

STRENGTHENING THE ROLE OF THE INTERNATIONAL COURT OF JUSTICE AS THE PRINCIPAL JUDICIAL ORGAN OF THE UNITED NATIONS

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I. INTRODUCTION

Article 92, paragraph 1 of the Charter and Article 1 of the Statute make the International Court of Justice “the principal judicial organ of the United Nations”. In many people’s eyes this strengthens the authority of the Court, but if one were to give it a little more consideration, this also places the Court in a somewhat paradoxical situation.

In its role as an “organ” of the Organization, first and foremost, like the United Nations as a whole, the Court is dedicated to the maintenance of international peace and security, in accordance with the primary goal of the United Nations as expressed in Article 1, paragraph 1 of the Charter. Fortunately this is not incompatible with respect for international law and, as the same provision continues: “and to that end” the United Nations “shall bring about by peaceful means [...] adjustment or settlement of international disputes or situations which might lead to a breach of the peace” “in conformity with the principles of justice and *international law*”.

Nonetheless, international law is in the Charter only a means – one amongst others – to achieve a superior goal: peace. Article 94 provides an almost caricatural illustration of this by providing for the possible intervention of the Security Council in order to ensure the respect of the Court’s judgments, while still leaving to the Security Council a large power of appreciation in this respect.¹

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¹ See the commentary on this provision by Alain Pillepich in Jean-Pierre Cot and Alain Pellet (eds.), *La Charte des Nations Unies – Commentaire article par*

The Court does not benefit from such a power of discretion. Its mission as a judicial organ is to state the law, “to decide in accordance with international law such disputes as are submitted to it”² and to render advisory opinions on legal questions to the organs by which it has been seised.³

To be blind to the tensions which might arise from this requires a large amount of angelism or naïveté: tensions between the Court, whose functions are, as it has reminded us on several occasions “purely judicial”,⁴ and the other principal organs, i.e. the General Assembly and, most importantly, the Security Council, vested with the “primary responsibility for the maintenance of international peace and security”⁵, and for which respect for the law is not a goal within itself; but tensions also between the differing functions of the Court itself, which is at the same time an element of the United Nations system for the maintenance of international peace and security and an “organ of international law”,⁶ of which it cannot, or at least not upon its own initiative,⁷ avoid the application. As a “Court of Justice, [it] cannot even, in giving advisory opinions, depart from the essential rules guiding its activity as a court”.⁸ However, this was stated by the Permanent Court, which was not an organ of the League of Nations and for which it was perhaps easier to adhere to the principle than it is for the present Court.

Such tensions are at the heart of any study that envisages the Court as the “principal judicial organ of the United Nations”. Because it is an “organ”, a “principal organ” and a “judicial organ”, the Court benefits

article (Paris, *Economica*, 1991), pp. 1275–1285 or Hermann Mosler and Karin Oellers-Frahm in Bruno Simma (ed.), *The Charter of the United Nations – A Commentary* (2nd ed., Oxford, Oxford University Press, 2002), pp. 1174–1179.

² Statute, Article 38, paragraph 1.

³ Charter, Article 96.

⁴ See, for example, the Judgment of 26 November 1984, *Military and Paramilitary Activities in and against Nicaragua (Jurisdiction and Admissibility)*, *I.C.J. Reports 1984*, p. 435, para. 95; see also 24 May 1980, *United States Diplomatic and Consular Staff in Tehran*, *I.C.J. Reports 1980*, p. 22, para. 40.

⁵ Charter, Article 24, paragraph 1.

⁶ Cf. P.C.I.J., Judgment of 25 May 1926, *Certain German Interests in Polish Upper Silesia, Merits, Series A, No. 7*, p. 19.

⁷ It could on the basis of Article 38, paragraph 2 of its Statute, if the parties to a dispute authorize the Court to decide a case *ex aequo et bono*.

⁸ P.C.I.J., Advisory Opinion of 23 July 1923, *Status of Eastern Carelia, Series B, No. 5*, p. 29.

from a unique status that confers on it exceptional authority but which also imposes on it certain restrictions that it must confront particularly in its relations with the other principal organs of the United Nations, essentially in the pivotal area of the maintenance of international peace and security.

II. THE COURT, “PRINCIPAL JUDICIAL ORGAN OF THE UNITED NATIONS”

A. An “organ” of the United Nations

An organ of the Organization, the Court was created by the Charter and functions in conformity with the provisions of the Statute that are “an integral part”⁹ of the Charter and to which “all Members of the United Nations are *ipso facto* parties”.¹⁰ The result of this is, ostensibly, that the general provisions of the Charter apply to the Court and, in particular, the Court is bound to the goals and principles expressed in Articles 1 and 2 of the Charter, and the Statute benefits from a “super-binding” character that Article 103 of the Charter confers on its provisions.

The composition of the Court reflects this element of an organ of the world organization: the judges are elected by the General Assembly and the Security Council, and they must ensure “as a whole the representation of the main forms of civilization and of the principal legal systems of the world”.¹¹ Even if it is uncertain whether the rather artificial “geographical distribution” maintained today reaches this result in a completely satisfactory manner, the concern of “globalization” that this requirement suggests deserves to be raised.

With this idea in mind, incidentally, the virtue of recourse to chambers of the Court might be questioned. As written by President Bedjaoui, their creation “does not fit completely with the concept of a world Court”¹² and, at the same time, with that of a United Nations organ.

It is true that this “organ” has some very unique characteristics:

- The non-member States of the Organization can become parties to the Statute of the Court and therefore participate in the “life” of the Court;

⁹ Charter, Article 92.

¹⁰ Charter, Article 93.

¹¹ Statute, Article 9.

¹² “*ne cadre pas tout à fait avec la notion même de Cour mondiale*” – “Remarques sur la création de Chambre *ad hoc* au sein de la Cour internationale de Justice”, in S.F.D.I., colloque de Lyon, *La juridiction internationale permanente*, (Paris, Pedone, 1987), p. 73.

- Amendments to the Statute are subject to a legal process that differs partially from that used for amending the Charter itself;
- The status of the personnel of the Registry is distinct from that of other personnel of the Organization.

However, this does not make the Court any less an organ of the United Nations, and, in that capacity, the Court has an unquestionable general obligation of cooperation with other organs of the U.N. This is not without effect on its jurisdiction and, primarily, on its advisory jurisdiction; a point that was raised by the Court as early as 1950 in its advisory opinion on the *Interpretation of Peace Treaties*: the reply to a request for an advisory opinion “represents the participation of the Court, itself an ‘organ of the United Nations’, in the activities of the Organization and, in principle, should not be refused”.¹³

This is also the case for its contentious jurisdiction: irrespective of the lack of enthusiasm that the Security Council demonstrates in applying this provision, in its role as promoter of the peaceful settlement of disputes it is bound, in accordance with the terms of Article 36, paragraph 3 of the Charter, to “take into consideration that legal disputes should as a general rule be referred by the parties to the International Court of Justice in accordance with the provisions of the Statute of the Court”.¹⁴ Even if contradicted by the facts, it is not too extreme to conclude from this that the Court is potentially vested with the principal responsibility of settling legal disputes; and that this function is all the more fundamental as all disputes comprise, necessarily, legal aspects.¹⁵

It is true that the Court would more completely be an organ of the Organization if the U.N. could seize the Court for contentious proceedings; and we are not dealing here with the possibility that the U.N. could pursue a State that has not respected its obligations under international law, which might be envisaged. That possibility would entail instituting a type of “global public prosecutor” and the time is not yet ripe for this sort of thing, even if it has been thought about, especially with regard to environmental matters.¹⁶ Rather, this entails theories whereby the Organization weighs

¹³ Advisory Opinion of 30 March 1950, *I.C.J. Reports 1950*, p. 71.

¹⁴ See the commentary on these provisions by Brigitte Stern in J.P. Cot and A. Pellet (eds.), *op. cit.*, fn. 1, pp. 621–627 and by Torsten Stein in B. Simma (ed.), *op. cit.*, *ibid.*, pp. 625–627.

¹⁵ See also, *infra* fn. 23.

¹⁶ Cf. Elihu Lauterpacht, *Aspects of the Administration of International Justice*, (Grotius Publs., 1991), p. 62.

how its own body of law might affect a State or vice versa. The *Comte Bernadotte* case could have been this type of case, as might have been the *Arbitration Obligation under the Headquarters Agreement of 1947* case, and the objections relating to the interpretation or application of the Convention on the Privileges and Immunities of the United Nations. Thus, in all these cases, it was necessary to use – or anticipate using¹⁷ – advisory opinion proceedings, which, in reality, seems exceedingly artificial. With regard to recourse to arbitration, as stipulated in section 21.a of the Headquarters Agreement between the United Nations and the United States, this seems highly suspect as the Organization includes within its system an impartial organ that is perfectly qualified to undertake this task.¹⁸

Its qualification as an organ of the Organization produces other consequences for the Court, which are more trivial, but nonetheless threatening. In particular, the final result is that the budget of the Court is integrated into the budget of the United Nations and adopted by the General Assembly. Based on this fact, the number and level of positions in the Registry depend on the good will of the General Assembly, which considerably restricts the meaning of Articles 21, paragraph 2, of the Statute and 25 of the Rules of Court. The financial difficulties faced by the Court in the late 1990s seem to be partly overcome, due to the energetic action of President Guillaume, who obtained from the General Assembly, in 2001, an appreciable increase in the budget which made possible the funding of several posts in the Registry, thus avoiding a complete asphyxiation of the Court.¹⁹ However, the situation in this respect remains

¹⁷ Cf. Article VIII, section 30, of the Convention on the Privileges and Immunities of the United Nations of 13 February 1946 that envisages an “obligatory advisory” which was used for the first time in the *Cumaraswamy* case (see Advisory Opinion of 29 April 1999, *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission of Human Rights*, I.C.J. Reports 1999, pp. 76–77, paras. 24–25).

¹⁸ In this regard, see Gilbert Guillaume, “The Future of International Judicial Institutions”, ICLQ (1995), p. 853; see also Sir Robert Jennings, “The International Court of Justice after Fifty Years”, AJIL (1995), pp. 504–505; *contra*: Christian Dominicé, “Request of Advisory Opinions in Contentious Cases” in Laurence Boisson de Chazournes, Cesare Romano and Ruth Mackenzie (eds.), *International Organizations and International Dispute Settlement: Trends and Prospects* (New York, Transnational Publishers, 2002), pp. 101–102.

¹⁹ For a description of this relative improvement of the situation, see Philippe Couvreur, “L’Organisation et les moyens des juridictions internationales face au contentieux international”, in S.F.D.I., colloque de Lille, *La juridictionnalisation du droit international* (Paris, Pedone, 2003), pp. 477–478 and Gilbert Guillaume,

critical and it appears urgent to consider a form of financial independence that, alone, would shelter the public service of international justice from the paralysing ardour of States Members.

B. A “principal” organ

The Court is not only an organ of the United Nations, it is also a “principal” organ of the United Nations. It is nonetheless questionable whether this characteristic has widespread legal consequences or if, at least up until now, all of the implied consequences that might arise from this character have been drawn.

In any event, it is not this characteristic that allows for creation of subsidiary organs by the Court. Article 7, paragraph 2, of the Charter does not authorize the creation of such organs other than “in accordance with the present Charter” and neither the Statute nor the Charter itself envisages the Court doing this, with the exception of considering the Registrar, the Registry or the Chambers as subsidiary organs, which is debatable.²⁰ Neither does this quality as a “principal” organ establish the independence of the Court or its equality with the General Assembly or the Security Council.²¹ After all, the Economic and Social Council, the Trusteeship Council and the Secretariat are also principal organs; they are, however, “less equal” than the others.

In other words, if the adjective, “principal” has any real legal significance, it is only “negatively”, in the sense of implying that, as Article 24 of the Charter does not confer on the Security Council exclusive responsibility in matters of the maintenance of international peace and security,²² the Court does not have a monopoly over judicial activities within the United Nations.

“La Cour internationale de Justice – situation présente et perspectives d’avenir”, in *La Cour internationale de Justice à l’aube du XXI^{ème} siècle – Le regard d’un juge* (Paris, Pedone, 2003), p. 43.

²⁰ See, however, in this regard Shabtai Rosenne, *The Law and Practice of the International Court* (The Hague/Boston/London, Nijhoff, 1997), p. 117.

²¹ In contrast to what I formerly thought (cf. “Le glaive et la balance – Remarques sur le rôle de la C.I.J. en matière de maintien de la paix et de la sécurité internationales”, *International Law at a Time of Perplexity; Essays in Honour of Shabtai Rosenne* (Dordrecht, Nijhoff, 1990), p. 541.

²² Cf. I.C.J., Advisory Opinion of 20 July 1962, *Certain Expenses of the United Nations*, *I.C.J. Reports* 1962, p. 163 or the Judgment of 26 November 1984, *Military and Paramilitary Activities in and against Nicaragua*, *Jurisdiction and Admissibility*, *I.C.J. Reports* 1984, p. 414.

Furthermore, the practice is well-oriented in this direction, when considering the United Nations tribunals for Libya and Eritrea or the United Nations Administrative Tribunal created by General Assembly resolutions,²³ which have been held to be legitimate by the Court at least in the latter case,²⁴ or the two *ad hoc* international criminal tribunals for the former Yugoslavia and Rwanda that were more recently instituted by the Security Council.²⁵ It remains that if the legality of the establishment of these tribunals is unquestionable, their relationship with the “principal judicial organ of the United Nations” would benefit, most certainly, from being specified or even simply organized. At the moment these relationships are poorly defined – this is the case for the United Nations Administrative Tribunal – where they are not defined at all – and this is the case of the ICTY and the ICTR.

However, by its decision of 2 October 1995, the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia, courageously and justifiably, considered that it was its duty to examine the validity of resolution 827 (1993) creating the Tribunal.²⁶ It must be considered that the Chamber accomplished its task conscientiously and competently. But would it not have been more customary and appropriate with regard to its role as the principal judicial organ of the United Nations to have assigned the Court this task? There would have been no need to modify the Charter; it would have been sufficient to include in the Statutes of the two tribunals for the former Yugoslavia and for Rwanda, and of course, for even better reasons, in the Statute of the International Criminal Court, a provision envisaging, like the famous Article 234 (former 177) of the Treaty of Rome, the possibility (or the obligation) to seise the Court on preliminary issues when, in the exercise of their functions, these tribunals are charged with interpreting the Charter or acknowledging the legitimacy of other organs of the Organization.²⁷ By doing so, there would be a partial solution to one of the principal problems arising from the multiplication of

²³ Cf. resolution 388(V) of 15 December 1950 or 530(VI) of 29 January 1952 and 351(IV) of 24 November 1949.

²⁴ Advisory Opinion of 13 July 1954, *Effect of Awards of Compensation Made by the United Nations Administrative Tribunal*, I.C.J. Reports 1954, pp. 56–58.

²⁵ Cf. resolutions 808 (1993) of 10 February 1993 or 827 (1993) of 25 May 1993 and 955 (1994) of 8 November 1994.

²⁶ Case IT-94-1-AR72, *Prosecutor v. Dusko Tadic alias “Dule”*, Judgment concerning the Defence’s appeal to the exceptional objection to jurisdiction, “the issue of constitutionality”, paras. 26–48, pp. 12–26 of the French version.

²⁷ For a similar suggestion, see, e.g., Gilbert Guillaume, “Progrès et limites de la justice internationale” in, *op. cit.*, fn. 19, p. 27; see also p. 45.

international fora.²⁸ And through these means the Court would ensure uniform interpretation of the Charter, or even further, of international law as it would be conceivable that this procedure could extend to other international tribunals or even to national tribunals.

Of course, the same could apply to the United Nations Administrative Tribunal and, more generally, to the administrative tribunals as a whole, at least within the United Nations system. In this regard, even though this view might not be shared by all, one might be shocked by the lack of enthusiasm demonstrated by the Court for its responsibilities relating to the reformulation of judgments of the UNAT and the ILOAT and the suppression of this procedure at least with regard to the former.²⁹ Certainly, the system leaves something to be desired. Perhaps in this area a Chamber would have been more appropriate than the full Court. Without a doubt, the Committee in charge of “filtering” the judgments of the Administrative Tribunal was hardly trained for this task; but the idea that the Court, principal organ of the Organization, should be able to have its say, at least with regard to the application of the Charter, and even to guarantee the uniform application of the fundamental principles of public international functions by subsidiary judicial organs, seems to have been accepted and has furthermore proved itself. The jurisprudence of the Court in this area is far from negligible.

²⁸ See the commentary of Christopher Pinto and Thio Su Mien in C. Peck and R. Lee, *op. cit.*, fn. *, “The Court and Other International Tribunals”, pp. 281–311 and Gerhard Hafner, “Should One Fear the Proliferation of Mechanisms for the Peaceful Settlement of Disputes?” in Lucius Caflisch (ed.), *The Peaceful Settlement of Disputes Between States: Universal and European Perspectives* (Kluwer, 1998), pp. 25–41; Pierre-Marie Dupuy, “The Danger of Fragmentation or Unification of the International Legal System and the International Court of Justice”, *NYU JI of International Law and Politics* (1999), pp. 791–807 or Lofti Méchichi, “Prolifération des juridictions internationales et unité de l’ordre juridique international” in R. Ben Achour and Slim Lagmani (eds.), *Justice et juridictions internationales* (Paris, Pedone, 2000), pp. 73–100.

²⁹ Cf. resolution 50/54 of 11 December 1995.

C. A “judicial” organ

All of this brings us back to, or rather underlines, the obvious importance of the qualification of the Court as a “judicial” organ. It is this label, much more than that of a “principal” organ, that establishes the independence and the special role of the Court within the United Nations and serves as the basis for its role as the guardian of legality for the international community as a whole, both within the United Nations and outside of the Organization.³⁰

Indeed, the Court itself has explained as well as emphasized on several occasions the “purely judicial”³¹ character of its functions and the respect for its responsibility by virtue of its “inherent power”.³² Even though its predecessor was not an organ of the League of Nations,³³

“This Court, like the Permanent Court of International Justice, has always been guided by the principle which the latter stated in the case concerning the *Status of Eastern Carelia* on 23 July 1923:

‘The Court, being a Court of Justice, cannot, even in giving advisory opinions, depart from the essential rules guiding their activity as a Court’ (P.C.I.J., Series B, No. 5, p. 29)”³⁴

This has very important consequences, whether with regard to the composition of the Court and the status of the Judges and the Registry or with regard to the operation and accomplishment of its functions, in both contentious and advisory matters.

These two functions are distinct and both rather artificially limited – only States can seize the Court in contentious matters, and only

³⁰ Manfred Lachs, Separate Opinion appended to the Orders of 14 April 1992, Cases concerning *Questions of Interpretation and Application of the Montreal Convention of 1971 arising from the Aerial Incident at Lockerbie*, *I.C.J. Reports 1992*, pp. 26 and 138.

³¹ See *supra*, fn. 4.

³² Judgments of 20 December 1974, *Nuclear Tests*, *I.C.J. Reports 1974*, pp. 259 and 463. In its Judgment of 27 June 2001 in the *LaGrand* case, the Court invoked its “basic function of judicial settlement of international disputes by binding decisions” to assert the binding nature of its Orders indicating interim measures of protection (*I.C.J. Reports 2001*, p. 500, para. 102 – see Hervé Ascensio, “La notion de juridiction internationale en question” in, *op. cit.*, fn. 19, p. 193).

³³ See *supra*, fn. 2.

³⁴ *I.C.J.*, Judgment of 2 December 1963, *Northern Cameroons*, *I.C.J. Reports 1963*, p. 30.

international organizations can request advisory opinions from the Court – both of these functions allow the highest international jurisdiction to carry out one of its fundamental tasks, even if this task is often forgotten, namely the “crystallization” of the law formulated within the framework of the Organization which makes the Court a “natural candidate to play a uniforming role”³⁵ in the interpretation and application of international law.

With regard to uniformization, this is well-known; but the role of the Court could certainly be strengthened if, on one hand, the system of “preliminary issues” discussed above³⁶ were implemented and if, on the other hand, the bodies having the competence to request advisory opinions made greater use of them,³⁷ even in the interest of eventually receiving responses to questions of general international law that they might encounter in the conduct of their activities. Even though the new trend might invite criticism of undue “politicization”, the General Assembly seems to have become more aware of those possibilities when it seized the Court on the questions of the *Legality of the Threat or Use of Nuclear Weapons*³⁸ or on the *Legal Consequences of the Construction of a Wall in the Palestinian Occupied Territories*.³⁹

As for the “crystallization” of U.N. law by the Court, this is a less-studied phenomenon.⁴⁰ But that does not make it any less important: in fact it is noticeable that, through its judgments and, perhaps even more so by its advisory opinions, the Court formulates, pronounces, indicates and, at the same time, strengthens the norms pronounced by other organs of the United Nations and, in particular, by the General Assembly. To cite just one example, it is worth recalling the principle of the right of self-determination by the colonial population, proclaimed, admittedly, with force, by the widely known resolution 1514(XV) on which the Court, by

³⁵ “*le candidat naturel pour jouer un rôle uniformateur*”; Luigi Condorelli, “La Cour internationale de Justice: 50 ans et (pour l’heure), pas une ride”, *ESIL* (1995), Vol. 6, No. 3, p. 396.

³⁶ Under Section B.

³⁷ See also *infra* fn. 48 and the related text.

³⁸ Resolution 49/75 K of 15 December 1994.

³⁹ Resolution ES-10/14 of 8 December 2003.

⁴⁰ See, however, Eduardo Jiménez de Aréchaga, “The Work and the Jurisprudence of the International Court of Justice”, *BYIL* (1988) pp. 1–38, in particular, pp. 1–7; see also Olivier Corten and Pierre Klein, “L’efficacité de la justice internationale au regard des fonctions manifestes et latentes du recours à la Cour internationale de Justice” in R. Ben Achour and S. Laghmani (eds.), *op. cit.*, fn. 28, pp. 33–71, in particular at pp. 56–71.

its advisory opinions in *Namibia* and *Western Sahara*, and, more recently, by its judgment in the case concerning *East Timor*, has undoubtedly conferred a legal “pedigree”.

Part of the doctrine has criticized this tendency of the Court to rely, sometimes very heavily, or even exclusively, on Security Council resolutions. One is reminded in this context of certain elements of the Judgment in the *Nicaragua* case in 1986. However, when formulated in such a general way, this criticism is not well-founded; on the contrary, it appears that it is normal and legitimate that the principal judicial organ of the United Nations demonstrates that it is particularly attentive to the “trends” expressed in the resolutions of the political organs. And one might question whether or not the relative drought in the Court’s recent jurisprudence constitutes an impoverishment in this area.

Understandably, the situation remains that the resolutions of other principal organs, whether of the General Assembly or the Security Council, are not relied on that much by the Court unless they have a compulsory nature. All things considered, this is not where the real problem lies. The issue is rather to determine if the Court, a principal organ on the same level as the others, must in all cases apply decisions that, in view of the Charter⁴¹ or of the norms of customary international law,⁴² have a binding nature by themselves.

III. THE COURT, AN ELEMENT OF THE SYSTEM FOR THE MAINTENANCE OF INTERNATIONAL PEACE AND SECURITY

It is clearly in relation to the Security Council that the problem mainly arises: the Security Council assumes, by virtue of Article 24, “the principal responsibility” within the system’s framework for the maintenance of international peace and security as organized by the Charter, which includes the Court. In the exercise of this responsibility, it can take decisions that Members of the Organization are bound to enforce.⁴³

Two essential questions arise in this connection:

- Can the Court rule on a dispute concerning the maintenance of peace of which the Security Council (or the General Assembly) is itself seised?

⁴¹ Cf. Article 25 and, more generally, Articles 18, paragraphs 2 and 3, and 56.

⁴² Cf. I.C.J., Advisory Opinion of 21 June 1971, *Legal Consequences for States of the Continued Presence of South Africa in Namibia notwithstanding Security Council Resolution 276 (1970)*, I.C.J. Reports 1971, p. 50.

⁴³ Cf. Article 25 of the Charter.

- If yes, and if the Council has formulated a position on certain aspects of the dispute, can the Court put this position in question?

A. “*Functional Parallelism*”⁴⁴

With regard to the first question, the response of the Court is firmly established and seems to be without reservation: as an organ of the United Nations, in principle, the Court can, and even should, intervene in matters or situations where the maintenance of international peace and security is in issue –

“It is for the Court, the principal judicial organ of the United Nations to resolve any legal questions that may be in issue between parties to a dispute”.⁴⁵

The fact is that “The Council has functions of a political nature assigned to it, whereas the Court exercises purely judicial functions. Both organs can therefore perform their separate but complementary functions with respect to the same events”.⁴⁶

This occurs in both contentious and advisory matters.

As the Court indicated as early as 1950 in its Advisory Opinion concerning *Interpretation of Peace Treaties*, a response to a request for an advisory opinion should not, “in principle”, “be refused”.⁴⁷ But does this “principle” have, or should it have, exceptions?

It would appear that it does, or at least it did in one case, where it failed to correspond exactly to the principle raised by the Permanent Court in the *Eastern Carelia* case, in which the PCIJ refused to render an advisory opinion on a question concerning “the main point” of a dispute between a Member State and a Non-Member State of the League of Nations.⁴⁸ But one might consider that, since the present Court has become an organ of the United Nations, this hypothesis has become obsolete.⁴⁹ Today, the exception appears to be rather that when an advisory opinion could complicate the maintenance or reinforcement of international peace

⁴⁴ Cf. Shabtai Rosenne, *op. cit.*, fn. 20, p. 87.

⁴⁵ See I.C.J., Judgment of 24 May 1980, *supra* fn. 4, *I.C.J. Reports 1980*, p. 22; see also Judgment of 26 November 1984, *supra* *ibid.*, *I.C.J. Reports 1984*, p. 434.

⁴⁶ *I.C.J. Reports 1984*, p. 435.

⁴⁷ See *supra*, fn. 13.

⁴⁸ Advisory Opinion of 23 July 1923, *supra* fn. 8, pp. 28–29.

⁴⁹ See, however, the Advisory Opinion of 8 July 1996, *Legality of the Threat or Use of Nuclear Weapons*, *I.C.J. Reports 1996*, pp. 235–236, para. 14, where the Court seems to accept that the *Carelia* precedent is still meaningful.

and security, the Court, an organ of the United Nations, should abstain from rendering that advisory opinion.⁵⁰ However, in its Advisory Opinion of 8 July 1996 on the *Legality of the Threat or Use of Nuclear Weapons*, the Court considered that it is not its role “to purport to decide whether or not an advisory opinion is needed by the Assembly for the performance of its functions” and that the implications that the opinion given might have on disarmament negotiations could not constitute a reason for its refusal to exercise its advisory jurisdiction. One might conclude from this that as soon as it is seised the Court does not believe that it is able to acknowledge the eventual risks that its response might cause to the maintenance of peace; the judicial organ takes over from the organ responsible for the maintenance of international peace and security.

On the other hand, one might envisage mechanisms that would allow the Court to cooperate more closely in maintaining peace by way of its advisory proceedings, by, for example, simply expanding its advisory caseload. In any event, such progress does not depend on the Court but on the organs competent to seise the Court and which in the post cold war world should probably be interested in doing so more often, even if: i) the quantity of advisory opinions rendered by the Court is not a goal in itself, and ii) more frequent requests are only of interest if intergovernmental organs do not use the Court exclusively for political aims, which in the long run would only serve to weaken the Court’s authority.⁵¹

Must the Secretary General be recognized the right to seise the Court of requests for advisory opinions? There are those who think so and it is with this idea in mind that Mr. Boutros-Ghali, in his famous *Agenda for Peace*, recommended “that the Secretary-General be authorized, in accordance with paragraph 2 of Article 96 of the Charter, to request advisory opinions of the Court [...]”.⁵² This idea, which is “in the air”, is only enticing in appearance despite the eminence of its supporters,⁵³ and

⁵⁰ Ibid., p. 237, paras. 16 and 17.

⁵¹ See above, fn. 39 and the corresponding text.

⁵² Report to the Security Council dated 30 June 1990, para. 38.

⁵³ See, for example, Stephen Schwebel, “Authorizing the Secretary-General of the United Nations to Request Advisory Opinions of the International Court of Justice”, *AJIL* (1984), pp. 869–878 or Sir Robert Jennings, *op. cit.*, fn. 18, p. 503; *Contra*: Rosalyn Higgins, “A Comment on the Current Health of Advisory Opinions of the International Court of Justice” in V. Lowe and M. Fitzmaurice (eds.), *Fifty Years of the International Court of Justice: Essays in Honour of Sir Robert Jennings* (Cambridge, Cambridge University Press, 1996), pp. 567–581. See also the very moderate views of Mohammed Bedjaoui, *Nouvel ordre mondial*

there is the general apprehension that implementing it would create more problems rather than resolve old ones. The result would be either that the Court's role will be encumbered by relatively secondary issues and that the authority of advisory opinions will be unnecessarily weakened, or if the request for advisory opinions focuses on questions relating to the maintenance of peace and security, that the balance arising from the Charter between, on the one hand, the political organs and, on the other hand, the Secretary-General, would risk being threatened without any benefit accruing to either the political organs or to the Secretary-General.

If the Court can contribute to the maintenance of international peace and security with a moderate use of advisory opinions, the Court can also, quite evidently, accomplish this in the exercise of its contentious jurisdiction.

Not only has the Court stated that it “has never shied away from a case brought before it merely because it had political implications or because it involved serious elements of the use of force”,⁵⁴ but furthermore, the existence of a threat to the peace, or a breach of the peace, not to mention an act of aggression, constitute, on the contrary, particularly pressing reasons to compel the Court to exercise its jurisdiction, especially when it has been established on another basis.

This is indeed the Court's persistent practice: it has rejected all preliminary objections based on the distinction between legal disputes and political disputes, including those preliminary objections alleging that the Court did not have jurisdiction in cases where the use of armed force was in issue (and we are reminded of, in particular, the *Hostages and Nicaragua–United States* cases). Above all, the Court has deliberately demonstrated its will to contribute to the maintenance of international peace and security in several of the orders it issued in the 1990s or more recently on the indication of interim measures.⁵⁵ Moreover, one may think that it is indeed *because* it is an organ of the United Nations that the Court has, since 1951,⁵⁶ adopted this stance, which contrasts with the infinitely

et contrôle de la légalité des actes du Conseil de sécurité (Bruxelles, Bruylant, 1994), pp. 92–94.

⁵⁴ Judgment of 26 November 1984, Case concerning *Military and Paramilitary Activities in and against Nicaragua, Jurisdiction and Admissibility*, *I.C.J. Reports 1984*, p. 435.

⁵⁵ See, e.g., Order of 15 March 1996, *Land and Maritime Boundary between Cameroon and Nigeria*, *I.C.J. Reports 1996*, p. 13.

⁵⁶ Order of 5 July 1951, *Anglo-Iranian Oil Co.*, *I.C.J. Reports 1951*, p. 93.

more reserved position of the Permanent Court,⁵⁷ a Court which was not an organ of the League of Nations.

Not only can the Court decide if the maintenance of international peace and security has been threatened, it can do so even if the same problems are brought before other organs of the United Nations or external mechanisms.

This jurisprudence, which is firmly established, has been founded on strong legal arguments. For example, in the Judgments of 1980 and 1984 in the *Hostages* and *Nicaragua* cases the Court indicated that:

- the responsibility of the Security Council in matters of security is “principal” and not exclusive;
- there does not exist, with respect to the Court, any provision corresponding to Article 12 of the Charter that excludes all recommendations from the General Assembly with regard to a dispute or situation of which the Security Council is seised;
- the Court “can play an important and sometimes decisive role in the peaceful settlement” of disputes; this is a role that Article 36, paragraph 3 of the Charter invites the Security Council to take into account;
- and finally that this is a well-established practice.⁵⁸

Certainly, this position cannot be criticised.

B. Control of the decisions of the Security Council

Thus, the principle of “functional parallelism”⁵⁹ is established, which sets forth the ability of the Court to examine a question while that same question is being examined by other principal organs. However, it forms the crux of an intricate question, the response to which remains open for discussion, namely whether in the exercise of its judicial functions, the Court is bound by a decision taken by the Security Council or, as the case may be, by the General Assembly, or whether, in one way or another, the Court can control its legal validity.

The problem is not restricted to the area of maintenance of peace and it is not new; it was at the center of several requests for advisory opinions

⁵⁷ See Order of 3 August 1932, *Legal Status of the South-Eastern Territory of Greenland*, P.C.I.J., Series A/B, No. 48, p. 284.

⁵⁸ See *I.C.J. Reports 1980*, pp. 20–24 and *I.C.J. Reports 1984*, pp. 431–436.

⁵⁹ See *supra* fn. 44.

(notably those relating to the *Conditions of Admission of a State to Membership in the United Nations* and the *Review of Judgments of the United Nations Administrative Tribunal*, or *Certain Expenses of the United Nations*), but the Court always arranged itself so as to skirt the issue and went so far as to confirm in its opinion in *Namibia*:

“Undoubtedly, the Court does not possess powers of judicial review or appeal in respect of the decisions taken by the United Nations organs concerned,”

the Security Council and the General Assembly.⁶⁰

Very fortunately, irrespective of this *dictum*, the highest international Court has always headed in the opposite direction, and in all cases, including in the *Namibia* case, the Court did not hesitate to pronounce on the validity of resolutions in issue, a validity that the Court has always recognized. Expressing an opposite view would have seriously weakened the role of the Court as the principal judicial organ of the United Nations: like the Court itself, the Security Council and the General Assembly are creations of the Charter, which establishes their competence and the procedures that they must follow and determines the form and legal significance of the resolutions that they adopt,⁶¹ they must respect its provisions; and the Court, as the principal judicial organ of the Organization, must keep watch.

The problem resurfaced in the 1990s in the context of several contentious cases. It was discussed in the *Certain Phosphate Lands in Nauru* and *East Timor* cases, but neither in the latter nor in the former did the Court enter into the debate between the parties on the question of knowing whether the determinations made by intergovernmental organs of the Organization could or could not be contested. In the same vein, in the case concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, Bosnia and Herzegovina contested the embargo on the delivery of arms to all of the former Yugoslavia imposed by Security Council resolution 713 (1993), but the Court considered that it did not have *prima facie* jurisdiction to decide this claim;⁶² therefore, the Court was not able to anticipate the question of

⁶⁰ *Supra* fn. 42, *I.C.J. Reports 1971*, p. 45.

⁶¹ See in this regard Rosalyn Higgins, “The Place of International Law in the Settlement of Disputes by the Security Council”, *AJIL* (1970), p. 1 or Thomas M. Franck, “The Security Council and ‘Threats to the Peace’: Some Remarks on Remarkable Recent Developments”, *A.S.I.L. Proceedings*, 1993, p. 83.

⁶² Order of 13 September 1993, *I.C.J. Reports 1993*, p. 345; see, however, the Separate Opinion of Judge *ad hoc* Elihu Lauterpacht, *ibid.*, pp. 435–442. Bosnia

knowing whether, in the exercise of its judicial capacity, it was responsible for controlling the conformity of resolutions of the Security Council with *jus cogens*, a function that, nonetheless, appears beyond all doubt to belong to the Court.⁶³

It was therefore not until the cases concerning the *Lockerbie* incident that the Court was led to adopt a position on the extent of its power of control. The Court did so in a way that might appear ambiguous and, frankly, rather troubling. As noted, at least implicitly, by the three authors of the Joint Declaration appended to the Order of the Court of 14 April 1992,⁶⁴ it was sufficient to assume that at the phase of the indication of provisional measures it was not up to the Court – or the Court was not in a position – to exercise its control over the validity of the relevant Security Council resolutions – one of which, moreover, had been adopted after the closure of the oral pleadings. It is clear that the Court did this while considering that “at this stage [it] [...] was not called upon to determine definitively the legal effect of Security Council resolution 748 (1992)”,⁶⁵ but it went further under a double point of view:

- on one hand, it seemed to consider that there exists a presumption of validity in favour of Security Council resolutions,⁶⁶ which seems, indeed, to conform with the system of the Charter,
- but, on the other hand, the Court considered that “prima facie the obligation to accept and carry out the decisions of the Security Council in accordance with Article 25 of the Charter [...] extends to the decision contained in resolution 748 (1992), and that, *in accordance with Article 103 of the Charter*, the obligations of the Parties in that respect prevail over their

and Herzegovina, thereafter, withdrew its claim – cf. Judgment of 11 July 1996, *I.C.J. Reports 1996*, pp. 600–604, paras. 13–14.

⁶³ See in this regard Judge Lauterpacht’s opinion, *ibid.*, pp. 440–442 and Alain Pellet, “Peut-on et doit-on contrôler les actions du Conseil de sécurité?”, in S.F.D.I., colloque de Rennes, *Le chapitre VII de la Charte des Nations Unies* (Paris, Pedone), pp. 236–237.

⁶⁴ *I.C.J. Reports 1992*, pp. 24–25 and 136–137.

⁶⁵ *Ibid.*, pp. 15 and 126 – emphasis added.

⁶⁶ By recalling the “rights that resolution 748 (1992) seemed *prima facie* to have conferred” on respondent States (*ibid.*, pp. 15 and 127).

obligations under any other international agreement, including the Montreal Convention”.⁶⁷

This is what is troublesome. It is not because the Court extended a value of “super-obligations” to Security Council resolutions that Article 103 attributes to the provisions of the Charter, which seems legitimate as the “derivative” law has the same legal value as the “original” or “constitutive” law (under the condition that it is in accordance therewith). It is because the highest international Court confronted the problem at that stage of the proceedings, when it was completely superfluous. This could imply that the dye is cast and that the Court does not intend to decide the validity of this resolution during its examination of this case on the merits, but will be content to find shelter behind Article 103. The Court has not entirely cleared the matter in its Judgments of 27 February 1998 on the *Preliminary Objections* in that case since it declared that the objection raised by the United Kingdom and the United States “according to which Security Council resolutions 748 (1992) and 883 (1993) have rendered the claims of Libya without object does not, in the circumstances of the case, have an exclusively preliminary character”.⁶⁸ As several Judges noted, this should imply that “the Court will have to decide that point when it reaches the merits phase”;⁶⁹ however, others have been of the opinion that the ICJ should have stepped aside in favour of the Security Council.⁷⁰

Since the case has been discontinued by request of the parties,⁷¹ no answer to those questions of paramount importance can be expected in this case; but it is obvious that such caution would definitely be excessive and not compatible with the Court’s qualification as the principal judicial organ of the United Nations.

Even if opinions may differ as to the solution provided, the problem was very well addressed by Judge Weeramantry in the Dissenting Opinion that he appended to the Orders of 1992.⁷² The main point is the following: it is clear that, if the Court must collaborate with the Security Council in achieving the goals of the United Nations, the Court “must at all times

⁶⁷ Ibid., pp. 15 and 126 – emphasis added.

⁶⁸ *I.C.J. Reports 1998*, pp. 31 and 136.

⁶⁹ See, e.g., the Joint Declaration of Judges Bedjaoui, Ranjeva and Koroma, *ibid.*, p. 46 or Judge Rezek’s Separate Opinion, *ibid.*, pp. 61–63.

⁷⁰ For a particularly clear view along this line, see the dissent of Judge *ad hoc* Sir Robert Jennings, *ibid.*, pp. 109–112.

⁷¹ See the Order of the President of the Court of 10 September 2003.

⁷² *I.C.J. Reports 1992*, pp. 53–56 and 163–176.

preserve its independence in performing the functions which the Charter has committed to it as the United Nations' principal judicial organ".⁷³ The result being that having to pronounce a legal decision on problems that the Security Council examines from a political angle, the Court can arrive at a different conclusion. There is nothing shocking here: the Security Council is a political organ; the Court is a tribunal; the Court states the law; the Court "makes" the law in part – but only if it remains within the framework of the functions conferred on it by the Charter.

Addressing the problem in this manner, however, calls for two comments:

- To begin with, if we address it in these terms, the problem concerns not so much the "control" of Security Council resolutions by the Court, as the parallel exercise by these two organs of their distinct and complementary functions;
- That being said, in the event that the Court delivers, in the exercise of its judicial functions, a critical legal assessment of the Security Council's activities, we would have something that closely resembles a form of control and problems would arise as to who, between the Court and the Security Council (and the same goes for the General Assembly), would have the last word.

The response does not seem to create any doubt: necessarily, the Court will have the last word. This is not because the Court has some sort of greater power than the political organs in the hierarchy, it certainly does not. It is because, quite simply, as a legal entity, dedicated to the maintenance of international peace and security, "in conformity with the principles of justice and international law",⁷⁴ the United Nations is an "international organization of law". That law is the law stated by the Court, in the exercise of the judicial functions granted to it by the Charter and its Statute. This constitutes the primary consequence of the institution of the Court as the principal judicial organ of the United Nations.

This quality, moreover, contains some "inherent limitations"⁷⁵ that find application within the context of this study:

⁷³ Ibid., pp. 58 and 168.

⁷⁴ Article 1, paragraph 2 of the Charter, *supra* fn. 1.

⁷⁵ Cf. I.C.J. Judgments of 2 December 1963, *supra* fn. 34, p. 29 and 20 December 1974, *supra* fn. 32, pp. 259 and 463.

- First, seising the Court is unpredictable: unless a type of self-seizure could be imagined that would overturn the institutional equilibrium of the Organization – and would necessitate a revision of the Charter – then it depends in advisory matters on the good will of the organs authorized to request advisory opinions and, initially, of the Security Council itself. In contentious matters, it depends on the joint will of the States parties to a dispute, the settlement of which requires an assessment of the validity of certain resolutions;
- Second, without underestimating the influence of a judicial pronouncement by the World Court, the effect of such control could only be a limited one, either because of the advisory value of the opinions, or because of the principle of *res judicata* as set out in Article 59 of the Statute;
- Third, and perhaps most importantly, there is no room for error in the extent of this control: it could only include an assessment of the conformity of resolutions in issue to the binding norms of general international law on one hand, and to the Charter on the other.

Without a doubt, the interpretation of the Charter, including first and foremost the interpretation of its goals and principles, leaves room for a certain margin of appreciation. But this is precisely the point: it is up to the *political* organs to exercise this review, not the judicial organ; the latter must simply be assured that such appreciation is within its competence and is not contrary to international *law*. One may have doubts as to whether a particular situation, recently qualified as a “threat to the peace” by the Security Council does indeed constitute such a threat. On the other hand, one may be surprised by the excessive reserve shown by the Security Council in refraining from qualifying other situations that clearly appear to be aggressions as such. But it is the Security Council, not the Court, that is responsible for assessing “the existence of a threat to the peace, of a rupture of the peace or an act of aggression” in the context of its “primary responsibility for the maintenance of international peace and security” and like any judicial organ, the Court can certainly not substitute its own review for that of the Council or, in appropriate circumstances, that of the General Assembly.

This certainly does not mean that the Court, out of principle, should bow down before the *diktats* of the Security Council;⁷⁶ it should simply take into account the fact that the competence and power of review that the Charter allows the Security Council – and also the General Assembly – also arises from the international law over which the Court enjoys custody:

- That when the Security Council adopts resolutions in the context of these powers, it “creates” the applicable law that eventually becomes binding on the parties addressed in those resolutions;
- That these resolutions benefit from a “super-legality” that Article 103 recognizes in the Charter itself and from the law derived from it – and with regard to this one can issue a stamp of approval for the majority opinion of the Court in its orders issued in the *Lockerbie* case; and
- As a result, as a judicial organ, the Court must apply these resolutions, other than in the scenario, which is fortunately fairly rare, where it considers they are marred by a defect affecting their validity.

It seems certain that in assuming firm and balanced positions on these questions, the Court would contribute considerably to the strengthening of its role as the principal judicial organ of the United Nations. This initiative must come from the Court, however, it has not seized the opportunity to confront the problem in several recent cases which would have been fitting to solve those issues.⁷⁷

⁷⁶ See in this regard the eloquent pleadings of President Mohammed Bedjaoui: “Du contrôle des actes du Conseil de sécurité”, *Nouveaux itinéraires en droit – Hommage à François Rigaux* (Bruxelles, Bruylant), pp. 69–110; op. cit., fn. 7, pp. 11–150, passim, and “Un contrôle de la légalité des actes du Conseil de Sécurité est-il possible?” in S.F.D.I., op. cit., fn. 37, pp. 255–297, studies that recall, while amplifying them and, sometimes, toning them down, the themes presented in the dissenting opinion appended to the two orders of the Court in the *Lockerbie* case, *I.C.J. Reports 1992*, pp. 33–49 and 143–159. See also Luigi Condorelli, “La Corte internazionale di Giustizia e gli organi politici delle nazioni unite”, *Rivista di diritto internazionale* (1994), pp. 897–921, e.g., pp. 910–919.

⁷⁷ Neither in its Advisory Opinion of 9 July 1996 on the *Legality of the Threat or Use of Nuclear Weapons*, nor in its Judgments of 11 July 1996 concerning preliminary objections in *Application of the Convention on the Prevention and*

Finally, to speak of the Court as the principal judicial organ of the United Nations is quite simply to speak about the Court, because, whether dealing with its role in contentious matters or its advisory function, it is always under this title that the Court carries out its mission; and, by settling “disputes that are submitted to it in accordance with international law”, as well as by rendering its opinions “on all legal questions”, the Court contributes, in all cases, to the pacification of international tensions and, at the same time, given its eminent position, the Court fulfils the goals of the Organization and contributes to the strengthening of the principles by which it should be guided. Therefore, all that contributes to “increasing the effectiveness of the Court” will at the same time strengthen its role as the principal judicial organ of the United Nations.

Punishment of the Crime of Genocide and of 27 February 1998 in the *Lockerbie* cases has the Court really dealt with those issues.