068 SCSL-2003-09-PT 1055

(1055 - 1073)

IN THE SPECIAL COURT FOR SIERRA LEONE
TRIAL CHAMBER

Before: Judge Bankole Thompson-Presiding Judge
Judge Pierre Boutet
Judge Mutanga Itoe

Registrar: Mr Robin Vincent

Date filed: 6th November 2003 **Case No. SCSL 2003-09-PT**

The Prosecutor Against:

AUGUSTINE GBAO

Preliminary Motion on the Invalidity of the Agreement Between the United Nations and the Government of Sierra Leone on the establishment of the Special Court of Sierra Leone

---

Office of The Prosecutor

Mr David Crane
Mr Desmond de Silva, QC, Deputy Prosecutor
Mr Luc Cote, Chief of Prosecutions
Mr Walter Marcus-Jones
Mr Christopher Staker
Mr Abdul Tejan-Cole

For Mr Augustine Bao

Mr Girish Thanki
Professor Andreas O'Shea
Mr Kenneth Carr

1056

Invalidity through incapacity of the United Nations, through the Secretary-General, to conclude a treaty on the establishment of an international criminal court

1. The responsibility for the maintenance of international peace and security falls squarely within the primary responsibility of the Security Council of the United Nations.[1] By entrusting the Secretary-General to conclude a treaty with the government of Sierra Leone for the creation of a new international organisation with a separate legal personality, it is submitted that the Security Council has unlawfully delegated and transferred the responsibility of the United Nations as guardian of international peace to another body which does not fall under the direct control of the United Nations.

2. This new body, unlike the United Nations or one of its subsidiary bodies does not enjoy the direct blessing of the international community of states as a whole. Furthermore, it does not fall under the direct control or responsibility of the United Nations, and does have the direct blessing of the international community of states;

3. International law only operates through the consent of states. The member states of the United Nations have consented to a specific system and balance of power for the maintenance of international peace and security and the enforcement of international obligations in this regard. By creating a separate international organisation, and therefore removing the Court from the direct control and supervision of the United Nations, the Secretary General of the United Nations has unlawfully derogated from the envisaged system for the maintenance of international peace and security as envisaged by the members of the United Nations under the Charter of the United Nations;

---

[1] See Article 24 of the United Nations Charter.

4. Further, the United Nations, as an international organisation, while it has the power to conclude international agreements, it does not possess the power to create new international organisations through the conclusion of an international agreement, as the sovereign state power to create new international organisations with separate legal personalities falls within the exclusive jurisdiction of states. It is submitted that all international law and international legal persons are created and recognised by the international community of states, from which their legitimacy on the international plane is drawn. In so far as it could be argued, which is not admitted, that international organisations have the power to create new international organisations through treaties, it is nevertheless clear that such power would not extend to the exercise of criminal jurisdiction which falls within the preserve of sovereign states unless states have manifested a very clear intention to transfer that power to a particular international organisation.

Invalidity by virtue of Sierra Leone's renunciation of sovereign power to establish an international criminal court

5. The creation of an international criminal court is the prerogative of states. An international criminal court constitutes the joint and collective exercise of the sovereign jurisdiction that the states creating that court possess already individually. So, an international criminal court can only exercise jurisdiction when the states that have created the court already possess such sovereign power.

6. The prosecution of international crimes is a customary right. A state can voluntarily renounce a right or area of sovereign jurisdiction that it otherwise possesses. By agreeing to article IX of the Lome Accord of 1999, the state of Sierra Leone had voluntarily renounced its right to prosecute international crimes under international law and thereby lost its capacity to conclude a treaty to exercise sovereign power, which it no longer possessed.

Invalidity by virtue of fraud, perfidy or error

7. A treaty concluded as a result of a fundamental error, either by virtue of the fraud of one party to the treaty or where there has been no negligence on the part of the other party leads to the invalidity of that treaty.[2]

8. In the conclusion of the Special Court Agreement on 16th January 2002, the government of Sierra Leone failed to give full disclosure to the United Nations, the other party to the treaty. In particular, it failed to disclose to the United Nations that it and the ECOWAS states continued to represent expressly and or impliedly to the RUF, right up to the time of final disarmament on 14th January 2002, that the Lome Accord continued to apply and that its members would not be punished for crimes under international law.

9. Had the United Nations been fully appraised of the manner in which the RUF was being tricked into laying down its arms, it is fair to assume that the United Nations would not have been party to such a trick. The treaty was therefore concluded through a fraud on the United Nations or alternatively through an error for which the United Nations bore no responsibility and the treaty is consequently invalid.

10. Further, the express and or implied representations made to the RUF by the government of Sierra Leone itself and through the innocent conduit of ECOWAS states amounted to a fraud or perfidy on the RUF vitiating the treaty establishing the Special Court for Sierra Leone.

Girish Thanki
Andreas O'Shea
Kenneth Carr

[2] McNair, *The Law of Treaties*, 211-213

Index to Authorities

Preliminary Motion on the Validity of the Agreement Between the United Nations and the Government of Sierra Leone on the establishment of the Special Court of Sierra Leone

bargaining and which one of the parties would much like to have avoided.

2. *Mistake, including Mistake induced by Fraud*

There is general agreement amongst writers that a treaty concluded as the result of a fundamental mistake induced in one party, either by circumstances involving no negligence on its part or by the fraud of another party, is void, or at any rate voidable, by that party. The mistake induced must go to the root of the transaction and be such that but for its existence the party misled would not have entered into the transaction. Lord Sumner stated in *The Blonde*[1] that '*consensus ad idem* is fundamentally necessary to an international agreement, as it would be to a private offer and acceptance under municipal law'. It is, however, not easy to find much direct arbitral or judicial authority on the matter. In my *Law of Treaties*, 1938 (pp. 131–2) reference is made to an inconclusive incident arising from an alleged mistake in a map used during the negotiation of a treaty.[2]

A Report of 3 April 1871, by Collier, Coleridge, and Twiss, upon a question relating to the boundary between the United States of America and Canada, contains the following observation:

> We however so far agree with the Canadian Government, considering the character of the report [prepared by the Boundary Commissioners appointed under the Treaty of Ghent] and of the reference to the map, as to think that the map can only be referred to as illustrating the report, and that if the report and the map should be found in any particular at irreconcilable variance, the report must prevail.[3]

[1] [1922] 1 A.C. 313, 321. References to the effect of mistake occur in two Awards made in arbitrations to which Great Britain was a party, which are printed in Hertslet, *Map of Africa by Treaty* (3rd ed., 1909), pp. 895, 898, and 997. See also the following brief *Extract from a Report by the King's Advocate (later Lord Stowell) dated December 26, 1797* (F.O. 83. 2364): 'I am of opinion that His Majesty is fully justified in making a demand to the Court of Spain that the Crew of the *Hermione* shall be given up to be proceeded against as murderers and Pirates; the terms under which they enjoy a present Protection having been granted, as is to be supposed, under Ignorance of those Circumstances which, if known, would have rendered such Stipulations unlawful, or at least being, in point of authority, merely conditions on the Part of the Governor and subject to the control of his own Government in Europe.'

[2] The incident is dealt with in detail by Temperley in 4 *Journal of Modern History* (1932), pp. 534 et seq.

[3] Some discussion upon the relevance of the accuracy of maps in the conclusion of a treaty will be found in Moore, *International Adjudications*, Modern Series, i and ii, St Croix River Arbitration.

In the *Mavrommatis Palestine Concessions* (*Merits*) case before the Permanent Court we find the United Kingdom Government in its counter-case putting forward the following proposition of law as to the effect of mistake—not, it is true, in the conclusion of a treaty but in the making of a concessionary contract between a Government and an individual:[1]

> . . . M. Mavrommatis is described in the concessions as an Ottoman subject [which he was not] and . . . he obtained them in that character. It is plain on the face of the documents that the Turkish Government granted him the concessions on that understanding and subject to that condition. The contracts were based on a mistake, and this alone would, it is submitted, be sufficient to render the concessions void *ab initio*.

Again in its Rejoinder[2] the United Kingdom stated that

> the two Parties were not *ad idem* inasmuch as the Turkish authorities thought they were granting the concessions to an Ottoman subject. . . .

The court observed that

> Since the identity of the person has never been in any doubt, the error can only relate to one of the attributes of the concessionnaire. The absolute nullity of the concessions would appear to be excluded; their liability to annulment depends on the question whether Ottoman nationality was considered as a condition of the grant of the concessions. . . .

Thereupon the court came

> to the conclusion that the reference to M. Mavrommatis as an Ottoman subject in the agreements concerning the Jerusalem concessions, is not intended to represent a condition on which the grant of the concession is dependent and that, therefore, the fact that M. Mavrommatis is not an Ottoman subject cannot involve the validity of the concession. The concessions must therefore be regarded as valid and definitively acquired . . ..[3]

an opinion which, whether the construction of the particular instrument is right or wrong, is in harmony with the principles of the common law; in short, the mistake was not an essential one.

It may be mentioned that British courts, in dealing with a class of agreement lying outside the strict sphere of international law but has much in common with it, namely, treaties and contracts with, and grants and concessions from, native chiefs, have enunciated doctrines which may in course of time find a place in the corpus of international law. In these cases it frequently becomes necessary to inquire, 'What did the native chief understand by his grant? Did he fully realize what he was doing?' Thus in *Cook* v. *Sprigg*[4] attention is drawn by the Privy Council

[1] Ser. C, No. 7, ii, p. 212. [2] Ibid., p. 326. [3] Ser. A, No. 5, pp. 30, 31.
[4] [1899] A.C. at p. 578.

[redacted]

'IES

'erits) case before
ngdom Govern-
llowing proposi-
it is true, in the
ncessionary con-
al:[1]

ions as an Ottoman
n in that character.
urkish Government
and subject to that
ıd this alone would,
s void *ab initio*.

om stated that

Turkish authorities
ttoman subject. . . .

doubt, the error can
ınaire. The absolute
led; their liability to
man nationality was
ions. . . .

matis as an Ottoman
n concessions, is not
ıt of the concession is
avrommatis is not an
concession. The con-
ıitively acquired . . ..[3]

ı of the particular
with the principles
as not an essential

in dealing with a
ere of international
y, treaties and con-
, native chiefs, have
of time find a place
cases it frequently
native chief under-
hat he was doing?'
y the Privy Council
Ser. A, No. 5, pp. 30, 31.

to a finding of fact by the court below that Sigcau, paramount chief of Pondoland, 'understood perfectly well that he was purporting to grant such rights as the instruments which he executed professed to convey'. And in the *Southern Rhodesia* case before the Privy Council in 1918 Lord Sumner remarked, somewhat caustically, that:[1]

> Private concessions of large extent and of ambitious character, when obtained by white financiers from untutored aborigines, are generally and justly objects of close scrutiny, but their Lordships are relieved from the duty of inquiring into the circumstances under which this grant was made by the fact that competent officials reported to the High Commissioner, after making full inquiry under his direction, that the concession had been properly obtained and that its terms correctly expressed Lobengula's intentions and exactly reflected his understanding of the matter. This is a testimony to his enlightenment and acumen, which perhaps goes beyond what might have been supposed. . . .

Mistake was also touched upon in the *Legal Status of Eastern Greenland* case where it was suggested that the Norwegian Minister, Mr. Ihlen, was under some misapprehension as to the consequences of the declaration which he was asked by the Danish Minister to make and did in fact make. The Permanent Court found[2] that he must have foreseen the action which would be taken by Denmark as the result of his declaration. The point is rather more specifically discussed by Judge Anzilotti in his Dissenting Opinion (which was against Denmark), where he expressed the opinion[3] that there was no mistake at all and that, even if there was, 'this mistake was not such as to entail the nullity of the agreement. If a mistake is pleaded it must be of an excusable character; and one can scarcely believe that a Government could be ignorant of the legitimate consequences[4] following upon an extension of sovereignty.'

3. *Incompatibility or Conflict with Rules of International Law or Treaty Obligations*[5]

It is difficult to imagine any society, whether of individuals or of States, whose law sets no limit whatever to freedom of

[1] [1919] A.C. at p. 236; other references could be given.
[2] Ser. A/B, No. 53, at pp. 71–72. See above, p. 9. [3] At p. 92.
[4] There can be no doubt that this Opinion was written in French; *legal consequences* seems to be a better rendering of *conséquences légitimes*.
[5] For invalidity by reason of non-compliance with constitutional requirements, see Ch. II.

substantial differences of opinion as to details.[27] Proposals for the suitable size of the SC range mo between 21 and 25 seats. Germany and Japan are widely expected to fill a permanent seat, but there are further uncontested candidates for this category from Africa, Asia or Latin America. It is also disput whether the new permanent members should enjoy the same status as the existing ones (especially the ri of veto). Also the principles of the election process for non-permanent members are not yet settled.

25 On November 23, 1998, the GA[28] decided not to pass any resolution or decision on the subject of the S reform without the affirmative vote of two-thirds of the GA members. This resolution marked a major back for the reform process by establishing a further procedural hurdle in addition to the requirement Art. 108 of the Charter.

27 For detailed accounts see *ibid.*, pp. 382 *et seq.*, Winkelmann, *supra*, fn. 14, pp. 51 *et seq.*; Fassbender, B., *UN Security Council R and the Right to Veto. A Constitutional Perspective* (1998), pp. 221 *et seq.*

28 GA Res. 53/30, Nov. 23, 1998.

FUNCTIONS AND POWERS

ARTICLE 24

(1) In order to ensure prompt and effective action by the United Nations, its Members confer on th Security Council primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility the Security Council acts on their behal

(2) In discharging these duties the Security Council shall act in accordance with the Purposes and Principles of the United Nations. The specific powers granted to the Security Council for the dischar these duties are laid down in Chapters VI, VII, VIII, and XII.

(3) The Security Council shall submit annual and, when necessary, special reports to the Genera Assembly for its consideration.

UN MATERIALS

'Draft Constitution of an International Organisation of July 14, 1943', in US Dept. of State (ed.), *Postwar Forei Preparation 1939–1945*, Publication 3580 (1950), 477–83.

'Draft Charter of the United Nations of August 14, 1943', *ibid.*, 526–32.

'Plan for the Establishment of an International Organisation for the Maintenance of International Peace and of December 23/29, 1943', ibid., 576–81.

'Possible Plan for a General International Organisation of April 29, 1944', *ibid.*, 582–91.

'Tentative Proposals for a General International Organisation of July 18, 1944', *ibid.*, 595–606.

'Dumbarton Oaks Proposals for the Establishment of a General International Organisation of October 7 Dept. of State (ed.), *Dumbarton Oaks Documents on International Organisation*, Publication 2257 (194

Wellens, K. C. (ed.), *Resolutions and Statements of the United Nations Security Council: A Thematic Guide*, I–II (1

TABLE OF CONTENTS

SELECT BIBLIOGRAPHY

Bedjaoui, M., *Nouvel ordre mondial et contrôle de la légalité des actes du Conseil de Sécurité* (1994).
Dahm, G., *Völkerrecht*, ii (1961).
Delbrück, J., 'Peace-keeping by the United Nations and the Rule of Law', in *Declarations on Principles: A Quest for Universal Peace* (Akkermann, R. J./van Krieken, P. *et al.* eds., 1977), 73–99.
Dicke, K., 'National Interest v. the Interest of the International Community: a Critical Review of Recent UN Security Council Practice', *New Trends in International Lawmaking: International 'Legislation' in the Public Interest* (Delbrück, J. ed., 1997).
Fassbender, B., *UN Security Council Reform and the Right of Veto: A Constitutional Perspective* (1998).
Ferencz, Benjamin B., *New Legal Foundations for Global Survival: Security through the Security Council* (1994).
Goodrich, L. M., 'The UN Security Council' in *The United Nations: Past, Present, and Future* (Barros, J. ed., 1972), 16–63.
Herndl, K., 'Reflections on the Role, Functions and Procedures of the Security Council of the United Nations', *Rec. des Cours* (1987–IV), 289–396.
Higgins, R., 'The Place of International Law in the Settlement of Disputes by the Security Council', *AJIL* 64 (1970), 1–18.
—— 'The Advisory Opinion on Namibia: Which UN Resolutions are Binding under Article 25 of the Charter?', *ICLQ* 21 (1972), 270–86.
Hiscocks, R., *The Security Council: A Study in Adolescence* (1973).
Jiménez de Aréchaga, E., 'United Nations Security Council', *EPIL* IV, 1168–72.
Klein, E., 'Paralleles Tätigwerden von Sicherheitsrat und Internationalem Gerichtshof bei friedensbedrohenden Streitigkeiten. Zu Fragen der Zuständigkeit und Organtreue', in *Essays in Honour of Hermann Mosler* (Bernhardt, R./Geck, W. K. *et al.* eds., 1983), 467–91.
Prandler, A., 'Competence of the Security Council and the General Assembly', in *Questions of International Law* (Haraszti, G. ed., 1978), 153–72.
Schwebel, Stephen M., 'The Roles of the Security Council and the International Court of Justice in the Application of Humanitarian Law', *NYUJ of Int'l. L & Pol.* 27 (1995), 731–59.
Suy, E., 'Some Legal Questions Concerning the Security Council', in *Festschrift Schlochauer* (v. Münch, J. ed., 1981), 676–89.
Welles, S., *Seven Decisions that Shaped History* (1950/51).
Wood, M. C., 'The Interpretation of Security Council Resolutions', *Max Planck UNYB* 2 (1998), 73–95.

A. Historical Background

The San Francisco Conference of 1945 was not the first occasion when the status and function of the SC in 1
the general context of the organizational structure of the UN—especially *vis-à-vis* the Plenary organ of the organization, the GA—and the definition in detail of the functions and powers of the SC were the object of extensive discussions. Already in the early planning stages in the establishment of a new international organization for the maintenance of international peace and for securing close international co-operation economic, social, and cultural matters, the problem of how to organize an effective executive organ and delineate the functions and powers of such an executive organ *vis-à-vis* those of the Plenary organ consisting of all the members of the future organization had been thoroughly discussed. In the course of the discussions, a number of fundamental considerations, in some cases contradicting one another, were of prime concern. In view of the dominant position held by the Great Powers among the 'United Nations at war with the Axis Powers',[1] they were determined to obtain a preponderant position in the future organization commensurate with their primary responsibility for the maintenance of peace, which they had already shared which was considered to be indispensable in the future as well. Consequently, some proposals provided for membership by the Great Powers (United States, United Kingdom, the Soviet Union, China, and France) within an executive organ, while other proposals called for at least a legally and politically

[1] The term 'United Nations' refers to those States which found themselves at war with the Axis Powers and which, on January 2, 1942, confirmed by their signatures the Declaration of the United Nations already signed by the United States, the Soviet Union, the United Kingdom and the Republic of China; see RM, pp. 50 *et seq.* and Grewe/Khan on Drafting History MN 30 *et seq.*

privileged status for the Great Powers.[2] On the other hand, the medium and smaller powers within the UN group were critical of such privileged status for the Great Powers. Articulating the interests of all the other States of their size, they demanded the widest possible participation of all States in decision-making on the future world order as a whole, as well as the need for them to have a voice in the resolution of individual crises. In pursuing these demands, these States argued on the basis of the principle of the equality of States and the realization of the ideal of democracy in international relations.[3] If one looks for the underlying reasons for these differences in the political stances taken by the Great Powers on the one hand, and by the medium and small States on the other, one is referred to the still unresolved problem of the tension between the preservation of national sovereignty and the subjection of individual States' decision-making power to an international authority responsible for the maintenance of international peace and empowered to render binding decisions. In the course of the discussions, it was finally agreed as a guiding principle that in the new Organization there should be a link between the special responsibility of the Great Powers for the fulfilment of the Organization's functions and the privileged position of these powers, and a corresponding relationship between the scope of the decision-making competence and the voting procedure applied in taking decisions.

2 The result of these discussions during the early drafting period and at the San Francisco Conference was to charge the SC with the primary responsibility for peace and international security (Art. 24), giving a secondary or co-responsibility for peace and security to the GA within the framework of its general powers to debate and make recommendations (Art. 10). This result was basically already shaped in a verbal compromise during the Dumbarton Oaks negotiations,[4] and was accepted by the San Francisco Conference against considerable opposition from the medium and smaller powers,[5] and after a prior agreement between the Great Powers (United States, Soviet Union, and United Kingdom) at the Yalta Conference on the voting procedure.[6] This result of the negotiations may only be regarded as a verbal compromise, since the provisions of the UN Charter on the status, function, and responsibilities of the SC, and the Great Powers within it, at least in their relation to the GA, by no means proved to be final. This outcome was due to the fact that the process of shifting responsibility in the field of maintaining international peace and security from the executive to the Plenary organ and back, which could be observed during the negotiations on the Charter, continued after 1945. In the course of these post-1945 developments, it became evident, however, that the distribution of powers between the SC and the GA as provided for by the Charter was inoperative because of the political situation in the post-war period, and particularly because of the East–West conflict and the rapid increase in membership which began in 1955–60. It was also clear, however, that this distribution of powers could not be changed in principle. Thus, after an initial period in which the SC functioned properly according to the Charter provisions, by the beginning of the 1950s and with the intensification of the East–West conflict the GA had begun to take on the leading role within the Organization with regard to the maintenance of international peace and security. The SC proved to be inoperative because of the frequent use of the veto right by its permanent members. The number of sessions held by the SC declined drastically between 1955 and 1960, which was a clear indication of the shifting of the exercise of the responsibility for the maintenance of peace from the SC to the GA.[7] Attempts at giving this *de facto* development a permanent legal basis—for example, by means of the Uniting for Peace Resolution[8]—were unsuccessful.[9] Thus, with

2 See US Dept. of State (ed.), *Postwar Foreign Policy Preparation 1939–1945*, Publication 3580 (1950), *passim*; RM, pp. 1[illegible] (Roosevelt's 'Four Policemen Concept') and *passim*.

3 The medium and smaller States were able to articulate this position only at the San Francisco Conference: see UNCIO III, pp. [illegible] IX, pp. 233–4. These thoughts had already been expressed, however, during the earlier planning activities, particularly by US Secretary of State Cordell Hull, but also by the British Government, see RM, p. 165; Welles, pp. 187 *et seq.*; Schaefer, M., *Die Funktionsfähigkeit des Sicherheitsmechanismus der Vereinten Nationen* (1981), pp. 28 *et seq.*

4 RM, pp. 411 *et seq.*

5 See references in *supra*, fn. 3.

6 RM, pp. 497 *et seq.*, 531 *et seq.*

7 Prandler, pp. 153 *et seq.*

8 GA Res. 377 (V), Nov. 3, 1950.

9 Goodrich, pp. 43 *et seq.*

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

3 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.

4 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

[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 member 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), in Art. 101(3), the less ambiguous term 'paramount' was not used.

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', which go beyond those of the GA, are, for instance, the right of the SC—when dealing with disputes—to make decisions which are binding upon the member States (Art. 25), and particularly the exclusive right of the

16 The conflict between these two fundamentally different interpretations came to the fore, for example, in the discussions of the S... 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 Internati... Criminal Tribunals for the former Yugoslavia and Rwanda, see Sarooshi, D., 'The Legal Framework Governing United Nations Subsidi... Organs', *BYIL* 67 (1996), pp. 422 *et seq.*; *id.*, 'The Powers of the United Nations International Criminal Tribunals', in *Max Planck UN...* (1998), pp. 143 *et seq* (fn. 7); see also *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West A... 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 1... a discussion of whether a literal, restrictive interpretation of Art. 24 is appropriate in a historical and doctrinal perspective, s... CP/Degni-Segui (2nd edn.), pp. 458 *et seq.*

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

s the organ charg...ith the primary responsibility for the maintenance of peace, the SC does not enjoy 9
priority of any kind ov...e ICJ.[21] Such priority could be conceivable considering the fact that, according to the will of the authors ...e Charter, the UN was perceived as a predominantly political Organization. The alleged legalism of the L...e of Nations was clearly to be rejected, and a political instrument for the preservation of peace—though ... within the bounds of international law[22]—was to be created. Its foundation was to rest on the potentia...itical power of the Great Powers,[23] which is reflected in the structure of the SC where the Great Powers en... privileged position. Following this concept, the very fact that the primary responsibility for the mainte...ce of peace is placed in the SC could be interpreted in such a way as to preclude the ICJ from dealing w... case of which the SC is already seized. Such priority and exclusiveness regarding the competence of t...C *vis-à-vis* the ICJ, however, can neither be deduced from the notion of the primary responsibility of the ...for the maintenance of peace, nor find support in any other Charter provisions or any general principles ...w. Although binding decisions which are of a judicial nature could be taken in the course of dealing wit...ase before the SC as, for instance, the adjudication of a contested territory to one of the disputing parti...he decision-making procedure of the SC is fundamentally different from that of the ICJ. The ICJ has to ...de exclusively on the basis of international law (Art. 38 of the ICJ Statute), whereas the SC has to decide ...marily according to political criteria. Considering this basic difference between the procedures of the SC ... the ICJ, no objection of *lis pendens* or *res judicata* may be raised against the ICJ acting simultaneously (...rior to or after the SC) in a case pending before the SC.[24] It is in accordance with this finding, which is de...ed from the nature of the procedures before the SC and the ICJ ...ll as from general principles of law, t...either the UN Charter nor the ICJ Statute provide for any such restrictions on the freedom of the ICJ to ac...n the contrary, the fact that according to Art. 94(2) of the UN Charter the SC is called upon to enforce a j...ment of the ICJ if necessary may be seen as supporting the view that the procedures of the two organs ...e to be recognized as being independent of one another. Article 94(2) does not contain any restrictions ...atsoever with regard to the way in which the judgment of the ICJ to be enforced by the SC has come abou...hether or not in a case which has already been dealt with by the SC, or whether or not it is in accordance w...previous decisions of the SC.[25] Of course, from the point

[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 Stre...iten 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.*; Goo..., 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...06, 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 des 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.*

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.

12 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]

13 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.

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.

C. Practice

14 The small number of cases in which Art. 24 has been invoked as the direct basis for action by the SC, or in which it has been discussed in connection with actions taken by the SC,[40] stand in clear contrast to the fundamental importance of this provision. It regulates the status and competences of the SC in the organizational structure of the UN. There are, however, a large number of resolutions, draft resolutions, and other documents where paras. 1 and 2 of Art. 24 have been referred to as the basis of action, although without any detailed discussions of these references to Art. 24 paras. 1 and 2.[41] Recently, however, in the course of the SC action on the violent conflicts in the former Yugoslavia, the SC has repeatedly referred to its primary responsibility for the maintenance of international peace and security in the introductory considerations of no less than seven resolutions adopted under Chapter VII of the Charter.[42]

15 The relationship between the GA and the SC, and especially the meaning of the term 'primary responsibility' of the SC in the field of peace-keeping, was discussed extensively for the first time when the Uniting for Peace Resolution[43] was adopted. However, this discussion did not take place in the SC under the terms of Art. 24, but in the GA with reference to Arts. 10, 11, 12, and 24. In accordance with an interpretation of Art. 24 which only partially establishes an exclusive competence for the SC (see *supra*, MN 8), it was widely held that a subsidiary or secondary competence of the GA to deal with questions of peace-keeping was well founded in law.[44] Conversely, the GA emphasized the primary responsibility of the SC under Art. 24 when the political activities in the field of the maintenance of peace were shifting back to the SC, and the GA expressly demanded the discharge of the respective duties by the SC.[45]

16 The question of the scope of the powers of the SC under Art. 24(1) and (2) or, in other words, the question as to the meaning of the reference in Art. 24(2) second sentence to the special powers of the SC under Chapters VI, VII, VIII, and XII, was the subject of debate several times in the early years after the founding of the UN. But it has been raised recently in the context of the establishment of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia and a similar Tribunal for Rwanda.[46]

17 The problem was discussed quite extensively in connection with the debate over the case of the Soviet troops in north Iranian territory (1946), the Spanish question (1946), the Statute of Trieste (1947), and the Palestine case (1947–8), which has been taken up by the SC several times.[47] It was then asked whether the SC possessed further powers on the basis of Art. 24(1) in addition to those enumerated in Art. 24(2) second sentence. The core point of the discussion in the Iranian case was whether the SC could keep a dispute on its agenda even after the parties to the dispute had mutually agreed to withdraw their motion to have the dispute dealt with by the SC.[48] The majority of the SC members correctly held that on the basis of its primary responsibility for the maintenance of peace, the SC had the right to retain a dispute on its agenda even though the parties to a dispute had withdrawn the case. Otherwise, it would be left to the disputing parties

40 See the summary reports in UN Doc. ST/PSCA/1 (1946–51), *supra*, fn. 16, p. 478; ST/PSCA/1/Add. 1 (1952–5), p. 159; ST/PSCA/1/Add. 2 (1956–8), p. 184; ST/PSCA/1/Add. 3 (1959–63), pp. 303 *et seq.*; ST/PSCA/1/Add. 4 (1964–5), p. 207; ST/PSCA/1/Add. 5 (1966–8), p. 238; ST/PSCA/1/Add. 6 (1969–71), p. 226; ST/PSCA/1/Add. 7 (1972–4), p. 236; ST/PSCA/1/Add. 8 (1975–80), p. 419.

41 An example of this is the list of the questions, disputes, and situations dealt with under Art. 24, in RP 4 I, pp. 276 *et seq.* (Annex I and II).

42 See SC Res. 713 (1991), Sept. 25, 1991; 721, Nov. 27, 1991; 724, Dec. 15, 1991; 727, Jan. 8, 1992; 743, Feb. 21, 1992; 752, May 15, 1992; 757, May 30, 1992; 762, June 30, 1992.

43 As to the relevance and the analysis of the Uniting for Peace Resolution see, in particular, Hailbronner/Klein on Art. 10 MN 24–32; Art. 11 MN 31–3; and Art. 12 MN 12–16.

44 Like so many others Dahm, pp. 196, 400; Kelsen, pp. 953 *et seq.*; GHS, pp. 122 *et seq.* (each one with extensive further refs.); dissenting (with no convincing argumentation) CP/Degni-Segui (2nd edn.), pp. 455 *et seq.*; the ICJ has assented to the practice of the GA in *Certain Expenses of the United Nations*, Advisory Opinion, ICJ Reports (1962), pp. 151, 164; but see the critical comment on this by Prandler, pp. 176 *et seq.*

45 See RP II, pp. 26 *et seq.* (Annex I and II).

46 See S. Res. 827 (1993), May 25, 1993, text in *ILM* 32 (1993), pp. 1203 *et seq.* and SC Res. 955, Nov. 8, 1994, text in *ILM* 33 (1994), pp. 1600 *et seq.*

47 For the details of the development in the SC, see RPSC (1946–51), p. 479.

48 *Ibid.*, pp. 479–81.

whether or not the SC could follow up on a case brought to its attention until it had been settled in accordance with the Charter Principles. This would not be in line with the role of the SC as it is envisaged under Art. 24(1). In the case of the Spanish question, however, the decision on the scope of the powers of the SC under Art. 24(1), beyond those under Art. 24(2) second sentence, was left open.[49] While the majority of the SC considered it legal to deal with a case under Art. 24(1) even though no prior determination of a threat to the peace had been made, a decision on the measures to be taken by the SC failed because of the veto of a permanent member of the SC.

18 The question of the scope of the powers of the SC under Art. 24 paras. 1 and 2 was discussed with particular clarity in the Trieste case.[50] While some members of the SC were of the opinion that the SC could not assume the tasks accorded to it by the Trieste Statute, i.e. guaranteeing the territorial integrity and security of Trieste, because the Charter did not offer the necessary basis, others objected that such comprehensive powers were to be inferred from the primary responsibility of the SC for the maintenance of peace. This latter opinion was also shared by the SG of the United Nations.[51] After a prolonged debate the SC took a decision in line with this view.[52]

19 Similar questions were also raised in dealing with the Palestinian case during the years 1948–51. They were answered by the majority in the sense that a wide scope of the powers of the SC was accepted.[53] In later years, a question that gained importance in the practice of the SC was whether the SC could concern itself with human rights violations, a problem which was already touched upon in the debate on the Spanish question. This question was discussed in the case of Angola and with regard to the situation in Southern Africa, namely the South African Apartheid regime.[54] In the course of these discussions, the decisions on whether the SC could become active in cases of human rights violations without first determining the existence of a threat to the peace in the sense of Chapter VII of the Charter, and specifically on whether it could exercise powers that went beyond those enumerated in Art. 24(2) second sentence, were again left open because with increasingly strong arguments the SC has qualified gross violations of human rights as constituting a threat to the peace under the Charter.[55] In the course of these discussions, it also became clear that the position taken in the Spanish and the Trieste cases, according to which the SC was considered to possess the necessary powers under Art. 24(1) to fulfil its tasks in the maintenance of peace beyond the enumeration in Art. 24(2) second sentence, was still accepted. This position of the SC was corroborated by the *Namibia* Advisory Opinion of the ICJ.[56]

20 In the course of the discussions of the legal basis for establishing the International Tribunals for the former Yugoslavia and Rwanda, the question was raised as to whether the decisions by the SC could be based on Art. 24 directly, in conjunction with Art. 29, or solely on Art. 29 which provides for the SC's competence to establish subsidiary organs. The SC, however, decided to act under Chapter VII, thereby declaring that the establishment of the Tribunals was a measure to enforce and maintain international peace and security. Presently, the SC's view seems to meet with rather widespread approval as it is in accordance with the broad construction by the SC of the terms of Art. 39, although other views are still to be found in the literature.[57]

21 The statement contained in Art. 24(1) that, in discharging its responsibility for the maintenance of peace, the SC acts 'on behalf' of the member States has not so far been the object of any extensive discussion of a decision. The problem has only occasionally been touched upon in various SC discussions in which the

49 *Ibid.*, pp. 481 *et seq.*
50 *Ibid.*, pp. 482–4.
51 *Ibid.*, p. 483 (excerpts of the opinion of the SG).
52 *Ibid.*, p. 484.
53 *Ibid.*, pp. 484–8; UN Doc. ST/PSCA/Add. 1 (1952–5), pp. 159 *et seq.* (Egyptian objection to the stance taken by the SC concerning freedom of passage through the Suez Canal).
54 UN Doc. ST/PSCA/Add. 1 (1959–63), pp. 304 *et seq.*; RP 5 II, p. 12.
55 See e.g., SC Res. 418, Nov. 4, 1977; with regard to the preceding practice see also Delbrück, J., 'Apartheid', in *United Nations: Law, Policies and Practice* (Wolfrum, R. ed., 1995), pp. 27–38; *id.*, 'Apartheid', *EPIL* I, pp. 192–6.
56 *Namibia*, ICJ Reports (1971), p. 16.
57 See commentaries of Paulus on Art. 29 and Frowein/Krisch on Art. 39.

opinion prevailed that the members of the SC do not act for their governments but via the SC as an organ of the UN acting on behalf of the Organization as a whole. That opinion is endorsed here. The SC, therefore, does not act as the agent of the individual member States.[58]

22 Practice under Art. 24(3) corroborates the position taken here that the duty of the SC to report to the GA has no bearing upon the overall organizational structure of the UN in the sense that subordination of the SC to the authority of the GA could not be inferred from it. Practice shows that the GA has taken only formal cognizance of the reports submitted to it by the SC. So far, no debate on the substance of the reports has ever taken place.[59] All 'special' reports which have been submitted have been concerned with questions of the admission of new members on which the SC had previously decided. Therefore, the treatment of these special reports by the GA is irrelevant to the interpretation of Art. 24(3).

D. The Question of the Legitimacy of Security Council Actions

23 The broad construction by the SC of its powers under Art. 24 and Chapter VII has given new strength to the discussion of the legitimacy of the SC's actions in the sense that its composition is no longer representative of the overall membership of the United Nations Organization. This discussion is reminiscent of the early debates over the composition and the powers of the SC that centred around the question of whether broad powers could be conferred on a small executive organ that could subject sovereign States to binding decisions. The early dispute over this issue has become exacerbated today because the SC's composition has largely remained the same,[60] i.e. great power dominated with an underrepresentation of Third World countries, while the early—and still abstract—fear of smaller countries of SC intervention into their internal affairs has become a stark reality in, for instance, cases of gross violations of human rights deemed to constitute a threat to international peace and security. There can be no doubt that reform measures to allay these concerns, particularly of Third World countries, has become an urgent necessity because the alternative, i.e. the reversion to a very restrictive construction of the SC's competences, is hardly acceptable in view of the increasing number of instances of grave violations of human rights, including genocidal acts, on the one hand, and an increased sensitivity of world public opinion with regard to such atrocities, on the other hand.

58 See the discussion in the SC, 662nd session of Mar. 23, 1954, UN Doc. ST/PSCA/Add. 1 (1952–5), pp. 159 *et seq.*
59 See, e.g., RP 5 II, p. 15.
60 See Fassbender, pp. 197 *et seq.*

Article 25

The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter.

UN Materials

See the list for Art. 24.

Table of Contents