Leave to the Court What Belongs to the Court
The Libyan Case

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Many recent activities of the United Nations Security Council have been carried out in the shadow of legal doubts.[1] A prominent and disturbing example of apparently activist Security Council action is found in measures taken against Libya due to its alleged involvement in the bombing of a Pan Am flight over Lockerbie in Scotland in 1988. On 21 January 1992 the Security Council passed Resolution 731 which *inter alia* obliged Libya to extradite two suspected perpetrators of the crime to either the United States or the United Kingdom for trial in one of those countries. In response Libya brought an action before the International Court of Justice (ICJ) and requested the Court to indicate provisional measures to enjoin the United States from taking coercive actions against Libya and to ensure that no steps were taken that would prejudice Libyas's rights.

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1 E.g., the measures taken authorizing military intervention in the Gulf War have been widely criticized. Graefrath, Mohr, 'Legal Consequences of an Act of Aggression: The Case of the Iraqi Invasion and Occupation of Kuwait', 43 *Austrian Journal of Public and International Law* (1992) 109; Weller, 'The Kuwait Crisis: A Survey of some Legal Issues', 3 *The African Journal of International and Comparative Law* (1991) 1; Schachter, 'United Nations Law in the Gulf Conflict', 85 *AJIL* (1991) 452; Weston, 'Security Council Resolution 678 and Persian Gulf Decision Making: Precarious Legitimacy', in 85 *AJIL* (1991) 516; Sucharitkul, 'The Process of Peace-Making following Operation "Desert-Storm"', 43 *Austrian Journal of Public and International Law* (1992) 1; Rostow, 'Until What? Enforcement Action or Collective Self-Defence?', 85 *AJIL* (1991) 506; Reisman, 'Some Lessons from Iraq: International Law and Democratic Politics', 16 *Yale Journal of International Law* (1991) 203; Heintschel von Heinegg, 'Kriegsentschädigung, Reparation oder Schadenersatz', 90 *Zeitschrift für vergleichende Rechtswissenschaft* (1991) 113; Bothe, 'Die Golfkrise und die Vereinten Nationen – eine Rückkehr zur kollektiven Sicherheit?', 19 *Demokratie und Recht*, 1 (1991) 2; Franck and Patel, 'UN Police Action in Lieu of War: The Old Order Changeth', 85 *AJIL* (1991) 63; Freedman, 'The Gulf War and the New World Order', 33 *Survival* (1991) 195; F. Malekin, *Condemning the Use of Force in the Gulf Crisis* (1992). Dominicé, 'La sécurité collective et la crise du Golfe', 2 *EJIL* (1991) 85; Conforti, 'Non-Coercive Sanctions in the United Nations Charter: Some Lessons from the Gulf War', 2 *EJIL* (1991) 110; Malanczuk, 'The Kurdish Crisis and Allied Intervention in the Aftermath of the Second Gulf War', 2 *EJIL* (1991) 114.

4 EJIL (1993) 184–205

Unfortunately, any opportunity for the ICJ to make an independent ruling was thwarted by a Security Council decision. On 31 March 1992, three days after the close of oral hearings but before the ICJ brought down its judgment, the Security Council passed Resolution 748 ordering sanctions against Libya. The sanctions were to come into effect on 14 April, one day before a decision of the Court was due.

As is well known the Court in *Libyan Arab Jamahiriya v. United States of America* did not order the interim measures requested by Libya,[2] fearing that they would be likely to impair compliance with the Security Council Resolution 748(1992). However, at the same time the Court stressed that it was not called upon and had not determined any of the substantive questions.[3] The Court explicitly emphasized that, in accordance with Article 41, it 'cannot make definitive findings either of fact or of law on the issues relating to the merits.'[4] That means the Court cautiously left the door open to review all questions of fact and law when dealing with the merits of the case. The Court emphasized that 'at the stage of proceedings on provisional measures, [it] considers that *prima facie*' the obligation of member States of the United Nations to accept and carry out decisions of the Security Council under Article 25, 'extends to the decision contained in Resolution 748 (1992)' and that according to Article 103 of the Charter 'the obligations of the Parties in that respect prevail over their obligations under any other international agreement, including the Montreal Convention.'[5] However in order to avoid any misinterpretation, the Court added in the next paragraph that at this stage it 'is not called upon to determine definitively the legal effect of the Security Council Resolution 748 (1992).'[6] This also seems to indicate that the Court, when dealing with the merits feels free to determine the legal effects of Security Council resolutions. However, at this stage of its proceedings the Court in accordance with its rules of procedure obviously avoided considering any questions related to the legality of the Security Council resolutions. I am not going to report the Court's decision or to examine the issues related to interim measures but will concentrate on more general questions, such as the legal background of the Security Council activities in this case and some aspects of the relationship between the Security Council and the ICJ.

2 Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident in Lockerbie, Request for the Indication of Provisional Matters, ICJ Reports (1992) 3.
3 Ibid. at paras. 40-42.
4 Ibid. at para. 38.
5 Ibid. at para. 38.
6 Ibid. at para. 40.

I. Strengthening Peace in Applying Principles and Purposes of the United Nations Charter

These questions may be of general interest which are not limited to the Libyan case, because the action of the Security Council reflects[7] a new policy, as is illustrated by the statement issued at the Security Council summit meeting of 31 January 1992. In this statement members of the Security Council declared as follows:

> The absence of war and military conflicts amongst States does not in itself ensure international peace and security. The non-military sources of instability in the economic, social humanitarian and ecological fields have become threats to peace and security. The United Nations membership as a whole, working through the appropriate bodies, needs to give the highest priority to the solution of these matters.[8]

Clearly economic, social, humanitarian and ecological instability within a country can become sources that threaten peace and security and may therefore become matters of international concern. In the history of the United Nations the Apartheid system is a relatively old example that immediately comes to mind.[9] Of course, not all non-military forms of instability will amount to a threat to peace. Therefore the mere fact that there is social instability does not justify action under Chapter VII of the Charter. The instability, caused by whatever reason, has to be of such a kind, or develop such forms or activities that the Security Council considers that the situation constitutes a threat to international peace or security.[10] Thus far, the Security Council has found such conditions in only narrowly defined circumstances, and it has been even more reluctant to censure such conduct with sanctions.[11]

With the demise of the East-West conflict, the Security Council has evidenced an intention to give high priority to the solution of social, economic, humanitarian and ecological problems. This change of emphasis will be widely praised, given the expanding poverty problem in many parts of the world. However, a change in policy and priorities does not alter the UN Charter, nor can it justify deviation from the competences given to the various organs under the Charter. Further, despite the broad objectives reflected in the Security Council statement reproduced above, it is

7 See Ipsen, 'Auf dem Weg zur Relativierung der inneren Souveränität bei Friedensbedrohung', 40 *Vereinte Nationen* (1992) 41.

8 S/PV 3046, 143, 31 January 1992.

9 Cf. also General Assembly resolutions which repeatedly stressed the close connection between the strengthening of international security and development, e.g. Resolution 45/80 of 12 December 1950.

10 Even in case of the first use of armed force an act of aggression is only assumed *prima facie* and a determination by the Security Council is required; for a definition of aggression, Art. 2, General Assembly Resolution 3314 (XXIX), 14 December 1974.

11 A telling example is the inactivity of the Security Council *vis-à-vis* the continuing occupation of Lebanese territory and repeated Israeli aggression against Southern Lebanon. Cf. S/24252, 8 July 1992.

important to note that the sentiment expressed was qualified in the very next paragraph by reference to the proper channels provided in the Charter:

> The members of the Council pledge their commitment to international law and to the United Nations Charter. All disputes between States should be peacefully resolved in accordance with the provisions of the Charter.
> The members of the Council reaffirm their commitment to the collective security system of the Charter to deal with threats to peace and to reverse acts of aggression.[12]

The Secretary-General in his report 'Agenda for Peace' also concentrated on proposals to enhance the effective use of the provisions of the Charter. He did not advance suggestions or recommendations to amend or change the Charter. While stressing that 'the time of absolute and exclusive sovereignty ... has passed' and indeed was never matched by reality, he explicitly warned against interventionist policies by stating as follows:

> The foundation-stone of this work is and must remain the State. Respect for its fundamental sovereignty and integrity are crucial to any common international progress.[13]

The Secretary-General in his report rightly stressed that the changes occurring in international relations call for an active and effective World organization to maintain and strengthen peace. According to the Charter this is the primary responsibility of the Security Council. However, strengthening the role of the Security Council and encouraging the Council to use the tools which the Charter has foreseen also requires a careful consideration of 'checks and balances' to ensure that the Security Council in discharging its duties acts strictly 'in accordance with the Purposes and Principles of the United Nations' (Article 24(2)). It is in that background that the Libyan case warrants general attention.

II. What is the Legal Basis for Security Council Resolution 731 (1992)?

It seems that the Security Council acted as a dispute settlement mechanism in deciding a dispute between Libya on one side and the United States, the United Kingdom and France on the other. The substantive issues were settled in favour of the latter. In doing so the Security Council effectively endorsed the requests of the successful states and recommended their effective implementation as appropriate terms to settle the dispute.

The most peculiar aspect of Council Resolution 731 (1992) was the participation in voting procedures of interested parties. The dispute clearly fell within Chapter VI of

12 S/PV 3046, 143/144, 31 January 1992.
13 A/47/277; S/24111, 17 June 1992, para. 17.

the Charter, and Article 27(3) explicitly prescribes that in decisions under Chapter VI a party to a dispute shall abstain from voting. Nonetheless, the United States, the United Kingdom and France all cast a vote. Further, in the meeting of the Security Council which led to the adoption of Resolution 731 (1992) Libya clearly relied on the Montreal Convention and presented the case as a legal dispute. None of the sponsors of the resolution deemed it necessary to respond to the Libyan initiative, nor did they attempt to explain why their claims were different from claims based on a legal dispute.[14]

As I understand the facts, the United States and the United Kingdom requested Libya to surrender two suspects whom they held responsible for the Lockerbie incident. They claim compensation from Libya because they believe that Libya as State was involved in the terrorist act which caused the incident and the death of 270 people. The term surrender is obviously chosen because the United States and United Kingdom were well aware that under international law there is no obligation for Libya to extradite her own nationals and there is no extradition treaty between the United States or the United Kingdom and Libya. As Professor Bassiouni has put it:

> The US and British governments certainly know that Libya legally cannot extradite its nationals. These Governments, however, actually might not expect extradition, but would prefer the propaganda benefits of condemning Libya for not extraditing.[15]

Libya rejected the joint United States/United Kingdom claim but, in accordance with the Montreal Convention, initiated prosecution against the two suspects and requested legal assistance from the United States and the United Kingdom. Even though this was denied. Libya was even willing to accept an international inquiry into the case. The United States and the United Kingdom rejected anything less than the fulfilment of their demands for surrender and compensation.[16]

However, there is no obligation on Libya under international law to surrender her nationals to a foreign State. To justify their request the United States and the United Kingdom argued that the suspects would not face a fair trial in Libya because allegedly Libya was involved in the terrorist act. This may be true, but it does not provide the United States and the United Kingdom with a legal claim to have the two Libyan nationals extradited or surrendered. The United States and the United Kingdom of course assumed that the suspects would be fairly tried if brought before their national courts, despite all the prejudgments made by their media and their governments.[17] In

14 S/PV 3033, 21 January 1992.

15 Bassiouni, 'The Need for an International Criminal Tribunal in the New International Order', in Parliamentarians for Global Action, Occasional Paper No. 1, *An International Criminal Court* (1992) 9, at 22.

16 For a summary of the facts see *Libyan Arab Jamahiriya v. United States of America*, *supra* note 2, at 115 seq. and the dissenting opinion of Judge M. El-Kosheri, at 94 et seq.

17 Judge M. El-Kosheri in his dissenting opinion favoured an order of interim measures by the Court explicitly arguing 'that the two Libyans suspected to be the authors of the Lockerbie massacre could not possibly receive a fair trial, whether in the United States or in the United Kingdom, nor in Libya.' *Supra* note 2, at 111.

Libyan Arab Jamahiriya v. United States of America Judge Shahabuddeen dealt *in extenso* with this aspect of the claim and concluded that, taking into account the official announcements of the governments and the reparation claim of the United Kingdom, these in fact constituted a prior determination that the two accused were guilty. He held that it 'is nevertheless clear that guilt has already been determined by the United Kingdom as a State'.[18] It is therefore very questionable whether the suspects would be given a fair trial in the United States or the United Kingdom. In such a case, where concurrent claims of jurisdiction, or the alleged involvement of a State in terrorist acts actually blocks the penal prosecution of the alleged offender, an international criminal tribunal, even if agreed upon *ad hoc* by the parties concerned, would be a useful way out and ensure a peaceful resolution of the dispute.[19]

Libyan Arab Jamahiriya v. United States of America as presented to the International Court of Justice looks like a normal dispute between States where both facts and the applicable law are under dispute. Even if the applicability of the Montreal Convention is questioned by the United States and the United Kingdom (because allegedly Libya was involved in the terrorist act[20]) the issue of Libyan jurisdiction would remain a dispute concerning the interpretation and application of Article 14 of the Montreal Convention. This Convention lays down a procedure to be followed when Article 14 is raised, but instead of complying with it the United States and the United Kingdom brought the case to the Security Council.

Also, if the demand for surrender of the two suspects is interpreted as part of a reparation claim,[21] to avoid a dispute on extradition law it must necessarily be classified as a dispute between States on an alleged violation of international law. The contents of any reparation claim brought before the Security Council will be governed by the principle of peaceful dispute settlement under Article 2(3) of the United Nations Charter and Article 27(3).

18 Ibid. at 31.

19 Bassiouni, *supra* note 15, at 23 argues as follows: 'Thus, three states claim jurisdiction over two individuals, and their national state is offering to prosecute in lieu of extradition. If no diplomatic solution is reached, tensions will increase and perhaps violence will erupt. The presence of an international criminal tribunal would be a viable alternative to resolve such jurisdictional conflicts and could indeed lead to the peaceful solution of conflicts such as this.' See also Tomuschat, 'The Lockerbie Case before the International Court of Justice', 48 *ICJ Review* (1992) 38.

20 Cf. USA in S/PV 3033, 79, 21 January 1992; S/23308, 20 December 1991; A/46/827. The United States claimed that Art. 14 of the Montreal Convention could not provide a possible basis for jurisdiction of the Court, inasmuch as the six-month period prescribed by Article 14(1) of the Convention had not yet expired when Libya filed its application, see *Libyan Arab Jamahiriya v. United States of America*, *supra* note 2, at para. 24.

21 Such an interpretation is proposed by Ipsen, *supra* note 7, at 43. It seems rather difficult to subsume a demand to surrender nationals to a trial before a foreign court under the normal scope of a reparation claim, because it is quite different from a request to punish those responsible for an illegal act. See Arangio-Ruiz on the contents of a reparations-claim A/CN.4/425 and Corr.1; A/CN.4/425/Add.1 and Corr.1 and the ILC Report of the forty-second session A/45/10, 181.

An interpretation which excludes the applicability of the Montreal Convention[22] does not as such justify the application of Chapter VII of the Charter. However, it would have the effect of avoiding the jurisdiction of the ICJ. So far the Court has not tried to do this. The duty to find a peaceful settlement is applicable whether the dispute is related to the Montreal Convention or not. Given the facts of the case, it seems rather impossible to avoid the application of the Montreal Convention.[23]

III. The Procedure under Chapter VI

One would assume that the Security Council would first seek to confirm its authority to act under Chapter VI of the Charter. In order to do so the Security Council would need to investigate whether the continuation of the dispute is likely to endanger the maintenance of international peace and security. If this proved to be the case, it could then, according to Article 33(2), call upon the parties to settle their dispute by peaceful means, or initiate a more detailed investigation under Article 34 on whether the dispute is likely to endanger the maintenance of international peace. A further option would be to recommend an appropriate procedure or method to settle the dispute under Article 36. None of these procedures were adopted. Also the Security Council did not seem to act under Article 37(2) which would have implied a finding that the attempts of the parties to solve the dispute have failed, and the continuation of the dispute is in fact likely to endanger international peace and security.

Security Council Resolution 731 'strongly' deplored Libya's failure to respond effectively (that is, refused to fulfil) the United States and the United Kingdom requests, and urged the Libyan Government 'immediately to provide a full and effective response to those requests'. The requests were put forward in a joint declaration of the United States and the United Kingdom of 27 November 1991 which the ICJ quotes:

> The British and American Governments today declare that the Government of Libya must:
> - surrender for trial all those charged with the crime; and accept responsibility for the actions of Libyan officials;
> - disclose all it knows of this crime, including the names of all those responsible, and allow full access to all witnesses, documents and other material evidence, including all the remaining timers;
> - pay appropriate compensation.
>
> We expect Libya to comply promptly and in full;[24]

22 Such a result would arise by employing the reasoning of Ipsen, *supra* note 7.

23 Also Judges Evensen, Tarassov, Guillaume and Aguilar stressed in their separate opinion that the Montreal Convention is applicable, *Libyan Arab Jamahiriya v. United States of America*, *supra* note 2, at 24.

24 Ibid. at para. 30; the declaration has been reproduced in document S/23307, 20 December 1991 and included in document S/23308, 20 December 1991 to which reference was made in the Preamble of Resolution 731 (1992) and in the substantive para. 1 of Resolution 748 (1992); see also dissenting opinion of Judge Ajibola, ibid. at 87.

By Resolution 731 (1992) the Security Council simply decided the dispute in favour of the United States and the United Kingdom, without giving any explanation as to why Libya would be obliged to surrender its nationals or pay compensation for an act which, at that point, had not been attributed to Libya by any legal procedure. There was no need for the Security Council to behave like a summary court. It did not specifically state that it acted under Chapter VI, which is what most members who spoke before the vote seemed to assume. None of the authors introduced the resolution or advanced any legal argument. Having made sure in advance that the resolution would be adopted, they confined themselves to short political statements which were made after the vote. Whether Libya took the floor in this debate or not did not matter at all. The result of the meeting and the 'judgment' had been decided long before, by means of private consultations among members of the Security Council.[25] This kind of procedure, if applied by any court to an individual, would raise an allegation that the right to fair trial had been breached. However, the procedural rules of the Security Council, a political organ which 'shall act in accordance with the Purposes and Principles of the United Nations' (Article 24(2) of the Charter), do not contain any procedural safeguards which a State would automatically enjoy if involved in Court proceedings.

Given the structure and detailed provisions of Chapter VI it seems rather doubtful that the Security Council was authorized to construct a settlement which was as precisely tailored as that which appeared in Resolution 731 (1992). A procedure that permits such a ruling is provided in Article 37, but in this case the Security Council was not acting within its terms. If the procedure employed by the Security Council against Libya were to become common practice, the Security Council would become a major dispute settlement mechanism which could set aside arbitration and even court procedures agreed upon by the parties to the dispute. Such a development is even more disturbing due to the absence of procedural safeguards in formulating Security Council resolutions, and the apparent ease with which the Security Council will disregard Article 27(3). The proper channels for dispute settlement could be avoided whenever one party can manage to obtain a Security Council decision in its favour. Obviously this would not comply with the principles and purposes of the United Nations.

25 See the provisional verbatim record S/PV 3033, 21 January 1992.

IV. The General Mandate of the Security Council under Article 24

It is true that the competence of the Security Council cannot be limited to activities under Chapters VI and VII of the Charter. In its *Namibia* opinion the ICJ endorsed a statement of the Secretary-General to the effect that:

> the powers of the Council under Article 24 are not restricted to the specific grants of authority contained in Chapter VI, VII, VIII and XII... The Members of the United Nations conferred upon the Security Council powers commensurate with its responsibility for the maintenance of peace and security. The only limitations are the fundamental principles and purposes found in Chapter I of the Charter.[26]

However, it seems that this does not authorize the Security Council to circumvent the specific provision in Article 27 in case of a dispute between member States which at best would fall under Chapter VI.[27] Further, it does not explain the legal basis for a decision of the Security Council requesting a State to surrender its own nationals to a foreign power in disregard of its constitution. Without any doubt, such surrender would be a serious interference with the sovereign sphere of a State. Such interference whether based on Article 24 or on Chapter VI is not covered by Article 2(7) of the Charter which exempts only enforcement measures under Chapter VII, and enforcement measures formed no part of Security Council Resolution 731 (1992). Even if the Security Council was acting under the general competence of Article 24, this could not justify the introduction of this kind of summary court procedure. It certainly would not change the character of the resolution from a recommendation to a binding decision.

Unfortunately it is true that there are several examples where the Security Council avoided acting under Chapter VI, and that there is a tendency 'to consider most issues brought before it in accordance with Article 24, as falling under its general responsibility'.[28] However, the problem is that this practice circumvents the important provisions of Article 27(3), which is a procedural safeguard designed for the parties to a dispute which are not members of the Security Council. Further, it simultaneously facilitates an obscure transition to Chapter VII. Some of these questions recently came

26 *Namibia* opinion, ICJ Reports (1971) 52; for a view which opposes this broad interpretation see the dissenting opinion of Fitzmaurice, at 293. However, the Court's position has found wide support; see Jimenez de Arechaga, 'International Law in the Past Third of a Century', 159 *RdC*, I (1978) 124; Higgins, 'The Advisory Opinion on Namibia: Which UN Resolutions are Binding Under Article 25 of the Charter?', 21 *ICLQ* (1972) 270; Weissberg, 'The Role of the International Court of Justice in the United Nations System: The first Quarter Century', in L. Gross (ed.), *The Future of the International Court of Justice*, Vol. I (1976) 131, at 142.

27 Also Judge Bedjaoui considered Resolution 731(1992) as 'firmly within the bounds of Chapter VI', *Libyan Arab Jamahiriya v. United States of America*, *supra* note 2, at 42; cf. also Judge Ajibolla, at 87 and 90; Judge Weeramantry, at 66.

28 Herndle, 'Reflections on the Role, Functions and Procedures of the Security Council of the United Nations', 206 *RdC*, VI (1987) 331.

up in the International Law Commission (ILC) in connection with a discussion on countermeasures. That provoked the Special Rapporteur to note as follows:

> As stipulated unambiguously in the Charter, the Security Council's powers consisted of making non-binding recommendations, under Chapter VI, which dealt with dispute settlement, and also binding decisions under Chapter VII, which dealt with measures of collective security. The main point was that, according to the doctrinal view – which did not appear to be seriously challenged either in the legal literature or in practice – the Security Council would not be empowered, when acting under Chapter VII, to impose settlements under Chapter VI in such a manner as to transform its recommendatory function under VI into binding settlements of disputes or situations.[29]

Normally the Security Council has a policing function. It is only in the exceptional circumstances of Article 37(2) that the Security Council may recommend appropriate terms of settlement, and even then it remains only a recommendation. In principle under Chapter VI its power is limited to recommending appropriate procedures or measures of adjustment. Recently G. Arrangio-Ruiz went so far as to make the following revealing statement:

> Although the Security Council had the right to take measures to put an end to fighting, it was not empowered to settle disputes or to impose a solution to a dispute.[30]

This remark emphasizes that even under Chapter VII the Security Council's action is normally confined to halting military activities, and determining the legal consequences that are related to the breach of the peace so that peaceful settlement procedures can be employed. It therefore is difficult to assume that Article 24 could be used to justify such a broad decision-making power in an international dispute as has been applied in Resolution 731 (1992).

I do not share the opinion that Security Council Resolution 731 has to be understood as a Chapter VII 'recommendation' under Article 39.[31] Such a conclusion cannot be drawn from the text of the resolution. The Security Council did not refer to Chapter VII of the Charter, nor did it use the term 'decide', which is normally applied

29 See G. Arangio-Ruiz A/CN.4/SR. 2277, 3, 30 June 1992.

30 A/CN.4/SR. 2267, 21, 29 May 1992; see also Klein, 'Paralleles Tätigwerden von Sicherheitsrat und Internationalem Gerichtshof bei friedensbedrohenden Streitigkeiten', in R. Bernhardt, G. Jaenicke, K.-G. Geck, H. Steinberger, *Völkerrecht als Rechtsordnung, Internationale Gerichtsbarkeit, Menschenrechte, Festschrift für Hermann Mosler* (1983) 467, at 477.

31 See Judge M. El-Kosheri, *Libyan Arab Jamahiriya v. United States of America*, *supra* note 2, at 97; Judges Evensen, Tarassov, Guillaume and Aguillar who voted in favour of the court decision in a separate opinion also held the view that the Security Council with Resolution 731 acted under Chapter VII of the Charter. They only found that the consequences following from the applicability of the Montreal Convention 'were not considered satisfactory by the Security Council which was acting, with a view to combating international terrorism within the framework of Chapter VII of the United Nations Charter.' (at 24); Judge Weeramantry also stressed that Resolution 731 'makes no mention of the Montreal Convention or of the multilateral treaty structure build up to counter international terrorism', at 69.

to distinguish a binding order from a recommendation. In a way this was confirmed by Resolution 748 (1992), which in contrast to Resolution 731 (1992), uses the term 'decides' and explicitly states that the Security Council was in the operative part, 'acting under Chapter VII of the Charter'.[32]

The mere fact that the request of the United States and the United Kingdom for surrender was based on a reproach of international terrorism does not replace or substitute a finding of the Security Council that the relevant State conduct constitutes a threat to the peace. It is crucial that the Security Council reaches this conclusion before taking action. However, this seems to have been the assumption of the United States and the United Kingdom. After the adoption of Resolution 731 (1992) the British representative in the Security Council declared as follows:

> It is this exceptional circumstance of government involvement which has made it appropriate for the Council to adopt a resolution urging Libya to comply with these requests.[33]

He obviously understood the Security Council Resolution as creating a new rule of international law which replaces or amends the Montreal Convention:

> In future, terrorists operating with the convenience or support of a Government will know that they can be brought to trial swiftly and effectively in the country where their crime was committed.[34]

However, such a rule does not exist in international law[35] and cannot be created by a resolution of the Security Council.

Resolution 731 (1992) obviously avoids reference to Chapter VII, and does not try to imply a threat to or a breach of the peace. It therefore seems that Resolution 731 can only be based on the competences of the Security Council under Chapter VI or its general responsibilities under Article 24. In both cases the situation under consideration remains an international dispute between States. Therefore, in accordance with Article 27(3), a party to the conflict should abstain from voting.

32 See Judge Weeramantry, at 66 et seq.

33 S/PV 3033, *supra* note 20, at 103.

34 S/PV 3033, *supra* note 20, at 105.

35 See Mohr, 'Der Lockerbie Fall vor UN-Sicherheitsrat und Internationalem Gerichtshof', 20 *Demokratie und Recht* (1992) 305, 306; see also Muller, Rappard, 'The European Response to International Terrorism', in C. Bassiouni (ed.), *Legal Responses to International Terrorism* (1988) 402; Stein, 'Die europäische Konvention zur Bekämpfung des Terrorismus', 37 *ZaöRV* (1977) 668; Bin Cheng, 'Aviation Criminal Jurisdiction and Terrorism: The Hague Extradition/Prosecution Formula and Attacks at Airports', in B. Cheng, E. Brown, *Contemporary Problems of International Law: Essays in Honour of Georg Schwarzenberger on his Eightieth Birthday* (1988) 25.

V. Security Council Procedure under Chapter VII

Another question which is posed by the Security Council procedure is whether the failure to comply with a Security Council recommendation, which is adopted under the general competence of Article 24 or Chapter VI, can trigger a decision under Chapter VII of the Charter? So far most scholars that have addressed this question clearly took the position that it cannot.[36]

To justify action under Chapter VII the Security Council has to determine that there is at least a threat to the peace. A statement that a Security Council decision (which may have been a recommendation) has not been complied with would not be sufficient to justify action under Chapter VII.[37]

Resolution 748 (1992) relied directly on Chapter VII. It was adopted even though several members expressed reservations. It was felt that the resolution was too early or hasty, that it was not really justified, that it would interfere with an ongoing Court procedure, or that it should not be passed when peaceful means had not been exhausted.[38] Again, as had occurred with regard to Resolution 731 (1992) none of the sponsors introduced any legal reasoning or responded to the plea of Libya, which repeated its preparedness to comply with a peaceful settlement procedure. Libya also made it clear that it would consent to arbitration before an international tribunal, and questioned the legality of a Security Council decision made under Chapter VII.[39] The whole matter was considered and decided in one Security Council meeting, without regard to the procedure before the ICJ, and in the absence of any pressing circumstances. The sponsors of the resolution did not even take the floor before the vote. One suspects that the Security Council would have taken the decision even if Libya had not attended the meeting, or had rejected outright the opportunity to explain its position. Evidence for this assertion can be gleaned from the fact that the decision was effectively made before the opening of the meeting. The sponsors of the resolution did not even answer the legal arguments of the 'accused'. The 'judgment' was rendered as agreed in prior consultations. Such a procedure may be necessary and also justified when the Security Council is facing facts which leave no room for doubt that an act of aggression has occurred. However, it seems highly questionable that such a procedure is appropriate in deciding a dispute on legal questions.

In contrast to Resolution 731 (1992), the Security Council in Resolution 748 (1992) determined that there was a threat to international peace and security. What were the acts which were considered by the Security Council to constitute a threat to the peace?

36 See B. Simma, *Charta der Vereinten Nationen* (1991) 529; J. P. Cot, A. Pellet, *La Charte des Nations Unies* (1991) 639.

37 This is a problem that was and still may be acute in relation to Iraq. Continuing to apply sanctions according to Art. 41 in order to enforce reparation claims is highly questionable under the system of the Charter. See Graefrath, Mohr, *supra* note 1, at 121.

38 See the statements in S/PV 3063, 31 March 1992 of Jordan, at 24-25; Mauritania, at 31; Cape Verde, at 46; Zimbabwe, at 52; India, at 56; China, at 59; Morocco, at 64.

39 S/PV 3063, 4, 31 March 1992.

According to Resolution 748 (1992) the Security Council 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' of the United States and the United Kingdom 'constitute a threat to international peace and security' (emphasis added). It seems that the Security Council by Resolution 748 (1992) transformed the terms of settlement recommended by Resolution 731 (1992) under Chapter VI into a binding dispute settlement under Chapter VII, a procedure that is not provided for in the Charter. It is not at all convincing that a single act of terrorism could constitute a threat to peace, in particular if compared with other circumstances where the Security Council could not find that a threat to international peace existed. Further, on previous occasions the Security Council has declined to act even when measures were requested to stop activities which were in clear contempt of an ICJ judgment.[40]

It is worth noting that no terrorist acts or actions are mentioned in Resolution 748 (1992). Alleged omissions of the Libyan Government to fulfil requests of the United States, the United Kingdom and France were the basis for the Security Council decision. However, Libya was under no obligation in international law to hand over the alleged perpetrators of a terrorist act. Of course, it cannot be excluded that a threat to international peace and security can be committed by omission. However, the omission itself would have to constitute a threat to the peace. Causation would be very difficult to prove in this context, and the Security Council has never attempted to classify an omission as threat to the peace.

It remains absolutely unclear why or how the *failure* to renunciate terrorism by concrete acts (whatever that may be) or the *failure* to surrender suspects, or the refusal of compensation claims which are not established under any legal procedure, could constitute a threat to the peace. All these omissions cannot be defined as acts of terrorism, and not even every act of terrorism would constitute a threat to the peace.[41]

The concept behind this ambiguous language is that the continuing existence of the Libyan Government is a threat to the peace. Nobody dared to say so and surely such a position would not have found the support of a majority in the Security Council. The Security Council has no competence to decide whether a government can constitute a threat to the peace. It is only empowered to determine whether certain conduct that can be attributed to a State constitutes a threat to or breach of the peace. This difference should not be blurred. The decision on the legitimacy of a Government is not within the competence of the Security Council, but is a judgment for the people. The United

40 See the USA vetos against resolutions relying on Article 94(2) of the Charter S/PV 2704 (S/18250), 31 July 1986; S/PV 2718 (S/18428), 28 October 1986; see also General Assembly Resolutions 41/31, 3 November 1986, 42/18, 12 November 1987, 43/11, 25 October 1988, and 44/43, 7 December 1989.

41 Judge Bedjaoui refers in that connection to the American air attack on Tripoli and Bengasi condemned by General Assembly Resolution 41/38, *Libyan Arab Jamahiriya v. United States of America*, *supra* note 2, at 41.

Nations is still based, as the Secretary-General felt obliged to stress, on the principle of sovereign equality of States.

In the contemporary Security Council the veto power has lost much of its balancing force. Therefore, the following statement from the *Namibia* opinion is even more pertinent today than it was during the Cold War:

> ... limitations on the powers of the Security Council are necessary because of the all too great ease with which any acutely controversial international situation can be represented as involving a latent threat to peace and security, even where it is really too remote genuinely to constitute one. Without these limitations, the functions of the Security Council could be used for purposes never originally intended...[42]

Resolution 748 (1992) suffers also from other flaws which emerge from the mix-up of three legal activities, dispute settlement, action under Chapter VI, and sanctions pursuant to Chapter VII of the Charter. On the one hand the surrender of the suspects allegedly proved that the Libyan Government was involved in the terrorist attack on the Pan Am flight which exploded over Lockerbie. On the other hand, Libya had already been condemned as a terrorist government and convicted of certain actions which were enforced by sanctions, before any judge had seen the case. The demand that a State has to demonstrate its renunciation of terrorism by concrete actions (which perhaps means whatever will satisfy the United States and the United Kingdom) and pay compensation,[43] also clearly presupposes that this State is guilty and is considered to be a terrorist State. The burden of proof is thereby turned around. Resolution 748 (1992) is based on an assumption of guilt that would be rejected by any judge in any court of a democratic State.[44] This again raises the question of fair trial procedures as a general principal of law within Security Council practice.

The Court referred to Article 25 of the Charter and to Article 103 to explain that obligations of the parties under the Charter prevail over their obligations under any other international agreement, including the Montreal Convention.[45] In doing so the Court carefully added a reservation that this statement does not include any definite determination of the legal effects of the Security Council Resolution 748 (1992). The question whether, and if so how, Article 103 of the Charter can be invoked to strip Libya of its right to refrain from extraditing its nationals remains unclear. What are the obligations imputable to Libya under the Montreal Convention that have been overruled by the Security Council Resolution? Is it the obligation to initiate proceedings against

42 Judge Fitzmaurice, dissenting opinion in the *Namibia* opinion, *supra* note 26; this paragraph is quoted by Judge Bedjaoui in his dissenting opinion *Libyan Arab Jamahiriya v. United States of America*, *supra* note 2, at 43.

43 Resolution 748 (1992) explicitly refers to documents S/23307 and 23308, *supra* note 20 which contain *inter alia* the request 'to pay appropriate compensation'.

44 Cf. Judge Ajibolla, dissenting opinion, *Libyan Arab Jamahiriya v. United States of America*, *supra* note 2, at 87; Judge M. El-Kosheri, dissenting opinion, at 97; see also Judge Shahabuddeen, separate opinion, at 30.

45 Ibid. at 15.

suspects if the State is not willing to extradite them? Is it the obligation to submit a dispute on the interpretation and application of the Montreal Convention to arbitration? Is it the obligation to provide legal assistance? What did the Court have in mind when it referred to Article 103 of the UN Charter? The obligation to prosecute or extradite can barely be substituted by an obligation to surrender nationals based on a Security Council decision.[46] Since the right to try its own nationals and not to surrender or extradite them for foreign prosecution is generally considered to be a sovereign right of States, it obviously is not an obligation that is derived from the Montreal Convention. Therefore, what is the significance of the reference to Article 103? Is that used as an argument that the Security Council can suspend sovereign rights? Judge Bedjaoui rightly raised this issue in his dissenting opinion and emphasized the following point:

> That article ... is aimed at 'obligations' – whereas we are dealing with alleged 'rights' – ... and, in addition does not cover such rights as may have ... other than conventional sources and be derived from general international law.[47]

The Court found that imposing interim measures requested by Libya 'would be likely to impair the rights which appear ... to be enjoyed by the United States by virtue of the Security Council resolution 748 (1992).'[48] Has the Security Council Resolution 748 (1992) the effect of a Court decision as stipulated in Article 59 of the statute of the ICJ? Does a Security Council Resolution replace or substitute a formal court procedure? It is important to bear in mind that we are not dealing with suppressing an act of aggression or an imminent terrorist act, we are dealing with a legal dispute on extradition and responsibility for a terrorist act that happened nearly four years ago. What legal rights do the United States enjoy by virtue of Security Council Resolution 748 (1992) which they did not enjoy before?

46 I always found constitutional provisions prohibiting surrender of nationals very difficult to sustain, in particular in relation to crimes against peace and security of mankind and war crimes. Both are considered to be international crimes. But this is a general problem and so far States are not at all prepared to give up the right not to surrender their own nationals, even in such extreme cases.

47 *Libyan Arab Jamahiriya v. United States of America*, *supra* note 2, at 47; see also Judge Shabuddeen who states, 'the question now raised by Libya's challenge to the validity of Resolution 748 (1992) is whether a decision of the Security Council may override the legal rights of a State, and, if so, whether there are any limitations on the power of the Council', ibid. at 32.

48 Ibid. para. 41.

VI. Security Council Interference with Court Procedures

Without any doubt a matter being considered by the ICJ can be concurrently reviewed by the Security Council. This has happened several times and does not hinder the sphere of competence of either body.[49] However, one must question whether the Security Council can legitimately interfere with Court procedures, thereby rendering them meaningless, unless an acute breach of the peace necessitates Security Council action.

With due respect to the wisdom of the Security Council, it seems to me rather doubtful whether a failure to fully respond to United States' requests to surrender suspects to the United States or the United Kingdom and to pay compensation can be interpreted, within the meaning of Article 39 of the Charter, as a threat to international peace; especially when it has not been established that Libya violated international law. We should not forget that in the opinion of the ILC countermeasures can only be applied if all available amicable settlement procedures have been exhausted.[50] It would be dangerous to open a means for one party of a dispute to suspend settlement procedures under an international convention by using the Security Council to decide the case and order sanctions. Such a development would interfere with the Court's attempts to settle the dispute.

As long as a conflict can be defined as a typical dispute between States, it has to be solved by peaceful means, using the procedures agreed upon in a relevant treaty by the disputing parties. In this case a multilateral convention has been explicitly established to coordinate the fight against these kinds of terrorist acts. There was no reason not to apply the mechanisms of the Montreal Convention to a case that happened four years ago. It is against an established practice in international relations to order or apply sanctions against a State that is willing to accept the peaceful settlement procedure provided by the relevant treaty. Under such circumstances, one would be inclined to assume that a threat to abduct a suspect from a foreign country by armed force or the suggestion to run an air attack against the State to enforce the surrender of suspects, is a threat to international peace.

It is extremely dangerous to consider the failure to fulfil demands made by States, which were based on non-proven allegations of involvement in terrorist acts, as a threat to international peace. This is a particularly perilous path to take when the terrorist attack occurred years before the Security Council's imposition of sanctions under Article 41 or 42 of the UN Charter. This surely raises doubts whether such a decision of the Security Council is in accordance with the principles and purposes of the United Nations. Several Judges in their opinion clearly recognized that this was the

49 See separate opinion of Judge Ni, ibid. at 22; and dissenting opinion of Judge Weeramantry, ibid. at 55 seq. who considers this question and the jurisprudence of the Court; see also Klein, *supra* note 30, at 467.

50 Cf. Fourth Report on State Responsibility by G. Arangio-Ruiz, A/CN. 4/444, 12 May 1992.

crucial question,[51] which raises the problem of whether the Court has jurisdiction to decide on the legality of a Security Council decision. However, the Court abstained from discussing this point because it was considered to be premature, as the Court was only reviewing the question of provisional measures.[52]

The Court has not yet started proceedings on the substance of the case. But its order not to impose interim measures already raises many questions on the legality of the Security Council resolutions, as can easily be seen from the many interesting separate and dissenting opinions.

VII. The Relationship Between the Security Council and the International Court of Justice

This leads to my last and most important question. Let us assume that either or both Security Council Resolutions 731 (1992) and 748 (1992) are not in accordance with the purposes and principles of the United Nations as provided in Article 24 of the Charter. Who has the competence to decide on the constitutionality – so to speak – of acts of the Security Council? Has the ICJ the power and independence to decide this question in a manner akin to the role of the United States Supreme Court?[53] Or is the Security Council outside any control of the rule of law?

The Court is obliged to rule on any matter properly brought before it (that means it must establish jurisdiction or competence to deliver an advisory opinion) on the basis of international law and by applying judicial methods.[54] If necessary, this of course includes an interpretation of the Charter and a review of the legality of a Security Council resolution. I cannot find any provision in the Charter that would hinder the Court in exercising such jurisdiction. According to Article 92 of the Charter the Court is 'the principal judicial organ of the United Nations'. What other organ could legally decide whether an act of a UN organ is in accordance with the principles and purposes of the Charter?

It is conceded that in its *Namibia* opinion the Court stated as follows:

> Undoubtedly, the Court does not possess powers of judicial review or appeal in respect of the decisions taken by the United Nations Organs concerned.

51 Or as Franck puts it, 'the nube of the matter'. See Franck, 'The "Powers of Appreciation": Who is the Ultimate Guardian of the UN Legality?', 86 *AJIL* (1992) 519, at 522.

52 Cf. Judge Bedjaoui, *Libyan Arab Jamahiriya v. United States of America*, *supra* note 2, at 41, 43, 46; Judge Ajibolla, at 88; Judge El-Kosheri, at 102; Judge Weeramantry, at 53.

53 This analogy has already been discussed by Franck, *supra* note 52.

54 See Judge Weeramantry, *Libyan Arab Jamahiriya v. United States of America*, *supra* note 2, at 55 et seq.

But this was said because the

> question of the validity or conformity with the Charter ... of related Security Council resolutions does not form the subject of the request for advisory opinion.[55]

This suggests that, if requested, the Court would have dealt with this crucial question. Indeed, later on in its opinion the Court reviewed whether the Security Council Resolution was in conformity with the Charter, because this arose in the course of its normal judicial procedure. The Court reached the conclusion that: – .

> the decisions made by the Security Council ... were adopted in conformity with the purposes and principles of the Charter and in accordance with its Articles 24 and 25.[56]

The Court therefore examined the 'formal legality' as well as the 'intrinsic or substantive legality'[57] of the Security Council Resolution. It seems that the Court has the authority and competence to decide whether a Security Council decision is in conformity with the Charter when this question comes up in the normal course of its judicial function.

Professor Alain Pellet recently discussed this point before the International Law Commission.[58] He stressed that the Court should always satisfy itself that any given decision of the Security Council was legally correct, and that Security Council decisions must at least comply with the norms of *ius cogens* and certainly should not be contrary to the Charter itself, which is definitely superior to any finding of the Security Council.

This question was dealt with by the Court when it gave its opinion in *Certain Expenses of the UN*.[59] This opinion is often quoted to affirm that each organ has to determine its own jurisdiction and that proposals to place the ultimate authority to interpret the Charter in the ICJ were not accepted at the conference formally establishing the UN in San Francisco.

But the Court was careful to add that 'each organ must, in the first place at least, determine its own jurisdiction.'[60] That leaves room for a second place and indeed it did not prevent the Court from stressing that 'the Court must have full liberty to consider all relevant data available to it in forming an opinion on a question posed to it.'[61] Judge Spencer, after noting that in practice United Nations organs must interpret their authority so that they can effectively function,[62] elaborated on this point:

> In any case, their right to interpret the Charter gives them no power to alter it.

55 ICJ Reports (1971) 45.
56 Ibid. at 53.
57 This terminology has been used by Judge Bustamente in his dissenting opinion, in *Certain Expenses of the UN*, ICJ Reports (1962) 4, 290.
58 A/CN. 4/SR. 2257, 16, 8 May 1992.
59 *Supra* note 57.
60 Ibid. at 168.
61 Ibid. at 4, at 157.
62 Ibid. at 195.

> The question of constitutionality of action taken by the General Assembly or the Security Council will rarely call for consideration except within the United Nations itself, where a majority rule prevails. In practice this may enable action to be taken which is beyond power. When, however, the Court is called upon to pronounce upon a question whether certain authority exercised by an organ of the Organization is within the power of that organ, only legal considerations may be invoked and de facto extension of the Charter must be disregarded.[63]

Also Judge Morelli stressed that:

> It is exclusively for the Court to decide, in the process of its reasoning, what are the questions which have to be solved in order to answer the question submitted to it... The organ submitting the question to the Court cannot, once that question has been defined, place any limitations on the Court as regards the logical processes to be followed in answering it... Any limitation of this kind would be unacceptable because it would prevent the Court from performing its task in a logically correct way...
> Therefore, even according to the request for advisory opinion, the Court is free to consider or not consider the question of the conformity of the resolutions with the Charter.[64]

Judge Bustamente emphasized that the Court is free in its decisions and the master of its own reasoning and 'any limitation whatever on this point would run counter to the principle of judicial independence.'[65] He extensively explained why it was necessary to ensure that the organs act within their competence as described by the Charter.

> Only because of their acceptance of the purposes of the Charter and the guarantees therein laid down have the States Members partially limited the scope of their sovereign powers (Article 2). It goes without saying, therefore, that the real reason for the obedience of States Members to the authorities of the Organization is the conformity of the mandates of its competent organs with the text of the Charter. This principle of the conditional link between the duty to accept institutional decisions and the conformity of those decisions with the Charter is enshrined in Article 25...
> There is therefore a legal presumption that each of the organs of the Organization is careful in its actions to comply with the prescriptions of the Charter; but when, in the opinion of one of the Member States, a mistake of interpretation has been made or there has even been an infringement of the Charter, there is a right to challenge the resolution in which the error has been noted for the purpose of determining whether or not it departed from the Charter.

63 Ibid. at 197.

64 Ibid. at 217; arguing along the same lines Judge Bedjaoui in *Libyan Arab Jamahiriya v. United States of America*, *supra* note 2, at 44 complains, that 'Invitations clearly made to the Court (by the USA representative) to refrain from exercising its judicial function independently are puzzling'; see also Judge Weeramantry, at 59.

65 *Certain Expenses of the UN*, *supra* note 57, at 288; similar reasoning was employed by Judge Weeramantry in *Libyan Arab Jamahiriya v. United States of America*, *supra* note 2, at 58: 'It is clear ... that the Court must at all times preserve its independence in performing the functions which the Charter has committed to it as the United Nations principal judicial organ.'

> It cannot be maintained that the resolutions of any organ of the United Nations are not subject to review: that would amount to declaring the pointlessness of the Charter or its absolute subordination to the judgment – always fallible – of the organs.[66]

The same conclusion has been drawn by Judge Weeramantry in *Libyan Arab Jamahiriya v. United States of America* after a careful study of the *travaux préparatoires* concerning the competences of the Security Council:

> The history of the United Nations Charter thus corroborates the view that a clear limitation on the plenitude of the Security Council's powers is that those powers must be exercised in accordance with the well established principles of international law. It is true, this limitation must be restrictively interpreted and is confined only to the principles and objects which appear in Chapter I of the Charter...
> The restriction nevertheless exists and constitutes an important principle of law in the interpretation of the United Nations Charter.[67]

I believe that the Libyan case puts a serious question before the Court; i.e. who monitors the legality of Security Council decisions?[68] This question is, in contemporary international circumstances, of tremendous importance.

The founders of the Charter did not find it necessary to explicitly formulate a mandate for the Court to review the legality of General Assembly or Security Council resolutions. They thought that the system of the veto would suffice as a check and balance device against the plenitude of the Security Council's powers. They were of the view that the different political interests of several superpowers would prevent decisions of the Security Council from going beyond the Charter, and that this political device would ensure that the UN was not reduced to a tool of one superpower.

Unfortunately that system has never functioned properly. Over the years it blocked the Security Council from taking the necessary decisions. Now that it can work, given that the East-West conflict has disappeared, it lacks teeth because only one superpower remains. The veto therefore does not function as a check and balance mechanism; it has lost its balancing capability.

The Charter does not exclude the Court from reviewing the formal as well as the substantive legality of decisions taken by UN organs and it makes no exceptions for Chapter VII. Actually the Court has done so on several occasions. The Security Council is a political organ. Even if it sometimes exercises quasi-judicial functions, 'its use of the law is very different from that of the International Court'.[69] The

66 *Certain Expenses of the UN*, ibid., at 304; this has been strongly endorsed by Jiminez de Arechaga *supra* note 26, at 123.

67 *Supra* note 2, at 65. However, without much reasoning Judge Weeramantry limits this conclusion to activities of the Security Council outside Chapter VII. He believes that decisions under Chapter VII are 'entirely within the discretion of the Council.' (at 66).

68 See Franck *supra* note 51.

69 Higgins, 'The Place of International Law in the Settlement of Disputes by the Security Council, in 64 *AJIL* (1970) 1, at 18.

procedure applied by the Security Council is even more different. It lacks any safeguards for the 'accused'. However, this does not justify resort to arbitrary procedures or authorize a breach of general legal principles.

The Security Council remains a political organ that takes political decisions. Even if the Council decides legal disputes and exercises 'quasi-judicial functions' it neither applies judicial methods nor reaches judicial results, and its conclusions never attain the quality of a judicial decision. Its decisions therefore cannot replace rulings of the Court or make them superfluous. The Security Council should leave to the Court what belongs to the Court. It should not take decisions in matters that are already before the Court or which should be dealt with by the Court, unless there is a threat to peace entailing an urgent need for immediate action.

> Two of the main organs of the United Nations have the delivery of binding decisions explicitly included in their powers under the Charter: The Security Council and the International Court of Justice. There is no doubt that the Court's task is 'to ensure respect for international law...' (ICJ Reports (1949) 35). It is its principle guardian... The Court, for reasons well known so frequently shunned in the past, is thus called upon to play an ever greater role.[70]

If a Security Council decision – for whatever reason – in practice adjudicates a dispute between States, nothing can prevent the Court from deciding on the legality of such a Security Council decision if this becomes necessary when the matter is brought before the ICJ. Otherwise it would be quite easy for States to limit the jurisdiction of the Court even though they had previously accepted it. States could simply bring the case to the Security Council and obtain a political decision. Such a procedure would severely affect the independence of the Court.

Perhaps further consideration needs to be given to the circumstances in which the Court may examine the 'legality' of Security Council decisions. It seems to be obvious that the Court cannot act *proprio motu* and has no competence to exercise an abstract control over the legality of General Assembly or Security Council resolutions at the behest of Member States. Whenever a matter is properly brought before the Court, that is either by a party to a dispute or when the Court is requested to give an advisory opinion, the Court's jurisdiction should not be questioned, even if it has been called on to decide on the legality of a Security Council resolution.

In order to strengthen the Court, and as an immediate consequence of the Libyan case, the General Assembly should authorize the Secretary-General to request advisory opinions of the Court on legal questions arising within its competence (Article 96(2)).[71] This could become an important tool in what is now called

70 Judge Lachs in his separate opinion, *Libyan Arab Jamahiriya v. United States of America*, *supra* note 2, at 27.

71 This is not at all a new proposal. The Secretary-General has made it several times, see his Report 'Agenda for Peace' (*supra* note 13), and Legal Counsel has supported this idea in a recent statement. See Report of the Special Committee on the Charter of the United Nations and on the Strengthening of the Role of the Organization, A/47/33, para. 31 et seq., 18 March 1992.

'preventive diplomacy'. There is certainly an assumption that the Security Council acts according to the principles and purposes of the Charter and that its efforts to settle disputes or to maintain international peace are based on principles of justice and international law (Article 1(1) of the Charter). However, whenever this is challenged before the Court, there should be no question that it is the Court which has to decide relevant issues in accordance with international law.

If the procedure applied in the Libyan case is deemed to have political and legal validity without the possibility of being challenged before the International Court of Justice, then it cannot be denied that there is a serious flaw in the Charter itself which was aggravated by the demise of the East-West conflict. Presently, volatile international conditions underline the need for an active Security Council which can activate the potential of the UN Charter. Equally, the same conditions require the attention of a powerful International Court of Justice which can function as a true World Court, and which is not afraid to decide on the legality of Security Council resolutions, whenever it has jurisdiction to do so. A new World order – if that is a meaningful term – has to be based on the rule of law, which needs both an active Security Council and an independent Court.