

# THE INTERNATIONAL COURT OF JUSTICE AND ITS POWERS TO JUDICIAL REVIEW OF THE UNITED NATIONS SECURITY COUNCIL RESOLUTIONS

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**Abstract:** *The UNSC has under Chapter VII of the UN Charter broad powers to maintain international peace and security. The “primary responsibility” of the UNSC for this “maintenance” was expressly embodied in the UN Charter (Art. 24). The only explicit limitation on the UNSC powers is in Art. 24(2), which states that the UNSC shall act in accordance with the purposes and principles of the United Nations. There is often raised a legitimate question of judicial review of the Council’s decisions. Frankly to say this possibility was rejected already during negotiations on the UN Charter. This study is dealing with contentions jurisdiction of the ICJ and its advisory opinions as well. The UNSC cannot act contrary to jus cogens. But the UN Charter does not explicitly authorize the ICJ to review the legality or validity of acts of the UNSC and other bodies of the UN. There is opinion that UNSC resolutions which are ultra vires or violate jus cogens norms are void and not legally binding. However, another opinion insists that the UNSC sole bears responsibility for determination of legality of its own acts. The members of the UN agree to accept and carry out the decisions of the UNSC in “accordance with the present Charter”. This brief study endeavours to discuss the question of judicial control of acts adopted by the UNSC. The issue of judicial review has received extensive scale of discussion in the last years. But there are problems with the scope and implementation of judicial review.*

**Keywords:** *Judicial review, Security Council, UN Charter, International Court of Justice, Advisory opinion, Lockerbie, international law*

## I. INTRODUCTION

The question of **judicial review** of the United Nations Security Council (UNSC) resolutions by the International Court of Justice (ICJ) remains controversial question whether the UNSC decisions can be subjected to judicial review by the ICJ. This question is of crucial importance for the whole world order, including the future activities of the United Nations (UN). This paper has been discussing whether the ICJ currently possesses powers of judicial review of the binding resolutions of the UNSC adopted according to Chapter VII of the UN Charter. Judicial review of other political organs of the UN is not discussed in this paper. The UNSC was given “**primary responsibility for the maintenance of international peace and security**” (Art. 24(1), UN Charter) and is empowered to take decisions binding on all member states (Art. 25, Charter). It is obvious that judicial review power was not directly attributed to the ICJ in the UN Charter or in the Statute of the ICJ. There are various opinions claiming that the ICJ currently possesses powers of judicial review of “binding decisions” and “recommendations” of political organs of the UN. With regard to Chapter VII of the UN Charter the judicial review of the UNSC decisions is a **main problem**. There is discussion as to whether the UNSC decision is subject to any limitation when it is acting to maintain or restore international peace and security. But, neither the UN Charter nor the ICJ Statute addresses directly or indirectly the question of the ICJ power

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to such judicial review. The ICJ is entitled to determine any legal matter properly in accordance with provisions of its Statute (Art.1, Statute). It is also rendering important **advisory opinions** on “any legal questions on the request of the UNGA or the UNSC” (Art. 96 (1)). Other organs of the UN and specialized agencies authorised by the UNSC may also request advisory opinions on legal questions, arising within the scope of their activities (Art. 96(2)). The jurisdiction of the ICJ comprises not only all cases which the parties refer to it but also to “all matters” specially provided for on the UN Charter or in treaties and conventions in force” (Art. 36(1), Statute).

This article endeavours to analyse the question whether the ICJ should “judicially review” the UNSC decisions and the closely related problems of the principal legal and political limitations of its powers. The relationship between the ICJ and the UNSC is approached from standpoint of the UN Charter and the ICJ Statute. In recent years we are witnessing political and legal debate as to whether the UNSC is subject to any limitations when it is acting to maintain or restore international peace and security.<sup>1</sup> The UN Charter **does not authorize** its principal judicial organ, the ICJ to review the validity of acts of other principal organs. Judicial review is mainly about **determination of legality**. With regard to the UNSC there is no institutional process of judicial review. The **separation of powers** does not exist in the UN Charter. The power of judicial review of the ICJ was **rejected** already at the United Nations Conference in 1945; this fact confirms recourse to travaux préparatoires of the UN Charter and its ICJ Statute.

The idea of judicial review of the UNSC decisions by the ICJ was open by the ICJ practice, after short period the end of the cold war. There are several Court’s cases where some Judges of the ICJ in their dissenting opinions asserted that the Court retained **some power of judicial review**. Several advisory opinions have been often quoted in support of limited judicial review. There are **arguments for and against** a such judicial review. The question of judicial review of the UNSC decisions (and of other principal organs of the UN) was well substantiated by the **Lockerbie case** of 1988. This case, however, was dismissed by the Court without a decision on the merits on late 2003. The question whether

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<sup>1</sup> See among others ALVARES, J. E. Judging the Security Council. *AJIL*. 1996, Vol. 90, No. 1, pp. 1–39. AKANDE, D. The International Court of Justice and the Security Council: Is there Room for Judicial Decisions of the Political Organs of the United Nations? *ICLQ*. 1997, Vol. 46, No. 2, pp. 309–343. BEDJAOUI, M. *Nouvel ordre mondial et contrôle de la légalité des actes du Conseil de Sécurité*. Bruxelles: Bruylant, 2014. FRANCK, T. The Power of Appreciation: Who is the Ultimate Guardian of UN Legality? *AJIL*. 1992, Vol. 86, pp. 519–523. GOWLLAND-DEBBAS, V. The Relationship Between the International Court of Justice and the Security Council in the Light of the Lockerbie Case. *AJIL*. 1994, Vol. 88, No. 4, pp. 643–677. De WET, E. Judicial Review as an Emerging General Principle of Law for the International Court of Justice. *Netherlands International Law Review*. 2000, Vol. 47, No. 2, pp. 181–210. GAJA, G., STOUTENBURG, J. G. (eds.). *Enhancing the Rule of Law Through the International Court of Justice*. Leiden: Brill Nijhoff, 2014, p. 172. NOLTE, G. The Limits of the Security Council’s Powers and its Functions in the International Legal System: Some Reflections. In: Michael Byers (ed.). *The Role of Law in International Politics*. Chapter 15, Oxford: Oxford University Press, 2000, pp. 320–321. MARTENCZUK, B. The Security Council, the International Court and Judicial Reviews: What Lessons from Lockerbie? *AJIL*. 1999, Vol. 10, No. 3, pp. 517–547. RAMCHARAN, B. A Judicial Review Role for the ICJ. In: Bernard Ramcharan (ed.). *Modernising the Role of the International Court of Justice*. Hague: T. M. C. Asser Press, 2022, pp. 1136–120. REINISCH, A. Should Judges Second – Guess the UN Security Council. *International Organization Law Review*. 2009, Vol. 1, No. 6, pp. 257–291. ROBERTS, K. Second – Guessing the Security Council: The International Court of Justice and its Powers of Judicial Review. *Pace International Law Review*. 1995, Vol. 7, No. 2, p. 281. WATSON, G. Constitutionalism. *Judicial Review and the World Court*. *Harvard International Law Journal*. 1993, Vol. 34, No. 1, pp. 282–326.

or not the ICJ has the right to exercise is jurisdiction over the legality of the UNSC decisions was so left unanswered and remains still controversial. For years it was generally accepted that the UNSC acts could not be reviewed by the ICJ.

At the time being it is very difficult to predict the future standing of the United Nations, including assumed revision of the Charter (Art. 108 and 109) or the ICJ Statute (Art. 69–70). The Russian invasion of Ukraine on February 24, 2022 will have very serious implications on the whole international order and the United Nations system. There are already politicians and other persons who suggest to “dissolve” this universal organization of collective security or to exclude the Russian Federation from the United Nations. But it would be enormous detriment to the life of the whole international community and to the role of international law. It would be therefore appropriate to consider failure of the League of Nations. The Soviet Union was expelled from the League on 14. December 1939 in connection with **Soviet-Finnish War**. The Soviet Union at that time also refused to accept mediation of its claims against Finland. Sixteen member states, including Germany and Japan withdrew their membership already in 1935. The United States ever refused to join the League. The result of the failure of the League system was the outbreak of the Second World War...

## II. THE UN CHARTER, THE UNSC AND THE STATUTE OF THE ICJ

### II.1 The competence of the UNSC

The UNSC bears the “**primary responsibility**” for the maintenance of international peace and security (Art. 24(1), UN Charter). Decisions of the UNSC on procedural matters, shall be made by an affirmative vote of nine members (Art. 27(2), Charter). Decision of the UNSC on all other matters requires an affirmative vote of nine members, including the concurring votes of five permanent members (Art. 27, (3)). In discharging its duties the UNSC is obliged **to act in accordance with purposes and principles** of the United Nations (Art. 24 (2)). The five permanent members of the UNSC enjoy their privileged position with the right of “**veto**”. This privileged membership of the Great Powers granted them by the UN Charter, has been based on results of the Second World War. This provision reflects the special status of originally three Great Powers (the Big Three) which was extended first to China and later to France. This prominent position is established on exception to the principle of sovereign equality.<sup>2</sup> The members of the UN are obliged to accept and carry out the decisions of the UNSC in accordance with the Charter (Art. 25, Charter). The UNSC plays a central role with respect to **threats to the peace, breaches of the peace, and acts of aggression** (Chapter VII of the Charter). It is entitled to make **recommendation or to decide**, what measures should be taken in accordance with the Charter (Arts. 41 and 42), to maintain or restore international peace and security (Art. 39). To prevent an aggravation of the situation the UNSC may, before making recommendation or decision upon these measures, call upon the parties to comply with **provisional measures** (Art 40). With

<sup>2</sup> SIMMA, B. (ed.). *The Charter of the United Nations, A Commentary*. New York: Oxford University Press, 1995, p. 394.

regard to individual or collective self-defence, states must immediately report to the UNSC. The **right to self-defence** is temporary until the UNSC takes measures necessary to maintain international peace and security (Art. 51). The powers of the UNSC **are not unlimited**. In discretion of its actions the UNSC is obliged to act in accordance with the purposes and principles of the UN Charter (Art. 24(2)). The powers of the UNSC under Art. 39 of the UN Charter and its **“primary responsibility”** according to Art. 24(1) can be viewed as a **nonreversible competence** of the UNSC. The UNSC may also recommend appropriate procedures or methods of adjustment (Art. 36(1)). The member states authorized the UNSC to take prompt and effective action on their behalf (Art. 24(1)).

To avoid paralysis of the UNSC, various proposals were made. There were suggestions to **expand** the UNSC permanent membership for Germany, Brazil, India, Japan and for a greater presence of African states. Already in 2013 France e.g. proposed that the permanent members voluntarily and collectively pledge not to use their veto in case of recognised mass atrocities. The proposed reform of the UNSC is not confined to permanent membership and the right of veto only. It involves some amendment of the whole Charter (see Arts. 108 and 109). The Russian invasion of Ukraine on February 24, 2022 will have serious negative impact on the whole existing international order, including the structure and activity of the United Nations.

## II.2 The ICJ as the principal judicial organ of the United Nations

The ICJ is one of the **“principal organs”** of the UN (Art. 7, UN Charter). It functions as the “principal judicial organ”, in accordance with the annexed **Statute** (Art. 92, UN Charter), which is based on the Statute of the Permanent Court of Justice (PCIJ) and forms an **“integral part”** of the UN Charter (Art. 92, UN Charter). The ICJ is an independent court which is not responsible for the exercise of the judicial functions to any organ of the UN, including the UNSC or the UNGA. The ICJ is open not only to all UN members, but to all existing states, on conditions to be determined by the UNGA upon the recommendation of the UNSC (Art. 93, UN Charter). The ICJ **jurisdiction** comprises all matters provided for in the Charter or in treaties and conventions in force (Art. 36(1)) of the Statute). The decisions of the ICJ are binding between the parties of any respective case (Art. 94(1), UN Charter). The Court has also the competence to give advisory opinion (Art. 96, UN Charter). Unlike the national courts the ICJ is not endowed with general competence to guarantee the maintenance of the rule of law in the same way as these courts.<sup>3</sup> No international organization has any **locus standi** before the ICJ (see Art. 34(1)) as a party to contentions case. Conversely, the advisory jurisdiction of the Court is available to organizations but not to states.<sup>4</sup>

## II.3 The relationship between the ICJ and the UNSC

The ICJ as the principal judicial organ of the UN shall apply international law specified in Art. 38 of the ICJ Statute. The Court is entitled **to establish rules** for carrying out its

<sup>3</sup> SIMMA, B. (ed.). *The Charter of the United Nations, A Commentary*, p. 979. McWHINNEY, E. *Judicial Settlement of International Disputes, Jurisdiction, Justiciability and Judicial Law Making on the Contemporary international Court*. Dordrecht: Martinus Nijhoff, 1991, p. 179.

<sup>4</sup> BOWETT, D. W. *The Law of International Institutions*. London: Stevens, 1982, p. 277.

function, in particular to lay down rules of procedure (Art. 30(1) of the Statute). The ICJ is **not responsible** to any organ of the UN, including the UNSC or UNGA, for exercise of its judicial functions. The UNGA shall receive and consider annual and **special reports** from the UNSC, including an account of measures that the UNSC has decided upon or taken to maintain international peace and security (Art. 15(1), UN Charter). When any party to a case fails perform obligations incumbent upon it under a judgment rendered by the Court, the other party may have recourse to the UNSC. The UNSC, if it seems necessary, can make **recommendation or decide** upon measures to be taken to give effect to the judgment (Art. 94(2), UN Charter). Members of the UN are free, however, to entrust the solution of their differences to other tribunals (Art. 95, UN Charter). The Commentary to the UN Charter with regard to the relationship between the ICJ and the UNSC e. g. stated: “As the organ charged with the primary responsibility for the maintenance of peace, the **SC does not enjoy priority of any kind over the ICJ**. Such priority would be conceivable, considering the fact that according to the will of the authors of the Charter, the UN was perceived as a predominantly political organization.<sup>5</sup> In view of the perceived Commentary such priority and exclusiveness regarding the competence of the SC vis-à-vis the ICJ, however, can neither be deduced from the notion of primary responsibility of the SC for the maintenance of peace, nor find support in any Charter provisions or any general principles of law”<sup>6</sup>

Although the UNSC may take the binding decisions which are of “judicial nature” the decision-making procedure of the UNSC is “**fundamentally different**” from that of the ICJ. The function of the Court is to decide on the basis of **international law** (Art. 38(1), Statute), whereas the UNSC takes its decisions primary on the basis of **political criteria**. Therefore no objections of **lis pendens** or **res judicata** may be raised against the ICJ acting simultaneously or prior to or after the SC in a case pending before the SC.<sup>7</sup> When the UNSC is called upon to enforce a judgment rendered by the ICJ, the UNSC can make recommendation or decide upon measures to give effect to the judgment (Art. 94(2)). Neither the UN Charter, nor the ICJ Statute provide any limitations of their activities. Both organs are acting **independently**, taking into consideration one another decisions. The fact that a subject is being dealt with by the UNSC cannot be an obstacle to the exercise of jurisdiction in a case concerning the same matter.<sup>8</sup> The UNSC gives priority attention and support to the restoration of and respect for the **rule of law**, particularly when United Nations supports for judicial and prosecutorial processes is required.<sup>9</sup> The objection that a dispute falls within the competence of the UNSC and is therefore inadmissible to judicial proceedings was rejected by the ICJ in the Nicaragua case or Tehran case, together with the objection that a dispute pending before the UNSC and a recommendation or decision of the UNSC was an obstacle to the exercise of the Court’s competence.<sup>10</sup>

<sup>5</sup> SIMMA, B. (ed.). *The Charter of the United Nations, A Commentary*, p. 402.

<sup>6</sup> *Ibid.*, p. 403.

<sup>7</sup> *Ibid.*, p. 403.

<sup>8</sup> *Ibid.*, p. 990.

<sup>9</sup> Report of the Secretary-General. The rule of law and transitional justice in conflict and post-conflict societies. Doc.S/2004/616, p. 21.

<sup>10</sup> ICJ Reports 1980, Tehran case, pp. 21–22 and ICJ Reports 1984, Nicaragua case, pp. 434. See SIMMA, B. (ed.). *The Charter of the United Nations, A Commentary*, p. 990.

The UNSC receives an **annual briefing** from the President of the ICJ and they exchange views about issues of common interests. Those meetings are by custom held in private. Both principal organs of the UN play the complementary role in the maintenance of international peace and security. The ICJ activity may so strengthen the rule of international law. The reports of the UNSC focus on the relationship with the ICJ and potential points of mutual interaction to make better use of the Court's jurisdiction. Over the years, the UNSC reports have analysed relationship between the rule of law and activity of the UNSC.<sup>11</sup> The UN Charter gives the Council responsibility for addressing instances of non-compliance by states with the ICJ judgments brought before the UNSC. But, in fact the Council has only scarcely taken advantage of this possibility.

### III. THE ROLE OF THE ICJ REVIEW VIS-À-VIS THE UNSC PRIMARY RESPONSIBILITY

#### III.1 Negotiating history of judicial review

The question whether the ICJ may review the legality and validity of the UNSC resolutions was raised already at the 1945 Conference on International Organisation (UNCIO) in San Francisco. The travaux préparatoires of the UN Charter confirms that the idea of judicial review power for the Court at that time was resolutely refused. The idea of judicial review was brought into agenda of conference by the Belgian delegate who proposed that any state party to a dispute before the UNSC shall have the rights to ask the Court whether a recommendation or a decision of the UNSC infringes on its essential rights. If such rights have been disregarded or threatened, it was for the Court to reconsider the question or to refer the dispute to the Assembly for decision. This proposed addendum was to be incorporated into the Chapter VI of the UN Charter.<sup>12</sup> In favour of the Belgian amendment was only the delegate of Columbia. Negative approach to this proposal was voiced by most of all countries awaiting a place on the Court: The Soviet Union, USA, Great Britain and France. Main arguments of these countries were not to weaken the Security Council, not to restrain confidence on its activity or not to disperse responsibilities in the United Nations. Belgium later raised the second amendment with intention to determine the Court as a proper interpretative organ of the UN Charter. This proposal was not accepted and Belgium in the end withdrew it.

It is apparent that no judicial review power was attributed by the UN Charter or Statute to the ICJ. The UNSC was given primary responsibility for the maintenance of international peace and security by Art. 24(1). It was empowered to take decisions binding on all member states (Art. 25). The members of the UN agree and carry out the decisions of the UNSC "in accordance with the present Charter" (Art 25).

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<sup>11</sup> Security Council Report, 2016, No. 5. The Rule of Law: Can the Security Council make better use of the International Court of Justice? pp. 1–2.

<sup>12</sup> Doc. 2, G 17(b) (1); 3. UNCIO Docs 334, 336, 1945, Doc. 433, 11/2/15, 12 UNCIO Docs. 47, 48, 1945. The negotiating history of the judicial review at the UNSC use e. g. ROBERTS, K. *Second – Guessing the Security Council: The International Court of Justice and its Powers of Judicial Review*. pp. 10–11.

### III.2 Arguments for and against judicial review

The ICJ currently does not possess powers of judicial review of the UNSC decisions in compliance with Chapter VII of the UN Charter. This fact is confirmed by the all negotiating history and travaux préparatoires of the UN Charter. The question if the ICJ should “judicially review” the UNSC decisions, once “fanciful”, is according to some scholars being asked seriously by litigants and by judges on the ICJ. Several non-permanent members of the UNSC considered it as an “undemocratic” body.<sup>13</sup> For many years after the adoption of the UN Charter there was a generally accepted opinion, that the UNSC resolutions can’t be reviewed and supervised by the ICJ.<sup>14</sup> There is an expanded opinion that the UNSC resolution which are ultra vires or violating jus cogens are void and not legally binding.<sup>15</sup> There is also an assertion that it is possible to disregard decisions of the UNSC which are not substantially in compliance with the purposes and principles of the United Nations.<sup>16</sup> Some commentators have described some UNSC actions as directly ultra vires and criticized the lack of a binding, legally oversights mechanism.<sup>17</sup> On the other hand, however, there are authors who argue that the UNSC has sole responsibility to determinate the legality of its own acts.<sup>18</sup> Very often it was stated that contrary to many domestic legal systems, where judicial control is envisaged either by an explicit empowerment or by a “constitutional custom” a similar entrustment is not envisaged by the UN Charter and therefore a “specific jurisdictional entitlement” is needed for the ICJ.<sup>19</sup>

Former president of the ICJ R. H. Higgins in her Grotius lectures on the rule of law at the British Institute of International and Comparative law pointed to a number of the difficulties with regard to activities of the UNSC. She stated that the UNSC is far from representative of the membership as a whole, its decisions are not applied in a consistent or equal manner and its decisions are not “subject to judicial review for non-arbitrariness” by the ICJ. Besides she mentioned that there are deficiencies in the judicial adjudication and enforcement of international law. The ICJ is then restricted by the

<sup>13</sup> ALVAREZ, J. E., *Judging the Security Council*, published also online by Cambridge University Press, 27 February 2017 (Extract).

<sup>14</sup> ROSENE, S. H. *The Law and Practice of the International Court*. 1920-1996, Leiden, Boston: 1997, pp. 809–815. Martinus Nijhoff, 1920. FALK, R. *Reviving the World Court*. Virginia: University of Virginia, 1986, p. 186.

<sup>15</sup> DOEHRING, K. *Unlawful Resolutions of the Security Council and their Legal Consequences*. Max Planck, Yearbook of United Nations: 1997, p. 91.

<sup>16</sup> BOWETT, D. Judicial and Political Functions of the Security Council and the International Court of Justice. In: Hazel Fox (ed.). *The Changing Constitution of the United Nations*. London: British Institute of International and Comparative Law: 1997, pp. 79–82.

<sup>17</sup> WHITTLE, D. The limits of legality and the United Nations Security Council: Applying Model to Chapter VII Action. *EJIL*. 2015, Vol. 26, No. 3, p. 672.

<sup>18</sup> ZEMANEK, K. Is the Security Council the Sole Judge of its Own Legality? A Re-Examination, In: A. Reinisch – U. Kriebaum (eds.). *The Law of International Relations – Liber Amicorum H. Neuhold*. Utrecht: Eleven International Publishing, 2007, p. 483.

<sup>19</sup> DISTEFANO, G. International judicial Review of the Legality of Acts adopted by United Nations Organs. *Journal of Sharia and Law*. 2018, Vol. 32, No. 73, [2022-06-01]. Available at: <[http://www.academia.edu/35812316/INTERNATIONAL\\_JUDICIAL\\_REVIEW\\_of\\_the\\_LEGALITY\\_OF\\_ACTS\\_ADOPTED\\_BY\\_UNITED\\_NATIONS](http://www.academia.edu/35812316/INTERNATIONAL_JUDICIAL_REVIEW_of_the_LEGALITY_OF_ACTS_ADOPTED_BY_UNITED_NATIONS)>. In view of this author one of the most far – reaching international judicial review of the validity of acts adopted by a United Nations organ has been wielded by a Court outside the UN system, i. e. by the Court of Justice of European Union.

requirement of state consent and there is a risk of inconsistency in the application of international law.<sup>20</sup>

The UNSC is surely bound by the UN Charter and principles of public international law. It is not omnipotent or *legibus solutus*. In other words the UNSC is not above the law.<sup>21</sup> Some scholars argue in favour of a judicial review role for the ICJ and dissent from the procedure for the submission of application for judicial review. One author e. g. submits that judicial review could cover pronouncement on international law by a UN organ and alleged breaches of the principle of justice. At the time he insists that the review would not apply to exercise of political judgment by member states.<sup>22</sup> Judicial review of the ICJ is even described as an “emerging principle of law”.<sup>23</sup>

#### IV. JUDICIAL REVIEW IN “CASE LAW” AND ADVISORY OPINIONS OF THE ICJ

In making recommendation under Art. 36(3) the UNSC should take into consideration that legal disputes should as a “general rule” be referred by the parties to the ICJ. The ICJ has followed this “general rule” on one occasion only. It was in **the Corfu Channel case**, when the UNSC recommended that Albania and the UK immediately refer their dispute to the Court.<sup>24</sup> The resolution of the UNSC was adopted on 9 April 1947 with eight votes in favour and two abstentions from U.S.S.R. and Poland. The UK, as a party to the dispute, abstained from voting in accordance with Art. 27(3) of the UN Charter. The UNSC was also asked to solve the dispute between the Greece and Turkey over the continental shelf on Hagean Sea. On 10 August 1976 Greece requested the UNSC for a meeting to discuss “violations of its sovereignty” by Turkey. The UNSC on 25 August 1976 adopted resolution n. 395 to consider judicial settlement, particularly of the ICJ. Greece submitted the dispute to the ICJ, but the Court decided that it did not have jurisdiction on this case owing to missing Turkish consent to the proceedings.<sup>25</sup>

In the **Certain Expences case of 1962**, the ICJ expressly rejected the view that it might possess a power of judicial review, stating that, proposals made during the drafting of the Charter in the International Court of Justice were not accepted “the opinion which the Court in the course of rendering is an advisory opinion”.<sup>26</sup> But Judges **J. L. Bustamante, and G. Morelli** in their dissenting opinions argued in favour of some restricted judicial review of the UN organs. Judge Bustamante was stating that it cannot be maintained the United Nations are not subject to review. Otherwise, in their view, it “would amount to

<sup>20</sup> JUDGE, H. E., HIGGINS, R. Delivers Institute’s 2007, Grotius lecture. In: *BICIL* [online]. 24. 10. 2007 [2022-06-01] Available at: <<https://www.biiicl.org/newsitems/82/he-judge-rosalyn-higgins-delivers-institutes-2007-grotius-lecture>>. See also HIGGINS, R. *The ICJ and the Rule of Law: Some Sceptical Thoughts, Themes and Theories Selected Essays*. Speeches and Writings in International Law, Vol. 2, Oxford University Press: 2009, p. 133.

<sup>21</sup> See i. a. PELLET, A. *Peut-on et doit-on contrôler les actions du Conseil de Sécurité?* In: *SFDI. Colloque de Rennes, Le Chapitre VII de la Charte des Nations Unies*. Paris: Pedone, 1995, p. 233.

<sup>22</sup> RAMCHARAN, B. *Modernizing the Role of the International Court of Justice. Chapter 8 A Judicial Review Role for the ICJ, T.M.* The Hague: Asser Press, 2022, pp. 113–120.

<sup>23</sup> De WET, E. *Judicial Review as an Emerging Principle of Law and its Implications for the ICJ. NILR*. 2000, Vol. 47, pp. 181.

<sup>24</sup> ICJ Reports 1949. *Corfu Channel Case (Merits)*.

<sup>25</sup> ICJ Report, 1976 *Aegean Shelf Case (Interim protection) Greece v. Turkey*, p. 3.

<sup>26</sup> ICJ Reports 1962, *Certain Expences of the United Nations Case*, p. 168.



declaring the pointlessness of the resolutions of any organ of the Charter....”<sup>27</sup> Judge Morelli hereinafter stressed: “It is exclusively for the Court to decide... what are questions which have to be solved in order to answer the question submitted to it... Therefore, even according to the request for advisory opinion, the Court is free to consider or not consider the question of the conformity of the resolutions with the Charter...”.<sup>28</sup>

In the **Namibia case** the ICJ in its **advisory opinion** proclaimed, that the “**Court undoubtedly does not possess powers of judicial review**” in respect of decision taken by the UN organs concerned.<sup>29</sup> This advisory opinion reflexes the view that the Court, when is once asked cannot avoid statement whether the resolution is valid. Despite its rejection of judicial review the Court affirmed its competence to decide, whether a Court’s decision is in conformity with the purposes and principles of the Charter.<sup>30</sup> In this case, the ICJ had to consider its powers of judicial review with regard to the contention by the governments of France and South Africa that the GA resolution 2145/XXI was ultra vires. The restrictive power of a judicial reviews for the ICJ admitted in this case e.g. **Judge L. P. Nervo**, who stated that the Court should not assume powers of judicial review of the action of principal organs of the United Nations without specific request to that effect.<sup>31</sup> The need for some kind of judicial review argued in their separate opinions **Judges S. Petrén** and **H. C. Dillard**.<sup>32</sup> **Judge G. Fitzmaurice** in his dissenting opinion expressed his doubts about the validity of the UNSC resolutions.<sup>33</sup>

In the **Nicaragua case** in 1984 the ICJ **refused the objection**, that a dispute which falls within the competence of the UNSC is therefore inadmissible to judicial proceedings and a dispute pending before the UNSC is an obstacle to the exercise of the Court’s competence.<sup>34</sup> On 20 October 1986 Nicaragua requested the UNSC for an emergency meeting to consider the US failure to execute the ICJ’s judgment of 27 June 1986 in this case. A draft resolution for full and immediate compliance with the ICJ judgment was vetoed by the US.<sup>35</sup>

In the **Tehran advisory opinion** case the ICJ rejected the objection that when a dispute falls within competence of the UNSC, it is therefore inadmissible to judicial proceedings. This rejection included also the objection that a dispute actually pending before the UNSC and a recommendation or decision of the UNSC was an obstacle to the exercise of the Court’s competence.<sup>36</sup> The ICJ stated that there can be no doubt that the UNSC was “acti-

<sup>27</sup> Ibid. Judge Bustamante, p. 304; Judge Morelli, p. 217.

<sup>28</sup> Ibid., p. 217.

<sup>29</sup> ICJ Reports 1979 Legal Consequences for States of the Continued Presence (of South Africa in Namibia (South West Africa)), p. 45.

<sup>30</sup> Ibid., p. 53, para 89.

<sup>31</sup> Ibid. Separate opinion of Judge L. P. Nervo, p. 105.

<sup>32</sup> Ibid., pp. 151–152.

<sup>33</sup> Ibid., pp. 292–293.

<sup>34</sup> Cf. : Nor can the Court accept that the present proceedings are objectionable as being appeal to the Court from an adverse decision of the Security Council. The Courts is not asked to say that Security Council was wrong on its decision, nor that there was anything inconsistent with law.... The Court is asked to pass judgment on certain legal aspects of a situation which has also been considered by the Security Council a procedure which is entirely consonant with United Nations. ICJ Reports 1984, Case Concerning Military and Paramilitary Activities In and Against Nicaragua, (Jurisdiction and Admissibility), p. 436.

<sup>35</sup> ICJ Reports 1986, Case Concerning Military and Paramilitary Activities. Case In and Against Nicaragua (Merits).

<sup>36</sup> ICJ Reports 1980, Case Concerning United States Diplomatic and Consular Staff in TEHRAN, Judgment, pp. 21–22. Preliminary objections submitted by the United States of America, May 1, 1977.

vely seized by the matter” and “the Court decided unanimously that it was competent to entertain the United States request for an indication of provisional measures, and proceed to indicate such measures”. The Court also observed that it was for the Court to resolve any legal question that may be on issue between parties to a dispute. In the Court’s view the resolution of such legal questions may be important and sometimes decisive factor in promoting the peaceful settlement of the dispute.<sup>37</sup>

Judge ad hoc **E. Lauterpacht** in the case **Bosnia versus Yugoslavia** in 1993 asserted in his separate opinion that the ICJ does not have the right to substitute its discretion for that of the Security Council in determining the existence of a threat to the peace, a breach of the peace or an act of aggression, or the political steps to be taken following such a determination.<sup>38</sup> At the same time E. Lauterpacht declared that the UNSC can’t be free of all legal control, but that the Court’s power of judicial review is limited and the Court as the principal judicial organ of the UN is entitled, indeed bound to “ensure the rule of law within the United Nations system”.<sup>39</sup> He also mentioned that powers of UNSC by the virtue of Art. 25 and 103 of the UN Charter are “able to prevail over the obligations by the parties under any other international agreement”. Besides, Lauterpacht has mentioned that “the concept of jus cogens operates as a concept superior to both customary international law and treaty”.<sup>40</sup> In this way he extended the issue of the Court’s ability to review the conflict between a UNSC resolution and jus cogens.

On July 9, 2004 the ICJ issued an **advisory opinion** concerning the “**Legal Consequences of the Construction of a wall in the Occupied Palestinian Territory**”.<sup>41</sup> This opinion was rendered on response to a request of the UNGA that the ICJ ruled on, the legal consequences from the construction of the wall being build by Israel.<sup>42</sup> In this way the ICJ dealt with the SC interpretation of the Charter.<sup>43</sup> The ICJ came to the conclusion that the construction of wall was illegal and stated that Israel could not claim that it was acting in self-defence against terrorist attack because Article 51 of the UN Charter does not afford the right to self-defence unless a state is defending against an armed attack by another state. This ICJ statement was not conform to the SC interpretation of Article 51, which recognised a right of self-defence against nonstate actors. This case may demonstrate divergent interpretation of the UN Charter by the UNSC and the ICJ.<sup>44</sup>

The idea of judicial review of the decisions of the political organs of the UN was supported by **the 1988 Lockerbie case**. This case has once more raised question about the UNSC’s powers under Chapter VII of the UN Charter. The question of whether the SC resolutions can be subjected to judicial review has crucial importance for the whole universal system of the UN. The Lockerbie case emerged from the destruction of a US airliner

<sup>37</sup> ICJ Reports 1980, *ibid.*, p. 22.

<sup>38</sup> ICJ Reports 1993, Case Concerning the Application of the Genocide Convention (Bosnia and Hercegovina v. Yugoslavia (Serbia and Montenegro). Provisional Measures.

<sup>39</sup> *Ibid.*, point 99, p. 439.

<sup>40</sup> *Ibid.*, point 100, p. 440.

<sup>41</sup> Reports of Judgements Advisory Opinion of 9 July 2004, p. 136.

<sup>42</sup> UNGA OR 10<sup>th</sup> Emergency Special Session, UN Doc. A/ES-10 PV.14, October 20, 2000.

<sup>43</sup> See. The Wall Opinion, *supra* note 42, see also 95, AJIL 2005, No. 1, p. 141.

<sup>44</sup> CRONIN-FURMAN, K. R. The International Court of Justice and the United Nations Security Council: Rethinking a Complicated Relationship. *Columbia Law Review*. 2006, Vol. 106, No. 2, p. 435.

over the Scottish town Lockerbie in December 1988. Two Libyan intelligence officers were in this connection alleged by the USA and the UK that they planted the bomb that destroyed the aircraft. Libya, however, refused to extradite these persons to criminal prosecution. Therefore the USA and the UK asked the UNSC to use its authority under Chapter VII of the UN Charter to turn both suspects over. Libya, on the other hand, requested the Court to adopt **provisional measures** against the UK and the USA on the basis of the principle **aut dedere aut judicare** laid in the 1971 **Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation**. The Libyan request followed after the decision of the UNSC acting under Chapter VII, that Libya must surrender both persons to the UK and the USA for trial of terrorist act against a PanAm flight. Libya asked the ICJ to adopt provisional measures. The ICJ came to conclusion that there was not necessary to adopt provisional measure. The ICJ stressed that the parties as the UN members are according to Art. 25 of the Charter obliged to accept and carry out the decisions of the UNSC “in accordance with the present Charter”.<sup>45</sup> Libya alleging jurisdiction under 1971 Convention, seeking for interim measures, asked the ICJ to consider the legality of the UNSC resolution 748. This resolutions imposed on Libya economic sanctions to comply with the UK and the USA demands to surrender two Libyan persons accused of the Lockerbie bombing.<sup>46</sup> When Libya refused to surrender the suspects, the UNSC adopted resolution 731 of 21 January 1992. This non-binding recommendation, asked Libya to comply with the request of the British and American governments. On 3 March 1998 Libya asked the ICJ to find that the UK and the US were in violation of obligations under the Montreal Convention and were also liable to desist from the use of force or threat of force against Libya.<sup>47</sup> The ICJ rejected Libya’s request for preliminary measures by a vote of 11 to 5 votes.<sup>48</sup> **Judge M. Shahabuddeen** in his separate opinion raised the question whether these limitation are any limitations on the power of the Council.<sup>49</sup> **Judge Ch. G. Weeramantry** in his dissenting opinion asked whether the UNSC “discharge its variegated function free of all limitations, or is there a circumscribing boundary of norms or principles within which its responsibility are to be discharged?”<sup>50</sup> Both judges were obviously for limits on the powers of the UNSC. Judge Ch. G. Weeramantry observed that “the court acts as guardian of the Charter and of international law”. Besides he stated that “even issues involving the maintenance of international peace and security” on the Charter “confers no exclusive competence on any one principal organ.”<sup>51</sup> **Judge M. Bedjaoui** in his dissenting opinion asserted that a resolution preventing the Court from exercising its judicial function may

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<sup>45</sup> Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident of Lockerbie. Libyan Arab Jamahiriya v. United Kingdom, Preliminary Objections. Judgement of 27 February 1998. Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie, Libyan Arab Jamahiriya v. United States, Preliminary objections, Judgement of 27 February 1998.

<sup>46</sup> ICJ Reports 1992, Libyan Arab Jamahiriya v. United Kingdom, Provisional Measures, pp. 5–8 and pp. 113–114. ICJ Report 1992, Libya v. USA, Provisional Measures, p. 3 and p. 114. GOWLLAND-DEBBAS, V., *The Relationship Between the International Court of Justice and the Security Council in the Light of the Lockerbie Case*; MARTENCZUK, B., *The Security Council, the International Court and Judicial Reviews: What Lessons from Lockerbie?*

<sup>47</sup> Supra note 45.

<sup>48</sup> Ibid., p. 15.

<sup>49</sup> Ibid., p. 32.

<sup>50</sup> Ibid., p. 61.

<sup>51</sup> Ibid., p. 65.

raise questions regarding its lawfulness.<sup>52</sup> **Judge El-Koshi** on his dissenting opinion argued that the legality of the Council's work is subject to its observance of the provision of the Charter and to its proper implementation of those provisions.<sup>53</sup>

Acting at that time as President of the ICJ **Sh. Oda** stated that “a decision of the Security Council, properly taken in the exercise of its competence, cannot be summarily reopened”.<sup>54</sup> Unfortunately it was not said what would happen if the UNSC acts were not properly taken and would fall outside the UNSC competence. Former President of the ICJ **R. Jennings** in his dissenting opinion observed that the ICJ is obliged “to act always as the principal organ” of the UN and so apply UN law. In his view “there is no power of judicial review of the Security Council decisions under Chapter VII of the Charter not merely because of the dictum of the Court in the Namibia case”. The position is established by the provisions of the Charter itself. Moreover it is evident from the records of San Francisco conference that a power of judicial review was proposed and rejected by the drafting conference. The Court is not a revising body, it may not substitute its own discretion for that of Security Council.<sup>55</sup> The UN Charter itself grants really no authority to the ICJ to review legality of acts of the UNSC (and UNGA as well). It is therefore difficult for many scholars to agree that the Court without revision of the UN Charter is authorized to make determination of the legality of the UNSC actions.

Some authors discussed the criteria governing the clarification of meaning and standards of review of the UNSC resolutions. The standards against which the decision of the UNSC can be reviewed are classified as the very same international law, including the standards under *jus cogens* which bind the Council.<sup>56</sup> This observation, however, only confirms that the UNSC is bound by international law. More interesting is the statement on the impact of the SC resolutions on the law of self – defence. Indeed, the emphasis on the possibility of armed attacks by non – state actors entitling states to exercise their rights to self – defence first emerged after the September 11 2001, when the UNSC referred in its resolutions (S/RES/1368 of 12 September 2001 and 1373, of 28 September 2001) to the right to self – defence in the context of terrorist attacks.<sup>57</sup> Until the terrorist attacks of September 11, 2001, it was always the state who was conducting an armed attack triggering the right to self–defence under Art 51 of the UN Charter. It was the US President Bush, who came with the conception of “war against terrorism”. The UNSC so in fact extended its power above framework of the UN Charter without serious objections.

The UNSC has primary role in the maintenance of international peace and security. This position of the UNSC, however, does not exclude ICJ jurisdiction over cases with which the UNSC is dealing. It is possible to mention at least four judgments on the merits as already aforesaid “Corfu Channel”, “Nicaragua case”, “Oil Platforms”, or “DRC v. Uganda

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<sup>52</sup> *Ibid.*, p. 44.

<sup>53</sup> *Ibid.*, p. 99.

<sup>54</sup> *Ibid.*, pp. 17–18.

<sup>55</sup> Case Concerning Questions of Interpretation and Application of the 1971 Montreal Convention Arising From the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United Kingdom, Dissenting Opinion of Judge Sir R. JENNINGS.

<sup>56</sup> ORAKHELASHVILI, A. The Acts of the Security Council. Meaning and Standards of Reviews. In: A. Von Bogdandy – R. Wolfrum (eds.). *Max Planck Yearbook of United Nations Law*. Vol. 11, 2007, Koninklijke Brill N.V., pp. 149, 178.

<sup>57</sup> *Ibid.*, p. 164.

case”. Besides, the ICJ issued at least two advisory opinions relating to the international security and the use of force, explicitly the Nuclear Weapons Opinion and the Wall Opinion. The SC primary role does not exclude ICJ jurisdiction over cases with which the SC is concerned. However, the ICJ’s role in the development of the law has proved in some cases to be extremely controversial. The USA as defeated respondent in Nicaragua and Oil Platforms cases has expressed its fierce rejection of the Court’s reasoning.<sup>58</sup> The objection that a dispute falls within the competence of the SC and was therefore inadmissible to judicial proceedings has been rejected by the Court, along with the objection that a dispute actually pending before the SC and a recommendation or decision of the Council was an obstacle to the exercise of the Court’s competence.<sup>59</sup> The UNSC is “generally reluctant to pronounce on the legality of the use of force.” The ICJ does not pronounce on aggression and “many questions as to how far the ICJ should defer to the SC remain unanswered.”<sup>60</sup>

The question of the limitation of the powers of the UNSC and of the review of its resolutions arose also before the ICTY. In the **Dusko Tadić** case the defendant tried to cast doubts on the validity of the SC actions in setting up the Tribunal. In his view the resolutions of the SC were invalid and the Tribunal had no jurisdiction to try him in this case. The ICTY rejected the claim that the UNSC resolution establishing this Tribunal was unlawful. According to the ICTY the UNSC is not “legibus solutus” and “neither the part nor the spirit of the Charter conceives of the Security Council as unbound by law.”<sup>61</sup> The legality of the UNSC resolutions establishing the two criminal tribunals has become also the subject of challenges before national courts. But national courts have no power to question in review the legality of the UNSC resolutions. The ECJ stated that review is strictly limited to Community acts and does not extend to underlying UN resolutions. It refused the idea, that Community courts would have jurisdiction to review the lawfulness of resolutions adopted by an international body, even if that reviews were to be limited to examination of the compatibility of that resolution with jus cogens.<sup>62</sup>

## V. CONCLUSION

Despite support for limited judicial review expressed by some scholars and the judges of the ICJ, the judicial review of the UNSC resolutions remains controversial and rather unclear whether such power really exists. The question is whether the ICJ can exercise judicial review not only on contentions proceedings but also in advisory ones. The ICJ interpreted the competences and powers attributed to the UN organs, particularly to the UNSC. The powers of the ICJ to review the decisions of the UNSC resolutions has been often disputed with justification that the matters in field of the UNSC interest are pred-

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<sup>58</sup> GRAY, Ch. The International Court of Justice and the Use of Force. In: Ch. J. Tams – J. Sloan (eds.) *The Development of International Law by the International Court of Justice*. Part VI, Chapter 11, Oxford University Press, 2014.

<sup>59</sup> SIMMA, B. (ed.). *The Charter of the United Nations, A Commentary*. p. 990.

<sup>60</sup> GRAY, Ch. *The International Court of Justice and the Use of Force*.

<sup>61</sup> Prosecutor v. Dusko Tadić (Decision on the Defence Motion from Interlocutory Appeal on Jurisdiction) ICTY, Appeals Chamber, October 2, 1995, Case No. IT-94-I-AR 72, p. 13.

<sup>62</sup> Joined Cases C-402/05 P and C-415/05 P, Yasson Abdullah Kadi and Al Barakaat, International Foundation v. Council und Commission, ECJ, 3 September 2008.

ominantly political, not legal. Even if the Court can exercise judicial review, the remaining problem is the scope of this review. Judicial review is mainly about determination of **legality**. With regard to the UNSC powers there is **no institutional process of judicial review** in the UN Charter.

The strong impetus for the debate on existence of judicial review was given by the 1998 **Lockerbie case**. Unfortunately the arguments advanced in favour of judicial review did not specify exactly what the Court's judicial function might be. Despite increasing attention to the issue of judicial review by the ICJ, its judicial competence to determine whether decisions of the UNSC complied with the UN Charter and principles of international law is not explicitly and on the whole endorsed. Maybe it should be worthwhile to remember the words of **Judge M. Lachs** who in his separate opinion in Lockerbie case stated: "... while the Court has the vocation applying international law as universal law, operating both within and outside the United Nations, **it is bound to respect, as part of that law, the binding decisions of the Security Council**".<sup>63</sup>

It seems that there is a growing tendency to conclude that the ICJ possesses a **limited power of judicial review** with regard to decisions of the UN organs. The issue of judicial review by the ICJ is very complicated in particular with respect to decisions of the UNSC according to Chapter VII by the UN Charter, relating to "threats to the peace, breaches of peace and acts of aggression." The decisions of the UNSC shall be supported in accordance with the purposes and principles of the UN and should comply primarily with the norms of jus cogens. To extend powers of judicial review would **mean to diminish** power of the UNSC, including its **primary responsibility** for the maintenance of international peace and security. The UN security system based on the concurring votes of the five permanent members would be so in fact dissolved. The right to "veto" is **prerogative** for Great Powers as a result of the II. World War. Without amendments to the present Charter it is difficult to foresee compliance of the SC permanent members to admit review of their decisions. Some defenders of judicial review support also a limitations of the UNSC powers. A limited power of judicial review is supported by already existing "case law" and commentaries of some judges and scholars.

The political situation in the world has been rapidly changed after the Russian invasion of Ukraine which will have serious impact on the search for a **new world order**. There are various suggestions and demands to change the structure and membership, of the UNSC, to restructure its membership to increase the number of permanent members or even to eliminate the veto power. The question of whether and to what extent has the ICJ as the principal judicial organ the competence to review the legality of the UNSC decisions remains of crucial importance in the context of Chapter VII of the UN Charter. There is a rather complicated debate on the limits of the powers of the UNSC and ultimate protection of legality of its acts. The ICJ is not emerging Constitutional court. It is doubtful that the ICJ would question the UNSC authority. Art 39 of the UN Charter is entirely within the discretion of the UNSC. According the Art. 92 of the Charter, the ICJ has not been endowed with competences of judicial review of the UNSC resolutions. The UN Charter does not foresee the right of the ICJ to review the UNSC decisions.

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<sup>63</sup> Ibid., p. 26.

It remains also questionable what meaning is to be attached to the term “judicial review”. Does this expression mean a special legal procedure by which decisions of the UNSC could be subjected to “revision”, “change” or even “cancellation”? The UN Charter does not foresee any such powers. The term “review” means to “re-examine judicially or administratively” any legal act. “Judicial review” has been characterized as “power of courts to review decisions” of another legal or administrative body. A “revision of law” has been defined as a “restatement of the law” in “a correlated or improved form”.<sup>64</sup> The examination of a decision of a court or administrative body has been used by appellate courts or appellate administrative bodies. But the ICJ is no appellate or review organ for the UNSC decisions. After examining the drafting history of the UN Charter and jurisprudence of the ICJ, **Judge S. M. Schwebel** in case “Lockerbie” maintained that the ICJ did not possess powers of judicial review of decisions of the Security Council based on Charter VII of the UN Charter.<sup>65</sup> Similarly in the same case, **Judge ad hoc Jennings** stated that since Court did not possess powers of judicial review, it could not “substitute its, own discretion for that of the Security Council.”<sup>66</sup>

It seems that without **revisions of the UN Charter**, the UNSC competence to determine the existence of any threat to the peace, breach of the peace or any act of aggression based on Art. 39 has been “non – revivable” by the ICJ. However, it is possible to conclude, that the UNSC **cannot authorize acts which would violate jus cogens norms**. But it does not mean that this problem should fall within the ICJ review. Hitherto the ICJ has always shown a reluctance to get into direct controversy with the UNSC. It would be difficult to accept a Court’s finding that a Council resolution was ultra vires and therefore void ab initio. Besides Art. 59 of the UN Charter states, that “the decision of the Court has no binding force except between the parties and in respect of that particular case”. The UN Charter provides the power to determine threats to the peace breaches of the peace, and acts of aggression exclusively to the UNSC. There are no institutionalized powers of review, neither in the Charter nor in the Charter’s travaux preparatoires. It seems that the ICJ in the meantime remains powerless to review the decisions of the UNSC under the Chapter VII.

The UN Charter confers the primary responsibility for the maintenance of international peace and security on the UNSC. Russian invasion of Ukraine shocked the whole international community. The permanent members, including the Russian Federation have the special status. It is difficult to predict changes on the SC’s composition after and of war in Ukraine. This article tried shortly address the relationship between the ICJ and the UNSC. The role of Russia as the permanent member of the UNSC plays essential role in the activity. Therefore Russia’ invasion to Ukraine may substantially influence new world political and security order, including the relationship between ICJ and the UNSC. China and Russia are both major political powers challenging to US hegemony. The UNSC has to prove its importance and not to indicate its often criticised “futility”.

<sup>64</sup> *Black’s Law Dictionary*. St. Paul: West Publishing Co., 1990, pp. 849, 1320.

<sup>65</sup> Lockerbie, Preliminary Objections (Libya v. United States, supra note 45, Dissenting opinion Judge S. M. Schwebel, pp. 7–13).

<sup>66</sup> Lockerbie, Preliminary Objections (Libya v. United Kingdom, supra note 45, Dissenting opinion, Judge Jennings, p. 30.