INTERNATIONAL JUDICIAL REVIEW OF THE LEGALITY OF ACTS ADOPTED BY UNITED NATIONS ORGANS

Giovanni Distefano
Professor of International Law
At the University of Neuchatel

Abstract:

This brief article endeavours to tackle the thorny question of the judicial control of acts adopted by United Nations Organs. The analysis is strictly confined to the international judicial control of two specific organs, i.e. Security Council and General Assembly. Contrary to many domestic legal systems, where such judicial control is envisaged either by an explicit empowerment or by a constitutional custom, a similar entrustment is not envisaged by the United Nations Charter. Therefore, a specific jurisdictional entitlement is needed for the International Court of Justice to assess the validity of a resolution adopted by the two aforementioned organs. This has been the case through the seisine, in the case of a contentious case brought before her, or a through a specific request of advisory opinion made by one of the organs vested with this power by the United Nations Charter, that is to say, according to its Article 96 (1), Security Council and General Assembly. This has in fact hitherto occurred 7 times since the entry into force of the United Nations Charter. Finally, one of the most far-reaching international judicial reviews of the validity of acts adopted by a United Nations organ, has been wielded by a Court outside the UN System, i.e. the Court of Justice of European Union. This article eventually delves into all these judgments and advisory opinions rendered by the International Court of Justice and the Court of Luxembourg.

1. Remarks on the United Nations Charter

It is undisputed that every United Nations (hereinafter: UN) organ, just like any organ of any International Organization (hereinafter : I.O.), must, in order to fulfil its mission attributed by the latter, respect: a) the obligations contained in the constitutive treaty (as the organ is "enslaved" to the constitutive charter)(1); b) the obligations contracted by the I.O. (convention,(2) contracts under member States' domestic law, etc.); c) public international law (hereinafter: PIL),(3) including, above all, peremptory international law rules (*jus cogens*).(4) In this last respect, Article 103 of the United Nations Charter (hereinafter UNC) cannot prevent the operation of *jus cogens*, so that the latter will always prevail over conflicting UNC obligations (including those conveyed by the United Nations Security Council(5) resolutions). As the Court affirmed in its 1980 advisory opinion:

"International organizations are subjects of international law and, as such, are bound by any obligations incumbent upon them under general rules of international law, under their constitutions or under international agreements to which they are parties"(6)

The conformity of any organ activity to the constitutive instrument thus represents a topical issue of constitutionality, which must be addressed while having in mind the institutional dimension of the

(1) ICTY, The Prosecutor v. Tadic, Judgment (Appeals Chamber) of October 3, 1995, § 28.
(2) See for instance (with regard to the EU): Racke case (C-162/96), Court of Justice of the European Union [hereinafter: CJEU], Judgment of June 16, 1998, § 41.
(3) As the CJEU declared: "I*t should be noted in that respect that, as is demonstrated by the Court's judgment in Case C-286/90 Poulsen and Diva Navigation [1992] ECR I-6019, paragraph 9, the European Community must respect international law in the exercise of its powers. It is therefore required to comply with the rules of customary international law when adopting a regulation suspending the trade concessions granted by, or by virtue of, an agreement which it has concluded with a non-member country", Racke case, § 45.*
(4) See: K. Zemanek, "The legal foundations of the international system : general course on public international law ", RCADI, vol. 266 (1997), 231-232.
(5) Hereinafter: UNSC
(6) Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt, Advisory Opinion of December 20, 1980, *ICJ Reports* 1980, § 37.

instrument establishing an I.O.(1) Last but not least, it ought not to be forgotten or even underrated that the establishment of an I.O. can by no means serve as a purpose for Member States to shy away from the application of PIL. In short, to erect a shield between States and PIL by setting up an I.O. would both be unlawful and devoid of any legal effect.(2) In fact, it would be at variance with the spirit and the letter of PIL since an I.O. is a tool aimed at international cooperation and not a means allowing Members States to shy the Empire of Law away.

Notwithstanding this general obligation for UNO to abide by the Law, there is a complete absence of jurisdictional control by the ICJ, which, in spite of its pompous denomination conferred by the UNC ("principal judiciary organ"),(3) was not bestowed with power of judicial review.(4) In

(1) A State owes its existence to a sheer fact (sometimes violent ones) while a I.O. may only exist by dint of an international treaty regulating its creation, thus serving as its birth declaration, and establishing its own rules of operation. This legal act possesses both institutional and conventional characters; indeed, while it is shaped as a multilateral treaty (that is, conventional), its substance rather mirrors the creation of a State (that is, institutional).(1) It is then appropriate to conciliate the *formal* (i.e. its origins) dimension of the constitutive instrument with its striking *constitutional* aspect. As the ICJ affirmed in its 1996 Advisory opinion: "From a formal standpoint, the constitutive instruments of international organizations are multilateral treaties, to which the well-established rules of treaty interpretation apply … But the constitutive instruments of international organizations are also treaties of a particular type; their object is to create new subjects of law endowed with a certain autonomy, to which the parties entrust the task of realizing common goals. Such treaties can raise specific problems of interpretation owing, *inter alia,* to their character which is conventional and at the same time institutional; the very nature of the organization created, the objectives which have been assigned to it by its founders, the imperatives associated with the effective performance of its functions, as well as its own practice, are all elements which may deserve special attention when the time comes to interpret these constitutive treaties", Legality of the Use of by a State of Nuclear Weapons in Armed Conflict, Advisory Opinion of July 8, 1996, *ICJ Reports* 1996, § 19.

(2) As the European Court of Human Rights (hereinafter: ECHR) affirmed in an uncontroversial passage: "The Court is of the opinion that where States establish international organisations in order to pursue or strengthen their cooperation in certain fields of activities, and where they attribute to these organisations certain competences and accord them immunities, there may be implications as to the protection of fundamental rights. It would be incompatible with the purpose and object of the Convention, however, if the Contracting States were thereby absolved from their responsibility under the Convention in relation to the field of activity covered by such attribution", Waite and Kennedy v. Germany (Case 26083/94), Judgement of February 18, 1999, § 67.

(3) As provided for in Art. 92 UNC.

(4) On the contrary, in such cases as provided by some IOs constitutive instrument, the Court has been empowered to scrutinize the validity of the acts adopted by the former organs. In this regard: Appeal

addition, it must be underlined that, without going so far as reviewing the validity of another UN organ, the Court is obviously empowered to *interpret* it(1) and *define* its scope and even its legal effects.(2)

In general, we observe that I.O.s do not possess, in most cases, a centralized control for the validity of the acts of their organs. Hence, one of the most striking contradictions is represented by the fact that, on the one hand, UN organs are subject to general international law and particularly to the UNC, but, on the other hand, the latter does not provide for a jurisdictional mechanism of control and review of their acts. This issue, practically dormant since 1945 – with the notable exceptions of *Certain Expenses* (1962) and *Namibia* (1971) –, has led to an abundant literature since the end of the Cold War and the consequential awakening of the UNSC.

Before addressing the issue of judicial review of UN organs' activities, one should recall that PIL provides for other means of control which, albeit being non-jurisdictional, may represent an efficient instrument for the fulfilment of this purpose. They are not specific to the I.O., but they belong to the traditional toolbox of the international lawyer: protest, silence, acquiescence, recognition and the like.(3) In short, if Member States, and especially those sitting in the organ concerned, consider that the latter has either trespassed its competence, infringed the procedure, carried out an act at variance with public international law at large, or if its conduct has somehow arisen a problem of constitutionality, then they are allowed to *react* in view of challenging its legality. They can resort to

Relating to the Jurisdiction of the ICAO Council (India v. Pakistan), Judgement of August 18, 1972, *ICJ Reports* 1972, § 26.

(1) However, one ought to stress, this power is not at all exclusive, since given the equality of UN principal organs between them, it was agreed during the San Francisco Conference, that none of them could impose a binding interpretation of the UNC to another organ. See *infra* note 27.

(2) See in this regard: East Timor (Portugal v. Australia), Judgement of June 30, 1995, *ICJ Reports 1995*, §§ 30-32.

(3) Admittedly, UNC has been modified by way of tacit agreement (or custom) in quite a few of its provisions, States resorting to these means instead of triggering the heavy and lengthy procedure envisaged by UNC Chapter XVIII.

protest and even refuse to abide by it.(1) This approach is a horizontal one, i.e. Member States compensate the lack of a centralized (institutional) control (that is, provided by the constitutive instrument) by reverting to classical PIL means. In this regard, one shall not forget that PIL, unless clearly derogated from by the constitutive instrument, is still applicable and govern State conducts, inside or outside the I.O. concerned. The conduct and decision-making of the Member States is thus paramount for the adoption of the secondary organs' acts. They can, for instance, express their doubts as to a potential illegality of the organ's decisions by making statements in this respect. Their silence, their agreement, or *a fortiori* their conduct or explicit statements play a great role in determining the validity of an act carried out by a UN organ.(2) As Parties to the treaty creating the Organization, and thus the organ, they are empowered to interpret, according to international law, the legality of an organ's act in the light of the Law of Treaties,(3) and can possibly react accordingly (e.g. not to apply the contested resolution).(4) This wide array of the classical means of determination-interpretation of international law reflect the horizintak dimension of the international legal system.

Therefore, such a rudimentary control by Member States can be envisaged even within the UN, and it was indeed contemplated during the preparatory works of the UNC at San Francisco in 1945.(5) Now,

(1) See: K. Zemanek, cit. (1997), 96-97.

(2) "Finally, this 15-member Council acts on behalf of a total of 175 States Members of the United Nations. This means that 160 States have placed their security, and possibly their very survival, in the hands of the 15. This is a solemn and heavy responsibility that each and every member of the Council carries. It is therefore of crucial importance that every decision taken by the Security Council be able to withstand the careful scrutiny of the 160 Member States on whose behalf the Council is expected to act. This is only possible if the Council insists on being guided in its decisions and actions by the Charter and other international conventions", Intervention of Zimbabwe, UN Doc. S/PV.3063 (31 March 1992) before the UNSC (relating to the UNSC's action during the crisis sparked by Lockerbie's incident), 54-55.

(3) Article 31 of the Vienna Convention on the Law of Treaties [hereinafter: VCLT 1969].

(4) In this vein: A. Tzanakopoulos, *Disobeying the Security Council: Countermeasures against Wrongful Sanctions*, Oxford, 2011.

(5) "In brief, the Members or the organs of the Organization might have recourse to various possible expedients in order to obtain an appropriate interpretation. It would appear neither necessary nor

coming back to the judicial control by the ICJ, a few words must be said about UNC's *travaux préparatoires*. In fact, the possibility for the ICJ to review the conformity of a UNSC resolution (under Chapter VI of the UNC) with PIL was evoked. In this context, the idea that UNSC could force a Member State to settle a dispute following the terms of its resolution potentially at odds with "positive international law" was feared by some States. Quite understandably, this concern stemmed from small States (in the case in point, Belgium) which therefore proposed that in such circumstances, "the State could ask the International Court whether the decision or recommendation of the Council [under Chapter VI] infringed the essential rights of the member. If the Court so decided, the Council would then have to reconsider the question or refer the dispute to the General Assembly."(1) The issue was somehow solved by a double action: a) on one side, it was stressed that, in carrying out its functions, the UNSC has to stay within the realm of PIL; b) on the other side, "Council recommendations [under 37 § 2 UNC] would not be obligatory."(2) Therefore, while Member States are not bound to follow UNSC recommendation to settle a dispute according to the terms contained therein, the thorny question of judicial control was, though, left unprejudiced.(3)

Therefore, since no special and explicit powers have been vested with the ICJ the UNC, the Court's faculty to review (and maybe) declare the

desirable to list or to describe in the Charter the various possible expedients. *It is to be understood, of course, that if an interpretation made by any organ of the Organization or by a committee of jurists is not generally acceptable it will be without binding force*. In such circumstances, or in cases where it is desired to establish an authoritative interpretation as a precedent for the future, it may be necessary to embody the interpretation in an amendment to the Charter. This may always be accomplished by recourse to the procedure provided for amendment", United Nations Conference on International Organization) UNCIO, Report of the Rapporteur of Committee IV/2, Doc. 933 (IV/2/42 (2)), Printed documents, vol. XIII, 709 [emphasis added].

(1) R. Russell, *A History of the United Nations Charter*, Washington, 1958, 664.

(2) *Ibid.*, 665.

(3) For further elaboration on this topic, see: G. Distefano, E. Henry, "The International Court of Justice and the Security Council: disentangling Themis from Ares", in *The ICJ and the Evolution of International Law. The enduring impact of the Corfu Channel case*, ed. by K. Bannelier, Th. Christakis and S. Heathcote, London, 2012, 60-84.

invalidity of UN organs acts, can only be found in its general competences stated in the UNC as well as in its Statute.

It is well established that the Court can exercise – according to its Statute – both contentious and advisory functions. As for the former, the Court may settle any dispute between Member States, while for the latter the Court is vested with the power to render an Advisory opinion if so requested by the UNSC, the General Assembly [hereinafter: UNGA] (Article 96 (1) UNC), any authorized organ of the UN or by any UN specialized agency, duly authorized by the UNGA (Art. 96 (2) UNC).(1)

2. Judicial Review by the International Court of Justice

Time has come to browse ICJ's case-law in order to assess whether, while accomplishing its functions, the Court has ever been led review the validity of an act carried out by a UN organ. In fact, grossly speaking, the Court has hitherto been faced in five advisory opinions and two contentious cases; in both of its functions, it had to deal with a UNGA resolution on four occasions, and twice with a UNSC's. Hereafter we will try to focus on the ICJ's reasoning in a timeline perspective.

In *Conditions of admission* case (1948), the Court adamantly ruled out that it was empowered to enquire into the reasons which might [have] prompt[ed] a Member to vote in a certain manner within the UNGA, "such reasons, which enter into a mental process, are obviously subject to no control."(2) Indeed, those "reasons" belonged to the discretionary power inherent to both UN political organs, and as such fundamentally escape the Court scrutiny.

(1) At least theoretically it can be envisaged an advisory opinion requested by UNGA in matter of UNSC activities. However, even if this approach can be based on the black-letter law of the UNC, it is hardly viable from a political point of view. However, as underlined by several leading scholars (i.a.: C. Tomuschat, "International law: ensuring the survival of mankind on the eve of a new century: general course on public international law", *RCADI*, vol. 281 (1999), 424-428), the review the validity of UNSC (and other organ's) resolutions through the advisory function remains a powerful tool in the hands of the ICJ and, upstream, in those of the UNGA which shall have to so request.

(2) Conditions of Admission of a State to Membership in the United Nations (Article 4 of the United Nations Charter), Advisory opinion of May 28, 1948, *ICJ Reports 1948*, 60.

In the second case – *Certain expenses* (1962) – the Court was faced with the question of alleged unconstitutionality of some UNGA and UNSC recommendations establishing peace-keeping forces (in the Middle East and Congo).(1) Since some Member States were challenging the competence of the UNGA and UNSC and thus the validity of the relevant resolutions, the UNGA asked the Court to verify their constitutionality. It is more specifically with regard to the UNGA's power to establish peace-keeping forces, that the Court made highly interesting developments. The Court response was twofold; after having established that the UNGA possesses indeed a secondary responsibility in matters of maintenance and restoration of peace and security,(2) the Court affirmed that:

"If it is agreed that the action in question is within the scope of the functions of the Organization but it is alleged that it has been initiated or carried out in a manner not in conformity with the division of functions among the several organs which the Charter prescribes, one moves to the internal plane, to the internal structure of the Organization. If the action was taken by the wrong organ, it was irregular as a matter of that internal structure, but this would not necessarily mean that the expense incurred was not an expense of the Organization. Both national and international law contemplate cases in which the body corporate or politic may be bound, as to third parties, by an ultra vires act of an agent"(3)

The Court thus seems to shy away from the disputed question – did the UNGA has the power to establish peace-keeping forces and, consequently, were Member States bound to pay for them? – preferring instead to focus on the competence of the UN as a whole. But then, if the Court kept a low-profile approach in this regard, it was quite bold as

(1) Respectively UNEF I (established by the UNGA) and ONUC (established by the UNSC).
(2) Thanks to the ICJ's Advisory opinion, the constitutionality of the peace-keeping forces *recommended* by the INGA will not be challenged anymore.
(3) Certain Expenses of the United Nations, Advisory opinion of July 20, 1962, ICJ Reports 1962, 168 *[emphasis added].*

to, in the following paragraph, throw back the argument to UN Member States:

"In the legal systems 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 the ultimate authority to interpret the Charter in the International Court of Justice were not accepted; the opinion which the Court is in course of rendering is an *advisory* opinion. As anticipated in 1945, therefore, each organ must, in the first place at least, determine its own jurisdiction"(1)

It sounds clearly like a reproach … Be that as it may, the last sentence of the quotation clearly suggests that, as sovereign States in the international realm, every UN organ is "Emperor in its Kingdom."(2)

Just hardly one year later, the ICJ, faced again with a UNGA resolution,(3) yet in a contentious case, was adamant in affirming that it cannot invalidate this organ's resolutions:

"But the Applicant has stated that it does not ask the Court to invalidate the plebiscite … If the Court were to proceed and were to hold that the Applicant's contentions were all sound on the merits, it would still be impossible for the Court to render a judgment capable of effective application. The role of the Court is not the same as that of the General Assembly. The decisions of the General Assembly would not be reversed by the judgment of the Court. The Trusteeship Agreement would not be revived and given new life by the judgment"(4)

(1) *Loc.cit.*
(2) G. Distefano, "Theories on Territorial Sovereignty: A Reappraisal", *Journal of Sharia & Law*, vol. 24 (January 2010), 28-33.
(3) The Republic of Cameroon (the Applicant), which obtained independence from France, challenged Resolution 1608 (XV), by which the UNGA abrogated the Trusteeship Agreement following the plebiscite previously recommended by the same organ in Northern Cameroons. The Applicant challenged both the organization of the plebiscite and the administration of this trusteeship territory.
(4) ICJ, Case Concerning the Northern Cameroons (Cameroon v. United Kingdom), Judgement of December 2, 1963 (Preliminary Objections), *ICJ Reports 1963*, 33.

In so doing the Court paved the way for the consecration, a decade later, of a principle which is consonant with its previous statement dating back to 1962. In the last episode of the South-Western Africa (*Namibia*) judicial saga, the Court was requested by the UNSC to render an Advisory opinion on the consequences of South-Africa occupation of that territory (formerly a League of Nations Mandate).(1) South-Africa argued before the ICJ that the UNSC resolution 276 (1970) was invalid for several reasons. The Court response left no doubt in this regard:

"A resolution of a properly constituted organ of the United Nations which is passed in accordance with that organ's rules of procedure, and is declared by its President to have been so passed, must be presumed to have been validly adopted"(2)

True, this statement is hardly dissonant with the Court's previous stance yet, and here appears the first breach, the Court immediately added:

"However, since in this instance the objections made concern the competence of the Court, the Court will proceed to examine them"(3)

The Court did actually review – incidentally(4) – the validity of the relevant SC resolutions, insofar as it was necessary to establish whether or not it was validly empowered to render an advisory opinion. Thus, the conviction emerges within the Court that it can, *albeit incidentally* (in an advisory opinion), examine the validity of a SC resolution if so is needed to correctly discharge its duties under its Statute.

(1) On this topic, see : G. Distefano, "Article 22", in *Commentaire sur le Pacte de la Société des Nations*, sous la direction de R. Kolb, Bruxelles, 2014, 841-1002.

(2) Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970), Advisory Opinion of June 21, 1971, ICJ Reports 1971, *§ 25.*

(3) *Loc.cit.*

(4) Even though, the Court hastened to make clear in a subsequent paragraph of the same advisory opinion, that: "Undoubtedly, the Court does not possess powers of judicial review or appeal in respect of the decisions taken by the United Nations organs concerned. The question of the validity or conformity with the Charter of General Assembly resolution 2145 (XXI) or of related Security Council resolutions does not form the subject of the request for advisory opinion", § 89.

In the *Lockerbie* case (1992), a contentious case brought by Libya, the Court was asked by the Applicant to indicate provisional measures pending its judgment on the merits. Libya filed the case asking the Court to adjudge that the United Kingdom and the United States were infringing the 1971 Montreal Convention.(1) In a nutshell, Libya contended that, after the bombing of the Pan Am airplane above the small Scottish village of "Lockerbie", it was complying with the Montreal convention according to which a State could, itself, either extradite or judge those persons deemed to be responsible. In fact, Libya assured the Court that it was willing to judge the two alleged responsible individuals (Libyan nationals, by the way) by its own tribunals. Yet, UNSC had adopted resolution 748 (1992) imposing economic sanctions only Libya unless it ceased its support for international terrorism *and extradited* those responsible for the bombing. Therefore, it was argued by Libya that it was faced with two conflicting obligations: one, flowing from the UNSC resolution (requesting the extradition), the other, contained in the Montreal convention, providing either for the judgment *or* the extradition. Hence, in order to avoid further sanctions, Libya also requested the ICJ to order the Defendant to cease their alleged wrongful acts towards it, i.e. economic sanctions. As for the request of provisional measures, the ICJ restrained itself to state:

"Whereas both Libya and the United States, as Members of the United Nations, are obliged to accept and carry out the decisions of the Security Council in accordance with Article 25 of the Charter; whereas the Court, which is at the stage of proceedings on provisional measures, considers that prima facie this obligation extends to the decision contained in resolution 748 (1992); and whereas, in accordance with Article 103 of the Charter, the obligations of the Parties in that respect prevail over their obligations under any other international agreement,

(1) Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, signed at Montreal in 1971.

including the Montreal Convention;"(1)

The Court could not say more than "prima facie", thus not completely closing the door to a substantive review of the relevant SC resolution validity. In its subsequent judgement, the Court rejected, with a comfortable majority, all the Defendant's preliminary objections and thus found itself to have jurisdiction to entertain Libya's claims. Regrettably, after the three parties to the disputes accomplished their written and oral pleadings, the ICJ, following an agreement between the Parties,(2) removed *Lockerbie* case from its docket just at the time when it was ready to enter the deliberation phase. Therefore, a good chance was missed, at least for international law scholars, to know whether the Court could somehow review SC resolutions.

In 2004, the Court rendered a much-awaited Advisory opinion in the matter of the construction of the *Wall in the Palestinian* occupied territories. Here again, the Court was asked to determine the validity of a UNGA resolution by rendering an Advisory opinion; in some regards, it was the same situation as Namibia's except for the organ concerned. In the case in point, some States argued before it that the UNGA on introducing a request to the Court had trespassed its competence, thus infringing the UNC. The Court observed that the practice in the application of the Charter had evolved in such a way as to permit the UNGA to formulate recommendations, in the field of the maintenance and restoration of peace and security, even though "the matter remained on the Council's agenda."(3)

(**1**) Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United Kingdom), Order of April 14, 1992 (Request for the Indication of Provisional Measures), ICJ Reports 1992, § 42.

(2) The three Parties found an alternate way to settle their dispute and finally, a Scottish Court sitting in The Hague and applying UK law, judged the two alleged authors of the bombing: one was acquitted, the other condemned. In return, Libya having likewise made a compensation for the loss resulting from the bombing, the UNSC eventually lifted the economic sanctions.

(3) Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion of July 9, 2004, *ICJ Reports 2004,* § 27. With regard to Article 12 (1) of the UNC, the Court had previously made the followings observation in this same advisory opinion: "This interpretation of Article 12 has evolved subsequently… The Court considers that the accepted practice of the General Assembly,

Therefore, the Court did not hesitate to review the UNGA resolution for the purpose of establishing its jurisdiction to render an Advisory opinion, thereby discharging its statutory duty.

In the same vein, the Court responded to similar arguments in the *Kosovo case*. A long passage of her 2010 advisory opinion deserves of being quoted since it recapitulates the Court's prior decisions in this regard:

"While the interpretation and application of a decision of one of the political organs of the United Nations is, in the first place, the responsibility of the organ which took that decision, the Court, as the principal judicial organ of the United Nations, has also frequently been required to consider the interpretation and legal effects of such decisions. It has done so both in the exercise of its advisory jurisdiction (see for example, *Certain Expenses of the United Nations, (Article 17, paragraph 2, of the Charter), Advisory Opinion, I.C.J. Reports 1962*, p. 175; and *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971*, pp. 51-54, paras. 107-116), and in the exercise of its contentious jurisdiction (see for example, *Questions of the Interpretation and Application of the*

as it has evolved, is consistent with Article 12, paragraph 1, of the Charter." (§§ 27-28). This construction of Article 12 espoused the Court's interpretation of another UNC's key provision, namely Article 24: Under Article 24 of the Charter the Security Council has "primary responsibility for the maintenance of international peace and security". In this regard it can impose on States "an explicit obligation of compliance if for example it issues an order or command […] under Chapter VII" and can, to that end, "require enforcement by coercive action" *(Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter), Advisory (Opinion, I. C. J. Reports 1962,* 163). However, the Court would emphasize that Article 24 refers to a primary, but not necessarily exclusive, competence. […] As regards the practice of the United Nations, both the General Assembly and the Security Council initially interpreted and applied Article 12 to the effect that the Assembly could not make a recommendation on a question concerning the maintenance of international peace and security while the matter remained on the Council's agenda … However, this interpretation of Article 12 has evolved subsequently. […] Indeed, the Court notes that there has been an increasing tendency over time for the General Assembly and the Security Council to deal in parallel with the same matter concerning the maintenance of international peace and security […] The Court considers that the accepted practice of the General Assembly, as it has evolved, is consistent with Article 12, paragraph 1, of the Charter. The Court is accordingly of the view that the General Assembly […] did not exceed its competence" (§§ 26-28).

1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. *United Kingdom), Provisional Measures, Order of 14 April 1992, I.C.J. Reports 1992*, p. 15, paras. 39-41; *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), Provisional Measures, Order of 14 April 1992, I.C.J. Reports 1992*, pp. 126-127, paras. 42-44)"(1)

Therefore, the Court seems to affirm that it has the power to interpret UNSC and UNGA resolutions, which nonetheless is formally a step away from reviewing their validity. In fact, the Court has gone further at times by examining (in 1971, 2004, 2010) whether the UN organ had trespassed its competence. In short, it is not unsound to claim that in the future the Court might incidentally carry out such a review through a consultative procedure, or even potentially through a contentious one.(2)

3. Judicial Review by the Court of Justice of the European Union:

However, in the last years, international tribunals belonging to other – regional – I.O.s have been bolder and dared to cross the line. For instance, the European Court of Justice (hereinafter: ECJ) has not hesitated, in accordance with its powers, to review the compatibility of UNSC resolutions vis-à-vis special rules of the European Union (hereinafter: EU) and PIL general norms.

Once again, it was a UNSC resolution which was at stake, namely the "Antiterrorist" resolution 1373 adopted on 28 September 2001, in the midst of the aftermath of the 9/11 terrorist attacks in New York and Washington. This resolution provided *inter alia* for the freezing of the assets of persons and entities which participated in, facilitated, committed, or attempted to commit, terrorist acts. By virtue of the

(1) Accordance with international law of the unilateral declaration of independence in respect of Kosovo, Advisory Opinion of July 22, 2010, ICJ Reports 2010, § 46.

(2) See Resolution 1904 (17 December 2009) in which the Security Council establishes an ombudsman in charge of the procedure for the defalcation of the person signed up on the black list according to Resolution 1373 (2001). The mechanism put in place vaguely echoes a contradictory procedure.

transfer of powers from EU Member States to the EU, the latter had to comply with the former's obligations under the UNC. Accordingly, the EU established "black lists", i.e. the list of natural and corporate bodies which were deemed to fall within the category indicated by the UNSC. Hence, the Tribunal of the ECJ rightly affirmed, and the reasoning may be easily extended to any other I.O., that since obligations upon EU Members under the UNC are henceforth incumbent upon the EU:

"first, the Community may not infringe the obligations imposed on its Member States by the Charter of the United Nations or impede their performance and, second, that in the exercise of its powers it is bound, by the very Treaty by which it was established, to adopt all the measures necessary to enable its Member States to fulfil those obligations"(1)

This entails that EU Member States cannot shield themselves behind the I.O. in order to escape from their obligations under PIL and, in this case, of the UNC; this is even more cogent on the grounds of Article 103 UNC, establishing the primacy of the latter vis-à-vis any other "ordinary" obligation (be it conventional or customary). Yet, on the other hand, the same argument can be reversed and applied to the UN itself, insofar as UN Member States cannot empower one of the latter's organs to infringe PIL peremptory norms (jus cogens). In this respect, the Tribunal affirmed that:

"International law thus permits the inference that there exists one limit to the principle that resolutions of the Security Council have binding effect: namely, that they must observe the fundamental peremptory provisions of *jus cogens*. If they fail to do so, however improbable that may be, they would bind neither the Member States of the United Nations nor, in consequence, the Community"(2)

(1) Ahmed Ali Yusuf, residing at Spånga (Sweden), Al Barakaat International Foundation, v. Council of the European Union and Commission of the European Communities, Case T-306/01, Judgement of the Court of First Instance (21 September 2005), § 254.
(2) *Ibid.*, § 281.

By way of consequence, the Tribunal considered itself empowered to verify whether the EU internal act establishing the "black lists" system, is compatible with:

"superior rules of international law falling within the ambit of *jus cogens* … in particular, the mandatory provisions concerning the universal protection of human rights, from which neither the Member States nor the bodies of the United Nations may derogate because they constitute 'intransgressible principles of international customary law' (Advisory Opinion of the International Court of Justice of 8 July 1996, The Legality of the Threat or Use of Nuclear Weapons, Reports 1996, p. 226, paragraph 79; see also, to that effect, Advocate General Jacobs's Opinion in *Bosphorus*, paragraph 239 above, paragraph 65)"(1)

In the case in point, the Tribunal had to verify whether:

"the limitation of the applicants' right of access to a court, as a result of the immunity from jurisdiction enjoyed as a rule, in the domestic legal order of the Member States of the United Nations, by resolutions of the Security Council adopted under Chapter VII of the Charter of the United Nations, in accordance with the relevant principles of international law (in particular Articles 25 and 103 of the Charter), is inherent in that right as it is guaranteed by jus cogens"(2)

Hence, the Tribunal considered that not only UNSC has to abide by PIL peremptory norms, but also, and foremost, that it is empowered to review their compatibility and, if necessary, divest the resolution from its binding effects within the EU legal order. The Tribunal's response is articulated in two branches. Firstly, it weighs up conflicting interests, i.e. the Applicant's ("right of access to a court") and UNSC's (the maintenance and restoration of peace and security vis-à-vis the terrorist threat). It then concludes that the former's particular interest cannot "outweigh" the latter's general interest. Secondly, it considers that, all in

(1) *Ibid.*, § 282.
(2) *Ibid.*, § 343.

all, "the setting-up of a body such as the Sanctions Committee and the opportunity, provided for by the legislation, of applying at any time to that committee in order to have any individual case re-examined … constitutes another reasonable method of affording adequate protection of the applicants' fundamental rights as recognised by *jus cogens.*"(1) On this basis, the Tribunal dismissed the Applicant's request for annulment of the concerned EU act.

In fact, the latter filed an Appeal to the Court which eventually overruled the Tribunal judgement and annul the Council regulation. The Court firstly underlined that it is not its prerogative to review the validity of an act adopted by an organ belonging to another legal order (UN), especially since such an order enjoys the primacy by virtue of Art. 103 UNC. It then made a useful distinction between invalidity and wrongfulness, stressing that:

"Any judgment given by the Community judicature deciding that a Community measure intended to give effect to such a resolution is contrary to a higher rule of law in the Community legal order would not entail any challenge to the primacy of that resolution in international law"(2)

Then, after underlining the principle of the UNC primacy, the Court moved a step further by declaring:

"that primacy at the level of Community law would not, however, extend to primary law, in particular to the general principles of which fundamental rights form part"(3)

Now, contrary to what the Tribunal of first instance had previously said, EU organs are not vested with the power to review, and if necessary to annul, a UNSC resolution since the latter, as we have seen, enjoys an "immunity of jurisdiction" by dint of Article 103 UNC. Though,

(1) *Ibid.*, § 345.
(2) Judgement of the Court (Grand Chamber), Case C-402/05, 3 September 2008, § 288.
(3) *Ibid.,* § 308.

if a UNSC resolution cannot be examined, the validity of an EU act ("Regulation") accordingly adopted to implement the former can and must be reviewed by the Court, since it is precisely an act which has to satisfy EU fundamental principles. Here the Court draws a boundary line between two separate legal orders: on one side the international (i.e. the UN system) and regional (the internal EU legal system) legal orders, and on the other, the UNSC resolution and the EU Regulation. Within the EU system, a UNSC resolution cannot be reviewed, while the EU Regulation can and must be scrutinized by the competent EU judicial organs (i.e., the Court) since it is going to deploy its legal effects in this order. Following this logic, the Court declared:

"the review by the Court of the validity of any Community measure in the light of fundamental rights must be considered to be the expression, in a community based on the rule of law, of a constitutional guarantee stemming from the EC Treaty as an autonomous legal system which is not to be prejudiced by an international agreement"(1)

In the case in point, this determination led the Court to declare that the EU regulation concerned is at variance with EU "fundamental rights,"(2) and thus declaring its nullity.

What next then?(3) The Court's reasoning is founded upon the existence of two legal orders, which albeit being interconnected and one (UN) holding primacy over the other (EU), still allows it to annul an act belonging to the latter. As a consequence, the EU – and its Member States – has to abide by UNSC resolutions, among which resolution 1373. Yet, because of the annulment by the Court of the controversial EU Regulation, the EU and its Member States will find themselves in an odd position: on one side, they are at variance with UNSC resolution 1373,

(1) *Ibid.*, § 316.
(2) "[T]he procedure before that Committee is still in essence diplomatic and intergovernmental, the persons or entities concerned having no real opportunity of asserting their rights and that [SC] committee [of sanctions] taking its decisions by consensus, each of its members having a right of veto", *Ibid.*, § 323.
(3) The Grand Chamber of the European Court of Justice in its last and definite judgement (18 July 2013) largely confirmed this decision.

thus infringing Art. 25 and 103 UNC,(1) and on the other they cannot but respect the Court annulment of the EC Regulation. The relations between these two legal orders take the shape of two different concepts of Law, i.e. invalidity (of the EU Regulation within this legal system) and wrongfulness (by the non-compliance of the EU and its Member States with the UNSC Resolution). Therefore, and in a nutshell, what is considered null and void in a given legal system puts EU Member States at variance with the universal legal system, the UN and its primacy. In fact, it would not have been different if the Constitutional Court of a UN Member State had annulled an enactment made by its legislative power in compliance with a UNSC resolution, but at variance with *its municipal system's fundamental* rights. All in all, the question revolves around the relations between legal systems, of which one is superior to the other, without, though, having the power to annul the acts adopted by the inferior one. In fact, what occurs is almost the contrary, while the EU was under the primacy of the UN, it annulled an act adopted in compliance with a SC resolution (and ultimately with Article 25 UNC).

(1) As long as EU Member States do not abide by a UNSC resolution – within the EU legal system – EU and its Member States engage their international responsibility, by committing what is called a "continuous wrongful act". See in this respect: G. Distefano, "Fait continu, fait compose et fait complexe dans le droit de la responsabilité", *AFDI*, Vol. 52 (2006), 1-54.

المراجعة القضائية الدولية لقانون شرعية الأعمال المعتمدة من قبل هيئات الأمم المتحدة

الأستاذ الدكتور/ جيوفاني ديستيفانو
أستاذ القانون الدولي في جامعة نوشاتيل، سويسرا

ملخص البحث باللغة العربية

يسعى هذا المقال الموجز إلى معالجة المسألة الشائكة المتمثلة في الرقابة القضائية على الأفعال التي تعتمدها هيئات الأمم المتحدة. ويقتصر التحليل بشكل صارم على الرقابة القضائية الدولية لهيئتين محددتين، أي مجلس الأمن والجمعية العامة. وخلافا للعديد من النظم القانونية المحلية، حيث تتوخى هذه الرقابة القضائية إما بتمكين صريح أو عرف دستوري، لا يتوخى ميثاق الأمم المتحدة تكليف مماثل. ولذلك، فإن هناك حاجة إلى استحقاق قضائي محدد لمحكمة العدل الدولية لتقييم مدى صحة قرار اعتمده الجهازان المشار إليهما أعلاه. وقد حدث ذلك عن طريق "سيسين" (أو حِيَازَة)، في حالة وجود قضية خلافية عرضت عليها، أو من خلال طلب محدد من فتوى أصدرها أحد الأجهزة المخولة بهذه السلطة بموجب ميثاق الأمم المتحدة، وفقا للمادة ٩٦ (١)، ومجلس الأمن

والجمعية العامة. وقد حدث ذلك حتى الآن سبع مرات منذ بدء نفاذ ميثاق الأمم المتحدة. وأخيرا، فإن إحدى المحاكمات القضائية الدولية خارج نطاق منظومة الأمم المتحدة، أي محكمة العدل في الاتحاد الأوروبي، كانت من بين أكثر المحاكمات القضائية الدولية بعيدة المدى عن صحة الأفعال التي اعتمدتها إحدى هيئات الأمم المتحدة. وتنص هذه المادة في نهاية المطاف على جميع هذه الأحكام والفتاوى الصادرة عن محكمة العدل الدولية ومحكمة لكسمبرغ.