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The "Constitutionalization" of the UN Security System

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ABSTRACT

The considerable activism displayed by the Security Council over the last years and its dynamic application of the powers under Chapter VII of the UN Charter recently have inspired concern for the institutional balance within the United Nations and the quest for justiciable restraints upon the Council. Such concern underlines a "constitutional" approach to the United Nations framework: the Charter is conceived as a kind of constitution for the community of states with the International Court of Justice as the ultimate guardian of its legality vis-à-vis the Council. Such a "constitutional" approach should be viewed with caution. The scrutiny of mandatory Council resolutions by the International Court of Justice must be confined to legal defects that release Member States from compliance; that is, to defects that render the resolution null and void. Such a qualification by the Court, always declaratory in character, is justified only when the Council has manifestly exceeded its powers under the Charter or violated peremptory norms of public international law.

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A. *New Issues in a New World Order*

The considerable vitality that the United Nations Security Council recently has displayed, especially since Iraq's invasion of Kuwait, marks not only a shift in this body's "chemistry" but also a more dynamic perception of the Security Council's own field of action.[1] The Security Council's declaration that the world community enjoys the most favorable conditions for the preservation of peace and security since the foundation of the United Nations[2] reflects a rather serene understanding of its own actual role. The Security Council's new activism, however, has not always met with satisfaction; there has been concern

1. *See* Thomas M. Franck & Faiza Patel, *UN Police Action in Lieu of War: "The Old Order Changeth,"* 85 AM. J. INT'L L. 63 (1991); Richard B. Lillich, *Humanitarian Intervention Through the United Nations: Towards the Development of Criteria*, 53 ZEITSCHRIFT FÜER AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT 557 (1993); W. Michael Reisman, *The Constitutional Crisis in the United Nations*, 87 AM. J. INT'L L. 83 (1993).

2. *Note by The President of Security Council* at 5, UN Doc. S/23500 (1992).

regarding the lion's showing of teeth and flexing of muscles. The unprecedented activation of powers under the auspices of Chapter VII of the Charter of the United Nations, addressing "Action with Respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression,"[3] has caused uneasiness about the extent of the lion's hunting grounds and provoked calls for a lion tamer. Some of the beneficiaries of the paralyzing conflict between the United States and the late Soviet Union now find themselves uprooted from the cozy shelter of client-state status and exposed to the new reality of a world lacking the counterbalancing forces of bipolarism. The first signs of a forceful, albeit incoherent, enforcement of widely shared values have spurred a growing choir of scholars to voice concern about the paramount influence of the only remaining superpower within the United Nations, the Security Council, and to express doubts about the legitimacy of this body's potential for intervention. Within the UN system, the searching eye lands on the International Court of Justice (ICJ) as the final arbiter of legitimacy, with the fashionable call being for "constitutional" restraints to be placed on the power of the Security Council and enforced by the ICJ.

In past decades, the Security Council's actions have given rise only rarely to questions about the scope of its competence. The Security Council's declaration that the South African Constitution of 1983 was illegal as a "further entrenchment of apartheid"[4] stands as an example of the hitherto unquestioning acceptance of the Security Council's exercise of power. The natural indignation regarding the manifest racial discrimination embodied in this constitution swept away any doubts cautiously ventilated by some Member States, regarding the United Nations' competence to declare the basic law of a Member State null and void. It is only recent practices that have raised fundamental questions about the justiciability of the Security Council's actions. These issues crystallized in the *Lockerbie* case[5] with the ICJ's ambiguous deference to a Security Council Resolution

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3. U.N. CHARTER, ch. VII. Chapter VII includes Articles 39-51, and addresses the Security Council's authority to "determine the existance of any threat to the peace, breach of the peace, or act of aggression" and to "decide what measures" are necessary "to maintain or restore international peace and security." *Id.* art. 39. The Security Council is given the authority in Chapter VII to bring economic sanctions or take military action against offending states. *Id.* arts. 41-42.

4. *Political and Security Questions: Africa*, S.C. Res. 554, 1984 U.N.Y.B. 161, U.N. Doc. S/16700.

5. *See infra* part I.C.

adopted pursuant to Chapter VII. No less intriguing is the issue of Bosnia and whether the Security Council may tie a state's hands in a struggle for survival by imposing an arms embargo both against the Serbian aggressor and the victim.[6] Aside from the problem of the victim's clean hands in the ongoing armed conflict, the case of Bosnia presents a more fundamental question: Are there justiciable limits to Security Council intervention that has the effect of strangling a state?

The discussion of limitations on the Security Council's ability to intervene, of the possible invalidity of Security Council resolutions, and of judicial review reaches to the very core of the functioning of the UN security system: the obligation of Member States to comply with Security Council resolutions under Article 25 of the Charter. Article 25 states that "[t]he Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter."[7] A pronouncement by the ICJ declaring a Council resolution invalid presents potentially dramatic and ironic scenarios. States will have to consider the possibility of being sued before the ICJ for having complied with a resolution that allows or compels the infringement of another Member State's rights. If the ICJ deems compliance with a Security Council resolution to violate international law, such a decision may invite or oblige noncompliance. Of course, it may be argued that behavior sanctioned by a Security Council resolution enjoys a presumption of legality. If an ICJ ruling removes this presumption, however, this rebuttal would seem to be on shaky gounds. Moreover, this presumption does not prevent a Member State from invoking the manifest illegality of a resolution and, concurrently, the lack of any binding effect. On the other hand, if Article 25 strictly covers and justifies action based on a resolution, regardless of its adoption intra or ultra vires, the discussion of judicial review shrinks to an essentially academic exercise. In proceedings at the Hague, the issue of ultra vires would be moot. The possibility must be reserved, however, for Member States, and concurrently the ICJ, to be able to charge the Security Council with having abused its power in manner sufficiently gross and evident to defeat the obligation of obedience mandated under Article 25. This residual capacity should be justified only in exceptional cases. A parallel should be drawn between the obligations under Article 25 and mandatory compliance with ICJ judgments

6. Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia-Herzegovina v. Yugoslavia), 1993 I.C.J. 3 (Apr. 8).

7. U.N. CHARTER, art. 25.

required under Article 94(1).[8] The example of the United States government declaring the ICJ's judgment in the Nicaragua case a nullity nonetheless invites a high degree of caution in regards to admitting the validity of challenges.

Two other conceptual alternatives must be dismissed. The concept of limited compliance with mandatory resolutions[9] may appear attractive at first sight, for it maintains the binding effect of a mandatory resolution at least until the ICJ's intervention. Legal certainty and the justifying effect are thus preserved for a transitional period. Judicial powers of annulment with general effects pro futuro have no basis, however, either in the Charter or in the Statute of the ICJ. In addition, the basis for judicial intervention is too slim to support this model, as long as any judicial review depends on jurisdiction in terms of Article 36 of the ICJ Statute,[10] and as long as any judicial pronouncement

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8. Article 94(1) states that: "[e]ach Member of the United Nations undertakes to comply with the decision of the International Court of Justice in any case to which it is a party." *Id.* art. 94(1).

9. An example of limited compliance with a mandatory resolution is an obligation to comply only until a Court's ruling to the contrary.

10. Article 36 states that:

> 1. The jurisdiction of the Court comprises all cases which the parties refer to it and all matters specially provided for in the Charter of the United Nations or in treaties and conventions in force.
>
> 2. The states parties to the present Statute may at any time declare that they recognize as compulsory *ipso facto* and without special agreement, in relation to any other state accepting the same obligation, the jurisdiction of the Court in all legal disputes concerning:
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> a. the interpretation of a treaty;
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> b. any question of international law;
>
> c. the existence of any fact which, if established, would constitute a breach of an international obligation;
>
> d. the nature or extent of the reparation to be made for the breach of an international obligation.
>
> 3. The declarations referred to above may be made unconditionally or on condition of reciprocity on the part of several or certain states, or for a certain time.
>
> 4. Such declarations shall be deposited with the Secretary-General of the United Nations, who shall transmit copies thereof to the parties to the Statute and to the Registrar of the Court.
>
> 5. Declarations made under Article 36 of the Statute of the Permanent Court of International Justice and which are still in force shall be deemed, as between the parties to the present Statute, to be acceptances of the compulsory jurisdiction of the International Court of Justice for the period which they still have to run and in accordance with their terms.
>
> 6. In the event of a dispute as to whether the Court has jurisdiction, the matter shall be settled by the decision of the Court.

upon the validity of a Security Council resolution is merely incidental. Moreover, analogizing limited compliance with mandatory resolutions to the invocation of changed circumstances under the Vienna Convention on the Law of Treaties (Article 62)[11] does not stand up to scrutiny. A different legal appraisal of a given situation by the ICJ could only be a material circumstance if the ICJ's judgment of a situation contemplated under Chapter VII trumped the Security Council's assessment of the situation. Arguments drawn from the Vienna Convention therefore seem circular. Another option also must be ruled out: mandatory compliance without necessary justification in subsequent proceedings. This concept would turn compliance into a legal gamble by throwing the risk of potential illegality upon the Member States without any possible release from compliance under Article 25. An obligation to carry out mandatory resolutions without a correlative justification would destroy the coherence of the UN system. There cannot be two separate legalities, a subjective one for the Security Council vindicated by Article 25, and another objective legality for judicial determination. Thus, the UN order depends far more upon the continuing and comprehensive loyalty of its members than the internal order of states with national legal systems possessing manifold mechanisms to ensure compliance by their citizens in spite of the possible judicial annulment of domestic rules.

Statute of the International Court of Justice, June 26, 1945, art. 36, 59 Stat. 1055, 1060, 3 Bevans 1153.

11. Article 62 is entitled "Fundamental Change of Circumstances." It states that:

> 1. A fundamental change of circumstances which has occurred with regard to those existing at the time of the conclusion of a treaty, and which was not foreseen by the parties, may not be invoked as a ground for terminating or withdrawing from the treaty unless:
>
> *(a)* the existence of those circumstances constituted an essential basis of the consent of the parties to be bound by the treaty; and
>
> *(b)* the effect of the change is radically to transform the extent of obligations still to be performed under the treaty.
>
> 2. A fundamental change of circumstances may not be invoked as a ground for terminating or withdrawing from a treaty:
>
> *(a)* if the treaty establishes a boundary; or
>
> *(b)* if the fundamental change is the result of a breach by the party invoking it either of an obligation under the treaty or of any other international obligation owed to any other party to the treaty.
>
> 3. If, under the foregoing paragraphs, a party may invoke a fundamental change of circumstances as a ground for terminating or withdrawing from a treaty it may also invoke the change as a ground for suspending the operation of the treaty.

Convention on the Law of Treaties, *done on* May 23, 1969, U.N. Doc. A/Conf. 39/27, *reprinted in* 1969 U.N. Jurid. Y.B. 140, 156, U.N. Doc. ST/LEG/SER.C/7.

B. *Elements of the Security Council's New Dynamism*

The quest for a judicial counterweight to the Security Council must be examined in light of the Security Council's new dynamic understanding of its own competence.[12] In this context, three new components can be distilled from recent practice: (1) A more expansive construction of the notions "threat to the peace" and "breach of the peace" under Article 39 of the UN Charter,[13] both concerning international legal violations in the absence of an interstate conflict, and of the application of this Article without conclusive evidence; (2) the exercise of creative, quasi-legislative functions by new bodies established for dispute resolution; and (3) the resort to adjudicative functions under Chapter VII.

The expansive approach to the UN Charter, which broadly interprets the "breach of the peace" formula enunciated under Article 39, provided the basis for the Security Council's intervention at the end of the Second Gulf War to protect minorities in Iraq against repression.[14] The second practice, the creation of new fora for dispute resolutions is apparent in the Security Council's establishment of the United Nations Compensation Fund (Fund) to meet claims against Iraq flowing from its invasion and occupation of Kuwait and to create a commission to administer the Fund.[15] The Security Council also created an international tribunal to prosecute violations of humanitarian law in the former Yugoslavia[16] and adopted a statute for the tribunal.[17] With respect to the activity of these

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12. *See* Reisman, *supra* note 1, at 92-94.

13. Article 39 states that: "[t]he Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security." U.N. CHARTER art. 39.

14. *See* S.C. Res. 688, 30 I.L.M. 858 (1991) ("condemning repression of the Kurds; requesting the U.N. Security Council to pursue humanitarian assistance"). *See also* S.C. Res. 794, U.N. Doc. S/Res/794 (1992) (more sweeping resolution on humanitarian intervention in Somalia). On this new dynamism, see generally Thomas M. Franck, The Security Council and "Threats to the Peace:" Some Remarks on Remarkable Recent Developments 83 (July 21-23, 1992) (printed for private circulation only, as part of the Hague Academy of International Law Workshop 1992 on the Development of the Role of the Security Council) (on file with the author).

15. S.C. Res. 687, 30 I.L.M. 847, 852 (1991) (Security Council's request for a plan to develop the Fund); S.C. Res. 692, 30 I.L.M. 864 (1991) (creation of the Fund). *See* John R. Crook, *The United Nations Compensation Commission—A New Structure to Enforce State Responsibility*, 87 AM. J. INT'L L. 144 (1993).

16. S.C. Res. 827, 32 I.L.M. 1203 (1993).

17. *Statute of the Int'l Tribunal*, Annex, S.C. Res. 808, 31 I.L.M. 1192 (1993).

auxiliary organs of the Security Council, the implications of judicial review are particularly intriguing. Can a party challenge binding decisions of these judicial or quasi-judicial organs before the International Court of Justice, either for lacking constitutionally valid powers or, at least, for exceeding the mandate set forth by the Security Council? The controversial *Lockerbie* case is illustrative of the issues surrounding the resort to quasi-adjudicative measures. Relying on its powers under Chapter VII of the UN Charter, the Security Council enjoined Libya to surrender two Libyan nationals considered responsible for the Lockerbie terrorist attack.[18] These three categories of Security Council activism under Chapter VII underscore the potential breadth and impact of ICJ judicial review.

C. *The ICJ's Understanding of Its "Constitutional" Function*

The jurisprudence of the International Court of Justice offers little clear cut guidance regarding its "constitutional" function vis-à-vis the Security Council. Judicial scrutiny of the Security Council's action appears a kind of Pandora's box, the opening of which the ICJ holds cautiously reserved for special scenarios. The ICJ's advisory opinion in *Certain Expenses of the United Nations* points out only that under the UN Charter no procedure exists for determining the validity of an organ's act and indicates that "each organ must, in the first place at least, determine its own jurisdiction."[19] Similarly, the ICJ's advisory opinion in the *Namibia* case notes that "[u]ndoubtedly, the Court does not possess powers of judicial review or appeal in respect of the decisions taken by the United organs concerned."[20] In spite of this language, the ICJ did examine the merits of French and South African objections to the Assembly's resolution on the termination of the mandate for South West Africa and to the subsequent Security Council resolution on the same subject; the ICJ ultimately held that the General Assembly had acted intra vires.[21] Observers have termed this inquiry a sort of judicial review of the "constitutionality" of the termination of the mandate.[22] The ICJ's reasoning, however, did not refer to

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18. S.C. Res. 748, 31 I.L.M. 750 (1992). *See* Christopher C. Joyner & Wayne P. Rothbaum, *Libya and the Aerial Incident at Lockerbie: What Lessons for International Extradition Law?*, 14 MICH. J. INT'L L. 222 (1993).

19. Certain Expenses of the United Nations, 1962 I.C.J. 151, 168 (Jul. 20).

20. Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970), 1971 I.C.J. 16, 45 (Jun. 21) [hereinafter *Namibia Case*].

21. *Id.* at 45, 54.

22. E. Jiménez de Aréchaga, *United Nations Security Council*, *in* 5 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 345, 347 (R. Bernhardt ed., 1983).

Security Council action under Chapter VII. Moreover, the judicial scrutiny undertaken in this instance can be explained by the lack of an explicit competence regarding the termination of the mandate. Therefore, the advisory opinion in the *Namibia* case ultimately does not permit any general conclusions about the relations between the ICJ and the Security Council. In this same case, the ICJ deferred to the judgment of the "appropriate political organs of the United Nations acting within their authority under the Charter."[23] Inferences drawn from these cases must have due regard to their context: noncontentious proceedings based on a request for advice by the General Assembly.

In the *Lockerbie* case,[24] Libya sought protection against pressure by the United States and the United Kingdom aimed at achieving the surrender of two Libyan suspects in the bombing of Pan Am flight 103 under the auspices of Article 41 of the ICJ statute.[25] The Libyan application indirectly challenged Security Council Resolution 731 (1992), which had supported the American and British requests. Libya argued that the United States and the United Kingdom had violated its sovereign right to choose between criminal prosecution and surrender of the subjects as protected by the Montreal Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation of 1971. During the pendency of the proceedings regarding Libya's Article 41 request for provisional measures, the Security Council passed Resolution 748 (1992) pursuant to Chapter VII of the UN Charter and ordered the Libyan government to comply with the extradition requests. The ICJ, relying on the summary character of proceedings under Article 41, did not squarely address the issue of judicial scrutiny of the Security Council's action. Instead, the ICJ deferred, somewhat evasively, to the Security Council's exercise of competence under Chapter VII.[26]

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23. *Namibia Case*, 1971 I.C.J. at 55.

24. Order with Regard to Request for the Indication of Provisional Measures in the Case Concerning Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. U.K.), 1992 I.C.J. 3 (Apr. 14), (Libyan Arab Jamahiriya v. U.S.), 1992 I.C.J. 114 (Apr. 14), *reprinted in* 31 I.L.M. 662 [hereinafter *Lockerbie Case*].

25. Article 41 states that:

> 1. The Court shall have the power to indicate, if it considers that circumstances so require, any provisional measures which ought to be taken to preserve the respective rights of either party.
>
> 2. Pending the final decision, notice of the measures suggested shall forthwith be given to the parties and to the Security Council.

Statute of the International Court of Justice, *supra* note 10, at 1061.

26. The Court stated:

As several separate opinions by concurring or dissenting judges point out, the ICJ, however, left open the door to judicial examination of Security Council resolutions.[27] The cautious wording of the ICJ's reasoning suggests that the forbidden area in which the ICJ fears to tread is confined to Chapter VII. Less reluctance to interfere with the Security Council's actions, therefore, might be expected in a potential conflict involving nonbinding measures under Chapter VI.[28]

The ICJ's decision in the *Lockerbie* case has provoked a host of comments upon the ICJ's future role and the separation of powers within the United Nations.[29] While authoritative voices have hailed the ICJ's decision as the dawning of a *Marbury v. Madison* approach to judicial review,[30] others have detected "unsound constitutional policy reasoning" in the decision.[31] It remains to be seen whether this focus on "constitutional" thinking, the implantation of domestic legal concepts, does not distort the perception of the ICJ's function.

> [B]oth 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; . . . 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 . . . in accordance with Article 103 of the Charter, their obligations of the Parties in that respect prevail over their obligations under any other international agreement, including the Montreal Convention; . . . the Court, while thus not at this stage called upon to determine definitively the legal effect of Security Council resolution 748 (1992), considers that, whatever the situation previous to the adoption of that resolution, the rights claimed by Libya under the Montreal Convention cannot now be regarded as appropriate for protection by the indication of provisional measures.

1992 I.C.J. at 126-27.

27. *See id.* at 129 (declaration of acting President Oda); 138 (separate opinion of Judge Lachs); 140, 142 (separate opinion of Judge Shabuddeen).

28. *See id.* at 175-76 (dissenting opinion of Judge Weeramantry) (stating that the International Court of Justice would not be precluded from reviewing Security Council resolutions by a resolution under Chapter VI).

29. *See* Thomas M. Franck, *The Powers of Appreciation: Who Is the Ultimate Guardian of the UN Legality?*, 86 AM. J. INT'L L. 519 (1992); Bernhard Graefrath, *Leave to the Court What Belongs to the Court: The Libyan Case*, 4 EUR. J. INT'L L. 184 (1993); Reisman, *supra* note 1, at 86; Alfred P. Rubin, *Libya, Lockerbie and the Law*, 4 DIPL. & STATECRAFT 1 (1993); Christian Tomuschat, *The Lockerbie Case Before the International Court of Justice*, 48 REV. INT'L COMMISSION OF JURISTS 38 (1992); Geoffrey R. Watson, *Constitutionalism, Judicial Review, and the World Court*, 34 HARV. INT'L L.J. 1 (1993); *see also* Torsten Stein, *Das Attentat von Lockerbie vor dem Sicherheitsrat der Vereinten Nationen und dem Internationalen Gerichtshof*, 31 ARCHIV DES VÖLKERRECHTS 206 (1993).

30. *See* Franck, *supra* note 29, at 520; *see also* Watson, *supra* note 29.

31. Reisman, *supra* note 1, at 87.

II. THE IMPLICATIONS OF JUDICIAL REVIEW FOR THE FUNCTIONS OF THE UN SECURITY SYSTEM

Discussion of judicial review must focus primarily on its implications for the system of collective security established by the UN Charter, rather than on academic speculations analogizing the United Nations to various domestic systems and their doctrines of separation of powers. The current fascination of recent commentators with such constitutional parallels demonstrates that this elementary principle has not been adequately considered.

Nonbinding measures adopted by the Security Council under Chapter VI or Article 39 of the Charter certainly cannot a priori preempt the ICJ's consideration of a corresponding behavior by Member States,[32] once the ICJ's jurisdiction is established. In light of the different dispute settlement functions of the Security Council, on the one hand, and the ICJ, on the other, there is no direct conflict of competencies between these two branches. It follows from the principle of mutual cooperation,[33] however, that the exercise of any judicial discretion is guided by due consideration of the Security Council's position.[34] Rights protected by "hard" law under custom or treaty are not suspended by nonbinding measures of the Security Council in proceedings before the ICJ. Thus, in the *Lockerbie* case, any rights asserted by Libya under the Montreal Convention could not have been trumped by Resolution 731 (1992). The clash between a recommendation by the Security Council and a court order does not have only political consequences. A legal doctrine justly recognizes that nonbinding Security Council resolutions prima facie justify corresponding behavior of Member States.[35] A conflicting ICJ decision removes this presumption of legality.

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32. *Cf. Lockerbie Case*, 1992 I.C.J. at 175-76 (dissenting opinion of Judge Weeramantry) (stating that decisions made by the Security Council under Article 39 are not revisable by the Court).

33. Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, 1950 I.C.J. 65, 82 (Nov. 30) (separate opinion of Judge Acevedo).

34. Conversely, the Security Council's position is guided by the ICJ's exercise of judicial discretion. On this aspect of mutual loyalty among organs of the United Nations, see Eckart Klein, *Paralleles Tätigwerden von Sicherheitsrat und Internationalem Gerichtshof bei friedensbedrohenden Streitigkeiten*, *in* VOELKERRECHT ALS RECHTSORDNUNG, FESTSCHRIFT FÜR HERMANN MOSLER 468, 481 (1983).

35. Jochen A. Frowein, *Collective Enforcement of International Obligations*, 47 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT 67, 70 (1987).

With respect to binding decisions under Chapter VII, the situation is more intricate. This analysis must start from Article 25 of the Charter, which obliges the Member States to comply with mandatory resolutions.[36] Similarly, Article 48 of the Charter obliges members to implement the decisions of the Security Council for the maintenance of international peace and security according to the Security Council's determination.[37] The mere existence of judicial review would have a dramatic impact on the functioning of the UN security system, for neither the Charter nor the ICJ Statute vests the ICJ with any powers to strike down binding decisions adopted pursuant to Chapter VII. During the *travaux préparatoires* preceding the adoption of the UN Charter, Belgium proposed an amendment that would have allowed a State, whose "essential rights" might be infringed by a resolution of the Security Council, to request an advisory opinion by the ICJ.[38] Later, however, Belgium withdrew this proposal. The lack of specific annulment powers means that any ICJ judicial scrutiny must focus on the invalidity of a Security Council decision and not on mere illegality as such. The ICJ is confined to scrutinizing these decisions for superficial legal defects that would deprive a resolution adopted under Chapter VII of its binding effect. Such declaratory and incidental scrutiny is no larger in scope than sound objections raised by a Member State against the validity of a resolution. If the legal violations do not reach the threshold of voidness, judicial examination of a violation of the Charter, or of other rules which the Security Council may have to respect, would be merely an academic exercise. A mandatory resolution, even if tainted by illegality, compels and accordingly justifies corresponding compliance under Article 25 as long as the resolution is valid. The ICJ's exercise of judicial scrutiny, therefore, must be confined to legal defects sufficiently grave to defeat the Member States' duty of compliance. Judicial cognizance thus does not stretch farther

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36. *See supra* text accompanying note 7.

37. Article 48 states that:

> 1. The action required to carry out the decisions of the Security Council for the maintenance of international peace and security shall be taken by all the Members of the United Nations or by some of them, as the Security Council may determine.
>
> 2. Such decisions shall be carried out by the Members of the United Nations directly and through their action in the appropriate international agencies of which they are members.

U.N. CHARTER art. 48.

38. *See Lockerbie Case*, 1992 I.C.J. at 175-76 (dissenting opinion of Judge Weeramantry).

than any Member State's freedom to challenge a decision of the Security Council.

More important is the converse implication: The scrutiny pertaining to the invalidity of a Security Council resolution as performed by the ICJ may be undertaken by all Member States. This is the other side of the coin. Any excessive activism by the ICJ has a serious impact on the degree of Member State compliance with Security Council decisions and, consequently, on the functioning of the United Nations security system as a whole. This consideration does not dismiss, however, the value of judicial review for legal certainty, so long as judicial self-restraint regarding declarations of invalidity gives due regard to these functional implications. The difference between a Member State's objection and the ICJ's review lies only in the authority of the ICJ as the ultimate nonpolitical forum for dispute resolution. An objection to the validity of a Security Council resolution will claim hardly rebuttable plausibility once it finds clear support in a ruling of the ICJ.

The inherent risk of eroding the Security Council's authority is much greater in the case of incidental declaratory scrutiny, than in the hypothetical case when the ICJ exercises the power of judicial review expressly conferred upon it by a change of its governing statute. Such a new explicit competence to strike down resolutions of the Security Council could be construed to provisionally guarantee the binding effect of a decision under Chapter VII from objections regarding its validity until a ruling by the ICJ. Nothing in the present system provides this preliminary protection to the Security Council's authority; instead, there is only the mere presumption of legality and validity enjoyed by resolutions that serve the UN purposes and were adopted according to the relevant rules of procedure.[39] The invalidity of a Security Council resolution destroys any binding effect *ab initio*.

In light of the correlation between the extent of the ICJ's power to declare a resolution invalid and the objections available to a Member State, invalidity[40] arguably justifies the latter's unilateral noncompliance. Justified noncompliance turns on the conditions under which a Member State is released from compliance with a Security Council resolution purporting to have a binding effect under Article 25 and Article 48 of the Charter. A resolution of the Security Council binding under these provisions necessarily must be respected by the ICJ and precludes a full-

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39. *Cf. Namibia Case*, 1971 I.C.J. at 22 (Advisory Opinion); Klein, *supra* note 34, at 484 (against a presumption of legality for Council resolutions).

40. Invalidity is understood as voidness *ab initio*.

fledged inquiry of the factual and legal situation so far as it is covered by the resolution, (or more precisely, by its tenor).

A cardinal issue is the Security Council's power to make concrete the broad and open phrases of Chapter VII. Any authoritative determination regarding Article 39 or other provisions of Chapter VII, both as to facts and law, cannot be questioned by the ICJ, if covered by the Security Council's competencies. This power of authoritative construction refers to interpretation as well as to the appreciation of facts. Beyond those competencies authoritatively concretized in the Charter, the ICJ may be barred from inquiring into the legality of a Security Council's decision to the extent that legal defects do not destroy its validity and its binding effect under Article 25 and Article 48 of the Charter.

These observations apply not only to objections against a Security Council decision that altogether deny this decision's validity, but also to a narrow construction curtailing the ambit of a resolution in conflict with the Security Council's intent. The basis of this construction is a scrutiny aiming at interpretation in conformity with the Charter and other principles of international law, which the Security Council may be bound to respect. The application to the ICJ by Bosnia-Herzegovina, arguing that the Security Council resolutions imposing a weapons embargo upon the former Yugoslavia must be construed in a manner compatible with the applicant's right of self-defense, furnishes a recent example of this construction.[41] The analogy to an individual state's interpretation of its laws in conformity with its own constitution, is obvious. In both cases judicial construction depends upon review in light of superior law.

Conceptual analysis calls for a word of caution and for some clarification regarding opposing perspectives about the extent and role of judicial review in the UN system. This discussion is subject to a risk of misunderstandings that, without excessive simplification, may be related to a gap between two different visions: a realist approach on the one hand,[42] for which limitations upon powers are meaningless unless seconded by judicial review, and a normative approach, on the other, which is more concerned with a statutory basis for judicial intervention. It certainly would be an undue, though tempting, generalization to term the first approach the "United States" and the second the "European" perspective of judicial review. For many scholars, the

41. Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia-Herzegovina v. Yugoslavia), 1993 I.C.J. 3 (Apr. 8).

42. The "realist" approach was inspired by an enchantment with the teachings of *Marbury v. Madison.*

United States approach, as enunciated in *Marbury v. Madison*, recommends itself as a mechanism necessary to turn inherent limitations of power into practically relevant restraints. These scholars conceive controversies regarding the scope of the Security Council's competence as a form of political gamble to be settled authoritatively by the International Court of Justice as the appropriate nonpolitical forum. The lack of an explicit authorization of judicial intervention is, from this view, a negligible factor in the quest for institutional balance. The opposite, normative approach to judicial review advocated in this paper focuses more on a clear statutory basis for "constitutional" review and functional checks. This perspective takes a look at the justiciable illegality of Security Council action, especially in light of its dramatic impact on the standard of compliance under Article 25.

In the context of this approach, the notion of "invalidity" assumes crucial significance. Within the UN system, in the absence of a clear statutory basis for the ICJ's intervention in the administration of Chapter VII, the concept of invalidity applied to a Security Council resolution must be taken at its face value: as meaning that the act is null and void *ab initio*. This understanding of invalidity as absolute nullity, opposed to mere voidability depending on judicial review, finds forceful support in the opinion of Judge Morelli in the *Certain Expenses* case.[43]

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43. Judge Morelli wrote:

> In the case of acts of international organizations, and in particular the acts of the United Nations, there is nothing comparable to the remedies existing in domestic law in connection with administrative acts. The consequence of this is that there is no possibility of applying the concept of voidability to the acts of the United Nations. If an act of an organ of the United Nations had to be considered as an invalid act, such invalidity could constitute only the absolute nullity of the act. In other words, there are only two alternatives for the acts of the Organization: either the act is fully valid, or it is an absolute nullity, because absolute nullity is the only form in which invalidity of an act of the Organization can occur. An act of the Organization considered as invalid would be an act which had no legal effects, precisely because it would be an absolute nullity. The lack of effect of such an act could be alleged and a finding in that sense obtained at any time.

Certain Expenses of the United Nations (Advisory Opinion), 1962 I.C.J. 150, 222 (July 20) (opinion of Judge Morelli).

III. THE FOCUS ON "CONSTITUTIONAL UNDERPINNINGS" AND ITS FALLACIES

A. *The "Constitutional" Approach and Its Heuristic Value*

In the choir of international doctrine, authoritative voices have focused the actual discussion regarding the authority of UN bodies on constitutional underpinnings. From this perspective, the Charter appears as a "constitution" of delegated powers.[44] This approach vests the ICJ with the role of the ultimate guardian of the whole system's legitimacy.[45] Similarly, the *Lockerbie* decision of the International Court of Justice is placed in context with the search for a "better approximation of a modern constitution" and for "constitutional restraints."[46]

This constitutional approach certainly possesses some merits. It emphasizes that the Security Council, though a political organ, is confined to legally determined powers flowing from a treaty. The binding effect of Security Council resolutions cannot be severed from compliance with legal rules that limit the Security Council's political choices. The Member States of the United Nations certainly do not submit themselves to any decisions of the Security Council that purport to be binding. Rather, the invocation of Chapter VII is no magic formula for the Security Council's dispensing with respect for express and implied Charter limits for its actions.

On the other hand, the constitutional perception is of doubtful heuristic value. The underlying analogy risks blurring fundamental differences between the nature of the UN system and classic issues of the separation of powers in a truly constitutional context. There is no solid basis for these analogies from which any persuasive conclusions may be drawn. In structural density, the United Nations Charter is still far from a closed system of competencies in which the application of constitutional concepts really makes sense. In light of the actual distribution of functions between the General Assembly and the Security Council and the ICJ, the invocation of a "separation of powers" is merely a form of speech.

Generally, there are very few multilateral agreements in which the reference to constitutional concepts is particularly helpful. One, possibly the only, example is the system of the European Union (EU). Unlike the United Nations, the EU truly exercises competencies that have been transferred to it by the

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44. Franck, *supra* note 29, at 523.
45. *Id.*
46. Reisman, *supra* note 1, at 95.

Member States. Its main political organ is the Council of Ministers, which makes decisions usually on the basis of majority rule. The Community Treaties explicitly recognize the European Court of Justice (European Court) as the guardian Union legality vis-à-vis the other organs and the Member States. This court possesses a clear cut "constitutional" authority to interpret the Community Treaties and to annul measures adopted by other EU organs.[47] Thus, it is plausible to invoke concepts like the "institutional balance" between Union organs, as the European Court of Justice has done, to reinforce the judicial protection of the European Parliament as the embodiment of democratic principles.[48] The active role played by the European Court enjoys a sufficient "statutory" mandate under the Union Treaties and the Court has figured in helping to enlarge rather than to restrain European Union competencies. Contrasted with the comprehensive powers of the European Court, the ICJ's intervention in the administration of the Charter and the occasions for it to pronounce upon the effect of Security Council resolutions depend on rather hazardous and incidental elements: a proper case brought by the proper parties under proper submission to the Hague. Because the International Court of Justice possesses no power of annulment, the impact of its reasoning regarding the illegality of a Security Council resolution will often be left to speculative guessing. In addition, the ICJ's decisions cannot claim binding effect *erga omnes*.

Moreover, there is no doctrine of separation of powers nor of judicial review that easily could be distilled from a comparative analysis as a general and, at the same time, sufficiently concrete concept. Even within the family of western constitutionalism, there exists a whole doctrinal spectrum ranging from absolute judicial deference, to legislative choices, to full-fledged constitutional jurisdiction, from the nullity of the deficient law, to the verdict of unconstitutionality with effects only pro futuro. Moreover, it is by no means clear what is the common point of reference for a comparative analysis, the *tertium comparationis*: Are Security Council resolutions under Chapter VII to be analogized to legislative acts or, as "police actions", to executive measures?

Finally, modern constitutions with judicial review preserve the effectiveness of the legal order with subtly tuned mechanisms

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47. *See* TREATY ESTABLISHING THE EUROPEAN ECONOMIC COMMUNITY [EEC TREATY] art. 164.

48. Case 138/79, SA Roquette Fréres v. Council, 1980 E.C.R. 3333, 3360; Case C-70/88, Council v. Parliament, 1990 E.C.R. 2041, 2072.

which ensure that even a potentially unconstitutional act will have certain binding effects. Such mechanisms are foreign to the UN system. Unbalanced mobilization of judicial review for "constitutional" restraints threatens to affect not only the authority of the Security Council, but also the legitimacy of the whole system. The aggregation of the veto of the permanent members of the Security Council and nebulous "constitutional" restraints easily may cripple a security system that has just begun to display some vitality.

B. *The Authoritative Concretization of Chapter VII by the Security Council*

Beyond these structural defects, the constitutional approach obscures another vital aspect. The quest for "constitutional" restraints based on a separation of powers doctrine distorts an essential functional issue: the authoritative concretization of the Charter by the Security Council as opposed to a fully justiciable interpretation. The authoritative concretization by the Security Council not only extends to the appreciation of facts and evidence, but also has an important normative component: the mandate for a dynamic construction of Chapter VII, which goes well beyond the mechanical application of the relevant provisions according to traditional canons of legal craftsmanship. This concretization imposes itself upon the other organs of the United Nations, including the ICJ, within certain limits flowing from the purposes of the Charter and from customary international law.

The UN Charter couches the competence of the Security Council under Chapter VII in very broad terms. The notions of "threat to the peace" and "breach of the peace" and, to a lesser degree, "act of aggression" contained in Article 39 of the Charter are rather indeterminate formulas that obviously shall vest wide powers of appreciation in the Security Council.[49] The determination of the corresponding conditions that might bring this Article into operation are contingent upon a political judgment by the Security Council. In this respect, Chapter VII calls for a subjective determination.[50] This degree of discretion invested in the Security Council is corroborated by the Charter *travaux préparatoires*.[51] In the *Lockerbie* case, even voices

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49. Giorgio Gaja, *Reflexions sur le Role du Conseil de Securité dans le Novel Ordre Mondial*, 97 REV. GÉN. D. INT'L PUBLIC 297, 305 (1993); Rosalyn Higgins, *The Place of International Law in the Settlement of Disputes by the Security Council*, 64 AM. J. INT'L L. 1, 16 (1970).

50. Reisman, *supra* note 1, at 93.

51. See the Rapporteur of Committee III/3 on Article 39: "The Committee . . . decided to adhere to the text drawn at Dumbarton Oaks and to leave to the Council the entire discretion as to what constitutes a threat to peace, a breach of

emphasizing the Security Council's legal restraints acknowledge the far-reaching discretion of the Council under Article 39.[52] This latitude of authoritative judgment allowed to the Security Council also refers to the construction of Article 39. The distinction between the interpretation of a norm and its application to a concrete set of facts, a distinction already rather problematic in domestic constitutional and administrative law, cannot be upheld rigidly in the context of the UN system. The application of Article 39 of the Charter to the repression of minorities and other gross violations of human rights goes far beyond a discretionary appreciation of facts. It touches upon the very scope of Chapter VII as a matter of legal construction. The discretion accorded to the Security Council under Chapter VII is even more sweeping regarding the choice of reactions made available by an authoritative determination of the existence of the conditions described in Article 39.

The concretization of powers by political organs is a familiar phenomenon in constitutional law. It has been recognized in even the most elaborate system of constitutional jurisdiction, that of Germany. Thus, the Federal Constitutional Court of Germany (German Court) has emphasized that particularly "open" norms in the Basic Law are subject to a continuous process of "concretization" by the political organs concerned and that the German Court, while exercising powers of constitutional review, must respect the process within certain limits.[53] These considerations also apply to rules of procedure. Thus, the ICJ has accepted the "concretization" of Article 27 (3) of the Charter by the Security Council's practice to the effect that only a veto by a permanent member, and not mere abstention, bars the valid adoption of a resolution. In the context of this ruling, the ICJ referred to a "continuous and uniform interpretation" by the

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the peace or an act of aggression." 12 United Nations Conference on International Organization 505 (1945); Michael Krökel, DIE BINDUNGSWIRKUNG VON RESOLUTIONEN DES SICHERHEITSRATES DER VEREINTEN NATIONEN GEGENÜBER MITGLIEDSTAATEN 66 (1977).

52. In a dissenting opinion, Judge Weeramanty stated:

> [T]he determination under Article 39 of the existence of any threat to the peace, breach of the peace or act of aggression, is one entirely within the discretion of the Council. It would appear that the Council and no other is the judge of the existence of the state of affairs which brings Chapter VII into operation. That decision is taken by the Security Council in its own judgment and in the exercise of the full discretion given to it by Article 39.

53. 62 ENTSCHEIDUNGSSAMMLUNG DES BUNDESVERFASSUNGSGERICHTS 1, 39 (1983).

Council and its acceptance by the members of the Organization.[54]

Under the Charter, the primary safeguard against an unbalanced dynamism does not lie with judicial control, but rather with a political check—the veto. This safeguard is conceived as a kind of compensation, not so much for a truly representative basis of the Security Council, but rather for a broad homogeneity regarding metajuridical values in the community of nations. This homogeneity is the necessary basis for justiciable standards of rationality and corresponding restraints upon political discretion. Thus, the primary restraint and check against excessive interventionism by the Security Council lies with an inherent element of the decisionmaking process within this body itself. This element, and not dynamic intervention by the ICJ, is the main guardian of the Security Council's abstention from irrationality and abuse of powers. This consideration suggests that the ICJ should interfere with the Security Council's discretion only when the latter clearly abuses it. While disenchantment with the composition of the Council and the recent functioning of the veto system may call for a reform of the Charter, it forms no sound basis for judicial activism.

IV. JUSTICIABLE LIMITS OF THE SECURITY COUNCIL'S COMPETENCE

The deference to political choices taken by the Security Council under authority of Chapter VII and the concretization of this power cannot be tantamount to allowing the Security Council to define its own powers, a "*Kompetenzkompetenz*." The Security Council clearly is bound by procedural and substantive rules any disrespect of which would taint its resolutions with illegality.

Justiciable restraints on the procedural level can be formulated rather clearly. Even in this context, however, deviations from the Charter may be covered by legitimate concretization, as in the case of the generous handling of abstentions by one of the five permanent members under Article 27(3) of the Charter.[55] The degree of the permissible development of legal rules via Security Council's practice depends upon three factors: First, the degree of deviation from an "orthodox" construction of development provisions, having a regard to the traditional methods of interpretation; second, the acceptance

54. *Nambia Case*, 1971 I.C.J. at 22. *See also* Bruno Simma & Stefan Brunner, *Kapitel V. Der Sicherheitsrat*, *in* CHARTA DER VEREINTEN NATIONEN art. 27, ¶ 46, at 412 (Bruno Simma ed., 1991).

55. *See* Simma & Brunner, *supra* note 54.

within the United Nations;[56] and, third, the duration of the Security Council's practice. Thus, the admission of Russia as the late Soviet Union's successor to the Security Council certainly could have been challenged, if this step *ab initio* had been opposed by other successor states or by a significant segment of the General Assembly. At the present stage, it would seem a rather delicate task for the ICJ to subject this rather generous handling of the Charter to judicial review. This reasoning is not based on acquiescence in this strict sense or the preclusion of legal challenges by lapse of time. It rather refers to a modification of legal rules by the Security Council's practice sanctioned by the other protagonists in the institutional system of the United Nations. As the modification of Article 27(3) of the Charter recognized by the ICJ, this process of procedural development via Security Council practices bears some affinity to the creation of customary institutional law.

As to the Security Council's determination that there is a threat to the peace, a breach of the peace, or even an act of aggression in the terms of Article 39 of the Charter,[57] the underlying components of such a statement are in varying degrees covered by the Security Council's powers of appreciation. The assumption that a state has violated international law must be entirely open to judicial scrutiny regarding the legal appraisal of the state's behavior.[58] By contrast, the conclusions drawn from nonconclusive evidence are covered by the Security Council's latitude of judgment. A change in the factual basis for the decision by fresh evidence may affect, however, the legality of the Security Council's judgment.[59] The appraisal of breaches of international obligations regarding their weight and political impact, again, is subject to the Security Council's powers of appreciation.

The most intriguing aspect of implied limitations upon the Security Council's power under Chapter VII concerns the range of binding measures available to the Security Council. The Charter itself does not label any specific sovereign rights of states as intangible and sacrosanct, nor does the Charter refer to any elementary standards of rationality such as the prohibition of arbitrary measures. It also seems rather clear that non-Charter

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56. Acceptance means explicit or tacit approbation by the General Assembly or the majority of individual Member States.

57. *See supra* note 13.

58. Gaja, *supra* note 50, at 315.

59. Legality of the decision will be affected by change in the factual basis for the decision subsequent to its adoption by the Security Council.

rights and obligations flowing from treaties must give way to the Security Council's discretion. This inference is warranted by Article 103 of the Charter, as the decision of the Hague Court in the *Lockerbie* case seems to recognize.[60]

However, there are some elementary, justiciable principles that limit the Security Council's discretion. Hans Kelsen's quasi-absolutist view of the Security Council as an organ largely exempted from compliance with international law[61] seems hardly sustainable nowadays.[62] The powers of the Security Council are based on treaty. Therefore, the peremptory norms of international law provide insurmountable limitations upon both the conferment and the exercise of competence flowing from the Charter. Of course, it is true that many rules of *jus cogens* do not apply at all to "police actions" of the United Nations or presuppose the existence of the Security Council's intervention under Chapter VII, like the prohibition of the use of force. There are some iron rules, however, that restrain even action under Chapter VII. For example, the humanitarian standards of customary law on armed conflicts leave no room for modification by the Security Council. An absolute embargo based upon Article 41 that extends to the affected population's access to medicine would violate peremptory human rights law. Moreover, there is an even more elementary limitation: a state's claim to substantial preservation of the components of statehood. An international order demanding a state to sacrifice its own existence or to suffer the complete erosion of vital options regarding the management of its territory would overstrain legitimate expectations of compliance, and by such excessive imposition, undermine its own normativity. This contention lies at the core of the Bosnia-Herzegovina's claim before the International Court of Justice that the arms embargo should not

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60. The Court held that:

> [B]oth 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; . . . 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 . . . 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, including the Montreal Convention.

Lockerbie Case, 1992 I.C.J. at 126. *See also* Franck, *supra* note 29, at 521.

61. Hans Kelsen, THE LAW OF THE UNITED NATIONS 294 (1964).

62. *See* Mohammed Bedjaoui, *Du Controle de Legalité des Actes du Conseil de Securité*, NOUVEAUX ITINÉRAIRES EN DROIT—HOMMAGE À FRANCOIS RIGAUX 69, 83 (1993).

be construed to defeat Bosnia's right to self-determination.[63] In this context, the very self-preservation of a state is at issue. Similarly, the deposition of an effective government and its replacement by a group of the Security Council's choice would exceed the competence of the Security Council.

Finally, there are good grounds for submitting the Security Council's discretion to some kind of proportionality analysis. It may be strongly argued that over the past decades, some interrelation between the degree of interference with a state's rights and the aim pursued has emerged as a general principle of law. Action under Chapter VII can be analogized to police actions that in most of the more developed administrative law systems are subject to the prohibition of means that are either unnecessary for the goal pursued or out of proportion in the light of the damage inflicted. Even in some of the great legal systems that are reluctant to recognize the principle of proportionality, such as the English common law, these elements are often an integral part of the judicial scrutiny of unreasonableness.[64] Of course, the application of a proportionality standard must respect the Security Council's discretion on the appropriate measures and prohibits only the manifest excess and disproportion. Beyond that, there is no room for the application of a general test of "irrationality" as applied under English law.[65] The mere existence of the veto vests any Security Council decision with the irrebuttable presumption of rationality.

V. DEFICIENT RESOLUTIONS AND THEIR INVALIDITY

Article 25 of the Charter obliges all Member States to "accept and carry out the decisions of the Security Council in accordance with the present Charter."[66] The binding effect of mandatory resolutions stands and falls with their validity. The formula "in

63. Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia-Herzegovina v. Yugoslavia), 1993 I.C.J. 3, 6 (Apr. 8).

64. *See, e.g.*, Council of Civil Service Unions v. Minister for the Civil Service (H.L. (E.)), 1985 App. Cas. 374, 410 (opinion of Lord Diplock); J. Beatson, Note, *Proportionality*, 104 LAW Q. REV. 180 (1988); Matthias Herdegen, *Landesbericht Großbritannien*, *in* DIE KONTROLLDICHTE BEI DER GERICHTLICHEN PRÜFUNG VON HANDLUNGEN IN DER VERWALTUNG 38, 46 (J.A. Frowein ed., 1993).

65. Council of Civil Service Unions, 1985 App. Cas. at 410 (opinion of Lord Diplock) ("It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it.").

66. U.N. CHARTER art. 25.

accordance with the present Charter" contained in Article 25 is ambiguous.[67] This language may only refer to mandatory compliance, such as compliance with binding resolutions but it is also plausible to interpret this formula as a reservation regarding resolutions not adopted in accordance with the Charter.

The resulting controversy of interpretation is not as dramatic as it may seem. First, there cannot be any doubt that certain defects of mandatory resolutions destroy their binding effect. Second, the considerable powers of concretization under Chapter VII and the political discretion of the Security Council, as a general rule, limit the possible illegality to manifest excesses of its competence. Finally, it should be easy to reach consensus on the link between validity and the observance of elementary rules of procedure. Nonobservance of this procedural standard deprives a resolution of its validity.[68]

Whether a Member State also can challenge a mandatory resolution on substantive grounds is a matter of dispute. The restrictive view denies Member States the ability to object, arguing that substantive challenges would undermine the functioning of the Security Council of the United Nations.[69] This restrictive doctrine has the far-reaching consequence of barring the ICJ from a similar scrutiny, despite a manifest excess of powers of a mandatory resolution of the Security Council. A total immunity from judicial review seems hardly sustainable. The Security Council's powers of concretization cover the grey areas of construction under Chapter VII. Overstepping these wide powers means invalidity. There remain only the rare cases in which the Security Council may intrude upon vital positions of States when the scope of the interference is not subject to the Security Council's discretion. An example is the humanitarian rules on the use of military force against a State. Only evident excesses, in the appraisal of evidence or in the application of the law, should entail invalidity.[70] This is an exceptional case, however, in which illegality is not automatically linked to the overstepping of already broad powers and in which invalidity therefore requires an additional element, the obvious character of the deficiency. In this situation, the legal restraints upon the Security Council are stricter than the standards of validity.

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67. *See* Jost Delbrück, *in* CHARTA DER VEREINTEN NATIONEN, *supra* note 54, art. 25, ¶ 6, at 17.

68. *See id.* at 18.

69. *See* 2 Georg Dahm, VÖLKERRECHT 212 (1961); Delbrück, *supra* note 68, ¶ 18.

70. *See* Certain Expenses of the United Nations (Advisory Opinion), 1962 I.C.J. 150, 221-22 (July 20) (opinion of Judge Morelli).

It must be conceded that the connection of invalidity with the manifest excess of powers contains elements of uncertainty. The preservation of the functions of the Security Council under Chapter VII and of the standard of compliance under Article 25, however, calls for a concept that raises the threshold of invalidity beyond the misapplication of the Charter which is not manifest. The connection of invalidity with the evident excess of powers refers to a standard that invites the consensus of a large segment of the community of states under the roof of the United Nations. In light of the actual basis of jurisdiction for the ICJ, a more active role of the Hague Court on judicial review of the Security Council's resolutions as such does not yield a higher degree of legal position and certainty.

The main thrust of this Article lies in the argument for a concurrent capacity of the ICJ and of the individual Member State to challenge the validity of a Security Council resolution. It cannot be denied that the present scope of the ICJ's jurisdiction is rather unsatisfactory. The call for a modification in the composition and the procedure of the Security Council certainly has its attractions. Such modifications of the institutional framework of the United Nations may also call for a revision of the proposed standards of justiciability.

Finally, a Member State will deny the validity of a mandatory Security Council resolution always at its own risk, a risk only mitigated by the speculative hope of subsequent vindication by the ICJ. It lies with the Security Council itself, by relying upon recognized methods of legal interpretation and pursuing a coherent policy, to vest its position with persuasive force and to reduce noncompliance to an isolated phenomenon, with dissuasive consequences for the objector. It is the Security Council itself that is the primary guardian of its own legitimacy.