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The Legal Security of the United Nations

-Can the International Court of Justice review the decisions of the Security Council?

Graduate thesis
20 points

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Contents

Summary

Created in the aftermath of the Second World War the United Nations and its bodies do not represent the world that we live in today. The effectiveness and the usefulness of the organisation have been questioned and the need for a reformation has increased. The distinction between power and authority and the different organs of the UN is difficult to draw. The Security Council has the main responsibility for the maintenance of international peace and security and the International Court of Justice is the principal judicial organ of the UN. These two roles of the organisation can be very complex and hard to separate. The main opinion is that the Security Council works with the political disputes and the International Court of Justice with the judicial, but problems arise when these two disputes cannot be separated and therefore makes it impossible for the organs to solve them accordingly to the opinion of the international community. An example of this is the Lockerbie case, where the United States of America and the United Kingdom brought the case before the Security Council and at the same time Libya complained to the International Court of Justice. The outcome of this case was that the International Court of Justice referred to the resolutions of the Security Council and therefore did not try the case, which leaved a lot of questions unanswered.

The texts of the Charter of the UN and of the Statute of the Court give no support for a conclusion that the Court possesses a power of judicial review in general, or a power to supervene the decisions of the SC in particular. The Security Council has the primary responsibility for the maintenance of international peace and security. If the Court could overrule, negate and modify, it would be the Court and not the Council that would exercise the dispositive and hence primary authority.

In the meantime, the Court can not review the Council's chapter VII decisions and judicial control of SC resolutions remains unlikely. But the discussions is being raised that these decisions should at least comply with the norms of jus cogens and should not be contrary to the Charter itself. Although it seems possible to conclude that the Court currently possesses at most a limited power of judicial review, there is little doubt that there has been a recent trend in support of increasing such a power. This support is found in the existing case law and in academic commentary.

The United Nations needs the International Court of Justice and other organs to increase its possibility to interfere and also adjust the level of power and authority and to be able to create that effective and useful organisation the UN could be. An effective legal review of the decisions maid by the Security Council could be one way to achieve it, but on the other hand it could result in wariness from the Security Council, that could lead to just the opposite result accomplish.

Abbreviations

AJIL	American Journal of International Law
EJIL	European Journal of International Law
GA	General Assembly
ICJ	International Court of Justice
SC	Security Council
UK	United Kingdom
UN	United Nations
USA	United States of America

1 Introduction

Created in the aftermath of the Second World War, the main task of the United Nations (UN) is the maintenance of international peace and security. As the USA secretary of state, Cordell Hull, once stated:

> "From the moment when Hitler's invasion of Poland revealed the bankruptcy of all existing methods to preserve peace, it became evident…that we must begin almost immediately to plan the creation of a new system."[1]

The UN Charter begins with the words: "We the people of the United Nations are determined to save succeeding generations from the scourge of war…" The central purpose of the UN is to promote and preserve peace, peace that is based on justice. Although the UN Charter, signed in San Francisco in 1945, has remained almost the same, the world has radically changed since from the beginning the UN was formed to make sure that all possible measures were taken to prevent a new world war. That is why the UN was created with five permanent members, all of which have the right of veto. The influence this power gives to the permanent members has been much criticised.

Parts from the organisation of the UN, its strength and capacity have become a big issue. It has been questioned if the organisation can handle its tasks or if it has lost the powers and many people believe that the UN is run by a few states or to go even further, now it is dictated by the USA. The work of the UN seems for numerous of people inefficient and too slow. But is it really, don't we have too high of expectations as Dag Hammarskiöld, the former Secretary-General once said: "The UN was not created to take humanity to heaven but to save it from hell."[2]

The Charter has gone through decades without changes and the bodies of the UN have been forced to solve problems that it was not created for. It has been imposed on the UN to tackle situations where there are no rules. The organs of the UN have been forced to create their own solutions and created a difficulty to draw a straight line between the bodies of the UN if you look at powers and authority.

The result of the necessary reformation of the organisation as a whole must end with a UN that can maintain international law and safeguard international peace and security and withstand mighty powers, which try to fight out their political and military disputes through the organisation.

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[1] Hull Cordell, Memories of Cordell Hull, New York, Macmillan, 1948, page 1625.
[2] Tharoor Shashi, Why America Still Needs the United Nations, 2003, http://www.foreignaffairs.org.

In my effort to link my subject for this thesis I have chosen to look at two of the bodies of the UN, namely the Security Council (SC) and the International Court of Justice (ICJ). This will show the difficulties of setting the limits of power and authority between bodies inside the UN.

1.1 Purpose

The thesis aims to suggest a new development regarding the powers of the Security Council and the International Court of Justice, which through the decades have transformed some areas of the organisation. The purpose of this thesis is to provide a legal analysis concerning the UN, by inquiring into two of its bodies. By looking at the development from the Lockerbie case and forward, I want to understand the organisation that is now. This treatment will hopefully contribute to a better understanding of legal issues concerning the powers of the ICJ and the SC. The thesis aims to analyse if the International Court of Justice today can review the decisions of the Security Council.

1.2 Disposition and limitations

This thesis proposes to examine a few of the most important and interesting problems in international law associated with the power of the International Court of Justice and the Security Council. First the thesis provides an independent analysis of the two main bodies. Second I try to determine the differences between the two organs and also determine and explain judicial and political disputes. Thereafter I use case law to highlight some of the legal problems that have occurred between these two bodies of the UN. Finally I try to tie the information together and argue for an institutional reform of the United Nations to secure international law and security, the main task of the organisation. Only the most relevant legal issues that need to be analysed for answering the legal questions will be brought up. This will exclude a deeper analyse of interpretation of treaties, other bodies of the UN and other problems concerning the organisation.

1.3 Methods and materials

When writing this thesis a descriptive and analytical judicial method has been used. The sources used have mainly been UN documentation, doctrinal texts, the UN Charter, articles and Internet web pages.

2 The Security Council

The Security Council has the primary responsibility for the maintenance of international peace and security. The SC has 15 members, five of which are permanent. They are China, France, the Russian Federation, the United Kingdom and the United States of America addition another ten members are elected by the General Assembly for two-year terms. The permanent members were chosen in the aftermath of the Second World War and therefore it does not reflect how the international situation is today. Countries from the Eastern Europe, South-America and Africa have no representations among the permanent members. Also Germany and Japan see themselves as the next countries in line for becoming permanent members of the SC. The great difference between the permanent members and the elected ones is the rule of great power unanimity; also known as the veto power. That means that if a permanent member does not agree with a decision, it can interpose its veto against the decision. All five permanent members have exercised the right of veto several times and all of them have been accused of using the veto power incorrectly.

The SC decisions are something that all members of the UN have agreed to accept and carry out, while other bodies of the UN make recommendations to governments, the Council alone has the power to take decisions, which member states are obligated under the Charter to carry out. Nevertheless the powers of the SC are not unlimited; the Charter sets both procedural and substantive limitations on them, to the extent that under article 25 members are obliged to carry out the decisions of the SC only if they are taken in accordance with the Charter. The limitations of article 24 (2), which provides that the Council is bound to act only in accordance with the purpose and principles of the UN, continue to be meaningful.

Under the Chapter VII of the Charter the Council is empowered to take measures to enforce its decisions. It can impose embargoes and sanctions, or authorise the use of force to ensure that mandates are fulfilled. The Council can also under Chapter VII, authorise the use of military force by a coalition of member states or by a regional organisation or arrangement. These actions that will be made only as a last resort, when peaceful means of settling a dispute have been exhausted, and after determining that a threat to the peace, a breach of the peace or act of aggression exist.[3]

There is nothing in the Charter to suggest that the SC cannot, where there is an actual threat to the peace, take an action inconsistent with a treaty or customary international law. On the contrary, the Charter implies that such actions might be necessary. Article 2(7) prohibits the UN from intervening in matters within the domestic jurisdiction of any state, but indicates that the prohibition does not apply in the case of enforcement measures taken under

[3] http://www.un.org/.

Chapter VII. The argument that the SC must act consistently with jus cogens norms finds some support in the Vienna Convention, which provides that treaties violating jus cogens norms are void. The Charter, however, is not like other treaties, and a strong argument can be made that this provision does not apply to it. Moreover, whether the duty to extradite or prosecute is one of the few jus cogens norms is debatable. With respect to treaties, the Charter provides in article 103 that in the event of a conflict between a state's obligations under an international agreement and the UN Charter, the obligations under the Charter shall prevail. Many Chapter VII resolutions have required modification or suspension of trade or mutual defence agreements.[4]

2.1 Some historical examples of the work of the Security Council

The development in the UN takes small steps forward and in many cases these small steps come during a long period of time. One of the earliest applications of Chapter VI of the Charter was on the Kashmir dispute. Following negotiations and agreements among the parties the SC adopted resolution 47 (1948), which promised a free and fair plebiscite under UN sponsorship to enable the people of Jammu and Kashmir to determine whether they wish to join Pakistan or India. Before and after this resolution the SC instituted a series of mechanism, including the establishment of UN Commission of India and Pakistan (UNCIP), the development of a military observer mission (UNMOGIP) and the appointment of eminent special representatives of the UN who consulted the two parties and submitted extensive reports on how to resolve the dispute in accordance with provisions of the SC resolutions. The process ran aground due to the Cold War, when the SC no longer acted to persuade the parties to implement its resolutions. Agreements and declarations support the solution through bilateral discussions. At the Agra Summit in July 2001 Pakistan and India almost succeeded in launching a framework for revived talks. The prime ministers of Pakistan and India have recently taken initiative to reduce tension in South Asia and reserve the negative trend of the recent past.[5]

Palestine is another historical issue, which remains outstanding on the Council's agenda. On this issue the Council has acted under both Chapter VI and Chapter VII of the Charter. In recent years, efforts for peace in the Middle East have proceeded mostly outside the SC. These endeavours reflect the spirit and substance of Chapter VI of the Charter. A proposal for a road map has been presented and this is a step towards durable peace, based on resolution 242, 338 and 1397 of the SC, and aimed at the creation of two states, Palestine and Israel, living side by side within secure and

[4] MacPherson Bryan, Authority of the Security Council to Exempt Peacekeepers from International Criminal Court Proceedings, 2002, http://www.asil.org.
[5] Press Release SC/7756.

recognised borders. Now it requires determined measures to implement the road map.[6]

These examples do not mean that the SC is incapable to act as a peace settler, or the techniques for peaceful settlement are unknown or inadequate. In many cases the fault lay first in the lack of political will of parties to seek a solution to their differences through such means as are suggested in Chapter VI of the Charter and second, in lack of influence at the disposal of third party if this was the procedure chosen. Each party tends to seek a better solution than it had been called upon to accept. A third party might not find a reason to use the influence it has for the settlement of the particular dispute. In a world where the indispensability of the sovereign state as the fundamental political unit of the international community is still vigorously reaffirmed, the perceptions by states of their territorial integrity and the essential values, which are permeated their respective political structures, are bound to rank as the utmost priority. This will admit little compromises.[7]

2.2 Carrying out its obligations

The SC has under Chapter VII the sole prerogative to decide when it can order enforcement measures to be taken and the discretion as to what type of measures should be taken. Article 39 states that:

> "The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security."

The Charter does not, however, expressly state which entities the Council can use in its efforts to ensure the maintenance or restoration of international peace and security. In the vast majority of cases where the Council has imposed economic or military sanctions against a state or non-state entity, the Council has attempted to ensure the implementation of these sanctions by delegating its Chapter VII powers to UN principal bodies, UN subsidiary bodies, UN member states, and regional arrangements bodies. The reason for such delegations of power is a practical one. The SC has had to delegate its Chapter VII powers to entities that have an enforcement capacity, which the Council at present lacks; in particular, it lacks a military force, which it can use directly to carry out military enforcement action.[8]

[6] Press Release SC/7756.
[7] Press Release SC/7756.
[8] Fassbender Bardo, Review Essay: Quis judicabit? The Security Council, its Powers and its Legal Control, http://www.ejil.org.

2.2.1 General competence to delegate

To be able to delegate its powers a principal organ of an international organisation must possess either the express or implied competence to do so. Both the possessions by a principal organ of either an implied or express power or the competence to delegate this power are necessary preconditions for a lawful delegation. The SC possesses a general competence to delegate its powers to certain entities. This is not provided for in express terms by the Charter, but derives its existence from two main sources.[9] The first is that it exists as a general principle of law for the purposes of article 38(1)(c) of the Statute of the International Court of Justice, which is, according to article 92 of the Charter, an integral part of the Charter. The existence of such a general competence constituting a general principle of law is indicated by the fact that constitutions of a large number of states, both from common and civil law systems, allow their bodies of government to delegate powers.[10]

The second source of the SC possessing a general competence to delegate its powers is the law of international institutions. It is contended that it is a general principle under the law of international institutions that a principal organ of an international organisation possesses a general competence to delegate certain of its powers to other entities. This means that the SC can use its general competence to delegate its Chapter VII powers, subject to certain limitations, to other UN principal and subsidiary bodies without any further Charter authority being required.[11]

The Council possessing a general competence to delegate its Chapter VII powers is in accord with the object and purpose of Chapter VII. The object and purpose being that the Council should be able to take such action as it deems necessary to maintain or restore international peace and security. Just because the Council is purporting to delegate its Chapter VII powers does not mean that it can disregard the Charter requirements, which it must itself observe if it were to exercise these powers. As such, the Council must make either an express or implied article 39 determination in a resolution before it can delegate its Chapter VII powers.[12]

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[9] Sarooshi Danesh, The United Nations and the Development of Collective Security: The Delegation by the UN Security Council of Its Chapter VII Powers, Oxford University Press, 1999, p 17.

[10] As Kelsen states: No organ can legally delegate power to another organ without being authorised by the constitution to do so. Kelsen Hans, Principles of International Law, R. W. Tucker ed., 1966 p 142.

[11] Fassbender Bardo, Review Essay: Quis judicabit? The Security Council, its Powers and its Legal Control, http://www.ejil.org.

[12] The General Legal Framework, Governing the Process of a Delegation by the UN Security Council of its, Chapter VII Powers, http://www.oup.co.uk.

2.2.2 Limitations on the power of delegation

The limitations, which exist on the general competence of the Council to delegate its Chapter VII powers, also apply to the exercise by the Council of a specific competence to delegate these powers to an entity external to the organisation. There is however additional limitations that go with the exercise of delegated Chapter VII powers, which depend on the nature of the particular delegate.

The delegation of powers is a necessary part of any system of governance. However, it is also generally recognised that restrictions on such delegations are just as necessary. There are several limitations on the general competence of UN principal bodies to delegate their powers. A fundamental precondition for a lawful delegation of powers by an organ of an international organisation is that the powers purportedly being delegated can only be those, which the organ itself either expressly or impliedly possesses under its constituent treaty. An organ cannot delegate powers, which it does not itself possess. This derives from the general principle of law; one cannot give what one does not possess.[13]

When the international community acts it can confer powers on an international organisation, which sovereign states acting individually could not. This idea was implicitly recognised by the ICJ when discussing the international legal personality of the UN in the Reparations case. The Court opined:

> "..fifty states, representing the vast majority of the members of the international community, had the power, in conformity with international law, to bring into being an entity possessing objective international personality, and not merely personality recognised by them alone..." [14]

It seems very doubtful that a state acting individually or in concert with a few other states could confer such objective international personality on an entity, but, as the Court noted, the vast majority of the members of the international community do possess this competence. Therefore where the international community has delegated the exercise of enforcement powers to the Council, the Council is responsible to the international community for the way in which these powers are exercised.

Of particular importance in the context of a delegation of Chapter VII powers and limitations of that power is that there is a conferral on the delegate of a degree of legitimacy of action. The source of this legitimacy is that the SC has, through the Charter, been given by UN member states the primary responsibility for the maintenance of international peace and

[13] The General Legal Framework, Governing the Process of a Delegation by the UN Security Council of its, Chapter VII Powers, http://www.oup.co.uk.
[14] Reparations case, ICJ Reports (1949), p. 174 at p. 185.

security. This issue of legitimacy deserves further attention since it is important in terms of the *collective security*[15] function of the SC, an important part of which now is the delegation of Chapter VII powers.[16]

The limitation, which exists on the law-making power of the international community, is jus cogens. This is reflected in article 53 of the Vienna Convention on the Law of Treaties, which states that a treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law, jus cogens. Moreover, article 53 defines a peremptory norm of general international law as:

> "a norm accepted and recognised by the international community of states as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character."

The converse of this argument is that where states have not delegated a particular power to an international organisation when establishing the organisation, then the member states cannot be liable for the acts of the organisation in the exercise of the power in question. As Seyersted has observed: "It is not possible … to hold the member states responsible for acts of the organisation which involve no delegation of powers from these states".[17]

2.2.2.1 Collective security

The UN Charter constitutes a collective security system with the SC as its focus. A collective security system can be defined in broad terms as a system where a collective measure is taken against a member of a community that has violated certain community defined values. An important feature of collective security is the maintenance of the status quo of the system. The UN is the creature of a treaty and, as such, it exercises authority legitimately only in so far as it deploys powers, which the treaty-parties have assigned to it.[18]

In the case of the Charter, it is the Security Council which has been given the authority to determine the content of the community value or interest in a particular case and consequently that its violation necessitates a collective security response. Using United Nations Charter terminology, collective security can both promote the peaceful settlement of situations that endanger peace (Chapter VI processes) and take action with respect to threats to the peace, breaches of the peace or acts of aggression (Chapter VII action). There is underlying this general assumption that the community

[15] See 2.2.2.1 Collective Security.
[16] Franck Thomas, Fairness in the International Legal and Institutional System, Clarendon Press, Oxford, 1995, p. 218.
[17] Seyersted Finn, Objective International Personality of Intergovernmental Organisations, Zeitschrift für ausländisches öffentliches Recht und Völkerrecht, 1965, p. 70.
[18] Franck Thomas, Fairness in the International Legal and Institutional System, Clarendon Press, Oxford, 1995, p. 219.

values which the system aims top reserve are the result of a process of consensus or are in any case acceptable to the members of the community. In the case of the UN, this process culminated with the conclusion and adoption of the Charter, this is the source of legitimacy of action by the Council when using its Chapter VII powers. The way in which the delegate exercises delegated Chapter VII powers is important for the Council's legitimacy. The legal elements of the process of a delegation of powers assume importance. In particular, the procedural and substantive limitations the Charter places on the competence of the Council to delegate its Chapter VII powers. The element, which distinguishes a "community" from its components, is a "higher unity", as it was the representation and prioritisation of common interests as against the egoistic interests of individuals.[19]

2.3 The veto power

2.3.1 The history of the veto power

The official record of the negotiations in 1945 at San Francisco Conference clearly shows that since the very beginning the procedure for decision-making in the Security Council, particularly the veto power was a thorny issue, which faced widespread opposition and major dissatisfaction among the participating governments. The whole question of unanimity of permanent members in the decisions of the Security Council, article 27 (3), then called the Yalta Formula, came under a general and serious criticism. Numerous proposals were made by participating delegations to remove the so-called veto power or to lessen its scope of application. One such proposal was the Australian amendment[20] which aimed to deem Security Council actions under the present Chapter VI of the Charter to be regarded as procedural matters, and thus not subject to veto. This amendment was voted upon on June 12, 1945, and it was defeated.

Taking the political atmosphere and the balance of power in the world immediately after the Second World War into account, many of the participants in the Conference felt they had no choice but to submit to inequality of sovereign states in order to create the international organisation. This sense of practically conditional acceptance of the veto power and the overall dissatisfaction of the general membership about it have been continually discussed and criticised during the years. The attempt by the General Assembly on 14 April 1949 in the form of

[19]Simma, Bruno, From Bilateralism to Community Interest in International Law, Hague Recueil des Cours, 250 (1994-VI) p. 9 at p. 245.
[20] A46/11/3/1.

adopting resolution 267 (III) to curtail the excessive use and scope of the application of veto was practically disregarded.[21]

The general requirement provided for by article 27(3) is that any SC decision on a non-procedural issue is subject to the veto of any of the five permanent members. Article 27(3) states that "Decisions of the Security Council… shall be made by an affirmative vote of nine members including the concurring votes of the permanent members." During the San Francisco Conference spring 1945 the USA, former USSR, China, and the UK stated:

> "In view of the primary responsibilities of the permanent members, they could not be expected, in the present condition of the world, to assume the obligation to act in so serious a matter as the maintenance of international peace and security in consequence of a decision in which they had not concurred. Therefore, if a majority voting in the Security Council is to be made possible, the only practicable method is to provide, in respect of non-procedural decisions, for unanimity of the permanent members plus the concurring votes of at least two of the non-permanent members."[22]

For all these reasons, the four sponsoring governments or the Big Four[23] agreed on the Yalta formula and have presented it to this conference as essential if an international organisation is to be created through which all peace-loving nations can effectively discharge their common responsibilities for the maintenance of international peace and security. Moreover, the veto was and still is perceived as an important institutional limitation on the use of Chapter VII enforcement powers by the Council. Therefore the primary restraint and check against excessive interventionism by the SC lies with an inherent element of the decision-making process within this body itself. This element is the main guardian of the SC's abstention from irrationality and abuse of powers. But the present article 27 of the Charter was also put to the vote. Twenty delegations refrained from voting in favour of paragraph 3 of this article, that is, 2 voted against, 15 others abstained and 3 did not participate, while 30 voted in favour of the paragraph. The vote showed that there was no consensus on the requirement of the unanimity of the permanent members for decisions of the Council.

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[21] Working group on the reform of the Security Council, during the consideration of the question of the veto, http://www.globalpolicy.org.

[22] UNCIO 1945, v.11, Statement by the Delegations of the Four Sponsoring Governments on Voting Procedure in the Security Council. It is widely reproduced as the Statement by the Sponsoring Governments on Security Council Voting. The government of France, which was not a sponsor of San Francisco but was included by the Charter among the permanent members, noted at the time that it, associates itself completely with the Four Power Statement, Hurd Ian, Legitimizing Inequality through Deliberative Procedures: Selling the Security Council at San Francisco 1945, http://www.isanet.org.

[23] When people talk of the Great Powers or the Big Three or Big Four that is: the USA, the UK, and the Sovjetunion before Dumbarton Oaks (the Big Three); those three plus China after Dumbarton Oaks (the Big Four); and those four plus France at San Francisco and after (the Big Five, now the P-5 of the Council).

It is not just the existence of the veto as an institutional requirement of the decision-making processes of the Council, which may prohibit an agreement. The additional institutional decision-making process, which has been provided by the Charter as a fundamental guarantee when the Council is exercising Chapter VII powers, is that the ten non-permanent members can also veto in effect a resolution by voting against a particular resolution. This is the case since art 27(3) requires an "affirmative vote of nine members" for the adoption of a resolution. The provision of the veto in respect of any decisions taken by the Council under Chapter VII seems to have been an important reason why states conferred on the Council the primary responsibility for the maintenance or restoration of peace and the competence to exercise Chapter VII powers.[24]

2.3.2 Use of veto

The veto has been used very moderately, lately. However this was not the case before 1990. The end of cold war cast almost 280 vetoes cast in the SC. Of those almost 50% were either to block applications for membership to the UN or to block appointment of Secretaries General. Almost 10% were cast to block resolutions directed against a permanent member. The other 40 % were cast in relation to different conflicts in the world.[25]

After 1990 the number of vetoes expressed in the SC reduced considerably. However, the "threat" of veto continues to be a crucial element in the Council's decision-making process. Managing, by the mere threat of veto, to block Council action, the permanent members need not any more to expose themselves to the public opinion and general membership of the UN. They do not have to express and explain a negative vote in a public meeting of the SC.

[24] Application for Review case, ICJ Reports (1973), p. 166.
[25] Monteiro António, Decision-making process in the UN, speaker notes, UN Course, 2000.

3 International Court of Justice

The International Court of Justice, often called the World Court, is the primary judicial organ of the United Nations. Its basic instrument, the Statute of the International Court of Justice, is an integral part of the Charter of the UN, which is a treaty that supersedes all other treaties and which forms basis for the UN's function of maintaining international peace and security. Therefore all member states are by definition parties to the Statute of the Court. However the Court does not have compulsory jurisdiction, therefore are states not legally obliged to bring a case to the Court, nor are they obliged to enforce the decisions of the Court. The Court's rulings do however have powerful political and, indirectly, judicial consequences. Article 36(3) gives a power to the Security Council to recommend parties to a legal dispute to refer it to the Court, but these recommendations of the Security Council are not legally binding.[26]

The optional clause, article 36(2) of the Statute states:

> "The state parties to the present statute may at any time declare that they recognise as compulsory ipso facto and without special agreement, in relation to any other state accepting the same obligation, the jurisdiction of the court in all legal disputes concerning: (a) the interpretation of a treaty; (b) any question of international law; (c) the existence of any fact which, if established, would constitute a breach of an international obligation; (d) the nature or extent of the reparation to be made for the breach of an international obligation."

This provision was intended to operate as a method of increasing the Court's jurisdiction. Today, about one-third of state parties to the Statute have accepted the jurisdiction of the Court under the optional clause. The declarations are submitted to the UN Secretary General, and once a state has made it, it is compulsory and the state has a right to bring to the Court any other state which accepting the same. The effectiveness of article 36(2) depends on how many states that make such a declaration, therefore is the current situation not ideal.

The reasons for this unpopularity of accepting jurisdiction of the Court are rather obvious. States may be reluctant to go to the Court because they prefer other tribunals which are more informal, and thus cheaper and faster or more specialised. Also, a state, which is newly independent, might be unwilling to accept unfamiliar obligation. However, there is more significant problem for the reluctance of state parties appearing before the ICJ is rooted in general distrust for legal settlement. This does not mean that

[26] Hochhauser Karen, Chief of International Court of Justice, http://www.yu.edu.

states want to break international law, but it could be said that the existence of the courts may be effective as prevention of breaking international law.[27]

Article 36(3) permits reservations in relation to reciprocity and reservations in relation to time. Actually reservations of other types are also made and have usually been accepted. Most of declarations accepting optional clause are on the reciprocity basis. It means that a state cannot enjoy the benefit of optional clause unless it is prepared to accept it. In practice, other reservations have been successfully accepted as valid. From past examples, one possible exception was there in the case of automatic reservations, for example, "reservations whose scope is to be determined by the reserving state, for instance, a reservation excluding the Court's jurisdiction over all matters within the domestic jurisdiction of state X, as determined by state X". Furthermore, since the reservation could not be broken off from the rest of the acceptance, the invalidity of reservation involved the invalidity of the whole acceptance itself. These reservations are called escape clause, which is included in the requirement of matter and they are reservation for total abolishment, reservation for partial abolishment which allows to alter, add, withdraw the contents of acceptance of declaration and lastly, automatic reservation clause.[28]

3.1 International Court of Justice acting as the principal judicial organ of the United Nations

The Charter of the UN provides that the ICJ shall be the principal judicial organ of the UN. The Court has therefore been endowed with a special, and the most senior, judicial position within the UN system. As domestic legal systems have a Supreme Court, the international community has its principal judicial organ. But the ICJ is not, or at any rate is not now, a Supreme Court of Appeal from other international judicial bodies, and still less a Court of Appeal from national courts. At the San Francisco meeting 1945, it was recognised that each organ would be responsible for interpreting those parts of the Charter applicable to its functions. The Court itself has clearly stated:

> "In the legal systems of States, there is often some procedure for determining the validity of even a legislative or governmental act, but no analogous procedure is to be found in the structure of the United Nations. Proposals made during the drafting

[27] Egusa Takako, Modern International Law imposes a general duty upon states to settle disputes peacefully, but leaves states entirely free as to the choice of means. Explain and discuss. Department of International Studies and Diplomacy School of Oriental and African Studies, The University of London, January 1999.
[28] Egusa Takako, Modern International Law imposes a general duty upon states to settle disputes peacefully, but leaves states entirely free as to the choice of means. Explain and discuss. Department of International Studies and Diplomacy School of Oriental and African Studies, The University of London, January 1999.

> of the Charter to place the ultimate authority to interpret the Charter in International Court of Justice were not accepted."[29]

While not acting as a Court of Appeal, the ICJ has acted as the principal judicial organ of the UN in more than one way. First of all, the Court contributes to the peaceful settlement of international disputes in furtherance of the first purpose of the UN:

> "To bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes which might lead to a breach of the peace?"[30]

A primary way in which the Court performs as the principal judicial organ of the UN is as a factor and actor in the maintenance of international peace and security. Today the Court is integrated into the UN system of the peaceful settlement of international disputes. The Court is no longer seen solely as "the last resort" in the resolution of disputes. States rather may have recourse to the Court in parallel with other methods of dispute resolution, appreciating that such recourse may complement the work of the SC and the GA as well as bilateral negotiations. Since the Council's powers are not entirely unlimited and may be exercised unconstitutionally the question has been raised concerning the legal authority for judicial control. Both the Charter and the Statute are silent in this respect.[31]

Only states can initiate contentious proceedings. Certain non-state entities can only request advisory opinions. Well known cases brought before the Court by parties other than states have included the request by the World Health Organization for an advisory opinion on whether, given their serious, permanent and inherently indiscriminately long term health consequences, nuclear weapons were illegal weapons of war. Another such case was brought by the General Assembly in response to USA legislation that would have led to the closure of the PLO mission to the UN. The Court delivered an advisory opinion on its interpretation of the Headquarters Agreement signed between the USA and the UN, and stated that the USA was obliged to submit this matter to arbitration and could not act unilaterally to suspend the activities of a UN mission.[32]

In this combined process of dispute resolution, judicial recourse has helped parties to a dispute to clarify their positions. Parties are led to reduce and transform their sometimes-overstated political assertions into factual and legal claims. This process may moderate tensions and lead to a better and fuller understanding of opposing claims. The result is that, in some cases,

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[29] Certain Expenses Case, ICJ Reports (1962), at 168.
[30] A/RES/44/23.
[31] Address by the president of the International Court of Justice, Judge Stephen m. Schwebel, to the General Assembly of the United Nations 27 October 1998.
[32] Hochhauser Karen, Chief of International Court of Justice, http://www.yu.edu.

political negotiations have resumed and succeeded before the Court rendered judgement. In other cases, the Court's decision has provided the parties with legal conclusions, which they may use in framing further negotiations and in achieving settlement of the dispute. There have been a number of examples of political and judicial resolution of disputes working in parallel.

The most recent such instance is the current case of the Land and Maritime Boundary between Cameroon and Nigeria. When armed incidents occurred between Cameroon and Nigeria in 1996 in the Bakassi Peninsula, both the Organisations for African Unity (OAU) and the SC was seized with the dispute. At the same time, one of the parties to the dispute brought it before the Court and requested it to indicate provisional measures, to order interim measures of protection or an interim injunction. As a result, both the SC, through a statement of its president, and the Court, in an order indicating provisional measures, called on the parties to respect a cease-fire and to take the necessary steps to return their forces to the positions that they had occupied before the outbreak of fighting.[33]

To turn to the second way in which the Court acts as the principal judicial organ of the UN, and of the world community as a whole, it is the most authoritative interpreter of the legal obligations of states in disputes between them. This indeed is its paramount function, and it antedates the establishment of the UN. This central role of the Court as the adjudicator of contentious differences between states represents over 70 years of achievement in settling international legal disputes.

In the third place, the Court as the organisation's principal judicial organ has acted as the supreme interpreter of the UN Charter. It has been the authoritative interpreter of the legal obligations of states under the Charter. The Court has done this in a number of advisory and contentious proceedings. It has interpreted a voluntary abstention by a permanent member of the SC as not debarring adoption of a resolution. Challenging questions of the interpretation of the Charter are currently before the Court, including the boundaries between the powers of principal bodies of the UN. The cases brought by Libya against the UK and the USA raise issues of the relationship between SC resolutions adopted under Chapter VII of the Charter and the judicial role of the Court.[34]

While the Court and other principal bodies of the UN may work together, it is vital that the judicial independence of the Court is maintained. That is a matter of some delicacy. The Court is bound to give due weight to the powers, practice and positions of other UN bodies, and particular weight to decisions of the SC taken under Chapter VII of the Charter. But in deciding

[33] Case Concerning the Land And Maritime Boundary Between Cameroon and Nigeria, ICJ Reports (2002).
[34] Address by the president of the International Court of Justice, Judge Stephen m. Schwebel, to the General Assembly of the United Nations 27 October 1998.

on the law, the Court is and must remain free of the political influence of the UN as it is bound to remain free of the political influence of any of its members.

Finally, there is another characteristic that distinguishes the International Court of Justice from specialised and regional international tribunals. The Court is the only truly universal judicial body of general jurisdiction. Unlike specialised judicial and arbitral bodies, the Court enjoys comprehensive jurisdiction in inter-state disputes. Unlike bilateral or regional bodies, the Court is available to all states of the international community, on all aspects of international law. The Court's decisions, large and small, general and particular, may have an influence beyond the parties in dispute and beyond the issues in dispute. The Court has contributed to the growth of international law, to a universal system of international law. Over the years, the Court has interpreted, refined and advanced principles of international law that govern the whole of international society. It is inevitable that other international tribunals will apply the law whose content has been influenced by the Court, and other international tribunals may influence that the Court will apply the law as it. At the same time, it is possible that various Courts may arrive at different interpretations of the law. Proliferation risks conflict. But the risk should not be exaggerated. While in principle there is a single system of international law, in practice there are various views on issues of the law, and not only between international tribunals and among other authoritative interpreters of the law. There are differences within the International Court of Justice itself. That is marked not only by separate and dissenting opinions, but also in adjustments of the holdings of the Court over the years. In practice international courts may be expected to demonstrate due respect for the opinions of other international courts.[35]

3.2 Provisional (Interim) measures

Before the tribunal starts, the Court generally must concern some preliminary objections. Often defendant states plead by way of this objection that the Court is lacking jurisdiction to examine the case. About preliminary objections, when it is decided that the Court lacks the jurisdiction to try the case, the proceedings would not be come along. In addition, interim protection may be awarded under the provision of article 41 of the Statute.

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

[35] Address by the president of the International Court of Justice, Judge Stephen m. Schwebel, to the General Assembly of the United Nations 27 October 1998.

If it is awarded, a complicated problem may occur in the light of the jurisdiction, which is not concluded at that time. The application of interim measures should have top priority over all cases so that it should be judged previously the issue of jurisdiction. "In making interim indications, which are heard first, the Court has to be satisfied that there is a prima facie basis for jurisdiction".[36] What constitutes prima facie jurisdiction within the context of a specific case is still in the process of development.

The Court will only indicate provisional measures if the circumstances so require in order to prevent a possible irreparable prejudice to substantive rights of either party. This means that a degree of urgency at least implicitly underlines a positive response by the Court to a request for provisional measures. The basic object of provisional measures could best be described as the maintenance or restoration of the status quo. The Court's rules and practice require that a request for the indication of provisional measures will take priority over any other proceeding or activity of the Court. Court orders indicating provisional measures are in themselves neither legally or practically enforceable by the SC. However a state, which disregards them, "acts at its peril (in the sense) that the Order must be regarded at least as a warning estopping a party from denying knowledge of any probable consequences of its action."[37]

3.3 Advisory opinion

The normal legal safeguards one would expect to find surrounding the exercise of executive powers in a democratic, constitutional system do not reinforce the apparent expectation that the Council will function under the rule of law. There is no judicial review of Council decisions and no provision for third-party settlement of disputes between the Council and a member. The Council could agree to arbitration with a member, but has never yet done so, and even the power to request an advisory opinion has been used very seldom by the Council, an example is the Namibian case 1971.[38] In article 96 of the Charter the SC has the opportunity to ask the Court for advisory opinion.

> "1. The General Assembly or the Security Council may request the International Court of Justice to give an advisory opinion on any legal question.
>
> 2. Other organs of the United Nations and specialized agencies, which may at any time be so authorized by the General Assembly, may also request advisory

[36] Egusa Takako, Modern International Law imposes a general duty upon states to settle disputes peacefully, but leaves states entirely free as to the choice of means. Explain and discuss. Department of International Studies and Diplomacy School of Oriental and African Studies, The University of London, January 1999.
[37] Lauterpacht Hersch, The Development of International Law by the International Court, Praeger, 1958, p. 254.
[38] Advisory opinion on the Legal Consequences for States of the Continued Presence of South Africa in Namibia, Notwithstanding SC Res. 276 (1970), ICJ Reports (1971).

> opinions of the Court on legal questions arising within the scope of their activities."

The difficulties with advisory opinion are well known. No state can, itself, request an opinion, so the procedure presupposes the state in question obtains the support of a majority of the Council, including the permanent members, or a two-thirds majority of the GA. An isolated or unpopular state will find this difficult. Moreover, in principle, the opinion, once given, is not binding. The risks of the state which has sought the opinion taking that view are perhaps slight, but the risks are real enough where the Council is concerned unless the Council has committed itself in advance to accept the opinion as binding.[39]

3.4 Jus Cogens

The evolution of international law has included the emergence of an international public policy, which sets limits on the kinds of rights that can be overridden by the Council. Some limits have been set by the application of article 103 by the operation of jus cogens.

> "Article 103: In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail."

Judge Lauterpacht referred in his separate opinion on the Bosnia-Herzegovina Case, to article 103 and jus cogens, he stated:

> "The prohibition of genocide, unlike the matters covered by the Montreal Convention in the Lockerbie case, to which the terms of Article 103 could be directly applied, has generally been accepted as having the status not of an ordinary rule of international law but of jus cogens… The relief, which Article 103 of the Charter may give the Security Council in case of conflict between one of its decisions and an operative treaty obligation cannot, as a matter of simple hierarchy of norms, extend to a conflict between the Security Council resolution and jus cogens."[40]

The Court has faced the problem of potential incompatibility between the SC resolution on sanctions and certain basic norms of international law, for example the right of self-defence and the prohibition of genocide. In the Courts opinion on the Namibia case, the Court, by addressing the question that was put to it, was led to interpret SC resolution 276 (1970) and in doing so, the Court defined the outer limits of its application. It held that the obligations of states under the resolution, not to enter into treaty relations

[39] Bowett Derek, The Impact of Security Council Decisions on Dispute Settlement Procedures, http://www.ejil.org/.
[40] Bosnia-Herzegovina case ICJ Reports (1993), at 440.

with South Africa, could not be applied to certain general conventions such as those of humanitarian character.[41]

Ultimately, interpretation of the Charter involves the Court in an exercise that engages its dual responsibilities. As a principal organ of the UN, it is bound by the purposes and principles of the Charter and as an independent judicial organ; it is also bound to apply international law. There are important limitations to the role the Court can play in matters of interpretation and review of the validity of UN resolutions. First the Court must have a jurisdictional basis enabling it to pronounce on the validity of the UN resolutions. For a resolution requesting and advisory opinion requires the support of a majority in the organ making the request. Therefore its unlikely that the question put to the Court will touch directly on the validity of a resolution adopted by the same majority, although there may be situations in, which the organ concerned, seeks the Court's legitimisation of the measures it has instituted. Secondly the Court's competence to pronounce on the constitutionality of UN resolutions is undoubted, but the question of the opposability or authoritative nature of the Court's conclusions is another matter. For an example an advisory opinion is of course advisory, although it could be argued that since it is based on international law and the Charter, it is a declaratory of existing law and in that sense mandatory for the bodies and states concerned. Moreover it may formally be accepted and endorsed by the organ that requested it.[42]

3.5 Delegation of powers and the International Court of Justice

It must be emphasised that the effect of an invocation by states of the elements of the legal framework governing a delegation by the Council of its Chapter VII powers will often depend on the other, often political, considerations that the Council takes into account when making decisions. This does not, however, detract from the restraints, which the legal framework governing the process of a delegation of powers places on the Council when engaged in this activity. As explained above, the decision by the SC when and how to carry out Chapter VII enforcement powers is a matter of political discretion which the Charter leaves solely to the Council. It is accepted that the ICJ should not seek to interfere in the exercise by the Council of this political discretion. However, it is not the exercise of political discretion, which is at the heart of the determination of the legality of a purported delegation of Chapter VII powers by the Council. The Council possesses discretion in this regard, but the point is that the exercise of this discretion does not take place outside our legal framework. As Brownlie has stated:

[41] Namibia case, ICJ Reports (1971), at 55-56.
[42] Gowlland-Debbas Vera, The Relationship between the International Court of Justice and the Security Council in the Light of the Lockerbie Case, American Journal of International Law 88, 1994, p 671-673.

> "there is no dichotomy involving discretionary power and the Rule of Law. A discretion can only exist within the law. . . . [The] conclusion must be that the Security Council is subject to the test of legality in terms of its designated institutional competence."[43]

As described above, the Charter and the wider law of international institutions place certain limitations on the exercise by the Council of its general competence to delegate Chapter VII powers. In addition to these limitations on the general and specific competencies of the Council to delegate Chapter VII powers, there are limitations, which attach to the exercise of the power depending on the nature of the delegate. It is these sets of limitations, which provide the objective criteria by which the legality of a delegation by the Council of its Chapter VII powers is to be judged and, moreover, may allow the Court to rule on the legality of an exercise by a delegate of Chapter VII powers. Such review is an important way that the Court can defend the legitimacy of the UN system for maintaining or restoring international peace and security. The use of this mechanism is not, however, unproblematic. The review of the legality of decisions of principal bodies by the Court can only proceed once the Court has established some basis for its jurisdiction in accordance with article 36 of its Statute. If, however, the Court finds that it does and that it has some basis for asserting its jurisdiction in a particular case, then the legal framework governing the process of a delegation of powers and the exercise of these powers may well provide an important corpus of law by reference to which the Court can review the legality of action by the SC and its delegates.[44]

[43] Brownlie Ian, The Decisions of Political Bodies of the United Nations and the Rule of Law, in Essays in Honour of Wang Tieya, Macdonald, R. St J., ed. 1993, p. 91.
[44] The General Legal Framework, Governing the Process of a Delegation by the UN Security Council of its, Chapter VII Powers, http://www.oup.co.uk.

4 Distinctions between the Court and the Council

4.1 Basic differences

Since the Statute forms an integral part of the Charter, the two instruments must be interpreted together as an integral whole. The Court clearly sees the Charter and its Statute as having intended a clear separation between it and the SC as regards the pacific settlement of disputes. There are some fundamental differences in nature and methods of operation. Looking at the responsibility of the two bodies, article 92 of the Charter states that the Court is the principle judicial organ of the UN. The Court is set up to function in accordance with the annexed Statute. The SC is the organ with primary responsibility for the maintenance of international peace under article 24 of the Charter. The composition of the two organs is totally different. The impartial judges of the Court are elected regardless of their nationality. In the SC governmental representatives render their decisions in that capacity, of nationality and governmental adherence, even when they are making legal decisions. Looking at methods of operation, you'll find that both bodies are entrusted with the function of peaceful settlement of disputes, but there is a distinction between their methods of operation. The Court is concerned with third-party adjudication of disputes and the basis of its jurisdiction is the consent of the parties, expressed in a variety of ways. The Court function, under article 38 of the Statute, is to decide, in accordance with international law, disputes brought before it by states, and the proceedings are legal proceedings.[45]

The SC can, in the contrast from the Court, under Chapter VI of the Charter, on its own initiative, investigate any dispute or situation that might lead to international friction, or give rise to a dispute, to determine whether its continuance is likely to endanger the maintenance of international peace and security. It may recommend appropriate procedures and methods of adjustment, or it may recommend terms of settlement for such disputes that the parties have failed to settle by other means. The Charter also enables any member of the UN, not only the parties to the dispute concerned, to bring to the Council's attention any dispute or situation referred to in article 34.[46] The Council is not bound by judicial proceedings, nor need it apply international law in recommending such terms of settlement, as it may consider appropriate. Although, under article 1 (1) of the Charter,

[45] Gowlland-Debbas Vera, The Relationship between the International Court of Justice and the Security Council in the Light of the Lockerbie Case, American Journal of International Law 88, 1994, p 653.
[46] Gowlland-Debbas Vera, The Relationship between the International Court of Justice and the Security Council in the Light of the Lockerbie Case, American Journal of International Law 88, 1994, p 654.

adjustment or settlement of international disputes or situations that might lead to a breach of the peace is to be brought about in conformity with the principles of justice and international law and article 2 (3) obliges members to settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered.

The Court has in its jurisprudence contrasted the expediency that characterises the work of the political organ with the judicial integrity of the ICJ. It stated that:

> "The main function of a political organ is to examine questions in their political aspects… It follows that the members of such an organ…are legally entitled to base their arguments and their vote upon political considerations."[47]

The legal nature of the powers of the Court and the SC, with regard to the terms of settlement is different. The Court has the power to issue binding decisions, though only for the parties and in respect of the particular case, whereas the Security Council may only recommend, under article 37 (2) or 38 of the Charter, procedures or terms of settlement, which are not binding.

4.2 The hierarchy between the two bodies

The absence of a clear hierarchy between the two bodies has been a problem for a long time. The matters concerning international peace and security lie within the exclusive competence of the SC and the Court must defer to the Council. But in its jurisprudence, the Court has rejected both assertions.

> "It does not seem to have occurred to any member of the Council that there was or could be anything irregular in the simultaneous exercise of their respective functions by the Court and the SC…. The reasons are clear. It is for the Court, the principal judicial organ of the United Nations, to resolve any legal questions that may be in issue between parties to a dispute; and the resolution of such legal questions by the Court may be an important, and sometimes decisive, factor in promoting the peaceful settlement of the dispute."[48]

The Court has maintained that there can be no hierarchy between the Court and the Council. Passage of resolutions by the SC and even the establishment of a fact-finding commission by the SC do not prevent the Court from exercising its judicial functions.[49] The Court has pointed out that even though the GA is expressly forbidden by article 12 of the Charter to make any recommendations with regard to a dispute or situation while the

[47] The Membership case, ICJ Reports (1984) at 85.
[48] Hostages Case, ICJ Reports (1980) at 21-22.
[49] Lockerbie case, ICJ Reports (1992) at 20-21, 132-133.

Security Council is exercising its functions in respect of that dispute or situation, no such restriction is placed on the Court.[50] This position was also taken by the USA at the time of the Tehran hostages' crisis when they stated that there is absolutely nothing in the UN Charter or in the Court's Statute to suggest that action by the Security Council excludes action by the Court, even it the two actions might in some respects be parallel.[51]

The SC and the ICJ exercise their competences independently. The principles of lis pendens, connexity and res judicata are not applicable to the relationship between the two bodies. With regard to a possible distinction between legal and non-legal questions, there are no matters that are, by their nature, excluded from judicial review. The relationship between the SC and the ICJ is characterised by functional parallelism. In the exercise of their competences both bodies must act in consideration of each other's interest, and not impede each other in their action. Judicial review of the legality of SC decisions is both possible under procedural law and permitted under constitutional law of the UN. There can be principal as well as incidental control. In contentious proceedings such control is only possible if the decision in question affects the legal relationship between the parties. The GA and the SC have the right to request an advisory opinion on the legality of a SC decision. Because of the discretion granted to the SC when acting under Chapter VII of the Charter, the standard of judicial review is limited.[52]

Neither the SC nor the Court appear to have adopted the position that the simultaneous submission of closely related aspects of a multifaceted dispute to both the judicial and political machinery of dispute settlement, automatically precluded either organ from seizing itself of the matter at hand. The exception is when the SC exercises its enforcement powers under Chapter VII of the Charter and chose to put an end to the Court's jurisdiction for pressing reasons.[53]

[50] Hostages Case, ICJ Reports (1980) at 22.
[51] ICJ Pleadings (1980), USA Diplomatic and Consular Staff in Tehran at 25, 29.
[52] Fassbender Bardo, Review Essay: Quis judicabit? The Security Council, its Powers and its Legal Control, http://www.ejil.org.
[53] Gill Terry D., Litigation Strategy at the International Court –A Case Study of the Nicaragua v. United States Dispute, Martinus Nijhoff Publishers, 1989, p. 28.

5 Legal and political disputes

5.1 Introduction

The relationship between the ICJ and the SC may be approached from the perspective of the Charter and the way it delimits competence's between the two principal bodies and regulates the exercise of their concurrent powers. The Court however has a dual ambivalent role. It is not only the principal judicial organ of the UN under article 92 of the Charter, it is also an autonomous adjudicative body with the function of applying international law to such disputes between states as is brought up before it. Viewed in the light of the Lockerbie case, the relationship between the judicial and the political organ raises some fundamental questions of general international law that go beyond UN constitutional issues. The Lockerbie case therefore provides a convenient point of departure for examining this relationship and I will come back to that case later on.

Concurrent jurisdiction of political and judicial bodies is made possible by the constituent instruments themselves. The Charter provides in article 35 (1) that any member of the UN may bring to the attention of the SC any dispute, or any situation, likely to endanger the maintenance of international peace and security. At the same time article 36 (1) of the Court's Statute, states that the jurisdiction of the Court comprises all cases, which the parties refer to it, and all matters specially provided for in the Charter of the UN or in treaties and conventions in force. The Court has tried to clarify it by saying that dispute is a disagreement on a point of law or fact. The Court is aware that political actors might be presented in any dispute before it, but it wish to first establish that it is a legal dispute, that it could be settled through international law and that the Court has jurisdiction to deal with it. So the political aspects of disputes should not really prevent their referral to the Court.[54]

5.2 Legal and political disputes

There has been a traditional doctrine based on an alleged distinction between legal and political disputes, justiciable and non-justiciable disputes and disputes as to rights and disputes arising out of conflicts of interest.

[54] Gowlland-Debbas Vera, The Relationship between the International Court of Justice and the Security Council in the Light of the Lockerbie Case, American Journal of International Law 88, 1994, p 648.

5.2.1 Dispute definition

A dispute has been defined as a disagreement on a point of law or fact, a conflict of legal views or of interest between two persons.[55] It must be shown that the claim of one party is positively opposed to the other.[56] The subject of the dispute should be specific and finally one party has lodged a specific claim against the other party and the latter has rejected it.[57] The doctrine holds that there are certain categories of international disputes that by their very nature are not appropriate for judicial settlement. This doctrinal distinction has been utilised both, as a cloak for the sovereign state to retain ultimate control over the kind of disputes it will submit to international adjudication, and as encouragement for it to submit to compulsory third-party adjudication by limiting the categories of disputes to be covered.

5.2.2 Legal or political dispute definition

There appears to be little agreement on the meaning of the term's legal or justiciable disputes. The attempts to find a solution to the problem have found the way in treaty law in relation to the development of international arbitration, beginning with article 16 and 38 of the 1899 and 1907 Hague Convention for Pacific Settlement of International Disputes. They were based on the view that acceptance in principle of disputes settlement through voluntary submission to arbitration would serve as a substitute for war.[58] The article states that:

> "In questions of legal nature, and especially in the interpretation or application of international conventions, arbitration's is recognised by the Contracting Powers as the most effective and, at the same time, the most equitable means of settling disputes which diplomacy has failed to settle."

The term legal dispute can also be found in the UN Charter and the Statute of the ICJ; however nowhere in the Charter can a definition of the term legal disputes be found. Article 33 (1) of the Chapter VI of the Charter, confers freedom of choice by specifying a wide range of means by which parties to disputes whose continuance is likely to endanger the maintenance of international peace and security are to seek a solution, of which judicial settlement is only one. Article 36 (3) states that the SC should take into consideration, when they are dealing with recommending appropriate procedures or methods of adjustments, that legal disputes should as a

[55] Mavrommatis Palestine Concession, PCIJ Reports, 1924, at 11.
[56] South West Africa cases, ICJ Reports (1962) at 328.
[57] Damrosch Lori, The International Court of Justice at a Crossroads, Transnational Publishers, 1987 p. 245.
[58] Gowlland-Debbas, Vera, The Relationship between the International Court of Justice and the Security Council in the Light of the Lockerbie Case, American Journal of International Law 88, 1994, p 649.

general rule be handed over to the ICJ. Article 96 of the Charter and 65 (1) of the Statute entitle the Court to give advisory opinion on any legal question at the request of the GA or the SC, or other authorised bodies.

Article 36 (2) of the Statute offers a definition of the term in the form of an enumeration of categories of disputes, but only in connection with acceptance of the compulsory jurisdiction of the Court by means of unilateral declarations. This enumeration is considered to describe, rather than qualify, the term of legal dispute.[59]

5.2.3 To determine the dispute and the body of settlement

The issue to determine whether a dispute is legal or political is very difficult and many times can such distinction not be made. The Court said in the Hostages case that:

> "Legal disputes between sovereign states by their very nature are likely to occur in political contexts and often form only one element in a wider and long-standing political dispute between the states concerned. Yet never has the view been put forward before that, because a legal dispute submitted to the Court is only one aspect of a political dispute, the Court should decline to resolve for the parties the legal questions at issue between them."[60]

The Court has also stated in the Nicaragua case "the Court has never shied away from a case brought before it merely because it had political implications". That was the reason why the Court rejected the USA contention that the Court could not have jurisdiction over an ongoing armed conflict or the inherent right to self-defence because these issues.[61]

The Court has expressed this statement in advisory opinions, holding that it could not attribute a political character to a request inviting it to undertake an essentially judicial task, such as, for example, the interpretation of a treaty provision.[62]

This does not mean, however that the Court has not exercised discretionary power to refuse to deal with a case on the basis of judicial propriety. The distinction between legal and a political question lies not, according to many people specialised in international law, in its inherent nature but in its distinction between a political and a legal method of solving the dispute. Kelsen ones explained it "that the legal or political character of a dispute

[59] Gowlland-Debbas, Vera, The Relationship between the International Court of Justice and the Security Council in the Light of the Lockerbie Case, American Journal of International Law 88, 1994, p 651.
[60] Hostages Case, ICJ Reports (1980) at 20.
[61] Nicaragua Case, ICJ Reports (1984) at 435.
[62] Admission of a State to the United Nations, ICJ Reports (1948) at 57, 61 and Competence of Assembly regarding admission to the United Nations, ICJ Reports (1950) at 4, 6-7.

does not depend, as the traditional doctrine seems to assume, on the nature of the dispute, that is to say on the subject matter to which the dispute refers, but on the nature of the nature of the norms to be applied in the settlement of the dispute. A dispute is a legal dispute if it is to be settled by the application of legal norms, that is to say, by the application of existing law."[63]

International issues have often both political and legal aspects. The Court demonstrated as early as 1949 in the Corfu Channel case an active approach in such a situation.[64] In that case, however, the SC undoubtedly intended that the Court should deal with the whole situation.[65] In most other situations where the SC and the ICJ addressed the same events, the approach has been different. In the United States Diplomatic and Consular Staff in Tehran case the Court held that both proceedings could be pursued pari passu:

> "... it does not seem to have occurred to any member of the Council that there was or could be anything irregular in simultaneous exercise of their respective functions by the Court and the Security Council."[66]

In 1986 the Court addressed the question of simultaneous proceedings in the contentious context of the preliminary objections of the USA in the case concerning military and paramilitary activities in and against Nicaragua. In that judgement on the preliminary objections the Court explained that the Charter confers primary and not exclusive responsibility upon the SC for the purpose of the maintenance of international peace and security. The Court then continued and stated:

> "The Council has functions of political nature assigned to it whereas the Court exercises purely judicial functions. Both bodies can therefore perform there separate but complementary functions with respect to the same events."[67]

As these few examples demonstrate, the situations of parallel pursuit of the separate but complementary functions of the ICJ and the SC with respect to the same events are not new. There is no conflict of jurisdiction involved. The Charter requires from those who interpret and implement it to keep this in mind and refrain from interpretations by which activities of either of these two principal UN bodies would prejudge the exercise of functions of the other. This is of paramount importance for the functioning of the UN system. The Court acted in conformity with this separation of powers when,

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[63] Kelsen Hans, Principles of International Law, R. W. Tucker ed., 1966, p 526.
[64] Reparations case, ICJ Reports (1949) at p. 4.
[65] Reparations case, ICJ Reports (1949) p. 26.
[66] Hostages case, ICJ Reports (1980) at p.21, para.40.
[67] Nicaragua case, ICJ Reports (1986), pp.434-435, para.95.

in its orders of 14 April 1992, it rejected the Libyan request for indication of provisional measures.[68]

There are basically three factors that can determine whether or not an international legal dispute could be brought before the ICJ as a contentious matter namely, the scope of the declaration of acceptance by a state in relation to any other state accepting the same obligation of the ICJ's compulsory jurisdiction under article 36 (2) of the Statute, the existence of any treaty provision or agreement between the parties accepting the Court's jurisdiction with regard to disputes that may arise between them, or the willingness of the states parties to a dispute to submit the issues to the ICJ without raising objections to its jurisdiction.[69]

5.3 Justiciable and non-justiciable disputes

To a certain degree a state may subjectively determine in establishing the scope of its consent to jurisdiction what kind of disputes it will consider non-justiciable, that is to say, inadmissible to judgement by the Court. The competence of the Court depends on the consent of states expressed in a variety of ways including declarations made under article 36 (2) of the Statute.[70]

The question of justiciable and non-justiciable falls within the scope of the Court's competence ratione materiae, in a matter of disagreement as to whether an international dispute is or is not justiciable, article 36 (6) of the Statute provides that the issue should be decided by the ICJ. The concept of justiciability can embrace all disputes. The distinction between political and legal disputes must not necessarily be made by reference to the legal or political nature of the matter in dispute. The fact that the dispute may involve high political issues, so-called vital interests, for one or both the parties, will not make the subject matter of the dispute any less legal.[71]

[68] S/23306, S/23307, S/23308, S/23309 and S/23317.
[69] Damrosch Lori, The International Court of Justice at a Crossroads, Transnational Publishers, 1987, p. 245.
[70] Nicaragua Case, ICJ Reports (1984) at p. 44.
[71] David Davis, Memorial Institute of International Studies, Report of Study Group, International Disputes: The Legal Aspects, 1922, p. 6-7.

6 The Expenses case

In the Expenses case, France had introduced an amendment to the General Assembly resolution requesting an advisory opinion that would have put the question of the validity of GA and the SC resolutions directly before the Court. In 1961, the Assembly requested an advisory opinion from the Court on whether member states were responsible for expenses relating to UN operations in the Congo in 1960 - 61 and in the Middle East in the 1950s. This was because article 17(2) of the Charter provides that the "expenses of the Organisation shall be borne by the Members as apportioned by the General Assembly." The legal question was whether the expenses in the Congo and the Middle East fit within the meaning of this article.

The opinion of the Court in this case has often been cited in support of the view that each organ within the UN system must determine its own jurisdiction. The Court was asked to examine incidentally various resolutions of the GA and the SC for the purpose of interpreting article 17, paragraph 2, of the Charter. There is no suggestion here of a general power of review of decisions of either organ. On the contrary, the Court stated,

> "In the legal systems of States, there is often some procedure for determining the validity of even a legislative or governmental act, but no analogous procedure is to be found in the structure of the United Nations. Proposals made during the drafting of the Charter to place the ultimate authority to interpret the Charter in the International Court of Justice were not accepted; the opinion which the Court is in the course of rendering is an advisory opinion. As anticipated in 1945, therefore, each organ must, in the first place at least, determine its own jurisdiction."[72]

The Court went on to stress that it was engaged in rendering an advisory opinion. It also emphasised that, when the organisation takes action on the basis of an assertion that the action in question is appropriate for the fulfilment of one of the stated purposes of the UN, there is a presumption that such action is not ultra vires. Despite this apparently clear statement, there is some support for the view that it is not necessary to interpret this passage as a complete rejection of judicial review by the Court.[73] Stronger arguments in favour of judicial review highlight the Court's referral to a rejected French amendment to the Assembly resolution calling for the Court to decide first whether the expenditures authorised by the Council and the Assembly were in conformity with the Charter. Despite the fact that this request was not sent to the Court in the final version of the resolution, the Court reserved for itself the power to decide if the expenditures were authorised in conformity with the Charter if it so wished.[74] In so doing, the

[72] Certain Expenses Case, ICJ Reports (1962) at p. 168.
[73] Graefrath, Bernhard, Leave to the Court What Belongs to the Court: The Libyan Case, http://www.ejil.org.

[74] Certain Expenses Case, ICJ Reports (1962) at p 153.

Court asserted a power of judicial review in a situation in which the Assembly had clearly opted against offering such power to the Court. This contradiction between the words and actions of the majority of the Court has left some room for debate.

Further support for judicial review is found in the Court's statement that where UN action is for the fulfilment of one of the Conference's stated purposes, "the presumption is that such action is not ultra vires . . ."[75] This would appear to suggest that the Court reserved for itself a right of judicial review when the Council is not acting to fulfil one of its stated purposes, the action thus being ultra vires. This presumption of validity has since served as the Court's standard of review, replacing the drafters' suggested standard of without binding force if not generally acceptable.[76]

In the previous analysis, all arguments in favour of judicial review have been implied from statements of the Court majority, going against their explicit views on the issue. However, Judge Bustamente in his separate opinion categorically rejected any possibility of a complete absence of judicial review, stating that,

> "[i]t cannot be maintained that the resolutions of any organ of the United Nations are not subject to review: that would amount to declaring the pointlessness of the Charter or its absolute subordination to the judgement, always fallible, of the organs."[77]

In the separate opinion of Judge Morelli, it was directly argued that the Court should have a narrow power of review to deal with questions of the validity of the acts of the UN.

> "It is exclusively for the Court to decide, in the process of its reasoning, what are the questions which have to be solved in order to answer the question submitted to it. While… the organ requesting the opinion is quite free as regards the formulation of the question to be submitted to the Court, it cannot, once that question has been defined, place any limitations on the Court as regards the logical processes to be followed in answering it. That organ cannot, therefore, exclude the possibility of the Court's dealing with a question which the Court might consider it necessary to answer in order to perform the task entrusted to it… Any limitation of this kind would be unacceptable because it would prevent the Court from performing its task in a logically correct way… Therefore, even according to the request for advisory opinion, the Court is free to consider or not consider the question of the conformity of the resolutions with the Charter…" [78]

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[75] Certain Expenses Case, ICJ Reports (1962) at p 168.
[76] Roberts Ken, Second-Guessing the Security Council: The International Court of Justice and its Powers of Judicial Review, Pace International Law Review, 1995, http://www.globalpolicy.org.
[77] Certain Expenses Case, ICJ Reports (1962) at 304.
[78] Certain Expenses Case, ICJ Reports (1962) at 217.

Thus, a certain amount of individual support may be found in favour of a power of judicial review in the Certain Expenses case, particularly in a situation in which there is a question of which organ may properly exercise the power. However, support for review power over decisions by the correct organ must be considered to be tempered by the outright rejection of such a power by the Court's majority.[79]

6.1 The possibility of judicial review

Although it seems possible to conclude that the Court currently possesses at most a limited power of judicial review, there is little doubt that there has been a recent trend in support of increasing such a power. As already shown, this support is found in the existing case law and in academic commentary. Support may also be found in other places, such as legal reform bodies. For example, Professor Alain Pellet brought up the issue of whether there should be a power of judicial review over Chapter VII decisions before the International Law Commission in May 1992.[80] He stated that the Court should always satisfy itself as to the legal validity of a Council decision, and that these decisions should at least comply with the norms of jus cogens and should not be contrary to the Charter itself.

While the view favouring expanded powers of judicial review does not as yet have the legal basis to make it law, it is worth considering whether full judicial review could or perhaps should be introduced. If this is to happen by conscious decision rather than by case law based incremental change, it is not simply a matter of deciding that judicial review would be good in principle. Such an increase requires an understanding of how it might best be achieved, the scope of review, problems to be overcome, and the legal effect of a broader review power.[81]

There is also a great issue of election of judges, if the Court would have the possibility of reviewing the Security Council. There is a sense of democratic legitimacy that can be said to differentiate the Court from the domestic situation. However, detractors point out that the election process can be intensely political, and although there is no Charter or Statute provision for it, the permanent members tend to be represented on the Court. There are several points in favour of judicial review at this level. While there is no popular ballot for judges, the election is still more democratic than, for example, the election of Council members. There is no life tenure for these judges. They must step down or run for re-election every nine years.[82] This

[79] Roberts Ken, Second-Guessing the Security Council: The International Court of Justice and its Powers of Judicial Review, Pace International Law Review, 1995, http://www.globalpolicy.org.
[80] A/CN.4/SR.2257.
[81] Roberts Ken, Second-Guessing the Security Council: The International Court of Justice and its Powers of Judicial Review, Pace International Law Review, 1995, http://www.globalpolicy.org.
[82] Statute of the International Court of Justice, article 13.

means that judges can be removed and decisions re-examined. In addition, it is not possible for one country to pack the Court, as it would be contrary to the provisions of the Statute.[83] The problem on this level is a question of encouraging all states to accept the Court's compulsory jurisdiction.

There is little doubt that there exists a solid base of support for the existence of a power of judicial review. However, it is important to distinguish between the desirability of such a power and its legal existence. While the case law shows strong signs that it is desirable, most judges stop short of actually attributing powers of judicial review in Chapter VII situations to the Court. This is because the provisions of the Charter clearly delegate sole authority to determine threats to the peace to the Council, and make its decisions binding by virtue of article 25.

[83] Statute of the International Court of Justice, article 3.

7 USA Diplomatic and Consular Staff in Tehran

7.1 The facts of the case

In Iran on 4 November 1979 student militants seized the USA embassy and the militants, who had completely taken over the embassy premises, held the diplomatic and technical-administrative staff as hostages. At the same time the USA chargé d affaires was detained. When it became clear that the seizure and detainment of the embassy and its staff had the support of the Iranian authorities, the USA government undertook a comprehensive diplomatic effort to restore status quo ante.

The USA first addressed a letter to the president of the Security Council on 9 November 1979 calling for a meeting of the SC. On the same day the president of the SC made an authorised statement calling for the release in the strongest term of the USA diplomatic personnel without delay. A communication by the Iranian foreign ministry of 13 November 1979 accused the USA government of creating a war psychosis in the USA and other Western countries in order to justify an attack on Iran, and also called for a Council meeting to hear the Iranian position on the matter. This position consisted of following demands, recognition of the USA of its guilt in supporting the ex-Shah, restoration to Iran of property and funds of the ex-Shah and members of the imperial family, which had allegedly been illegally transferred or held outside the country.[84]

The Secretary-General acted on the basis of article 99 of the Charter, by addressing a letter to the SC, in which he stated his opinion that the crisis posed a serious threat to international peace and security and urgently requested that the council be convened. The Secretary-General did not qualify in his statement that the seizure of the embassy and its personnel was in violation of international law, the very issue that was to be the essential element of the USA application to the ICJ later on. The USA campaigned and gathered an intense diplomatic offensive and mobilized the international public opinion.

7.2 Actions taken by the Security Council

The SC held several meetings concerning this issue and on the 4 of December the Council passed a unanimous resolution which called upon Iran to release the hostages unconditionally and without delay, as well as calling on both parties to exercise restraint and resolve their differences

[84] UN Yearbook, 1979, at 302.

peacefully.[85] In a statement to the Council following the adoption of its resolution, the USA specifically stated that adoption of the resolution was not intended to displace peaceful efforts in other organs. That it should not have any prejudicial impact on the USA request for provisional measures at the ICJ.[86]

While the USA was proceeding with its action at the Court, it returned to the Council and called for a new meeting because of Iran's failure to comply with the resolution, the Court order and the appeals and efforts of the international community.[87] The USA attempted to marshal support for a reference to enforcement action under Chapter VII of the Charter in the event Iran failed to comply. A second resolution with reference to the possibility of enforcement measures was adopted on 31 December 1979.[88] After the failure of the mediation effort of the Secretary-General, the USA returned to the SC in an effort to obtain enforcement measures under Chapter VII of the Charter in the form of a trade embargo except for food and medicines, and a diplomatic boycott. It soon became clear though that the Sovjetunion would oppose to the imposition of enforcement measures and a USA draft resolution submitted on 13 January 1980 failed to be adopted as a result by a negative vote by the USSR.[89]

7.3 Actions taken by the International Court of Justice

The USA filed on 29 November 1979 a unilateral application instituting proceedings and request for the implementation of provisional measures. The Court was requested inter alia to order the release of the hostages and restore embassy premises to the USA government control.[90] The Court issued a unanimous Order on 15 December 1979, which accedes to the USA request. At the same time as the SC debates and resolution took place, the USA request for provisional measures were pending at the Court and the Court order was issued while the question was still on the Council's agenda.

After an USA abortive rescue attempt of the hostages on 24 of April 1980 the Court's judgement followed on 24 May 1980 concluded by a large majority that Iran had violated the Optional Protocols of the 1961 Vienna Convention on Diplomatic Relations, the 1963 Vienna Conventions on Consular as well as a bilateral Friendship, Consular and Navigation Treaty, the Court also called upon Iran to comply with the terms of the Order of 15 December 1979 and censured the USA for undertaking armed self-help

[85] Resolution 457 (1979).
[86] S/PV 2178 at 3.
[87] S/13075.
[88] Resolution 469 (1979).
[89] S/13735.
[90] ICJ Reports (1979), at. 7.

while case was pending judgement.[91] The dispute was finally resolved with aid of Algerian mediation on 20 January 1981.

7.4 Conclusion drawn from the case

The USA undertook a number of measures, including submission of the question to the SC, the mobilisation of support from friendly and concerned governments and the institution of Court proceedings accompanied by a request for interim measures. The diplomatic offensive combined both political and legal measures and the dispute itself contained both a political and a legal dimension, which were closely interrelated. The submission of the dispute to both the SC and the ICJ within a few weeks after each other had the tactical objects of maintaining momentum in the overall diplomatic offensive, thereby demonstrating to Iran the degree of diplomatic isolation in which it had placed itself.

The overlapping was considerable; the activities by the SC, the Secretary-General and the Court took place at very close intervals, or even simultaneously at various points of the dispute. The SC and the Court acted simultaneously or nearly simultaneously with identical aspects of the same dispute. It did not restrain them for exercising within their respective spheres of activity. Neither organ viewed that they had been affected by measures taken by the other organ. The SC and the ICJ had taken of any measures which it feels is necessary and within its competences. The decision of a political organ to consider a dispute or take action will depend upon the policy issues involved, the degree of diplomatic support that the parties to the dispute can muster for the taking of action and other questions of expediency. The Court will base its action or inaction primarily upon the sources of its jurisdiction.[92]

[91]US Diplomatic and Consular Staff in Tehran, ICJ Reports (1980), at 3.
[92] Gill Terry, Litigation Strategy at the International Court –A Case Study of the Nicaragua v. United States Dispute, Martinus Nijhoff Publishers, 1989 p. 34.

8 The Lockerbie Case

Unlike any previous case, the Lockerbie case has raised questions about the nature and extent of the SC's powers under Chapter VII of the UN Charter. Due to the surrender of the suspects in the 1988 Lockerbie bombing, the International Court of Justice may no longer be in a position to pronounce itself on the validity of the resolutions adopted by the Council in this matter. However, the question of whether SC resolutions can be subjected to judicial review by the Court remains of crucial importance for the constitutional system of the UN.

8.1 The facts of the case

On December 21, 1988, Pan American flight 103 took off from London's Heathrow airport on its transatlantic flight to JFK airport in New York. At 6:56 p.m., at an altitude of 10 000 meters, the plane made its last contact with ground control, seven minutes later it exploded in midair. Her fiery skeleton, laden with the bodies of passengers and crew, rained down on the people of Lockerbie, Scotland. Within the hour, 243 passengers, 16 crewmembers, and 11 townspeople were dead. The plane and most of the passengers were Americans, the village of Lockerbie is in the territory of United Kingdom, and 11 Scottish citizens were killed. The bomb was estimated to have exploded inside British airspace. Between January 1989 and November 1991, a joint USA-Scottish team tracked down leads in fifty countries, questioned 14,000 people, and combed some 845 square miles around Lockerbie. The fruits of their search: a shard of circuit board smaller than a fingernail, a fragment of an explosive timer embedded in an article of clothing, and a few entries in a private diary. These three pieces of physical evidence led investigators to two Libyan nationals, Abbel Basset Ali al-Megrahi and Lamen Khalifa Fhimah.[93]

Nearly three years later, the cumulative evidence led to the indictment of the two Libyan intelligence officers by a federal grand jury in Washington, D.C. The 193-count indictment accusing Fhimah and al-Megrahi with planning and carrying out the Lockerbie bombing represented the most extensive investigation ever conducted for an act of terrorism. Handed down on November 14, 1991, the indictment supplied the final piece of a multinational jigsaw puzzle that took three years to complete. On the same day, a similar indictment was handed down in the United Kingdom.[94]

Although neither formal diplomatic relations nor a bilateral treaty existed between the USA and UK, on the one hand, and Libya, on the other,

[93] Blystone Richard, Remembering the Lockerbie tragedy, http://www.cnn.com.
[94] Plachta Michael, The Lockerbie Affair: When extradition fails are the United Nations' sanctions a solution? (The role of the Security Council in the enforcing of the rule aut dedere aut judicare), http://www.unafei.or.jp.

informal extradition requests were forwarded through the Belgian Embassy to Tripoli. Two weeks later, the two governments issued a joint declaration in which they demanded Libya to surrender for trial all those charged with the crime; and accept responsibility for the actions of Libyan officials; disclose all it knows of this crime, including the names of all those responsible, and allow full access to all witnesses, documents and other material evidence, including all the remaining timers and pay appropriate compensation.

Libya's response to these demands has evolved since November 1991, taking the following forms. The first reaction was predictable, the Libyan government refused to grant extradition, asserting that such an act constituted direct interference in Libya's internal affairs. After a while, Libya started its own judicial investigation. The competent authorities officially instituted criminal proceedings in the case. The Libyan examining magistrate ordered the two suspects to be taken into custody. Later on, Libya went even a step further by offering to admit both the British and American observers to the Libyan trial, or, in the alternative, to have the ICJ determine which nation has the proper jurisdiction. The Libyan government also indicated, at various times, that it might surrender the suspects for trial in a "neutral" forum. Finally, that government suggested that it would not object if the two suspects voluntarily surrender for trial in Scotland.[95] Libya addressed several communications to the SC requesting the co-operation of the UK and the USA in its investigations and declaring its willingness to negotiate. It also expressed its willingness to cooperate to the UN, the Arab League, and the judicial authorities of a third country or an international judicial or arbitral body.[96]

The USA and the UK presented the case before the SC. In January and March 1992, the SC adopted two resolutions in this matter; the first was urging Libya to respond fully and effectively to the requests of the USA and the UK, while the second imposed economic sanctions on Libya. Libya rejected the joint USA/UK claim but, in accordance with the Montreal Convention, initiated prosecution against the two suspects and requested legal assistance from the USA and the UK, even though this was denied. Libya was even willing to accept an international inquiry into the case. The USA and the UK rejected anything less than the fulfilment of their demands for surrender and compensation.[97]

However, there was no obligation on Libya under international law to surrender her nationals to a foreign state. To justify their request the USA and the UK argued that the suspects would not face a fair trial in Libya because allegedly Libya was involved in the terrorist act. This may be true, but it did not provide the USA and the UK with a legal claim to have the

[95] Plachta Michael, The Lockerbie Affair: When extradition fails are the United Nations' sanctions a solution? (The role of the Security Council in the enforcing of the rule aut dedere aut judicare) http://www.unafei.or.jp.
[96] S/23574 (1992), S/23672 (1992).
[97] Lockerbie Case, ICJ Reports (1992), at 94 and 115.

two Libyan nationals extradited or surrendered. The USA and the UK of course assumed that the suspects would be fairly tried if brought before their national Courts, despite all the prejudgements made by their media and their governments.[98]

In the Lockerbie case Judge Shahabuddeen dealt in extenso with this aspect of the claim and concluded that, taking into account the official announcements of the governments and the reparation claim of the UK, these in fact constituted a prior determination that the two accused were guilty. He held that it was nevertheless clear that guilt has already been determined by the UK as a state. It was therefore very questionable whether the suspects would be given a fair trial in the USA or the UK.[99]

Libya submitted the case to the Court on 3 March 1992, which contended that the USA and the UK did not have the right to compel it to surrender two Libyan nationals. Libya argued that the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation signed at Montreal in 1971, hereafter named the Montreal Convention, authorised it to try the suspects itself. The Montreal Convention, which had the purpose of solving the problem of aircraft sabotage, which had become a danger to international peace, gave accordingly to article 7, Libya the right to refuse extradition and prosecute their own nationals in their own territory. Libya complained that the SC, when deciding on the resolutions had arbitrarily abrogated Libya its rights.[100]

The purpose of the Montreal Convention is to prevent attacks against civil aircraft and provide for co-operation between countries when there has been such an attack and to provide appropriate measures to punish offenders. The Montreal Convention deals with for example the exchange of information to prevent unlawful acts against aircraft safety, facilitating the journeys of those who are affected and providing mutual assistance in criminal proceedings. In 1992, however, Libya instituted proceedings against the USA and the UK claiming they had breached obligations under that convention by taking various actions related to Lockerbie including bringing charges by grand juries against the Libyan suspects. The Libyan action purported to seek an interpretation of that treaty by the ICJ that could have invalidated steps taken by the UK and the USA relative to Lockerbie. Libya's position was purportedly based on article 14 of the Convention, which is the key to the ICJ decision[101].

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[98] Judge M. El-Kosheri in his dissenting opinion favoured an order of interim measures by the Court explicitly arguing that the two Libyans suspected to be the authors of the Lockerbie massacre could not possibly receive a fair trial, whether in the United States or in the United Kingdom, nor in Libya, Lockerbie Case, ICJ Reports (1992), at 111.

[99] Graefrath Bernhard, Leave to the Court What Belongs to the Court: The Libyan Case, http://www.ejil.org.

[100] Franck Thomas, Fairness in the International Legal and Institutional System, Clarendon Press, Oxford, 1995p. 242.

[101] Kreindler Lee S., Litigation Status in Lockerbie Case, New York Law Journal, http://www.globalpolicy.org.

It provides:

> "Any dispute between two or more Contracting States concerning the interpretation or application of this Convention, which cannot be settled though negotiation, shall, at the request of one of them, be submitted to arbitration. If within six months from the date of the request for arbitration the Parties are unable to agree on the organisation of the arbitration, any one of those Parties may refer the dispute to the International Court of Justice by request in conformity with the Statute of the Court."

In the view of Libya the Montreal Convention was the only appropriate convention in force between the parties, since the acts that had been committed over Lockerbie constituted an offence within the meaning of article 1 of the convention.[102] Libya requested that the Court adjudges and declares,
1. that Libya had fully complied with all of its obligations under the Montreal convention;
2. that the UK and the USA had breached and were continuing to breach various provisions of the convention, in particular article 7 incorporating the principle aut dedere aut judicare, according to which Libya had a choice between extradition and prosecution of an alleged offender;[103] and
3. that the UK and the USA were obliged to desist from use or threat of force against Libya and from all violations of its sovereignty, territorial integrity and political independence.[104]

Libya's applications were accompanied with request for provisional measures, which the Court has the power to indicate under article 41 of the Statue pending its final judgement, "if it considers that circumstances so require…to preserve the respective rights of either party". These measures would seek to prevent the UK and the USA from taking any action that would force Libya into surrendering the two accused to any jurisdiction outside Libya or otherwise prejudice the rights claimed by Libya and to restrain those states from taking any step that might aggravate or extend the dispute, as would surely happen if sanctions were imposed against Libya or force were employed.[105]

[102] Article 1 covers any person who unlawfully and intentionally destroys and aircraft in service or places or causes to be placed in any aircraft in service by any means whatsoever, a device or substance which is likely to destroy that aircraft.
[103] Other alleged breaches of the convention by the UK and the USA were of Article 5 (2), by preventing Libya from establishing its jurisdiction over alleged offenders present in its territory; Article 5 (3), by preventing Libya from exercising criminal jurisdiction under its national law; Article 8 (2), by which extradition is subordinated to national law; and Article 11, by refusing judicial assistance in connection with criminal proceedings, Lockerbie Case ICJ Reports (1992) at 4-6, 115-17.
[104] Lockerbie Case ICJ Reports (1992) at 6-7, 117-18.
[105] Lockerbie Case ICJ Reports (1992) at 7-8, 118-19.

8.1.1 Resolution 731 (1992)

The USA and the UK requested Libya to surrender two suspects whom they held responsible for the Lockerbie incident. They claimed compensation from Libya because they believed that Libya as state was involved in the terrorist act, which caused the incident and the death of 270 people. The term surrender was obviously chosen because the USA and UK were well aware that under international law there was no obligation for Libya to extradite her own nationals and there was no extradition treaty between the USA or the UK and Libya.[106]

The demands stated in the resolution urged Libya to provide a full and effective response to surrender for trial the two of its nationals charged with the bombing of Pan Am flight 103, accept responsibility for the actions of those designated as "Libyan officials" and pay appropriate compensation.

8.1.2 Resolution 748 (1992)

By adopting resolution 748, the SC explicitly invoked Chapter VII of the Charter. This resolution provided, inter alia, that on April 15, 1992, all states would adopt, under article 41, certain coercive measures against Libya, such as economic, commercial and diplomatic, if Libya did not comply with resolution 731, including the demand that it surrender the two suspects to the UK or the USA. Libya contended that by deciding that Libya had to surrender its nationals to the USA and the UK, the SC infringed or threatened to infringe the enjoyment and the exercise of the rights conferred on Libya by the Montreal convention ad its economic, commercial and diplomatic rights.[107] The Council established, by resolution 748, Libyan responsibility for international terrorism under the Charter by linking terrorist acts to article 2 (4). On the basis of article 41 of the Charter the Council therefore authorised to infringe on rights that Libya may have had under general international law or the Montreal Convention by requesting that it discharged its responsibility by surrendering the two of its nationals.

8.1.3 Resolution 833 (1993)

The sanctions envisaged by resolution 748 subsequently went into effect on the designated date, which the day after the Court was rendered its decision on provisional measures. These sanctions were reinforced on November 11, 1993, by resolution 833, which provided for an extension of the measures on December 1, 1993, requiring all states to freeze Libyan funds and to bar provision of equipment and certain services for aviation, if Libya should continue not to comply with resolution 731 and 748.

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[106] Graefrath, Bernhard, Leave to the Court What Belongs to the Court: The Libyan Case, http://www.ejil.org.
[107] Lockerbie Case, ICJ Reports (1992) at 125.

8.1.4 Resolution 1192 (1998)

Resolution 1192 demanded once again that the Libyan government immediately would comply with the above-mentioned resolutions and welcomed the initiative for the trial of the two persons charged with the bombing of Pan Am flight 103 before a Scottish Court sitting in the Netherlands. It also called upon the government of the Netherlands and the government of the UK to take such steps that would be necessary to implement the initiative, including the conclusion of arrangements with a view to enables the Court to exercise jurisdiction. The Court also reaffirmed that the measures set forth in its resolutions 748 (1992) and 883 (1993) remained in effect and binding on all member states.

8.2 The jurisdiction of the Court

In June 1995, the USA raised three preliminary objections to the International Court of Justice; the jurisdiction of the Court, the admissibility of the Libyan application, and alleging that the Libyan claims had become moot as having been rendered without object by resolutions taken by the SC. The USA contended, moreover, in the alternative that, should the Court nonetheless hold that it had jurisdiction, it could and should resolve the case in substance now by deciding that the relief sought by Libya was precluded. The USA contested the jurisdiction of the Court by contending that there was no legal dispute with Libya on the convention. They claimed that it was not a question of bilateral differences, but one of a threat to international peace and security resulting from state-sponsored terrorism.[108]

In its judgement, however, the Court found that the parties differed on the question whether the Montreal Convention governed the destruction of the Pan Am aircraft over Lockerbie. A legal dispute of a general nature concerning the convention thus existed between the parties. In the opinion of the Court, however, several disputes[109] existed between the parties concerning the Montreal Convention, namely the Convention's applicability to the present case, the alleged right of Libya itself to prosecute its nationals, article 7, and the alleged lack of assistance by the respondents to the Libyan prosecution, article 11.

Admissibility of Libyan application the USA contended that, by seizing the Court, Libya was endeavouring to undo the Council's actions and that, even if Libya could make valid claims under the Montreal Convention, these were superseded by the relevant decisions of the SC. The Court found that it could not uphold this conclusion. The date, 3 March 1992, on which Libya

[108] Bekker Peter H.F., International Court of Justice Upholds its Jurisdiction in Lockerbie Cases, http://www.asil.org.

[109] According to ICJ jurisprudence, a dispute is defined as disagreements on a point of law or fact, a conflict of legal views or of interests between two persons. This classical definition of a dispute is contained in the Mavrommatis decision of the PCIJ, Mavrommatis Palestine Concessions, PCIJ (1924) at 11.

filed its application, was, in fact, the only relevant date for determining the admissibility of the application. SC resolutions 748 and 883 could not be taken into consideration in this regard, since they were adopted at a later date. As to resolution 731 (1992), adopted before the filing of the application, it could not form a legal impediment to the admissibility of the latter, because it was a mere recommendation without binding effect, as was recognised moreover by the USA. The Court concluded, by 12 votes to 3, that Libya's application was admissible.[110]

Finally, the Court did not uphold the claim of the USA by which it requested the Court, in the alternative, to resolve the case in substance now in the event that it should declare that it has jurisdiction and deem Libya's application admissible. The Court indicated that, by raising preliminary objections, the USA had made a procedural choice the effect of which is to suspend the proceedings on the merits.[111]

8.3 Courts actions

Prima facie basis can in this case be found in article 36 (1) of the Courts Statute and article 14 (1) of the Montreal Convention. Article 14 (1) of the Montreal Convention provides that any one of the parties may refer to the Court any dispute concerning the interpretation or application of the convention that cannot be settled trough negotiation, within a period of six months of the date of an unsuccessful request for arbitration. Although the period of six months had not elapsed the Court seemingly considered that Libya had fulfilled the conventions requirements on the basis that there is no need to exhaust obviously ineffective remedies.[112] Judge Ni was the only member of the Court that contested that the period of six months had not elapsed.[113]

The Court did not appear to consider that Libya’s request for provisional measures was inadmissible, there were rights in issue to be protected, there was urgency to the request and there was the possibility of irremediable harm to those rights. The Court reasoned that Libya was obliged by article 25 of the Charter to carry out the decisions of the SC and this obligation extended prima facie to SC resolution 748.

Following the adoption of resolution 748, the Court on April 14, 1992 dismissed Libya’s request for provisional measures. The Court did not ground the dismissal on the absence of a jurisdictional basis. All the Court is required to do at the stage of provisional measures is to show that it has prima facie jurisdiction. The Court has pointed out at several occasions that:

[110] Bekker Peter H.F., International Court of Justice Upholds its Jurisdiction in Lockerbie Cases, 1998, http://www.asil.org.
[111] Press Release ICJ/553.
[112] ICJ Verbatim Record CR 92/5, at 30-35 (1992).
[113] Lockerbie Case, ICJ Reports (1992) at 23, 125.

> "On a request for provisional measures the Court need not, before deciding whether or not to indicate them, finally satisfy itself that it has jurisdiction on the merits of the case." [114]

In accordance with article 103 of the Charter, member states obligations under the Charter prevailed over their obligations under any other international agreement, therefore resolution 748 prevailed over the obligations of Libya under the Montreal Convention. The adoption of the mandatory resolution 748 therefore had the consequence of annihilating the rights claimed by Libya for protection under the Montreal Convention, resulting in an absence of rights to protect.[115]

The Court's ruling means that under article 103 of the Charter the resolution 748 takes precedence over any other international agreement, including the Montreal Convention. Given the UN Charter's Chapter VII exceptions to article 2(7), the Security Council has the authority to determine whether a situation is so severe that it constitutes a threat to the peace, a breach of the peace, or an act of aggression. Therefore, the Security Council has the authority to take up such matters.[116] In the case it was given a distinction between the effective exercises of the Courts power to indicate provisional measures, which of one judge was considered as nullified by resolution 748.[117] This means that the Court while it has the vocation of applying international law as a universal law, operating both within the UN and outside, it is bound to respect, as part of the law, the binding decisions of the SC.[118]

The Lockerbie case as presented to the ICJ looked like a normal dispute between states where both facts and the applicable law were under dispute. Even if the applicability of the Montreal Convention were questioned by the USA and the UK[119], the issue of Libyan jurisdiction would remain a dispute concerning the interpretation and application of article 14 of the Montreal Convention. This convention laid down a procedure to be followed when article 14 was raised, but instead of complying with it the USA and the UK brought the case to the SC. Also, if the demand for surrender of the two

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[114] Nicaragua Case, ICJ Reports (1984) at. 179.
[115]The Court stated: ”Whatever the situation previous to the adoption of that Resolution, the rights claimed by Libya under the Montreal Convention cannot now be regarded as appropriate for protection”, Lockerbie Case, ICJ Reports (1992) at 19,131.
[116] Plachta Michael, The Lockerbie Affair: When extradition fails are the United Nations' sanctions a solution? (The role of the Security Council in the enforcing of the rule aut dedere aut judicare), http://www.unafei.or.jp.
[117] Lockerbie Case, ICJ Reports (1992) at 46-47, 156-57.
[118] Lockerbie Case, ICJ Reports (1992) at 26.
[119] S/PV 3033, S/23308, The United States claimed that Article 14 of the Montreal Convention could not provide a possible basis for jurisdiction of the Court, inasmuch as the six-month period prescribed by Article 14(1) of the Convention had not yet expired when Libya filed its application, Lockerbie Case, ICJ Reports (1992) at p 24.

suspects was interpreted as part of a reparation claim,[120] to avoid a dispute on extradition law it must necessarily be classified as a dispute between states on an alleged violation of international law. The contents of any reparation claim brought before the SC will be governed by the principle of peaceful dispute settlement under article 2(3) of the UN Charter and article 27(3). An interpretation, which excluded the applicability of the Montreal Convention, did not as such justify the application of Chapter VII of the Charter. However, it would have the effect of avoiding the jurisdiction of the ICJ. The duty to find a peaceful settlement was applicable whether the dispute was related to the Montreal Convention or not. Given the facts of the case, it seemed rather impossible to avoid the application of the Montreal Convention.[121]

8.4 Procedure

Diplomatic efforts had overtaken the court's proceedings, with the USA and UK agreeing to an arrangement that they had refused earlier: the extradition of the suspects to a neutral third country to be tried by a neutral court. The Libyan raised a number of remaining issues of concern regarding the Lockerbie suspects, and the Secretary-General sought to reassure them that all the governments concerned were dealing in good faith.[122] In April 1999 Libya transferred the two suspects to a USA airbase in the Netherlands to be tried by a three-judge Scottish court applying Scottish law. Libya also received assurances that the trials will not be used as a means to implicate the government of Libya.

The members of the SC welcomed the report of the Secretary-General on the arrival in the Netherlands for the purpose of trial of the two persons charged. The members of the Council noted that with this report the conditions set forth in resolution 1192 (1998) for the immediate suspension of the measures established in SC resolution 748 (1992) and 883 (1993) had been fulfilled. These measures were therefore effectively suspended.[123]

8.5 The relationship between the Security Council and the International Court of Justice

The relationship between the judicial and political bodies raised some fundamental questions of general international law that went beyond UN constitutional issues and was viewed in the light of the questions of interpretation and application of the 1971 Montreal Convention arising from the aerial incident at Lockerbie. The problem with this case was that it was

[120] A/CN.4/425 and Corr.1; A/CN.4/425/Add.1 and Corr.1.
[121] Also Judges Evensen, Tarassov, Guillaume and Aguilar stressed in their separate opinion that the Montreal Convention is applicable, Lockerbie Case, ICJ Reports (1992) at 24.
[122] Press Release, SG/T/216, Press Release, SG/SM/6682.
[123] Press Release, SC/6662, Press Release, SC/6655.

the same state alleging a breach of an international obligation that sought support from two bodies.[124]

The Court took the position that while the Montreal Convention was the applicable law in this dispute; it needed not to be the only one. That is, the Court made clear that it did not in any way seek to negate the applicability of Security Council resolutions. However, having decided that there was a legal dispute the Court was simply fulfilling its own obligations under the UN Charter, as the primary judicial organ of the UN.

Judge Bedjaoui stated in the case that the situation facing the Court concerned two disputes. The first dispute concerned the extradition of two Libyan nationals and was being dealt with legally by the Court at the request of Libya. The second dispute concerned more generally state terrorism as well as the international responsibility of the Libyan state and was being dealt with politically by the SC at the request by the UK and the USA.[125] This was criticised and questioned, to say that the Council's role is purely political one, as opposed to the Court's legal one, does not explain or declare the Council's true function in these matters or as a result, on its complementary, or conflictive, relationship with the Court.

Judge Weeramantry concurs with Bedjaoui; he states that both organs are complementary to each other, each performing the special role assigned to them. He maintains that:

> "Where the Security Council is addressing a situation with direct implications for the matter brought before the Court, the Court should examine whether its actions would conflict with the actions that the Security Council has taken or is considering and, where the circumstances permit, should seek to reinforce the actions of the Council."[126]

The leitmotif running through the Lockerbie case was the following; the Council has functions of a political nature assigned to it, whereas the Court exercises purely judicial functions. Both bodies can therefore perform there separate but complementary functions with respect to the same events.[127]
From this following conclusions can be drawn:
1. The Court rejected, as it had done it the past, the view that there were intrinsically legal or intrinsically political disputes.
2. In the view of the Court, the legal/political dichotomy stemmed from a functional distinction between the two bodies in the pursuit of the same purpose, the peaceful settlement of disputes.

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[124] Gowlland-Debbas Vera, The Relationship between the International Court of Justice and the Security Council in the Light of the Lockerbie Case, American Journal of International Law 88, 1994, page 644.
[125] Lockerbie Case, ICJ Reports (1992) at 34, 143-144.
[126] Lockerbie Case, ICJ Reports (1992) at 169.
[127] Lockerbie Case, ICJ Reports (1992) at 29, 141.

3. The Court considered that there was no hierarchy between the two bodies, although, since there was some overlap, each should operate in such a way as not impede the functions of the other or achieve results that would render decisions of the other nugatory.[128]

The issue before the SC was for Libya a purely legal dispute arising over a conflict of jurisdiction and a request for extradition. Since it was regulated by the relevant rules of international law, it should have been referred to the ICJ in accordance with article 36 (3) of the Charter. The UK and the USA on the other hand contended if indeed there was a dispute; it could not be reduced to a legal dispute involving a bilateral question of treaty interpretation because it was a fundamental political controversy over terrorism and therefore a multilateral problem involving the maintenance of peace.[129] Both the UK and USA believed that Libya's application to the Court was directed at interfering with the exercise by the Security Council of its primary responsibility for the maintenance of international peace and security. The UK stated that:

> "Matters of political appreciation are for the Security Council alone… The Court should never, when exercising its jurisdiction to indicate interim measures under Article 41of its Statute, do so if the result would be to interfere with the Security Council in the exercise of its duties and powers under Chapter VI or VII of the Charter or even run the risk of doing so. Above all, the Court should never indicate interim measures designed to protect a State against the decisions of the Security Council."[130]

8.6 Questions raised from Lockerbie

8.6.1 Judicial review

Many have suggested that the ICJ should have the power of judicial review over the SC's actions to ensure that they are consistent with the UN Charter and other instruments of international law. Some argue the ICJ has already asserted jurisdiction over SC decisions, by the Lockerbie case. Other statements laid said that in fact, all the Court did was deny preliminary objections made by the USA and the UK. It did not decide the case on the merits. It did in no way undo UN sanctions against Libya or denied USA and Scottish requests that the two Libyan suspects to be turned over to them.

In its orders of 14 April 1992, the Court declined the indication of provisional measures, article 41 of the ICJ Statute, holding that such an

[128] Gowlland-Debbas Vera, The Relationship between the International Court of Justice and the Security Council in the Light of the Lockerbie Case, American Journal of International Law 88, 1994, page 648.
[129] ICJ Verbatim Record CR 92/4, at 10.
[130] S/PV.3063, 1992, at 68-69.

indication could impair rights prima facie enjoyed by the defendants pursuant to SC resolution 748 (1992) under articles 103 and 25 of the UN Charter.[131] These orders have sparked an intense debate in the international legal community, particularly in relation to the issue of judicial review of SC resolutions.[132]

According to several people in a broad interpretation of the judgement, the relationship between the Montreal Convention and the subsequent SC resolutions is a matter within the jurisdiction of the Court. Another, narrower reading states that the ICJ jurisdiction only extends to interpreting and applying the Montreal Convention and not to the SC resolutions. The latter view seems more in line with the treaty-based jurisdiction of the Court in the present case, it would, however, considerably limit a judicial review of SC resolutions by the Court.[133]

To reject the objections to the admissibility of Libya's application, the Court relied on a rather narrow interpretation of its jurisprudence, according to which the admissibility of an application has to be judged at the date of filing.[134] This is what the Court did with a 10 to 6 majority, holding that the question concerned the very subject matter of the case. Thereby, the majority of the Court seems to indicate that it does not intend to avoid the question of the primacy of the SC resolutions over the Montreal Convention.

This has met with strong criticism by some judges. In their joint declaration, judges Guillaume and Fleischhauer emphasise their narrow reading of the ICJ jurisdiction and argue that the matter of the prevalence of one or the other instrument has already been argued by the parties, does not require any further evidence and would end the case if decided in favour of the defendants. Agreeing with them on the jurisdiction issue judge Kooijmans points out, that the SC resolutions do not change the existing obligations of the parties, but might supersede them for the time they are in force. Accordingly, the Court could still decide on the rights and duties of the parties under the Montreal Convention, even if the SC resolutions superseded it for the time being.[135]

The decision, therefore, leaves the substantive issues for the merits phase. But it has become apparent that there is no agreement within the Court as to whether its jurisdiction is limited to a pronouncement on the rights and duties of the parties pursuant to the Montreal Convention itself, or whether

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[131] Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (*Libyan Arab Jamahiriya v. United Kingdom*), Provisional Measures, ICJ Reports (1992) 3, at paras 41, 43, 44, 46.
[132] Martenczuk Bernd, The Security Council, the International Court and Judicial Review: What Lessons from Lockerbie?, 1999, http://www.ejil.org.
[133] Martenczuk Bernd, The Security Council, the International Court and Judicial Review: What Lessons from Lockerbie?, 1999, http://www.ejil.org.
[134] Nicaragua v. Honduras, ICJ Reports (1988), at 66.
[135] Lockerbie Case, ICJ Reports (1992) at 8, 17, 18 of his separate opinion.

it also enables the Court to decide on the relationship between the Convention and subsequent SC resolutions. If the latter was the case, this decision would set the stage for a possible confrontation between the SC and the ICJ.[136]

The Court's own power to decide on this case, which could mean, in effect, overruling the SC in imposing sanctions, is very interesting. It is interesting to note that the SC itself renewed the sanctions even after the ICJ decision, thus taking some of the sting out of the ICJ decision. Some also pointed out the basic illegality, if not impossibility of the ICJ acting like an Appellate Court, reviewing the actions of the SC. Noting that the issue of judicial review is what brought down the Permanent Court of International Justice.[137]

Some critics asks if the Court may have opened itself, not only in this case but in future cases, to appearing to offer to noncompliant states a means to parry and frustrate decisions of the SC by way of appeal to the Court. The texts of the Charter of the UN and of the Statute of the Court give no support for a conclusion that the Court possesses a power of judicial review in general, or a power to supervene the decisions of the SC in particular. One may state that by the absence of any such provision, and by according the SC primary responsibility for the maintenance of international peace and security, the Charter and the Statute import the contrary.[138]

The power of judicial review is not ordinarily to be implied and never has been on the international plane. If the Court were to generate such a power, to overrule, negate and modify, the SC would no longer be primary in its assigned responsibilities. It would be the Court and not the Council that would exercise the dispositive and hence primary authority. Judge Schwebel stated in his speech to GA that "judicial review could have been provided for at San Francisco, in full or lesser measure, directly or indirectly, but both directly and indirectly it was not in any measure contemplated or enacted."[139]

It was never proposed or, so far as the records reveal, considered, that the ICJ would be entrusted with, or would develop, a power of judicial review at large, or a power to supervene, modify, negate or confine the applicability of resolution of the SC whether directly or in the appearance of interpretation. Many people state that the Charter was largely a concept and draft of the USA, and secondarily of the UK, the other most influential state concerned was the USSR. The USA was cautious about the endowments of

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[136] Paulus Andreas L., Jurisprudence of the International Court of Justice Lockerbie Cases: Preliminary Objections, http://www.ejil.org.
[137] Kreindler Lee S., Litigation Status in Lockerbie Case, New York Law Journal, http://www.globalpolicy.org.
[138] Kreindler Lee S., Litigation Status in Lockerbie Case, New York Law Journal, http://www.globalpolicy.org.
[139] Schwebel Stephen M., Address to the Plenary Session of the General Assembly of the United Nations, 26 October 1999.

the Court. Recalling the rejection by the senate of the USA a decade earlier of adherence to the Statute of the Permanent Court of International Justice, the department of state was concerned to assure that nothing in the Charter concerning the Court, and nothing in the Statute which was to be an integral part of the Charter, could prejudice the giving of advice and consent by the senate to the ratification to the Charter.[140]

The task of the Court is not, via a process of so-called interpretation, to turn the resolutions into something they are not. Rather, it is to discover their intended meaning and to give effect thereto. If, in the course of this exercise, it becomes apparent that the obligations in the resolutions conflict with the obligations under some or other international agreement, article 103 of the Charter clearly sets the hierarchy of international obligations.[141] The issue is not whether advisory opinions contain authoritative statements of law. The issue is rather that the Court's advisory jurisdiction and its contentious jurisdiction are distinct, designed to achieve different ends and for the exclusive use of different participants. The Court itself has always been careful to preserve that distinction and not to merge one jurisdiction with the other. Many do not accept that the functions, which the Court may possess in advisory proceedings, have any bearing on its treatment of SC resolutions in the context of contentious proceedings.[142]

8.6.2 The legal basis for resolution 731 and 748

Another question that has been raised is why the Security Council in the Lockerbie case called for the mentioned actions to be taken in accordance with resolution 731 and 748. By the application of international sanctions, there would have been an indication of a threat to world peace or security, as the UN Charter requests it. But neither resolution 731 or 748 do explicit refer to such a danger.[143]

What was then the legal basis for Security Council resolution 731? It seems that the SC acted as a dispute settlement mechanism in deciding a dispute between Libya on one side and the USA and the UK on the other. The substantive issues were settled in favour of the latter. In doing so the SC effectively endorsed the requests of the successful states and recommended their effective implementation as appropriate terms to settle the dispute.

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[140] Kreindler Lee S., Litigation Status in Lockerbie Case, New York Law Journal, http://www.globalpolicy.org.

[141] Public sitting held on Monday 20 October 1997, at 10 a.m., at the Peace Palace, Vice-President Weeramantry, Acting President, presiding in the case concerning Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United Kingdom) Preliminary Objections.

[142] Martenczuk Bernd, The Security Council, the International Court and Judicial Review: What Lessons from Lockerbie? 1999, http://www.ejil.org.

[143] Graefrath, Bernhard, Leave to the Court What Belongs to the Court: The Libyan Case, http://www.ejil.org.

The most peculiar aspect of resolution 731 (1992) was the participation in voting procedures of interested parties. The dispute clearly fell within Chapter VI of the Charter, and article 27(3) explicitly prescribes that in decisions under Chapter VI a party to a dispute shall abstain from voting. Nonetheless, the USA and the UK all cast a vote. Further, in the meeting of the SC, which led to the adoption of resolution 731 (1992) Libya clearly relied on the Montreal Convention and presented the case as a legal dispute. None of the sponsors of the resolution deemed it necessary to respond to the Libyan initiative, nor did they attempt to explain why their claims were different from claims based on a legal dispute.[144]

This can be compared with resolution 1044, adopted by the SC in January 1996. The SC called upon the Islamic Republic of Sudan to extradite three nationals for trial to Ethiopia. Sudan provided details of its effort to apprehend the three suspects, but failed to locate them in Sudanese territory. The request for extradition was, contrary to the Lockerbie case, backed up by resolutions from the Organisation of African Unity. Furthermore there was no ability or competence-dispute, since neither Sudan nor Ethiopia is members of the SC. In response to Sudan not complying with resolution 1044, the SC passed resolution 1054 in May 1996, threatening Sudan with economical sanctions.

The context and legal basis for resolution 1054 is however quite different from resolution 731 or 748. In resolution 1054 the SC acted under UN Chapter VII, determined that the Sudan's non-compliance with demands stated in resolution 1044 constituted a treat to international peace and security. It is interesting that the SC in two so similar cases reacted under two different articles and Chapters of the Charter. The Libyan-resolution did not explicit mention such a threat. The Sudanese-resolution did.[145]

8.6.3 Abdication of powers of the Court

As it is, the interim measures decision represents a delicate balancing. As Judge Lachs noted in his separate opinion confirming the majority's result: "While the Court has the vocation of applying international law as a universal law, operating both within and outside the United Nations, it is bound to respect, as part of that law, the binding decisions of the Security Council." The operative verb is "respect"-not "defer to." The Court's decision, Lachs emphasized, "should not ... be seen as an abdication of the Court's powers."[146] Judge Shahabuddeen further discusses this non-abdication term. He meant the issues here was if a decision of the SC may override the legal rights of states and if so, are there any limitations on the power of the Council to characterize a situation as one justifying the making of a decision entailing such consequences. Are there any limits to the power

[144] S/PV 3033.
[145] Aoude Safia, The Lockerbie Legality: What Went Wrong in International Criminal Law? http://ourworld.compuserve.com.
[146] Lockerbie Case, ICJ Reports (1992), Separate Opinion of Judge Lachs, at 1,2.

of appreciation of the Council? If there are limits, what are those limits and what body, if other than the SC, is competent to say what those limits are?

The majority and dissenting opinions seem to be in agreement that there are limits and they cannot be left exclusively to the SC to interpret. The legality of actions by any UN organ must be judged by reference to the Charter as a constitution of delegated powers. In extreme cases the Court may have to be the last resort defender of the system's legitimacy if the UN is to continue to enjoy the adherence of its members. As the UN system increasingly effects its intended operations, the rule of law imposed on the political process by the Charter will assume increasing importance.[147]

It is very interesting to discuss what the Court left unsaid. The majority of judges seem to agree that, for purposes of interim measures, article 103 of the Charter overrides any rights Libya might have under the Montreal Convention, and thus frees the SC to apply sanctions as a suitable remedy in exercise of its powers under chapter VII. On the other hand, had Libya been able to allege a more general ground of ultra vires, that a coercive demand for extradition of a state's own national had been requested, it could be deemed contrary, in protection of sovereign rights under general international law.[148]

[147] Franck Thomas, Fairness in the International Legal and Institutional System, Clarendon Press, Oxford, 1995.
[148] Lockerbie Case, ICJ Reports (1992), Declaration of Judge Oda, pt. III, at 3.

9 Analyse

The United Nations has stood the test of time and remains the central multilateral instrument to deal with global problems and issues. The UN Charter continues to serve as the cornerstone of international relations, notwithstanding the fact that some of its provisions have ceased since long ago to be politically valid. On the other hand certain lack of support, like the lack of provisions referring to peacekeeping, had to be filled up in a pragmatic way. Throughout the UN history many new legal and political documents have been elaborated with a view to developing the principles embodied in the Charter. The UN has done a lot to adapt itself to the changing international environment, for example the Millennium Declaration, but the world is changing at a faster pace than the UN. The tragic events of September 11 remind us of the new dangers posed to the international system. The international scene is very uncertain and unpredictable and therefore there is a need to review and redefine the present structure, arrangements and mandates. The UN must increase its effectiveness and openness, to be able to secure international peace and justice.

9.1 The possibility of legal review of the Security Council

The last fifteen years the Council has often been called on to deal with problems within the borders of a single state, and it seems likely that will continue to be one of its main challenges. Though, that was not what the technique of peacekeeping was originally designed for, and it is not surprising that many difficulties have arisen. When dealing only with conflicting governments, the authority of the Council and the support of its members usually gave remarkable strength to small and lightly armed peacekeeping forces. Dealing with violent non-governmental groups and factions, which have a little knowledge of, or indeed respect for, the SC, is a very different matter. On the institutional level, the Council sometimes has acted as if it enjoyed absolute and unchallengeable power to interpret the rule of law and the rights and obligations of states and resisted accountability to any other political or judicial organ. Operationally the Council has been carrying out its responsibilities without the benefit of clearly defined rules.

If you look at recent definitions of danger to world peace and security as described by SC resolutions, there is no concrete legal pattern. One type of genocide for instance is criminalized; where as another act of genocide is not. One invasion of a neighbouring country is a danger to world peace another invasion is not. One terrorist act in international aviation is a danger to world security another one is not. This shows, that the resolutions passed on by the SC is no legal guideline to what exactly constitutes a danger to

world peace and security. It cannot be used to pattern international criminal law. But legally the members of the UN are obliged by the Charter to follow up on the resolutions of the Security Council. For this reason, many have taken the position that the relevant issue is conclusively settled through an analysis of the politically possible. If the Council, or the permanent five, can agree, then there is little more to say. For better or for worse, what the Council says is "the law". The competence of the UN relates to questions of order (power) and of justice (authority).[149]

Article 103 is concerned with compatibility between Charter obligations and obligations under any other international agreement; it confirms the reasoning of the supremacy of a Council decision over inconsistent treaty rights or obligations and under article 25 members have an obligation to accept Security Council decisions. By supporting a stronger judicial control of SC decisions, some argue for a constitutionalisation of the UN system. In every government there are three sorts of power; the legislative; the executive, in respect to things dependent on the law of nations; and the executive, in regard to things that depend on the civil law.[150] Like Montesquieu I believe in the idea of a separation of powers and a system of checks and balances. Perhaps this could and should be made applicable to the UN constitutional order in a manner appropriate to its distinct structure and characteristics. However, the discretion that the SC enjoys when using its powers under article 39 of the Charter shows that an introduction of direct judicial review alone, may not lead to a functioning legal control of the Council. It would have to be accompanied by a change in the standard of control the Court can apply to Council decisions. But every such change in the direction of an increase in the intensity of control involves the risk of producing a Council too constrained, and too much afraid of a later repeal of its measures by the ICJ, to accomplish its tasks. We need the Council to be able to give a quick response to an emergency.

Many people do not consider the possibility of a control in the form of advisory opinions to be an efficient substitute. I do not believe that the SC will challenge a resolution previously adopted by it, and chances of gaining a majority in the GA for a request of an advisory opinion will usually be slim. But some have reservations about the idea of introducing a system of direct judicial review of SC decisions, reservations in view of the present stage of development of the international community. Other points out to a growing imbalance between the assessment of the powers of the SC on the one hand, and that of the competence of the ICJ on the other hand. They mean that the Council by far has exceeded its powers given by the drafters of the Charter. It would be difficult for the Council to discharge its responsibilities if members were free to challenge those decisions and decline to implement them. Moreover, in the kind of situation covered by

[149] Koskenniemi Martti, The Police in the Temple: Order, Justice and the UN- A Dialectical View, 1995, http://www.ejil.org.
[150] Modern History Sourcebook: Montesquieu: The Spirit of the Laws, 1748, http://www.fordham.edu.

Chapter VII, and in which binding decisions are made, it is unlikely that there will be time for suspension of compliance whilst verification of the correctness of the Council's decision is made by some third party: speed of compliance may be essential.

Some situations require effective and immediately response from the Security Council, such as a right to intervene in situations of large-scale, man-made human suffering. Established by the UN Charter the prevention of extreme human suffering is of central importance. As the impressive words of its preamble emphasize, it is "the dignity and worth of the human person" which is the principal concern of the UN Charter. This concern must guide any interpretation of the instrument. When assessing a particular situation, the Council is supposed to consider, and weigh different factors. Such as the rank of the threatened right or value in the international legal order, the fact of how strongly this right or value is being endangered or violated, and the transborder effects of the threat or violation. The Security Council must also consider the sovereignty of a state, which is being affected by an intended action of the SC in a hierarchy of freedoms of states under international law.[151]

Many recent activities of the Security Council have been carried out in the shadow of legal doubts. The absence of war and military conflicts amongst states does not in itself ensure international peace and security. The non-military sources of instability in the economic, social humanitarian and ecological fields have become threats to peace and security. The United Nations membership as a whole, working through the appropriate bodies, needs to give the highest priority to the solution of these matters.[152] Clearly economic, social, humanitarian and ecological instability within a country can become sources that threaten peace and security and may therefore become matters of international concern.[153] Of course, not all non-military forms of instability will amount to a threat to peace. Therefore the mere fact that there is social instability does not justify action under Chapter VII of the Charter. The instability, caused by whatever reason, has to be of such a kind, or develop such forms or activities that the Security Council considers that the situation constitutes a threat to international peace or security. Thus far, the Security Council has found such conditions in only narrowly defined circumstances, and it has been even more reluctant to censure such conduct with sanctions.

Nevertheless, law at this primary constitutional level is under the greatest political pressure. Terms such as breach of the peace and threat to the peace, are very difficult to define and must be interpreted. This gives the result of insecurity and uncertainty. The amount of discretion, however, is debated, with there being strong contentions that even determinations of threats to

[151] Fassbender Bardo, Review Essay: Quis judicabit? The Security Council, its Powers and its Legal Control, http://www.ejil.org.
[152] S/PV 3046.
[153] Resolution 45/80 (1950).

the peace by the Security Council are subject to law. It has been suggested that legal principles applicable include the concept of bona fides, the principle of due process, the norms of jus cogens, as well as the purposes and principles of the Charter. An assertion of legal review over the most guarded element of Security Council discretion could indeed establish the reality of collective security law. The existence of discretion is not inconsistent with the idea of the rule of law. It is perfectly possible to state that discretion must be exercised in accordance with the law.

Finally before the UN member states can agree on the ICJ receiving the power of judicial review, it still remains the problem of determining the scope for review. This problem may prevent any changes to the status quo in the near future. The texts of the Charter of the UN and of the Statute of the Court give no support for a conclusion that the Court possesses a power of judicial review in general, or a power to supervene the decisions of the SC in particular. The Security Council has the primary responsibility for the maintenance of international peace and security. A power as of judicial review is not ordinarily to be implied and never has been on the international plane. If the Court were to generate such a power, the SC would no longer be primary in its assigned responsibilities. If the Court could overrule, negate and modify, it would be the Court and not the Council that would exercise the dispositive and hence primary authority.

In the meantime, the Court can not review the Council's chapter VII decisions and judicial control of SC resolutions remains unlikely. But the discussions is being raised that these decisions should at least comply with the norms of jus cogens and should not be contrary to the Charter itself. Although it seems possible to conclude that the Court currently possesses at most a limited power of judicial review, there is little doubt that there has been a recent trend in support of increasing such a power. This support is found in the existing case law and in academic commentary.

9.2 The strength of the International Court of Justice

In the Lockerbie case[154], the applicant asked the ICJ to find that there was reason to believe that the SC might have exceeded its charter-delegated powers by imposing sanctions. May, and should, the ICJ, the UN principal judicial organ, give itself the power to determine whether a political organ has acted ultra vires? May, and should, it become the supreme organ of judicial review, assuming a role comparable to national supreme courts? The International Court of Justice is one of the UN's organs and is not independent from the decision of the Security Council. It can be discussed

[154] In May 2003, Libya took responsibility for the terrorist attack and decided to compensate the relatives with seven million pounds each. The verdict of the case came the 20 of November 2003 and Ali Mohmed Al Megrahi was sentenced to minimum 27 years in prison. Lamen Khalifa Fhimah was found not guilty.

whether the Lockerbie case is a leading case in the relationship between the Court and the SC.

The Court stated in the Lockerbie case that:

> "Whereas both Libya and the United States, as Members of the United Nations, are obliged to accept and carry out the decisions of the Security Council in accordance with Article 25 of the Charter; whereas the Court ... considers that *prima facie* this obligation extends to the decision contained in resolution 748 (1992); and whereas, in accordance with Article 103 of the Charter, the obligations of the Parties in that respect prevail over their obligations under any other international agreement... "[155]

Some argue that the Court in the Lockerbie case equates a Council decision with a Charter treaty obligation, and that that is incorrect, that a Council decision is not a treaty obligation. The obligation to comply maybe, but the decision per se is not.[156] This come from article 25 that states that states have agreed to accept only such decisions as are in conformity with the Charter. So a decision taken in violation of the Charter should not be held to be binding. It is true that this reasoning is confined to the supremacy of a Council decision over inconsistent treaty rights or obligations, because article 103 is concerned solely with compatibility between Charter obligations and obligations under any other international agreement. A member's Charter obligations are set out, as treaty obligations, in the Charter provisions. They are there for all to see, and every Member State has ratified them. But who knows what the Council may decide? Are members to be treated as having accepted, in advance, whatever decisions the Council might make, so that such decisions have the very same force as the Charter provisions themselves? It may be doubted whether states ratifying the Charter ever believed they were granting to the Council a blank cheque to modify their legal rights. This is why the last phrase of article 25 – in accordance with the present Charter – is so important. The Council decisions are binding only in so far as they are in accordance with the Charter. They may spell out, or particularise, the obligations of members that arise from the Charter. But they may not create totally new obligations that have no basis in the Charter, for the Council is an executive organ, not a legislature. Thus, despite the Court's apparent acceptance of the binding force of Security Council resolution 748 (1992) there is some evidence that, at the merits stage, the Court might reserve the right to question its validity. It is important that this position should be maintained, and that the Court should not regard itself as precluded from questioning the validity of a Council resolution in so far as it affects the legal rights of states.

It is true that the development of international law is not possible without judicial settlement. It is desirable to oblige dispute settlement under

[155] Lockerbie case ICJ Reports (1992) 114.
[156] Bowett Derek, The Impact of Security Council Decisions on Dispute Settlement Procedures, http://www.ejil.org/.

jurisdiction of the court to establish legal order in international society and make peace maintenance as effective. Although under present system, the system is not yet established enough as in municipal legal system. Therefore, it is hard to bind all states to compulsory judicial settlement in every case. So it is limited that the case may be referred to the court, other methods such as diplomatic measures are highly useful. It is also worth mentioning the requirement of ICJ jurisdiction in accordance with article 36 of the ICJ Statute, and the low number of recognition's of compulsory jurisdiction under article 36, paragraph 2. One of the reasons why not more disputes have been referred to the ICJ is that it requires a wider acceptance of the Court's compulsory jurisdiction; today only 63 states have accepted the Court out of 191.[157]

9.3 Rule of law in international law

There is now global understanding that without the rule of law, the ideals of the UN Charter are almost irrelevant. The answer to bringing about stability, justice and rule of law lies in closer international cooperation, multilateral approach and democracy and rule of law in international relations. Rule of law must be seen in the context of respect for human rights and democracy. The rule of law subsequently covers a wider field than just criminal procedure: it shall ensure that government and other public officials act under the law, in accordance with the law and within the limits set by law, not only in criminal cases, but in civil cases as well as in the daily decision-making in the administration. The UN Charter and other norms governing international relations must be respected. At the international level, the creation of the International Criminal Court was an historic advance in efforts to support justice and prevent impunity. Although without ratification of the Rome statute by the USA and China, it may not have the desirable effect. States such as the USA that have the power to act outside the existing rules of international law without needing to fear any sanctions being imposed on them, would lose their standing and influence if they were to forego international legitimacy for their actions.

New dangers such as international terrorism and of weapons of mass destruction have moved to the forefront of the debate. Countering these dangers also involves the further development of international law. One of the most urgent issues is the question regarding the interpretation of international law, in particular where the line should be drawn between the right of states to defend themselves and the fact that the UN remains the sole body with the authority to use force. The new threats to world peace, as well as the fact that war crimes are committed in domestic and international conflicts, require a reform of our security policy strategies and instruments. They also require a willingness of the international community to re-examine existing legal instruments and interpretations of the law to

[157] Press Release GA/10089.

determine if they are suitable for resolving newly-arisen problems and conflicts.

Both world wars led to the realization that the overriding interests of the international community and the observance of fundamental human rights must take precedence over the purely national interests of individual states. In principle, no state can be forced against its will to be legally bound by new rules of international law. It is however uncontested that certain rules apply to all states: the jus cogens embodied in customary international law. Basic norms and convictions those are indispensable for the common interest of the community of states.

Although these rules provide answers with regard to international law for some new challenges, they do not solve the real problem arising from the tension that exists between power and law. The basic principle of sovereign equality of all UN members laid down in Article 2 (1) of the UN Charter remains the foundation of all international relations between states. However, the privilege of state sovereignty should ideally not be misused so as to harm the international community. In concrete terms this means that state sovereignty should not serve as an excuse for the violation of human rights.

The traditional interpretation of Chapter VII of the UN Charter concerned the use of force between states. However article 39 of the Charter speaks, in a very general sense, of any threat to the peace. This open formulation can be used for the further development of international law. The Security Council was of the same opinion. To respond to new threats, it also applied Chapter VII of the Charter to cases involving the use of force between non-state structures. By adopting resolutions 1368 and 1373 on September 12 and 28 2003, respectively, the Security Council further developed international law to also define acts of international terrorism as a threat to peace within the meaning of the Charter. This further development however also brings with it the risk of different possible interpretations.

9.4 Preferred solutions for the future

I believe that the United Nations needs a more efficient apparatus, together with a SC representing not only the victors of the Second World War. However the two-thirds majority, including all the permanent members of the SC, required by article108 for amending the Charter makes it exceedingly difficult to introduce any major change. Furthermore no one could deny that in the world community there are a number of political problems that are objectively intractable on account of deep-rooted tensions and conflicting ethnic, political and ideological claims. Another difficulty with the Security Council is that the permanent members try to solve and agree on policies outside the SC. Today USA, France and the UK meet privately to discuss and agree on different issues, then with all five permanent members before the formal Council meeting. So the crucial

decisions are often taken prior to the meetings of the Council, rather than emerging from debate in the Council, and in consequence the official records reveal little of the real discussions on constitutionality.

The Security Council, which makes decisions in accordance with Chapter VII of the UN Charter, should maintain the greatest possible credibility in order to remain capable of global action. Interesting ideas are being discussed, such as requiring a country to issue an explanation when exercising its right of veto.[158] I also believe that during an executive mission or executive phase of a mission, it should be possible to call upon rule of law- experts to take direct part notably in the administration of justice. Depending upon the mandate, this may include functions all along the judicial chain, in support of an existing local system or through a system established through the executive mandate.

A totally new solution would be for the UN to establish an Arbitral Tribunal, or even a Commission of Jurists, to act as a kind of constitutional Court in the sense that it would be a standing body to which, whenever a decision was challenged by a state, the Council would refer the challenge. Ideally, the Council should be committed in advance to accept any report from such a Commission of Jurists. But the likelihood of the Security Council accepting such a new solution must be extremely low. The present mood of the Council seems to indicate impatience with legal restraints, rather than a willingness to create them. Nevertheless, I believe that it needs to be pointed out that verbal support for the rule of law, coupled with a refusal to accept any real legal control over executive decisions, is not a consistent position in an age pledged to uphold democratic values.

A desirable development for the future would be if the Council would use a consistent practice of declaring, within the resolution itself, the legal basis upon which any decision is based. The Council should also consistently seek legal advice whenever a prospective decision is likely to affect the rights of member states, or impose obligations on members, the Security Council must of course weight this against the need for a fast and efficient action. Member states likely to be affected by the decisions of the SC should get the opportunities of responding its views. Finally the SC must get access to improved techniques for fact-finding, which would ensure that the factual basis for any decision is properly verified and independent from member states, which are involved in the actual issue.

The evolution of the UN has been an ongoing process but the progress of it could be questioned. As I have mentioned earlier I believe that there has to be a separation of powers. The decision-making process needs to be change to avoid the UN to be controlled by a couple of states. Furthermore the International Court of Justice must be strengthening, in order to ensure justice and the rule of law. Reformation will take time and, of course, can be

[158] Voigt Karsten D, Power, sovereignty and the rule of law - new challenges for transatlantic relations, http://www.auswaertiges-amt.de.

prevented by any of the Council's present permanent members. If the organisation is to navigate the shoals of reform without disabling itself, everyone will have to practice modesty: those who have power and those who do not, but want some.

9.5 Conclusion

Some commentators have proclaimed that the SC has failed when it could not agree to a resolution to authorise the use of force against Iraq. On the contrary, you can say that the outcome emphasised that the SC sets a very high bar for the authorisation of enforcement action in accordance with article 42, Chapter VII of the Charter. Efforts for conflict resolution must go through the stages of pacific settlement encouraged in Chapter VI, and thereafter to the coercive measures outlined in article 40 and 41 of the Charter, before any final recourse to article 42-type enforcement action. The SC’s rejection against authorising force against Iraq, notwithstanding the previous regime’s flagrant violations highlights the need to do everything possible to succeed in resolving conflicts through the processes set out in Chapter VI of the Charter.

There have been many suggestions how the SC can be more efficiently utilised and support its actions for maintenance of peace and security. I would like to underline the primary role of the SC in accordance with the Charter in the area of peaceful settlement of disputes, or any situation the continuation of which is likely to endanger international peace and security. But the importance of judicial mechanisms in the prevention and resolution must be emphasised. The early and more frequent resort to these mechanisms and in particular to the ICJ would greatly contribute to the maintenance of international peace and security and the promotion of the primacy of international law in international relations.

The debate about the efficiency and the role of the UN is very up-to-date when we look at the world picture today. The UN has been questioned and criticised. The UN remains and indispensable forum in spite of the enormous asymmetry of power among its member states. It is in the interest of all member states, including those, which have the capacity for unilateral action to address issues through the SC and the UN. This is the only institution, which offers international legitimacy, credibility and acceptability for the actions and policies of individual member states or groups of states. In this age of nuclear weapons and advanced conventional means of destruction, the SC must give life to the central obligation of member states under the Charter to refrain from the threat or use of force, to avoid war and to seek and build peace.

The UN remains a unique and indispensable tool to face the threats to peace and create a more secure world. States are the foundation stones of the organisation; on them rest the primary responsibility to develop the United Nation’s potential for creating international cooperation for the peaceful

settlement of disputes. Preventive diplomacy is the most suitable way to resolve disputes before conflict breaks out. However, this can only be applied when the parties display political will and good faith.

We must always keep in mind that the primary responsibility for settlement remains with the parties themselves; the UN body is nothing without its members. The United Nations is what we make of it.

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