CHAPTER 7

Act-dependent Judicial Review of Security Council and General Assembly Resolutions

Rosa Möhrlein

Introduction

The purpose of this contribution is to examine the role of the International Court of Justice with regard to the judicial review of three categories of General Assembly and Security Council resolutions. The three categories for which the role of the Court is examined are resolutions adopted not in accordance with the prescribed procedure, resolutions adopted on the basis of a power not expressed in the United Nations Charter and resolutions adopted on the basis of a discretionary power.¹

By means of an analysis of advisory opinions and judgments of the Court, it will be explored what kind of role the Court has actually played in the past, how we can qualify this role and what standard of review (if any) the Court adopted. The hypothesis is that the extent of judicial review and the level of scrutiny depend on the type of resolution adopted by the political organs of the United Nations.

* Lecturer and researcher at the Law Faculty of the Radboud University Nijmegen. I would like to thank the International Court of Justice for giving me the opportunity to present an earlier version of this paper at the Conference on the occasion of the Centenary of the Peace Palace. The remarks that have been made in reaction to my speech have been very useful. I would also like to thank Dr. E. Rieter for her suggestions for improvement of this contribution.

¹ These categories have been mentioned by Jan Klabbers, An Introduction to International Institutional Law (Cambridge: Cambridge University Press, 2009), 215. Klabbers has identified these types of resolutions based on a combination of potentially unlawful acts considered by Lauterpacht and fields where questions of legality could arise as analysed by Morgenstern. See Elihu Lauterpacht, “The Legal Effect of Illegal Acts of International Organisations,” in Cambridge Essays in International Law: Essays in Honour of Lord McNair, ed. Derek W. Bowett et al. (New York: Oceana, 1965), 89 and Felice Morgenstern, “Legality in International Organisations,” British Year Book of International Law 48 (1976–1977): 241–80. The formulation used by Klabbers is slightly different, namely: instruments adopted not in accordance with the prescribed procedure, by an organ lacking the requisite power to adopt the measure in question, and the improper exercise of a discretionary power.
The categorisation selected for this paper does not pretend to be an exhaustive overview of the resolutions that can be adopted or a mutually exclusive framework, but it could lead to more extensive research on the categorisation of General Assembly and Security Council resolutions for analysing the role of the Court with respect to judicial review.

The Concept of Judicial Review

When discussing judicial review, authors have come to different conclusions with regard to the question whether the ICJ can review resolutions adopted by the General Assembly and the Security Council. This is not surprising since the conclusions depend on what a particular author understands by the concept of judicial review. As José E. Alvarez has put it: “it is wrong to assume that we will know ‘judicial review’ when we see it, that all define ‘judicial review’ the same way.”

For some authors, judicial review means that the Court can ‘invalidate’, ‘strike down’ or declare ultra vires resolutions of the Security Council and the General Assembly. Put this way, judicial review is understood as judicial, ‘constitutional’ control over the resolutions of United Nations organs. For other authors, however, judicial review is defined as the possibility for the Court to

---


5 Babback Sabahi, “The ICJ’s Authority to Invalidate the Security Council’s Decisions under Chapter VII: Legal Romanticism or the Rule of Law?,” New York International Law Review 17 (2004): 1. Although General Assembly resolutions are recommendations, they can likewise be subject of judicial review since they may have highly important legal effects. See Kolb, The International Court of Justice, 908.