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ON THE SECURITY COUNCIL'S «LAW-MAKING»

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> «It was to keep the peace, not to change the world order, that the Security Council was set up» (Judge Fitzmaurice, diss. op., *I.C.J. Reports 1971*, p. 294).

I. *Introduction*

1. The present writer's long hesitation in taking up the difficult subject indicated in the title has finally been set aside by a reflection one reads in Bedjaoui's book on «contrôle de la légalité». After recalling John Foster Dulles' mot célèbre, according to which the Security Council «is not a body that merely enforces agreed law. It is a law unto itself», the author of that book states: «Cette idée que le Conseil de sécurité crée et impose son droit pose bien évidemment, outre le problème de savoir si c'est exact, celui de savoir si, dans son action de "law-maker", le Conseil de sécurité est dispensé de respec-

ter d'une part les dispositions de la Charte des Nations Unies et d'autre part les règles et principes du droit international» (1).

Leaving out in principle — except for some points relating to the ICJ's role — the problem of control (2), the present article addresses, in the hope of provoking some debate, the question whether, in what sense, and how far, the Security Council is really endowed with the kind of power that Dulles' *boutade* (3) and a number of acts of the Security Council seem to imply. For the sake of brevity the title only mentions law-making. But the present writer is even more concerned with law-determining and law-enforcing. This piece is prompted precisely by the author's inability to accept without resistance, however inadequate the latter may be, the view, apparently prevailing among a number of scholars, that the Council's tendency to create law, determine the law and impose the law — thus affecting decisively States' rights and obligations — is justified *de jure condito* or desirable *de jure condendo*.

The Council's tendency referred to does not require illustration here. Questionable excursions from the area of peace-enforcement to that of law-making, law-determining or law-enforcing have been occasioned, leaving out for the moment the less recent past, by a number of post-1990 cases, such as — in approximate order — the Iraqi aggression against Kuwait and the following, ongoing crisis in the area, the *Lockerbie* affair, the Yugoslav crisis with the establishment of the International Criminal Tribunal for the Former Yugoslavia (ICTFY), the intervention in Haiti, the Rwanda situation with the establishment of another *ad hoc* Tribunal, the adoption of coercive measures against Sudan (to compel the delivery of alleged perpetrators of an assassination attempt in Addis Ababa). At one or more stages of the episodes known under the above names the Security Council has taken (on the more or less explicitly and clearly declared strength of Chapter VII in general or on the strength of more specific sources within or outside that Chapter)

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(1) BEDJAOUI, *Nouvel ordre mondial et contrôle de la légalité des actes du Conseil de sécurité*, Bruxelles, 1994, p. 11 [italics added].

(2) See paras. 19, 42 (a) and 54 *infra*.

(3) As quoted in note 1 of the same page of Judge BEDJAOUI's cited book, Dulles' statement (from *War or Peace*, New York, 1950) ran: «The Security Council is not a body that merely enforces agreed law. It is a law unto itself. If it considers any situation as a threat of peace, it may decide what measures shall be taken. No principles of law are laid down to guide it; it can decide in accordance with what it thinks is expedient. It could be a tool enabling certain powers to advance their selfish interests at the expense of another power».

binding decisions imposing, upon one or more of the States concerned, obligations — with the corresponding rights' sacrifice — that found no legal justification either in the Council's conciliatory function under Chapter VI or in what at least the present writer considers to be its peace-enforcing function under Chapter VII. In so doing, the Council took upon itself, in our opinion, law-making, judicial or law-enforcing powers it is surely not endowed with. The present writer has repeatedly called attention to this matter in connection with Article 39 of the International Law Commission's (ILC) draft Articles on State responsibility and with the régime of State crimes (4).

2. Despite the high quality of the rich literature devoted to the cited Security Council's practice, and although a fair number of comments express perplexity or learned criticism (5), the scho-

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(4) See para. 2 *infra*; and our comment *Article 39 of the ILC First-Reading Draft Articles on State Responsibility*, in this *Rivista*, same number, paras. 7-10.

(5) Among the numerous critical surveys: BOTHE, *Les limites des pouvoirs du Conseil de sécurité*, in DUPUY, R.-J. (ed.), *The Development of the Role of the Security Council, Workshop, The Hague, 21-23 July 1992*, Dordrecht, 1993, p. 67 ff.; CONFORTI, *Le pouvoir discrétionnaire du Conseil de sécurité en matière de constatation d'une menace contre la paix, d'une rupture de la paix ou d'un acte d'agression, ibid.*, p. 51 ff.; GRAEFRATH, *Leave to the Court What Belongs to the Court. The Libyan Case*, in *European Journal of Int. Law*, 1993, p. 184 ff.; ID., *Iraqi Reparations and the Security Council*, in *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, 1995, p. 1 ff.; ID., *International Crimes and Collective Security*, in WELLENS (ed.), *International Law: Theory and Practice. Essays in Honour of Eric Suy*, The Hague, 1998, p. 237 ff.; GAJA, *Réflexions sur le rôle du Conseil de sécurité dans le nouvel ordre mondial*, in *Revue générale de droit int. public*, 1993, p. 298 ff.; HARPER, *Does the United Nations Security Council Have the Competence to Act as a Court and Legislature?*, in *New York University Journal of Int. Law and Politics*, 1994-95, p. 103 ff.; GOWLLAND-DEBBAS, *Security Council Enforcement Action and Issues of State Responsibility*, in *Int. and Comparative Law Quarterly*, 1994, p. 55 ff.; DOMINICÉ, *Le Conseil de sécurité et l'accès aux pouvoirs qu'il reçoit du Chapitre VII de la Charte des Nations Unies*, in *Revue suisse de droit int. et de droit européen*, 1995, p. 417 ff.; KIRGIS, *The Security Council's First Fifty Years*, in *American Journal of Int. Law*, 1995, p. 89 ff.; ALVAREZ, *Judging the Security Council*, in *American Journal of Int. Law*, 1996, p. 1 ff.; BOWETT, *Judicial Functions of the Security Council and the International Court of Justice*, in FOX (ed.), *The Changing Constitution of the United Nations*, London, 1997, p. 73 ff. Further critical comments are referred to in Section VI.B.

The present writer finds it difficult to agree with Caron's remark that « it is with no small measure of irony that, as the international community finally achieved what quite a few of its members at least officially had sought — a functioning UN Security Council — many of them began to have second thoughts about the legitimacy of that body's use of its collective authority » (CARON, *The Legitimacy of the Collective Authority of the Security Council*, in *American Journal of Int. Law*, 1993, p. 552 ff., at p. 553). To us the phenomenon looks like a perfectly normal reaction: and we believe that lawyers as well as States had — and still have — much to think and say about the

larly reaction is in our view — even if one leaves aside the enthusiastic applause of some commentators — inadequate. The impression remains that international lawyers are inclined, on the whole, to be satisfied with marginal criticism and marginal procedural suggestions aimed at making the Security Council's action legally less questionable and politically more palatable. Quite a number of commentators seem to resign themselves to the thought that the matter is too overwhelmingly dominated by political — and moral! — factors for it to be worthwhile exploring its legal aspects deeply enough. On the whole, in other words, one does not see, in the literature, an adequate treatment of a legal problem of Charter interpretation and application which has remained for about half a century under the sway of questionable Charter readings. The prosperity enjoyed by these readings was perhaps inevitable at a time when the Security Council was so paralysed by the «veto» that little risk of abuse could be feared and no price seemed to be too high to pay to enable the UN to do something. One perceives, at times, in scholarly attitudes on the subject, an inexplicable renunciation by the legal commentator of his duty in the face of power politics and «realism».

What seems to the present writer the predominantly passive attitude of scholarship on the subject is unlikely to be improved by the active stand taken, with regard to the matter, by the ILC in its codification work on State responsibility. Unexpectedly confirming a decision it had taken rather hastily in 1983 — at a time when the delimitation of the Security Council's powers was far from assuming what we consider to be its current importance — the ILC included, in the 1996 first-reading text of the draft Articles on the topic, a provision on the «Relationship with the Charter of the United Nations». I refer to draft Article 39 which provides, rather inconsistently and ambiguously: «The legal consequences of an internationally wrongful act of a State set out in the provisions of this Part [Two] are subject, as appropriate, to the provisions and procedures of the Charter of the United Nations relating to the maintenance of international peace and security» (6).

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legitimacy of the Council action in a number of cases, including even the Gulf crisis. And it would be surely a wholesome reaction (not a matter of «second thoughts»).

(6) The inconsistency is with the title. There is a conspicuous difference between the Charter as a whole and the «provisions and procedures of the Charter relating to the maintenance of international peace and security» (see *Article 39* [*supra* note 4], Section C). The ambiguity, far more serious, is inherent in the fact that, although the article is placed within Part Two of the draft Articles and explicity confi-

As will be shown in a « comment » appearing in another part of the present number of this *Rivista* (7), by leaving practically to the Security Council the determination of the appropriateness of subjecting to its decisions the application of the Articles of a possible international convention on State responsibility, Article 39 would seriously jeopardize the integrity of international law. Considering the authority generally acquired by ILC draft Articles as soon as they appear in the relevant UN documents, that process — that would amount to no less than an « undoing of the law of State responsibility » — is likely to have started in 1996 if not already in 1983. The functions attributed to the Security Council by the Rome Statute of the International Criminal Court (8) are certainly not of a nature such as to mitigate the lawyer's preoccupation with regard to the development of the rule of law in international society.

There is enough evidence, we submit, for the attention of international legal scholarship to be called anew to the issue of the delimitation of the powers of the Security Council under the Charter and general international law. Of course, one fully shares the concern of those scholars who have raised the issue of control of the legality of the Security Council's action. However, as rightly noted in the book cited at the outset, the issue of control is, in a sense, an instrumental, however essential, aspect of the problem of the legality of the Council's actions. Some control should and could come anyway, *faute de mieux*, from the UN member States: as it sometimes does. But also for such control to be deployed there should be, as a starting point, a more precise or less vague determination,

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nes its object to the « legal consequences...set out in [that] Part [Two] », it seems likely that the Article extends its impact to the entire draft and even further (cited *Article 39*, Section A).

(7) Paras. 1-4 of the cited *Article 39* [*supra* note 4].

(8) See LATTANZI, *Riflessioni sulla competenza di una corte penale internazionale*, in *Rivista*, 1993, p. 661 ff.; ID., *The Rome Statute and State Sovereignty: ICC Competence, Jurisdictional Links, Trigger Mechanism*, in LATTANZI, SCHABAS (eds.) *Essays on the Rome Statute of the International Criminal Court*, vol. I, L'Aquila, 1999, p. 51 ff.; ID., *Compétence de la Cour pénale internationale et consentement des Etats*, in *Revue générale de droit int. public*, 1999, p. 426 ff.; GARGIULO, *Il controverso rapporto tra Corte penale internazionale e Consiglio di sicurezza per la repressione dei crimini di diritto internazionale*, in *La Comunità int.*, 1999, p. 428 ff.; ID., *The Controversial Relationship Between the International Criminal Court and the Security Council*, in LATTANZI, SCHABAS (eds.), *Essays on the Rome Statute*, *supra*, p. 67 ff.; WILLIAMS, *Article 13: Exercise of Jurisdiction*, in TRIFFTERER (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article*, Baden-Baden, 1999, p. 343 ff.; YEE, *The International Criminal Court and the Security Council*, in LEE (ed.), *The International Criminal Court: the Making of the Rome Statute. Issues, Negotiations, Results*, The Hague, 1999, p. 143 ff.

by scholars, of the area within which the Council is empowered by the Charter to dispose of States' rights or obligations: a task which requires more work than the present writer is able to provide here. He can put forward, on such a difficult subject, little more than tentative views.

3. The present writer had indeed wondered, while working on this article, whether it would be appropriate even to try to provoke a scholarly debate on the limits of the Security Council's powers at the very time when the United Nations was being unlawfully bypassed — whatever the degree of their moral or political justifications — by the NATO members' legally questionable Kosovo operation (9). The doubt was dispelled, however, by the consideration (and the wish) that NATO would sooner or later be forced, by the *impasse* in which it found itself, to put the hot Balkan potato back into the hands, however weak, of the United Nations, such a course to be followed, hopefully, by a «re-evaluation» of the role of the Organization and first of all of the Security Council itself. Of course, this might well bring about, *en revanche*, a resumption, and even perhaps a stepping-up, of the Council's tendency to trespass from its legitimate role of *gendarme* — namely of peace-enforcer — to those roles of law-maker, law-determiner and law-enforcer to which it is not entitled and for which it is not equipped. This

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(9) On that operation: BOBBIO, *Guerra nei Balcani e pace ideale*, in *La Stampa*, May 10, 1999; RIGAUX, *La Nato viola il suo statuto*, in *Fondazione int. Lelio Basso*, Anno V, no. 1-2, Jan.-June 1999, p. 5; CASSESE, Ex iniuria ius oritur: *Are We Moving towards International Legitimation of Forcible Humanitarian Countermeasures in the World Community?*, in *European Journal of Int. Law*, 1999, p. 23 ff.; ID., *A Follow-up: Forcible Humanitarian Countermeasures and* Opinio Necessitatis, in *European Journal of Int. Law*, 1999, p. 791-799; KIRGIS, HAYDEN, D'AMATO, DRUMBL, ROGERS, MERTUS, in *Proceedings of the American Society of Int. Law, Insight: The Kosovo Situation*, March 1999; SPINEDI, *Uso della forza da parte della Nato in Jugoslavia e diritto internazionale*, in *Quaderni Forum (Guerra e pace in Kosovo. Questioni etiche, politiche e giuridiche)*, vol. XII (1998), No. 3; STARACE, *L'azione militare della Nato contro la Jugoslavia secondo il diritto internazionale*, in *Filosofia dei diritti umani*, 1999, no. 2, p. 36 ff.; VILLANI, *La guerra del Kosovo: una guerra umanitaria o un crimine internazionale?*, in *Volontari e terzo mondo*, Roma, 1999, Nos. 1-2, p. 26 ff.; SIMMA, *NATO, the UN and the Use of Force: Legal Aspects*, in *European Journal of Int. Law*, 1999, p. 1 ff.; RONZITTI, *Raids aerei contro la Repubblica federale di Iugoslavia e Carta delle Nazioni Unite*, in *Rivista*, 1999, p. 476 ff.; STARACE, *L'intervento della NATO in Iugoslavia*, in *Sud In-Europa*, 1999, No. 3, p. 1, 13 ff.; *NATO's Kosovo Intervention*, editorial comments by HENKIN, WEDGWOOD, CHARNEY, CHINKIN, FALK, FRANCK, RIESMAN, in *American Journal of Int. Law*, 1999, p. 975 ff.; ZAPPALÀ, *Nuovi sviluppi in tema di uso della forza armata in relazione alle vicende del Kosovo*, in *Rivista*, 1999, p. 824 ff.; PICONE, *La «guerra del Kosovo» e il diritto internazionale generale*, in *Rivista*, 2000, p. 309 ff.

possibility makes it even more necessary, in our opinion, for scholars to focus in depth on the existing legal limitations of the Security Council's function in order to help the UN membership, generally too reluctant to make its weight felt, exercise a more effective control over the Council's action.

4. What we rightly or wrongly consider the inadequacy of the scholarly reaction to the Security Council's tendency to use its peace-enforcement powers in order to dispose of States' rights seems to be due to a variety of factors. One of the most important of those is, of course, the understandable anxiety of any person of goodwill, whether layman or cleric, to see an effective United Nations even at the price of neglect of the rule of law. Account must further be taken of the natural reluctance of such persons to put into question the legality of UN actions pursuing such worthy aims as resisting aggression, protecting populations from violations of human rights or genocide, restoring the peace within or among States, curbing usurpation of power and restoring a minimum of order or democratic rule in a country: sentiments one finds difficult not to share. Two main sets of factors, however, seem to matter most from the perspective of international law and legal scholarship.

(a) The first set of factors is represented by authoritative readings of the Charter, the first and most prominent among which are the remarkably keen comments on international organization, collective security, self-defence and dispute-settlement produced by Hans Kelsen in 1945, 1946 and 1948, later incorporated in his major work on the law of the United Nations and his « Principles » of 1952 ([10]). I refer to Kelsen's well-known view that the Security Council can « make new law » by qualifying a given State conduct as a threat to, or breach of, the peace. Although generally understood as depending on the concept of Chapter VII measures as sanctions, that bold assertion is made by Kelsen also within the framework of his alternative interpretation of those measures as political measures ([11]). Of equally direct relevance to the present topic is Kelsen's theory —

([10]) *The Old and the New League: the Covenant and the Dumbarton Oaks Proposals*, in *American Journal of Int. Law*, 1945, p. 45 ff.; *Sanctions in International Law under the Charter of the United Nations*, in *Iowa Law Review*, 1945-1946, p. 499; *Collective Security and Collective Self-Defense under the Charter of the United Nations*, in *American Journal of Int. Law*, 1948, p. 783 ff.; *The Settlement of Disputes by the Security Council*, in *The International Law Quarterly*, 1948, p. 173 ff.; *The Law of the United Nations*, London, 1950; *Principles of International Law*, New York, 1952.

([11]) *The Law of the United Nations* [*supra* note 10], p. 732-737, 743-744.

closely interrelated with the idea of the Council's power to «make new law» — of a continuous, functional link between Chapters VI and VII of the Charter, namely between the Security Council's dispute-settlement and enforcement roles, that link apparently allowing for a dispute-settlement recommendation practically to be turned into a binding decision under Chapter VII. In working out the latter branch of this theory Kelsen draws upon not only the wording of the Charter but also upon his reading of the Dumbarton Oaks proposals and his understanding of some of the relevant portions of the United States Senate Foreign Relations Committee Hearings which were held in July 1945 as a preliminary to that Senate's consent to ratification of the Charter (12). A further authoritative contribution to the Council's law-making doctrine is the remarkable 1974 work by Jean Combacau on the UN's «pouvoir de sanction» (13). The latter author seems to go further than Kelsen in two ways. Firstly, he proceeds to a deeper and more thorough analysis leading, it seems to me, to a broadening — and a more refined technical definition — of the law-making powers attributed to the Council. Secondly, the latter author analyses in greater depth the theme of the functional link between Chapters VI and VII of the Charter drawing more specific textual argument, in support of such a link, from provisions of the Dumbarton Oaks proposals and the Charter. Both scholarly contributions have naturally found not only a fair number of followers, but also valuable independent support from other authors (14). One of the most recent among the latter contributions is that of Professor Weckel, who seems not to hesitate to assert that the Security Council makes law, without making it sufficiently clear (at least to the present reader) whether this is meant to be a description of a state of fact or of law (15).

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(12) *Infra*, para. 33 ff.

(13) COMBACAU, *Le pouvoir de sanction de l'ONU: étude théorique de la coercition non militaire*, Paris, 1974. Combacau's views seem to be confirmed in his contributions: *Le Chapitre VII de la Charte des Nations Unies: résurrection ou métamorphose?*, in BEN ACHOUR, LAGHMANI (eds.), *Les nouveaux aspects du droit international, Rencontres internationales de la Faculté des Sciences juridiques, politiques et sociales de Tunis, Colloque des 14-16 avril 1994*, Paris, 1994, p. 139-158; *Sanctions*, in BERNHARDT (ed.), *Encyclopedia of Public Int. Law*, vol. 9, Amsterdam, 1986, p. 337 ff.

(14) See, for example, SIMON, *Article 40*, in COT, PELLET (eds.), *La Charte des Nations Unies*[2], Paris, 1991, p. 667 ff., esp. at p. 668.

(15) WECKEL, *Le Chapitre VII de la Charte et son application par le Conseil de Sécurité*, in *Annuaire français de droit int.*, 1991, p. 165-202, at p. 166. A bold stand on the «complete» interlink between Chapters VI and VII and the broad interpretation of Articles 24 and 25 is that of HERNDL, *Reflections on the Role, Functions and Procedures of the Security Council of the United Nations*, in *Recueil des cours*, 1987,

(b) The second set of factors is represented by those generally prevailing scholarly views on Charter adaptation or modification which are based upon a particular concept of the UN Charter which seems also prevalent today. I refer to the concept of the Charter not just as an ordinary albeit particularly important multilateral treaty setting up an international institution (*scilicet*: a set of international organs — and only in that sense, of course, a constitution) but as the constitution of the international community, or organised international community, such community being understood — with (for the present writer) astonishing indifference — either as the community of States or as the legal community of mankind ([16]). It is upon such concepts of the Charter, explicitly or implicitly presented as the international equivalent — not without, of course, a variety of *mutatis mutandis* — of the public law of a modern State, that an increasing number of commentators base the extension to the Charter of such « constitutional » or « public law » interpretation, adaptation or modification methods as « implied powers », « subsequent constitutional practice » and *de facto* constitutional amendment. The result seems to be the idea that the organized community — as personified by the UN — is, like a State, an entity of « general competence » endowed with *compétence de la compétence* and able as such to perform, without any formal modification of the Charter, any new tasks or functions prompted by the community's developing exigencies.

(c) It is hardly necessary to note that the two sets of factors interact and that extensive interpretations of the Charter foster questionable adaptations — and viceversa. The outcome is a *circulus inextricabilis* discouraging any attempt to question the so-called « new international ["constitutional"!] order ». There are, indeed, in this *circulus*, some dangerous ambiguities and illusions. One of

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VI, p. 322 ff. Enthusiasm for the said interlink seems to be shown by ORREGO VICUÑA, *The Settlement of Disputes and Conflict Resolution in the Context of a Revitalized Role of the UN Security Council*, in DUPUY, R.-J. (ed.), *The Development* [*supra* note 5], p. 41-49, esp. at p. 43, 48-49.

([16]) See especially, among the numerous adherents to this view, DUPUY, P.-M., *The Constitutional Dimension of the Charter of the United Nations Revisited*, in *Max Planck Yearbook of United Nations Law*, vol. I, 1997, p. 1 ff. and the references therein; TOMUSCHAT, *L'adaptation institutionnelle des Nations Unies au Nouvel Ordre mondial*, in BEN ACHOUR, LAGHMANI (eds.), *Les nouveaux aspects* [*supra* note 13], p. 159 ff.; MCWHINNEY, *The International Court as an Emerging Constitutional Court and the Co-ordinate UN Institutions (Especially the Security Council): Implications of the Aerial Incident at Lockerbie*, in *Canadian Yearbook of Int. Law*, 1992, p. 261 ff. For a rather circumspect view on the subject see HERDEGEN, *The « Constitutionalization » of the UN Security System*, in *Vanderbilt Journal of Transnational Law*, 1994, p. 135-159. Further references under para. 49, *infra*.

them, generally unmentioned, is the idea that by reading in the Charter Security Council law-making and related powers, some scholarly authorities might have (unconsciously) set up in advance, so to speak, a sort of repository of (*Ersatz*!) *opinio juris* that could be put into use as soon as some *diuturnitas* of behaviour (or misconduct) came about for «easy-going» law reformers further to extend UN powers by *de facto* amendment. This point will be explored in Section V below [17]. This explains our choice to revisit first of all the interpretation of the relevant provisions of the Charter — an instrument originally conceived as a «rigid» one — in order at least to remind «*de facto* reformers» of where the law stood, at least in our view, in 1946.

5. Our plan of work is dictated by the two sets of factors identified in the preceding paragraph as the foundations of the doctrine of the Security Council's law-making, law-determining and law-enforcing powers.

With regard to the first set of factors, our discussion must focus on the reading of the main Charter provisions which are relevant for the above-mentioned doctrine. We shall thus leave out, together with such rules as those of Articles 29-32 (essentially procedural) also Articles 4, 5, 6 and 83, envisaging Security Council powers to affect decisively — «positively» or «negatively» — only given, *specific* States' rights or obligations under the Charter [18]. Any of the

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[17] Para. 42 ff., *infra*.

[18] Indeed, the exercise of the Council's powers set forth in Articles 4, 5, 6 and 83 presents no doubt features that one could generically ascribe to law-making, law-determining and/or law-enforcing functions. By recommending admission or readmission of a State under Article 4, the Council participates with the Assembly in a law-creating function in the sense of conferring upon a State the status of UN member with the rights and privileges attached thereto. By participating with the Assembly in the suspension of membership rights under Article 5 («an additional measure», to use Kelsen's words, «taken against a Member subjected to preventive or enforcement action»), the Council operates directly on the suspended State's rights, thus performing, so to speak, a «negative» law-making operation: but see especially FORLATI PICCHIO, *La sanzione nel diritto internazionale*, Padova, 1974, p. 248-249, 392. Furthermore, the Council performs a law-making function where, by revoking the suspension, it restores the exercise of membership rights and privileges. Equally law-making — in the sense of abrogating a given member's rights and the corresponding obligations — is the recommendation which, once integrated by the General Assembly's decision, expels a member State. The same applies, *mutatis mutandis*, to the role performed by the Security Council in the exercise, under Article 83, of all the UN trusteeship functions (otherwise performed by the General Assembly) relating to strategic areas (availing itself «without prejudice to security considerations» of the assistance of the Trusteeship Council). Here again the Security Council participa-

general powers of the Security Council to affect States' rights — the term « affect » being used here, unless qualified, in the broadest factual/legal sense — are to be determined mainly within the framework of Chapters VI and VII and Articles 24-25 of the Charter. It is with regard to these all-important provisions that a careful delimitation is still called for: firstly, between the conciliatory role attributed to the Council under Chapter VI and its enforcement role under Chapter VII; secondly, and more generally and importantly, between *peace-enforcing* under Chapter VII, on the one hand, and law-making, law-determining and law-enforcing, as governed by general international law, on the other hand ([19]).

As regards the second set of factors identified in the preceding paragraph, namely, the apparently prevailing theories of Charter adaptation by the doctrines of implied powers, subsequent practice and *de facto* amendment, we should be able to be more succint than on textual Charter analysis. The theories in question do not seem to have had, so far, a significant impact on the specific Security Council practice referred to in para. 1, *supra*.

6. The content of the following paragraphs is thus organised as follows. Section II deals with the impact (on States' rights) of the Council's role in dispute or situation settlement under Chapter VI and Article 94(2) (II.A); in peace-enforcement action under Articles 40, 41 and 42 (II.B); in Article 39 determinations (II.C); and in the « interaction » or « overlapping » between the Council's conciliatory (Chapter VI) and enforcement (Chapter VII) functions (II.D). Section III briefly revisits relevant interpretative issues of Articles 40 and 41

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tes in a law-making function in a broad sense. The Security Council's capacity to affect States' rights or obligations under para. 2 of Article 94 is considered further in para. 9, *infra*.

We are not considering (see, however, para. 46 (b), *infra*) the Security Council's competences deriving from international instruments other than the Charter. Instances of such competences are considered by HERNDL, *The « Forgotten » Competences of the Security Council*, in MOCK, SCHAMBECK (eds.), *Verantwortung in unserer Zeit. Festschrift Kirschschläger*, Wien, 1990, p. 83-91.

([19]) According to KOSKENNIEMI, if we understand correctly, the Charter would not contain « textual » restrictions of the « authority » of the Security Council (*The Police in the Temple, Order, Justice and the UN: a Dialectical View*, in *European Journal of Int. Law*, 1995, p. 325 ff.). It does not seem to us that the purposes and principles, the conditions envisaged in Article 39, the clear differences between Chapters VI and VII, not to mention para. 2 of Article 24 (and the frequently misread or simply neglected pieces of *travaux préparatoires* and pre-ratification considered in Section IV.B and C, *infra*) fail so much to provide — together with general international law — substantial legal guidance to the searching scholar or judge.

(III.A) and of Articles 24-25 (III.B). A discussion will follow of the Chapter VI and Chapter VII « functional link » theory (IV.A) with a revisitation of *travaux préparatoires*, *pré-préparatoires* and pre-ratification which are relevant to test that theory (IV.B and IV.C). Section V discusses the relevance of the implied powers, subsequent practice and *de facto* amendment doctrines. Section VI sets forth the author's — tentative — conclusions (VI.A), followed by comments (VI.B) on a few of the recent examples of questionable Security Council action. Such comments are meant to clarify those tentative conclusions.

The present writing will concern itself only incidentally with the issue of the legal control of the Security Council's decisions, except for some aspects of the ICJ's control of that legality [20]: this despite the high importance of that subject and its obvious interrelationship with the delimitation of the Security Council's power to affect States' rights.

II.A. *States' rights and the Council's dispute (or situation) settlement function under Chapter VI and Article 94(2)*

7. The Security Council's action under Chapter VI may affect States' rights through inquiry, conciliation and/or recommendation of terms of settlement, conforming to existing law or departing therefrom.

Considering, however, that within the scope of Chapter VI — except for *inquiry* under Article 34 — the Council is only empowered to recommend, any State's rights or obligations could not be decisively affected by a Council indication of terms of settlement except insofar as the parties accepted or otherwise acted on the recommendation touching upon their rights or obligations [21]. That

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[20] Paras. 19, 42 (a) and 54.

[21] According to KELSEN: « Since [...] Article [39] provides not only for enforcement measures but also authorises the Security Council, after having determined the existence of a threat to the peace or breach of the peace [...], "to make recommendations" of any kind, consequently also recommendations of the kind referred to in Article 36 or 37, this provision establishes another procedure for the settlement of disputes or adjustment of situations, provided the dispute or the situation involves a threat to the peace or breach of the peace. It will probably be applied only if the dispute or the situation involves a threat to the peace and not yet an open breach of the peace, since in the latter case only enforcement action seems to be adequate. » (*The Settlement of Disputes* [*supra* note 10], p. 210).

Our position with regard to the effects of Security Council dispute-settlement recommendations under Article 39 is set forth in connection with the hypothesis of overlapping of the Council's peace-enforcement and dispute-settlement functions

would be the case of any « primary » right voluntarily modified by the parties in compliance with a recommendation, or (in the area of the so-called « secondary » rules) of any « secondary » right to compensation or other form of reparation, as well as of the *faculté* to resort to a countermeasure: such a (« secondary ») right or *faculté* being waived, though available under the general law of international responsibility, in voluntary adherence to a Security Council recommendation.

8. Slightly more complex — although equally clear — is the case in which the Security Council's recommendation relates to the means rather than the terms of settlement of a dispute, and the parties resort to a friendly settlement procedure in adherence, for example, to a recommendation under paragraph 2 of Article 33 or under Article 36.

The impact of the Council's indirect action on States' rights and obligations could in such cases derive either from a binding third-party decision (such as by the ICJ or an arbitral tribunal) or from the acceptance of, or compliance with, a third-party recommendation involving either the determination of an existing « primary » or « secondary » legal situation, or some departure from the existing legal situation. The most important among such instances of indirect Charter impact would obviously be the case where the Security Council had recommended that the dispute be referred to the ICJ in conformity with the indication contained in paragraph 3 of Article 36.

9. Account must also be taken, with regard to the part of the Council's powers under the present heading (although outside the provisions considered so far), of that body's role under paragraph 2 of Article 94, evidently also falling within the scope of dispute-settlement.

As everybody knows, the nature and scope of the function envisaged in that (hardly applied) provision is rather controversial [22].

(Section II.D) esp. paras. 15(b) and 16 below, which refer in particular to the *Paul-Boncour Report* at the San Francisco Conference and Henri Rolin's statement embodied therein). Our position is further explained in the discussion of the Chapters VI and VII « functional link » theory (Section IV.A, B and C, including, in subsection B, a review of the relevant *travaux préparatoires* and pre-ratification). Also para. 22 is relevant.

[22] KELSEN, *The Settlement of Disputes* [*supra* note 10]; ID., *The Law of the United Nations* [*supra* note 10], p. 539-544; ROSENNE, *La mise en vigueur des décisions*

According to one position supported in some measure by the US State Department expert, Pasvolski, during the Senate Foreign Relations Committee Hearings of July 1945 (23) the Security Council, when confronted with a party's «recourse» under the said paragraph (against the party failing to perform the obligations incumbent upon it under an ICJ judgment), would be confined to the powers enumerated in Chapter VII. In particular, according to that interpretation, the Council would «call upon the country concerned to carry out the [ICJ] judgment but only if the peace of the world is threatened and if the Council has made a determination to that effect» under Article 39. Considering, however, the wording of Article 94(2) and the fact that the San Francisco records do not offer evidence in support of the above restrictive interpretation, the present writer is inclined to agree with a number of authorities according to whom Article 94(2)'s functioning is independent from the collective security system. As summed up by Oscar Schachter, Article 94(2) is intended to operate «irrespective of the relationship that the non-performance [of an ICJ judgment] may have on peace and security» (24). The same author explains persuasively: «Indeed,

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de la Cour internationale de Justice, in *Revue générale de droit int. public*, 1953, p. 532 ff., at p. 568-582; ID., *The International Court of Justice. An Essay in Political and Legal Theory*, Leyden, 1957, p. 105-107; SCHACHTER, *The Enforcement of International Judicial or Arbitral Decisions*, in *American Journal of Int. Law*, 1960, p. 17-24, at p. 21; ARANGIO-RUIZ, *Controversie internazionali*, in *Enciclopedia del diritto*, vol. X, Milano, 1962, p. 442 (para. 89); DUBISSON, *La Cour internationale de justice*, Paris, 1964, p. 274; ROSENNE, *The Law and Practice of the International Court*, vol. 1, Leyden, 1965, p. 149-154, esp. p. 151-154; FORLATI PICCHIO, *La sanzione* [*supra* note 18], p. 261-264; COMBACAU, *Le pouvoir* [*supra* note 13], p. 69-72; PILLEPICH, *Article 94*, in COT, PELLET (eds.), *La Charte* [*supra* note 14], p. 1275-1285; MOSLER, *Article 94*, in SIMMA (ed.), *The Charter of the United Nations*, Oxford, 1994, p. 1005 ff. FORLATI PICCHIO, *La sanzione* [*supra* note 18], rightly notes that Article 94(2) guarantees a special category of rules «external» to the Charter, namely, the ICJ judgments, such guarantee extending to the rules of general or conventional international law applied by the Court. On the latter point see *infra* para. 23.

(23) *Hearings Before the Committee on Foreign Relations, United States Senate, Seventy-ninth Congress, on the Charter of the United Nations for the Maintenance of International Peace and Security submitted by The President of the United States on July 2, 1945*, Washington, 1945, p. 287.

(24) SCHACHTER, *The Enforcement* [*supra* note 22], p. 21, who refers to other authorities. The same view is expressed by COMBACAU, *Le Pouvoir* [*supra* note 13], p. 69-70. A different view is expressed by REISMAN, *The Enforcement of International Judgments*, in *Proceedings of the American Society of Int. Law*, 1968, p. 13 ff., at p. 21. See also SCHACHTER, *International Law in Theory and Practice, General Course*, in *Recueil des cours*, 1982, V, p. 223 ff.

On the whole, we feel closest to the «independent» concept of the function of para. 2 of Article 94 as set forth by ROSENNE, *The Law and Practice* [*supra* note 22], p. 149-154, esp. p. 151-154. This position confirms the cited author's earlier firm

if 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 that state to claim that it may be compelled to resort to force or to other acts endangering international peace — a consequence which was almost surely not intended and which cannot be considered as desirable» (25).

Naturally, under Chapter VI the Council can take up the dispute between the party refusing and the party claiming compliance with the ICJ's judgment as a *legal* or a *political* dispute, according to the nature of the parties' arguments. It may thus proceed, under Chapter VI, to recommendations of terms or means of settlement of that dispute. It may either recommend that the resisting party comply, or recommend some different solution, the former recommendation adding only hortative force to the Court's Statute and Article 94(1). Failing agreement between the parties on the basis of the Council's recommendations, the Council is, in our view, empowered to impose compliance with the ICJ judgment on the resisting party by appropriate Chapter VII measures. It is questionable whether the use of force would be subject to a determination on the basis of Article 39 (26). By enforcing, if necessary by measures, compliance with an ICJ judgment, the Council performs an obligation-enforcement action comparable to those envisaged in Articles 5, 6 and 102(2). It applies what we consider a sanction in the proper sense (27).

We are unable to share Kelsen's view that the Security Council would be empowered to enforce under Chapter VII a solution of the dispute departing from the Court's decision (28).

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stand on the respect by the Council of the ICJ's judgment (*The International Court of Justice* [*supra* note 22], p. 105-107).

(25) SCHACHTER, *The Enforcement* [*supra* note 22], p. 20.

(26) MOSLER, *Article 94* [*supra* note 22], p. 1006.

(27) FORLATI PICCHIO, *La sanzione* [*supra* note 18], p. 256 ff.

(28) *Controversie internazionali* [*supra* note 22], p. 442 (para. 89). According to KELSEN the Security Council would be authorized, under Article 94(2), not only to make « any recommendation whatever » including a « solution of the dispute totally different from that decided by the Court [a point that we share] » but also to impose it by considering non-compliance with its recommendation under 94(2) a threat to the peace, « thus enforc[ing] its recommendation instead of enforcing the Court's decision » (*The Settlement of Disputes* [*supra* note 10]). Kelsen admits, though (*The Law of the United Nations* [*supra* note 10], p. 540, last part of note 7 of p. 539), that that might not have been the intention of the drafters of the Article (a different intention, however, having been not « satisfactorily expressed »). We doubt both the « grammatical » reason alluded at by Kelsen and the probative value of the relevant passage of the cited US Senate Foreign Relations Committee *Hearings* of July 1945. That passage is a rather unclear piece of that otherwise lucid document

10. On the whole — and even in the case where it leads to an ICJ judgment, the binding force of which derives not from the Council's recommendation (another matter being the 94(2) procedure) — the Security Council's exercise of the so-called quasi-judicial function (under Chapter VI) does not bring about *per se* any determination or modification of the rights or obligations of the States involved in the relevant dispute or situation ([29]). As noted above, the possibility of a decisive legal impact on such rights or obligations will only materialize if, following a (non-binding) Council recommendation, the parties resort to arbitration or judicial settlement and ultimately face a binding award or judgment, or, for that matter, adhere to a Council recommendation to negotiate and attain what Morelli calls a « resolutive agreement ». Clearly, the Council's impact is, in such a case, both merely hortative and indirect.

One must conclude that the Council's dispute-settlement function can only bring about, as a rule, a factual weakening or strengthening, according to the case, of the legal, political or other claims or defences of either party in the relevant legal or political dispute or situation. The only exception seems to be the Article 94(2) hypothesis. Another matter is of course that more general political fallout of the Council's conciliatory action and possible recommendations: with which — despite its importance from different viewpoints — the present work is not directly concerned ([30]).

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to be considered in Section IV.B (ii), para. 33 ff., *infra*. The Council procedure under Article 94(2) essentially falls within the framework of Chapter VI of the Charter (dispute-settlement). It follows that any party to the dispute is obliged to abstain from voting under Article 27(3). *Contra* KELSEN, *The Law of the United Nations* [*supra* note 10], p. 541. Rather inconsistent seems to be PILLEPICH's position that although « [r]ien n'indique que les "recommandations ou ... mesures à prendre" doivent être fondées sur le chapitre VII relatif aux cas de menace contre la paix, rupture de la paix et acte d'agression » — a consideration that seems to imply the applicability of Chapter VI — the permanent members' veto would nonetheless apply in their favour « même s'ils sont impliqués dans l'affaire » (*Article 94* [*supra* note 22], p. 1282, para. 17). The same author thinks that « l'aspect facultatif du paragraphe 2 » (citing *U.N.C.I.O.*, vol. 11, p. 401-403; vol. 13, p. 461; vol. 19, p. 102-103) « semble » to have originated from the fact that while some delegations thought that non-compliance with a judgment of the ICJ would be a threat to security, « d'autres délégations, comme celles des Etats-Unis et de l'URSS, craignaient au contraire de voir attribuer au Conseil de Sécurité des pouvoirs dépassant le cadre du maintien de la paix et de la sécurité » (*ibid.*, p. 1280, para. 11).

([29]) HIGGINS, *The Place of International Law in the Settlement of Disputes by the Security Council*, in *American Journal of Int. Law*, 1970, p. 1 ff.; BOWETT, *The Impact of Security Council Decisions on Dispute-settlement Procedures*, in *European Journal of Int. Law*, 1994, p. 89 ff.

([30]) The non-binding nature of the Council's Chapter VI recommendations was unambiguously affirmed by a number of delegates during the discussion of the

II.B. *States' rights and the Council's peace-enforcement measures under Chapter VII*

11. Coming now to the impact upon States' rights of the Council's recommendation of, or decision on, enforcement measures under Articles 40, 41 or 42, it goes without saying that those measures inevitably affect to some extent — in the comprehensive sense in which the term « affect » is in principle being used in the present writing — such rights or obligations ([31]).

Examples are mainly the States' rights relating to international economic relations, to the use of rail, sea, air, postal, telegraphic, radio, and other means of international communication or to diplomatic relations. Any such rights — of the target State or States and, of course, of the implementing States themselves — would be rightly affected to some degree by the relevant Article 41 measures, such as complete or partial interruption of trade relations, freezing of assets in foreign States, general or specific embargoes (such as arms embargoes), breaking-off of diplomatic relations, or interruption of land, air and/or sea and/or postal, telegraphic and radio communications.

Equally obvious examples could be envisaged for Article 42 measures directly or indirectly - but in either case, hopefully, legitimately - deployed by the Security Council. Any « action by air, sea or land forces » by the UN or any « demonstrations, blockade, and

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well-known Belgian amendment considered in para. 19, *infra*. In the recent literature the non-binding nature of Chapter VI recommendations is clearly confirmed by KRÖKEL, *Die Bindungswirkung von Resolutionen der Sicherheitsrates der Vereinten Nationen gegenüber Mitgliedstaaten*, Berlin, 1976, p. 66, and by TOMUSCHAT, SCHWEINFURTH, STEINRICHTER, *Articles 33-38*, in SIMMA (ed.), *The Charter* [*supra* note 22], p. 505 ff.). The same concept is indirectly asserted by FROWEIN, where he excludes that the « decisions » referred to in Article 41 are anything but the Council's « decision to maintain or restore peace » (*Article 41*, in SIMMA (ed.). *The Charter* [*supra* note 22], p. 624). On the latter point see para. 23, *infra*.

An unusual description of the Charter dispute-settlement system (particularly of the Security Council's powers in that respect) is contained in the following passage: « Third, the Charter provides a procedure for addressing disputes that *cannot be resolved by peaceful settlement*. They are to be submitted *for decision to the Security Council if the continuance of the dispute constitutes a 'threat to the peace, breach of the peace or act of aggression' (Art. 39)* » (FRANCK, *The United Nations As Guarantor of International Peace and Security*, in TOMUSCHAT (ed.), *The United Nations at Fifty - A Legal Perspective*, Dordrecht, 1995, p. 25 ff., at p. 27 [emphasis added]). At the same page the author speaks of a « mandatory conflict-resolution » régime which might also imply dispute-settlement by binding decisions.

([31]) On the impact (on States' rights) of the Council's determinations of Article 39 enforcement action conditions, see *infra* para. 13 ff.

other operations by air, sea or land forces of Members of the United Nations» would inevitably and lawfully affect to some degree the target State's independence, territorial sovereignty and/or domestic jurisdiction: by impeding governmental functions or interfering therewith; by causing the target State's organs to be controlled or superseded by foreign or international organs; by the military occupation of part or all of its territory; by subjecting the population to military government; and by the subjection of members of the adverse armed forces to prosecution before military tribunals; etc.

Military measures would presumably trigger a state of war between the target State and the participating «active» States and/or, possibly, the UN itself, as well as the entry into force of the law of neutrality as amongst the non-participating «third» States, on the one hand, and the belligerent States, on the other hand.

We shall deal with the impact of provisional measures under Article 40 further on (32).

Chapter VII measures could also jeopardise to some degree rights or obligations other than the so-called «primary» rights or obligations implicitly referred to so far. They could notably have an impact on the operation of the so-called «secondary» rules relating to State responsibility (33). Chapter VII measures could affect, for example, the operation of the rules of the law of State responsibility relating to the right or *faculté* of an injured State to resort to countermeasures against the author of an internationally unlawful act. A decision under Article 41 calling on an injured State to implement given economic measures could make some countermeasures mandatory for that State which would otherwise be at liberty not to avail itself of such a *faculté*. A peace-enforcement measure under Article 41 could also make given countermeasures lawful or even mandatory for third, non-injured States, or could temporarily relieve a wrongdoing State from the obligation to make reparation by imposing on it the adoption of a more or less incompatible measure. Measures under Article 42 might equally have some impact on States' «secondary» rights.

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(32) Para. 21, *infra*.

(33) We use the obviously relative distinction — resorted to for practical purposes by the ILC in its work on State responsibility — between the «primary» rules setting forth international obligations, on the one hand, and the «secondary» rules envisaging the obligations (and rights) arising from the infringement thereof, on the other hand. Reservations on the distinction were expressed by the present writer during the ILC's thirty-seventh session (*Yearbook of the Int. Law Commission*, 1985, vol. I, p. 149, para. 12).

It seems clear, therefore, that enforcement measures under Articles 40, 41 or 42 can affect a host of possibly vital States' rights and the corresponding obligations by imposing incompatible behaviours, the involved parties being either the target State, or the State or States called upon to apply the measures, or both. It seems equally clear that in the above-mentioned cases States' rights or obligations would be affected far more seriously than they are by the Council's conciliatory action under Chapter VI. The binding nature of the Security Council's decisions under Chapter VII would, in the considered cases, bring about a suspension of rights or obligations when the exercise of these rights or compliance with these obligations would be incompatible with the applied measures. Insofar as this was the meaning of Kelsen's and other authorities' theory of a Security Council power to make, determine or enforce the law in a specific case, one could agree with that view (34).

12. It must immediately be stressed, however, that although the Security Council's enforcement action may legitimately affect States' rights as decisively as noted in the preceding paragraph, the Council has no power: (i) to override States' rights other than those the overriding of which is inevitably instrumental to the enforcement of international peace and security; or, (ii), to threaten enforcement measures in order to impose upon a State a conduct which is not genuinely instrumental to that same end. A good hypothetical example has been recently offered by Franck (35).

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(34) Para. 47 (a) and note 161, *infra*.

(35) During the debate on FRANCK's piece entitled *The Security Council and «Threats to the Peace»: Some Remarks on Remarkable Developments*, in DUPUY, R.-J. (ed.), *The Development* [*supra* note 5], p. 83-110, at p. 137, the former author made the following statement: «M. Delon a donné le point de vue du practicien sur le fondement des résolutions du Conseil de sécurité. Mais le théoricien ne peut admettre que celui-ci dépasse les limites de la légalité d'après la Charte. Par exemple, si certains Etats prennent l'initiative au Conseil d'un projet de résolution comportant des mesures coercitives du chapitre VII contre le Gouvernement cubain invité à instaurer un régime démocratique à Cuba, sous peine de sanctions. Dans un tel cas, il faudrait que le Secrétaire général, chargé de faire la démarche préalable auprès du Gouvernement cubain, puisse dire au Conseil de demander un avis consultatif à la Cour internationale de Justice sur la légalité du projet de résolution, ce qui permettrait de sauvegarder l'intégrité du système prévu par la Charte».

Be it as it may of the remedy to save the integrity of the Charter, the cited author seems to us to take a questionable stand in his Hague Academy course, where, if we understand him correctly, he subjects the exercise of Security Council's powers to scrutiny under Article 2(7) — of the inapplicability of which to enforcement action he is well aware — instead of scrutiny under what the present writer rightly or wrongly considers to be the really essential *functional limit* of the Security Council's compe-

Means to maintain or restore the peace under Chapter VII must consist, however broad may be the Council's discretion in choosing among them, of measures directed against threats to the peace, breaches of the peace or acts of aggression. They must be *bona fide* intended to put an end to one or the other of such situations. They cannot consist either in the imposition upon a State of new obligations (and the granting of the corresponding rights to another State), or in a binding determination of existing obligations or rights, or else in the enforcement of any such existing or new obligations or rights, except insofar as such occurrences are the inevitable effect of genuine peace-enforcement measures taken to face the said Article 39 situations or acts. Under Chapter VII the Security Council has no function or power to impose as a peace-enforcement measure the alteration, the revocation, or the suspension of States' rights or obligations the affectation of which is not an inevitable consequence of the implementation of a genuine peace-enforcement measure: namely, of a measure intended to avert or put an end to a threat to the peace, breach of the peace or act of aggression ([36]).

In other words, while it is in the obvious logic of peace-enforcement action that States' rights and obligations be restricted, suspended, or otherwise affected — in the sense explained — by the inevitable impact of Chapter VII measures, it is not admissible that any alterations of States' rights or obligations be used as a substitute for such measures. It is precisely not within the powers vested in the Security Council to substitute the creation, modification, adjudication or enforcement of States' rights or obligations for peace-enforcement measures. For the Council to tamper in any such ways with States' rights or obligations would be precisely for it to turn the peace-enforcement function expressly contemplated in Chapter VII

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tence (= *peace* and not *law* enforcement). The latter limit obviously precedes, in theory and practice, any consideration of the limit set forth in para. 7 of Article 2. The basic question is whether the Council *has* any law-enforcement powers, and possibly what powers; not whether the matters with regard to which those powers would or could (allegedly) be exercised fall in the reserved domain of Article 2(7) (FRANCK, *Fairness in the International Legal and Institutional System, General Course on Public International Law*, in *Recueil des cours*, 1993, III, p. 189 ff.). The cited view of the limits of the Council's power is presumably based upon the idea that the Charter's provisions on collective security are « a new instrument of international conflict resolution » (*ibid.*, p. 189).

([36]) For a different view, if we understand correctly, see WECKEL, *Le Chapitre VII* [*supra* note 15], esp. p. 66-181. According to that author: « La dissociation entre la fonction d'application du droit et l'activité de maintien de l'ordre public international semble difficilement acceptable » (p. 171).

into legislative, judicial or law-enforcing powers. More than just not attributed by the Charter, such powers are *expressly* denied to the UN — Security Council included — by a number of provisions in Chapter VI and other Articles vesting UN organs with mere recommendation powers. To take the described course would be, for the Council, nothing less than a blatant *détournement de pouvoir* that no *belle cause de l' humanité* could justify as a matter of law (37).

Even less could the Security Council be justified in enacting, as a substitute for enforcement measures or as a complement thereof, binding rules, whether of an abstract or concrete nature. According to Zemanek:

> « The word "measures" used in Articles 39, 41 and 42 of the Charter does, in spite of the Security Council's discretionary power, not suggest that it may *generate rules of general international law by decision*. The ordinary meaning of the word in the context of the articles indicates a specific action intended to achieve a concrete effect and, thus, a temporary, case-related reaction to one of the situations referred to in Article 39; it does not include the *abstract prescription* of *future rules of general conduct for an indefinite period of time*. This interpretation is corroborated by the type of measures mentioned in Articles 41 and 42. And in its Advisory Opinion on *Certain Expenses* the ICJ specifically pointed out that measures under Article 42 were *enforcement measures against a State* ... Until the 1980's the few decisions of the Security Council under Chapter VII were indeed of this nature, consisting mostly of economic embargoes against Southern Rhodesia and South Africa. In the context of its measures against Iraq, however, the Security Council began to show a certain tendency towards *general law-making* and that tendency increased with its measures against the Former Yugoslavia and against Rwanda, culminating in the establishment of international criminal tribunals » (38).

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(37) Although some readers of Kelsen's works on the Council's powers seem to think that Kelsen's theory is based exclusively on his concept of Chapter VII measures as sanctions, Kelsen actually bases his theory also upon that generally less-studied kelsenian interpretation of those measures as political measures. Under the former interpretation the Council would be legitimized to create new obligations (or rights) for member States by sanctioning given acts or omissions as materializations of one or the other of the three cases (but mainly the « threat to the peace ») contemplated in Article 39 even when such acts or omissions are not identifiable as infringements of an existing obligation such as that covered by Article 2(4) (or by Article 2(3)) of the Charter. Under the « political measures » alternative — presented by Kelsen as an equally valid interpretation ever since his earliest commentaries on the UN security system — the Council's legislative and judicial powers would flow (even more plausibly, one would be inclined to believe) from the assimilation of Chapter VII enforcement measures to the law-creating acts of a constituent or legislative organ within a national legal system. See esp. *The Law of the United Nations* [*supra* note 10], p. 293 ff. and 724-739.

(38) ZEMANEK, *Is the Security Council the Judge of Its Own Legality?*, in YAPKO,

While sharing our Colleague's justified preoccupation, our concern goes far beyond the problem of general, abstract rules, or rules of general conduct for an indefinite period of time, such as those apparently referred to by Abi-Saab and others in the course of the Rennes Colloque of *Société française* ([39]). The point we are stressing here is that the Security Council is not empowered to dispose even of a single State right or obligation (even by a specific decision in a particular case) except to the extent to which the overriding of any such right or obligation is genuinely instrumental to meet the relevant Article 39 condition.

It is just another aspect of the limit under discussion that when enforcement measures have proved to be successful, they should cease. A State should not become a permanent hostage of the Security Council or, worse, of given Powers. Once *debellatio* of an aggressor has been achieved, for example, the former aggressor must be reintegrated in the so-called community, if necessary under severe conditions in order to guarantee non-repetition, such conditions to be governed by the applicable rules on State responsibility; it is not to be reduced to a protectorate or a vassal State. Were it to be otherwise, the most fundamental States' rights — starting with territorial sovereignty and independence — would be illegitimately affected.

Considering, however, the object of the present writing we do not concern ourselves here directly, either with the (surely not unlimited) extent to which the range of Article 41 measures can be stretched, or with the various specific limitations of «the range of binding measures available to the Security Council» under Article 41 or 42 (*jus cogens*, *jus in bello*, preservation of the components and attributes of statehood, etc.) ([40]).

II.C. *States' rights in the Council's determinations under Article 39*

13. Of course, States' rights and obligations can also come into question before the Council — as in numerous cases they have come

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BOUMEDRA (eds.), *Liber Amicorum Mohammed Bedjaoui*, The Hague, 1999, p. 629-645, at p. 636-637 [italics added].

([39]) *Société française pour le droit international, Le Chapitre VII de la Charte des Nations Unies, Colloque de Rennes*, Paris, 1995, esp. p. 304-307. It is the idea of «dire le droit», appearing repeatedly in the report on that *Colloque* that the present writer finds it difficult to accept. See especially the following Section.

([40]) On the latter limitations see, for example, HERDEGEN, *The "Constitutionalization"* [note 16 *supra*], p. 155-157.

so far (41) — at the time of determining the conditions of enforcement action spelled out in Article 39. The Council may well be led, in making that determination, to find and declare that a threat to, or breach of, the peace coincides with or is due, totally or in part, to an internationally unlawful act — under the Charter, or under any other treaty or customary rule — attributable to one or more States and infringing a right of one or more other States.

Considering that they are embodied in binding Security Council resolutions under Chapter VII, one might think, *prima facie*, that the findings in question acquire the same binding force as the determination of the existence of a threat to, or breach of, the peace. One must consider, on the other hand, that the Council's function under Article 39 is to determine the existence of one or more of the Article 39 cases for the purpose of triggering the exercise of its power to take enforcement action, namely to enforce the peace. No provision can be found in the Charter indicating that such a peace-enforcement power includes any competence to determine, declare or enforce international rights or obligations, or, for that matter, any competence to apply sanctions, except in cases considered in para. 5, *supra,* for unlawful behaviour (42). Any findings of such a nature embodied in a Security Council resolution and relating to the existence of an internationally unlawful act, or the consequences thereof, remain in our view, whatever the factual, logical or political connection possibly existing or established by the deciding body between the findings themselves and the existence of the relevant Article 39 case, outside the scope of the Security Council's competence.

14. Failing any attribution to the Council of a law-determining, law-enforcing (and law-making) function, attempts are made, however, to legitimize such a function by finding it implicit in the nature of the Chapter VII measures and/or in the consequences that may happen to be attached to them. Kelsen thus maintains that « [if the Charter which provides] for enforcement measures is to be interpreted as being *in conformity with general international law* [namely, with the concept of "reprisals [measures] as permissible

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(41) COMBACAU, *Le pouvoir* [*supra* note 13], esp. p. 104-106; *Sanctions* [*supra* note 13], p. 339; LATTANZI, *Sanzioni internazionali*, in *Enciclopedia del diritto*, vol. XLI, Milano, 1989, p. 536 ff.; WECKEL, *Le Chapitre VII* [*supra* note 15], p. 169.

(42) Compare GAJA, *Réflexions* [*supra* note 5], p. 315; and HERDEGEN, *The «Constitutionalization»* [*supra* note 16], p. 155.

only as reactions against delicts"], the conduct which constitutes the condition of an enforcement measure [under the Charter] *must be considered to be a delict* and the contrary conduct *the content of an obligation*, even if it is not expressly stipulated as an obligation » (43).

Hence — according to Kelsen — the Council's power to make law for the specific case. It is similarly maintained by Combacau that « according to customary international law... reprisals are always represented by States resorting to them as acts which are by themselves unlawful but which, in so far as they reply to a prior unlawful act, become legitimate. If a sanction seems to correspond to conduct which the treaty creating it does not characterize as unlawful, in practice this necessary condition is always restored. Thus, Chapter VII of the Charter envisages the application of Arts. 41 and 42, *inter alia*, against a State whose conduct ("threat to the peace", and not only "breach of the peace or act of aggression", Art. 39) is not explicitly said to be unlawful by the Charter; but every time a UN organ has used measures of this type, it has taken the precaution of an *a priori* characterization of the act against which it was reacting as a violation of international law » (44).

In the light of our understanding of the relationship between the Security Council's peace-enforcement functions and its alleged law-making, law-determining and law-enforcing powers, the important above-mentioned scholarly comments call, in our view, for the following *mises au point*.

(i) The answer to Kelsen's proposition is that it is nowhere demonstrated that the Charter conforms to general international law, or should necessarily conform to it, so that Chapter VII measures would have to be viewed as reprisals or, in the current language, as countermeasures. On the contrary, it is perfectly conceivable that the Charter derogates from general international law with regard to the nature of Chapter VII measures as well as with regard to a number of other matters. It is therefore quite admissible to recognize those measures as police measures *vis-à-vis* a State, a people or a group, without necessarily assuming that the entity in question — which may even lack international personality — has been legally found by the Security Council to have committed an international delict.

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(43) KELSEN, *The Law of the United Nations* [*supra* note 10], p. 709 [emphasis added].

(44) *Sanctions* [*supra* note 10], p. 339.

(ii) To the similar position taken by Combacau one should reply — in addition — that the fact that the Security Council takes « the precaution », at the moment of deciding enforcement measures, « of an *a priori* characterization of the act against which it [is] reacting as a violation of international law » does not demonstrate that such a characterization consists in the application of a sanction in a proper sense and not just in a police (peace-preserving or restoring) measure (45).

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(45) It is similarly held by Lattanzi that: « If it is true that such [Article 41] measures may be adopted, under Article 39, also in case of a threat to the peace situation which does not constitute an internationally unlawful act, it is also true that the tenor of Article 39 leaves no room for the possibility of measures against an innocent State ... The total or partial interruption of relations *et similia* are typical inter-State sanctioning measures conceived just as a consequence of a wrongful act and not, for instance, for police purposes » (LATTANZI, *Sanzioni internazionali* [*supra* note 41], p. 564) [translated from Italian].

As regards Lattanzi's argument, apart from the usual assumption that Charter enforcement should be seen as an extension to the Security Council of the régime of inter-State reprisals or countermeasures under general international law, one fails to see the relevance of the analogy between the measures generally used as reprisals (or countermeasures) and the measures envisaged in Article 41 (or, for that matter, Article 42). Considering the difficulty of conceiving that a State could be subjected to police measures like arrest, house arrest, imprisonment *et similia*, one does not see why the measures envisaged in Article 41 or Article 42 could not be characterized as police measures to enforce peace simply because they resemble to inter-State countermeasures.

GOWLLAND-DEBBAS, for her part, seems to bring fuel to the above arguments where, in discussing the relationship between ICJ and Security Council in relation to the *Lockerbie* case: *The Relationship between the International Court of Justice and the Security Council in the Light of the Lockerbie Case*, in *American Journal of Int. Law*, 1994, p. 643 ff., at p. 659-660, she rightly points out that: « much of the recent practice of the Security Council regarding enforcement action has been closely related to issues of state responsibility [citing here her previous work: GOWLLAND-DEBBAS, *Security Council Enforcement Action* [*supra* note 5], p. 74-90]. In the majority of cases in which it has acted under the mandatory provisions of Chapter VII, the Council has clearly not limited itself to a prior determination under Article 39 that there has been a threat to, or a breach of, the peace, but has linked this determination to a finding that a state (or non-state...) has breached a fundamental international obligation [citing here from her above-mentioned work p. 63-68]. Such determinations have had definitive legal effect, as well as extensive legal consequences » [citing here again her same work, p. 74-90].

Regarding the practice analysed by Gowlland-Debbas, we submit that a part of that practice, namely that which is covered by the cited author's *Security Council Enforcement Action*, p. 84-90 (relating to the « relationship between the UN and implementing States ») does not seem to us to exceed the Council's powers. It consists precisely of the decisions that the Council is fully empowered to take, with binding effect for the implementing States (as well as the target State), in the exercise of its Chapter VII peace-enforcement action. A problem does exist instead with regard to the practice considered by the cited author at p. 74-83 of the same work (« relationship between the UN and the violating [namely, "target"] State »). The « consequences » referred to by the cited author in those pages are in our view to be ascribed, however,

We are thus inclined to believe that, despite their presence in binding Chapter VII resolutions, no Council pronouncements on the legal merits of any «primary» or «secondary» State rights or obligations acquire *per se* — on their own strength — any binding force as law-making, law-determining or law-enforcement acts. They can only be taken into account, by States, by the General Assembly or by other UN organs, as part of the practice of the Council, of the Council's members, or of the other UN member States, their ultimate juridical evaluation remaining, in principle, a prerogative of States as constituents of the international legal system. In his general course Schachter speaks of *censure* or *condemnation* as being «characteristically the sanctions most readily available to political organs» ([46]). We would find those terms not inappropriate, provided they were not to be understood as final or otherwise decisive juridical pronouncements or sanctions in a proper sense ([47]). More on the subject will be said under para. 46.

Indeed, the Council's pronouncements in question are understandable as moral, political and/or practical justifications of the de-

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not to the Security Council's decisions and actions *per se*, as the Council has no power to impose them either by way of law-making or by way of law-determining or law-enforcing. They occur, either as a consequence of voluntary adherence by given injured States (at their risk), by way of countermeasures, to the Council's censure and/or initiative, or on the strength of rules of general or conventional international law (Charter included) as applicable to the factual situation created by the decision and implementation of the Security Council's peace-enforcement measures; or, simply, as a consequence of mere abuse, on the part of given States, of Council's pronouncements which are not necessarily justified under international law. In any case, the consequences in question should not be considered, from the viewpoint of international law, as direct legal effects of the Council's pronouncements on States' rights *other* than those instrumentally affected, as explained in the preceding paragraphs, by (genuine) peace-enforcement measures. And there may well be cases where one is simply in the presence of unlawful situations which are made good neither by the Security Council's *ultra vires* findings, nor, obviously, by scholarly ingenuity. In addition to those listed by Gowland-Debbas in the cited work, an example could be the aftermath of resolution 688 (1991) as described by GAJA, *Réflexions* [*supra* note 5], p. 314.

([46]) SCHACHTER, *International Law* [*supra* note 24], p. 229-230.

([47]) As noted by BOWETT, *Crimes of State and the 1996 Report of the International Law Commission on State Responsibility*, in *European Journal of Int. Law*, 1998, p. 163 ff., at p. 166, note 8: «It is true that, in the exercise of its powers under Chapter VII, the Security Council may appear to make an initial determination of responsibility, for example where it determines that a state has breached international peace and security. But this does not mean that the Council therefore has judicial powers. To take a domestic law analogy, a police officer may intervene in a street brawl and arrest A rather than B for a breach of the peace. But no one assumes that the police officer has judicial powers. Those rest with the criminal courts which may, in due course, find the accused not guilty.»

termination made by the Council with regard to the relevant Article 39 condition. But it would not be in conformity with the Charter, in our view, to draw from such occurrences — the most impressive of which have been some of the decisions taken in connection with the Yugoslav crisis, the Persian Gulf crisis and in the *Lockerbie* case [48] — the daring conclusion drawn by Professor Weckel (at least from the Gulf crisis) that « [l]a fonction du Conseil de Sécurité s'élargit considérablement, parce-que ce qui paraissait jusqu'à présent la circonscrire — l'opposition entre la sécurité et la légalité — s'est effacée. Cet organe dit le droit, fait le droit, impose le droit » [49].

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[48] Section VI.B, *infra*.

[49] WECKEL, *Le Chapitre VII* [*supra* note 15], p. 166.

The dissociation between the law-determining function and the maintenance of international public order [*scilicet*, what we call peace-enforcement] seems thus to Weckel « difficilement acceptable » (p. 171): and this because, if we understand correctly, although a « threat to the peace » does not always find its origin in an unlawful behaviour, « tous les systèmes juridiques ménagent une place à l'action de police dans la répression des atteintes à l'ordre public. Notamment, les sanctions administratives ne sont pas rares dans les ordres nationaux » (*ibid.*).

Apart from the fact that the Security Council's illegitimate overriding of a State's rights (as in the cases considered under Section VI.B) is hardly comparable to mere « sanctions administratives », it is of course quite true that what the cited author calls « l'opposition entre la sécurité et la légalité » — a rather odd dichotomy between a fact and the law, for which we would substitute the distinction between legitimate peace-enforcing, on the one hand, and *ultra vires* (= illegitimate) « law-making », « law-determining » and « law-enforcing », on the other hand — appears to be increasingly blurred.

If the distinction is blurred, however, it is not so much because of the difficulty of seeing the essential difference. Apart from the most obvious political motivations or implications of the Council's (especially its permanent members') conduct — with regard to which the lawyer should not feel exempted from his job of analysing critically — two sets of factors lie at the root of the blurring.

One set of factors are the obscurity surrounding the Security Council's activity (most of which is simply inaccessible to the scholar), the too predominantly political outlook of the individuals involved in that activity (including, together with government representatives and experts, the UN legal counsel's office itself), the frequent lack of explicit or implied legal justification for the action deployed and the lack of clarity, if not wilful ambiguity, of the language of many among the Council's resolutions, etc. For a substantial list of such factors, see KOSKENNIEMI, *The Place of Law in Collectice Security*, in *Michigan Journal of Int. Law*, 1995-1996, p. 455 ff., at p. 485-488, who points to five sets of problems affecting the justifiability of the Security Council's « practical approach to its task » or « the Council's handling of particular problems »: secrecy, lack of procedural safeguards, lack of accountability, lack of « commitment » (by the Council) « to the policies it has chosen » and scarce (if any) « representativeness of the Council as reflected in its composition »).

Another set of factors are the very scholarly attitudes of which Weckel himself (and plenty of other contemporary commentators) offer examples, together with the well-known less recent doctrinal authorities, the main among which are indicated in para. 4 *supra* and discussed throughout the present paper. Be that as it may regarding such causes of confusion, the distinction is there for every one working hard enough

II.D. *States' rights in the overlapping of the Council's peace-enforcement and dispute (or situation) settlement functions*

15. The most important specification of the cases considered in sub-sections II.B and II.C *supra* — namely, of Security Council pronouncements on States' rights occasioned by that body's decisions (or recommendations) relating either to enforcement measures or to the existence of an Article 39 condition — are those where the Council's conciliatory and enforcement functions overlap or otherwise coexist in the same situation. We refer to the cases in which enforcement action is taken concerning a dispute or litigious situation with regard to which the Council has been performing, is still performing or might be led to perform at any stage the conciliatory function governed by Chapter VI, or, for that matter, its function under Article 94(2).

(a) Although such a phenomenon may even occur at a more advanced stage of Security Council action under Chapter VII, namely involving measures under Article 41 or Article 42, it is more likely to occur — and the practice shows that it does occur — in those early stages that are covered by recommendations under Article 39 or calls under Article 40 for provisional measures. Considering that a formal or informal determination under Article 39 may well follow some exercise of Chapter VI dispute-settlement action and that such an action may well recommend itself further on with regard to the same dispute or to a supervening or not yet considered dispute, the occurrence seems likely to be a not infrequent one ([50]).

It is in such cases that Council action is more likely to have an impact on existing legal relationships between States, by pronouncements with regard thereto: and it is in view of what occurs or may

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to see it: and it can be traced even when it is made less easy to perceive, either by the (inevitable) overlapping of peace-enforcement issues with issues of State responsibility, or, more precisely, by the possible concomitance (to be considered in the next Section), of the Council's conciliatory and enforcement functions.

([50]) While explicitly dealing with «settlement under Article 39» (*The Law of the United Nations* [*supra* note 22], p. 437 ff.), Kelsen implicitly recognizes — judging also from the practice he considers — the presence of the same phenomenon when he deals (*ibid.*, p. 739 ff.) with provisional measures under Article 40. But see, *inter alios*: on Article 40, FABBRI (*Le misure provvisorie nel sistema di sicurezza delle Nazioni Unite*, in *Rivista*, 1964, p. 186 ff.) and SIMON (*Article 40* [*supra* note 14], esp. p. 671-676, 683-685), both authors referring to substantial practice; on Articles 39 and 40, CONFORTI, *Le Nazioni Unite*, Padova, 1996, p. 181 ff.; FROWEIN, *Article 39* and *Article 40*, in SIMMA (ed.), *The Charter* [*supra* note 22], esp. p. 614 and p. 618-619, respectively.

occur in that area that a number of scholars are inclined to read in the Charter — or in real or alleged Charter applications, adaptations or amendments — a « logical », or « functional », « link » or « nexus » between Chapters VI and VII. It is presumably with regard to the same area that at least one author speaks — by an imaginative term we find ambiguous — of *téléscopage* (51) between the functions governed by the two Chapters.

In commenting on the phenomenon in question, scholars seem generally not to take adequate account of the distinction between the Security Council's functions under Chapter VI and those under Chapter VII. The prevailing opinion seems indeed to be that the conciliatory action under Chapter VI gets so absorbed, so to speak, into the mechanism of the Chapter VII (peace-) enforcement action that it becomes completely subject to that Chapter's régime from the viewpoint of both the binding nature of the Council's decisions and the application of para. 3 of Article 27. We wonder whether this is not the sense in which the above-mentioned *téléscopage* image is being used.

Although the overlapping case is not explicitly considered in either Article 39 or Article 40, this prevailing opinion seems to be contradicted, in our view, not only by the titles and the contents of Chapters VI and VII, but also — rather emphatically — by *travaux préparatoires*, such *travaux* to be confirmed by other documents considered further on (52).

(b) As regards the San Francisco Conference, both Articles 39 and 40 (as well as the whole of Chapter VII) were the object of an important report by Paul-Boncour (rapporteur in Committe III/3), embodying an even more important statement by the Belgian delegate Henri Rolin, the latter statement being, to our knowledge, mostly ignored. After explaining the rejection of amendments aimed at introducing definitions of the peace-enforcement conditions which were to be covered by Article 39, Rapporteur Paul-Boncour commented on the Chinese proposal which, while suppressing the so-called « transition » para. 1 of Section B of Chapter VIII of the Dumbarton Oaks proposals (53), introduced, just after the provision

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(51) On « telescoping », see SUR, *Sécurité collective et rétablissement de la paix: la résolution 687 (3 avril, 1991) dans l'Affaire du Golfe*, in DUPUY, R.-J. (ed.), *The Development* [*supra* note 5], p. 19.

(52) We refer to para. 19, *infra*, and subsections (i) and (ii) of Section IV.B (para. 29 ff.).

(53) A point discussed in para. 31, *infra*.

that was to become Article 39 of the Charter (and prior to the provisions that were to become Articles 41 and 42), a paragraph on «conservative measures» which was to become Article 40 of the Charter. Considering, though, that both the two first paragraphs of Section B of Chapter VIII of the Dumbarton Oaks proposals and the Charter provisious worked out in the Committee, used terms (such as «recommendation» and «measure») which might cause misunderstanding, Rolin «a tenu à souligner», according to the Paul-Boncour Report,

> «que le nouveau texte présenté devait être interprété dans le cadre des *observations suivantes dont l'inscription au rapport a été unanimement approuvée par le Comité:*
>
> 1. En utilisant dans le Section B le mot "recommandations", qui est déjà inscrit dans l'alinéa 5 de la Section A, le Comité a entendu indiquer que l'action du Conseil, dans la mesure où elle se rapporte au règlement pacifique du différend ou de la situation ayant donné naissance à la menace de guerre, la rupture de la paix ou l'agression, devrait être considérée comme réglée *par les dispositions de la Section A. Dans une telle hypothèse, le Conseil poursuivrait en réalité simultanément deux actions distinctes, l'une ayant pour objet le règlement du différend ou de la difficulté, l'autre les mesures coercitives ou conservatoires, chacune d'elles régie par une section propre du Chapitre VIII.*
>
> 2. Dans l'esprit du Comité la faculté laissée au Conseil par le texte des alinéas 1 et 2 de ne pas recourir aux mesures prévues aux alinéas 3 et 4 ou de n'y recourir qu'après avoir tenté de maintenir ou de ramener la paix, en invitant les Parties à consentir certaines mesures conservatoires se rapporte avant tout à l'hypothèse de la menace de guerre. Le Comité est unanime à penser qu'au contraire, dans le cas d'agression flagrante mettant en péril l'existence d'un membre de l'Organisation, les mesures coercitives devront être prises sans aucun retard avec toute l'ampleur requise par les circonstances *sauf au Conseil à tenter simultanément d'amener l'agresseur à renoncer à son entreprise, par les moyens prévus dans la Section A et par la prescription de mesures conservatoires.*» (54)

16. (a) It seems thus clear — and we shall find it confirmed in further documents (55) — that in the understanding of the authors of Chapters VI and VII, particularly Articles 39-40 (not to mention Articles 41 and 42), whenever the Security Council's conciliatory role should happen to be deployed *at the side* of an action covered by Chapter VII of the Charter, that role would «[be] governed», to use the terms of the English version of Henri Rolin's unanimously

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(54) *U.N.C.I.O.*, vol. XII, p. 515 ff., at p. 522-523 [italics added].
(55) Section IV.B, para. 33 ff., *infra*.

approved statement, by that « appropriate section of Chapter VIII [of the Dumbarton Oaks text as modified by the Chinese amendment] » which was to correspond to Chapter VI of the Charter. Notwithstanding the fact that that role would overlap with an action of the Council « having as its object... *enforcement or provisional measures* » under the Charter's Chapter VII (formerly the Dumbarton Oaks Section B of Chapter VIII): (i) the Council was empowered to do no more, with regard to « the settlement of the dispute or the difficulty », than recommend; and, (ii) any Council member, whether elective or permanent, would be bound by para. 3 of Article 27 of the Charter, under which « in decisions under Chapter VI ... a party to a dispute shall abstain from voting » ([56]).

([56]) According to SIMMA, BRUNNER, *Article 27*, in SIMMA (ed.), *The Charter* [*supra* note 22], p. 430 ff., at p. 456: « Distinguishing between Chapters VI and VII can be difficult in specific cases. It is unclear, for instance, whether, after armed force has been used by a party to a dispute, the disagreement which preceded the use of force can continue to be dealt with under Chapter VI or whether the entire dispute should now be covered by Chapter VII. In this case, the following distinction must be made: all disputes that correspond to a finding pursuant to Art. 39, which necessarily presuppose it or which anticipate such a finding by the coming to a decision on a necessary preliminary question, are excluded from the rule of Art. 27(3) clause 2. Apart from this, however, the dispute itself can be separated from the questions which have to be dealt with in the context of Chapter VII, namely the attempt at a (legally inadmissible) non-peaceful settlement. In this case, the competence of the Security Council to deal with the dispute under Chapter VI would continue; in cases of doubt the Security Council would have to make a decision with the assent of all the permanent members, and would have to specify that it was acting on the basis of Chapter VI ».

This position seems to us to be acceptable subject to the quoted Rolin's (and Committee III/3's) statement. Rolin's statement excludes any absorption of the Chapter VI action into the Chapter VII action (« chacune d'elles régie par un [chapitre] propre [de la Charte] »), meaning Chapter VI and Chapter VII, *respectively*.

It should be recalled that the question of abstention under what was to become the last sentence of Article 27(3) was the object, at San Francisco, of a Dutch amendment to Chapter VIII of the Dumbarton Oaks Proposals, which appears in doc. 2, G/7(j)(1), May 1, 1945 in *U.N.C.I.O.*, vol. III, p. 325 ff. According to the Netherlands delegation's comment to that rather complex proposal, « A distinction should be made, so far as voting is concerned, between the *quasi-judicial* function of the Security Council in promoting the pacific settlement of disputes and its *executive function* in taking action for the maintenance of peace and security. It would seem desirable to treat the function of the Security Council in determining the existence of a threat to the peace, breach of the peace or act of aggression, as part of its quasi-judicial function and to stipulate therefore that in such cases also, a party to a dispute should abstain from voting ». In addition to the cited doc., p. 325-326, see the Netherlands delegate's statement at the ninth meeting of Committee III/1 on May 17, 1945 (*U.N.C.I.O.*, vol. XI, doc. WD 215, III/1/36 of June 7, 1945).

Considering its incompatibility with the Yalta voting formula, the Dutch amendment was not put to a vote.

Although the setting aside of the Dutch amendment has been interpreted as an explicit rejection by the San Francisco Conference of any possible extension of the

As noted in the preceding paragraph, « *téléscopage* » seems thus not the right term to indicate the relationship between two parallel but distinct sets of procedures and powers that may frequently co-exist in the course of an operation formally or informally initiated as an enforcement action under Chapter VII (a phenomenon that may well occur — *repetita iuvant* — also at any one of the stages situated beyond the stage of Article 40 provisional measures). *Téléscopage* seems to convey the notion of a conciliatory function absorbed into the Chapter VII enforcement action and thus subject to the binding decisions régime of that Chapter. This would be in manifest contradiction with the unambiguous above-reported statement by Rolin, that was unanimously approved — as attested by Paul-Boncour — by the relevant Committee at San Francisco. Strong confirmation of that understanding comes from the debate on the Belgian amendment (para. 19, *infra*) and from the 1945 pre-ratification work of the US Senate.

(b) It must be concluded that, however high the degree of interrelationship between the relevant Article 39 situation and the overlapping dispute or litigious situation, the distinction existed in 1946; and nothing proves that it does not persist today. However high the degree of overlapping, the Security Council's action under Chapter VII is, under both the Charter and general international law, a matter of peace-enforcement, not law enforcement, let alone law-making. In other words, the measures recommended or decided upon by the Council under Chapter VII are legally justified as mea-

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obligatory abstention rule of Article 27(3) to the case of Article 39 dispute settlement (or otherwise States' rights related) recommendations (see for example CONFORTI, *Le Nazioni Unite* [*supra* note 50], p. 182), the failure of the Dutch proposal does not seem to have, in our view, such a negative bearing upon that possibility. The purpose of the Dutch amendment — certainly an ambitious one — was to subject to the abstention provision of Article 27(3) the Council's Article 39 *determinations* of threats to the peace, breaches of the peace or acts of aggression. Nothing was said in that amendment about (possible) Security Council Article 39 *deliberations consequential to such determinations*, other than « tak[ing] » or « decid[ing] » *measures to maintain or restore international peace and security*; and the only recommendations envisaged (by implication) in the Dutch amendment, notably in the (additional) para. 8 of Section A, were obviously the Council's recommendations of « appropriate *procedures or methods of adjustment* » indicated in para. 5 of Section A of the Dumbarton Oaks Proposals (where no terms of settlement were notoriously contemplated as possible object of Security Council recommendation). Our conclusion would be that the failure of the Dutch amendment proves nothing against a logical extension to Article 39 Security Council recommendations relating to dispute settlement (or otherwise affecting States' rights) of the essence of Rolin's statement as incorporated in Paul-Boncour's above-cited *rapport* of June 9, 1945 (para. 15, *supra*) and again recalled above in the present note.

sures against a threat to the peace, a breach of the peace or an act of aggression, namely as *peace-enforcement* measures; they would not be legally justified as *obligation-determination* or *obligation-enforcement*, let alone *obligation-creation*.

17. The « natural » overlapping between peace-enforcement and dispute-settlement may, of course, bring about some degree of interaction between the two, however distinct, functions: in the « initiative », in the process and in the outcome (57). It may actually happen that the Security Council's enforcement action interacts not only with the same Council's conciliation function — and any State behaviour conditioned thereby — but also with one or more injured States' reactions (countermeasures) to an internationally wrongful act. It may happen in particular that the Security Council's enforcement action under Chapter VII relating to a threat to the peace or breach of the peace is solicited or accepted by one or more injured States as a total or partial substitute for such States' individual or concerted countermeasures. On this possibility see also para. 46, *infra*.

Even occurrences such as these may obfuscate but not obliterate, though, the distinction between peace-enforcement, on the one hand — as a specific part of the Security Council's primary function — and any law-determining and law-enforcing (let alone law-making), on the other hand. While the former is a Security Council's statutory function and prerogative (under the Charter and the general rules of international law upon which it rests), the latter functions remain: (a) outside the Security Council's powers, the exceptions being, in addition to the Article 94(2) procedure, the examples which were briefly mentioned in para. 5, *supra*; and (b) reserved instead, despite any interaction with Chapter VII (and related Charter provisions): (i) either to the involved States themselves; or (ii) to any binding or non-binding settlement procedures that such States may be bound or may agree to resort to, including, of course, UN statutory dispute-settlement procedures, notably the Council's conciliatory procedures under Chapter VI.

18. It would be equally improper for the Council to use Chapter VII measures as a means not only to meet, avert or resist one of

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(57) See, for example, Ross, *Constitution of the United Nations*, Copenhagen, 1950, p. 143 f., 146-147, 155-157.

the Article 39 situations but also to impose upon a State — whether or not the cause of that situation — a conduct declared by the Council to be due either *de jure condito* or *de jure condendo*, but having no reasonable relationship with a threat to or breach of the peace or an act of aggression.

The Council, in other words, is empowered to «make» peace, not to make law through peace. Kelsen's theory of the Security Council's law-making on the strength of Chapter VII seems to be the exact reverse of the title of Kelsen's masterly and inspired booklet «Peace Through Law». Through Chapter VII, precisely, the Council would make, according to Kelsen, law through peace. In a national legal system that would be equivalent to making law (in any area, not just during a street brawl!) through police or military power.

Any Security Council pronouncements touching upon States' rights other than those that are inevitably affected by peace-enforcement action remain, in conclusion, *censures* or *condemnations* in the sense considered in para. 14, *supra* ([58]).

([58]) It should not be difficult to envisage the kind of cases where, although not reaching such an extreme abuse as that committed by the Security Council in the *Lockerbie* case, the Security Council should not improperly affect States' rights by resort to Chapter VII, namely, by issuing law-making, law-determining or law-enforcing decisions as peace-enforcement measures. A case in point would be the territorial dispute used as an illustration by Kelsen in 1948 and 1951. Were such a dispute to cause, be a factor in, or otherwise be related to, or overlap with, a threat to the peace, breach of the peace or act of aggression, the Security Council's task would be, under Chapter VII, to impose international peace on both parties; not to impose a settlement in favour of State A claiming the territory or in favour of State B resisting the claim. Whether the threat or the breach came, as would presumably be more likely, from State A or whether it came, less likely, from State B, it would be the Council's task to face the threat or the breach by any measures under Articles 40, 41 or 42 it deemed suitable to maintain or restore the peace. Nothing in Chapter VII or any other related Charter provision empowers the Council to decide, with binding effect, that the dispute should be settled by one settlement procedure or another, let alone to decide the merits of the underlying political or legal dispute in favour of State A's claim or B's resistance, either by altering the status of the disputed territory or bindingly determining its existing legal status. With regard to the dispute the Council has only the power, under the conditions of Chapter VI, to recommend a settlement or a settlement procedure.

Another example could be a dispute between State A, claiming the surrender of an alleged criminal, and State B refusing extradition. If State A threatens or breaks the peace in order to prevail, the Council's task would not be to decide whether B is bound to extradite or perhaps to choose between *dedere* and *iudicare*. Under Chapter VI the Council may well recommend either that B give in either way or that A give up its claim, possibly involving one or more third States and perhaps some international body. Under Chapter VII, however, the Council is only empowered — if not,

19. The distinction between the Security Council's functions under Chapter VI and Chapter VII, and the limitation of the Council's power to override States' rights, finds support also in the San Francisco Conference debate on the Belgian amendment to the Charter's dispute-settlement provision, namely to what was to become Chapter VI. Under that amendment:

> « Any state party to a dispute brought before the Security Council shall have the right to ask the Permanent Court of International Justice [International Court of Justice] whether a recommendation or a decision made by the Council or proposed in it infringes on its essential rights. If the Court considers that such rights have been disregarded or threatened, it is for the Council either to reconsider the question or to refer the dispute to the Assembly for decision » ([59]).

The debate on that proposal shows *ad abundantiam* that Belgium, and the other States supporting that delegation's meritorious idea, accepted the withdrawal of the amendment only after receiving assurance « that a recommendation made by the Council under Section A of Chapter VIII [namely under the Dumbarton Oaks provisions corresponding to the dispute-settlement articles of Chapter VI] did not possess obligatory effect » ([60]). None of the statements made by major powers' delegates during the debate to explain why the Belgian amendment should not be accepted — statements manifestly dictated by those States' keen interest in preserving the Council's Chapter VII powers — contradict a *travaux préparatoires*

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as we should like to be able to believe, duty bound — to adopt the measures it deems appropriate to face the threat to or the breach of the peace, wherever it originates.

In both instances, to use Chapter VII powers in order to impose any settlement or means of settlement would be an obvious *détournement de pouvoir* on the part of the Council.

([59]) *U.N.C.I.O.*, Doc. 2, G/7 (k) (1), p. 2; cf. also *U.N.C.I.O.*, Doc. 461, III/2/16. It is worth recalling that that amendment must surely have been drafted or approved by one or more of the three fine jurists (Dehousse, Rolin and Charles de Visscher) who were attached to the Belgian delegation to San Francisco.

([60]) The Report of the Rapporteur of Committee III/2 (*U.N.C.I.O.*, Doc. 1027, III/2/31 (1), p.4) contains the following statement with respect to Article 37: « In the course of discussion on an amendment offered by the delegation of Belgium, the delegates of the United Kingdom and the United States gave assurance that such a recommendation of the Security Council possessed no obligatory effect for the parties ». The present writer finds it very hard to believe that any one of the three jurists mentioned in note 59, *supra* could have accepted such an assurance if only he had suspected that it could be bypassed by a simple jumping of the Council's action from Chapter VI to Chapter VII.

datum that could not coincide more perfectly with the clear text of all the relevant provisions of Chapter VI ([61]).

Obviously, the Belgian amendment could have been conceived not just for Chapter VI but also for the Security Council's powers that were to be covered by Chapter VII. The reason why the proposed amendment was not so extended to the Chapter VII area was probably, quite logically, the fact that only in acting as conciliator could the Security Council deal with the merits or methods of dispute-settlement, namely (although confined to recommendations) with the fate of States' rights. That reason is thus the same as the reason why paragraph 1 of Article 1 of the Charter refers to the principles of justice and international law with regard to the UN's role in adjustment or settlement of disputes or situations, and not with regard to enforcement action. The reason resides precisely in the fact — «naturally» overlooked by the commentators who assume the existence of Security Council law-making powers — that in taking enforcement action the Security Council is not empowered, as explained, to override any States' rights other than those instrumentally and inevitably affected by genuine enforcement measures. Consequently, while a safeguard of the latter rights by the «justice and international law» clause would be manifestly contradictory, the safeguard of the rights that the Council is not permitted to override anyway would be pointless. The «justice and international law» clause only makes sense for the UN dispute-settlement role.

The yoking together of the assertion, on the one hand, of the Security Council's power to «make new law», and the inapplicability of the «justice and international law» clause to peace-enforcement action, on the other hand, is so widespread as to obviate the need for citation. We confine ourselves to recalling Schachter's statement before the ICJ on October 15, 1997 in the *Lockerbie* case:

> «Much of the legal argument on [the] question ["whether the Charter requires the Council to conform to the rules of international law in its decisions under Chapter VII of the Charter"] goes back to Article 1, paragraph 1, of the Charter which sets out the purposes of the United Nations and includes in its latter part the words "in conformity with the principles of justice and international law". As one might expect, this phrase received close attention in the drafting of Article 1 at San Francisco. The Committee concerned took a decision

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([61]) As will be shown in due course (Section IV.B, *infra*), an identical conclusion must be reached from the reading of the relevant Section A of Chapter VIII of the Dumbarton Oaks Proposals.

to move the phrase "in conformity with the principles of justice and international law" from the first part of paragraph 1 to the latter part, so that it would apply only to the "adjustment or settlement of international disputes or situations" (United Nations Doc. No. 944, Report of Committee I/1). As stated in the report, this change was made to ensure that the "vital duty of preventing and removing threats to and breaches of the peace" would not be limited by existing law. It was clear then, as it is to us now, that preventive or enforcement measures could — and often would — entail overriding the legal rights of the States. However, when it came to "adjusting or settling" disputes or situations, the Organization would be expected to act in conformity with principles of justice and international law » ([62]).

([62]) Case concerning *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya* v. *United States of America), Preliminary Objections*, ICJ, *Verbatim Record of the Public Sitting of October 15, 1997*, para. 4.17.

Schachter's statement continues: « The distinction obviously makes sense. When the Council takes preventive or enforcement measures under Chapter VII — in a word "sanctions" — it will as a rule affect the legal rights of States and override some of these rights; in that particular sense, the measures would not conform to international law as distinct from the Charter itself. The Charter itself is the governing law, as affirmed by Article 103 and other Articles. This brings us back to the argument that judicial oversight of Council decisions is essential to ensure their legality and conformity to the Charter. There is an old saying — "to a shoemaker there is nothing like leather, to a lawyer there is nothing like a court". But much as we lawyers appreciate courts, they need not be — and are not — the sole guardians of legality. In the world of sovereign States, the States themselves collectively and individually have a responsibility and the capability to ensure adherence to their fundamental law. True, the Security Council is pre-eminently a political organ; its member States generally apply political criteria and make political judgments. That does not mean that they are indifferent to the principles and rules of the Charter or incapable of reaching decisions based on the Charter. It is surely in their collective interest to maintain the basic framework of their authority. The records of the Council amply demonstrate that the Members of the Council take account that the Charter provisions and on the whole resolve such differences as arise by reference to the Charter and accepted principles of interpretation. The Council (as we know) is not a monolithic body. Its Permanent Members and its elected Members are broadly representative of a plural world. It is essential to their collective authority to maintain their constitutional compact. We stress this point (though it may seem obvious) to respond to the suggestion that the Court alone is the guardian of legality. Under the Charter, the Security Council along with other principal organs, share that responsibility. In the final analysis, it is the member States that have the power — and the duty — to ensure that *their* Charter is maintained and respected. It is they, after all, who are accountable to their peoples for international peace and security. » (*Ibid.*, para. 4.18).

The present writer agrees that it all makes perfect sense, provided that the overriding of State's rights does not exceed the limit dealt with in the present writing. As regards the role of adjudication, however, we fear that the above-reported reasoning expresses even too clearly where the « constitutional » concept of the Charter leads: « if you want the "organized international community" you must take the Charter ("implied powers" and "subsequent practice" included) as its legal constitution. And since it is a constitution in which the Security Council is supreme — and (wron-

In a number of recent cases the Security Council went, as will be shown, beyond the pursuit of the "vital duty" alluded to in the quoted passage. It trampled States' rights the overriding of which was not instrumental to genuine peace-enforcement measures. The Council used Chapter VII powers to deal with matters it was competent to deal with under Chapter VI; and in the *Lockerbie* case it did so in contempt of the ICJ.

Considering that we are not dealing here in principle with the control of the legality of Security Council's acts, the question of a possible role of the ICJ in that regard will only be dealt with incidentally (in connection with the *Lockerbie* case) in para. 54, *infra* (63).

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gly) qualified here above as sharing the role of "guardian of legality" — forget about the rule of law and about legality control»... On the « constitutional » conceptions of the Charter see, however, para. 42, *infra*; and, on the ICJ's role, para. 54.

(63) With regard to that ICJ's role Schachter's cited statement reads as follows: « There is patently a fundamental distinction between a Court exercising its inherent power to interpret and apply a legal rule in a case before it and the assertion of a power of judicial control that would annul decisions of an independent body not subordinate to it. The inherent powers of the Court to interpret texts cannot be stretched to a power of review and annulment. This is a matter of such fundamental importance in the law of the United Nations — as in national constitutional law — that it cannot be obscured by referring vaguely to an inherent judicial power. It would surely astonish the legal communities in many countries if this Court should announce that the judicial power inherently encompassed the authority to override decisions of political organs where constitutional provisions do not provide for such review» (*October 15, 1997 Verbatim Record* [*supra* note 62], para. 4.16).

One is unable to resist the impulse of commenting that the « constitutional » provisions which « do not provide for [judicial] review » (a review which in my opinion would surely lie within the ICJ's statutory function when the validity or interpretation of a Council's act would come into question in a case before it) do not envisage either a Security Council's power to override States' rights *other* than those which are affected by genuine Chapter VII enforcement measures. And the question whether any such non-overridable rights are illegitimately jeopardized by Security Council action may well fall under the ICJ's scrutiny on the basis of the legal instruments referred to in Article 36 of the Court's Statute (para. 54, *infra*).

Going back to the *Lockerbie* pleadings, the present writer is not persuaded either by Counsel for Libya's argument on the point. In discussing the Council's relevant resolutions, Professor Suy stated: « Il résulte de tout ceci que les pouvoirs du Conseil de sécurité en vertu du chapitre VII peuvent être conçus de deux façons: soit l'on admet comme les auteurs de la Charte, que le Conseil ne peut pas trancher, en vertu du chapitre VII, un différend comme celui qui oppose la Libye aux défendeurs, soit l'on admet que le Conseil de sécurité peut, en vertu du chapitre VII, trancher le fond d'un différend, ou ajuster une situation. Mais dans ce cas, l'article 1 par. 1 suppose que, ce faisant, le Conseil de sécurité respecte les principes de justice et de droit international » (*October 15, 1997 Verbatim Record* [*supra* note 62], para. 5.25). The point at issue, in our view, was not whether the Council, in dealing with a dispute in a Chapter VII context, is bound to respect the principles of justice and international law. The point was that the Council has no power to settle disputes, *even in a Chapter*

III.A. *Arguable ambiguities in Chapter VII*

20. We submit that no argument could correctly be drawn against the suggested limitation of the Security Council's power from those possibly ambiguous provisions of Chapter VII, on some of which a number of authors seem to rely in order to support a broader view of the Security Council's power to affect States' rights. To begin with textual analysis — keeping in mind, however, the preparatory works already considered (paras. 15 and 19 *supra*) and those that will be considered (paras. 29 ff., *infra*) — we refer: (i) to the phrase in Article 40 according to which provisional measures « shall be without prejudice to the rights, claims and positions of the parties concerned », and to the absence of any such language in Articles 41 and 42; (ii) to the (last) sentence of the same Article 40 according to which the Council « shall duly take account of failure to comply with such provisional measures »; and (iii) to the sentence in Article 41 according to which the measures contemplated therein « are to be employed to give effect to [the Council's] decisions ».

21. The fact that while provisional measures are expressly indicated in Article 40 as being « without prejudice » (to the rights, claims or positions of the parties concerned), no such reservation is expressed in Articles 41 and 42, suggests, *prima facie*, that the rights (as well as claims and positions) of the « parties concerned » could indeed be affected by measures taken by the Security Council under Articles 41 and 42. One should not necessarily infer from this, however, that these measures can affect States' rights *other* than those the infringement of which is instrumental, as explained in paras. 11 ff., *supra*, to the enforcement of peace and security.

(i) Indeed, the *raison d'être* of the phrase under which Article 40 provisional measures « shall be without prejudice to the rights, claims and positions of the parties concerned » is not immediately clear. As rightly noted by Kelsen « it might be doubtful whether under [Article 40] any measure disadvantageous to a party could be recommended or ordered by the Security Council. But such an interpretation would deprive the article of any value » (64).

VII context, except by way of mere recommendations under Chapter VI — and that is, we submit, the objection that should have been put forward.

(64) *The Law of the United Nations* [*supra* note 10], p. 743.

(a) A sensible explanation seems to reside, in our view, in the fact that Article 40 was meant by the Chinese proponent and by Committee III/3 that unanimously approved it, not just as a provisional «cooler off» of an Article 39 situation before resorting to Articles 41-42 measures, but also as a more appropriate device replacing the original paragraph 1 of Section B of Chapter VIII of the Dumbarton Oaks proposals. We refer to that paragraph that some commentators have understood to be, due to its mention of an unsettled dispute as an enforcement-triggering condition, the «transition» provision between Sections A (settlement) and B (enforcement) of Chapter VIII of the Dumbarton Oaks proposals. By giving instead the first place in Section B to the more general provision that was to open Chapter VII of the Charter (with no reference to the specific case of an «unsettled dispute») and inserting at the same time Article 40 between that generalized formulation of the enforcement-triggering conditions and Articles 41-42, the Chinese proposal pursued presumably the dual purposes that the abundant practice concerning provisional measures seems to confirm. One purpose — the most direct one — was to interpolate an intermediate phase, once an Article 39 condition had been declared or implied, prior to a possible resort to measures under Article 41 or Article 42. Another purpose — perhaps a more important one — was to leave the way open to the continuation, the resumption or the initiation of a conciliatory action which the Council should obviously not be precluded to undertake by the determination of a threat to or a breach of the peace. Of this second purpose one finds some trace in the language of Article 40: the only provision of Chapter VII — *inter alia* — where mention is made of «*parties* [concerned]» a term otherwise ignored throughout that Chapter. This understanding of Article 40's *ratio* is also confirmed by the *travaux préparatoires* considered in para. 19 *supra* and some of the commentaries on Article 40 as well as on Article 39 (65).

(b) It is mainly the second of the said purposes — together with the fact that the implementation of provisional measures whether merely recommended or bindingly decided upon by the Council (66) is generally understood to be entrusted to the parties

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(65) See especially the early practice cited by Kelsen and the rich subsequent practice referred to by FABBRI, *Le misure provvisorie* [*supra* note 50] and SIMON [*supra* note 14].

(66) I refer, on the subject, to KELSEN, *The Law of the United Nations* [*supra* note 10], p. 740-742; SIMON, *Article 40* [*supra* note 14], p. 686-688; and FROWEIN,

themselves — that explains the « without prejudice » clause. This seems to be particularly evident if one considers that the most typical instance of provisional measures is the call to the parties in a territorial (or border) dispute to cease or suspend hostilities or withdraw their respective forces to initial positions. Implying as it does the abandonment of physically occupied territory such a measure is not likely to be viewed positively by the parties concerned if they perceive it as a settlement or as a factor that might assume any weight in the settlement of a territorial dispute (67).

It could of course be objected that the purpose of the « no prejudice » clause remains unclear in that no irremediable prejudice could result from recommendations addressed to the parties concerned within the framework of a conciliation process which (as noted in paras. 15 ff., *supra*), is still governed, despite the overlapping with a Chapter VII situation, by the rules of Chapter VI. Be that as it may, the above-mentioned explanation of the clause is bound to appear plausible if one considers, in agreement with Kelsen and more recent commentators such as Simon, the difficulty of fashioning provisional measures which would be unlikely to affect some right, claim

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Article 40 [*supra* note 50], p. 620-621. According to the latter author: « It is largerly assumed in the literature that the Security Council could make both binding decisions and mere recommendations under Art. 40. The position of Art. 40 in Chapter VII proves to be the most important argument in this regard. Since recommendations for a non-binding cease-fire are also clearly possible according to Chapter VI, a sytematic interpretation must result in the attribution of binding effect to an order under Art. 40. ». See also GILL, *Legal and Some Political Limitations on the Power of the UN Security Council to Exercise Its Enforcement Powers under Chapter VII of the Charter*, in *Netherlands Yearbook of Int. Law*, 1995, p. 33 ff., at p. 47; and TAVERNIER, *Le caractère obligatoire de la résolution 598 (1987) du Conseil de sécurité relative à la guerre du Golfe*, in *European Journal of Int. Law*, 1990, p. 278-285.

In the view of the present writer the issue relating to the binding or non-binding nature of Article 40 provisional enforcement « calls » is not relevant for the purposes of the Council's power to override States' rights while engaged in dispute or situation settlement under Article 40.

(67) An example might be found in resolution 1297 (2000) of 12 May 2000 relating to the current conflict between Ethiopia and Eritrea. By that resolution the Council has affirmed « that the situation between Eritrea and Ethiopia constitutes a threat to peace and security »; has demanded « that both parties immediately cease all military action and refrain from further use of force »; has requested « the earliest possible reconvening, without preconditions, of substantive peace talks, under OUA auspices, on the basis of the Framework Agreement and the Modalities and of the work conducted by the OUA as recorded in its Communiqué issued by its current Chairman of 5 May 2000 »; has referred to the said instruments « as the basis for the peaceful resolution of the dispute between the two parties ». Although the resolution refers neither to Chapter VII nor to Article 40, it seems plausible that one is in the presence of provisional measures. It is in situations of this kind that the « no prejudice » clause of Article 40 makes sense.

or position of one or the other of the «parties concerned» if not of both.

(c) As regards the peace-preserving role of provisional measures under Article 40, the «no prejudice» clause might seem rather redundant; and to the extent those measures have an impact on the parties' rights, claims or positions, any such impact would be subject to the same general restriction of the Council's power to affect States' rights, which is set forth in para. 12, *supra*.

(ii) Whatever explanation for the clause in question is right, it seems that two reasons explain its absence in the following Articles of Chapter VII, notably in Articles 41 and 42. The attention inevitably focusses, at such an advanced stage of the enforcement process, on measures which are bound to affect decisively, as just reiterated, any States' rights the overriding of which would be an inevitable consequence of the impact of genuine enforcement measures. The limitation can only be, at this stage, the lack, in the Security Council, of any power bindingly to affect any States' rights *other* than those indicated.

Of course, even at such an advanced stage as that of measures under Article 41 or Article 42, it is still quite conceivable — although perhaps less probable — that a parallel conciliatory action be deployed by the Security Council in conjunction with enforcement, or after suspension or cessation thereof. It will again be, of course, for the reasons indicated in paras. 15 ff., *supra*, a matter of recommendation under the régime of Chapter VI: and it seems natural that no express «no prejudice» clause should have been deemed to be appropriate at a stage where, although within the legal bounds of *peace*-enforcement action, substantial States' rights would have to be put in serious jeopardy.

22. As for the provision suggesting that the Security Council «shall duly take account of failure to comply» with provisional measures under Article 40, any inference of Security Council law-making, law-determining or law-enforcing powers is excluded, in our view, by two considerations.

(i) If one looks at it in the light of the «overall» — but not «compounded» — competence of the Security Council under Chapters VI and VII, the provision in question is perfectly understandable. As well as the «no prejudice» safeguard of Article 40 ([68]) it serves as

([68]) Para. 21, *supra*.

guidance to the Council in the exercise of its direct or indirect conciliatory function under Chapter VI. It seems natural that in recommending terms or means of settlement under the latter Chapter — whether or not *within the context* of a threat to or breach of the peace — the Security Council takes due account of any party's failure to respond to its call for provisional measures. This would not alter the merely conciliatory (non-binding) nature of the Security Council's role under Chapter VI.

(ii) Considered instead in the more specific framework of Chapter VII enforcement — and keeping in mind the proper distinction between peace-enforcing, on the one hand, and law-making, law-determining or law-enforcing, on the other — the provision in question is equally understandable as a suggestion to the Security Council: the suggestion that the target State's or States' response to a call for provisional measures under Article 40 should be taken into account, within the said Chapter VII framework, in deciding which measures under Articles 41 or 42 should be applied — and with regard to whom and what — in order to maintain or restore peace and security. In other words, the suggestion is that any negative response by a State to a call for provisional measures should naturally be taken into account in deciding on the object, the nature and the weight of Articles 41-42 measures. To interpret instead the phrase in question to mean that the Council should pronounce and enforce a more severe legal régime *vis-à-vis* the recalcitrant State or States is to beg the very question whether Chapter VII empowers the Security Council to impose, determine or enforce the law and not just the peace. As noted under (i) above, the suggestion is perfectly in keeping with the Council continuing or undertaking a concomitant conciliatory function under Chapter VI, namely recommending terms or means of settlement with non-binding effect, albeit within the context of an Article 39 situation.

In other words, a higher degree of severity can attend measures taken against the uncooperative State within the framework of both the recommendation of terms (or means) of settlement under Chapter VI and the decision of measures under Chapter VII. But nothing in the last sentence of Article 40 warrants the assumption that it implies a law-making, law-determining or law-enforcing function of the Security Council under either Chapter.

23. The distinction between peace-enforcing, on the one hand, and law-making, law-determining and law-enforcing, on the other, is

neither contradicted nor attenuated by the presence in Article 41 of the phrase « to give effect to its decisions », a phrase which in the Dumbarton Oaks proposals found its place in the provision which was to become Article 41. We refer to para. 3 of Section B of Chapter VIII, concerning measures not involving the use of armed force.

With respect to that phrase it must be stressed that it is far from certain that it refers only to those *terms of settlement* of a dispute (or even « procedures or methods of adjustment », as envisaged in paragraph 5 of Section A of the same Dumbarton Oaks Chapter VIII). On the contrary, such an interpretation is excluded, in our opinion:

(i) by the fact that the Charter, as well as the Dumbarton Oaks draft, speaks not of decisions but only of recommendations in Chapter VI, the equivalent of Dumbarton Oak's Section A;

(ii) by the fact that the Dumbarton Oaks proposals did not even mention *terms* of settlement; they only mentioned « procedures or methods of adjustment »: the jump from a recommendation of « procedures or methods » to binding terms is a long one indeed.

To that « negative » argument one must add a « positive » consideration. It seems indeed logical to understand the phrase in question in Article 41 as referring to the decisions (« determine » and « decide ») contemplated in Article 39, namely decisions intended to face a threat to, or breach of, the peace: to enforce the peace, not to settle disputes or situations with binding effect or otherwise to make law, determine the law, or enforce the law (69).

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(69) As noted long ago by HALDERMAN, *The United Nations and the Rule of Law*, Dobbs Ferry (N.Y.), 1966, p. 66-77 (in connection with the plan of partition of Palestine): « The two major functions here ["peaceful settlement" and "collective measures"] stand side by side, both forming component parts of the first-stated major "Purpose" of the United Nations, namely the maintenance of international peace and security [...]; at the same time, however, it is to be reiterated that they are essentially different functions. Only the "peaceful settlement" function is concerned with the substantive issues of disputes. The "collective measures" function, which is, in effect, a "police" function, is to be employed only to deal with threats to peace, breaches of peace and acts of aggression. [...] The "decisions" [...] referred to [in Article 41] seem clearly those pertaining to the "collective measures" function, *e.g.*, those deemed necessary to deal with threats to peace, breaches of peace and acts of aggression. That they do not mean "decisions" on the substantive issues of international disputes, or as to procedures for settling such issues, seems clear from the fact that the Council's powers in these latter respects are affirmatively stated in Articles 36 and 37 to be basically recommendatory in character ». As noted *supra*, note 30, the view that the decisions referred to in Article 41 are those covered by Chapter VII is clearly taken also by FROWEIN, *Article 39* [*supra* note 50], p. 624.

III.B. *The Council's alleged general powers under Article 24 (and Article 25)*

24. The doctrine of the Security Council's generalized law-making, law-determining and law-enforcing powers does not find valid support, in our view, in that reading of the second sentence of paragraph 2 of Article 24 of the Charter which is known as the theory of the Council's « residual » powers.

As the ICJ suggested in the *Namibia* advisory opinion:

> « The reference in paragraph 2 of [Article 24 of the Charter] to specific powers of the Security Council under certain chapters of the Charter does not exclude the existence of general powers to discharge the responsibilities conferred in paragraph 1. Reference may be made in this respect to the Secretary-General's Statement, presented to the Security Council on 10 January 1947, to the effect that "the powers of the Council under Article 24 are not restricted to the specific grants of authority contained in Chapters VI, VII, VIII and IX... The members of the United Nations have conferred upon the Security Council powers commensurate with its responsibility for the maintenance of peace and security. The only limitations are the fundamental principles and purposes found in Chapter I of the Charter" » ([70]).

25. Indeed, the ICJ's advisory opinion in the Namibian case is the *locus classicus* of the doctrine of the residual powers of the Security Council. But despite the ICJ's opinion and a number of not negligible scholarly views, we are unable to accept such a simplistic reading of Article 24 of the Charter.

The present writer fully shared at the time and continues to share the feelings of all men of goodwill for that « belle cause de l'humanité » that was the decolonization of dependent peoples and, within that framework, the liberation of Namibia from colonial rule. We believe, however, in point of law — of existing international law (then and today) — that the reference to the Purposes and Principles in the first sentence of paragraph 2 of Article 24 of the Charter is being misunderstood in the ICJ's *dictum* and by those who accept it.

That reference was obviously intended, and should in our view continue to be intended, not as a blank cheque for a broadening of the Security Council's powers at the hands of the Security Council itself. It was and should be understood, on the contrary, as a restriction, a limitation

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([70]) *I.C.J. Reports*, 1971, p. 52, para. 110.

of the Security Council's powers. The whole function of Article 24 paragraph 2, the wording of which could not be clearer, is to set forth the limits within which the Council's powers are circumscribed: and this with a view to maintaining within reasonable bounds the unprecedented impact of a general attribution of responsibility such as the one that the authors of the Charter made upon that restricted organ under paragraph 1 of Article 24, and particularly under Chapter VII.

26. Those bounds consist, on the one hand — as a *caveat* to the high degree of discretion inevitably allowed under Chapter VII — in the Council's express, general duty to «act in accordance with the Purposes and Principles of the United Nations». On the other hand, they derive from the phrase indicating the Council's duty to confine itself to the specific powers «laid down» in Chapters VI, VII, etc. In other words, *only* those specific powers, it is stated in the Article, are «granted» to the Security Council: *all* such powers are to be exercised, as stated in the first sentence of paragraph 2, in accordance with the Purposes and Principles.

The general reference to the Purposes and Principles obviously relates to the manner and direction in which the specific powers are meant to be deployed. That reference was not and could not be intended instead as authorizing or otherwise legitimizing beforehand the addition of further powers, by way of a, so to speak, «pre-figured» extensive interpretation (by the Council itself), to the specific powers which were being granted.

With all respect, the Court's reliance on the fact that «the existence of general powers» is *not excluded*, and on the Secretary-General's statement to the effect that the Security Council's powers are «commensurate with its responsibility», is not sound. Neither argument seems sufficient to set aside the clear indication in paragraph 2 that the «specific powers granted» to the Council are laid down in the four listed Chapters.

That would be, in our view, the proper interpretation of Article 24, as combined with 25, under the generally accepted rules of treaty — and I stress treaty — interpretation. One hardly needs to recall Articles 31 and 32 of the Vienna Convention on the Law of Treaties ([71]).

([71]) Subject to what we may have to say further on about the relationship of the current reading of Article 24 (and Article 25) with the «federal» or «constitutional analogy», it is useful to note here that the tenor of Article 24 would in any case not conform to the model of federal constitutions. In federal constitutions there is, to our knowledge, neither a rule envisaging implied powers — such powers being by

One does not find convincing arguments to the contrary either in the rather curt statement by the ICJ and, for that matter, in the 1947 Secretary-General's opinion upon which the Court seems too easily to rely, or in the relevant scholarly writings (72).

IV.A. *The Chapters VI-VII functional link theory*

27. The view that the Security Council is not unconditionally entitled to dispose of States' rights through the exercise of its Chapter VII function is also at variance with the Chapters VI-VII « functional link » theories. Whoever tries to defend the former view — as we are doing — cannot thus escape the hurdles represented by those theories. A more specific *excursus* into that matter seems inevitable in order to complete the incidental references to the theory made so far.

The first scholarly appearance of the idea of a « functional nexus » between Chapters VI and VII is to be found in Hans Kelsen's 1945 comparative study of the Dumbarton Oaks proposals and the League of Nations Covenant (73). In dealing with « complete or incomplete settlement of disputes » under Chapter VIII Section A, paragraph 5 of the proposals (« The Security Council should

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definition not even generally mentioned expressly — nor references to objects, purposes or principles other than those which are intended to perform a restrictive function with regard to any powers not specifically attributed. A special case is the European Community.

(72) See especially DELBRÜCK, *Article 24*, in SIMMA, *The Charter* [*supra* note 22], p. 404; BOTHE, *Les limites des pouvoirs du Conseil de sécurité*, in DUPUY, R.-J. (ed.), *The Development* [*supra* note 5], p. 67 ff., at p. 70-73 ff. We subscribe to Fitzmaurice's view as expressed in his well-known dissenting opinion to the ICJ's advisory opinion of 21 June 1971 concerning *Legal consequences for States of the continued presence of South Africa in Namibia (South-West Africa) notwithstanding Security Council Resolution 276 (1970), I.C.J. Reports 1971*, p. 292-295, esp. para. 113.

Compare, anyway, the said Fitzmaurice's evaluation of the reference to UN Purposes and Principles in para. 2 of Article 24 with the dismissal of that phrase as practically irrelevant on the part of DELBRÜCK, *Article 24, loc. cit.*, p. 404. Something similar I find in the minimization of the value of the first part of Article 24's sentence according to which the Security Council « in carrying out its duties under [its primary responsibility ...] acts on [the UN members'] behalf » (DELBRÜCK, *ibid.*); and in the minimization of the provision of para. 3 of the same Article 24 relating to the submission by the Security Council of « annual and, when necessary, special reports to the General Assembly for consideration... » (*ibid.*, p. 405 and 407). We share Bothe's prudent view.

(73) To our knowledge, the only previous mentions of such a functional link were those contained in documents to be considered further on (*travaux préparatoires* and pre-ratification: *infra*, Section IV.B, paras. 29 ff.)

be empowered...to recommend appropriate procedures or methods of adjustment»), Kelsen states that, considering that under «paragraph 3 of the same Chapter and Section... [the Council] is already authorized to recommend procedures or methods of adjustment», «the meaning of [paragraph 5] can hardly be that, after the parties... have failed to apply certain procedures or methods and are therefore obliged to refer their dispute to the... Council, the latter shall have the power — not to *settle* the dispute, but to recommend just the same procedures or methods which the parties have failed to apply» ([74]).

Such a «literal» interpretation of the paragraph in question would also have been inconsistent, according to Kelsen, with paragraph 6 ([75]), with paragraph 7 ([76]) and with paragraph 1 of Section B of the same Chapter VIII of the proposals. As Kelsen puts it:

> «[the fact that] the Security Council is authorized to apply sanctions in case the parties fail to settle a dispute "in accordance with its recommendations made under paragraph 5 of Section A"....presupposes that the recommendation made is a recommendation *for the settlement* of the dispute; otherwise the words "or in accordance with its recommendations made under paragraph 5 of Section A" were superfluous, since the immediately preceding words "failure to settle a dispute in accordance with procedures indicated in paragraph 3 of Section A" would refer to the same case. If the Council has, by Chapter VIII, Sec. A, par. 5, no power to *settle* a dispute according to par. 3, and if failure so to settle a dispute is a condition for enforcement action under Sec. B, then the question arises *against whom this action is to be directed.* How is such action possible *without prior decision as to which party is right*? And how is such a decision possible *without deciding the merits of the case, without a decision "settling" the dispute*? All these inconsistencies allow the assumption that paragraph 5, *in spite of its unprecise wording, authorizes* the Council to *settle* the disputes which the parties are obliged to refer to it, *and that in the draft of the future Charter the wording will be corrected* [*sic!*]. If it were intended not to confer upon the Council the right to *"settle"* disputes

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([74]) KELSEN, *The Old and the New League* [*supra* note 10], p. 62-63 [italics added].

([75]) According to which, KELSEN wrote, the Security Council was «empowered to refer to the court, for advice, legal questions connected with non-justiciable disputes»: which presupposed, according to Kelsen himself, «that the ... Council ha[d] to *settle* such disputes» (*The Old and the New League* [*supra* note 10], p. 63-64 [italics added]).

([76]) Namely, the domestic jurisdiction reservation of para. 7 of the cited Section, which also presupposed, according to KELSEN, that the Council « ha[d] the power to *settle* disputes» not covered by that reservation. The quoted author seems to use the term «settle» in the sense of resolving a dispute with binding effect.

which have not been settled in another way, the Dumbarton Oaks proposals *would here be a regrettable setback as compared with Article 15 of the Covenant of the League of Nations.* » [*sic*!] ([77])

Thus, Kelsen concludes, with a seemingly inescapable logic:

« According to Chapter VIII, Sec. B, par. 1, quoted above, the Security Council should "take any measures necessary for the maintenance of international peace and security" if the parties to the dispute fail to settle the dispute in accordance with procedures indicated in paragraph 3 of Section A, or in accordance with its recommendations made under paragraph 5 of section A. The measures to be taken for the maintenance of peace and security are true sanctions. They are characterized by paragraphs 3 and 4 of section B as diplomatic, economic or other measures not involving the use of armed force, and action by air, naval, and land forces. If recommendation of "appropriate procedures or methods of adjustment" (par. 5 of Sec. A) implies recommendations for the settlement of disputes, and if failure to settle a dispute in accordance with such recommendations is made — in paragraph 1 of section B — the *condition of a sanction*, the *settlement* of disputes according to paragraph 5 of section A has, in spite of the wording of paragraph 5, *not necessarily the character of a mere "recommendation" in the true sense of the term. For a recommendation which can be enforced by the measures determined in Chapter VIII, Sec. B, paras. 1-11, is a decision binding upon the parties to the dispute.*

It must be noticed, however, that the Security Council is not legally bound to apply sanctions in case the parties to the dispute do not comply with its recommendations or fail to settle a dispute in accordance with procedures indicated in paragraph 3 of Section A, especially in accordance with a call of the Security Council to settle their dispute by such means. The Security Council — says paragraph 1 of section B — should take measures necessary for the maintenance of international peace and security only if it should deem that a failure

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([77]) *The Old and the New League* [*supra* note 10], p. 64 [italics added]. In note 7 (same page) KELSEN adds: « Mr. Durward Sandifer, Acting Chief, Division of International Security and Organization, Department of State, said in an address on the Dumbarton Oaks Proposals delivered before the Federal Bar Association at Washington on Dec. 8, 1944 (*Department of State Bulletin*, Vol. XI. No. 285, p. 711 ff.): "The Security Council... would not itself be a primary agency for the settlement of disputes. Its function would be to *encourage* settlement by the parties through peaceful means of their own choice, to recommend procedures and methods of settlement when the parties have failed to reach a settlement, and to keep constant *vigil that failure to settle a dispute does not threaten the peace*". But he said also: "If the parties failed to effect a settlement by these methods they would be obligated to refer the dispute to the Security Council". For what purpose should an unsettled dispute be referred to the Security Council? For the same purpose for which, according to Chapter VIII, Sec. A, para. 6, justiciable disputes should be "referred" to the international court of justice: *to be settled by the authority to which the parties are obliged to refer the dispute.* » [italics added]

> to settle a dispute in accordance with procedures indicated in paragraph 3, or in accordance with its recommendations "constitutes a threat to the maintenance of international peace and security". Since the existence of this condition must be ascertained by the Security Council the effect of the formula is that *the application of sanctions is left to the discretion of the Security Council — a further strengthening of its power.*
>
> If this interpretation of Chapter VIII, Section A and B, is correct, the procedure for the *settlement* of diputes by the Security Council suggested at Dumbarton Oaks *is much more effective than the analogous procedure of the Covenant of the League of Nations.* In contradistinction to the latter, the former may lead to a *complete settlement* of the dispute through an *enforceable decision* of the Security Council, which is not the case in the procedure before the Council of the League of Nations» ([78]).

These views were later to be mostly reasserted, in relation to the Charter itself, within the framework of Kelsen's above-mentioned and better-known broad views of the Security Council's powers in the maintenance of peace and security. Kelsen's example is a territorial dispute, in dealing with which the Security Council after (presumably) recommending that one party cede territory to the other, qualifies the former party's non-compliance with its recommendation as a threat to the peace ([79]).

Odd aspects of Kelsen's writing on the issue in question are both his apparent assumption that the Charter (and the Dumbarton Oaks proposals before it) was bound, so to speak, to represent a progress over the Covenant (or at least be equally generous with regard to the Organization's powers in the area of dispute-settlement) ([80]), and his view that such a result was (or was to be) achieved by resort to the Security Council's powers under Chapter VII.

As noted in para. 4(a), *supra*, a more elaborate theory of the link in question is that offered by Jean Combacau — again with reference to the Dumbarton Oaks text — in his above-cited 1974 book on the UN's sanction power ([81]). According to Combacau a

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([78]) *The Old and the New League* [*supra* note 10], p. 65 [italics added].

([79]) This hypothesis is discussed in note 58, *supra*.

([80]) This is what appears from Kelsen's considerations in *The Old and the New League* [*supra* note 10] reported above in the text of the present paragraph. In a similar vein are the quoted author's comments in *The Settlement of Disputes* [*supra* note 10], p. 210 ff.

([81]) COMBACAU, *Le pouvoir* [*supra* note 13], p. 12-13. We only refer to that part of his theory of the Security Council's powers that relates to the comparative analysis of the Charter version with the Dumbarton Oaks version of the relationship between the Council's conciliatory and enforcement functions. We leave aside, for the purposes of the present section, that more substantial and essential portion of

functional link would have been manifest in the Dumbarton Oaks Chapter VIII, « qui s'articulait avec beaucoup de logique »: section A envisaged a « décision au fond » and Section B envisaged the taking of coercive measures to sanction non-compliance with that « décision au fond ». Despite « la rupture apparente », the link between the obligation (deriving from « la décision au fond ») and « la sanction » was not really broken by the amendment introduced at San Francisco. Despite the « bouleversement » of the Dumbarton Oaks « logique » caused by the sponsoring powers' amendment, notably by the suppression of « la décision au fond à laquelle pourtant l'art. 41 continue de se référer, et...[la perte par les] mesures de l'art. 41 et suivants de leur caractère de sanction de l'obligation de respecter les décisions du Conseil de sécurité », the link between the obligation and the sanction would be revealed by the existence of the sanction ([82]).

28. The present writer was somehow attracted, long ago ([83]), by Hans Kelsen's « functional link » theory. He spoke of « interdi-

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the cited author's theory which relates to the qualification of the Security Council's enforcement power as « pouvoir normatif discrétionnaire »: a qualification we are inclined to accept — subject to the delimitation which is the object of the present article — for the Council's enforcement power as well as for the police power within any modern national legal system (para. 47, *infra*). A position similar to that expressed by Combacau is taken by SIMON, *Article 40* [*supra* note 14]. According to the latter writer, « [d]ans la version initiale du projet, la section B du chapitre VIII imposait au Conseil de sécurité, en présence d'une menace résultant d'un différend qui n'avait pu être résolu par application des dispositions de la section A (actuel chapitre VI), l'obligation de prendre toute mesure nécessaire au maintien de la paix, notamment sous la forme de recommandations ou de décisions (Chapitre VIII, Section B, para. 2); il lui appartenait ensuite de sanctionner le cas échéant le non-respect par les parties de sa décision (Section B, para. 3). En modifiant sensiblement ce système, l'amendement adopté a San Francisco allait intercaler, entre la qualification de la situation (actuel article 39) et l'adoption de mesures coercitives (actuels articles 41 et 42), un para. 2 bis qui devait devenir l'actuel article 40 de la Charte. Les conditions dans lesquelles fut introduite cette disposition, et sa place dans la structure du chapitre VII, fournissent une première indication sur sa fonction: en cas de menace contre la paix, de rupture de la paix ou d'acte d'agression, le Conseil de sécurité pourra prendre immédiatement des mesures d'urgence, d'autant plus faciles à adopter rapidement qu'elles ne préjugent pas les droits respectifs des parties intéressées, en se réservant un certain laps de temps pour se prononcer sur les recommandations ou les décisions nécessaires au maintien ou au rétablissement de la paix, ces dernières résolutions étant plus difficiles à élaborer et à voter, dans la mesure où elles impliquent une recherche de responsabilité et la mise en œuvre d'une action coercitive susceptible de susciter des divergences d'appréciation entre les membres du Conseil » (p. 668).

([82]) COMBACAU, *Le pouvoir* [*supra* note 13], p. 12.

([83]) *Controversie internazionali* [*supra* note 22], p. 439-440 (para. 86).

pendenza» between the two Chapters. A more thorough study of the matter, however, leads him to a different conclusion.

The «functional link» theories find adequate textual support neither in the Dumbarton Oaks proposals nor in the Charter. Any ambiguities in the texts are dispelled by a thorough study of *travaux préparatoires, travaux pre-préparatoires* and *travaux pré-ratification*: to a revisitation of which the next Section is devoted.

IV.B. *The evidence of* travaux préparatoires, pré-préparatoires *and pre-ratification.*

(i) *From the Dumbarton Oaks proposals (and the US preparatory work) to the San Francisco Conference*

29. Serious ambiguities indeed exist in the literature concerning the provisions of the Dumbarton Oaks proposals dealing with the relationship between the two Sections that were to become Chapters VI and VII of the UN Charter.

In order to perceive those ambiguities one should consider separately, firstly, (a) the differences between Chapter VI of the Charter, on the one hand, and Section A («Pacific Settlement of Disputes») of Chapter VIII («Arrangements for the Maintenance of International Peace») of the Dumbarton Oaks proposals, on the other hand; secondly, (b) the differences between Chapter VII of the Charter, on the one hand, and section B («Determination of Threats to the Peace or Acts of Aggression and Action with Respect Thereto») of the same Chapter VIII of the proposals, on the other hand.

(a) With regard to the first comparison, namely Chapter VI of the Charter and Section A of Chapter VIII of the proposals, the main differences are:

(i) unlike the Charter (Articles 36-37), which empowers the Security Council to recommend not just « procedures or methods» but also «such terms of settlement as it may consider appropriate» (Article 37(2)), paragraph 5 of the said Section A («Pacific Settlement of Disputes») of the Dumbarton Oaks proposals only envisaged the recommendation of «appropriate procedures or methods of adjustment» (while paragraph 3 of the same section A, corresponding to paragraph 2 of Article 33 of the Charter, envisaged that the Security Council «should call upon the parties to settle their dispute by [the] means [listed in the previous sentence of that same paragraph 3]»);

(ii) unlike Chapter VI of the Charter, whose opening provision (Article 33) sets forth directly the parties' obligation to «seek a solution...», with only the following Article 34 addressing the Security Council's power «to investigate any dispute or any situation which might lead to international friction or give rise to a dispute...», the Dumbarton Oaks Section A (corresponding to Chapter VI) started from the outset with a paragraph according to which the Security Council should be so empowered to investigate (in the same terms of what would become Article 34 of the Charter);

(iii) while the Charter envisages, in paragraph 1 of Article 35, the right of «Any member of the United Nations to 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», paragraph 2 of the Dumbarton Oaks Section A, obviously corresponding to what was to become Article 35 of the Charter, read: «Any State, whether member of the Organization or not, may bring any such dispute or situation [as described in the previous paragraph 1 of the same Section A] to the attention of the General Assembly or the Security Council», the non-member State hypothesis not being further elaborated, however, as it is in Article 35, paragraph 2 of the Charter;

(iv) unlike Article 36(3) of the Charter, indicating that «legal disputes should as a general rule be referred by the parties» [to the ICJ], paragraph 6 of the cited Dumbarton Oaks Section seemed to use broader language which might have allowed an interpretation according to which reference to the ICJ could also have been made directly by the Security Council.

(b) Moving now to the second comparison, namely between Chapter VII of the Charter and Chapter VIII Section B of the proposals («Determination of Threats to the Peace or Acts of Aggression and Action with Respect Thereto»), the main differences are:

(i) while Chapter VII of the Charter starts directly with the provision (Article 39) envisaging the Security Council's function as determining the existence of the three well-known cases for possible enforcement action, namely threat to the peace, breach of the peace or act of aggression, the Dumbarton Oaks draft placed the equivalent provision in a paragraph 2 of Section B, such provision being preceded by a paragraph 1 according to which, «[s]hould the Security Council deem that a failure to settle a dispute in accordance with procedures indicated in paragraph 3 of Section A, or in accordance with its recommendations made under paragraph 5 of Section A, constitutes a threat to the maintenance of international peace and

security, it should take any measures necessary for the maintenance of international peace and security in accordance with the purposes and principles of the Organization»;

(ii) unlike Article 39 of the Charter, paragraph 2 of the Dumbarton Oaks Section B read: «In general the Security Council should determine the existence of any threat to the peace, breach of the peace or act of aggression and should make recommendations or decide upon the measures to be taken to maintain or restore international peace and security»;

(iii) unlike the Charter, where provisional measures are envisaged in Article 40, no express provision of the kind appeared in Section B of Chapter VIII of the Dumbarton Oaks proposals, paragraphs 3 and 4 of that Section corresponding instead, without significant differences, to Articles 41 and 42 of the Charter, respectively.

30. If one looks at the above differences, the only conceivable *prima facie* sign of a functional link between the Security Council's dispute-settlement and enforcement powers (namely, between Sections A and B of Chapter VIII of the Dumbarton Oaks proposals) would be the presence of paragraph 1 of Section B which was to be dropped at San Francisco when it was decided to start Chapter VII directly with the general provision of Article 39. If one considers, however, the wording and substance of that paragraph 1 and the above-noted features distinguishing the Dumbarton Oaks Section A from the tenor and substance of Chapter VI of the Charter, one can hardly attribute any linking function to the presence of that paragraph in the Dumbarton Oaks text. That paragraph does not indicate, in particular, that the Dumbarton Oaks Chapter VIII envisaged such a functional link between the dispute-settlement provisions of Section A and the enforcement provisions of Section B: at least not in the sense, surely, of implying for the Security Council the power to enforce under Section B recommendations made under Section A.

There are, viceversa, at least three good reasons to believe that no such link was envisaged in the Dumbarton Oaks proposals:

(i) the absence, in Section A, of any express or implied reference to a Security Council power to recommend more than «procedures or methods» (contrary to what the Charter was to do), nothing whatsoever being stated about «terms of settlement». That makes it clear that none of the phases contemplated in the paragraphs of that Dumbarton Oaks Section could possibly be under-

stood as envisaging the Security Council's power to get to the merits of the dispute, let alone *decide* such merits.

(ii) in the light of such a decisive *datum*, the above-mentioned link between Section A and Section B of Chapter VIII — assuming it had existed — could not have made any difference other than as an express indication of the possibility of a factual link between dispute and enforcement conditions or of a merely chronological sequence. This point was to be clarified beyond any doubt during the Senate Foreign Relations Committee *Hearings* of July 1945 which preceded the US Senate's consent to ratification of the Charter (84).

(iii) as regards in particular the latter clarification, one must stress that it came about — as one can see from the passages of the *Hearings* quoted in paras. 33 ff., *infra* — neither as a detail among many others in a comprehensive statement of the State Department's witness Pasvolsky, nor in reply to a more or less casual or incidental question addressed to that witness. Indeed, that clarification was given in the course of a thorough, keen analysis of the phase of the Security Council's dispute conciliation function which consisted of the recommendation of terms of settlement, other than just procedures or methods of settlement. It came about more precisely, as one can see from the relevant passages of the *Hearings*, at the moment when, following the illustration by Pasvolsky of the non-binding nature of the Security Council's recommendation of settlement terms, Senator Austin expressed the wish to know what was «a correct judgment of what was done [by the negotiators in San Francisco] and what the negotiators finally did». We shall see further on (85) that the letter and the substance of the Senate exercise point unambiguously to the conclusion that the United States constitutional body competent to authorize the ratification of the Charter did so on the firm understanding that the Security Council, while endowed with the function of recommending means or terms of settlement under Chapter VI, had no power to turn any recommendations made in that capacity into binding settlements by calling Chapter VII into play.

31. The distinction and separation between the conciliation and enforcement functions is further emphasized by the vicissitudes of that so-called «transition» paragraph which had been proposed

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(84) Para. 36, *infra*.
(85) *Infra* paras. 34 ff., esp. 35-38.

for inclusion in Section A of Chapter VIII by a Joint Formulation Group in the course of the so-called Soviet phase (United Kingdom-United States-USSR) of the Dumbarton Oaks Conference. We refer to that concluding paragraph of Section A, which, by expressly envisaging the Security Council's power to identify a threat to the peace in the parties' failure to settle a dispute in accordance with the contemplated procedures, and by specifically empowering the Council to take enforcement action, seemed to establish a kind of logical *continuum* from dispute-settlement to enforcement, the latter to be used in order to impose a «recommended» settlement or settlement procedure (86).

As Ruth Russell reports in her history of the Charter, «[when that paragraph was considered by the Dumbarton Oaks Steering Committee (Stettinius, Cadogan and Gromyko)] the Soviet delegate proposed that [it] belonged more appropriately in Section VIII-B [namely to what was to become Chapter VII], as it related to action to be taken by the Council itself in the event of a threat to the peace [namely to the Council's enforcement function]». According to the USSR it should either be moved from the bottom of Section A to the beginning of Section B, or be deleted altogether «for it concerned only one type of threat (failure to achieve settlement) while the proposed draft paragraph VIII-B-1 authorized Council action in the event of *any* threat, reading: "The Council should determine the existence of any threat to the peace or breach of the peace or any form of aggression and should make recommendations or decide upon measures to be taken to maintain or restore peace"» (87).

As further indicated by Russell, the British and American delegates

> «accepted the first suggestion. They agreed that the new initial paragraph in Section VIII-B would mark the transition between pacific settlement and enforcement action. The other provision [just quoted here above], would then generalize the authority to enforce peace, as paragraph VIII-A-2 [which is presumably a printing error for VIII-B-2]. This decision, which made the determination of a

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(86) It should be noted, in any event, that such a paragraph — almost identical with the one reported in para. 29 (b) (i) *supra* and also quoted by Pasvolsky in the passage of the US Senate's *Hearings* cited in note 129, *infra* — could not be read as intended to enforce a recommendation relating to dispute-settlement (whether it concerned terms or procedure). The paragraph only referred to the maintenance of peace and security.

(87) RUSSELL, *A History of the United Nations Charter*, Washington, 1958, p. 462.

> threat to the peace the first step in enforcement, rather than the last step in settlement was adopted without further recorded discussion... The placing of this paragraph in Section VIII-B, also, was more in accord with the division between settlement and enforcement that had been made in the Tentative proposals. » [such « proposals » being reported by Russell in Appendix G of her cited book] ([88]).

As everybody knows, the « transition » paragraph, however, was finally dropped — in conformity with the Soviet Dumbarton Oaks proposal — at San Francisco, where it was considered to be superfluous. The fact that no « transition » provision was thus maintained in the Charter is a further sign of the correctness of the interpretation which was to be sanctioned — at least in so far as the United States was concerned — by the US Senate Foreign Relations Committee *Hearings* of July 1945.

The study of the above-mentioned vicissitudes of the relevant texts is invaluable, in our view, for a proper understanding of the relationship between the Security Council's settlement and enforcement functions:

(i) The fact that the « transition » paragraph which had originated in Dumbarton Oaks was moved at that Conference from Section A to Section B, combined with the fact that Section A, while envisaging a Security Council power to recommend procedures or methods of adjustment, did not envisage any power of that body to recommend terms of settlement, contradicts the « link » theory. It notably contradicts the views of those who read in the Dumbarton Oaks Chapter VIII such a link between Section A and B as to conclude that the Dumbarton Oaks draft established a coercive dispute-settlement function of the Security Council, namely an express statutory power of that body to impose terms of settlement ([89]).

([88]) RUSSELL, *A History* [*supra* note 87], p. 462-463. I refer the reader, in addition, to the more recent work by HILDERBRAND, *Dumbarton Oaks*, Chapel Hill, 1990, p. 129 ff., esp. p. 136.

([89]) The most authoritative elaboration of this interpretation is set forth in COMBACAU, *Le pouvoir* [*supra* note 13], as reported *supra* para. 27, esp. note 81. It is on that basis that the author suggests that, within the framework of the Dumbarton Oaks draft, UN enforcement measures qualified as sanctions in a technical sense more surely or obviously than they do so under the Charter. However, considering in particular the absence, in the Dumbarton Oaks drafts, of any provision introducing a Security Council power to indicate terms of settlement, we fail to see any trace, in that document, of the « décision au fond » assumed by our eminent colleague as being entrusted to the Council; and we could hardly recognize such a « décision au fond » in any Security Council measures of the kind of those contemplated in the

(ii) The fact, in particular, that the so-called «transition» paragraph (originally concluding Section A and later opening Section B) of Chapter VIII of the Dumbarton Oaks proposals failed to survive San Francisco (where it was simply deleted) is another element contradicting the related interpretation of the measures under Chapter VII of the Charter as «sanctions»: an interpretation considered by Kelsen to be preferable to the «political» or «police» measures theory that he himself envisaged as a possible alternative.

The disappearance, at San Francisco, of the only provision of the Dumbarton Oaks Chapter VIII which would have singled out «failure to settle» a dispute as a case more readily identifiable as a threat to the peace, is a clear indication that the view of the drafters of the Charter, not only in San Francisco, but already in Dumbarton Oaks, was that the Security Council's recommendations in the area of dispute-settlement carried *per se* no compulsion; and — *pace* Hans Kelsen — *remained* recommendations. Enforcement actions under Chapter VII were envisaged not as a means to turn recommendations into decisions. Security Council decisions under Chapter VII were intended by the authors, and are just as clearly intended in the Charter, to maintain or restore peace and security, not to impose any settlement of a dispute or situation, or any settlement procedure. This means that even where the Council would have power and good cause to intervene in a Chapter VII kind of situation, it would have to do so by using enforcement measures only to eliminate the threat to, or breach of, the peace, not to dispose of States' rights by settling a dispute, or otherwise improperly affecting such rights.

32. The distinction and separation between the dispute or situation settlement function and the enforcement function appears to be equally firm when one considers those *travaux pré-préparatoires* which had been carried out in the United States in view of the elaboration of the Dumbarton Oaks proposals themselves. That elaboration proceeded through a number of stages under such labels as «Draft Constitution», «Agenda Group», «Staff Charter» and others: and they contemplated an «Executive» Council's settlement and enforcement functions obviously representing the *précurseurs* of the functions ultimately conferred to the Security Council in the Dumbarton Oaks proposals and in San Francisco.

Dumbarton Oaks provisions which were the antecedents of Articles 39 ff. of the Charter.

From Russell's detailed and documented account of that process, it clearly appears that, following a *phase* during which it was « more or less taken for granted » that « [t]he Executive Council should be empowered with respect to any dispute threatening the peace to take necessary measures to assure compliance with the terms of any final settlement prescribed under the authority of the international organization » (90),... « the principle of compulsory enforcement of settlement decisions by the Council » *was decidedly abandoned* by the US decision-makers (especially Secretary of State Hull) within the framework of a new draft which, always in the words of Russell, « separated the two problems of settling disputes and repressing aggression, *stressing the police functions of the Council at the expenses of its arbitral functions* » (91).

In the words of the same author, the final paragraph of the chapter on pacific settlement in the US « Tentative proposals » (to the other governments represented at Dumbarton Oaks) « *no longer provided for compulsory enforcement*, but only that: "The Executive Council should be empowered with respect to any dispute [likely to threaten the peace] to *encourage and facilitate* the execution of the terms of any settlement determined under the authority of the International Organization." [Tentative proposals, para. V-11] [...] Thus, in practice, the Council would be able to take action to *maintain the peace (not to enforce its terms of settlement)* against a non-complying state if its non-co-operation threatened to rupture peaceful relations » (92).

(ii) *The relevant part of the US Senate July 1945 Hearings*

33. The reciprocal independence of Chapters VI and VII, which was manifest in the text of the Charter (and fully confirmed by the Dumbarton Oaks and the United States preparatory works), was to be unambigously emphasized in the course of the above-men-

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(90) RUSSELL, *A History* [*supra* note 87], p. 297 [emphasis added]. « This was in line — Russell also notes — with previous thinking, and it was left in substantially this form through the draft discussed with the Senate committee at the end of April 1944 » (*ibid.*), the 1943 « Outline Plan for the President » having even more explicitly « recommended that the Council be given authority: "(a) to prescribe the terms of settlement of a dispute within its jurisdiction, (b) to institute measures for the enforcement of its decisions, (c) to determine the existence of a threat or act of aggression, and (d) to institute measures to repress such threat or act" » (*ibid.*, p. 298).

(91) RUSSELL, *ibid.*, p. 299-302 [emphasis added].

(92) RUSSELL, *ibid.*, p. 302 [italics added].

tioned *Hearings* on the UN Charter before the Foreign Relations Committee of the United States Senate (93). The relationship between the two Chapters was repeatedly and keenly explored by the Foreign Relations Committee members with the help of Dr. Pasvolsky, Special Assistant to the Secretary for International Organizations and Security Affairs, and of Green H. Hackworth, the State Department Legal Adviser. Except perhaps for the question of the voting procedure in the Security Council, the debate was focussed principally: (a) on the question whether any compulsion was envisaged in the Council's conciliatory — dispute and situation settlement — function under Chapter VI; and, (b) mainly on the question whether any « combination » or « coupling » was envisaged between the conciliatory function under Chapter VI and the (peace) enforcement function under Chapter VII, namely on the functional link issue (94).

34. On point (a) Pasvolsky had little trouble dispelling any doubts with regard to the non-binding nature either of the Council's call to the parties, under Article 33(2), to settle a dispute « the continuance of which is likely to endanger the maintenance of international peace and security » by the means listed in paragraph 1 of that same Article, or of the Council's recommendations of means or terms of settlement under Articles 36, 37 or 38 (95).

This was underlined first in an exchange between the Committee's Chairman, Mr. Connally and Dr. Pasvolsky:

> « The CHAIRMAN. Lest there be some misapprehension, somebody spoke about the authority of the Council to compel the states to do something. The suggestion that they adopt these peaceful methods only arises because of their obligation and their promise to do so, but there is no compulsion to make them do these things. Of course, if they don't, and a situation develops which threatens world peace, the quarrel then goes to the Security Council.
>
> Mr. PASVOLSKI. That is right. The quarrel goes to the Security Council, and even so the Security Council can only recommend at this stage.
>
> The CHAIRMAN. Oh yes; it cannot compel them, though. » (96)

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(93) *Hearings* [*supra* note 23], p. 270 ff. Consideration will also be given to Secretary of State STETTINIUS' *Report to the President*, Dept. of State Publ. 2349, June 26, 1945.

(94) *Hearings* [*supra* note 23], p. 274 ff.

(95) The relevant *Hearings* pages are 270-274.

(96) *Ibid.*, p. 272.

Secondly, the same point was clarified by Pasvolsky in the immediately following statement in a further assurance to the Chairman [97]; and just as clearly in Pasvolsky's reply to Senator Lucas' question whether failure « to carry through the suggestions made [under] article 33 » could cause « some penalty ... [to] be attached to that nation that fails to follow through .. » [98]. Pasvolsky replied that in such a case « article 37 comes into play », providing for the parties' obligation to refer the dispute to the Security Council [99]; the latter may recommend « appropriate » means or methods of settlement and, moreover, if the situation so warrants, « it can actually recommend the terms of the settlement » [100].

A further clarification was triggered by Senator Austin's question relating to the meaning of maintenance of « international security and peace » [101]. Here Pasvolsky mentioned the distinction between the Security Council's « repressive function » and « preventive or adjustment function » [102] and explained how the provisions relating to « pacific settlement of disputes » envisage the recommendation by the Council of means or terms of settlement [103]: and it was at this stage — at the conclusion of the basic exchanges on Chapter VI — that the Committee took up the question of the link between the Council's conciliatory and enforcement functions.

35. The relationship between the two functions — dealt with in a considerable number of pages of the *Hearings* [104] — was raised directly by two questions addressed to Dr. Pasvolsky. Senator Austin

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[97] *Ibid.*: « Mr. PASVOLSKY. Senator, there is a very important distinction to be kept in mind here. At this stage, the determination of the Security Council is on the subject of whether or not a dispute or a situation is of such a character that its continuance may lead to a threat to the peace or a breach of the peace. At a later stage, or at the next stage to which I will come in a minute, the determination of the Council will be as to whether or not a particular dispute or situation in fact represents a threat to the peace or a breach of the peace, and then the whole action is different. But as long as we are in the stage of determination by the Council as to whether or not the continuance of the situation is likely to lead to a threat to the peace or a breach of the peace that stage involves only the procedures described in chapter VI under which the Security Council may make various recommendations ».

[98] *Ibid.*

[99] *Ibid.*

[100] *Ibid.*, p. 273.

[101] *Ibid.*

[102] *Ibid.*, p. 274.

[103] *Ibid.*

[104] Namely, from p. 274 bottom lines to p. 279 and, less exclusively or directly, p. 281-297.

enquired whether it was « true that [the drafters of the Charter had] accomplished the *combination of the authority to pass upon the merits of an issue and to enforce it by arms — that combination in the Security Council* » ([105]). Not satisfied with the Committee Chairman's interjection — unobjected to by Pasvolsky — « that the recommendation [of methods or terms of settlement] carries no compulsion whatever », Senator Austin put a second, possibly more explicit question by calling Pasvolsky's attention to the language in page 84, para. 2 of the Secretary of State Stettinius Report to the President ([106]). According to that paragraph, the parties were not « obligated at this stage of the dispute to accept the terms of settlement recommended by the [...] Council, anymore than they are obligated to accept the Council's other recommendations: [i]f, however, [the parties'] failure to do so results in a threat to the peace, then the enforcement provisions of Chapter VII come into play » ([107]). Senator Austin's pointed question in that regard was whether « there [was] anything wrong with that application [*sic*] of the [Stettinius] report » ([108]).

Following a number of exchanges between Pasvolsky and the Senator to be considered further on ([109]) — all unambiguously denying any « combination of the authority to pass upon the merits of an issue and to enforce it by arms » ([110]) — Senator Austin's question about the correctness of the relevant passage of the Stettinius report was reiterated by Austin himself and by the Chairman, and answered by Pasvolsky in the following terms:

> « Senator AUSTIN. In effect I gather from what you say that this provision or application of chapter VII that is referred to in the report by the Secretary of State to the President on page 84 does not apply to this situation and ought not to be there. This provision reads: "If, however, their failure to do so results in a threat to the peace, then the enforcement provisions of chapter VII come into play".
>
> Mr. PASVOLSKY. But that is absolutely correct. If their failure to accept this recommendation results in a situation which is determined by the Security Council to constitute a threat to the peace, it is no longer a situation the continuance of which may threaten the peace, but it is a situation which itself represents a threat to the peace. When the Security Council determines that, then irrespective of what hap-

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([105]) *Ibid.*, p. 274-275 [italics added].
([106]) *Supra* note 93.
([107]) *Hearings* [*supra* note 23], p. 275.
([108]) *Ibid.*
([109]) *Infra* para. 37(b).
([110]) *Hearings* [*supra* note 23], p. 274-275.

pened, irrespective of whether it was a failure to accept its recommendation or any other act that led to the creation of that situation, the powers of the Security Council under chapter VII *as they relate to the enforcement provisions* come into play.

...

Senator AUSTIN. In this report to the President, action under chapter VII *is coupled up* with the action under Chapter VI, isn't it? Do you have that before you.

Mr. PASVOLSKY. That is on page 84, paragraph 2.

Senator AUSTIN. They are *coupled* there. You say they ought *not to be coupled, that they are not related to each other.* Can you say, then, that the use of military authority which is granted by chapter VII, *is not intended* by this treaty to be used to *enforce in this indirect way*, that is spoken of here on page 84, *the recommendation of the Security Council*, but is used only for the purpose of *preventing hostilities.*

Mr. PASVOLSKY. *I would say that; certainly.*

Senator AUSTIN. *All right. Let us have the record rest there.* That is where I thought it *ought to be left.* It is not my disposition in asking these questions to develop the fact that this expansion of the authority of the Security Council was intended *to combine in the Security Council both the powers of judgment and the powers of execution* of the judgment. I think that would be a *grave mistake and a step backward instead of forward.*

The CHAIRMAN. Senator Austin, with all due respect to the Secretary and to you, the *report to the President could in no wise control the text of the Charter.* If there is any conflict, *the text of the Charter would govern.*

Senator AUSTIN. I think *this clears it up in good shape* » (111).

It could not be clearer from the quoted passages that not only in the minds of the Chairman and Senator Austin (and obviously of the whole Senate Committee) but also in the mind of the State Department's expert, Dr. Pasvolsky, the passage at page 84 of Stettinius' report to the President did not reflect a proper reading of the Charter. It was equally clear that the participants in the discussion were not only quite explicit in rejecting the Stettinius report's interpretation of the « combination » or « coupling » between Chapters VI and VII but also very determined to remove any ambiguity about the matter both *de jure condito* — namely, as a matter of Charter interpretation — and *de jure condendo* (112). While not reflecting any reservations, conditions, or understandings added to

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(111) *Ibid.*, p. 278-279 [italics added].

(112) We refer to Chairman Connally's and Senator Austin's conclusive exchanges as reported in the last lines of the above-quoted passage of the *Hearings.*

the treaty in the Senate's "advice and consent" resolution on ratification, the United States President's official "Proclamation" of the Charter — as it appears in *United States Statutes at Large*, vol. 59 (1945), Part 2, p. 1031 ff. — sets forth in its turn no reservations, conditions, or understandings either; and the text of the Senate's Resolution and the text of the President's Instrument of Ratification confirm such state of affairs. It follows that the Senate's interpretation of the Charter provisions referred to in the cited passage of the Stettinius Report undoubtedly prevailed, in the course of the decisive phases of the United States ratification process, over the Secretary of State's understanding of those provisions.

36. But the *Hearings* tell us more. The absence of a functional link between Chapters VI and VII was repeatedly stressed, in unambiguous language, by the Committee's Chairman, Senator Connally, who expressed himself - if possible - even more firmly than Senator Austin. Following some of the State Department expert's considerations (in reply to Senator Austin) on the consequences of the parties' failure to settle a dispute in accordance with the recommended methods or terms ([113]), Chairman Connally stated:

> «The CHAIRMAN. May I interject right there and make an observation, Senator? I do not quite agree with either one of you 100 percent. According to my view of article 37 [...] Dr. Pasvolsky I think is correct in his statement that *that is simply a part of [the Council's] general authority to preserve the peace*, and that by suggesting a settlement which is appropriate and which the parties accept, it has performed a very high function. *I do not agree, however, that it adds anything to the jurisdiction of the Council under chapter 7.* If the parties do not accept the recommendation, they have got to go under chapter 7 *with no new jurisdiction but just what chapter 7 provides.* I do not agree that there is anything in chapter 7 that would give the Security Council authority to say, "Well, *you have got to change this boundary here* and *give this piece of territory* to some other country," because there is *nothing in chapter 7 that authorizes that sort of action.* I think the recommendation is all right and perfectly sound and perfectly wise if they accept it, but if they do not accept it, it is just as though the proposition *was never made* and the *recommendation never made.* They are then remitted to chapter 7 with the enforcement provision *without any other added jurisdiction and strictly within the powers conferred by chapter 7.* That is my own individual view.

([113]) *Ibid.*, p. 275-276.

Senator AUSTIN. *I think that is very important.* Your views about the matter count very heavily, and they are a very important part of this record, and they *give me a great deal of comfort.*

The CHAIRMAN. I do not speak by any great legal experience or anything like that, but *I was on this Commission when we did consider these very matters, and my construction - and others', I think, too* - was simply an effort to get the parties together under peaceful settlement. You have already urged them to settle the dispute by arbitration, diplomacy, conciliations, and judicial settlement, and if they do not do it, and when they do not do it, all you can do is to take them before the Security Council. There is no compulsion for arbitration except as suggested by Senator Millikin except that the Council could pick out arbitration and suggest that the parties use arbitration, but if they do not use arbitration *they are relegated to chapter 7 under its own jurisdiction and clauses, and this development does not add to that jurisdiction. It does not say they shall take action; it says "recommend" and "recommend" does not mean to enter judgment or to compel action on the part of the disputants.* » (114)

Furthermore, following another intervention by Senator Austin in the same vein (115), Chairman Connally insisted: « I do not think that the suggestion that the Council recommend such terms of settlement as they consider appropriate *in anywise increases the Council's jurisdiction under Chapter VII* » (116).

A further unequivocal statement to the same effect was to come further on, during the discussion of the voting procedure in the Security Council, in the following exchange between Senator Burton and Mr. Pasvolsky:

« Senator BURTON. Referring again to the point Senator Austin made, as I understood you, Doctor, you said that *article 39 does not provide authority for the enforcement of the terms of settlement under article 37.*

Mr. PASVOLSKY. That is right » (117).

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(114) *Ibid.*, p. 276 [italics added].
(115) *Ibid.*, p. 277.
(116) *Ibid.* [italics added].
(117) *Ibid.*, p. 285 [italics added]. The distinction between the two Security Council's functions is also illustrated by Pasvolsky's statements (again within the framework of the voting procedure analysis) at p. 286 of the *Hearings*: « ... but its action under article 39, for the purpose of maintaining international peace and security would be for that purpose primarily ». The adverb « primarily » is abundantly outweighed by Pasvolsky's cited assents to Senators Connally, Austin and Burton's understanding of the relationship between Chapter VI and Chapter VII.

The distinction between dispute (or situation) settlement and peace-enforcement is, if possible, further emphasized by the exchanges between Senator Burton and Mr. Pasvolsky on the distinction between Article 37 and Article 39 from the viewpoint of the Council members' voting rights. On that point the exchange is clearly to the effect that between Article 37 and Article 39 there is a difference as regards both the issue (namely a non-binding recommendation and a decision, respectively) and the voting rights of the parties (under Article 37 the interested party being bound to abstain while under Article 39 the unanimity rule applies in any case) ([118]).

In an identical vein was Pasvolsky's answer, at a later stage, to Senator Murray's question relating to any conceivable theoretical Security Council intervention in matters to be settled by the imminent World War II peace-arrangements ([119]).

37. Sufficient though the above statements are to make matters clear — none of them, indeed, being contradicted by Pasvolsky — they do not exhaust the contribution of the Senate Committee *Hearings* to the determination of the limits of the Security Council's powers. Even further elements emerge relating, respectively, (a) to the *purpose of enforcement* action and (b) to *the role of the Council in dispute-settlement*, notably with regard to the settlement of those

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([118]) «Senator BURTON. Therefore, you have both a difference in the issue and a difference in the voting rights of the parties? Mr. PASVOLSKY. That is right» (*Ibid.*, p. 285).

([119]) «Mr. PASVOLSKY. Senator, I do not think it will be a question [for the Security Council] of upholding or not upholding rulings. There will be a settled situation, a situation which exists by virtue of agreements, treaties, or whatever they may be. If out of that situation or out of any other circumstance there arises a condition or a situation which threatens the peace, then the Security Council acts in such a way as *to see to it that a threat to the peace does not develop; or if it develops that it is stopped.* As far as the *relations between the particular states are concerned, the Council cannot impose upon them any kind of relationship that it thinks ought to exist between them*, but the Council can urge them, help them provide facilities for them, to reach an amicable solution of whatever difficulties exist between them.

Senator GEORGE. In other words, a perfect world is not presupposed after all?

Mr. PASVOLSKY. No, that is right.» (*Ibid.*, p. 294) [italics added].

Undoubtedly significant of the limits of the Security Council's powers is also the following remark (once more within the framework of the analysis of the Council's voting procedure and the conditions of the Council's armed enforcement):

«Senator BURTON ... As I understand it, [the] demonstration of the military force of the United Nations has *the same effect on an aggressor nation as a squad of policemen* on a street corner would have, because people do not commit assault and battery in the presence of a squad of policemen. In order to *maintain peace, this is the effective measure which we take.*» (*Ibid.*, p. 297) [italics added].

territorial disputes which strangely seem to be viewed by Kelsen as an example of the alleged Security Council's power to enforce means or terms of settlement.

(a) As regards the purpose of the Council's enforcement action (under Chapter VII), it is striking that the participants in the *Hearings* — Chairman Connally, Senator Austin and Dr. Pasvolsky *en tête* — constantly refer to Chapter VII enforcement action as intended to face, thwart, resist or curb the *threat or use of force or aggression*; *never as intended to impose means or terms of settlement.*

They speak of « restor[ing] or maintain[ing] international peace and security » (p. 275), of « maintain[ing] security » (*ibid.*), of « remedy for the aggression » (*ibid.*), of « prevent[ing] war » (p. 277) or preventing « the use of armed force between [the parties] » (*ibid.*), « prevent[ing] hostilities » (p. 279), « stopp[ing] the fighting » or ... « remov[ing] the threat to the peace » (p. 282), « maintain[ing] security from war » (*ibid.*), « stopping [a threat to the peace] or acts of aggression » (p. 294-299), « retain[ing] the peace » (p. 297) ([120]) *et similia.* There was no instance of any participant in the Senate Committee's exercise indicating that Chapter VII Security Council action was intended either to impose a given settlement, or settlement method, for a dispute or situation, or otherwise improperly affect States' rights. On the contrary, any explicit or implied references to the latter possibility are intended to exclude it. Such is the case of Senator Austin's above-mentioned question whether there was any « combination of the authority to pass upon the merits of the issue and to enforce it by arms » (p. 274-275) and of Chairman Connally's repeated rejection of any Charter reading implying « the suggestion that the Council recommend such terms of settlement as they consider appropriate in anywise increas[ing] the Council's jurisdiction under Chapter VII » ([121]). The same can be said of the above-noted distinction stressed by Pasvolsky between the Council's repressive and preventive or adjustment functions (p. 274).

(b) Concerning Hans Kelsen's favourite example of a territorial dispute, that issue was dealt with in the *Hearings* more than three times with an equally high degree of clarity. It was first mentioned by Chairman Connally in order to stress his point about Chapter VII not envisaging any « new jurisdiction but just what Chapter VII pro-

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([120]) The idea that the Council's task is to enforce *peace* and not changes in the law also emerges in and within the lines of the part of the *Hearings* devoted to the voting procedure in the Security Council (p. 281 ff.).

([121]) *Infra* note 123.

vides». As already noted, he added on that occasion: «I do not agree that there is anything in chapter 7 that would give the Security Council authority to say, "Well, you have got to change this boundary here and give this piece of territory to some other country"» ([122]).

The same hypothesis was to be developed shortly thereafter by Senator Austin and the Chairman himself ([123]).

Although it was perhaps less clearcut, Pasvolsky's subsequent statement was in essential conformity with the two Senators' view, particularly as expressed by Connally ([124]). Any doubts that might

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([122]) *Supra* para. 36. That clear point was to be reiterated in the passage quoted in the next footnote.

([123]) «Senator AUSTIN. I would like to get your views about this: Assume that the dispute which the parties themselves could not settle involved the location of the boundary line, and thereby the Security Council believing and having found that this threatens the peace of the world and took jurisdiction and said, "On the merits this country should give us [*sic*!] and deed to the other country certain territory" and fixes the boundary line at this or that place and says, "We therefore recommend that one country cede to the other certain territory." That is nothing but a recommendation, and they do not carry it out, and the disturbance still threatens the international peace and security. What I would like to have this record show is that this provision involves *no more* than that the powers of the Security Council under chapter 7 go *only to the extent of preventing the issue getting to war* and compel those parties to *keep the peace*. In spite of the failure to carry out the recommendation, all the Security Council can do is to *prevent war*. Is that your understanding?

The CHAIRMAN. That is a pretty broad question. I have not studied these things recently with that particular thing in mind, but I have already made the general statement that *I do not think that the suggestion that the Council recommend such terms of settlement as they consider appropriate in anywise increases the Council's jurisdiction under Chapter VII. It is just as though no recommendation was ever made*. When the Council considers, under chapter VII, *the boundary dispute we were discussing* a moment ago, my tentative view is - and I think it will be confirmed - that *the Security Council would have no authority to enter an order that "You have got to establish a new line here and hand this territory over* to some other nation."

Senator AUSTIN. That is not my question.

The CHAIRMAN. I know what your question is. The Council can then take measures *to prevent armed conflict* and they have that power under Chapter VII.

Senator AUSTIN. Can they go any further than that? Having *recommended the cession of certain territory* in order to establish a boundary line, I would like to ask whether anybody in this Conference having to do with this treaty regarded *this reference to chapter VII*, that is the application of the *enforcement provision of chapter VII, to have anything to do with the recommendation beyond the point of preventing the use of armed force between them?*

The CHAIRMAN. *That is my view.*

Senator AUSTIN. That is what I would like to have Dr. Pasvolsky say. I would be glad if he can say that» (*Hearings* [*supra* note 23], p. 277) [italics added].

([124]) To quote from the *Hearings*:

«Mr. PASVOLSKY. Senator, as I read these provisions of chapter VI, chapter VI relates to the various things that the Security Council can do by way of recommendation, without the power to enforce, under a determination by it that the situation with

arise from some of Pasvolsky's words in the latter passage are unambiguously dispelled by the word « certainly » uttered by Pasvolsky himself in answer to Senator Austin's last condemnation of para. 2 of page 84 of the Stettinius report. It was indeed immediately after Pasvolsky's reference to Chairman Connally's statement ([125]) that Senator Austin reiterated that question about the correctness or not of the Stettinius report's paragraph 2 of page 84 which he had formulated at the beginning of the meeting ([126]): and it was on the above-

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which it is dealing if allowed to continue may threaten peace but does not yet threaten peace. When the Council gets into chapter VII as a source of its power, where it has power to act, it has to make another determination, and that makes article 39 one of the most important articles in the whole Charter.

Senator AUSTIN. Article 39 reads:

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

Mr. PASVOLSKY. When the Council begins to make recommendations under Article 39, that is another story. That is another kind of a recommendation, because that is a recommendation which occurs at a stage at which the Council has determined that there exists an actual threat to the peace or a breach of the peace. Even here, however, it is very important to bear in mind that in chapter V which relates to the powers and responsibilities of the Security Council it was stated that the Security Council shall in the performance of its duties be guided by and act in accordance with the Purposes and Principles of the Organization.

In the article on Purposes and Principles, article 2, it is stated that — "The Organization and its Members, in pursuit of the Purposes stated in article 1, shall act in accordance with the following Principles" — that is, both the Organization and its Members.

And paragraph 4 of the Principles states that "all Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations".

When it comes to the sort of a situation which you have described where there is a threat to the peace — let us say where there is an argument about a boundary and the Council makes a recommendation that by peaceful methods and by peaceful adjustment the parties to that controversy should adjust their boundary — that is one thing. When it comes to putting that recommendation into effect, under the powers inherent in chapter VII, then the Security Council has to act in accordance with the Purposes and Principles of the Organization. It is not free, therefore, to act in any way that it chooses; it has to act in accordance with those Purposes an Principles, and that was clearly understood.

Therefore, *as Senator Connally says, what the Council does under chapter VI in no way affects its powers under chapter VII*, because chapter VII deals with a situation based on a different set of facts from the set of facts on which the powers of the Security Council are based under Chapter VI. That is, there is the determination to which I have referred several times as to whether or not an actual threat to the peace exists » (*Ibid.*, p. 277-278) [italics added].

([125]) In the last paragraph of the statement just quoted above (in the preceding note).

([126]) *Supra* para. 35.

mentioned clarification of that question by the above-quoted exchanges between Austin, Pasvolsky and Chairman Connally that the matter was «left to rest» and the meeting adjourned ([127]).

The importance of point (b) above seems strangely to have escaped Kelsen in his analysis of the *Hearings*.

The Committee *Hearings* also contain a comparison by Pasvolsky of the Charter and the Dumbarton Oaks provisions which could be relevant for the relationship between Security Council enforcement action and Security Council dispute-settlement (or, more generally, for the disposal by the Council of States' rights or obligations).

In answering (in the above quoted terms) Senator Austin's repeatedly mentioned question relating to the Stettinius report passage (in para. 2 of page 84) concerning that relationship, the State Department expert interestingly stressed three points. One point, thoroughly explored already in the previous exchanges, was again that the Council's action under Chapter VII was merely intended to «maintain security» ([128]). Another point — already noted *supra* para. 30(iii) — was that the suppression in San Francisco of the paragraph allegedly representing a «functional link» between Chapters VI and VII did not represent any real innovation with respect to the relationship between the Security Council's dispute-settlement and peace-enforcement functions ([129]). A third point was that the Council's power to enforce peace did not convert that body into a

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([127]) It will be recalled that that part of the *Hearings* concluded with Pasvolsky's clear approval of Senator Austin's and the Chairman's firm assertion of the incorrectness of the said para. 2 of page 84 of the Stettinius *Report to the President* [*supra* note 93]. That part of the *Hearings* has already been set forth in para. 35 *supra*.

([128]) «Mr. PASVOLSKY. Well, Senator, I think that when failure to settle a dispute by any of the means that are proposed here or in accordance with the terms that are recommended results in a situation which the Security Council considers as becoming a threat to the peace, then the Security Council presumably under its responsibility and power can take any measures that it feels necessary in order to restore or maintain international peace and security; provided there intervenes a determination by it that a threat to the peace exists. In this case, since it is a threat to the peace, *its action is to maintain security.*» (*Hearings* [*supra* note 23], p. 275).

([129]) «If you will recall, Senator, the language of the Dumbarton Oaks proposals contained a paragraph which disappears in the new draft because it was considered no longer necessary and was covered by other provisions. That is a paragraph which was originally paragraph 1 of section B of chapter VIII: "Should the Security Council deem that a failure to settle a dispute in accordance with procedures indicated in para. 3 of section A, or in accordance with its recommendations made under para. 5 of section A, constitutes a threat to the maintenance of international peace and security, it should take any measures necessary for the maintenance of international peace and security in accordance with the purposes and principles of the Organization". The substance of that paragraph is now embodied in article 39 which is the original paragraph that follows and is a generalized paragraph. It is embodied

court ([130]): and this further *mise au point* triggered the (above-registered) insistence by Chairman Connally that the performance by the Security Council of the « very high function » of « suggesting a settlement which is appropriate » *did not add « anything to the jurisdiction* of the Council under Chapter 7 » ([131]). This point was made if possible even clearer by Senator Connally in the passages reported in para. 35 *supra*.

38. The above reading of the US Senate Foreign Relations Committee *Hearings* disposes, we submit, of the assertion that since « under Article 39 the Security Council may determine that nonacceptance of its recommendation constitutes a threat of the peace or a breach of the peace, ...and may take enforcement action in order to maintain or restore peace, the Council may enforce its recommendation ». It does not seem correct to say, as Kelsen concludes: « In this case the Security Council's recommendation has binding force upon the parties; and that means that it is not a mere "recommendation" » ([132]).

On the contrary, it was stressed repeatedly during the cited *Hearings*, that the Security Council's task under Chapter VII is to enforce *peace* ([133]) *not* to enforce recommendations, let alone to turn a recommendation under Chapter VI, as maintained by Kelsen, into more than « a mere recommendation » ([134]).

In conclusion, the *Hearings* unambiguously show that, although the Security Council's functions under Chapters VI and VII are obviously both related to the maintenance of international peace and security, Chapter VII represents the « *teeth* » *of the UN* (as stated in

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in part in this proposition and it is embodied in part in the new proposal about preliminary measures in article 40. » (*Ibid.*, p. 275).

([130]) « Now, there is a question which is involved here which is rather important, and that is whether or not this converts the Council into a court. The whole tenor of the Charter is that as far as possible all legal disputes, that is all justiciable disputes, all disputes which involve situations that can be settled by a court, should be settled by a court. It is only where you have a dispute about such a matter, or of such a character, that the court cannot take jurisdiction because it does not fall within its compass that the Security Council should be the agency in the world to which nations can turn if they fail to achieve the settlement of a dispute by means of their own choice. » (*Ibid.*, p. 276).

([131]) *Hearings* [*supra* note 23], p. 276. The cited sentence is part of the passage quoted *supra* para. 36.

([132]) Both passages are from KELSEN, *Principles* [*supra* note 10], p. 371-372.

([133]) Para. 37(a), *supra*.

([134]) One should recall here Chairman Connally's conclusive statement appearing in the passage quoted at the beginning of para. 36, *supra* (*Hearings*, p. 276).

the cited Report to the President) for the maintenance of *peace and security*. It does *not represent the «teeth» of Chapter VI* to settle disputes or litigious situations, or otherwise dispose of States' rights.

(iii) *The Stettinius Report to the US President*

39. After what was stated *supra* with regards to the Stettinius report's passage on page 84, wrongly establishing a link between the two Chapters ([135]), there is not much to add by way of comment to that document. The only paragraph of a certain interest is an inaccurate paraphrase of paragraph 5 of Section A of Chapter VIII of the Dumbarton Oaks proposals ([136]). Despite the inaccuracy, there is nothing in that passage supporting the functional link theories ([137]).

([135]) *Supra* para. 35. The quoted passage was preceded in that document by the following language: « The answer to that question may be found, not in this Chapter but in the following one, which grants the Security Council power to coerce states when, refusing to follow peaceful procedures to ultimate settlement of disputes they attempt to gain their ends. Security Council's recommendations under Chapter VI give new meaning to the old procedures for peaceful settlement which are embodied in this Chapter. If the security functions of the organization develop over the years, as they can with the cooperation of the nations and peoples of the world, emphasis on peaceful settlement will grow too, and do so, paradoxically as it may first appear, precisely because the Security Council possesses under Chapter VII the power to take enforcement action. » (p. 82).

([136]) « [I]f the parties failed to reach a settlement by the [various] means [indicated in the previous paragraphs also reported in the same note *supra*] they were to be obligated to refer to the Security Council which, however, could do no more than recommend methods or procedures of adjustment » (*ibid.*, p. 83).

([137]) See p. 83-86 of the cited Stettinius *Report* [*supra* note 93]. A further ambiguity is to be found in the conclusive part of the *Report*'s Section on the same Chapter, notably in the last paragraph of that Section, at p. 86. In that passage, *à propos* of Article 37, it is stated: « The Council may now recommend either procedures or actual terms of settlement *but it does not have the power to compel the parties to accept these terms*. It has power *to enforce its decisions* only after it has determined under the provisions of Chapter VI that a threat to the peace, a breach of the peace or an act of aggression exists. These positions are analyzed in the following chapter of the report » [italics added]. Again, however, the ambiguity appearing in the quoted passages of p. 82 and 86 of the report to the President was to find authoritative and repeated clarification in the course of the cited Senate Foreign Relations Committee *Hearings*, and precisely in the words of Pasvolsky, of the Committee Chairman and of a number of Committee members. Those statements — reported *supra* paras. 33 ff. — leave no room for doubt as to the understanding of the Charter provisions in question by the United States Senate at the time when it scrutinized the Charter prior to ratification.

IV.C. *Concluding remarks on the Chapters VI-VII functional link theory*

40. If the present writer has read the *Hearings* properly, Kelsen seems to have underestimated the importance of very significant passages of those *Hearings* when he asserts that the statement in para. 2 of page 84 of Stettinius' *Report to the President* reflected a more correct interpretation of Article 39 — with regard to the relationship between dispute-settlement and peace-enforcement — than the interpretation adopted and confirmed repeatedly in the above-quoted exchanges among Senator Austin, the Committee's Chairman Connally, the State Department's expert Pasvolsky and one or two other Senators, and obviously accepted by the Committee as a whole.

As Kelsen himself puts it (after discussing the well-known Belgian amendment here considered in para. 19 *supra*): « There can be little doubt that the statement in the *Report to the President*, but not the interpretation of Article 39 by the Senator, with which the representative of the Department of State finally agreed, is in accordance with the text of this Article, and that this Article indeed confers upon the Security Council both the power of judgment and the power of execution of the judgment » ([138]).

We fail to see how the text of Article 39 (and any other possibly related provision of the Charter) could be understood as confirming Stettinius' rather than Pasvolsky's and the whole Senate Committee's (not to mention the Senate plenary's) view of the matter.

Secondly, the same author omits to take into account — or, more precisely, ignores *in toto* — those exchanges between the Senators and the State Department's expert Pasvolsky relating to the Security Council's role in the case of a territorial dispute expressly and repeatedly considered by Kelsen himself.

Thirdly, the passage in the Senate *Hearings* relating to the comparison and relationship between Article 37 and Article 39 — clearly to the effect that the latter provision does not relate to binding dispute-settlement — is at variance with Kelsen's theory of binding dispute-settlement under Article 39.

Kelsen seems thus inexplicably to ignore important evidence which contradicts, in our view, his theory of the Council's legislative and judicial powers and of the Chapters VI-VII functional link.

([138]) KELSEN, *The Law of the United Nations* [*supra* note 10], p. 449 ff., note 8.

41. A point we do not find sufficiently considered (if at all) by commentators is the fact that even if the Chapters VI-VII link existed — which the texts and *travaux préparatoires* (or pre-ratification) show not to be the case — the triggering factor for the Council to move from one Chapter to the other is generally not assumed (by the theory's adherents themselves) to be a single party's failure. It is a failure by two or more parties.

Assuming then that the link existed, its effect would be to connect the determination of a threat to the peace to the failure of two or more parties to settle the dispute. But this situation could in no way be assimilated to the case involving the failure of *one* of the parties to comply with a settlement recommendation: in the absence of such a failure no imposition of a settlement could be effected. Indeed, Kelsen's construction of the matter (whether under the Dumbarton Oaks proposals or the Charter) seems to omit to take account of the fact that a dispute involves at least two parties. To say that failure *by the parties* to settle the dispute triggers the exercise by the Council of a *settlement* (instead of *peace*) enforcement power means to neglect the fact that no such power could be exercised unless the Council decided *to which party* the failure would be attributable. As long as the « failure to settle » remains *all* the parties' failure as apparently assumed in Kelsen's passages quoted in para. 27, *supra*, it is hard to imagine in what sense the enforcement of a settlement by the Council could be envisaged. In other words, for any dispute-settlement compliance to be imposed there must be — as Kelsen seems fugaciously to recognize in one of those passages — one party upon whom to impose it. All that can be imposed on the two or more parties is the obligation to settle peacefully, namely, not by resort to force: the only purpose for which Chapter VII measures could lawfully be used against any number of parties. The obligation to settle is *per se* practically not enforceable by Chapter VII measures.

V. *The questionable impact of « implied powers », « subsequent practice », «* de facto *amendment » and other doctrines*

42. Insofar as they do not find support in the Charter readings discussed in the preceding paragraphs, the theories of the Security Council law-making (law-determining and law-enforcing) powers might seek support in other theoretically conceivable sources of the legitimation of such powers. The main candidates among these are known under such labels as « implied powers », « subsequent

practice » and « *de facto* Charter amendment ». Considering, however, that these doctrines seem to be more or less directly interrelated with what we referred to at the outset as the constitutional (federal) theories of the Charter (para. 4 (b), *supra*), some preliminary attention should briefly be given to those theories.

Our answer to the question whether the Charter is a treaty or a constitution is that it is obviously both. There remains to be seen, though — it is the essential point — in what sense — or of « what » — the Charter is the, or a, constitution. In the view of the present writer, the Charter is the constitution of the United Nations as an international organization and not, contrary to a rather rapidly spreading view, a constitution of the international community of States or of mankind. A *critique* of such a concept of the Charter has been developed by the present writer since about 1950. While there is regrettably no proof that a legal community of mankind is a reality, inter-State relations are still governed by general international law and treaty law. The Charter is of course, thanks to the presence of more or less effective organs and Article 103, the most prominent part of the (treaty) law of international organizations. It is hardly necessary to add that just as the UN as an international organization finds its constitution in the Charter, each one of the innumerable international agencies of the so-called UN family is provided with its own statute, charter or constitution: a factor with which the « world constitutionalists » of the Charter should also reckon.

We believe, immodestly, that that, by now seasoned, *critique* (recently renewed) still holds ([139]); and no persuasive evidence to

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([139]) *Rapporti contrattuali fra Stati e organizzazione internazionale*, in *Archivio giuridico Filippo Serafini*, 1950, esp. p. 73 ff., 93 ff., 130-137; *The « Federal Analogy » and UN Charter Interpretation*, in *European Journal of Int. Law*, 1997, p. 1-28, esp. p. 5-9, 12 ff., 16-17 (with the references therein); and *Postfazione*, in PICCHIO FORLATI, MIELE (eds.), *Le Nazioni Unite*, Torino, 1998, p. 238 ff., esp. p. 252.

According to KUNZ, « [w]hether [international law] is, as Jenks believes, "the common law of mankind", in an early, imperfect and precarious stage of its development, cannot yet be determined with scientific "authority" » (*Sanctions in International Law*, in *American Journal of Int. Law*, 1960, at p. 346). The difference between the constitution of an international organization and a national constitution is rightly stressed by SKUBISZEWSKI, *Implied Powers of International Organizations*, in DINSTEIN, TABORY (eds.), *International Law at a Time of Perplexity. Essays in Honour of Shabtai Rosenne*, Dordrecht, 1989, p. 855 ff., at p. 855-856.

It was also on the basis of his *critique* of the theory of the Charter as a world constitution that the present writer discussed, in the early seventies, the theory, based apparently on the implied powers doctrine, according to which the General Assembly was bound to be endowed, as the most representative organ of the UN (namely, of

the contrary seems to emerge — we submit — from the undoubtedly imaginative but perplexing writings recently devoted by some learned scholars to the Charter as an existing or prospective world constitution ([140]).

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the « organized international community »), with a power to enact — particularly by means of « declarations » — rules or principles legally binding on the UN member States. While not denying the possibility that Assembly resolutions could in fact concur (contribute) to the formation of binding rules of international law, the present writer contested — in his view successfully — that such resolutions (or even « declarations ») could be *ipso facto* or *per se* law-making acts. At that time, Western governments were generally inclined to resist the Third World tendency (favoured by the Communist States) to invoke the implied powers doctrine in favour of General Assembly law-making. It was thus relatively easy for the negative arguments to prevail (ARANGIO-RUIZ, *The Normative Role of the General Assembly and the Declaration of Principles of Friendly Relations, Appendix on the Concept of International Law and the Theory of International Organization*, in *Recueil des cours*, 1972, III, p. 629-731, reprinted under the title *The UN Declaration on Friendly Relations and the System of the Sources of International Law*, with the same *Appendix*, Alphen aan den Rijn, 1979, p. 199-301; and SKUBISZEWSKI, *Resolutions of the General Assembly of the United Nations*, in *Institut de droit international, Annuaire*, vol. 61 (1985), Part I, p. 29-249 and 305-334).

One must wonder, nowadays, whether there is any sense in which the alleged UN Charter analogy with a federal constitution — particularly the United States constitution — would be more justified for the powers of the Security Council than for those of the General Assembly. Would the analogy be more justified because the Council is endowed with more penetrating and broader powers of binding decisions? Would it be more justified because the Council is partly composed of States stronger than other UN members? This writer's submission is that the federal analogy would be far less justified for the Security Council than it would be for the Assembly. None of the above reasons makes the Council's powers more susceptible of broad interpretation by the federal analogy or the implied powers doctrine than those of the General Assembly. The Security Council's powers are instead an egregious example of a matter that should be subject to strict interpretation.

Of course UN bodies also exercise « operational » or « operative » functions or activities in national territories. They actually do so with increasing frequency. But they do so only with the expressed or implied consent of the target, or otherwise involved, State or States. To argue from such practices that the acting bodies are accepted in law as organs of a world government or « super-State » or even as candidates (*de jure condendo*) to such roles, is, with all respect, pure fantasy, unsupported by any scientific, legally significant data.

([140]) See esp. SLOAN, *The United Nations Charter as a Constitution*, in *Pace Yearbook of Int. Law*, 1989, p. 61 ff. The latest remarkable work (announcing also a forthcoming « The International Legal Order: Unity or Fragmentation ») is P.-M. DUPUY'S *The Constitutional Dimension* [*supra* note 16], p. 1-33. While awaiting the forthcoming « Legal Order » we find still appropriate Joseph Kunz' remark and we are closer to COMBACAU'S *Le droit international: bric-à-brac ou système?*, in *Archives de philosophie du droit*, 1986, p. 85 ff., and WEIL'S *Vers une normativité relative en droit international?*, in *Revue générale de droit int. public*, 1982, p. 6-47. Less decisive, for example, on the concept of the Charter as the « constitution of the international community » sounds to us also BERNHARDT, *Article 103*, in SIMMA (ed.), *The Charter* [*supra* note 22], p. 1117 ff. While at p. 1123 he states that « [t]he Charter *has become the constitution* of the international community ... », his conclusive « ou-

Two *mises au point* seem to be necessary, for the purposes of the present paper, with regard to the constitutional theories.

(a) Firstly, to say that the Charter is the constitution neither of the inter-State community (of its member States or all States) nor of mankind, but the constitution of the United Nations, does not imply

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tlook» on Article 103 (at p. 1125) seems more guarded. According to the latter passage: «Art. 103 is essential *if* the Charter is to be recognized as the "constitution" of the International Community, and *if this recognition is to be respected in practice.* World peace itself may depend on respect for the higher rank and binding force of the Charter, as emphasized by Art. 103. Developments in the world since 1988 can be considered to have strengthened the role of the UN and its Charter, *which may become* a real and effective constitution for the international community» [italics added].

The present writer feels less distant from the latter propositions than from the former. As long as the only image offered of a world constitution will be that of a plurality of States dominated by an omnipotently envisaged Security Council, we shall continue to share, on this subject, Kunz's view of 1960. Nothing of what has occurred, or been written, since then, contradicts that view. See also, on the point, sub-paras. (a) and (b) below and para. 54.

As regards in particular the indispensable distinction between the theory of the Charter as the constitution of the UN or the «world constitution», the learned and informed writings devoted to the Charter's constitutionality by ST. J. MACDONALD (*The UN Charter: Constitution or Contract*, in MACDONALD, JOHNSTON (eds.), *The Structure and Process of International Law. Essays in Legal Philosophy, Doctrine and Theory*, The Hague, 1983, p. 889 ff.; *The Charter of the UN and the Development of Fundamental Principles of International Law*, in CHENG, BROWN (eds.), *Contemporary Problems of International Law. Essays in Honour of Schwarzenberger*, London, 1988, p. 196 ff.; and *Reflections on the Charter of the UN*, in JEKEWITZ and others (eds.), *Des Menschenrecht zwischen Freiheit und Verantwortung. Festschrift Partsch*, Berlin, 1989, p. 29 ff.) enlighten us neither on that distinction, nor on the precise sense in which the Charter could be viewed as more than the constitution of an inter-State organization and its internal, institutional apparatus. We are inclined to believe, in particular, that Articles 2(6), 103 and 108, specially considered by the cited author, do not bring any real support to the «world constitution» theory. The really essential point is, in our view, the "constituency" of the Charter, and general international law in the first place (*The "Federal Analogy"* [*supra* note 139], esp. p. 5-9). Less decisive are perhaps the undoubtedly important "contitutional virtues" or "weaknesses" of the Charter (CRAWFORD, *The Charter of the United Nations as a Constitution*, in FOX (ed.), *The Changing Constitution* [*supra* note 5], p. 3 ff.).

Considering the (undeserved) increasing prosperity of the «world constitution» concept of the Charter — as opposed to the traditional notion of the inter-State system's general international law — it is perhaps worth wondering what the «constitutionalists» think of the question of China's participation in the UN, still partly unresolved since 1971. One can hardly say that that question has been settled, either between 1949 and 1971, or from 1971 onwards, on the basis of the Charter as a world constitution. Throughout the first period — almost a quarter-century — the whole people of mainland China was excluded from any participation in the life of the alleged constitution. Then, in 1971, General Assembly resolution 2758 (XXVI) performed that *jeu de prestidigitation*, by which Taiwan was out and Communist China was in; another people, however smaller, thrown out, and, since then, still remaining outside the so-called constitution. As regards the solution attained that year, it was not only based indisputably on a contractual conception of the Charter but it was accom-

any denial of the constitutional nature of some of the (legal) issues arising under the Charter. One should not infer from this, on the other hand, that those problems are all — or entirely — constitutional in the same sense as the analogous or allegedly analogous constitutional issues of national, especially federal, systems (141). Some analogy with national constitutional issues does exist, for example, in the relationship between General Assembly and Security Council, as well as between Council or Assembly and the respective subsidiary bodies, in view of the close functional interaction between the said organs. Constitutional (or federal) analogies — as discussed, *inter alia*, by Alvarez, Reisman, Herdegen and McWhinney (142) — are however more problematic with regard to the relationship between the Security Council and the ICJ. We shall revert to the ICJ-Security Council relationship further on, in connection with one aspect of the *Lockerbie* case (para. 54, *infra*).

(b) A second *mise au point* relates to the nature of the international legal personality of the UN. As the present writer still believes, that personality is a merely «primary» personality, qualitatively not dissimilar, under general international law, from that of a State or mini-State. It is not a functional personality placing the UN (in Fitzmaurice's sense) «over and above» UN member States, let alone non-members (143). In other words, as recognised also by a

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plished manifestly by a purely contractual arrangement. May we refer to our *La questione cinese*, in *Scritti di diritto internazionale in onore di Tomaso Perassi*, Milano, 1957, p. 67 ff.

(141) ALVAREZ, *Judging* [*supra* note 5], p. 1-4, presents a rich, vivid review of the suggestions (mostly if not all based on «federal» analogies) relating to the possibility of ICJ review of Security Council Chapter VII decisions.

(142) REISMAN, *The Constitutional Crisis in the United Nations*, in *American Journal of Int. Law*, 1993, p. 83-100 (also in DUPUY, R.-J. (ed.), *The Development* [*supra* note 5], p. 399-423); ALVAREZ, *Judging* [*supra* note 5]; HERDEGEN, *The «Constitutionalization»* [*supra* note 16]; MCWHINNEY, *The International Court* [*supra* note 16]. Of course, it is likely that the constitutional issues in question appear in a different international light according to whether one characterizes the Charter as just the constitution of the UN or as a world constitution. An example is the *mise au point* following in the text above.

(143) *Rapporti contrattuali* [*supra* note 139], p. 130-137. *The «Federal Analogy»* [*supra* note 139], p. 15-18 reiterates our *critique* of the ICJ's superfluous and misleading application of the «implied powers» doctrine to an allegedly functional personality of the UN for the purposes of the cited *Reparation* case [*infra* note 149]. See also *Postfazione* [*supra* note 139], p. 248-253. Our point, further developped in the *Normative Role* [*supra* note 139], p. 675-684 and in *The UN Declaration of Friendly Relations* [*supra* note 139], p. 245 ff., seems to escape the commentators cited by BETTATI in DUPUY, R.-J. (ed.), *A Handbook of International Organization*^{2}, Dordrecht, 1998, p. 50-59.

« constitutionalist » like P.-M. Dupuy, the UN is not a personified « super-State » (144).

But to reject the notion of the UN as a super-State is not sufficient. One must specify that neither the Charter nor "subsequent practice" justify the notion of the UN or any UN body as a supreme organ personifying the community of States or mankind and endowed as such with a sort of *compétence de la compétence* enabling it to deal with any old or new community interests, such as the pursuit of humanitarian causes, or the determination and prosecution of international crimes of States (145). Such a general *compétence* would be, if it really existed, the « mother » of all implied (and even non-implied) powers (146).

This disappoints, surely, all the people of goodwill who are anxious to see the Security Council more active in the enforcement of humanitarian law or causes. The reply to this justified concern would be that humanitarian law must be endowed with appropriate enforcement mechanisms. It may be that one should, as a *pis-aller*, let the Council do what it can for the time being. But one should try harder to find better ways and means than the passive acceptance or the enthusiastic promotion of questionable extensions of Chapter VII powers. One should do better — *pace* the « constitutionalists » — than to encourage a body which is entrusted with

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(144) DUPUY, P.-M., *The Constitutional Dimension* [*supra* note 16], p. 30.

(145) It seems indeed from an assumed concept of the UN as the personification of the international community that Professor DE HOOGH has recently held, in a meritorious monographic work, that *erga omnes* obligations should be envisaged not only « in terms of obligations towards States, but in terms of obligations towards an international organization, that is, towards the United Nations » (*Obligations* Erga Omnes *and International Crimes: A Theoretical Inquiry into the Implementation and Enforcement of the International Responsibility of States*, Dordrecht, 1996, esp. p. 114 ff.). Hence the assertion of an institutional Security Council's competence over State crimes (*ibid.*, p. 115-136). One finds some comfort, with respect to the alleged personality of the international community, in the finely measured language of ASCENSIO, *Sujets* (*Chapitre 3*), in ALLAND (ed.), *Droit international public*, Paris, 2000, p. 139-147.

(146) On stressing the UN's authority and its impact on an alleged demise of States and States' sovereignty one should not fail to consider the abysmal differences existing between some States and others. While it is even too easy to proclaim the evanescence of sovereignty of very small and crippled, if not actually « failing », States, it would be difficult to apply the same standard to the NATO members acting in Kosovo; and it would be even more difficult to apply the same standard to the attitude of the United States towards the organization: default in paying its dues, refusal to put any US nationals under UN command, refusal to submit US nationals to a world criminal jurisdiction; most ironically, one must add the news (*International Herald Tribune* of May 15, 2000) that « the Clinton administration ... would provide transportation of UN peacekeeping forces *"only for a fee"* » [emphasis added].

the role of keeping order to assume, on the flimsy basis of the untenable conception of the Charter as a world constitution, the role of a world government, or, as they put it, of «the "Executive" of the International Community» ([147]). The Security Council was simply not meant, by the authors of the Charter, to be the «Directorate», the legislator, and the judge that a number of authors seem to be ready to recognize it to be, *de jure condito* or *condendo*.

43. To begin with implied powers, the recent Security Council practice which is relevant for the purposes of the present writing seems not to have been put, so far, to any decisive test. The literature relating to that doctrine ([148]) seems not to go beyond well-seasoned deviations from the Charter's letter, none of which has a bearing on the limit of the Security Council's power discussed in the present writing ([149]).

([147]) DUPUY, P.-M., *The Constitutional Dimension* [*supra* note 16], p. 21.

([148]) See especially SKUBISZEWSKI, *Implied Powers* [*supra* note 139]; and ZULEEG, *International Organizations, Implied Powers*, in BERNHARDT (ed.), *Encyclopedia* [*supra* note 13], vol. 7, 1984, p. 313-314. On the problem of implied powers in the European Communities see GIARDINA, *Sulla competenza a stipulare della Comunità economica europea*, in *Rivista*, 1971, p. 619 ff., esp. p. 612 f.; and ID., *The Rule of Law and Implied Powers in the European Communities*, in *Italian Yearbook of Int. Law*, 1975, p. 99 ff.; FERRARI BRAVO, GIARDINA, *Art. 235*, in QUADRI, MONACO, TRABUCCHI (eds.), *Commentario al Trattato istitutivo della Comunità economica europea*, vol. III, Milano, 1965, esp. p. 1704 ff.; and DAVÌ, *Comunità europea e sanzioni economiche internazionali*, Napoli, 1993, p. 222 ff., esp. p. 235 ff.

([149]) Except for the *Reparation* opinion, we confine ourselves to adhering, for the analysis of possible precedents of resort to the implied powers doctrine, to Skubiszewski's *Implied Powers* [*supra* note 139], p. 857 ff. Of the two PCIJ opinions, in the *Work of the Employers*, where implication was not the sole argument, there was obviously a simple matter of extensive interpretation of the International Labour Organization's competence. In the *Jurisdiction of the European Commission of the Danube*, sometimes quoted as an example of implication, the Court remained within the limits of express powers. As regards the ICJ, the *Reparation* opinion is generally wrongly cited, in the view of the present writer, as a classic case of implied powers. There is, for example, little substance in the alleged implied-powers basis of the ICJ's 1949 finding that the UN's international personality included the possibility for the Organization to claim reparation for damage suffered in its service. The UN's right to put forward such a claim had nothing to do with the functions or powers of the Organization as governed by the Charter (and relating essentially to the UN's powers *vis-à-vis* its member States *qua* members). That right derived from the simple consideration that, as a factually existing and relatively independent entity, the UN was (as it still is) a (*primary*) person under general international law, entitled as such, as well as a State, to claim damages for injuries suffered by its officials. There was thus no need to look for «functions» or Charter «implications» (*Federal Analogy* [*supra* note 139], p. 15-16). A State does not perform an international *function* when it deals (in diplomatic protection or otherwise) with damage suffered by one of its subjects or officials, and thus by itself. It performs a function only from the viewpoint of its

Be that as it may, the present writer believes that it would be very difficult for any law court to admit that the possibility for the Council to override under Chapter VII States' rights other than those inherently and inevitably affected by (genuine) peace-enforcement measures was implied in that organ's exercise of its peace-enforcement function. Overriding States' rights for purposes other than peace-enforcement would constitute a different function altogether.

44. Security Council's law-making (*et similia*) would find even less support, we submit, either in « subsequent practice », or, for that matter, in the so-called *de facto* Charter amendment doctrine (150).

With regard to the latter, the present writer is unable to understand what one could possibly mean by yoking mere *factum* with the amendment of a legal instrument: unless, of course, *de facto* amendment was another name for some kind of incipient « subsequent practice ». From the comment offered by Schröder, who rightly questions its « legal admissibility », this type of review « has led to only a few generally accepted results and has scarcely changed the

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own law. Under general international law it merely exercises a right or a *faculté*. The same should be said about the UN's analogous right under that same general law.

The ICJ's pronouncements of 1950 and 1971, relating respectively to the extension of the UN supervisory power in the territory of South-West Africa and the revocation of the mandate over Namibia, are ambiguous and partly legally untenable. Citations in SKUBISZEWSKI, *Implied Powers* [*supra* note 139].

Of no consequence for the Organization's powers *vis-à-vis* the member States are the two ICJ pronouncements on the *Effects of the Awards* (of the Administrative Tribunal) and in the *Fasla* case. Here again, we share Skubiszewski's view. We feel, in particular, that the same superficiality that caused the Court to overlook, in the *Reparation* opinion, the fact that there was no need to relate the UN's prerogative to claim under general international law (for damage suffered by its officials) to the organization's functions, caused the Court to ignore that the establishment and operation of an administrative tribunal was a purely internal matter that did not affect the member States' rights directly, or otherwise involve the exercise of any power *vis-à-vis* the States themselves. As regards the *Expenses* and *Namibia* opinions we share Skubiszewski's consideration that in neither of those cases the implied powers « doctrine » was really involved. Of course, we are not concerned here with the European Communities Court of Justice practice, involving as it does the application of treaty rules envisaging the exercise of powers that are not expressly granted (SKUBISZEWSKI, *Implied Powers* [*supra* note 139], p. 865; and GIARDINA, *The Rule of Law* [*supra* note 148], p. 99 ff.).

(150) A study of the literature suggests, however, that also the said sources or doctrines are unlikely to have a significant impact — at least for the present — on the issue of the limits of the Security Council's power to affect States rights, as discussed in the present article.

rigid nature of the Charter» ([151]). From the examples offered by the same author, it seems clear that none of them are of interest for the purposes of the Security Council's power to affect States' rights by enforcement decisions under Chapter VII.

With regard to subsequent practice ([152]), there is no doubt that any *ultra vires* actions of an international body can eventually be made good, so to speak, by the lack of adequate opposition, or by acquiescence, if not acceptance: and it seems reasonable to assume that the lapse of time may well have obliterated the illegality of most if not all of the *ultra vires* decisions taken by the Council or the Assembly. A process of such a kind could theoretically be envisaged for the recent Security Council's practice of overriding States' rights other than those which are affected by genuine peace-enforcement measures. Such an occurrence is not only conceivable in far more effective legal systems — such as national legal orders — but it is also frequent in the relations between any law-breaking State or States, on the one hand, and any injured State or States, on the other hand. Not all internationally unlawful acts

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([151]) SCHRÖDER, *Amendment and Review of the Charter*, in WOLFRUM, PHILIPP (eds.), *United Nations: Law, Policies and Practice*, München, Dordrecht, 1995, p. 20-26, esp. p. 24-26. As described by this author, *de facto* amendments are characterized by « more uncertainty as to their implementation »;... « they can be abrogated at any time by international practice where a return to the original text and meaning of the Charter is desired» (*ibid.*, p. 24).

([152]) ZEMANEK, *Was kann die Vergleichung staatlichen öffentlichen Rechts für das Recht der internationaler Organisationen leisten?*, in *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, 1964, p. 453-471; BERNHARDT, *Interpretation and Implied (Tacit) Modification of Treaties*, in *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, 1967, p. 491-506; ENGEL, *«Living» International Constitutions and the World Court (The Subsequent Practice of International Organs under their Constituent Instruments)*, in *Int. and Comparative Law Quarterly*, 1967, p. 865 ff.; ELIAS, *The Modern Law of Treaties*, Leiden, 1974, p. 98-100; AKEHURST, *The Hierarchy of the Sources of International Law*, in *The British Year Book of Int. Law*, 1974-1975, p. 277; KARL, *Vertrag und spätere Praxis im Völkerrecht*, Berlin, 1983, esp. p. 390-391; CAPOTORTI, *Sul valore della prassi applicativa dei trattati secondo la Convenzione di Vienna*, in *Il diritto internazionale al tempo della sua codificazione. Studi in onore di Roberto Ago*, vol. I, Milano, 1987, p. 197-218; WOLFRUM, *Die Reform der Vereinten Nationen, Möglichkeiten und Grenzen*, Berlin, 1987, p. 129-156; KLEIN, *Vertragsauslegung und «spätere Praxis» Internationaler Organisationen*, in BIEBER, RESS (eds.), *Die Dynamik des Europaïschen Gemeinschaftsrecht*, 1987, Baden-Baden, p. 101-112; SKUBISZEWSKI, *Implied Powers* [*supra* note 139]; BLUM, *Eroding the United Nations Charter*, Dordrecht, 1993, p. 239-256; GRAEFRATH, *Jugoslawientribunal — Präzedenzfall trotz fragwürdiger Rechtsgrundlage*, in *Neue Justiz*, 1993, p. 433-437; RESS, *The Interpretation of the Charter*, in SIMMA (ed.), *The Charter* [*supra* note 22], p. 35 ff.; SCHRÖDER, *Amendment* [*supra* note 151], p. 24-26; KARL-MÜTZELBURG, *Article 108*, in SIMMA (ed.), *The Charter* [*supra* note 22], p. 1163 ff., at p. 1167-1168.

are followed by reparation, or, failing reparation, by adequate countermeasures. No right or *faculté* must necessarily be exercised.

Failure or inadequacy of reaction, however, does not necessarily mark the abrogation of the infringed rule ([153]). However frequently certain UN *ultra vires* actions may have been inadequately resisted or even accepted or acquiesced in, there is no reason to infer therefrom that States in general or the so-called « organised international community » have either accepted Charter interpretations allegedly justifying the relevant Security Council practice or participated in the formation of a customary rule so empowering that body.

For example, the fact that the establishment of the ICTFY and the related impact on the affected States' rights have been legitimized, as is presumed and explained further on, by the conduct and attitude of any number of States (despite what the present writer considers to be the invalidity of Security Council resolution 827 under the Charter and general international law) does not mean that a customary rule has come, or is in the process of coming, into being, under which the Security Council would be empowered to establish similar institutions on the basis of Chapter VII and under similarly awkward conditions. For any development of such a kind to take place in international law, far more conclusive evidence should be produced than the mere fact that a given *ultra vires* action remained unchallenged or otherwise prevailed.

Be all that as it may, it does not seem that the « subsequent practice » theory has been convincingly invoked, so far, to legitimize such usurpations of States' prerogatives as those that the Council has been committing in the course of the last decade of the twentieth century.

If this is correct *de jure condito* it is even more so *de jure condendo*. It would be one thing for States to condone — by express or implied acceptance or acquiescence — given instances of *ultra vires* actions and altogether another thing for them, through *diuturnitas* of behaviour and *juris opinio*, to produce by custom such sweeping reform of the Charter and/or general international law as would be necessary to confer in a general way on the Security Council the kind of law-making, law-determining and law-enforcing powers it has illegitimately exercised in recent years. Nor would it be correct

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([153]) I recall on this point SCHACHTER's *Entangled Treaty and Custom*, in DINSTEIN, TABORY (eds.), *International Law* [*supra* note 139], p. 734.

— as noted in para. 4 (c) *supra* — to infer States' *opinio juris* from questionable, however authoritative, Charter interpretations.

VI.A. *Closing remarks on the Security Council's alleged law-making, law-determining and law-enforcing power*

45. Much as one may be right in contesting the heuristic nature of the use of national law concepts, one cannot fail to take account of the fundamental distinctions, within the law of any society — however rudimentary its structure — of such basic functions as law-making, law-determining and law-enforcing, not to mention order-enforcing, or peace-enforcing. In particular, one cannot study or compare such instruments as the League of Nations Covenant and the UN Charter without taking some account of their respective features in such areas of the law as legislating and dispute-settlement or administration of justice — namely, abstract or concrete law-making — on the one hand, and the maintenance of peace or order, on the other hand: areas which are distinguishable in any legal system ([154]).

Now, it has been generally agreed among commentators that the area where the Charter attempts the most serious innovation as compared to the League Covenant is in collective security, namely the enforcement of peace: and in that area something has indeed been achieved, partly only on paper, by the general prohibition of force and the centralization of the use of force. It is also generally agreed that in the area of dispute-settlement the Charter is, if anything, less progressive. The Covenant was *axé*, in a sense, on dispute-settlement in that, at least on paper, it envisaged sanctions for the infringement of dispute-settlement obligations and afforded some protection to a State complying with League dispute-settlement recommendations, in addition to leaving more leeway to States in the area of self-defence (Kelsen). As for the Charter, its drafters did not envisage the establishment of a tight arbitral and judicial dispute-settlement system that would ensure, not only that any dispute be subject to settlement by a «third-party» decision, but also that any such settlement be enforced by the organization. No lawyer can refrain from wondering whether it is conceivable that the authors of a system

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([154]) The argument against such national law analogies is a very poor one indeed. If one accepts that international law is law at all (despite its abysmal structural «gaps») one cannot study and apply it without using legal terms and concepts: which inevitably remain essentially — *mutatis* all the necessary *mutandis* — the terms and concepts of that law *par excellence* which is the law of national communities.

within which only security was centralized actually envisaged an institutionalization of dispute-settlement of the kind that the old and new theories of the Council's law-creating, law-determining and law-enforcing powers would imply.

Firstly, it is very hard to believe that the States participating in the San Francisco Conference, unwilling to accept the compulsory jurisdiction of an elective court of justice, composed of jurists acting in a personal capacity, and empowered to settle legal disputes (normally) on the basis of existing law, could accept that a political body, composed of the delegates of a restricted number of the Organization's member States and operating on the basis of an unequally distributed voting power, enact binding decisions on any — legal or political — disputes.

What has been said so far *de jure condito* applies, *a fortiori*, *de jure condendo*. The notion that a political body — and a restricted body in particular — should be entrusted with judicial or law-making powers by a so-called informal or *de facto* Charter adaptation or amendment, is contrary to the most elementary principles of civilized jurisprudence. It would be the negation of the very idea of law. It is precisely for such reasons that the present writer did his utmost, as ILC Rapporteur on State responsibility, to suggest solutions that might help contain in some measure the extension of Security Council action to the area of State responsibility for internationally unlawful acts — whether « delicts » or « crimes » ([155]).

Going back to existing law, the present writer is strongly inclined to believe that the Charter did not bring about an alteration of those basic rules in which Anzilotti or Hart identified the essentially inorganic — or « unorganized » — régime of law-making, law-determining and law-enforcing in the inter-State system. Indeed, those rules have not undergone any essential change in the course of the twentieth century. States remain the ordinary lawmakers by treaty or custom; States remain the ordinary dispute settlers; and States remain the ordinary enforcers of their rights against lawbreakers. The only general exception, in the Charter, is collective security *scilicet*: the peace-enforcement system.

This confirms the soundness of the view that States' rights deriving from any rule of international law (whether general law, Charter law or any other treaty law) may not be overridden or otherwise bindingly affected by the Security Council's peace-enforcement ac-

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([155]) *Article 39* [*supra* note 4] .

tion except to the extent that their jeopardy is instrumental to the pursuit of genuine peace-enforcement purposes (156).

Our inability to accept as valid the Security Council's assumption of increasing powers may well appear excessively conservative or restrictive. We wonder, though, how the more « liberal » theoreticians of the Security Council's powers justify the broadening of those powers *de jure condito* or *de jure condendo*. To what extent do they see those powers implied in the Charter, and to what extent do they believe those powers to be legally legitimized by the UN member States? And in the case of alleged validation *ex post*, do they wonder how the governments' acceptance or acquiescence is proved? Do they wonder, in that regard, how many of the possibly or supposedly accepting or acquiescing governments are competently advised with regard to the contents of the Charter, or, for that matter (and more importantly), about the content of general international law?

46. As regards the characterization of the Security Council's function as negatively circumscribed in the preceding paragraph (and in para. 14, *supra*), the obvious, common sense interpretation of UN enforcement action in the light of the Charter and general international law is that they should be characterized as political measures for the preservation or restoration of peace. Although such measures may well perform — as they frequently do — the *practical function* of a sanction (for the violation, for example, of obligations under Article 2(4) or Article 2(3) or other provisions of the UN Charter or of other treaty or customary rules) they cannot be regarded as sanctions in a proper, legal sense (157).

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(156) In the sense that, although the Council is not bound, when acting under Chapter VII, by the principles of international law and justice, the rights affected by enforcement measures « do not disappear, since the Council cannot impose a permanent settlement of a dispute or allocation of rights on any State, but they do come into abeyance to the degree and for as long as the Council determines is necessary », see GILL, *Legal and Some Political Limitations* [*supra* note 66], p. 67-68. The cited author seems to conclude that « This raises the question as to which legal limitations — if any — apply to the Council... ». The purpose of the present writing is precisely to try to identify those limitations; and the tentative finding seems to be to the effect that limitations can be identified by stricter distinctions between the Council's Chapter VI and Chapter VII functions and between law-making, law-determining and law-enforcing, on the one hand, and peace-enforcement, on the other hand.

(157) BOBBIO, *Sanzione*, in *Digesto italiano*, vol. XVI, Torino, 1957, p. 530-540; KELSEN, *Sanctions* [*supra* note 10]; ID., *The Law of the United Nations* [*supra* note 10], p. 706 ff.; KUNZ, *Sanctions* [*supra* note 139], p. 324-347; GENTILE, *Competenza del Consiglio di sicurezza e dell'Assemblea Generale in materia di mantenimento e ri-*

(a) In the first place, the Charter contemplates enforcement actions, namely coercive measures, not sanctions. Secondly, any sanction under international law — or, for that matter, under any law — presupposes some determination of existence/attribution of a breach. According to the best authorities such determination should be made, for international legal purposes, either (at their risk) by the injured State or States themselves — which is the most common occurrence — or by an arbitral or judicial body such as the International Court of Justice.

Faute de mieux, a finding of a breach and the meting out of a sanction can also be entrusted to a non-judicial organ. A study of the Charter, however, shows that there is no sign that that instrument, in addition to providing for the Security Council's competence to deal (with a non-binding effect) with breaches of any treaty or customary rule in the exercise of the conciliation functions contemplated in Chapter VI, has also entrusted the Security Council in a general way with the more penetrating task — as discussed in para. 14, *supra*) — of determining, with binding effects, the existence and the legal consequences of any breaches of the member States' obligations, let alone with the task of using the peace-enforcement measures contemplated in Chapter VII as legal sanctions for the breach of the said obligations. In addition to the Council's specific power decisively to affect States' rights under the provisions cited in para. 9 (and in para. 4), *supra*, the only exception, it seems, is that covered by Article 94(2). There is much too little, if anything, in the language, the logic or the political implications of the Charter to turn the peace-enforcement functions attributed to the Security Council under Chapter VII (and Articles 24-25) into the judicial or legislative function which the Council seems particularly inclined at the present time to appropriate to itself ([158]).

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stabilimento della pace, in *Comunicazioni e studi*, vol. V, Milano, 1953, p. 295-298; ZICCARDI, *L'intervento collettivo delle Nazioni Unite e i nuovi poteri dell'Assemblea Generale*, in *La Comunità int.*, 1957, p. 221 ff., 415 ff. In the more recent doctrine see esp. COMBACAU, *Le pouvoir* [*supra* note 13], *passim*; and ID., *Sanctions* [*supra* note 13], p. 337 ff.; FORLATI PICCHIO, *La sanzione* [*supra* note 18], p. 40 ff. (esp. p. 11 and note 71), 137 ff., 183 ff., 256-264; LEBEN, *Les sanctions privatives de droits ou de qualité dans les organisations internationales spécialisées*, Bruxelles, 1979, *passim*; ID., *Les contre-mesures interétatiques et les réactions à l'illicite dans la société internationale*, in *Annuaire français de droit int.*, 1982, p. 9 ff., esp. p. 13-19, 27-31, 39, 76-77; LATTANZI, *Sanzioni internazionali* [*supra* note 41]; FRANCIONI, *Sanzioni internazionali*, in *Enciclopedia giuridica*, vol. XXVIII, Roma, 1992, p. 1-9.

([158]) Generally close to our concerns — as indicated in paras. 1-4, *supra* —

(b) Of course, further functions can be entrusted to the Security Council by special, *ad hoc* — or otherwise *extra ordinem* — instruments. It is on the basis of such instruments, for example, that the Council is legitimized: (i) to carry out special functions with which it is occasionally entrusted by an agreement in the interest of the participating States ([159]); (ii) to perform with the target States' consent — or, possibly, in the territory of «absent» or «failing» States or governments — the so-called Chapter VI 1/2 operations. It is also conceivable, (iii) that the Security Council occasionally acts

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are, in particular, GAJA, *Réflexions* [*supra* note 5], p. 297-320, and BOWETT, *Crimes of State* [*supra* note 47], p. 163-171, at p. 166 and note 8 thereunder.

A rather significant comment was made by COHEN-JONATHAN to the effect that in a number of cases the mention by the Council of a «menace contre la paix» «était toujours accompagnée, et quelquefois absorbée par une allégation de violation du droit international et du non respect de résolutions antérieures dont toutes ne possédaient pas le caractère obligatoire. Il en résulte ici aussi que le système originaire est transformé car, au titre du chapitre VII le Conseil de sécurité, organe politique, n'est pas chargé de rendre la justice internationale, ni de faire la loi et encore moins de transformer la société selon le vœu de la majorité de l'Assemblée générale. L'objectif que lui assigne l'article 39 c'est "de maintenir ou de rétablir la paix et la sécurité internationale". C'est pour cette raison qu'on lui a attribué des prérogatives autoritaires et que les Etats ont consenti à des limitations de souveraineté» (*Article 39*, in COT, PELLET (eds.), *La Charte* [*supra* note 14], p. 665-666). The author does not explain, however, whether and how «le système originaire est *transformé*» in any plausible legal sense.

More satisfactory from our viewpoint are Gill's and Halderman's views respectively mentioned in notes 66 and 69, *supra*. Another author who is conscious of limits to enforcement — although he refrains from specifying them — seems to be RATNER, *Image and Reality in the UN's Peaceful Settlement of Disputes*, in *European Journal of Int. Law*, 1995, p. 428 ff., at p. 444. Ratner deprecates the «[w]ild rush and enthusiasm about Chapter VII» and indicates in the fact that «its boundaries are pushed» the cause of the refusal of more States «to comply by its decisions». That same author seems to deprecate (at p. 443) that «the line between pacific settlement and enforcement has blurred» and that «even in earlier years the line lacked much clarity».

As regards law-enforcement, at least our view that the Security Council is not empowered to enforce obligations except, as explained, by the inevitable effect of genuine peace-enforcement measures, the enforcement of ICJ judgments under Article 94(2) and the kind of cases mentioned in para. 5, *supra* (and note 18 thereunder), finds some comfort in the opinions expressed in 1997 by STEIN, *Collective Enforcement of International Obligations*, in *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, 1987, p. 56 ff., and FROWEIN, *Collective Enforcement of International Obligations, ibid.*, p. 67 ff. The first author seems to admit only peace-enforcement by the Council. The latter writer's not less guarded developments only add, to UN peace-enforcement powers, an adherence to the well-known «justifying effect» theory: a theory (not shared by us) of which Frowein recognizes, however, that it is a «difficult one» (p. 70, note 15). It will be noted that according to Frowein UN enforcement powers are subject to Fitzmaurice's restrictive understanding of Article 25 of the Charter (p. 69-70).

([159]) Examples are illustrated by HERNDL, *The «Forgotten» Competences* [*supra* note 18].

— as noted in para. 17, *supra* — as an instrumentality of given States choosing to collectively exercise rights or *facultés* to which they are entitled under the general law of international responsibility.

It would not be correct, in the present writer's opinion, to place such functions among the Council's statutory or « constitutional » functions as if they represented consolidated Charter interpretations or adaptations under the « implied powers » or « subsequent practice » doctrine (discussed in paras. 42-44) or under the broad interpretation of Article 24 considered in paragraphs 24-26 *supra*.

47. As regards positive characterizations, while the Security Council's function under Chapter VI may obviously be regarded as a conciliatory function (encompassing as it does good offices, mediation and conciliation *stricto sensu*), that body's function under Chapter VII is to be characterized as an authoritative police function. As such, the Council's Chapter VII function is comparable — with a number of important *mutatis mutandis* — to the function performed, within a national legal system, by the police and any other organs entrusted with the maintenance of *order* — and, only in *that* sense, of « *law and* order ».

Such a generic characterization however, is not sufficient. Although it was frequently used during the preparatory and pre-ratification work (including the cited US Senate Committee *Hearings* of 1945) ([160]), and frequently appears in the literature, the term « police » is too vague and requires some qualification.

(a) For the purposes of delimitation of the Security Council's power to override or otherwise affect States' rights, we believe that the Council's police power is precisely a peace-enforcement power to be exercised by means of binding determinations of the existence of Article 39 conditions, and recommendations of or decisions on measures under Articles 40-42. Both operations involve, as well as the comparable determinations and actions of national police organs, what has rightly been called a normative discretionary power (Combacau). The exercise of such a power in fact adds concreteness — by applying it in a given situation *vis-à-vis* given entities — to Articles 39-42 provisions, and affects, in the described sense and extent, the States' rights and obligations whose exercise is inherently incompatible with the imposed measures. In that specific sense

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([160]) Paras. 35 ff., *supra*, esp. para. 37(a).

one can rightly say that enforcement action — as a concretization of Articles 39-42 — is a normative one: but only in that very limited sense — and not without effort, considering the political nature of the acting body — can one assimilate the function in question to that of a judge, not to mention a legislator or a law-enforcer ([161]).

(b) The present writer is unable to accept, however, the extension of the Security Council's «normative discretionary» police power, except, of course, in the specific instances covered by the Charter Articles recalled in para. 46 (a), *supra*, to the overriding of any States' rights or obligations which as not strictly instrumental to genuine peace-enforcement measures. In other words, one admits that the exercise of the Council's peace-enforcement power naturally has an impact on States' rights. Nevertheless, the only way the Council's action may legitimately have such impact is by affecting the said rights as an inevitable consequence of Chapter VII peace-enforcement measures. It would indeed be an entirely different mat-

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([161]) The present writer's position can perhaps be made clearer by comparison with the positions respectively taken on the matter by Combacau and Sur. Starting with Combacau's views, while unable to share that author's concept of measures under Chapter VII as sanctions — thus incurring (presumably together with Sur) the first of the reproaches addressed by him to those who objected to that concept (namely, that they wrongly assumed, as we also assume, that any sanction presupposes «une définition préalable de l'infraction») —, the present writer is inclined to share not only that author's general theory position — finely argued by him — that the police function is a «pouvoir normatif discrétionnaire» (not a «pouvoir non normatif arbitraire») but also that theory's extension in principle — although with considerable restrictions — to the Security Council's peace-enforcement function. We accept, in particular, the cited author's view that in making determinations under Article 39 and in recommending or deciding under the following Articles 40-42 the Security Council performs a normative discretionary function comparable to the function of the police: and in extreme cases, we would add, of the armed forces themselves, in a national legal system. Indeed, what for the present writer is only *peace*-enforcement does fit into the general notion of a normative discretionary police power. It is law-creating in the generic sense accepted in the text above.

Moving to Professor Sur's views, we feel closer to his position where he prefers to speak of «mesures coercitives, dans une logique de police internationale et non de sanctions, qui évoquent un contexte judiciaire ou disciplinaire» (SUR, *Sécurité collective* [*supra* note 51], p. 20). But we feel less close when he points out, more generally, that collective security «repose en pratique sur un droit d'exception, dont la réglementation demeure embryonnaire et qui reste par nature tributaire des contraintes de l'urgence. Aussi bien ne saurait-on y voir un régime de sanctions rigoureusement préétablies et encadrées, mais bien plutôt un cadre pour des mesures, coercitives ou non, destinées non à réprimer des comportements fautifs mais à rétablir une situation troublée au moyen de mesures de police internationale» (*ibid.*, p. 14-15). The present writer shares both the rejection of the idea of sanction and the concept of «police internationale». He has difficulty with regard to «un droit d'exception» and «contraintes de l'urgence»: concepts with regard to which the present writer's position is indicated in the next note.

ter for the Council's action improperly to dispose of States' rights to the extent to which it has done so in some of the cases listed at the outset of the present article, particularly in the cases considered in the following section VI.B ([162]). Another matter, of course, are the three hypotheses considered in para. 46 (b), *supra*.

48. The legal situation here under consideration is far from unique. Limitations similar to those applying to the Security Council's powers exist in national legal systems.

In all such systems, there are, first of all, the legal provisions governing, by appropriate restrictions, the powers of ordinary police forces.

([162]) At this point we must regretfully part company, perhaps in slightly different measure, from the learned authors quoted in the preceding note. One is unable to share, either the notion that a Chapter VII situation « crée une sorte de vacance de la légalité commune » (COMBACAU, *Le Chapitre VII* [*supra* note 13], p. 142) or « l' indifférenciation à peu près complète des techniques auxquelles le Conseil de sécurité se croit autorisé à recourir une fois qu'il a décidé de sortir du droit commun pour se placer sous l'empire du chapitre VII » (« déclenchement de l'état de chapitre VII ») (*ibid.*, p. 153-154); or the notion that Article 39 situations are subject to a « droit d'exception » (SUR, in the passage quoted in the preceding note; ID., in *Colloque de Rennes* [*supra* note 39], p. 311 ff., esp. p. 313, and in *La résolution 687 (3 avril 1991) dans l'affaire du Golfe*, in *Annuaire français de droit int.*, 1991, p. 25 ff., at p. 38 ff., esp. p. 40-42). Fine concepts, no doubt, brilliantly describing what the Council did in given instances; but hardly satisfactory — considering the « perspective » (and « démarche ») « non légaliste » in which they are offered — *de jure condito* or *condendo*. They present, in our view, the double snag of placing the Chapter VII action *extra* or *supra legem* and justifying, as a consequence, that improper overriding by the Council of States' rights which is the cause of the present writer's concern.

A clear evidence is these authors' ... sublimation of the Security Council's powers, which is apparent in Sur's justification of some controversial elements of resolution 687, and in Combacau's apparent lack of criticism of the Security Council's recent abuses, especially with regard to that body's « décisions substantielles » referred to in his *Colloque de Tunis* contribution [*supra* note 13]. One is equally unable to share the notion that threats to, or breaches of, the peace are not « des "choses", d'êtres réels, mais des choses qu'un organe désigne... parce qu'il a le pouvoir de "décider" (*determine*, dit le texte anglais) qu'elle existe » (COMBACAU, *Le Chapitre VII* [*supra* note 13], p. 145); or, for that matter, Sur's yoking of his welcome critique of the theory of enforcement measures as sanctions with the notion that those measures are subject not to any « normes préexistantes » but merely to the « suprématie du politique » (SUR, in *Colloque de Rennes* [*supra* note 39], p. 316).

It is hard to believe that these were the views of the authors of Chapter VII or are the views of the generality of the UN membership at present. We would feel closer again, however, to Sur's considerations on the lack of a Security Council's power « [de] proclamer l'intangibilité d'une frontière, pas davantage qu'il ne peut la fixer » (*ibid.*, p. 312); to diverge again, though, from the apparent acceptance of the idea that the Council « définit lui-même sa propre légalité » (SUR, *Sécurité collective* [*supra* note 51] p. 18) or « se considère largement comme à la source da sa propre légalité » (*ibid.*, p. 23).

Secondly — and, in a qualitative sense, principally — there are the written and unwritten rules, constitutional or legislative, coming into play in circumstances in which, because of war, grave civil disturbances or natural disaster, the normal machinery for running a country is ineffective. In such cases, a state of «emergency», «stato di assedio» («état de siège») or «martial law» may be declared by the executive (even without *ad hoc* legislative action) for the government to be consequently enabled to rule by decree. Subject to control *a posteriori* or to the resistance of the parliamentary opposition (and, as a last resort, the resistance of the *corps social*), governmental decrees may suspend civil and political rights and liberties. It is an accepted principle, however, that the exceptional measures of this kind only affect individual or «collective» rights (and not all of them!) to the extent and for the time strictly necessary to meet the emergency or exceptional situation. The prohibition to affect civil and political rights and liberties more than strictly required under the circumstances is even more severe, in national legal systems, with respect to ordinary police action, including action intended to maintain public order and to prevent or pursue criminal conduct.

49. It should be stressed that the limitation to the Council's enforcement powers is provided for even more strictly by the relevant Charter provisions than the limitations to the powers of the executive branch of the government, including the police, within the framework of a national constitution.

National legal systems are inherently organised systems, where private parties are inherently subject to governmental power. On the contrary, the presence of organisation is still the exception in international society and any form of majority rule or supraordination, especially a supraordination of restricted bodies characterized by restrictively distributed voting rights is even more exceptional. It follows that any function or power attributed to an international body — especially a body of the latter kind — cannot reasonably be interpreted extensively.

This applies even more cogently whenever the proposed broad interpretation would involve nothing less than a «jump» — on the part of the political body — from the lane of peace-keeping or peace-enforcing to the lane of law-making or adjudication. To put it bluntly, is it possible to conceive of the UN membership as having accepted a derogation from the principle of equality not only for the purposes of police action but also for the purposes of legislation and adjudication?

VI.B. *Egregious examples of recent Security Council quetionable infringements of States' rights*

50. Although it has acquired of late a far greater dimension, the problem of legality — we keep referring, of course, to legality tout court, not to the legality control issue — concerning the action of UN political bodies has been more or less explicitly present since the inception of the UN. To confine ourselves to the clearest instances, some of the decisions that were the object of the 1962 *Certain Expenses* opinion of the ICJ, the 1966 General Assembly resolution that revoked South Africa's mandate over Namibia (163), the subsequent Security Council resolutions 264 and 269 (of 1969), 276 and 284 (of 1970) (164) and the ICJ's advisory opinion of June 21, 1971 (165), all raised undoubtedly, whatever the underlying social, political, human and moral merits of the issues involved, serious doubts from the viewpoint of their conformity with international law. We confine ourselves to referring to the well-known opinions of dissenting judges and critical commentators, particularly to the dissenting opinions of judges Fitzmaurice and Gros (166). Notable criticism was also voiced by some States.

For the specific purposes of the present writing it seems preferable to turn instead to just a few of the episodes of Security Council practice evoked at the outset, with a view to illustrating by some examples the limit of the Security Council's power to override States' rights, as discussed in the preceding paragraphs. Considering, however, the richness of the available literature, the present writer shall refrain from inflicting upon the reader repetitive case reviews. All that needs to be done here is to add to the valuable, widely known commentaries, the few remarks necessary to illustrate the said limit (167).

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(163) General Assembly resolution 2145 (XXI) of October 27, 1966.

(164) For a remarkable summary of the vicissitudes (since 1950) which led to these UN acts, see KLEIN, *South West Africa/Namibia (Adv. Opinions and Judgments)*, in BERNHARDT (ed.), *Encyclopedia* [*supra* note 13], vol. 2, 1981, p. 260 ff., esp. p. 266-269.

(165) *I.C.J. Reports 1971*, p. 16-58.

(166) A small sample of Fitzmaurice' sharp criticism is reported in the first page *supra*.

(167) A significant general comment is that offered by KIRGIS by way of conclusion of his thorough review of the Council's first fifty years (*The Security Council's First Fifty Years* [*supra* note 5], p. 506 ff., at p. 538). Equally significant are the conclusive pages of KOSKENNIEMI, *The Place of Law* [*supra* note 49], at p. 482-483.

51. The *Lockerbie* case is surely one of the most puzzling among recent Security Council *exploits*. In addition to raising more acutely than any other case the issue of the bounds of the Security Council's powers, that case involves directly the issue of the political body's relationship with what Article 7 of the Charter defines as one of the other principal organs of the UN, particularly as its «principal judicial organ»: which in its turn affects States' rights also ([168]).

Despite its questionable content, one can let aside, for the present purposes, Security Council's resolution 731. Notwithstanding its language («urges the Libyan Government immediately to provide a full and effective response to [the United States and United Kingdom extradition and compensation] requests»), that act was legally a recommendation under Chapter VI or perhaps Article 39 of the Charter. Although it did touch upon a State's right, it did not attempt to override it.

52. Security Council's resolution 748 was another matter altogether. It has been universally recognized to be intended, by the Council as well as by the proponent States, to achieving a number of purposes. One was to deprive the target State of its right under the Montreal Convention not to extradite (or, precisely, to choose between *dedere* and *iudicare*) ([169]); another was to frustrate the Libyan

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([168]) For a thorough critical analysis see: ARCARI, *Le risoluzioni 731 e 748 e i poteri del Consiglio di sicurezza in materia di mantenimento della pace*, in *Rivista*, 1992, p. 932-965; GRAEFRATH, *Leave to the Court* [*supra* note 5], p. 195 ff.; WELLER, *The Lockerbie Case: a Premature End of the «New World Order»*, in *African Journal of Int. Law*, 1992, p. 319 ff.; SKUBISZEWSKI, *The International Court of Justice and the Security Council*, in LOWE, FITZMAURICE (eds.), *Fifty Years of the International Court of Justice. Essays in Honour of Sir Robert Jennings*, Cambridge, 1996, p. 606 ff.; GOWLAND-DEBBAS, *The Relationship* [*supra* note 45]; MALANCZUK, *Reconsidering the Relationship between the ICJ and the Security Council*, paper for the «*The Hague 750th Anniversary International Law Conference*», The Hague, 2-4 July 1998, p. 1-12.

The adoption by the Council of resolution 748 (notwithstanding the request of Cape Verde, India and Zimbabwe that the Council's action be postponed until the Court took its decision) is commented upon by SKUBISZEWSKI, *inter alia*, as follows: «The dates speak for themselves: the closing of the Court hearings on provisional measures took place on 28 March; resolution 748 was adopted on 31 March; and the Court issued its Order on 14 April 1992. These dates show that the Council, as Judge Oda observed, 'must ... have acted in full cognizance of the impact of its own decision on that which still fell to be taken by the Court as well as of the possible consequences of the latter'. One may say more: the Council and in particular the initiators of resolution 748 aimed at frustrating the Libyan action in the Court. They were, in that phase of the dispute, successful: the Court refused to indicate provisional measures» (above-cited article, p. 616-617).

([169]) According to HARPER (*Does the UN Security Council* [*supra* note 5], p. 128-129), resolution 748 «imposed extradition in direct contravention of a Multi-

action before the ICJ, whether by preventing an indication of provisional measures, a positive decision on jurisdiction or a favourable judgment on the merits of the application. A third aim was to embarrass the Court by placing it before a supposedly superior decision affecting its duty to pronounce itself on provisional measures, on jurisdiction and on the merits ([170]). The Council made an attempt to do so precisely on the basis of what the present writer considers to be an untenable interpretation of its powers under Chapter VII ([171]).

This point was naturally overlooked, in our view, by the learned judges who evoked the Council's discretionary and exclusive power to determine the existence of an Article 39 situation justifying enfor-

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lateral Agreement [the Montreal Convention] to which Libya and a majority of Council members are parties » and the provisions of the same resolution imposed the payment of compensation to the bombing's victims.

Whether the intent to deprive Libya of the right not to extradite was *actually* achieved as a matter of international law (Charter included) — as well as whether the ICJ's competence was *actually* affected as a matter of international law (Charter included) — is, from the present writer's viewpoint, highly questionable and briefly discussed further on (para. 54). According to Skubiszewski's last cited work: « Resolution 748 (1992) deprived Libya of the right not to extradite her citizens which she would have under the Montreal Convention provided she acted in conformity with the Convention's provisions on criminal proceedings. This resolution, as some judges emphasized, changed 'the legal situation' the Court was considering ... But there was more than that. The Council has brought about a change that had a direct effect on the Court's jurisdiction. The Council modified the scope of that jurisdiction ... In the collision between the duty under the resolution and the right under the Montreal Convention the former has primacy. There was concurrent competence of the two organs and the action of the Security Council cut down the Court's competence ... The Court could not exercise its function. The effect of resolution 748 was to prevent the Court from indicating the provisional measures as requested by Libya. To avoid collision with the Council ... the Court refrained from indicating these measures ... The resolution 'concerned the very object of the legal dispute submitted to the Court', and the Court's power has been 'constrained' ... Each of the respondent states made no bones about it: the UK contended that the provisional measures were designed to fetter the Security Council of the United Nations in the exercise of its proper powers, ... while the US also asked the Court to refrain from exercising its judicial function ... and assumed that if the Court did not do it, there would be a conflict with the Council » (SKUBISZEWSKI, *The International Court of Justice* [*supra* note 168], p. 618-619).

([170]) On the conflict of obligations involved, see GAJA's comment *Quale conflitto fra obblighi negli affari relativi all'incidente aereo di Lockerbie?*, in *Rivista*, 1992, p. 374 ff.

([171]) *Contra*: TOMUSCHAT, *The Lockerbie Case Before the International Court of Justice*, in *The Review (of the International Commission of Jurists)* No. 48, June, 1992, p. 39 ff., at p. 48): « The requests of the United States and the United Kingdom for surrender of the two suspects, originally in violation of Libya's rights under the Montreal Convention have a firm support in Resolution 748 (1992) of the Security Council [which] *does not disclose any legal deficiencies* » [italics added]. Elaborate comments in SCISO, *Può la Corte internazionale di giustizia rilevare l'invalidità di una decisione del Consiglio di sicurezza?*, in *Rivista*, 1992, p. 369.

cement action ([172]). However close the cited judges' opinions may have been to the legal «truth» regarding the Council's discretionary powers under Chapter VII — reservations like those of President Bedjaoui's being surely justified with regard to the «threat to the peace» issue ([173]) — none of those considerations addressed the decisive point whether the Council was empowered both to override Libya's right to choose between *dedere* and *iudicare* by imposing upon it the obligation to extradite, and to cut down, by placing the ICJ before a binding enforcement resolution, the Court's statutory competence to pronounce itself on Libya's right. Of course, the Security Council is endowed with a high degree of discretionary (although not absolute) power to determine a threat to the peace. Of course there are limits to what the Court is competent to do when it is confronted, in the course of the exercise of its judicial function, with a Security Council controversial determination under Article 39 or under Articles 41 or 42.

However, this was beside the main point placed in our view before the Court by the Libyan application. That was the question how far the Council was empowered, in the course of its Chapter VII peace-enforcement action, to override a State's right and to cut down the Court's competence to pronounce itself on such a right. The answer to such a question had to do neither with the degree — however high — of the Council's competence to determine threats to the peace, nor with the Court's competence to supervise such a determination, nor with the appropriateness of the peace-enforcing measures. Although, as shown further on, the Court might well have something to say also with regard to the use by the Council of its discretionary powers under Article 39 ([174]) or under Articles 41 and 42, the essential point related in our view to that limitation of the Council's power under which that organ, while permitted to override States' rights through the impact of genuine Chapter VII enforcement measures, is not permitted to override States' rights

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([172]) Judge Schwebel argued that «only the Security Council can determine what is a threat to or breach of the peace or act of aggression» (diss. op. in the case concerning *Question of interpretation and application of the 1971 Montreal Convention arising from the aerial incident at Lockerbie*, preliminary objections judgment of February 27, 1998, in *I.C.J Reports 1998*, p. 64 ff., at p. 79-80). Judge Jennings argued that Article 39 gave the Council a «discretionary competence» (which the Court had to «protect» rather than supervise) (diss. op. to the same judgment, *ibid.*, p. 99 ff., at p. 110).

([173]) Dissenting opinion on ICJ's order on provisional measures of April 14, 1992 concerning the *Lockerbie* case, in *I.C.J. Reports 1992*, p. 152-153, para. 21.

([174]) As rightly hinted by judge Bedjaoui, note 173, *supra*.

when this is not strictly instrumental to the implementation of such measures.

Considering that in the present writer's view resolution 748 transgressed that limit, it neither bound the target State to provide extradition nor impeded the Court from exercising its function with regard to the issue before it. Resolution 748 was no obstacle for the Court, either to indicate provisional measures or to affirm its own jurisdiction and the admissibility of Libya's application.

53. One commentator notes — resuming an argument we already met in para. 19, *supra* — that « it is doubtful whether general international law is a binding constraint on the Council acting under Chapter VII as Article 1(1) of the Charter mentions "the principles of justice and international law" only in the context of the peaceful settlement of disputes under Chapter VI, while no mention is made of justice and international law in the context of collective measures under Chapter VII... » ([175]).

We believe that there is an answer. The reason why the reference to law and justice does not apply to Chapter VII enforcement action is that the Council, when acting under Chapter VII, has no power unconditionally to affect States' rights. It can only override, as explained *supra*, paras. 11. ff., those States' rights as are inevitably affected by genuine peace-enforcing measures; and it could only affect those rights under Chapter VI *by mere recommendation* if it chose concomitantly to deploy its conciliatory role with regard to an underlying dispute or situation: in which case the law and justice requirement would obviously apply.

The same commentator rightly notes in his conclusion that, « [b]y affirming its jurisdiction over the disputes the Court had resisted all attempts to remove Chapter VII of the Charter from the ambit of legal interpretation » (a « perspective » from which « the Court's judgments of February 1998 constitute a small, but nonetheless important step forward »); and he also notes that « [a]t issue is the question of whether the United Nations security system should be regarded primarily as a political mechanism, or rather as an organization of law governed by binding rules and procedures » ([176]).

([175]) MARTENCZUK, *The Security Council, the International Court and the Judicial Review: What Lessons from Lockerbie?*, in *European Journal of Int. Law*, 1999, p. 544-545.

([176]) *Ibid.*, p. 546.

This alternative sounds to us a curious one. Surely the UN security system involves political decisions by a political body. But such a fact does not mean that it is not an «organization of law», governed by binding rules and procedures: and, one must add, subject to legal limitations and constraints. The question is not, we submit, whether in dealing with *Lockerbie* the Security Council was *legibus solutus* — as the first alternative seems to suggest — or a judicial body, assuming that to be the sense of the second alternative. The Council is surely empowered to exercise its peace-enforcing role by deciding discretionally (within the bounds of reasonableness) whether there is an Article 39 condition and by what measures to confront it. At the same time — and not «rather» — the Council is bound under the Charter and general international law to keep its enforcement action within the limits of peace-enforcement: and this means that no rights of Libya could be overridden in the *Lockerbie* case by enforcement action, except those that would inevitably be affected by any measures deemed by the Council to be necessary to meet the threat to the peace allegedly deriving from Libya's involvement in terrorism. The extradition first called for by resolution 731 and later imposed by resolution 748 was precisely the object of one such right that could not be overridden by the Council's enforcement action. The same applied to Libya's right to have her case heard and decided by the Court without undue interference by Council enforcement decisions; not to mention the Court's prerogative to exercise its judicial function notwithstanding a binding Council resolution implicitly jeopardizing that prerogative.

It is on that issue — namely, the attempt improperly to override Libya's rights when their jeopardy was not instrumental to the enforcement of peace — that the Council's handling of *Lockerbie* is legally unexcusable. This should be, in our view, the answer to a very pertinent question put by Karl Zemanek echoing questions evoked by judges Shahabuddeen and Weeramantry ([177]).

([177]) «Does the Charter empower the Security Council to request that a State surrender its own nationals, a demand which has no basis in international law, and to impose economic sanctions if the State refuses to comply with the request but offers to try the suspects itself? This is what Resolutions 731 (1992) and 748 (1992), which the Security Council adopted against Libya after the destruction of a PanAm airliner over Lockerbie, amount to» (ZEMANEK, *Is the Security Council The Sole Judge Of Its Own Legality?*, in YAKPO, BOUMEDRA (eds.), *Liber Amicorum Judge Mohammed Bedjaoui*, The Hague, 1999, p. 629 ff., at p. 630). See judge Shahabuddeen sep. op., *I.C.J. Reports 1992*, p. 28 ff., at p. 32; and judge Weeramantry diss. op., *ibid.*, p. 50 ff., at p. 61.

Although we are not concerned here with the modalities of the Security Coun-

54. As the object of the present article is a discussion of the limits to the Council's power to override States' rights with binding effects, what the Council's resolutions in the Lockerbie case did with regard to the ICJ might be, *à la rigueur*, out of the picture. In this respect, however, a few additions seem appropriate to the authoritative comment made by Krisztof Skubiszewski by way of conclusion of his analysis of the case from the viewpoint of the relationship between the ICJ and the Council. According to the cited author, « [t]o pursue the question any further in an abstract way does not seem useful. The decisions of the Court show that in dealing with the category discussed here it protected 'the interests of the integrity of the judicial function' [...]. One could not say that in the *Lockerbie* cases the Security Council necessarily and intentionally ignored these high interests. Yet it pursued its own course of action which unavoidably had its effect on what the Court would do and indeed did. Is this a pattern for the future? » ([178]).

Despite the numerous points of view from which the Charter and the Court's Statute can rightly be seen to be interrelated ([179]),

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cil's action it seems worth recalling Graefrath's pertinent remark that: « In [the relevant] Resolutions the Security Council did not even bother to define its demands on Libya. It simply made the USA and UK demands its own, by referring to requests made in documents of the two Governments, and quoting them in the Resolution. It simply ordered that Libya has "immediately to provide a full and effective response to those requests." (731,3). The Security Council never explained why the non-compliance with the request of other States to extradite two nationals and to pay compensation, amounts to a threat or breach of the peace, but used this non-compliance in Resolution 748 as a justification for the imposition of sanctions. However, it was not the non-compliance with American requests but only a threat to peace which could legally justify imposing sanctions or taking binding decisions... » (GRAEFRATH, *International Crimes and Collective Security* [*supra* note 5], p. 245).

([178]) SKUBISZEWSKI, *The International Court of Justice* [*supra* note 168], p. 622. As shown in the text above, the « abstract » question becomes perhaps less abstract for the purposes of the present writing. Resolution 748 was, in our opinion, highly questionable from the legal viewpoint. It will be recalled that with reference to para. 5 of Section A, Chapter VIII, of the Dumbarton Oaks proposals (the equivalent of Article 36(1) of the Charter) Kelsen wrote: « This [para. 5] seems to mean that Security Council has the power to assume jurisdiction over a dispute *even if it is before another authority, courts not excluded.* If this interpretation is correct a rather far-reaching power is conferred upon the Security Council, especially in case the dispute has a legal character » (*The Old and the New League* [*supra* note 10], p. 63 [italics added]). We are able to share this view only to the extent that the Security Council's powers under Chapter VI are limited to recommending means or terms of settlement; and the Council's powers under Chapter VII are confined to peace-enforcement and do not involve overriding any States' rights unless this was strictly instrumental, as repeatedly stated in the text, to genuine peace-enforcement measures.

([179]) One thinks of the budgetary relationship, the election of the judges, the possibility for the ICJ to be called to give advisory opinions, the Statute amendment

there is not such a functional connection between the UN political bodies and the Court as to justify a general characterization of the relationship between the Council and the ICJ as a constitutional one. The exceptions regard only specific points which are not related to the problem of a possible ICJ review of the political body's decisions.

Considering that the Charter does not contemplate any power of direct judicial review of the Security Council's acts either *ex officio* or on the initiative of a State, one may tentatively take the view that no such power of the ICJ exists. In other words, it does not seem admissible under the Charter that a Security Council decision (or, for that matter, any Security Council resolution) could either be directly appealed against by a State, or be the object of Court review *ex officio*. Those who regret the absence of such a possibility — as we do to a certain extent — may describe that situation as a «gap» (in a non-technical sense) in the Charter. Assuming, however, that that is a correct understanding of the Charter, and that the Security Council's acts are not subject to the ICJ's direct review, there remains to be seen how things stand on the other side, namely on the side of the Court's Statute. From that Statute's viewpoint it seems that if the Council is not subject to the Court's direct review (in the sense just specified) in no way is the Court unconditionally subject to the Council's decisions, either.

Indeed, resort to the Court is not envisaged, in Articles 33 and 36 of the Charter — despite the definition in Article 92 of the Court as «the principal judicial organ of the United Nations» and the statement that its Statute is «an integral part» of the Charter — as any more a part of the UN system proper than any one of the other procedures indicated in Article 33 of the Charter as possible

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procedure, UN members participation in the Court system, and, of course, Article 94(2).

The peculiarity, despite such connections, of the «organic» relationship between the Charter and the ICJ Statute was considered by the present writer in *Corte internazionale di Giustizia*, in *Enciclopedia del diritto*, vol. X, Milano, 1962, p. 1037-1048. That study's conclusion was that: «Sembra dunque fermo che lo statuto della Corte costituisca un atto o un sistema di norme a sé stante ripetto alla Carta delle Nazioni Unite. Allo stesso modo come lo statuto della C.P.G.I. non era il prodotto né di un atto normativo degli organi della Società delle Nazioni e neppure dello stesso atto normativo che aveva posto in essere la Società delle Nazioni, lo statuto della Corte internazionale di giustizia non è prodotto né d'un atto normativo degli organi delle Nazioni Unite né dell'atto che ha posto in essere le Nazioni Unite. Al pari di quello della C.P.G.I., lo statuto della Corte internazionale di giustizia è il prodotto d'un accordo fra gli Stati ad esso statuto partecipanti come costitutori delle norme che lo compongono» (p. 1048).

dispute-settlement mechanisms. It is thus in principle in its own Statute that the Court finds the source of its judicial power (180).

It follows that the issue whether the ICJ is competent to pronounce itself, in the course of a case before it, on the existence, validity or effects of a Security Council decision (including a decision taken under Chapter VII) — and the right of any State participating in the ICJ Statute to obtain from the Court, *le cas échéant*, such a pronouncement — is not a constitutional question either under the Charter as the constitution of the UN, or, *a fortiori*, under the Charter as an alleged constitution of the international community «federating» (to use Pierre-Marie Dupuy's very imaginative language) customary international law or any part thereof. The issue in question is to be considered simply under the Court's Statute: and the central provision for that purpose is Article 36 of that Statute, to be interpreted and applied under the general law of treaties and as complemented by the instruments that Article refers to.

As regards the merits, the Charter will, of course, play a role, particularly by its Articles 103, 24 and 25 as understood by the Court in the course of the exercise of its jurisdiction in the case. Those Articles will be relevant, however, only in so far as the Court is confronted with a conflict between any party's obligations under a *valid* international agreement, on the one hand, and a *valid* — namely, non *ultra vires* — UN General Assembly or Security Council decision, on the other hand: the validity of either instrument to be judged by the Court on the strength of its competence under its own Statute and other relevant inter-State instruments, including, of course, the Charter.

It is worth specifying, in order to make our point clear, that the task thus pertaining to the Court involves the judicial consideration of two kinds of issues. One kind of issue relates to the well-known question of the extent of the Security Council's discretion in determining the existence of any one of the Article 39 conditions, and recommending or deciding provisional or enforcement measures under Articles 40-42 (181). No degree of such discretionary powers

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(180) Compare ALVAREZ, *Judging* [*supra* note 5], p. 15.

(181) While refraining from commenting here on the broadening of the concept of threat to the peace, surely the most problematic among the three hypotheses of Article 39, we keep in mind particularly, among the many different views, judge Fitzmaurice's well-known remarks in his cited dissenting opinion [*supra* note 72], para. 116, p. 294-295; judge Bedjaoui's reservation in his dissenting opinion [*supra* note 173]; GAJA's notations on the issue in *Réflexions* [*supra* note 5], p. 299, 300, 304; COMBACAU's remarks in *Le Chapitre VII* [*supra* note 13], p. 145 ff.; SOREL, *L'é-*

should presumably bar the Court from questioning the reasonableness/appropriateness of the use of either power in any case where it proved to be legally questionable as a matter of *ultra vires* action or *détournement de pouvoir*.

The second kind of issue to be considered by the Court is whether the Security Council's enforcement decisions — whether within or outside the limits of the said discretionary powers — do not exceed the insurmountable functional limit which is the object of the present paper. It is worth specifying further that, whatever the measure in which the Court may feel entitled, in the exercise of its judicial authority, to question the reasonableness/appropriateness of the discretionary Security Council determinations under Article 39 or Articles 40-42, there is no doubt — we submit — that the Court would be fully entitled to pronounce the invalidity of any Security Council decision overriding a State's rights *other* than those the jeopardy of which is genuinely instrumental to the enforcement of peace and security.

In overriding Libya's right to choose, under the Montreal convention, between *dedere* and *iudicare*, resolution 748 manifestly exceeded the functional limit in question. This emerges from comparing operative paras. 1, 2 and 3 of resolution 748. Paras. 1 and 2 impose upon Libya the *dedere* obligation and the obligation to desist from any form of terrorism. Para. 3 indicates the measures to be implemented by States. While para. 2 can be recognized as a legitimate intimation to desist from terrorism and, together with para. 3, broadly relates to enforcement measures, para. 1 simply overrides a Libyan right under the Montreal Convention, the existence and exercise of which held no relation to an enforcement action against the alleged threat to the peace represented by terrorism. It was not a police action; instead it had clearly, from the viewpoint of its content, the features of a judicial or legislative (*ultra vires*) act. We wonder, therefore, whether resolution 748 could rightly have been considered as a *prima facie* obstacle precluding the indication of

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largissement de la notion de menace contre la paix, in *Colloque de Rennes* [*supra* note 39], p. 3 ff., *passim*. We find great merit in Fitzmaurice's and Bedjaoui's prudence; and we agree with FROWEIN's view that «the most far-reaching use of the notion of threat to the peace was made in Resolution 748 of March 31, 1992 concerning Libya» (*Article 39* [*supra* note 50], p. 611). Important developments, on the notion in question, are those of FRANCK, *The Security Council and «Threats to the Peace»* [*supra* note 35], p. 87 ff., and FREUDENSCHUSS, *Article 39 of the UN Charter Revisited; Threats to the Peace and the Recent Practice of the UN Security Council*, in *Austrian Journal of Public and Int. Law*, 1993, p. 4 ff.

provisional measures. One could contend instead that resolution 748 was, indeed, *prima facie* — due, in particular, to its operative para. 1 — *ultra vires*, and as such not of a nature to affect Libya's rights under the Montreal Convention on the basis of Article 103 of the Charter.

Given the subject of the present article we refrain from dealing in depth with the question whether the target State's failure to extradite could be characterized as a threat to the peace. We doubt, however, that it could be reasonably so considered.

Be all that as it may, the ICJ has more to gain in effectiveness and prestige, in our submission, from its relatively independent status as a permanent judicial body — despite the umbilical connection with the Charter — than as a nominally extolled but practically emasculated element of a UN Charter's structure dominated, according to the prevailing doctrine, by an omnipotent, *legibus solutus* Security Council ([182]). We fear, however, that the Court might not

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([182]) Regarding the delimitation of the Court's role *vis-à-vis* the UN functions in collective security, we would have some reservations on the notion that that role should be deployed only in « extreme cases », as advocated by Franck, quoted by GOWLLAND-DEBBAS, *The Relationship* [*supra* note 45], p. 677 note 185. The Court should not hesitate to perform its judicial function under the Statute whenever a dispute is before it and a party has valid reason to challenge a Security Council arbitrary or *ultra vires* decision. It is for the Council — and that should be the main lesson of the *Lockerbie* case — to refrain from overriding States' rights beyond the limits set by the Charter.

We are even less able to share the view that « [a]s an organ of the United Nations, the International Court of Justice clearly [*sic!*] constitutes *part of the mechanism* for the maintenance of peace and international security as was conceived at San Francisco in 1945 » (PELLET, *The International Court of Justice and the Political Organs of the United Nations. Some further but cursory Remarks*, in SALERNO (ed.), *Il ruolo del giudice internazionale nell'evoluzione del diritto internazionale e comunitario. Convegno di studi in memoria di Gaetano Morelli*, Padova, 1995, p. 115 ff., at p. 116 [italics added]). This is an arbitrary idea — not in conformity with the text of the Charter or *travaux préparatoires* and pre-ratification (Section IV.B, *supra*) — which would make the Security Council even more *legibus solutus* than it would be under the theory of the Chapters VI-VII « functional link ». It is equally unacceptable that one extends to the role of the ICJ such a sweeping statement as that « the drafters of the Charter had a coherent global design: *all and everything* is subordinate to the maintenance of peace. As an organ of the United Nations the Court is an element of this global design. If it does not contribute to this general purpose, *the Charter is rather suspicious both of international law and the Court.* This is a bitter lesson [*sic!*] [but from whom?] which should *instill modesty* [*sic!*] *amongst lawyers!* » (*ibid.*, p. 119-120 [italics added]). We fail to see the legal basis of a description of the Court as a kind of subsidiary body of the Security Council, integrated into the mechanisms of collective security.

Subject to the points made in the present paragraph, including notes, we are in essential agreement with CONDORELLI, *La Corte internazionale di giustizia e gli organi politici delle Nazioni Unite*, in *Rivista*, 1994, p. 897 ff.

be as fully conscious of its independence *vis-à-vis* the Security Council as in our view it is entitled and duty-bound to be.

55. Concerning a case resembling *Lockerbie* — namely, regarding Security Council's resolutions 1044 and 1054 relating to the alleged involvement of Sudanese nationals in an attempt, in Addis Ababa, against the life of a Head of State — it has been noted by Arcari in this *Rivista*:

> «In definitiva, l'intervento del Consiglio nel caso sudanese solleva più di una perplessità. Tali perplessità si aggiungono alle più generali problematiche poste dal corretto utilizzo da parte del Consiglio dei meccanismi regolati nei capitoli VI e VII della Carta e della nozione di "minaccia alla pace" (Può l'inosservanza di una risoluzione di natura raccomandatoria, inquadrabile nel capitolo VI, rappresentare una minaccia alla pace? Può il Consiglio, tramite una determinazione basata sul capitolo VII, attribuire una portata vincolante a eventuali termini di regolamento suggeriti in base al capitolo VI, ed incidere sui diritti sostanziali delle parti ad una controversia?)» ([183]).

As noted by the latter author, the case differed from *Lockerbie* in some respects, particularly because an extradition treaty did exist between Ethiopia and Sudan. However, this case also raises the issue of the limits to the Security Council's powers, especially with regard to the use of enforcement measures under Chapter VII to impose a settlement or a particular kind of conduct: matters with regard to which the Security Council only has the power to make recommendations under Chapter VI. In the case in hand, for example, it could recommend the performance of treaty obligations by one of the States involved.

56. In the UN handling of the crisis triggered by Iraq's brutal invasion of Kuwait, commentators have generally expressed, in addition to satisfaction for the revitalization of the Security Council and some rather generic applause for a «new world order», a varying degree of favour or disfavour for a number of the decisions taken by the Council in the aftermath of the Gulf war ([184]). Whatever their

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([183]) ARCARI, *Le risoluzioni 1044 e 1054 del Consiglio di sicurezza relative al Sudan: un nuovo caso «Lockerbie»?*, in *Rivista*, 1996, p. 726-730, at p. 729 ff. [emphasis added].

([184]) DUPUY, P.-M., *Après la guerre du Golfe...*, in *Revue générale de droit int. public*, 1991, p. 621 ff., at p. 625; SUR, *La résolution 687* [*supra* note 162], p. 25 ff.; MARAHUN, *The Implementation of Disarmament and Arms Control Obligations Impo-*

evaluations of the various legal issues, however, commentators are unanimous in stressing the broadness and depth of the UN's interventions affecting States' rights, as compared not only with the previous practice but also with the very tenor of Chapter VII. This emerges with particular vividness from a few of the general comments.

In an early 1991 « editorial », where he spoke of a « surchauffe du système de la sécurité collective », Pierre-Marie Dupuy stated:

> « Le chapitre VII se trouve toutefois à nouveau invoqué, mais cette fois pour être *largement dépassé sinon même transcendé* aussitôt la guerre interrompue, dans la résolution 687. Ce texte est sans aucun précédent notable dans l'histoire des Nations Unies, par *l'ampleur des décisions qu'il comporte et des compétences que s'y octroie* le Conseil de sécurité, soudainement suractivé. » ([185])

No less impressed sounded Michael Reisman:

> « Now, however, the Cold War has ended and, suddenly, the Council, by national or international governmental standards, seems remarkably effective. Not simply in the expulsion of an aggressor and the liberation of Kuwait. That was a campaign all could applaud because it responded to the sort of international delinquency that, writ large, is a potential threat to every small State. But the expulsion has been followed by deployment

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sed upon Iraq by the Security Council, in *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, 1992, p. 882-883; REISMAN, *The Constitutional Crisis* [*supra* note 142], p. 399 ff., at p. 404 (also in *American Journal of Int. Law*, 1993, p. 83 ff.); ORREGO VICUÑA, *The Settlement of Disputes* [*supra* note 13], p. 41-49, esp. p. 43; FRANCK, *The Security Council and « Threats to the Peace »* [*supra* note 35], p. 83 ff., esp. p. 87-97; ROBERTS, *United Nations Security Council 687 and Its Aftermath: The Implications for Domestic Authority and the Need for Legitimacy*, in *New York University Journal of Int. Law and Politics*, 1993, p. 613-614; CARON, *The Legitimacy* [*supra* note 5]; FREUDENSCHUSS, *Article 39* [*supra* note 181], p. 30-39, esp. p. 4-27, 30; ID., *Between Unilateralism and Collective Security: Authorizations of the Use of Force by the UN Security Council*, in *European Journal of Int. Law*, 1994, p. 500-501; BEDJAOUI, *Nouvel ordre* [*supra* note 1], esp. p. 53-67; GOWLLAND-DEBBAS, *Security Council Enforcement Action* [*supra* note 5]; HARPER, *Does the UN Security Council* [*supra* note 5], p. 112 ff.; 115-128; GRAEFRATH, *Iraqi Reparations* [*supra* note 5], p. 1 ff.; ID., *International Crimes and Collective Security* [*supra* note 5], p. 244-245; FROWEIN, *Article 39* [*supra* note 50]; VILLANI, *Lezioni su l'ONU e la crisi del Golfo*[2], Bari, 1995; ZEMANEK, *Is the Security Council* [*supra* note 38]; LATTANZI, *Assistenza umanitaria e intervento di umanità*, Torino, 1997, p. 43-45, 73-75.

([185]) DUPUY, P.-M., *Après la guerre du Golfe* [*supra* note 184], p. 625 [italics added]. The author's following pages include an apparently unreserved acceptance of the role assumed by the Council, on behalf of « l'ensemble de la communanté internationale », with regard to State responsibility (including for crime) of Iraq (p. 632): not without the expression of some « circonspection » (p. 635-636), also with regard to « nouvel ordre international » (p. 637).

of the military, economic and diplomatic means at the Council's disposal with the manifest objective of forcing a leader from power and changing a Government. Using the powers of the United Nations to change a national Government that two or three of the permanent members dislike is quite different from expelling an aggressor. The United Nations branch of Saddam Hussein's fan club may be small and shrinking, but actions like these may have precedential dimensions. The permanent members have also, in effect, demarcated a boundary [citing S/22412 and resolution 687, 3 April, 1991], a dramatic new policy which makes many political élites elsewhere uneasy. And the permanent members have undertaken to sequester the natural resource wealth of a State without its agreement and to require it to pay a potentially large amount of damages, whose quantum and beneficiaries will be determined, in the ultimate instance, by the Council [citing res. 692, 20 May, 1991; and S/23608 of 19 Feb. 1992]. Thus, with the end of the Cold War, the Council has not only revived atrophied functions but has also undertaken activities that, arguably, may not have been contemplated at its inception. » (186)

An equally general — but more severe — evaluation is that announced at the outset of his 1994 article by Keith Harper:

« Though some recent Security Council decisions were unquestionably legal and have garnered wide international support, other Council actions were based on dubious legal grounds and have been criticized as inappropriate by both states and scholars. I will argue that one source of the debatable illegality and impropriety is the Council's increasing inclination to assume the role of both court and legislature. In its recent actions against Iraq, Libya, and Israel, the Council has demonstrated a willingness to answer juridical questions and impose legal obligations on states through its Chapter VII powers. This Note discusses the legality and appropriateness of the Council as an institutional chameleon. » (187)

A less general comment, but expressing a very serious juridical concern is that of Karl Zemanek:

« In its Resolution 687 (1991) concerning Iraq, the Council *i.a. guaranteed* the inviolability of the boundary between Iraq and Kuwait and established a Compensation Commission, a judicial body for assessing financial claims against Iraq ... It is difficult to imagine a provision in the Charter which could be invoked as authorising these decisions. A guarantee is a preventive act not covered by Article 39 of the Charter which re-

(186) REISMAN, *The Constitutional Crisis* [*supra* note 142], p. 85.
(187) HARPER, *Does the UN Security Council* [*supra* note 5], p. 105-106.

> quires an actual, not a potential danger; and the Compensation Commission can hardly qualify as a subsidiary organ of the Security Council since the Council is not empowered to judge financial claims; installing the Commission for that purpose is a legislative act for which the Council seems to lack the required authority. » ([188])

57. Specific criticism is addressed, *inter alia*, to the « unilateral » nature of the conclusive resolution 687 ([189]), to a number of that resolution's clauses and further resolutions relating to Iraqi armaments ([190]), to the treatment of the Iraqi-Kuwait boundary dispute ([191]) and to the reparation régime imposed to Iraq ([192]). Considering the richness of the debate on those important points we confine ourselves to a few remarks on the boundary issue and on the compensation régime, which seem to be of a greater interest from the viewpoint of the present paper.

(i) In section A of resolution 687 the Council demands that Iraq and Kuwait respect the international boundary established in a contractual arrangement (« Agreed Minutes regarding the restoration of Friendly Relations, Recognition and Related Matters ») signed by the parties in 1963 (para. 2): to which end the Secretary-General was invited to promote agreement to reach a boundary demarcation based on « appropriate documentation » (which included a map indicated by the Council itself) (para. 3). The Council also decides to guarantee the inviolability of the above-mentioned boundary (para. 4). The controversial nature of such an intervention by the Council had been stressed by the Yemen delegate (who subsequently abstained in the vote):

> « ...the imposition of the boundaries between Iraq and Kuwait ... is counter to Security Council resolution 660 (1990), which called upon the two parties to begin intensive negotiations for the resolution of their differences. We might mention that the Security Council has never set any boundaries. That task has always been left to negotia-

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([188]) ZEMANEK, *Is the Security Council* [*supra* note 38], p. 630.

([189]) HARPER, *Does the UN Security Council* [*supra* note 5], p. 103 ff., esp. 112-113; see also SUR, *La résolution 687* [*supra* note 162], *passim*; and ID., *Sécurité collective* [*supra* note 51], p. 22-23.

([190]) HARPER, *ibid.*, p. 113-114; and VILLANI, *Lezioni su l'ONU* [*supra* note 184], p. 129 ff.

([191]) HARPER, *ibid.*, p. 114, 115-118, 127-128, 144-147.

([192]) HARPER, *ibid.*, p. 114, 118-120, 127-128; GRAEFRATH, *Iraqi Reparations* [*supra* note 5]. The latter author's *critique* is weakened, in my opinion, by his reference to « delegated » powers (at p. 68), a typical *Leitmotiv* of the « constitutional » theories of the UN Charter.

> tions or brought before the International Court of Justice, with the agreement of the parties concerned ... There is no precedent whatsoever for the Security Council to guarantee the boundaries of any country. Does that not open the door to asking the Security Council to guarantee the boundaries of many other States, an area in which there are many instances of disagreement? » ([193])

It has been noted by a commentator that any objections against the Council's competence to deal with the boundary issue would be overcome by the fact that that body had not intended to determine *proprio motu* and in a final way the Iraq-Kuwait boundary but merely ensure the frontier's inviolability, presumably as a guarantee of non-repetition of the Iraqi violation:

> « Le Conseil entend simplement ... reconnaître la régularité internationale de la frontière, qu'il considère également avoir été antérieurement reconnue par les deux Etats. En conséquence, il rappelle son inviolabilité ... Mais il ne va pas au-delà. Il ne délimite pas lui même la frontière, et surtout, il ne proclame pas son intangibilité. Rien ne s'oppose à ce que l'existence d'un différend à cet égard entre les deux Etats ne soit ultérieurement reconnue, sans doute sur une autre base que sur celle du Traité, et que ce différend puisse être réglé par des voies pacifiques. Ce que le Conseil entend consolider, ce n'est pas l'intangibilité de la frontière, mais son inviolabilité. » ([194])

The distinction between « intangibilité » and « inviolabilité » is perhaps too subtle and, in our view, not quite convincing, especially if one considers that, following resolution 687, a demarcation commission has been set up and the Council - acting under Chapter VII - has declared the « finality » of the conclusions of the Commission ([195]). Following such a step by the Council it is difficult to believe that any future claims on the part of Iraq would not be viewed by that body as justifying a new resort to enforcement action under Chapter VII and as prejudging a peaceful settlement of the dispute under Chapter VI procedures.

It should further be noted that the Council has actually intervened directly in the very merits of the boundary dispute ([196]).

([193]) UN doc. S/PV. 2981, 3 April 1991, p. 41.

([194]) SUR, *Sécurité collective* [*supra* note 51], p. 26.

([195]) Resolution 833 of May 27, 1993. See QUENEDEC, *La démarcation de la frontière entre l'Irak et le Koweït*, in *Revue générale de droit int. public*, 1993, p. 767 ff.

([196]) Resolution 687 indicates, as a basis for demarcation, both the conventional arrangement signed by the parties in 1963 and the boundary chart referred to in

The essence of the matter seems to be more convincingly expressed in the following comment: « Prior to the establishment of the border by the combined efforts of the Security Council and the Secretary-General, fundamental issues of both law and fact existed which required juridical analysis. In deciding the line of demarcation, and assuming that the Council was not acting arbitrarily, the Council must have answered these implicit juridical questions. As such, the Council assumed the role of a judicial organ » (197).

(ii) Section E of resolution 687, which opens with the finding of the responsibility of Iraq for the damage caused to States, nationals and foreign companies as a consequence of the unlawful occupation of Kuwait (198), deals with the implementation of Iraq's obligation to give reparation. The Council establishes a compensation fund which is earmarked for the settlement of the compensation claims and a Commission entrusted with the fund's management (para. 18). Para. 19 gives the Secretary-General the task of compiling reports and of making recommendations relating to the constitution of the fund and its administration, the levels of Iraq's contribution (which is to consist of a percentage of the country's oil revenues), the claims settlement procedure and the composition of the managing commission.

During the debate on the subject the Cuban delegate contended that

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the above-mentioned para. 3. Be that as it may, it may be worth recalling that Iraq has repeatedly contested the validity and binding force of the 1963 « Agreed Minutes » as well as the conformity of the chart to the actual boundary line. On these Iraqi positions see HARPER, *Does the UN Security Council* [*supra* note 5], p. 26-27. The Council's authoritative determination under Chapter VII of the elements upon which the demarcation should be made, namely the data which were essential for the settlement of a territorial dispute between States, makes it difficult to recognize, in section A of resolution 687, the exercise of « une technique juridique [située] davantage dans une logique de règlement pacifique d'un différend, ou d'ajustement d'une situation, que dans une logique de mesures coercitives » (SUR, *Sécurité collective* [*supra* note 51], p. 26-27).

(197) HARPER, *Does the UN Security Council* [*supra* note 5], p. 118. See also VILLANI, *Lezioni su l'ONU* [*supra* note 184], p. 126-129.

(198) Para. 16, opening section E, states: « Iraq, without prejudice to its debts and obligations arising prior to 2 August 1990, which will be addressed through normal mechanism, is liable under international law for any direct loss, damage — including environmental damage and the depletion of natural resources — or injury to foreign Governments, nationals, and corporations as a result of its unlawful invasion and occupation of Kuwait ». On this and the following issues see VILLANI, *Lezioni su l'ONU* [*supra* note 184], p. 136-144.

> « Since the Charter of our Organization, which is supposedly the mandate circumscribing the actions of the Security Council, nowhere grants any power to this body to decide or determine with respect to claims [of compensation] of this nature, it could be alleged that a body as powerful as this is able to assume rights and responsibilities in areas not defined by the Charter. But I wonder what could possibly be alleged in this case, when the Charter clearly states that the judicial body of this Organization is the International Court of Justice, and clearly grants the Court and not the Council, in Article 36 (d) of the Court's Statute — which is part of the Charter, as we all know — responsibility for dealing with such issues. » ([199])

Similar doubts were expressed on the same occasion by the Yemen delegate:

> « According to international law it is, indeed, a fact that ... responsibility should be borne by Iraq. But why should the Secretary-General be involved in a matter that falls within the purview of the International Court of Justice? ... With regard to reparations, there is no doubt that there will be many claims from different quarters. Do we not need a neutral party whose procedures are subject to a set of regulations to decide on such claims? » ([200])

Doctrinal commentaries do not fail to develop the above-mentioned criticism.

Although it is questionable, in our view, whether the Security Council is empowered — even in a case of aggression — to deal with State responsibility by determining the existence of the obligation to provide reparation for damage caused, we refrain from discussing this, so to speak, preliminary legal issue. Although less controversial methods could have been found to meet that problem, we tentatively accept, for the sake of brevity, Graefrath's comment, based on a number of precedents, that the « confirmation of an obligation to make reparation is in accordance with ... a practice often used by the Council » ([201]).

([199]) UN doc. S/PV 2981, p. 68-70.

([200]) *Ibid.*, p. 41 and 42.

([201]) GRAEFRATH, *Iraqi Reparations* [*supra* note 185], p. 35. The same author mentions, as precedents, resolution 262 of 1968 relating to the Israeli raid on Beirut airport; resolution 290 of 1970 on the Portuguese invasion of Guinea; and resolution 387 of 1976 on South African attacks against Angola (*ibid.*, p. 16-19). On the whole question of Iraqi reparations, see GATTINI, *La riparazione dei danni di guerra causati dall'Iraq*, in *Rivista*, 1993, p. 1000 ff.; FRIGESSI DI RATTALMA, *Nazioni Unite e danni derivanti dalla guerra del Golfo*, Milano, 1995.

Doctrinal comments rightly contest, on the other hand, the Council's intervention on the merits of reparation, the terms of compensation and the modalities thereof, such matters being normally left to the direct negotiations between the parties concerned and possibly entrusted by them, wholly or in part, to some impartial, arbitral or judicial, third party. As Graefrath puts it:

> « Only when the Security Council established the Resolution 692 (1991) procedure, and took decisions on individual reparation-claims (on the assessment of the damage, which amounts should be paid, etc.), did the Security Council clearly misuse its competences under Chapter VII. The establishment of the United Nations Compensation Commission, a subsidiary organ of the Security Council, which exercises legislative and quasi-judicial powers, was clearly outside the competence of the Security Council, and its creation was simply an *ultra vires* act. Furthermore, there is absolutely no justification for the Security Council replacing normal dispute-settlement procedures and imposing on Iraq an administrative decision-making process, in which Iraq has no standing at all. » ([202])

We confine ourselves to adhering to the above criticism of the questionable manner in which the problem of Iraqi reparations was handled by the Security Council.

58. (a) With regard to one aspect of the Yugoslav crisis, it has been noted:

> « In imposing in Resolution 713 (1991) an embargo on the delivery of weapons and military equipment to "Yugoslavia", the Council was, in fact, applying that embargo indiscriminately to all successor States of the former Yugoslavia. It thereby impaired the inherent right of Bosnia-Herzegovina under Article 51 of the Charter to defend itself effectively against attacks. It seems unlikely that such an effect was intended by the drafters of the Charter when they qualified the right to self-defence by the words "until the Security Council has taken measures necessary to maintain international peace and security". Even given the wide power of appreciation of the Security Council to determine the measures necessary in a case, such measures must still satisfy one objective requirement: they must be capable of *protecting* the victim of an overt or covert aggression, not deprive it of the means for its effective defence. » ([203])

([202]) GRAEFRATH, *International Crimes* [*supra* note 5], p. 244-245.
([203]) ZEMANEK, *Is the Security Council* [*supra* note 38], p. 630.

The fact that the ICJ found reason to reject Bosnia-Herzegovina's attempt to challenge before it the Security Council's decision — which clearly affected that State's ability to exercise its right of self-defence — does not make the Council's decision less questionable.

(b) As regards the setting up of the *ad hoc* criminal tribunal for Yugoslavia (ICTFY) by a Security Council decision, that procedure was contested by the present writer during the forty-fifth (1993) session of the International Law Commission ([204]). Noting, during the forty-sixth ILC session, that the legitimacy of the establishment of the tribunal by a UN body was defended again by one member, who seemed not to hesitate to draw an analogy with the establishment of the UN Administrative Tribunal (and perhaps the ILC itself) ([205]), this same writer:

> « emphasized that the functions of the court and its auxiliary institutions meant that it could not be set up as a subsidiary body of any other body. That meant that it could not be established in any way other than by an amendment of the Charter of the United Nations or by a treaty. The second solution seemed to be the most practical one. ... The United Nations Administrative Tribunal and the International Law Commission [itself] were both subsidiary bodies which operated in different ways and for different purposes within the United Nations system. The United Nations Administrative Tribunal dealt with the rights and obligations of United Nations staff, while the Commission made recommendations to the General Assembly on the rights and duties of States which did not have binding effect on those States... The situation would be completely different for an international criminal court, whose decisions would affect States more directly and more profoundly than even an arbitral tribunal with jurisdiction to settle inter-State disputes and more than the ICJ itself, which had compulsory jurisdiction in certain areas of inter-State relations. There was thus an enormous difference between the ICJ and the proposed international criminal court. The compulsory jurisdiction of ICJ affected States in their relations with one another as sovereign States. The jurisdiction of the international criminal court would affect States in the exclusive "control" that they exercised over their

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([204]) Apart from obvious *de jure condendo* objections he held that « it was not at all clear [under the circumstances prevailing at the time in Yugoslavia] under which express or implied provisions of the Charter ... the ... Council would be empowered to set up a criminal court and define its task ... The position would of course be different if the Security Council were engaged in an action against an aggressor under Chapter VII of the Charter of the United Nations. In that case, by analogy with a belligerent State, the Council would be entitled to set up tribunals to try persons arrested for violations of the laws of war. Otherwise, a treaty would, in his view, be indispensable », in *Yearbook of the Int. Law Commission*, 1993, vol. I, p. 16-17).

([205]) PELLET in *Yearbook of the Int. Law Commission*, 1994, vol. I, p. 15-17.

> nationals and most particularly over their leaders or officials... The only hypothesis in which a criminal tribunal could be established by a decision of the Council would be if the Council were directly engaged in military action against a State or a similar entity under Article 42 of the Charter, in order to maintain or restore international peace and security. By analogy with the situation of a belligerent State, the Council would, in such a case, be entitled under general international law to set up *ad hoc* organs for the prosecution, trial and eventual punishment of the members of the opposing party's armed forces (or even civilians) accused of violations of the laws of war. » ([206])

Considering the enthusiasm of some scholars, it is no wonder that — as noted by Zemanek — « the question of whether the Security Council had the required authority [to establish the Tribunal for the former Yugoslavia] did not seriously preoccupy the members of the Council prior to the decision » ([207]). No wonder either that the

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([206]) *Yearbook of the Int. Law Commission*, 1994, vol. I, p. 33-34. The same speaker added that: « He could not endorse [either another] idea put forward by one member of the Commission who was in favour of the establishment of the court by a resolution of an organ of the United Nations rather than by a treaty. According to that view, the international criminal court should be seen as an institution of the international rather than the inter-State community, owing to the distinction between the international community of men, or what could be called the legal community of mankind, and the community of States. That approach seemed to suggest that placing the court at the highest level, as an institution of the legal community of mankind and not of the community of States, would facilitate, and be facilitated by, the establishment of the court through a resolution of an organ of the United Nations. It was hard to accept that thesis, which implied that the General Assembly or the Security Council were considered to be institutions of the community of mankind. Although the Charter of the United Nations began with the words: "We, the peoples of the United Nations ...", those peoples had not been present at the signing of the Charter, unlike the peoples of the 13 original colonies of the United States of America at the time of signature, first, of the Articles of Confederation, and then of the Constitution ... [T]he thesis cited above implied that the Assembly and the Council were not only vested with inter-State functions, but that they also exercised supranational functions. In his view, it was inconceivable that the General Assembly, which, rightly or wrongly, was not empowered to impose binding obligations on States except in some very limited and closely circumscribed areas of their inter-State relations, should be authorized to impose binding obligations on States in a matter implying the penetration of international institutions into the most jealously guarded areas of their sovereign functions. Only a treaty could achieve that result. » (*Ibid.*, p. 34). The present writer's position on the establishment of ICTFY was further developed in ARANGIO-RUIZ, *The Establishment of the International Criminal Tribunal for the Former Territory of Yugoslavia and the Doctrine of Implied Powers of the United Nations*, in LATTANZI, SCISO (eds.), *Dai tribunali penali internazionali* ad hoc *a una corte permanente*, Napoli, 1996, p. 31-45. We now find comfort in ZEMANEK's above-cited article [*supra* note 38], p. 635-640, particularly in his comment on Pellet's position on the Administrative Tribunal analogy (p. 638-639). See also note 210, *infra*.

([207]) ZEMANEK, *Is the Security Council* [*supra* note 38], p. 637.

UN Legal Counsel, Hans Corell, as also noted by Zemanek, «said that the Security Council has the authority to act under either chapter VII or chapter VIII of the UN Charter» and that only two Council members — Brazil and China — questioned that authority for both Yugoslavia and Rwanda (208).

59. After the many years during which the ICTFY has been functioning, despite the difficulties, with great merit and a relatively high degree of cooperation on the part of a number of States, any sensible lawyer should agree that there is today far less reason for an academic discussion of any flaw in that tribunal's establishment.

Nevertheless, no international lawyer can refrain — simply on the ground of policy — from wondering about the legal merits of Security Council resolution 827 (1993). One is therefore reassured by the fact that the Appeals Chamber in the *Tadić* Appeal Decision (209) reversed the Trial Chamber's decision that the Tribunal lacked authority to review its establishment by the Security Council and found instead that it (a) had «jurisdiction to examine the plea against its jurisdiction based on the invalidity of its establishment by the Security Council»; and (b) was not barred from examining the defense jurisdictional plea by the so-called «political» or «non-justiciable» nature of «the issue it raise[d]» (210).

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(208) ZEMANEK, *Is the Security Council* [*supra* note 38], p. 637-638. As regards the rich literature, see, *inter alios*, BASSIOUNI, *The Law of the International Criminal Tribunal for the Former Yugoslavia*, Irving-on-Hudson, 1996, p. 237-264; GRAEFRATH, *Jugoslawientribunal* [*supra* note 152]; TOMUSCHAT, *A System of International Criminal Prosecution is Taking Shape*, in *Review of the International Commission of Jurists*, vol. 50, 1994, p. 56-70; KOLODKIN, *An Ad Hoc International Tribunal for the Prosecution of Serious Violations of International Humanitarian Law*, in *Criminal Law Forum*, 1994, p. 341-80; MERON, *War Crimes in Yugoslavia and the Development of International Law*, in *American Journal of Int. Law*, 1994, p. 78 ff.; RUBIN, A.P., *An International Criminal Tribunal for Former Yugoslavia?*, in *Pace Int. Law Review*, 1994, p. 7 ff.; ARANGIO-RUIZ, *The Establishment of the ICTFY* [*supra* note 206], p. 31-45; PALCHETTI, *Il potere del Consiglio di sicurezza di istituire tribunali penali internazionali*, in *Rivista*, 1996, p. 413 ff.; VITUCCI, *Il tribunale ad hoc per la ex-Jugoslavia e il consenso degli Stati*, Milano, 1998. A rather weak defence of the tribunal establishment's legality was made by O'BRIEN, *The International Tribunal for Violations of Humanitarian International Law in the Former Yugoslavia*, in *American Journal of Int. Law*, 1993, p. 639-659.

(209) *Decision on the defence motion for interlocutory appeal on jurisdiction, The Prosecutor v. Dusko Tadić, case no. IT/94/1/AR 72.*

(210) For the sake of brevity I merely refer to the Appeals Chamber's decision in *The Prosecutor v. Dusko Tadić* [*supra* note 209], p. 5 ff., at p. 6. We find instead discouraging — for its adherence to the theory of the Security Council's power to establish any subsidiary body to operate in any area on the mere condition that the Council express the intention to operate under Chapter VII — the following argument resor-

Also with regard to the merits one must agree with the Appeals Chamber on a number of points: where it finds that Article 39 had been properly applied by the Security Council when it qualified the Yugoslav situation as presenting a threat to the peace; where it excludes the possibility that Council resolution 827 (1993) establishing the Tribunal could be viewed as a provisional measure under Article 40; where it excludes the notion that the establishment of the Tribunal had amounted (*per se*) to a use of force under Article 42; or where it rejects the appellant's contention that resolution 827 was illegal because the establishment of judicial bodies was not indicated as one of the possible measures under Article 41.

60. It is another matter, though, whether such arguments are sufficient to justify the Chamber's conclusion that « Chapter VII serves as a basis for the establishment of a tribunal » ([211]) or that that establishment « [w]as an appropriate measure » ([212]) or that the mode by which the Tribunal had been set up by the Council conformed to the principle whereby courts must be « established by law » ([213]). It is also another matter whether and under what conditions « the Security Council can establish a subsidiary organ with judicial powers », a topic discussed by the Appeals Chamber in paras. 37-38 of its decision.

The difficulty resides in the very notion of enforcement measures under Chapter VII. It is indeed misleading to say — as stated by the Appeals Chamber — that Article 41 measures are *any* measures short of armed force. For such a sweeping statement to be legally exhaustive it must be complemented by another general qualification, which applies to the whole of Chapter VII, including Articles

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ted to by the Prosecutor and accepted by the Trial Chamber: « This International Tribunal is not a constitutional court set up to scrutinize the actions of organs of the United Nations. It is, on the contrary, a criminal tribunal with clearly defined powers, involving a quite specific and limited criminal jurisdiction. If it is to confine its adjudications to those specific limits, it will have no authority to investigate the legality of its creation by the Security Council » (Decision at Trial in *Tadić*, at para. 5). The Appeals Chamber (disagreeing) also recalls, of that Decision, paras. 7, 8, 9, 17, 24 and *passim*.

Equally discouraging is the possibility mentioned by PELLET that the mode of the establishment of the tribunal was chosen because « un tel procédé garantit un contrôle étroit du Conseil - *et donc de ses membres permanents* — sur la création de juridictions criminelles internationales futures » (*Le Tribunal criminel pour l'ex-Yougoslavie. Poudre aux yeux ou avancée décisive?*, in *Revue générale de droit int. public*, 1994, p. 28 [italics added].

([211]) Cited decision, paras. 33-36.

([212]) *Ibid.*, paras. 39-40.

([213]) *Ibid.*, paras. 41-47.

41 and 42. We refer to that fundamental legal characterization of Chapter VII measures as *peace*-enforcement measures rather than law-enforcing, law-making or law-determining measures ([214]).

Clearly, the establishment of a tribunal with tasks comparable to those entrusted to the ICTFY would inevitably have a very serious impact on the rights or obligations of the States whose sovereignty and criminal jurisdiction prerogatives would be affected by the carrying out of those tasks. Two possibilities — assuming the impracticability of a treaty — were thus theoretically open as a matter of law to the Council. One was to take action by armed force in the territory involved, thus opening the way to the possible establishment of a criminal law court within the framework of military operations carried out by the UN or given States under Article 42 or Article 51. Had this alternative materialized, the involved States' rights and obligations relating to criminal jurisdiction would have been affected as part of a legitimate peace-enforcement or collective self-defence action.

The other way was to set up the criminal court *per se*, as an isolated measure affecting the involved States' prerogatives of criminal jurisdiction outside the framework of any military operations under the Charter and general international law. Unable or unwilling to pursue the former course, and led astray by legal experts, the Council chose to pursue the latter course. In so doing the Council did not take a legitimate peace-enforcement measure under any Article or Articles of Chapter VII, notably under Article 41. It took, simply, a law-making (not to mention law-determining and law-enforcing) measure which fell outside its functions under Chapter VII or any other provision of the Charter or general international law. The UN ignored, in so doing, the capital distinction established in the Charter between peace-enforcement, on the one hand, and law-making, law-determining or law-enforcing, on the other hand: the latter «functions» not having been attributed to UN bodies beyond specified areas.

VII. *Post-scriptum*

61. This writing must surely have proved too long. Although the lengthening was due in part to the necessity to take a fresh look at *travaux préparatoires* and pre-ratification, the author presents his apologies to any reader and to the *Rivista*.

([214]) Otherwise, anything could be validly decided by the Council by simply evoking Chapter VII: it would be too easy, that way, to attain the «paradise» of a fully-fledged (although hardly lawful) world order and world government.

Not much remains to be said by way of a general conclusion. *De jure condito*, we hope to have assembled data and some tentative arguments that, subject to correction, show that the assertion that the Security Council « makes law, determines the law, enforces the law » may be correct as a description of what the Council at times attempts to do, but — except in the sense specified in para. 47, *supra* — has no juridical foundation. We recall hereunder a few scholarly dicta in which our position finds, we believe, a generic but authoritative support ([215]).

Assuming, though, that the present writer's view proved to be wrong *de jure condito*, namely, that the Council is entitled to override, by simply making a finding under Article 39, any State's rights, there would still remain more than sufficient political and moral grounds — not to mention the law of nature — to maintain that such a state of affairs should not be left to continue without opposition from the international legal scholarship. An absolute monarchy of the Security Council (or its permanent members) would not mark an improvement over the anarchy of the inter-State system ([216]).

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([215]) KUNZ, *Sanctions* [*supra* note 139], p. 329-330: « The United Nations is again an organization for the maintenance and restoration of international peace and security, but not an organization for enforcing the law against all other violations of international law »... « Only under article 94 paragraph 2... may the Security Council decide upon sanctions to give effects to the judgment of the International Court of Justice... This is the only case where the Security Council may take executive sanctions, when the United Nations is, at least in this one case, a law-enforcing agency in general »; SCHACHTER, in *Proceedings of the American Society of Int. Law*, 1991, p. 428: « The UN Charter says very little about enforcing law »; RUBIN, A. P., in DELBRÜCK (ed.), *The Future of International Law Enforcement - New Scenarios - New Law?*, Berlin, 1993, p. 58: « Under the current distribution of authority, apparently the Security Council of the United Nations determines if there has been a violation of law. But that appearance is deceptive. The Security Council certainly determines what, if anything, should be done about threats to the peace, although that determination is not exclusive. The Security Council has no power to determine rules of law; it is not a legal organ »; WATTS, *ibid.*, p. 74: « But there is a great danger, it seems to me, in taking the process of using the existing Charter text too far if it means a distorted interpretation of the Charter language. Creative interpretation is all very well, but if we try to stretch a legal text too far, we damage respect for international law as a whole. And that could only be bad. However much it may solve an immediate problem, in the long run it is bad for respect for the Charter and for respect for international law ».

([216]) Of course we fully share the tribute recently paid to Hans Kelsen by a number of scholars (in *European Journal of International Law*, 1988, p. 287 ff.). To that master's general theory the present writer owes much of its *formation*. We believe however that Kelsen's signal contribution to the « theory of centralization of legal orders » (LEBEN, *Hans Kelsen and the Advancement of International Law*, *ibid.*, p. 292-293) as so rightly applied to international law in the above cited *Peace through Law* [*supra* para.18] is somehow dimmed by his ...liberal understanding of the powers of the Security Council under Chapter VII of the Charter.