

# NAMIBIA OPINION REVISITED: A GAP IN THE CURRENT ARGUMENTS ON THE POWER OF THE SECURITY COUNCIL

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## I. INTRODUCTION

This article discusses the interpretation of Article 25<sup>1</sup> of the United Nations Charter that was offered by the International Court of Justice in its advisory opinion of June 21, 1971 (*Namibia Opinion*).<sup>2</sup> It is a topic that is unfortunately overlooked by the current arguments concerning the power of the *revived* Security Council. The end of the Cold War has liberated the United Nations from the confrontation between the West and the East, and has freed the Security Council from the functional paralysis that the veto power of its permanent members had forced upon it. The activities

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1. Article 25 of the United Nations Charter provides, “[T]he members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter.” U.N. CHARTER art. 25.

2. Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), 1971 I.C.J. 16 (Advisory Opinion of June 21) [hereinafter *Namibia Opinion*].

of the revitalized Security Council, which have been activated not only quantitatively but also qualitatively,<sup>3</sup> have pushed the question of the limitations on the Council's power under Chapter VII of the United Nations Charter into "the forefront of attention"<sup>4</sup> of international lawyers. While numerous articles have discussed this question from various points of view,<sup>5</sup> little attention has been given to the interpretation of Article 25 of the Charter.

## II. NAMIBIA OPINION, ARTICLE 25, AND THE POWER OF THE SECURITY COUNCIL

In the *Namibia Opinion*<sup>6</sup> the International Court of Justice stated that in addition to the powers specifically granted to the Security Council in Chapters VI, VII, VIII, and XII, which are enumerated in Article 24, paragraph 2, of the United Nations Charter, the Council has *general implied powers* in paragraph 1<sup>7</sup> of the same Article, stemming from its

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3. BOUTROS BOUTROS-GHALI, AN AGENDA FOR PEACE 7-12 (ed. 1995).

4. T.D. Gill, *Legal and Some Political Limitations on the Power of the UN Security Council to Exercise its Enforcement Powers Under Chapter VII of the Charter*, 26 NETH. Y.B. INT'L L. 34 (1995).

5. E.g., LE DÉVELOPPEMENT DU RÔLE DU CONSEIL DE SÉCURITÉ (Renée-Jean Dupuy ed., 1993); Giorgio Gaja, *Réflexions sur le rôle du Conseil de Sécurité dans le nouvel ordre mondial*, 97 REV. GÉN. D. INT'L PUB. 297-320 (1993); Thomas M. Franck, *The Powers of Appreciation: Who is the Ultimate Guardian of UN Legality?* 86 AM. J. INT'L L. 519-23 (1992); Vera Gowlland-Debbas, *Security Council Enforcement Action and Issues of State Responsibility*, 43 INT'L & COMP. L.Q. 55-98 (1994); Martti Koskeniemmi, *The Police in the Temple*, 6 EUR. J. INT'L L. 325-48 (1995); R. Laval, *The Law of the United Nations and the Use of Force, Under the Relevant Security Council Resolutions of 1990 and 1991, To Resolve the Persian Gulf Crisis*, 23 NETH. Y.B. INT'L L. 3-65 (1992); Oscar Schachter, *United Nations Law in the Gulf Conflict*, 85 AM. J. INT'L L. 452-73 (1991); Gill, *supra* note 4, at 33-138.

6. *Namibia Opinion*, 1971 I.C.J. 16. The confrontation between the United Nations and South Africa concerning the Mandates of Namibia (South West Africa) has occurred since the establishment of the United Nations. The International Court of Justice gave some decisions and advisory opinions regarding the conflict. See Ernst Klein, *South West Africa/Namibia (Advisory Opinions and Judgments)*, in 2 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 260-70 (R. Bernhardt ed., 1981). The Security Council, on January 30, 1970, adopted resolution 276 and declared that "the continued presence of the South African authorities in Namibia is illegal, and that consequently all acts taken by the Government of South Africa, on behalf of or concerning Namibia after the termination of the Mandate, are illegal and invalid." *The Situation in Namibia*, S/RES/276 (1970) S.C. Res. 276 (1970). Moreover, the Council called upon all States "to refrain from any dealings with the Government of South Africa." *Id.* Since South Africa, nevertheless, did not withdraw from Namibia and did not alter her policy concerning it, the Security Council requested the International Court of Justice to give an 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 Situation in Namibia*, S/RES/284 (1970) S.C. Res. 284 (1970).

7. Article 24, paragraphs 1 and 2, of the United Nations Charter provides,

responsibility for maintaining international peace and security.<sup>8</sup> In support of this position the Court cited the Secretary General's statement of January 10, 1947, which was submitted to the Security Council. That statement pronounced that

[t]he powers of the Council, under Article 24, are not restricted to the specific grants of authority contained in Chapters VI, VII, VIII, and XI.<sup>9</sup> The Members of the United Nations have conferred upon the Security Council powers commensurate with its responsibility for the maintenance of peace and security. The only limitations are the fundamental principles and purposes found in Chapter I of the Charter.<sup>10</sup>

Furthermore, the Court stated that Article 25, which provides decisions of the Security Council with legal binding effect upon Member States,<sup>11</sup> applied not only to decisions taken under Chapter VII but also to those taken under the general implied powers.<sup>12</sup> In other words, the Court admitted that the Security Council had *general mandatory powers*, which are implied from its responsibility to maintain international peace and

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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. The specific powers granted to the Security Council for the discharge of these duties are laid down in Chapters VI, VII, VIII, and XII.

U.N. CHARTER art. 24., paras. 2-3.

8. This is theoretically justified by *implied powers doctrine*, according to which international organizations can deduce powers necessary for discharging their objects from their duties when such powers are not explicitly provided in the constituent documents. See, e.g., Manfred Zuleeg, *International Organizations, Implied Powers*, in 7 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW, 312 (1984); Manuel Rama-Montaldo, *International Legal Personality and Implied Powers of International Organizations*, 44 BRIT. Y.B. INT'L L. 111-55 (1970). The International Court of Justice has admitted this doctrine. For example, in the *Reparation Case*, it stated, "[T]he rights and duties of an entity such as the [United Nations] Organization must depend upon its purpose and functions as specified or implied in its constituent documents and developed in practice." *Reparation for Injuries*, 1949 I.C.J. 180 (Advisory Opinion of Apr. 11) (emphasis added).

9. *Namibia Opinion*, 1971 I.C.J. 52.

10. *Id.*

11. U.N. CHARTER art. 25.

12. *Namibia Opinion*, 1971 I.C.J. at 52-54.

security.<sup>13</sup> Those general implied powers give the Security Council the authority to impose any obligation upon Member States, so long as the Council acted for such purposes.

Little attention has been paid to the *Namibia Opinion* in this context. Instead, current arguments only focus on what the Security Council can decide under Chapter VII of the United Nations Charter. The Security Council increased mandatory sanctions after the end of the Cold War.<sup>14</sup> These mandatory sanctions have been justified "under Chapter VII of the United Nations Charter."<sup>15</sup> This justification precludes an argument proposing that Article 25 applies to the Council's decisions. Thus, it has been found unnecessary to discuss what decisions can be made outside Chapter VII with legal binding effect.

However, if the interpretation of Articles 24 and 25 offered by the International Court of Justice is accepted, current arguments concerning the limitations on the Security Council's exercise of authority under Chapter VII would become futile. An action taken pursuant to the Council's direction could be vindicated by its general mandatory powers even if one could contend that the Council's action could not be justified by its power under Chapter VII.

Arguments concerning the *Lockerbie Incident* provide a good example of this point. Three years after the explosion of Pan American Flight 103, on December 21, 1988, the Security Council adopted resolution 748 (1992), which determined that "the failure by the Libyan Government . . . to respond fully and effectively to the requests in resolution 731 (1992) constitute[d] a threat to international peace and security"<sup>16</sup> and decided that, "[a]cting under Chapter VII, . . . the Libyan Government must now comply without any further delay with . . . resolution 731 (1992) regarding the requests" for extradition of the alleged suspects of Libyan nationality.<sup>17</sup> Although this incident has raised animated arguments concerning the limitations of the Council's power under Chapter VII and the justiciability of the Council's activities,<sup>18</sup> very

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13. UN SCOR, 3d Sess., 91 mtg. at 45. (1947).

14. There were seven sanction regimes imposed by the Council as of December 16, 1994, although there was only one as of January 31, 1988. See BOUTROS-GHALI, *supra* note 3, at 8.

15. E.g., S.C. Res. 661 (1990), S.C. Res. 670 (1990), *Humanitarian Assistance* S.C. Res. 687 (1991); S.C. Res. 778 (1992) (against Iraq); *Yugoslavia Situation* S.C. Res. 713 (1991); S.C. Res. 820 (1993) (against Former Yugoslavia); S.C. Res. 733 (1992) (against Somalia); *Air and Arms Embargo* S.C. Res. 748 (1992) (against Libya); S.C. Res. 788 (1992) (against Liberia); S.C. Res. 841 (1993) (against Haiti).

16. S.C. Res. 748 (1992) S/RES/748 (1992).

17. *Id.*

18. Bernard Graefrath, *Leave to the Court What Belongs to the Court, the Libyan Case*, 4 EUR. J. INT'L L. 184-205 (1993); Mark Weller, *The Lockerbie Case: A Premature End to the*

few of these arguments pay attention to the issue of general mandatory powers of the Security Council.<sup>19</sup> Most fail to recognize that the general mandatory powers *would* justify the Council's sanction on Libya, even if any limitations of the power under Chapter VII exist.

Among the few scholars who have discussed the relationship between the Council's general mandatory powers and its power under Chapter VII, three standpoints emerge. Professor Bothe contests the interpretation of Article 24 offered by the International Court of Justice. He contends that the predominance of the great powers in the system of international peace and security is legitimated by the fact that the power of the Council is defined very strictly, that is, the Council has only specific powers as defined by Article 24, paragraph 2.<sup>20</sup> Since Bothe denies the existence of the general implied powers of the Security Council, naturally he would also deny the Council's general mandatory powers, which are premised upon the existence of the general implied powers. Professor Gill basically accepts the interpretation of the International Court of Justice but contends that, where the Council's authority is defined by specific provisions in the Charter, the Council's general powers "should not be construed in such a way as to violate or exceed the allocation and limitation of authority contained in specific provisions of the Charter."<sup>21</sup> Professor White definitely supports the position of the Court<sup>22</sup> and contends that the current Security Council resolutions imposing mandatory sanctions should be adopted under "the Council's *general mandatory powers*, as identified by the World Court in the *Namibia* [sic] case rather than under Chapter VII."<sup>23</sup>

None of these views are satisfactory. First, Professor Bothe's perspective neglects the fact that the general implied powers of the Security Council are widely accepted by the international community.<sup>24</sup> Second, Professor Gill's view is inconsistent because the Security Council's powers cannot be limited to those things specifically listed in the

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*New World Order?*, 4 AFR. J. INT'L & COMP. L. 302-24 (1992); Manfred Mohr, *Der Lockerbie-Fall vor UN-Sicherheitsrat und Internationalem Gerichtshof*, 20 DEMOKRATIE UND RECHT 305-14 (1992); C. Tomuschat, *The Lockerbie Case before the International Court of Justice*, 48 THE REVIEW 38-48 (1992); Gerald McGinley, *The ICJ's Decision in the Lockerbie Cases*, 22 GA. J. INT'L & COMP. L. 577-607 (1992); Franck, *supra* note 5, at 519-23.

19. See Bothe, *Les limites des pouvoirs du Conseil de Sécurité*, in LE DÉVELOPPEMENT DU RÔLE DU CONSEIL DE SÉCURITÉ, *supra* note 5, at 70-71.

20. *Id.*

21. Gill, *supra* note 4, at 70.

22. N.D. WHITE, KEEPING THE PEACE 61-66 (1993) (emphasis added).

23. *Id.* at 66.

24. LELAND M. GOODRICH ET AL., CHARTER OF THE UNITED NATIONS, COMMENTARY AND DOCUMENTS 204-07 (3d & revised ed. 1969).

chapters granting its powers and at the same time be expanded to include implied powers.

Moreover, both Professors Gill and White do not examine the validity of the Court's interpretation. Both of them premise the Court's interpretation without questioning it. The advisory opinion of the International Court of Justice is not binding, and even the decision of the Court has no precedential value in a strict sense.<sup>25</sup> This means that the Court's opinion can be relied upon only when it is in accordance with existing international law.<sup>26</sup> Thus, study on the Court's interpretation is essential in discussing the relationship between the Council's general mandatory powers and its power under Chapter VII.

In discussing whether the majority of the International Court of Justice validly interpreted Article 25 of the Charter, this article examines whether the Court's own reasoning is sustainable (Section II); whether the Court's opinion can be supported by certain other doctrines (Section III); and finally, whether the Court's interpretation has been accepted by the Member States of the United Nations (Section IV).

### III. MAJORITY OPINION OF THE INTERNATIONAL COURT OF JUSTICE

The majority opinion of the International Court of Justice in the *Namibia Opinion* explores two premises in determining whether Security Council resolution 276 (1970) is mandatory.<sup>27</sup> First, the Court examines the legal basis of the resolution and, second, the binding effect of the decision.<sup>28</sup> That is to say, the Court distinguishes the legal basis for adopting such a resolution from the legal effect that the resolution may have. This distinction should be noted. As for the legal basis of the resolution, the Court relies upon the general implied powers of the Council. This is necessary for discharging the responsibility of maintaining international peace and security, which is vested in the Council under Article 24, paragraph 1, of the Charter.<sup>29</sup> As to the legal effect of the resolution, or in other words, what makes the implied powers mandatory, the Court contends that Article 25 not only applies to enforcement measures adopted under Chapter VII of the Charter but also to the

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25. Statute of the International Court of Justice, art. 59. However, it is usual for the International Court of Justice to follow its preceding judgments and opinions.

26. Judicial decisions shall be applied by the International Court of Justice "as *subsidiary means* for the determination of rule of law." Statute of the International Court of Justice, art. 38, para. I(d) (emphasis added).

27. Strictly, the Court admits the mandatory nature of paragraphs 2 and 5 of the Security Council resolution. *Namibia Opinion*, 1971 I.C.J. 52.

28. *See id.* at 51-54.

29. *See id.* at 52.

decisions of the Security Council adopted in accordance with the general implied powers.<sup>30</sup>

It is true, as mentioned above, that the Security Council's general implied powers regarding Article 24, paragraph 1, of the Charter have been generally accepted. However, this does not necessarily mean that the Security Council can take *any type of action*, even though this means that it can act *upon any appropriate occasion*.<sup>31</sup> That is, even though the general implied powers empower the Security Council to act in any appropriate occasion, this does not necessarily mean that, on such occasion, it can issue binding decisions directly based upon such general powers. This is the reason why the majority opinion explores two premises in reasoning that the Security Council has general mandatory powers. Since the majority's first premise is generally accepted, the second premise is the focus of this paper. That is, the focus of this paper is to discuss whether Article 25 applies to those decisions of the Security Council which are adopted in accordance with the general implied powers under Article 24, paragraph 1.

The reasoning of the majority on this point is rather simple. The Court shows a strong presumption that the declarations made under Article 24 would bind all the Member States, rejects two refutations of the presumption, and, consequently concludes the legal binding effect of resolution 276.<sup>32</sup>

First of all, a strong assumption is granted to the legal binding effect of resolution 276 which is adopted in accordance with the general implied powers without showing any grounds but by stating that

[i]t would be an untenable interpretation to maintain that, once such a declaration had been made by the Security Council under Article 24 of the Charter, on behalf of all member States, those Members would be free to act in disregard of such illegality or even to recognize violations of law resulting from it. When confronted with such an internationally unlawful situation, Members of the United Nations would be expected to act in consequence of the declaration made on their behalf.<sup>33</sup>

Second, the Court rejects the contention "that Article 25 of the Charter applies only to enforcement measures adopted under Chapter VII

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30. *See id.* at 52-53.

31. *See id.* at 293 (dissenting opinion of Judge Fitzmaurice).

32. *Namibia Opinion*, 1971 I.C.J. at 52.

33. *Id.* at 52.

of the Charter”<sup>34</sup> for the following reasons: (a) no words define “the decisions of the Security Council” in Article 25, as those merely in regard to enforcement action under Chapter VII, and the only words confining such decisions are “in accordance with the Charter;”<sup>35</sup> (b) Article 25 is placed not in Chapter VII but in Chapter V, which deals with the functions and powers of the Security Council in general;<sup>36</sup> and, finally, (c) Article 25 would be unnecessary if it only related to decisions regarding enforcement actions under Chapter VII, since Articles 48 and 49 provide binding effect for such decisions.<sup>37</sup>

Furthermore, the Court refutes the contention that resolution 276 does not purport to impose any legal duty upon the Member States as it is couched in exhortatory language, on the grounds that i) “the terms of the resolution to be interpreted,” ii) “the discussions leading to it,” iii) “the Charter provisions invoked,” and iv) “in general, all circumstances that might assist in determining the legal consequences of the resolution” have to be taken into account to determine the binding effect of the Security Council resolution.<sup>38</sup> That is, the decisive factor is not the language used in the resolution, but the Council’s intention, which can be inferred from “all circumstances.”<sup>39</sup>

Two issues should be separated in examining the Court’s reasoning. The first issue is whether this reasoning is sufficient to refute the contention that Article 25 applies only to enforcement measures adopted under Chapter VII. The second issue is whether the reasoning is adequate enough to prove that Article 25 applies to any decisions adopted in accordance with the general implied powers of the Security Council. The Court’s reasoning as to the first issue is convincing. Article 25 would be unnecessary *if it only relates to decisions regarding enforcement actions under Chapter VII*. However, this does not lead to the conclusion that Article 25 applies to any decisions based upon the Council’s general implied powers. In other words, negating the view that Article 25 applies only to enforcement measures adopted under Chapter VII does not necessarily refute the contention that Article 25 applies *only to decisions adopted in accordance with specific provisions in the Charter*, including Articles other than Chapter VII, such as Article 34 and Article 94, paragraph 2.

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34. *Id.* at 52-53.

35. *Id.* at 53.

36. *See id.*

37. *See id.* at 54.

38. *Namibia Opinion*, 1971 I.C.J. at 54.

39. *Namibia Opinion*, 1971 I.C.J. 52.



In light of the possibility that under Article 25 the powers of the Security Council are limited by the specific Charter provisions, the basis of the majority opinion of the Court becomes unstable. First, “[i]f . . . Article [25] were automatically to make *all* [sic] decisions of the Security Council binding, then the words ‘in accordance with the present Charter’ would be quite superfluous.”<sup>40</sup> Second, the fact that Article 25 is placed in Chapter V of the Charter does not mean that it applies to all decisions adopted in accordance with general implied powers. Article 25 is placed in Chapter V as a general provision, which provides a binding effect with decisions adopted in accordance with specific provisions including those other than Chapter VII. Third, Articles 48 and 49 complement Article 25, and the latter is still significant as a general provision.<sup>41</sup>

On the other hand, the rejection of the second refutation is not meant to prove the legal binding effect of the resolution itself. According to the Court’s reasoning, the Security Council’s intention is a decisive factor in determining what declaration made in accordance with the general implied powers would have legal binding effect. However, it is only when the Council has the general mandatory powers that the Council’s intention would matter. Here, the Court presumes the Security Council’s general mandatory powers again.

In conclusion, although the Court effectively refutes the contention that Article 25 applies only to enforcement actions under Chapter VII, its reasoning is not enough to prove that the Article applies to any decisions adopted in accordance with the general implied powers of the Security Council. It is the strong presumption that “[i]t would be an untenable interpretation to maintain that, once such a declaration had been made by the Security Council under Article 24 of the Charter, . . . , those Members would be free to act in disregard of such illegality or even to recognize violations of law resulting from it”<sup>42</sup> that nevertheless leads the Court to the latter conclusion.

However, such a presumption by the Court is not shared by all. Indeed, this view emphasizing institutional effectiveness<sup>43</sup> of the Security

40. *Id.* at 293-94 (dissenting opinion of Judge Fitzmaurice).

41. AC Cilliers, *United Nations Competence in respect of South West Africa*, 2 SOUTH AFR. Y.B. INT’L L. 136-37 (1976); Von Wilhelm A. Kewenig, *Die Problematik der Bindungswirkung von Entscheidungen des Sicherheitsrates*, in Festschrift für U. Scheuner zum 70 Geburtstag 273-74 (H. Ehmske et al. eds., 1973); M. Krökel, *Die Bindungswirkung von Resolutionen des Sicherheitsrates der Vereinten Nationen gegenüber Mitgliedstaaten* 49 (1977); Jean Paul Jacqué, *L’Avis de la cour internationale de justice du 21 Juin 1971*, 76 REV. GÉN. DROIT INT’L PUB. 1088-89 (1972).

42. *See Namibia Opinion*, 1971 I.C.J. at 52.

43. Institutional effectiveness has been relied upon by the International Court of Justice to provide an international organization with “those powers which, though not expressly provided

Council is strongly criticized as making the Council's power essentially unlimited, thus enabling the Council to impose any obligation upon Member States against their will.<sup>44</sup> According to the majority opinion, the Security Council could impose any obligation upon Member States by asserting that it is discharging its responsibility for the maintenance of international peace and security, since it is easy to represent any controversial international situation as involving a latent threat to peace and security.<sup>45</sup> As Judge Gros contends, the majority opinion is "to turn the Security Council into a world government,"<sup>46</sup> a result that is most likely unacceptable to many of the Member States, which are part of an international community whose main actors are still independent sovereign states.<sup>47</sup>

In other words, the Council's emphasis on the institutional effectiveness of the Security Council comes into conflict with state sovereignty, which is an issue emphasized by some dissenting opinions.<sup>48</sup> Institutional effectiveness and state sovereignty are equally crucial since both of them relate to fundamentals of the international society. Basic units of the international community are sovereign states, and yet, on the other hand, the function of the Council is to maintain peace and security of the international community. It is true that state sovereignty is somehow limited by the establishment of the United Nations, but this does not lead to the conclusion that institutional effectiveness always supersedes state sovereignty. Thus, any attempt to deduce a conclusion from a certain value is bound to be futile, for it leads to the sterile confrontation between

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in the [constituent documents], are conferred upon it *by necessary implication as being essential to the performance of its duties.*" *Corfu Channel*, 1949 I.C.J. 182 (Apr. 9) (emphasis added). See IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 690 (4th ed. 1990).

44. W. Riphagen, *The Legal Consequence of Illegal Acts under Public International Law*, 20 NETH. INT'L L. REV. 27, 31 (1973); Lawrence L. Herman, *The Legal Status of Namibia and of the United Nations Council for Namibia*, 13 CAN. Y.B. INT'L L. 306, 319 (1975). *Contra*, RENATA SONNENFELD RESOLUTIONS OF THE UNITED NATIONS SECURITY COUNCIL 127-28 (1988); RÖSGEN, *supra* note 41, at 159; Rosalyn Higgins, *The Advisory Opinion on Namibia: Which UN Resolutions Are Binding Under Article 25 of the Charter?* 21 INT'L & COMP. L.Q. 270, 286 (1972).

45. See *Namibia Opinion*, 1971 I.C.J. at 294 (dissenting opinion of Judge Fitzmaurice).

46. *Id.* at 340 (dissenting opinion of Judge Gros).

47. See Anthony J.M. Zuijdewijk, *The International Court and South West Africa: Latest Phase*, 3 GA. J. INT'L & COMP. L. 332, 338-40 (1973). See also Riphagen, *supra* note 44, at 34; P.H. Koojijmans, *The Advisory Opinion on Namibia of the International Court of Justice*, 20 NETH. INT'L L. REV. 17, 24 (1973); Herman, *supra* note 44, at 319; Arthur W. Rovine, *The World Court Opinion on Namibia*, 11 COLUM. J. TRANSNAT'L L. 203, 230 (1972); Cillers, *supra* note 41, at 136; Oliver J. Lissitzyn, *International Law and the Advisory Opinion on Namibia*, 11 COLUM. J. TRANSNAT'L L. 50, 73 (1972).

48. See *Namibia Opinion*, 1971 I.C.J. at 294-95 (dissenting opinion of Judge Fitzmaurice); *Id.* at 341 (dissenting opinion of Judge Gros); *Id.* at 147 (separate opinion of Judge Onyeama).

two absolute values. Therefore, apart from such axiology, a more fruitful discussion can be had by examining how states regard the scope of binding decisions of the Security Council.<sup>49</sup>

#### IV. GENERAL MANDATORY POWERS DOCTRINE

This section examines whether the interpretation offered by the majority opinion can be sustained from another perspective. Having analyzed the reasoning of the majority opinion, this section examines the alleged basis of *the general mandatory powers doctrine*, which contends that the Security Council has general and almost unlimited powers to issue binding decisions if it acts in maintaining international peace and security. The alleged basis of this doctrine, other than those discussed above, are *travaux préparatoires* (preparatory documents) of the United Nations Charter and practices of the Security Council.

##### A. *Travaux Préparatoires (Preparatory Documents)*

Some scholars<sup>50</sup> base their contention on the fact that, at the San Francisco Conference, an amendment proposed by Belgium was voted down.<sup>51</sup> That amendment would have required that any obligation of the Member States, under Article 25 to carry out the Security Council's decisions, be restricted to those decisions adopted under Chapter VIII<sup>52</sup> of the Dumbarton Proposal<sup>53</sup> be expressly stated. Indeed, the Secretary General's statement reads, "[t]he rejection of this [Belgian] amendment is clear evidence that the obligation of the Members to carry out the decisions of the Security Council applies equally to decisions made [under the general implied powers] under Article 24 and to the decisions made

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49. See A. C. Arend, *Chapter III: A Methodology for Determining an International Legal Rule*, in *LEGAL RULES AND INTERNATIONAL SOCIETY* (unpublished manuscript, on file with author).

50. Koojimans, *supra* note 47, at 22-23; Jost Delbrück, *Artikle 25*, in *CHARTA DER VEREINTEN NATIONEN KOMMENTAR* 376 (B. Simma ed. 1991; RAHMATULLAH KHAN, *IMPLIED POWERS OF THE UNITED NATIONS* 7 (1970). See also Higgins, *supra* note 44, at 278-79; SONNENFELD, *supra* note 44, at 126-27.

51. The Belgian proposal was to add the words "taken under Chapter VIII" after the words "Security Council" in paragraph 4, section B, chapter VI, which provided as follows: "All members of the Organization should obligate themselves to accept the decisions of the Security Council and to carry them out in accordance with the provisions of the Charter." *The United Nations Dumbarton Proposals for a General International Organization*, Doc.1, G/1, 3 U.N.C.I.O. Docs. 9 (1945).

52. Chapter VIII of the Dumbarton Proposal corresponds to Chapters VI, VII, and VIII of the current United Nations Charter. *Dumbarton Oaks Proposals for a General International Organization*, Doc.1, G/1. 3 U.N.C.I.O. Doc. 12-19 (1945).

53. *Id.*

under the grant of specific powers."<sup>54</sup> However, this understanding is too simplistic and it is untenable to conclude so from this fact.

First, the Belgian proposal received a favorable vote of a majority of the delegates that attended and voted at the meeting, despite it being voted down due to the lack of the necessary two-thirds majority.<sup>55</sup> Moreover, the Belgian amendment was not intended to modify the text substantially, but to make explicit that the decisions of the Security Council, which Member States have an obligation to accept, referred solely to its powers under Chapter VIII of the Dumbarton Proposal.<sup>56</sup> In addition, one of the sponsoring countries, the United Kingdom, suggested that the amendment was not necessary, since the decisions of the Security Council were specified by the phrase, "in accordance with the provisions of the Charter."<sup>57</sup>

Furthermore, some governmental official reports on the San Francisco Conference support the view that the binding decisions of the Security Council must be based upon the specific Charter provisions. For example, the United States report on the result of the San Francisco Conference clearly states that it is to be noted that the members of the Organization agree to carry out the decisions of the Security Council in accordance with the present Charter. Thus, *the precise extent of the members' obligation under Article 25 can be determined only by reference to other provisions of the Charter*, particularly Chapters VI, VII, VIII, and XII.<sup>58</sup> Moreover, the Canadian official commentary on the Charter emphasizes that the view that Member States assume obligations under

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54. U.N. SCOR, 2d Sess., 91st mtg. at 45, U.N. Doc. S/PV. 91 (1947) [hereinafter U.N. SCOR]. See also Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), 1971 I.C.J. Pleadings, 100, n.160 (1970) (statements of the Secretary General of the United Nations).

55. The proposal received a favorable vote of 14 to 13. *Summary Report of Fourteenth Meeting of Committee*, Doc. 597, III/1/30, 11 U.N.C.I.O. Docs. 395 (1945).

56. See *id.* at 394.

57. *Id.* Indeed, the British delegation suggested the Security Council can issue binding decisions only under Chapters VIII and XII (Chapter XVII of the current Charter) of the Dumbarton Proposal. *Id.* Other than these two countries, the Soviet Union argued against the Belgian amendment because the proposal would restrict the Council's power undesirably but Canada contended that paragraph 4 should be interpreted as relating exclusively to chapter VIII of the Dumbarton Proposal. *Id.* at 394-95.

58. See *The Charter of the United Nations for the Maintenance of International Peace and Security*, Submitted by the President of the United States on July 2, 1945: Hearings on Senate, Before the Comm'n on Foreign Relations, 79th Cong., 1st Sess. 81 (1945) (report to the President on the Results of the San Francisco Conference by the Chairman of the United States delegation, the Secretary of State, June 26, 1945) (emphasis added).

Article 25 only when other specific provisions provide so was accepted at the Conference.<sup>59</sup>

This analysis on *travaux préparatoires* (preparatory documents) shows that inferring from these *travaux préparatoires* (preparatory documents) that the Security Council has general mandatory powers is invalid.<sup>60</sup> The record strongly suggests that the prevailing view was that the binding decisions of the Security Council must be based upon the specific provisions of the United Nations Charter.<sup>61</sup>

### B. Practices of the Security Council

Other scholars<sup>62</sup> claim that the Security Council has general mandatory powers, based on the analysis of several practices. However, these practices, such as the question of the Statute of the Free Territory of Trieste, the Palestine question, the Congo question, the Indonesian question, the Cashmere question, the Greek frontier incidents question, the Iranian question, and the South African question, are not relevant to the present issue<sup>63</sup> and no conclusion regarding the general mandatory powers can be drawn from these practices.<sup>64</sup>

#### 1. The Question of the Free Territory of Trieste<sup>65</sup>

The Permanent Statute for the Free Territory of Trieste, one of the instruments relating to the establishment of Free Territory of Trieste, which was decided under the proposed peace treaty with Italy, provided that the integrity and independence of the Free Territory should be assured

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59. See DEPARTMENT OF EXTERNAL AFFAIRS, 2 REPORT ON THE UNITED NATIONS CONFERENCE ON INTERNATIONAL ORGANIZATION 33 (Conference Series 1945).

60. Kewenig, *supra* note 41, at 274; Higgins, *supra* note 44, at 278; Jacqué, *supra* note 41, at 1089.

61. See RUTH B. RUSSELL & JEANNETTE E. MUTHER, A HISTORY OF THE UNITED NATIONS CHARTER 665 (1958); GOODRICH ET AL., *supra* note 24, at 208; Kewenig, *supra* note 41, at 275-77.

62. PHILIPPE MANIN, L'ORGANISATION DES NATIONS UNIES ET LE MAINTIEN DE LA PAIX 50, 57-69 (1971); JORGE CASTAÑEDA, LEGAL EFFECTS OF UNITED NATIONS RESOLUTIONS 72-75 (1969).

63. Jacqué, *supra* note 41, at 1089-92.

64. See, e.g., GOODRICH ET AL., *supra* note 24, at 208; Kewenig, *supra* note 41, at 265; SONNENFELD, *supra* note 44, at 122; A. J.P. Tammes, *Decisions of International Organs as a Source of International Law*, 94 R.C.A.D.I. 299 (1958-II).

65. See 2 REPERTORY OF PRACTICE OF UNITED NATIONS ORGANS 41-42 (1955).

by the Security Council.<sup>66</sup> The Statute raised a discussion regarding the authority of the Council to assume the responsibilities relating to the Free Territory and regarding the obligations of Members of the United Nations in consequence of the decision by the Council to assume those responsibilities. This case is viewed as a decisive precedent since, in this discussion, the Secretary General of the United Nations submitted a statement expressing the view that "the obligation of the Members to carry out the decisions of the Security Council applies equally to decisions [based upon the general implied powers] . . . under Article 24 and to the decisions made under the grant of specific powers."<sup>67</sup>

However, this case only relates to the Security Council's general implied powers under Article 24, not to its mandatory powers under Article 25.<sup>68</sup> It was not made clear as to "what countries would be bound by the obligations to ensure the integrity and independence of the Free Territory."<sup>69</sup> Furthermore, it should be emphasized that the territory was not under any sovereignty and that the responsibility of the Security Council was consented to by all the signatories to the proposed Peace Treaty. In other words, this decision "is not one where the principle of the sovereignty of States . . . is at stake."<sup>70</sup>

## 2. Palestine Question

This case related to the implementation of the Plan Partition with the Economic Union for Palestine.<sup>71</sup> In the Plan, the General Assembly requested the Security Council to assume responsibility for the Plan's execution. Consequently, the question was raised whether the Council had the power to accept such responsibility. This case is definitely irrelevant since the Security Council rejected the Assembly's request. However, Professor Jorge Castañeda regards this as one of the precedent-setting cases of general mandatory powers of the Security Council.<sup>72</sup>

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66. See Permanent Statute of the Free Territory of Trieste, art. 2, 49 U.N.T.S. 187 (1950).

67. U.N. SCOR, *supra* note 54, at 45.

68. See Jacqué, *supra* note 41, at 1090-91.

69. U.N. SCOR, *supra* note 54, at 57 (statement of Australian delegation).

70. *Id.* at 58 (statement of French delegation).

71. See 2 REPERTORY, *supra* note 65, at 22-24.

72. CASTAÑEDA, *supra* note 62, at 73.

### 3. Congo Question, Indonesian Question, and Cashmere Question

These cases are also irrelevant to this issue. All of these related to the resolutions, which requested a cease-fire. Thus, Article 40<sup>73</sup> of the Charter is regarded as their authority, and, indeed, in the latter two cases a cease-fire came into effect only after the parties concerned accepted them.<sup>74</sup> Therefore, these questions did not involve the issue of general mandatory powers of the Security Council.

### 4. Greek Frontier Question

The issue raised in this case was whether Article 25 applied to the decisions of the Security Council to conduct an investigation under Article 34.<sup>75</sup> That is, the decision was not based upon the general mandatory powers of the Security Council but was based upon a specific provision of the Charter, Article 34 in Chapter VI.

### 6. Iranian Question and South African Question

In these cases, the Security Council did not issue any binding decisions upon Member States. As for *the Iranian question*, the controversial issue was whether the Security Council could remain seized of the dispute even after the complaint was withdrawn by the submitting state, Iran.<sup>76</sup> Although the Council decided to continue the discussion on the dispute, this decision did not impose any obligation upon Iran or any other Member States. As to *the South African question*, Security Council resolution 134 (1960), requesting South Africa to "abandon its policy of apartheid and racial discrimination," which Professor Castañeda<sup>77</sup> contends is a binding decision, was not regarded as such by the Security Council.

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73. Article 40 of the Charter provides, "[i]n order to prevent an aggravation of the situation, the Security Council may, before making the recommendations or deciding upon the measures provided for in Article 39, call upon the parties concerned to comply with such provisional measures as it deems necessary or desirable." U.N. CHARTER art. 40.

74. As for *the Indonesian question*, the Council indicated the Commission on Indonesia should assist the parties in reaching agreements for cease-fire. (U.N. SCOR, 4th Sess., 421st mtg. at 5 (1949)). As to *the Congo question* and *the Cashmere question*, see Jacqué, *supra* note 41, at 1092.

75. See 2 REPERTORY, *supra* note 65, at 45. Article 34 of the Charter provides, "[t]he Security Council may investigate any dispute, or any situation which might lead to international friction or give rise to a dispute, in order to determine whether the continuance of the dispute or situation is likely to endanger the maintenance of international peace and security." U.N. CHARTER art. 34.

76. See 2 REPERTORY, *supra* note 65, at 19-20.

77. CASTAÑEDA, *supra* note 62, at 75.

In conclusion, none of these alleged practices of the Security Council support the contention that Article 25 of the Charter applies to any decisions adopted under the Council's general implied powers. In some of these cases, no binding decision was taken and, in others, the legal basis of the binding decision can be found in a specific Charter provisions.

## V. RESPONSE TO THE COURT'S OPINION

As indicated by the foregoing analysis, the reasoning behind the majority opinion in the *Namibia Opinion* and the general mandatory powers doctrine is untenable. Next, the responses of states to the Court's opinion is examined to discover whether the opinion has been accepted by the Member States of the United Nations.

Although South Africa was offended by the Court's opinion,<sup>78</sup> the Security Council, in resolution 301 (1971), agreed with the Court's conclusion. However, in the resolution, the Council did not refer to the Court's reasoning. Indeed, some Council members severely contested its reasoning concerning Article 25 of the Charter in the discussion on the *Namibia Opinion*.

The United Kingdom and France<sup>79</sup> strongly criticized and even denied the Court's interpretation of Article 25 of the Charter.<sup>80</sup> According to both states, Article 25 only applies to the decisions under Chapter VII of the United Nations Charter. The delegate of the United Kingdom stated,

[T]his part of the majority opinion [which asserts that certain resolutions adopted by the Security Council were legally binding] seems . . . to be open to the most serious legal objection . . . . And, as a matter of law, my Government considers that the Security Council can take decisions generally binding on Member States only when the Security Council has made a determination under Article 39 that a threat to the peace, breach of the peace or

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78. See JOHN DUGARD, *THE SOUTH WEST AFRICA/NAMIBIA DISPUTE* 490-92 (1973).

79. Delegate of France stated, "[T]he Security Council is empowered to take decisions binding on all States. But such decisions are limited to cases of a threat to the peace, breaches of the peace or aggression." U.N. SCOR, 26th Sess., 1588th mtg. at 2-3. See also U.N. SCOR, 26th Sess., 1598th mtg. at 2.

80. These two permanent members of the Security Council abstained from voting on Resolution 301 (1971).



act of aggression exists. Only in these circumstances are the decisions binding under Article 25.<sup>81</sup>

Moreover, some other countries, such as Japan,<sup>82</sup> Italy, Belgium,<sup>83</sup> and the United States,<sup>84</sup> also put up a question on the interpretation. As the delegate of Italy clearly stated, “[T]he Court offered a far-reaching interpretation of Articles 24 and 25 of the Charter — an interpretation which is highly controversial and, I must say, not shared by my Government.”<sup>85</sup>

Italy’s criticism of the Court’s reasoning was not necessarily in contradiction with their agreement with the conclusion of the opinion. The states could rely upon the illegality of South Africa’s presence in Namibia to accept the Court’s conclusion. As in previous resolutions regarding this issue,<sup>86</sup> the Security Council, in the resolution 301 (1971), emphasized the illegality of the South Africa’s presence in Namibia, not referring to the reasoning advanced by the majority opinion. Indeed, in resolution 301 (1971), the Security Council stated,

The Security Council,

4. Declares that South Africa’s continued illegal presence in Namibia constitutes an internationally wrongful act and a breach of international obligations and that South Africa remains accountable to the international obligations or the rights of the people of the Territory of Namibia;

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81. U.N. SCOR, 26th Sess., 1589th mtg. at 5-6. *See also* U.N. SCOR, 26th Sess., 1598th mtg. at 3.

82. Delegate of Japan stated, “[W]e do not fully agree with all of the reasoning, particularly with regard to some interpretations of the Charter, underlying the Court’s opinion . . .” U.N. SCOR, 26th Sess., 1589th mtg. at 9.

83. Delegate of Belgium stated, “[W]e feel that the Security Council can adopt decisions mandatory for all Member States of the United Nations only when, in conformity with chapter VII of the Charter, it has found that there is a threat to the peace, a breach of the peace or an act of aggression.” U.N. SCOR, 26th Sess., 1594th mtg. at 5-6.

84. Delegate of the United States stated, “Our acceptance, of course, does not necessarily imply approval of all the Court’s reasoning. We note in this connection concern about the Charter interpretation which has been expressed by several members of this Council.” U.N. SCOR, 26th Sess., 1598th mtg. at 3.

85. U.N. SCOR, 26th Sess., 1589th mtg. at 11. *Cf.* U.N. SCOR 26th Sess., 1594th mtg. at 4 (1971) (statement of the Liberian delegate).

86. *See* S.C. Res. 269 (1969), para. 4; *The Situation in Namibia*, S.C. Res. 276 (1970), para.2.

5. Takes note with appreciation of the advisory opinion of the International Court of Justice of 21 June 1971;
6. Agrees with the Court's opinion, as expressed in paragraph 133 of its advisory opinion.<sup>87</sup>

## VI. CONCLUSION

The end of the Cold War has revitalized the activities of the Security Council and consequently activated the discussions on the issue of the limitations on the Security Council's power under Chapter VII of the United Nations. However, the *Namibia Opinion* has the potential for ruining such arguments due to the majority opinion's contention that the Security Council has *general mandatory powers*. If, as the International Court of Justice stated, Article 24, paragraph 1, of the United Nations Charter grants the Security Council the general implied powers and Article 25 provides a legally binding effect with decisions based upon such general powers, the Security Council does not have to rely on Chapter VII when it imposes sanctions. The general mandatory powers would empower the Council to take any action so long as it asserts that it is acting pursuant to its responsibility to maintain international peace and security.

Among the few scholars who have referred to the relationship between the Security Council's general mandatory powers and its powers under Chapter VII, even fewer have examined the validity of the Court's interpretation in the *Namibia Opinion*. However, since the advisory opinions of the International Court of Justice have no precedential value in a strict sense, the authority of the opinion depends upon the soundness of its reasoning. Thus, the *Namibia Opinion* should be fully examined from this viewpoint.

The Court's interpretation of Article 25 of the Charter is not sustainable. Its own reasoning is untenable. First, the Court's reasoning does not by itself prove that Article 25 applies to any decisions based upon the general implied powers. However, its reasoning in refuting the contention that Article 25 only applies to enforcement measures adopted under Chapter VII of the Charter is sound. Second, the Court's presumption that the Security Council has general mandatory powers leads to the sterile confrontation between two absolute values, the institutional effectiveness and the state sovereignty. Moreover, the reasoning behind some other doctrines are also untenable. First, *travaux préparatoires*

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87. S.C. Res. 301 (1971).

(preparatory documents) of the Charter do not support the conclusion that the Security Council has general mandatory powers to the extent claimed. Second, *practices* of the Security Council are irrelevant to the issue discussed here. Furthermore, the Court's interpretation of Article 25 has not been accepted by Member States of the United Nations, especially the members of the Security Council.

In conclusion, the proposition that the Security Council has general mandatory powers, as admitted by the International Court of Justice in the *Namibia Opinion*, is not sustainable and, indeed, is not accepted by states. In other words, the existence of general mandatory powers cannot be based upon the *Namibia Opinion*. Since the general mandatory powers is found untenable, *limitations*, on the Security Council's power under Chapter VII, are not superseded by *the general mandatory powers*, which are essentially unlimited.

Hopefully, this analysis fills the gap in the current arguments on the power of the Security Council. The common understanding that the Security Council's mandatory powers could not be deduced from its general implied powers should be the starting point of a fruitful discussion on the limitation on the Security Council's power, thereby surmounting the sterile debate between legalists, insisting upon state sovereignty, and hard-headed realists, insisting upon the institutional effectiveness of the United Nations Security Council.<sup>88</sup>

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88. See Jose E. Alvarez, *Judging the Security Council*, 90 AM. J. INT'L L. 1-38 (1996); Koskenniemi, *supra* note 5, at 325-48.