084 SCSL-2003-11-PT (3076-3119) 3076

THE APPEALS CHAMBER

Before: Judge Geoffrey Robertson, President
Judge Emmanuel Ayoola
Judge George Gelaga King
Judge Renate Winter
Fifth Judge to be determined

Registrar: Mr. Robin Vincent

Date: 6 January 2004

THE PROSECUTOR

Against

MOININA FOFANA

CASE NO. SCSL-2003-11-PT

ADDITIONAL SUBMISSIONS PERTAINING TO THE PRELIMINARY MOTION BASED ON LACK OF JURISDICTION: ILLEGAL DELEGATION OF POWERS BY THE UNITED NATIONS

Office of the Prosecutor:
Mr. Desmond de Silva, Deputy Prosecutor
Mr. Luc Côté, Chief of Prosecutions
Mr. Walter Marcus-Jones
Mr. Christopher Staker
Mr. Abdul Tejan-Cole

Defence Office:
Mr. Sylvain Roy, Acting Chief

For Mr. Fofana:
Mr. Michiel Pestman
for Mr. Victor Koppe
for Mr. Arrow John Bockarie
for Prof. André Nollkaemper
for Dr. Liesbeth Zegveld

P. Knowles 6/1/04

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1. On 14 November 2003, the Defence for Mr. Fofana filed its Preliminary Motion on the Lack of Jurisdiction: Illegal Delegation of Powers by the United Nations (the "Preliminary Motion"). The Prosecution response to this motion was filed on 21 November 2003 (the "Prosecution Response"). The Defence filed its reply to the Prosecution Response on 30 November 2003 (the "Reply"). On 3 December 2003, the Trial Chamber referred the Preliminary Motion, the Prosecution Response and the Reply to the Appeals Chamber for determination pursuant to Rule 72(E) of the Rules of Procedure and Evidence. The Defence now makes use of its right to file additional written submissions.

2. The Defence will in these additional submissions not repeat arguments set forth in the Preliminary Motion and its Reply. Rather it will identify what appear to be the main points of controversy between Defence and Prosecutor and provide, in regard to these points, further authorities to develop and support its arguments. Wherever relevant, it will refer to arguments made in the Preliminary Motion and Reply.

3. The core of the argument of the Defence is that the conclusion by the Secretary-General of the Special Court Agreement between the United Nations and Sierra Leone was not an act within the Secretary-General's own powers;[1] that it is to be considered as the exercise of authority that was delegated to him by Security Council S/RES/1315(2000);[2] that the conclusion of the Special Court Agreement was a response to a threat to peace and security in terms of Article 39 of the United Nations Charter;[3] that the Security Council must at all times retain control over the exercise of the delegated authority in regard to threats to peace and security;[4] that by concluding the Special Court Agreement, the Security Council has set up an independent legal person over which it exercises no control;[5] that the delegation of the power to conclude the Special Court Agreement thus is outside the competence of the Security Council; and that therefore the Special Court Agreement is invalid and the Special Court lacks jurisdiction.[6]

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[1] Preliminary Motion, para. 11.
[2] Preliminary Motion, para. 10.
[3] Preliminary Motion, para. 6-7.
[4] Preliminary Motion, para. 10; Reply, para. 4.
[5] *Ibidem.*
[6] Preliminary Motion, paras. 18-19.

4. On the basis of the Prosecution Response, the Defence concludes that the Prosecution agrees with a number of important elements in the above argument. First, the Defence and the Prosecution agree that the conclusion by the Secretary-General of the Special Court Agreement between the United Nations and Sierra Leone is not an act performed within the Secretary-General's own powers, but an act performed at the request of the Security Council[7] and on the basis of the powers of the Security Council.[8] Second, the Defence and the Prosecution agree that by empowering the Secretary-General to conclude the Special Court Agreement, the Security Council created an organ with the objective of restoring peace and security.[9] Third, the Defence and the Prosecution agree that the primary responsibility for the maintenance of peace and security in Sierra Leone rested and still rests with the Security Council.[10]

5. The main issues on which the Prosecution appears to disagree with the Defence, and that therefore require additional submissions, are (1) whether the Special Court Agreement was established under Art. 24(1) or under Chapter VII of the Charter,[11] (2) whether there is a distinction between the powers and responsibilities of the Security Council with regard to subsidiary organs on the one hand, and entities external to the United Nations on the other;[12] (3) whether consent by Sierra Leone can remove the limitations on the delegation of powers by the Security Council and (4) whether the Security Council can still exercise its primary responsibility for the maintenance of peace and security in Sierra Leone.[13]

The legal basis of the conclusion of the Special Court Agreement

6. The identification of the legal basis of the conclusion of the Special Court Agreement by the United Nation is relevant, since the Defence's argument hinges on the contention that the establishment of the Special Court is an act that comes within the powers of the Security Council with regard to the maintenance of peace and security and that the Security Council

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[7] Prosecution Response, para. 7.
[8] This follows from several passages in the Prosecution Response, including paras. 9, 10, 11 and 16.
[9] This follows from Prosecution Response, paras. 10 and 12.
[10] Prosecution Response, para. 16.
[11] Prosecution Response, para. 16.
[12] Prosecution Response, para. 12.
[13] Prosecution Response, para. 16.

has a continued responsibility in regard to a situation that it has determined to be a threat to peace and security.[14]

7. In the system of the Charter, the Security Council has under Article 24(1) "primary responsibility for the maintenance of international peace and security". The powers of the Security Council to maintain peace and security are contained in Chapter VII of the United Nations Charter.[15] Although S/RES/1315(2000) does not refer to Chapter VII, the fact that in this Resolution the Security Council has determined the situation in Sierra Leone to be a threat to peace and security in terms of Article 39, and the fact that it considered the Special Court as a means to attain in Sierra Leone a situation of peace and security, strongly suggest that the Security Council acted on the basis of Chapter VII.[16] The fact that the Council chose not to make use of its power to impose obligations on non-consenting states, as it did when establishing the ICTY and the ICTR, does not mean that the Resolution was not made under Chapter VII.

8. The Prosecution argues that the conclusion of the Special Court Agreement was based on Article 24(1) of the Charter. The Defence disagrees with this construction. In addition it argues that even if Article 24(1) is accepted as the legal basis for the conclusion of the Special Court Agreement, it is still the case that all the conditions and limitations on a delegation of powers with regard to threats to peace and security apply to the setting up of an international court to respond to such threats.

9. The Prosecution argues that Article 24(1) can be invoked as a direct basis for action of the United Nations, outside any specific powers attributed to it under for example Chapter VI and Chapter VII. This argument is uncompelling. The language of Article 24(2) clearly speaks against this interpretation. Article 24(2) provides that the "specific powers" granted to the Security Council for the discharge of its responsibility for the maintenance of peace and security are laid down in Chapters VI, VII, VIII and XII. If Article 24(1) in itself provided a legal basis for action, Article 24(2) would be without legal effect and would be redundant. Under the generally accepted principles of treaty interpretation, this interpretation of Article

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[14] Preliminary Motion, para. 10; Reply, para. 4.
[15] D. Sarooshi, *The United Nations and the Development of Collective Security. The Delegation by the UN Security Council of its Chapter VII Powers*, Oxford 1999, (hereinafter: Sarooshi), p. 3.
[16] Sarooshi, p. 3.

24 is unacceptable. Treaty clauses are to be interpreted as far as possible to avoid depriving one of them of practical effect for the benefit of others. This rule is particularly applicable to the interpretation of a treaty of a constitutional nature like the United Nations Charter.[17] Moreover, substantive and procedural differences exist between the powers under Chapter VI, VII, VIII and XII. The acceptance of a general power, that would supercede these specific powers, would take away the legal relevance and controlling effect of the various conditions and limitations under the mentioned chapters. The proper conclusion, therefore, is that Chapters VI and VII set out the full range of powers for the maintenance of peace and security, and that there is no room for resort to Article 24(1) as an alternative legal basis. As Benedetto Conforti concludes in his book on the law and practice of the United Nations: "it would be difficult to imagine any effective intervention by the Security Council for the maintenance of the peace that did not come within the provisions of one or the other Chapter".[18]

10. The argument of the Prosecution that Article 24(1) can provide a legal basis rests on the discussion of the matter in the Commentary edited by Bruno Simma.[19] However, it cites only one argument from that book to support its conclusion: the proposition that if a treaty lists "specific" powers, there are necessarily "general" powers.[20] This argument is not compelling. It goes against the above-mentioned principle of treaty interpretation according to which an interpretation is to be rejected if it would render redundant a provision that the drafters intentionally included. It also goes against the well-accepted principle of attribution, according to which an international organisation only has those powers which are explicitly or impliedly attributed to it.[21] The principle of attribution would be meaningless if the formulation of specific powers automatically implied general powers, beyond what is attributed. Of course, organs may have implied powers, but these are quite different from general powers. Implied powers are powers that are necessary for the achievement of the objectives of an organisation which are not explicitly provided for in its constitutive

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[17] *See:* International Court of Justice, International Status of South-West Africa, Advisory Opinion, 3 March 1950, p. 187.
[18] Benedetto Conforti, The Law and Practice of the United Nations, The Hague 2000, (hereinafter: Conforti) p. 206.
[19] B. Simma (ed.), The Charter of the United Nations: A Commentary, 2002, Vol. II, (hereinafter: Simma) pp. 445-448; Prosecution Response, footnotes 8-10.
[20] Prosecution Response, para. 9
[21] International Court of Justice, Legality of Nuclear Weapons, para. 25.

document.[22] Chapter VII does provide for the necessary powers to maintain peace and security, so there can be no justification for resort to implied powers. The better view is that once the Security Council had determined the situation in Sierra Leone to be a threat to peace and security, its acts to address that threat fell within its Chapter VII powers.

11. However, even if one accepts the argument of the Prosecution that Article 24(1) provides for general powers beyond the specific powers of Chapter VII, that does not in any way address the legal argument that the adoption of measures to respond to threats to the peace and security by entities to which the Security Council may delegate powers is subject to limitations and conditions. The requirement that the Security Council must at all times retain control over the exercise of the delegated authority with regard to threats to peace and security[23] applies irrespective of the legal basis. If one accepts a distinction between measures taken under Article 24(1) and measures under Chapter VII, that distinction only has a bearing on the additional powers that the Security Council can derive from Chapter VII: the power to take measures without the consent of the state(s) concerned and the power to take binding measures on all states. These distinguishing features do not expand or limit the conditions under which the Security Council can delegate its powers.

12. In conclusion, the question of the exact legal basis for the establishment of the Special Court is of no relevance for the point before the Appeals Chamber. The key is rather that what was at issue – the maintenance of peace and security - is the primary responsibility of the Security Council, and the delegation of that responsibility is limited.

The distinction between the powers and responsibilities of the Security Council with regard to subsidiary organs and entities external to the United Nations

13. The submission of the Defence that the delegation of responsibilities with regard to the maintenance of peace and security to subsidiary organs is conditional on the power of the delegating organ to revoke that delegation in order to maintain ultimate control appears not to be in dispute. In addition to the authority cited in the Preliminary Motion and the Reply,

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[22] *Ibidem.*
[23] Preliminary Motion, para. 10; Reply, para. 4.

several additional authorities can be referred to.[24] In the Preliminary Motion, the Defence already referred to the rationale of the limitation: without such control, the entity to which the powers are delegated may use these powers to attain national ends that are not necessarily similar to the purposes of the United Nations.[25]

14. The Prosecution argues that the type of powers that may be conferred on a subsidiary organ of the United Nations may instead be conferred on an entity external to the United Nations, and that the establishment of an international organisation by a treaty to which the United Nations is a party is one such an example.[26] In principle, this proposition is not objectionable. However, if that is the case, the conditions that apply for the conferral of powers on subsidiary organs also apply to entities external to the United Nations.[27] Any other conclusion would allow the Security Council to circumvent limitations that the Charter system imposed on it, simply by creating organs outside the United Nations.

15. It deserves mention that the Prosecution has not been able to cite one precedent of a situation in which the Security Council has attributed its own responsibility in the area of peace and security not to a subsidiary organ, but to an external entity over which it no longer exercised any control.

16. In conclusion, the distinction between subsidiary organs and entities external to the United Nations cannot serve as a basis for the Security Council to delegate its powers without limitations to an external entity when it could not do so to a subsidiary organ. The Appeals Chamber should be extremely wary of accepting a precedent that could destroy the institutional balance within the United Nations.

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[24] International Court of Justice, *Effect of Awards of Compensation Made by the United Nations*, January 14th, 1954, p. 18. Conforti, p. 221, J-P Cot and A. Pellet, La Charte des Nations Unies, Paris 1985, p. 220; See for statement of the principle also Repertory of Practice of United Nations Organs, Vol. 1, Articles 1—22 of the Charter (New York 1955), p. 228. For practice: Repertoire of the Practice of the Security Council 1946-1951 (procedure for terminating Subsidiary Group with regard to the Greek frontier incident question); Repertory of Practice of United Nations Organs, Vol. II, Articles 23—54 of the Charter (New York 1955), p. 121.
[25] Reply, para. 4, Sarooshi, pp. 154-155.
[26] Prosecution Response, para. 12.
[27] Sarooshi, p. 19.

The relevance of the consent by Sierra Leone for the limitations of the delegation of powers by the Security Council

17. A third issue on which the Defence and the Prosecutor appear to disagree is whether the fact that the Special Court agreement has been concluded with the consent of Sierra Leone is relevant for the limitations on the Security Council's delegation of its powers.

18. The Prosecutor refers in several places to the fact that the Special Court was created with the consent of Sierra Leone.[28] The Defence agrees that consent is relevant for the question whether the Security Council needs to resort to Chapter VII measures. That indeed appears to the main legal relevance of the argument of the Prosecutor: consent would help the argument that the Agreement was concluded under Article 24(1), rather than under Chapter VII. However, the legal relevance of Sierra Leone's consent does not extent beyond this.

19. In addition to that submitted on this point in the Reply,[29] the following can be observed. Once a determination has been made that there is a threat to peace and security, the Security Council acts on behalf of the collectivity of member states.[30] The powers and limitations on the powers of the Security Council are defined in terms to implement that collective responsibility and to ensure a careful allocation of competences between the organs of the United Nations. The limitations on the power to delegate responsibility is a principle of institutional law of the United Nations that serves to protect the functioning of the organisation as a whole and the position of the organisation vis-à-vis the collectivity of the member states. Individual member states cannot override these interests by "consenting" to remove such limitations. Any other conclusion would make it possible for one state, in collaboration with the Security Council, to remove that organ's internal limitations of powers; or, conversely, for the Security Council to evade, with the consent of one state, the limitations on the exercise of its powers. This would clearly destroy the system of distribution of powers within the United Nations.

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[28] Prosecution Response, paras. 10-11.
[29] Reply, paras. 6-8.
[30] Article 24(1).

20. In conclusion, the fact that Special Court Agreement is concluded with consent is not relevant to the limitations of the power of the Security Council to delegate its responsibility with regard to peace and security.

The ability of the Security Council to exercise its primary responsibility

21. The fourth issue on which on which the Defence and the Prosecutor appear to disagree is whether the Security Council can still exercise its primary responsibility with regard to the maintenance of peace and security in Sierra Leone. In this regard it is important to repeat that the Prosecution agrees that the primary responsibility for the maintenance of that peace and security rested and still rests with the Security Council;[31] the only disagreement appears to concern the question whether the Council can still exercise that responsibility.

22. The Prosecution argues that the delegation or transfer of its responsibility does not denude the Security Council of its right to exercise that power. However, the Prosecution does not directly address the question of whether the Security Council could exercise its powers with regard to the prosecution of suspects of international crimes if that were necessary for the maintenance of peace and security. As already noted in the Reply,[32] the Security Council could, by violating the Agreement with Sierra Leone, re-assume its powers and change the Statute or terminate the operation of the Special Court. It is in this respect that there is a fundamental difference between the ICTR and the ICTY on the one hand, and the Special Court on the other. Unilateral termination or amendment of the Special Court Agreement would violate Article 23 of the Agreement and would violate the principle of good faith that is also binding upon the United Nations.[33]

23. Finally, in this context reference should be made to the Prosecution's argument that it follows from the term "primary responsibility" in Article 24(1) that the transfer by the Security Council of its responsibility to maintain peace and security does not "denude the Security Council of its right to exercise that power or to control and/or supervise the exercise

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[31] Prosecution Response, para. 16.
[32] Reply, paras. 9-10; Preliminary Motion, para. 10.
[33] Henry G. Schermers and Niels M. Blokker, *International Institutional Law*, 3rd rev. ed., 1995, p. 984; Conforti, pp. 289-290.

of that power".[34] That conclusion, however, cannot be supported by Article 24(1). The legal implications of the term "primary responsibility" are limited to the determination of the relationship between the Security Council and the General Assembly.[35] There is no reason to object to the statement that the creation by the Security Council of other organs or responsibilities in this field is consistent with the primary responsibility of the Security Council.[36] However, the legal effects of the clause "primary responsibility" would be unduly broadened if one were to conclude on that basis that the Security Council did not need to remain in a position to exercise its primary responsibility.

Conclusion

24. On the basis of the above the Defence maintains that the Special Court Agreement is invalid and that the Special Court therefore lacks jurisdiction over the Defendant.

COUNSEL FOR THE ACCUSED

Mr. Michiel Pestman
Prof. André Nollkaemper
Dr. Liesbeth Zegveld

[34] Prosecution Response, para. 14.
[35] Simma, pp. 446-447.
[36] Prosecution Response, para. 15.

Defence list of authorities

1. D. Sarooshi, *The United Nations and the Development of Collective Security. The Delegation by the UN Security Council of its Chapter VII Powers*, Oxford 1999, pp. 3, 19, 153-5.

2. International Court of Justice, *International Status of South-West Africa*, Advisory Opinion, 3 March 1950, pp. 186-7.

3. Benedetto Conforti, *The Law and Practice of the United Nations,* The Hague 2000, pp. 206, 220-1, 289, 290.

4. B. Simma (ed.), *The Charter of the United Nations: A Commentary*, 2002, Vol. II, pp. 445-9..

5. International Court of Justice, *Legality of Nuclear Weapons in Armed Conflict,* 8 July 1996, para. 25.

6. International Court of Justice, *Effect of Awards of Compensation Made by the United Nations*, January 14th, 1954, pp. 17-8.

7. J-P. Cot and A. Pellet, *La Charte des Nations Unies*, Paris 1985, p. 220.

8. Repertory of Practice of United Nations Organs, Vol. 1, Articles 1—22 of the Charter (New York 1955), pp, 228-9.

9. Repertoire of the Practice of the Security Council 1946-1951, pp. 207-8.

10. Repertory of Practice of United Nations Organs, Vol. II, Articles 23—54 of the Charter (New York 1955), p. 121.

11. Henry G. Schermers and Niels M. Blokker, *International Institutional Law*, 3rd rev. ed., 1995, p. 984.

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THE UNITED NATIONS AND THE DEVELOPMENT OF COLLECTIVE SECURITY

The Delegation by the UN Security Council of its Chapter VII Powers

DANESH SAROOSHI

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The General Legal Framework Governing the Process of a Delegation by the UN Security Council of its Chapter VII Powers

With the creation of the UN in 1945 it was envisaged that the UN Security Council would play a central role in the maintenance or restoration of international peace and security. To this end, UN Member States agreed in Article 24 of the Charter to confer on the Council primary responsibility for the maintenance of international peace and security.[1] The specific powers which the Charter gives the Council to achieve this objective are contained in Chapter VII.[2] Chapter VII gives the Council certain prerogatives:[3] the sole authority to determine when a threat to, or breach of, the peace has occurred;[4] the authority to order provisional measures;[5] and the authority to order enforcement measures to be taken against a State,[6] that is to impose economic and military sanctions against a State or entities within a State.[7] It

[1] See further on Article 24 the following commentaries on the Charter: *La Charte des Nations Unies*, (Cot, J-P., and Pellet, A., eds.) (1991), p. 447; and *The Charter of the United Nations: A Commentary* (Simma, B., ed.) (1994), p. 397.

[2] Article 24(2) of the UN Charter.

[3] The enforcement powers of the Council are based on broad discretionary findings. In fact at the San Francisco Conference it was deliberately left to the Security Council to decide on a case-by-case basis when to use its enforcement powers: see Doc. 881, III/3/46, 12 *UNCIO Docs.* 502, 505 (1945).

[4] This exclusive authority is contained in Article 39 of the Charter. The *travaux preparatoires* of Article 39 validates this interpretation: see the statement by the rapporteur of Committee III/3 that dealt with Article 39, *United Nations Conference on International Organization*, 12 (1945), p. 505. See also Judge Weeramantry in his opinion (dissenting on other points) in the *Lockerbie* case, *Provisional Measures Phase, ICJ Reports* (1992), p. 66 at p. 176; Cot and Pellet, *supra* note 1, p. 645; and Simma, *supra* note 1, p. 608.

[5] This authority is contained in Article 40 of the Charter. With respect to Article 40 see the following: Cot and Pellet, *supra* note 1, p. 667; and Simma, *supra* note 1, p. 617.

[6] The word enforcement as used here has a meaning different from the way in which it is often used in domestic legal systems: it does not necessarily mean action designed to ensure compliance with law. See also Cassesse, A., *International Law in a Divided World* (1994), p. 215.

[7] The authority to impose economic sanctions is contained in Article 41, and for military sanctions is contained in Article 42. See further on Article 41 the following: Cot and Pellet, *supra* note 1, p. 691; Simma, *supra* note 1, p. 621; and Reisman, M., and Stevick, D., 'The Applicability of International Law Standards to United Nations Economic Sanctions Programmes', *European Journal of International Law*, 9 (1998), p. 86. See further on Article 42 the following: Cot and Pellet, *supra* note 1, p. 705; and Simma, *supra* note 1, p. 628. On the taking of enforcement action against entities within a State, see *infra* notes 3–5 and corresponding text in Chapter 5.

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Chapter VII powers to UN Member States and regional arrangements is, however, different. The general competence to delegate does not extend to these entities since they are, clearly, entities external to the Organization. This approach is buttressed when it is realized that all UN organs are under a legal obligation to act in the interests of the Organization,[16] but that entities external to the Organization are not under such an obligation.[17] Accordingly, a specific competence must be found in either express or implied terms for the Council to be able to delegate its Chapter VII powers to such entities. This does not mean, however, that such specific competencies do not exist in the case of UN Member States and regional arrangements: the basis for such competencies are in fact the subject of discussion in Chapters 4 and 6.

Although the competence of the Security Council to delegate its Chapter VII powers to an entity is thus dependent on the nature of the particular entity to which powers are being delegated, there is an important common issue. The issue of limitations. The limitations which exist on the general competence of the Council to delegate its Chapter VII powers, which are explained below, also apply, *mutatis mutandis*, to the exercize by the Council of a specific competence to delegate these powers to an entity external to the Organization since they represent fundamental limitations on the competence of the Council to delegate its Chapter VII powers. There are, however, additional limitations that pertain to the exercize of delegated Chapter VII powers which depend on the nature of the particular delegate. Since these can only be determined by consideration of the particular entity which is exercizing the delegated powers, these are examined in the context of the delegation of powers to the UN Secretary-General, subsidiary organs, Member States, and regional arrangements, in the Chapters which follow.

The nature of the relationship between the general and specific competencies and their respective limitations is such that if there is a conflict between the specific competence and the general competence then the specific competence prevails: *expressio unius est exclusio alterius*. Put differently, the general competence of the Council to delegate its powers cannot be used to delegate a power in a situation which is prohibited by the limitations on the Council's specific competence.

[16] See, for example, in the case of the UN Secretary-General: *infra* note 28 in Chapter 2 and corresponding text.

[17] This is distinct from the more general obligation of Member States under Article 2(5) of the Charter to 'give the United Nations every assistance in any action it takes in accordance with the present Charter, and [that all Members] shall refrain from giving assistance to any State against which the United Nations is taking preventive or enforcement action'.

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in effect a kind of *ad hoc* Article 43-type agreement. If such an agreement is concluded it should include an express provision that will ensure the Member States concerned will continue to act until the Council's objective is achieved. By conclusion of this agreement, the legal obligation on States not to withdraw their troops from a UN authorized force until the achievement of the Council's stated objectives would be reinforced. This is an important safeguard which the Council may wish to use to guarantee not only the efficacy of collective action to restore or maintain international peace and security, but also its credibility.

To summarize this section, the Security Council has the competence to delegate its Chapter VII powers to UN Member States and can do so either by means of a decision or recommendation. In either case there is no obligation on States to take up this delegation of powers. This does not, however, preclude States from exercizing these powers where there is a conflict with their other treaty obligations, nor does it mean that States can withdraw their troops from a force carrying out enforcement action without Council authorization.

With an increase in the practice of the Council delegating its Chapter VII powers to Member States, it is envisaged that future challenges to the legality of such delegations will shift from the issue of the competence of the Council to do so to the non-observance by the Council of the limitations on this competence.

II. LIMITATIONS ON THE COMPETENCE OF THE COUNCIL TO DELEGATE CHAPTER VII POWERS TO MEMBER STATES

There are inherent dangers in the practice of the Council delegating Chapter VII powers to Member States.[43] The main danger is that those Member States will exercize the delegated powers to achieve their own self-interest and not that of the UN.[44] As Abi-Saab has noted, in the case of an authorization given to a group of States to undertake enforcement action, the risk

[43] These have been alluded to by the Secretary-General in the *Supplement to An Agenda for Peace*: 'The experience of the last few years has demonstrated both the value that can be gained and the difficulties that can arise when the Security Council entrusts enforcement tasks to groups of Member States. On the positive side, this arrangement provides the Organization with an enforcement capacity it would not otherwise have and is greatly preferable to the unilateral use of force by Member States without reference to the United Nations. On the other hand, the arrangement can have a negative impact on the Organization's stature and credibility. There is also the danger that the States concerned may claim international legitimacy and approval for forceful actions that were not in fact envisaged by the Security Council when it gave its authorization to them.' (Boutros-Ghali, B., *Supplement to An Agenda for Peace* (1995), para. 80.)

[44] A problem related to a delegation of Chapter VII powers may be that private actors will also be able to exert a disproportionate influence on the way in which this power is being

is great that it will be abused as a vehicle for the realization of the national interest of the States concerned rather than for the realization of the purposes of the Organization.[42] This is contrary to the very reason for centring in the UN the responsibility for maintaining and restoring international peace and security: to regulate the use of force by States to attain their national ends.[43]

This issue of self-interest is not, however, always antithetical to the collective security purpose for which a Chapter VII power is delegated to Member States. In many cases there may be a convergence of a State's political interests and the UN's interest in maintaining or restoring international peace and security, although the latter of course being the reason for the delegation of Chapter VII power. The development of this notion of a convergence of self-interest is of some importance to the efficacy of the UN system for maintaining international peace and security. The perception by States that their own self-interest rests in large part in terms of the interests of the international community at large will see a Security Council which is better able to maintain or restore international peace and security, since the Council will be able to delegate its Chapter VII powers to UN Member States with the security that Member States will take up the delegation of powers and that the powers will be exercized to achieve the Council's objectives. The problem, as outlined above, arises, however, when the interests of a State are in conflict with those of the UN, as defined by the Security Council. However, the existence of limitations on the competence of the Council to delegate Chapter VII powers to Member States provides a safeguard against such a potentially negative consequence of a delegation of Chapter VII powers. There are two types of limitations on the competence of the Council to delegate Chapter VII powers to UN Member States.

The first involves a limitation on the competence of the Council to be able to delegate certain of its Chapter VII powers to Member States. These

exercized. Private actors in this case could be, for example, domestic political parties, which exercize control over a domestic legislative arm of government, or large multinational companies. This has been an issue that has plagued the delegation of governmental power in the United States: see Schoenbrod, D. *Power Without Responsibility* (1993).

[42] Arè-Saab, G., *United Nations Forces in the Congo* (1978), p. 20. See also Bowett, D., *United Nations Forces* (1964), p. 358; Duke, S., 'The State and Human Rights: Humanitarian Intervention Versus Sovereignty', in *Peacemaking, Peacekeeping and Coalition Warfare: The Future Role of the United Nations* (Mukhtari, F., ed.) (1994), p. 149 at p. 168; and Ferencz, B., *Global Survival: Security through the United Nations* (1994), pp. 138–9. See for a discussion of this possibility: Second Report on UNEF, A/3302, 5 Nov. 1956, paras. 4–5.

[43] Goodrich, L., and Simons, A., *The United Nations and the Maintenance of International Peace and Security* (1955), pp. 433–4. For an excellent description and analysis of international law regulating the use of force by States, see Brownlie, I., *International Law and the Use of Force by States* (1963).

substantive limitations have already been explained in Chapter 1 and prohibit the delegation by the Council of certain of its Chapter VII powers.[44]

The second—what are termed conditions for a lawful delegation—only regulate the way in which the Council should delegate its powers and do not as such prohibit the delegation of a particular power. These conditions flow from the requirement, as explained in Chapter 1, that the exercize of delegated Chapter VII powers must always remain under the overall authority and control of the Council. The obligation to ensure that these conditions are imposed on the delegate rests with the Security Council, as delegator. The failure by the Council to do so in a particular case means that the delegation of Chapter VII powers is *ultra vires*.

There are three conditions for a lawful delegation by the Council of its Chapter VII powers to Member States. First, there must be a certain minimum degree of clarity in the resolution which delegates the power. Put differently, the objective for which the power is being delegated must be clearly specified. Second, there is an obligation on the Council to exercize some form of supervision over the way in which the delegated powers are being exercized. Third, the Security Council must impose on Member States a requirement to report to the Council on the way in which the delegated power is being exercized. All three of these conditions have been recognized by the Council itself,[45] as well as UN Member States,[46] as important conditions for a lawful delegation by the Council of its Chapter VII powers to Member States.[47] The source of each of these requirements is

[44] See *supra* Section III(2)(b)(i) in Chapter 1.

[45] Thus, in response to recommendations proposed by the Secretary-General, the Security Council provided for the following machinery in resolution 794: '[The Security Council] Requests the Secretary-General and the Member States acting under paragraph 10 [the provision delegating to Member States the power to use "all necessary means"] above, to establish appropriate mechanisms for coordination between the United Nations and their military forces; . . . Decides to appoint an ad hoc commission composed of members of the Security Council to report to the Council on the implementation of this resolution; . . . Requests the Secretary-General and, as appropriate, the States concerned to report to the Council on a regular basis, the first such report to be made no later than 15 days after the adoption of this resolution, on the implementation of this resolution and the attainment of the objective of establishing a secure environment so as to enable the Council to make the necessary decision for a prompt transition to continued peace-keeping operations. See also the practice of the Security Council in Chapter 5.

[46] There was considerable emphasis placed on this machinery by States when deciding to adopt the draft version of resolution 794. All or some of these conditions appear in the statements in the Security Council by the representatives of Zimbabwe (S/PV.3145, pp. 7, 8–10); Ecuador (S/PV.3145, pp. 13–14); Belgium (S/PV.3145, pp. 24–5); France (S/PV.3145, pp. 29–30); Austria (S/PV.3145, p. 36.); and Japan (S/PV.3145, p. 42.) Similarly, in the context of the Council authorizing 'Operation Turquoise' in Rwanda, see the statements in the Security Council by the representatives of the USA (S/PV.3392, p. 6); and Russia (S/PV.3392, p. 2).

[47] Accordingly, Erskine Childers has called for '. . . a General Assembly resolution stating that armed force cannot be employed using the name or authority of the United Nations unless

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INTERNATIONAL COURT OF JUSTICE

YEAR 1950

1950
July 11th
General List:
No. 10

July 11th, 1950

INTERNATIONAL STATUS OF SOUTH-WEST AFRICA

Continued existence of the Mandate for South-West Africa conferred upon the Union of South Africa, and of the international obligations derived therefrom.—Article 22 of the Covenant of the League of Nations.—Article 80, paragraph 1, of the Charter.—International Mandates distinguished from the nations of mandate in national law.—Declarations by Union Government as to the continuance of its obligations under the Mandate.—Obligation of Union Government to accept supervision by the United Nations and to submit reports and petitions.—Competence of the General Assembly of the United Nations derived from Article 10 of the Charter.—Compulsory jurisdiction of the International Court of Justice.

Applicability of Chapter XII of the Charter.—Optional or compulsory nature of the placing of the Territory of South-West Africa under the Trusteeship System.—Articles 75, 77, 79 and 80, paragraph 2, of the Charter.

Competence to modify the international status of the Territory of South-West Africa.

ADVISORY OPINION

Present: *President* BASDEVANT; *Vice-President* GUERRERO; *Judges* ALVAREZ, HACKWORTH, WINIARSKI, ZORIČIĆ, DE VISSCHER, Sir ARNOLD MCNAIR, KLAESTAD, BADAWI PASHA, KRYLOV, READ, HSU MO, AZEVEDO; *Registrar* HAMBRO.

DISSENTING OPINION OF Mr. DE VISSCHER

[*Translation.*]

I regret that I am unable to concur in the second part of the Court's answer to the question under letter (*b*). I concede that the provisions of Chapter XII of the Charter do not impose on the Union of South Africa a legal obligation to conclude a Trusteeship Agreement, in the sense that the Union is free to accept or to refuse the particular terms of a draft agreement. On the other hand, I consider that these provisions impose on the Union of South Africa an obligation to take part in negotiations with a view to concluding an agreement. In this respect, the Court's answer falls short of my opinion on the obligations resulting from the Charter for the Mandatory Power. My opinion is based on an interpretation of texts which differs from that adopted in the Court's Opinion.

The Opinion says: "The Charter has contemplated and regulated only a single system, the International Trusteeship System. It did not contemplate or regulate a co-existing Mandates System." Furthermore, the relevant articles of Chapter XII dealing with the International Trusteeship System are clearly imperative: Article 75: "The United Nations shall establish under its authority an International Trusteeship System....", "L'Organisation des Nations Unies établira, sous son autorité, un régime de tutelle....": Article 77: "The Trusteeship System shall apply....": "Le Régime de Tutelle s'appliquera....".

The Mandates System was maintained by Article 80 of the Charter only as a transitional measure. The terms of the first paragraph alone: "and until such agreements have been concluded" exclude the possibility of prolonged co-existence of the two régimes. As to Article 80, paragraph 2, its legal bearing in this connexion is clearly defined. It provides that the preceding paragraph, which maintains the *status quo* until such agreements have been concluded (the so-called safeguarding clause), "shall not be interpreted as giving grounds for delay or postponement of the negotiation and conclusion of agreements for placing mandated and other territories under the Trusteeship System as provided for in Article 77".

I consider that the Opinion does not give to these provisions their proper place in the general framework of the provisions of Chapter XII, and, as a result, does not deduce from them all the consequences which follow therefrom. The Opinion minimizes their import to the point of considering them merely as expres-

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sing the expectation that "the mandatory States would follow the normal course indicated by the Charter, namely, conclude Trusteeship Agreements".

It is an acknowledged rule of interpretation that treaty clauses must not only be considered as a whole, but must also be interpreted so as to avoid as much as possible depriving one of them of practical effect for the benefit of others. This rule is particularly applicable to the interpretation of a text of a treaty of a constitutional character like the United Nations Charter, above all when, as in this case, its provisions create a well-defined international régime, and for that reason may be considered as complementary to one another.

I cannot readily believe that the authors of the Charter would have warned the mandatory Powers, by means of an express and particularly emphatic provision, that the negotiation and conclusion of Trusteeship Agreements could not, by reason of the *status quo* temporarily guaranteed under Article 80, paragraph 1, "give grounds for delay or postponement" if the scope of this provision amounted simply to the expression of an expectation or, at the most, of a wish or an advice. The terms of article 80, paragraph 2, do not favour this interpretation.

The negative character of the phrase is not an argument in favour of the absence of an obligation. The warning given to the mandatory Powers that the *status quo* referred to in the preceding paragraph gives no valid ground for delaying or postponing the agreements which, as will be shown later, are the instrument for the application of the Trusteeship System, is clearly, in my opinion, a direction to those Powers to be ready, at the earliest opportunity, to negotiate with a view to concluding such agreements. What Article 80, paragraph 2, intended to prevent was that a mandatory Power, while invoking on the one hand the disappearance of the League of Nations, should refuse on the other hand to recognize the United Nations or to consider submitting itself to the only régime contemplated in the Charter, namely, the Trusteeship System. What this same provision intended to enact was that the mandatory Power should take appropriate measures for the negotiation of a Trusteeship Agreement.

If, as has already been said, we must endeavour to reconcile the texts rather than to set them in opposition to one another, and attempt to give each one its due by preserving its practical effect within the system as a whole, we are led to the following conclusions.

The wording of Articles 75, 77 and 79 is permissive in the sense that the placing under Trusteeship is contingent upon the conclusion of subsequent agreements, the mandatory Power being free to accept or to reject the terms of a proposed agreement.

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The Law and Practice of the United Nations

Second Revised Edition

by

Benedetto Conforti

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Chapters VI and VII, and especially the latter, may be considered complete in that it would be difficult to imagine any *effective* intervention by the Security Council for the maintenance of the peace that did not come within the provisions of one or the other Chapter (with the exception of specific interventions concerning regional arrangements contemplated by Chapter VIII and the trusteeship system under Chapter XII: see, respectively, p. 224 and Article 83). The Charter appears to confirm this since Article 24, after having defined the Council as the organ primarily responsible for collective security, adds that "the specific powers granted to the Security Council... are laid down in Chapters VI, VII, VIII and XII".

We cannot therefore agree with the view that Article 24, in entrusting the Council in a general way with primary responsibility for maintenance of the peace, would give it all other residual powers on this matter. During the Cold War, this apparently progressive view was used to provide a legal basis for those Council resolutions characterised by compromise, basic disagreement among the members of the organ, and near total incapacity to deal effectively with the substantive issues of a dangerous situation. Article 24, in other words, was invoked for resolutions which clearly betrayed its spirit in as much as they involved the circumvention of the Council's responsibilities rather than the earnest undertaking of them.

This can also be said with regard to the advisory opinion of June 21, 1971 of the International Court of Justice, which applied the theory of residual powers under Article 24 (cf. ICJ, *Reports*, 1971, p. 51, no. 110) to Council resolution no. 276 of January 30, 1970 on the Namibia question. This resolution had been limited to declaring South Africa's presence in Namibia (today independent) as "invalid", and it had been adopted after ascertaining that it was impossible for the Council to proceed against South Africa with effective and decisive sanctions, as the majority of the member States and civilised peoples wished to do.

The debate over the residual powers of the Council has again become animated as a result of the activism of the Council after the end of the Cold War, in relation to several resolutions adopted expressly or implicitly under Chapter VII but where there was doubt as to which specific provision of this chapter would apply. These were the resolutions which established organs of a judicial or quasi-judicial nature, and, specifically, part E of res. no. 687 of April 3, 1991, which created a Commission entrusted with the task of deciding on the compensation owed by Iraq for its aggression against Kuwait (see p. 178), and of res. no. 827 of May 25, 1993, which established an independent Tribunal for the prosecution of crimes against humanity (particularly war crimes) committed by individuals in the former Yugoslavia after January 1, 1992 (see p. 194). A similar Tribunal has been also

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Westport, 1993; MURTHY, *The Role of the UN Secretary-General since the End of the Cold War*, in *The Indian Journal of International Law, 1995, p. 181 ff.*; NEWMAN, *The UN Secretary-General from the Cold War to the New Era: A Global Peace and Security Mandate ?*, New York, 1998; BOUTROS-GHALI, *Unvanquished*, London-New York, 1999.

24. *Delegated functions and executive functions.*

The most important power of the Secretary-General in the area of maintenance of the peace (as in every other field of UN activity) is drawn from Article 98, under which the Secretary performs the functions that are "entrusted" to him by the General Assembly or the Security Council. The delegation of powers so provided by Article 98 is not subjected to any special condition or even to the setting of any guidelines. An objective limit, however, may be implied in the UN system, especially in the provisions which attach the responsibility for maintenance of the peace to the Security Council and, secondarily, to the General Assembly. These provisions make it unthinkable that there could be any transfer of functions that does not pertain to *specific* issues. It is also obvious that the only functions that can be transferred are the ones held by the delegating organ.

As occurs in any case of delegation, the Secretary enjoys wide autonomy in carrying out the functions entrusted to him. In the exercise of such autonomy the personality of the holder of the office plays a decisive role. Autonomy must, however, be exercised in compliance with limits and instructions imposed by the delegating organ as well as with the observance of the Charter provisions. However, it includes the decision-making power and also the implied powers that are necessary for fulfillment of the task.

Many examples of delegation can be seen in practice. There are various resolutions in which the Secretary was entrusted with powers pertaining to the Security Council or the General Assembly, particularly powers of investigation, of mediation and, more in general, of conciliation. However, the most striking cases concern operations for the maintenance of the peace, especially the establishment, as requested by the Security Council, of military forces entrusted with peacekeeping functions (see p. 197 ff.). These cases are to be noted precisely because of the Secretary-General's exercise of a series of powers expressly coming within the tasks entrusted to him. Examples can be seen in the conclusion of agreements with States on whose territories the Forces have been operating and with the States that have contributed to their establishment, the decision concerning the specific use of such Forces, the issuance of all the rules governing the service relationship between the solders and the Secretary, and so on.

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The delegation may always be revoked by the delegating organ. However, what will happen if the organ in question, after having transferred certain powers and issued certain directions on a specific question, no longer is able to take decisions on subsequent developments in the matter? Must the Secretary-General in this case continue in the exercise of the delegated functions, or will the delegation terminate because of the change in circumstances? A question of this kind arose during the Congo action when, between August 1960 and February 1961, the chaos existing within the Congo made the carrying out of the task (which had no time limit) entrusted to the Secretary by Security Council res. no. 143 of July 14, 1960 very problematic. The task was to assist the Congolese Government in maintaining order (see p. 198). Dag Hammarskjold, who was Secretary at the time (and who lost his life serving the United Nations), on one hand had requested, to no avail, instructions from the Security Council and the General Assembly (both were paralyzed by conflicts between their members), and on the other was harshly criticized by the Soviet Union and the other Socialist countries (who reached the point of asking for his resignation) for his initiatives. Hammarskjold's view that the Secretary had the duty to continue an operation he had undertaken, even at the cost of making independent decisions, should be shared in this particular case. Perhaps it is correct to say that a delegation ceases only when there has been such a radical change of circumstances as to make any decision impossible in the light of what were the instructions. And this cannot be said about the Congo.

Cf., for the criticism and the defence in the Security Council of the Secretary-General's actions: SCOR, 15th year, 888th-889th meets., 901st-916th meets., and 16th year, 928th-932nd meets.

The purely administrative functions of the Secretary-General must be kept distinct from the delegated functions, although this distinction is more quantitative than qualitative and has had no important repercussions. The executive functions (Article 97: "The Secretary-General... shall be the chief *administrative* officer of the Organization") include any kind of activity necessary to give effect to the decisions of the General Assembly or of the Security Council which does not involve, or which involves to a very limited extent, the exercise of decision-making power by the Secretary. An example which is typical and which often occurs is given by resolutions which, after having recommended certain conduct to the States, request the Secretary-General to make inquiries and to keep the organ informed as to whether the recommendation has been carried out.

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the rapid increase in membership made the gaining of majorities in the GA more difficult to calculate for the Great Powers, the original distribution of powers within the Organization resurfaced. Member States in general, not only the Great Powers, again had recourse to the SC as the organ vested with the primary responsibility for the maintenance of peace and security. The increasing number of sessions held by the SC since the beginning of the 1960s is only one example of this development.[10] Whether this means, however, that a stabilization of the distribution of roles between the SC and the GA as envisaged by the Charter (and thereby of the normative content of Art. 24) has been brought about, in view of the dynamics of the development of the Organization as a whole, is still an open question in principle; however, the greatly increased activities of the SC in the last decade seem to point in that direction. At any rate, the importance of Art. 24 can only be properly understood against the background of these dynamics and their determinant historical, political, and legal factors—factors that also have to be recognized in the interpretation of Art. 24.

B. Interpretation

The rules laid down in Art. 24 carry different legal and political weights. Paragraphs (1) and (2), on the one hand, contain the fundamental provisions with regard to the powers of the SC and the regulation of the position of this organ within the overall structure of the Organization and *vis-à-vis* the member States, respectively. Paragraph (3), on the other hand, only provides for the duty of the SC to report to the GA. As the authors of the Charter felt that the League of Nations system had suffered from the lack of a clear delimitation of the powers of the main political organs, it is consistent with their concept of providing for such a clear distribution and delimitation of powers between the executive organ and the Plenary organs with all members represented, since para. (1) of Art. 24 places the 'primary responsibility' for the 'maintenance of international peace and security' on the SC. With this phrasing of Art. 24(1), the intentions of the authors of the Charter are expressly emphasized. Charging the SC with the primary responsibility for the maintenance of peace is intended 'to ensure prompt and effective action by the United Nations'. Accordingly, the 'specific powers granted to the Security Council for the discharge' of its duties in Chapters VI, VII, VIII, and XII are referred to in para. (2) second sentence. At the same time, however, para. (2) first sentence, makes it clear that in discharging its duties, the SC shall act in 'accordance with the Purposes and Principles of the United Nations'. This is an indication that although the 'political approach'[11] is intended to take priority in the actions of the Organization, at least the limits of the law of the Charter have to be observed.[12] Finally, Art. 24(1) states that the members are in agreement that the SC, in carrying out its duties, acts on their behalf. 3

Upon closer inspection, the seemingly clear provisions of Art. 24 with regard to the powers of the SC and its guiding principles pose considerable problems of interpretation,[13] which have also had their bearing upon UN practice at various times. For example, the meaning of the term 'primary responsibility', which is conferred by the members upon the SC for the maintenance of international peace and security, is a problematic one. The term 'primary responsibility' could indicate that, in principle, the organs charged with the peace-keeping function of the organization of the UN as a whole, i.e. the SC and the GA, would act in parallel and concurrently,[14] but that in discharging its peace-keeping function in a given situation the SC would only be granted priority over the GA with regard to the time of taking the first step and/or in political terms. Such an interpretation of the wording of the Article could be seen as gaining support in particular from the English text of the Charter, which uses the term 'primary' responsibility, a word that indicates priority in time.[15] In support of this interpretation, reference could also be made to Art. 12(1), according to which the 4

10 See Goodrich, p. 41; Schaefer, *supra*, fn. 3, pp. 333, 336.

11 See Delbrück, pp. 74 *et seq.* with further refs.

12 In this regard it is interesting to note that in their declaration of January 31, 1992 (UN Doc.S/PV.3046) the heads of State of the members of the UN Security Council expressed their commitment to 'international law and the United Nations Charter'.

13 See Kelsen, pp. 280 and *passim*.

14 CP/Degni-Segui (2nd edn.), p. 448.

15 See *The Shorter Oxford English Dictionary* (3rd edn., 1972), entry 'primary', p. 1582. One could also point to the fact that in Art. 24(1), unlike in Art. 101(3), the less ambiguous term 'paramount' was not used.

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GA is prohibited from making a recommendation with regard to a dispute or situation as long as the SC, for its part, is discharging the functions conferred upon it by the Charter. The term 'primary responsibility' may, however, be conceived of in a qualitative sense, i.e. that the most important powers in the field of the maintenance of peace are placed exclusively on the SC. In the qualitative sense then, the majority of the rights and powers to act which are at the disposal of the Organization would lie with the SC. In support of this interpretation regarding the meaning of 'primary responsibility', one could point to the French text of the Charter which speaks of the 'responsabilité principale'—a phrase which appears to imply a lesser sense of priority of the SC with regard to time and procedure than the English choice of wording. An interpretation of Art. 24 which gives the SC a qualitative priority over the GA could also be held to be corroborated by Art. 11(2), according to which the GA has to refer a question under discussion to the SC 'if action is necessary'.

5 Another question closely related to the foregoing problem of interpretation with Art. 24 is whether according to the wording of para. 1 and para. 2 second sentence, the SC is only granted those powers for the discharge of its functions which are specifically named in Chapters VI, VII, VIII, and XII, or whether it has further competences not expressly mentioned in the Charter but necessary for the proper discharge of its functions.[16] The wording of para. 2 taken alone could speak in favour of a narrow interpretation, i.e. an interpretation limiting the SC to the powers enumerated in sentence 2 of para. 2. This sentence would then simply detail the powers of the SC which are accorded to it for the discharge of its functions 'in accordance with the Purposes and Principles of the United Nations'. Particularly with a view to the 'primary responsibility' of the SC for the maintenance of peace—understood in a qualitative sense—one could, however, also conclude that the SC has 'general' powers beyond those named in para. 2 second sentence, since these are referred to as 'specific' powers.

6 Furthermore, it is by no means clear what the normative content of the provision of Art. 24 is according to which the SC in its peace-keeping function acts on behalf of the member States, since the SC takes action on the basis of the powers conferred upon it as an organ of the UN, and not on the basis of an individual mandate from the members.

7 The foregoing remarks outlining the problems one encounters in applying a purely literal interpretation make it quite clear that by a literal interpretation of the Charter alone, unambiguous findings as to the normative and political meaning of Art. 24 cannot be arrived at.[17] Rather, as has been mentioned before (*supra*, MN 2), the systematic, teleological, and historical context has to be brought into the interpretation of Art. 24. On the basis of this approach, the following interpretation may be offered as correct.

8 In Art. 24, the use of the term 'primary responsibility' to characterize the powers conferred upon the SC is a substantive and qualitative determination of the role which the SC is to play in the realm of the maintenance of peace as a whole. The SC enjoys priority over the GA, and not merely in terms of time and procedure. Those provisions of the Charter which secure the SC's priority of action in a temporal sense, such as Art. 12(1), only serve the purpose of safeguarding the substantive priority of the SC over the GA, i.e. the primary responsibility of the SC, also with regard to procedure. Therefore, 'primary responsibility' in the field of the maintenance of peace means that the SC has stronger powers than other organs, namely the GA, even though the latter may also concern itself with such questions as the maintenance of international peace and security, under Art. 10. Such powers, which give a distinct meaning to the term 'primary responsibility', and which go beyond those of the GA, are, for instance, the right of the SC—when dealing with disputes—to take decisions which are binding upon the member States (Art. 25), and particularly the exclusive right of the SC

16 The conflict between these two fundamentally different interpretations came to the fore, for example, in the discussions of the SC on the Trieste Statute, see UN Doc. ST/PSCA/1 (1946-51), pp. 482 *et seq.*; and recently in the context of the establishment of the International Criminal Tribunals for the former Yugoslavia and Rwanda, see Sarooshi, D., 'The Legal Framework Governing United Nations Subsidiary Organs', *BYIL* 67 (1996), pp. 422 *et seq.*; *id.*, 'The Powers of the United Nations International Criminal Tribunals', in *Max Planck UNYB* 2 (1998), pp. 143 *et seq* (fn. 7); see also *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Resolution 276 (1970)*, Advisory Opinion, ICJ Reports (1971), p. 16.

17 See Kelsen, p. 282 (in the context of the interpretation of Art. 24) and p. 970 (in the context of the interpretation of Arts. 10 and 11). For a discussion of whether a literal, restrictive interpretation of Art. 24 is appropriate in a historical and doctrinal perspective see also CP/Degni-Segui (2nd edn.), pp. 458 *et seq.*

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to order binding sanctions against a State[18] which is guilty of an act of aggression or of a threat to the peace within the meaning of Art. 39. In other words, placing the primary responsibility for the maintenance of peace and security on the SC means that the SC and the GA have a parallel or concurrent competence with regard to dealing with questions of the maintenance of peace,[19] but that the SC possesses exclusive competence with regard to taking effective and binding action, especially enforcement measures. In this way, the SC is clearly designated as the politically more important organ which, according to the intentions of the authors of the Charter, is supposed to take the necessary prompt and effective measures for the maintenance of peace, and which possesses the corresponding powers to do so. Such an interpretation of Art. 24(1) is definitely compatible with the term 'primary responsibility', because the word 'primary' may not only refer to priority in time but may also indicate a substantive priority, i.e. in this case a main responsibility.[20] At the same time, this interpretation of the term 'primary responsibility' does not exclude the possibility that the GA, while recognizing the primary responsibility of the SC, may become active in the field of the maintenance of peace under the general and specific powers conferred upon it, as the GA did in fact rule when it adopted the Uniting for Peace Resolution.

As the organ charged with the primary responsibility for the maintenance of peace, the SC does not enjoy priority of any kind over the ICJ.[21] Such priority could be conceivable considering the fact that, according to the will of the authors of the Charter, the UN was perceived as a predominantly political Organization. The alleged legalism of the League of Nations was clearly to be rejected, and a political instrument for the preservation of peace—though one within the bounds of international law[22]—was to be created. Its foundation was to rest on the potential political power of the Great Powers,[23] which is reflected in the structure of the SC where the Great Powers enjoy a privileged position. Following this concept, the very fact that the primary responsibility for the maintenance of peace is placed in the SC could be interpreted in such a way as to preclude the ICJ from dealing with a case of which the SC is already seized. Such priority and exclusiveness regarding the competence of the SC *vis-à-vis* the ICJ, however, can neither be deduced from the notion of the primary responsibility of the SC for the maintenance of peace, nor find support in any other Charter provisions or any general principles of law. Although binding decisions which are of a judicial nature could be taken in the course of dealing with a case before the SC as, for instance, the adjudication of a contested territory to one of the disputing parties, the decision-making procedure of the SC is fundamentally different from that of the ICJ. The ICJ has to decide exclusively on the basis of international law (Art. 38 of the ICJ Statute), whereas the SC has to decide primarily according to political criteria. Considering this basic difference between the procedures of the SC and the ICJ, no objection of *lis pendens* or *res judicata* may be raised against the ICJ acting simultaneously (or prior to or after the SC) in a case pending before the SC.[24] It is in accordance with this finding, which is deduced from the nature of the procedures before the SC and the ICJ as well as from general principles of law, that neither the UN Charter nor the ICJ Statute provide for any such restrictions on the freedom of the ICJ to act. On the contrary, the fact that according to Art. 94(2) of the UN Charter the SC is called upon to enforce a judgment of the ICJ if necessary may be seen as supporting the view that the procedures of the two organs have to be recognized as being independent of one another. Article 94(2) does not contain any restrictions whatsoever with regard to the way in which the judgment of the ICJ to be enforced by the SC has come about, whether or not in a case which has already been dealt with by the SC, or whether or not it is in accordance with previous decisions of the SC.[25] Of course, from the point

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18 Kelsen, p. 283; Goodrich, pp. 20 *et seq.*
19 Kelsen, p. 283; CP/Degni-Segui (2nd edn.), pp. 448 *et seq.*
20 *The Shorter Oxford English Dictionary, supra*, fn. 15, p. 1582.
21 Klein, pp. 474 *et seq.*; Escher, R., *Friedliche Erledigung von Streitigkeiten nach dem System der Vereinten Nationen* (1985), pp. 10 *et seq.*
22 Higgins, *AJIL*, pp. 1, 8; Escher, *supra*, fn. 21, pp. 103 *et seq.*; Goodrich, pp. 49 *et seq.*; Klein, p. 476.
23 In more detail see Delbrück, pp. 77 *et seq.* with further refs.
24 Klein, pp. 474 *et seq.*; in line with Klein, see Escher, *supra*, fn. 21, pp. 106, 109, both with further refs.; also *United States Diplomatic and Consular Staff in Tehran*, Judgment, ICJ Reports (1980), pp. 3, 19, 22.
25 See Klein, pp. 489 *et seq.*

of view that they have to pay due respect to each other, the SC and the ICJ have to take each other's decisions into consideration.[26]

10 The enumeration of the specific powers under Chapters VI, VII, VII, and XII which are granted to the SC by Art. 24(2) second sentence for the discharge of its duties[27] is not to be taken as a final listing of the powers conferred upon the SC. First of all, the view that the enumeration of the powers of the SC in Art. 24(2) second sentence is final is not supported by the phrasing of this clause. The granting of 'specific' powers logically presupposes that the organ holding such 'specific powers' also has 'general' powers as well. Furthermore, an examination of the UN Charter shows that the listing of powers in Art. 24(2) second sentence cannot be meant to be a final one because the competences of the SC which are related to the maintenance of peace are also described in other Chapters than those named in Art. 24. For example, there is Chapter IV (Art. 12(1), requesting the GA to make a recommendation in a dispute with which the SC is involved), Chapter V (Art. 26, a mandate for the elaboration of a system of arms control), and Chapter XIV (Art. 94(2), concerning the enforcement of judgments of the ICJ). Finally, a restrictive interpretation of Art. 24(2) second sentence, in the sense of a final enumeration of the powers of the SC—or reading this provision as a mere concretization of the powers which are granted exclusively to the SC for the discharge of its primary responsibility for the maintenance of peace—is not compatible with the fact that the SC is charged with such primary responsibility.[28] For, if the SC, as the primarily responsible political organ, is to live up to its mandate to take prompt and effective measures for the maintenance of peace, it must be accorded the widest possible discretion as to the kind of measures to be taken. A restriction of the powers of the SC based on Art. 24(2) second sentence, which in the eyes of the authors of the Charter would appear 'legalistic', would run counter to the purpose of the UN Charter. Article 24(1) therefore serves as the basis for comprehensive powers for the SC which goes beyond the enumeration in para. 2, and thereby fulfils the function of closing any gaps in the provision of powers for the SC which might otherwise exist, considering the wide range of tasks to be undertaken by the SC.[29] However, given the fact that the range of powers of the SC is open in principle, the discretion of the SC in taking action is not completely unlimited. In discharging its functions, the SC also has to stay within the liberally drawn limits set by the delimitation of the functions and purposes provided for in the UN Charter. As the Charter states, the SC 'in discharging these duties shall act in accordance with the Purposes and Principles of the United Nations', i.e. it may not act arbitrarily. In summing up we have to recognize that Art. 24(2) second sentence turns out to be legally rather meaningless—as has been correctly observed by Kelsen[30]—since the conclusion that an organ may act only within the limits of the powers granted to the Organization for which it functions is self-evident. Additionally, the clause is meaningless because the enumeration of the powers granted to the SC for the discharge of its functions is incomplete as well as legally superfluous because of its merely declaratory nature.

11 The legal purpose and meaning of the provision of Art. 24(1), according to which the SC, in discharging its functions for the maintenance of peace, acts on behalf of the member States, is similarly problematic. This provision has been interpreted as meaning that the competence of the SC in the realm of the maintenance of peace rests on a delegation of powers by the members.[31] In conferring power on the SC, each member

26 More extensively Klein, pp. 481 *et seq.* with further refs.

27 The term 'duties' is an unfortunate choice; the subject of the provisions is the functions and powers granted to the SC by the Charter, since by its very nature, the Charter is an order of competences. This is correctly indicated by Kelsen, p. 154, even if one does not agree with his view that the consequence accepted here ultimately results from the lack of power to sanction the 'duties' set out by Art. 24.

28 Kelsen, p. 284, with the proviso, however, that the powers beyond Art. 24 could only be such as are granted by the Charter. A broader view is taken by Dahm, p. 210; GHS, pp. 204 *et seq.* See on this problem also CP/Segni-Degui (2nd edn.), pp. 458 *et seq.*

29 Jiménez de Aréchaga, E., 'United Nations Security Council', *EPIL* IV, pp. 1168 *et seq.*; Dahm, p. 210; GHS, p. 204; CP/Degni-Segui (2nd edn.), p. 459; Dicke, D./Rengeling, H-W., *Die Sicherung des Weltfriedens durch die Vereinten Nationen—Ein Überblick über die Befugnisse der wichtigsten Organe* (1975), expressly quoting from Dahm, pp. 60 *et seq.*, with further refs.; these authors emphasize at the same time that this broader interpretation is not without limits; dissenting with reference to the broad interpretation, Kelsen, p. 284, critical also CP/Degni-Segui (2nd edn.), pp. 458 *et seq.*

30 Kelsen, pp. 230 *et seq.*; Dahm, p. 210.

31 CP/Degni-Segui (2nd edn.), pp. 450 *et seq.*

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State has surrendered a part of its sovereignty to that organ.[32] A more detailed analysis of this provision does not, however, support such an interpretation. It is true that in conferring upon the Organization a binding decision-making power and the right to take enforcement measures for the maintenance of peace, the members of the UN have agreed to a restriction of their sovereignty. This becomes particularly clear if one considers that such binding decisions could affect those member States which are neither members of the SC (and therefore did not participate in the decision) nor agreed to it. In spite of this, an interpretation of Art. 24(1) which is based on the premise of a delegation by the member States of the powers granted to the SC under this provision cannot be upheld. The SC is an organ of the UN and therefore derives its powers from the UN Charter itself. As an organ of the UN, the SC acts on behalf of the Organization and not on behalf of the individual member States. Accordingly, its actions and decisions are attributed to the UN Organization as a whole and not to individual members such as, for instance, the members of the SC.[33] If one were to speak of a delegation of sovereign rights by the member States, then it would only refer to the founding of the Organization, i.e. the conclusion of the founding treaty and its acceptance and ratification by the members.[34] Therefore, following Kelsen, the majority of writers deem Art. 24(1), according to which the member States 'agree that in carrying out its duties under this responsibility, the Security Council acts on their behalf', to be legally erroneous and superfluous.

Article 24(3) obliges the SC to 'submit annual and, when necessary, special reports to the General Assembly'. This duty of the SC to report to the GA has been used to argue that the relationship between the SC and the GA is one of subordination of the former to the latter.[35] Such an interpretation of the duty of the SC to report to the GA is supported by the drafting history of Art. 24(3), which was introduced into the Charter in response to the wishes of the medium and small States, with a view to strengthening the position of the GA *vis-à-vis* the SC.[36] 12

One may consider that, going beyond Art. 24(3), the GA has an all-embracing competence in so far as it may, unlike the SC, concern itself with all matters falling within the general competence of the UN. Furthermore, the GA also has the right to decide on the UN budget. Yet it cannot be maintained that the GA is superior to the SC, or that the duty of the SC to report to the GA is merely a concretization of such superiority.[37] Although the idea of conceiving the GA as superior to the SC ultimately rests on the analogy with the relationship between the parliament and the executive in parliamentary democracies,[38] this analogy does not hold in the case of the UN because the small executive organ, the SC, is not responsible to the Plenary organ; such a relationship is an intrinsic element of the parliamentary system. Likewise, the Plenary organ in the UN system, the GA, does not possess any right to sanction decisions or acts of the executive organ, i.e. the SC. The GA has not been granted the power to hold the SC responsible for failing to present a report according to Art. 24(3) or presenting a deficient report, or even for any actions by the SC listed in a report. The SC is not subordinate to the GA either with regard to the duty to report or in the sense that its ability to function could be impaired by the GA if the latter did not fulfil its task of electing a non-permanent member to the SC in time.[39] Even if one were to attribute some kind of politically guiding function to the GA, as some authors do, this result would not support the view that the SC is in law (*inter alia* under Art. 24(3)) subordinate to the GA. 13

32 CP/Degni-Segui (2nd edn.), p. 450 with reference to Virally, M., *L'Organisation mondiale* (1972).
33 Kelsen, p. 280; Dahm, p. 7 and fn. 5; Dicke/Rengeling, *supra*, fn. 29, p. 57.
34 Kelsen, pp. 281 *et seq.*; Dicke/Rengeling, *supra*, fn. 29, pp. 54, 57.
35 See Dahm, p. 186, who does accept 'a certain hierarchy of the organs', but reaches the same conclusion as is drawn here, i.e. that the SC and GA do not exist in a relation of superiority of one over the other or subordination to one another (p. 187).
36 CP/Cassan (2nd edn.), p. 468 with further refs.
37 Dahm, p. 187.
38 For a discussion of this problem see Seidl-Hohenveldern, I./Loibl, G., *Das Recht der Internationalen Organisationen einschließlich der Supranationalen Gemeinschaften* (7th edn., 2000), MN 0917.
39 Suy, pp. 677, 683, who warns, however, that the ultimate test of this view has not been undertaken, because at the beginning of 1980 the SC proceeded to take a vote after the 15th seat on the SC (after 155 ballots) was finally filled by the GA.

INTERNATIONAL COURT OF JUSTICE

YEAR 1996

1996
8 July
General List
No. 93

8 July 1996

LEGALITY OF THE USE BY A STATE OF NUCLEAR WEAPONS IN ARMED CONFLICT

(...)

25. The Court need hardly point out that international organizations are subjects of international law which do not, unlike States, possess a general competence. International organizations are governed by the "principle of speciality", that is to say, they are invested by the States which create them with powers, the limits of which are a function of the common interests whose promotion those States entrust to them. The Permanent Court of International Justice referred to this basic principle in the following terms:

> "As the European Commission is not a State, but an international institution with a special purpose, it only has the functions bestowed upon it by the Definitive Statute with a view to the fulfilment of that purpose, but it has power to exercise those functions to their full extent, in so far as the Statute does not impose restrictions on it." (*Jurisdiction of the European Commission of the Danube, Advisory Opinion, P.C.I.J., Series B, No. 14*, p. 64.)

The powers conferred on international organizations are normally the subject of an express statement in their constituent instruments. Nevertheless, the necessities of international life may point to the need for organizations, in order to achieve their objectives, to possess subsidiary powers which are not expressly provided for in the basic instruments which govern their activities. It is generally accepted that international organizations can exercise such powers, known as "implied" powers. As far as the United Nations is concerned, the Court has expressed itself in the following terms in this respect:

> "Under international law, the Organization must be deemed to have those powers which, though not expressly provided in the Charter, are conferred upon it by necessary implication as being essential to the performance of its duties. This principle of law was applied by the Permanent Court of International Justice to the International Labour Organization in its Advisory Opinion No. 13 of July 23rd, 1926 (Series B, No. 13, p. 18), and must be applied to the United Nations." (*Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion, I.C.J. Reports 1949*, pp. 182-183; cf.

Effect of Awards of Compensation Made by the United Nations Administrative Tribunal, I.C.J. Reports 1954, p. 57.)

In the opinion of the Court, to ascribe to the WHO the competence to address the legality of the use of nuclear weapons ‹ even in view of their health and environmental effects ‹ would be tantamount to disregarding the principle of speciality; for such competence could not be deemed a necessary implication of the Constitution of the Organization in the light of the purposes assigned to it by its member States.

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INTERNATIONAL COURT OF JUSTICE

1954
January 14th
General List :
No. 21

YEAR 1954

January 14th, 1954

EFFECT OF AWARDS OF COMPENSATION MADE BY THE UNITED NATIONS ADMINISTRATIVE TRIBUNAL

(REQUEST FOR ADVISORY OPINION)

ORDER

The President of the International Court of Justice,

having regard to Article 66, paragraph 2, of the Statute of the Court ;

Whereas on December 9th, 1953, the General Assembly of the United Nations adopted a resolution requesting the International Court of Justice to give an advisory opinion on the following questions :

"(1) Having regard to the Statute of the United Nations Administrative Tribunal and to any other relevant instruments and to the relevant records, has the General Assembly the right on any grounds to refuse to give effect to an award of compensation made by that Tribunal in favour of a staff member of the United Nations whose contract of service has been terminated without his assent ?

(2) If the answer given by the Court to question (1) is in the affirmative, what are the principal grounds upon which the General Assembly could lawfully exercise such a right ?"

Whereas certified true copies of the English and French texts of the aforesaid resolution of the General Assembly were transmitted to the Court by a letter of the Secretary-General of the United

*

It has also been contended that the implied power of the General Assembly to establish a tribunal cannot be carried so far as to enable the tribunal to intervene in matters falling within the province of the Secretary-General. The Court cannot accept this contention.

The General Assembly could at all times limit or control the powers of the Secretary-General in staff matters, by virtue of the provisions of Article 101. Acting under powers conferred by the Charter, the General Assembly authorized the intervention of the Tribunal to the extent that such intervention might result from the exercise of jurisdiction conferred upon the Tribunal by its Statute. Accordingly, when the Tribunal decides that particular action by the Secretary-General involves a breach of the contract of service, it is in no sense intervening in a Charter power of the Secretary-General, because the Secretary-General's legal powers in staff matters have already been limited in this respect by the General Assembly.

*

A similar problem is involved in the contention that the General Assembly cannot authorize and the Secretary-General cannot enter into contracts of service which are not in conformity with the Charter. The Staff Regulations are made a part of the contracts of service and No. 11.2 reads as follows :

> "The United Nations Administrative Tribunal shall, under conditions prescribed in its Statute, hear and pass judgment upon applications from staff members alleging non-observance of their terms of appointment, including all pertinent regulations and rules."

It is contended that the incorporation, in the contracts of service, of the right to rely on the Statute of the Administrative Tribunal would conflict with the powers conferred on the General Assembly and on the Secretary-General by the Charter. In view of the foregoing considerations, the Court cannot accept this contention. There can be no doubt that, by virtue of the terms thus incorporated in the contracts of service, and so long as the Statute of the Administrative Tribunal in its present form is in force, the staff members are entitled to resort to the Tribunal and rely on its judgments.

*

In the third place, the view has been put forward that the Administrative Tribunal is a subsidiary, subordinate, or secondary organ ; and that, accordingly, the Tribunal's judgments cannot bind the General Assembly which established it.

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This view assumes that, in adopting the Statute of the Administrative Tribunal, the General Assembly was establishing an organ which it deemed necessary for the performance of its own functions. But the Court cannot accept this basic assumption. The Charter does not confer judicial functions on the General Assembly and the relations between staff and Organization come within the scope of Chapter XV of the Charter. In the absence of the establishment of an Administrative Tribunal, the function of resolving disputes between staff and Organization could be discharged by the Secretary-General by virtue of the provisions of Articles 97 and 101. Accordingly, in the three years or more preceding the establishment of the Administrative Tribunal, the Secretary-General coped with this problem by means of joint administrative machinery, leading to ultimate decision by himself. By establishing the Administrative Tribunal, the General Assembly was not delegating the performance of its own functions : it was exercising a power which it had under the Charter to regulate staff relations. In regard to the Secretariat, the General Assembly is given by the Charter a power to make regulations, but not a power to adjudicate upon, or otherwise deal with, particular instances.

It has been argued that an authority exercising a power to make regulations is inherently incapable of creating a subordinate body competent to make decisions binding its creator. There can be no doubt that the Administrative Tribunal is subordinate in the sense that the General Assembly can abolish the Tribunal by repealing the Statute, that it can amend the Statute and provide for review of the future decisions of the Tribunal and that it can amend the Staff Regulations and make new ones. There is no lack of power to deal effectively with any problem that may arise. But the contention that the General Assembly is inherently incapable of creating a tribunal competent to make decisions binding on itself cannot be accepted. It cannot be justified by analogy to national laws, for it is common practice in national legislatures to create courts with the capacity to render decisions legally binding on the legislatures which brought them into being.

The question cannot be determined on the basis of the description of the relationship between the General Assembly and the Tribunal, that is, by considering whether the Tribunal is to be regarded as a subsidiary, a subordinate, or a secondary organ, or on the basis of the fact that it was established by the General Assembly. It depends on the intention of the General Assembly in establishing the Tribunal, and on the nature of the functions conferred upon it by its Statute. An examination of the language of the Statute of the Administrative Tribunal has shown that the General Assembly intended to establish a judicial body ; moreover, it had the legal capacity under the Charter to do so.

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LA CHARTE DES NATIONS UNIES

Commentaire article par article
sous la direction de

Jean-Pierre COT et **Alain PELLET**

Professeur à l'Université de Paris I (Panthéon-Sorbonne) Ancien Ministre

Professeur à l'Université de Paris-Nord et à l'Institut d'Etudes Politiques de Paris

Secrétaire de la rédaction : **Paul TAVERNIER**
Professeur à l'Université de Grenoble II

Préface de
Javier PEREZ de CUELLAR
Secrétaire général des Nations Unies

Ouvrage publié avec le concours de l'Association française pour les Nations Unies

ECONOMICA
49, rue Héricart, 75015 Paris

BRUYLANT
67, rue de la Régence, Bruxelles 1000

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Maquette de la couverture : **Alain GAZIER**

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tion spécialisée. Placée sous l'égide des Nations Unies, elle entretient avec l'ONU des relations très étroites dans des conditions définies par un accord approuvé par l'*Assemblée générale le* 14 novembre 1957[27].

Le lien est au contraire beaucoup moins net entre l'ONU et des organes créés en vertu de traités conclus sous les auspices des Nations Unies, tel le Conseil international du blé — accord international de 1949 sur le blé, renouvelé —, le Conseil international du café — accord international de 1962 sur le café, renouvelé. Ces organes entretiennent des relations suivies de consultations et de coopération avec les organes appropriés des Nations Unies mais, prévus par accord intergouvernemental, ils ne présentent pas les caractéristiques des organes subsidiaires au sens de l'article 7, paragraphe 2, de la Charte[28].

Les *conditions de suppression* d'un organe subsidiaire sont symétriques des conditions de création : la suppression résulte d'une manifestation de volonté de l'organe principal créateur. De fait, aux Nations Unies, en dehors des organes ayant un mandat limité dans le temps, les suppressions formelles d'organes subsidiaires sont relativement rares. On observe des disparitions par désuétude ou par disparition de l'objet, le mandat ayant été rempli — notamment dans le cas d'organes créés par le Conseil de Sécurité[29].

Fonctions de l'organe subsidiaire

On est frappé par la généralité de la formule de l'article 7, paragraphe 2 : les organes subsidiaires « qui se révèleraient nécessaires pourront être créés conformément à la présente Charte ». C'est avec une formule à peu près analogue que l'Assemblée générale (article 22), le Conseil de Sécurité (article 29) et le Conseil économique et social (article 68) sont invités à créer les organes subsidiaires qu'ils jugeront nécessaires : un champ très large d'appréciation est laissé aux organes principaux dans les limites de la Charte. A la lumière de la pratique suivie et des indications fournies par deux avis importants de la Cour Internationale de Justice, l'avis sur la *Réparation des dommages subis au service des Nations Unies* de 1949 et l'avis sur les *Effets des jugements du Tribunal administratif des Nations Unies* de 1954, il semble que la *théorie des compétences fonctionnelles* de l'organisation fournisse la meilleure explication et de l'étendue et des

27. Contrôle du Conseil de sécurité sur les règles d'emploi des matières fissiles, cf. COLLIARD, *Institutions des relations internationales*, Précis Dalloz, 7ème éd. 1978, n° 673.

28. Pour le détail de ces accords voir Pierre Michel EISEMANN, *L'organisation internationale du commerce des produits de base*, Publications de la Faculté de droit de l'Université René Descartes (Paris V), Bruylant, Bruxelles, 1982 pp. 114 et s. 176 et s.

29. Cf. commentaires de l'article 29 de la Charte. Sur la suppression de la Commission d'observation pour la paix, l'Assemblée prenant acte de ce que cette Commission ne s'était pas réunie depuis 1963 : P. TAVERNIER « L'Année des Nations Unies. Problèmes juridiques », *AFDI* 1983, p. 441.

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UNITED NATIONS

Repertory of Practice of United Nations Organs

VOLUME I

Articles 1-22 of the Charter

NEW YORK, 1955

parent organ and another principal organ. For example, the office of the High Commissioner for Refugees, a subsidiary organ of the General Assembly, has been required to report to the Assembly through the Economic and Social Council and to follow policy directives laid down by the Assembly or by the Council.

f. DURATION

20. Some subsidiary organs, such as the Advisory Committee on Administrative and Budgetary Questions, have been established on a "permanent" or standing basis, without indication of duration. They continue in existence indefinitely, unless specifically abolished. The sessional committees, for example the Main Committees of the General Assembly and the committees of the Economic and Social Council function during the sessions of the principal organ concerned. Frequently, subsidiary organs are created on an ad hoc basis, for a limited time or for the accomplishment of a particular purpose, and are generally required to report to the principal organ concerned at a subsequent session.

3. Common features

21. Despite the wide range of differences, there appear to be some features common to all subsidiary organs. These are:

(a) A subsidiary organ is created by, or under the authority of, a principal organ of the United Nations;

(b) The membership, structure and terms of reference of a subsidiary organ are determined, and may be modified by, or under the authority of, a principal organ;

(c) A subsidiary organ may be discontinued by, or under the authority of, a principal organ.

B. Organs established by treaty

22. There are examples of organs existing within the framework of the United Nations, which have some features differentiating them from the subsidiary organs mentioned in the preceding paragraphs. These include the Permanent Central Opium Board (PCOB), [26] the Drug Supervisory Body, [27] and the International Bureau for Declarations of Death. [28] The Appeals Committee, to be established when the Opium Protocol of 1953 [29] comes into force, will be a similar organ. The PCOB and the Drug Supervisory

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[26] Established by the Agreement Concerning the Manufacture of, Internal Trade in, and use of Prepared Opium signed on 11 February 1925, as amended by the Protocol of 1946 approved by General Assembly resolution 54 (I) (United Nations Publication, Sales No.: 1950.V.1).

[27] Established by the International Convention for Limiting the Manufacture and Regulating the Distribution of Narcotic Drugs, signed on 13 July 1931, as amended by the Protocol of 1946 approved by General Assembly resolution 54 (I).

[28] Established by the Secretary-General under the terms of the Convention on the Declaration of Death of Missing Persons, signed on 6 April 1950 (United Nations Publication, Sales No.: 1950.V.1).

[29] Protocol for Limiting and Regulating the Cultivation of the Poppy Plant, the Production of International and Wholesale Trade in, and Use of Opium, signed on 23 June 1953 (United Nations Publications, Sales No.: 1953.XI.6).

Body have been considered as "organs of the United Nations" for the purpose of General Assembly resolution 774 (VIII), 30/ and they appear to have been regarded as "other organs", as distinguished from "subsidiary bodies", in General Assembly resolution 875 C (IX).

23. While the subsidiary organs referred to in the section entitled "Nature of subsidiary organs" of the present study have been created by decision of an organ of the United Nations, the bodies referred to in this section have been established by, or under the authority of, a treaty. They differ, therefore, from the above-named subsidiary organs in that their terms of reference, having been laid down by treaty, cannot be modified by a principal organ of the United Nations. On the other hand, they are generally subject to the administrative procedures of the United Nations. For example, their expenses are included in the budget of the United Nations, their staffs are appointed by the Secretary-General 31/ and, in this sense, they may be considered as part of the Organization.

30/ See also G A (VIII), Annexes, a.i. 68, p. 2, A/2516, para. 9. It should also be noted that, before the establishment of the United Nations, the PCOB had apparently been regarded as an organ of the League of Nations. (See League of Nations document O.C. 669 of 1 October 1927, Advisory Committee on Traffic in Opium and other Dangerous Drugs, Report of Sub-Committee on the relations of the Advisory Committee and the Central Board.)

31/ In the case of the PCOB, the secretary and staff are appointed by the Secretary-General on the nomination of the Board and subject to the approval of the Economic and Social Council (article 20 of the Convention of 1925 as amended by the Protocol of 1946). The secretariat of the PCOB acts also as secretariat of the Drug Supervisory Body.

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REPERTOIRE
OF THE
PRACTICE
OF THE
SECURITY COUNCIL
1946-1951

NEW YORK, 1954

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sinister about this word. If it means strict compliance with the Council's decision, I cannot see that it has any pejorative sense."

At the 137th meeting on 22 May, the representative of Syria expressed the view that, since it had not been instructed to that effect by the Security Council, the Commission of Investigation should not have established "new terms of reference or a new form of mandate for the Subsidiary Group". The composition of both investigating bodies being identical, the Subsidiary Group should have been given "all the authority which it should have had to continue its examination and investigation under the same mandate which was assigned to the Commission . . ."[45]

The USSR draft resolution was put to the vote at the 137th meeting on 22 May, and was rejected, having failed to obtain the affirmative votes of 7 members. There were 2 votes in favour, 6 against and 3 abstentions.[46]

D. CONSIDERATION OF THE PROCEDURE OF MODIFICATION OF TERMS OF REFERENCE

Case 70

At the 394th meeting on 28 December 1948, in connexion with the Palestine question, the representative of the United Kingdom submitted a draft resolution concerning the maintenance of the truce and, more especially, a cease-fire in Southern Palestine. This draft resolution included a provision that the Security Council:[47]

"Instructs the Committee of the Council appointed on 4 November[48] . . . to consider the situation in Southern Palestine and to report to the Council on the extent to which the Governments concerned have . . . complied with the present resolution".

At the 396th meeting on 29 December 1948, the representative of the USSR stated:

"It should be added that the Committee was created exclusively as an advisory organ, for the sole purpose of being consulted by the Mediator in the event of the Mediator feeling the need of such consultation . . . Consideration of the situation in Southern Palestine, like the consideration of the Palestine question as a whole, is the function and prerogative of the Security Council. The proposal, therefore, that the Committee should resume its work and that new members should be added to it, not only has no legal basis but is devoid of any practical sense."

The representative of France proposed to call upon the Governments concerned to implement also the Security Council resolution of 16 November 1948, regarding immediate establishment of an armistice, and to ask the Committee "to report . . . on the way in which . . . the injunctions to implement the two resolutions—had been put into practice".

He considered that, as the Security Council "was entitled to define the original functions, it is obviously also entitled to alter them".

In opposing the French amendment, the representative of the USSR stated:

"... Mr. Parodi said that the Security Council could assign any functions to the Committee of the Security Council on Palestine. This is, of course, true, but it is altering the constitution of the Committee itself" *[which would]* "no longer be an advisory committee, but a committee with entirely new functions. Hence a new constitution and new rules will have to be drawn up for it . . . In view of the fact that the Security Council itself will have to deal with the Palestine problem, is there any point in setting up a special committee on this problem, when we already have a Conciliation Commission?"

The representative of France replied:

"I do not think that my position is incompatible with that of the USSR representative. The text we are considering concerns the period before the Commission established by the General Assembly begins to function. We are still in a period during which we admit that the Mediator retains his powers, and during which, consequently, the Committee we had established to advise him still exists. In these circumstances, it seems to me that we can quite well instruct the Committee to bear in mind the implementation of the 16 November resolution as well as that of the 4 November resolution."[49]

E. CONSIDERATION OF THE PROCEDURE OF TERMINATION

Case 71

At the 133rd meeting on 12 May 1947, in connexion with the Greek frontier incidents question, the draft resolution submitted by the representative of the USSR included the provision that "the Subsidiary Group will cease its activity with the liquidation of the Commission itself".[50]

At the 135th meeting on 20 May, the representative of the United States in this connexion stated:

"... the United States delegation never had any idea other than that the Subsidiary Group would cease its activity with the liquidation of the Commission itself . . . Nowhere is it precisely stated when the Commission will cease to exist, but common sense would seem to suggest that the Council may declare that the Commission is no longer in existence, once it has received its report and taken a final decision. At that time, unless the Council has in the meanwhile taken other action of an affirmative nature, the Subsidiary Group will automatically cease to exist."

At the 136th meeting on 22 May, the representative of the United Kingdom stated:

". . . A subsidiary group dies with the parent organization but, in our view, death does not occur until the Council liquidates the parent . . . If we say that the Subsidiary Group dies with the Commission of Investigation, that cannot, of course, limit in any way the right of the Council to continue its existence or to substitute something similar in its place, if it should wish to do so."

[45] 137th meeting: p. 911.
[46] 137th meeting: pp. 924-925.
[47] 394th meeting: p. 14.
[48] See Case 63.

[49] For texts of relevant statements see:
396th meeting: France, pp. 11-12, 22; USSR, pp. 7, 21-22; United Kingdom, p. 18. For the decision of the Council see Case 63.

[50] 133rd meeting: p. 832. For draft resolution referred to in this case, see chapter X, Case 12. For establishment of the Subsidiary Group, see Case 2.

The representative of France stated:

"In regard to the duration of the Subsidiary Group, it is quite evident that it cannot exceed that of the Commission, since the Group was created by the Commission in conformity with the provisions of its terms of reference. The powers of the Subsidiary Group will therefore expire at the same time as those of the Commission ... After the dissolution of the Commission, the Council may establish any other supervisory group it may think necessary."

The representative of Poland stated:

"... It is quite understandable that the Subsidiary Group cannot live longer than the Commission from which it draws its power and mandate. Practically all the representatives have agreed on that ..."[51]

At the 188th meeting on 19 August, after the Council had rejected the United States draft resolution based on the report of the Commission of Investigation, the President (Syria) referred to the resolution of the Council authorising the Subsidiary Group to fulfil certain functions "pending a new decision of the Security Council", and stated:

"... Unfortunately, the Security Council has failed up to this point to take any decision in that respect. I therefore have no alternative but to conclude that the Subsidiary Group will continue to exist and to exercise the same duties and functions which were assigned to it by the previous resolution."

The representatives of Poland and the USSR opposed this interpretation, and the latter stated that the tasks of the Commission and the Subsidiary Group having been exhausted, they must be considered dissolved and non-existent.

The representative of the United Kingdom, objecting to the statement by the representative of the USSR, stated that both subsidiary organs "can be terminated only by an affirmative decision of the Council".

The representative of the United States stated:

"I entirely support the President's ruling that the Group and the Commission should remain in existence until the Council takes affirmative action."

At the 202nd meeting on 15 September 1947, the representative of the United States in submitting a draft resolution, under Article 12 of the Charter, to request the General Assembly to consider the dispute and to make recommendations, stated that such a procedure would avoid the necessity of terminating the Commission of Investigation or its Subsidiary Group on the spot. The draft resolution was rejected by 9 votes in favour and 2 against, one vote against being that of a permanent member.[52]

The representative of the United States thereupon introduced another draft resolution to remove the question from the list of matters of which the Security Council was seized. There could be no doubt, he observed, that in taking such a decision the Council would be destroying the Commission and its Subsidiary Group.[53]

At the same meeting, the United States draft resolution was adopted.[54]

The Greek question was accordingly removed from the list of matters and the Commission of Investigation terminated.

[51] For texts of relevant statements see:
135th meeting: United States, p. 873.
136th meeting: France, p. 905; Poland, p. 909; United Kingdom, p. 898.

[52] 202nd meeting: pp. 2399-2400.

[53] For texts of relevant statements see:
188th meeting: President (Syria), p. 2100; Poland, pp. 2100-2101; USSR, pp. 2099, 2100; United Kingdom, p. 2099; United States, p. 2101.
202nd meeting: United States, pp. 2369, 2401-2402.

[54] 202nd meeting: p. 2405.

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analogous procedure had been originally foreseen; however, the Council later decided to enlarge the membership to five; in addition to the two members respectively selected by the parties, the Council appointed two others, the fifth member being nominated by the President of the Council, upon a special authorization given to him by the Council.

23. The subsidiary organs have usually been composed of representatives of States. However, in certain cases, the members were appointed in their personal capacity. Such has been the case for the United Nations Representative for India and Pakistan.

24. Field commissions have usually adopted their own rules of procedure. The Commission of Investigation concerning Greek Frontier Incidents and its subsidiary body largely followed the rules of procedure of the Security Council. The Committee of Good Offices on the Indonesian Question decided first that no formal rules of procedure were necessary but later found it desirable to adopt a provisional guide for the conduct of business.

25. All the subsidiary organs in the field established by the Security Council have been required, under their terms of reference, to report to the Council. While some of the organs established by the General Assembly have been requested to report also to the Security Council, none of the organs established by the Security Council has been requested to report to any other United Nations organ. No firm pattern with regard to the form or frequency of reporting has developed; this aspect has depended on the circumstances. Sometimes the Council has requested submission of progress or interim reports apart from the final report of the organ concerned. The Commissions have also on occasion found it necessary to send special reports to the Security Council regarding matters requiring the immediate attention of the Council.

26. Cessation of function without formal termination by the Security Council has taken place in three instances: (1) the Consular Commission at Batavia which ceased to function after the Commission for Indonesia had reported on 3 April 1951 that the services of the military observers, which had been provided by the Consular Commission, would no longer be required after 6 April 1951; (2) the United Nations Commission for Indonesia, which stated in its last report, dated 3 April 1951, that since no items remained on its agenda, it had decided to adjourn sine die, while holding itself at the disposal of the parties; (3) the Truce Commission for Palestine, which ceased to function after the General Assembly, by resolution 194 (III) of 11 December 1948, had established the Palestine Conciliation Commission and had instructed this Commission to undertake, upon the request of the Security Council, any other functions then assigned to the Truce Commission by resolutions of the Council.

27. Four subsidiary organs have been terminated by formal decision of the Security Council. These were: (1) the Commission of Investigation concerning Greek Frontier Incidents and (2) its subsidiary group, which were terminated at the 202nd meeting on 15 September 1947, when the Council adopted a draft resolution submitted by the United States by which the question was removed from the list of matters of which the Security Council was seized; (3) the Committee of Good Offices on the Indonesian Question, which was terminated at the 406th meeting on 28 January 1949, when it became known as the United Nations Commission for Indonesia and received expanded terms of reference; (4) the United Nations Commission for India and Pakistan which was terminated on 17 May 1950, after the Security Council, at the 470th meeting on 14 March 1950 had decided to appoint a United Nations Representative for India and Pakistan and to terminate the Commission one month after both parties had informed the United Nations Representative of their acceptance of the transfer to him of the powers and responsibilities of the United Nations Commission.

28. In annex II a tabulation of the various occasions on which proposals for the establishment of commissions and similar subsidiary organs in the field have been