

Problems of Enforcement of Decisions of the International Court of Justice and the Law of the United Nations

Attila Tanzi*

I. Introductory Remarks

The enforcement of decisions of the International Court of Justice may involve problems that touch upon some of the most delicate areas of both public international law, and the law of the United Nations, at a time when these two systems of law can hardly be considered as totally separate from each other. In the body of general law and practice concerning enforcement of international rules the principle of self-help remains prominent.¹ On the other hand, within the apparently more integrated and institutionalized context of the UN system – and this is the field into which we are principally going to venture in the present study – one is confronted with highly controversial issues, such as voting procedure in the Security Council, or the relationship between the Council and the International Court of Justice, these issues being part and parcel of the everlasting controversy between law and politics.

First, with regard to the question of the relationship between the Security Council and the Court,² consideration will, primarily, be given to the implications of

* Professor of Diplomatic and Consular Law on annual term at the University of Florence and Lecturer in International Law at the University of Perugia.

I would like to thank Professors Marina Spinedi, Bruno Simma, Giorgio Gaja and Luigi Ferrari Bravo for their helpful comments.

1 Schachter refers to self-help as 'a broad, if somewhat imprecise, term that covers a range of actions (other than armed force) which may be taken by a state injured by a violation of legal obligations owed to it. Analytically, it falls into the category of actions to achieve compliance or to enforce obligations. ('United Nations Law', *AJIL* (1994) 14.) For a commentary on the ongoing work of the International Law Commission in this area, see the collective contribution under the title 'Symposium: Counter-measures and Dispute Settlement: The Current Debate within the ILC', *EJIL* (1994) 20 et seq. On the traditional prominence of the principle of self-help as a remedy against breaches of law in international relations, see Fitzmaurice, 'The Future of Public International Law', *Livre du Centenaire, Annuaire de l'Institut de Droit International* (1973) 300 et seq.

2 The question of the discretionary powers of the Council under Article 94(2) represents, indeed, only a part of the more general problem of the relation of the Council to the Court, which cannot be analysed here. More generally, on the problem of the concurrent jurisdiction between the Council and the Court, see T.G.H. Elsen, *Litispence Between the International Court of Justice*

the discretionary character of the role of the Council under Article 94(2). Second, and in particular, when assessing the voting procedure which applies when the Council votes on a draft resolution aimed at giving effect to a judgment of the Court, a systematic analysis will be made of Articles 94 and 27 of the Charter in connection with the more general competence of the Council under Chapters VI and VII. Last, this enquiry will focus on the scope of application of Article 94(2), having special regard to orders of the Court indicating provisional measures, and giving consideration to those special advisory opinions that are made compulsory under *ad hoc* agreements.

The few scholars who have dealt with this topic in the past have lamented the almost total lack of relevant practice.³ After almost fifty years of functioning of the UN, the instances in which action by the Security Council has been invoked under Article 94(2) are still rare: this Article was used by the UK, in 1951, with respect to the *Anglo-Iranian Oil Company* case; by Nicaragua, in 1986, in the case against the United States and by Bosnia-Herzegovina, in 1993, in the case against the Federal Republic of Yugoslavia.

II. The Discretion of the Security Council Under Article 94(2)

Article 94(2) of the Charter, in vesting the Security Council with the power to give effect to a judgment of the ICJ, seems to provide a potential element of cohesion between the two UN organs.⁴ However, surveying this provision more closely, one

and the Security Council (1986). In fact, in the present study the problem of concurrent jurisdiction is analysed with regard to whether the Security Council can bring about a sort of political review of a Court decision, a problem that presents itself when the Council deliberates on an issue which has been brought before the Court after it has passed a judgment. The other side of the problem is that of the possibility of judicial review of the legality of a Council decision. The most recent case addressing this problem is that on the interpretation and application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (*Libya v. US*), Request for the Indication of Provisional Measures. The Court's Order of 14 April 1992 has prompted an intense debate among international law scholars, see, among others, Andreas Saenz de Santa Maria, 'De maximis non curat praetor ...? El Consejo de Seguridad y el TIJ en el asunto de Lockerbie', *Revista española de derecho internacional* (1992) 327 et seq.; Franck, 'The 'Powers of Appreciation': Who is the Ultimate Guardian of UN Legality?', *AJIL* (1992) 321 et seq.; Sciso, 'Può la Corte internazionale di giustizia rilevare l'invalidità di una decisione del Consiglio di sicurezza?', *RDI* (1992) 369 et seq.; Graefrath, 'Leave to the Court what Belongs to the Court. The Libian Case', *EJIL* (1993) 184 et seq.; Kennedy (R.F.), 'Libya v. United States: The International Court of Justice and the Power of Judicial Review', *Va.J.Int'l L.* (1993) 899 et seq.; Watson, 'Constitutionalism, Judicial Review, and the World Court', *Harv. Int'l L.J.* (1993) 1 et seq.; Bowett, 'The Impact of Security Council Decisions on Dispute Settlement Procedures', *EJIL* (1994) 89 et seq.

3 See, in particular, Schachter, 'The Enforcement of International Judicial and Arbitral Decisions', *AJIL* (1960) 5; S. Rosenne, *Law and Practice of the International Court* (1965) 154; Kerley, 'Ensuring Compliance with Judgments of the International Court of Justice', L. Gross, *The Future of the International Court of Justice* (1976) 276.

4 Article 94 reads as follows: '1. Each member of the United Nations undertakes to comply with the decision of the international Court of Justice in any case to which it is a party. 2. If any party to a case fails to perform the obligations incumbent upon it under a judgment rendered by the Court, the other party may have recourse to the Security Council, which may, if it deems necessary, make recommendations or decide upon measures to be taken to give effect to the judgment.'

might be led to a different conclusion. This arises mainly out of the discretionary character of the authority of the Council in the matter. The wording of the provision expressly indicates that the Security Council 'may' exercise its power to enforce compliance with a Court's judgment only 'if it deems [this to be] necessary'. It is to be noted that in its original version the proposal that led to Article 94(2), as in the case of the analogous prescription in the Covenant of the League of Nations,⁵ provided an obligation for the Security Council to act when the successful litigant had brought the case of non-compliance before it.⁶

Already at the San Francisco Conference the question arose whether, in its final version, Article 94(2), and particularly the phrase 'if it deems necessary', might impair the independence of the Court *vis-à-vis* the Security Council:

It was observed that the use of this phrase might tend to weaken the position of the Court. In answer to this argument it was pointed out that the action to be taken by the Security Council was permissive rather than obligatory and that the addition of the aforementioned phrase merely made more clear the discretionary power of the Security Council.⁷

Be that as it may, it is apparent that, contrary to what was prescribed in the Covenant,⁸ the drafters of the Charter, in preserving the discretion of the Security Council in this matter, have rendered the Court totally dependent on the logic of political negotiation between Members of the Council with regard to the enforcement of its judgments that are not spontaneously complied with.⁹ Basically, the provision in point gives the Council the liberty not to act to enforce the decision,

5 Article 13(4) of the Covenant reads as follows: 'The Members of the League agree that they will carry out in full good faith any award or decision that may be rendered and that they will not resort to war against a Member of the League which complies therewith. In the event of any failure to carry out such an award or decision, the Council shall propose what steps should be taken to give effect thereto'.

6 This proposal was introduced in San Francisco by the Cuban delegation at a very late stage in the proceedings (United Nations Conference on International Organizations (UNCIO), Vol. 4. at 695 and *ibid.*, Vol. 13, at 508). In effect, the proposal was originally to be inserted in the Statute of the Court. There followed a second version of the proposal which still provided for an obligation to act, but in softer terms ('the Security Council shall make recommendations or decide upon measures to be taken to give effect to the judgment'), *ibid.*, at 510. For a thorough examination of the preparatory works of Article 94, see, in particular, the commentary by Pillepich in J.-P. Cot and A. Pellet (eds), *La Charte des Nations Unies* (2nd ed., 1991) 1275 et seq.

7 UNCIO, Vol. 13, at 459. For further debate on the same issue, see also *ibid.*, Vol. 12, at 505, 519-520.

8 See Article 13(4), *supra* note 5. For a thorough analysis of the discrepancies between this provision and Article 94 of the Charter, see Schachter, *supra* note 3, at 18.

9 The Statute of the Court contains no provision enabling the Court itself to take any steps in cases of non-compliance. The suggestion has been made that Article 60 of the Statute might be amended in such a way as to allow the successful party to apply to the Court for a 'declaration of non-compliance' (W.M. Reisman, *Nullity and Revision, Review and Enforcement of International Judgments and Awards* (1971) 671 et seq.). Such an amendment would offer the advantage of increasing the pressure on the defaulting party. Therefore, if a substantial modification of the Charter, of which the Statute forms an integral part, were to be undertaken, proposals like this one should be taken into serious consideration, together with others aimed at improving the administration of justice. At the same time, one would hesitate to endorse the amendment suggested above to the extent that it contemplates a procedure whereby the Court would complement a 'declaration of non-compliance' with the possibility of adjusting its decision, or rendering an award of substitutive compliance. One can certainly agree that 'it seems unwise to establish a procedure when the losing party can seek to change the judgment against it simply by not complying with it' (Kerley, *supra* note 3, at 283).

even if so requested by the party in favour of which the decision has been rendered. However difficult it would be for a constitutional lawyer to come to terms with the idea that on the domestic plane the Judiciary might be in a position of dependence upon the Executive in such substantive terms, it cannot be denied that the above picture should not appear as particularly shocking to a United Nations student. One should not lose sight of the fact that the Security Council is, at the same time, both the supreme political organ of the Organization and, virtually, the only institutional means for enforcement in the UN system, and that it is also vested with powers to promote peaceful settlement of disputes under Chapter VI of the Charter. It is as well to bear in mind that realistically the wording of Article 94(2), in its final version, is totally in line with the political underpinnings of the overall structure of the UN Charter, i.e. a construction centred on the pillar of the five Permanent Members of the Security Council. It would have been surprising, however desirable in principle, if a Charter provision were to provide an absolute obligation for the Council to act in order to give effect to a Court decision. Difficulties would arise with respect to such a provision with regard to the possibility – also inevitable under the present Charter – that the political evaluations of the Council on a given case might differ from the stand taken by the Court on the basis of purely legal reasoning. Such difficulties would become only more apparent in a situation where the Council found itself compelled to pass *ex-officio* a resolution against a Permanent Member which had lost a case before the Court and did not intend to comply with its ruling. This consideration will also be relevant later on, when dealing with the voting procedure applicable to a draft resolution based on Article 94(2).

A. Are Political Organs of the UN Vested with the Power to ‘Review’ a Decision of the Court?

1. The Security Council

In studying Article 94(2), the question has also been raised whether the Council is vested with some power to review decisions of the Court.¹⁰

No power of revision over pronouncements of the Court is expressly provided for the Council anywhere in the Charter. The rationale of Article 94 is certainly not that of providing the Security Council with the power to decide on the validity of a Court decision. On the contrary, Article 60 of the Statute of the Court, which forms an integral part of the Charter, provides that '[t]he judgment is final and without appeal', and Article 61 confers upon the Court exclusive competence over any dispute 'as to the meaning and scope of the judgment', as well as over proceedings for its revision. In addition, the latter provision makes application for revision conditional upon discovery of a new fact unknown to the Court at the time when it

10 Kelsen, 'The Settlement of Disputes by the Security Council', *The Int'l Law Quart.* (1948) 211 et seq.; A. Ross, *Constitution of the United Nations (Analysis of Statement and Functions)* (1950) 102 et seq.; Kerley, *supra* note 3, at 278 et seq.

handed down the judgment.¹¹ The contention could be made, though, that these statutory rules on revision are totally irrelevant to the question in point, which does not refer to the power of revision of a judgment in technical terms, but, instead, from a primarily political point of view. Therefore, the issue should be analysed having regard to the powers of the Council to discuss and to deliberate on any dispute, or situation, of the nature referred to in Articles 34 or 39 of the Charter generally, or in 94(2) in particular. Under such terms, it seems difficult to rule out, in principle, that the Council may act in conformity with the Charter in such a way that could amount to a political revision of a Court decision.

When a State has recourse to the Security Council under Article 94(2), a debate normally ensues in which it is highly likely that arguments will be put forward, at least by the defaulting State, that will question the validity of the Court's decision, either on the merits of the case, or on the Court's jurisdiction, which must also be decided upon by the Court itself, according to Article 36(6) of its Statute.¹² Such a debate could in itself provide an element of political revision of the Court's decision. The strength of such a revisionary debate would be proportional to the force of the arguments put forward to contest the decision and, especially, to the number of Members of the Council that subscribe to them. Such a form of political revision would be formally sanctioned – in total conformity with the discretionary character of the powers of the Security Council under Article 94(2) – if a draft resolution, introduced under this provision and containing a recommendation, or measures, to give effect to the judgment, were not adopted through lack of the necessary majority.¹³

The first two instances in which Article 94(2) was invoked before the Security Council – in 1951 by the United Kingdom against Iran in the *Anglo-Iranian Oil Co.* case, and in 1986 by Nicaragua in the well-known case against the United States – corroborate the assumption that the scenario above depicted might well occur in practice.

As regards the *Anglo-Iranian Oil Co.* case, its main relevance here lies in the fact that it referred to an order of the Court requiring provisional measures, whereas Article 94 refers, in paragraph 1, to decisions, and, in paragraph 2, to judgments. The question of the scope of application of the provision at hand with respect to Court orders will be considered later on in this paper; but what is of special relevance for us at this juncture is the fact that, as a result of the UK having

11 It is noteworthy that paragraph 3 of Article 61 also provides that '[t]he Court may require previous compliance with the terms of the judgment before it admits proceedings in revision'.

12 Obviously, one is not suggesting that Article 94(2) applies to decisions of the Court as to its jurisdiction.

13 The case has also been made (it would certainly be a border-line case) that the Council might deliberate to the effect that the decision of the Court should not be given immediate effect. One cannot but subscribe to the argument that the only way to reconcile such a deliberation with Article 76 of the Rules of Court, according to which the judgment becomes binding on the parties as of the day on which it is read in open Court, is to consider that '... [t]his type of moratorium [...] would not undermine the authority of the Court but simply suspend the obligatory force of the judgment on the ground that new proceedings have intervened' (Schachter, *supra* note 3, at 22).

proposed under Article 94(2) that the Security Council call upon Iran to comply with a pronouncement of the Court,¹⁴ a debate followed in which arguments similar to those submitted to the Court by the parties were taken up by Members of the Council,¹⁵ and the draft resolution submitted by the United Kingdom¹⁶ and repeatedly revised, was eventually withdrawn.¹⁷

The *Case of the Military and Paramilitary Activities in and against Nicaragua* may be regarded as another example in which recourse to the Security Council under Article 94(2) could be seen as a threat to the legal authority of the judicial decisions of the Court, due to the lack of action by the Council.

With a letter dated 17 October 1986 the Permanent Representative of Nicaragua to the United Nations requested an emergency meeting of the Security Council 'in accordance with the provisions of Article 94 of the Charter, to consider the non-compliance with the Judgment of the International Court of Justice dated 27 June 1986 [...].'¹⁸ Pursuant to that request a meeting of the Council was held a few days later¹⁹ during which a draft resolution was introduced that '... [u]rgently call[ed] for full and immediate compliance with the Judgment of the International Court of Justice of 27 June 1986 [...].'²⁰ Put to the vote, the draft resolution in point was not considered as adopted by the President of the Council owing to the negative vote of

14 In a letter dated 28 September 1951 the UK brought before the Council, as a matter of extreme urgency, the failure by the Iranian Government to comply with the provisional measures indicated in the Court's Order of 5 July 1951 (UN Security Council Official Records (SCOR), 6th Yr. Suppl. for October, November and December, at 1 and 2, S/2357. For the text of the Order, see ICJ Reports (1951) 89).

15 Iran objected to the validity of the Court's order on the basis that the Court was not competent in the case by virtue of Articles 1(2) and 2(7) of the Charter (UNSCOR, 6th Yr, 560th mtg, paras. 28-39 and 43-67). For his part, the representative of the former Yugoslavia, siding with Iran, argued that the Security Council was not bound by decisions taken by another organ of the United Nations (UNSCOR, 6th Yr, 559th mtg, at 3). See also the stand taken by India, according to which it was not proper for the Council to pronounce on the question of jurisdiction when it had not been decided by the Court (ibid., paras. 69-76). It is to be noted that the two sets of arguments presented before the Council, those in favour and those against the Court's competence, reproduced much the same issue that was pending before the Court, and were meant to be formalized in a Council resolution. A draft to that effect had been introduced by Ecuador. In its first preambular paragraph, it referred to the statements made in the Council by the parties to the dispute before the Court, and in its operative part it advised the parties to try again to settle their dispute, without even mentioning the preventive measures contained in the Court's Order (UNSCOR, 6th Yr. 562nd mtg., para. 48, S/2380).

16 Ibid., at 2 and 3 (S/2358).

17 Given the special circumstances of the case, it can be regarded as a precedent in which the Security Council solved by way of self-restraint, a typical case of 'litispence' between itself and the Court. In fact, at the time when the Council was debating the issue, the same case was pending before the Court which, after having indicated interim measures, had still to pass judgment on its own jurisdiction. Since the proposal by the UK on the question of non-compliance by Iran with the Court's order, was not gaining ground in the Council, and in consideration that in debating such a question a number of issues were being discussed which were still pending before the Court, as they basically pertained to its jurisdiction, the view prevailed that the Council should have adjourned its debate until the Court had handed down the judgment on its jurisdiction. A French proposal to that effect was finally approved by eight votes to one, with two abstentions (UNSCOR, 6th Yr, 563rd mtg, paras. 135 et seq., ibid., 565th mtg, para. 62).

18 UN Doc. S/18415.

19 On 28 October 1986, see UN Doc. S/PV. 2718.

20 UN Doc. S/18428.

a Permanent Member, i.e., the United States.²¹ This negative result was, though, formally reached through a debate which substantially upheld, or, at least, did not aim to undermine the authority of the Court. The United States, i.e., the defaulting party, was the only Member that put forward arguments against the validity of the judgment of the Court arguing that the latter had passed a decision that it 'had neither the jurisdiction nor the competence to render'.²² The United States was also the only Member that voted against the draft resolution. It is noteworthy that Honduras, admitted to the debate under Article 31 of the Charter, aside from blaming Nicaragua for having made 'use of the Court for propagandistic purposes', did not touch upon the Court's findings either as to its jurisdiction, or on the substantive merits of the case.²³ Also those Members of the Council who did not support the draft resolution and, therefore, abstained, namely, France, Thailand and the United Kingdom, did not object to the validity of the Court's pronouncement. It was made clear by those delegations that their stand on the matter was based on purely political considerations regarding the implications of the Court's decision, rather than on legal grounds concerning its validity.²⁴

After the above-mentioned draft resolution was vetoed in the Security Council, an identical text was submitted by Nicaragua to the General Assembly.²⁵

21 S/PV.2718, at 51. A similar draft resolution (S/18250) had already been submitted at the 2704th meeting of the Security Council and vetoed by the United States. For an extensive background to the case, see A.V. Patil, *The UN Veto in World Affairs. A Complete Record and Case History of the Security Council's Veto* (1992) 372 et seq.

22 S/PV.2718, at 44 et seq. The US Representative went on to say that '[...] no Court, not even the International Court of Justice, has the legal power to assert jurisdiction where no basis exists for that jurisdiction. The language and negotiating history of the Charter of the United Nations and the International Court of Justice, as well as the consistent interpretation of those instruments by the Court, this Council, and Member States, make abundantly clear that the Court's claim to jurisdiction and competence in the Nicaragua case was without foundation in law or fact' (ibid., at 46).

23 Ibid.

24 The Permanent Representative of Thailand expressed the view that it would have been more effective for the Council to have supported the regional peace initiatives, at the time still under way, rather than rely on Article 94 of the Charter (ibid., at 42 et seq.). He also put forward an argument of legal character, carefully enough, though, so as not to make it sound like an objection to the validity of the Court's decision. On the one hand, he accepted that, in spite of the position taken by the United States, the Court had determined that the latter was to be considered a party to the case; on the other hand, he stressed that Article 94(2) would place the Council in a dilemma, as 'the Council may make recommendations or decide upon measures under this provision only if it considers that a party has failed to perform its obligations under a judgment of the Court, a determination which is intrinsically legal in nature' (ibid., at 42).

Both France and the United Kingdom, in their statements after the voting, explained their abstention by saying that they were trying to leave the legal authority of the Court untouched (ibid., at 52 et seq.). In particular, the Representative of the United Kingdom stated that '... [c]ompliance by the parties with the International Court of Justice decisions is a clear Charter obligation, but it is nothing less than presumptuous for the Government of Nicaragua [...] to call for selective application of the Charter in this case', and concluded by saying that '... [w]hile we do not challenge the draft resolution on legal grounds, we are unable to support a draft resolution which fails to take account of the wider political factors [...]' (ibid., at 52).

25 Draft Resolution A/41/L.22.

2. The General Assembly

As a result of Nicaragua's initiative to transfer the debate from the Security Council to the General Assembly, the question turns on the competence of the latter over issues of non-compliance with decisions of the International Court of Justice. Unlike the Security Council, the General Assembly is not specifically vested with a similar competence. However, one should not deduce from this that the Charter rules out such a competence.²⁶ No arguments *a contrariis* based upon Article 94(2) can defeat the general scope of the functions and powers of the Assembly entrusted to it by Article 10, and stressed in Article 11(4) of the Charter. Limitations to the general competence of the Assembly have been expressly provided in Articles 11(2) and 12(1). According to these provisions, the General Assembly cannot lawfully deal with a dispute over non-compliance with a Court decision while the issue is pending before the Council, nor can it decide that action should be taken with respect to such a dispute.²⁷

In line with the above reasoning, and in consideration of the fact that the draft resolution introduced by Nicaragua did not provide for any enforcement measures of the kind provided for in Chapter VII, the draft resolution was discussed and put to the vote in the General Assembly. It was adopted by ninety-four votes to three (El Salvador, Israel and the United States voting against), with forty-seven

26 Against such a competence, see the statement of the US Representative, UN Doc. A/41/PV. 53, at 66 et seq., and that of the Representative of El Salvador, *ibid.*, at 84 et seq. In favour, see especially, the statement of the Representative of Mexico (*ibid.*, at 77).

27 For the argument that the General Assembly is competent in the matter, see Reisman, *supra* note 9, at 729 et seq. and Kerley, *supra* note 3, at 282. The latter finds the Assembly's competence in point on the assumption that both the Council's and the Assembly's powers in the matter derive from Chapter VI. Therefore, he affirms that 'if requests for enforcement of judgments of the Court are received by the Council as "disputes" or "situations" under Article 35(1), the competence of the General Assembly to receive them under the same provision is difficult to question' (*ibid.*). See, also, Rosenne, *supra* note 3, at 575. It is difficult though to understand how this author could further found the Assembly's competence in the matter on its right to request advisory opinions to the International Court of Justice (*ibid.*). Rosenne also suggested that the Assembly's competence in the matter could be of an operative nature on the strength of the then alleged evolutive practice based on the so-called 'Uniting for Peace Resolution': 'Il y a eu une tendance, qui a trouvé son expression dans la Résolution appelée "Action conjuguée en faveur de la Paix" (377, V) et dans les amendements qu'elle a apportés au règlement intérieur de l'Assemblée Générale, qui consiste à essayer de créer un certain parallélisme entre les pouvoirs et les fonctions de l'Assemblée Générale d'une part et ceux du Conseil de Sécurité d'autre part [...]'. C'est alors une conséquence naturelle de cette tendance de reconnaître que des organes autres que le Conseil de Sécurité peuvent être capable de traiter la mise en vigueur des décisions de la Cour' (*ibid.*). This assumption was debatable already at the time when it was put forward in the light of the controversy which sprang around the 'Uniting for Peace' practice itself. On account of the evolution in the political balance in the United Nations since the time when this author wrote on the subject, it is even more difficult in this day and age to agree with the opinion that, on the basis of the Uniting for Peace Resolution, '[...] in the future, the Assembly could plainly recommend economic sanctions against the judgment debtor, deny benefits and services, order a peacekeeping force to patrol borders or send the Secretary General to discuss compliance' (O'Connell, 'The Prospects for Enforcing Monetary Judgments of the International Court of Justice: A Study of Nicaragua's Judgment Against the United States', *Va.J.Int'l L.* (1990) 913). More generally, on the debate concerning the powers of the General Assembly with respect to actions for the maintenance of international peace and security, see in particular Andrassy, 'Uniting for Peace', *AJIL* (1956) 563 et seq.; Gulhaudis, 'Considérations sur la pratique de l'Union pour le maintien de la paix', *AFDI* (1981) 382 et seq.; Reicher, 'The Uniting for Peace Resolution on the Thirtieth Anniversary of its Passage', *Colum. J. Trans. L.* (1981) 1 et seq.

abstentions.²⁸ In the debate that preceded and followed the vote the Court's authority was, basically, left intact, apart from the United States' reiteration of the arguments put forward in the Council against the Court's assertion of jurisdiction.²⁹ The Representative of El Salvador, who, together with those of Israel and the United States, had voted against the resolution, focused his objection on the content of the draft resolution itself rather than on the Court's decision, and refuted the political usefulness of the latter *vis-à-vis* the then ongoing peace process in Central America.³⁰ The Representative of Ecuador explained his affirmative vote, even though his delegation was against 'the eminently political implications' of the resolution, by stressing Ecuador's 'unswerving respect for the legal and peaceful means provided by international law for the consideration and the settlement of disputes, one of the most effective ways of which is resort to the International Court of Justice and full respect for the Court's judgments.'³¹ By the same token, the Representative of Luxembourg explained that his delegation 'did not vote against the draft resolution because it recognize[d] the validity of the judgments of the International Court of Justice' even if it disagreed as to its appropriateness with respect to the general political situation in Central America.³² Mexico's stand is particularly relevant for our purposes insofar as its Representative maintained that compliance with Court's judgments should always be supported 'regardless of any particular position taken on the substance of the issue that led to the litigation'.³³

3. *Some Tentative Conclusions*

As regards the general question of whether United Nations political organs are vested with the power to 'review' a Court decision, given that the Charter neither expressly provides, nor excludes, such a power, discussion of the matter must be based on practice, however scarce, as much as on principle. According to a textual interpretation of the Charter, both the Security Council, under Article 94(2), Chapters VI and VII, and the General Assembly, under Article 10 and Chapter VI, can discuss and make recommendations on the merits of a case decided upon by the Court in a way which might be somehow at variance with the Court's decision. However, one cannot but agree that '... [t]he more persuasive view [...] is that [they] should not do so'.³⁴ The view that the statutory powers of the Council and of the General Assembly should be interpreted in such a way as to prevent them from

28 UN Doc. A/41/PV.53, at 92.

29 *Ibid.*, at 67.

30 *Ibid.*, at 93.

31 *Ibid.*

32 At the same time, he explained his delegation's abstention stating that 'Luxembourg did not vote for the draft resolution in the belief that it is inadvisable to consider the judgment of 27 June 1986 in isolation from a general review of the situation in Nicaragua, including the peace proposals of the Contadora Group, involving concessions by all parties' (*ibid.*).

33 He went on to say that '... [f]ailing to do that would undermine the legal foundations of the international order as well as the importance and compulsory nature of the judgments of the International Court of Justice' (*ibid.*, at 77).

34 Kerley, *supra* note 3, at 278.

interfering with the judicial authority of the Court could be substantiated by a teleological interpretation of the Charter aimed at meeting the constitutional need for a separation of powers within the United Nations system. Nevertheless, this argument should be without prejudice to the possibility for the Council, or the Assembly, to resort in extreme cases to the said textual interpretation of the Charter and deny the requested support, when the overwhelming majority of Members in the Council, or in the Assembly, agree on the inappropriateness, from a political viewpoint, of upholding the findings reached by the Court on the strength of strictly legal grounds.

This view seems to be in line with the position taken by Member States in the few instances in which the question in point has presented itself. Particularly, in the course of the debate over the Court's decision in the *Nicaragua* case in the Security Council, as well as in the General Assembly, the prevailing attitude of Member States has been one of either total support for the Court's authority, or of self-restraint, with the exception of those States adversely affected by the decision. A policy of self-restraint also seems to have been followed, after all, by the Council and its Members in the *Anglo-Iranian Oil Co.* case. The lack of action by the Council in that case was aimed at preventing support for the provisional measures originally indicated by the Court later proving to be in conflict with the Court's judgment on its jurisdiction.

Support, by analogy, for the assumption that the Council, and, even more so, the Assembly, should not review the validity of a decision of the Court has been found in the position taken repeatedly by Member States in the General Assembly with regard to advisory opinions of the Court.³⁵ The general view expressed by Member States is that advisory opinions should be accepted by the Assembly, or, possibly, even refused upon political considerations, without discussion of the findings of the Court.³⁶ One of the most indicative statements to that effect is that of the United States Representative on the advisory opinion on *Certain Expenses of the United Nations*:

35 Kerley, *supra* note 3, at 278 et seq. The analogical basis of this argument, though, seems rather loose, for advisory opinions are not, by their very nature, final decisions.

36 For the advisory opinion on the International status of South West Africa (ICJ Reports (1950) 128 et seq.), see the statements by the Representatives of the United Kingdom, Venezuela and Brazil (UN General Assembly Official Records (GOAR), 5th sess. 4th Comm., respectively, at 319, 335 and 337. A/C.4/SR. 191, 192, 194). On the advisory opinion on the Effect of Awards of compensation made by the United Nations Administrative Tribunal (ICJ Reports (1954) 47 et seq.), see the statements by the Representatives of the United States, Argentina, Norway and Australia (UN GAOR, 9th sess., 5th Comm., respectively, at 271, 277-278, 280-281. A/C.5/SR. 474, 476). For the advisory opinion on the Admissibility of hearings of petitioners by the Committee on South West Africa (ICJ Reports (1956) 23 et seq.), see the statements by the Representatives of the United States and New Zealand (UN GAOR, 11th sess., 4th Comm., respectively, at 93 and 95. A/C.4/SR. 568). More articulated were the positions expressed in the Security Council on the advisory opinions on the Legal Consequences for States of the Continued Presence of South Africa in Namibia (ICJ Reports (1971) 16 et seq.). See Resolution 301 adopted on 20 October 1971, and the position taken by Italy, Japan, Sierra Leone (UNSCOR 26th Yr, 1585th mtg. respectively, at 47, 39-40, 27); United States and United Kingdom (*ibid.*, 1589th mtg., respectively, at 8-11, 30); Argentina (*ibid.*, 1593rd mtg., at 12-16); Belgium (*ibid.*, 1594th mtg., at 27) and France (*ibid.*, 1598th mtg., at 4-6).

... [M]y Government sees no need for this Assembly to pass upon, or even go into, the reasoning of the Court. [...] The draft resolution [accepting the advisory opinion] anticipates the General Assembly performing a function which is proper to it. The General Assembly is not a Court. It is not a judicial organ of the United Nations, and still less it is 'the principal judicial organ of the United Nations', as Article 92 of the Charter describes the International Court of Justice. It is not the function of this Assembly [...] to act as a Court to review the International Court of Justice. To do so would depart from the Charter's clear intention. When the Court's opinion is asked, establishment and interpretation of the law, in the design of the Charter, is the function of the Court; action to implement the law is, as the case may be, the function of other organs of the United Nations.³⁷

This policy of self-restraint on the part of UN political organs and its Members would not consist only of avoiding action that might be in contrast with a ruling of the Court, the UN political body could also be said to have followed a satisfactory policy of self-restraint when, in the particular circumstances, it did not follow up the request by the successful litigant, or deliberated in such a way that might not reflect the decision of the Court, provided this was based on merely political grounds and without touching upon the legal reasoning of the Court.³⁸ The basic justification, from both a legal and a political point of view, for the Council to take a stand, based upon political considerations, in conflict with the decision of the Court would rest on the generally agreed principle that the dispute decided by the Court should be considered as separate from the one arising out of the non-compliance with the Court's decision.³⁹

The conclusion that an attitude of self-restraint by UN political organs and its Members would be the only realistic way to preserve the authority of the Court in the matter at hand could be implemented by a rule of conduct. Such a rule, unsuitable by its nature for insertion in the Charter by way of a formal amendment, could be 'codified' by a General Assembly resolution⁴⁰ – and, possibly, also, by a

37 US Del. to UN General, Press Release No. 4112 (1962) 3, summarized in UN GAOR, 17th sess., 5th Comm., at 277 et seq. (A/C.5/SR.961). See also the statement made by the Representative of the United Kingdom in the same debate, UN GAOR, 17th sess., 5th Comm., at 282 (A/C.5/SR.962).

38 As Schachter put it, '... [i]t [the Security Council] will, in short, be neither a sheriff nor an appellate tribunal, but a political body competent to take account of the widest range of considerations that may be involved in determining whether, and to what extent, the coercion of the international community shall be brought to bear upon the recalcitrant State' (*supra* note 3, at 21).

39 'En droit international, la séparation du prononcé de l'arrêt et de sa mise en vigueur est un postulat essentiel tant dans le domaine de l'arbitrage que dans celui du règlement judiciaire' and added that 'la Charte aussi bien que le Pacte avant elle-même, sont basés sur la présomption que la procédure de mise en vigueur, si elle est portée devant l'organe politique compétent, acquiert le caractère d'un différend entièrement nouveau qu'il convient de régler par des moyens politiques, où la sentence arbitrale ou judiciaire n'est elle-même qu'un seul parmi plusieurs facteurs' (Rosenne, *supra* note 3, at 534, 535).

40 We are referring to the kind of General Assembly resolutions that have been the result of the work of the Assembly's 'Special Committee on the Charter of the United Nations and on the Strengthening of the Organization'. Such non-binding instruments were aimed, in some cases, at confirming the evolutive practice of UN organs, in other cases, at maximising the application of existing Charter provisions in the field of peaceful settlement of disputes and maintenance of international peace and security. Reference should be made, in particular, to Resolution 37/10 of 15 November 1982 on 'Peaceful Settlement of Disputes', also known as the 'Manila Declaration';

Security Council resolution with the same content and the same hortatory effect. Obviously, one would not think of a resolution exclusively devoted to the question in point. The suggestion could be more appropriately discussed in the context of a resolution of wider scope, such as the enhancement of the role of the International Court of Justice. A similar initiative could fit well within the current United Nations Decade on International Law and might represent a consistent development of the Manila Declaration on the Peaceful Settlement of Disputes.

III. Voting Procedure in the Security Council When it Acts under Article 94(2) of the Charter

As is well known, voting procedure in the Security Council was one of the most debated issues at the San Francisco Conference,⁴¹ and has been one of the most politically controversial ever after.⁴² With regard to the so called 'veto power', as early as 1953 McDougal referred to Article 27 as an example of 'normative ambiguity with respect to rules created by agreement'.⁴³

Among the several problems concerning the application of Article 27 of the Charter, one is voting in the Council on a draft resolution introduced under Article 94(2). The problem is twofold. First, an assessment must be made as to whether the question of non-compliance with a Court decision amounts to a procedural matter under Article 27(2). If so, no Permanent Member of the Council may exercise its veto power, nine unqualified votes being sufficient for the adoption of the draft resolution. Second, in the case of a negative answer to the above query, the question arises whether a Member of the Council who was a party in the litigation before the Court should abstain under Article 27(3). Both arguments, clearly incompatible with each other, were put forward by Nicaragua after the above mentioned request to the Council to call for compliance with the Court's judgment of 27 June 1986 was not

Resolution 43/51 of 5 December 1988 on 'Prevention and Removal of Disputes and Situations which may Threaten International Peace and Security and on the Role of the United Nations in this Field'; and to Resolution 46/59 of 9 December 1991 on 'Fact-Finding by the United Nations in the Field of Maintenance of International Peace and Security'.

41 UNCTAD, Vol. 1, at 288-290 and Vol. 11, at 117-121, 305-306, 309-310, 313-314, 317-330, 332-337, 347-352, 360, 433-440, 454-460, 471-476, 486-496, 512-519, 534-535, 538, 552, 604-615, 648-652, 683-686, 693-714.

42 See, among others, Kelsen, 'Organization and Procedure of the Security Council', *Harv. L. Rev.* (1946) 1096 et seq.; *id.*, *The Law of the United Nations* (1950) 239 et seq.; Lee, 'The Genesis of the Veto', *International Organization* (1947) 33 et seq.; Liang, 'The Settlement of Disputes in the Security Council: The Yalta Formula', *BYIL* (1947) 354 et seq.; E. Jiménez de Aréchaga, *Voting and the Handling of Disputes in the Security Council* (1950); McDougal, 'The Veto and the Charter: an Interpretation for Survival', *Yale Law Journal* (1951) 278 et seq.; P.F. Brugière, *Droit de veto: la règle de l'unanimité des membres permanents au Conseil de Sécurité* (1952); Day, *Le droit de veto dans l'Organisation des Nations Unies* (1952); Russel, *A History of the United Nations Charter* (1958) 445 et seq.; L. Goodrich, E. Hambro and A. Simons, *Charter of the United Nations* (1969) 215 et seq. See also the commentary on Article 27 by Tavernier in J.-P. Cot and A. Pellet (eds), *supra* note 6, at 495 et seq.

43 'International Law, Power and Policy: A Contemporary Conception', *RdC* (1953-I) 149.

considered as adopted on account of the contrary vote of the United States.⁴⁴ They deserve further thought and consideration particularly in view of the likelihood that situations similar to the *Nicaragua* case will present themselves before the Council in future.

A. The Alleged Procedural Character of a Resolution Under Article 94(2)

The argument that a Council resolution to give effect to a Court judgment is to be considered as a decision on a procedural matter under Article 27(2) was based upon General Assembly Resolution 267(III) of 14 April 1949.⁴⁵ This resolution indicated a list of issues to be treated as procedural for the purpose of voting in the Council. The list included '[d]ecisions to remind members of their obligations under the Charter'. This argument must have sounded effective from a political view point when it was put forward by Nicaragua after the United States had cast its veto against the adoption of a resolution calling them to abide by the judgment. Indeed, as it appears from the preparatory works of the said General Assembly Resolution,⁴⁶ its rationale was precisely to stress the need that the Permanent Members of the Council should not defeat the purpose of the Charter and its obligations through the exercise of the veto.

From a strictly legal point of view, however, the above argument is hardly convincing.⁴⁷ First and foremost, a General Assembly resolution cannot possibly bind the Security Council, particularly on a question of fundamental importance such as voting. According to Article 10 of the Charter, the Assembly may make recommendations to the Council, even relating to its powers and functions. By definition, however, recommendations are not legally binding *per se*, and it is unthinkable that a General Assembly resolution could modify the voting procedures of the Council as determined in Article 27, unless within the framework of the procedure for amending the Charter provided for in Article 108. It is also to be noted that, in keeping with the principle that each UN organ is the master of its own procedure, in 1946 the Council adopted its Rules of Procedure⁴⁸ which, as of its

44 Tanzi, 'Diritto di veto ed esecuzione della sentenza della Corte Internazionale di giustizia tra Nicaragua e Stati Uniti', *RDI* (1987) 293 et seq. The views on the question at hand have partly changed with respect to those expressed in the above article.

45 Statement by the then Minister for Foreign Affairs of Nicaragua, Mr D'Escoto Brockmann, in the General Assembly on 6 November 1986 (A/41/PV.53, at 62 et seq.).

46 See the debate held in the General Assembly on draft Resolution A/AC.24/20 on 13 and 14 April 1949 (GAOR of the Third Session, Part Two, Plenary meetings of the General Assembly, Summary Records of the meetings from 5 April to 18 May 1949, at 48 et seq.) This draft resolution had been originally introduced in the Ad Hoc Political Committee of the General Assembly by China, France, the United Kingdom and the United States; see the report of this Committee to the General Assembly in UN Doc. A/792 (also in *Yearbook of the United Nations* (1948-1949, at 426 et seq.).

47 The few scholars who have touched upon this question are virtually unanimous that resolutions under Article 94(2) are not to be considered as procedural and hence the veto should apply; see Vulcan, 'L'exécution des décisions de la Cour internationale de justice d'après la Charte des Nations Unies', *RGDIP* (1947) 201 et seq.; Kelsen, *supra* note 10, at 541, 543 et seq.; Day, *supra* note 42, at 552; Schachter, *supra* note 3, at 23.

48 UN Doc. S/96.

latest amended version,⁴⁹ add nothing, nor change anything with respect to the Charter prescriptions on voting in the Council, not even in the sense suggested by General Assembly Resolution 267(III).⁵⁰ The argument could be put forward that this resolution might be regarded as a form of interpretation of the Charter, but, even as such, it cannot be considered as binding, as there is no indication in the Charter, nor in the preparatory works at San Francisco, that the General Assembly was granted a legally-binding supreme competence to interpret the constitutive Treaty of the Organization.⁵¹ Finally, the contention could also be made that, in the very case in which the above argument was raised by Nicaragua, it could not apply. In fact, draft Resolution S/18428 in its operative part did not generally remind Member States of their obligation to abide by decisions of the International Court of Justice under Article 94(1) of the Charter, but called for full and immediate compliance with a specific judgment of the Court.⁵²

B. The Argument that a Party to the Dispute Decided upon by the Court Should Abstain from Voting on a Draft Resolution Under Article 94(2)

The argument that, when the Council votes on a resolution under Article 94(2), a party to the dispute which was decided upon by the Court should abstain according to Article 27(3) lends itself to more problematic considerations, if only because, if accepted, it should also bind Permanent Members of the Council. On the face of it, according to a textual interpretation of the Charter, this argument seems utterly untenable. In fact, according to Article 27(3) a Member of the Council which is also

49 Ibid., Rev. 7.

50 Article 40 of the Rules of Procedure of the Security Council reads as follows: 'Voting in the Security Council shall be in accordance with the relevant Articles of the Charter and of the Statute of the International Court of Justice.'

51 The question of whether the Assembly should have a pre-eminent role in the interpretation of the Charter was raised at the San Francisco Conference, and the answer given was negative (UNCIO, Vol. 13, at 719 et seq.). On problems of interpretation of the UN Charter, see, among others: Pollux (Hambro), 'The Interpretation of the Charter', *BYBIL* (1946) 54; E. Jiménez de Aréchaga, *Derecho Constitucional de las Naciones Unidas, Comentario Teórico y Práctico de la Carta* (1958) 621 et seq.; R. Higgins, *The Development of International Law Through the Political Organs of the United Nations* (1963); Hexner, 'Teleological Interpretation of Basic Instruments of Public International Organizations', *Law, State and International Legal Order, Essays in Honour of Hans Kelsen* (1964) 120 et seq.; Schachter, 'Interpretation of the Charter in the Political Organs of the United Nations', *ibid.*, at 269 et seq.; Engel, 'Procedures of De Facto Revision of the Charter', *Proceedings of the American Society of International Law* (1965) 108 et seq.; J. Rideau, *Juridictions internationales et contrôle du respect des traités constitutifs des organisations internationales* (1969) 237 et seq.; Ciobanu, 'Impact of the Characteristics of the Charter upon Its Interpretation', A. Cassese (ed.), *Current Problems of International Law: Essays on UN Law and the Law of Armed Conflict* (1975) 3 et seq.; Skubiszewski, 'Remarks on the Interpretation of the United Nations Charter', R. Bernhardt, W. Geck, G. Jaenicke, M. Steinberger (eds), *Völkerrecht als Rechtsordnung. Internationale Gerichtsbarkeit. Menschenrechte. Festschrift für Hermann Mosler* (1983) 891 et seq.

52 Besides, on the strength of General Assembly Resolution 267(III), one might equally make the opposite argument to the one put forward by Nicaragua. Indeed, even if one were to attach a certain binding force to Resolution 267(III), from the fact that it did not expressly include in the list of resolutions to be considered as procedural those under Article 94(2), one could infer by implication that these resolutions are to be considered as pertaining to substantive matters under Article 27(3). See also Schachter, *supra* note 3, at 23.

a party to a dispute should abstain from voting on a resolution which refers to the said dispute only when the resolution is based on Chapter VI, whereas Article 94 belongs to Chapter XIV. This reasoning must have been implicitly followed in the *Nicaragua* case, when the President of the Council did not consider draft Resolution S/18428 as adopted, due to the veto cast by the United States.

On the other hand, it is as well to bear in mind that the subject in point prompted widely differing opinions in the past – before the *Nicaragua* case.⁵³ Furthermore, the said ruling of the President of the Council cannot be taken to reflect a consolidated practice, as it constitutes the only specific precedent. A special precedent, since the party to the dispute before the Court was a Permanent Member of the Council, and one which did not pass undisputed.⁵⁴ Therefore, the textual interpretation of the relevant provisions of the Charter referred to above might not be the only one apt to provide a tenable solution to the problem at hand.

1. A Functional Interpretation of Article 94(2)

One might argue that Article 94(2) adds nothing to the powers ‘to make recommendations or to decide measures’ that are conferred to the Council under Chapters VI and VII of the Charter, with special regard to Articles 36, 37, 41 and 42. This argument rests on the absolute discretion given by Article 94(2) to the Council, discussed above,⁵⁵ as well as on the absence, in the same provision of any indication of substance as to the specific kind of measures the Council could recommend or decide to take, if asked to give effect to a decision of the Court.

53 In favour of the above textual interpretation of the Charter, in the sense that the abstention provision of Article 27(3) would not apply to a resolution under Article 94(2), see Vulcan, *supra* note 47; Kelsen, *supra* note 42, at 541 et seq.; Brugiere, *supra* note 42, at 124; Day, *supra* note 42, at 229; Schachter, *supra* note 3, at 23; M. Dubisson, *La Cour Internationale de Justice* (1964) 273; Ferrari Bravo, ‘La Corte internazionale di giustizia e la questione degli “ostaggi” americani a Teheran’, *La Comunità Internazionale* (1981) 378; Pillepich, *supra* note 6, at 1282. For the contrary opinion, namely, that a draft resolution under Article 94(2) may, according to the circumstances, fall within the framework of Chapter VI, and that, in such a case, a Permanent Member that were to find itself involved in the case of non-compliance could not cast its veto, see Jiménez de Aréchaga, *supra* note 51, at 557 et seq. and Kerley, *supra* note 3, at 281 et seq. The arguments put forward by Reisman against the application of the right of veto in the issue at hand, may cause some confusion (*supra* note 9, at 718 et seq.). In the first place, this author maintains that resolutions under Article 94(2) should be considered to be of a procedural character, within the meaning of Article 27(3) (*ibid.*, at 718). At the same time, he contends that, even if the Council were to be resorted to, and took action, under Article 39, a Permanent Member involved in the dispute over the non-compliance with a Court’s decision should abstain (*ibid.*, at 718 et seq.).

54 During the debate in the General Assembly, a week after draft Resolution S/18428 was vetoed by the US, the Representative of Nicaragua contested the ruling of the President of the Council as follows: ‘Here, we are dealing with a case in which paragraph 3 of Article 27 of the Charter was unquestionably applicable, and the United States had no right to vote, much less to use its veto. There was no way that the draft resolution considered by the Security Council could be legally vetoed by the United States. Any of the other Permanent Members could have exercised the veto, but not the United States. Therefore, since the draft resolution was not vetoed by any Member of the Council not debarred from exercising its right of veto, the draft was legally adopted and should have been proclaimed as a legitimate resolution of the Security Council.’ (UN Doc. A/41/PV. 53, at 61).

55 *Supra*, section II.

According to this argument, the voting procedure that applies when the Council deliberates under Article 94(2) cannot be determined on principle, once and for all. Rather, such a determination should be made on a case-by-case basis, having regard to the content of the operative part of a given draft resolution, in order to assess whether the latter falls within the framework of Chapter VI or VII. This conclusion would apply even if one considered Article 94(2) as an independent legal basis for the Council to recommend or take measures of the kind indicated in Chapter VII, irrespective of 'the existence of any threat to the peace, breach of the peace, or act of aggression' under Article 39.⁵⁶ In this case, the same voting procedure that applies when voting on a draft resolution under Chapter VII should apply by analogy.

It has been maintained that '[t]he Council may proceed to call upon the country concerned to carry out the judgment, but only if the peace of the world is threatened, and if the Council has made determination to that effect'.⁵⁷ With respect to similar assumptions, Schachter has rightly pointed out the absence of 'reasons of policy or general principle to justify such restriction'.⁵⁸ He went on to say that:

... [I]f it should be necessary that there be a threat to the peace before the successful party can obtain the assistance of the Council, there would evidently be a direct incentive for

56 There are no indications on this important point in the San Francisco Conference, and international law scholars are not unanimous on this issue. Kelsen stated that 'it is possible to interpret Article 94, paragraph 2, to mean that the Security Council may take enforcement measures to give effect to the judgment of the Court without determining under Article 39 that non-compliance with the judgment of the Court constitutes a threat to, or a breach of, the peace'. He went on to say '... [t]hat the Security Council may make recommendations under Article 94, paragraph 2, without applying Article 39, results from the fact that Article 94, paragraph 2, expressly authorizes the Council to this effect.' (*supra* note 42, at 542); see also Sloan, 'Enforcement of Arbitral Awards in International Agencies', *Arbitration Journal* (1948) 145; Ross, *supra* note 10, at 102 et seq. and Schachter, *supra* note 3, at 21 et seq.

Contrary to the above contention, Jiménez de Aréchaga has stated that '... [l]as medidas coercitivas que puede decidir el Consejo conforme al artículo 94 no puede ser sino las del Capítulo VII, sólo proceden previa comprobación de las hipótesis previstas en el art. 39. Es cierto que, como lo observa Ross, la existencia de una competencia independiente sería preferible desde el punto de vista de los intereses de los pequeños Estados y las exigencias de la justicia, pero el único argumento indicado por Ross, o sea, que el art. 94, paragrafo 2, sería entonces superfluo, no parece convincente. La otra conclusión resulta impuesta por una interpretación armónica y contextual de la Carta' (*supra* note 51, at 560).

The letter dated 16 April 1993, in which the Permanent Representative of Bosnia and Herzegovina requested the Council to act in order to give effect to the Order rendered by the Court on 8 April 1993, seems to lend equal support to both arguments, if only for the fact that the very case before the Court was certainly one that met the preconditions set out in Article 39 for the Council to take measures under Chapter VII. In the most relevant part for our purposes, this letter read: 'Pursuant to Article 94, paragraph 2 of the Charter of the United Nations, request is hereby made that the Security Council take immediate measures under Chapter VII of the Charter to stop the assault and to enforce the Order of the International Court of Justice' (S/25616).

57 Statement by Mr Pasvolosky, a member of the US delegation at the San Francisco Conference, during the *Hearings on the Charter of the United Nations before the Senate Committee on Foreign relations, 79th Cong. 1st Sess.* (1945) 287. As a matter of fact, this passage has often been quoted by scholars who neglect other parts of Mr Pasvolosky's statement which would considerably alter the meaning of his words. Special reference should be made to the consideration that the Security Council, when acting under Article 94(2), 'would have to determine first of all, under Chapter VI, whether or not a continuance of that situation [the non-compliance of the Court's decision] would be likely to threaten the peace, and then it could take measures which are indicated under Chapter VI. Then, if the situation became aggravated, it would have to determine under Article 39 whether that particular situation actually represented a threat to peace' (*ibid.*).

58 *Supra* note 3, at 20.

that state to claim that it may be compelled to resort to force or other acts endangering international peace – a consequence which was almost surely not intended and which cannot be considered as desirable.⁵⁹

There are, indeed, no indications in the preparatory works of the Charter that the drafters envisaged Article 94(2) exclusively as a specific case of application of Chapter VII. During the San Francisco Conference, the delegation of Bolivia had proposed the inclusion in the Charter of a non-exhaustive list of situations to be considered as cases of aggression,⁶⁰ and according to this proposal, a State party to a case before the Court which did not comply with its decision should be considered as an aggressor State.⁶¹ This proposal met with the opposition of a considerable number of delegations and, eventually, was not adopted.⁶² This refusal was certainly due to a widespread disinclination among delegations at San Francisco to have a list of cases of aggression, as this would restrict considerably the margins of discretion of the Council in the assessment of the preconditions for it to take enforcement action under Chapter VII. Though, this refusal can also be attributed to an objection to the very idea that non-compliance with a Court decision could be considered to amount to a threat to, a breach of the peace, or an act of aggression.⁶³ Furthermore, one should not overlook the fact that non-compliance with a Court decision does not appear among the cases of aggression listed in the General Assembly Declaration on the Definition of Aggression of 14 December 1974.⁶⁴

In principle, the powers of the Security Council regarding non-compliance with the obligations stemming from a decision of the International Court of Justice should fall primarily within the ambit of its functions in the field of the peaceful settlement of disputes, under Chapter VI.⁶⁵ Therefore, it should make little difference whether, in a case of non-compliance with a Court decision, the Council is convened under Article 94(2), or under Article 35(1), according to which ‘... [a]ny Member of the United Nations may bring any dispute, or any situation of the nature referred to in Article 34, to the attention of the Security Council or of the General Assembly.’⁶⁶ It is to be noted how, in keeping with this reasoning, the Rules of

59 Ibid. The same consideration has been made by Pillepich, *supra* note 6, at 1276.

60 UNCIO, Vol. 12, at 205, 316, 341-343, 348, 349, 448, 505.

61 According to the Bolivian proposal the following provision should have been inserted in the text of the Charter: ‘The decisions of this Court [the International Court of Justice] shall be of a binding and final nature in all disputes of a juridical nature which it may not have been possible to solve by other peaceful means. All States which refuse to comply with these decisions shall be declared aggressor States’ (Doc. 2, G/14 (m), in UNCIO, Vol. 12, at 205).

62 Ibid., at 342, 349, 448.

63 See, especially, the statement of the representative of Norway (ibid., Vol. 12, at 205).

64 Resolution 3314 (XXIX). See Zourek, ‘Enfin une définition de l’aggression’, *AFDI* (1974) 9 et seq.; B. Ferencz, *Defining International Aggression. The Search for World Peace* (1976); Cassin et al., ‘The Definition of Aggression’, *Harv. Int’l L.J.* (1976) 589 et seq.; Rambaud, ‘La définition de l’aggression par l’O.N.U.’, *RGDIP* (1976) 835 et seq.; Gargey, ‘The UN Definition of “Aggression”, Law and Illusion in the Context of Collective Security’, *Va.J.Int’l L.* (1977) 17 et seq.

65 See the statement of Mr Pasvolosky, a member of the US delegation at the San Francisco Conference, *supra* note 57. See also E. Jiménez de Aréchaga, *supra* note 51, at 557 et seq. and Kerley, *supra* note 3, at 280 et seq.

66 Alternatively, for non-members of the Organization, the Council could be convened under paragraph 2 of Article 34.

Procedure of the Security Council refer to the possibility that the Council might be resorted to by a Member State which is not a Member of it only in cases where the dispute has been brought before it under Article 35(1), with no mention of Article 94(2). Likewise, Article 3 of the same Rules of Procedure provides that:

The President shall call a meeting of the Security Council if a dispute or situation is brought to the attention of the Security Council under Article 35 or under Article 11(3) of the Charter, or if the General Assembly makes recommendations or refers any question to the Security Council under Article 11(2), or if the Secretary-General brings to the attention of the Security Council any matter under Article 99.

One might infer from the above that the legal basis for resorting to the Council for non-compliance with a Court decision under Article 94(2) has not been considered independently from other provisions of the Charter, namely Articles 35 and 37, when non-compliance with a Court's decision is deemed to give rise to a dispute, or situation, of the kind envisaged in Article 34. It is to be noted that, very much in line with this reasoning, when the United Kingdom resorted to the Security Council under Article 94(2), in the *Anglo-Iranian Oil Co.* case, the UK representative, in order to establish the competence of the Council to consider the question, also invoked the right, under Article 35 of the Charter, to bring before the Council any situation of the kind envisaged in Article 34.⁶⁷ The Nicaragua precedent itself, apart from the ruling of the President of the Council under consideration, did not provide any further clear answers to the issue at hand, for draft Resolution S/18428 did not state in its preamble on which Charter provision it was based, whereas, in its operative part it confined itself to calling for compliance with the Court's Judgment 'in conformity with the relevant provisions of the Charter'.⁶⁸

When we come to the operative stage, Article 94(2) provides that the Council may 'make recommendations or decide upon measures to be taken to give effect to the judgment'. In line with the assumption put forward above, the most appropriate tool for the Council to deal with a case of non-compliance with a Court decision, which is deemed to constitute a 'situation which might lead to international friction', according to Article 34, would be a recommendation under Articles 36 and, or, 37.⁶⁹ As to the voting on such a resolution, which would be based on Chapter VI, Article 27(3) should apply; accordingly, a State Member of the Council who is a party to the case should abstain. The above should be without prejudice to the Council dealing with a case of non-compliance within the framework of Chapter VII. This shift from Chapter VI to VII would depend, in principle, on the determination by the Council that a given case of non-compliance amounts to a threat to or breach of the peace, or an act of aggression under Article 39. The contention has been made that

67 UNSCOR, 6th Yr., 559th mtg., paras. 19, 20, 93-99.

68 Nicaragua, which was not a Member of the Council in 1986, requested an emergency meeting of the Council invoking only Article 94 (S/18415) with a letter from its Permanent Representative, dated 17 October 1986. One could infer from this that Nicaragua considered this Charter provision as an independent source of action for the Council, but this is certainly not conclusive.

69 See E. Jiménez de Aréchaga, *supra* note 51, at 555 et seq.; Kerley, *supra* note 3, at 280.

'there might be little to gain by escalating the question to Chapter VII. Chapter VII decisions are binding under Article 25 as are decisions of the Court under Article 94.'⁷⁰ One might share this view in respect of the case in which the Council adopted a mere resolution under Article 39, only calling for compliance with the Court's decision,⁷¹ but one cannot agree with it with regard to the case in which the Council decided that some concrete enforcement measures were to be taken. In this case, the obligations deriving from the Court's decision – for the parties only – would be complemented by those, binding upon all the Members of the Organization, providing for the adoption of a given conduct *vis-à-vis* the defaulting State with a view to coercing the latter to comply with the decision. Obviously, the procedure under Article 27(3) would apply when voting on such a draft resolution to the effect that a Member of the Council which is a party to the dispute is not under an obligation to abstain. Consequently, a Permanent Member of the Council who happened to be the defaulting party could legitimately cast its veto on a similar draft resolution.

An interpretation of Article 94(2) has also been advanced to the effect that this provision could also constitute an independent legal ground for the Council to take coercive measures of the kind under Chapter VII, irrespective of the preconditions provided for in Article 39.⁷² One can certainly subscribe, in principle, to this assumption with respect to enforcement measures not involving the use of armed force. Since Article 41 indicates a non-exhaustive list of possible measures, one can hardly think of measures that the Council could take under Article 94(2) that it could not adopt also under Article 41. Given the obligatory character that such a decision would derive from Article 25, then by analogy, the veto power of the Permanent

70 Kerley, *supra* note 3, at 280.

71 There can however be cases in which a reiteration of the Court's decision by a Council resolution under Chapter VII might bring about, by virtue of Article 2(5) and 25, the not negligible consequence of extending (obviously not in technical terms) to all UN Member States at least some of the legal effects of the decision which, under Article 59 of the Court's Statute, is binding only on the parties. This could be the case with respect to a judgment declaring the invalidity of a given situation. If such a declaration of invalidity were to be 'incorporated' in a Chapter VII Council resolution (which would amount to a decision under Article 41) this would imply a duty of non-recognition of such a situation for all UN Members. This mechanism of improper 'extension' of at least some of the legal effects of a Court decision by the Council should be the natural practice followed with respect to judgments in which the Court has declared the *erga omnes* character of a given wrongful activity, such as genocide or the illegal acquisition of territories through the use of armed force.

72 See *supra* note 56. Strong doubts arise, however, as to whether the Council could legitimately decide measures involving the use of armed force of the kind under Article 42, in the absence of the preconditions set out in Article 39 (see on this point Schachter, *supra* note 3, at 22). However, from a practical point of view, this seems to be a rather artificial question. Once the Council finds the necessary political cohesion among its Members to respond to a given case of non-compliance with a Court decision with measures under Article 42, it needs only to determine that such conduct amounts, at least, to a threat to the peace under Article 39. The latter provision leaves ample discretion to the Council with respect to such a determination, and recent practice has shown that the Council has made full use of it. On the increasing tendency by the Council to widen the concept of 'threat to the peace', see Freudenschuss, 'Article 39 of the UN Charter Revisited: Threats to the Peace and the Recent Practice of the UN Security Council', *Austrian Journal of Public International Law* (1993) 3 et seq. and Gaja, 'Réflexions sur le rôle du Conseil de Sécurité dans le Nouvel Ordre Mondial', *RGDIP* (1993) 297 et seq.

Members of the Council should apply as if the decision were adopted under Chapter VII.

The considerations developed so far on voting on a draft resolution under Article 94(2), with special regard to the duty of abstention for the parties to a dispute, have been made on the basis of a textual interpretation of Article 27(3). However, even if this is not the appropriate place to delve into this issue, one cannot overlook the fact that the relevant practice shows that in the great majority of instances when Article 27(3) should have applied this has not been the case.⁷³ That is to say that first, never has the Council rejected the claim to a vote, and that it be counted, made by one of its Members who was a party to a dispute. Besides, never, in such a case, have the Permanent Members of the Council refrained from using the veto.⁷⁴ In the few instances in which Members of the Council who were parties to a dispute have abstained from voting on a draft resolution referring to such a dispute, they have done so expressly indicating that their conduct was not to be considered as an application of Article 27(3).⁷⁵ In the only case when the provision at hand has been applied, the *Eichmann* case, the abstaining Member was not a Permanent Member and its vote would not have affected in any way the final result of the vote.⁷⁶ On account of the above, the question has been rightly raised whether the duty to abstain under Article 27(3) has not become obsolete, or, abrogated by subsequent practice.⁷⁷

2. A Tentative Assessment of the Precedent in the Nicaragua Case

As already indicated, draft Resolution S/18428 contains no express reference to any Charter provision as its legal basis. The main purpose of the draft resolution was to request the defaulting party to abide by the Court's Judgment. While the Security Council can only decide measures exclusively under Chapter VII, it can make recommendations either under Chapter VI, or under Chapter VII. Even if one were to regard Article 94(2) as an independent source of power, for the purposes of assessing the applicable voting procedure in the Council, an Article 94(2) draft resolution should be considered within the context of either Chapter VI, or Chapter VII. A number of criteria have been suggested in scholarly writings⁷⁸ which would determine, in doubtful cases, if a Security Council recommendation is to be considered under Chapter VII, rather than Chapter VI:

- (a) By assessing whether in its operative part the recommendation is in any way associated with measures typical of Chapter VII, namely, those under Articles 40, 41, or 42;

73 Tavernier, 'L'abstention des Etats parties à un différend (Article 27(3) *in fine* de la Charte), examen de la pratique', *AFDI* (1976) 282 et seq.

74 *Ibid.*, at 289.

75 *Repertory of Practice of United Nations Organs*, Suppl. 1 and 2.

76 *Ibid.* Suppl. 3.

77 Tavernier, *supra* note 73, at 289.

78 See, for a complete list, B. Conforti, *Le Nazioni Unite* (5th ed., 1994) 182 et seq.

- (b) by determining whether in its preamble there is any language that describes the situation it refers to as a threat to, or a breach of, the peace;
- (c) subsidiarily, by making an objective assessment of the situation referred to in the resolution.

Since the draft resolution in point does not offer any indication of the kind referred to above under (a) or (b), one has to rely on an evaluation of the objective situation, or dispute, created by the failure on the part of the United States to comply with the Court's Judgment. Such an evaluation, in order to be complete, would require a series of factual and political assessments that go beyond the scope of the present study. Therefore, we shall confine ourselves to some general considerations of a legal character.

Following the above described reasoning, the contention might be made that draft Resolution S/18428, calling for immediate compliance with the Judgment of the Court in the *Nicaragua* case, should not necessarily have been placed within the framework of Chapter VII only because the dispute decided upon by the Court was one that involved the use of armed force and, therefore, unquestionably, constituted a threat to, or a breach of, the peace under Chapter VII. As already emphasized,⁷⁹ the dispute arising out of non-compliance with a judgment should have been considered as separate from the one which was before the Court. This argument was also put forward during the debate in the Council on the case in point. Namely, the representative of Syria stated the following:

While it is true that today's complaint has been presented by the Government of Nicaragua against the United States, this complaint is not really confined to the conflict between the United States and Nicaragua. In actual fact this complaint relates to the obligation on the part of Member States to abide by the judgments of the highest international judicial authority, that is the International Court of Justice.⁸⁰

However, one cannot automatically exclude, just on the strength of this argument, that the dispute, or situation, deriving from the non-compliance with the Court's decision in this particular case, as well as in similar cases which could arise in future, might in itself amount to a threat to, or a breach of, the peace.⁸¹ The Court in its Judgment of 27 June 1986 had found the United States responsible for continuing

79 See above text at note 39.

80 UN Doc. S/PV. 2718, at 23-25.

81 An argument to the contrary seems to have been put forward by the representative of Mexico in the General Assembly, after the United States had cast the veto against the draft resolution at hand. He said that '... [i]t seems clear that no permanent member of the Security Council can exercise its veto when it is a party to a dispute before the Council. This is particularly so when that dispute has been put before the International Court of Justice and on which the Court has handed down a binding judgment. As stated in paragraph 3 of Article 27 of the Charter, this is particularly true when the matter raised is related to Chapter VI of the Charter pertaining to the peaceful settlement of disputes' (UN Doc. A/41/PV. 53, at 81). This statement seems to automatically place on an equal footing any dispute concerning the failure to comply with a Court's decision and a situation envisaged in Chapter VI, if only for the fact that the matter, having been brought before the Court, necessarily falls within the ambit of the peaceful settlement of disputes. However, one should take into consideration the fact that this intervention, even if couched in legal terms, was meant to serve the merely political purpose of providing support and solidarity for the position of Nicaragua. Furthermore, this argument was not taken up by any other delegation.

conduct in breach of a number of international obligations, clearly aimed at protecting international peace.⁸² The fact that the United States did not comply with the 'duty' decided by the Court 'immediately to cease and to refrain from all such acts as may constitute breaches of the foregoing legal obligations',⁸³ could just as well have been considered in itself as a continuing breach of the peace. Ironical as it may seem, this interpretation would benefit the position of the United States in the Council, placing the subject-matter of the relevant draft resolution within Chapter VII, and, therefore, legitimizing its veto.

If, on the other hand, one were to give prevalence to the interpretation according to which the resolution in point fell under Chapter VI, and on the assumption that the obligation to abstain in Article 27(3) was still in force, the ruling of the President who counted the negative vote of the United States, should be considered illegal. Lacking a system of judicial review of the activity of United Nations organs, it is basically the attitude of Member States, with their express acceptance or acquiescence, that can legitimate *ex post*, and on an *ad hoc* basis, a ruling at variance with the Charter.⁸⁴ It is certainly easier to speculate as to the legal effects of a resolution allegedly wrongfully adopted, than the possibly illegal non-adoption of a draft resolution. However, it is to be noted that during the debate in the Council immediately following the above ruling, the legality of the non-adoption was not contested, except by the directly interested State, namely Nicaragua, although a rule has been inferred from UN practice to the effect that an objection as to the legitimacy of a given ruling should be raised immediately after having had notice of such a ruling for it to bear legal effects.⁸⁵ In this case, however, the right of veto of the United States was even recognized expressly by the Representative of Ghana, one of the six co-sponsors of the draft resolution in point:

The Council has just failed to take a decision on a landmark case. This failure has been made possible by the use of the veto by a permanent member of the Council. That course of action is within the competence of the Council and legitimate, and we respect the decision so made.⁸⁶

82 The Court had found that the United States had breached the following international legal obligations: not to use force in international relations; not to violate the sovereignty of another State; not to intervene in the affairs of another State (ICJ Reports (1986) 146 et seq.).

83 *Ibid.*, at 149.

84 '... [T]he entire history of the United Nations supports the common perception that interpretation in UN bodies is essentially political in the sense that disputes about interpretation are resolved mainly by what member states desire as a matter of policy. Alliances, coalitions and bargaining affect their choices. The elasticity of the Charter language allows such choices to be free of restraints. *This is bolstered by the assumption that interpretations which are 'generally acceptable' settle the issue.* Of course, if all members agree, the question of the proper legal interpretation would rarely arise' (Schachter, *supra* note 1, at 7, italics added). For strictly legal considerations leading to much the same conclusion, see also Conforti, 'Le rôle de l'accord dans le système des Nations Unies', *RdC* (1974-II) 209 et seq.

85 Conforti, *supra* note 78, at 292 et seq.

86 S/PV. 2718, at 53. It is as well to note that the objection to the ruling at hand made by Nicaragua during the same debate in the Council was expressed in rather vague terms from a legal viewpoint (*ibid.*, at 57). It was only in the General Assembly, a week later, that a more legally orientated objection was advanced in the terms above described (*supra* note 54).

Be that as it may, one could not consider this precedent to be binding with respect to future cases of non-compliance with a Court decision, where the cases do not involve the use of force.

IV. The Nature of Measures Under Article 94(2)

The Charter provision in point provides that the Security Council may 'make recommendations or decide upon measures to be taken to give effect to the judgment' but does not refer to any specific kinds of measures. None of the three cases in which resort has been had to the Council under Article 94(2), namely, the *Anglo-Iranian Oil Co.*, the *Nicaragua* and the *Bosnia* cases, offers useful insights into this matter. Here again, therefore, discussion must be based mainly on principle.

A tendency has emerged in scholarly writings to compare the scope of 'measures' under Article 94(2) with that of measures under Article 41.⁸⁷ However appropriate it would be to consider the authority of the Council to take, or decide, 'action' under Article 94(2) comparatively with that under Chapter VII, the above seems to be a moot question. This is so, if only because Article 41 provides a non-exhaustive list of coercive measures. Consequently, the Council could decide measures of the kind expressly listed in the latter provision, or even outside such a list, either under Article 94(2), or under Article 41 itself. As repeatedly indicated above, in principle, the characteristic feature of the enforcement action that the Council might take under Article 94(2) would not pertain so much to its content as to the fact that its legitimacy does not necessarily depend on the preconditions set out in Article 39. A case of non-compliance with a Court decision could be in itself a sufficient prerequisite. An assumption to the contrary, besides not finding support in the letter of the Charter, would entirely defeat the object and purpose of Article 94(2), rendering it totally superfluous.

In trying to consider which measures, among those within or outside the list of Article 41, could serve the purposes of Article 94(2), one should not lose sight of the fact that each case of non-compliance would be a special one. Nevertheless, some remarks of a general character would seem appropriate.

As to the suitability and the effectiveness of measures of the kind listed in Article 41 with respect to non-compliance with a Court decision, one should bear in mind that they were designed as a collective response to conducts that amount to threats to, or breaches of, the peace, or acts of aggression. Consequently, they may

87 Schachter, *supra* note 3, at 21 et seq. As already indicated, even if one were to consider Article 94(2) as an independent source of enforcement authority for the Council, doubts would remain as to whether the Council could take measures of the kind contained in Article 42 in the absence of the preconditions under Article 39. However, this consideration is based on purely theoretical reasoning. For, if the Council really intended to take measures of the kind indicated in Article 42, under the current practice, of the Council of interpreting Article 39 in the most extensive way, it could just as well determine that a given case of non-compliance with a Court decision represented a threat to the peace.

seem drastic and disproportionate. It is no wonder that, not only have they never been applied, they have not even been proposed. Among such measures, though, 'partial interruption of economic relations' might be appropriate, if applied in a very restrictive way; for example, an embargo on a limited number of categories of goods. Another kind of economic measure that would seem particularly appropriate to the issue at hand, not necessarily to be confined to cases of non-compliance with judicial awards of damages,⁸⁸ is the freezing of those assets belonging to the defaulting State that are to be found in the territory of the State which is the successful party, as well as in that of third States. The effectiveness of the enforcement function of such measures would certainly not depend on the economic disadvantage for the defaulting State. Such measures would increase public exposure of non-compliance by involving third States which would be bound under Articles 2(5), 25 and 49 to adopt the said measures. There is a fair chance that this would bring to bear pressure of a political and moral character on the defaulting State. At the same time however, there would be the risk that this attitude taken by the Council might lead to the counterproductive effect of prompting the defaulting State to hold on to its position for reasons of national pride.

A kind of action that may not be considered to involve a concrete type of coercive measure but that might, nevertheless, serve enforcement purposes, would be a Security Council resolution under Chapter VII reiterating the Court's pronouncement. By virtue of Article 25 such a resolution would extend – indirectly, and certainly not in technical terms – to all UN Member States the legal effects (or, at least, some of them) of the decision which, under Article 59 of the Court's Statute is binding only on the parties. This would be appropriate, not only to decisions calling for some affirmative step, or the cessation of wrongful conduct, but also declaratory judgments, particularly those declaring the wrongfulness or the invalidity of a given situation, which, at least implicitly, would require a duty of non-recognition. Such a course of action by the Security Council, aimed at legally involving all Member States with a case of non-compliance, would be especially appropriate when the Court has determined the existence of a serious breach of an international obligation *erga omnes*.⁸⁹

Even if the present study is confined to the UN dimension of the question of the enforcement of judicial decisions, it is appropriate to mention the possibility that measures aimed at giving effect to decisions of the ICJ could be taken by other

88 Referring to the attachment of assets of the defaulting party, Bowett considered that, even if 'this is a remedy most appropriate to the enforcement of a judicial award of damages, [...] in principle, there is no reason why it should not be done to enforce compliance with any judicial decision' ('Contemporary Developments in the Legal Techniques in the Settlements of Disputes', *RdC* (1983-II) 212).

89 On the concept of *erga omnes* obligations, see among others, Ruiz, 'Las obligaciones *erga omnes* en derecho internacional publico', *Estudios de derecho internacional: Homenaje al profesor Miaja de la Muela* (1979) Vol. I, 219 et seq., and Annacker, 'The Legal Regime of *Erga Omnes* Obligations in International Law', *Austrian Journal of Public International Law* (1994) 131 et seq. On the tendency of the Security Council to extend its powers under Chapter VII in order to deal with situations or disputes arising out of serious breaches of *erga omnes* obligations, see, especially, Gaja, *supra* note 72.

international organisations. The linkage between this phenomenon and the UN normative system might be found in an extensive interpretation of Article 48(2) of the UN Charter which prescribes that Security Council decisions for the maintenance of international peace and security 'shall be carried out by the Members of the United Nations directly and through their action in the appropriate international agencies of which they are members'. This provision has been expressly referred to in a compatibility clause contained in Article III of the 1948 Agreement between the UN and the International Monetary Fund. More specifically, the Constituent Treaty of the International Labour Organization (Article 33) provides that in case of failure to carry out a decision of the International Court of Justice 'the Governing body may recommend to the Conference such action as it may deem wise and expedient to secure compliance therewith'. The Constituent Treaty of the International Civil Aviation Organization (Article 88) provides that the Assembly may suspend from voting any Member failing to comply with a decision of the International Court of Justice or arbitral tribunal. The same Treaty also contains the obligation for Member States (Article 87) not to allow any airline of a Member State which is not acting in conformity with any such decision to operate in their territory.

There are other measures of a coercive nature that the Council could decide upon, or recommend under Article 94(2), individually or in conjunction with other Charter provisions, that have not been mentioned here, either because they are too drastic to be effective, or because the normative force of other Charter rules would be overriding with respect to the provision in point, or both. This would be the case of a recommendation by the Council to the General Assembly to suspend the persistently defaulting State 'from the exercise of the rights and privileges of [UN] membership' under Article 5.⁹⁰ It would also be the case of enforcement measures involving the use of force of the kind indicated in Article 42.

V. Article 94(2) and the Enforcement of Court Decisions which are not Judgments

As to the scope of application of the Charter provision at hand, a problem may arise, and has in fact already emerged, with regard to the fact that, whereas paragraph 1 of

90 'A Member of the United Nations against which preventive or enforcement action has been taken by the Security Council may be suspended from the exercise of the rights and privileges of membership by the General Assembly upon the recommendation of the Security Council. The exercise of these rights and privileges may be restored by the Security Council'. It has been suggested, though, that it might be difficult to make a persuasive case that action under Article 94(2) can be defined as 'preventive or enforcement action' (Kerley, *supra* note 3). However, one could well make the case that, if the Council were to 'decide upon measures to be taken to give effect to the judgment' under Article 94(2), the difficulty would be to find any other way to describe the adoption of such measures but 'enforcement action'. The problem would rather concern the fact that measures such as suspension should be regarded as the last resort, but even as such, they would seem to stand little chance of having any persuasive effect on the defaulting party.

Article 94 provides for the compulsory character of 'decisions' of the International Court of Justice, in general, paragraph 2 of the same provision confers an enforcement competence upon the Council with reference to 'judgments'. On the basic question of whether the choice of the term 'judgment' was purposely used, as opposed to the term 'decision', with a view to avoiding giving the Council the authority to enforce all types of pronouncements other than final judgments that can be made by the Court, no help can be found in the preparatory works of the Charter. Some indications may be inferred from practice as well as from discussion on principle.

A. Orders Indicating Provisional Measures. The Anglo-Iranian Oil Co. Case and the Bosnia Case

As a matter of fact, of the three cases in which Article 94(2) has been invoked, two refer to orders of the Court indicating provisional measures, namely the *Anglo-Iranian Oil Co.* case of 1951 and the *Bosnia* case of 1993. In the former case the problem at hand was expressly discussed in the Council,⁹¹ but no conclusive solution can be derived from the debate. The representative of the UK, which had resorted to the Council under Article 94(2), as well as Article 35, argued that the Council was competent to deal with a problem of enforcement of a Court order on the basis of both Article 94(2) of the Charter and Article 41(2) of the Statute,⁹² the latter provision stating that the Court has to give notice to the Council of any provisional measures it has taken to preserve the rights of the parties.⁹³ He further expanded upon this point by arguing that the Council derived its authority to give effect to a Court order indicating provisional measures from the fact that the latter had no less binding force than the final decision. Such a consideration was built upon the *a contrariis* assumption that the binding force of the final judgment would be frustrated if the interim measures aimed at preserving its efficacy were not legally binding. The representative of the United Kingdom eventually weakened the strength of his argument, from a legal point of view, by stating that, irrespective of its legally-binding force, the Court's Order was 'an expression of opinion by the highest international judicial tribunal' of what was considered to be necessary to preserve the rights of the parties pending the final decision; he consequently inferred from this a 'strong moral obligation' on every Member of the United Nations to conform thereto.

The above argument was contested, amongst others, by the representative of Iran.⁹⁴ He maintained that, since a Court order is neither a decision nor a judgment under Article 94, it is not legally binding; the Council was conferred with

91 See a description of the case, *supra* section II.A.1.

92 UNSCOR, 6th Yr., 559th mtg., paras. 19, 20 and 93-99.

93 See Man, 'Interim Measures of Protection: Art. 41 of the ICJ Statute and Article 94 of the Charter', *Indian Journal of International Law* (1970) 368 et seq.

94 UNSCOR, 6th Yr., 560th mtg., paras. 28-39 and 43-67.

enforcement authority only with respect to a Court decision which is final and binding. He also countered, more specifically, the arguments put forward by the representative of the United Kingdom. As to the assumption by implication that a provisional order derived a legally-binding force from the fact that, otherwise, the binding character of the very final decision would be prejudiced if its effect could be frustrated in advance by ignoring the provisional measures, the representative of Iran maintained that this could well be a *de lege ferenda* argument, but that it did not reflect the existing law. As to the argument based on Article 41(2) of the Statute, he denied that the obligation for the Court to notify the Council of the provisional measures taken could provide the legal basis for the competence of the Council to take enforcement measures to give effect to the order indicating such measures, since the notification provision had merely a function of information. Also the representative of Ecuador strongly objected to considering the scope of application of Article 94(2) as encompassing Court orders indicating provisional measures, so much so, that he stated that his delegation could not vote in favour of a revised draft resolution submitted by the United Kingdom⁹⁵ for the simple reason that it seemed to admit by implication that the Council had the competence to take action under Article 94(2), despite the fact that the Court had merely ordered provisional measures. It is to be noted that the language of the revised draft resolution in point did not request Iran to comply with the said order, as it did in the original draft, but called for

... [t]he resumption of negotiations at the earliest practicable moment in order to make further efforts to resolve the differences between the parties in accordance with the principles of the provisional measures indicated by the International Court of Justice unless mutually agreeable arrangements are made consistent with the Purposes and Principles of the United Nations Charter [...].⁹⁶

As already indicated,⁹⁷ the Council decided to adjourn the debate until the Court had handed down the judgment on its jurisdiction and the matter was never brought up again, after the Court concluded that it had no jurisdiction in the case.

As stressed by Schachter, this case threw little light on the question at hand as '... [i]t is likely that the indecision of the Council was attributable to the doubts which several Members had regarding the competence of the Court on the merits of the case.'⁹⁸

As to the *Bosnia* case, the Permanent Representative of Bosnia and Herzegovina to the United Nations addressed to the President of the Security Council a letter dated 16 April 1993, bringing to the attention of the Council the intensification of the assault on the city of Srebrenica by forces under the control of the Federal Republic of Yugoslavia (Serbia and Montenegro).⁹⁹ After indicating that such an

95 S/2358/Rev. 1.

96 Ibid.

97 *Supra*, section II.A.1.

98 See Schachter, *supra* note 3, at 23 et seq.

99 S/25616.

assault amounted to an act of genocide, the letter stressed that it constituted a 'direct violation' of the Order of the International Court of Justice issued on 8 April 1993 in the case concerning the application of the Convention on the Prevention and Punishment of the Crime of Genocide. The letter specifically recalled that the Court had indicated, as a provisional measure, that the Federal Republic of Yugoslavia

should in particular ensure that military, paramilitary or irregular armed units which may be directed or supported by it as well as any organizations and persons which may be subject to its control, direction or influence do not commit any acts of genocide, of conspiracy to commit genocide, of direct and public incitement to commit genocide, or of complicity in genocide [...].

Eventually, the Permanent Representative of Bosnia and Herzegovina, '... [p]ursuant to Article 94, paragraph 2, of the Charter of the United Nations', requested the Council to 'take immediate measures under Chapter VII of the Charter to stop the assault and to enforce the Order of the International Court of Justice.' On the same day, 16 April 1993, the Security Council adopted Resolution 819, in which, in its preamble, it *took note* of the Order of the Court, but did not mention Article 94(2) as its legal basis.

This case, again, is not decisive as to the question of whether the enforcement authority of the Council under Article 94(2) also covers Court's orders indicating provisional measures.¹⁰⁰

The letter from the Permanent Representative of Bosnia and Herzegovina of 16 April 1993, can be taken as a strong element in favour of the assumption that Article 94(2) applies to provisional orders. Though, by requesting the Council to 'take immediate measures under Chapter VII to stop the assault and to enforce the Order of the International Court of Justice' the letter may lend support to the view that Article 94(2) does not provide an independent source of action for the Council. Nevertheless, such a reference to Chapter VII, it is submitted, was not made with regard to the legal basis of the Council's authority in the matter, but in order to indicate the coercive nature of the action requested. One should also remember that the facts complained of in the letter in point were part and parcel of a situation that patently involved the use of force and that, already at that time, had been many times before the Council which had dealt with the issue repeatedly, mainly by exercising coercive authority under Chapter VII.¹⁰¹

On the other hand, Security Council Resolution 819 did not contain any reference to Article 94(2). The case could be made that this was just because the Court pronouncement was contained in an order and not in a final judgment. In

100 The ICJ did not address this subject in its Order of 13 September 1993, concerning 'Further Requests for the Indication of Provisional Measures' by Bosnia in the same case (ICJ Reports (1993) 325 et seq.). Nevertheless, Judge Ajibola gave thorough consideration to Article 94 in his separate opinion in which he arrived at the conclusion that the provision 'is not adequately or elegantly worded to assist the Court in ensuring due compliance with its orders under discussion' (*ibid.*, at 403).

101 In effect, in the opening paragraph of the preamble of Resolution 819 the Council '... [r]eaffirm[ed] its Resolution 713 (1991) of 25 September 1991 and all its relevant resolutions'.

supporting the opposite view, one could maintain, in the first place, that express reference in a resolution to its legal basis is not a requirement and, as a matter of practice, such a reference has not always been made by the Council. Furthermore, this alleged shortcoming could be considered compensated by the fact that in the preamble of the resolution at hand, the Council took extensive note of the Order of the Court of 8 April 1993. It is true that, in the last preambular paragraph of Resolution 819, the Council indicated that it was 'acting under Chapter VII of the Charter of the United Nations', also in accordance with the request by the Bosnian Government. Such a reference, however, does not appear to pertain to the legal basis of the competence of the Council in the matter, but seems intended to determine the enforcement nature of its action. Besides, this was further sufficiently qualified by the Council to indicate that the resolution in point was to be considered as aimed at supplementing the coercive course of action already undertaken under Chapter VII. The paragraph in point read as follows: 'Recalling the provisions of resolution 815 (1993) on the mandate of UNPROFOR and in that context acting under Chapter VII.'

As a matter of substance, it remains to be noted that, with Resolution 819, the Council, in line with the request made by the Bosnian Government under Article 94(2), demanded, acting under Chapter VII, 'that all parties and other concerned treat[ed] Sebrenica and its surroundings as a safe area [...]', it also called for 'the immediate cessation of armed attacks by Bosnian Serb paramilitary units against Sebrenica', as well as 'that the Federal Republic of Yugoslavia (Serbia and Montenegro) immediately cease[d] the supply of military arms, equipment and services to the Bosnian Serb paramilitary units in the Republic of Bosnia Herzegovina' and requested 'the Secretary-General, with a view to monitoring the humanitarian situation in the safe area, to take immediate steps to increase the presence of UNPROFOR in Sebrenica and its surroundings.'¹⁰² The resolution in point also reaffirmed 'that any taking or acquisition of territory by the threat or use of force, including the practice of 'ethnic cleansing', is unlawful and unacceptable'.¹⁰³

Basically, one can safely say that the Council, with Resolution 819, decided on measures that, with the reservation that its language omits the word 'genocide', can well be considered as measures aimed at giving effect to the provisional measures indicated by the International Court of Justice in its Order of 8 April 1993. The fact is that it could just as well have done so irrespective of Article 94(2).

Both the *Anglo-Iranian Oil Co.* case and the *Bosnia* case show that, under Article 94(2), Members of the United Nations have brought before the Council situations of non-compliance with orders of the Court indicating provisional measures, and that, irrespective of the position on the competence of the Council to take action in these cases under the Charter provision at hand, no objection was

102 Operative paras. 1 to 4.

103 Operative para. 5.

raised as to the right to resort to the Council under Article 94(2) for non-compliance with interim measures. On this score, it is to be recalled that, whereas in the *Anglo-Iranian Oil Co.* case the United Kingdom brought the case before the Council invoking Article 94(2) together with Article 35, in the *Bosnia* case the Bosnian Government resorted to the Council exclusively under Article 94(2), invoking Chapter VII only to indicate the nature of the measures requested.

Apart from this meagre finding, one cannot possibly derive from the two cases just mentioned conclusive indications on the question of whether the term 'judgment' in paragraph 2 of Article 94, should be interpreted, as opposed to the term 'decision', so as to strictly confine the enforcement authority of the Council to the 'final judgment' in the most technical sense. In his dissenting opinion in the 1966 *West Africa* case, Judge Jessup tried, convincingly, it is submitted, to prove that the terms 'decision' and 'judgment' are interchangeable, if not identical, within the meaning of Article 94, through a comparative analysis of the use of the said terms in the relevant provisions of the Statute of the Court and the Rules of the Court.¹⁰⁴ This argument might give strength to the view in favour of a flexible meaning of the term 'judgment', but it is to be recognized that Judge Jessup did not advance this argument in connection with the question under consideration in the present study, but in order to object to an interpretation of the said terms, according to which, they would apply, within the meaning of Article 94, only to the Court's rulings on the merits of a particular case, so excluding rulings on preliminary objections.¹⁰⁵

In principle, the solution to the problem of whether the enforcement authority of the Security Council under Article 94(2) of the Charter applies to interim measures indicated by the Court in the form of an order might seem to depend on the question of the legal force of such measures.¹⁰⁶ This argument, brought up in the terms already referred to above, in the *Anglo-Iranian Oil Co.* case, has been extensively, though not unanimously, debated in scholarly writings. Even though the compulsory character of these measures has been refuted in the past by authoritative lawyers, such as Guggenheim,¹⁰⁷ Hammarskjöld¹⁰⁸ and Schwarzenberger,¹⁰⁹ the prevailing view seems to be that Court orders indicating provisional measures have a legally-binding force. The main argument in support of this assumption, very much in line with that pleaded by the representative of the United Kingdom before the Security Council in the *Anglo-Iranian Oil Co.* case, rests on the consideration that the

104 ICJ Reports (1966) 331 et seq.

105 *Ibid.*, also at 328, 329 and 337.

106 Contrary to this construction of the problem, Pillepich maintains that there should be a 'decoupling' between the question of the legal force and that of the executory force of Court's orders. While accepting that Court's orders indicating provisional measures are legally binding, on the basis of general principles of law, this author denies that they may have executory force, on the strength of a textual interpretation of Article 94 (*supra* note 6, at 1284). See also the separate opinion of Judge Weeramantry appended to the Order of 13 September 1993 in the *Bosnia* case (ICJ Reports (1993) 374 et seq.).

107 'Les mesures obligatoires dans la procédure arbitrale et judiciaire', *RdC* (1932-II) 685.

108 *Jurisdiction internationale* (1938) 307.

109 *International Law* (2nd ed., 1948-I) 434.

legally-binding force of the final judgment itself would be prejudiced if one of the parties could frustrate it in advance by engaging in conduct at variance with an order indicating interim measures. As clearly stated by Fitzmaurice:

The whole logic of the jurisdiction to indicate interim measures entails that, when indicated, they are binding – for this jurisdiction is based on the absolute necessity, when the circumstances call for it, of being able to preserve, and to avoid prejudice to, the rights of the parties, as determined by the final judgment of the court.¹¹⁰

It is to be noted how this passage was carefully drafted to counter those textual interpretations of Article 41 of the Statute of the Court which, in order to substantiate the non-binding character of interim measures, stress that the said provision uses the verb 'to indicate', rather than 'to order' or 'to prescribe'. One can only agree on the importance of drawing attention to the fact that according to Article 41 the Court may indicate provisional measures when it 'considers that circumstances so require'.¹¹¹ Another argument, grounded outside the normative framework of the Charter, in support of the binding character of interim measures, and, especially, that Court orders indicating such measures are suitable for enforcement action, should be inferred from the contention that the power to indicate interim measures in international law amounts to a general principle of law reflecting the procedural law of a great number of national legal systems.¹¹² In fact, where contemplated at the domestic level, such measures, are immediately enforceable.

Even though, from a strictly theoretical point of view, there might still be doubts as to the appropriateness of considering orders of the Court indicating provisional measures to be on the same footing as its final judgments, it seems that it would be only in line with the general powers of the Security Council to maintain that it is vested with the authority to 'make recommendations or decide upon measures to give effect to [orders indicating provisional measures]'. However, even if one were to deny that such a conclusion could be reached through a textual interpretation of

110 'The Law and Practice of the International Court, 1951-54, Questions of Jurisdiction, Competence and Procedure', *BYBIL* (1958) 122. The argument of the preservation function of interim measures and of the irretrievable character of the damage that can be caused to the rights of the parties by conduct at variance with the said measures is well reiterated by A. El Ouali, *Essai juridique de la sentence internationale* (1984) at 99 et seq. who further substantiated his position by quoting the ICJ in its 1972 Order in the *Fisheries* case, when it stated that '[...] the immediate implementation by Iceland of its Regulations would, by anticipating the Court's judgment, prejudice the rights claimed by the Federal Republic of Germany and affect the possibility of their full restoration in the event of a judgment in its favour'. (ICJ Reports (1972) 34).

111 See also El Ouali, *supra* note 110.

112 See Bing Cheng, *General Principles of Law as Applied by International Court and Tribunals* (1953) 267 et seq.; E. Dumbauld, *Interim Measures of Protection in International Controversies* (1932) 7, 180 et seq.; Mendelson, 'Interim Measures of Protection and the Use of Force by States', A. Cassese, *The Current Legal Regulation of the Use of Force* (1986) 345. The assumption that the power to order provisional measures of protection is inherent in the jurisdictional function, irrespective of Article 41 of the Statute of the Court, is shared, amongst others, also by Fitzmaurice (*supra* note 1, at 115 et seq.) and Hambro ('The Binding Character of Provisional Measures of Protection Indicated by the International Court of Justice', *Rechtsfragen der Internationalen Organisation* (1956) 167 et seq.).

Article 94,¹¹³ the same conclusion could be reached on the basis of the general competence of the Council under Chapters VI and VII, without regard to cases of non-compliance with a final judgment of the Court.¹¹⁴

B. Advisory Opinions

It would seem a contradiction in terms to consider that a problem of enforcement might arise only in connection with an advisory opinion given by the International Court of Justice under Article 96 of the Charter.¹¹⁵ Some could make the case that it might not be so, in the light of the practice of the Court or, rather, of an evolutive interpretation of such practice. A thorough analysis of this highly complex and controversial subject cannot be undertaken in the present study, as it would be far beyond its scope.¹¹⁶ However, some comments of a general character seem to be called for.

It may well be that the Security Council has acted according to, or even made recommendations or taken measures to give effect to, the findings of an advisory opinion given by the Court under Article 96(1). But, even if the legal questions submitted to the Court were to involve a dispute between States, such action taken by the Council could not be considered to have been taken under Article 94(2), according to both a textual and a teleological interpretation of Articles 94 and 96. This seems the correct legal interpretation of the relevant Charter provisions, even if, in practical terms, it may not entail any concrete consequences. The said hypothetical course of action could be taken by the Council under either Chapter VI, or VII, as much as it could under Article 94(2).

Some further thought might justifiably be given to the kind of advisory opinions of the Court that acquire a legally-binding character by virtue of special international instruments, such as headquarters agreements or agreements on privileges and immunities, mostly entered into by the UN and UN agencies. This kind of special advisory procedure, leading to what Rosenne has defined as 'compulsive opinions',¹¹⁷ has come most noticeably to the fore in connection with the Advisory Opinion given by the Court on 15 December 1989, on the applicability of Section 22 of Article VI of the Convention on the Privileges and Immunities of the United Nations.¹¹⁸ One should not lose sight of the fact that such advisory

113 Mendelson, *supra* note 112, at 349 et seq. See also Pillepich, *supra* note 6.

114 Mendelson, *supra* note 112, at 344 and 352. See also the separate opinion of Judge Weeramantry appended to the Order of 13 September 1993 in the *Bosnia* case (ICJ Reports (1993) 401).

115 Sette-Camara, 'Methods of Obligatory Settlement of Disputes', M. Bedjaoui (ed.), *International Law: Achievements and Prospects* (1991) 539 et seq.

116 P. Benvenuti, *L'accertamento del diritto mediante pareri consultivi della Corte internazionale di Giustizia* (1984). The main argument, developed throughout this monograph, is that, in exercising its advisory jurisdiction, the Court performs an objective law-assessment function that would be difficult to distinguish from its judicial function in contentious cases.

117 *The Law and Procedure of the International Court of Justice* (1965) 682 et seq. See also Bacot, 'Réflexions sur les clauses qui rendent obligatoires les avis consultatifs de la CPII et de la CIJ', *RGDIP* (1980) 1087 et seq.

118 Ago, "'Binding" Advisory Opinions of the International Court of Justice', *AJIL* (1991) 439 et seq.

opinions do not derive their legally-binding character from the original normative basis of the International Court of Justice itself nor the Statute conferring advisory competence, namely, the Charter and the Statute of the Court. This does not however mean that such advisory opinions should be deprived of the 'relative' binding force conferred upon them by treaty law regimes other than that of the UN Charter. Nevertheless, it should be borne in mind that the enforcement role of the Security Council with respect to Court decisions was conceived with a view to its operation within the Charter regime. In contrast with Article 13 of the Covenant, not even arbitral awards are contemplated under Article 94(2).

VI. Concluding Remarks

It appears from the above analysis that the only way to interpret Article 94(2) in such a way that, in strictly legal terms, might confer an independent normative function to this provision and, thus, a reason for it to have been inserted in the Charter is to consider it as the legal basis for the Council to take enforcement action of the kind set forth in Chapter VII, irrespective of the preconditions provided for in Article 39, i.e., 'the existence of any threat to the peace, breach of the peace, or act of aggression'. Nevertheless, this contention remains of only theoretical importance, so long as the Council keeps interpreting the preconditions for its coercive action set out in Article 39 as extensively as possible, so as to consider even cases of non-compliance with a Court decision that may not involve the use of force as a threat to the peace. For the rest, Article 94(2) only reiterates, with special regard to cases of non-compliance with Court decisions, other Charter provisions of a more general character:

- (a) Articles 35(1) and 37(1), that give any Member State a *locus standi* before the Council with regard to Chapter VI like situations;
- (b) Articles 36 and 37(2), that confer the Security Council the power to act *motu proprio* with respect to the same kind of situations;
- (c) Article 39.

Even if, from a legalistic point of view, one can see little additional value in Article 94(2), and even if one were to consider the latter as devoid of almost any normative autonomy, it seems appropriate to have a provision in the Charter that singles out a *locus standi* before the Council for cases of non-compliance with a Court decision. Furthermore, in the light of relevant practice (though scarce) the Charter provision under consideration, proves to be perfectly in line with the main political underpinnings of the United Nations system. On the one hand, it is in keeping with those Charter provisions aimed at upholding the 'rule of law': the purpose of the peaceful settlement of disputes (Article 2(3) and Chapter VI) and the importance the Charter attaches for its pursuance to the International Court of Justice (Articles 7, 36(3), and 92), the binding character of its decisions (Article 94(1)) and the duty for all Members to 'fulfil in good faith the obligations assumed by them in accordance

with the [...] Charter' (Article 2(2)). On the other hand, in conformity with the general rationale of the Charter, Article 94(2) combines the above principles with the needs of international politics. In order to meet such needs the Charter has avoided putting the Security Council under the judicial authority of the Court and has provided the Permanent Members of the Council with the right to veto any decision, or even recommendation, concerning 'action with respect to threats to the peace, breaches of the peace, and acts of aggression', especially so, if any of them was allegedly responsible for the existence of such a situation.¹¹⁹ Accordingly, when the Council was asked to take action under Article 94(2) against one of its Permanent Members for non-compliance with a Court decision in a case involving the use of force it was blocked by the veto of the defaulting Permanent Member. However, this apparently negative result for the rule of law in the *Nicaragua* case, as well as the lack of action in the *Anglo-Iranian Oil Co.* case, were reached through a policy decision-making process, which did not really impair the legal authority of the Court. In both cases, the Members of the Council who were against action to give effect to the judicial decision, presented their position by and large on mainly political grounds, without questioning the legal reasoning of the Court.

The case has been made in the present study that such an attitude of self-restraint could be sanctioned by a rule of conduct to be 'softly' codified, at least, in a resolution of the General Assembly.¹²⁰ This would have primarily symbolic meaning. At the same time, it would have the merit of reminding Member States of a rule of conduct which they, themselves, have applied spontaneously as a way to preserve in the matter at hand the delicate balance between law and politics which is essential for the functioning of the United Nations system.

The main consideration which might help in striking the correct balance between respect for legal values and satisfaction of political exigencies in this issue is one which holds true from both a legal and a political point of view. That is the separation between the dispute before the Court and the dispute concerning non-compliance with the Court's decision, the latter of which is to be dealt with by the Council. Obviously, while before the Court legal considerations necessarily prevail, when a case of non-compliance with a Court ruling comes to the Security Council, which is a body established and functioning under legal rules that have made it purportedly a political as opposed to a judicial organ, such a case becomes one of political relevance. This may justify the impression that the said balance gives prevalence to political factors.¹²¹

119 This apparently deplorable rule has permitted the Organization to go through almost forty years of crisis without the withdrawal of any major Member, therefore, keeping alive within the Organization what might be defined as a mix between a permanent negotiation for international peace and 'horse trading' in pursuance of national interests.

120 *Supra*, section II.A.3.

121 As it was recently maintained by Kennedy, 'it may be hoped that Court and Council will continue to complement each other, as required by the spirit of the UN Charter, and will remain cognisant of their respective roles and capabilities, each acknowledging the distinctive competence of the other for addressing particular kinds of disagreements in the international arena' (*supra* note 2).