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THE CONTROL OF THE LEGALITY OF THE ACTS OF THE UNITED NATIONS SECURITY COUNCIL

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Abstract. *The end of the antagonisms between the East and West in the 90s of the 20th century has created, for many, conditions for more creative approach of the Security Council within the United Nations to maintain international peace and security. Tre author propounds a question of principle: Does not this initial state, created at the Security Council, impose at the same time the need of the appropriate control of such an organ with such vast authorizations?*
The author provides an answer to the question propounded in four sections: 1. The roots of propounding the question; 2. The Charter of the United Nations and the heritage from San Francisco in 1945; 3. The latest practice of the operation of the Security Council and suggestions for the control of legality of the international organs acts, in particular those of the Security Council; and 4. The aggression of NATO states on the Federal Republic of Yugoslavia in 1999.

Key words: *Security Council, UNO, legality*

I. THE ROOTS OF RAISING THE QUESTIONS

1. The end of the antagonism between the East and West in the 90s of the 20th century has created, for many, conditions for more creative approach of the Security Council within the United Nations to maintain international peace and security. The uniting of two German states and the end of the so-called cold war have marked, that is, influenced bi-polarism in the international relations to cease, followed by the dissolution of the socialist states in the East Europe.

As early as 1950, John Foster Dulles, the American secretary of state, wrote in his "War or Peace" that:

"The Security Council is not only a body that applies contractual law. It is a law by it-self. If it deems that certain situation is a threat to the peace, it can decide what measures are to be taken. There are no legal principles it should be guided by: it can decide to act in

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keeping with what it deems appropriate. It could be a means enabling certain powers to carry out their selfish interests on the account of other powers."[1]

Does this mean that now, under the new conditions, we have come to the point that the Security Council in its actions is a "creator of law"?

The above mentioned events and cessation of bipolarism, the Gulf War and the events following it mark the era of the origin of the "new world order", the origin and distribution of the new balance of powers the announcement of which is connected with the address of President George Bush in the Congress of the United States of America on September 11, 1990.

2. Mohammed Bedjaoui, the renowned Algerian writer, former president and now the judge of the International Court of Justice, published a study in 1994 entitled "Nouvel ordre mondial et contrôl de la légalité des actes du Conceil de sécurité" which attracted attention of the scientific public with reference to the possible further practice of the International Court of Justice that would refer to the activities of the Security Council and the United Nations itself.[2]

Following are some subtle questions from the above study which received widespread attention by the mentioned writer:

- first, whether there are objective conditions that some of the Security Council decisions, the character and mechanism of which has been basically changed over the recent years, should be subjected to the control of legitimacy by the International Court of Justice;
- second, whether it is feasible and desirable to authorize Secretary-General of the United Nations by the General Assembly of the United Nations to ask for advisory opinions per each legal question from the Court (now entitled to that right are the General Assembly and the Security Council, also entitled under a particular authorization are the Economic and Social Council as well as some other organs and a number of specialized agencies, but only within their competences – Article 96 of the Charter of the United Nations);
- third, on the feasibility of the idea of the new world order.

Both, much prior to publishing of this study and after it, the papers in the scientific and expert literature are increasingly getting in number in this field taking critical attitudes on the justification and suitableness of the judicial control of the international organs decisions legality, depending on the nature, structure and authorizations of the international organs and international organizations in question. The problems are not new ones.[3]

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[1] John Foster Dulles, War or Peace, The MacMillans Company, New-York, 1950, pp. 194-95 (quoted after Mohammed Bedjaoui, Nouvel ordre mondial et contrôle de la légalité des actes du Conseil de sécurité, Bruylant-Bruxelles, 1994, p.11).

[2] Mohammed Bedjaoui, op. cit. pp. 1-150. See also: Stevan Đorđević, Control of the Legality of Security Council Acts, Possibility or Utopia? Review of International Affairs, Belgrade, 35-36/1995, pp. 23-25; the same: Kontrola zakonitosti akata Saveta bezbednosti mogućnosti ili utopija, "Politika", 7 July 1995, p. 14.

[3] See voluminous literature with: M. Bedjaoui, op. cit. pp. 605-619. Also: Nicolas Valticos, L'expansion et la mutation du droit international et le Conseil de sécurité, Jugoslovenska revija za medjunarodno pravo, 1-2/1996, pp. 416-418.

There are papers in our literature as well, which deal with these questions. A mention here will be made of some which are most closely connected with the title of this paper. Lubivoje Aćimović, a Yugoslav writer, most critically and in details points to the constitutive elements (certain basic normative elements, corresponding institutional structure and mechanism and procedures for implementation of its principles, rules and standard) for each legally founded order. According to the author, certain current changes in the system of international relations do not yet mean that the "United Nations order has thus been derogated".

We can agree with the opinion that "the new world order has not been born yet", but not that "it has not began to be created". In view of the fact that the author had presented the viewpoint prior to the latest occurrences in 1999, the aggression of the USA and her NATO allies (on Serbia and the FR Yugoslavia, Editor's Remark) remains to be seen how it fits into the existing system of the United Nations, which, according to us, is not possible.[4]

Another paper (Prof. Obrad Račić), with many founded observations, points to the quasilegislative and quasijudicial actions of the Security Council within Chapter VII of the Charter of the United Nations. At the same time, the author deems that certain rules of the Charter of the United Nations should be amended under the provided procedure of amendments and supplements.[5]

Principal questions are being raised: Whether this initial state created in the Security Council, its coordinated operation, periodical evasion of confronting opinions of its permanent members as well as medium position in making such important decisions in the work of the United Nations at the same time imposes the question of the corresponding control of the work of such an organ vested with such vast powers? And the other one resulting thereof: What is the power of the Security Council under the new conditions in interpreting actions it takes itself within or outside the Charter of the United Nations, particularly if it is recognizable that certain actions and measures features unilateral character with the expressed superiority of a great power, that is, the United States of America?[6]

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[4] Ljubivoje Aćimović, "Novi svertski poredak" i jugoslovenska kriza, Jugoslovenska revija za medjunarodno pravo, 1-2/1996, pp. 57-59. Remark is made here that the author quickly concludes that Serbia, that is, Yugoslavia, "has decided to take international law in her own hands" in the Yugoslav crisis.

[5] Obrad Račić, Medjunarodni sud i ovlašćenja Saveta bezbednosti: from the advisory opinion on Namibia to the Lockerbie case, Anali Pravnog fakulteta in Belgrade, 1-3/1997, pp. 39-64.

[6] Thus, a great number of resolutions adopted by the Security Council over the last few years is cited in the literature. E.g., only in 1992, the Security Council held 13 official and 188 informal sessions. 1765 documents were passed out of which 85 presidential reports and 74 resolutions were taken over from: Benedetto Conforti, Notes sur la pratique récente du Conseil de sécurité, Jugoslovenska revija za medjunarodno pravo, 12/1966, p. 123. See also the statistics on the United Nations activities concerning the peace and security 1988-1994, Ujedinjene nacije 1945-1995, izmedju priznanja i pokude, published by "Medjunarodna politika" and other, Beograd, 1995, p. 96.

II. THE CHARTER OF THE UNITED NATIONS AND THE SAN FRANCISCO HERITAGE OF 1945

1. Competence to Interpret the Charter of the United Nations

In addition to the contrary endeavours and proposals (Belgium and other states), the San Francisco 1945 heritage undoubtedly tells us that establishment of a separate mechanism for interpreting the Charter of the United Nations was rejected at the time of its adopting. The majority attitude was accepted of, namely, inevitable interpreting by each principal organ of the United Nations within the framework of its everyday competence, that is, competence bearing on that organ. Further, the Organization of the United Nations and States have been invited to consider themselves legally responsible for any interpreting which would be "generally accepted", sure, the formulation is somewhat general opening the way for various arbitraries. And finally, left to the future was the possibility of setting up an organ which would trustworthy interpret the Charter of the United Nations (later on, this proposal has never been discussed institutionally by the member states of the United Nations). These conclusions of different organs and bodies of the Conference in San Francisco in 1945 have never been included in the text of the Charter of the United Nations, so that they were not subject to ratification by the founders of the United Nations and the newly admitted states to the membership of the United Nations, such as is the case of the normative text of the Charter of the United Nations. Thus, every principal organ of the United Nations enjoys the so-called Kompetenzkompetenz, that is, "dispersness" of the power of interpreting the Charter of the United Nations has been created. Sure, this dispersness of the competence in interpreting the Charter of the United Nations was and remained a cause to and creator of conflicts, misunderstandings and various disagreements, but that was a majority intention of the founders of the United Nations for different reasons and motives. Accepted as a conclusion may be that each activity of the United Nations or any of its principal organs, that would be contrary to the provisions of the Charter of the United Nations regulating their functions, represents overstepping of authorisations.

In addition to maintaining the sacred principle of sovereignty of states (basically), the system of the United Nations established under the UN Charter, relies, first of all, upon the executive function concept in maintaining the international peace and security (the principal responsibility being entrusted to the Security Council), the function of conferring, discussing and making recommendations on all questions or matters within the sphere of the Charter of the United Nations (entrusted to the General Assembly) and the court function, which is, to tell the truth, of optional character (entrusted to the International Court of Justice).[7]

[7] Mohammed Bedjaoui, Heurs et malheurs de la compénce de la Cour Internationale de Justice, Jugoslovenska revija za medjunarodno pravo, 1-2/1996, p.74.

2. Security Council is Bound by the Charter of the United Nations, that is, by the International Law

a) Article 24 of the Charter of the United Nations reads as follows:
"**1.** In order to ensure prompt and effective action by the United Nations, its Members confer on the Security Council primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf.
2. In discharging these duties the Security Council shall act in accordance with the Purposes and Principles of the United Nations. The specific powers granted to the Security Council for the discharge of these duties are laid down in Chapters VI, VII, VIII and XII."
...
while Article 25 stipulates as follows:
"The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter."
Finally, Article 103 of the Charter of the United Nations stipulates the norms importance hierarchy in this way:
"In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail."

Are there uncertainties in the Charter of the United Nations (i.e. in the positive law) as far as the subjugation of the Security Council to the Charter of the United Nations in its all subject provisions is concerned and was that uncertainty left intentionally? Rightfully, the doctrine notes that the Security Council is principally bound by the objectives and principles of the Charter of the United Nations in their generality, but not by the subject and corresponding provisions of the Charter in their particularity and singularity, that is, that the text of the UN Charter has been made up so that the Security Council is more concerned about the United Nations objectives values and about their finality, but not so much about its strict and literal respect for such and such provision of the Charter of the United Nations. This results from the mainly political nature of this organ.

b) The following practice of the United Nations after 1945 in the matter of interpreting the Charter of the United Nations and the control of legality of the Security Council decisions ranged within the endeavours to engage the International Court of Justice through the advisory opinions. (Admission of new states to the membership of the United Nations; Remuneration for damages suffered while serving the United Nations; What legal consequences result for the states due to the prolonged presence of South Africa in Namibia, and other.)
In certain cases worry was expressed, and namely, refusal to control the Security Council acts legality by the International Court of Justice was excused by the fear that it might cause delayed actions of the Security Council and parallelism of its work (Australia's representative coming out in case of Indonesia in 1947). The minority of adherents came out for the control of the Security Council acts legitimacy (Holland, Belgium, France). However, the majority were adherents to refuse the dissociation, that is, closing of the Security Council ("in the legal straitjacket"

as it was said on that occasion – coming out of the China's representative, also in the case of Indonesia). That request to control the United Nations organ acts legitimacy came to an end as a "stillborn child".

On other occasions (the case of the Anglo-Iranian company in 1951), according to the representatives of certain states, the Security Council competence determination should not depend on the will some other organ and that the advisory actions of the International Court of Justice in that case cannot be connected with the Security Council autonomy to determine its competence (Yugoslavia, China and other states).

Over the first years after 1945, the USSR, Poland and other states of East Europe (those attitudes were sometimes backed by Yugoslavia as well) assumed the attitude that the Security Council competence was political by nature and that it excluded every "legal censorship", particularly by an organ such as the Court. A battle was being fought for completeness and exclusivity in the Security Council competence, counting on the right of veto in cases when superiority of the western powers was imposed, with or without the legal grounds, in the United Nations. Later on, this attitude underwent some changes.

Such rigid and exclusive attitudes of states, either in one or in the other direction, which are frequently an expression of political determination or competition in the times of the so-called cold war, should be taken conditionally and with a great deal of caution. Under its Article 96, the Charter of the United Nations provided for that the General Assembly or the Security Council may request the International Court of Justice to provide them with an advisory opinion for each legal question. Such request, encouraged by themselves, cannot be made equal with the situations if imposed, that is, that Court imposed the solution according to which the Security Council is to act, which, of course, was not the case here.[8] Although these opinions are not compulsory, the former practice has shown their paramount importance in interpreting the Charter of the United Nations and the rules of international law.

Finally, we can conclude that the practice after 1945 has shown that there is lack of reference to the corresponding chapters and provisions of the Charter of the United Nations for political reasons. Its decision-making can be explained by the general objectives, functions and authorisations of the United Nations. This leads and will lead in the future to the situations to easily avoid and make difficult evaluation of the Security Council acts legality, which is sometimes understandable in view of the nature of this organ of the United Nations.

c) The attitudes of the International Court of Justice regarding the Security Council acts legality and its binding by the Charter of the United Nations have been shown

[8] M. Bedjaoui, in carefully chosen words in the context of broader presentation, compares the situation of the Security Council, which makes decisions on its competence by itself and assesses suitableness whether to ask for the advisory opinion from the International Court of Justice (in connection with harmonizing with the Charter of the United Nations) with the position of a prisoner, who has been left the keys of the prison he is locked into and whose obligation to remain deprived of freedom depends on himself (Note 1, p. 40). Otherwise, after him, "The advisor is not a tutor" (p. 31).

in the practice of the Court either through the advisory opinions or through the Court's coming out for such and such provision of the Charter of the United Nations in the case of other incidental situations, either for the value of such and such resolution of the Security Council. Generally, in all these cases, the Court has rendered its services being reserved and wisely cautious, sometimes extremely, contrary to the attitudes frequently expressed in separate opinions of certain judges which were severely opposed to the majority and which were, regardless of their minority character, very frequently cited in the scientific literature, depending on the case.

Most generally speaking, the Court has denied, that is, come out as having no authorisations of the judicial control or appellation regarding the decisions of the organ of the United Nations in question. However, the proclaimed competence of the Court does not free the Security Council in advance from respecting the provisions of the Charter of the United Nations. Further, the political character of the Security Council does not free it from considering the respect for the contractual provisions by means of which its work is being regulated since these contractual provisions make a boundary to its power and criteria for its decision-making and authorisations. The contractual provisions of the Charter of the United Nations which make a boundary to the authorisations of an organ should be respected by that organ. Lack of institutionalisation of the United Nations organ acts legality control cannot affect the obligation of respecting the provisions of the Charter of the United Nations by those organs as well. There were different viewpoints in practice that supported the views that interpreting the Charter of the United Nations should not be forwarded to the Court as a noncompetent organ, but to the political organs of the United Nations itself (attitude of the judge B. Krilov, in the case of determining conditions for admission of states to the membership of the United Nations).

Based on the analysis of a number of cases, a general conclusion can be drawn that the Security Council shall be responsible to bring its acts in harmony with the provisions of the Charter of the United Nations. Susceptibility to the provisions of the Charter of the United Nations results from the Charter of the United Nations, from the general contractual law and the international court practice performed so far. Also, the most generous objectives are within the framework of permissible means they are performed with.[9]

d) Let us take up the question whether the Security Council is subordinated to the general international law? This question is even more difficult than the previous one bearing on the subordination of the Security Council to the Charter of the United Nations. Is the Security Council subordinated to the respect for international law on the whole or only through the provisions provided by the Charter of the United Nations? Here, also, the heritage from San Francisco of 1945 is used to answer the question.

Certain representatives of states (e.g. of Ecuador, also in the same sense of Vene-

[9] Me. Bedjaoui, Note 1, Documents, pp. 151-603, See also, S. Djordjević, M. Kreća, R. Etinski, I. Čukulović, M. Ristić, Gradja medjunarodnog javnog prava, I-III, Novi Sad, 1988-1989 (selected examples).

zuela) presented their opinions in San Francisco way back in 1945 that, based on the fact that the Security Council is responsible for the maintenance of international peace and security, no conclusion can result that it can either create new principles and legal rules or change the existing ones. After them, it applies the already existing principles and rules. Thus, a conclusion can be drawn in the doctrine that there is nothing more evident than the attitude on the duty of the Security Council to respect international law. Fear that the Security Council was creating the law beyond the United Nations could be felt even in the times the Charter was adopted. The idea has always been that its authorisations may range only within the frameworks of the Charter of the United Nations.

In the doctrine, Article 1 of the Charter of the United Nations is being referred to which reads that the objectives of the United Nations are: "in conformity with the principles of justice (rather wide notion, S.Dj.) and international law" (which is very clear and precise, S.Dj.). Solemnly stated in the Introduction to the Charter of the United Nations is as follows: "We the peoples of the United Nations determined ... to establish the conditions under which justice and respect for the obligations arising from treaties and other sources of interntional law can be maintained ..." It is logical to request the same from the Security Council what is requested from the states. The conclusion is that the Security Council is obliged to perform its competences in the sphere of international law. Hans Kelsen, a worldwide renowned writer, has at one time assumed a contrary attitude bearing on Security Council authorisations in case of employing enforcement sanctions within Chapter VII of the United Nations Charter, i.e., that it can create "a new law for the concrete case".[10] The viewpoint presented at the same time like the aforementioned attitude of John Foster Dulles, the American secretary of state, are very akin although assumed independely one from the other for scientific and political reasons.

III. The Latest Practice from the Security Council Work and Suggestions for the International Organs Acts Legitimacy Control, Particularly those of the Security Council

1. Precedents and changed relations in the Security Council

During the last decade the Security Council has passed, under the new conditions, several decisions (resolutions) the passing of which could, in view of their contents, hardly be expected over the earlier period. Leaving aside great expectations and the most ardent hopes of some writers in the West from the so-called new world order, including the well-measured and cautious M. Bedjaoui as well, the writer of the excellent aforementioned study, the question of the Security Council acts legality control has again been brought to discussion. An exceptional rebirth, flourishing of actualization of this question, embodyment of the new world order status and other are spoken about.

The Security Council actions contents changes have primarily been reflected in three

[10] Hans Kelsen, The Law of the United Nations, London, 1951, pp. 294, 295.

directions:

- first, the broadest interpreting of the notion "threat to the peace", which has enabled the Security Council to become engaged within the Chapter VII of the Charter of the United Nations in certain cases wider that it could be supposed in the earlier practice (Article 39 of the Charter of the United Nations);
- second, diversity of enforcement measures is much wider than that resulting from Articles 41 and 42 of the Charter of the United Nations, and it is also hard to imagine that they could be carried out over the period after 1945 because of using the right to veto by the permanet members of the Security Council;
- third, many actions of the Security Council and the bodies set up by it directly affect domestic legislations of relative states, so that the question is being raised how far the power and authorizations of the Security Council and its bodies and organs extend to directly influence the internal development of states and to change their legislatures.

a) Here are those resoltutions of the Security Council most frequently referred to in the doctrine:

aa) Resolutions 660 and 678/1990 as well as 687/1991 are concerned with the Gulf War and the aggression of Iraq on Quwait. They refer to Chapter VII of the Charter of the United Nations; the use of force against Iraq was not effected under the authority and control of the Security Council and not in the way stipulated under the Charter of the United Nations; the armed coallition was under the leadership of the USA although the operations were approved by the Security Council.

The Resolution 687/1991, which denoted the ceasefire, was in fact a small agreement on peace with the defeated Iraq. It contains provisions, in addition to others, on reparation payment, establishing the demarcation line between Quwait and Iraq (favouring Quwait, according to some authors), with a principal emphasis on the inspection of military facilities and potentials of Iraq and disarmament control with the established verification system. Some of the states have raised a question of legality of these acts on the whole or partially. For example, there is a worked out system of compensation with the United Nations organs provided for to translate it into reality, but general rules of international law on the responsibility of states for illegal acts, including the resulting war damage, binding for both the victors and the defeated, are not respected; many enforcement measures taken against Iraq are beyond the scope of Chapter VII of the Charter of the United Nations and serve other purposes, that is, to exert pressure against Iraq beyong the provisions of the Charter of the United Nations.

bb) The Resoltuion 731 and 748/1992 are concerned with the Pan Am airplane shot down above Lockerbie (Scotland) and death of a great number of passengers. As for Lybia, the citizens of which were charged with the crash, legal consequences should be discussed based on the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (Montreal, 1971); for the USA, this is a question of terrorism. The Resolution 748/1992, otherwise passed based on Chapter VII of the Charter of the United Nations, provides for definite sanctions against Lybia and extradiction of two citizens of

Lybia has been requested. At the same time, Lybia has initiated proceedings before the International Court of Justice bearing on the application of the said Convention of 1971. Provisional measures against the USA and Great Britain, requested by Lybia with reference to these two states, were not passed, that is, the request was refused, but the International Court of Justice proclaimed itself competent in the dispute in meritum on February 27, 1998, which was repudiated by the USA and Great Britain (it was even requested by the USA from the International Court of Justice, in a form of an ultimatum, to proclaim itself incompetent in this concrete case).

A lot of questions have been initited: the possibility the decisions of the Court and the Security Council to be contradictory; an attempt of supremacy of the Security Council over the International Court of Justice in the concrete competence in using the said Convention of Montreal of 1971 and other. Some of the states have raised a question of legitimacy of the Security Council resolutions. A relation between pacific setllement of disputes (Chapter VI) and taking of enforcement measures and their scope (Chapter VII of the Charter of the United Nations) is in question. In addition, the International Court of Justice has no the appelation power with reference to the decisions of the Security Council and other.

cc) The Resolution 808 and 827/1993 referring to the establishment of the Tribunal for the Prosecution of Serious Violations of International Humanitarian Law Committed in the Territory of Former Yugoslavia over the period from 1991 (and the corresponding resolution for Rwanda) also refer to Chapter VII of the Charter of the United Nations. Their passing permanently, both at the time of their passing and now, raise the following issues of quasilegislative and quasijudicial character with reference to the Security Council: legality of these resolutions (legal grounds for establishing court bodies of such character by the Security Council do not exist in the Charter of the United Nations; the supremacy problem in competencies between the General Assembly and the Security Council in connection with such authorisations; the tribunal cannot be a subsidiary organ of the Security Council based on Article 29 of the Charter of the United Nations (the tribunal referred to), the possibility of which is hard to imagine; and other); quasijudicial authorisations of the Security Council with reference to the passed Statute of the Tribunal; disrespect of Article 17 of the Charter of the United Nations referring to the authorisations of the United Nations General Assembly bearing on the budgetary questions; imposure of obligations to the states to change the domestic legislatures based on the decisions of the Security Council on the extradiction of person suspected for war crimes and other questions of relations between the domestic and international laws. The so-called "expeditiousness" wages war against legality in many fields. Not calling into question the obligation of punishing all war crimes, increasingly brought to the surface is the fact that the establishment of the Tribunal then was and is now in the political function of certain states, particularly the USA in the Security Council. This was particularly demonstated recently when many war crimes committed during the NATO states aggression on the Federal Republic of Yugoslavia during 78 days of crazed bombing in 1999 have been pardoned

in advance by the Tribunal procesutor.

dd) A number of resolutions on the crisis and conflicts in the territory of former Yugoslavia; Resolution 713/1991 (embargo on shipment of weapons); Resolutions 757 and 787/1992 (sanctions and their expansion against the Federal Republic of Yugoslavia); Resolutions 777 and 821/1993 ... (expelling the Federal Republic of Yugoslavia from the work of the organs of the United Nations organs work) and other. A problem is posed on the character of sanctions pursuant ot Chapter VII of the Charter of the United Nations (prevention, punishment, disrespect of humanitarian law and the like); the present status of the Federal Republic of Yugoslavia in the United Nations contrary to the provisions of the Charter of the United Nations and other. Noted in the docrtine was that the embargo referred to the newly-created states as well which did not exist as independent states at the time of critical events (according to M. Bedjaoui, pp. 65-67, imbalance was created for Bosnia and Herzegovina, which is totally out of touch with reality).

ee) The Resolution 837/1993 refers to the armed attack to the UN operations personnel and death of 22 members of the UN forces; also refers to Chapter VII of the Charter of the United Nations. The decision on arresting General Aida, Somalian leader, based on the above mentioned Resolution has not provoked any debate on the Security Council competence in this field.[11]

Precedents and innovations extending beyond the scope of the Charter of the United Nations and the general international law are being created. All the resolutions mentioned refer to Chapter VII of the Charter of the United Nations, which in some cases may and should be accepted, but modalities and ac-

[11] Wider: M. Bedjaoui, Note 1, pp. 49-68. On the above Security Council Resolutions, the following opinions of writers are also added. Thus, Giorgio Gaja, Réflexions sur le rôle du Conceil de sécurité dans le nouvel ordre mondial, Revue générale de Droits international public, 2/1992, pp. 297-319, writes that the possibilities of legal control of the Security Council statements are limited and that there is little likelihood that the International Court of Justice will play an important role in the near future in limiting the Security Council in employing authorisations granted to it under Chapter VII of the Charter of the United Nations bearing on the reactions to the violations of obligations not concerned with the employment of force (p. 317). Further, he adds that certain existing resolutions of the Security Council refer to the remarks. Since the Security Council acts rather on its convenience in the statements on violations, the United Nations system does not offer effective remedy in supposing mistakes or misuses. It is, after him, unavoidably a source of tensions within the United Nations (p. 318); Pierre Marie Dupuy (Sécurité collective et organisation de la paix, Revue géneralé de Droit international public, 3/1993, pp. 617-627), also admits that the Resolution of the Security Council on Establishing the Tribunal for Yugoslavia (808/1993) have caused more than any other, from other sides, questions on the extensive interpreting the legality of the Charter of the United Nations (p. 622); it is concluded in the joint treatise (N.Q. Dinh, P. Daillier, A. Pellet, Droit international public, 5 édition, Paris, 1994, pp. 929-931) that, after the analysis of several cases, the interpretation of the notion "threat to the peace" from Article 39 of the Charter of the United Nations has considerably stirred up the problem of controlling the Security Council acts by the International Court of Justice in a very keen way and particular importance of advisory opinion of the Court of 1971 with reference to Namibia concerning the binding nature of the resolutions of the security Council was pointed out; Obrad Račić (O pravu Saveta bezbednosti da tumači Povelju UN: da li je potrebna (savetodavna) kontrola Medjunarodnog suda?, Medjunarodni problemi, 1-2/1995, pp.113-130) after a detailed analysis of the doctrinary opinions on the latest practice of the Security Council reports that "the International Court of Justice should interfere, at least on the advisory basis, at the very moment when a dispute arises, how to apply and/or interprete those rules (of the Charter of the United Nations)" (p. 129).

tions taken within the frameworks of this Chapter of the Charter of the United Nations, rightfully pose the question of the control of this decisions legality. Somewhere the contents of Chapter VII of the Charter of the United Nations are respected, somewhere neglected ans sometimes even exceeded, that is, some actions have no grounds in the Charter of the United Nations.

b) The General Assembly of the United Nations has been put aside the work of the United Nations over the last decade of this century. Each side of the problem should be weighted and the practice between the Security Council responsibilities on the one hand and the coaction and coparticipation of all organs of the United Nations, particularly the General Assembly, within the sphere of the prescribed provisions of the Charter of the United Nations in the maintenance of the international peace, on the other hand harmonized. The Security Council shall be obliged to avoid "double standars", different actions in identical or nearly identical situations. Or as it is also designated in the doctrine: "two speeds". Also, for objectivity, the fact that since 1945 to the present day there has been no permanent member of the Security Council that has not accused or made objections to illegal employment of force or threat with force should not be disregarded. There is a general obligation to all organs of the United Nations concerning the respect for the international humanitarian law and the law of armed conflicts in particular the rules *ius cogens*. No one an say "yes" to the work of the Security Council that departs from the letter of the Charter of the United Nations (until its contens are such as those set up in 1945) and creates a state which for a moment seems such as that the Security Council is freed from any control of legality in its work.

In certain answers of the states in 1993 in connection with the fair representing of states in the Security Council and enlarging of its composition as well as reforming the United Nations, noticeable proposals on the need that the Security Council should consult the member states of the United Nations ouside its composition have been given when making important and conclusive decisions. Columbia has done its utmost a separate and independent organ for the constitutional control of the legality of the Security Council decisions and those of other organs of UN to be established.[12] There were also other proposals in the doctrine (joint committee of the Security Council and the General Assembly for such cases; election of persons with great integrity into the principal organs of the United Nations and other).

As an echo of the heated atmosphere at the beginning of the 90s of this century in connection with the necessity for the control of legitimacy of the Security Council acts, these proposals have in principal been accepted and hailed in subsequent papers, but the possibilities for their accomplishment are viewed more critically. The questions are posed whether such control is desirable, that is, whether the Security Council acts can and should be controlled, by whom and what consequences may result, the question of groundedness and fairness and other is also posed.[13]

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[12] Doc. A/48/264, 20 julliet 1993.

[13] Christian Dominicé, Le Conseil de sécurité et de droit international, Jugoslovenska revija za medjunarodno pravo, 1-2/1996, pp. 197, 209; Nicolas Valticos, op. cit. pp. 417, 418, 420.

2. Doctrinaire Attitudes to Revaluate and Expand the Herritage from San Francisco of 1945

The proposals on certain aspects of the judicial control of the legality of the international organs acts, particularly those of the Security Council and broader engagement of the International Court of Justice in providing advisory opinions (American Society for International Law; International Law Association at the 47th conference in Dubrovnik; Grotius Society; Institute for International Law 1952 and 1957 and other) have permanently been repeated over the postwar period.

Based on the detailed analysis of M. Bedjaoui in the aforementioned study, the following general and particular attitudes can be concluded:[14]

a) The state-founders at the Conference in San Francisco in 1945 and editors of the Charter of the United Nations and the Statute of the International Court of Justice were aware of the necessity and usefulness of the judicial control of the Security Council acts, but those proposals had to be left for practice to be formed and nuanced (conditions, forms, mechanism, consequences, etc.). So, there is no pursuant to the Charter a mechanism for such control, which, at the same time, does not mean that the Security Council is, within the frameworks of broad and primary authorisations for maintenance of the international peace and security, relieved of the responsibility of the respect for the provisions of the Charter and the general international law.

   The practice has not been stabilized. "Judicial control of the international organs acts legality is still in embryo and weak". Its contours are vague, boundaries subject to changes and violations. Estimation of legality is performed by every organ of the United Nations within the frameworks of its competences. Exceptionally encountered are some forms of the control of legality of acts of the international organs, that is, the Security Council. The starting point that the Security Council is above the law could not be admitted. But "sure that the era of violating justice has not come to an end yet", so that the way of the rule of the law over the violation is distant and still hoped for.

b) It is a general need and necessity to respect the judical function within the provisions of the Charter and the Statute of the International Court of Justice when the case of the so-called "litispendence", that is, comparative competence of two organs of the United Nations arises, out of which one is the Court. Former examples are: Corfu Straits, Anglo-Iranian Company; Diplomatic and consular personnel in Tehran; military and paramilitary activities in Nicaragua, the 1971 Montreal Convention application and other.

   There are no texts in the Charter which prevent the states to simultaneously appeal to two organs of the United Nations with their requests. An exception is Article 12 of the Charter of the United Nations which reads:

   "While the Security Council is exercising in respect of any dispute or situation the functions assigned to it in the present Charter, the General Assembly shall not make any recommendations with regard to the dispute or situation unless the Secu-

[14] Mohammed Bedjaoui, Note 1, pp. 147, 136, 80, 75-150.

rity Council so requests...".

The same state may simultaneously but alternatively as well appeal to the Security Council and to the International Court of Justice, to the Court after the Security Council, but to the Security Council after the Court as well. One state can utilize one of the UN organs, while the other, having a dispute with it, can utilize the other organ.[15] Exceptionally, the states can separately reach agreement on certain limitations in the pacific settlement of disputes. There is a principle of autonomy and nonsubordination to the Court with reference to the Security Council in those relations.

In its former advisory opinions, the International Court of Justice has cautiously come out for legal questions related to the work of the UN organ, taking care of the competences of the Security Council, with the purpose of making the UN organs purposes accomplishment easier. Judical function was understood only within the frameworks of the UN Charter provisions.

c) Proposals bearing on the strenghtening of the international judiciary function are directed towards:
   aa) widening the domain intended for disputes settlement by the International Court of Justice; encouraged is but not excluded the possibility of creating and work of other specialized international courts (International Maritime Committee, Permanent International Criminal Court and other);
   bb) abandoning reservations by the states when approaching the compulsory competence of the International Court of Justice (*ratione materiae* and *ratione personae*);
   cc) including customary provisions in new multilateral conventions on the acceptance of the compulsory competence of the International Court of Justice for disputes settlement arising from the application of these conventions;
   dd) widening the advisory competence of the International Court of Justice. The authorization to ask for the advisory opinion of the Court shall also be given to the Secretary-General of the United Nations *proprio moto* or at least, based on the authorization of the General Assembly and the Security Council, in much more cases than it was possible so far.

With reference to the general destiny of the judicial settlement and the future of the International Court of Justice, the doctrine also points to the new disputes arising from the birth of new categories of internal conflicts; to the growing importance and role of the international organizations; to the need of more closely determining the notion "threat to the peace" and definig the rules of the international law of importance for the peace and security and other. All this should be tracked by continuing with painstaking work on codifying the rules on the international responsibility of states.

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[15] Shabtai Rosenne, The Law and Practice of the International Court, 1985, p. 85 and further. The author thinks that the political organs should usually abstain from placing on their agenda disputes they recommended to be settled in the court and vice versa, that states which have initiated the proceedings in the courts should not bring the same disputes before the political organs while they have not been settled. Sure that this cannot be interpreted as an obligation.

IV. The Aggression of the NATO States on the Federal Republic of Yugoslavia

The NATO states committed aggression against the Federal Republic of Yugoslavia by bombing on 24 March, 1999, which lasted continuously for 78 days, that is, till 9 June 1999. On the very day the Government of the Federal Republic of Yugoslavia made a Decision on announcing the state of war in the Federal Republic of Yugoslavia and the next day separate dicisons on interruption of diplomatic relations with the USA, G. Britain, France and Germany as well as on closing embassies of the Federal Republic of Yugoslavia in those states.[16] The decision on breaking off the state of war was made public in the second half of June, 1999.[17]

At the open session of the Security Council convened for 25 March, 1999, on request of the Russian Federation (but on request of Yugoslavia and other states as well), the proposed resolution, under which cessation of military actions and renewal of the dialog on political settlement of the Kosovo (and Metohia) crisis, was rejected by 12 votes against 3 (Russia, China and Namibia voted in favour of the proposal). Professor Rodoljub Etinski writes about this decision making and discussions:

"On the basis of this voting some think that the legality of this intervention was approved by the Security Council. The Security Council did not come out on this by voting, which is a fortunate circumstance. The Security Council practice shows that it is not considered particularly bound by the rules of international law."[18]

The UN Security Council resolution 1244 dated 10 June, 1999, as well as earlier resolutions also refer to Chapter VII of the UN Charter. Enforcement measures and actions taken by the Security Council when there is a threat to the peace and security are in question, and the serious humanitarian situation is ascertained in this region. But there were no authorisations in those earlier resolutions to take the enforcement military measures.

The Government of the Federal Republic of Yugoslavia instituted proceedings with the International Court of Justice on 29 April, 1999, against 10 member states of NATO separately: the USA, Great Britain, France, Germany, Italy, Holland, Belgium, Canada, Portugal and Spain because of the violation of the international obligation not to resort to use the force. After rejecting the request of FR Yugoslavia that the International Court of Justice should designate provisional measures for cessation of bombing (Decision of the Court dated 2 June, 1999), the deadline for bringing complaint of the Federal Republic of Yugoslavia against eight NATO states (as for the USA and Spain, there were no legal grounds for compulsory competence of the Court) was fixed to 5 January, 2000 (which was observed) and the answer to the compalint of FR Yugoslavia to the states in dispute to 5 July, 2000. In the meantime the sued states could be expected, in keeping with the Court Rules, to make preliminary objections bearing on the competence of the Court and acceptability of the complaint.

There were grounds, prima facie (UN General Assembly Resolution on defining ag-

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[16] Yugoslav Official Register, 15/1999.
[17] Yugoslav Official Register, 44/1999.
[18] Rodoljub Etinski, Moć i pravo u slučaju agresije NATO država protiv SR Jugoslavije, International Symposium Novi Sad 15'16 October, 1999, NATO aggression on the Federal Republic of Yugoslavia '99, Proceedings of Papers, Novi Sad, March 1999, p. 48.

gression No. 3314-XXIX of 1974), the Security Council to proclaim aggression. It is a matter of violation of Article 2, paragraph 4 of the UN Charter referring to refraining from the treath with or use of force, violation of imperative norms (jus cogens) also based on the Vienna Convention of the Law of Treaties of 1969. In addition, bombing of FR Yugoslavia was done contrary to the prohibition of enforcement actions according to regional arrangements and by regional agencies without the authorization of the Security Council (Artcile 53, paragraph 1 of the UN Charter).

Failing to accuse and hushing up the aggression of the NATO states on FR Yugoslavia, which could have neither been expected from the Security Council since its three permanent members have directly participated in the aggression, the existing system and order of the United Nations have been violated. The so-called air campaigns, in the heads of powerful states that they can do anything, which brought about a multitude of violations of the provisions of the international conventions in effect and so much war crimes by the forces of the NATO states, under the pretext of humanitarian interventions, have no grounds in the UN Charter and international law. In the concrete case, the Security Council has neither observed the rules of the UN Charter on its work. A question is being raised to which extent the International Court of Justice was able to pronounce provisional measures on cessation of further bombing, having in mind the fact that no agreement was reached within the Security Council to accuse such act. As for the doctrine, the writers who have supported the imagined so-called new world order, otherwise uncontrollably praised, have proceeded from the assumption that it should be inspired by respesting the Charter of the United Nations, recognizing the dignity and effectiveness of international law (although helpless when the balance of powers is disturbed) and strengthening confidence in the international judiciary.

Bipolarism has had its weak points due to the use of veto by the permanent members of the Security Council; because of the supremacy of one power in the Security Council unilateral actions also have the other side of the coin. Pointed in the doctrine is the fact that the new world order announced a few years ago may, unfortunately, remain "illusion" and that the ideas about it are easily abandoned, of course, based on various explanations. This is the context within which the question should be answered whether the Security Council acts legality control, under the order of the United Nations when that mechanism has not been made institutional, is a possibility or an utopia. Yet, all this is said to have happened in the United Nations Decade of International Law, not gloriously completed in the years 1989-1999.

In the clash of opinions between those who count on and take into account the reality of supporters of exclusive interests, policy of force and playing games with some else's rights, on the one hand, and the champions of the rule of the law and justice (or "incurable romantic lawers" as they are named), the wishes of which are interwoven with the harsh reality, on the other hand, we decide to stick to the painstaking and hard way, very often only the supposed one that the control of the legality of the Security Council acts is required. It should always be sought after within the boundaries of the existing order of the United Nations to the extent the order itself makes it possible. We should persist to that end step by step, at least being satisfied with partial achievements, regardless of the conceptual restrictions the present legal order of the United Nations is based on.

KONTROLA ZAKONITOSTI AKATA SAVETA BEZBEDNOSTI UN: PREPORUKE I OGRANIČENJA

Stevan Djordjević

Prestanak antagonizama izmedju Istoka i Zapada devedeseuih godina 20. veka, za mnoge je stvorio uslove za stvaralački pristup Saveta bezbednosti u okviru Ujedinjenih nacija u održavanju mira i bezbednosti. Autor postavlja principijelno pitanje: Zar ovo početno stanje, koje je stvoreno u Savetu bezbednosti, ne nameće u isto vreme potrebu za odgovarajućom kontrolom takvog organa sa tako velikim ovlašćenjima?

Autor daje odgovor na postavljeno pitanje u četiri odeljka: 1. Koreni postavljanja pitanja; 2. Povelja Ujedinjenih nacija i nasledje iz San Franciska 1945; 3. Najnovija praksa rada Saveta bezbednosti i sugestije za kontrolu legaliteta akata medjunarodnih organa, posebno organa Saveta bezbednosti; i 4. Agresija NATO država na Saveznu Republiku Jugoslaviju 1999. godine.

Ključne reči: *Savet bezbednosti, OUN, legalitet*