8

The legitimacy of Security Council activities under Chapter VII of the UN Charter since the end of the Cold War

Tetsuo Sato

Introduction

The provisions relating to the Security Council in the United Nations Charter of 2000 do not look much different to those in the Charter of 1945. Articles 23 and 27 were amended in 1965 to increase the membership of the Security Council from its original 11 members to the present 15, with a corresponding change from seven to nine votes for the adoption of resolutions. No change was made in the five Permanent Members' veto power over substantive matters.[1]

However, the practice of the Security Council, particularly the enforcement activities based upon the powers enjoyed by the Security Council under Chapter VII of the UN Charter, have changed dramatically since the end of the Cold War.[2] And with this change, a series of new legal problems have appeared. Kirgis succinctly summarized the controversial situation of the Security Council as follows:

> The most serious legal or quasi-legal issues surrounding the post–Cold War Security Council have so far been of the sort an observer during the Cold War would hardly have dreamt could reach centre stage. They have had much more to do with the possible abuse of power than with abdication of it. The Council has invoked Chapter VII when the threat to international peace was not self-evident, and has for the most part omitted any justification for finding such a threat. It has

invoked Chapter VII to authorise member states to use armed force to preserve or restore peace, without relying on Article 42 and without any Article 43 agreements in place.

On the quasi-legislative front, the Council has established war crimes tribunals and in connection with them has issued directives to member states to co-operate. It has created a compensation commission to determine claims against an aggressor state. It has empowered the tribunals and the commission to apply norms that do not necessarily reflect pre-existing international law.

The Council has made quasi-judicial determinations that go well beyond those inherent in its express authority to determine threats to the peace, breaches of the peace and acts of aggression. It has also gone beyond its readily implied authority to interpret and apply relevant Charter provisions or to interpret its own resolutions. It has done so despite its own nonjudicial character, and without procedural safeguards.[3]

The intended purpose of this chapter is threefold. It is, firstly, to give, as a preliminary observation for the following analysis, an overall idea of the possible position to be given to the Security Council in the United Nations and in the international community as a whole; secondly, to demonstrate that the Security Council has stepped into legally grey areas from the perspective of the UN Charter, while most of the cases could be legally justified; and finally, to emphasize the importance and role of legitimacy in these legally grey areas.

Chapter VII of the UN Charter and practice during the Cold War period

Interpretation of the Charter

International organizations are functional entities established by states on the basis of agreements (constituent instruments). Since the purposes, functions, powers and competence, organizational structures, activities, and all other important matters of international organizations are, in essence, provided in their constituent instruments, any legal analysis of their structures and activities should logically start with analyses and interpretations of those constituent instruments. In fact, many of the disagreements and disputes concerning their structures and activities, when discussed in the organs of international organizations or referred to the International Court of Justice, have been argued on the level of interpretation of their constituent instruments. On the other hand, the interpretation of law always leaves some room for discretion, and involves

a value judgement by the interpreter in selecting one of several possible meanings within the framework of the norm concerned. In this sense, the matter of who is to interpret and apply a norm is decisive in determining its content. Treaties are generally interpreted and applied by the states parties themselves. In the case of constituent instruments, the organs of international organizations also interpret and apply those provisions related to their activities as an inseparable process of their operation.

There is no provision concerning interpretation in the Charter of the United Nations. To indicate the conclusion of discussions in the San Francisco Conference, there exists only the final report of Committee IV/2 (Legal Problems) of the Conference, a part of which is as follows:

> In the course of the operation from day to day of the various organs of the Organisation, it is inevitable that each organ will interpret such parts of the Charter as are applicable to its particular functions. This process is inherent in the functioning of any body which operates under an instrument defining its functions and powers. It will be manifested in the functioning of such a body as the General Assembly, the Security Council, or the International Court of Justice. Accordingly, it is not necessary to include in the Charter a provision either authorising or approving the normal operation of this principle.
>
> Difficulties may conceivably arise in the event that there should be a difference of opinion among the organs of the Organisation concerning the correct interpretation of a provision of the Charter. Thus, two organs may conceivably hold and may express or even act upon different views. Under unitary forms of national government the final determination of such a question may be vested in the highest court or in some other national authority. However, the nature of the Organisation and of its operation would not seem to be such as to invite the inclusion in the Charter of any provision of this nature ... In brief, the Members or the organs of the Organisation might have recourse to various expedients in order to obtain an appropriate interpretation ...
>
> It is to be understood, of course, that if an interpretation made by any organ of the Organisation or by a committee of jurists is not generally acceptable it will be without binding force ...[4]

It can be seen from this report that the possibility was clearly rejected that an organ (such as the ICJ or the General Assembly) of the United Nations be given the power to authoritatively interpret the Charter either in whole or partially, its interpretation binding all the other organs and all the member states of the United Nations.[5] As a consequence, each member state could question an interpretation of the Charter made by one of the organs in taking a specific measure. In so doing, a member state questions whether the measure is in accordance with the Charter, and therefore whether it is lawful.[6]

What role does the UN Charter give to the Security Council, particularly under Chapter VII of the Charter?

The United Nations was conceived by the four great powers – the Soviet Union, the United Kingdom, the United States of America, and China – at the Dumbarton Oaks Conference in 1944. The goal was primarily to create an organization that would serve as a mechanism for post–Second World War international security.[7] The Dumbarton Oaks plan was refined by Stalin, Churchill, and Roosevelt at Yalta in early 1945, and was moulded into the Charter at San Francisco later that year.[8]

Article 1 of the Charter, "The Purposes of the United Nations," refers in paragraph 1 to the effort to "maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace." Article 24 of Chapter V, "The Security Council," confers on the Security Council primary responsibility for the maintenance of international peace and security.

Chapter VII of the Charter enables the Security Council to adopt economic sanctions and military measures where there is a "threat to the peace, breach of the peace or act of aggression," thereby equipping it with enforcement powers in disputes or situations that are particularly serious.[9] To bring Chapter VII into play, Article 39 states that it is for the Security Council to determine that the necessary conditions are present; that is, that one of the three situations above exists. Once such a determination has been made under Article 39, it is open to the Security Council to make recommendations, or to decide what measures shall be taken in accordance with Articles 41 and 42 to maintain or restore international peace and security. Article 41 is primarily concerned with economic sanctions. Article 42 is concerned with military sanctions, and Article 43 provides for member states to conclude agreements with the United Nations under which their forces will be available for use when needed.

With these provisions, the Security Council could be considered as a primarily executive organ equipped with policing power and the capacity to use coercive force in the form of military and non-military sanctions.

What role did the Security Council play during the Cold War period?

The long period that we generally identify as the "Cold War" has meant an almost total paralysis of the Security Council in the exercise of its enforcement powers under Chapter VII. The Council has been crippled by its ideological polarization and the abuse of the veto power of the Permanent Members. During this period, only three enforcement actions have been

taken under Chapter VII: the attack upon the Republic of Korea, the situation in Southern Rhodesia, and the internal situation in South Africa.[10]

The attack upon the Republic of Korea

The Security Council, through Resolution 82 (1950), determined that the armed attack by North Korea constituted a breach of the peace, and called upon the North Korean authorities to withdraw their forces to the 38th parallel. Through Resolutions 83 (1950) and 84 (1950), it recommended that member states assist Korea in repelling the armed attack, and that they make such assistance available to a unified command under the United States, which was authorized to use the United Nations flag and was obliged only to report to the Security Council. The collective military action undertaken against North Korea was led by the United States with troops contributed by 16 states. The Security Council had no authority over the conduct of military operations. As soon as the representative of the Soviet Union came back to the Security Council, it ceased to play an active role. The General Assembly, however, played this role and buttressed its position by adopting the "Uniting for Peace" Resolution.

The situation in Southern Rhodesia

Against the unilateral declaration of independence by the authorities of Southern Rhodesia, which was a non-self-governing territory, the Security Council, in Resolution 216 (1965), declared the annulment of this declaration of independence. Furthermore, after determining the existence of a threat to peace, in Resolution 221 (1966), it "call[ed] upon" the United Kingdom "to prevent by the use of force if necessary the arrival at Beira" (Mozambique), which is connected to Rhodesia by pipeline, of ships presumably carrying oil destined for Rhodesia, and "empower[ed]" it to arrest a tanker concerned. The Security Council also imposed economic and other sanctions, in stages, under Article 41.

The internal situation in South Africa

The Security Council had been beset by questions related to the racial policy of South Africa since 1963, and it had condemned the apartheid policy several times and called for an arms embargo in Resolution 181 (1963). It was only in Resolution 418 (1977) that the Security Council actually imposed such a weapons embargo. Here the Security Council found the existence of a threat to peace only in relation to South Africa's acquisition of weapons and materiel, rather than in the apartheid policy itself. However, it seems clear that the Security Council was motivated by considerations concerning the apartheid policy, which were already sufficiently aggravated at that time.

Some comments

Concerning Article 39, "Threat to Peace," despite its clear, direct allusion to an armed conflict, the concept of a threat to peace evolved in the practice of the Security Council to refer to something broader than that. The Security Council could be considered to have included in this concept such cases as the denial of self-determination to the black majority in Southern Rhodesia, and the large-scale, systematic denial of basic human rights in South Africa.

Concerning Article 39, "Recommendations," and Article 42, in the Cold War period, one of the crucial questions was whether the Council could take military enforcement actions under Article 42 in the absence of the agreements and the machinery provided for in Articles 43–47. The prevalent opinion at that time was that Article 42 was not applicable without special agreements to be concluded under Article 43.[11] Thus, the Korean action and possibly the action called for in the Resolution on Southern Rhodesia were considered to have been taken on the basis of a "recommendation" by the Security Council under Article 39.[12] It is true that these were scarcely the kinds of "recommendations" that the drafters of the Charter had in mind when they adopted Article 39. At the time, however, this concept of military measures on the basis of a Council "recommendation" was accepted by a great majority of members, with the major exception of the Soviet bloc.[13]

The actions of the Security Council in the two cases of Korea and Southern Rhodesia were not explicitly based upon relevant articles of the Charter. To that extent, the resolutions mentioned above worked as a legitimizing factor for the use of force by recommending or delegating forcible actions to individual states for specified purposes.

Apart from a few examples, the rule of the Security Council during the Cold War period was characterized by virtual paralysis, deep disagreements and mistrust among the Permanent Members, and an inability to prevent, manage, or redress the many conflicts with which it was faced.[14]

Security Council activities under Chapter VII of the UN Charter since the end of the Cold War

What have been the main activities of the Security Council under Chapter VII of the UN Charter since the end of the Cold War? Are they legal in the sense that they are in conformity with international law, and constitutional in the sense that they are in conformity with the Charter, which is the constitution of the United Nations? Some of the main and particularly controversial cases will be discussed below.

Article 39

Interference into internal affairs of member states by the United Nations on humanitarian grounds in the case of the Kurds (Resolution 688 (1991)), of Somalia, and other cases

The notion of "threat to the peace" is now interpreted as including essentially internal situations that might degenerate into an international conflict. The Security Council referred to "the repression of the Iraqi civilian population in many parts of Iraq, including most recently in Kurdish-populated areas, which led to a massive flow of refugees towards and across international frontiers and to cross-border incursions which threaten international peace and security in the region,"[15] and "the magnitude of the human tragedy caused by the conflict in Somalia, further exacerbated by the obstacles being created to the distribution of humanitarian assistance, constitut[ing] a threat to international peace and security."[16] One should also consider the civil war in Liberia, in regard to which the Security Council determined "that the deterioration of the situation [in this region] constitute[d] a threat to international peace and security, particularly in West Africa as a whole";[17] the civil war and genocide in Rwanda, in regard to which the Security Council determined "that the magnitude of the humanitarian crisis [in this region] constitute[d] a threat to peace and security in the region";[18] and the coup against the elected President of Haiti.[19] In this context, all of these cases were seen in a similar light by the Security Council.[20]

This evolution was defended from the viewpoint of the real-life dynamics of ethnic and similar conflicts as follows:

Ethnic conflict blurs the line between domestic and international, state and non-state actors, as well as that between Chapter VI and VII. Ethnic conflict has also made a mockery of the doctrine that only interstate conflict can be a "threat to international peace and security" (Article 39). Conflicts in which more than half a million people get killed and hundreds of thousands of people have to flee are a threat to international peace and security in a highly interdependent world. The Security Council was absolutely right to decide accordingly in the case of Somalia, Liberia, Angola, Rwanda, etc.[21]

The Appeals Chamber of the International Tribunal for the Former Yugoslavia acknowledged this in the Tadic Case by saying:

[E]ven if [an armed conflict in the territory of the Former Yugoslavia] were considered merely as an "internal armed conflict", it would still constitute a "threat to the peace" according to the settled practice of the Security Council and the common understanding of the United Nations membership in general. Indeed,

the practice of the Security Council is rich with cases of civil war or internal strife which it classified as a "threat to the peace" and dealt with under Chapter VII, with the encouragement or even at the behest of the General Assembly, such as the Congo crisis at the beginning of the 1960s and, more recently, Liberia and Somalia. It can thus be said that there is a common understanding, manifested by the "subsequent practice" of the membership of the United Nations at large, that the "threat to the peace" of Article 39 may include, as one of its species, internal armed conflicts.[22]

The Libyan case: Resolutions 731 (1992) and 748 (1992)

Security Council Resolution 731 of 21 January 1992, *inter alia*, called upon Libya to extradite two suspects allegedly linked to the bombing of an American airliner over Lockerbie to either the United States or the United Kingdom for trial. In response, Libya brought an action before the International Court of Justice and requested the Court to indicate provisional measures to prevent the United States from taking coercive actions against Libya, and to ensure that no steps were taken that would prejudice Libya's rights. Three days after the close of oral hearings in the case, the Security Council adopted Resolution 748 as a binding decision requiring Libya to extradite the persons in question and imposing sanctions upon it should it fail to do so by 15 April of that year.

Graefrath criticized this action as follows:

> With due respect to the wisdom of the Security Council, it seems to me rather doubtful whether a failure to fully respond to [the] United States' requests to surrender suspects to the United States or the United Kingdom and to pay compensation can be interpreted, within the meaning of Article 39 of the Charter, as a threat to international peace; especially when it has not been established that Libya violated international law.[23]

A serious and cautious consideration is required on the matter of whether the Security Council could reasonably determine the existence of a threat to international peace and security three and a half years after the Lockerbie bombing, simply because Libya had not surrendered the suspects.

Article 41

The Libyan case: Resolutions 731 (1992) and 748 (1992)

Graefrath further points out that "the Security Council by Resolution 748 (1992) transformed the terms of settlement recommended by Resolution 731 (1992) under Chapter VI into a binding dispute settlement under Chapter VII, a procedure that is not provided for in the Charter,"[24] citing the following statement by G. Arangio-Ruiz:

As stipulated unambiguously in the Charter, the Security Council's powers consisted of making non-binding recommendations, under Chapter VI, which dealt with dispute settlement, and also binding decisions under Chapter VII, which dealt with measures of collective security. The main point was that, according to the doctrinal view – which did not appear to be seriously challenged either in the legal literature or in practice – the Security Council would not be empowered, when acting under Chapter VII, to impose settlements under Chapter VI in such a manner as to transform its recommendatory function under Chapter VI into binding settlements of disputes or situations.[25]

This is a rather delicate and controversial point, and will be further dealt with later in this chapter.

Post-war settlement in the Gulf War, including the destruction of Iraq's chemical and biological weapons, and the delimitation of the boundary between Iraq and Kuwait (Resolution 687 (1991))

Resolution 687 of 3 April 1991 provides for the inviolability of the international boundary between Iraq and Kuwait, the demarcation of that boundary and the establishment of a UN observer unit (UNIKOM), the destruction of Iraq's chemical, biological, and nuclear weapons and long-range ballistic missiles, and an undertaking by Iraq not to develop any such weapons in the future. A Special Commission (UNSCOM) and the IAEA were to monitor and verify Iraq's compliance. Iraq was to return Kuwaiti property and was declared liable for loss and damage as a result of its unlawful invasion and occupation of Kuwait. A fund to pay compensation was to be established. Sanctions against Iraq were to be maintained until it had fulfilled its disarmament obligations under the resolution. Kuwaiti and third-country nationals detained in Iraq were to be repatriated. Finally, the Security Council declared, "upon official notification by Iraq to the Secretary-General and to the Security Council of its acceptance of the provisions above, a formal cease-fire is effective between Iraq and Kuwait and the Member States co-operating with Kuwait in accordance with Resolution 678 (1991)."

Graefrath criticized this in the following terms:

[A]s the different structures of Chapter VI and Chapter VII demonstrate, the Security Council under Chapter VII has a policing function only ...

Therefore, when acting under Chapter VII the Security Council action normally is confined to stop[ping] military activities or avert[ing] a specific danger for the maintenance of peace, in order to allow the functioning of peaceful dispute settlement procedures to solve the conflict which led to the breach of the peace.[26]

To accept that the Security Council could impose its reparation scheme on Iraq and other member States of the United Nations would run completely against the system of the Charter. It would not only confuse political and judicial powers vested intentionally in different organs, but also endow the Security Council with legislative powers which States never have transferred to any United Nations organ.[27]

Establishment of an International Criminal Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law (Resolution 827 (1993) and Resolution 955 (1994))

The Security Council, in Resolution 827 (1993), established the "International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991."[28] Similarly, the Security Council, in Resolution 955 (1994), established the "International Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States, between 1 January 1994 and 31 December 1994."[29]

The establishment of these tribunals by resolutions of the Security Council gave rise to reservations and criticism. It was argued that the authority to establish a tribunal to try offences being committed in the territory of any state was essentially to be left to the state(s) with jurisdiction over the individuals concerned; that the Charter, when adopted, constituted treaty obligations that did not include the establishment of a compulsory criminal jurisdiction; and that neither had the member states given such jurisdiction to the UN thereafter.[30]

However, the Appeals Chamber of the International Tribunal for the Former Yugoslavia affirmed its legality in the Tadic Case, saying:

> The establishment of the International Tribunal by the Security Council does not signify, however, that the Security Council has delegated to it some of its functions or the exercise of some of its own powers. Nor does it mean, in reverse, that the Security Council was usurping for itself part of a judicial function which does not belong to it but to other organs of the United Nations according to the Charter. The Security Council has resorted to the establishment of a judicial organ in the form of an international criminal tribunal as an instrument for the exercise of its own principal function of maintenance of peace and security, *i.e.*, as a measure contributing to the restoration and maintenance of peace in the former Yugoslavia.[31]

Article 42

Authorization of the use of force by member states in the Gulf War (Resolution 678 (1990)) and other cases

The Security Council resorted to a formula authorizing or calling upon member states generally to act with the Security Council's blessing but without its control. In the Gulf War, it authorized "Member States co-

operating with the Government of Kuwait ... to use all necessary means to uphold and implement resolution 660 (1990) and all subsequent relevant resolutions and to restore international peace and security in the area."[32] In different contexts of a lesser scale, the Security Council resorted to this formula in such cases as Somalia,[33] Bosnia-Herzegovina,[34] Rwanda,[35] and Haiti.[36] There occurred, particularly in relation to Security Council Resolution 678 (1990), a great deal of controversy over their legality, constitutionality, and possible legal grounds.

The arguments against this formula can be summarized as follows:

> [C]haracterising an action as taken under Article 42 should depend on whether the Council gave itself the means to exercise control and direction over the measures adopted. The resolution in question contradicts the basic premises of Article 42, for the total lack of direction and control by the Council over the actions it authorises. The vagueness of the delegation of authority provided by paragraph 2 is striking; the wide discretion enjoyed by the States concerned as to the "necessary means" to use, the lack of any indication about the command and co-ordination of the military operation, the vagueness of the purpose of the authorisation, and the lack of even a clear reporting obligation for the coalition States make Desert Storm an operation external to the United Nations, as the former Secretary-General himself has taken pains to underline on a few occasions.[37]

The majority of legal scholars, however, although more or less reluctantly, are ready to accept this formula as realistically practical and acceptable. This position seems to be based upon several elements.[38] Some provisions in the Charter, such as Articles 48 and 53, expressly envisage the Council authorizing action by others. As the Secretary-General acknowledged, the United Nations is not equipped to take command of a major military operation involving the use of force against an aggressor. To exclude the possibility of authorization would mean no possibility of the United Nations taking military enforcement action on any substantial scale. It is generally considered as "unlikely that in the near future any operation of importance will be conducted otherwise than by means of a force that is authorised by the Security Council or is totally outside the UN system."[39]

Unilateral use of force for the implementation of Resolution 687 (1991)

The United Nations ran into serious difficulties over the implementation of Resolution 687 (1991). This resolution assumed Iraqi cooperation, and the main problems with the implementation of the resolution came out of its enforcement against an unwilling Iraq. In this sense, one could say that the Security Council paid for the decision of the coalition not to destroy Saddam Hussein's regime under the cover of the authorization to use "all necessary measures ... to restore international peace and security."

However, it is doubtful whether it would have been politically feasible at the time of the adoption of Resolution 687 to provide for the issue of enforcement. Those critical of the open-ended authorization of the use of force in Resolution 678 (1990) were not likely to accept a general authority to use force to secure compliance with Resolution 687.[40]

Among the various incidents related to Iraq, the matters of disarmament and weapons inspections are particularly relevant to the implementation of Resolution 687. Iraq obstructed the implementation by denying access to the IAEA and the UNSCOM weapons inspectors. The Security Council unanimously adopted Resolution 707 (1991), in which it condemned Iraq's serious violation of a number of its obligations under Resolution 687. It also adopted Resolution 715 (1991) to supplement Resolution 687. Iraq, on the other hand, continued its obstruction and finally informed UNSCOM that the UN weapons inspectors would no longer be allowed to use their own aircraft. The president of the Security Council issued a statement in which it was determined that Iraq was in material breach of Resolution 687 and its related resolutions, and warned Iraq of the serious consequences that would flow from such continued defiance. Furthermore, the United States, the United Kingdom, and France started air strikes on sites in southern Iraq.[41]

Thus, a question is posed as to whether Resolution 687, the cease-fire resolution, allowed the unilateral use of force without any further Security Council resolution in order to secure the implementation of the cease-fire regime, even in the absence of any use of force by Iraq. The Security Council, in Paragraph 1 of Resolution 687, affirmed all 13 prior resolutions, including Resolution 678, "except as expressly changed below to achieve the goals of this resolution, including a formal cease-fire," and declared, in Paragraph 33, that a formal cease-fire was effective upon official acceptance by Iraq. The authorization to use force in Resolution 678 is therefore no longer in force. Thus, one commentator concluded:

> In the absence of express and formal Security Council authorisation the cease-fire must remain in force. The UK Minister's argument that, "in the light of Iraq's continued breaches of Security Council Resolution 687 and thus of the cease-fire terms, and of the repeated warnings given by the Security Council and members of the coalition, their [the USA] forces were entitled to take necessary and proportionate action in order to ensure Iraqi compliance with those terms" is not legally convincing.[42]

A series of crises ensued, particularly in 1997 and 1998, concerning the implementation of Resolution 687. The United States announced that it was prepared to use military force as a last resort. Secretary-General Kofi Annan went to Baghdad in February 1998 and announced an agreement

confirming full compliance by Iraq with all relevant resolutions, including Resolution 687. The Security Council endorsed this Memorandum of Understanding in Resolution 1154 (1998), adopted under Chapter VII, in which the Security Council warned that "any violation would have the severest consequences for Iraq."[43] However, while the United States asserted that unilateral forcible action in response to violations remained possible, a number of Council members, including Russia, China, and France, stated that this resolution could not be relied upon as automatically authorizing the use of force against Iraq.[44] The Security Council, again, adopted Resolution 1205 (1998), in which it condemned the decision by Iraq to cease cooperation with the Special Commission as a flagrant violation of Resolution 687 (1991) and other relevant resolutions, but did not authorize the use of force against Iraq.

One month later, however, when Iraq again restricted inspections by UNSCOM, the United Kingdom and the United States carried out massive air strikes against Iraq without trying to acquire authorization to use force. Concerning this series of air strikes against Iraq, the following conclusion, reached by Krisch, seems reasonably accurate:

> [N]either the interpretation of Resolution 678 (1990), 687 (1991), 1154 (1998) and 1205 (1998) nor state practice since 1991 give indications for United Nations authorization of the threat or use of force in order to enforce Iraq's post-war obligations ... Thus, the reliance on United Nations authority seems motivated by the desire to enhance the appearance of legitimacy despite obvious illegality.[45]

The Security Council stepping into legally grey areas

The brief analysis above of the main and controversial activities of the Security Council under Chapter VII of the UN Charter since the end of the Cold War implies that some of the actions of the Security Council might be ambiguous in terms of their legality and constitutionality. Two important issues will be considered below.

Whether the Security Council has the legal power to impose a binding dispute settlement under Chapter VII

The essence of the role of the Security Council in maintaining international peace and security lies in its ability to act quickly and decisively to prevent or punish a threat to or breach of the peace, or an act of aggression. Such executive action and enforcement activity could not be accomplished if accompanied, for example, by rigorous and lengthy evidentiary processes involving complicated procedures for gathering facts and hearing witnesses, nor if delayed due to some form of legal appeal mechanism.[46] Thus, Kelsen, for example, argued that the Council need not act

in accordance with existing international law when it is acting to maintain or restore international peace and security. He stated:

> The purpose of the enforcement action under Article 39 is not: to maintain or restore the law, but to maintain, or restore peace, which is not necessarily identical with the law ... [When it is acting under Chapter VII,] the Security Council would be empowered to establish justice if it considered the existing law as not satisfactory, and hence to enforce a decision which it considered to be just though not in conformity with existing law. The decision enforced by the Security Council may create new law for the concrete case.[47]

The argument that legal rights of states may be infringed upon or suspended by the Security Council in the application of collective enforcement measures is supported by the Charter and the *travaux préparatoires* of the Charter, as well as the practice of the Security Council.[48] Article 1(1) of the Charter provides as follows:

> Article 1. The purposes of the United Nations are:
> 1. To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace.

This provision divides the means for maintaining international peace and security into collective measures and peaceful settlement, and it is only in the context of the latter that the Security Council is subject to the constraints of international law and justice. Furthermore, it could be contended that the very notion of enforcement measures implies that the Council has the authority to impinge upon, restrict, or suspend the rights that states are normally entitled to exercise under both customary and conventional international law. Such authority for the Council could be implicit in Chapter VII of the Charter, specifically Articles 39, 41, 42, and 48.[49] Thus, the practice of the Security Council clearly demonstrates that a trade embargo imposed by it could affect rights to engage in commerce as well as rights of free movement by ships on the high seas.

However, it is incorrect to contend that the Security Council is completely unrestrained by the principles of justice and international law when it is taking collective measures under Chapter VII of the UN Charter.[50] To the contrary, it could reasonably be contended that the founding states of the United Nations gave this extraordinary power to the Security Council only on the condition that the scope of this power would be limited to enforcement activities necessary for the purposes of maintaining

international peace and security, excluding adjustment or settlement of international disputes or situations, as is implied in the structure of Article 1(1) of the UN Charter. What is unclear and unresolved is where and how the boundary should be drawn between the two – that is, enforcement activities necessary for the purposes of maintaining international peace and security on the one hand, and adjustment or settlement of international disputes on the other – and not the fact that such a boundary actually exists. As regards this dichotomy, it has been suggested that:

> It could well be argued that ... secondary level actions after the initial response has been taken to restore international peace and security should not also fall within the wide discretion of the Council, but should be tested also against the prevailing principles of international law. The further a Security Council action is from its primary activity of maintaining or restoring international peace and security, the more important it is to reassert the key role of international law.[51]

The Security Council resolutions that in effect amount to a determination or characterization of a legal situation are extensive. They include: those that assert that particular acts are illegal and null and void; those demanding international non-recognition; those imposing arms embargoes; those dealing with and recognizing as an authority an ousted regime, rather than the regime in actual control; those imposing peace conditions, defining and guaranteeing boundaries, and determining state responsibility issues; and those establishing international criminal tribunals. Although it might be difficult to draw a clear line between enforcement activities and settlement of international disputes, it must be emphasized that the further a Security Council action is from its enforcement activity for maintaining or restoring international peace and security, the more consideration is to be given to the principles of justice and international law.

Whether the Security Council could delegate the use of force to member states

While a general analysis on this point has already been made above, the basic idea underlying the opinions of a majority of legal scholars on this point could be summarized in the following terms:

> Article 42 does not itself tie Security Council armed action to Article 43 and does not necessarily depend on a strong Military Staff Committee. Article 42 does contemplate that member states will take armed action deemed necessary by the Council. Thus, one could argue that when the Council has authorised the use of armed force under chapter VII without specifying which article it has relied on, the source of its authority is Article 42. The argument is a pragmatic one, treating the Charter as a constitution capable of growing to meet changing circumstances. By the same token, the Council's power to authorise the use of armed force under

chapter VII may be seen as an implied power that is not literally tied to Article 42, but is consistent with the purpose of that article and emanates from the functional necessity to make the Council's enforcement authority effective.[52]

Criticism, however, persists. Sarooshi, for example, asserts that the Security Council does not possess the competence to delegate to member states the power to decide that a threat to, or breach of, international peace and security has either started or ceased to exist, for several reasons. Firstly, that decision is the very *raison d'être* of Chapter VII, as an Article 39 determination is the gateway to action under Chapter VII. States have delegated this authority to the Security Council on the condition that the Security Council would be the only entity to exercise this power. Secondly, the institutional safeguard of the veto is attached to the Council's decision-making processes. This ensures that states exercise delegated Chapter VII powers only in order to achieve the objectives of the United Nations, and not solely to further their own self-interest in a particular situation. Thirdly, Article 53, on regional arrangements to carry out military enforcement action in order to maintain international peace and security, provides that such action cannot be carried out "without the authorisation of the Security Council." One cannot argue, Sarooshi continues, that the Security Council is allowed to delegate its Article 39 power of determination to individual member states but not to regional arrangements, since a regional arrangement is, after all, only a collection of UN member states. In the case of the Gulf War, Resolution 678 set two objectives: namely, to uphold and implement Resolution 660 (1990) and all subsequent relevant resolutions, and to restore international peace and security in the area. Sarooshi considers that the second objective involves delegating to member states the competence to decide when international peace and security in the region have been restored, and that the purported delegation by the Council of this broad power to member states is thus unlawful.[53]

Persistent criticisms seem to indicate Resolution 678's fragile constitutionality and the necessity of legitimacy in this new area of enforcement power delegation. It had already been pointed out that this mechanism may be: "Legal? Yes, technically. But legitimate? A borderline proposition at best."[54]

Legitimacy in the light of the UN Charter as the constitution of the international community

Having briefly analysed some of the main cases of Security Council activities under Chapter VII of the UN Charter since the end of the Cold War in

the light of their legality and constitutionality, this chapter will now discuss the legitimacy[55] of these and other activities of the Security Council. This discussion will be based upon the following two basic themes:

- The more the Security Council steps into legally grey areas, the more legitimacy is required for its activities to be effective and acceptable.
- Legitimization of Security Council activities in the light of the UN Charter as the constitution of the international community needs a higher degree of support in terms of separation of powers and judicial review which aims at preventing abuse of and ensuring proper exercise of powers. As the Security Council has more occasions to exercise its strong powers, it is necessary to examine whether, and if so, to what extent, separation of powers and judicial review as fundamental mechanisms for preventing abuse of and ensuring proper exercise of powers in centralized national governing systems can be applied to the United Nations system.[56]

The UN Charter as the constitution of the international community

There have been two streams of thought that regard the UN Charter as a constitution.[57] One regards it as the constitution of the United Nations. The Charter as the constituent instrument of the United Nations contains the constitution defined as those provisions that provide for the legal foundation and framework of an international organization. The core of the constitutional nature of constituent instruments lies in the fact that constituent instruments provide the legal foundations and framework for the structures and activities of international organizations on the basis of their evolutionary and teleological interpretations so that, despite changing international relations, international organizations can continue to function efficiently, and effectively perform their given purposes and functions. International organizations have been created because their purposes and functions cannot be achieved by the creation of simple norms of conduct by means of treaties, including multilateral law-making treaties. Their purposes and functions can be achieved only by the permanent operation of organizational entities. This implies that constituent instruments will always need to be adapted to changing circumstances for the purposes of the efficient functioning and effective activities of international organizations.[58] This stream of thought is fairly well established by the practice of states and international organizations.[59] It would be possible to argue that, based upon the doctrine of the interpretation of constituent instruments as the constitutions of international organizations, most, if not all, of the above-mentioned activities of the Security Council are legal; this is demonstrated, for example, by the discussion concerning the legality and constitutionality of Resolution 678 (1990).[60]

The other school regards the Charter as the constitution of the international community. After the end of the Cold War, many authors began to refer to this idea. It is an idea that is clearly promoted by the impressive activities of the Security Council in the 1990s. Opinions vary, however, on whether the Charter can be regarded as a "constitution" of the international community[61] in a sense comparable to the function of domestic constitutions.

Some are quite positive. Tomuschat, for example, takes the position that it has "become obvious in recent years that the Charter is nothing else than the constitution of the international community." He elaborates on this point as follows:

> [T]o enter the United Nations differs profoundly from accepting a treaty of the usual type. A State which becomes a member of the world organisation consents not just to a series of well-defined and easily identifiable obligations, it agrees to a changed status under international law ... [T]he Security Council is authorised to impose binding obligations on every member State whenever issues of "international peace and security" are at stake. This is an extremely broad formula. Nobody can foresee with any degree of precision in what sense it will be interpreted by the Security Council ... Whoever joins the United Nations gives blanket powers to the Security Council.[62]

Some are more cautious. Dupuy, for example, draws attention to "the sharp contrast still existing between, on the one hand, the exigencies of normative and organic integration attached to the idea of constitution and, on the other hand, the persisting dissemination of power among competing and formally equal sovereign states, which still characterises the international society in spite of the importance now taken by the action of hundreds of international organisations."[63] He concludes:

> The international legal order remains more characterised by the spreading of sovereignty than by the overall normative and organic subordination of states to an international public order embodied in the text of a Charter that would at the same time provide a central authority aimed at enforcing the "constitutional" rules characterising that public order. What the ICJ said in 1949 remains true: the United Nations is not a "super-State".[64]

Other observers are more critical. Arangio-Ruiz, for example,[65] is quite negative in assuming that the doctrine of implied powers is applicable as an interpretive tool of the Charter for the determination of the powers of the political organs of the United Nations, the Security Council in particular; he rejects this as being more dangerous for the preservation and development of the rule of law in the "organised international community." He states:

[A]lthough the UN is without doubt an organisation, having its legal statute in the Charter (and in that sense a constitution of its own), the Charter is not "the constitution" or "a constitution" of the community of the member States or of the community of all existing states, let alone the community of mankind. In other words, the UN is not an organisation *of* the member States themselves, almost as if they were in some measure absorbed or dissolved in it; nor is it, despite the bold lie with which the text of the UN Charter begins – "We the Peoples" – an organisation of the peoples of the member States, as a single people. The member States remain, under the Charter, the separate, independent political entities they were beforehand, in their mutual relations, as well as in relation to the UN; and they remain also – this is of paramount importance – subject to general international law and endowed with the rights deriving therefrom.[66]

The contention of each school contains some truth; it is probably wisest to try to synthesize those appropriate points, aiming at some consistent doctrine. It could at least be concluded that:

The constitutional system set up for the international community in the United Nations Charter is of course far from being perfect. It has only a limited capacity to enforce compliance with its basic rules. This, however, should not detract our attention from the fact that we live in an international legal system rather different from the one existing before 1945.[67]

The Security Council: Between fairness and effectiveness

The Security Council can be conceptually located on a continuum between two poles: fairness and effectiveness. While these two elements are not inherently contradictory, they seem to exclude each other to some extent with regard to the Security Council in the decentralized power structure of the world today.

Franck defines "legitimacy" as it applies to the rules applicable among states. "Legitimacy," he writes, "is a property of a rule or rule-making institution which itself exerts a pull toward compliance on those addressed normatively because those addressed believe that the rule or institution has come into being and operates in accordance with generally accepted principles of right process."[68] Legitimacy, he says, can only be accorded to rules and institutions, or to claims of right and obligation, in the circumstance of an existing community. It is only by reference to a community's evolving standards of what constitutes right process that it is possible to assert meaningfully that a law, or an executive order, or a court's judgement, or a citizen's claim on a compatriot, or a government's claim on a citizen, is legitimate.[69]

Franck developed his analysis from the viewpoint of fairness; he argues that fairness "is a composite of two independent variables: legitimacy and

distributive justice." "Fairness discourse," he continues, "is the process by which the law, and those who make law, seek to integrate these variables, recognising the tension between the community's desire for both order (legitimacy) and change (justice), as well as the tensions between differing notions of what constitutes *good* order and *good* change in concrete instances."[70] Having analysed from this viewpoint the collective security of the UN Security Council, Franck points out:

[With the Charter of the United Nations,] we see a dramatic return to just war theory and, since the end of the cold war, of just war practice. In future one might reasonably expect to see UN peacekeeping and peace-enforcing contingents largely pre-empt the *right* justly to engage in war. All other war will be unjust. This enforcement monopoly makes it extraordinarily important that the institutional process by which the system resorts to military force is not merely formally legitimate but is seen to be fair. Fairness in this context means (1) that the Security Council engages in open fairness discourse – for example, about treating likes alike and about fault and proportionality – before making a decision to deploy force; (2) that power within the Security Council itself be perceived to be allocated fairly in accordance with the equal rights, balanced against the unequal distribution of responsibility among states for carrying out the Council's tasks; and (3) that all decisions to use force allocate costs and benefits (in lives, resources, and outcomes) in a manner which does not exacerbate the gap between advantaged and disadvantaged states.[71]

Effectiveness, on the other hand, derives from the recognition that "it is not at all self-evident in today's world that 'fair' and 'genuinely collective' decision-making by the Security Council is a sensible approach for global conflict management."[72] Realistically effective collective security comes from the concept of relating responsibility for the maintenance of peace and security to the self-interest of the major powers. The League of Nations' collective security mechanism had proven inadequate in that it purported to impose responsibilities on states that they were unwilling to undertake in practice, because of the serious consequences such responsibilities could have for them. The Security Council was constituted so as to reflect the special interests and responsibilities of its principal contributors. In this sense, the roots of the Security Council lie less in the Council of the League of Nations than in the nineteenth-century Concert of European Powers.[73] Murphy makes the following persuasive point in this regard:

The most realistic means of achieving a credible threat or use of power by the United Nations is through close co-operation among the major military powers of the world. Those powers must be convinced to leave aside the option of exercising unilateral action in favour of the collective process that forces them to take account of each other's interests. To do so, the major powers must be permitted to

bring into the process those matters they consider vital to their own interests and to push for those matters to be addressed in a satisfactory manner. In doing so, each power is forced to take into account the concerns of the other major powers, thereby minimising the likelihood of an escalation of conflict. On the other hand, each power will only be willing to participate in the process if it is capable of protecting its own vital interests from collective action and of avoiding the commitment of its military forces when it so chooses. For both reasons, the system should not aspire to treating all threats to the peace equally through automatic and reliable responses.[74]

It seems undeniable that this contention of effectiveness contains some important truths. However, our analysis of Security Council activities under Chapter VII of the UN Charter since the end of the Cold War demonstrates that the contention of effectiveness needs to be modified by the consideration of fairness.[75]

Functional separation of powers as a factor for legitimization

The Appeals Chamber of the International Tribunal for the Former Yugoslavia, in the Tadic Case, set the correct starting point for discussion on the matter of separation of powers:

> It is clear that the legislative, executive and judicial division of powers which is largely followed in most municipal systems does not apply to the international setting nor, more specifically, to the setting of an international organisation such as the United Nations. Among the principal organs of the United Nations the divisions between judicial, executive and legislative functions are not clear cut. Regarding the judicial function, the International Court of Justice is clearly the "principal judicial organ" (*see* United Nations Charter, art. 92). There is, however, no legislature, in the technical sense of the term, in the United Nations system and, more generally, no Parliament in the world community. That is to say, there exists no corporate organ formally empowered to enact laws directly binding on international legal subjects.
>
> It is clearly impossible to classify the organs of the United Nations into the above-discussed divisions which exist in the national law of States. Indeed ... the constitutional structure of the United Nations does not follow the division of powers often found in national constitutions.[76]

Thus, the question of legality and constitutionality of Security Council activities cannot be approached on the basis of analogies and presumptions based upon national governing systems, but only by interpreting the United Nations' constituent instrument, the Charter, and its practices.

However, the question of legitimacy of Security Council activities can be better analysed by classifying whether the Security Council is acting in an executive, legislative, or judicial capacity. In another words, it is

possible to evaluate more accurately whether, and if so, to what extent, the Security Council is acting properly by adopting a frame of reference based on the type of decisions the Council makes.[77] For example, when the Security Council steps into the judicial, rather than executive, function, it is possible to use such frames of reference as independence from political influences, and requirements inherent in judicial function (such as due process, publication of justified reasoning, principle of *nemo judex in sua causa*, equality of the parties). When the Security Council steps into the legislative function, frames of reference such as the question of to what extent a Security Council action belonging to the legislative function is necessary and useful in achieving the original purpose of maintaining or restoring international peace and security, and some requirements inherent in the legislative function (such as conformity with principles of justice and international law, respect of fundamental consideration of humanity), can be used.

We have started from the basic theme that the more the Security Council steps into legally grey areas, the more legitimacy is required for its activities to be effective and acceptable. In the light of this legitimacy of Security Council activities, it is important, if not expressly provided in the Charter of the United Nations, for the Security Council to analytically separate executive, legislative, and judicial functions to avoid an undesired mixture of two functions. Separation of powers in the centralized national governing system is fundamentally organizational in the sense of attributing different functions to different organs. The separation of powers in this organizational sense is, as was pointed out above in the Tadic Case, not adopted in the United Nations. However, the idea of analytically separating Security Council activities into executive, legislative, and judicial functions to judge their propriety in the light of the frame of reference appropriate for each function can be considered a functional, if not organizational, separation of powers in the less strict sense of the word. Thus, we can conclude that more attention should be paid to the requirements of a functional separation of powers in evaluating Security Council activities. From this viewpoint, we will examine some of the controversial Security Council activities related to either judicial or legislative function.

Quasi-judicial powers

Graefrath points out that:

> The Security Council remains a political organ that takes political decisions. Even if the Council decides legal disputes and exercises "quasi-judicial functions" it neither applies judicial methods nor reaches judicial results, and its conclusions never attain the quality of a judicial decision. Its decisions therefore cannot replace rulings of the Court or make them superfluous. The Security Council should leave

to the Court what belongs to the Court. It should not take decisions in matters that are already before the Court or which should be dealt with by the Court, unless there is a threat to peace entailing an urgent need for immediate action.[78]

However, it could be contended that the Security Council can exercise a quasi-judicial function by establishing a judicial organ. The Court, in the Effect of Awards Case, found that the General Assembly did not itself, under the Charter, possess the judicial function exercised by the Administrative Tribunal that the General Assembly had established. However, it considered that the General Assembly possessed the power to establish the Administrative Tribunal, this power being implied from its competence to regulate staff relations. The Court stated:

[T]he Charter does not confer judicial functions on the General Assembly ... By establishing the Administrative Tribunal, the General Assembly was not delegating the performance of its own function: it was exercising a power which it had under the Charter to regulate staff relations.[79]

This use of the power to establish subsidiary organs to perform functions that the principal organ cannot itself exercise is quite important in determining the legality and constitutionality of recent activities by the Security Council. Several examples are given below.

The International Tribunal for the Former Yugoslavia

The Appeals Chamber of the International Tribunal for the Former Yugoslavia acknowledged, in the Tadic Case, that the Council possessed the power to establish the War Crimes Tribunal to exercise judicial functions, implied by its express powers in Article 41, because it is a measure necessary for the effective exercise of its powers to maintain or restore international peace.

Prosecution of persons responsible for serious violations of international humanitarian law committed in the territory of the Former Yugoslavia is quintessentially a judicial matter. It needs to be exercised not through arbitrary punishment by a political organ, but by an independent judicial organ. The Statute of the Tribunal included in Security Council Resolution 827 (1993) clearly indicates that this judicial function is exercised by a judicial, although ad-hoc, organ, in accordance with judicial procedures.

The United Nations Compensation Commission

Another example is the United Nations Compensation Commission contemplated in Resolution 687 (1991), to evaluate losses suffered as a result of Iraq's invasion of Kuwait and to resolve disputed claims as to Iraq's

liability for those losses, and established by Resolution 692 (1991) based upon the report by the Secretary-General. The Commission's principal body is the Governing Council, which is composed of representatives of the current members of the Security Council at any given time. The Governing Council is the policy-making organ and administrator of the United Nations Compensation Fund for payment of claims against Iraq; as such, it has responsibility for establishing guidelines on matters such as the administration and financing of the Compensation Fund, and the procedures to be applied in the processing of claims. The Governing Council is assisted by a number of commissioners, who are experts in fields such as finance, law, insurance, and environmental damage assessment, and act in their personal capacity. While the Commission is said not to be a court or an arbitral tribunal, it performs at least a quasi-judicial function in the sense that it examines individual claims, verifies their validity, evaluates losses, and assesses payments. Given the nature of this function, it is essential that some elements of due process be built into the procedure, and that the Governing Council establish the guidelines regarding the claims procedure. Panels normally composed of three commissioners implement these guidelines in respect of claims that are presented and resolution of disputed claims. They make the appropriate recommendations to the Governing Council, which in turn makes the final determination.

While the Commission could be legally based upon the implied power under Chapter VII to provide justice and resolve outstanding issues after a devastating armed conflict, Kirgis critiqued its establishment as follows:

> In one important respect, however, the mechanism lacks essential procedural safeguards. The whole procedure is supervised by a Governing Council, which consists of the representatives of the Security Council's members at any given time, acting not as independent individuals, but in their governmental capacities. The Governing Council establishes rules and interpretations for application by the commissioners (who do act in their personal capacities) and serves as the appellate body for the review of damage assessments. The legitimacy of this mechanism is thus open to question, not because it was unforeseen in 1945 or the Security Council lacked the implied power to create a compensation commission after an armed conflict, but because the Council hedged some basic principles of procedural fairness when it created a commission lacking independence from political influence.[80]

In the light of legality and constitutionality, it is possible to conclude that the Security Council can establish the Compensation Commission for processing the claims against Iraq under Chapter VII. Furthermore, it would not have been realistic and suitable to adopt a traditional arbitral procedure to deal with the claims, because the huge number of claims and

the differences between them constitute an insurmountable obstacle to the adoption of a classic arbitral approach. However, it is not desirable that the Governing Council acting as a political organ is engaged in the performance of judicial functions to the extent that processing the claims against Iraq entails the basically judicial tasks of examining individual claims, verifying their validity, evaluating losses, and assessing payments. It will not possess sufficient legitimacy considered against the requirements of a functional separation of powers with a view to preventing abuse of and ensuring proper exercise of powers.

The United Nations Iraq-Kuwait Boundary Demarcation Commission

The duty of the Security Council to respect the territorial integrity of states was another issue bound up in Resolution 687 (1991). Since the Security Council was set up to maintain the political independence of states and has no adjudicatory powers to permanently allocate rights or impose the terms of a settlement of a dispute or situation on any state, it consequently follows that it has no right to permanently allocate title to territory, or to detach or transfer sovereignty over a portion of a state's territory, without the consent of that state.[81] With respect to the demarcation of the Iraq-Kuwait boundary indicated in Resolution 687, the Secretary-General, at the request of the Security Council, established the United Nations Iraq-Kuwait Boundary Demarcation Commission. The Commission was composed of one representative each from Iraq and Kuwait and three independent experts appointed by the Secretary-General, one of whom would serve as chairman. The Security Council, acting under Chapter VII of the Charter, unanimously adopted Resolution 833, in which it endorsed the Commission's report and affirmed that the Commission's decisions on the demarcation of the boundary were final. The Security Council asserts that this operation was a demarcation of an existing boundary and not a delimitation of what the boundary was; in another words, that the Commission was not reallocating territory between Iraq and Kuwait, but was simply carrying out a technical task.

In the light of legality and constitutionality, it is true that there existed the Agreed Minutes of 4 October 1963, setting out the international boundary between Iraq and Kuwait, and that Iraq accepted Resolution 687 in which the Security Council demanded that Iraq and Kuwait respect the inviolability of the international boundary between them. In this sense, it seems hardly possible to critique the legality and constitutionality of the actions that the Security Council took.

However, it is also true that there existed a dispute between Iraq and Kuwait on the validity of the Agreed Minutes. It was also pointed out, after a careful analysis, that "to say that the Commission was merely

engaged in a technical demarcation exercise is a considerable [oversimplification], even if it is also true that the Commission was not reallocating territory."[82]

Under these circumstances, while the determination of where the boundary lay between Iraq and Kuwait was necessary for the restoration and continued maintenance of international peace and security, it could be contended that this should have been carried out by an independent judicial tribunal to be established under the authority of the Council. Also, the Security Council, as the main guarantor of international order, has in such cases a responsibility to ensure that justice is seen to be done between the parties by referring the matter to the International Court of Justice or establishing a judicial tribunal that can decide the matter through judicial process. Concerning this matter, Sarooshi makes the following point:

> The point is that the choice of institutional response is of crucial importance also in determining the long-term effectiveness of the Council's actions. A tribunal would have provided the appropriate judicial safeguards to ensure that the arguments of both States were fully heard and given due weight in a subsequent decision. This would contribute significantly to the perception by the parties that justice was in fact done between them, and, it is thus submitted, a significant contribution would be made to the legitimacy of any subsequent enforcement action by the Council that may be necessary to enforce the decision of the tribunal.[83]

The Charter confers different powers upon United Nations organs, consistent with the composition of those organs. The Security Council is composed of the most powerful states (at least at the time of its establishment), and consequently maintains the inherent capacity to coerce compliance with its decisions. For the Security Council, however, the resolution of issues of law in a dispositive manner is not consistent with its role as executive enforcer, nor is the Security Council equipped with the composition and process suitable for the exercise of such powers. The Security Council, even when acting under Chapter VII of the Charter, is not a judicial organ capable of adopting final decisions on the rights of parties. Unlike the decisions of judicial organs, its decisions are therefore not entitled to *res judicata* effect.[84] In the same way, when the Security Council makes legal determinations, it should not incorporate political considerations into its decision-making. Considering political factors is inappropriate because law, unlike politics, is primarily based on considerations of fairness and normative applications of rules.[85] Thus, when the Security Council steps into the judicial, rather than executive, function, it is important to fulfil such requirements as independence from political influences and requirements inherent in judicial function (such as due

process, publication of justified reasoning, principle of *nemo judex in sua causa*, and equality of parties).

Quasi-legislative powers

Whether the Security Council has quasi-legislative powers depends upon the definition of "legislative powers." An affirmative conclusion might follow if we start from a widely accepted definition of legislative authority in the UN setting; that is, that "legislative acts have three essential characteristics: they are unilateral in form, they create or modify some element of legal norm, and the legal norm in question is general in nature, that is, directed to indeterminate addressees and capable of repeated application in time."[86] Kirgis, from this viewpoint, makes the following assessment:

> UN Charter Articles 41 and 42, buttressed by Articles 25 and 48, clearly authorise the Security Council to take legislative action in the [above] sense. Thus, economic sanctions under Article 41 have been unilateral in form (adopted by the fifteen-member Security Council rather than agreement of all UN members); they have created or modified legal norms (binding rules); and they have been general in nature (directed to all member states and sometimes even to non-members, although Article 48 (1) permits them to be directed more selectively).[87]

It is debatable whether one can consider as legislative the nature of the powers exercised under Chapter VII, particularly Article 41, as Kirgis does. It would rather be considered as concrete execution, as these powers are normally exercised with regard to particular cases in the context of maintaining or restoring international peace and security.[88] However, many of the norms of conduct embodied in, for example, Resolution 661 (1990) adopted under Article 41 are general in nature, directed to all member states as addressees, although limited to their relationship with Iraq or Kuwait. Such concepts as legislation or execution are not strictly defined in the context of Security Council powers, nor are they given legally normative effects. These powers can, therefore, simply be described as quasi-legislative.[89]

The disarming of Iraq, one of the main objectives of Resolution 687 (1991), might be described as a case of quasi-legislation, not in the above sense, but in the sense of creating new obligations for Iraq that had not existed prior to the enactment of this resolution.[90] For example, although the Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare only restricts the "use" of such materials, Resolution 687 required the "destruction" of those weapons and prohibited Iraq from even possessing the necessary agents. However, the Security Council, in the preamble to Resolution 687, laid out evidence supporting its finding that Iraq continued to be a threat to international peace; specifically, Iraq's proclivity

toward aggression, evidenced by its threats to use outlawed weaponry and its past instances of aggression. Thus, one commentator concluded: "These increased obligations were logical and reasonable extensions of the Geneva Protocol, especially given the Iraqi propensity to use and threaten to use these weapons."[91]

The conclusion reached in the above section, concerning the matter of whether the Security Council has the legal power to impose a binding dispute settlement under Chapter VII, will apply to these and other cases[92] of quasi-legislation. That is to say, the further a Security Council action, an exercise of quasi-legislative powers, is from its enforcement activity for maintaining or restoring international peace and security, the more consideration is to be given to such requirements as conformity with principles of justice and international law, and respect of the fundamental consideration of humanity. This is in accordance with the proper interpretation of the UN Charter, particularly Chapter VII, as well as with the expectation or anxiety that most of the member states have with regard to the exercise of quasi-legislative powers by the Security Council.

Judicial review by the Court as a factor for legitimization

Neither the UN Charter nor the Statute of the International Court of Justice directly addresses the question of judicial review. Thus, Graefrath points out:

> The founders of the Charter did not find it necessary to explicitly formulate a mandate for the Court to review the legality of General Assembly or Security Council resolutions. They thought that the system of the veto would suffice as a check and balance device against the plenitude of the Security Council's powers. They were of the view that the different political interests of several superpowers would prevent decisions of the Security Council from going beyond the Charter, and that this political device would ensure that the UN was not reduced to a tool of one superpower.[93]

Similarly, the Court, in the Certain Expenses Case, had the following point to make:

> In the legal systems of States, there is often some procedure for determining the validity of even a legislative or governmental act, but no analogous procedure is to be found in the structure of the United Nations. Proposals made during the drafting of the Charter to place the ultimate authority to interpret the Charter in the International Court of Justice were not accepted; the opinion which the Court is in the course of rendering is an advisory opinion. As anticipated in 1945, therefore, each organ must, in the first place at least, determine its own jurisdiction.[94]

However, it now seems probable that the Court could interpret the Charter and judge the legality of a Security Council resolution both in advisory opinions and in contentious cases. Firstly, the General Assembly and the Security Council have competence to request an advisory opinion on any legal question, whether or not it arises within the scope of their activities. The Court, in the Namibia Case, made this point clear by stating:

> Undoubtedly, the Court does not possess powers of judicial review or appeal in respect of the decisions taken by the United Nations organs concerned. The questions of the validity or conformity with the Charter of General Assembly resolution 2145 (XXI) or of related Security Council resolutions does not form the subject of the request for advisory opinion. However, in the exercise of its judicial function and since objections have been advanced the Court, in the course of its reasoning, will consider these objections before determining any legal consequences arising from those resolutions.[95]

Secondly, in the Lockerbie Case, the Court held that: "Whatever the situation previous to the adoption of [Security Council Resolution 748 (1992)], the rights claimed by Libya under the Montreal Convention cannot now be regarded as appropriate for protection by the indication of provisional measures." The majority opinion thus relied on the Council resolution without addressing the question of whether it might be *ultra vires*. However, several judges clarified their belief that the rejection of Libya's application for provisional measures did not imply that the Court was "abdicat[ing]" its role as the principal judicial organ of the United Nations. A number of judges, furthermore, believed that the Court should consider whether the Council's actions were valid. One commentator concluded as follows:

> In sum, the *Libya* decision marked the first time a significant portion of the World Court intimated it could exercise a power of judicial review in contentious cases. This development is important not simply because a contentious case has arguably greater precedential value than an advisory case; it also suggests that the Court does not think judicial review should be exercised only when implicitly or explicitly endorsed by a UN organ seeking an advisory opinion on the effect of that "organ's acts".[96]

However, the present mechanism of judging the legality of Security Council resolutions, either in advisory opinions or in contentious cases, is very limited. In a contentious case, the matter depends on whether two states accept the jurisdiction of the Court in a case where the issue between them is essentially related to the legality of a Security Council resolution. This could be a very rare incident. As for the advisory opinion, neither

the General Assembly nor the Security Council has been active in utilizing this mechanism.

It has been correctly pointed out that the question of judicial review should not be approached from an all-or-nothing viewpoint, since the Court is only one of many (de)legitimators. Alvarez had the following point to make:

> [T]he World Court's right to critique the Council should not be premised on the proposition that the Court is the "only institution" capable of verifying the law. As the drafters of the Charter conceded, the usual test for constitutionality is "general acceptance", and, given the paucity of cases that reach the Court and the need for day-to-day decisions, each UN organ is usually in charge of "verifying legality" and typically does so without incident. As US constitutional scholars have noted, institutional practices have had as much (or more) to do with certain constitutional developments in the United States as the US Supreme Court. Given the huge lacunae in case law and its haphazard nature, it is unwarranted to assume that constitutional development or innovation necessarily relies on a judicial imprimatur or that the legitimation of such developments requires a court's blessing. That notion is particularly problematic in the context of the United Nations and the Security Council – where the Court's involvement, given its jurisdictional limits, is necessarily attenuated when it comes to judging the Council's acts, where some chasms in the law of the Charter are wider than any gaps in US constitutional law, and where many of the constitutional innovations in practice have not involved the Court's participation.[97]

This current situation leads to the conclusion that if the Security Council is to be effective in the long run, it needs to demonstrate that it is using its powers judiciously.

On the other hand, according to Bowett, the current case for providing the Court with a direct power of judicial review rests on three considerations. Firstly, in most democratic societies, governmental (and sometimes legislative) acts are reviewable by the established courts so as to ensure that they are valid under the constitution; why should this not be the case in the United Nations? The second is that with the termination of the Cold War, the Security Council can now operate without political or legal controls. And the third is that, where such organs are not plenary organs, the states not represented in them need some means to ensure that what is done in their name is constitutional.[98] Based upon these considerations, Bowett reached the following conclusion:

> It must be conceded that there are few signs that, at present, the members of the Security Council are prepared to contemplate judicial review by the Court: the Western powers would see this as a hindrance and neither Russia nor China display[s] any great confidence in the Court. But in the long-term interests of the UN the idea is worth pursuing.[99]

While, as noted, the Court is not given the full-fledged institutional power of judicial review, it could certainly be utilized more extensively in interpreting the Charter and judging the legality and constitutionality of a Security Council resolution. Here, however, it is wise to keep in mind some of the difficulties that the Court would have to deal with. Firstly, there are no clear legal standards given to the Court, for example, as to what constitutes a threat to the peace, a breach of the peace, or an act of aggression, or as to whether a certain measure is likely or necessary to maintain or restore the peace. Although the Court may decide that a measure would be contrary to norms of *jus cogens* or fundamental human rights, its power, as was asserted by Judge Lauterpacht in the Bosnia Genocide Convention Case, would probably "not embrace any right of the Court to substitute its discretion for that of the Security Council in determining the existence of a threat to the peace, a breach of the peace, or an act of aggression or even the political steps to be taken following such a determination."[100]

Secondly, active utilization of the Court in judging the Council's actions might have some negative influence on the Court itself if administered carelessly. Alvarez gave the following admonition:

> To the extent the World Court becomes more systematically involved in the partisan struggles of the Council, it may be "politicized" ... increased judicial review may blur the present distinctions between the proper roles for Court and Council, politics and law. While the blurring of these distinctions may not pose so serious a legitimacy problem for domestic legal rules, which are backed by effective institutionalised sanctions, the consequences for the legitimacy of international law may be much graver. Given the tenuous legitimacy of ICJ judges, turning them into umpires of the Council's political games is too risky.[101]

These problems, however, would probably not constitute insurmountable obstacles in promoting the legitimacy of Security Council actions by involving the Court to a reasonable extent with political wisdom.[102] It is true that there is little possibility for the full-fledged institutional power of judicial review, like that found in national governing systems, to be brought into the legal structure of the United Nations by a formal amendment of the Charter. However, the Court can judge the legality and constitutionality of a Security Council resolution within the present, although limited, legal framework described above. Furthermore, the three reasons that Bowett points out as grounds for his argument *de lege ferenda* of introducing the full-fledged institutional power of judicial review are also persuasive as grounds for the argument *de lege lata* of more actively involving the Court either in advisory opinions or in contentious cases. In the light of these considerations, the following point, made by Franck, is certainly justified:

While it would be foolhardy – and entirely improbable – for the Court to substitute its judgment of what constitutes a "threat to the peace" and what measures are appropriate in meeting such a threat, some degree of competence to review Council decisions is essential to maintaining the confidence of all the states that have freely chosen to delegate specific and limited powers to a supranational organ with restricted membership. Judicial review for "gross abuse of discretion" would enhance significantly the authority of the Council by assuring members of the UN – especially those not on the Council – that its actions remain accountable to the Charter and the membership.[103]

Conclusion

An interesting fact is that for the past several years, international legal scholars have referred to the concept of legitimacy not only in those articles analysing the legitimacy of the Security Council, but also in those discussing the legality and constitutionality of various activities by the Security Council. As has been demonstrated in this chapter, the Security Council has increasingly stepped into legally grey areas from the perspective of the UN Charter. Increasing references to the concept of legitimacy in legal literature would be a clear indication that the legality or constitutionality of various activities by the Security Council is ambiguous or fragile at best.

More specifically, the Security Council has increasingly been performing quasi-judicial and quasi-legislative functions since the end of the Cold War. As was pointed out by the Appeals Chamber of the International Tribunal for the Former Yugoslavia in the Tadic Case, there is no organizational separation of powers in the United Nations. Thus, the legality or constitutionality of Security Council activities can only be judged in the light of the relevant provisions of the Charter and its practice. As was emphasized in this chapter, the more the Security Council steps into legally grey areas, the more legitimacy is required for its activities to be effective and acceptable. For this purpose to be achieved, much attention should be paid to the requirements of a functional separation of powers, even though this is not explicitly detailed in the UN Charter. The idea of analytically separating Security Council activities into executive, legislative, and judicial functions to judge their propriety in the light of the frame of reference appropriate for each function can be considered a functional, if not organizational, separation of powers in the less strict sense of the phrase.

It could certainly be argued that the legal rights of states may be impinged upon or suspended by the Security Council in the application of collective enforcement measures. It could furthermore be contended that some quasi-judicial and quasi-legislative powers are given to the Security Council in its enforcement activities deemed necessary for the purposes

of maintaining international peace and security, although not explicitly provided for in the UN Charter. However, once the Security Council steps into these legally grey areas, much attention must be paid to the requirements of a functional separation of powers.

On this point, however, the practice of the Security Council has not been highly commendable. Although the Security Council has increasingly adopted resolutions that in effect amount to a determination or characterization of a legal situation, it has not paid enough attention to the requirements of a functional separation of powers. In such cases, for example, as the United Nations Compensation Commission and the United Nations Iraq-Kuwait Boundary Demarcation Commission, the Security Council did not secure judicial independence, thus leading to the fragile legitimacy of these commissions and the Security Council itself. It could be concluded that the further a Security Council action is from immediate collective enforcement measures to prevent a threat to or breach of the peace or an act of aggression, the more legitimacy is required; hence, more attention must be paid to the requirements of a functional separation of powers.

Legitimacy, however, is an ambiguous and broad concept. It could be enhanced not only by fulfilling the requirements of a functional separation of powers, but also by recourse to the judicial review mechanism. In the legal framework of the United Nations, the International Court of Justice is not given a direct power of judicial review, and its role in judging the legality and constitutionality of Security Council resolutions is quite limited. However, the legitimacy of Security Council activities could be enhanced by actively providing recourse to the judicial review mechanism, especially when the legality or constitutionality of such activities is not clear. Here again, the more the Security Council steps into legally grey areas, the more legitimacy is required, hence the more active recourse, although within a reasonable scope, to the judicial review mechanism should be encouraged.

Notes

1. Kirgis, F. L. Jr, 1995. "The Security Council's First Fifty Years." *American Journal of International Law* 89: 506. This is a good article analysing the development of the Security Council over the past 50 years.
2. It is now clear, however, that the new era since the end of the Cold War can be divided into two periods. The first is from the late 1980s to 1994, when the Security Council became dramatically revitalized and expanded its activities. The second is from 1994 onwards, when the Western Permanent Members became cautious following their experiences in Somalia and the Former Yugoslavia. Furthermore, Russia and China often opposed those three Permanent Members and prevented Security Council activities proposed by them.
3. Kirgis, F. L. Jr, "The Security Council's First Fifty Years" (see note 1, above), 537–538.

4. "Report of the Rapporteur of Committee IV/2, as Approved by the Committee," UN Doc. 933 IV/2/42 (2), 1945. *United Nations Conference on International Organisation Documents* 13: 645.
5. See, for details, Sato, T., 1996. *Evolving Constitutions of International Organisations.* The Hague: Kluwer Law International, 164–181.
6. Conforti, B., 1996. *The Law and Practice of the United Nations.* The Hague: Kluwer Law International, 16.
7. Benefiting from the League of Nations' experience, the United Nations strengthened its purposes in economic and social areas as well.
8. Kirgis, F. L. Jr, "The Security Council's First Fifty Years" (see note 1, above), 506–509.
9. Merrills, J. G., 1998. *International Dispute Settlement* (3rd ed.). Cambridge: Cambridge University Press, 245–249.
10. Burci, G. L., 1993. "The Maintenance of International Peace and Security by the United Nations: Actions by the Security Council under the Chapter VII of the Charter," in *Prospects for Reform of the United Nations System*, edited by the Italian Society for International Organisation. Padova: CEDAM, 123, 124–131.
11. See the authorities cited in Schachter, O., 1991. "United Nations Law in the Gulf Conflict." *American Journal of International Law* 85: 452, 464, notes 33 and 34. See also Kirgis, F. L. Jr, "The Security Council's First Fifty Years" (see note 1, above), 506–509.
12. Bowett, D. W., 1964. *United Nations Forces: A Legal Study of United Nations Practice.* London: Stevens and Sons, 34.
13. Goodrich, L. M., Hambro, E., and Simons, A. P., 1969. *The Charter of the United Nations* (3rd and revised ed.). New York: Columbia University Press, 301.
14. Burci, G. L., "The Maintenance of International Peace" (see note, 10, above), 129.
15. SC Res. 688 (1991) of 5 April 1991.
16. SC Res. 794 (1992) of 3 December 1992.
17. SC Res. 788 (1992) of 19 November 1992.
18. SC Res. 929 (1994) of 22 June 1994.
19. SC Res. 873 (1993) of 13 October 1993.
20. As for the peacekeeping operations in these cases, many were within single states where civil wars were raging, and some of them were without the consent of the government, if indeed there was a government. Kirgis correctly points out (Kirgis, F. L. Jr, "The Security Council's First Fifty Years" (see note 1, above), 535) that: "A legal purist would have trouble finding authority in the Charter for Security Council measures of this sort, but the international community has not objected to them on legal grounds"; and that objections to these operations "have been based instead on success/failure, or cost/benefit, grounds."
21. Kühne, W., 1995. "The United Nations, Fragmenting States, and the Need for Enlarged Peacekeeping," in Tomuschat, C. (ed.), *The United Nations at Age Fifty: A Legal Perspective.* The Hague: Kluwer Law International, 91, 99. See also Osterdahl, I., 1998. *Threat to the Peace: The Interpretation by the Security Council of Article 39 of the UN Charter.* Uppsala: Iustus Forlag.
22. "The Prosecutor v. Dusko Tadic," Case No. IT-94-1-AR72, Decision of 2 October 1995. 1996, *International Legal Materials* 35: 32, 43. Alvarez, however, criticized this point as follows (Alvarez, J. E., 1996. "Nuremberg Revisited: The Tadic Case." *European Journal of International Law* 7: 245, 256):

    The appellate chamber's cursory treatment of the Council's determination of "threat to the peace" is not likely to be comforting to non-permanent members of the Council. At stake in this case is the legally binding nature of a quasi-legislative/quasi-judicial action

by the Council. While it may be "settled practice" that the Council has indicated, through prior quasi-legislative/quasi-judicial determinations, that "internal armed conflicts" constitute such threats, reliance on such findings to determine the legality of the particular finding in this case is circular and unhelpful.

23. Graefrath, B., 1993. "Leave to the Court What Belongs to the Court: The Libyan Case." *European Journal of International Law* 4: 184, 199. One might say that the threat to international peace and security found by the Security Council was Libyan support for terrorism in general, not simply the failure to respond to the requests for surrender. However, judging from the position later taken by the Security Council – in paragraph 16 of Resolution 883 (1993) and paragraph 8 of Resolution 1192 (1998) – that the measures set forth in its previous resolutions should be suspended immediately if the two accused arrived in the Netherlands for trial, it is reasonable to assume that the request to surrender suspects was the core point.
24. Ibid., 196.
25. Arangio-Ruiz, G., 1992. *Yearbook of International Law Commission* I: 150.
26. Graefrath, B., 1995. "Iraqi Reparations and the Security Council." *Heidelburg Journal of International Law* 55: 1, 12–13.
27. Ibid., 26.
28. SC Res. 827 (1993) of 25 May 1993.
29. SC Res. 955 (1994) of 8 November 1994.
30. Rao, P. S., 1995. "The United Nations and International Peace and Security – An Indian Perspective," in Tomuschat, C. (ed.), *The United Nations at Age Fifty* (see note 21, above), 143, 158–159. See also the statement of Arangio-Ruiz, G., 1993. *Yearbook of International Law Commission* I: 16.
31. "The Prosecutor v. Dusko Tadic," Case No. IT-94-1-AR72, Decision of 2 October 1995 (see note 22, above), 45. Kirgis also stated (Kirgis, F. L. Jr, "The Security Council's First Fifty Years" (see note 1, above), 522): "[I]t is not farfetched to find an implied power to create war crimes tribunals if the conditions for applying chapter VII are met and principles of fundamental adjudicatory fairness are followed."
32. SC Res. 678 (1990) of 29 November 1990.
33. SC Res. 794 (1992) of 3 December 1992.
34. SC Res. 816 (1993) of 31 March 1993 and SC Res. 836 (1993) of 4 June 1993.
35. SC Res. 929 (1994) of 22 June 1994.
36. SC Res. 940 (1994) of 31 July 1994.
37. Burci, G. L., "The Maintenance of International Peace" (see note 10, above), 134–135.
38. See, for example, Greenwood, C., 1995. "The United Nations as Guarantor of International Peace and Security: Past, Present and Future – A United Kingdom view," in Tomuschat, C. (ed.), *The United Nations at Age Fifty* (see note 21, above), 59, 70.
39. Gaja, G., 1995. "Use of Force Made or Authorised by the United Nations," in Tomuschat, C. (ed.), *The United Nations at Age Fifty* (see note 21, above), 39, 43. See also Kühne, W., *The United Nations* (see note 21, above), 106.
40. Gray, C., 1994. "After the Cease-fire: Iraq, the Security Council and the Use of Force." *British Year Book of International Law* 65: 135, 136–137.
41. See, for these points, United Nations, 1996. *The United Nations and the Iraq-Kuwait Conflict, 1990–1996.* New York: United Nations, 79–87, 438, 512–513, 516.
42. Gray, C., "After the Cease-fire" (see note 40, above), 155.
43. SC Res. 1154 (1998) of 2 March 1998.
44. UN Doc. S/3858 (1998), 14, cited in Wedgwood, R., 1998. "The Enforcement of Security Council Resolution 687: The Threat of Force Against Iraq's Weapons of Mass Destruction." *American Journal of International Law* 92: 724, 728.

See also Lobel, J. and Ratner, M., 1999. "Bypassing the Security Council: Ambiguous Authorizations to Use Force, Cease-fires and the Iraqi Inspection Regime." *American Journal of International Law* 93: 124.

45. Krisch, N., 1999. "Unilateral Enforcement of the Collective Will: Kosovo, Iraq, and the Security Council." *Max Planck Yearbook of United Nations Law* 3: 59, 73. It could be argued that the unilateral enforcement of Security Council resolutions not by single states but by multilateral regional organizations has the merit of achieving the common good recognized by the Security Council. However, if it were justified in such a way, Council members would be much more cautious in adopting the original Security Council resolutions that might lead to unilateral enforcement in a similar way. After all, this simply seems to transfer the problem from the level of express authorization to that of adoption of resolutions, thus going into a vicious circle. Ibid., 93–94.
46. Shaw, M. N., 1997. "The Security Council and the International Court of Justice: Judicial Drift and Judicial Function," in Muller, A. S. et al. (eds), *The International Court of Justice: Its Future Role after Fifty Years*. The Hague: Kluwer Law International, 219, 225–6.
47. Kelsen, H., 1951. *The United Nations: A Critical Analysis of its Fundamental Problems*. New York: Stevens, 294.
48. See, for example, Gill, T. D., 1995. "Legal and Some Political Limitations on the Power of the UN Security Council to Exercise Its Enforcement Powers under Chapter VII of the Charter." *Netherlands Yearbook of International Law* 26: 33, 64–68; Goodrich L. M. et al., *The Charter of the United Nations* (see note 13, above), 27–28.
49. Ibid., 61–62.
50. Ibid., 72ff. See also Lamb, S., 1999. "Legal Limits to United Nations Security Council Powers," in Goodwin-Gill, G. S. and Talmon, S. (eds), *The Reality of International Law: Essays in Honour of Ian Brownlie*. Oxford: Oxford University Press, 361; Zemanek, K., 1999. "Is the Security Council the Sole Judge of Its Own Legality?," in Yakpo, E. and Boumedra, T. (eds), *Essays in Honour of Judge Mohammed Bedjaou*. The Hague: Kluwer Law International, 629; Akande, D., 1997. "The International Court of Justice and the Security Council: Is There Room for Judicial Control of Decisions of the Political Organs of the United Nations?" *International and Comparative Law Quarterly* 46: 309, 319ff.; Gardam, J. G., 1996. "Legal Restraints of Security Council Military Enforcement Action." *Michigan Journal of International Law* 17: 285; Golland-Debbas, V., 1994. "Security Council Enforcement Action and Issues of State Responsibility." *International and Comparative Law Quarterly* 43: 55.
51. Shaw, N. M., "The Security Council" (see note 46, above), 227. He described this gradation from the immediacy and seriousness of the danger as follows (ibid., 234):

    The less immediate or serious the danger constituted by the predetermined threat to or breach of the peace, the more likely that one is concerned with peaceful adjustment or settlement and thus the consequential application of justice and international law.

    Shaw was clearly inspired on this point by a similar distinction made by Lauterpacht (Lauterpacht, E., 1991. *Aspects of the Administration of International Justice*. Cambridge: Grotius Publications Limited, 44) as follows:

    Though it may not be possible to draw the line with absolute precision, one may suggest that a distinction can be drawn between prescriptions of conduct that are directly and immediately related to the termination of the impugned conduct, such as calling upon the aggressor to withdraw, authorising collective forcible response or ordering the interruption of trade relations with him, and those findings that, though not related,

have a general and long-term legal impact that goes beyond the immediate needs of the situation. Into this category would fall legal findings that certain conduct is "unlawful" or is "invalid" or "null and void".

52. Kirgis, F. L. Jr, "The Security Council's First Fifty Years" (see note 1, above), 521. See also Frowein, J. A., 1994. "Reactions by Not Directly Affected States to Breaches of Public International Law." *Recueil des cours* 248: 377.
53. Sarooshi, D., 1999. *The United Nations and the Development of Collective Security: The Delegation by the UN Security Council of its Chapter VII Powers*. Oxford: Clarendon Press, 33–34, 178–185.
54. Weston, B. H., 1991. "Security Council Resolution 678 and Persian Gulf Decision Making: Precarious Legitimacy." *American Journal of International Law* 85: 516, 533. Weston pointed out four problems in this lack of legitimacy (ibid., 518): in the indeterminacy of the legal authority of Resolution 678; in the great-power pressure diplomacy that marked its adoption; in its wholly unrestricted character; and in the Council's hasty retreat from non-violent sanctioning alternatives permissible under it.

    See also Quigley, J., 1996. "The 'Privatization' of Security Council Enforcement Action: A Threat to Multilateralism." *Michigan Journal of International Law* 17: 249.
55. The concept of legitimacy will not be discussed here. See Caron, D. D., 1993. "The Legitimacy of Collective Authority of the Security Council." *American Journal of International Law* 87: 552.
56. See, for domestic analogies particularly in relation to international organizations, Suganami, H., 1989. *The Domestic Analogy and World Order Proposals*. Cambridge: Cambridge University Press.
57. See also Suy, E., 1995. "The Constitutional Character of Constituent Treaties of International Organisations and the Hierarchy of Norms," in Beyerlin, U. et al. (eds), *Law Between Change and Preservation. Commemorative Collection for Rudolf Bernhardt*. Berlin: Springer, 267.
58. See, for details, Sato, T., *Evolving Constitutions* (see note 5, above), 229–230.
59. The interpretative framework proper to the constituent instruments of international organizations based upon their evolutionary and teleological interpretations, on which the author elaborated in his work (ibid.), now seems to be widely accepted in doctrines. See, for example, Zemanek, K., 1997. "The Legal Foundation of the International System: General Course on Public International Law." *Recueil des cours* 266: 9, 90–91; Zemanek, K., "Is the Security Council the Sole Judge of its own Legality?" (see note 50, above), 632–634.
60. Reference was made to the concept of "a constitution" in this connection by many legal scholars; see, for example Franck, T. M. and Patel, F., 1991. "UN Political Action in Lieu of War: 'The Old Order Changeth'." *American Journal of International Law* 85: 63, 66–67. See also the quotation from Kirgis in the text corresponding to note 52, above. The logic of this argument was later used by Franck as follows (Franck, T. M., 1995. *Fairness in International Law and Institutions*. Oxford: Clarendon Press, 299–300):

    Peacekeeping is popularly attributed to an imaginary 'Chapter $6^1/_2$' of the Charter, a replacement for the immobilised Article 43; but the Charter, being of the genus constitution, should be read as capable of regeneration and adaptation ...

    Thus, while the framers may have mooted the collective enforcement system on the assumption that states would commit forces, in accordance with Article 43, to be at the disposal of the Council, this intention is not chiselled into the text. If Article 43 cannot be implemented in practice, that does not necessarily frustrate the Charter's larger purpose. A cardinal purpose, made explicit in Article 42, is to enable the UN to

"take such action by air, sea, or land forces as may be necessary to restore international peace and security" deploying "air, sea or land forces of Members". Article 42 does not mention Article 43, and it is therefore possible to conclude that the latter is merely one way to make such forces available and that the Charter does not preclude the Council devising other means to accomplish this paramount institutional purpose.

61. It is said that the majority of writers today see the specific meaning of the concept of a "constitution" in the combination of two elements (Simma, B., 1994. "From Bilateralism to Community Interest in International Law." *Recueil des cours* 250: 260). On the formal side, a constitution enjoys priority over "ordinary" rules; with regard to substance, it lays down the basic rules governing the life of a community.

    Dupuy clarified two meanings of the term "constitution" as follows (Dupuy, P., 1997. "The Constitutional Dimension of the Charter of the United Nations Revisited." *Max Planck Yearbook of United Nations Law* 1: 1, 3). The constitution in the material or substantial sense of the term is "to be considered as a set of legal principles of paramount importance for every one of the subjects belonging to the social community ruled by it. It places all of them (including the different state's organs) in a subordinate position and implies a hierarchy of norms, on the top of which are the legal principles belonging to the said constitution." The constitution in the organic and institutional sense "points to the designation of public organs, the separation of powers and the different institutions which are endowed each with its own competencies." The analysis in this chapter is related to this second sense.
62. Tomuschat, C., 1993. "Obligations Arising for States Without or Against Their Will." *Recueil des cours* 241: 249. Tomuschat's analysis is based upon the following understanding of international law and society (ibid., 210–211):

    One should bear in mind that answers, even if correctly provided on a given problem at some point in time, do not necessarily remain valid for ever. The fact is that the cohesive legal bonds tying States to one another have considerably strengthened since the coming into force of the United Nations Charter ...

    Given the developments triggered by the UN Charter, today a community model of international society would seem to come closer to reality than any time before in history. According to this interpretation, States live, as from their birth, within a legal framework of a limited number of basic rules which determines their basic rights and obligations with or without their will, leaving them, however, sufficient room for self-responsible action within the openings of that legal edifice. One may call this framework, from which every State receives its legal entitlement to be respected as a sovereign entity, the constitution of international society or, preferably, the constitution of the international community, community being a term suitable to indicate a closer union than between members of a society.

    See also the discussion by Fassbender in Fassbender, B., 1998. *UN Security Council Reform and the Right of Veto: A Constitutional Perspective.* The Hague: Kluwer Law International.
63. Dupuy, P., "The Constitutional Dimension" (see note 61, above), 2.
64. Ibid., 30. Dupuy, however, is also positive in acknowledging the contribution by the United Nations, as he states as follows (ibid., 30–31):

    That being said, the assertion that the creation of the United Nations has introduced a radical change in the structure of international law, which was made by a series of authors including Friedman, Lachs, Schachter, Virally or R. J. Dupuy has likewise proved to be true over the last fifty years.

65. In addition to Arangio-Ruiz, Herdegen made a similar contention as follows (Herdegen, M. J., 1994. "The 'Constitutionalization' of the UN Security System." *Vanderbilt Journal of Transnational Law* 27: 135, 150):

> [T]he constitutional perception is of doubtful heuristic value. The underlying analogy risks blurring fundamental differences between the nature of the UN system and classic issues of the separation of powers in a truly constitutional context. There is no solid basis for these analogies from which any persuasive conclusions may be drawn. In structural density, the United Nations Charter is still far from a closed system of competencies in which the application of constitutional concepts really makes sense. In light of the actual distribution of functions between the General Assembly and the Security Council and the ICJ, the invocation of a "separation of powers" is merely a form of speech.

66. Arangio-Ruiz, G., 1997. "The 'Federal Analogy' and UN Charter Interpretation: A Critical Issue." *European Journal of International Law* 8: 1, 16–17. See also Arangio-Ruiz, G., 1996. "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, F. and Sciso, E. (eds), *From the Ad Hoc International Penal Tribunals to a Permanent Court.* Napoli: Editoriale Scientifica, 31. While it would not be wise to accept the whole argument of Arangio-Ruiz, some of his points are well worth quoting as admonitions:

> [T]he real test as to whether the federal analogy thesis holds with respect to the UN is the degree, if any, to which the Charter affects the legal structure of the relations of the member States with each other. The problem is whether the rules laid down in the Charter and the organs operating in implementation thereof modify to any degree the kind of egalitarian, essentially horizontal relations existing among states under general international law and ordinary treaty rules. It is, in other words, a question of determining whether – and possibly to what extent – the Charter brings about any "verticalisation" in the relations of the member States *inter se* and with the UN that may justify the federal analogies assumed by the constitutional theories. (Ibid., 5.)
>
> As far as international legal scholars are concerned, I find two tendencies dangerous ... The first is the tendency to justify in law anything that happens in the UN by assuming too easily either the modification or abrogation of Charter rules by tacit agreement or through the formation of customary rules; rules which, if need be, would change when the UN practice changes direction. I would feel more confident about the future of the UN if, every so often, one were to find that there had been no modification of the law, that the article of the Charter had not disappeared, but that it had suffered, purely and simply, a breach; and likewise, that no customary rule had come into being or vanished.
>
> The second tendency [is related to] combining the privileged condition of certain states in the Security Council with the condition of strength they would also enjoy legally ... under general international law itself. These states would apparently operate, "*uti universi*", both on behalf of the international community as a whole, and on behalf of the UN. The fabric of international law ... would thus attain a considerable degree of ... "verticalisation" of international law inside and outside the UN ...
>
> One wonders what encouragement to resist abuse can ever come, to the governments of the small or weak states, from theories according to which the strong would

have acquired the legal powers of a world directorate without being subject to all the obligations of common members, and without submitting to any duty to account for their actions to the states in relation to which they would exercise, through the Council, allegedly legislative and adjudicatory functions not contemplated in any provision of the Charter. (Ibid., 25–26.)

The crucial point is that it is very hard to conceive as a normal development of the "organism" created by the Charter the fact that the Security Council turn itself *proprio motu*, and without adequate control by the entire membership, from the *gendarme* that the founders are generally considered to have created, into the supreme legislative, judicial and executive organ of a super-state. It seems reasonable to assume that, had the founders envisaged the possibility of such a dramatic development, they would have provided for adequate guarantees. (Ibid., 28.)

67. Frowein, J. A., "Reactions" (see note 52, above), 358. Against the attitude taken by Weil that the international legal order should still be seen as mainly based on the will of the states as expressed in bilateral and multilateral treaties, Frowein stated (ibid., 365) that: "With public international law developing into much more than a law of bilateral and multilateral treaty relationships the threshold to a constitutional structure has long been crossed."
68. Franck, T. M., 1990. *The Power of Legitimacy Among Nations*. New York: Oxford University Press, 24. Franck points out four criteria of legitimacy (ibid., chapters 4–11, and Franck, T. M., *Fairness* (see note 60, above), 30–46): determinacy, symbolic validation, coherence, and adherence.

    Against these analyses, Williams critiqued legitimacy in these terms as a conservative principle, reflecting the conservatism of the states-systemic value of order. He pointed out (Williams, J., 1998. *Legitimacy in International Relations and the Rise and Fall of Yugoslavia*. London: Macmillan and New York: St. Martin's Press, 12–13):

    His criteria stress the need to be in touch with the past, to validate actions and actors against expectations and existing practice. Therefore the normative vision of what ought to be rests on the perfection of what already is, the more effective operation of international society rather than its transformation into something new built on different principles.

69. Franck, T. M., *Fairness* (see note 60, above), 26.
70. Ibid., 25–26.
71. Ibid., 313–314.
72. Murphy, S. D., 1994. "The Security Council, Legitimacy, and the Concept of Collective Security After the Cold War." *Columbia Journal of Transnational Law* 32: 201, 258.
73. Ibid., 256–257. Similarly, Goodrich stated as follows (Goodrich, L. M., 1974. *The United Nations in a Changing World*. New York: Columbia University Press, 21):

    [T]he drafters of the Charter came to the conclusion that a form of organisation that followed the general lines of the League system, but incorporated the concert principle that peace could only be maintained so long as the major powers had an interest and were willing to co-operate in maintaining it, had at least a chance of success.

74. Ibid., 260. From this viewpoint, the method of authorizing states to use force to respond to threats to peace and security is considered well suited to the concept of major

powers acting by consensus. Murphy develops this point as follows (ibid., 261–262):

> When such situations arise, one or more powers will be the motivating force in securing Security Council authorisation for the action, and should be expected to carry the primary burden through the use of its military forces. Imposition of this burden makes it more likely that enforcement action will only be taken when there is a real commitment by one or more major powers, which is an essential element to the success of the action.
>
> For similar reasons, the process of providing fairly open-ended authorisation to these national forces is appropriate ... in most cases, it is simply not feasible for the Security Council to attempt to impose extensive constraints on the actions of those states conducting the enforcement action ... Such constraints ultimately can be highly counterproductive to the conduct of the enforcement action ... The Security Council must take seriously any authorisation for the use of force in light of the inevitably serious consequences that will result; at the same time, there must be a degree of faith and trust in the actions of the enforcing states to adhere to the basic goals established by the Security Council.

75. Caron made a similar point (Caron, D. D., 1993. "The Legitimacy of the Collective Authority of the Security Council." *American Journal of International Law* 87: 552, 566–567):

> Now that the Council is acting, legitimacy arguably is essential to ensuring its long-term effectiveness. But just as it seems wrong to gain effectiveness at too great an expense to legitimacy, so does it not make sense to increase legitimacy at the expense of a significant loss in effectiveness.

76. "The Prosecutor v. Dusko Tadic," Case No. IT-94-1-AR72, Decision of 2 October 1995 (see note 22, above), 46–47.
77. Harper, K., 1994. "Does the United Nations Security Council Have the Competence to Act as Court and Legislature?" *New York University Journal of International Law and Politics* 27: 103, 156.
78. Graefrath, B., "Leave to the Court" (see note 23, above), 204. In this connection, Harper referred to several points (Harper, K., "Does the United Nations Security Council Have the Competence" (see note 77, above), 137–140). Firstly, a court is generally presumed to have procedural safeguards for due process. Secondly, it is required to explain its holdings on legal and factual issues in published opinions. Thirdly, if the Council is to act in a judicial capacity, it must not allow its members to adjudicate matters in which its members are interested parties.

    Similarly, Kirgis stated (Kirgis, F. L. Jr, "The Security Council's First Fifty Years" (see note 1, above), 532): "The Council has no rules of procedure for fair adjudicative hearings; nor could it reasonably be expected to adopt or follow any such rules."
79. 1954 ICJ Rep., 61.
80. Kirgis, F. L. Jr, "The Security Council's First Fifty Years" (see note 1, above), 525. See also Kirgis, F. L. Jr, 1995. "Claims Settlement and the United Nations Legal Structure," in Lillich, R. B. (ed.), *The United Nations Compensation Commission*. New York: Transnational Publishers, 103.

    It is said, however, that the Governing Council has so far always approved without any change the recommendations of the Panels of Commissioners. Di Rattalma, M. and Treves, T. (eds), 1999. *The United Nations Compensation Commission: A Handbook*. The Hague: Kluwer Law International, 35–37.
81. Gill, T. D., "Legal and Some Political Limitations" (see note 48, above), 85ff.
82. Mendelson, M. H. and Hulton, S. C., 1993. "The Iraq-Kuwait Boundary." *British Year*

Book of International Law 64: 135, 193. With regard to the position of the Security Council mentioned above, Mendelson and Hulton pointed out as follows (ibid., 192):

> Technically, this may have been correct, but substantively there was more to it.
>
> In the first place ... this was not a demarcation exercise in the usual sense of the term. The Commission was not merely marking out on the ground a boundary which had already been defined with some precision in a treaty. So far as concerned the boundary in the Khowr Abd Allah, there was no treaty definition at all; and, as for the land boundary, the treaty definition was so vague as to require considerable elaboration (to use a neutral term).

83. Sarooshi, D., 1996. "The Legal Framework Governing United Nations Subsidiary Organs." *British Year Book of International Law* 67: 413, 471–472. Harper, K., "Does the United Nations Security Council Have the Competence" (see note 77, above), 146–147.
84. Martenczuk, B., 1999. "The Security Council, the International Court and Judicial Review: What Lessons from Lockerbie?" *European Journal of International Law* 10: 517, 533.
85. Harper, K., "Does the United Nations Security Council Have the Competence" (see note 77, above), 137, 141. Simma, particularly concerning the Former Yugoslavia and Rwanda tribunals and sanctions regimes, made a similar point. While such Security Council law-making or regulatory measures appear justified, and should be deemed legal if they limit themselves to specific cases of particularly huge dimensions – the underlying consideration being that international peace and security can only be restored if the factors that led to the Article 39 situations are redressed as thoroughly as possible – he pointed out as follows (Simma, B., "From Bilateralism to Community Interest" (see note 61, above), 277):

> However, in such instances, the Council should be held to conform to general principles of law and elementary considerations of humanity. Thus the Yugoslavia and Rwanda Tribunals must certainly be regarded as obliged to accord due process of law, fair trial, and to respect the rights of the accused (as provided in their statutes). Similarly, sanctions régimes like that embodied in resolution 687 on Iraq must remain proportionate to the breaches of the law thus concerned.

86. Yemin, E., 1969. *Legislative Powers in the United Nations and Specialised Agencies*. Leyden: A. W. Sijthoff, 6.
87. Kirgis, F. L. Jr, "The Security Council's First Fifty Years" (see note 1, above), 520.
88. See, for example, Skubiszewski, K., 1965–66. "Enactment of Law by International Organizations." *British Year Book of International Law* 41: 198, 202.
89. Similarly, de Brichambaut stated (de Brichambaut, M. P., 2000. "The Role of the United Nations Security Council in the International Legal System," in Byers, M. (ed.), *The Role of Law in International Politics: Essays in International Relations and International Law*. Oxford: Oxford University Press, 269, 275): "Although the Security Council does not have the power to create law, it does have the power to create rights and obligations for the member States of the United Nations."
90. Roberts, L. D., 1993. "United Nations Security Council Resolution 687 and Its Aftermath: The Implications for Domestic Authority and the Need for Legitimacy." *New York University Journal of International Law and Politics* 25: 593, 597–610: see also Harper, K., "Does the United Nations Security Council Have the Competence" (see note 77, above), 127–128.
91. Ibid., 155.
92. Establishment of subsidiary organs could sometimes involve quasi-legislative functions

in such cases as the International Tribunal for the Former Yugoslavia, and for Rwanda, as well as the United Nations Compensation Commission. Concerning the former, it was pointed out (Kirgis, F. L. Jr, "The Security Council's First Fifty Years" (see note 1, above), 522): "These Statutes are legislative in nature even though each Statute applies to only one existing situation: each is directed to indeterminate addressees (individuals) and may be applied repeatedly until all justiciable cases have been tried." See also Kirgis' discussion with regard to the problems of applicable law and procedural provisions concerning the tribunals, as well as the directives to apply the *force majeure* defence concerning Resolution 687. Ibid., 523–525. However, concerning these tribunals, Kirgis acknowledged their legality (ibid., 523):

> To be sure, the framers of the Charter do not seem to have contemplated the use of Article 29 in this fashion. Nevertheless, the objection seems legalistic because the Article 39 conditions are met, the Tribunal's decision makers are independent of political control, and the adjudicative procedure appears to be essentially fair.

93. Graefrath, B., "Leave to the Court" (see note 23, above), 203. Herdegen stated similarly as follows (Herdegen, M. J., "The 'Constitutionalization' of the UN Security System" (see note 65, above), 150):

> Under the Charter, the primary safeguard against an unbalanced dynamism does not lie with judicial control, but rather with a political check – the veto ... This element, and not dynamic intervention by the ICJ, is the main guardian of the Security Council's abstention from irrationality and abuse of powers.

94. 1962 ICJ Rep., 168.
95. 1971 ICJ Rep., 45.
96. Watson, G. R., 1993. "Constitutionalism, Judicial Review, and the World Court." *Harvard International Law Journal* 34: 1, 27.
97. Alvarez, J. E., 1996. "Judging the Security Council." *American Journal of International Law* 90: 1, 9. Herdegen made a similar point (Herdegen, M. J., "The 'Constitutionalization' of the UN Security System" (see note 65 above), 151):

> Contrasted with the comprehensive powers of the European Court, the ICJ's intervention in the administration of the Charter and the occasions for it to pronounce upon the effect of Security Council resolutions depend on rather hazardous and incidental elements: a proper case brought by the proper parties under proper submission to the Hague. Because the International Court of Justice possesses no power of annulment, the impact of its reasoning regarding the illegality of a Security Council resolution will often be left to speculative guessing. In addition, the ICJ's decisions cannot claim binding effect *erga omnes*.

98. Bowett, D. W., 1996. "The Court's Role in Relation to International Organisations," in Lowe, V. and Fitzmaurice, M. (eds), *Fifty Years of the International Court of Justice: Essays in Honour of Sir Robert Jennings*. Cambridge: Cambridge University Press, 181, 190–191.

    See also the various discussions by Bedjaoui in Bedjaoui, M., 1994. *The New World Order and the Security Council: Testing the Legality of its Acts*. Dordrecht: Marinus Nijhoff.
99. Ibid. Lauterpacht is also positive and, in the context of "recourse against quasi-judicial decisions of political organs of international organisations," stated (Lauterpacht, E.,

Aspects (see note 51, above), 113–114):

In what direction then can we move to reduce or eliminate the problem of erroneous or improper institutional quasi-judicial activity? The answer would appear to lie in the direction of judicial review; in effect, in the direction of some kind of appeal. It should be open to a State or entity prejudiced by a Security Council resolution to insist on the submission of the disputed questions of law to an international tribunal.

See also the relevant discussion by the present author (Sato, T., *Evolving Constitutions of International Organisations* (see note 5, above), 177–178).

100. 1993 ICJ Rep., 439; *International Law Reports* 95: 159. See also the discussion on this point by Akande, D., "The International Court of Justice and the Security Council" (see note 50, above), 325–342.

101. Alvarez, J. E., "Judging the Security Council" (see note 97, above), 37. Another problem was pointed out by Greenwood as follows (Greenwood, C., 1999. "The Impact of Decisions and Resolutions of the Security Council on the International Court of Justice," in Heere, W. P. (ed.), *International Law and the Hague's 750th Anniversary*. The Hague: T. M. C. Asser Press, 81, 85–86):

The assertion of a generalised power of judicial review of Security Council resolutions and decisions could have a destabilising effect on the workings of Chapter VII of the Charter, if a decision taken by the Security Council, for example, to impose economic sanctions, could be challenged, perhaps many years after it was taken. That would induce an element of uncertainty which could hang like a sword of Damocles over every sanctions regime on which the Council might decide.

102. On this matter, Bowett continued as follows (Bowett, D. W., "The Court's Role" (see note 98, above), 191):

The objection that this would invite the Court to question the Council's political judgement, or discretion, is not compelling. Most legal systems have a tradition of judicial abstention from "political questions," and it should not be expected that the Court would attempt to substitute its political judgement for that of the Security Council.

103. Franck, T. M., 1995. "The United Nations as Guarantor of International Peace and Security: Past, Present and Future," in Tomuschat, C. (ed.), *The United Nations at Age Fifty* (see note 21, above), 37. See also Simma, B., "From Bilateralism to Community Interest" (see note 61, above), 282; Malanczuk, P., 1999. "Reconsidering the Relationship Between the ICJ and the Security Council," in Heere, W. P. (ed.), *International Law* (see note 101, above), 87, 98–99.

* The author would like to note, with gratitude, the generous contribution given to his research by the Murata Science Foundation in 1998.