

DISSENTING OPINION OF PRESIDENT SCHWEBEL

I regret that I am unable to agree with the Judgment of the Court. It is arguable that the challenge of the Respondent to the jurisdiction of the Court should not carry. But the reasons so tersely stated by the Court are conclusory rather than elucidatory, and, at most, are barely persuasive in a subsidiary respect. In my view, the Court's conclusions on the admissibility of Libya's Application, and as to whether it has become moot, are unpersuasive.

JURISDICTION

The question of whether the Court has jurisdiction over a dispute between the Parties under the Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation depends on the resolution of antecedent questions. Does the Montreal Convention apply to the facts at issue in the current case? If it does, do the positions of the Parties in this case give rise to a dispute under the Convention?

The Preamble to the Convention declares its purpose to be that of "detering" unlawful acts against the safety of civil aviation and providing appropriate measures for punishment of offenders. Article 10 provides that contracting States shall "endeavour to take all practicable measure for the purpose of preventing the offences mentioned in Article 1". Article 12 provides that any contracting State having reason to believe one of the offences mentioned in Article 1 will be committed shall furnish relevant information to other States concerned. These provisions may be interpreted to imply that the Convention does not apply to allegations against persons accused of destroying an aircraft who are claimed, as in the instant case, to be acting as agents of a contracting State. Or, if that implication is too extended, those provisions of the Montreal Convention suggest that the Convention would hardly have deterrent effect if the State accused of having directed the sabotage were the only State competent to prosecute the persons accused of the act. At the same time, Article 1 of the Convention capaciously provides that, "Any person" commits an offence under the Convention if he performs an act thereafter listed. Moreover, Libya has not accepted that the accused were agents of its Government.

If it be assumed that the Convention does apply to persons allegedly State agents who are accused of destroying an aircraft, the question then

arises whether there is a dispute between Libya and the Respondent *under the Convention*.

It is difficult to show, and in its Judgment the Court in my view does not show (as contrasted with concluding), that the Respondent can be in violation of provisions of the Montreal Convention, with the possible exception of Article 11; the Court does not show that there is a dispute between the Parties over such alleged violations. The Convention in the circumstances of the case imposes multiple obligations on Libya. None of the articles of the Convention invoked by Libya in the circumstances of this case imposes obligations on the Respondent (as demonstrated by Sir Robert Jennings in his dissenting opinion). At most, it might be maintained that there is a dispute over breach of an obligation under Article 11, which provides in paragraph 1 that,

“Contracting States shall afford one another the greatest measure of assistance in connection with criminal proceedings brought in respect of the offences. The law of the State requested shall apply in all cases.”

The Respondent, the State requested, has provided Libya with the indictment, but, in reliance upon the resolutions of the Security Council and its own law, has not, despite Libyan requests, done more. If in fact Libya has brought criminal proceedings against the accused, there is arguable ground for alleging the existence of a dispute under Article 11, though in truth the dispute is over the force of the Security Council’s resolutions.

The Court principally relies, in upholding jurisdiction, on its unexplicated conclusion that, in view of the positions of the Parties, there exists between them a dispute regarding the interpretation and application of Article 7. Article 7 provides:

“The Contracting State in the territory of which the alleged offender is found shall, if it does not extradite him, be obliged, without exception whatsoever and whether or not the offence was committed on its territory, to submit the case to its competent authorities for the purpose of prosecution. Those authorities shall take their decision in the same manner as in the case of any ordinary offence of a serious nature under the law of that State.”

The Respondent has not disputed Libya’s obligation to prosecute the accused under Article 7 if Libya does not extradite them. It rather maintains that Libya is obliged by the supervening resolutions of the Security Council to surrender the accused for trial in the United States or the United Kingdom. Libya challenges this reading of the resolutions of the Security Council and contends that, if it is the right reading, the resolutions of the Security Council are unlawful and *ultra vires*. That is to say, there is no dispute between the Parties in this regard under Article 7 of the Montreal Convention. There is a dispute over the meaning, legality

and effectiveness of the pertinent resolutions of the Security Council. The latter dispute may not be equated with the former. Consequently it does not fall within the jurisdiction of the Court under Article 14 of the Montreal Convention, which confines the Court's jurisdiction to "Any dispute between two or more Contracting States concerning the interpretation or application of this Convention . . .". Libya's complaint that the Security Council has acted unlawfully can hardly be a claim under the Montreal Convention falling within the jurisdiction of the Court pursuant to that Convention.

The Court holds that there is a further, overarching dispute between the Parties, because

"the Parties differ on the question whether the destruction of the Pan Am aircraft over Lockerbie is governed by the Montreal Convention. A dispute thus exists between the Parties as to the legal régime applicable to this event. Such a dispute, in the view of the Court, concerns the interpretation and application of the Montreal Convention, and in accordance with Article 14, paragraph 1, of the Convention, falls to be decided by the Court." (Judgment, para. 25.)

That holding is not without formal force. But, as in this case, it lends itself to undue extension of the jurisdiction of the Court. If two States are parties to a treaty affording jurisdiction to the Court in disputes over its interpretation or application, is there a dispute under the treaty merely because one party so maintains — or maintains that the treaty constitutes the governing legal régime — while the other denies it?

It is in any event obvious that the Montreal Convention cannot afford the Court jurisdiction over Libya's submission that the Respondent

"is under a legal obligation to respect Libya's right not to have the Convention set aside by means which would in any case be at variance with the principles of the United Nations Charter and with the mandatory rules of general international law prohibiting the use of force and the violation of the sovereignty, territorial integrity, sovereign equality and political independence of States" (Memorial of Libya, Submissions, p. 242, para. 8.1 (*d*)).

Disputes under the Montreal Convention do not import those arising under the Charter and customary international law. Yet the Court's holding on this submission is equivocal. While it states that it cannot uphold the Respondent's objection, at the same time it confines the Court's jurisdiction to actions alleged to be at variance with the provisions of the Montreal Convention.

Finally, in respect of jurisdiction, the Court observes that Security

Council resolutions 748 (1992) and 883 (1993) were adopted after the filing of Libya's Application on 3 March 1992. It holds that, in accordance with its established jurisprudence, if the Court had jurisdiction on that date, it continues to do so; subsequent adoption of the Security Council's resolutions cannot affect its jurisdiction once established. That holding by its terms does not resolve whether, on 3 March 1992, the Court had jurisdiction. For the reasons set out above, the conclusion that it did is dubious.

Moreover, the cases on which the Court relies in so holding hardly seem to apply to the instant situation. The question at issue in the relevant phase of the *Nottebohm* case was whether, where jurisdiction had been established at the date of the application by Declarations under the Optional Clause, it could be disestablished by subsequent lapse of a Declaration by expiry or denunciation. Inevitably the Court held that it could not. In the case concerning *Right of Passage over Indian Territory*, the Court concordantly held that,

"It is a rule of law generally accepted, as well as one acted upon in the past by the Court, that, once the Court has been validly seised of a dispute, unilateral action by the respondent State in terminating its Declaration . . . cannot divest the Court of jurisdiction." (*Right of Passage over Indian Territory, Preliminary Objections, Judgment, I.C.J. Reports 1957*, p. 142.)

Nothing of the kind at issue in either of those cases is pertinent to the instant case. There is no question of the Respondent unilaterally taking action that purports to denounce the Montreal Convention or to excise Article 14 thereof. Rather the Security Council has taken multilateral action in pursuance of its Charter powers by adopting resolution 748 (1992) which, as the Court held at the provisional measures stage of this case, both Libya and the Respondent, "as Members of the United Nations, are obliged to accept and carry out . . . in accordance with Article 25 of the Charter" (*I.C.J. Reports 1992*, p. 15). The Court then held that, "in accordance with Article 103 of the Charter, the obligations of the Parties in that respect prevail over their obligations under any other international agreement, including the Montreal Convention" (*ibid.*). That is no less true in 1998 than it was in 1992.

In its Judgment on jurisdiction and admissibility of 11 July 1996 in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, the Court held that, "It is the case that the jurisdiction of the Court must normally be assessed on the date of the filing of the act instituting proceedings." (*I.C.J. Reports 1996*, p. 613, para. 26.) This most recent holding on the question imports that what is normal is not invariable; there is room for special treatment of the abnormal. The instant case, in which the Applicant challenges the legality and applica-

bility to it of resolutions of the Security Council adopted to deal with what the Council held to be a threat to international peace, surely is one to be treated in the exceptional way to which the Court opened the door in 1996.

ADMISSIBILITY AND MOOTNESS

The Respondent objects to the admissibility of Libya's claims in reliance upon Security Council resolutions 748 (1992) and 883 (1993), which, having been adopted under Chapter VII of the Charter, are binding and govern the Montreal Convention by virtue of Article 103 of the Charter. It maintained that the Court is not empowered to overturn the decisions of the Security Council and certainly is not authorized to overturn the Council's determination under Chapter VII of the existence of a threat to the peace and its choice of measures to deal with the threat. Libya, among other arguments, invoked the Court's holding in *Border and Transborder Armed Actions* that, "The critical date for determining the admissibility of an application is the date on which it is filed (cf. *South West Africa, Preliminary Objections, I.C.J. Reports 1962*, p. 344)" (*Border and Transborder Armed Actions (Nicaragua v. Honduras), Jurisdiction and Admissibility, I.C.J. Reports 1988*, p. 95).

In its Judgment, the Court upholds this submission of Libya, declaring that,

"The date, 3 March 1992, on which Libya filed its Application, is in fact the only relevant date for determining the admissibility of the Application. Security Council resolutions 748 (1992) and 883 (1993) cannot be taken into consideration in this regard since they were adopted at a later date." (Para. 44.)

It is solely on this ground that the Court dismisses the Respondent's objection to the admissibility of the Application. It is solely on this ground that the Court finds it right, at this stage of the proceedings, to put aside resolutions of the Security Council adopted to deal with what the Council has found to be acts of international terrorism that constitute threats to international peace and security. ("Acts", rather than the atrocious act of destroying the aircraft of Pan American flight 103, not only because Libyan agents are alleged by French authorities to have destroyed Union de transports aériens flight 772 on 19 September 1989, another atrocity addressed by the Security Council in resolutions 731 (1992), 748 (1992) and 883 (1993). That allegation has led French juge d'instruction Jean-Louis Bruguière, after extensive investigation completed on 29 January 1998, to call for trial of six alleged Libyan secret service or former secret service agents, including a brother-in-law of Colonel Qaddafi (a trial which, under French law, can take place *in absentia*) (*Le Monde*, 31 January 1998, p. 11). The Security Council also has chosen to act

under Chapter VII of the Charter in view of its broader determination in resolution 748 (1992) “that the failure by the Libyan Government to demonstrate by concrete actions its renunciation of terrorism and in particular its continued failure to respond fully and effectively to the requests in resolution 731 (1992) constitute a threat to international peace and security”.)

In my view, the holding of the Court is, on the facts of this case, even less persuasive in respect of admissibility than it is in respect of jurisdiction. It may be recalled that, in customary international law, the admissibility of a claim espoused by a State, under the rule of nationality of claims, is determined not as of the date of filing but as of the date of judgment. It may also be observed that the whole basis on which the Court in 1992 proceeded in approving its Order rejecting the provisional measures sought by Libya was that of the applicability, as of the date of its Order, of Security Council resolution 748 (1992), adopted after the date of the filing of Libya’s Application and Libya’s request for the indication of provisional measures.

There is little in the legal literature on the question of whether, in the jurisprudence of the Court, admissibility must be assessed as of the date of application, perhaps because the quoted holding of the Court in the case concerning *Border and Transborder Armed Actions (Nicaragua v. Honduras)* is the only such general holding of the Court. In the latest edition of his magisterial work, Shabtai Rosenne writes that the date of the filing of the act instituting the proceedings is the date “by reference to which the existence of the dispute and the admissibility of the case are normally determined . . .” (*The Law and Practice of the International Court, 1920-1996*, Vol. II, pp. 521-522). That appraisal leaves room for not necessarily determining admissibility as of the date of the application.

The Court’s holding in the *Border and Transborder Armed Actions* case referred to its prior holding in the *South West Africa* cases. In those cases, as well as in *Border and Transborder Armed Actions*, the issue was not generally whether admissibility of an application is determined as of the date of the application but specifically whether an alleged impossibility of settling the dispute by negotiation could only refer to the time when the applications were filed. (*South West Africa, Preliminary Objections, I.C.J. Reports 1962*, p. 344; *Border and Transborder Armed Actions (Nicaragua v. Honduras), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1988*, p. 95. See also to similar effect, *Right of Passage over Indian Territory, Preliminary Objections, Judgment, I.C.J. Reports 1957*, p. 148.) The utility of determining that question as of the date of the filing of the application is clear. But whether it follows that, generally and in all cases, the admissibility of an application is to be determined as of the date of its filing, is not so clear. It may indeed be asked whether the Court’s apparently general holding in *Border and Transborder Armed*

Actions is meant to have the comprehensive force which the Court assigns to it in this case, in view of the restricted concern of the Court in that and the other cases cited.

Moreover, the following lines of that Judgment significantly qualify the sweep of the first sentence of the paragraph. It is instructive to quote the first sentence in the context of the following sentences:

“The critical date for determining the admissibility of an application is the date on which it is filed (cf. *South West Africa, Preliminary Objections, I.C.J. Reports 1962*, p. 344). It may however be necessary, in order to determine with certainty what the situation was at the date of filing of the Application, to examine the events, and in particular the relations between the Parties, over a period prior to that date, and indeed during the subsequent period. Furthermore, subsequent events may render an application without object, or even take such a course as to preclude the filing of a later application in similar terms.” (*I.C.J. Reports 1988*, p. 95, para. 66.)

In the case before the Court, it is precisely such “subsequent events”, namely adoption by the Security Council of resolutions 748 (1992) and 883 (1993), that render Libya’s Application “without object”, that is to say, moot. Accordingly any judgment by the Court could have no lawful effect on the rights and obligations of the Parties in light of the Council’s binding decisions and would thus not be within the proper judicial function of the Court.

In the case concerning *Northern Cameroons*, the Court declared:

“The function of the Court is to state the law, but it may pronounce judgment only in connection with concrete cases where there exists at the time of the adjudication an actual controversy involving a conflict of legal interests between the parties. The Court’s judgment must have some practical consequence in the sense that it can affect existing legal rights or obligations of the parties, thus removing uncertainty from their legal relations. No judgment on the merits in this case could satisfy these essentials of the judicial function.” (*Northern Cameroons, Preliminary Objections, Judgment, I.C.J. Reports 1963*, pp. 33-34.)

The Court concluded:

“The Court must discharge the duty to which it has already called attention — the duty to safeguard the judicial function. Whether or not at the moment the Application was filed there was jurisdiction in the Court to adjudicate upon the dispute submitted to it, circumstances that have since arisen render any adjudication devoid of pur-

pose. Under these conditions, for the Court to proceed further in the case would not, in its opinion, be a proper discharge of its duties.” (*I.C.J. Reports 1963*, p. 38.)

In the two cases on *Nuclear Tests*, the Court held:

“The Court, as a court of law, is called upon to resolve existing disputes between States. Thus the existence of a dispute is the primary condition for the Court to exercise its judicial function; it is not sufficient for one party to assert that there is a dispute, since ‘whether there exists an international dispute is a matter for objective determination’ by the Court . . . The dispute brought before it must therefore continue to exist at the time when the Court makes its decision. It must not fail to take cognizance of a situation in which the dispute has disappeared . . . all the necessary consequences must be drawn from this finding.

Thus the Court concludes that, the dispute having disappeared, the claim advanced . . . no longer has any object. It follows that any further finding would have no *raison d’être*.

The Court therefore sees no reason to allow the continuance of proceedings which it knows are bound to be fruitless.

The object of the claim having clearly disappeared, there is nothing on which to give judgment.” (*Nuclear Tests (Australia v. France)*, *I.C.J. Reports 1974*, pp. 270-272, paras. 55-56, 58-59. See also *Nuclear Tests (New Zealand v. France)*, *I.C.J. Reports 1974*, pp. 476-477, paras. 58-59, 61-62.)

It follows that, in the case now before the Court, the Court should have held Libya’s claims to be inadmissible, or at any rate moot, on the ground that the issues between it and the Respondent have been determined by decisions of the Security Council which bind the Parties and which, pursuant to Article 103 of the Charter, prevail over any rights and obligations that Libya and the Respondent have under the Montreal Convention. If the Court had done so, it would have removed a prolonged challenge to the exercise by the Security Council of its Charter responsibilities and presumably promoted Libya’s compliance with its obligations, under Article 25 of the Charter, “to accept and carry out the decisions of the Security Council in accordance with the present Charter”.

AN EXCLUSIVELY PRELIMINARY CHARACTER

However, the Court’s Judgment holds that it may not so determine at this stage of the proceedings because of the terms of Article 79 of the

Rules of Court. That article provides that its judgment on preliminary objections, whether they be to the jurisdiction or to the admissibility of the application, "or other objection the decision upon which is requested before any further proceedings on the merits", shall either uphold the objection, reject it, "or declare that the objection does not possess, in the circumstances of the case, an exclusively preliminary character". The Court concludes that the objection that Libya's claims are without object constitutes in many respects the very subject-matter of any judgment on the merits and, hence, since it does not possess an exclusively preliminary character, must be remitted to the stage of the merits.

In my view, the Court's conclusion in this regard is substantial and, unlike some of its other conclusions, draws support from the reasoning and authority set out in the Judgment. But is the Court's conclusion, however plausible, compelling?

I do not find it so for these reasons. The Court takes an absolute view of an admittedly absolute term, "exclusively". It holds that the Respondent's objections are not exclusively preliminary in character. But it will be the rare preliminary objection that actually is exclusively preliminary in character. This will especially be so if the wide construction given by the Court in the current case to the meaning of "exclusively" is followed in future cases. The fact that a preliminary objection, if upheld, will dispose of the merits of the case in the sense of preventing a hearing of them proves nothing; all preliminary objections, if sustained, have this effect. More than this, Article 79 qualifies the conclusion that the objection does not possess an exclusively preliminary character by specifying that it "does not possess, in the circumstances of the case, an exclusively preliminary character". In the circumstances of this case, concerned as it is or should be with jurisdiction under the Montreal Convention — and there is no other ground for jurisdiction — a plea that the case should not proceed to a consideration of the merits of rights and obligations under the Montreal Convention because resolutions of the Security Council render such consideration without object must be treated as a plea of an exclusively preliminary character.

It may be added that, in the circumstances of this case, the Parties have extensively argued elements of the case which the Court now remits to the merits as part of the very subject-matter of the merits (as indeed the Parties did at the stage of provisional measures). Presumably they did so by dint of construction of paragraph 6 of Article 79 of the Rules, which provides that,

"In order to enable the Court to determine its jurisdiction at the preliminary stage of the proceedings, the Court, whenever necessary, may request the parties to argue all questions of law and fact, and to adduce all evidence, which bear on the issue."

They may also have had regard to the first paragraph of Article 79, which speaks of any other objection the decision upon which is requested before any "further" proceedings on the merits. The Court made no effort to limit the arguments of the Parties embracing elements of what it now treats as the merits. I do not think that the Court need now require, as it does require, the Parties to argue these elements once more — actually, for a third time — before it passes upon them and disposes of these objections. To have done so at this stage the Court needed neither the resolution of disputed facts nor the consideration of further evidence. To have ruled on the question of whether the resolutions of the Security Council render Libya's invocation of the Montreal Convention moot would not have entailed adjudicating the merits of the case in so far as it relates to what may be within the jurisdiction of the Court under the Montreal Convention. Important questions which may arise on the merits would in any event remain unaddressed, such as the propriety of the trial of the suspects in the United States or in the United Kingdom.

The Court's decision in effect to join the preliminary objections to the merits, a decision based essentially upon its literal construction of a word of a Rule of Court, does not appear consistent with the design of the Court in amending the Rules of Court in 1972. It has regrettable if unintended results, the least of which is requiring the Parties to argue, and the Court to hear, arguments on those objections, or some of those objections, for a third time. It will prolong a challenge to the integrity and authority of the Security Council. It may be taken as providing excuse for continued defiance of the Council's binding resolutions. It may be seen as prejudicing an important contemporary aspect of the Council's efforts to maintain international peace and security by combatting State-sponsored international terrorism. Justice for the victims of an appalling atrocity may be further delayed and denied. The Court may have opened itself, not only in this but in future cases, to appearing to offer to recalcitrant States a means to parry and frustrate decisions of the Security Council by way of appeal to the Court.

JUDICIAL REVIEW

That last spectre raises the question of whether the Court is empowered to exercise judicial review of the decisions of the Security Council, a question as to which I think it right to express my current views. The Court is not generally so empowered, and it is particularly without power to overrule or undercut decisions of the Security Council made by it in pursuance of its authority under Articles 39, 41 and 42 of the Charter to determine the existence of any threat to the peace, breach of the peace, or

act of aggression and to decide upon responsive measures to be taken to maintain or restore international peace and security.

The Court more than once has disclaimed possessing a power of judicial review. In its Advisory Opinion in the case concerning *Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter)*, the Court declared:

“In the legal systems of States, there is often some procedure for determining the validity of even a legislative or governmental act, but no analogous procedure is to be found in the structure of the United Nations. Proposals made during the drafting of the Charter to place the ultimate authority to interpret the Charter in the International Court of Justice were not accepted; the opinion which the Court is in course of rendering is an *advisory* opinion. As anticipated in 1945, therefore, each organ must, in the first place at least, determine its own jurisdiction. If the Security Council, for example, adopts a resolution purportedly for the maintenance of international peace and security and if, in accordance with a mandate or authorization in such resolution, the Secretary-General incurs financial obligations, these amounts must be presumed to constitute ‘expenses of the Organization’.” (*I.C.J. Reports 1962*, p. 168.)

In its Advisory Opinion on *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, the Court reiterated that: “Undoubtedly, the Court does not possess powers of judicial review or appeal in respect of the decisions taken by the United Nations organs concerned.” (*I.C.J. Reports 1971*, p. 45.)

It should be noted that the Court made these holdings in advisory proceedings, in which the Security Council and the General Assembly are entitled to request the Court’s opinion “on any legal question”. The authority of the Court to respond to such questions, and, in the course of so doing, to pass upon relevant resolutions of the Security Council and General Assembly, is not disputed. Nevertheless, if the Court could hold as it did in advisory proceedings, *a fortiori* in contentious proceedings the Court can hardly be entitled to invent, assert and apply powers of judicial review.

While the Court so far has not had occasion in contentious proceedings to pass upon an alleged authority to judicially review decisions of the Security Council, it may be recalled that in *Military and Paramilitary Activities in and against Nicaragua* the Court observed that:

“The Court is not asked to say that the Security Council was wrong in its decision, nor that there was anything inconsistent with law in the way in which the members of the Council employed their right to vote.

The Court is asked to pass judgment on certain legal aspects of a situation which has also been considered by the Security Council, a procedure which is entirely consonant with its position as the principal judicial organ of the United Nations." (*Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*), *Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984*, p. 436.)

The implication of this statement is that, if the Court had been asked by the Applicant to say that the Security Council had been wrong in its decision, the Court would have reached another conclusion.

The texts of the Charter of the United Nations and of the Statute of the Court furnish no shred of support for a conclusion that the Court possesses a power of judicial review in general, or a power to supervene the decisions of the Security Council in particular. On the contrary, by the absence of any such provision, and by according the Security Council "primary responsibility for the maintenance of international peace and security", the Charter and the Statute import the contrary. So extraordinary a power as that of judicial review is not ordinarily to be implied and never has been on the international plane. If the Court were to generate such a power, the Security Council would no longer be primary in its assigned responsibilities, because if the Court could overrule, negate, modify — or, as in this case, hold as proposed that decisions of the Security Council are not "opposable" to the principal object State of those decisions and to the object of its sanctions — it would be the Court and not the Council that would exercise, or purport to exercise, the dispositive and hence primary authority.

The drafters of the Charter above all resolved to accord the Security Council alone extraordinary powers. They did so in order to further realization of the first Purpose of the United Nations,

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

Article 24 thus provides:

"1. In order to ensure prompt and effective action by the United Nations, its Members confer on the 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 behalf.

2. In discharging these duties the Security Council shall act in accordance with the Purposes and Principles of the United Nations . . ."

Article 25 provides that: "The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter."

These provisions — the very heart of the Charter's design for the maintenance of international peace — manifest the plenitude of the powers of the Security Council, which are elaborated by the provisions of Chapters VI, VII, and VIII of the Charter. They also demonstrate that the Security Council is subject to the rule of law; it shall act in accordance with the Purposes and Principles of the United Nations and its decisions must be adopted in accordance with the Charter. At the same time, as Article 103 imports, it may lawfully decide upon measures which may in the interests of the maintenance or restoration of international peace and security derogate from the rights of a State under international law. The first Purpose of the United Nations quoted above also so indicates, for the reference to the principles of justice and international law designedly relates only to adjustment or settlement by peaceful means, and not to the taking of effective collective measures for the prevention and removal of threats to and breaches of the peace. It was deliberately so provided to ensure that the vital duty of preventing and removing threats to and breaches of the peace would not be limited by existing law. (See the Report on the Preamble, Purposes and Principles, *United Nations Conference on International Organization (UNCIO)*, Vol. 6, pp. 453-454, and the observations of Lord Halifax, p. 25.)

It does not follow from the facts that the decisions of the Security Council must be in accordance with the Charter and that the International Court of Justice is the principal judicial organ of the United Nations, that the Court is empowered to ensure that the Council's decisions do accord with the Charter. To hold that it does so follow is a monumental *non sequitur*, which overlooks the truth that, in many legal systems, national and international, the subjection of the acts of an organ to law by no means entails subjection of the legality of its actions to judicial review. In many cases, the system relies not upon judicial review but on self-censorship by the organ concerned or by its members or on review by another political organ.

Judicial review could have been provided for at San Francisco, in full or lesser measure, directly or indirectly, but both directly and indirectly it was not in any measure contemplated or enacted. Not only was the Court not authorized to be the ultimate interpreter of the Charter, as the Court acknowledged in the case concerning *Certain Expenses of the United Nations*. Proposals which in restricted measure would have accorded the Court a degree of authority, by way of advisory proceedings, to pass upon the legality of proposed resolutions of the Security Council in the sphere of peaceful settlement — what came to be Chapter VI of the Charter — were not accepted. What was never proposed, considered, or, so far as the records reveal, even imagined, was that the International Court of Justice would be entrusted with, or would develop, a power of judicial review at large, or a power to

supervene, modify, negate or confine the applicability of resolutions of the Security Council whether directly or in the guise of interpretation.

That this is understandable, indeed obvious, is the clearer in the light of the conjunction of political circumstances at the time that the Charter was conceived, drafted and adopted. The Charter was largely a concept and draft of the United States, and secondarily of the United Kingdom; the other most influential State concerned was the USSR. The United States was cautious about the endowments of the Court. Recalling the rejection by the Senate of the United States a decade earlier of adherence to the Statute of the Permanent Court of International Justice, the Department of State was concerned to assure that nothing in the Charter concerning the Court, and nothing in the Statute which was to be an integral part of the Charter, could prejudice the giving of advice and consent by the Senate to the ratification of the Charter. Thus the Report of the Senate Committee on Foreign Relations on the United Nations Charter of 16 July 1945 to the Senate recommending ratification of the Charter specified:

“The Charter does not permit the Security Council or the General Assembly to force states to bring cases to the Court, nor does it or the Statute permit the Court to interfere with the functions of the Security Council or the General Assembly . . . Your committee recommends that the Senate accept the International Court of Justice in the form and with the authority set forth in chapter XIV of the Charter and the annexed Statute of the Court.” (United States Senate, 79th Congress, 1st session, Executive Report No. 8, “The Charter of the United Nations”, republished in United States Senate, 83rd Congress, 2nd session, Document No. 87, “Review of the United Nations Charter; A Collection of Documents”, 1954, p. 67.)

The British Government which, together with the United States, was the principal proponent of the creation of the Permanent Court of International Justice and which had played a large and constructive part in respect of that Court, was hardly less cautious in its approach to the powers of the International Court of Justice, as is illustrated by a quotation from the proceedings of the San Francisco Conference set out below.

As for the Government of the Union of Soviet Socialist Republics — a Government which had been ideologically hostile to the Court since its creation (as a reading of the *Eastern Carelia* case so vividly illustrates) — can it be thought that Stalin, whose preoccupation in the days of San Francisco was giving the veto power the widest possible reach, could have assented to the establishment of a Court authorized to possess or develop the authority to review and vary the application of resolutions adopted by the Security Council under Chapter VII of the Charter?

At San Francisco, Belgium proposed the following amendment:

“Any State, party to a dispute brought before the Security Council, shall have the right to ask the Permanent Court of International

Justice whether a recommendation or a decision made by the Council or proposed in it infringes on its essential rights. If the Court considers that such rights have been disregarded or are threatened, it is for the Council either to reconsider the question or to refer the dispute to the Assembly for decision." (*UNCIO*, Vol. 3, p. 336.)

The purpose of the amendment, the Belgian delegate explained, was to allow the State concerned to seek an advisory opinion from the Court if that State believed that a Security Council recommendation infringed upon its essential rights. It was not in any sense the purpose of the amendment to limit the legitimate powers of the Security Council (*ibid.*, Vol. 12, pp. 48-49).

The Belgian proposal gave rise to a mixed reaction, support from States such as Ecuador and Colombia, and opposition from Great Power Sponsors of the Conference. The delegate of the Soviet Union

"considered that the Belgian Amendment would have the effect of weakening the authority of the Council to maintain international peace and security. If it were possible for a state to appeal from the Council to the International Court of Justice . . . the Council would find itself handicapped in carrying out its functions. In such circumstances, the Council might even be placed in a position of being a defendant before the Court." (*Ibid.*, Vol. 12, p. 49.)

The delegate of the United States explained the importance of the requirement that the action of the Security Council in dealing with a dispute involving a threat to the peace be taken "in accordance with the purposes and principles of the Organization". One of the purposes is to bring about peaceful settlement of disputes "with due regard for principles of justice and international law". He did not interpret the Proposals as preventing any State from appealing to the International Court of Justice at any time on any matter which might properly go before the Court. On the whole, he did not consider the acceptance of the Belgian Amendment advisable, particularly since he believed that "the Security Council was bound to act in accordance with the principles of justice and international law" (*ibid.*). (It should be noted that this statement of 17 May 1945 antedated revision of the draft of the Charter's Purposes and Principles in June to provide that "the principles of justice and international law" relate only to the adjustment or settlement of international disputes by peaceful means and not to measures of collective security.)

The delegate of France declared that, while he viewed with great sympathy the ideas in the Belgian Amendment, he was doubtful that "it would be effective in obtaining its desired end, especially since it

involved a dispersal of responsibilities in the Organization" (*UNCIO*, Vol. 12, p. 50).

The delegate of the United Kingdom stated that the adoption of the Belgian Amendment "would be prejudicial to the success of the Organization". The amendment would

"result in the decision by the Court . . . of political questions in addition to legal questions. The performance of this function by the Court . . . would seriously impair the success of its role as a judicial body. Further, the procedures proposed by the amendment would cause delay, at a time when prompt action by the Security Council was most desirable. A powerful weapon would thus be placed in the hands of a state contemplating aggression, and the Council would not be able to play the part in maintaining peace which was intended for it . . . he considered it necessary that the Council possess the trust and confidence of all states; its majority would be composed of small states, and it would be obligated to act in a manner consistent with the purposes and principles of the Organization." (*Ibid.*, p. 65.)

After a few other statements in this vein, the delegate of Belgium stated that, since it was now clearly understood that a recommendation under what was to become Chapter VI did not possess obligatory effect, he wished to withdraw his amendment (*ibid.*, p. 66).

Subsequently, the Conference rejected a proposal by Belgium to refer disagreements between organs of the United Nations on interpretation of the Charter to the Court. The pertinent report concludes:

"Under unitary forms of national government the final determination of such a question may be vested in the highest court or in some other national authority. However, the nature of the Organization and of its operation would not seem to be such as to invite the inclusion in the Charter of any provision of this nature. If two member states are at variance concerning the correct interpretation of the Charter, they are of course free to submit the dispute to the International Court of Justice as in the case of any other treaty. Similarly, it would also be open to the General Assembly or to the Security Council, in appropriate circumstances, to ask the International Court of Justice for an advisory opinion concerning the meaning of a provision of the Charter." (*Ibid.*, Vol. 13, pp. 668-669.)

It may finally be recalled that, at San Francisco, it was resolved "to leave to the Council the entire decision, and also the entire responsibility for that decision, as to what constitutes a threat to peace, a breach of the peace, or an act of aggression" (*ibid.*, Vol. 11, p. 17).

The conclusions to which the *travaux préparatoires* and text of the Charter lead are that the Court was not and was not meant to be invested with a power of judicial review of the legality or effects of decisions of the Security Council. Only the Security Council can determine what is a threat to or breach of the peace or act of aggression under Article 39, and under Article 39 only it can “decide what measures shall be taken . . . to maintain or restore international peace and security”. Two States at variance in the interpretation of the Charter may submit a dispute to the Court, but that facility does not empower the Court to set aside or second-guess the determinations of the Security Council under Article 39. Contentious cases may come before the Court that call for its passing upon questions of law raised by Council decisions and for interpreting pertinent Council resolutions. But that power cannot be equated with an authority to review and confute the decisions of the Security Council.

It may of course be maintained that the Charter is a living instrument; that the present-day interpreters of the Charter are not bound by the intentions of its drafters of 50 years ago; that the Court has interpreted the powers of the United Nations constructively in other respects, and could take a constructive view of its own powers in respect of judicial review or some variation of it. The difficulty with this approach is that for the Court to engraft upon the Charter régime a power to review, and revise the reach of, resolutions of the Security Council would not be evolutionary but revolutionary. It would be not a development but a departure, and a great and grave departure. It would not be a development even arguably derived from the terms or structure of the Charter and Statute. It would not be a development arising out of customary international law, which has no principle of or provision for judicial review. It would not be a development drawn from the general principles of law. Judicial review, in varying forms, is found in a number of democratic polities, most famously that of the United States, where it was developed by the Supreme Court itself. But it is by no means a universal or even general principle of government or law. It is hardly found outside the democratic world and is not uniformly found in it. Where it exists internationally, as in the European Union, it is expressly provided for by treaty in specific terms. The United Nations is far from being a government, or an international organization comparable in its integration to the European Union, and it is not democratic.

The conclusion that the Court cannot judicially review or revise the resolutions of the Security Council is buttressed by the fact that only States may be parties in cases before the Court. The Security Council cannot be a party. For the Court to adjudge the legality of the Council's

decisions in a proceeding brought by one State against another would be for the Court to adjudicate the Council's rights without giving the Council a hearing, which would run counter to fundamental judicial principles. It would run counter as well to the jurisprudence of the Court. (Cf. *East Timor (Portugal v. Australia)*, Judgment, *I.C.J. Reports 1995*, pp. 100-105; *Monetary Gold Removed from Rome in 1943*, Judgment, *I.C.J. Reports 1954*, pp. 32-33.) Any such judgment could not bind the Council, because, by the terms of Article 59 of the Statute, the decision of the Court has no binding force except between the parties and in respect of that particular case.

At the same time, a judgment of the Court which held resolutions of the Security Council adopted under Chapter VII of the Charter not to bind or to be "opposable" to a State, despite the terms of Article 25 of the Charter, would seriously prejudice the effectiveness of the Council's resolutions and subvert the integrity of the Charter. Such a holding would be tantamount to a judgment that the resolutions of the Security Council were *ultra vires*, at any rate in relation to that State. That could set the stage for an extraordinary confrontation between the Court and the Security Council. It could give rise to the question, is a holding by the Court that the Council has acted *ultra vires* a holding which of itself is *ultra vires*?

For some 45 years, the world rightly criticized stalemate in the Security Council. With the end of the Cold War, the Security Council has taken great strides towards performing as it was empowered to perform. That in turn has given rise to the complaint by some Members of the United Nations that they lack influence over the Council's decision-making. However understandable that complaint may be, it cannot furnish the Court with the legal authority to supervene the resolutions of the Security Council. The argument that it does is a purely political argument; the complaints that give rise to it should be addressed to and by the United Nations in its consideration of the reform of the Security Council. It is not an argument that can be heard in a court of law.

(Signed) Stephen M. SCHWEBEL.