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THE CONSTRUCTION OF UN-SYSTEM LAW IN DOMESTIC AND INTERNATIONAL COURTS - THE SECOND GULF WAR AS A CASE STUDY**

Introduction

This article explores avenues and mechanisms for the judicial review of the meaning and effects of United Nations (UN) peace-coercion law created by the UN Security Council under the

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UN Charter[1]—hereinafter, UN-system law. It will use as a case study the controversy regarding the legality of military action against Iraq by the Coalition of the Willing[2] in March of 2003.

Before and after invading Iraq, various coalition members had justified their military action under the rationale that UN-system law in place provided the requisite legal coverage and that therefore, a further authorization through the UN was not required at all. At the time, this legality rationale was at the center of heated political, diplomatic and academic exchanges. Rather than adding one more opinion piece to a debate conducted long ago[3], this article focuses on the judicial review of UN-system law in domestic and international courts of law.

The article consists of three parts. After briefly recalling the UN-system law relevant to the Iraq situation, the article discusses cases seen through in the United Kingdom, the Republic of Costa Rica and the Federal Republic of Germany. It then works through conceivable proceedings on the international plane. Finally, the article broaches two ideas for reforming the regime of judicial control when the courts are called to construe the meaning and effects of UN-system law.

I. The Legal Framework in Place: UN-System Law on the Eve of the Invasion

This section reviews the UN-system law framing the debate over the legality of military action against Iraq by the Coalition of the Willing. Chapter VII of the UN Charter[4] assigns the UN Security Council the primary responsibility for use-of-force enforcement actions designed to coerce the maintenance or restoration of international peace and security[5]. However, without the blessing or acquiescence of the UN Security Council's permanent five members – the French Republic, the People's Republic of China, the Russian Federation, the United Kingdom of Great Britain and Northern Ireland, and the United States of America – no such action can be taken[6]. Their blocking power is unfettered. In particular, the theory of presuming the UN Security Council's authorization of an enforcement action in the face of a veto deemed unreasonable has not been accepted for lack of a basis in law and precedent under the UN

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1 Charter of the United Nations, 26 June 1945 [UN Charter], 59 Stat. 1031, T.S. No. 933, 3 Bevans 1153 (*entered into force* 24 Oct. 1945).

2 Cfr. E. Knowles, *Coalition of the Willing*, in *The Oxford Dictionary of Phrase and Fable*, 2006, http://www.encyclopedia.com/doc/1O214-coalitionofthewilling.html («[C]oalition of the willing – a group of nations agreeing to act together, especially with military involvement; the term has been particularly associated with those countries giving active support to American intervention in Iraq in 2003»). For usage of the term by U.S. President George W. Bush, see for example, CNN, *Bush: Join Coalition of the Willing*, 20 Nov. 2002), http://edition.cnn.com/2002/WORLD/europe/11/20/prague.bush.nato/.

3 For a concise discussion, along with numerous references to the secondary literature, see William K. Lietzau, *Old Laws, New Wars: Jus ad Bellum in an Age of Terrorism*, in *8 Max Planck Yb. Un. Nat. Law*, 2004, pp. 383, 420-29.

4 UN Charter, artt. 39-51.

5 UN Charter, artt. 24, 42. For the purported conferral on or the recognition in the UN General Assembly of powers to «recommend» collective measures in the event that the UN Security Council is unable to act, see Uniting for Peace, G.A.Res. 377(V), U.N. Doc. A/1775 (3 Nov. 1950) [Uniting for Peace].

6 UN Charter, artt. 23, 27, parr. 3, 2.

Charter[7]. UN Security Council lawmaking pursuant to Chapter VII is disseminated through decisions, which are binding on all members[8] and take the form of resolutions[9]. Any measures thus decided are carried out either by the UN Security Council under its own responsibility or by other States or a regional system specifically authorized in this regard[10].

Whether the use of force by the Coalition of the Willing in 2003 was covered by UN-system law or required yet another step hinged on three UN Security Council resolutions passed in the thirteen-year window between the First Gulf War[11] and the Second Gulf War[12]. When, after its invasion and occupation of Kuwait in the summer of 1990, Iraq remained unyielding about its noncompliance with a string of UN Security Council decisions urging withdrawal, the UN Security Council, on November 28, 1990, adopted Resolution 678[13]. This resolution – hereinafter, «the liberation decision» – gave Iraq a «final opportunity» to comply with the decisions condemning the invasion and occupation of Kuwait by Iraq[14]. It further authorized the member countries cooperating with Kuwait to «use all necessary means» unless Iraq complied on or before January 15, 1991[15]. Iraq did not leave by the deadline, and the group of members supporting Kuwait acted on the authorization to use military force. After Iraq was ejected and hostilities were suspended, the UN Security Council, on April 3, 1991, adopted Resolution 687[16]. This resolution – hereinafter, «the cease-fire decision» – required Iraq to unconditionally accept a robust regime of material conditions before a formal cease-fire would be effective. The core of these conditions pertained to a program for the elimination of weapons of mass destruction and their delivery and support systems[17]. Other provisions addressed boundary demarcation[18], return of seized property[19], compensation[20], repatriation[21], and renunciation of terrorism[22]. The UN Security Council further decided to leave in place sanctions «until a further decision is taken»[23] and «to remain seized of the matter and to take

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7 R. FALK, M. JUERGENSMEYER, & V. POPOVSKI, *Legality and Legitimacy in Global Affairs*, Oxford, 2012, p. 342-43; M. BYERS, *War Law: Understanding International Conflict and Armed Conflict*, London, 2007, p. 1 ss.
8 UN Charter, art. 25.
9 For the various types of UN resolutions, see R. LAGONI, *Resolution, Declaration, Decision*, in R. WOLFRUM (a cura di), *United Nations: Law, Policies, and Practice*, Berlin, 1995, p. 1081-91.
10 UN Charter, artt. 42-43, 48, 49.
11 Cfr. M.R. GORDON & B.E. TRAINOR, *The Generals War*, London, 1995; U.S. NEWS AND WORLD REPORT, *Triumph Without Victory: The Unreported History of the Persian Gulf War*, New York, 1992.
12 Cfr. W. MURRAY & R. H. SCALES, JR., *The Iraq War: A Military History*, Cambridge, 2003.
13 Security Council Resolution 678, UN SCOR, 45th sess., 2963rd mtg., Nov. 28, 1990, UN Doc S/RES/678 (1990), in *Int. Leg. Mat.*, 1990, vol. 29, 1565 ss.
14 *Ibid.*, par. 1.
15 *Ibid.*, par. 2.
16 Security Council Resolution 687, UN SCOR, 46th sess., 2981 mtg., Apr. 3, 1991, UN Doc S/RES/687 (1991), in *Int. Leg. Mat.*, 1991, vol. 30, p. 846 ss.
17 *Ibid.*, pt. C, parr. 7-13.
18 *Ibid.*, pt. A, parr. 2-3.
19 *Ibid.*, pt. D, par. 15.
20 *Ibid.*, pt. E, parr. 16-19.
21 *Ibid.*, pt. G, parr. 30-31.
22 *Ibid.*, pt. H, par. 32.
23 *Ibid.*, pt. F, par. 24.

such further steps as may be required for the implementation of the…resolution and to secure peace and security in the area»[24].

More than a decade later, in the wake of numerous forcible responses to cease-fire violations by Iraq and the 9/11 attacks on the United States, the UN Security Council, on November 8, 2002, adopted Resolution 1441[25]. This resolution – hereinafter, «the last-chance decision» – determined the continued presence of a material breach by Iraq of the cease-fire decision and other resolutions[26]. In this light, the UN Security Council decided to give Iraq «a final opportunity» to come into compliance with the relevant UN-system law[27]. The decision also imposed an «enhanced inspection regime» to see through the disarmament program required by the UN Security Council[28].

At its core, the last-chance decision deemed submissions of false documentation and failures to cooperate by Iraq a further material breach subject to «assessment» by the UN Security Council[29], set to convene immediately upon receipt of a report to that regard «in order to consider the situation and the need for compliance with all relevant resolutions in order to secure international peace and security»[30]. Additionally, the UN Security Council recalled its repeated warnings to Iraq «that it will face serious consequences as a result of its continued violations of its obligations»[31]. Finally, the UN Security Council decided «to remain seized of the matter»[32]. Subsequently, two last-ditch efforts by the United States, the United Kingdom, and Spain to pass a «second resolution» failed[33]. On March 20, 2003, without having secured a fresh authorization from the UN Security Council, the United States and its coalition partners invaded Iraq to topple Saddam Hussein's regime[34].

The legality of the invasion, absent a further UN Security Council authorization to use force, was the subject of a controversy as to whether the last-chance decision itself was alone sufficient to revive the use-of-force authorization in the liberation decision[35]. Three opinion camps crystallized in the course of that revival debate: (1) those affirming the revival argument in principle and its operations in the Iraq situation; (2) those denying revival as such or specifically in the Iraq situation; and (3) those maintaining that the UN-system law on the

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[24] *Ibid.*, pt. I, par. 34.
[25] Security Council Resolution 1441, UN SCOR, 45th sess., 2929th mtg., Nov. 8, 2002, UN Doc S/RES/1441 (2002), in *Int. Leg. Mat.*, 2003, vol. 42, p. 250 ss.
[26] *Ibid.*, par. 1.
[27] *Ibid.*, par. 2.
[28] *Ibid.*
[29] *Ibid.*, parr. 4, 11, 12.
[30] *Ibid.*, par. 12.
[31] *Ibid.*, par. 13.
[32] *Ibid.*, par. 14.
[33] CNN, *U.S., UK, Spain Introduce New Iraq Resolution*, 24 Feb. 2003, http://www.cnn.com/2003/WORLD/meast/02 /24/sprj.irq.wrap/; Provisional Security Council Resolution S/2003/215, 7 Mar. 2003, *at* http://www.casi.org.uk/info/undocs/scres/2003/20030307draft.pdf.
[34] For the full transcript of the television address by U.S. President George W. Bush, see CNN, *Bush declares War*, 19 Mar. 2003, http://www.cnn.com/2003/US/03/19/sprj.irq.int.bush.transcript/.
[35] A.J. BELLAMY, *International Law and the War with Iraq*, in *Melb. Jour. Int. Law*, 2003, vol. 4, p. 497 ss.

books was indeterminate[36]. To rehash the various positions in this debate would certainly be redundant.

Unfortunately, however, when it comes to controlling the decision by a government to go to war based on its own interpretation of UN-system law, the role of the courts has largely been underexplored in the literature. Consequently, important lessons have remained unidentified, ones that can be learnt by shifting the visor of the discussion to the presence of parameters facilitating or foreclosing the judicial review of UN-system law in domestic and international courts of law.

II. THE ROLE OF JUDICIAL REVIEW IN CONTROLLING THE CONSTRUCTION OF UN-SYSTEM LAW: PROCEEDINGS IN DOMESTIC AND INTERNATIONAL COURTS OF LAW

Those interested in getting a case off the ground, domestically or internationally, could have availed themselves of a number of very different options in court. Some possibilities were more remote than others.

1. *The Domestic Plane*

Lawsuits arising from the Iraq situation were seen through in the United Kingdom[37], the Republic of Costa Rica[38], and the Federal Republic of Germany[39]. Each reflects a particular judicial review model and culture. A summary table, which is provided in the Annex, extracts from these decisions a selection of parameters shaping the availability and intensity of judicial review of UN-system law.

a. *The United Kingdom: Threshold Doctrines Foreclosing the Judicial Review of UN-System Law*

In the late autumn of 2002, soon after the last-chance decision had been adopted, the question of how to construe the meaning and effects of the topical UN-system law was tested in a court of law. The Campaign for Nuclear Disarmament (CND), a British not-for-profit

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[36] *Ibid.*, p. 499-500.
[37] R. (on the application of Campaign for Nuclear Disarmament) v. Prime Ministers & Others, [2002] EWHC 2777 (Admin) (QBD).
[38] Sala Constitucional de la Corte Suprema de Justicia (Sala IV), Res. 2004-09992, Exp. 03-004485-0007-CO (Costa Rica, de las 14:31 horas del 8 de septiembre de 2004), http://sitios.poder-judicial.go.cr/salaconstitucional/Constitucion%20Politica/Sentencias/2004/04-09992.htm.
[39] BVerwG, 2 WS 12.04, 21 June 2005, http://www.bverwg.de/entscheidungen/pdf/210605U2WD12.04.0.pdf.

anti-war protest organization[40], initiated proceedings against Prime Minister Tony Blair, Foreign Secretary Jack Straw and Defense Secretary Geoff Hoon in the Administrative Court[41] – a specialist court within the Queen's Bench Division of the High Court of Justice of England and Wales, which, through the procedure of judicial review, exercises supervisory jurisdiction over persons discharging a public law function[42].

CND asked Lord Justice Simon Brown, sitting with Mr. Justice Maurice Kay and Mr. Justice Richards, for a declaration determining the meaning of the last-chance decision and more specifically, whether, absent a fresh UN Security Council decision, the last-chance decision authorized UN members to take military action if Iraq breached its terms[43]. Because no actual decision amenable to a challenge existed at the time, CND only sought advisory relief[44]. CND asserted that the peremptory norm of customary international law prohibiting the unlawful use of force was part of English common law; hence, the court's conventional common law supervisory jurisdiction was triggered[45]. CND argued that their case on the true construction of UN-system law, which they insisted was one in law and not as such about policy, factual disputes, and international developments, was not merely arguable but strong[46]. This, according to CND was especially due to the great public interest in ensuring that the government would know what the law actually was so that it did not use military action in the mistaken belief that it was lawful to do so when it was not[47].

Her Majesty's Government countered that the relief sought by CND was detrimental to the national interest of the United Kingdom. A success by CND would prematurely forecast, disclose, and freeze in place a chiseled legal position of the executive, whilst its conduct of international affairs in general and diplomatic negotiations at the UN required unencumbered adaptability and agility[48].

CND's application did not survive the preliminary stage of the proceedings, which had been limited to justiciability, prematurity, and standing[49]. The Administrative Court was unwilling to go as far as to declare that Her Majesty's Government would be in violation of international law were it to take military action without a fresh authorization from the UN Security Council[50]. The three judges ruled that they had no power to declare the true interpretation of the last-chance decision. Describing CND's request as a «novel and ambitious claim»[51], Lord Justice Simon Brown dismissed the application as non-justiciable[52]. He rested his

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40 For its strategic objectives and policies, see Campaign for Nuclear Disarmament, About CND, http://www.cnduk.org/about/aims-a-policies. Cfr. P. BYRNE, *The Campaign for Nuclear Disarmament*, Kent, 1988.
41 R. (Campaign for Nuclear Disarmament) v. Prime Ministers & Others.
42 Justice, Courts, Royal Courts of Justice and Rolls Building Courts, Administrative Courts, http://www.justice.gov.uk/courts/rcj-rolls-building/administrative-court.
43 R. (Campaign for Nuclear Disarmament), par. 2.
44 *Ibid.*
45 *Ibid.*, par. 17.
46 *Ibid.*, par. 10.
47 *Ibid.*, par. 11-13.
48 *Ibid.*, parr. 5, 7.
49 *Ibid.*, par. 7.
50 *Ibid.*, par. 2.
51 *Ibid.*, par. 2.
52 *Ibid.*, par. 47, sottopar. iv).

determination on two principal rationales. First, the Administrative Court had no jurisdiction to interpret UN-system law, which, unlike customary international law, did not form part of English common law and operated solely on the international plane, without any foothold in domestic law in terms of construing a person's right and duties under English law[53]. Second, the Administrative Court needed to abstain, whether as a matter of discretion or as a matter of jurisdiction, from determining the question because a ruling would tie the government's hands in its negotiations with other countries and thereby damage the public interest in the fields of national security, defense and international affairs and relations[54]. Additionally, Lord Justice Simon Brown saw no demonstrably good reason why the Administrative Court should take the exceptional course of making an advisory declaration absent «[a] sound basis for believing the government to have been wrongly advised as to the true position in international law» and absent «any question here of declaring illegal whatever decision or action may hereafter be taken»[55]. Justice Maurice Kay added that, as a matter of principle and not because of an exercise of judicial discretion, the application had to fail since its subject matter forayed into «forbidden areas» such as foreign policy and military deployment[56]. Finally, Justice Richards offered that the claim should be rejected on discretionary grounds since the government, at the time when the application was pending, had not crystallized nor communicated a considered and definite legal view, and there was no reason that a court of law should do the job of the executive or impose, in advance of any decision, a ruling upon it[57]. In terms of forbidden areas off limits to judicial review, he further observed that it was impossible to surgically isolate a purely judicial issue from an amalgamation of legal, political, diplomatic and military matters[58]. Ultimately, he diagnosed that the claim did not fall into any recognized exception to the rule that a national court was to steer away from declaring the meaning and effect of an instrument of international law[59]. The judges refused CND the permission to appeal[60], and permission from the Court of Appeal was never sought.

b. *The Republic of Costa Rica: Dedicated Constitutional Access Ramp for the Judicial Review of UN-System Law*

In Costa Rica, the construction of UN-system law with regard to the Iraq situation took center stage in the spring of 2003. Luis Roberto Zamora Bolaños and others, in their personal capacities and as representatives of various professional and advocacy organizations, instituted actions of unconstitutionality (*acciónes de inconstitucionalidad*) in the Constitutional Chamber of the Supreme Court of the Republic of Costa Rica (*Sala Constitucional de la Corte Suprema de*

[53] *Ibid.*, parr. 47, sottopar. i), 23, 36-40.
[54] *Ibid.*, parr. 47, sottopar. ii), 41-43.
[55] *Ibid.*, parr. 47, sottopar. iii).
[56] *Ibid.*, par. 50.
[57] *Ibid.*, par. 53-58.
[58] *Ibid.*, par. 59.
[59] *Ibid.*, par. 61, sottoparr. i)-vi).
[60] *Ibid.*

Justicia de la República de Costa Rica). They challenged the Foreign Policy Communiqué of March 19, 2003, signed by President Abel Pacheco de la Espriella and Minister of Foreign Relations and Worship Roberto Tovar Faja, which, along with other pronouncements, not only expressed Costa Rica's support of the U.S.-led international alliance in the fight against terror but also explained Costa Rica's appearance on the White House's web-based list of countries ostensibly committed to the anti-terror cause[61]. The complaints asserted that the support by Costa Rica's executive for the military operations in Iraq amounted to a complete disrespect for the engagement of the UN Security Council in the process of finding a solution to the conflict and hence, negated the very objectives pursued by the international community through the creation of the UN[62]. According to the petitioners, not only did the UN Charter provide for a mechanism, through the UN Security Council, to authorize the use of force in general; more specifically, the Iraq situation was the subject of a UN Security Council resolution, the last-chance decision, which had been endorsed but subsequently and inexplicably left aside by Costa Rica's executive[63]. The Government of Costa Rica countered that there was no infringement upon the last-chance decision because the resolution covered actions similar to the one taken by the State of Costa Rica; it simply demanded compliance with UN-system law[64].

The Constitutional Chamber, by a unanimous vote of its seven magistrates, sided with the petitioners and annulled the Communiqué for violating Costa Rica's Political Constitution, the international system of the UN, and the international law accepted by Costa Rica[65]. In terms of parameters that could possibly control the constitutional margin of maneuver accorded to the executive power, the Constitutional Chamber first identified peace as one of the values informing Costa Rica's Political Constitution, which has been understood and carried out by society as a «living constitution» (*constitución viva*)[66]. According to the Constitutional Chamber, the value of peace, as part and parcel of Costa Rica's constitutional identity, had been consecrated by the Costa Rican people through symbolic and solemn acts ranging from the country's suppression of the army in 1949, to the Proclamation of Perpetual, Active and Unarmed Neutrality of 1983[67]. In complementation of these domestic expressions, the Constitutional Chamber listed numerous international instruments imposing on Costa Rica international law obligations related to the promotion of peace[68]. According to the Constitutional Chamber, these included the mechanisms established by the international community under the auspices of the UN, which entrust the UN Security Council with the power to maintain and restore the peace[69]. The Constitutional Chamber further added the

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[61] Seminario Universidad, *Roberto Zamora Bolaños: Presidente Debería Llevarse a la Corte de la Haya* (17 Sept. 2004), http://www.semanariouniversidad.ucr.cr/component/content/article/3555-Universitarias/9022-roberto-zamora-bolanos-presidente-deberia-llevarse-a-la-corte-de-la-haya-.html.
[62] Sala IV, 2004-09992, *Resultando*, par. 2.
[63] *Ibid.*, par. 3.
[64] *Ibid.*, par. 5.
[65] *Ibid.*, *Por tanto*.
[66] *Ibid.*, *Considerando*, par. IV.
[67] *Ibid.*
[68] *Ibid.*
[69] *Ibid.*

Proclamation of Perpetual, Active and Unarmed Neutrality of 1983, which it characterized as a unilateral promise to the world at large with the effect of promissory estoppel[70]. From this normative arc the Constitutional Chamber deduced the capacity of the value of peace to serve as a constitutional parameter validly equipped to confront and adjudge the acts of public authorities in general and the executive branch in particular[71]. This, according to the Constitutional Chamber, was indisputable. Likewise not subject to dispute was that, in concrete and tangible manifestation of said constitutional value, Costa Rica subscribed and adhered to the international system of the UN with its rules and mechanisms for resolving conflicts among the nations[72]. In this context, the Constitutional Chamber recalled Costa Rica's official posture as exemplified in an historical statement by one of its UN representatives who described the UN Security Council as the only and exclusive guarantor of the international stability and security of Costa Rica and its population[73].

While, according to the Constitutional Chamber, the existence and operations of the constitutional value of peace were undisputed, the issue was whether the actions of the Government of Costa Rica in support of the actions in Iraq undertaken by the Coalition of the Willing, which the Constitutional Chamber stipulated as clearly not covered by the rules and norms of the UN, were in consonance with this value of constitutional rank[74]. The Constitutional Chamber then diagnosed that in fact the controversy boiled down to the relationship between the objectives pursued and the means employed by the alliance[75]. Even if the objectives were politically valiant and constitutionally admissible, this did not clear the means[76]. According to the Constitutional Chamber, it was important that the means deployed by the Coalition of the Willing and supported by Costa Rica's executive included military action against the Iraqi nation[77]. Ultimately, the Constitutional Chamber found that the challenged acts and pronouncements of the executive power clearly manifested its support inasmuch for the objectives of the coalition as for the means in pursuance thereof, without any hint that the solidarity extended only to fighting terror and spreading peace, liberty and democracy in Iraq[78].

Before applying the factual findings to the legal framework assembled in the earlier portions of the merits discussion, the Constitutional Chamber reiterated that Costa Rica's pacifist tradition, which has impregnated the Costa Rican constitutional order, entrained as one of its most important expressions the country's devotion to the international system under the auspices of the UN as the mechanism for replacing the use of force as a national instrument of policy and international relations[79]. Therefore, UN-system law had to be considered as a controlling limit applicable to the conduct of Costa Rican authorities. More specifically, UN-

[70] *Ibid.*, par. V.
[71] *Ibid.*, *Considerando*, par. VI.
[72] *Ibid.*
[73] *Ibid.*
[74] *Ibid.*, par. VII.
[75] *Ibid.*, par. VIII.
[76] *Ibid.*, *Considerando*, at para. IX.
[77] *Ibid.*
[78] *Ibid.*, par. IX.
[79] *Ibid.*, par. X.

system law restricted their radius in the field of international relations, which made it impossible for the government to associate its foreign policy, even by way of mere moral support, with military activities outside or even in parallel with the system of the UN as a means of conflict resolution[80]. Consequently, the Constitutional Chamber rejected the argument of the Government of Costa Rica that review of support for military action was outside the court's purview absent a declaration as to the legitimacy or illegitimacy of armed operations in Iraq[81]. According to the Constitutional Chamber, the question was much narrower. Costa Rica's adhesion to the international system of the UN prohibits any manifestation suggestive of the use of force outside or even on the fringes of UN's procedures and processes[82]. Therefore, declaring the armed conflict legitimate or illegitimate was of no relevance whatsoever, when from the Costa Rican perspective it was incorrect, constitutionally speaking, to support the use of force outside the UN's framework[83]. In conclusion, the Constitutional Chamber declared that the Communiqué and other pronouncements of the executive giving moral support to the Coalition of the Willing contravened Costa Rica's constitutional order and the international system of the UN. Hence, they were unconstitutional and lost all their legal effects[84]. Further, the Constitutional Chamber admonished the Government of Costa Rica to respect the international mechanisms in the future regarding support of armed incursions of any form regardless of their objectives[85]. Moreover, the Constitutional Chamber tasked the Government of Costa Rica with negotiating with the United States Government to exclude Costa Rica from the White House's list of member countries in the Coalition of the Willing[86].

c. *The Federal Republic of Germany: Incidental Judicial Review of UN-System Law through Diffuse Judicial Protection of Fundamental Rights*

In the German case, the question of whether the military action against Iraq was covered by extant UN-system law arose in the course of disciplinary proceedings against Major Florian Pfaff. When instructed to participate in the development of a military software program, Major Pfaff had informed his superiors of his decision not to obey any army orders that, carried out, would make him complicit in what he considered Germany's unlawful contributions to an illegal war of aggression against Iraq[87]. Major Pfaff was found guilty of service malfeasance (*Dienstvergehen*) and demoted in rank to captain. This decision was appealed to the Second

[80] *Ibid.*
[81] *Ibid.*, *Considerando*, at para. XI.
[82] *Ibid.*
[83] *Ibid.*
[84] *Ibid.*
[85] *Ibid.*
[86] *Ibid.*
[87] BVerwG, 2 WS 12.04, p. 5, 15-23.

Senate for Military Service (*Zweiter Wehrdienstsenat*) of the Federal Supreme Administrative Court (*Bundesverwaltungsgericht*)[88].

The Second Senate for Military Service overturned the decision of the lower court and gave the soldier a full acquittal[89]. According to the Second Senate for Military Service, the solder did not commit a service malfeasance because he was not disobedient in regards to his official duty of service and because he did not otherwise breach his duties under the Law on Soldiers (*Soldatengesetz*) – the duty of loyal service, the duty of supervision, the duty to have one's own orders enforced, and the duty to preserve the respect and confidence in service[90].

The Second Senate for Military Service offered its legal opinion relative to the military combat operations in Iraq under UN-system law when analyzing whether the order subject to the proceedings was to be deemed non-binding because it violated the soldier's freedom of conscience – the only one of seven potential grounds for subordination further explored by the Second Senate for Military Service[91]. Laying out the protective ambit of the fundamental right,[92]the Second Senate for Military Service recalled that the freedom of conscience operated as a constitutional limitation to the statutory duty to obey orders[93]. It covered an internal psychological decision under the categories of good and evil and against the backdrop of a moral conflict[94], required the finding of a decision of conscience[95], and remained available to a soldier who had not applied to be recognized as a conscientious objector[96]. In this light, the Second Senate for Military Service had to determine whether the soldier took a decision of conscience in the case at bar[97]. The Second Senate for Military Service began its analysis by emphasizing that Major Pfaff's decision of conscience was not superficially accepted or deliberately caused by the soldier[98], but was asserted in the context of the war against Iraq by the Coalition of the Willing, which was ongoing when the opinion was issued[99]. According to the Second Senate for Military Service, the war exhibited «grave concerns under international law» (*schwere völkerrechtliche Bedenken*), which stemmed from the absence of a justification under UN-system law[100]. After finding a prima facie violation of the prohibition on the use of force by the Coalition of the Willing, the Second Senate for Military Service ticked through the liberation, cease-fire, and last- chance decisions[101]. It determined that the liberation decision had expired because its objectives had been accomplished in 1990/91, after Iraq was ejected from Kuwait, and therefore, it could not authorize the use of force more than a decade later[102].

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88 *Ibid.*, p. 5-9.
89 *Ibid.*, p. 1, 11, 125-26.
90 *Ibid.*, p. 25.
91 *Ibid.*, p. 28-46.
92 *Ibid.*, p. 46-70.
93 *Ibid.*, p. 47-51.
94 *Ibid.*, p. 51-56.
95 *Ibid.*, p. 56-57.
96 *Ibid.*, p. 57-70.
97 *Ibid.*, p. 70-105.
98 *Ibid.*, p. 71.
99 *Ibid.*
100 *Ibid.*, p. 71, 72-80.
101 *Ibid.*, p. 73-77.
102 *Ibid.*, p. 73-74.

The cease-fire decision could not either for the following three reasons: (1) the pre-conditions for the cease-fire had been met when Iraq consented in writing to fully comply with its contents; (2) the cease-fire was never formally rescinded; and (3) the UN Security Council had reserved the right to decide upon further steps[103]. Zeroing in on the last-chance decision, the Second Senate for Military Service distilled several reasons it did not furnish a valid authorization either[104]. In that instrument, according to the Second Senate for Military Service, the UN Security Council had left open how it would decide if Iraq had been reported in breach of the demands and inspection regime imposed on it[105]. Furthermore, it had not elaborated upon the meaning of its warning to Iraq of facing «serious consequences»[106]. Also, the UN Security Council had explicitly decided to remain seized of the matter, which the Second Senate for Military Service interpreted as meaning that the UN Security Council did not want to leave the decision-making to others or to approve or otherwise legitimize the use of force sought by the Coalition of the Willing[107]. If the UN Security Council had intended to authorize the use of force, the Second Senate for Military Service added, it would have needed to say so textually[108]. Hence, the absence of a definition of serious consequences precluded a finding of a sufficient basis for authorization[109]. The Second Senate for Military Service also rejected the assertion that the United States and the United Kingdom would not have voted for the final version of the last-chance decision unless the give-and-take adopted in the text allowed for making an arguable case that it contained the desired use-of-force authorization[110]. The Second Senate for Military Service found that any actual or purported reservations on the part of the representatives from the United States and the United Kingdom had to be immaterial since the text did not even mention the word «authorization»[111]. According to the Second Senate for Military Service, this was the reason that the United States, the United Kingdom, and Spain attempted to codify a positive and explicit authorization in a subsequent resolution, albeit unsuccessfully[112]. The Second Senate for Military Service found that the soldier embraced these grave concerns under international law with regard to both the Iraq war[113] as well as Germany's contributions as a launch pad and logistics hub in support of the military operations in Iraq, which triggered in him a severe moral conflict[114]. In this regard, the Second Senate for Military Service did not deem it necessary that his participation in the software project actually supported and sustained the war effort[115]. Rather, a serious possibility of such an outcome and his fear of making himself complicit were enough to justify a severe strain on his conscience[116].

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103 *Ibid.*, p. 74-75.
104 *Ibid.*, p. 76-77.
105 *Ibid.*, p. 76.
106 *Ibid.*
107 *Ibid.*, p. 76-77.
108 *Ibid.*, p. 77.
109 *Ibid.*
110 *Ibid.*
111 *Ibid.*
112 *Ibid.*, p. 77.
113 *Ibid.*, p. 71, 72-80.
114 *Ibid.*, p. 71, 80-100.
115 *Ibid.*, p. 71-72, 94-99.
116 *Ibid.*, p. 71, 98-99.

Therefore, when commissioned as a recruit and professional soldier, he did not have to take into account that Germany might engage in contributions meeting with grave concerns under international law and that his service might be a part thereof[117]. The Second Senate for Military Service was fully persuaded in light of the record that the soldier's decision of conscience was taken in view of his ethical compass and that his internal conflict was sufficiently serious, deep and compelling such that it would impede him from carrying out his orders[118]. Finally, the Second Senate for Military Service determined that in the absence any limits in law to the contrary, the soldier was free to exercise his basic right of freedom of conscience[119].

d. *Synopsis: Parameters Shaping the Availability and Intensity of Judicial Review of the Executive's Construction of UN-System Law*

A closer comparison of the three cases yields two parameters that can have a powerful impact on whether the construction of UN-system law by the executive branch is reviewed in courts of law. First, legal systems vary with regard to the significance of the political question doctrine – a preliminary filter allowing the courts to sidestep highly political or heavily politicized matters. Second, legal systems differ in how they position international law in their municipal legal orders. Choices made in this regard are either monist or dualist. The following sections offer definitions of the doctrinal frameworks behind these two parameters and explore their operations in each of the three Iraq decisions.

aa. *Political Question Doctrines: Screening out Highly Political Dossiers*

According to the classical test developed by the U.S. Supreme Court, the political question doctrine is triggered when a court, in the process of determining whether it is seized of a matter, deems political accountability to be the best mechanism for resolving an issue when one of the following six factors is met: «a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for non-judicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.»[120].

[117] *Ibid.*, p. 99.
[118] *Ibid.*, p. 99-105.
[119] *Ibid.*, p. 105-123.
[120] Baker v. Carr, 369 U.S. 186, 217 (1962).

When called to adjudge certain strategic decisions taken by the executive power, British courts regularly test the analogue to the American political question doctrine in the preliminary stage of justiciability[121]. In the Iraq opinion from the United Kingdom, the Administrative Court gives full expression of the doctrine. Beyond affirming the existence of sensitive, no-go, or forbidden areas of executive action, it firmly declines «to embark upon the determination of an issue [because] to do so would be damaging to the public interest [and embarrassing to the government] in the field of international relations, national security or defence»[122].

In Costa Rica, the political question doctrine (*doctrina de la cuestión política*) exhibits a mixed record in the recent history of constitutional jurisprudence[123]. It may even be on the retreat[124]. In contrast to the British court's deferential posture of staying out of government decisions such as that of going to war, the Iraq decision by the Constitutional Chamber[125] showcases active judicial intervention by a special court[126] entrusted with exercising completely concentrated judicial review[127]. Generous conceptions of standing facilitate access to the Constitutional Chamber for almost anyone – without the need for an actual case or a factual basis – as long as the petition invokes a collective interest in judicial intervention. The Iraq decision of the Constitutional Chamber does not mention the doctrines of justiciability or separation of powers. Rather, by relying on constitutional judicial decision-making (*judicialización*) from the perspective of its institutional raison d'être and design[128], the Constitutional Chamber, in its scrutiny of the executive branch is not hindered by the these doctrines in its Iraq decision because the sheer force of the value of peace, which springs from a living organism of constitutional values, permeates all facets of political life. This allows the

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121 D. JENKINS, *Judicial Review under a British War Powers Act*, in *Vand. Jour. Trans. Law*, 2010, vol. 43, p. 611 ss. (undertaking a comparative analysis of how U.S. courts apply the political question doctrine in war powers cases and how British courts might exercise review under a hypothetical British «war powers act»).

122 R. (Campaign for Nuclear Disarmament), par. 47, sottopar. ii).

123 D. FIGUERROA, *La Doctrina Estadounidense de la Cuestión Política: Etología, Axiología, y Perspectivas para Latinoamérica*, in *Ius Doctrina* , 2013, vol. IX, p. 8 ss., http://www.iusdoctrina.ucr.ac.cr/images/articulos/ed_9/doctrina_cuestion_politica.pdf (observing that, in its recent history, Costa Rica exhibits mixed approximations to the Political Question Doctrine).

124 P. NESTOR SAGÜÉS, *Constitución y Sociedad: La Revisión de las Cuestiónes Políticas No Justiciables (A Propósito de la «Coalición» contra Saddam Hussein*, in *Pensamiento Constitucional*, 2008, Año 13 no. 13, p. 73, 93 (2008) (diagnosing that the doctrine, which has political and pragmatic origins, has evolved over time and tends to dissipate in Costa Rica).

125 R.S. BARKER, *Constitutional Justice and the Separation of Powers: The Case of Costa Rica – A Translation into English of an Article by Justice Luis Fernando Solano Carrera*, in *Duq. Law Rev.*, 2009, vol. 47, p. 871, 895-99; F. CRUZ CASTRO, *Costa Rica's Constitutional Jurisprudence, Its Political Importance and International Human Rights Law: Examination of Some Decisions*, in *Duq. Law Rev.*, 2007, vol. 45, p. 557, 570-73; R.S. Barker, *Stability, Activism and Tradition: The Jurisprudence of Costa Rica's Constitutional Chamber*, *Duq. Law Rev.*, 2007, vol. 45, p. 523, 543-46.

126 M. IOVANE, *Domestic Courts Should Embrace Sound Interpretive Strategies*, in A. CASSESE (a cura di), *The Development of Human Rights-Oriented International Law in Realizing Utopia: The Future of International Law* , Oxford, 2012, p. 622 ss.

127 V. AUTHEMAN, *Global Lessons Learnt: Constitutional Courts, Judicial Independence and the Rule of Law*, in K. HENDERSON (a cura di), *IFES Rule of Law White Paper Series*, 2004, p. 3-4, http://www.ifes.org/~/media/Files/Publications/White%20PaperReport/2004/23/WhitePaper_4_FINAL.pdf.

128 For descriptions of the history, design, and jurisprudence of the Constitutional Chamber, see for example, B. M. WILSON, *Constitutional Rights in the Age of Assertive Superior Courts: An evaluation of Costa Rica's Constitutional Chamber of the Supreme Court*, in *Willamette Law Rev.*, 2012, vol. 48, p. 451 ss.; B.M. Wilson, *Enforcing Rights and Exercising an Accountability Function: Costa Rica's Constitutional Chamber of the Supreme Court*, in G. HELMKE & J. RÍOS-FIGUEROA (a cura di), *Courts in Latin America* , CAMBRIDGE, 2011, p. 55 ss.

Constitutional Chamber, when scrutinizing the Costa Rican Government's support activities against the measuring stick of peace, to squarely decide that such activities cross the line into the constitutionally impermissible, even if the Costa Rican Government's goals as such might be laudable. Still, it remains uncertain how and when the Government of Costa Rica could have better conveyed that its solidarity operated exclusively vis-à-vis the goals pursued by the Coalition of the Willing.

In Germany, it is said that «nothing done by government is beyond judicial review»[129]; therefore, political question doctrines are practically unknown. Pursuant to Germany's overarching constitutional principle of a state under law (*Rechtsstaatsprinzip*), all public authority must be lawfully exercised[130], and anyone whose rights are violated by public authority has recourse in the courts[131]. Thus, legal vacuums, free of judicial review, do not exist as such. In this sense, Germany's Federal Constitutional Court (*Bundesverfassungsgericht*) has steadily reserved the right to control the constitutionality of the government's conduct in the realm of foreign affairs[132]. However, in practice, the Federal Constitutional Court accords the executive power some latitude when making certain factual assessments and prognoses (*Beurteilungs- und Prognosespielraum*)[133].

The Iraq decision by the Second Senate for Military Service highlights the absence of a formal first filter corresponding to the practice of Anglo-American courts immunizing the government's conduct in foreign affairs from judicial scrutiny. At first blush, the judgment appears to offer an elaborate scholarly opinion regarding the legality of the military action against Iraq by the Coalition of the Willing and in consequence, Germany's contributions in support of the campaign and the occupation[134]. However, the Second Senate for Military Service stops short of espousing the prevailing view in the German literature that the military action was illegal. It does not make a hard determination in this regard but rather couches the result of its analysis in the locution of grave concerns under international law[135] – a label that appears 15 times in the judgment[136]. This is not due to the shackles of the political question

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129 T.M. FRANCK, *Political Questions/Judicial Answers: Does the Rule of Law Apply to Foreign Affairs?*, Princeton, 1992, p. 110.

130 GG, art. 20, par. 3.

131 GG, art. 19, par. 4.

132 N. SCHULTZ, *Was the War on Iraq Illegal? – The German Federal Administrative Court's Judgment of 21st June 2005*, in *Germ. Law Jour.*, 2005, vol. 7, p. 25, 38.

133 C. MAC AMHLAIGH, *Does Germany Need a Political Questions Doctrine?*, in *EUtopia law* (Feb. 21, 2014), http://eutopialaw.com/2014/02/21/does-germany-need-a-political-questions-doctrine/ (emphasizing that «what the [Federal Constitutional Court] does not do is determine, as a preliminary issue, whether the subject-matter is such that it is not appropriate, for practical or democratic reasons, that a court be seized of a particular dispute»); T. GIEGERICH, *Verfassungsgerichtliche Kontrolle der auswärtigen Gewalt im europäisch-atlantischen Verfassungsstaat: Vergleichende Bestandsaufnahme mit Ausblick auf die neuen Demokratien in Mittel- und Osteuropa*, in *Zeitschr. ausl. öff. Recht*, 1997, p. 409, 430, 433, http://www.zaoerv.de/57_1997/57_1997_2_3_a_409_564.pdf (diagnosing that, contrary to the prevailing literature, a rightly understood political question doctrine has its place in German constitutional law and has indeed occupied it in the jurisprudence of the Federal Constitutional Court in substance albeit not by name).

134 N. SCHULTZ, *War on Iraq*, cit., p. 25.

135 *Ibid.*, p. 25-27, 37.

136 M. LADIGES, *Irakkonflikt und Gewissenskonflikte*, in *Wissenschaft und Sicherheit Online*, 2007, p. 6 n.58, http://www.sicherheitspolitik.de/uploads/media/wus_02_2007_irakkonflikt-gewissenskonflikt.pdf.

doctrine as such[137] but to the court's diagnosis being wrapped into its analysis of whether the soldier's exercise of his basic right to freedom of conscience disabled the service order[138]. In this context, a dual apprehension of potentialities in the soldier's mind was sufficient for activating basic right protections – that Germany possibly supported a war effort that was possibly illegal. The stance of the Second Senate for Military Service with regard to the operation of political question rationales would in all likelihood have had to become much clearer, if it had reviewed the Iraq situation under a different stand-alone ground for disabling subordination, namely, the infringement of general rules of international law[139]. It would then have needed to make a hard illegality determination.

bb. *Monism or Dualism: Positioning International Law in the Municipal Legal Order*

Doctrines explaining the relationship between international law and domestic law have traditionally been grouped into one of two schools: dualism or monism[140]. According to the theory of dualism, international law and domestic law are independent of one another[141]. They differ in terms of their respective sources of law, subject matter, legal addressees, and coercive scope[142]. Since both legal orders exist in parallel a national legal act is necessary to bring about the municipal validity of international law within the domestic space[143]. Dualism exists in two variants: radical dualism and moderate dualism. Radical dualism allows both legal orders to co-exist but in strict separation and without any overlap[144]. Therefore, should a conflict arise between a municipal legal act (a statute law, a judgment or an administrative act) and international law, each law remains unaffected and continues to stand. Moderate dualism on the other hand recognizes some degree of overlap between international law and domestic law. Both legal orders intersect when norms refer to the other legal order or when norms are transformed from one order to the other[145]. Should municipal law be in conflict with international law each remains intact but the State becomes internationally responsible for the breach of its international obligations; in the long run, international law eventually prevails[146]. In contrast to dualism, monism posits that only one overall legal order exists comprising both international law and domestic law[147]. Consequently, international law is integrated into domestic law from its moment of inception[148] though the question of rank arises. The answer

137 *Ibid.*, p. 37-38.
138 *Ibid.*, p. 26.
139 *Ibid.*, p. 4.
140 For a detailed review of monism and dualism in international law doctrines, see C. AMRHEIN-HOFMANN, *Monismus und Dualismus in den Völkerrechtslehren*, Berlin, 2003.
141 G. DAHM, J. DELBRÜCK, R, WOLFRUM, *Völkerrecht I/1* , Berlin/New York 1988, p. 99.
142 *Ibid.*, p. 99-100.
143 *Ibid.*, p. 100.
144 M. SCHWEITZER, *Staatsrecht III: Staatsrecht, Völkerrecht, Europarecht*, Heidelberg, 2010, p. 12, para. 32.
145 *Ibid.*, p. 12, par. 33.
146 *Ibid.*, p. 12-13, par. 33.
147 G. DAHM ET AL., *Völkerrecht* , cit., p. 100.
148 *Ibid.*

is determined according to two doctrinal variants: monism with the primacy of domestic law and monism with the primacy of international law[149]. Under the former, international law always gives way to municipal law[150]. This theory, however, reduces international law to the whim of each individual single legal order in the world and thereby destroys the goal of legal uniformity. The alternative variant is radical monism with the primacy of international law, under which municipal law is trumped and obliterated by international law[151]. A moderated version of monism with the primacy of international law posits that while municipal law in conflict with international law stays provisionally around, the State is bound to come into compliance with international law[152]. Not surprisingly, in their Iraq decisions, the three courts reflect very different approaches to positioning international law, more specifically UN-system law, which is secondary international law made pursuant to international treaty law, within their respective legal orders.

The United Kingdom adheres to the doctrine of strict dualism[153]. Thus, international law treaties have no special status and no automatic effect in municipal law[154]. Inasmuch as provisions of a treaty have been transposed into the domestic law of the United Kingdom, the implementing legislation is dispositive with regard to the rise of private rights and remedies for alleged treaty breaches[155]. Typically, in the absence of such legislation, the courts will not accord a remedy for breaches of international law treaties[156]. Since neither the UN Charter nor UN Security Council resolutions have been incorporated into English law[157], it is not surprising that the Iraq opinion from the United Kingdom is so calm and unwavering in its adherence to the strict dualist posture in declining «jurisdiction to declare the true interpretation of an international instrument which has not been incorporated into English domestic law and which it is unnecessary to interpret for the purposes of determining a person's rights or duties under domestic law»[158].

Costa Rica adheres to the doctrine of radical monism with the primacy of international law (*monismo con primacía del Derecho Internacional*). Thus, Costa Rica's Political Constitution confers onto international agreements authority superior to the laws (*autoridad superior a las leyes*)[159]. The Iraq decision from Costa Rica adds yet another dimension to that by enlisting international elements to elucidate the contents and reach of the constitutional value of peace, thereby melding the international and municipal planes into a monist amalgamate of at least a quasi-constitutional rank amenable to be readily vindicated by anyone with *locus standi*. In its

149 *Ibid.*
150 *Ibid.*
151 M. SCHWEITZER, *Staatsrecht*, cit., p. 11, par. 28.
152 *Ibid.*, p. 11, par. 29.
153 A. AUST, *United Kingdom*, in D. SLOSS (a cura di), *The Role of Domestic Courts in Treaty Enforcement*, Cambridge, 2014, p. 476 («When it comes to treaties, the United Kingdom is very much a dualist state».); Nallaratnam Singharasa v. Attorney-General, S.C. Spl. (LA) No. 182/99 (2006) («The constitutional premise of the United Kingdom […] adheres to the dualist theory».).
154 A. AUST, *United Kingdom*, cit., p. 477.
155 *Ibid.*, p. 487.
156 *Ibid.*, p. 487, 503.
157 A. AUST, *Modern Treaty Law and Practice*, Cambridge, 2013, p. 53.
158 R. (Campaign for Nuclear Disarmament), par. 47, sottopar. i).
159 CR COST. POL., art. 7.

reasoning with regard to the relevant UN-system law, however, the Constitutional Chamber does not develop its own construction of the meaning and effects of the last-chance decision, which it simply reproduces without much commentary. Finally, in pursuance of its radically monist posture, the Constitutional Chamber deems an act not covered by international law when it is either «outside» (*fuera*) or merely «on the fringes» (*al marjen*) of UN-system law[160].

Germany leans towards the doctrine of moderate dualism (*gemäßigter Dualismus*)[161]. Treaties with legislative approval rank on par with domestic legislation[162]. However, there has been a debate about how this effect arises. Under the meanwhile rejected theory of wholesale adoption (*Adoptionstheorie*), the domestic approval law of incorporation preserves the international law character of the treaty[163]. The traditional theory of transformation (*Transformationstheorie*) construes the domestic approval law as discharging a dual role. Not only does it consent to the international act of ratification; at the same time it transposes the treaty from the international to the municipal realm[164]. Pursuant to the more progressive theory of execution (*Vollzugstheorie*), the domestic approval law is construed as an order to follow the treaty as international law[165]. Independent of whether one follows the transformation or the execution theory[166], Germany acceded to the UN in the wake of the passage of its domestic approval law[167]. In the literature, the question has arisen as to whether the German legislature also intended to transfer real sovereign powers to the UN and make UN-system law internally binding and enforceable by the courts[168]. Most commentators remain skeptical because the UN Charter, as the international law treaty to which the approval law consents, binds UN members as such; however, it does not imply that the UN Council, through UN-system law, has the prerogative to exercise such powers within the States[169]. The Iraq decision from the German court is not on point in this regard. First, it touches on peace coercion against a member country, as opposed to legislative measures by the UN Council implicating individuals or organizations. Moreover, the Second Senate for Military Service is not even indirectly «in the service of enforcing international law»[170] because the case discusses the effects of UN-system law on the basic right to freedom of conscience in the context of a soldier's conscientious objection and situational refusal to obey orders in the armed forces[171].

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160 Sala IV, 2004-09992, *Considerando*, par. VII.
161 M. SCHWEITZER, *Staatsrecht*, cit., p. 11, par. 38.
162 A. PAULUS, *Germany*, in D. SLOSS (a cura di), *The Role of Domestic Courts in Treaty Enforcement*, Cambridge, 2014, p. 217.
163 *Ibid.*
164 *Ibid.*
165 *Ibid.*
166 *Ibid.*, p. 217-18.
167 Legge 6 giugno 1973, BGBl II, 430.
168 M. SCHRÖDER, *Gesetzesbindung des Richters und Rechtsweggarantie im Mehrebenensystem*, Tübingen, 2010, p. 209-10.
169 *Id.* at 210.
170 BVerfGE 111, 307, at 328. For commentary, see Paulus, *Germany*, cit., p. 223.
171 Cfr. J. ROSE, *Conscience in Lieu of Obedience: Cases of Selective Conscientious Objection in the German Bundeswehr*, in A. ELLNER, P. ROBINSON & D. WHETHAM (a cura di), *When Soldiers Say No: Selective Conscientious Objection in the Modern Military*, Farnham, 2014, p. 185-88; H.G. BADMANN, *Militärischer Gehorsam und Gewissensfreiheit*, in H. ZETSCHE & S. WEBER (a cura di), *Recht und Militär: 50 Jahre Rechtspflege der Bundeswehr*, Baden-Baden, 2006, p. 156-68.

cc. *Summation: Combinations of Parameters*

In their ensemble, the three decisions highlight a larger spectrum. On one end, the combination of justiciability doctrines with strict dualism will in all likelihood foreclose the construction of UN-system law by courts of law. This is the case in the United Kingdom. At the other end of the spectrum, when the absence of a political question doctrine and adherence to radical monism with the primacy of international law combine, judicial review of acts and activities by the executive will become available. Such is the case in Costa Rica. Finally, the combination of judicial restraint short of a political question doctrine and moderate dualism leads to a more fluid, case-specific diagnosis regarding the degree of judicial control by a court of law. This is the case in Germany.

2. *The International Plane*

In the international domain, judicial proceedings never materialized. But conceivably, recourse could have been sought in two standing international tribunals. They are the International Court of Justice (ICJ) and the International Criminal Court (ICC).

a. *ICJ: Advisory Opinion*

One judicial means for throwing an obstacle in the way of the march to war by the Coalition of the Willing could have been the request for an advisory opinion from the ICJ as to whether military action in Iraq, absent a fresh UN Security resolution, would be in accordance with UN-system law. The ICJ is equipped with the competence to «give an advisory opinion on any legal question at the request of whatever body may be authorized by or in accordance with the [UN Charter] to make such a request»[172].

To obtain an advisory opinion, the first jurisdictional element required for the submission of a request to the ICJ pertains to standing. Only the UN General Assembly and the UN Security Council enjoy the original prerogative to submit to the ICJ any legal question they might have[173]. Other organs and specialized agencies within the UN system derive their right, which is limited to legal questions within the scope of what they do, from an

[172] Statute of the International Court of Justice, June 26, 1945 [ICJ Statute], 59 Stat. 1055, T.S. No. 993, at 25, 3 Bevans at 1179, art. 65 (*effective* 24 Oct. 1945).
[173] UN Charter, art. 96, par. 1.

authorization by the UN General Assembly[174]. However, intergovernmental and non-governmental organizations, States and individuals, and municipal courts have not been enabled by the framers of the UN Charter to seek an advisory opinion[175].

In this light, the best option for governments and civil society groups in pursuit of an advisory opinion from the ICJ with regard to the Iraq situation would have been to work through the UN General Assembly[176]. The consistent practice of the UN General Assembly to meet the requirement of making the request for an advisory opinion in writing has been to adopt a formal resolution[177], even without having previously gone through its Legal Committee[178]. Whether in regular session or having been called into an emergency special session in the wake of an effective stalemate in the UN Security Council[179], the adoption of a resolution transmitting an advisory request to the ICJ requires, at a minimum, a simple majority of delegations present and voting; at most, a two-thirds majority vote is needed, if an important question is raised[180]. Moreover, the delegations of the five permanent members are not able to wield their veto power in the UN General Assembly[181]. In contrast, an attempt through the UN Security Council, likewise equipped with original standing, would have been subject to the veto from a permanent member, which would have defeated the transmission of the question[182]. Lastly, a request from the Secretariat, acting through the Secretary-General,

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174 UN Charter, art. 96, par. 2. For a listing of authorized organs and agencies, see International Court of Justice, Questions and Answers about the Advisory Procedure, http://www.icj-cij.org/presscom/en/kos_faq_en.pdf.

175 UN Charter, art. 96 (arg. e cont.).

176 Goldsmith Final Advice, cit., par. 35 («The GA route may be the most likely»).

177 S. ROSENNE & Y. RONEN, *The Law and Practice of the International Court, 1920-2005*, Leiden/Boston, 2005, p. 342 (noting that the resolutions transmitting the request usually consist of a preamble and the question(s)).

178 *Ibid.*, p. 348-49.

179 K. HOSSAIN, *The Complementary Role of the United Nations General Assembly in Peace Management*, in *Uluslararasi Hukuk ve Politika (Rev. Int. Law Pol. or RIPL)* 2008, vol. 4(13), p. 77, (describing the appeals for an emergency session by Amnesty International, the Global Policy Forum and the Center for Constitutional Rights); Thalif Deen, NGOs Lead Move to Use UN, Inter Press Service (Jan. 31, 2003), http://www.ipsnews.net/2003/01/politics-ngos-lead-move-to-use-un-general-assembly-to-stop-war/ (noting in the context of delegations possibly taking up the issue the key role of the 115-member Non-Aligned Movement). For an advisory request to the ICJ by way of a resolution adopted by the UN General Assembly in emergency special session, see Illegal Israeli actions in Occupied East Jerusalem and the rest of the Occupied Palestinian Territory, G.A. Res. ES-10/14, at 3, U.N. GAOR, 10th Emergency Special Sess., 23d plen. mtg., U.N. Doc. A/Res/ES-10/14 (12 Dec. 2003).

180 UN Charter, art. 18, par. 2. Cfr. K. L. PENEGAR, *Relationship of Advisory Opinions of the International Court of Justice to the Maintenance of World Minimum Orde*r, in *Un. Penn. Law Rev.* , vol. 113, p. 529, 535 n.22 («There is no definitive answer on the majority required...[and] the Assembly has never decided categorically that all requests for advisory opinions raise an 'important question».). For the different views as to the majority required, see Goldsmith Final Advice, cit., par. 32 (simple majority); A. ZIMMERMANN, K. OELLERS-FRAHM, & C. TOMUSCHAT, *The Statute of the International Court of Justice*, 2012, p. 1613-14 (simple majority on the basis of apparently uncontroversial practice); K.L. PENEGAR, *Relationship of Advisory Opinions*, cit., p. 535 (at most two thirds majority); S. ROSENNE, *The International Court of Justice*, Leiden, 1957, p. 478 (majority to be determined on ad hoc basis, depending on procedural context).

181 *See* Goldsmith Final Advice, *supra* note 38, para. 32.

182 For the distinction between procedural matters (majority of nine, not subject to a veto) and all other matters (majority of nine, subject to a veto and compulsory abstention by a party to a dispute falling under the rules of pacific dispute settlement, either under the auspices of the UN or through regional arrangements or agencies encouraged by the UN Security Council when disputes are local), see UN Charter, art. 27 parr. 2, 3. For subjecting

was foreclosed, because the UN General Assembly has, to date, withheld the authorization required for being able to take advantage of the advisory competence of the ICJ on the basis of a derivative right[183]. If the UN General Assembly had adopted a resolution transmitting the request for an advisory opinion with regard to the Iraq situation, the ICJ would, if past were prologue[184], have reached the substance of the question as to whether military action in Iraq, absent a fresh UN Security Council resolution, would be in accordance with UN-system law.

Once seized of the request, the ICJ would have needed to determine first that it had the requisite subject-matter jurisdiction[185]. Albeit that the UN General Assembly is technically authorized to submit «any legal question»[186], the ICJ has in the past looked to whether the question transmitted by the UN General Assembly was in synchronicity with its activities[187]. The UN Charter empowers the UN General Assembly to discuss the business of the UN system as well as questions over the maintenance of international peace and security and the peaceful adjustment of situations[188]. It also gives the UN General Assembly the prerogative to make topical recommendations to UN members and the UN Security Council[189]. However, a recommendation by the UN General Assembly is beyond its powers when the UN Security Council is actively seized of a dispute or situation within its purview[190]. Yet, the ICJ's jurisprudence has firmly established that requesting an advisory opinion does not equate to making an ultra vires recommendation[191]. Finally, the ICJ would have needed to address suggestions that the question was political rather than legal in character and hence, not within the advisory jurisdiction of the ICJ[192]. The flexible jurisprudential approach by the ICJ in this regard has been to query whether the question was framed in terms of law, even if political and factual aspects, implications, or motivations were enmeshed with it[193]. Applied to the process of construing the meaning and effects of UN-system law, the ICJ would have likely found that

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advisory requests by the UN Security Council to the veto and compulsory abstention rules, see for example, S. ROSENNE & Y. RONEN, *The Law and Practice*, cit., p. 317-18 (offering that, in light of the so-called chain-of-events theory, which treats anything possibly resulting in an enforcement measure as an «other matter», advisory requests are in principle subject to the veto and compulsory abstention rules). Another voice in the literature deems advisory requests not subject to the veto due to their procedural nature. Cfr. R. KOLB, *The International Court of Justice* , Oxford, 2013, p. 1044.

183 Cfr. GAOR Annexes, a.i. 49 (A/AC.78/L.1, para. 67) 24 (1955); M. ALJAGHOUB, *The Advisory Function of the International Court of Justice 1946-2005*, Berlin/Heidelberg/New York, 2007, p. 49-51; S. ROSENNE & Y. RONEN, *The Law and Practice*, cit., p. 326-27.

184 For the most recent advisory opinion by the ICJ, see International Court of Justice, *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, I.C.J. Reports* 2010, p. 403 ss [Kosovo Advisory Opinion].

185 M. ALJAGHOUB, *The Advisory Function*, cit., p. 35.

186 UN Charter, art. 96, par. 1; ICJ Statute, art. 65, par. 1.

187 Kosovo Advisory Opinion, cit., par. 21. Cfr. M. ALJAGHOUB, *The Advisory Function*, cit., p. 41 (offering Judge Higgins as authority for the proposition that «the phrase any legal question […] must at least refer to a question under consideration within the UN»).

188 UN Charter, artt. 10, 11, parr. 2.

189 UN Charter, art. 14.

190 UN Charter, art. 12, para. 1.

191 Kosovo Advisory Opinion, cit., par. 24. Cfr. M. ALJAGHOUB, *The Advisory Function*, cit., p. 42.

192 Cfr. M. ALJAGHOUB, *The Advisory Function*, cit., p. 56.

193 Kosovo Advisory Opinion, cit., parr. 25, 27. Cfr. M. ALJAGHOUB, *The Advisory Function*, cit., p. 56-63.

it was essentially undertaking a judicial task, independent of the potential political fallout of its determinations in the ambit of the requesting political organ and beyond.

After affirming the presence of the requisite elements of its jurisdiction, the ICJ would then have paused in light of its discretion as to whether it should exercise that jurisdiction[194]. According to its consistent jurisprudence, the ICJ, as the judicial arm of the UN, regularly responds affirmatively to a request for an advisory opinion unless compelling reasons would counsel against it[195]. Three assertions could have been advanced to convince the ICJ that it should refrain from exercising its jurisdiction. First, States opposed to the Coalition of the Willing would be granted judicial recourse. Furthermore, the issuance of an advisory opinion would be devoid of any useful purpose. Finally, the request would be a contentious case in disguise.

Addressing the possible assertion that taking up the invitation to render an advisory opinion would give States opposed to the Coalition of the Willing access to the ICJ by simply working through the UN system, the ICJ would have likely referred to one of its core functions—lending assistance to the UN General Assembly[196]. In the context of the alleged lack of utility of the advisory process in the Iraq situation, the ICJ would likely have continued its practice to stay out of substituting its own view on whether a request was useful[197], even if it were assumed that the UN General Assembly had already made a predetermination of illegality. For the same reason, the ICJ would likewise not have imposed its own estimation as to whether its opinion could engender any adverse political consequences[198], which, for example, might have been conceivable in the contexts of political maneuvering within the UN Security Council or diplomatic negotiations with Iraq. Also, the ICJ would likely have rejected the contention that the exercise of its advisory jurisdiction would have altered the roles assigned by the UN Charter to the political organs because the request originated from the UN General Assembly rather than the UN Security Council[199]. Even though the situation in Iraq had triggered the UN Security Council into its peace-enforcement mode and continued to dominate its agenda, the ICJ would have determined, consistent with its jurisprudence[200], that the broad prerogatives of deliberation conferred upon the UN General Assembly and exercised with regard to «the Iraq issue» in general debates and different resolutions[201], were not displaced.

Finally, it was unlikely that the ICJ would have acceded to the assertion that the request for an advisory opinion was a backdoor for contentious cases otherwise doomed because of a

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194 Kosovo Advisory Opinion, cit., par. 29. Cfr. M. ALJAGHOUB, *The Advisory Function*, cit., p. 63-65.
195 Kosovo Advisory Opinion, cit., parr. 30-31. Cfr. M. ALJAGHOUB, *The Advisory Function*, cit., p. 65-67.
196 Kosovo Advisory Opinion, cit., parr. 32-33. Cfr. M. ALJAGHOUB, *The Advisory Function*, cit., p. 65-67.
197 Kosovo Advisory Opinion, cit., par. 34.
198 *Ibid.*, par. 35.
199 *Ibid.*, par. 36.
200 *Ibid.*, parr. 40-41.
201 Cfr. General Assembly Concludes General Debate Dominated by Terrorism, Iraq issue, Middle East, Africa, 57th Plen. Sess., 19th Mtg. (PM), Press Release GA/10065 (20 Sept. 2002); Situation of Human Rights in Iraq, G.A. Res. 374, U.N. Doc. A/RES/56/374 (27 Feb. 2002).

lack of consented-to jurisdiction[202]. Thus, the United States could not have been made a defendant in a contentious case based on the ICJ's compulsory jurisdiction in legal disputes over questions of international law[203], because it had long withdrawn its optional declaration, which was already heavily reserved and modified at the time[204]. While the United Kingdom has an optional declaration in place[205], States without a matching declaration, such as Iraq, would have failed the reciprocity requirement for opening up the ICJ's compulsory jurisdiction in a case against the United Kingdom[206]. Even if a third State had a reciprocal optional declaration, it would still have needed to surmount the hurdle of having to assert a real and actual controversy with the United Kingdom over its legal rights at the time when the case was presented[207]. In view of similar situations where States have expressed radically different views, the ICJ has traditionally held that the lack of State consent has no bearing as long as the advisory request is genuine, that is, when it does not concern a bilateral contentious matter between States in circumvention of the consent principle but rather has been made in circumstances where a political organ seized of a matter seeks legal assistance from the judicial organ for purposes of discharging its functions within the UN system[208]. Thus, the fact alone that the international community of States was deeply divided over the Iraq question would likely not have stopped the ICJ from furnishing guidance in law to the UN General Assembly

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202 International Court of Justice, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004*, p. 136 ss. [Wall Advisory Opinion]. For the jurisdiction based on the consent of entitled States, see UN Charter, art. 93, par. 1; ICJ Statute, artt. 34, 36, parr. 1-6; International Court of Justice, Jurisdiction, Basis of the Court's Jurisdiction, http://www.icj-cij.org/jurisdiction/index.php?p1=5&p2=1&p3=2 (special agreement, cases provided for in treaties and conventions, compulsory jurisdiction in legal disputes, forum prorogatum).

203 ICJ Statute, art. 36, par. 2, sottopar. b. For the list of States with optional declarations in place, see International Court of Justice, Jurisdiction, Declarations Recognizing the Jurisdiction of the Court as Compulsory, http://www.icj-cij.org/jurisdiction/index.php?p1=5&p2=1&p3=3.

204 United States: Department of State Letter and Statement concerning Termination of Acceptance of ICJ Compulsory Jurisdiction, in *Int. Legal Materials*, 1985, vol. 24, p. 1742. Cfr. S.D. MURPHY, *The United States and the International Court of Justice: Coping with Antinomies*, in C.P.R. ROMANO (a cura di), *The Sword and the Scales: The United States and International Courts and Tribunals* , Cambridge, 2009, p. 67 n.70 (noting that the United States: (1) «declined to participate in the ensuing merits phase of the *Nicaragua* case, which led to a judgment against the United States on several counts»; and (2) «ignored the Court's judgment and vetoed measures of implementation sought by Nicaragua at the Security Council»). For the optional declaration by the United States prior to the Nicaragua controversy, see *1982-1983 Yb. of the I.C.J.*, 1983, p. 88, 88-89.

205 For the full declaration by the United Kingdom (as of Dec. 31, 2014) [UK Optional Declaration], see International Court of Justice, Declarations Recognizing the Jurisdiction of the Court as Compulsory, http://www.icj-cij.org/jurisdiction/index.php?p1=5&p2=1&p3=3&code=GB («The Government of the United Kingdom of Great Britain and Northern Ireland accept as compulsory ipso facto and without special convention, on condition of reciprocity, the jurisdiction of the International Court of Justice, in conformity with paragraph 2 of Article 36 of the Statute of the Court, until such time as notice may be given to terminate the acceptance, over all disputes arising after 1 January 1984, with regard to situations or facts subsequent to the same date…»).

206 ICJ Statute, art. 36, parr. 2 & 3; UK Optional Declaration, cit. («on condition of reciprocity»).

207 ICJ Statute, artt. 34, 38, 41. Cfr. Goldsmith Final Advice, cit., par. 32 (not totally discarding the eventuality that a State strongly opposed to the use of force against Iraq could initiate a contentious case and ask for interim relief).

208 Cfr. Wall Advisory Opinion, parr. 46-50 (offering further references to its jurisprudence in this regard).

where some of the divisions had been vetted[209]. For similar reasons, because the request came from the UN General Assembly as a participant in the activities of the UN, in contrast to individual State actors in pursuit of their respective national interests, the ICJ would likely not have considered pertinent the assertion that an advisory opinion might in the end have granted Iraq a remedy despite being itself the source of material breaches of UN-system law—an outcome that could arguably taint the exercise of its advisory jurisdiction for failure to comport with basic notions of good faith and clean hands[210].

Once the ICJ had satisfied itself that compelling reasons for declining the request by the UN General Assembly for an advisory opinion were absent, it would have turned to the scope and meaning of the question,[211] which inquired about whether military action in Iraq, absent a fresh UN Security resolution, would be in accordance with UN-system law. There would have been no need to massage or reformulate this question because it would have been clothed in crisp and clear terms and posed in reflection of the need for an answer in law[212]. The ICJ's construction of the relevant UN-system law with regard to the Iraq situation would have required the cautious application of the rules governing the interpretation of treaties as well as the deployment of other interpretive canons, including statements by representatives during the negotiations and at the time of the adoption as well as ensuing practices at the levels of the UN and possibly affected States[213].

Independent of the ICJ's answer[214] no State, whether with or against the Coalition of the Willing, could have prevented it from being rendered[215] because the advisory opinion embodies the ICJ's assistance in law lent to the UN General Assembly, as opposed to a decision handed down in a real and actual dispute between proponents and opponents of the use of force against Iraq. Yet, the substance of the ICJ's guidance would have reached States with an interest in the Iraq situation through the UN General Assembly as a conduit[216]. If the ICJ had determined that military action in Iraq absent a fresh UN Security Council resolution would not be in accordance with UN-system law, the UN General Assembly would likely have passed a resolution[217] urging members not to take any action in contravention of the advisory opinion. Such a resolution might have either remanded the Iraq situation to the negotiating table at the UN Security Council or even avoided a military conflict. In the alternative, it might have forced members of the Coalition of the Willing to go ahead with the use of force against Iraq

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209 For the plenary speeches from the 57th Session of the UN General Assembly, see United Nations General Assembly, Fifty-Seventh Session, Plenary, Archived Videos and Statements, General Debate, 12-15, 17-20 Sept. 2002, http://www.un.org/webcast/ga/57/statements/th020912.htm.

210 Wall Advisory Opinion, parr. 63-64 (giving this argument short shrift).

211 Kosovo Advisory Opinion, cit., par. 49.

212 *Ibid.*, par. 50.

213 *Ibid.*, par. 94.

214 For a collection of voices in the «yes» and «no» columns as to whether extant UN-system law provided the requisite coverage for the use of force, see ProCon.org, Did the UN Security Council Resolution 1441 Provide Sufficient Legal Basis for Military Action against Iraq?, http://usiraq.procon.org/view.answers.php?questionID=000875.

215 Cfr. A. ZIMMERMANN ET AL., *The Statute*, cit., p. 1621.

216 *Ibid.*

217 For the practice of the UN General Assembly with regard to advisory opinions rendered by and received from the ICJ, see *ibid.*

in blatant disregard of the authoritative, albeit legally non-binding, pronouncements by the UN General Assembly and the ICJ. On the other hand, if the ICJ had determined that military action in Iraq absent a fresh UN Security resolution would be in accordance with UN-system law, this would have given the use of force by the Coalition of the Willing international judicial cachet.

Ultimately, the idea by some of going through the UN General Assembly and having it seek an advisory opinion from the ICJ never gathered enough steam. Perhaps too many delegations realized that the invasion would arrive sooner rather than later and that there simply was not enough time to secure the guidance in law from the ICJ before the fact. Indeed, even assuming that the UN General Assembly had passed a resolution with the request in the immediate aftermath of the UN Security Council's last-chance decision in the fall of 2002, it was somewhat uncertain that the UN General Assembly would have received the advisory opinion from the ICJ before the spring of 2003, and it was unlikely that the Coalition of the Willing would have put their military planning activities on hold during the pendency of the proceedings. Of course, if the UN General Assembly had made the request with urgency or the ICJ itself had found that an early answer was desirable, the ICJ would have been required to do everything in its power to accelerate the procedure[218]. This could have included dispensing with the second written phase normally conducted in its proceedings[219]. Yet, while advisory procedures do not tend to take long[220], the shortest time on record between the request from the UN General Assembly and the rendering of the opinion by the ICJ has been seven months[221]. Other than the potentially too-short window of time before the invasion, the thinking amongst certain delegations might have been that the military action would end quickly and in its wake, the UN system as a whole would need much inner- and inter-institutional cohesion for purposes of managing the post-conflict rehabilitation phase in Iraq.

Contrariwise and despite the massive U.S.-British troop buildup, it also appears that an insufficient number of delegations were convinced at the time that military action against Iraq was imminent, since negotiations in the UN Security Council over a second decision continued until less than a fortnight before the invasion. Or, more generally, the reluctance by many delegations to rally behind the adoption of a resolution transmitting a request for an advisory opinion to the ICJ may have stemmed from their unwillingness to remove the Iraq situation from the political and diplomatic dynamics under their direct control to the courtroom where the outcome in a politically charged situation, albeit only advisory in nature, was not subject to their immediate influence[222].

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[218] International Court of Justice, Basic Documents, Rules of Court, art. 103, http://www.icj-cij.org/documents/index.php?p1=4&p2=3&p3=0.

[219] R. BAVISHI & S. BARAKAT, *Procedural Issues Related to the ICJ's Advisory Jurisdiction*, 2012, p. 5 (giving the example of the *Wall* case), http://legalresponseinitiative.org/wp-content/uploads/2013/09/BP41E-Briefing-Paper-The-ICJ-Advisory-Opinion-Procedure-11-June-2012.pdf.

[220] R. KOLB, *The International Court of Justice*, cit., p. 1105.

[221] R. BAVISHI & S. BARAKAT, *Procedural Issues*, cit., p. 5.

[222] M. W. JANIS, *International Law*, Neuwied, 2012, p. 152-53.

b. *ICC: Crime of Aggression*

The international crime of aggression under the auspices of the ICC offers another potential gateway for the construction of UN-system law by an international court. At the time of the Iraq conflict, however, the ICC only had a mandate to examine conduct during an armed conflict (*in bello*), but none to scrutinize the legality of a decision to engage in an armed conflict (*ad bellum*).

As part of a compromise reached during the negotiations in 1998[223], the Rome Statute had listed the crime of aggression as one of the four core crimes within the jurisdiction of the ICC, but deferred offering substantive definitions or jurisdictional trigger mechanisms[224]. This gap was closed when the amendments defining the crime of aggression and setting out the conditions for the ICC's exercise of jurisdiction were adopted by consensus at the Review Conference of the Rome Statute, which was held in Kampala in 2010[225]. Under the new framework, the individual crime of aggression means «the planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations»[226]. When unpacked this dense definition of individual criminal responsibility yields three major building blocks—the leadership clause, the actus reus clause, and the threshold clause[227]. First, the perpetrator must be a political or military leader[228], but not necessarily the only leader. Second, he or she must have planned, prepared, initiated or executed a State act of aggression. This element presupposes that the State act of aggression was committed[229]. A State act of aggression, in turn, is defined as «the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the [UN Charter]»[230]. Examples of such kinetic force directed against the target through military weaponry[231]

blockade.[232]. Third, criminal responsibility for State acts of aggression is limited to those uses of force, which, in light of their nature, severity and magnitude, amount to a violation of the UN Charter that is manifest, and not merely unlawful in a technical sense[233].

The new provisions governing the conditions under which the ICC may exercise its jurisdiction over the crime of aggression distinguish between two trajectories based on the absence or presence of a referral by the UN Security Council. Both routes require the activation of the ICC's jurisdiction, which is predicated on the arrival of two cumulative events. First, at least 30 State Parties must ratify or accept the amendments[234]. Second, the State Parties must take a decision to activate, at any time after January 1, 2017, either by consensus or at least an absolute two-thirds majority[235]. The Kampala amendments contain no legal obligation for their domestic implementation before or after ratification[236]. Several States, however, have in place domestic provisions criminalizing aggression[237]. They differ as to whether domestic criminalization is extended only to their own leaders or likewise to leaders of other States[238].

The first trigger mechanism, which is based on State referral to the ICC Prosecutor or the ICC Prosecutor proceeding *proprio motu*, offers a consent-based jurisdictional regime for State Parties. Any State Party may opt out of the ICC's jurisdiction by lodging a declaration to this effect with the Registrar[239]. Simply not opting out suffices for consent. In contrast, the ICC does not exercise jurisdiction over non-State Parties[240]. For purposes of this trigger, the UN Security Council does not have to actively determine the presence of an act of aggression nor does it have to authorize investigations. If it does, after being notified by the ICC Prosecutor of his or her intention to open an investigation[241], such a determination suffices[242]. In the absence of word from the UN Security Council, the ICC Prosecutor may still proceed after waiting six months from the initial notification and upon receiving the authorization by the judges of the ICC Pre-Trial Division[243]. The second trigger mechanism, which is based on UN Security Council referral, does not require the satisfaction of any of the tailored conditions imposed on State referral or *proprio motu*[244]. Notably, the exercise of the ICC's jurisdiction is not predicated upon any type of consent furnished by the involved States.

Since it was agreed early on in the amendment process that the envisaged provision on aggression would be only prospective in nature, there could be no prosecution at the ICC of the Iraq situation under the aggression amendments in their current form[245]. Yet, the Iraq

232 Kampala Amendments, art. 8 *bis*, par. 2, cl. 2, sottoparr. a)-g).
233 M. GILLETT, *The Anatomy of an International Crime*, p. 23-26.
234 Kampala Amendments, artt. 15 *bis*, par. 2, 15 *ter*, par. 2.
235 Kampala Amendments, artt. 15 *bis*, par. 3, 15 *ter*, par. 3.
236 LIECHTENSTEIN INSTITUTE ON SELF-DETERMINATION, *Handbook*, cit., p. 14.
237 *Ibid.*
238 *Ibid.*
239 Kampala Amendments, art. 15 *bis*, par. 4.
240 Kampala Amendments, art. 15 *bis*, par. 5.
241 Kampala Amendments, art. 15 *bis*, par. 6.
242 Kampala Amendments, art. 15 *bis*, par. 7.
243 Kampala Amendments, art. 15 *bis*, par. 8.
244 Kampala Amendments, art. 15 *ter*, parr. 1 a 5.
245 M. GILLETT, *The Anatomy of an International Crime*, cit., p. 17 n.76.

situation must have colored the UK's posture in the amendment process. For example, in the deliberations over the trigger mechanisms for the ICC's exercise of jurisdiction over the crime of aggression, the UK vigorously favored giving exclusivity to the UN Security Council in line with its responsibility under UN Chapter VII[246]. This stance, of course, is not surprising since it would have enabled the UK to wield its veto power and avoid the onset of ICC jurisdiction at its pleasure. Although the Review Conference ultimately did not adopt the position of the United Kingdom, which, unlike the United States, has ratified the Rome Statute of the International Criminal Court[247], the comments by the United Kingdom welcoming the final text still invoke the «primacy» of the UN Security Council with respect to the maintenance of international peace and security, while at the same time speaking of a «mutually reinforcing relationship» between the UN Security Council and the ICC[248]. At present, the United Kingdom does not rank among those who have consented to the amendments adopted at Kampala.

Even if purely theoretical, playing through the Iraq situation highlights an open flank in the new regime governing the crime of aggression. Logically, the availability of exceptions to prohibited uses of force will deny the presence of a State act of aggression, which itself is a prerequisite for individual criminal responsibility. UN Security Council approval of the use of force in a certain situation would supply such an exception[249]. This would return us full circle to the question of how explicit the authorization must be and how implicit, or arguable, it can be[250]. Certainly, as much as the paradox of a UN Security Council determining an act of aggression in the wake of having previously passed a resolution under UN Chapter VII, construed by some as an authorization to use force, will hardly arise, it may be incumbent upon the ICC Prosecutor, once his or her mandate will have vested, to construe the meaning and effects of UN-system law when seeking to initiate an investigation in the wake of allegations concerning the legality of a conflict[251]. This is quite a significant horizon for the judicial construction of UN-system law.

III. PERSPECTIVES

[246] *Ibid.*, p. 5, n.23.

[247] Rome Statute of the International Criminal Court, UN Doc. A/CONF. 183/9, in *Int. Leg. Mat.*, 1998, vol. 37, p. 1002 ss. (*entered into force* 1 July 2002) [Rome Statute]; International Criminal Court, Assembly, State Parties to the Rome Statute, Western European and Other States, United Kingdom, http://www.icc-cpi.int/en_menus/asp/states%20parties/western%20european%20and%20other%20states/Pages/united%20kingdom.aspx.

[248] Review Conference of the Rome Statute of the International Criminal Court, Kampala, 31 May – 11 June, in *Official Records*, Annex VIII, 2010, p. 124.

[249] M. GILLETT, *The Anatomy of an International Crime*, cit., p. 16-17.

[250] *Ibid.*

[251] Cfr. Letter from Luis Moreno-Ocampo, Chief Prosecutor of the International Criminal Court, 9 Feb. 2006, p. 4, http://www.icc-cpi.int/NR/rdonlyres/4E2BC725-6A63-40B8-8CDC-ADBA7BCAA91F/143684/OTP_letter_to_senders_re_Venezuela_9_February_2006.pdf.

Judicial review mechanisms for the construction of UN-system law in a case face a unique challenge. UN Security Council decisions are the products of political and diplomatic negotiation and voting processes[252]; and therefore, they frequently contain formulaic compromises and open terms which, by design, are not drafted with the chiseled precision of court judgments[253]. This interpretation challenge as to what the law is and what it requires is vividly illustrated in the Iraq situation, which ultimately was all about language memorialized in the relevant UN-system law[254]. When court review with regard to the proper construction of UN-system law is sought, the design of the sluices for entry into the courtroom becomes crucial.

The United Kingdom, Costa Rica and Germany embody very different approaches to the control of interpretations of UN-system law. In the United Kingdom, the judicial review of UN-system law is curtailed by the operations of non-justiciability doctrines policing the entry to the courtroom—political question non-justiciability of acts of the executive in the arena of foreign affairs and international relations[255] and dualist non-justiciability of unincorporated treaties[256]. In this light, it is not surprising that CND's bid to win a declaration as to the true meaning and effects of the last-chance decision does not survive in court. Yet, they have their day in court as Her Majesty's Government at least has to explain its unwillingness to disclose whatever position it had developed at the time. Three senior judges, far from giving the matter short shrift, deliver, with marked responsiveness to the skillful arguments advanced by the litigants, a speedy and well-reasoned judgment. In the absence of access to the courts, challengers are then relegated to seeking relief through other democratic process controls, including checks and balances within the political branches, election cycles, and public opinion[257]. Costa Rica and Germany each offer a counter model. In Costa Rica, a highly vigilant constitutional guardian is on hand. It is readily accessible, undeterred by political question doctrines, and vigorously committed to the doctrine of radical monism. In Germany, the executive power is, at least in theory, fully controlled by the courts. This commitment to judicial review allows courts to speak to the construction of UN-system law – at a minimum incidentally but conceivably also more directly, depending on the particular posture of the case.

In view of the disparateness of municipal system paradigms, the international plane could offer a unifying dimension of review. The ICC, through the prism of its jurisdiction over crimes of aggression, may at some point be called to construe the meaning and effects of UN-system law. This horizon will become even more powerful once more State actors embrace the

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252 Kosovo Advisory Opinion, cit., par. 94.

253 Cfr. C. TOMUSCHAT, *Der 11. September 2001 und seine rechtlichen Konsequenzen*, in *Eur. Grun. Zeit.*, 2001, p. 535, 545.

254 2010 Transcript, cit., p. 244.

255 Council of Civil Service Unions v. Minister for the Civil Service [1985] 1 AC 374 (1985) («[M]any of the most important prerogative powers concerned with control of the armed forces and with foreign policy and with other matters which are unsuitable for discussion or review in the Law Courts».) (per Lord Fraser, at p. 398); R. v. Secretary of State for Foreign and Commonwealth Affairs, ex parte Ferhut Butt 116 ILR 607 (1999); R. (Campaign for Nuclear Disarmament).

256 For the general proposition that a treaty only creates rights and duties in domestic English law until an Act of Parliament gives effect to it, see, for example, J. H. RAYNER (Mincing Lane) Ltd v. Department of Trade and Industry [1990] 2 A.C. 418 (HL); M.B. AKEHURST, *Modern Introduction to International Law* , New York, 1970, p. 45.

257 M. IOVANE, *Domestic Courts*, cit., p. 622.

ICJ. In turn, the ICJ takes up contentious cases between States and entertains requests for advisory opinions from within the UN system. Due to the consent-based design of its contentious jurisdiction over cases between States, it is highly improbable that the ICJ will be called to decide an actual controversy over the interpretation of UN-system law; and, given that four of the five veto powers on the UN Security Council have not, or no longer have, in place an optional declaration opening up the ICJ's compulsory jurisdiction, even if a case were decided, enforcement by the UN Security Council[258] is even less likely[259]. Similarly, its advisory jurisdiction exhibits several open flanks. A request for an advisory opinion can only originate from within the UN system, which is populated by State representatives who would need to gel in sufficient majorities before a request could filter through the UN's political organs and specialized agencies. The framers deliberately excluded States from the circle of originators in their own name[260]. A further question harks back to the effect in law spawned by advisory opinions. In doctrine and practice, advisory opinions have been described as declarative of the law without binding force and without the effect of *res judicata*[261]. The practical reality is that within the invoking arena and beyond, there must be a political will to heed the ICJ's advice, whatever its contents may be[262]. Indeed, given the frequency and effects of advisory opinions, the record reflects rather low expectations in this regard.

In light of the availability and intensity of judicial review, as seen through the example of UN-system law in the Iraq situation, two reform proposals crystalize. One more modest idea would be to enable States to make a request of the ICJ for an advisory opinion. This would make it easier and faster for any State to reach the ICJ because it no longer would have to work through the UN General Assembly or the UN Security Council. Yet, the same compliance concerns afflicting the current system prevail unless advisory opinions were given *erga omnes* effects. An even bolder idea would be to confer upon the ICJ the jurisdiction to render preliminary rulings or interlocutory judgments in response to questions from municipal judges[263]. Specific references could of course be limited to construing the meaning and effects of UN-system law. This reform would open the ICJ to lawsuits by individual parties[264] and ensure that international law is observed in the interpretation of UN-system law. Restricting this function to questions of interpretation would make it very different from full-scale judicial review of UN-system law[265]. With the rise of the European Court of Justice, a template exists

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258 UN Charter, art. 94, par. 2.

259 S. G. OGBODO, *An Overview of Challenges Facing the International Court of Justice in the 21st Century*, in *Ann. Surv. of Int. & Comp. L.*, 2012, vol. 18, p. 93, 110.

260 M.W. JANIS, *International Law*, cit., p. 152-53.

261 R. KOLB, *The International Court of Justice*, cit., p. 1094; K.L. PENEGAR, *Relationship of Advisory Opinions*, cit., p. 555-57.

262 K. L. PENEGAR, *Relationship of Advisory Opinions*, cit., p. 557.

263 For a concise discussion identifying the relevant positions in the debate, along with references to the topical literate and scholarship, see, for example, M.W. JANIS, *International Law*, cit., p. 157-59.

264 *Ibid.*, p. 157-58.

265 M. ANGEHR, *The International Court of Justice's Advisory Jurisdiction and the Review of Security Council and General Assembly Resolutions*, in *Nw. Un. Law Rev.*, 2009, vol. 103, pp. 1007, 1026; J. E. ALVAREZ, *Judging the Security Council*, in *Am. Jour. Int. Law* 1996, vol. 90, pp. 1 ss.

for the regional integration space under the auspices of the European Union[266]. However, despite the allure of such a mechanism[267], the spectre of making the ICJ, throughout the space of its subscribers, some kind of «constitutional» guardian of international law would trigger staunch sovereigntists, especially among the permanent members of the UN Security Council, into stalling institutional reform[268]. Thus, the prospects of any amendments to the UN Charter[269] that would widen the prerogatives of the ICJ and in consequence, re-orient the international legal order away from its *carence institutionelle*[270] towards more complete governance by law appear dim at present.

Still, despite the fact that the military action against Iraq went ahead and despite the lack of a uniform judicial review model or integrative judicial review institution, this article illustrates that the use of force deployed by the Coalition of the Willing did not proceed unchecked and that new judicial review options may come online. It would therefore be premature indeed to label the control mechanisms at work with regard to the construction of UN-system law in the Iraq situation and beyond with the Ciceronian adage *silent enim leges inter arma* («for the laws fall silent in times of war»).

ANNEX

Municipal Judicial Review of UN-System Law in the Iraq Situation

	United Kingdom	**Cost Rica**	**Germany**
Review of UN-system law in the Iraq Situation	**No**	**Yes**	**Yes**
Timing of complaint	Pre-invasion (2002)	Invasion (2003)	Post-invasion (2005)
Court	England and Wales High Court (Administrative)	Supreme Court (Constitutional Chamber)	Federal Administrative Court (Second Senate for Military Service)
Type of proceeding	Petition for declaratory relief	Action of unconstitutionality	Appeal of the Decision by the Military Tribunal
Jurisdiction	Supervisory	Constitutional	Appellate

[266] Consolidated Version of the Treaty on the Functioning of the European Union art. 267, 2008 O.J. C 312/47, p. 164.
[267] M. W. JANIS, *International Law*, cit., p. 159.
[268] P.J. SPIRO, *The New Sovereigntists: American Exceptionalism and Its False Prophets*, in *For. Aff.*, 2000, vol. 79, p. 9, http://www.foreignaffairs.com/articles/56621/peter-j-spiro/the-new-sovereigntists-american-exceptionalism-and-its-false-pro (21 Jan. 2015).
[269] UN Charter, artt. 108, 109.
[270] G. SCELLE, *Manuel de Droit International Public*, Paris, 1948, p. 21.

Subject of review	No specific decision to challenge	Foreign Policy Communiqué in support of Coalition	Court martial for disobedience and insubordination
Standing	Not reached (obiter dictum: yes)	Yes (due to the assertion of a collective interest)	Yes (because of the court martial below)
Holding	Case dismissed in the preliminary stage as non-justiciable	Communiqué annulled for infringing the Political Constitution, the international system of the UN, and the international law accepted by Costa Rica	Decision overturned and respondent acquitted in-full because disobedience and insubordination protected by the basic right of freedom of conscience
Role of the interpretation of UN-system law for the outcome	**N/A** (not reached)	**Central** (Costa Rica's adherence to UN-system law part-and-parcel of constitutional value of peace)	**Incidental** (Decision of conscience taken under the "special circumstances" of the invasion of Iraq as well as Germany's contributions, both met with "grave concerns under international law")
Political question doctrine	**Yes**	**No**	**No**
Monist or dualist	**Strictly dualist** (by constitutional premise)	**Radically monist** (with the primacy of international law)	**Moderately dualist** (under the transformation and execution theories)