where the World Court has been called upon to review the legality of the actions of the political organs of the UN. Similar questions have come up before the Court, though not in so direct a form in the *Namibia Case*¹⁰ and the *Certain Expenses Case*.¹¹

In the *Certain Expenses Case*, the General Assembly requested an advisory opinion on the question of whether the expenses incurred by the UN operations in Congo in 1960-61 and in the middle-east in the late 1950s were expenses of the UN within the meaning of Art. 17(2)¹² of the Charter.

5 SC Res. 841, UNSCOR, 48th Sess., Res & Dec At 63 UN DOC S/INF/49 (1993), reprinted in 32 ILM 1205 [1993]; The discussion on the resolution concerned the urgent need to relieve the humanitarian crisis within the country. There was scarcely any mention of a threat to international peace and security.

6 SC Res. 864, UNSCOR, 48th Sess., Res & Dec at 119, UN Doc S/INF/49 (1993) cited from Kirgis, *loc. cit.* Again there was no evidence of a threat to international peace and security. At stake was the continuation of the Angolan Civil war at a time where the external sponsors of the factions had left the scene and very little, if any, of the actual fighting had spilled into the neighbouring states.

7 See T.M. Franck, *The Powers of Appreciation : Who is the Ultimate Guardian of UN Legality?* 86 A.J.I.L. 519, 523 (1992), where the author writes "Many members of the UN with little or no voice in the deliberations of the Council are probably somewhat surprised to find that it may order them to take major steps that they consider contrary to their national interest and that, moreover, are incongruent with expectations created by multilateral treaties to which they are parties".

8 *Questions of Interpretation and Application of the Montreal Convention Arising from the Aerial Incident at Lockerbie. (Libya v. US, Libya v. UK)*, 1992 ICJ Rep. 4.

9 Reisman, *supra* n. 92; M.J. Gleenan, *Protecting the Court's Institutional Interest; Why Not the Marbury Approach* 81 A.J.I.L. 121 [1987].

10 *Legal Consequence for States of the Continued Presence of South Africa in Namibia*, 1971 ICJ Rep. 16.

11 1996 ICJ Rep. 151.

12 Art. 17(2) authorises the General Assembly to apportion the expenses of the UN among members.

A French amendment to the question which was proposed but rejected would have asked the Court to decide first whether the expenses were decided in conformity with the provisions of the charter, i.e., whether the General Assembly and the Security Council had acted *ultra vires* in authorising the expenditure.¹³

The Court, while taking note of the rejection, held that this did not preclude it from deciding “whether the expenses were decided in conformity with the charter”.¹⁴ The Court thus asserted its power of judicial review despite the apparent intention that it refrain from doing so.

However, immediately thereafter, it seems to have made a *volte face* when it observed that there was no provision in the structure of the UN for judicial review analogous to that found in municipal legal systems to determine the validity of a governmental or legislative acts.¹⁵

It therefore concluded that each organ must, “in the first instance at least” determine its own jurisdiction.¹⁶

These two apparently contradictory stands, and the use of the words “in the first instance at least”, make the decision highly ambivalent.

In the *Namibia Case* the Court observing that France and South Africa had argued that the General Assembly had acted *ultra vires* in adopting the resolution purporting to terminate the mandate for Namibia and declaring South Africa’s presence illegal, noted that this argument also called into question the validity of certain Security Council resolutions.¹⁷ It then went on to hold that while the Court does not possess the power of judicial review or appeal in respect of the decisions of the UN organs concerned, it may, in the exercise of its judicial functions, consider objections as to their validity “in the course of its reasoning”, before determining any legal consequences arising from them.¹⁸

The several concurring judges who have been more assertive than the majority seem to have taken the view that the decision on the question of the validity of the various resolutions was a precondition to a decision on their legal consequences.¹⁹ The dissenting opinion of Judge Fitzmaurice attacked these resolutions as beyond the competence of the General Assembly and the Security Council.²⁰

13 1962 ICJ *Rep.* at 156.

14 *Ibid.* at 157.

15 *Ibid.* at 168.

16 *Id.*

17 1971 ICJ *Rep.* at pp. 21-22.

18 *Ibid.* at 45.

19 Separate opinion of Judge Petren at *Id.*, p. 131; of Judge Oneyama at *Ibid.* at 143-45, of Judge Dillard at *Ibid.* at 151-52; and of Judge de Caetro at *Ibid.* at p. 118.

20 *Ibid.* at 278-95.

THE LOCKERBIE CASE

The Libyan request for interim relief in the *Lockerbie* case invited the Court to decide that certain Security Council resolutions asking the Libyan Government to surrender two Libyan nationals accused of the Lockerbie bombing to stand trial in the US and the UK might be *ultra vires*. In particular, Libya argued that by its resolutions, “the Security Council infringes or threatens to infringe the enjoyment of the rights conferred on Libya by the Montreal Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, 1997,²¹ and its economic, commercial and diplomatic rights.”²²

Libya also alleged that the Security Council had “employed its power to characterize the situation for the purposes of Chapter VII simply as a pretext to avoid applying the Montreal Convention”.²³

In the face of Libya’s submissions, the Court could have asserted its power of judicial review, and then either have granted the relief sought for, or refuse it holding that sufficient grounds had not been made out. Alternatively, it could have refused to consider the legality of the Council’s resolutions at all on grounds that it lacked the power of judicial review.²⁴ The Court seems to have chosen the former option and denied Libya relief. The rejection was based, not on any lack of the power of review, but on the absence of any right of Libya under the Montreal Convention in view of Art. 25 read with Art. 103 of the UN Charter.²⁵

Thus, the *Marbury* analogy is further strengthened, since the Court has asserted its power of judicial review without bringing itself into conflict with the political organ whose actions it is reviewing.

As happened in the *Namibia Case*²⁶ the concurring judges who wrote separate

21 Art. 5(2) of the Convention to which both the US and Libya are parties requires each state party to either take jurisdiction over persons present on its territory who are alleged to have committed acts of terrorism against a civil aircraft, or to extradite them to a state which is willing to exercise such jurisdiction.

22 1992 ICJ Rep. at para 32.

23 *Id.*

24 T.M. Franck, *Fairness in the International Legal and Institutional System*. Recueil Des Cours, 189-221 (1993 III).

25 Art. 25 enjoins members to accept and implement decisions of the Council, while Art. 103 says that in the event of conflict between the obligations of the members under the Charter and any other international instrument, the Charter prevails. It is to be noted that Art. 103 speaks only of a conflict between the Charter and any other treaty. The outcome would perhaps have been different had Libya been able to canvass its claims, not under the Montreal convention, but under any customary rule of International law. See *supra* n. 8 at 162.

26 See *supra* n. 19.

judgements²⁷ and the dissenters²⁸ were more assertive of the Court's power of judicial review.

II. THE UN CHARTER, THE STATUTE OF THE ICJ & JUDICIAL REVIEW

Art. 32 of the Vienna Convention on the Law of Treaties permits recourse to the negotiating history of the treaty if the text leaves the meaning ambiguous or obscure. A scrutiny of the UN Charter and the Statute of the ICJ reveal that this is indeed the case with respect to judicial review,²⁹ and therefore, the preparatory history may be resorted to in order to ascertain whether the Charter envisages judicial review.

During the course of the drafting of the Charter, there were two Belgian proposals to incorporate judicial review by the ICJ explicitly in the Charter.

The first proposal was to confer on any state party to a dispute before the security Council, the right to refer any decision of the Council to the ICJ.³⁰ This proposal was objected to by six states (four of which - the USA, the USSR, UK and France - expected to become members of the Council) and was later withdrawn by Belgium.³¹

This withdrawal, according to certain authors, goes to show that the Charter did not, in fact, authorise judicial review.³² A contrary argument, however, is that the proposal was withdrawn by the Belgian delegate only on an assurance that the recommendation of the Security Council would only be advisory and would not

27 See *supra* n. 8 at 129, the separate opinion of Judge Lachs that the Court is a guardian of the legality of the international community as a whole, and at 146, the separate opinion of Judge Shahabuddeen.

28 *Ibid.* at p. 156, the opinion of Judge Bedjoui that the Security Council resolution would not be binding if its "object or effect" was to prevent the exercise by the Court of its power of judicial review, and at 166-81, the opinion of Judge Weeramantry, who indicated that the Council is required to act in accordance with the "principles and purposes of the Charter"

29 Art. 24(2) of the Charter enjoins the Security Council to act in infirmity with the purposes and principles of the UN; Chapter I enumerates these "purposes and principles. Art. 25 makes decisions of the Council binding only if taken in accordance with the Charter; Art. 92 of the Charter says that the ICJ shall be the "principal judicial organ" of the UN. This is reiterated by Art. 1 of the Statute of the ICJ. However the Charter or the Statute do not talk explicitly of judicial review.

30 The text of the proposal reads:

Any state party to a dispute brought before the Security Council shall have right to ask the PCIJ whether a recommendation or decision made by the Council or proposed in it infringes its essential rights.

Doc. 2, G/7(K)(1), 3 U.M.C.I.B. Docs. 335, 336 (1945), cited from II. Kelsen, *The Law of the United Nations*, 446-47 (1954).

31 *Id.*

32 R. Higgins, *The Development of International Law Through the Political Organs of the UN*, 446-47 (1954).

bind the parties,³³ and therefore, the withdrawal of the Belgian proposal does not signify the unacceptability of judicial review.³⁴

The second Belgian amendment proposed to the committee on legal problems (a subset of the committee on judicial organisation) suggested that a proper interpretative organ for the several parts of the Charter be designated. This was rejected by the committee. According to the committee, there was no need to refer interpretative disagreements on the Charter between organs as an “established procedure”.³⁵ The committee also held that an interpretation produced by an organ which was not “generally acceptable” would be without binding force.³⁶ Thus rejection of the second Belgian proposal is also inconclusive.

III. JUDICIAL REVIEW BY THE ICJ - PROS AND CONS

From the above discussion it is clear, that while the ICJ has repeatedly exercised the power of judicial review neither the text of the Charter or its preparatory history come out clearly in support of such an exercise. Nor does the Charter enumerate any clear constitutional restraints on the power of the Council which can be used as tools of review by the Court.

However, this cannot be used as an argument against judicial review, since there are several instances of domestic Courts exercising judicial review without an express constitutional warrant (*Marbury v. Madison* being the most famous example) and there is no reason why the ICJ should not do the same.³⁷ Similarly, instances abound where Courts from considering the vires of executive and legislative acts.³⁸

Another argument against judicial review is the absence of any suggestion of a hierarchy between the ICJ and the Council.³⁹

33 Kelsen, *loc cit.*

34 G.R. Watson, *Constitutionalism, Judicial Review and the World Court*, Harv. J. Int'l L. 1 (1993) at p. 8.

35 *Ibid.* at 11.

36 *Ibid.* at 13.

37 J.E. Alvarez, *Judging the Security Council*, 90 A.J.I.L. 1, 15-16 (1996)

38 *Id.*

39 See V.G. Debbas, *The Relationship Between the International Court of Justice and the Security Council in the Light of the Lockerbie Case*, 88 A.J.I.L. 643, 659 (1994), where the author points out that there have been instances for e.g., the *Hostages Case*, and the *United States Consular and Diplomatic Staff in Tehran (United States of America v. Iran)*, 1980 ICJ Rep. 1; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States)*, 1986 ICJ Rep. 14 and the *Nicaragua Case*, where the World Court has exercised its judicial functions over matters pending before the Security Council; Also, while the Charter prohibits the General Assembly from making any recommendation with respect to any matter pending before the Security Council (Art. 12), there is no corresponding prohibition with respect to the ICJ; similarly, there are no restrictions on the Security Council from taking up matter pending before the World Court.

However, this argument is consistent with the actual “functional parallelism” between the two organs - the Security Council being a purely political organ and the ICJ being a purely judicial one.⁴⁰

Practical problems regarding the exercise of judicial review by the ICJ revolve around the non-binding nature of the pronouncements made by the ICJ⁴¹ and also that since the ICJ relies on the Council for the implementation of its decisions, a pronouncement invalidating the acts of the Council itself is unlikely to be given effect to.

However, though non-binding in character, it cannot be said that a pronouncement by the ICJ is totally without any force of law.⁴²

CONCLUSION

An analysis of the pros and cons of the issue shows that there are no serious hurdles in the way of exercise of judicial review by the ICJ. Indeed, in view of the recent activism of the Security Council, it seems to be the need to of the hour. Especially so, since the ICJ is a considerably more democratic body than the Security Council.⁴³

The *Lockerbie* judgment therefore, seems to be the right step in the right direction.

Further progress along this line, however, should be made with caution. An immediate direct confrontationist approach in this regard is likely to do more harm than good in the long run. It must be borne in mind that even the United States Supreme Court took nearly fifty five years after *Marbury* to first invalidate a federal legislation in *Scott v. Sandford*.⁴⁴

40 G. Debbas, *supra* n. 39 at 658.

41 Advisory opinions are in general not binding upon the requesting body, while by virtue of Art. 59 of the Court's Statute, a decision given in the course of its contentious jurisdiction is binding only on the parties before it.

42 See Reisman *supra* n. 2 at 92, where he writes, “A statement of law, rendered according to due process by a Court obliged to decide according to law, cannot help but say something authoritative about the law”.

43 World Court judges are elected, albeit by the General Assembly (Art. 2, Art. 4 para. 1, Arts. 5-59 of the Statute of the ICJ). Though an intensely political process, this is definitely more democratic than the selection of members to the Security Council. There are no permanent members or the veto. No state is guaranteed a seat on the World Court. Each World Court Judge must step down or run for re-election every 9 years (Art. 13, para 2 of the Statute).

44 *Dred Scott v. Sandford*, 60 U. S. 393 (1856), cited from L. H. Tribe, *American Constitutional Law*, 28 (1988).