The Impact of Security Council Decisions on Dispute Settlement Procedures

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The essential aim of the Special Rapporteur's Draft Articles for Part III[1] on the settlement of disputes arising in connection with counter-measures is to ensure that clear restrictions on the taking of counter-measures[2] are agreed and met. This is to be achieved by affording to the States involved in the counter-measures the right to submit any resulting dispute to conciliation or, failing settlement by conciliation, to arbitration, or, failing settlement by arbitration, to the International Court of Justice.

The question to be considered in this paper is how the intervention of the Security Council will affect this system for allocating responsibility. For, in principle, the Security Council could either authorize counter-measures or prohibit counter-measures. In either case the question will arise whether such a decision by the Council will be regarded as conclusive of the legality, or illegality, of the measures taken. There is an apparent illogicality in making the right of a State to take counter-measures subject to carefully-formulated conditions, but leaving the Security Council free to authorize institutionalized counter-measures, subject to no such conditions. It is this illogicality which has seemingly worried the Special Rapporteur.

The question had, of course, been anticipated in Riphagen's earlier drafts, although not limited to situations of counter-measures and peaceful settlement.[3] Article 4 of Part Two[4] provides as follows:

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1 A/CN.4/453/Add.1 12 May 1993 and 28 May 1993.

2 See Third Report, A/CN.4/440, 19 July 1991 and Add. 1, 19 July 1991; also Fourth Report, A/CN.4/444/Add. 1, 25 May 1992.

3 There could be many situations in which, as a justification for a *prima facie* unlawful act, and as a 'circumstance precluding wrongfulness', a State might invoke the authorization of the Security Council for that act. Or, conversely, where a State condemned by the Council as an 'aggressor' might be thought to be precluded from invoking the right of self-defence before a tribunal.

4 Provisionally adopted by the ILC in 1983. The present Rapporteur had indicated that, in his view, this draft article may need re-examination. See Report of the ILC on the work of the 44th Session, 1992. G.A.O.R., 47th Sess., Suppl. No. 10 (A/47/10), 91-93.

5 EJIL (1994) 89-101

> The legal consequences of an internationally wrongful act of a State set out in the provisions of the present part are subject, as appropriate, to the provisions and procedures of the Charter of the United Nations relating to the maintenance of international peace and security.

This seemingly innocuous provision is not only obscure, for its consequences are unclear, but it may in the event by singularly ill-founded. Broadly speaking, there are two possible situations: a Security Council decision is either irrebuttable, or rebuttable. The merits, or demerits, of these alternatives need to be examined separately.

I. The Two Possible Views of the Effect of Security Council Decisions

A. Security Council Decisions are Conclusive and Irrebuttable as Regards the Measures Approved or Condemned by Those Decisions

This 'solution' has its attractions. Certainly in the domain of international peace and security the Council has been endowed with 'primary responsibility' (Article 24(1) of the Charter) and all members agree to 'accept and carry out the decisions of the Security Council...' (Article 25). It would be difficult for the Council to discharge its responsibilities if members were free to challenge those decisions and decline to implement them. Moreover, in the kind of situation covered by Chapter VII, and in which binding decisions are made, it is unlikely that there will be time for suspension of compliance whilst verification of the correctness of the Council's decision is made by some third party: speed of compliance may be essential.

On the other hand, the solution has some decidedly unattractive features. A Member State is entitled to assume that in taking any decision the Security Council will uphold international law and safeguard the legal rights of States.[5] The Preamble to the Charter recited the intention 'to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained'. Article 1(1) states the purpose of settling disputes 'in conformity with the principles of justice and international law', and Article 24(2) commits the Council to discharging its duties in accordance with that purpose. In Article 36(3) the Council is exhorted to encourage States to refer legal disputes to the Court, so that the clear implication is that legal disputes are not the business of the Council. Indeed, the power to order provisional measures under Article 40 is 'without prejudice to the rights, claims or position of the parties concerned'. And

5 See Bedjaoui, 'Du contrôle de légalité des actes du Conseil de Sécurité', *Nouveaux itinéraires en droit: Hommage à François Rigaux* (1993) 69-110 who develops a detailed argument (at 82-89) in support of this view, rejecting Kelsen's view that the Council creates law for members. See H. Kelsen, *The Law of the United Nations: A critical analysis of its fundamental problems* (1950) 294-5. Also, of the same view as Bedjaoui see P.M. Dupuy, *Droit international public* (1992) 127.

the obligation of members to accept the Council's decisions under Article 25 is limited to decisions 'in accordance with the present Charter'.

In practice, however, the apparent expectation that the Council will function under the Rule of Law is not reinforced by the normal legal safeguards one would expect to find surrounding the exercise of executive powers in a democratic, constitutional system.[6] There is no judicial review of Council decisions and no provision for third-party settlement of disputes between the Council and a member. The Council could agree to arbitration with a member, but has never yet done so, and even the power to request an Advisory opinion has been used only once[7] by the Council in nearly fifty years. The kind of recourse to a Commission of Jurists, which was seen in the days of the League of Nations[8] has never been used by the Security Council. Even more disturbing, the Council frequently fails to indicate the constitutional basis – i.e. the Charter provision – on which it acts, and discussions of legal rights or constitutionality are becoming more and more rare.[9]

In these circumstances, therefore, it would be surprising if members were to agree that any Council decision is conclusive as to that member's legal rights. Nor are the objections listed above met by simply asserting that the Council is a political – not a judicial – body. That is no doubt true. All the more reason, therefore, why it should not be assumed that the Council disposes of questions of legal right with finality.

This line of reasoning faces the difficulty that, in the *Lockerbie* case,[10] the ICJ took a different view. The Court said:

> Whereas both Libya and the United States, as Members of the United Nations, are obliged to accept and carry out the decisions of the Security Council in accordance with Article 25 of the Charter; whereas the Court ... considers that *prima facie* this obligation extends to the decision contained in resolution 748 (1992); and whereas, in accordance

6 As Bedjaoui points out ibid., at 72-75, during the Cold War the Soviets and the Western Powers, by their antagonism, provided a form of political check against the potential excesses of the other. But the political checks and balances produced by the Cold War are now much weakened by the collapse of the USSR, and it is not yet clear whether China will replace the USSR in its role of habitual opponent of the West. Nor is there any virtue in opposition to the West as such. The issue is the constitutional propriety of the action.

7 Advisory opinion on the *Legal Consequences for States of the Continued Presence of South Africa in Namibia (S.W. Africa) Notwithstanding SC Res. 276 (1970)*, ICJ Reports (1971) 12 (hereafter referred to as the *Namibia* case).

8 See, for example, the League Council's use of a Commission of Jurists in the Corfu Incident of 1923: *League of Nations Official Journal* (1924) 523-527; and in the Aaland Isles dispute of 1920: *League of Nations Official Journal*, Special Suppl. No. 3 (1921) 17-19.

9 Reisman, 'The Constitutional Crisis in the United Nations' 89 *AJIL* (1993) 83-100, points out that, today, the USA meets privately with France and the UK to agree policy; then with all five permanent members *before* the formal Council meeting. So the crucial decisions are often taken prior to the meetings of the Council, rather than emerging from debate in the Council, and in consequence the official records reveal little of the real discussions on constitutionality.

10 *Case concerning Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libya v. USA)*, ICJ Reports (1992) 114 (hereafter referred to as *Libya v. USA*).

> with Article 103 of the Charter, the obligations of the Parties in that respect prevail over their obligations under any other international agreement...[11]

It is true that this reasoning is confined to the supremacy of a Council decision over inconsistent *treaty* rights or obligations, because Article 103 is concerned solely with compatibility between Charter obligations and obligations 'under any other international agreement'. Accordingly, the reasoning would not apply where a member relied on its rights under general international law.[12] The issue, uncomplicated by Article 103, would be the straightforward one of whether the Court would allow a Security Council decision to prevail over the legal rights of a State under general international law.

But even in relation to Article 103 the Court's reasoning is unconvincing. It involves the following propositions.

(i) By virtue of Article 103, a Charter obligation prevails over any other inconsistent treaty provision. (Correct).

(ii) Under Article 25 members have an obligation to accept Security Council decisions. (Correct).

(iii) Therefore a Security Council decision prevails over any other inconsistent treaty right or obligation. (Incorrect).

The last step in the Court's reasoning is that it equates a Council decision with a Charter *treaty* obligation, and that is incorrect.[13] A Council decision is *not* a treaty obligation. The obligation to comply may be, but the decision *per se* is not.

In fact, the Court's reasoning is disturbing in its possibilities. A member's Charter obligations are set out, as treaty obligations, in the Charter provisions. They are there for all to see, and every Member State has ratified them. But who knows what the Council may decide? Are members to be treated as having accepted, *in advance*, whatever decisions the Council might make, so that such decisions have the very same force as the Charter provisions themselves? It may be doubted whether States ratifying the Charter ever believed they were granting to the Council a blank cheque to modify their legal rights. On the Court's reasoning quite radical changes to a member's obligations could be effected by Council decisions, without any formal amendment of the Charter. This is why the last phrase of Article 25 – 'in accordance with the present Charter' – is so important.[14] The Council decisions are binding only in so far as they are in accordance with the Charter. They may spell out, or particularize, the obligations of members that arise from the Charter. But

11 Ibid., at para. 42.

12 Judge Oda's Declaration ibid., at 129 to 131 viewed Libya's rights as arising under general international law not the Montreal Convention. He would nevertheless have declined Libya's request because of the 'mismatch' between the object of Libya's Application and the rights to be protected.

13 See Combacau, *Le pouvoir de sanction de l'ONU* (1974) 293 who would limit the operation of Article 103 to resolving a conflict between two equal norms (two treaties) and not extend it to a conflict between two unequal norms (a treaty and a resolution). See also Sorel 'Les ordonances de la Cour internationale de justice du 14 April 1992...' 97 *RGDIP* (1993) 689, at 714-715.

14 See the dissenting Opinion of Fitzmaurice in the *Namibia* case, *supra* note 7, at paras. 112-113.

they may not create totally new obligations that have no basis in the Charter, for the Council is an executive organ, not a legislature. In short, the Council does not have a blank cheque.

To take an extreme example, it is possible that the surest way to restore international peace and security, in a situation created by the aggression of a powerful State A, would be for the Council to agree that A should have what it covets, namely part of the territory of a weaker State B. But could the Council decide, with binding effect, that B must transfer the territory to A in the interests of restoring peace? Instinctively, one would reply in the negative, and, clearly, the simple recital of the binding effect of Council decisions under Article 25 would provide no kind of satisfactory answer.

B. Security Council Decisions are *prima facie* to be Presumed Valid and Binding, but their Binding Force may be Rebutted on Proof that they are *ultra vires* or Contrary to the UN Charter

There is some judicial support for the view that the acts of the Council enjoy only a *prima facie* validity, a presumption of legality that can be challenged in the final analysis. In the *Expenses* case[15] the Court said:

> .... when the Organisation takes action which warrants the assertion that it was appropriate for the fulfilment of one of the stated purposes of the United Nations, the presumption is that such action is not *ultra vires* the Organisation.

Similar language was used in the *Namibia* case,[16] and in the *Lockerbie* case[17] the Court said:

> ... the Court ... considers that *prima facie* this obligation [i.e. Article 25] extends to the decision contained in resolution 748 (1992)...

Thus, despite the Court's apparent acceptance of the binding force of Security Council resolution 748 (1992) there is some evidence that, at the merits stage, the Court might reserve the right to question its validity.

It is important that this position should be maintained, and that the Court – or for that matter any other competent judicial body – should not regard itself as precluded from questioning the validity of a Council resolution in so far as it affects the legal rights of States. If this is right, two questions arise: on what grounds would review be proper and by whom should the review be made?

15 *Certain Expenses of the United Nations*, ICJ Reports (1962) 151, at 168 (hereafter referred to as the *Expenses* case).

16 *Namibia* case, *supra* note 7, at para. 20.

17 *Libya v. USA*, *supra* note 10 at para. 42. Note also that, in his Separate Opinion at 140, Judge Shahabudeen said 'The validity of the resolution ... has, *at this stage*, to be presumed...'

II. The Potential Grounds for Review

Given that no review has ever taken place, discussion of the grounds for review must be based on principle rather than practice.

A. Grounds to be Excluded

1. Differences of Political Judgment

It would, in principle, be quite wrong to allow any Court to question matters of political judgment.[18] In particular, it would be wrong to allow any court to question the Council's judgment that a Chapter VII situation – a 'threat to peace, breach of peace, or act of aggression' – either had, or had not, occurred. Equally the Council's discretion over the choice of means to deal with the situation, for example, whether to order provisional measures under Article 40, or economic sanctions under Article 41, or to institute measures of peacekeeping, must be preserved as not subject to judicial challenge. The same would be true of decisions as to the timing of, or participation in, such measures.

There is, in fact, a long tradition in most legal systems of judicial abstention in 'political questions', and the International Court itself has recognized that there are inherent limitations on the judicial function.[19] It would be quite wrong for any Court to substitute its own political judgment for that of the Security Council. But the allocation of legal responsibility to a particular State is a different matter and in recent times has figured quite prominently in Council decisions.[20] Where the Council decides under Article 39 that Chapter VII applies, and in addition decides that State X is guilty of aggression, or must pay compensation, the latter finding is not simply a matter of political judgment. It is a finding based upon an assessment of the facts and the application of a norm of international law, based on that assessment of the facts. So, too, where the Council decides that Member States must apply economic sanctions against State X because of its violation of the right of

18 There is no suggestion in the Charter that a finding of illegality is a pre-condition for the application of Chapter VII. In the majority of cases the findings of the Council will be factual and political, not legal.

19 *Case concerning the Northern Cameroons (Cameroun v. United Kingdom)* ICJ Reports (1963) 3. Some constitutions expressly forbid courts to enter into political questions. See de Smith, Judicial Review of Administrative Action (1959) 231-2; *US Third Re-Statement of the Law: Foreign Relations Law of the US*, S.1 RN.4.

20 E.g. SC Resolutions 423 (1978) 448 (1979) on Rhodesia (violation of the right of self-determination); Res. 481 (1977) on South Africa (crime of apartheid); Res. 841 (1993) on Haiti (violations of human rights); Res. 687 (1991) on Iraq (unlawful invasion of Kuwait, violations of Fourth Geneva Convention, taking of hostages, unlawful destruction of property, human rights violations and establishing a Compensation Fund to meet Iraq's liability; Res. 787 (1992) on Yugoslavia (unlawful taking of territory, ethnic cleansing); Res. 748 (1992) on Libya (breach of Art. 2(4) by instigating terrorism; Res. 733 (1992) on Somalia (violations of international humanitarian law). This is not to question the rightness of these decisions, but rather to show that a question could arise.

self-determination. The obligation to apply sanctions arises because of the delict by State X, and a finding of delict is not a purely political decision: it is a finding of fact and law.

2. Evidence of Bias

Whilst bias may disqualify a judge, or a person acting quasi-judicially, it would be totally inappropriate to apply this as a ground for review of Security Council decisions. States are political institutions, not judges, and their 'bias' against States of quite different political persuasions is an accepted fact of life. It would be impossible to compose any UN political organ free of such 'bias'. Moreover, it has to be assumed that, acting collegiately, the Council members allow for, and take account of, any such bias in the weight they attach to the views of individual States. There is no place for a later judicial scrutiny on this ground.

3. Procedural Irregularities

Here, too, the Council must be accepted as the master of its own procedures. It has its Rules of Procedure, and its own means of challenge to any alleged procedural irregularity.[21]

B. Grounds to be Included as Valid Grounds of Challenge

1. Ultra vires

As indicated above, there is no reason to suppose that a decision is binding on a Member State when that decision is *ultra vires*, precisely because States have under Article 25 agreed to accept only such decisions as are in conformity with the Charter. So a decision taken in violation of the Charter should not be held to be binding.

As Bedjaoui says:

> Si l'organe ne respecte pas la Charte et spécialement 'l'économie interne' de l'Organisation, c'est-à-dire la répartition interne des compétences des organes, il est manifeste que sa décision est prise *ultra vires* et doit être tenue pour irrégulière... Cette obligation de respecter un instrument est juridiquement indépendante de l'existence d'un organe de contrôle.[22]

There can be no basis for arguing that, as a political organ, the Council is not subject to the *ultra vires* doctrine. Member States have every right to insist that the Council keeps within the powers they have accorded to it under the Charter. As the

21 In fact, in the *Namibia* case *supra* note 7, at paras. 20-22 the Court gave a substantive response to South Africa's contention that SC Res. 284 (1970) was procedurally invalid because of the abstention of two permanent members.

22 Bedjaoui, *supra* note 5, at 92-93.

International Court declared in its Advisory Opinion on *Conditions of Admission to the United Nations:*

> The political character of an organ cannot release it from the observance of the treaty provisions established by the Charter when they constitute limitations on its powers or criteria for its judgment.[23]

Thus, the Council could not make a mandatory decision, binding on all members, to impose economic sanctions without a prior determination of a 'threat to the peace, breach of the peace, or act of aggression'. The Council could not decide that States must submit to the jurisdiction of the ICJ – for Chapter VI confers only powers of recommendation. And the Council could not order a State to transfer any part of its own territory to another, for no such power exists in the Charter.[24]

A view recently expressed[25] is that, since the Council acts by delegation of powers from the membership as a whole, it cannot delegate those powers to a State or group of States (*delegatus non potest delegare*). In short, although the Council can utilize a State or States as its agent, subject to direction and control, it would be *ultra vires* to confer total discretion to a State or States to act on behalf of the Council. The view was expressed by way of criticism of Resolution 794, by which the Council authorized the United States and others to use 'all necessary means' to establish conditions of security for humanitarian operations in Somalia. Certainly without continuing close scrutiny by the Council, such delegation of power might be questionable.

2. Denial of a Right to a Hearing

The Charter provisions in Articles 31, 32 and 44 do not, *expressis verbis,* confer on a Member State the right to be heard before sanctions are imposed upon it:[26] and the maxim *audi alteram partem* is invoked in connection with judicial or quasi-judicial hearings, rather than hearings in a political organ.

Nevertheless it would seem extraordinary if the Council were able to make a finding of legal responsibility against a State, and perhaps impose sanctions, without offering that State an opportunity of being heard.

23 ICJ Reports (1948) 64.

24 Iraq's objections to SC Res. 687 (1991) of 3 April 1991, Part A, whilst seemingly invoking this principle in fact misuse it. The Council called for *demarcation* of the Iraq-Kuwait boundary, in accordance with the boundary agreed in 1963. It did not purport itself to fix a new boundary, or require Iraq to transfer territory to Kuwait. See Queneudec, 'La demarcation de la frontière entre l'Irak et le Koweit' 97 *RGDIP* (1993) 767 at 774; Mendelson and Hulton, 'La revendication par l'Iraq de la souveraineté sur le Koweit' 36 *AFDI* (1990) 1923.

25 Wembrou, 'Validité et portée de la résolution 794 (1992) du Conseil de Sécurité' 5 *African Journal of International and Comparative Law* (1993) 340 at 347-8.

26 Article 31 leaves it to the Council to decide whether the State should participate, and Article 32, although giving a right to participate, presupposes the Council is dealing with a dispute, to which that State is party, under Chapter VI: there is no similar provision in Chapter VII.

3. The Decision is Manifestly Defective

As already indicated, the defect would have to be more than procedural. But where a decision affects a State's legal rights or responsibilities, and can be shown to be unsupported by the facts, or based upon a quite erroneous view of the facts,[27] or a clear error of law, the decision ought in principle to be set aside.

III. The Fora Within Which a Review or Challenge Might be Made

If one takes the view that the current problem has its genesis in the ending of the Cold War, and the consequent disappearance of the checks and balances inherent in East-West rivalry, then it is possible to see the solution in the provision of some new political forum, or machinery, to provide substitute political checks and balances. Thus Reisman advocates a greater involvement of the General Assembly which, being advised of prospective Council action under Chapter VII, would activate a new 'Chapter VII Consultation Committee'.[28]

But there is no guarantee that the legal rights of a particular Member State will be protected by the General Assembly, for the Assembly remains a highly political body, with its own political agenda, and there have been periods when 'unpopular' States – Portugal, South Africa, and perhaps now Iraq and Libya – could not, with absolute confidence, look to the Assembly as the guardian of legality. Moreover, the general, constitutional experience has been to see the protection of legal rights, and the Rule of Law, as best allocated to judicial rather than political bodies.

Turning to judicial or arbitral bodies, the possibilities are both actual and potential.

A. The International Court of Justice

It is self-evident that the Court has no direct role as an organ of judicial review. As the Court noted in the *Expenses* case:

> In the legal systems of States, there is often some procedure for determining the validity of even a legislative or governmental act, but no analogous procedure is to be found in the structure of the United Nations.[29]

27 Not infrequently the Council acts on the basis of partial information, provided by one or two Member States, or acts quickly before the facts can be objectively established. This may be inevitable, but then this is precisely the situation for which Article 40 was designed, and the Council's actions ought to be without prejudice to the rights of the parties.

28 Reisman, *supra* note 9, at 98-99.

29 *Supra* note 15. It may be noted that Clark and Sohn, *World Peace through World Law* (1958) at 44 (in discussing proposed Article 96 of the Charter) suggested such a power should be given to the Court.

However, there are two means whereby the Court can currently pronounce on the legality of resolutions of any UN organ.

1. Pronouncements Incidental to an Inter-State Dispute

Situations do arise in which, as part of a more general dispute between States, the parties dispute the legality or effect of resolutions of UN organs.[30] In the context of the Special Rapporteur's proposed Part III on peaceful settlement, and assuming a dispute over the legality of counter-measures came before an arbitral tribunal or the ICJ, this situation could certainly occur. If one party relied on a resolution of the Security Council to prove either that a delict had been committed by the other, or that counter-measures had been authorized by the Council against the other, it would be open to the other party to contest the validity of the Council's resolution.

The drawbacks to this incidental competence of the Court are several. It would depend upon both parties accepting the jurisdiction of an arbitral tribunal or the Court, whether via Part III or some other instrument. It would also be limited by the fact that any award or judgment would be *inter partes,*[31] confined, in effect, to the proposition that the one party could not oppose the resolution to the other: it would not quash or condemn the resolution for all purposes.

Finally, it cannot be predicted with any confidence that the Court would tackle the fundamental issue of the legality or validity of the resolution. Certainly it has not so far categorically refused to do so, but equally we have no actual example of the Court ever having done so. Thus, as a direct means of challenge its utility is questionable.[32]

2. By Means of an Advisory Opinion

The possibilities for a much wider use of the advisory opinion as a means of challenging the validity of decisions of the Council have already been explored in detail by Judge Bedjaoui,[33] so they require no repetition here.

The difficulties are well known. No State can, itself, request an opinion, so the procedure presupposes the State in question obtains the support of a majority of the Council, including the permanent members, or a two-thirds majority of the Assembly. An isolated or unpopular State will find this difficult. Moreover, in

30 See the Libyan contention regarding Res. 748 (1992) in *Libya v. USA*, *supra* note 10, at para. 39. In *Certain Phosphate Lands in Naura (Naura v. Australia)* Judgment of 26 June 1992 (not yet reported) the issue was not so much the validity of G.A. Res. 2347 (XXII) but rather its effect: the Court held at para. 30 that it did not discharge Australia from any further liability to Naura arising from the administration of the trusteeship.

31 See Bedjaoui, *supra* note 5, at 105-6.

32 And if the ICJ is reticent to challenge Council decisions, the likelihood is that Arbitral Tribunals, or Conciliation Commissions, will follow suit. In this event the whole scheme of Part III is weakened, for an important element in counter-measures – the effect of Council decisions – will be 'non-justiciable'.

33 Bedjaoui, *supra* note 5, at 94-105.

principle, the opinion, once given, is not binding. The risks of the State which has sought the opinion taking that view are perhaps slight, but the risks are real enough where the Council is concerned (the *Expenses* case readily comes to mind) unless the Council has committed itself in advance to accept the opinion as binding.

As to speed, which may be of the essence where Chapter VII is concerned, Judge Bedjaoui suggests that an opinion within two weeks is possible.[34] That may be so, but it is unlikely if Member States or the Secretary-General are to be invited to submit their views to the Court. So it may be more practicable to assume a longer time will be needed, and allow for the resolution under challenge to continue to operate in the meanwhile, but subject to an obligation to make reparation if the challenge is upheld.[35]

3. By Reference to an Arbitral Tribunal or Commission of Jurists

A totally new solution would be for the UN to establish an Arbitral Tribunal, or even a Commission of Jurists, to act as a kind of 'constitutional Court' in the sense that it would be a standing body to which, whenever a decision was challenged by a State, the Council would refer the challenge. Ideally, the Council should be committed in advance to accept any report from such a Commission of Jurists.

The issue of timing is difficult and inescapable, but it is unthinkable that the Council would agree to suspend the implementation of a decision under Chapter VII pending an award or final report. In principle, however, the alternative should be either,

(i) the Council would suspend the implementation of the decision pending the award or report,

or

(ii) the Council would have the right to insist on continued compliance with its decision, but subject to an obligation to pay compensation for injury caused by any invalid decision.[36]

The likelihood of the Security Council accepting such a new solution must be extremely low. The present mood of the Council seems to indicate an impatience with legal restraints, rather than a willingness to create them. Nevertheless, it needs to be pointed out that verbal support for the Rule of Law, coupled with a refusal to accept any real legal control over executive decisions, is not a consistent position in an age pledged to uphold democratic values.

34 Bedjaoui, *supra* note 5, at 102-3, citing the Court's speedy reaction in the *United States Diplomatic and Consular Staff in Tehran*, ICJ Reports (1981) 45 and the *Frontier Dispute (Burkina-Faso/Mali)*, ICJ Reports (1986) 551.

35 *Supra* text notes 36 to 38.

36 The obligation to compensate could be quite complex. It would obviously have to cover the injuries directly caused to the State which had been damaged by the decision. But suppose the injured State pursued remedies against other Member States which had taken counter-measures on the basis of the Council's decision: would those Member States be entitled to seek contribution from the Council for any damages they might be held liable to pay to the injured State?

IV. Corollary Developments, Internal to the United Nations, Consequent Upon any Acceptance of Legal Control of Council Decisions

If, contrary to prediction, the Council were to accept some system for effective, legal control over its decisions, certain internal developments would seem advisable. Arguably, these are advisable even now, but the need for them would be strengthened. The most obvious would seem to be the following:

(i) a consistent practice of declaring, within the resolution itself, the legal basis (i.e. Charter provisions, principles of international law) upon which any decision is based. Without this, legal review becomes too much of a guessing-game.[37]

(ii) A consistent practice of seeking legal advice whenever a prospective decision is likely to affect the rights of Member States, or impose obligations on members.[38]

(iii) Regularization of the opportunities for hearing views of Member States likely to be affected by decisions.

(iv) Improved techniques for fact-finding so as to give the Council sources of information independent of those of Member States.[39]

The last of these would appear self-evident. If the Council is going to attribute responsibility for a delict or crime to a State, then it would seem logical to require the Council to have first verified that, on the evidence, this attribution is justified. There are bound to be misgivings if the Council makes no attempt to acquire evidence independently, but simply adopts, as proven fact, the allegations of one or more States which are interested parties.[40]

37 There are many examples of the Council failing to clarify the precise constitutional basis for its decisions. And the General Assembly is not free from criticism. In the *Expenses* case, *supra* note 15 the Court had to speculate on the basis in the Charter for the Assembly's establishment of United Nations Emergency Force, for the Assembly's resolutions gave none.

38 No doubt delegations use their own legal advisers, but such advice rightly remains confidential. More frequent recourse to the UN legal counsel is possible (see Bedjaoui, *supra* note 5, at 92), but if he found himself consistently opposing the policies of the permanent members his position would soon become untenable. The League's practice of referring questions to a Commission of Jurists, an independent body, was preferable, although this would have to be a body different from that which might be entrusted with judicial review.

39 To the extent that waiting for factual reports would 'slow down' decisions, the Council would have to rely more on Article 40 until the facts were clear enough to allow decisions allocating responsibility.

40 See Tomuschat, 'The Lockerbie Case before the ICJ' International Court of Justice, 48 *The Review* (1992) 38-48 at 43, who on this ground expresses concern over the Council's decision in Res. 748 (1992), condemning Libya and requesting Libya to pay compensation on the basis of evidence emanating from the USA, the UK and France.

V. Conclusions

1. The ILC Draft Articles on State responsibility and the scheme for settlement of disputes arising in connection with counter-measures, and contained in Part III, will remain defective until the Draft Articles deal adequately with the effect of Security Council decisions. Article 4 of Part Two is not adequate for this purpose.

2. The draft should indicate that, to have an effect on State responsibility, Security Council decisions must be lawful decisions, and it is unacceptable in a legal system to attach to decisions of an executive organ an irrebuttable presumption of legality.

3. It is right that Security Council decisions should enjoy a presumption of legality and should not be subject to challenge on questions of political judgment, or on the ground of bias or procedural irregularity.

4. But, in principle, the presumption of legality should be rebuttable, and challenge ought to be possible where the decision is *ultra vires,* or has attached legal responsibility to a State without that State being offered an opportunity of being heard by the Council, or where the decision is manifestly defective as being based upon a fundamental error in law or mistake of fact.

5. Under the Charter the means of legal, as opposed to political, challenge are limited. The ICJ has no direct power of judicial review, but is competent to pronounce on the validity of Security Council determinations of legal responsibility *either* where this arises as an issue in an inter-State dispute *or* when an Advisory Opinion is requested.

6. Alternatively, the Council is free to refer such challenges by any State to arbitration or to a Commission of Jurists.

7. In any event, the risks of challenge would be decreased, and the task of any judicial or arbitral body reviewing a decision would be facilitated, if the Council were to accept a number of improvements to its own internal practices, such as:

(i) identifying the basis in the Charter, or in international law, for any decision allocating legal responsibility;
(ii) taking legal advice more consistently;
(iii) ensuring that States liable to condemnation are heard;
(iv) ensuring that the factual basis for any decision is properly verified.