
The Security Council, the International Court and Judicial Review: What Lessons from Lockerbie?

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Abstract

Unlike any previous case, the Lockerbie affair has raised questions about the nature and extent of the Security Council's powers under Chapter VII of the UN Charter. Due to the recent 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 Security Council resolutions can be subjected to judicial review by the Court remains of crucial importance for the constitutional system of the United Nations. The article reviews the Court's orders and judgments in the Lockerbie cases and assesses the circumstances under which judicial review might occur in the context of the UN system. The article then turns to the substantive questions left unanswered by the Court, focusing on three main issues: the binding nature of the UN Charter for the Council; the nature and extent of the Council's power of determination under Article 39 of the Charter; and the Council's position with respect to general international law. Overall, the article proposes a textual approach to Article 39, the wording of which contains all the necessary elements for a workable delimitation of the Council's powers.

1 Introduction

On 5 April 1999, two Libyan nationals accused by the United States and the United Kingdom of being responsible for the 1988 bombing of Pan Am flight 103 over

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Lockerbie, Scotland, arrived for trial in the Netherlands.¹ The surrender of the suspects, who are to be tried by a Scottish court established for this purpose in the Netherlands, has brought a temporary close to a dispute that has continued for almost eight years. At the same time, the Security Council suspended the sanctions it had imposed on Libya under Chapter VII of the UN Charter with Resolutions 748 (1992) and 883 (1993) to secure the surrender of the suspects.² This diplomatic solution averted a potential conflict between the UN Security Council and the International Court of Justice. In parallel cases brought against the United Kingdom and the United States in 1992, Libya had asked the Court to declare that the requests for the surrender of the suspects were in violation of Libya's rights under the 1971 Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation.³ Despite the fact that these applications ran counter to the intention of the Security Council resolutions, the Court, in two judgments of 27 February 1998, rejected the preliminary objections raised by the United Kingdom and the United States and found that it had jurisdiction to entertain the cases.⁴ The implication of this decision was that at the stage of the merits, the Court would have to take a position on the effect of the resolutions on the Libyan applications. This raised the possibility that for the first time in its history, the Court might have to exercise a form of judicial review over resolutions adopted under Chapter VII of the UN Charter.

The *Lockerbie* cases have provoked a lively debate on the limits of the Security Council's powers, and on the question of how these limits could be enforced.⁵ Despite

¹ Swardson, 'Lockerbie Suspects Delivered for Trial; Sanctions on Libya Suspended by U.N.', *Washington Post*, 6 April 1999, at A 1.

² Cf. Statement by the President of the Security Council of 8 April 1999, S/PRST/1999/10. Even though under Resolutions 748 (1992) and 883 (1993), the suspects were to be tried in the United States or the United Kingdom, the Security Council in Resolution 1192 (1998) accepted the proposal of a trial before a Scottish court in the Netherlands as sufficient for a suspension of the sanctions (cf. Lippman, 'U.S., Britain Announce Plan for Pan Am Trial', *Washington Post*, 25 Aug. 1998, at A 1; Lippman and Goshko, 'Libya Accepts Proposed Trial in Pan Am Case', *Washington Post*, 27 Aug. 1998, at A 23).

³ 974 UNTS 177 [hereinafter Montreal Convention].

⁴ *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, Judgment of 27 February 1998; *Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United States)*, Preliminary Objections, Judgment of 27 February 1998. The two judgments being virtually identical, unless otherwise noted, only the judgment concerning the United States will be quoted. The judgment and opinions are cited in the version published on the Court's web site <<http://www.icj-cij.org>>. The judgment concerning the United States is also reprinted in 37 ILM (1998) 587. On the judgments, cf. also Becker, 92 *AJIL* (1998) 503; Sorel, 'Les arrêts de la C.I.J. du 27 février 1998 sur les exceptions préliminaires dans les affaires de Lockerbie: et le suspense demeure...', 102 *Revue générale de droit international public* (1998) 685.

⁵ M. Bedjaoui, *Nouvel Ordre Mondial et contrôle de légalité des actes du Conseil de sécurité* (1994); B. Martenczuk, *Rechtsbindung und Rechtskontrolle des Weltsicherheitsrats* (1996); Akande, 'The International Court of Justice and the Security Council: Is there Room for Judicial Control of the Decisions of the Political Organs of the United Nations?', 46 *ICLQ* (1997) 309; Alvarez, 'Judging the Security Council', 90 *AJIL* (1990) 1; Bothe, 'Les limites des pouvoirs du Conseil de sécurité', in R.-J. Dupuy (ed.), *Le développement du rôle du Conseil de sécurité* (1993) 67; Evans, 'The Lockerbie Incident Cases: Libyan-

the apparent solution of the Lockerbie dispute,⁶ this question remains of considerable interest for the constitutional system of the United Nations. Under Article 24 of the Charter, the Council is entrusted with the 'primary responsibility for the maintenance of international peace and security'. It enjoys broad powers under Chapter VII of the Charter, which include the imposition of non-military sanctions and other measures for the maintenance of international peace and security. The political significance of the Council's powers also remains undiminished. Although the Council's level of activity has subsided somewhat compared to the first half of the 1990s,⁷ there has been no return to the state of paralysis of the Cold War period. Depending on the political circumstances prevailing in each specific case, the Council can be expected to take an active stance in international conflicts in regions all over the world. It is therefore likely that *Lockerbie* will not have been the last challenge to the validity of Security Council resolutions adopted under Chapter VII of the Charter.

For these reasons, the present article will examine the question of whether and to what extent the International Court is entitled to subject Security Council resolutions adopted under Chapter VII to judicial review. In this context, special attention shall be given to the Court's orders and judgments in the *Lockerbie* cases, which will be reviewed in Section 2. The following section will examine the possibilities for judicial review within the context of the United Nations system (Section 3). Section 4 will turn to the questions of jurisdiction and admissibility, and will examine the Court's recent judgments in this respect. Finally, the article will address some of the issues regarding the validity of Security Council resolutions that the Court would have had to resolve at the merits stage of the proceedings, with special attention being given to the Council's power of determination under Article 39 of the Charter (Section 5).

Sponsored Terrorism, Judicial Review and the Political Question Doctrine', 18 *Md. J. Int'l L. & Trade* (1994) 21; Franck, 'The "Power of Appreciation": Who is the Ultimate Guardian of UN Legality?' 86 *AJIL* (1992) 519; Gowlland-Debbas, 'The Relationship between the International Court of Justice and the Security Council in the Light of the *Lockerbie* Case', 88 *AJIL* (1994) 643; Gunn, 'Council and Court: Prospects in *Lockerbie* for an International Rule of Law', 52 *University of Toronto Faculty of Law Rev.* (1993) 206; Herdegen, 'The "Constitutionalization" of the UN Security System', 27 *Vand. J. Transnat'l L.* (1994) 135; Kennedy, 'Libya vs. United States: The International Court of Justice and the Power of Judicial Review', 33 *Va. J. Int'l L.* (1993) 899; McWhinney, 'The International Court of Justice as Emerging Constitutional Court and the Coordinate UN-Institutions (Especially the Security Council): Implications of the Aerial Incident at Lockerbie', 30 *Can. Y.B. Int'l L.* (1992) 261; Reisman, 'The Constitutional Crisis of the United Nations', 87 *AJIL* (1993) 83; Watson, 'Constitutionalism, Judicial Review, and the World Court', 34 *Harv. Int'l L. J.* (1993) 1.

⁶ It should be noted that it is not entirely clear how the diplomatic developments will affect the *Lockerbie* cases, which are still pending before the Court. However, even if these cases are not settled or withdrawn at some point, it is unlikely that the Court would proceed to an examination of the validity of the resolutions now suspended.

⁷ For an overview of Security Council practice under Chapter VII until 1996, see Martenczuk, *supra* note 5, at 165–179.

2 The *Lockerbie* Cases before the International Court of Justice

On 21 September 1988, a bomb exploded on board Pan Am flight 103 from London to New York over Lockerbie, Scotland.⁸ The explosion caused the plane to crash, killing all 259 people on board and 11 on the ground. After lengthy investigations, the United Kingdom and the United States concluded that the bomb had been placed on the plane by two Libyan nationals alleged to have acted as agents of the Libyan government. In a joint declaration of 27 November 1991, the British and American governments demanded that Libya surrender the two suspects for trial in the United States or the United Kingdom.⁹

When Libya refused to surrender the suspects, the Security Council adopted Resolution 731 of 21 January 1992. This resolution, which had the character of a non-binding recommendation, asked Libya to comply with the request made by the British and American governments, including the call for the surrender of the two suspects. On 3 March 1998, while the matter was still pending before the Security Council, Libya, based on Article 14 of the Montreal Convention, filed an application asking the International Court to find that it had complied with all of its obligations under the Montreal Convention, that the United Kingdom and the United States were in violation of their obligations under that Convention, and that they were obliged to desist from the use of any force or threats against Libya.¹⁰

A *The Orders of 14 April 1992*

On the same day that the applications were filed, Libya also submitted a request for the indication of the following provisional measures:¹¹

- (a) to enjoin the United States from taking any action against Libya calculated to coerce or compel Libya to surrender the accused individuals to any jurisdiction outside of Libya; and
- (b) to ensure that no steps are taken that would prejudice in any way the rights of Libya with respect to the legal proceedings that are the subject of Libya's application.

⁸ For more background on the case, cf. S. Emerson and B. Duffy, *The Fall of PAN AM 103* (1990). A documentation of the background of the *Lockerbie* cases may be found in 31 ILM (1992) 717.

⁹ See S/3307, SCOR, 47th year, at 8; S/23308, SCOR, 47th year, at 2:
 'The British and American Governments today declare that the government of Libya must:
 – Surrender for trial all those charged with the crime and accept complete 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;
 – Pay appropriate compensation.'

¹⁰ *Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United Kingdom)*, Request for the Indication of Provisional Measures, Order of 14 April 1992, ICJ Reports (1992) 3, at 7; *Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United States)*, Request for the Indication of Provisional Measures, Order of 14 April 1992, ICJ Reports (1992) 114, at 119. The two orders being virtually identical, in the following only the order concerning the United States will be cited. On the exact wording of the applications, which were amended during the course of the proceedings, see *infra* at note 23.

¹¹ *Lockerbie*, Provisional Measures, *supra* note 10, at 119.

On 31 March 1992, three days after the closing of the hearings on the request for provisional measures, the Security Council, acting under Chapter VII of the Charter, adopted Resolution 748. In this resolution it determined ‘that the failure by the Libyan Government to demonstrate by concrete actions its renunciation of terrorism and in particular its continued failure to respond fully and effectively to the requests in resolution 731 (1992) constitute a threat to international peace and security’, and decided that Libya had to comply with the requests expressed in the joint declaration of the British and American Governments. In the case of non-compliance, the Security Council would impose sanctions on Libya that included an embargo on air travel to and from Libya and an arms embargo. Despite the fact that Resolution 748 had been adopted after the filing of the application, the Court decided to take the resolution into account in its decision.¹² On this basis, the Court dismissed the application in only a few sentences. It held that the parties were obliged to accept and carry out Security Council resolutions in accordance with Article 25 of the Charter, and that this obligation *prima facie* also applied to Resolution 748 (1992).¹³ For this reason, the Court considered the rights of Libya under the Montreal Convention as inappropriate for protection by means of provisional measures. While thus declining the Libyan request for provisional measures, the Court also pointed out that this decision did not prejudice its position on other questions it might be called to decide upon at a later stage of the proceedings.¹⁴

The Court’s refusal to grant the provisional measures requested by Libya as such was not controversial among the judges.¹⁵ This is hardly surprising, given that the measures requested by Libya would have been diametrically opposed to Resolution 748 (1992). In fact, it is hard to see how the Court could have resolved the complex issue of judicial review of the Security Council in the context of hearings on temporary relief.¹⁶ Accordingly, the Court carefully avoided taking any position on the issue of judicial review of Security Council resolutions. In their individual opinions, the Members of the Court took an equally cautious approach.¹⁷ Judge Lachs stated that the Court had to respect the binding decisions of the Security Council, but did not specify whether this would preclude an examination of their validity at the merits

¹² *Ibid.*, at 125. Some doubts were expressed with regard to this decision by Judge Bedjaoui, *ibid.*, at 151 (Judge Bedjaoui, dissenting).

¹³ *Ibid.*, at 126.

¹⁴ *Ibid.*, at 127.

¹⁵ In their dissenting opinions, however, several judges argued that the Court might have indicated other measures which would not have conflicted with the resolutions of the Security Council. See *Lockerbie*, Provisional Measures, *supra* note 10, at 158 (Judge Bedjaoui, dissenting); at 180 (Judge Weeramantry, dissenting); at 193 (Judge Ajibola, dissenting).

¹⁶ See Martenczuk, *supra* note 5, at 115–118. Cf. also Beveridge, ‘The Lockerbie Affair’, 41 *ICLQ* (1992) 907, at 918; Merrills, ‘Interim Measures of Protection in the Recent Jurisprudence of the International Court of Justice’, 44 *ICLQ* (1995) 90, at 130; Stein, ‘Das Attentat von Lockerbie vor dem Sicherheitsrat der Vereinten Nationen und vor dem Internationalen Gerichtshof’, 31 *Archiv des Völkerrechts* (1993) 206, at 227.

¹⁷ The only exception in this respect being Judge ad hoc El-Kosheri, who argued that Resolution 748, by virtue of having interfered with pending proceedings before the Court, was in violation of Article 92 of the Charter. Cf. *Lockerbie*, Provisional Measures, *supra* note 10, at 210 (Judge ad hoc El-Kosheri, dissenting).

stage.¹⁸ Judge Bedjaoui doubted that the Court could question the Council's authority to qualify international situations under Chapter VII of the Charter, but expressed discomfort with the fact that 'the horrific Lockerbie bombing should be seen today as an urgent threat to the peace when it took place over three years ago'.¹⁹ Judge Weeramantry first examined possible limits to the powers of the Council, but then concluded that the determination under Article 39 of the Charter is one 'entirely within the discretion of the Council'.²⁰ The degree of uncertainty that reigned in the Court, however, is best illustrated by the unusually doubting questions of Judge Shahabuddeen:²¹

The question now raised . . . is whether a decision of the Security Council may override the legal rights of States, and, if so, whether there are 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 Council's powers of appreciation? In the equilibrium of forces underpinning the United Nations within the evolving international order, is there any conceivable point beyond which a legal issue may properly arise as to the competence of the Security Council to produce such overriding results? If there are any limits, what are those limits, and what body, if other than the Security Council, is competent to say what those limits are? If the answers to these delicate and complex questions are all in the negative, the position is potentially curious. It would not, on that account, be necessarily unsustainable in law; and how far the Court can enter the field is another matter.

B The Judgments of 27 February 1998

On 27 February 1998, almost six years after the filing of the applications, the Court finally reached a decision on the preliminary objections raised by the respondents. In the meantime, with Resolution 883 of 11 November 1993, the Security Council had repeated its finding that Libya's refusal to extradite the suspects constituted a threat to the peace, and further tightened the sanctions.²² During the course of the proceedings, Libya had also modified its submissions, which in their final form asked the Court to adjudge and declare as follows:²³

- (a) that the Montreal Convention is applicable to this dispute;
- (b) that Libya has fully complied with all of its obligations under the Montreal Convention and is justified in exercising the criminal jurisdiction provided for by that Convention;
- (c) that the United Kingdom has breached, and is continuing to breach, its legal obligations to Libya under Article 5, paragraphs 2 and 3, Article 7, Article 8, paragraph 3, and Article 11 of the Montreal Convention;
- (d) that the United Kingdom is under a legal obligation to respect Libya's right not to have the Convention set aside by means which would in any case be at variance with the principles of the United Nations Charter and with the mandatory rules of general international law

¹⁸ *Lockerbie*, Provisional Measures, *supra* note 10, at 138 (Judge Lachs, concurring).

¹⁹ *Ibid.*, at 153 (Judge Bedjaoui, dissenting).

²⁰ *Ibid.*, at 176 (Judge Weeramantry, dissenting).

²¹ *Ibid.*, at 142 (Judge Shahabuddeen, concurring).

²² These included a freeze of Libyan foreign assets, with the important exception of revenue from oil exports, as well as restrictions on Libyan diplomatic and consular representations.

²³ *Lockerbie*, Preliminary Objections (*Libya v. United States*), *supra* note 4, para. 12.

prohibiting the use of force and the violation of the sovereignty, territorial integrity, sovereign equality and political independence of States.

Both respondents raised preliminary objections against the Libyan application, arguing that the Court lacked jurisdiction to deal with the claims and that the claims were inadmissible.²⁴ In particular, the respondents argued that the jurisdiction of the Court could not be based on Article 14 of the Montreal Convention,²⁵ since there was no dispute concerning the interpretation or application of that Convention.²⁶ In particular, the respondents argued that none of the provisions of the Montreal Convention cited by Libya imposed any obligations on them that could have been violated by their request for the surrender of the alleged offenders.²⁷ Concerning the Libyan submission (d), the respondents objected that it was not for the Court to 'decide on the lawfulness of actions which were in any event in conformity with international law, and which were instituted by the Respondents to secure the surrender of the two alleged offenders'.²⁸ Finally, the respondents contended that the rights claimed by Libya could not be exercised because they were superseded by Resolutions 748 (1992) and 883 (1993). According to the respondents, the only dispute which existed was one between Libya and the Security Council, which did not fall under Article 14 of the Montreal Convention.²⁹

The Court rejected these objections and found that it had jurisdiction. It held that since the parties differed on the question of whether the destruction of the Pan Am aircraft was governed by the Montreal Convention, a dispute concerning the interpretation and application of this Convention existed.³⁰ Moreover, the Court found

²⁴ *Ibid.*, at para. 13.

²⁵ Article 14(1) reads as follows: 'Any dispute between two or more Contracting States concerning the interpretation or application of this Convention which cannot be settled through 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 organization 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.'

²⁶ *Lockerbie*, Preliminary Objections (*Libya v. United States*), *supra* note 4, at para. 23. Both parties had initially also objected that the procedural requirements of Article 14 had not been respected, an objection that was later dropped by the United Kingdom, but not the United States. The Court dismissed these objections very briefly on the ground that the respondents had clearly expressed their intention not to accept arbitration under the Convention; see *Lockerbie*, Preliminary Objections (*Libya v. United States*), *supra* note 4, at paras 19–20.

²⁷ *Lockerbie*, Preliminary Objections (*Libya v. United States*), *supra* note 4, at para. 26.

²⁸ *Ibid.*, at para. 34.

²⁹ *Ibid.*, at para. 36.

³⁰ *Ibid.*, at para. 24.

that a specific dispute existed regarding the interpretation of Articles 7³¹ and 11³² of the Montreal Convention.³³ Regarding the Libyan submission (d), it argued that it was for the Court to decide ‘on the lawfulness of the actions criticized by Libya, in so far as those actions would be contrary to the provisions of the Montreal Convention’.³⁴ Finally, the Court also dismissed the objection regarding the effect of Resolutions 748 (1992) and 883 (1993) on the grounds that since these resolutions had been adopted after the filing of the application, they could not affect the jurisdiction of the Court.³⁵

Regarding the admissibility of the Libyan application, the respondents argued that the dispute was now governed by decisions of the Security Council which superseded any rights that Libya might have enjoyed under the Montreal Convention, and that as a consequence the Libyan application was inadmissible.³⁶ Alternatively, the respondents argued that the Libyan application had been rendered ‘without object’ or had become ‘moot’ as a consequence of the resolutions.³⁷ Regarding the first objection, the Court held that the only relevant date for determining the admissibility of the application was the date of its filing. Since Resolutions 748 (1992) and 883 (1993) had been adopted after that date, they consequently could not affect the admissibility of the application. As for Resolution 731 (1992), which had been adopted before the date of filing, it could not be an impediment to admissibility because it was a mere recommendation without binding effect.³⁸ Concerning the issue of mootness, the Court did not decide on the substance of this objection. However, it found that such a decision would require the discussion of many complicated issues relating to the subject-matter of the case, in particular the legal effect of the Security Council resolutions on the rights of Libya. For this reason, the Court found that the objection had the character of a defence on the merits, with which it was ‘inextricably interwoven’. Accordingly, the Court found that the objection was not of an

³¹ Article 7 of the Montreal Convention reads as follows:

‘The Contracting State in the territory of which the alleged offender is found shall, if it does not extradite him, be obliged, without exception whatsoever and whether or not the offence was committed in its territory, to submit the case to its competent authorities for the purpose of prosecution. Those authorities shall take their decision in the same manner as in the case of any ordinary offence of a serious nature under the law of that State.’

³² Article 11 of the Montreal Convention in relevant part reads as follows:

‘1. Contracting States shall afford one another the greatest measure of assistance in connection with criminal proceedings brought in respect of the offences. The law of the State requested shall apply in all cases.’

³³ *Lockerbie*, Preliminary Objections (*Libya v. United States*), *supra* note 4, at paras 28, 32.

³⁴ *Ibid.*, at para. 35.

³⁵ *Ibid.*, at para. 37.

³⁶ *Ibid.*, at para. 40.

³⁷ *Ibid.*, at para. 45.

³⁸ *Ibid.*, at para. 43.

‘exclusively preliminary character’ within the meaning of Article 79(7) of the Rules of Court,³⁹ and therefore had to be considered at the stage of the merits.⁴⁰

These findings of the Court were the subject of criticism from some of its Members. President Schwebel, Judge Oda and Judge ad hoc Jennings⁴¹ disagreed with the majority on the existence of a dispute within the meaning of Article 14 of the Montreal Convention.⁴² These three judges as well as Judge Herczegh also disagreed with the majority on the admissibility of the application. A minority of six judges,⁴³ finally, held the opinion that the objection concerning the mootness of the Libyan application should not have been joined to the merits, but should have been treated at the preliminary stage.

Overall, the approach of the majority of the Court in the 1998 judgments can be described as extremely cautious. Similar to its position in 1992, the Court carefully limited itself to the resolution of only those issues for which a decision could not possibly have been avoided at the preliminary stage; all other issues were left for decision at the merits stage. As a consequence of this approach, many questions surrounding the issue of judicial review of Security Council resolutions were dealt with only by implication or were left completely open. An attempt to shed some more light on these issues shall be made in the following sections.

3 Judicial Review and the UN Charter

The question of whether the Court may examine the legality and validity of Security Council resolutions raises difficult issues regarding the role and function of the Court in the system of the United Nations. Despite the fact that the Court, according to Article 92 of the Charter, is the ‘main judicial organ’ of the United Nations, it has not been endowed with competences similar to those of a national constitutional court. As a consequence, it has frequently been said that the Court does not possess ‘powers of judicial review’ or ‘appellate jurisdiction’ over the political organs of the United Nations.⁴⁴ In his dissent from the majority in the *Lockerbie* judgments, President

³⁹ ICJ Acts and Documents no. 5, (1989) 93. Article 79(7) in relevant part reads as follows:

‘1. Any objection by the respondent to the jurisdiction of the Court or to the admissibility of the application, or other objection the decision upon which is requested before any further proceedings on the merits, shall be made in writing within the time-limit fixed for the delivery of the Counter-Memorial. . . . 7. After hearing the parties, the Court shall give its decision in the form of a judgment, by which it shall either uphold the objection, reject it, or declare that the objection does not possess, in the circumstances of the case, an exclusively preliminary character. If the Court rejects the objection or declares that it does not possess an exclusively preliminary character, it shall fix time-limits for the further proceedings.’

⁴⁰ *Lockerbie*, Preliminary Objections (*Libya v. United States*), *supra* note 4, at para. 49.

⁴¹ Judge ad hoc Jennings sat only in the case concerning the United Kingdom.

⁴² Cf. the analysis by Judge ad hoc Jennings in his dissent in the case opposing the United Kingdom and Libya, *supra* note 4, at 1–5 of the opinion.

⁴³ President Schwebel, Judges Oda, Guillaume, Herczegh, Fleischhauer, and Judge ad hoc Jennings.

⁴⁴ O. J. Lissitzyn, *The International Court of Justice — Its Role in the Maintenance of International Peace and Security* (1951) 96–97; C. de Visscher, *Aspects récents du droit procédural de la Cour Internationale de Justice* (1966) 16; Gross, ‘The International Court of Justice and the United Nations’, 120 *RdC* (1967, I) 313, at 429.

Schwebel, examining the drafting history of the Charter and the jurisprudence of the Court, stressed that the Court did not possess powers of judicial review, and in particular could not ‘override or undercut decisions of the Security Council’ based on Chapter VII of the Charter.⁴⁵ Similarly, Judge ad hoc Jennings argued that since the Court did not possess powers of judicial review, it could not ‘substitute its own discretion for that of the Security Council’.⁴⁶

However, it is questionable whether such far-reaching conclusions can be derived from the Charter and its history. This depends primarily on what meaning is attached to the expression ‘powers of judicial review’. If this expression is understood as a reference to specific means or procedures by which decisions of the United Nations political organs could be subjected to the scrutiny of the Court, then it is indeed true that the Charter does not foresee any such powers.⁴⁷ However, this would not necessarily mean that the Charter precludes the Court from examining the validity of the decisions of the political organs of the UN, should such a question arise in proceedings duly brought before the Court. The power to interpret the UN Charter was the subject of intensive discussions at the San Francisco conference.⁴⁸ In a Subcommittee report on the interpretation of the Charter, the drafters of the report advised against a special provision on the competence to interpret the Charter. However, the report went on to say that the Member States were free to determine the interpretation of the Charter in a number of ways, including by reference to the International Court of Justice.⁴⁹

If two member states are at variance concerning the correct interpretation of the Charter, they are of course free to submit the dispute to the international Court of Justice as in the case of any other treaty. Similarly, it would always be open to the General Assembly or the Security Council, in appropriate circumstances, to ask the international Court of Justice for an advisory opinion concerning the meaning of a provision of the Charter. Should the General Assembly or the Security Council prefer another course, an *ad hoc* committee of jurists might be set up to examine the question and report its views, or recourse might be had to a joint conference. In brief, the members or the organs of the organization might have recourse to various expedients in order to obtain an appropriate interpretation. It would appear neither necessary nor desirable to list or to describe in the Charter the various possible expedients.

The drafters of the Charter thus followed what could be called a ‘decentralized’ approach to Charter interpretation. It does not appear, therefore, that it was the intention of the Charter to preclude the examination of the validity of decisions of the

⁴⁵ *Lockerbie*, Preliminary Objections (*Libya v. United States*), *supra* note 4, diss. op. President Schwebel, at 7–13.

⁴⁶ *Lockerbie*, Preliminary Objections (*Libya v. United Kingdom*), *supra* note 4, diss. op. Judge ad hoc Jennings, at 10. Similar views were also expressed by the United Kingdom in the *Lockerbie* case; cf. CR 97/17, at para. 5.43–5.52 (Lord Hardie).

⁴⁷ At San Francisco, certain proposals were debated on whether to confer on the Court a power to review decisions of the Security Council. Cf. on this Watson, *supra* note 5, at 8–11.

⁴⁸ On this, see Martenczuk, *supra* note 5, at 66–70; R. B. Russell and J. E. Muther, *A History of the United Nations Charter* (1958) at 925–927.

⁴⁹ *Report of Special Subcommittee of Committee IV/2 on the Interpretation of the Charter*, 13 UNCIO (1945) at 831–832.

UN political organs, for instance when this validity is relevant to the decision of a dispute between two UN Member States. The Court's jurisprudence seems to have followed similar lines, as can be seen from the Court's 1970 opinion in the *Namibia* case:⁵⁰

Undoubtedly, the Court does not possess powers of judicial review or appeal in respect of the decisions taken by the UN organs concerned. However, in the exercise of its judicial function and since objections have been advanced the Court, in the course of its reasoning, will consider these objections before determining any legal consequences arising from those resolutions.

The fact that an examination of the validity of a decision relevant to a case before the Court is indispensable for the exercise of the judicial function of the Court was stressed in the separate opinion of Judge Onyeama:⁵¹

The Court's powers are clearly defined by the Statute, and do not include powers to review decisions of other organs of the United Nations; but when, as in the present proceedings, such decisions bear upon a case properly before the Court, and a correct judgment or opinion could not be rendered without determining the validity of such decisions, the Court could not possibly avoid such determination without abdicating its role of a judicial organ. . . . I do not conceive it as compatible with the judicial function that the Court will proceed to state the consequences of acts whose validity is assumed, without itself testing the lawfulness of the origin of those acts.

This also seems to have been the Court's approach in the *Lockerbie* cases, where the lack of a power of judicial review was not even mentioned as a possible objection to the jurisdiction of the Court.⁵² Neither the Charter nor the jurisprudence of the Court would therefore support the claim that the Court is generally prevented from examining the validity of decisions of the UN political organs, including the Security Council, where such decisions have a bearing on a case before the Court. To this extent, it can be said that the Court may subject the resolutions of the Security Council to 'judicial review'. However, this review is implicit in the exercise of the judicial function of the Court; it does not constitute an independent 'power of judicial review'.

To the exercise of this incidental review function, it has sometimes been objected that since the Council could not be a party to such proceedings before the Court, any judgment adopted by the Court would not be binding on the Council under Article 59 of the Statute.⁵³ It is true that the judgments of the Court do not have binding force for the political organs of the United Nations.⁵⁴ However, this fact does not constitute a

⁵⁰ *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, ICJ Reports (1971) 16, at 45.

⁵¹ *Ibid.*, at 143–144.

⁵² Cf. also *Lockerbie*, Preliminary Objections (*Libya v. United States*), *supra* note 4, sep. op. Judge Rezek, at para. 4: 'La Cour jouit d'une pleine compétence pour l'interprétation et l'application du droit dans une affaire contentieuse, même quand l'exercice de cette compétence peut entraîner l'examen critique d'une décision d'un autre organe des Nations Unies.'

⁵³ Cf. *Lockerbie*, Preliminary Objections (*Libya v. United States*), *supra* note 4, diss. op. President Schwebel, at 13. The same argument was put forward by the United Kingdom, CR 97/17, at para 5.51 (Lord Hardie).

⁵⁴ *Northern Cameroons (Cameroon v. United Kingdom)*, ICJ Reports (1963) 3, at 33.

compelling reason against the exercise of the Court's review function.⁵⁵ The inherent limitations of an incidental review function do not render this form of review useless. In the absence of direct mechanisms of review, incidental review may be the only way in which an authoritative and impartial interpretation of the law can be obtained. This does not exclude the fact that there might be disagreement over the effect of a judgment finding a Council resolution to be invalid. However, this situation is not fundamentally different from the case of advisory opinions, which also do not have binding force on the political organs of the United Nations, but have generally been respected due to the judicial authority and impartiality of the Court. For the same reason, it is not likely that a judgment of the Court that found the Council to have exceeded its powers in a particular instance would be taken lightly by the political organs of the United Nations or the international community in general.

4 Questions of Jurisdiction and Admissibility

In the context of contentious cases,⁵⁶ any form of judicial review that the Court might exercise over resolutions of the Security Council is merely incidental in nature. For this reason, the question of judicial review could only arise if the Court has jurisdiction over the case before it, and if the application is otherwise admissible. The *Lockerbie* cases have illustrated some of the possible objections that might be raised on jurisdiction and admissibility in cases involving questions of judicial review.

A *Justiciability*

Disputes that involve questions concerning the legality of Security Council resolutions adopted under Chapter VII of the Charter tend to be of a highly political nature. Traditionally, it has been discussed whether such politically charged disputes are justiciable, and in particular whether they are legal disputes within the meaning of Article 36 of the Statute of the Court.⁵⁷ This issue received particular attention with respect to the Court's decision in the *Nicaragua* case, where some critics argued that the Court had been drawn into a political rather than a legal conflict.⁵⁸ However, the Court in its constant jurisdiction has never upheld objections based on considerations of justiciability. In the *Aegean Sea Continental Shelf* case, the Court rightly pointed out that the political nature of a dispute could not be an obstacle to its jurisdiction, since to

⁵⁵ Cf. Martenczuk, *supra* note 5, at 111–113; Sorel, *supra* note 4, at 716.

⁵⁶ It should be noted that the question of judicial review is not necessarily limited to the contentious jurisdiction of the Court. In particular, the question could also arise in the context of the Court's advisory jurisdiction under Article 96 of the Charter. However, it appears relatively unlikely that the political organs of the United Nations would submit such a politically charged matter to the Court. For more details on this question, see Bedjaoui, *supra* note 5, at 92; Martenczuk, *supra* note 5, at 74–77.

⁵⁷ On the background of this debate, see Martenczuk, *supra* note 5, at 87–90.

⁵⁸ Cf. *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States)*, Merits, ICJ Reports (1986) 13, at 220 (Judge Oda, dissenting); Cutler, 'Some Reflections on the Adjudication of the Iranian and Nicaraguan Cases', 25 *Va. J. Int'l L.* (1984/85) 437, at 442; Norton, 'The Nicaragua Case: Political Questions Before the International Court of Justice', 27 *Va. J. Int'l L.* (1987) 459, at 522.

some extent all disputes between states are of a political nature.⁵⁹ Both in the *Teheran Hostages* case and the *Nicaragua* case, the Court therefore declared the 'larger political context' of the dispute to be irrelevant for the question of jurisdiction.⁶⁰ In more recent decisions, the Court did not even consider justiciability as a possible obstacle to its jurisdiction. Despite the undeniably strong political implications of the *Bosnia* case, the Court found that there was a legal dispute and that it accordingly had jurisdiction.⁶¹ In the *Lockerbie* cases, none of the respondents directly raised the question of justiciability, and the Court consequently did not address the question. However, in his separate opinion, Judge Kooijmans emphasized that the fact that a dispute has political overtones does not act as a bar to the Court's jurisdiction.⁶² It must be concluded that any dispute brought before the Court is justiciable, regardless of what political overtones it may have. As a consequence, justiciability could not act to prevent the judicial review of Security Council resolutions by the Court.

B *The Basis of Jurisdiction*

The Court's jurisdiction in contentious cases may be established in two ways: either through the acceptance of the compulsory jurisdiction of the Court according to Article 36(2) of the Statute,⁶³ or by agreement of the parties according to Article 36(1) of the Statute. In the latter case, the agreement may be either concluded ad hoc, or it may be contained in the form of a compromisory clause in an international treaty between the parties. In either case, the jurisdiction of the Court extends only to the issues covered by a jurisdictional link between the parties. This means that the Court may proceed to the examination of the validity of a Security Council resolution only where this examination is necessary for the decision of a dispute that falls under a valid title of jurisdiction between the parties.

The determination of the basis of jurisdiction caused considerable difficulty for the Court in the *Lockerbie* case. Article 14 of the Montreal Convention, on which Libya had to rely for lack of a more general title of jurisdiction, covers only disputes concerning the interpretation or application of the Montreal Convention. However, it is questionable whether there was such a dispute between the parties with respect to the interpretation of any of the various provisions of the Montreal Convention cited by

⁵⁹ *Aegean Sea Continental Shelf (Greece v. Turkey)*, Jurisdiction, ICJ Reports (1978) 3, at 13.

⁶⁰ *United States Diplomatic and Consular Staff in Tehran (United States v. Iran)*, ICJ Reports (1980) 3, at 20; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States)*, Jurisdiction and Admissibility, ICJ Reports (1984) 391, at 435.

⁶¹ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia)*, Preliminary Objections, ICJ Reports (1996) 594, at 614–615.

⁶² *Lockerbie*, Preliminary Objections (*Libya v. United States*), *supra* note 4, sep. op. Judge Kooijmans, at para. 2.

⁶³ On the optional clause as a potential basis for the review of Security Council resolutions, in particular with respect to reservations to the acceptance of the compulsory jurisdiction of the Court, see Martenczuk, *supra* note 5, at 83–85.

Libya.⁶⁴ Article 7,⁶⁵ with respect to which the Court held a dispute to exist, contains an obligation of the state in which the alleged offender is found to submit the case to its competent authorities for prosecution, unless it decides to extradite the alleged offender. At first sight, this provision would impose an obligation only on Libya and not on the United Kingdom or the United States, and could therefore not form the basis of Libya's claims. A contrary view could only be reached if it were assumed that Article 7 implicitly recognizes the right of Member States not to extradite alleged offenders found on their territory.⁶⁶ However, this would seem to be an extensive construction of the Montreal Convention, which would be particularly problematic in cases where the supposed offenders are alleged to have acted as officers of the prosecuting state. As for Article 11,⁶⁷ the other provision cited by the Court as being in dispute between the parties, a dispute could potentially exist regarding the Libyan allegation that it had not received the assistance it requested from the authorities of the United Kingdom and the United States. However, this claim was clearly not central to the Libyan application. In particular, it would not have led to an occasion for the judicial review of the resolutions of the Security Council, and therefore not have provided Libya with the relief it was seeking.

Equally doubtful is the Court's overall finding that there existed a 'general dispute' on whether the Lockerbie incident is governed by the Montreal Convention.⁶⁸ The question is not whether the Montreal Convention as a whole could be applied to a situation, but which of its provisions are disputed between the parties.⁶⁹ For the same reason, the Libyan assertion of its 'right not to have the Convention set aside'⁷⁰ is merely begging the question of whether any of the provisions of the Montreal Convention are actually in dispute between the parties.⁷¹ Overall, the opinion of the majority concerning the basis of jurisdiction arguably constitutes the weakest part of the *Lockerbie* judgments. However, it is not clear whether the Court really meant to decide that the Montreal Convention is applicable to the case. The judgment left open the possibility that at the stage of the merits, the majority of the Court might reach the conclusion that none of the provisions of the Montreal Convention have been violated by the respondents, in which case no further examination of the validity of the Security Council resolutions would be necessary.

On the other hand, should Article 7 of the Montreal Convention be construed so as to guarantee Libya a right not to surrender the alleged offenders, then a conflict would exist between Article 7 and Security Council Resolutions 748 (1992) and 883 (1993), which require the surrender of the suspects. In this case, the Court would have had to

⁶⁴ See *supra* note 42 and accompanying text.

⁶⁵ For the wording of this provision, see *supra* note 31.

⁶⁶ In this sense, cf. Sorel, *supra* note 4, at 716.

⁶⁷ For the wording of this provision, see *supra* note 32.

⁶⁸ See *supra* note 30.

⁶⁹ *Lockerbie*, Preliminary Objections (*Libya v. United States*), *supra* note 4, diss. op. President Schwebel, p. 2.

⁷⁰ See *supra* at note 23.

⁷¹ *Lockerbie*, Preliminary Objections (*Libya v. United Kingdom*), *supra* note 4, diss. op. Judge ad hoc Jennings, at 5.

decide which obligation should prevail, and this would have made an examination of the validity of the resolutions inevitable. Some judges of the Court have suggested that such an examination might cause the Court to overstep the boundaries of its jurisdiction under Article 14.⁷² However, the Court could not rule on the existence of the rights of Libya under the Montreal Convention while leaving the question of the effect of the Security Council resolutions unanswered. As was already stated by Judge Onyeama in the *Namibia* case,⁷³ in the exercise of its judicial function, the Court would have to resolve all the legal questions pertaining to the dispute before it. Therefore, in conjunction with an extensive interpretation of Article 7, Article 14 of the Montreal Convention could have formed the jurisdictional basis for judicial review of Security Council Resolutions 748 (1992) and 883 (1993).

C Admissibility

As the *Lockerbie* cases have illustrated, in cases which involve the validity of Security Council resolutions adopted under Chapter VII of the Charter, the admissibility of the application is also likely to become an issue. In particular, objections to admissibility may relate to the relationship between the Court and the Security Council, and to the effect of Security Council resolutions on the subject-matter of the case.

1 Court and Council

According to Article 24(1) of the Charter, the Security Council is charged with 'primary responsibility' for the maintenance of international peace and security. If a case before the Court involves questions regarding the validity of Security Council resolutions adopted under Chapter VII of the Charter, it would necessarily have a bearing on the maintenance of international peace and security. The question could therefore arise whether the 'primary responsibility' of the Council is exclusive in nature, so as to exclude a role for the Court in cases involving the maintenance of international peace and security.⁷⁴

However, there is nothing in the Charter to suggest that the competences of the Security Council would be exclusive of those of the Court. Like the Council, the Court is a main organ of the United Nations devoted to the objective of international peace and security.⁷⁵ It would therefore be surprising if the Court were to be excluded from contributing to this most important objective of the United Nations. The Court has also consistently rejected any objections that were designed to deny its role in the maintenance of international peace and security. In the *Nicaragua* judgment, the

⁷² *Lockerbie*, Preliminary Objections (*Libya v. United States*), *supra* note 4, joint decl. of Judges Guillaume and Fleischhauer, at 4; sep. op. Judge Kooijmans, at para. 8.

⁷³ See *supra* note 51.

⁷⁴ Similar objections were raised by the United States in the *Nicaragua* case (cf. *Nicaragua*, Jurisdiction and Admissibility, *supra* note 60, at 431; on this, see Norton, *supra* note 58, at 462–492).

⁷⁵ Cf. Articles 7(1) and 1(1) of the Charter. See also Pellet, 'Le glaive et la balance — Remarques sur le rôle de la C.I.J. en matière de maintien de la paix et de la sécurité internationales', in Y. Dinstein (ed.), *International Law at a Time of Perplexity, Essays in Honour of Shabtai Rosenne* (1989) 539, at 541.

Court explicitly stated that the Council's primary responsibility under Article 24 of the Charter was not exclusive in nature; it characterized the functions of the Council and the Court as 'separate but complementary'.⁷⁶ In fact, any other interpretation would risk introducing the notion of justiciability through the back door and therefore would have to be rejected. Equally, there is no rule that would prohibit simultaneous proceedings before Court and the Council.⁷⁷ Even if the Council is seised of an affair and acting under Chapter VII of the Charter, the Court is not prevented from exercising its judicial function. In particular, Article 12 of the Charter, which prevents the General Assembly from issuing recommendations while the Security Council is seised of a matter, does not apply to the Court. According to the jurisprudence of the Court, parallel proceedings before the Court and the Council therefore do not constitute an obstacle to the exercise of the jurisdiction of the Court.⁷⁸ In the *Lockerbie* cases, the respondents did not explicitly raise the issue, but instead relied on the effect of Resolutions 748 (1992) and 883 (1992). However, the Court's rejection of these objections would appear to confirm by implication that simultaneous proceedings before the Council do not deprive the Court of jurisdiction.⁷⁹

2 *The Effect of the Security Council Resolutions*

Much more controversial in the *Lockerbie* judgments was the effect of Resolutions 748 (1992) and 883 (1993), both of which the Council had adopted acting under Chapter VII after the filing of the proceedings. Both respondents had repeatedly cited the resolutions in their preliminary objections, claiming that the resolution had rendered the Libyan objection inadmissible, 'without object', or 'moot'.⁸⁰ On the one hand, the Court held that the resolutions could not have rendered the applications inadmissible,

⁷⁶ *Nicaragua*, Jurisdiction and Admissibility, *supra* note 60, at 434–435. This position was confirmed most recently in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia [Serbia and Montenegro])*, Provisional Measures, ICJ Reports (1993) 3, at 19.

⁷⁷ On the question of litispendence between the Court and the Council, T. J. H. Elsen, *Litispendence between the International Court of Justice and the Security Council* (1986); Martenczuk, *supra* note 5, at 100–106.

⁷⁸ *Tehran Hostages*, *supra* note 60, at 22; *Nicaragua*, Jurisdiction and Admissibility, *supra* note 60, at 435; *Bosnia*, Provisional Measures, *supra* note 76, at 19. See also Elsen, *supra* note 77, at 66; Klein, 'Paralleles Tätigwerden von Sicherheitsrat und Internationalem Gerichtshof bei friedensbedrohenden Streitigkeiten', in R. Bernhardt *et al.* (eds), *Festschrift für (Essays in Honor of) Hermann Mosler* (1983) 467, at 477; Mosler, 'Political and Justiciable Legal Disputes: Revival of an Old Controversy?', in B. Cheng and E. D. Brown (eds), *Contemporary Problems of International Law, Essays in Honor of Georg Schwarzenberger* (1988) 216, at 227; Pellet, *supra* note 75, at 546.

⁷⁹ Judge Kooijmans in his separate opinion did point out, however, that the fact that a dispute is dealt with simultaneously by the Council could not deprive the Court of jurisdiction; see *Lockerbie*, Preliminary Objections (*Libya v. United States*), *supra* note 4, sep. op. Judge Kooijmans, at para. 2. Contrary to the opinion of Sorel, *supra* note 4, at 713, it would not appear that this result would have been different had the resolutions been adopted before the filing date of the applications.

⁸⁰ See *supra* notes 36 and 80.

as they had been adopted after the date of filing of the applications.⁸¹ On the other hand, it considered that the applications might have been rendered moot by the resolutions, but joined this issue to the merits as being 'not of an exclusively preliminary character'⁸² within the meaning of Article 79 of the Rules of Court.⁸³

This treatment of the objections by the Court is slightly confusing, if not contradictory. It is not clear why the Court would first rely on the date of filing in order to dismiss the objection to admissibility, and then join essentially the same argument to the merits as not being of an 'exclusively preliminary character'. However, the main question is in fact whether the effect of the Security Council resolutions is a question that can be dealt with at the preliminary stage at all. The Security Council, even when acting under Chapter VII of the Charter, is not a judicial organ capable of adopting final decisions on the rights of the parties; unlike the decisions of judicial organs, its decisions are therefore not entitled to *res iudicata* effect.⁸⁴ It is not obvious for what other reason the resolutions could affect the admissibility of the applications.⁸⁵ In particular, it does not appear that the resolutions would have rendered the Libyan applications without object or moot. It is true that the Court has occasionally acknowledged that events subsequent to the filing of the application may render an application moot and therefore inadmissible.⁸⁶ However, the cases in which mootness was an issue involved constellations in which, due to factual developments, the relief sought by the applicant had been rendered useless, and the application had thus become without interest for the applicant. In *Northern Cameroons*, for instance, the application was found moot because the Trusteeship agreement whose interpretation was at issue had already been terminated and could therefore no longer have any legal effects.⁸⁷ In the *Nuclear Tests* case, the Court found the application to have become without interest to the applicant because of a unilateral declaration on the part of the respondent not to carry out further tests, which the Court considered to be legally binding.⁸⁸ These cases are not comparable to the situation in the *Lockerbie* case. Libya did retain a genuine interest in the resolution of the dispute it had submitted to the Court. The potential effect of the Security Council resolutions was merely that they might have superseded the rights Libya was claiming, thereby depriving the Libyan application of its legal foundation. This, however, is not a question of admissibility, but one of the merits.

This result is also supported by considerations of judicial economy. The purpose of preliminary objections is to prevent the Court from entering into protracted debates

⁸¹ See *supra* note 38.

⁸² Cf. Sorel, *supra* note 4, at 704–705.

⁸³ See *supra* note 39.

⁸⁴ Cf. in more detail Martenczuk, *supra* note 5, at 107–108; Delbrück in B. Simma, *The Charter of the United Nations* (1995) Article 24, note 10; see also Klein, *supra* note 78, at 479.

⁸⁵ On this, see also Martenczuk, *supra* note 5, at 108–111.

⁸⁶ Cf. *Northern Cameroons*, *supra* note 54, at 38; *Nuclear Tests (Australia v. France)*, ICJ Reports (1974) 253, at 271–272; *Border and Transborder Armed Actions (Nicaragua v. Honduras)*, ICJ Reports (1985) 68, at 95.

⁸⁷ Cf. *Northern Cameroons*, *supra* note 54, at 38.

⁸⁸ Cf. *Nuclear Tests*, *supra* note 88, at 270.

on the merits before the questions of jurisdiction and admissibility have been settled.⁸⁹ A discussion of the validity of the resolutions would have drawn the Court into one of the most difficult debates possible. The Court was therefore justified in postponing consideration of the question to the merits. The reason, however, is not that the objection was not of an ‘exclusively preliminary character’, but rather that it was not of a preliminary character at all.⁹⁰

5 The Validity of Chapter VII Resolutions

The central problem of the *Lockerbie* cases, which the Court left to be resolved at the merits stage, is under what circumstances, if any, the Court could consider a Security Council resolution adopted under Chapter VII of the Charter as invalid. An answer to this question involves extremely delicate considerations regarding the nature and extent of the Council’s powers under the Charter. The following section will merely attempt to suggest some possible solutions to three important issues the Court would have to address in any case involving judicial review of the Security Council acting under Chapter VII of the Charter: first, the relationship of the Council to the UN Charter; second, the nature and extent of the Council’s power of determination under Article 39 of the Charter; and finally, the Council’s position with respect to general international law.

A *The Council and the Charter*

The Security Council was established by the United Nations Charter, which is a multinational treaty. Therefore, the starting point of the discussion is the assumption that the Security Council, like the organ of any other international organization,⁹¹ is bound by the Charter, and that a resolution adopted in violation of the provisions of the Charter would be *ultra vires* and invalid. However, for the Security Council, this contention has not always been accepted. Generally, the objections to the Charter as a standard for the judicial review of Security Council resolutions seem to have their origin in the specific functions of the Security Council within the system of collective security of the United Nations.⁹² Under Chapter VII of the UN Charter, only the Security Council may impose binding non-military sanctions and authorize measures

⁸⁹ On this, cf. *Lockerbie*, Preliminary Objections (*Libya v. United States*), *supra* note 4, at para. 48.

⁹⁰ This also seems to have been the opinion of Judges Bedjaoui, Ranjeva and Koroma, who appended the following declaration to the judgments:

‘La qualification de non exclusivement préliminaire attribuée à l’exception [de la partie défenderesse], selon laquelle les résolutions du Conseil de sécurité auraient privé les demandes de la Libye de tout objet, et le renvoi de son examen au fond, signifient à notre avis qu’il ne suffit pas d’invoquer les dispositions du chapitre VII de la Charte pour mettre fin de manière automatique et immédiate à tout débat judiciaire au sujet des décisions du Conseil de sécurité.’

⁹¹ However, it should be noted that — with the important exception of the European Communities — there is no generally accepted standard of judicial review for the acts of international organizations (cf. Martenczuk, *supra* note 5, at 57–62).

⁹² On the collective security aspects of the problem, see in more detail Martenczuk, *supra* note 5, at 134–142.

of collective security in the event of any threat to the peace, breach of the peace, or act of aggression. However, the Council's powers depend on the acceptance of their obligations by the UN Member States. It could be argued that if Member States were allowed to question the validity of Security Council resolutions, they would be provided with an easy excuse for not complying with their obligations under the Charter. Accordingly, various solutions have been suggested which would limit the binding force of the Charter for the Council. These suggestions, which would at the same time constitute the 'standard of judicial review' for the Court, will be examined subsequently.

1 *Authoritative Interpretation of the Charter*

Challenges by Member States to the authority of the Security Council could be precluded entirely if the interpretation of the provisions of the Charter by the Council were regarded as authoritative. Such an approach would result in a '*compétence de la compétence*' of the Council,⁹³ and exclude any possibility for the review of Security Council resolutions by the Court. Radical as such a solution might appear, it is not necessarily excluded by international law. The rule of law is still not a binding principle in international relations and organizations.⁹⁴ As a consequence, the UN Member States could have attributed an exclusive competence to a political organ like the Security Council.⁹⁵

However, the question is whether they had intended to do so. According to Article 25 of the Charter, '[t]he Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter.' The wording of this provision is ambiguous, since the words 'in accordance with the present Charter' could be read so as to refer to either the obligations of the Member States or the decisions of the Council.⁹⁶ Some authors have argued that they should be understood to refer to the obligations of the Member States only, as otherwise they would constitute an invitation to challenge the authority of the Council.⁹⁷ However, the ambiguous wording of Article 25 would not seem to allow such a far-reaching conclusion,⁹⁸ nor do the *travaux préparatoires* of the Charter support an absolute prerogative of the Council in the interpretation of the Charter. In the Subcommittee Report on interpretation of the Charter, the problem of possible conflicts of

⁹³ Cf. Osieke, 'The Legal Validity of Ultra-Vires Decisions of International Organizations', 77 *AJIL* (1983) 239, at 255.

⁹⁴ See Martenczuk, *supra* note 5, at 144–146.

⁹⁵ *Lockerbie*, Preliminary Objections (*Libya v. United States*), *supra* note 4, sep. op. Judge Rezek, at para. 5.

⁹⁶ H. Kelsen, *The Law of the United Nations* (1951), at 95; P. Manin, *L'organisation des Nations Unies et le maintien de la paix* (1971), at 13–14; Russell and Muther, *supra* note 48, at 665; Delbrück in Simma, *supra* note 84, Article 25, note 6; R. Sonnenfeld, *Resolutions of the United Nations Security Council* (1988) 127.

⁹⁷ J. Combacau, *Le pouvoir de sanction de l'O.N.U.* (1974) 259; E. Suy in J.-P. Cot and A. Pellet, *La Charte des Nations Unies* (2d ed., 1991) 477.

⁹⁸ The drafting history of this provision is equally inconclusive; cf. Martenczuk, *supra* note 5, at 132–133; Russell and Muther, *supra* note 48, at 665.

interpretation between the organs and the Member States of the United Nations was addressed as follows:⁹⁹

In the course of the operation from day to day of the various organs of the Organization, it is inevitable that each organ will interpret such parts of the Charter as are applicable to its particular functions. This process is inherent in the functioning of any body which operates under an instrument defining its functions and powers. . . . Accordingly, it is not necessary to include in the Charter a provision either authorizing or approving the normal operation of this principle. . . . It is to be understood, of course, that if an interpretation made by any organ of the Organization . . . is not generally acceptable it will be without binding force.

In this report, the Subcommittee clearly distinguished between incidental interpretation and authoritative interpretation, and envisaged the case that an interpretation made by a UN organ could be without binding force. It must be concluded from this that the Member States did not intend to attribute a '*compétence de la compétence*' to the Council. The same distinction between incidental and authoritative interpretation is also evident in the advisory opinion of the Court in the *Certain Expenses* cases, where it stated that 'each organ must, in the first place at least, determine its own jurisdiction'.¹⁰⁰ By limiting the power of incidental interpretation of the UN political organs to 'the first place', the Court implicitly admitted the possibility that an interpretation by a UN organ could be challenged subsequently.¹⁰¹

Finally, a '*compétence de la compétence*' of the Council would not be warranted by the Council's functions in the security system of the United Nations. The Council's authority exclusively depends on its acceptance by the Member States. This acceptance will not be enhanced if the Council claims for itself a place above the Charter. On the contrary, an authority that negates its legal foundations negates itself.¹⁰² The Charter provisions relating to the functions of the Security Council should not be regarded as a potential threat to the Council, but rather as the legal foundation of its authority.¹⁰³ Therefore, a '*compétence de la compétence*' of the Council would not only be unnecessary, but harmful. Accordingly, the Security Council cannot be regarded as the ultimate interpreter of its own bases of jurisdiction.

2 *The Purposes and Principles of the United Nations*

According to Article 24(2) of the Charter, the Security Council, in discharging its duties, 'shall act in accordance with the Purposes and Principles of the United Nations'. It has been argued that these purposes and principles constitute the only standard of review against which resolutions of the Security Council are to be

⁹⁹ See *supra* note 49.

¹⁰⁰ *Certain Expenses of the United Nations (Article 17, Paragraph 2, of the Charter)*, Advisory Opinion, ICJ Reports (1962) 151, at 168. Cf. also the separate opinion of Judge Spender, according to whom the right of the political organs 'to interpret the Charter gives them no power to alter it' (*ibid.*, at 197).

¹⁰¹ Graefrath, 'Leave to the Court what Belongs to the Court — The Libyan Case', 4 *EJIL* (1993) 184, at 201.

¹⁰² Cf. Koskenniemi, 'The Police in the Temple — Order, Justice and the UN: A Dialectical View', 6 *EJIL* (1995) 325, at 327: 'Authority is a normative and not a factual category.'

¹⁰³ Cf. Bedjaoui, *supra* note 5, at 147: 'Il faut commencer à bien prendre conscience que le respect de la Charte et du droit n'est pas l'ennemi de la paix.'

measured.¹⁰⁴ Similarly, in a statement dating back to 1947, the UN Secretary General argued that the only limitations to the competences of the Security Council are ‘the fundamental principles and purposes found in Chapter I of the Charter’.¹⁰⁵ Finally, the purposes and principles of the United Nations have also been referred to by the Court in *Certain Expenses*, where it stated the following:¹⁰⁶

When the Organization takes action which warrants the assertion that it was appropriate for the fulfillment of one of the stated purposes of the United Nations, the presumption is that such action is not *ultra vires* the Organization.

However, it is doubtful whether the purposes and principles of the United Nations, which are contained in Articles 1 and 2 of the Charter, can replace the other provisions of the Charter as the standard of review of Security Council resolutions. The Court’s reference to the purposes and principles in *Certain Expenses* occurred within the context of a highly specific discussion, i.e. the question of whether expenses arising from certain UN operations were expenses of the United Nations within the meaning of Article 17(2) of the Charter. This question had no relation to the judicial review of decisions of a specific UN organ. Moreover, the Court referred to the purposes and principles only as the foundation of a ‘presumption’ that the action is not *ultra vires*, not as an objection precluding any scrutiny of the legality of the action.

The reference in Article 24(2) of the Charter to the purposes and principles also does not exclude the other provisions of the Charter as a standard for the legality of Security Council resolutions. In its second sentence, Article 24(2) includes a reference to the Council’s specific powers under the subsequent Chapters of the Charter. It would appear highly contradictory if the provisions of these Chapters were rendered irrelevant by a general reference to the purposes and principles of the Charter. Already in its advisory opinion on conditions of admission to the United Nations, the Court held that Article 24(2) could not be interpreted so as to override other provisions of the Charter.¹⁰⁷ This consideration is given additional weight by the fact that the purposes and principles of the United Nations as laid down in Articles 1 and 2 of the Charter are extremely vague and general in nature. In fact, it is not easy to see how a workable limitation of the Council’s powers could be derived from them.¹⁰⁸ For these reasons, the standard of review of Security Council resolutions cannot be sought in the purposes and principles of the United Nations.

¹⁰⁴ V. Gowlland-Debbas, *Collective Responses to Illegal Acts in International Law* (1990), at 451–452 and *Idem*, ‘Security Council Enforcement Action and Issues of State Responsibility’, 43 *ICLQ* (1994) 55, at 91; Degni-Segui in Cot and Pellet, *supra* note 97, at 462–463; Zourek, ‘Enfin une définition de l’agression’, 20 *Ann. français de droit international* (1974) 9, at 23.

¹⁰⁵ UN SCOR 2nd year, 91st meeting (1947), at 44–45. This statement was cited by the Court in *Namibia*, *supra* note 50, at 52.

¹⁰⁶ *Certain Expenses*, *supra* note 100, at 168.

¹⁰⁷ Cf. *Conditions of Admission of a State to Membership in the United Nations (Article 4 of the Charter)*, Advisory Opinion, ICJ Reports (1947/48) 57, at 64.

¹⁰⁸ For a detailed examination of this point, see Martenczuk, *supra* note 5, at 207–213.

3 *Clear Error of Law*

It has variously been suggested that the invalidity of a Security Council resolution should be limited to cases where there has been a clear error of law,¹⁰⁹ i.e. to cases where the illegality of the resolution is obvious or manifest.¹¹⁰ Although this standard has never been applied by the Court, it has occasionally been advocated by some of its judges. A clear formulation of the standard can be found in the separate opinion of Judge de Castro in the *Namibia* case:¹¹¹

To challenge the validity of a resolution, it is not sufficient merely to allege that it is possible to find a better interpretation; a resolution can only be criticized if it is demonstrably absolutely impossible to find any reason whatsoever, even a debatable one, upon which an interpretation favourable to the validity of the resolution may be based.

At first sight, such a standard might appear quite attractive. By limiting the cases in which Security Council resolutions can be challenged to the most obvious ones, the potential for conflict between the Security Council and the Member States could be minimized. However, this would presuppose a certain consensus on what constitutes an 'obvious' or 'clear' error of law. Unfortunately, as the *Lockerbie* case has vividly illustrated, no question could be more difficult to resolve than the legality of Security Council resolutions adopted under Chapter VII. It is therefore unrealistic to expect that a consensus could emerge on the illegality of a Security Council resolution adopted at least with the support or acquiescence of all of the Council's permanent members. The verdict that a resolution is 'manifestly illegal' would simply substitute one value judgment for the other. The guiding principles according to which this judgment would have to be exercised, however, remain obscure. Therefore, it is not clear what would be gained by introducing a vague standard of review where the simple interpretation of the provisions of the Charter might suffice.

4 *The Presumption of Validity*

Arguably as the mildest form of deference to the Council, it has frequently been argued that the resolutions of the Security Council should enjoy a presumption of validity.¹¹²

¹⁰⁹ Bowett, 'The Impact of Security Council Decisions on Dispute Settlement Procedures', 5 *EJIL* (1994) 89, at 97.

¹¹⁰ Cf. Chappez, 'Questions d'interprétation et d'application de la convention de Montréal de 1971 résultant de l'incident aérien de Lockerbie (Jamahiriya Arabe Libyenne c. Royaume Uni) (Jamahiriya Arabe Libyenne c. Etats-Unis), Mesures conservatoires, Ordonnances du 14 Avril 1992', 38 *Ann. français de droit international* (1992) 468, at 478; Gowlland-Debbas, *supra* note 5, at 672; Herdegen, *supra* note 5, at 158; Gunn, *supra* note 5, at 229 ('patent unreasonableness standard').

¹¹¹ *Namibia*, *supra* note 50, at 185; see also *Certain Expenses*, *supra* note 100, at 204 (Judge Fitzmaurice, dissenting), and at 223 (Judge Morelli, concurring).

¹¹² Akande, *supra* note 5, at 341–342; Czaplinski, 'The Lockerbie Case — Some Comments', 20 *Polish Y.B. Int'l L.* (1993) 37, at 42; Franck, 'The Political and the Judicial Empires: Must there be Conflict over Conflict-Resolution?', in N. Al-Nauimi and R. Meese (eds), *International Legal Issues Arising under the United Nations Decade of International Law* (1995) 621, at 631; Graefrath, *supra* note 101, at 205; Gunn, *supra* note 5, at 236; Schilling, 'Die "neue Weltordnung" und die Souveränität der Mitglieder der Vereinten Nationen', 33 *Archiv des Völkerrechts* (1995) 67, at 100; Sorel, 'Les ordonnances de la Cour Internationale de Justice du 14 avril 1992 dans l'affaire relative à des questions d'interprétation et d'application de la Convention de Montréal de 1971 résultant de l'incident aérien de Lockerbie (Libye c.

The Court generally has accepted the existence of such a presumption regarding resolutions of the political organs of the United Nations:¹¹³

A resolution of a properly constituted organ of the United Nations which is passed in accordance with that organ's rules of procedure, and is declared by its President to have been so passed, must be presumed to have been validly adopted.

In the context of proceedings for temporary measures under Article 41 of the Statute, a presumption of validity of Security Council resolutions would appear entirely appropriate. In fact, such a presumption formed the basis for the Court's orders of 1992.¹¹⁴ By contrast, it is not clear what effect the presumption could have in the proceedings on the merits. It has been argued that the presumption of validity constitutes a 'deferential standard of review'.¹¹⁵ However, the Court is under an obligation to resolve all questions of law and fact that arise in a case properly brought before it. No 'presumption' can absolve the Court of this fundamental duty that follows directly from its judicial function. Accordingly, both in *Certain Expenses* and in *Namibia*, the Court proceeded to an in-depth examination of all legal challenges to the UN actions in questions, the stated 'presumption of validity' notwithstanding. Overall, it appears that the 'presumption of validity' serves more as a statement of judicial policy than a standard of judicial review. The presumption of validity may be regarded as a political assurance that the Court will not lightly assume that a resolution of a political organ of the United Nations is invalid. To this extent, the presumption may fulfil a useful role in the often delicate relationship between the Court and the political organs. However, this does not affect the standard of legal scrutiny for Security Council resolutions. Therefore, the only standard of judicial review for Security Council resolutions under Chapter VII is the Charter, and it is to the Charter that the next section will turn.

B Article 39 of the Charter and the Powers of the Council

Before the Security Council may impose non-military sanctions under Article 41 of the Charter or authorize other measures for the maintenance of international peace, it must determine the existence of a 'threat to the peace, breach of the peace, or act of aggression' within the meaning of Article 39 of the Charter. Accordingly, Article 39, which has been termed 'the single most important provision of the Charter',¹¹⁶ is the

Royaume Uni et Libye c. Etats-Unis', 97 *Rev. générale de droit international public* (1993) 689, at 719; Watson, *supra* note 5, at 16–17; Weller, 'The Lockerbie Case: A Premature End to the "New World Order"?', 4 *African J. Int'l Comp. L.* (1992) 302, at 324; generally cf. Lauterpacht, 'The Legal Effect of Illegal Acts of International Organizations', in *Cambridge Essays in International Law, Essays in Honor of Lord McNair* (1965) 88, at 117.

¹¹³ Cf. *Namibia*, *supra* note 50, at 22; see also *Certain Expenses*, *supra* note 100, and accompanying text.

¹¹⁴ See *supra* Section 2.A.

¹¹⁵ Watson, *supra* note 5, at 13–17.

¹¹⁶ U.S. Secretary of State, *Report to the President on the Results of the San Francisco Conference* (1945), at 90–91.

key to the broad powers of the Council under Chapter VII of the Charter. The question is to what extent the Court can review the Council's determination that a dispute or conflict constitutes a situation within the meaning of Article 39.

1 *The Nature of the Council's Power of Determination*

The nature of the Council's power of determination under Article 39 is highly controversial. According to some authors, the determination of what constitutes a threat to the peace, breach of the peace, or act of aggression is 'completely within the discretion of the Security Council'.¹¹⁷ It is argued that Council determinations are 'conclusive and have the nature of findings in the legal sense of the word',¹¹⁸ and that the Council's competence under Article 39 is 'non-reviewable'.¹¹⁹ In other words, according to these views, 'a threat to the peace is whatever the Security Council says is a threat to the peace'.¹²⁰ Other authors, while recognizing a discretion of the Council under Article 39, argue that some limitations on the Council's powers must exist. For instance, it has been claimed that under Article 39, the Council may not act arbitrarily.¹²¹ Other writers have argued that the purposes and principles of the United Nations may act as a potential limitation on the Council's discretion.¹²² By contrast, only a few authors have applied a textual approach to Article 39 by attempting to clarify the meaning of this provision.¹²³

To date, the Court has not had the opportunity to clarify the meaning of Article

¹¹⁷ Kelsen, *supra* note 96, at 727; Lapidoth, 'Some Reflections on the Law and Practice Concerning the Imposition of Sanctions by the Security Council', 30 *Archiv des Völkerrechts* (1992), at 114, 115; Reisman, *supra* note 5, at 93.

¹¹⁸ J. W. Halderman, *The United Nations and the Rule of Law* (1966), at 73; similarly, cf. also Bindschedler, 'La délimitation des compétences des Nations Unies', 108 *RdC* (1963) 307, at 366; Combacau, *supra* note 97, at 54; Herdegen, *supra* note 5, at 152.

¹¹⁹ Higgins, 'Policy Considerations and the International Judicial Process', 17 *ICLQ* (1968) 58, at 80; cf. also Akande, *supra* note 5, at 338; D. Ruzié, *Organisations internationales et sanctions internationales* (1971) 87; Fawcett, 'Security Council Resolutions on Rhodesia', 41 *BYbIL* (1965/66) 103, at 116. Similar views have also been put forward by the respondents in the *Lockerbie* cases; cf. CR 97/17, at para. 5.8 (Lord Hardie for the United Kingdom); CR 97/19, at para. 4.9–4.12 (Oscar Schachter for the United States).

¹²⁰ M. Akehurst, *A Modern Introduction to International Law* 219 (6th ed., 1987); Y. Dinstein, *War, Aggression, and Self-Defence* (2d ed., 1994) 282; cf. also Combacau, *supra* note 97, at 100.

¹²¹ Gaja, 'Reflexions sur le rôle du Conseil de Sécurité dans le Nouvel Ordre Mondial — A propos des rapports entre maintien de la paix et crimes internationaux des Etats', 97 *Revue générale de droit international public* (1993) 297, at 315; McDougal and Reisman, 'Rhodesia and the United Nations: The Lawfulness of International Concern', 62 *AJIL* (1968) 1, at 9; Stein, *supra* note 17, at 223.

¹²² Gowlland-Debbas, *Collective Responses*, *supra* note 104, at 451–452, and *Idem*, 'Security Council Enforcement Action', *supra* note 104, at 91; Degni-Segui, *supra* note 97, at 460.

¹²³ See notably J. Arntz, *Der Begriff der Friedensbedrohung in Satzung und Praxis der Vereinten Nationen* (1975), at 64, who argues that a threat to the peace is limited to the immediate threat of the use of physical force in international relations; cf. also Nowlan, 'Der Begriff der Friedensbedrohung bei innerstaatlichen Konflikten in der jüngsten Praxis des Weltsicherheitsrats', in *Beiträge zum humanitären Völkerrecht, zur völkerrechtlichen Friedenssicherung und zum völkerrechtlichen Individualschutz, Festschrift für (Essays in Honour of) Georg Bock* (1993) 165, at 181; Schilling, *supra* note 112, at 89–90.

39.¹²⁴ However, the question of the nature of the Council's powers under Article 39 was addressed by some of the judges in their individual opinions in the *Lockerbie* case. At the provisional measures stage, while most of the judges took a cautious approach,¹²⁵ Judge Weeramantry clearly argued in favour of an exclusive competence of the Council:¹²⁶

However, once we enter the sphere of Chapter VII, the matter takes on a different complexion, for the determination under Article 39 of the existence of any threat to the peace, breach of the peace, or act of aggression, is one entirely within the discretion of the Council. It would appear that the Council and no other is the judge of the existence of the state of affairs which brings Chapter VII into operation. That decision is taken by the Security Council in its own judgment and in the exercise of the full discretion given to it by Article 39.

At the jurisdictional stage, President Schwebel argued in his dissent that 'only the Security Council can determine what is a threat to or breach of the peace or act of aggression'.¹²⁷ Similarly, Judge ad hoc Jennings argued that Article 39 gave the Council a 'discretionary competence' which the Court had to protect rather than supervise.¹²⁸ By contrast, Judge Kooijmans argued that while the Security Council had the 'full competence' to determine that a factual situation constitutes a situation within the meaning of Article 39, the resolutions in question did not have a 'determinative and final character'.¹²⁹

However, the view that Article 39 is a discretionary competence, the exercise of which is not reviewable by the Court, is at least doubtful. As for any organ established by an international treaty, the assumption is that the Council is bound by the provisions of the Charter. This does not exclude the possibility that the Council may have been granted a discretion in the application of some of the provisions of the Charter. However, such a discretion would need a strong basis in the Charter. The wording of Article 39, according to which the Council 'determines'¹³⁰ the existence of a threat to the peace, breach of the peace, or act of aggression, does not necessarily imply that such determinations would have preclusive effect. The drafting history of the Charter also does not support the assumption of a discretionary competence under Article 39. It is true that at the San Francisco conference, several states had proposed that a definition of the term 'act of aggression' be included in the Charter.¹³¹ These

¹²⁴ By contrast, the International Criminal Tribunal for the former Yugoslavia has argued that the Security Council under Art. 39 disposes of a wide discretion, which is limited by the purposes and principles of the United Nations; see *Prosecutor v. Tadić*, 35 ILM (1996) 32.

¹²⁵ Cf. the dissenting opinion of Judge Shahabuddeen, *supra* note 21.

¹²⁶ *Lockerbie*, Provisional Measures, *supra* note 10, at 176 (Judge Weeramantry, dissenting).

¹²⁷ *Lockerbie*, Preliminary Objections (*Libya v. United States*), *supra* note 4, diss. op. President Schwebel, at 12.

¹²⁸ *Lockerbie*, Preliminary Objections (*Libya v. United Kingdom*), *supra* note 4, diss. op. Judge ad hoc Jennings, at 9.

¹²⁹ *Lockerbie*, Preliminary Objections (*Libya v. United States*), *supra* note 4, sep. op. Judge Kooijmans, at para. 18.

¹³⁰ French: 'constate'.

¹³¹ See 2 UNCIO (1945) 466, 538, 557, 584–585. Cf. also Martenczuk, *supra* note 5, at 197–199; Russell and Muther, *supra* note 48, at 670–672.

proposals were eventually rejected, and it was decided to leave to the Council the ‘entire decision’ as to what constitutes a threat to or breach of the peace or an act of aggression.¹³² However, in the light of the historic experiences of the pre-war period, the purpose of the proposed definition was not to limit the competences of the Council, but rather to ensure that the Council would come to the help of all victims of aggression. The rejection of a definition of aggression therefore concerned the question of whether the intervention of the Council should be rendered ‘automatic’ in the event of an act of aggression. The discussion at the Conference was not concerned with the question of what the limits to the Council’s power of determination should be. For this reason, it would be difficult to see in the drafting history of the Charter convincing evidence for a discretionary competence of the Council under Article 39.

Furthermore, an unlimited discretion of the Council under Article 39 of the Charter would risk destroying the carefully crafted balance of competences in the Charter. The competences of the Council are enumerated in the Charter and are clearly defined in each case. Only under Chapter VII of the Charter does the Council enjoy its broad powers to impose binding sanctions and authorize other measures for the maintenance of international peace. In contrast, in the context of Chapter VI on the peaceful settlement of disputes, the powers of the Council are far more limited. Under Chapter VI, the Council may examine ‘any dispute, or any situation, which might lead to international friction or give rise to a dispute’ (Article 34). In the event of a dispute ‘the continuance of which is likely to endanger the maintenance of international peace and security’ (Article 33 of the Charter), the Council may recommend procedures for the settlement of the dispute (Article 36) or, upon referral by the parties according to Article 37(1), recommend settlement terms. These distinctions between Chapters VI and VII would become obsolete if the Council at any given time were free to declare the provisions of Chapter VII applicable. More importantly still, if the Council were free to determine the meaning of Article 39, its involvement in the affairs of the Member States could become limitless. Clearly, neither had the Member States intended the Council to constitute a sort of world government, nor would the Council be equipped to fulfil such a role.¹³³ The view that the Council enjoys an unlimited discretion under Article 39 could lead to patently dysfunctional results.

On the other hand, it is also not sufficient to say that the Council should not ‘act arbitrarily’ in the exercise of its discretion. In the absence of manageable standards for the exercise of the Council’s powers, it is not clear what would constitute an ‘arbitrary’ use of those powers. The purposes and principles of the United Nations, to which reference is often made,¹³⁴ are far too vague and general as to provide a meaningful limitation of the Council’s powers. The view that the Council enjoys a discretion under Article 39 thus introduces the notion of a ‘*compétence de la compétence*’ of the Council

¹³² *Report of Rapporteur Paul-Boncour*, 12 UNCIO (1945) 505.

¹³³ Cf. *Namibia*, *supra* note 50, at 340 (Judge Gros, dissenting): ‘To assert that a matter may have a distant repercussion on the maintenance of peace is not enough to turn the Security Council into a World Government.’

¹³⁴ See *supra* note 122.

through the back door. Accordingly, the argument that the Council's power of determination under Article 39 is of a discretionary nature does not stand scrutiny.

2 A Textual Approach to Article 39

Any attempt to circumscribe the powers of the Council under Chapter VII must begin with the wording of Article 39. Rather than the 'purposes and principles' of the United Nations or other similarly vague standards of judicial review, it is the wording of this provision which provides the standard of review for the powers of the Council. Occasionally, doubts have been raised as to whether it is possible to define concepts such as 'threat to the peace' or 'act of aggression'.¹³⁵ In particular, it has been argued that these terms are political rather than legal concepts.¹³⁶ It is undeniable that there is some imprecision and vagueness surrounding the terms used in Article 39. However, imprecision and vagueness are general features of law. There is nothing inherently special about the terms used in Article 39 that would remove them from the ambit of legal interpretation. The claim that the expressions used in Article 39 are of a 'political' nature does not prove the existence of a discretion; rather, it is merely begging the question. Moreover, that no easy definition is available for the concepts of Article 39 does not mean that such a definition should not be attempted at all.¹³⁷ Only through constant and renewed attempts to clarify the meaning of Article 39 will it be possible to provide orientation and guidance for the Council in the exercise of its functions under Chapter VII. In the words of McDougal and Feliciano:¹³⁸

the incidence of rational decisions ... is more apt to be increased, by explicit, sustained, and systematic efforts of clarifying relevant variables and policies of community approved value goals affecting decisions about coercion.

On the other hand, nothing will be achieved by:¹³⁹

an approach that assumes a completely utilitarian attitude towards words, views each specific case of coercion in a microcosm with no more than a few terms of highest level of abstraction, and relies upon calculation of momentary expediencies and, as it were, on visceral sensitivity.

Therefore, the Court should take Article 39 seriously, and adopt a textual approach to the interpretation of this provision. In doing so, the Court should stress that international peace and security within the meaning of Article 39 only refers to the absence of armed violence in international relations.¹⁴⁰ The Security Council is the

¹³⁵ Frowein, in Simma, *supra* note 84, Article 39, note 17, 21; Freudenschuß, 'Article 39 of the UN Charter Revisited: Threats to the Peace and the Recent Practice of the UN Security Council', 46 *Austrian J. Public Int'l L.* (1993) 1, at 37; Dominicé, 'Le Conseil de sécurité et l'accès aux pouvoirs qu'il reçoit du Chapitre VII de la Charte des Nations Unies', 5 *Schweizerische Zeitschrift für internationales und europäisches Recht* (1995) 417, at 425.

¹³⁶ Cf. CR 97/17, at para. 5.8 (Lord Hardie for the United Kingdom).

¹³⁷ Cf. M. S. McDougal and F. P. Feliciano, *Law and Minimum World Public Order* (1961) 62: 'the impossibility of absolute precision does not necessarily render complete confusion desirable'.

¹³⁸ *Ibid.*, at 154–155.

¹³⁹ *Ibid.*

¹⁴⁰ On this, see Martenczuk, *supra* note 5, at 224–228.

guardian of the minimum conditions of peaceful coexistence in the international community; it is not a world government charged with the establishment of a 'world optimum order'.¹⁴¹ For this reason, any situation within the meaning of Article 39 must have a demonstrable link to the use of armed force in international relations. This does not mean that the Council would always have to wait until armed conflict has broken out. The competences of the Council under Chapter VII do have a preventive component.¹⁴² Certain behaviour short of the use of force may already constitute a 'threat to the peace' if it is of such a seriousness that it considerably increases the likelihood of armed international conflict in the short or medium term.¹⁴³ According to this interpretation, a textual approach to Article 39 would not unduly restrict the competences of the Council. The term 'threat to the peace' is sufficiently flexible and dynamic to include all major forms of serious international misconduct.¹⁴⁴ It would also allow consideration of the values of the international community, which may change over time. However, in every case, a 'threat to the peace' is a situation which objectively can be characterized as destabilizing and potentially explosive.¹⁴⁵ Whether this threshold had been crossed by the alleged involvement of Libya in the bombing of Pan Am flight 103, and more specifically by its refusal to surrender the suspects,¹⁴⁶ was one of the most interesting questions raised by the *Lockerbie* cases.¹⁴⁷ From this perspective, it could be seen as regrettable that the Court may have lost an opportunity to provide a judicial interpretation of the Charter on this point.

C The Council and General International Law

A final issue raised by the *Lockerbie* cases was the question as to whether the Council, in the exercise of its powers under Chapter VII, is bound to act in accordance with general international law. Libya had argued that in its dispute with the United Kingdom and the United States, the Montreal Convention should not be 'set aside'.¹⁴⁸ The Montreal Convention could provide an objection to the validity of the Security Council's resolutions only if the Security Council was bound to respect whatever rights Libya may have had under that Convention. However, it is doubtful whether general international law is a binding constraint on the Council acting under Chapter

¹⁴¹ On the distinction of 'minimum' and 'optimum order' see McDougal and Feliciano, *supra* note 137, at 122.

¹⁴² Cf. Dinstein, *supra* note 120, at 279 ('preemptive thrust' of Article 39).

¹⁴³ Similarly Gaja, *supra* note 121, at 301; McDougal and Feliciano, *supra* note 137, at 125 ('substantial likelihood of a need for a military response'); Nowlan, *supra* note 123, at 181; Schilling, *supra* note 110, at 89–90; cf. generally Martenczuk, *supra* note 5, at 235–239.

¹⁴⁴ For examples, cf. Martenczuk, *supra* note 5, at 246–253.

¹⁴⁵ See Combacau, *supra* note 97, at 100.

¹⁴⁶ Cf. on this question Martenczuk, *supra* note 5, at 260–263.

¹⁴⁷ One of the most difficult tasks will be the establishment of the relevant facts, which are in dispute between the parties. In this context, the Court would be in a very difficult position should it attempt to investigate the relevant facts. For this reason, it is arguable that the Court should grant the Council a certain prerogative with respect to its fact-finding under Article 39 (cf. Martenczuk, *supra* note 5, at 240–244).

¹⁴⁸ See *supra* note 23.

VII of the Charter. Article 1(1) of the Charter mentions 'the principles of justice and international law' only in the context of the peaceful settlement of disputes under Chapter VI, while no mention is made of justice and international law in the context of collective measures under Chapter VII of the Charter.¹⁴⁹ This distinction is by no means coincidental, but reflects a conscious decision on the part of the drafters of the Charter.¹⁵⁰ In San Francisco, several attempts had been made to require that collective measures under Chapter VII also be in accordance with general international law.¹⁵¹ However, the majority rejected these amendments, arguing that to require the Security Council to respect the rights of the parties under international law would invite the Member States to challenge the validity of the Council's resolutions.¹⁵² The following statement by the US delegate Stassen illustrates this position:¹⁵³

It is our view that the people of the world wish to establish a Security Council, that is, a policeman who will say, when anyone starts to fight, 'Stop fighting' Period. And then it will say, when anyone is all ready to begin to fight, 'You must not fight' Period. That is the function of a policeman, and it must be just that short and that abrupt; that is, unless at that place we add any more, then we would say, 'Stop fighting unless you claim international law is on your side'. That would lead to a weakening and a confusion in our interpretation.

Accordingly, under Chapter VII, the Council is not required to examine the legal position of the parties to a dispute which threatens international peace and security. To the extent that this is necessary to remove a threat to international peace, the Council may therefore set aside the rights under general international law of any state. Once an international crisis has passed the threshold of Article 39, the Council enjoys a wide discretion with respect to the measures to be taken, and the parties against which they are to be directed. It is not easy to see what other limitations this discretion is subject to.¹⁵⁴ Some authors have argued that the Council should at least be subject to the international *jus cogens* as 'eternal elements of public order common to all legal systems'.¹⁵⁵ Similarly, in his separate opinion in the *Bosnia* case, Judge ad hoc Lauterpacht argued that the prohibition of genocide should, as *jus cogens*, prevail over the resolutions of the Security Council.¹⁵⁶ However, it is doubtful whether *jus cogens* can constitute a binding limitation on the Council's discretion under Chapter

¹⁴⁹ Cf. Conforti, 'Le pouvoir discrétionnaire du Conseil de sécurité en matière de constatation d'une menace contre la paix, d'une rupture de la paix ou d'un acte d'agression', in R.-J. Dupuy (ed.), *Le développement du rôle du Conseil de sécurité* (1993) 51, at 55; Kelsen, *supra* note 96, at 730; Kennedy, *supra* note 5, at 905–906.

¹⁵⁰ Cf. Martenczuk, *supra* note 5, at 221–222; Russell and Muther, *supra* note 48, at 636.

¹⁵¹ Cf. 6 UNCIO (1945) 10, 318, 535–553.

¹⁵² 6 UNCIO (1945) 318.

¹⁵³ 6 UNCIO (1945) 29.

¹⁵⁴ On this question, cf. Martenczuk, *supra* note 5, at 254–282.

¹⁵⁵ Scott *et al.*, 'A Memorial for Bosnia: Framework of Legal Arguments Concerning the Lawfulness of the Maintenance of the United Nations Security Council's Arms Embargo on Bosnia and Herzegovina', 16 *Mich. J. Int'l L.* (1994) 1, at 110; cf. also Gowlland-Debbas, 'Security Council Enforcement Action', *supra* note 104, at 93; Herdegen, *supra* note 5, at 156; Watson, *supra* note 5, at 38.

¹⁵⁶ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia [Serbia and Montenegro]), Further Request for the Indication of Provisional Measures*, ICJ Reports (1993) 325, at 440 (Judge ad hoc Lauterpacht, concurring).

VII. The notion of *jus cogens* has its foundation in Article 53 of the Vienna Convention on the Law of Treaties.¹⁵⁷ Therefore, it is essentially a concept from the law of international treaties that cannot easily be transplanted into the law of the United Nations. In particular, the prohibition of the use of force, which is generally recognized as *jus cogens*,¹⁵⁸ is not binding on the Council acting under Chapter VII. Otherwise, the Council would be obliged to examine in the event of every international crisis whether one party has been a victim of an illegal use of force. Clearly, this would run counter to the conception of Chapter VII of the Charter, which does not require a legal evaluation of the positions of the parties.

As a consequence, the Council's discretion to overrule the rights of parties to a dispute that constitutes a situation within the meaning of Article 39 is essentially unlimited. This may not be entirely satisfactory from the point of view of international justice. However, it is the result of the clear approach of the Charter which gives precedence to international peace over international justice.¹⁵⁹ Accordingly, Libya could not have successfully opposed its alleged rights under the Montreal Convention to the Security Council resolutions in the *Lockerbie* cases. General international law does not provide a ground of invalidity of Security Council resolutions adopted under Chapter VII of the Charter.

6 Conclusion

Lockerbie was a first test case for the rule of law in the international legal order of the United Nations. For the first time, the authority of the Security Council under Chapter VII of the Charter has been challenged in the International Court of Justice. As a consequence of this challenge, the question of the nature and extent of the Council's powers under Chapter VII of the Charter has taken on a new significance. Unlike any previous case, the *Lockerbie* cases serve as a paradigm for the conflict between law and politics in international relations. They oppose fundamentally different conceptions of the security system of the United Nations. At issue is the question of whether the United Nations security system should be regarded primarily as a political mechanism, or rather as an organization of law governed by binding rules and procedures. The International Court of Justice has approached this question with considerable caution. Both in its orders of 1992 and its 1998 judgments, it has responded only to those questions whose resolution was strictly necessary at the corresponding stage of the proceedings. However, between the lines of the 1998 judgments, a newly gained confidence on the part of the Court may be discerned. By affirming its jurisdiction over the disputes, the Court has resisted all attempts to remove Chapter VII of the Charter from the ambit of legal interpretation. From this perspective, the Court's judgments of February 1998 constitute a small, but nonetheless important step forward.

¹⁵⁷ 1155 UNTS 331.

¹⁵⁸ Cf. S. Kadelbach, *Zwingendes Völkerrecht* (1992) 226–251.

¹⁵⁹ I. L. Claude, *Swords into Plowshares, The Problems of International Organization* (3rd ed., 1964) 232–233.

Due to the diplomatic settlement of the dispute, it is unlikely that *Lockerbie* will become the leading case on judicial review in the United Nations, in the way that *Marbury v. Madison* has become the leading case on judicial review in the United States.¹⁶⁰ However, it is probable that *Lockerbie* will not have been the last judicial challenge to the authority of the Security Council.¹⁶¹ Despite its current cautious approach, the Security Council may again enter a more activist phase, and UN Member States may again seek avenues to bring their dispute to the Court. In any such future case involving judicial review of the Security Council, the Court should not hesitate to affirm the rule of law in the international legal order. In particular, it should not concede to the Council a place above the Charter. Rather, it should adopt a textual approach to Article 39, the wording of which contains all the necessary elements for a delimitation of the competences of the Council under Chapter VII. In the end, this approach may be in the very interest of the Security Council itself. There may be good reasons for an extensive use of the powers of the Council, as in the *Lockerbie* case. However, these reasons should find a basis in the Charter, rather than in the mere political will of its members. The Security Council is more than a political power tool; it is an organ with important responsibilities derived from the Charter. The authority of the Council will not be diminished, but enhanced, if it accepts that its decisions are not above the law. There is no contradiction between the rule of law and international peace and security. By promoting the former, the International Court of Justice will contribute to the maintenance of the latter.

¹⁶⁰ Cf. Franck, *supra* note 5, at 519.

¹⁶¹ In fact, a second challenge was attempted by Bosnia in the Genocide case (*supra* note 76, at 6) against SC Resolution 713 (1991), which had imposed an arms embargo on the whole of the former Yugoslavia. For procedural reasons, this challenge was later dropped (cf. Martenczuk, *supra* note 5, at 24–26; Scott, *supra* note 155, at 9).