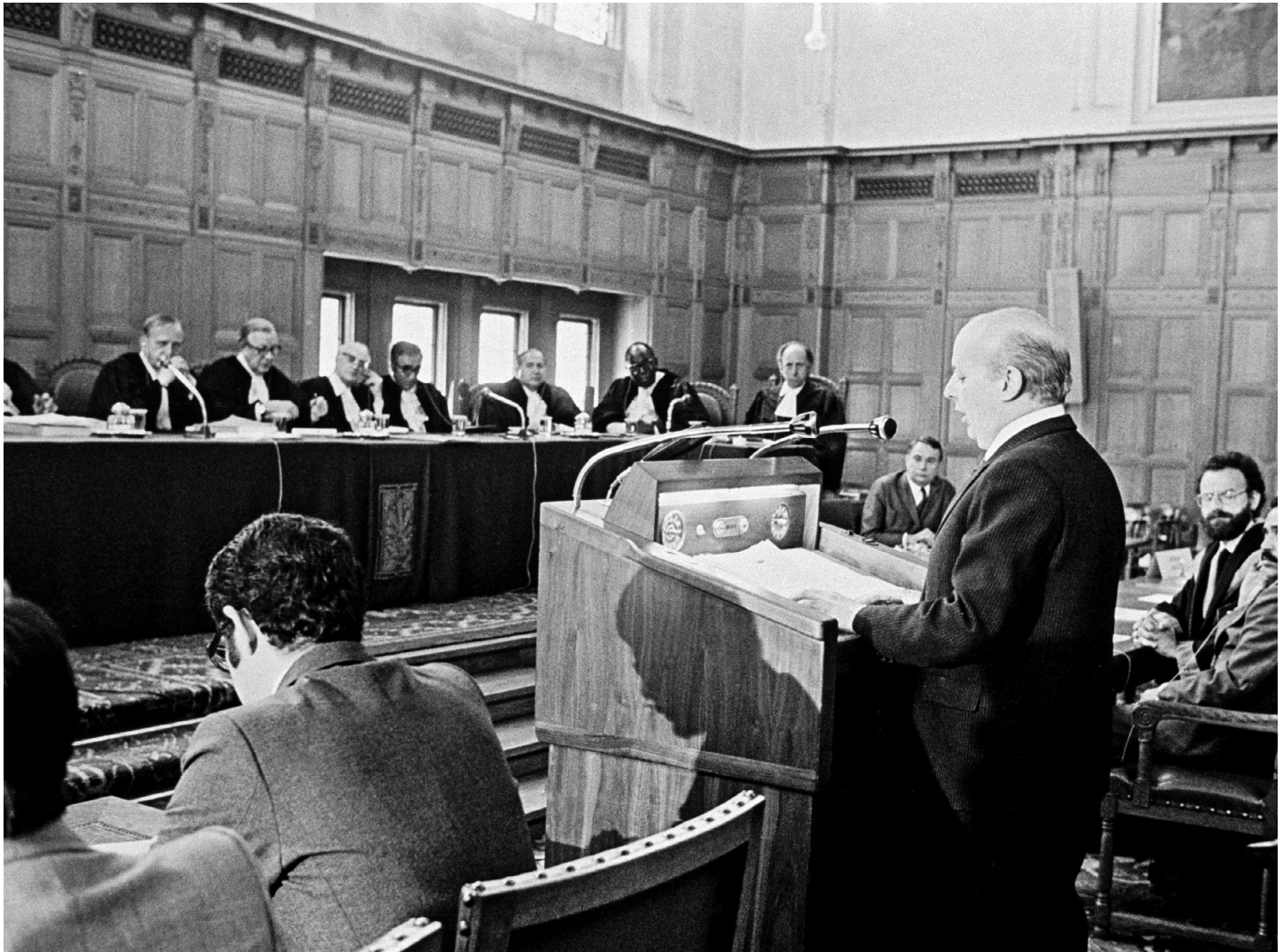


# The Rule of Law: Can the Security Council make better use of the International Court of Justice?



International Court of Justice  
Deliberations on Western Sahara: Mr.  
Jose R. Lacleta, Legal Adviser to the  
Ministry of Foreign Affairs of Spain,  
addressing the Court, 16 July 1975

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Security Council Report's fourth report on the rule of law focuses on the relationship between the Security Council and the International Court of Justice (ICJ). The UN Charter envisioned a symbiotic relationship between the Security Council and the ICJ, the principal judicial organ of the UN. However, the Council has rarely taken advantage of this potential and, for the most part, the role of the Court has been neglected by Council members and by the Secretariat.

This report on the rule of law, therefore,

analyses the history and dynamics of the Security Council's relationship with the ICJ and potential points of interaction and options for the Council to make better use of it in its work to promote international peace and security and the peaceful settlement of disputes.

Overall, the report concludes that, at a time when the demands on the Council are higher than ever in its history, strengthening the relationship between the Council and the Court could further promote international peace and security.♦

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Security Council Report's fourth report on the rule of law focuses on the relationship between the Security Council and the International Court of Justice (ICJ). The UN Charter envisioned a symbiotic relationship between the Security Council and the ICJ, the principal judicial organ of the UN. Indeed, one of the tools available to the Council to settle peacefully disputes affecting international peace and security is to make use of the ICJ's jurisdiction in such cases or to ask it to provide advisory opinions on legal questions that arise in the Council's work. At the same time, the Charter gives the Council responsibility for addressing instances of non-compliance by states with the Court's judgments brought before the Council. However, the Council has rarely taken advantage of this potential relationship or played a role in addressing non-compliance. For the most part, the role of the ICJ has been neglected by Council members and by the Secretariat.

This report on the rule of law, therefore, analyses the history and dynamics of the Security Council's relationship with the ICJ and the potential for the Council to make better use of it in its work to promote international peace and security and the peaceful settlement of disputes.

We conclude that, though the Council has wide discretion in the way it executes its primary responsibility for the maintenance of international peace and security, the Council could benefit by recommending in certain situations (and in extraordinary situations, demanding) that states settle their disputes before the Court, or by requesting advisory opinions from the Court. As a further part of its primary responsibility, the Council could also take a proactive role in ensuring compliance with Court judgments.

Another conclusion based on the analysis in this report is that it is important for the Council, the wider UN membership and the Secretariat to bear in mind the potential of the Court to assist the Council in executing its responsibilities when trying to resolve conflicts and situations on its agenda. By consistently considering the possible role of the ICJ in a given situation, the Council is more likely to utilise the ICJ appropriately, enhancing the effectiveness of its actions.

Overall, the report concludes that—at a time when the demands on the Council are higher than ever in its history—strengthening the relationship between the Council and the Court could further promote international peace and security.

## Introduction

Over the years, Security Council Report has analysed different aspects of the relationship between the rule of law and the Security Council. Our first report, published in 2011, surveyed the appearance in the previous 25 years or so of a broad new body of work collectively labelled “rule of law” in Security Council deliberations and actions, including as a thematic agenda item starting in 2003. The 2011 report showed that following the end of the Cold War, the Council's interest in the concept of the rule of law grew as the Council became more active and as the content of what is perceived as related to international peace and security expanded.

That report examined two main aspects of the Council's work related to the rule of law. First, it gauged the degree to which the rule of law had been incorporated into the Council's work on country-specific issues,

including ways to incorporate human rights-related action. The report found that while incorporating rule of law elements into its mandates had become prevalent, the Council had been inconsistent in adjusting its actions and approach on rule of law-related issues when situations developed on the ground.

The report also examined the degree to which the Council had been guided by the rule of law—taking into account the due process rights of those affected by Council measures—in the course of its resort to sanctions. On this issue, the report found that because of legal and political pressures, the Council had expanded the scope of due process rights it afforded individuals and entities affected by its sanctions, in a process that is still ongoing.

Our second report on the rule of law, in 2013, focused on the Council's work in

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upholding individual criminal accountability as an aspect of its rule of law agenda in the context of its primary responsibility, namely maintaining international peace and security. The report found that despite its rhetorical commitment to accountability as a principle, and an understanding that accountability is a practical tool that can promote peace and security and have a preventive impact, the Council had been inconsistent in its approach to this matter.

Following the 2013 report's focus on the normative aspect of the Council's work on upholding individual criminal accountability, our August 2015 report turned to look at the institutional architecture that the Security Council had established and used to advance individual criminal accountability. The report analysed in detail the establishment of the two ad hoc tribunals, the International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda, as well as their International Residual Mechanism, and their respective relationships with the Security Council. It further examined the mixed tribunals (the Special Court for Sierra Leone and the Special Tribunal for Lebanon), which the Council had been involved in establishing. It also reflected on the Council's relatively short yet complex relationship with the International Criminal Court.

Through these case studies, the report concluded that the Council had proven resourceful over the previous two decades in establishing a framework, or a "tool box", to contribute to international peace and security through institutional innovation and creativity. At the same time, the Council had been inconsistent in following up on these significant steps by providing the proper institutional support to these bodies to enforce its own decisions and to ensure the successful completion of the tasks it entrusted to these judicial institutions.

To canvass fully the institutional architecture of judicial bodies with which the Council interacts, it is necessary to examine the Council's relationship with the International Court of Justice. Unlike all the other international judicial bodies reviewed in this series of reports, the ICJ was established in 1945 by the same constitutive instrument as the Security Council, the UN Charter, to act as the principal judicial organ of the UN. In fact,

the Statute of the Court is annexed to the Charter itself, meaning that all UN members are automatically parties to the Statute. The Court, therefore, is not a subsidiary body of the Council, nor was it established directly or indirectly by it. Nor is it a creation of a multilateral treaty outside the UN system, as is the ICC.

Another fundamental difference between the ICJ and the other aforementioned judicial institutions is that the latter are criminal courts and tribunals that hold individuals accountable for their actions. The ICJ, by contrast, is mandated to settle contentious legal disputes submitted by states against other states in accordance with international law. When it comes to international peace and security, although most contemporary conflicts involve non-state actors, there are still several long-standing and emerging inter-state conflicts. Moreover, states can "adopt" a claim on behalf of their nationals and bring it before the Court against another state, in what is known as "diplomatic protection".

In contrast to the criminal tribunals, the ICJ also gives advisory opinions to the Council, the General Assembly and other authorised bodies on legal questions referred to it by these entities. No discussion of the Council's interplay with judicial institutions can be complete without examining its relationship with the principal judicial organ of the UN, the ICJ.

### Introduction to the ICJ

Modelled, to a large extent, on the Permanent Court of International Justice, which was part of the League of Nations system, the ICJ is a permanent court with its seat at the Peace Palace in The Hague. Though the Court's docket was not busy for the first decades after its establishment, it has seen a certain surge in cases since the late 1980s and early 1990s.

Under the Court's Statute, it has jurisdiction in two types of proceedings. The first is legal disputes between states, known as contentious cases. The Court's jurisdiction to preside over a contentious case is based on the consent of the parties involved. Such consent to the proceedings may be established in several ways:

- Two states or more may submit the dispute to the Court in a special agreement between them (Article 36.1 of the ICJ Statute).

- The states concerned are parties to a treaty containing a clause that grants the Court jurisdiction over disputes relating to that treaty, or disputes more generally. In this situation, one party to the treaty may initiate a case before the Court against another state that is a party to that agreement (Article 36.1). More than 300 international treaties contain such clauses, known as compromissory clauses.
- A state can make a declaration under the Court's Statute whereby it has accepted the jurisdiction of the Court as compulsory in the event of a dispute with another state having made a similar declaration (Article 36.2). This is known as the "optional clause". These declarations are submitted to the Secretary-General. It should be noted, however, that many of these declarations contain reservations excluding certain categories of disputes. To date, 72 states have made such declarations. Of the P5, China, France, the UK and the US all initially accepted the compulsory jurisdiction of the Court. Yet, as of today, only the UK has maintained its declaration accepting compulsory jurisdiction. China withdrew its declaration under the optional clause in 1972, shortly after the People's Republic of China replaced Taiwan as the sole legitimate government representing China in the UN. France withdrew its declaration in 1974 and the US did the same in 1986.

A judgment of the Court in a contentious case is final (without appeal) and binding on the parties to the dispute (Article 59 of the Statute). As will be discussed in the next section, the Council has a role to play in the case of non-compliance with a judgment.

The second type of proceeding before the Court is advisory. The Court may consider a request for an advisory opinion on any legal matter referred to it by the General Assembly and the Security Council (Article 96.1 of the Charter). Article 96.2 of the Charter adds that the General Assembly may grant other UN organs and specialised agencies the authority to request advisory opinions on legal matters within the scope of their mandate. The General Assembly has, to date, given such authority to the Economic and Social Council, the Trusteeship Council and 16 UN agencies.



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When it receives a request for an advisory opinion, the Court draws up a list of those states and international organisations that will be able to furnish information on the question before the Court. Generally, the states listed are the member states of the organ or agency requesting the opinion.

As will be seen in the next section, the UN Charter envisioned a synergetic relationship between the Council and the Court. Under the UN Charter, one of the means available to the Council to settle peacefully international disputes affecting international peace and security is to make use of the ICJ's jurisdiction in such cases or seek advisory opinions on legal questions that arise in the Council's work. The Charter also gives the Council responsibility for addressing instances of non-compliance by states with the Court's judgments brought before the Council. However, the Council has scarcely taken advantage of this tool or played a role in addressing non-compliance. Thus,

the purpose of this report is to analyse the history and dynamics of the Security Council's relationship with the ICJ and examine the potential for the Council to make better use of it in order to promote more effectively international peace and security and the peaceful settlement of disputes.

### Structure of the Report

To assess fully the current and potential relationship between the Council and the Court, one must start with the UN Charter. Therefore, Section 3 will begin with the history of negotiations on the Charter to shed light on the discussions between the drafters over the articles concerning this relationship, including ideas that did not find their way into the Charter. The section will then summarise the articles of the Charter governing the interaction between the two entities, before proceeding to survey the actual interaction between the Council and the Court since their establishment, limited as it has been.

Section 4 will then analyse the Council dynamics governing this relationship, and in particular, the forces that hinder the potential for more frequent and meaningful interaction between the two bodies. It will also try to identify instances where the Council could have benefited from making use of this judicial "tool" in fulfilling its responsibilities. In addition to considering ways to improve the interaction between the Council and the Court under the Charter framework, ideas for better interaction between the two that go beyond the current framework, but without the necessity of amending the Charter, will also be explored.

Finally, Section 5 will conclude with the findings of the report and provide options for better interaction between the Council and the Court in order to improve the Council's ability to execute its primary responsibility for the maintenance of international peace and security.

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## The Security Council and the International Court of Justice under the UN Charter

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### Drafting History

The ICJ was preceded by the Permanent Court of International Justice, provided for by Article 14 of the 1920 Covenant of the League of Nations. It held its inaugural sitting in 1922 and its last public sitting on 4 December 1939, following several years of diminished activity and after the onset of World War II. The Permanent Court was eventually formally dissolved by a League of Nations resolution in 1946.

In seeking a successor to the Permanent Court, the UK constituted in early 1943 an informal Inter-Allied Committee, which held 19 meetings attended by jurists from 11 countries. The Inter-Allied Committee subsequently published a report on 10 February 1944 that recommended that the Statute of any new international court should be based on that of the Permanent Court; that it should retain advisory jurisdiction; that acceptance of the jurisdiction of the new Court should not be compulsory; and that it should have no jurisdiction to deal with essentially political matters.

These events led the US, the USSR, the UK and China as the powers in attendance at the 1944 Dumbarton Oaks Conference (or the Washington Conversations on International Peace and Security Organization) to agree that a Committee of Jurists would prepare a draft statute for what was to become the ICJ for submission to the 1945 San Francisco Conference, where the UN Charter would be drawn up. The Committee of Jurists, comprising representatives from 44 states, was chaired by US State Department Legal Adviser Green Hackworth.

During the Committee's negotiations, the issue of compulsory jurisdiction emerged as a major source of contention, with opposition from the US and the USSR in particular. As an alternative to compulsory jurisdiction for the Court over UN members, another suggestion was put forward: that willing countries enter into a treaty accepting as binding the Security Council and General Assembly recommendations to adjudicate specific classes of cases before the Court. The position of

the US and USSR ultimately prevailed at the 1945 San Francisco Conference, in which 50 states participated. The conference decided against compulsory jurisdiction and in favour of the creation of a new court that would be a principal organ of the UN, along with the General Assembly, Security Council, Economic and Social Council, Trusteeship Council and Secretariat. It was also decided that the ICJ Statute would be annexed to the UN Charter. The US and USSR were more amenable on the issue of advisory jurisdiction and eventually agreed to empower the General Assembly to authorise other organs of the UN to request such opinions. However, proposals to allow states to request advisory opinions were not adopted.

The election of the first members of the ICJ took place on 6 February 1946 at the inaugural sessions of the General Assembly and Security Council. In April 1946, the ICJ met for the first time and elected Judge José Gustavo Guerrero (El Salvador), the last president of the Permanent Court, as its

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president. It held an inaugural public sitting on 18 April 1946, with the first case submitted in May 1947, concerning incidents in the Corfu Channel brought by the UK against Albania.

## The Relationship Envisioned in the UN Charter: Principles and Practice

The UN Charter and the Court's Statute provide for several institutional interactions between the two bodies.

### *Council Referral to the ICJ*

Under Article 36 (1) of the Charter, the Council may recommend "appropriate procedures or methods of adjustment" for situations that endanger international peace and security. Article 36 (3) of the Charter provides that in doing so, the Council should consider that legal disputes "should as a general rule be referred by the parties" to the ICJ. Despite this language, the Council has followed the "general rule" on only one occasion. The sole instance was in the *Corfu Channel Case*—the first proceeding of the ICJ—when it recommended that Albania and the UK immediately refer their dispute to the Court. The draft resolution sponsored by the UK was adopted on 9 April 1947 with eight votes in favour and two abstentions, from Poland and the U.S.S.R. while the UK, as a party to the dispute, abstained from voting in accordance with Article 27(3) of the Charter.

In its statement before the vote, Albania claimed that the Council did not have sufficient evidence to refer the case to the ICJ. Australia, on the other hand, defended the complementary roles of the Court and the Council: "the International Court of Justice can do very fully the very things we were not able to do here. It can collect additional evidence, and, particularly in the oral hearings provided under Article 43 of its Statute, it can call in witnesses, experts, counsel and advocates. It can obtain material witnesses for examination and cross-examination so that justice shall be done". The USSR, however, held firmly to the argument that the Council had no justification for "dragging" Albania before the Court and that "some sort of justification is necessary" in order to bring any country before the ICJ.

In another context, the Council recalled the potential of the ICJ in resolving the

dispute between Greece and Turkey over the continental shelf in the Aegean Sea, though it refrained from making a recommendation. In a 10 August 1976 letter to the Council, Greece requested that it convene an urgent meeting to discuss Turkish "violations of its sovereignty". After convening a meeting during which the two parties to the dispute addressed the Council, on 25 August 1976, the Council adopted resolution 395 inviting the two to consider judicial settlement, with a particular reference to the ICJ. Greece submitted the dispute to the Court; however, the Court found that it did not have jurisdiction to hear the case, as the communiqué Greece relied upon in its application did not contain Turkish consent to the proceedings.

### *Requests for Advisory Opinions from the ICJ*

Pursuant to Article 96 of the Charter, the General Assembly or the Security Council may request the Court to provide an advisory opinion on any legal question. The General Assembly has requested several such opinions of the Court, most recently regarding the legality of Kosovo's declaration of independence in 2008, which, in its eventual opinion, the Court said was not in violation of international law.

The possibility of the Council requesting an advisory opinion surfaced in its deliberations several times in the first few years of its existence. A draft resolution put forward by Belgium on 26 August 1947 for an advisory opinion on the competence of the Council to deal with the situation in Indonesia (where fighting with the Dutch colonial power broke out after the end of the Second World War) did not receive the required majority. A Syrian draft resolution proposed on 27 July 1948 requesting an advisory opinion on the legal status of Palestine after the termination of the British Mandate similarly failed to receive the required majority.

#### • *Namibia Advisory Opinion*

The Council has actually requested an advisory opinion on only one occasion. On 29 July 1970, it asked for an advisory opinion on the "legal consequences for states of the continued presence of South Africa in Namibia". The request came as members of the Council were growing concerned about South Africa's disregard for previous UN resolutions, including Council resolutions

264, 269 and 276, requiring it to end its presence in Namibia. By requesting the Court's opinion, the Council gave effect to a recommendation of the Ad Hoc Sub-committee of the Council, set up by resolution 276, to determine ways by which to address South Africa's refusal to withdraw from Namibia in defiance of UN resolutions.

The draft resolution sponsored by Finland was adopted, with Poland, the USSR and the UK abstaining, after more than five months of negotiation. One argument put forward in support of the request was the "need to reactivate the International Court of Justice itself", which was underutilised in terms of case load, contributing to its declining authority. Statements by other delegations drew attention to the limited scope of the question asked of the Court, which could be interpreted as a signal to the ICJ not to overstep the limited and focused scope of the opinion requested from it. Syria and Zambia stressed that the request in no way prevented the Council from considering the situation while the Court was seized of the issue. The USSR voiced serious doubts about the effectiveness of requesting an advisory opinion in resolving a crisis that requires "serious political action on the part of the Security Council". So did Poland, which also warned against measures that would "only give the appearance of genuine action".

In its advisory opinion of 21 June 1971, the Court found that the continued presence of South Africa in Namibia was illegal and that UN member states were obligated to refrain from any acts and in particular any dealings with the South African government that implied recognition of the legality of, or lent support or assistance to, such presence and administration.

In resolution 301 of 20 October 1971, the Council took note with appreciation of the advisory opinion, agreed with its operative conclusions and called upon all states to conduct themselves in accordance with the advisory opinion. France and the UK abstained on the resolution.

### *Enforcement of ICJ Judgments*

Another potential area of interaction for the Court and the Council is in the case of non-compliance with an ICJ judgment. Article 94(2) of the Charter gives the Council the power to "make recommendations or decide"

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on measures to be taken to give effect to a judgment if a request is made by one of the parties to the dispute. In practice, however, the Council has never used its power to enforce an ICJ judgment, though it should be noted that the parties to disputes mostly comply with ICJ judgments.

- *The Nicaragua Case*

However, one attempt to have the Council exercise its authority under article 94(2) was when Nicaragua requested, in a letter to the president of the Council on 20 October 1986, an emergency meeting to consider the failure of the US to execute the ICJ's judgment of 27 June 1986 against it in the *Military and Paramilitary Activities in and against Nicaragua Case*. In its judgment, the Court found that the US had violated the prohibition on the use of force by supporting the "Contras" rebels operating against the Nicaraguan government, and by laying mines in Nicaraguan waters. A draft resolution calling for full and immediate compliance with the ICJ judgment was vetoed by the US on 28 October. In a statement before the vote, the US rejected the jurisdiction and competence of the Court to render the 27 June judgment. France, Thailand and the UK abstained on the vote. This example demonstrates the futility of resorting to Article 94(2) when it concerns giving effect to judgments against a permanent member.

- *Libya/Chad Boundary Dispute*

While not within the purview of Article 94(2) of the Charter per se, the Council was instrumental in the implementation of the Court's judgment that determined the land boundary between Libya and Chad in 1994 in the "Aouzou Strip". At that time, the Council had imposed sanctions on Libya, including a flight ban, in relation to Libyan involvement in the Lockerbie incident (the bombing of Pan-Am flight 103 over Lockerbie, UK, which resulted in the death of all 243 passengers and 16 crew members, as well as 11 civilians on the ground). After the judgment was issued, Libya and Chad signed an agreement on implementation that requested the Secretary-General to supervise Libyan withdrawal from territories determined to be Chadian under the judgment. Upon the recommendation of the Secretary-General, the Council established the Aouzou Strip Observer Group (UNASOG) in resolution 915 of 4

May 1994 and called on both parties to cooperate with the mission. Acting under Chapter VII, the Council exempted the mission from the flight ban. The Council further stressed its determination "to assist the parties in implementing the Judgment of the International Court of Justice concerning their territorial dispute and thereby to help promote peaceful relations between them, in keeping with the principles and purposes of the Charter". UNASOG completed its task on 30 May 1994 and the Council terminated its mandate in resolution 926 of 13 June 1994.

- *Honduras/El Salvador Boundary Dispute*

Allegations of non-compliance with another judgment came before the Council in 2002 when Honduras claimed that El Salvador had not complied with the Court's judgment of 1992 concerning their land and maritime boundary. Though the two states agreed in 1998 to demarcate their boundary in accordance with the judgment within a year, in 2002 the process was far from completed. On 28 November 2000, Honduras had informed the Council of border tensions and said it had requested El Salvador to comply with the judgement and move ahead on demarcation, asserting that demarcation would help to reduce tension and promote a better climate of understanding. With no significant progress in the demarcation process, on 22 January 2002 Honduras sent a letter to the president of the Council, pursuant to Article 94(2) of the Charter, requesting the Council to "intervene and assist in securing the execution of and faithful compliance with the judgment of the International Court of Justice". El Salvador responded on 24 September 2002, denying accusations of non-compliance and adding that it did not object to the issues raised by Honduras being discussed by the Council. El Salvador conveyed its intention to request the ICJ to revise its judgment. The Council took no action in response to the letter. El Salvador proceeded to make such a request to the Court, but the Court rejected its application. The two sides then reached a further agreement on the demarcation of the boundary.

- *The Avena Case*

In another case of non-compliance, Mexico sent a letter to the Council on 28 March 2014, bringing to the attention of the Council the

fact that the US had not complied with a judgment of the Court in the *Avena Case* between the two countries. The Court found that the US was in violation of the Vienna Convention on Consular Relations because it had not notified the Mexican authorities of the incarceration of 51 Mexican nationals sentenced to death in Texas. It ordered the US to stay the executions and to provide, by means of its own choosing, a review and reconsideration of their conviction and sentences. Mexico noted that three of the individuals had already been executed without any such review by the authorities. The Council did not consider the letter or take any action, which would have been highly improbable as it concerned a P5 member, as had the *Nicaragua Case*. It seems that aware of this, Mexico refrained from asking the Council to take action, but merely brought the issue to its attention. Furthermore, there was some sympathy for the US among some Council members since the federal government was in favour of implementing the judgment, but state authorities in Texas refused to cooperate in a matter that was deemed under state jurisdiction.

### *The Council and the ICJ: Jurisdictional Issues*

Another point of interaction between the Council and the ICJ is found in several decisions of the ICJ. As a judicial institution, legal issues that touch upon international disputes with which the Council is dealing have inevitably arisen before it. When such instances have occurred, the intricate dynamics between the two bodies come to the fore and raise questions as to the extent of their respective authority. Indeed, one controversial issue that has been debated for years is the overlapping competence of the Council and the Court on certain matters of international peace and security. There are two aspects to that question. The first concerns whether the Court may consider an issue that is already before the Council. The other is whether the Court can review a decision of the Council or act as a form of appellate body adjudicating the legality of Council action.

The Court answered the former question positively in the *Case Concerning Diplomatic and Consular Staff in Teheran, (United States of America V. Iran)*, when it decided to apply provisional measures against Iran to ensure the inviolability of the premises of

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the US embassy and other places in Teheran, and the immediate release of US nationals being held hostage (Order of 15 December 1979). The Court noted that the Council had already expressed its deep concern over the issue and the potential consequences for international peace and security in its resolution 457 (4 December 1979). However, it said that “no provision of the Statute or Rules contemplates that the Court should decline to take cognizance of one aspect of a dispute merely because that dispute has other aspects, however important”. The Court’s interpretation of its competence was reinforced a few weeks later when the Council, in resolution 461 (31 December 1979), deplored the continued holding of hostages by Iran contrary to resolution 457 and noted the order of the Court obligating Iran to immediately release the hostages.

In the *Military and Paramilitary Activities in and against Nicaragua Case* mentioned above, the Court reiterated this point. It found that while the Charter gives the Council primary responsibility for the maintenance of international peace and security, it does not give it exclusive responsibility. It noted that the Charter assigns the Council functions of a political nature, whereas the Court exercises purely judicial functions. The Court added that it “cannot be debarred” from adjudicating a legal dispute between States “by the existence of a procedure for the States concerned to report to the Security Council” when acting in self-defence under Article 51 of the Charter. Therefore, both organs can perform their separate but complementary functions with respect to the same events.

As for reviewing the Council’s decisions, the Court made clear in the *Namibia Advisory Opinion* mentioned above that it does not possess powers of judicial review or appeal in respect of the decisions of the Council. Yet the Court has in fact reviewed decisions by the Council and the General Assembly and found them all to be within the competence of those two bodies.

Arguably, the Court has also hinted that it could review a Council decision if it was necessary in order to decide a legal matter arising in a contentious case between two states. In the *Lockerbie Case*, Libya claimed that the US and the UK had violated its rights under the Montreal Convention of 23 September 1971 for the Suppression of Unlawful Acts against

the Safety of Civil Aviation, by demanding the extradition of the suspects in the downing of Pan Am flight 103. According to Libya, the Convention gave it a choice between extradition and domestic prosecution of the alleged offenders. The US and the UK contended, however, that even if the Montreal Convention did confer on Libya the rights it claimed, these were “superseded” by the relevant decisions of the Security Council under Chapter VII of the UN Charter. Libya argued that it regarded the decision of the Security Council as “contrary to international law,” and considered that the Council had “employed its power to characterize the situation for purposes of Chapter VII simply as a pretext to avoid applying the Montreal Convention”. The proceedings were eventually terminated when Libya reached an agreement with the US and the UK on the prosecution of the two suspects, and the Court did not have to adjudicate the legality of the US and UK demands.

Although the merits of Libya’s claims were never determined, the Court did find it had jurisdiction to hear the case. Since the resolutions in question decided that Libya must comply with the US and UK’s requests for cooperation and extradition (resolution 748), under Chapter VII, such a judgment on the merits would have had to touch upon the legality of the Council’s resolutions themselves.

In its judgment on jurisdiction, the Court also observed that it could consider the merits of Libya’s claims, based on the fact that at the time Libya’s application was submitted, resolution 748 had yet to be adopted. The preceding resolution 731 urged Libyan cooperation, which would not limit the Court’s jurisdiction “because it was a mere recommendation without binding effect”. Thus, one can argue that the Court hinted that had Libya presented its legal claim after a binding resolution under Chapter VII had been adopted, it might not have been able to hear the case.

Libya also made a request for provisional measures in that case. While rejecting Libya’s request (without passing judgment on the legality of the Security Council resolutions concerned), the Court made an interesting observation. It said, “Members of the United Nations are obliged to accept and carry out the decisions of the Security Council in

accordance with Article 25 of the Charter; whereas the Court, which is at the stage of proceedings on provisional measures, considers that prima facie this obligation extends to the decision contained in resolution 748; and whereas, in accordance with Article 103 of the Charter, the obligations of the Parties in that respect prevail over their obligations under any other international agreement, including the Montreal Convention”. Thus, while not entering into the legal validity of the Council’s decision in question, the ICJ did observe that a binding Council resolution under Chapter VII prevails, in principle, over other legal obligations, such as those contained in the Montreal Convention.

## Provisional Measures

With respect to provisional measures, the Court is authorised under Article 41 of its Statute to issue provisional measures to preserve the respective rights of the Parties before it. In such a case, the Article dictates that the Court inform the Security Council of the measures indicated. This happened in 1951, when the UK initiated proceedings against Iran after the latter nationalised its oil industry, including the Anglo-Iranian Oil Company. At the request of the UK, the Court issued provisional measures of protection, which Iran refused to accept as it claimed the Court lacked jurisdiction in the case. In response, on 29 September 1951, the UK requested the Council to consider the issue as a matter of “extreme urgency”. Attached to the request was a draft resolution calling on Iran to act in conformity with the provisional measures. The Council considered the matter several times without taking any action, and on 19 October, France proposed to adjourn the discussion until the ICJ determined whether it had jurisdiction in the case. Later, the Court found that it lacked jurisdiction to entertain the UK’s application.

## Interpretation of Council Resolutions

The interaction of the Council and the Court has also manifested itself in the Court’s interpretation of Council resolutions. In its jurisprudence the Court has given guidance on the interpretation of Council documents, taking into account the special nature and context of Council resolutions—as opposed to treaties—and the function of the Council within the wider UN framework. In the



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Kosovo Advisory Opinion, the Court said:

*“While the rules on treaty interpretation embodied in Articles 31 and 32 of the Vienna Convention on the Law of Treaties may provide guidance, differences between Security Council resolutions and treaties mean that the interpretation of Security Council resolutions also requires that other factors be taken into account. Security Council resolutions are issued by a single, collective body and are drafted through a very different process than that used for the conclusion of a treaty. Security Council resolutions are the product of a voting process as provided for in Article 27 of the Charter, and the final text of such resolutions represents the view of the Security Council as a body. Moreover, Security Council resolutions can be binding on all Member States, irrespective of whether they played any part in their formulation. The interpretation of Security Council resolutions may require the Court to analyse statements by representatives of members of the Security Council made at the time of their adoption, other resolutions of the Security Council on the same issue, as well as the subsequent practice of relevant United Nations organs and of States affected by those given resolutions”.*

## Discussions between the Council and the Court

In recent years, the Council and the Court have taken a number of initiatives to invigorate their relationship.

A relatively new recurring practice is the annual closed briefing of the Council by the President of the ICJ, held since 2000. The President normally updates the Council on pending cases before the Court, recent judgments and the Court's budget. The complementary roles the Court and the Council play in the promotion of the rule of law and substantive links between issues considered by these bodies have also been the subjects of discussion. In the rule of law open debate in the Council initiated by Denmark on 22 June 2006, then ICJ President Judge Rosalyn Higgins briefed the Council. A further topic

of discussion has been the need to increase the number of states that accept the Court's compulsory jurisdiction. To that effect, in the 29 October 2014 briefing, some Council members welcomed the development of a handbook on accepting the jurisdiction of the ICJ, co-sponsored by Botswana, Japan, Lithuania, the Netherlands, Switzerland, the UK and Uruguay, published in July of that year.

The Council undertook its first formal visit to the Court's seat in The Hague on 11 August 2014. Luxembourg and Chile co-chaired the meeting, which aimed to express the Security Council's support for the work of the Court. The occasion also provided Council members with the opportunity to meet with the President and other members of the Court, and the Registrar. The main issues discussed included the challenge of achieving recognition by member states of the compulsory jurisdiction of the Court and the execution of its judgments.

## Election of ICJ Judges

The Security Council, along with the General Assembly, is responsible for the election of judges to the ICJ. The ICJ consists of 15 judges elected for nine-year terms by the General Assembly and the Council. Five seats come up for election every three years, normally in November.

According to Article 2 of the Statute, “the Court shall be composed of a body of independent judges, elected regardless of their nationality from among persons of high moral character, who possess the qualifications required in their respective countries for appointment to the highest judicial offices, or are jurisconsults of recognized competence in international law”.

Although there is no formal requirement for geographical distribution, Article 9 of the ICJ Statute requires representation of the “main forms of civilization and of the principal legal systems of the world”. The practice of the election process takes account of geographical distribution.

Members of the Court are to be elected, “regardless of their nationality” and are to be completely independent. No two nationals from the same state can hold office at the same time, and once elected, a judge is a delegate neither of the government of his or her own country nor of any other state. However, it is important to note that it has been the practice of the Security Council and the General Assembly to ensure that a judge from each of the P5 is always on the Court, thus reflecting their status in the Council.

Candidates are nominated by national groups

represented on the Permanent Court of Arbitration (an intergovernmental organisation established in 1899 to facilitate arbitration and other forms of dispute resolution between states, currently with a membership of 121 member states) or an equivalent national group. When making nominations, members of each national group are recommended to consult their highest national court, national legal faculties and national schools of law. No group may nominate more than four persons. The names of candidates are then communicated to the Secretary-General to prepare a list of nominations.

Article 8 of the Statute states the General Assembly and Security Council shall proceed independently of one another to elect the members of the Court in a secret ballot. Candidates who obtain an absolute majority of votes (i.e. a majority of all electors, whether or not they vote) in both the General Assembly and the Council are elected. A candidate, therefore, must obtain 97 votes in the former and eight votes in the latter. In the Council vote, there is no distinction between permanent and non-permanent members.

Each elector may vote for five candidates on the first ballot. If the number of candidates obtaining an absolute majority is fewer than five on the first ballot, a second ballot for the remaining positions will be held and balloting will continue until five candidates have obtained the required majority. If more than the required number of candidates obtain an absolute majority on the same ballot in either organ, a new vote on all the candidates will be held. In the event that the five candidates elected by one organ are not the same as those elected by the other, both will proceed (independently) to new balloting to fill the unresolved seats. This process will continue for three meetings when, if any positions are still not filled, the Council and the General Assembly may decide to convene a conference of six members (three from each organ) to recommend a candidate for acceptance by the General Assembly and the Council.

Results are usually achieved quickly in the Council, but balloting in the General Assembly can take much longer. For example, in 2011, four of the five vacant seats were filled with candidates obtaining an absolute majority in both the General Assembly and the Council in the first round of voting. After holding four additional ballots, the fifth vacant seat remained unfilled. Abdul G. Koroma (Sierra Leone) received the required majority in the Council while Julia Sebutinde (Uganda) received the required majority in the General Assembly. This voting pattern continued on 22 November when balloting was suspended. It resumed on 13 December when Sebutinde was declared elected after receiving an absolute majority in both organs.



# The Council's Potential Use of the ICJ: Analysis, Dynamics and Options

As has been seen, the UN Charter creates several areas of potential interaction between the Council and the ICJ. Nevertheless, the Council has scarcely made use of the ICJ as an instrument, or “tool”, in the exercise of its responsibility for the maintenance of international peace and security.

Over the years, the Council has been reluctant to resort to other UN organs and external actors that are independent of it—actors that it does not control and whose actions it cannot necessarily predict. Instead, the Council has opted to retain control and decision-making powers at the possible expense of effectiveness and taking full advantage of its options.

From the perspective of the P5, the Court's jurisprudence has, at times, been perceived as contrary to their interests. After judgments were given against them in sensitive cases, the US and France withdrew their acceptance of the compulsory jurisdiction of the Court. China and Russia, for their part, take a position of principle that states should resolve their differences through bilateral negotiations, not third-party dispute settlement procedures. Given the fact that all states have equal standing before the ICJ, it is not surprising that most of the P5 do not necessarily look favourably on promoting the role of the Court, which takes no account of their P5 prerogatives. This dynamic is exemplified by the fact that while traditionally a national from each P5 member is always a member of the Court, these five judges are equal in their authority and voting power to the other judges on the Court. This stands in contrast to the position of the P5 Council members vis-à-vis the ten elected members of the Council.

Yet a more prominent role for the Court, within the confines set by the Council itself in this context, would likely strengthen the effectiveness and legitimacy of the Council as an institution. And if the Council is perceived as more effective and successful, the unequal division of rights and powers in the Council favouring the P5 is less likely to be challenged.

## Reinforcing Council Legitimacy

A good example of how the ICJ could have reinforced the legitimacy of Council actions, rather than curtail its powers, relates to the issue of the human rights of individuals and entities on the Al-Qaida/ISIL (Da'esh) Sanctions Committee list. As was covered in

detail in our first rule of law report, the sanctions regime established by the Council fell under severe legal scrutiny from regional and domestic courts and human rights bodies for violating the due process and property rights of those on its sanctions list. These legal challenges became a catalyst for states to apply political pressure on the Council to adjust the regime to comply with legal standards, since the sanctions regime would become ineffective if states refused to comply with it, notwithstanding their legal obligations under the Charter. Reluctantly, particularly from the standpoint of the US and Russia, the Council conceded to the challenges and established the Office of the Ombudsperson to facilitate de-listings when warranted, introducing a process that, though still imperfect, better guarantees the ability of individuals and entities to challenge their listing and safeguard their rights. Since its establishment, the mandate of the Ombudsperson has undergone changes and improvements, and the role has become accepted by all Council members as improving the effectiveness of the sanctions regime and its implementation, rather than limiting it.

It has been suggested that instead of suffering challenges by various legal bodies and member states to its authority and ultimately being forced to adapt accordingly, the Council could have sought the advice of the principal judicial organ of the UN on the matter at various points. Even assuming that the end result—the Council's adjusting its sanctions regime to better safeguard the rights of those listed—would have been the same, doing so on the advice of the ICJ, rather than having to succumb to pressure from domestic jurisdictions, would have left the authority of the Council less diminished. Instead, to the dismay of some members of the P5, the Council proved susceptible to the pressures of member states which were obliged to comply with its decisions yet hinted—or even explicitly stated—that they would not do so. The Council could have benefited by choosing a different course to achieve the same result.

Undoubtedly, it was not the intention of the drafters of the Charter to allow the ICJ to serve as an “appellate court” and regularly monitor and review Council action or that of the other UN organs. But the Court does possess the authority to review Council decisions if the issue arises before it when considering

a wider legal dispute. And there should be room for a more proactive approach by member states and the Council itself to make use of the Court when it might improve the effectiveness of the Council itself.

## Maintenance of international peace and security

What role can and should the ICJ play vis-à-vis the Council's primary responsibility for the maintenance of international peace and security?

According to Article 36(3) of the Charter, the Council *should* consider that legal disputes “as a general rule” be referred to the ICJ; under Article 96 of the Charter, the Council *may* request the Court to provide an advisory opinion on a question of law facing the Council; under Article 94(2) of the Charter, the Council *may, if it deems necessary*, make recommendations or decide upon measures to give effect to an ICJ judgment. The language used by the drafters of the Charter undoubtedly reflects the wide discretion the Council has been given in performing its responsibilities.

However, these articles also provide the Council with the power and the duty to have recourse to and interact with the ICJ and with states that are unwilling to abide by a ruling in their case. The Council has thus been provided with significant tools by the Charter, but what is in question is its political will to make use of them in the exercise of its functions when it might prove beneficial.

This point was made by the President of the Court, Judge Rosalyn Higgins, in an open debate in the Council on the rule of law on 22 June 2006 when discussing the use of Article 36(3) of the UN Charter. She said: “I am obliged to say that the Security Council has failed to make use of this provision for many years. This tool needs to be brought to life and made a central policy of the Security Council”.

What then can the Security Council do to mobilise this potential? It is precisely the fact that the Council has such wide discretion on how to perform its responsibilities that would allow it to make energetic use of the Court. Notwithstanding the fact that Article 36(3) only mentions recommendations to states to refer their legal disputes to the Court, the Council's wide powers allow it to go well beyond mere recommendations.

# The Council's Potential Use of the ICJ: Analysis, Dynamics and Options (con't)

Acting under Chapter VII, the Council has developed a wide range of measures not involving the use of force in order to safeguard or restore international peace and security. Over the years, these included the establishment of judicial bodies, such as the international criminal tribunals, with which all UN member states are obliged to cooperate.

On one occasion, the Council took action to compel two states to settle their boundary dispute by a binding procedure as a matter of international peace and security. In resolution 687 of 3 April 1991, on the terms of the Iraqi ceasefire after the invasion of Kuwait, the Council demanded that both Iraq and Kuwait respect the international boundary agreed between them in 1963. It then called on the Secretary-General to assist the parties to make arrangements to demarcate the boundary. The Council also committed to guaranteeing the inviolability of the boundary and to take all necessary measures to that end.

On 2 May 1991, the Secretary-General reported to the Council on the establishment of the UN Iraq-Kuwait Boundary Demarcation Commission with the agreement of the parties. However, Iraq later refused to cooperate with the Commission, and the Iraqi-appointed member of the Commission stopped participating in its meetings, with Iraq arguing that the original 1963 agreement was invalid.

The Secretary-General submitted the final report of the Commission to the Council on 21 May 1993. Despite Iraqi protests, in resolution 833 of 27 May 1993 the Council demanded that Iraq and Kuwait respect previous Council resolutions and the inviolability of the boundary as demarcated by the Commission. Subsequently, the UN Iraq-Kuwait Observation Mission mandated by the Council was instrumental in the actual demarcation of the boundary. The Council thus compelled both states to demarcate their boundary despite the protests of Iraq.

In some respects, Chapter VII action by the Council could overcome the fact that the Court lacks compulsory jurisdiction in extreme situations that threaten international peace and security. It could be argued that in such situations, the Council could adopt a Chapter VII resolution obligating states that are parties to a dispute to refer part or all of the legal aspects of the dispute to the ICJ. The Council could also obligate the relevant

states to accept the jurisdiction of the Court for this purpose if they have otherwise not done so. With a mandate from the Security Council, the states would be obligated to have their dispute decided by a binding judgment of the Court. This would be the case even if the states involved had agreed otherwise, due to Article 103 of the Charter, which gives the Charter overriding power over other international treaties.

In her intervention in the 2006 debate, President Higgins said: “[L]itigation before the Court is not a hostile act. This fact can be testified by the many friendly states that have been wise enough to know that the best way to avoid deterioration in their good relations, if that cannot be done by negotiations, is to have a dispute between them resolved by the Court”.

Compelling states to submit to the Court’s jurisdiction in an international legal system based on consent is not a step the Council will or should take lightly. Yet even consistent usage of the Council’s power to recommend to parties to a dispute that their differences be settled before the ICJ could influence more states to do so over time. The Council, the Court and the General Assembly are all part of a UN system created for the maintenance of international peace and security. Each of these three organs has a different role to play to advance this cause. The Court has the unique characteristics of a judicial body within the UN system. One of the responsibilities of the Council under Chapter VI is to remind member states that at least some of their disputes may be resolved by an early recourse to judicial settlement, particularly before the ICJ.

The Council’s powers and its authority to create obligations for states entails that a recommendation from the Council to states to take their dispute before the ICJ may indeed impact the conduct of those states. However, the Council has thus far refrained from making use of this recommendation power, and the incentives for states to settle their disputes peacefully will only increase if the Council considers this option more frequently and on occasion acts upon it.

## Dispute Resolution

That Council consideration of disputes between states related to ICJ cases—even without making recommendations for states

to go before the ICJ—may affect those states’ behaviour is evident from past examples.

As discussed above, tensions concerning demarcation of the boundary between Honduras and El Salvador, in accordance with an ICJ judgment, were brought to the attention of the Council. The exchange of views and allegations exchanged by the parties—through their representations to the Council—was part of a political scenario that eventually led El Salvador to return to the ICJ, and eventually for both states to finalise the demarcation of their boundary.

### • *Thailand/Cambodia Boundary Dispute*

A related example is the tension that arose between Thailand and Cambodia concerning their boundary near the Temple of Preah Vihear. In 1962, the Court ruled that the temple was situated in Cambodian territory, and that consequently, Thailand was under an obligation to withdraw its forces from the temple and from its vicinity on Cambodian territory. Thailand subsequently withdrew its forces from the temple and erected a fence, which divided the temple ruins from the rest of the promontory of Preah Vihear.

Decades later, in February 2011, there were exchanges of fire in the temple area between Thai and Cambodian soldiers, resulting in at least eight killed and thousands displaced. Following the outbreak of fighting, both Thailand and Cambodia sent the president of the Council letters on 5 February, giving their descriptions of the incidents that had taken place. On 6 February, Cambodia wrote to the Council president again, documenting continued attacks on the border and citing how they violated international law. The Cambodian letter also asked the Council to convene an “urgent meeting” to stop “Thailand’s aggression”. On 7 February, Thailand wrote a second letter to the president of the Council, giving Thailand’s position on the latest developments. The letter also reiterated Thailand’s commitment to using bilateral frameworks and channels of communication to resolve the situation.

The Council held consultations on the matter under “any other business” on 7 February, after which the Council president conveyed elements to the press, calling for a ceasefire and urging the parties to resolve the situation peacefully. The Council held consultations again the following day, during

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which they were briefed by the president of the Council on her phone conversation with Marty Natalegawa, then Minister of Foreign Affairs of Indonesia and chair of the Association of Southeast Asian Nations, who was attempting to mediate between the two states.

The Council then held a private meeting during which it heard from then Under-Secretary-General for Political Affairs B. Lynn Pascoe, Deputy Prime Minister and Minister of Foreign Affairs and International Cooperation of Cambodia Hor Namhong, Minister of Foreign Affairs of Thailand Kasit Piromya, and Marty Natalegawa. In elements to the press after the meeting, Council members urged the parties to establish a permanent ceasefire, to implement it fully and to resolve the situation peacefully and through effective dialogue.

Clashes in the border area broke out again on 22 April, following which both states wrote the Council president, though neither requested the Council to discuss the matter.

On 28 April 2011, Cambodia instituted proceedings against Thailand before the ICJ, requesting the Court to interpret its 1962 judgment. The Court issued its judgment on the matter on 11 November 2011, concluding that its 1962 judgment had decided that Cambodia had sovereignty over the whole territory of the promontory of Preah Vihear and that consequently Thailand was under an obligation to withdraw from that territory.

The Thailand-Cambodia situation shows that the Council's consideration may play a role in pushing states to find a way to settle their dispute peacefully. It also provides an instance when the Council itself could have seized the opportunity to recommend to the states concerned that they take their dispute before the ICJ. This situation shows that the Council's authority to make such a recommendation is not something that is normally considered and contemplated within the various options the Council has before it.

Since most of the disputes between states on the Council's agenda are long-standing and protracted conflicts, some of which have been stagnant for decades, the Council could make use of the ICJ to resolve their legal aspect, or perhaps some legal issues that may later assist the states—and the Council—to resolve the greater differences. This might be the case, for example, with respect to India/Pakistan, Israel/Palestine, Cyprus, Western

Sahara and other protracted conflicts.

In fact, even in the case of emerging disputes, immediate action may not always be critical, thus giving the Court the time to consider the situation. The Anglo-Iranian Oil Company issue of 1951 demonstrates that the Council may find it appropriate to wait on the Court, even when new situations arise if they do not, in fact, require immediate Council action.

## *Consideration of the ICJ's Role by the Council and other UN Actors*

It is not only the Council that has neglected to consider making use of the Court while dealing with various situations on its agenda. The Secretariat also does not normally consider or raise in its interaction with the Council the possibility of resort to the ICJ. Similarly, member states—both Council members and the wider UN membership—do not raise before the Council the potential for it to interact with the ICJ when dealing with situations on its agenda.

The Council, the Secretariat and member states have thus all underutilised this relationship and its potential for the maintenance of peace and security. All might benefit from regularly weighing the benefit of Council interaction with the ICJ in general, and specifically in situations that have been on the Council's agenda for a long time or when new disputes arise. In some situations, recommending (or, in extraordinary cases, ordering) the parties to take their dispute to the Court might prove beneficial in defusing the situation. The role of the ICJ, as a judicial body that may assist the Council in the performance of its responsibilities, should be borne in mind by all relevant actors. Its intervention may in fact sometimes be welcome to the parties.

The need to consider more frequently the possible role of the ICJ applies equally to the Council considering requesting advisory opinions from the ICJ regarding legal issues that arise in its work. This power of the Council under Article 96 of the Charter could be considered regularly among the options available to the Council when dealing with certain situations. In many cases, a particular aspect of the dispute, or a distinct part of it, might be suited for a legal opinion that could assist the Council and facilitate its work.

This is all the more relevant when many

of the issues on the Council's agenda are long-standing and do not require an immediate reaction by the Council to a quickly developing situation. When a crisis emerges suddenly and requires a quick response by the Council, it may be that the recourse to a judicial body such as the ICJ is impractical as the Court will need time to hear interested parties, deliberate, and draft and issue its judgment. However, in the case of long-standing disputes, the ICJ would have sufficient time to hear interested parties, properly consider the legal issue and issue a judgment that could assist the Council in performing its duties. Furthermore, an advisory opinion might also help the Council overcome a lack of consensus on a dispute by resolving a particular impasse in the Council and allowing it to move on to other elements of the dispute.

One procedural measure that could promote more interaction between the Council and the Court would be to change the format of the former's annual meeting with the President of the Court from a private meeting to a public briefing, debate or, on occasion, even an open debate. This would allow a more visible discussion about where the functions and responsibilities of the Council and the Court coincide and overlap. That in turn, could promote greater cooperation between the two and, perhaps, lead to more advantageous recourses to the Court from the Council.

## *Enforcement of ICJ Judgments*

With respect to the Council's role in the implementation of ICJ judgments, the Nicaragua and Mexican cases concerning US non-implementation of judgments show that when a question of implementation concerns a permanent member, Council action is highly unlikely.

That said, the case of implementing the Court's judgment on the land boundary between Libya and Chad in 1994 demonstrates that the Council may otherwise have an important role to play in the implementation of judgments. In that case, the Council acknowledged that lack of implementation of judgments might threaten international peace and security. It further demonstrates that the Council can use the powers at its disposal, in that case by authorising a Council observer mission, to assist in implementing a judgment and adjust measures previously taken, such as sanctions already



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imposed on one of the states involved. The successful implementation of the judgment serves as a positive example of how the ICJ, the Council and the Secretary-General cooperated to ensure that the border dispute was resolved peacefully.

Similarly, the Honduras/El Salvador dispute mentioned above is not only an example of how two states eventually resolved their dispute before the ICJ, under the scrutiny of the Council. It is also an example of how Council oversight assisted the implementation of an ICJ judgment (which was achieved after El Salvador returned the matter to the Court for review). Thus, the Council has a positive role to play in the implementation of ICJ judgments and should aspire to be more proactive in this respect. The Council's wide discretion in the exercise of its responsibilities allows it to discuss occurrences of non-implementation on its own initiative, and take action if necessary.

Council action in this context, along with that of the Secretary-General, provides for coherent and collaborative action between various UN organs to achieve a fundamental purpose of the UN Charter—safeguarding international peace and security.

### *The Secretariat and the ICJ*

The Council and ICJ relationship may also benefit from certain changes and decisions taken outside of the Council. One such change concerns the ability of the Secretariat, with the Secretary-General as its head, to request advisory opinions of the ICJ on legal issues that arise within the Secretariat's work, including work related to matters of international peace and security. This change would not require the UN Charter to be amended.

Various proposals to this effect have been made over the years. Several Secretaries-General proposed that the General Assembly should use its Article 96 (2) powers to authorise the Secretary-General to request advisory opinions. In 1950, the first Secretary-General, Trygve Lie, concluded in a report that the General Assembly could not legally authorise the new Commission on Human Rights to request advisory opinions from the ICJ but suggested that the Secretary-General should be authorised to do so. (Subsequently, the ICJ has found in an advisory opinion that subsidiary bodies of authorised organs may indeed be authorised to ask for advisory

opinions, though this does not prejudice the issue of authorising the Secretary-General to do the same.) In 1955, Secretary-General Dag Hammarskjöld repeated the suggestion to allow the Secretary-General to request advisory opinions. In 1992, Secretary-General Boutros Boutros-Ghali, in his report *An Agenda for Peace*, also recommended that the Secretary-General be authorised to request advisory opinions. The intention was that the Secretary-General would then be able to use this power to assist his role as mediator and provider of good offices between states. Requesting an advisory opinion on a specific legal issue that arose between states could help resolve issues that cause an impasse and assist the relevant parties to move forward to further resolve their issues. It could also help the Secretary-General overcome legal uncertainties that might arise in the context of the Secretariat's work while performing tasks given to it by the Council.

As mentioned above, the Secretariat is the only principal UN organ that cannot, at present, request advisory opinions of the Court. The reason some states give for this situation is that allowing the Secretariat to make such a request is essentially giving the discretion to make such requests to the one individual, Secretary-General. Some states argue that this is not similar to giving the same power to one of the other UN organs, which are composed of member states and require a majority of states to approve a request for an advisory opinion. These states would prefer not to empower the Secretary-General relative to the other UN organs. Others also point out that the Secretariat's Office of Legal Affairs (OLA) has legal expertise, and argue that there is no need for such requests in practice.

That said, there are good reasons to allow the Secretary-General to make such requests. First and foremost, it could assist him in the performance of his duties, as suggested above. Second, the ability of the Secretary-General to request an advisory opinion from the Court would be the equivalent of his power under Article 99 of the Charter to bring issues to the attention of the Council on his own volition. Third, the fact that the Secretary-General would have the discretion to make such requests, as opposed to a need to obtain the agreement from a majority of states in other organs, is also an advantage; it simplifies the request process and removes

the politics involved in obtaining a majority in those other organs. Fourth, while the decision to request an advisory opinion would indeed be at the discretion of the Secretary-General, the advice itself would be given by the ICJ, the principal judicial organ of the UN, composed of judges of "high moral character who possess the qualifications required in their respective countries for appointment to the highest judicial offices, or are jurisconsults of recognized competence in international law". While the Secretary-General might formulate the request, he would not have discretion over the advice given by the Court.

It is true that OLA provides the Secretary-General with legal advice when sought. However, a request for an advisory opinion from the Court would not replace the advice of OLA. Rather, it would be a tool that could be used in such circumstances where a highly authoritative legal opinion is needed on complex matters or matters of unusual importance or sensitivity. In such cases, the expertise of the most eminent international judicial body would not only contribute to the quality of the advice but might also provide the required gravitas to ensure that the affected actors follow the advice, which as a matter of strict law, is not binding. Moreover, unlike an OLA opinion, the procedures of the ICJ enable interested states to appear before the Court to advocate their positions. Those procedures are public and transparent, and the eventual advisory opinion of the Court should be well reasoned and consider the various positions put before the Court. Justice would not only be done but also seen to be done.

Overall, the analysis leads to the conclusion that, under the framework set out in the UN Charter and considering the Council's wide discretion as to how it executes its responsibilities, the Council could and may want to consider and make use of the ICJ as a useful tool within its diverse tool-box for the maintenance of international peace and security.

As then ICJ President Higgins observed in 2006, "[w]e are all partners in the same magnificent enterprise—the enterprise spelled out in the Purposes and Principles in the United Nations Charter. The International Court of Justice stands ready to work alongside the Security Council in the fulfilment of these goals".

## Conclusions and Options

This survey of the relationship and interaction between the Security Council and the ICJ paints a rather gloomy picture: the interactions are infrequent, and the limited practice that does exist is, for the most part, not very recent. Over the years, the Council, the UN member states and the Secretariat have all largely refrained from taking advantage of the possible contribution the ICJ could make to the successful execution of the Council's mandate.

This failure to use the principal judicial organ of the UN stands in contrast to the potential fruitful interaction between the two organs envisaged in the UN Charter. The Charter gives much discretion to the Council in how to use the tools at its disposal, including the ICJ, in the exercise of its functions, but after 71 years it is evident that the Council has failed to resort effectively to the Court or press disputing states to do so, where relevant.

Of course, not every international conflict situation on the Council's agenda could or should be brought before the ICJ. Yet, as a general rule, the Council could make a more concerted effort to use of all of the tools at its disposal to resolve and avoid conflicts or, at the very least, consider the utility of these tools when solutions to conflicts are sought. When it comes to the ICJ, this report concludes that the potential utility of the Court to the work of the Council should not be overlooked, and interaction with the Court, as envisioned by the UN Charter, should regularly be considered.

Based on the analysis provided in the previous section, these options are intended to advance the better and more frequent use of

the Court by the Council:

- When dealing with issues on the Council's agenda, both thematic agenda items and country-specific situations, Council members—and member states more generally—should bear in mind the provisions of the Charter concerning the interaction of the Council with the ICJ and the possible role the ICJ could play in assisting the Council in the successful execution of its responsibilities.
- The Secretariat and other entities briefing the Council should likewise bear in mind the possible role the ICJ could play in assisting the Council in the successful execution of its responsibilities.
- In addition to the annual private meeting of the Council with the ICJ President, or in its stead, the Council should hold an annual (public) briefing, debate or open debate with the ICJ President to raise awareness of the role of the ICJ as it relates to the Council.
- The Council should, when appropriate, recommend that states involved in a situation on its agenda that threatens international peace and security resolve their dispute (or the legal aspects thereof) before the ICJ.
- In extraordinary situations threatening international peace and security, the Council should consider adopting a Chapter VII resolution, obliging the relevant states to resolve their dispute before the ICJ.
- The Council should, when appropriate, request an advisory opinion from the Court on legal matters that arise within

its work. This might assist the Council in resolving a dispute that threatens international peace and security (or part of such dispute) or might clarify the legal standing of certain Council actions.

- When a state that has been party to a case decided by the ICJ requests the Council to consider the non-compliance of another state, the Council should take up the matter and discuss it, possibly with both states, and, if warranted, take action to ensure that the Court's judgment is complied with.
- Concerning non-compliance with judgments more generally, the Council should take a proactive approach and discuss instances of non-compliance with ICJ judgments and provisional measures, even if not prompted by a state.
- The Council could consider inviting the President of the ICJ to brief it when instances of non-compliance might threaten international peace and security (albeit recognising that, as a judicial organ, the Court does not play a role in political issues within the Council).
- The Council should encourage the Secretary-General to assist states in implementing ICJ judgments and facilitate the work of the Secretary-General in this regard, when necessary.
- Granting the Secretary-General the authority to request advisory opinions from the Court on legal matters arising in his work could facilitate his good offices, as well as the effective execution of Council resolutions and mandates by the Secretariat.

## UN Documents

### Security Council Resolutions

[S/RES/926](#) (13 June 1994) terminated the mandate of the Aouzou Strip Observer Group after it successfully completed its mandate.

[S/RES/915](#) (4 May 1994) established the Aouzou Strip Observer Group and called on both parties to cooperate with the mission.

[S/RES/833](#) (27 May 1993) demanded that Iraq and Kuwait respect previous Council resolutions and the inviolability of the boundary as demarcated by the UN Iraq-Kuwait Boundary Demarcation Commission.

[S/RES/748](#) (31 March 1992) decided that Libya must

comply with the requests of the US and the UK for cooperation and extradition.

[S/RES/731](#) (21 January 1992) urged Libyan compliance with the requests of the US and the UK for cooperation and extradition.

[S/RES/687](#) (3 April 1991) was on the terms of the Iraqi ceasefire after the invasion of Kuwait; the Council demanded that both Iraq and Kuwait respect the international boundary agreed between them in 1963.

[S/RES/461](#) (31 December 1979) deplored the continued holding of hostages by Iran and noted the order of the ICJ obligating Iran to immediately release the

hostages.

[S/RES/457](#) (4 December 1979) was on the continued holding of hostages by Iran.

[S/RES/395](#) (25 August 1976) invited Greece and Turkey to consider judicial settlement, with a particular reference to the ICJ.

[S/RES/301](#) (20 October 1971) took note with appreciation of the ICJ's advisory opinion on South Africa's presence in Namibia, agreed with its operative conclusions and called upon all states to conduct themselves in accordance with the advisory opinion.

[S/RES/284](#) (29 July 1970) requested an advisory

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## UN Documents (con't)

opinion on the legal consequences of South Africa's continued presence in Namibia for other States.

[S/RES/264](#) (20 March 1969), [S/RES/269](#) (12 August 1969) and [S/RES/276](#) (30 January 1970) were on South Africa's presence in Namibia.

[S/RES/22](#) (9 April 1947) recommended that Albania and the UK immediately refer their dispute to the ICJ.

### Secretary-General's Reports

[S/1994/512](#) (27 April 1994) was on the agreement on the implementation of the ICJ judgement concerning the dispute between Chad and Libya.

[S/25811](#) (21 May 1993) was the final report of the UN Iraq-Kuwait Boundary Demarcation Commission.

[A/47/277](#) (17 June 1992) was the report *An Agenda for Peace*.

[S/22558](#) (2 May 1991) was on the establishment of the UN Iraq-Kuwait Boundary Demarcation Commission.

[E/1732](#) (26 June 1950) was on means by which the proposed Human Rights Commission might be able to obtain advisory opinions from the ICJ.

### Security Council Meeting Records

[S/PV.7245](#) (19 August 2014) was on the Council mission to Europe and Africa, including its first formal visit to the ICJ in The Hague.

[S/PV.6682](#) (13 December 2011) was on the election of five members of the ICJ, during which Julia Sebutinde (Uganda) was declared elected after receiving an absolute majority in the Council and General Assembly.

[S/PV.6651](#) (10 November 2011) was on the election of five members of the ICJ.

[S/PV.5474](#) (22 June 2006) was a rule of law debate where then ICJ President Judge Rosalyn Higgins briefed the Council.

[S/PV.1949](#) (12 August 1976) was convened at the

request of Greece concerning Turkish action in the Aegean Sea.

[S/PV.1550](#) (29 July 1970) was on the situation in Namibia.

[S/PV.565](#) (19 October 1951) was a meeting in which the Council adjourned its discussion over Iranian nationalisation of its oil industry until the ICJ considered the matter.

[S/PV.195](#) (26 August 1947) was on a draft resolution put forward by Belgium for an advisory opinion on the competence of the Council to deal with the Indonesian question.

[S/PV.127](#) (9 April 1947) was the meeting at which the UK abstained from voting on a draft resolution on the Corfu Channel Question in accordance with article 27 (3) of the UN Charter.

[S/PV.9](#) (6 February 1946) was to elect the first judges to the ICJ.

### Security Council Letters

[S/2011/59](#) (7 February 2011) was from Thailand to the president of the Council giving Thailand's position on the latest developments.

[S/2011/58](#) (6 February 2011) was from Cambodia to the president of the Council again documenting the continued attacks on the border and citing how they violated international law.

[S/2011/56](#) and [S/2010/57](#) (5 February 2011) were from Cambodia and Thailand respectively to the president of the Council describing the incidents that had taken place on 4 and 5 February 2011, regarding exchanges of fire in the temple area between Thai and Cambodian soldiers, resulting in at least eight people killed and thousands displaced.

[S/2002/1102](#) (24 September 2002) was from El Salvador to the president of the Council denying accusations of non-compliance, adding that it did not object that the issues raised by Honduras be discussed by the Council.

[S/2002/108](#) (22 January 2002) was from Honduras to the president of the Council requesting the Council to "intervene and assist in securing the execution of and faithful compliance with the judgment of the ICJ".

[S/2000/1142](#) (28 November 2000) was from Honduras to the Secretary-General on border tensions with El Salvador and its request to El Salvador that it comply with the ICJ's judgement.

[S/18415](#) (17 October 1986) was from Nicaragua to the president of the Council requesting an emergency meeting to consider the failure of the US to execute the ICJ's judgment in the Military and Paramilitary Activities in and against Nicaragua Case.

[S/12167](#) (10 August 1976) was from Greece to the president of the Council concerning Turkish actions in the Aegean Sea.

[S/2357](#) (29 September 1951) was from the UK to the president of the Council on its request that the Council consider the issue of Iranian nationalisation of its oil industry as a matter of "extreme urgency".

### Other

[A/RES/63/3](#) (8 October 2008) referred Kosovo's declaration of independence to the ICJ for an advisory opinion.

[S/18428](#) (28 October 1986) was a draft resolution calling for full and immediate compliance with the ICJ judgement in the *Military and Paramilitary Activities in and against Nicaragua Case*, vetoed by the US.

[S/2358](#) (29 September 1951) was a draft resolution submitted by the UK on Iran.

[S/894](#) (27 July 1948) was a Syrian draft resolution requesting an advisory opinion from the ICJ on the legal status of Palestine after the termination of the British mandate.





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