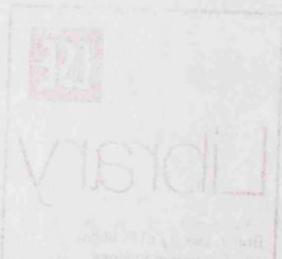


**THE ROLE OF THE INTERNATIONAL COURT OF JUSTICE
AS THE PRINCIPAL JUDICIAL ORGAN
OF THE UNITED NATIONS**

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Thesis submitted to the London School
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1997



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This thesis is dedicated to the memory of my grandmother

Dawelat El-Dahrawe

Abstract

The study attempts to provide a comprehensive analysis of the role of the International Court of Justice (ICJ) as the principal judicial organ of the United Nations (UN). It considers the contributions of the ICJ towards the UN system and concludes that, although the ICJ's contribution has been significant, many practical and theoretical issues regarding its role remain unsettled. The study proceeds as follows.

The first chapter sets out the history of international adjudication and the relationship between international adjudicatory mechanisms and political international organisations. It also includes a review of the legal basis and extent of the relationship between the ICJ and the UN.

The second and third chapters aim to throw light upon the advisory role of the ICJ and the manner in which the Court, through this jurisdiction, plays a role in interpreting and developing the institutional law of the UN.

The fourth chapter addresses the Court's role in facilitating the realisation of the purposes and principles of the UN through its contentious jurisdiction. This chapter discusses the basis of the contentious jurisdiction of the Court, then examines the practice of the Court in achieving these purposes and principles.

The fifth chapter examines the role of the ICJ as a "constitutional court" in the UN framework and its competence to review the legality of acts of the UN organs.

The sixth chapter evaluates the Court's role as a court of appeal in respect of the judgments of administrative tribunals established within the framework of the UN and its specialised agencies, particularly in the light of General Assembly Resolution 50/54 (1995).

By way of conclusion, the Court's role within the UN system is evaluated and a number of recommendations are made with a view to enhancing the role of the Court to enable it to address new challenges.

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List of Abbreviations

AALR	Anglo-American Law Review
AFDI	Annuaire Français de Droit International
AILJ	Asils International Law Journal
AJICL	African Journal of International and Comparative Law
AJIL	American Journal of International Law
Art.	Article
Arts.	Articles
ARUNA	Annual Review of United Nations Affairs
ASILP	American Society of International Law Proceedings
AUMCS	Annales Universitatis Mariae Curie Skolodowska
AYIL	Australian Yearbook of International Law
BCICLR	Boston College International & Comparative Review
BULR	Boston University Law Review
BYIL	British Yearbook of International Law
CBR	Canadian Bar Review
CILJ	Cornell International Law Journal
CJTL	Columbia Journal of Transitional Law
CLD	Current Legal Development
CLP	Current Legal Problems
CLR	California Law Review
Col.LR	Columbia Law Review
CWILJ	California Western International Law Journal
CYIL	Canadian Yearbook of International Law
Diss. Op.	Dissenting Opinion
DJIL	Dickison Journal of International Law
DJILP	Denver Journal of International Law and Policy
DLJ	Dalhousie Law Journal
EC	European Communities

ECJ	European Court of Justice
ECOSOC	Economic and Social Council of the UN
ECSC	European Coal and Steel Community
ed.	editor / edition
eds.	editors
EEC	European Economic Community
EILR	Emory International Law Review
EJIL	European Journal of International Law
EPIL	Encyclopaedia of Public International Law
FAO	Food and Agriculture Organisation of the UN
FILJ	Fordham International Law Journal
FLR	Federal Law Review
FLRUT	Faculty of Law Review, University of Toronto
For.Aff.	Foreign Affairs
GA	General Assembly of the UN
GA Res.	General Assembly Resolution
GAOR	General Assembly Official Records
GJICL	Georgia Journal of International and Comparative Law
GS	Grotius Society
GYIL	German Yearbook of International Law
HILJ	Harvard International Law Journal
HJLP	Hitotsubashi Journal of Law and Politics
HLJ	Howerd Law Review
HLR	Harvard Law Review
HRIR	Hellenic Review of International Relations
HRLJ	Human Rights Law Journal
HYIL	Hague Yearbook of International Law
ICAO	International Civil Aviation Organisation
ICJ	International Court of Justice
ICJ Pled.	International Court of Justice, Pleadings

ICJ Rep.	International Court of Justice Reports of Judgments, Advisory Opinions and Orders
ICJYB	Yearbook of International Court of Justice
ICLQ	International and Comparative Law Quarterly
IJIL	Indian Journal of International Law
ILACC	International Law and Armed Conflict Commentary (Nottingham University)
ILC	International Law Commission
ILM	International Law Materials
ILO	International Labour Organisation
ILOAT	International Labour Organisation Administrative Tribunal
ILQ	The International Law Quarterly
ILR	Iowa Law Review
ILRNU	Illinois Law Review, North Western University
IMCO	Inter-Governmental Maritime Consultative Organisation
IMO	International Maritime Organisation
Ind.Quer.	Indian Quarterly
Int.Aff.	International Affairs
Int.Con.	International Conciliation
Int.Org.	International Organisations
Int.Rel.	International Relations
Int.Stu.	International Studies
IRR	International Relations Review
IYIA	Indian Yearbook of International Affairs
IYIL	Indian Yearbook of International Law
JAIL	Japanese Annual of International Law
JIDR	Journal of International Dispute Resolution
LJIL	Leiden Journal of International Law
LLAICLJ	Loyola of Los Angeles International and Comparative Law Journal
LNOJ	League of Nations Official Journal

LNTS	League of Nations Treaty Series
MJIL	Michigan Journal of International Law
MJILT	Maryland Journal of International Law and Trade
MLR	Malaya Law Review
Mod.LR	Modern Law Review
NILR	Netherlands International Law Review
NJIL	Nordic Journal of International Law
Nor.TIR	Nordisk Tidsskrift for International Ret
NTIR	Netherlands Tijdschrift voor International Recht
NULR	Northwestern University Law Review
NYIL	Netherlands Yearbook of International Law
NYJILP	New York Journal of International Law and Politics
NYLSJICL	New York School of International and Comparative Law
ÖZÖR	Osterreichische Zeitschrift für öffentliches Recht
Para.	Paragraph
PCA	Permanent Court of Arbitration
PCIJ	Permanent Court of International Justice
PCIJ Ser.	Permanent Court of International Justice Series
PH	Pakistan Horizon
PLJ	Philippine Law Journal
PUSLYIL	Pace University School of Law Yearbook of International Law
PWA	Polish Western Affairs
PYIL	Pace Yearbook of International Law
PYBIL	Polish Year Book of International Law
RCADI	Recueil des Cours Academie de Droit International
RDISDP	Revue de droit International de Sciences Diplomatiques et Politiques
REDI	Revue Egyptienne de Droit International
Res.	Resolution
RGDIP	Revue Général de Droit International Public

RHDI	Revue Hellenique de Droit International
RICJ	Review of International Commission of Jurists
S-G	Secretary-General of the UN
SAYIL	South Africa Yearbook of International Law
SC	Security Council of the UN
SC Res.	Security Council Resolution
SCLR	Southern California Law Review
SCOR	Security Council Official Records
Sep. Op.	Separate Opinion
SJILC	Syracuse Journal of International Law and Commerce
SLR	Stanford Law Review
Syd.LR	Sydney Law Review
TILJ	Texas International Law Journal
UN	United Nations Organisation
UN Doc.	UN Documents
UNAT	UN Administrative Tribunal
UNCIO	UN Conference on International Organisation
UNESCO	UN Educational, Scientific and Cultural Organisation
UNOJ	UN Official Journal
UNTS	United Nations Treaty Series
UNYB	United Nations Year Book
UPLR	University of Pennsylvania Law Review
VJIL	Virginia Journal of International Law
VJTL	Vanderbilt Journal of Transnational Law
WHO	World Health Organisation
Wor.Tod.	The World Today
Wor.Aff.	The World Affairs
YBWA	Yearbook of World Affairs
YLJ	Yale Law Journal
ZaöRV	Zeitschrift für ausländisches öffentliches Recht und Volkerrecht

Preface

1. Purpose and significance of issues

The world has changed dramatically and in terms of historical development it can surely be said that we are witnessing a new era. These changes are equivalent to those that led the international community to establish the League of Nations in 1919 and the United Nations (UN) in 1945, giving rise to a number of questions regarding the effect of these changes upon the structure of the international community.

Because the UN enjoys a central position in the international forum, and because it is considered to be the only universal organisation, it is natural that many of these questions should concern the future of the international legal order in terms of the expected role of the UN (for example, its constitutional structure, the new role of its organs, the balance of power in the work of these organs, and the relationship between them). According to the UN Charter, the International Court of Justice (ICJ) is one of the principal organs of the UN. It therefore seems acceptable that international efforts directed towards the development and improvement of the UN to cope with the new challenges should touch upon the position of the ICJ and its role.

The purpose of the present study is to examine and evaluate the role of the ICJ as the principal judicial organ of the UN in the light of its experience and contribution during the past five decades. Has it helped the UN to achieve its purposes and principles? Has it worked harmoniously within the UN system? Has it achieved the hopes of its founders?

2. Scope and methodology

This study will focus on the role of the ICJ as the principal judicial organ of the UN. It does not deal with the ICJ as an international court in itself. Nor does it deal with some related issues such as the jurisdiction of the Court, intervention in cases before the Court, interim measures, its authority in fact finding, or the position of third

parties. However, some of these issues will be dealt with to the extent that they throw light on the role of the ICJ within the UN.

3. Structure

The study will be divided into the following chapters. Chapter One examines the historical development of the notions of international organisations and international adjudication which has led to the integration of these two phenomena. The provisions of the UN Charter that organise the relationship between the UN and the ICJ are then analysed.

Chapter Two deals with the Court's role as a legal adviser to the UN and its specialised agencies. A detailed account of how advisory opinions are requested is given and the ICJ's practice of its advisory jurisdiction is described.

Chapter Three examines in detail the ICJ's role in developing the law of the UN. The ICJ has had the opportunity to remove the ambiguity of some provisions and to settle many controversies regarding the application of the Charter. In addition, the study focuses on the role of the Court in developing the function and the role of the UN and its organs.

Chapter Four focuses on the Court's role in facilitating the realisation of the purposes and principles of the UN through its contentious jurisdiction. It illustrates the important role given by the Charter to the Court in settling international disputes. The current controversy regarding the relationship between the ICJ and other political organs authorised with the same function will be analysed in depth. In addition, this chapter will focus on the role of the Court in achieving the other purposes and principles of the UN. It will illustrate how the Court, through this role, has interpreted, defined and clarified these purposes and principles.

Chapter Five deals with the role of the ICJ as a "constitutional court" charged with reviewing the acts of the principal organs of the UN. An overview of the rule of law in domestic and international forums will be given, followed by a careful study of international lawyers' opinions and the Court's jurisprudence.

Chapter Six examines the position of the ICJ within the UN as a court of appeal upon the judgments of other tribunals acting within the framework of the UN and its specialised agencies.

Preface

The conclusion recalls, though not exhaustively, many of the principal issues in the preceding chapters. It will identify the obstacles to the satisfactory functioning of the ICJ and ways and means of removing them. Suggestions for improving the role of the ICJ and enabling it to function more effectively as the principal judicial organ of the UN will be provided.

It should be noted that there is considerable material on the ICJ in the publications of the Court and in various books and journals. In contrast to these studies, which focus on one or another of the aspects of the role of the ICJ, the present study seeks comprehensively to explore and analyse the objects, scope and limits of the role of the ICJ as the principal judicial organ of the UN. This study deals with the jurisprudence of the ICJ up to October 1996.

It is hoped that the present study will help to increase awareness of the role of the ICJ as the principal judicial organ of the UN by stimulating and provoking academic discussion. It is also hoped that this study might make a modest contribution to knowledge on the subject of the position of the ICJ within the framework of the UN.

Chapter One

Introduction

Introduction

The position of the ICJ as the principal judicial organ of the UN may appear to be a recent phenomenon in the history of international organisations and international adjudication. However, the status of the ICJ was a product of developments that took place over centuries in the arena of international organisations and international adjudication. An account of the historical developments in international co-operation and international adjudication prior to the establishment of the ICJ is relevant, because they explain the circumstances in which the ICJ was established and they can also help us to understand the reasons behind the adoption or rejection of a certain position.

The legal basis of the organic relationship between the UN and the ICJ will be examined in the light of the Charter and the Statute's provisions. Then the effect of this relationship upon the ICJ and the UN will be examined extensively.

1. International courts and international organisations: A historical development

In this section the development of the notion of international organisations and the development of the international tribunals within these organisations will be considered.

1.1. The situation prior to the First World War

1.1.1. Prior to 1899

(i) The development of the notion of international organisations

Prior to 1899, several attempts were made to establish international organisations with a view to preventing war and promoting international co-operation. These

attempts go far back in history to ancient Greece.¹ A turning point could be seen in the seventeenth century when several attempts were made, especially in the aftermath of wars, to reach agreements on territorial changes and adjustments resulting from war and to prepare peace treaties regulating the new situations. For instance, the Westphalia Peace Conference of 1648 marked the end of the Thirty Years War and the emergence of the modern concept of the sovereign state as a basis for international relations.² The Congress of Utrecht of 1713 represents an effort in the same direction.³ These two steps laid down the basis for the notion of sovereignty in Europe, which later extended to the rest of the world.⁴

The modern concept of international organisations can be traced back to 1815, which marked the commencement of co-operation between European states in response to the rapid changes in the world.⁵ In that year the Congress of Vienna was held by the European nations victorious over Napoleon in 1814-1815. The governments represented in this Congress decided to continue their co-operation on a more regular basis with a view to avoiding future conflicts. They also codified the rules of diplomacy, thereby establishing an accepted mode of regular peaceful relationship among most European states.⁶ Following that, several international meetings were held with a primary objective of preventing wars; for instance, the Paris Peace Conference of 1856, the Vienna Conference of 1864, the London Conferences of 1871, and the Berlin Congress of 1878 and 1884-1885.⁷

¹ For more details, see Potter, P., *An Introduction to the Study of International Organisations*, 1948, pp. 24 ff.; Leonard, L., *International Organisations*, 1951, pp. 23 ff.; Reuter, P., *International Institutions* (translated by J. Chapman), 1958, pp. 35 ff.; Bennett, A., *International Organisations: Principles and Issues*, 1995, p. 9; Amerasinghe, C., *Principles of the Institutional Law of International Organisations*, 1996, pp. 1 ff.

² Gross, L., "The Peace of Westphalia, 1648-1948" in Wood, R. (ed.), *The Process of International Organisations*, 1971, pp. 35 ff.; Randle, R., *Issues in the History of International Relations*, 1987, pp. 36 ff.

³ Randle, *ibid.*, p. 67.

⁴ Archer, C., *International Organisations*, 1992, p. 4; Reuter, *supra* note 1, pp. 40 ff.

⁵ Kirgis, F., *International Organisations in their Legal Setting, Documents, Comments and Questions*. 1977, pp. 1-2.

⁶ Reuter, *supra* note 1, pp. 46 ff.; Archer, *supra* note 4, p. 6.

⁷ For more details, see Leonard, *supra* note 1, pp. 31 ff.; Archer, *supra* note 4, p. 8; Knight, W., et al., "The United Nations' Contribution to International Peace and Security" in Dewitt,

During the nineteenth century, it was felt that the promotion of the notion of international co-operation in other fields was needed. Therefore, several international institutions were established as official unions, commissions and bureaux; for instance, the International Commission for the Elbe, 1821, the Central Committee for Navigation on the Rhine, 1832, the Sanitary Council for Tangier, 1840, and the European Danube Commission, 1856. Following that, various international organisations were set up and granted powers; for instance, the International Telegraphic Union, 1865, the Universal Postal Union, 1874, the International Bureau of Weights and Measures, 1875, the Union for the Protection of Industrial Property, 1880, and the International Union for the Publication of Customs Tariffs, 1890.⁸

(ii) The emergence of the notion of international adjudication

Prior to 1899, the idea of the settlement of inter-state disputes by a neutral third party could be traced back to the ancient Greek and Roman times. In this period, several treaties provided for arbitration as an *ad hoc* method of settling disputes related to these treaties.⁹ But, the growth of the superpowers of that period (the empires of Macedonia, Rome and Byzantium) disrupted the further development of this practice.¹⁰

The first attempt to establish an organised arbitration process can be traced back to the treaty of Amity, Commerce and Navigation between Great Britain and the United States of 1794, commonly known as the Jay Treaty.¹¹ This treaty

D., et al. (eds.), *Building a New Global Order, Emerging Trends in International Security*, 1993, pp. 284-5.

⁸ For an account of the establishment of these organisations, see Potter, *supra* note 1, pp. 272 ff.; Reuter, *supra* note 1, pp. 54 ff.; Baehr, P., et al., *The United Nations in the 1990s*, 1994, pp. 7-8; Archer, *supra* note 4, pp. 12-13.

⁹ Ralston, J., *International Arbitration from Athens to Locarno*, 1929, pp. 153-73, 191; Oppenheim, L., *International Law, vol. II - Disputes, War and Neutrality*, 1952, p. 34; Murty, B., "Settlement of Disputes" in Sørensen, M. (ed.), *Manual of Public International Law*, 1968, p. 684.

¹⁰ Yarnold, B., *International Fugitives. A New Role for the International Court of Justice*, 1991, p. 76; Rosenne, S., *The World Court - What It Is and How It Works*, 1995, pp. 3-4.

¹¹ In the *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania* case 1950, Judge Read noted that international arbitration has been developed since the Jay Treaty of 1794. See ICJ Rep., 1950, p. 242. In his Presidential Address at the special Commemoration Sitting of the International Court of Justice in 1972, Judge Muhammad Zafrulla Khan praised the Jay Treaty as the "historical landmark from which the trend which was to lead to the establishment of a true international judicial system is usually dated". ICJYB, 1971-2, No. 27, p. 130. Similarly,

contained several provisions calling for arbitration of cases concerning territorial delimitation and the seizure of ships at sea and other confiscation of private property that had arisen from the War of Independence.¹² The Jay Treaty was followed by a large number of other treaties in the nineteenth century whose general feature was reference to a mixed commission. For instance, in 1862 Great Britain had, by virtue of a treaty with other states, established permanent mixed courts at Sierra Leone to adjudicate on seizures of vessels suspected of engaging in the slave trade. The success of these commissions depended upon the ability of their members to combine the roles of judges and negotiators to produce decisions acceptable to both parties.¹³

A departure from the practice of constituting mixed commissions occurred in the arbitration of the Alabama Claims between the United States and Great Britain in 1871-1872. This arbitration gave “the process a new impetus, and introduced a number of rules and practices which were gradually to command general acceptance”.¹⁴ It also established a collegiate body of arbitral practice in that a tribunal consisted of one member nominated by each party, and three members nominated by the King of Italy, the president of the Swiss Confederation and the president of Brazil, respectively. Several disputes were subsequently settled through arbitration, such as the Newfoundland Lobster dispute (1891) between Britain and France, the Behring Sea Fur-Seal Fisheries dispute (1893) between

Schwarzenberger noted that “1794 is the landmark which neatly divides ‘les anciens errements de pratiques modernes’; it was then established that international judicial organs are entitled to vote by majority, determine their own jurisdiction, and settle international disputes on the basis of international law.” Schwarzenberger, G., *International Law as Applied by International Courts and Tribunals*, 1986, vol. IV, p. 22.

¹² Jessup, P., *The Price of International Justice*, 1971, pp. 25 ff.; McNair, A. *The Development of International Justice*, 1953, pp. 1 ff.; Ralston, *supra* note 9, p. 191.

¹³ Simpson, L., et al., *International Arbitration - Law and Practice*, 1959, p. 3.

¹⁴ As noted by Simpson, this arbitration “influenced the draft arbitral code, which the Institute of International Law drew up in 1875, and the Convention for the pacific settlement of international disputes of 1899 and 1907”. Simpson, *ibid.*, p. 9. In respect of this arbitration, it has also been noted by Ralston that “for the first time men opened their eyes to the possibility of wide application of judicial method to the settlement of international disputes”. Ralston, *supra* note 9, p. 123.

Britain and the United States, and the British Guiana-Venezuelan Boundary dispute (1899) between Britain and Venezuela.¹⁵

The above precedents resulted in the inclusion of arbitration clauses in several international treaties as a dispute settlement mechanism; for instance, the Treaty of Washington, 1871, the Universal Postal Convention, 1874, the General Act of Brussels, and the Convention on Railway Freight Transportation.¹⁶

In this regard, it should be noted that, although these tribunals played a role in settling some international disputes, they worked in an isolated fashion. Thus, in 1875, the Institut de Droit International discussed a project on arbitral procedure and formulated model regulations.¹⁷ The first actual attempt to institute a mechanism for the settlement of international disputes can be traced back to The Hague Peace Conferences of 1899 and 1907.

1.1.2. The Hague Peace Conferences of 1899 and 1907

The two Hague Conferences constitute the cornerstone of the development of the notion of international adjudication. They might be considered as the first endeavour to codify a vast domain of international justice.¹⁸

The First Hague Conference of 1899 adopted the Convention on the Pacific Settlement of Disputes. According to this Convention, the participant states agreed “to use their best efforts to ensure the pacific settlement of international differences”.¹⁹ The Convention provided several ways to settle international disputes between the member states. For instance, it dealt with good offices, mediation and commissions of inquiry.²⁰ It also stipulated that the “signatory powers” agreed to settle their disputes through international arbitration and to work

¹⁵ Schwarzenberger, *supra* note 11, p. 82.

¹⁶ Hudson, M., *The Permanent Court of International Justice 1920-1942*, 1943, p. 3; Singh, N., *The Role and Record of the International Court of Justice*, 1989, p. 7.

¹⁷ Bowett, D., *The Law of International Institutions*, 1982, p. 260.

¹⁸ For more details, see Potter, *supra* note 1, pp. 228 ff.; Leonard, *supra* note 1, pp. 254 ff.; Bederman, D., “The Hague Peace Conferences of 1899 and 1907” in Janis, M. (ed.), *International Courts for the Twenty-First Century*, 1992, pp. 9 ff.

¹⁹ Part I, Art. 1.

²⁰ Arts. 2-14.

towards the creation of a Permanent Court of Arbitration.²¹ One of the major achievements of this Conference was the acknowledgement of the utility of a permanent instance of international arbitration, with a view to solving conflicts among states and preventing wars.

The Second Hague Conference 1907 expanded the concept of pacific settlement of disputes. The Convention contained an obligation upon states “to use their best efforts to ensure the pacific settlement of international differences”.²² It referred, pursuant to Art. 14, to the establishment and maintenance of a Permanent Court of Arbitration as a more permanent institution.²³ In addition, it attempted to establish an International Prize Court to deal with claims between neutrals and belligerents arising out of the exercise of the belligerent right of prize at sea. The establishment of the latter Court faced some obstacles regarding the law that would be applied by the Court because the attempts to codify the existing law of maritime warfare were not successful. In addition, there were difficulties in finding a satisfactory procedure for electing judges and guaranteeing their independence. Thus the Convention did not enter into force and the efforts to create an International Prize Court did not attain their objective.²⁴

1.1.3. The establishment of the Permanent Court of Arbitration (PCA)

The PCA, as mentioned above, owes its existence to The Hague Conventions of 1899 and 1907. The PCA was organised and established at The Hague and was to meet at least annually. Its competence was to be derived from either general treaty or special agreement. At the Second Peace Conference 1907, many delegations

²¹ Art. 20 provides that, “with the object of facilitating an immediate recourse to arbitration for international differences, which it has not been possible to settle by diplomacy, the signatory Powers undertake to organise a Permanent Court of Arbitration, accessible at all times and operating, unless otherwise stipulated by the parties, in accordance with the rules of procedure inserted in the present convention”.

²² Part I, Art. 1.

²³ It should be noted that The Hague Peace Conferences had an influence at the regional level. For instance, the Central American Court of Justice was established in 1908, and exercised true compulsory jurisdiction until its demise in 1918 following the signing by Nicaragua and the United States of the Bryan Chamber Treaty.

²⁴ Gregory, C., “The Proposed International Prize Court and Some of its Difficulties”, *AJIL*, 2, 1908, pp. 458 *ff.*; Brown, H., “The Proposed International Prize Court”, *AJIL*, 2, 1908, pp. 476 *ff.*; El-Erian, A., “The International Court of Justice and the Concept of Universality”, *CJTL*, 19, 1981, p. 200; Rosenne, *supra* note 10, p. 10.

were convinced that the PCA ought to enjoy a truly judicial character, and that it should be supplemented by a permanent Bureau acting as the Court's Registry.²⁵ The draft convention annexed to the Final Act of the Second Peace Conference called for the creation of a Court "of a free and easy access, composed of judges representing the various judicial systems of the world and capable of ensuring continuity in arbitral jurisprudence".²⁶

Between 1899 and 1914 more than 120 arbitration agreements were concluded making reference to the PCA. The Court decided upon fifteen cases that had not been resolved through diplomatic channels.²⁷ The Court still exists, though it has had comparatively little work since the establishment of the Permanent Court of International Justice (PCIJ) 1921. There is no obligation upon states to refer their disputes to it and no means of enforcing its decisions. Nowadays, the PCA is used mainly (through its national groups)²⁸ to nominate candidates for the election of judges of the ICJ.²⁹

An evaluation of the PCA's practice leads to the conclusion that, despite the fact that it facilitated the setting up of arbitral tribunals by providing a central administrative body, it is neither permanent nor a Court *stricto sensu*. It is rather a panel of international arbitrators from which states can designate specific arbitrators

²⁵ The Final Act of the Second Peace Conference, 18 October 1907, stated that "[t]he Conference recommends to the signatory Powers the adaptation of the annexed draft convention for the creation of a Court of Arbitral Justice and the bringing it into force as soon as an agreement has been reached respecting the selection of the judges and the constitution of the Court" (cited in Hudson, *supra* note 16, p. 81).

²⁶ Hudson, *supra* note 16, p. 81; Gilmore, G., "The International Court of Justice", *YILJ*, 55, 1946, pp. 1050-1.

²⁷ Hudson, M., *International Tribunals: Past and Future*, 1944, p. 7; Janis, M. "The International Court" in Janis, M. (ed.), *International Courts for the Twenty-First Century*, 1992, p. 16.

²⁸ It should be noted that Art. 44 of The Second Hague Convention, 1907, for the pacific settlement of international disputes deals with the appointment of the "national groups" as follows: "each contracting power selects four persons at the most, of known competency in question of international law, of the highest moral reputation, and disposed to accept the duties of arbitrator ... Two or more powers may agree on the selection in common of one or more members. The same person can be selected by different powers." According to this article, the persons selected are members of the PCA. See Lissitzyn, O., *The International Court of Justice: Its Role in the Maintenance of International Peace and Security*, 1951, p. 10; Bowett, *supra* note 17, pp. 260 ff.

²⁹ The national groups of the PCA had the same role in respect of the nomination of the PCIJ's judges.

to sit on *ad hoc* tribunals to hear cases submitted voluntarily by states. Despite this conclusion, the Court is considered to be the forerunner of the PCIJ and the ICJ, in that it established and approved of the idea of international machinery as a means of settling international disputes.

1.2. After the First World War

1.2.1. The establishment of the League of Nations and the Permanent Court of International Justice (PCIJ)

During the First World War, a number of independent initiatives were made, all of which were aimed at avoiding another world war by creating an international organisation and machinery for the peaceful settlement of disputes. At the meeting of the Paris Peace Conference, a resolution was passed that called for the creation of a League of Nations “to promote international co-operation, to ensure the fulfilment of accepted international obligations, and to provide safeguards against war”. Its Covenant came into force early 1919.³⁰ The League of Nations became the first effective move towards the organisation of a political and social order on a global scale.

To achieve the objective of maintaining “international peace and security”, the Covenant of the League adopted the system of collective security for the first time in the history of international institutions. Any attempt to give a full treatment to the League system would be outside the scope of the present study. What needs to be mentioned here is that the parties to the Covenant of the League accepted the idea that they should attempt to resolve their disputes peacefully before having recourse to war. Therefore, the drafters of the Covenant were convinced that international disputes should be resolved in accordance with principles of law as an essential and necessary requirement.³¹ Accordingly, Arts. 12 and 13 were embodied in the Covenant. Pursuant to Art. 12, a mutual undertaking was given by all members of the League to submit their disputes to judicial settlement, arbitration or

³⁰ Yarnold, *supra* note 10, p. 79; Archer, *supra* note 4, pp. 15 ff.; Bennett, *supra* note 1, pp. 24 ff.

³¹ Hudson, *supra* note 16, p. 93; Rosenne, S., *The Law and Practice of the International Court*, 1985, p. 13.

inquiry. Pursuant to Art. 13, disputes on questions of fact or international law were generally to be submitted to arbitration and judicial settlement as an instrument for solving their international disputes. In addition, Art. 14 referred to the establishment of an international tribunal to settle international disputes.³² Pursuant to Art. 14, the Council appointed a Committee of Jurists to draft a Statute of the Court in 1920. The Assembly adopted the Statute of the Permanent Court of International Justice on 13 December 1920. On 16 December, the Assembly adopted a protocol of signature that was to be ratified by states to accept that they would be bound by the Court's Statute. The Statute came into force on 1 September 1921 upon the signature of the Protocol by the majority members of the League.³³

The PCIJ, which functioned effectively between 1922 and 1940,³⁴ was the first institutional international tribunal rather than a panel from which *ad hoc* tribunals could be constituted. It created a precedent in the history of international adjudication by establishing an international tribunal simultaneously with an international institution. It was also the first world-wide tribunal to which states in all parts of the world could submit their controversies for judicial settlement.

1.2.2. The institutional relationship between the PCIJ and the League of Nations

Art. 14 of the Covenant of the League of Nations was the only article that referred to the PCIJ. This article made a general reference to an international tribunal without details. The PCIJ was not enumerated among the organs of the League of

³² Art. 14 provided that "the Council shall formulate and submit to the Members of the League for adoption plans for the establishment of a Permanent Court of International Justice. The Court shall be competent to hear and determine any dispute of an international character which the parties thereto submit to it. The Court may also give an advisory opinion upon any dispute or question referred to it by the Council or by the Assembly."

³³ In this regard, it should be noted that the idea of the establishment of the PCIJ can be traced back to 1918, when the British Government Committee on the League of Nations proposed that a court be designed out of the forthcoming treaty of peace and that the tribunal also be empowered to hear cases concerning other international disagreements. At Versailles in 1919, the idea of establishing a new court was discussed and, as a result, Art. 14 was embodied in the Covenant. See Janis, *supra* note 27, p. 17.

³⁴ Between 1921 and 1945, the PCIJ issued 31 judgments, 25 substantive orders, and 27 advisory opinions. With regard to the evolution of the PCIJ's activities, see Elian, G., *The International Court of Justice*, 1971, pp. 34 ff.; Rosenne, *supra* note 31, p. 10; Knight, et al., *supra* note 7, pp. 284-5, 288.

Nations pursuant to Art. 2 of the Covenant.³⁵ Moreover, the PCIJ's Statute was not an integral part of the Covenant because it was adopted by a resolution of the First Assembly of the League of Nations as an international treaty distinct from the Covenant.

This situation led to a theoretical discussion among international lawyers regarding the institutional relationship between the PCIJ and the League of Nations. It is noted by some lawyers that the PCIJ was not an organ of the League of Nations but was a separate and independent organisation like the International Labour Organisation.³⁶ This opinion is based upon the absence of any specific provision in the Covenant and in the PCIJ's Statute referring to any institutional relationship between them.

The above view is rejected by other lawyers, who conclude that the PCIJ was an organ of the League despite the fact that its Statute was not an integral part of the Covenant.³⁷ This opinion is based on several grounds. The discussion of the *travaux préparatoires* of the Covenant, especially the Pact of Paris, 1919, left no doubt that the PCIJ was envisaged as a part of the League. Art. 415 of the Versailles Treaty referred to "the Permanent Court of International Justice of the League of Nations".³⁸ In addition, the statement made by the Court's President, Judge Loder, in the opening session of the PCIJ referred to the Court as "one of the principal organs of the League" which "occupies within the League of Nations a place similar to that of the judicature in many states". Moreover, the Constitution of the International Labour Organisation adopted the opinion of the PCIJ's President in the ceremony of the opening of the Court, where he described the Court

³⁵ Art. 2 provided "[t]he action of the League under this Covenant shall be effected through the instrumentality of an Assembly and of a Council, with a permanent Secretariat".

³⁶ Hammarskjöld, A., *Jurisdiction International*, 1938, p. 61; Kelsen, H., *Peace Through Law*, 1944, p. 49; Kelsen, H., *The Law of the United Nations*, 1951, p. 465; Simpson, et al., *supra* note 13, p. 25; Gill, T., *Litigation Strategy at the International Court: A Case Study of the Nicaragua v. United States Dispute*, 1989, p. 5.

³⁷ Hudson, *supra* note 16, pp. 111-12; Waltera, F., *A History of the League of Nations*, 1952, vol. 2, p. 815; Khan, M., "The Contribution of the Principal Judicial Organ of the United Nations to the Achievement of the Objects of the Organisation", *ARUNA*, 1969/70, p. 42.

³⁸ Hudson, *supra* note 16, p. 111.

as a Court of the League.³⁹ Finally, the invitation of the Council of the League to the Committee of Jurists stated that “[t]he Court is a most essential part of the organisation of the League of Nations”;⁴⁰ and the report of the Committee concluded that “[t]he new Court, being the judicial organ of the League of Nations, can only be created within this League”.⁴¹

The above two views are not without merit. However, it should be noted that, despite the fact that there was no provision either in the Covenant or in the Statute confirming the integral relationship between the PCIJ and the League of Nations, the PCIJ was sufficiently close to the League of Nations that we cannot notice any difference between their relationship and the current relationship between the UN and the ICJ. This was reflected through several provisions. First, the administrative and financial links between the League and the PCIJ appeared in several provisions of the Covenant and the Statute.⁴² According to these provisions, the League of Nations was charged with the election of the Court’s judges;⁴³ the expenses of the Court were met by the League; its budget was a part of the League’s budget and was examined and passed by the financial authorities of the League;⁴⁴ and it played a role in determining the conditions on which non-member states could be parties to cases before the Court.⁴⁵ Second, the practice of the PCIJ’s functions toward the other organs of the League leaves no doubt about its close relationship to the League. It operated as a part of the League machinery, playing a role in achieving the League’s principles of the peaceful settlement of international disputes. Third, the PCIJ co-operated with the Council of the League by providing advisory

³⁹ LNOJ, 1922, p. 312; Politis, N., *La Justice Internationale*, 1924, pp. 180 ff.

⁴⁰ The Council of the League Doc., 1921, p. 6 (cited in Keith, K., *The Extent of the Advisory Jurisdiction of the International Court of Justice*, 1970, p. 144).

⁴¹ Hudson, *supra* note 16, pp. 144-5.

⁴² In addition to these provisions, it should be noted that Art. 1 of the PCIJ’s Statute affirmed that the Court was established in accordance with Art. 14 of the Covenant.

⁴³ Art. 4 of the PCIJ’s Statute.

⁴⁴ Art. 32 of the PCIJ’s Statute.

⁴⁵ Art. 35/2 of the PCIJ’s Statute.

opinions.⁴⁶ Fourth, this relationship has been clearly demonstrated by the fact that the collapse of the League of Nations led to the collapse of the PCIJ. Finally, this closer relationship was confirmed by the report of the Informal Inter-Allied Committee, which described the relationship between the PCIJ and the League as “organic”.⁴⁷

In light of the above, it would be reasonable to pose the following question: why did not the founders of the League embody an express provision in the Covenant indicating that the PCIJ was an organ of the League? This question is not answered in the literature on the PCIJ. However, the status of the PCIJ may be attributed to the following factors. First, there might have existed a belief that the Court’s independence entailed its separation from the political organs. Second, it might have been envisaged that the separation between the Court and the League would guarantee the survival of the Court even if the League collapsed for whatever reason. Third, the fact that the PCIJ was the first attempt to establish a permanent court with a truly judicial character in the international forum might have led the drafters of the Covenant to concentrate on its Statute rather than its institutional relationship with the League. Fourth, at that time the League of Nations was the first real attempt at international co-operation between states, and it might have appeared to member states that an organisation that represented the international community and in a sense participated in regulating it in some way could affect their sovereignty. Therefore, a court within the structure of the organisation could have been deemed as a further threat to the sovereignty of member states. Hence, if the Court had been embodied in the League’s structure it could have affected the decision of states to join the League. Finally, the issue of the organic relationship was hard to perceive prior to asserting whether an international court had something to offer to the international community and that it could really work.

⁴⁶ Having analysed the PCIJ’s dicta in respect of some advisory opinions, Keith noted that “[t]he Permanent Court then, clearly considered itself to be under a duty to time its replies to requests for opinions so that they would be of most value to the Council; doubtless this duty resulted at least in part from its links with the League”. Keith, *supra* note 40, pp. 144-5.

⁴⁷ See UNCIO, 3, pp. 87-9; *AJIL*, 39, supp., 1945, p. 4.

1.3. After the Second World War

1.3.1. The development of the notion of international organisations

The development of international relations on the one hand, and the disaster of the Second World War on the other hand, revealed to the world the necessity and expediency of creating several permanent international institutions to enable states to co-operate. There was a call for the establishment of an international organisation for the “maintenance of international peace and security” among the Allied powers during the Second World War. The establishment of the UN and its specialised agencies was a logical consequence of this movement.

1.3.2. The establishment of the United Nations and the International Court of Justice

During the Second World War, the Allied powers made some suggestions about establishing a new world organisation after the end of the war to play a leading role in maintaining international peace and security. These bore fruit in the adoption of the UN Charter, which was signed on 26 June 1945.⁴⁸

With regard to the ICJ, there was no reference to it during the first stages of the *travaux préparatoires*.⁴⁹ The idea of establishing an international court appeared for the first time in the report of the Informal Inter-Allied Committee on the Future of the Permanent Court of International Justice, which convened between 1943 and 1944.⁵⁰ Two questions were considered by this Committee: first, whether to keep the PCIJ with some modification to its Statute or to establish a new court by means

⁴⁸ For more details, see Bennett, *supra* note 1, pp. 43 ff.

⁴⁹ Neither the Moscow Declaration nor the Tehran Conference resulted in any reference to the Court.

⁵⁰ Hudson, M., “The Succession of the International Court of Justice to the Permanent Court of International Justice”, *AJIL*, 51, 1957, p. 570. It should be noted that, in early 1943, the Governments of Belgium, Canada, Czechoslovakia, Greece, Luxembourg, the Netherlands, New Zealand, Norway, and Poland as well as the French Committee of National Liberation, agreed to nominate a number of their experts to constitute an informal committee to examine the question of the Court. The members of this Committee were acting in their personal capacity and without binding their governments. See Rosenne, *supra* note 31, pp. 27-8; Marston, G., “The London Committee and the Statute of the International Court of Justice” in Lowe, V., et al. (eds.), *Fifty Years of the International Court of Justice*, 1996, pp. 40 ff.

of a new Statute; second, whether this court would be institutionally integrated into the new organisation.

The above Committee did not deal with the first question because it concluded that “reference to the future court in this report should be regarded as applicable whether that court be the Permanent Court of International Justice or a newly-created body”.⁵¹ With regard to the second question, the Committee found that it was not desirable to connect the court with a future international organisation. In its opinion, the PCIJ had suffered from its quasi-organic connection with the League, which resulted in its prestige being dependent upon the varying fortunes of the League. The Committee also noted that this organic connection was undoubtedly responsible for the unwillingness of some states to become parties to the PCIJ’s Statute. Moreover, it was observed that any general international organisation would in its early stages be of a tentative character and might undergo changes as the result of experience. Therefore, it was desirable for the court to be on a permanent basis and not to be liable to be affected by changes that the organisation might undergo. Finally, it was considered that such an organic connection between the court and a general international organisation would not function satisfactorily unless the membership of the two institutions was entirely, or at any rate practically, identical.⁵²

Although the Dumbarton Oaks proposal of 1944 did not deal with the question of whether to keep the PCIJ or to establish a new court, it embodied the court within the principal organs of the organisation. Chapter VII stated that the court should constitute the principal judicial organ of the organisation. It also stated that this court should be constituted by and function in accordance with a Statute that should be annexed to and be a part of the Charter of the organisation. Furthermore, it pointed out that the membership should be identical in both the court and the general organisation.⁵³

⁵¹ For the report of the Committee, see *AJIL*, 39, supp., 1945, p. 2 ff.

⁵² Ibid.

⁵³ Dumbarton Oaks Proposal, see *AJIL*, 39, supp., 1945, p. 42; Hudson, M., “The Twenty-Third Year of the Permanent Court of International Justice, and its Future”, *AJIL*, 39, 1945, p. 3; Hudson, *supra* note 50, p. 570; Fakher, H., *The Relationships Among the Principal Organs of the United Nations*, 1951, pp. 19-20.

At the San Francisco Conference in 1945 there was a disagreement among the participants regarding the question of whether to keep the PCIJ or to establish a new court. Two different views were expressed.⁵⁴ Some participants were in favour of keeping the PCIJ and introducing some amendments to its Statute corresponding with the new needs of the replacement of the League of Nations by the UN. This view was based on the fact that there were in existence several hundred international treaties that contain the so-called compromissory clause providing that in the event of dispute the PCIJ should have the power to interpret the treaty, and that these treaties, despite the war, would probably continue in force. Conversely, it was noted that, if there was an intention to establish a court as part of the post-war organisation, it would be technically easier to adopt a new court rather than revive the PCIJ.

The latter view was upheld for several reasons. First, it was noted that, if the PCIJ were to continue, amendments in its Statute would be required as a result of the discontinuance of the League of Nations. This was legally impossible in the light of the absence of any provision for revision in the Statute of the PCIJ, and in the light of the absence of some parties to the Statute - the Axis states - which were not represented at the UN *travaux préparatoires*. Therefore, it was impossible to introduce any amendments because the voting requirements could not be fulfilled. Second, it was impossible to elect new judges because this election could be conducted only by the Assembly and the Council of the League of Nations, which was on the verge of collapse. Finally, some states that participated in the *travaux préparatoires*, such as the Soviet Union, were not parties to the PCIJ's Statute. In the light of the above, the First Committee of the Fourth Commission of the San

⁵⁴ Jessup, P., "The Court as an Organ of the United Nations", *For. Aff.*, 23, 1945, p. 235; Russell, R., *A History of the United Nations Charter: The Role of the United States (1940-1945)*, 1958, p. 879; Anand, R., *Compulsory Jurisdiction of the International Court of Justice*, 1961, p. 20; Rosenne, S., *The Law and Practice of the International Court*, 1965, vol. 1, p. 62; Goodrich, L., et al., *Charter of the United Nations: Commentary and Documents*, 1969, p. 546; Rousseau, C., *Droit International Public*, 1974, p. 331; Hilderbrand, R., *Dumbarton Oaks. The Origins of the United Nations and the Search for Post-War Security*, 1990, pp. 116-17.

Francisco Conference,⁵⁵ decided, for the first time, to propose the creation of a new court.⁵⁶

With regard to the position of the new court within the new organisation, the Rapporteur of Committee IV/I noted that the new international court should play an important role in the new organisation. The Rapporteur emphasised that the court had to be one of the principal organs and its Statute therefore should be a part of the Charter.⁵⁷ It was also stressed that the court was not established upon any different basis than that of the General Assembly (GA), the Security Council (SC), and other organs of the organisation.⁵⁸

The San Francisco Conference therefore decided to establish a new court which would be designated the “principal judicial organ” of the UN. The Conference also decided that the Statute of the court would be “annexed” to and form an integral part of the Charter. As a consequence, the PCIJ was officially dissolved in 1946, by a resolution of the Assembly of the League convened for the last time,⁵⁹ and the new court, the ICJ, started functioning on 18 April 1946.⁶⁰

1.3.3. The ICJ and the PCIJ: Is it a new Court?

As a result of the discussions during the *travaux préparatoires* stage and the provisions of the UN Charter and the ICJ’s Statute, there is no doubt that the ICJ is a new court and not a legal extension of the PCIJ. However, the PCIJ and its Statute were the basis of the ICJ and its Statute, and similarity and continuity between the ICJ and the PCIJ were reflected in various ways. The ICJ inherited the objectives and the primary purposes of the PCIJ. First, the ICJ, like the PCIJ, was

⁵⁵ Hereinafter the Committee IV/I.

⁵⁶ This proposal was justified as follows: “[a]fter balancing the advantage to be gained and the objections to be overcome in the adoption of either course, the First Committee [IV/1] decided to recommend the establishment of a new Court ... Moreover, the creation of a new court seems to be the simpler and at the same time the more expedient course to be taken. If the Permanent Court were continued, modification in its Statute would be required as a result of the discontinuance of the League of Nations.” UNCIO, 13, pp. 196, 381, 527.

⁵⁷ See UNCIO, 13, p. 381-4.

⁵⁸ See UNCIO, 17, pp. 37, 47-9.

⁵⁹ See LNOJ, supp., 1946, p. 256.

⁶⁰ It should be noted that the Statute of the PCIJ and the Statute of the ICJ were both in force until April 1946.

designed to contribute to world peace by means of the judicial settlement of international disputes, to develop international law through its judgments and opinions, and, finally, to help the development of international institutions by providing them with advisory opinions on the legal matters that they were dealing with when exercising their functions. Second, the rules of procedure adopted by the new court in 1946 were virtually identical to those of the PCIJ. Third, the Statute itself is very closely based upon the Statute of the PCIJ, as is made clear in the Charter. Art. 92 states that the ICJ “shall function in accordance with the annexed Statute, which is based upon the Statute of the Permanent Court of International Justice and forms an integral part of the present Charter”.⁶¹ This article expresses the intention of the drafters of the Charter to maintain continuity between the ICJ and the PCIJ.⁶² Fourth, the jurisdiction of the Court is still no different from that of the old one. Fifth, it is interesting to note that the ICJ has often referred to decisions of the PCIJ as supporting a given position taken within the context of a judgment.⁶³ Seventh, the ICJ’s Statute makes various references to the Permanent Court and has maintained a considerable degree of continuity in the jurisdiction that was conferred upon the PCIJ. In this respect, Arts. 36/5 and 37 of the Statute carry over to the ICJ valid acceptances of jurisdiction conferred upon the PCIJ with regard to the “optional clause” system and in multilateral and bilateral treaties.⁶⁴ The adoption of these provisions was justified by Committee IV/I on the basis that the new court would be the successor of the Permanent Court in respect of the matters with which these provisions deal and “the creation of a new Court will not break the chain of

⁶¹ It should be noted that the Washington Committee of Jurists, which was established to prepare a draft of the Statute, decided to take the Statute of the Permanent Court as the basis of the work, together with such modifications as might be required. See Rosenne, *supra* note 31, pp. 31-2.

⁶² In his Diss. Op. in the *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania* case, Judge Read explained that Art. 92 of the Charter disclosed the intention of continuity in jurisprudence as well as in less important matters. ICJ Rep., 1950, pp. 232-3.

⁶³ In this regard, it should be mentioned that during the San Francisco Conference there was a strong emphasis that the traditions and experiences of the PCIJ would be employed in the proceedings of the new Court and would be utilised just as if the Permanent Court had been continued. See Goodrich, L., et al., *Charter of the United Nations*, 1949, pp. 476-90. With regard to the reliance of the ICJ on the practice of the PCIJ, see Shahabuddeen, M., *Precedent in the World Court*, 1996, pp. 23 ff.

⁶⁴ See Chapter Four below.

continuity with the past”.⁶⁵ In addition, some international lawyers used to use the term “International Court” or “World Court” when they referred to both courts.⁶⁶ Finally, the ICJ in the *Military and Paramilitary Activities in and against Nicaragua* case 1984,⁶⁷ stated that “the primary concern of those who drafted the Statute of the present Court was to maintain the greatest possible continuity between it and its predecessor”.⁶⁸

Despite the similarity and continuity, the ICJ is still considered to be a new court and not, as noted by some lawyers, in effect the PCIJ with the only change being in its name.⁶⁹ The latter view ignores several fundamental elements, such as the fact that the ICJ’s Statute is considered to be an integral part of the UN Charter whereas the PCIJ was created by separate instrument, the fact that member states of the Charter are parties to the Court’s Statute, and the fact that the PCIJ’s jurisdiction in matters arising under the Covenant rested solely on Art. 36/1, giving the Court competence in “all matters specially provided for in treaties or conventions in force”, whereas the ICJ Statute states that the Court’s competence includes also “all matters specially provided for in the Charter of the UN”. Moreover, Art. 36/3 of the Charter provides that the SC “should take into consideration that legal disputes should as a general rule be referred by the parties to the International Court” whereas the Covenant was silent on this point. Finally, the ICJ - in contrast to the PCIJ - is under an obligation, as a consequence of its organic relationship with the UN, to co-operate with the UN to achieve its aims and objectives. This was clarified by the ICJ in the *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania* case (1950),⁷⁰ where it noted, in comparing its position in relation to the UN with the position of the PCIJ in relation to the League, that it had a special

⁶⁵ See UNCIO, 13, p. 384.

⁶⁶ In this regard, it should be noted that Hudson wrote his articles entitled “The World Court” in the AJIL from 1923 to 1959.

⁶⁷ Hereinafter the *Nicaragua* case.

⁶⁸ ICJ Rep., 1984, p. 407.

⁶⁹ Schwarzenberger, G., *International Law*, vol. 1 (International Law as Applied by International Courts and Tribunals), 1957, p. 3; Tornaritis, C., “The Review of the Role of the International Court of Justice”, *RHDI*, 24, 1971, p. 35.

⁷⁰ Hereinafter the *Peace Treaties* case.

relationship with the UN. It pointed out that “it is not merely an ‘organ of the United Nations’, it is essentially the ‘principal judicial organ’ of the organisation”.⁷¹ This indicates that the Court considers its relation to the UN to be different from that of the PCIJ to the League of Nations.

2. The ICJ as a part of the UN system

As mentioned above, the ICJ constitutes an integral part of the UN. This organic relationship has been confirmed by various provisions in the Charter and in the ICJ’s Statute. This relationship has affected both the ICJ and the UN. In this section the legal basis of this organic relationship and its dimensions will be demonstrated.

2.1. The legal basis of the organic relationship

The drafters of the Charter and the ICJ’s Statute were determined to make clear provisions in respect of the organic relationship between the ICJ and the UN, in order to avoid the confusion that occurred in the determination of the position of the PCIJ within the framework of the League of Nations. These provisions are incorporated both in the Charter and in the Court’s Statute.

2.1.1. The UN Charter

The basis on which the ICJ was created is the UN Charter. In respect of the Court, the Charter’s provisions can be classified into two categories: first, the general provisions, which deal with the legal position of the ICJ within the legal and political framework of the UN; second, the specific provisions, which deal with the organisation and tasks of the ICJ as an organ of the UN.

(i) The general provisions

First, Art. 7/1 crystallises the position of the Court within the framework of the UN. It stipulates that the Court is one of the six principal organs, together with the GA, the SC, the ECOSOC, the Trusteeship Council, and the Secretariat.⁷² This

⁷¹ ICJ Rep., 1950, p. 71.

⁷² Art. 7/1 of the Charter provides: “[t]here are established as the principal organs of the United Nations: a General Assembly, a Security Council, an Economic and Social Council, a Trusteeship Council, an International Court of Justice and a Secretariat.”

enumeration is exhaustive and does not place these organs in a hierarchical order, since each has an equal status in its capacity as a principal organ of the UN.⁷³

In addition, Art. 33/1 imposes an obligation on UN members to achieve first of all a peaceful solution by various means, including judicial settlement, of any dispute that is likely to endanger the maintenance of international peace and security. This article means that the drafters of the Charter considered the position of the ICJ as the judicial organ within the framework of the UN as an appropriate means to achieve one of the main objectives of the UN, namely the settlement of international disputes by peaceful means. This position was confirmed by Art. 36/3 of the Charter, which provides that the SC when making a decision should consider that legal disputes should, as a general rule, be referred by the parties to the ICJ in accordance with the provisions of the Statute.⁷⁴

(ii) The specific provisions

In contrast to the general provisions, the specific provisions are many and varied. The Charter devotes Chapter XIV to illustrating the organisation and the competencies of the ICJ.⁷⁵

Art. 92 of the Charter complements Art. 7/1 and reflects the constitutional position of the Court within the UN. It provides that the ICJ is the principal judicial organ of the UN and that it should function in accordance with its Statute, which is considered an integral part of the Charter.⁷⁶

Art. 93/1 of the Charter indicates that the member states of the UN are *ipso facto* parties to the Court's Statute. This article reflects the development of the

⁷³ Despite this fact it has been noted by some lawyers that "some articles of the Charter might allow one of these organs to control the activities of the other to some extent". See Jaenicke, G., "Article 7" in Simma, B., et al. (eds.), *The Charter of the United Nations: A Commentary*, 1994, pp. 195-6.

⁷⁴ Art. 36/3 of the Charter provides: "[i]n making recommendations under this Article the Security Council should also 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."

⁷⁵ Arts. 92 to 96.

⁷⁶ Art. 92 of the Charter provides: "[t]he International Court of Justice shall be the principal judicial organ of the United Nations. It shall function in accordance with the annexed Statute, which is based upon the Statute of the Permanent Court of International Justice and forms an integral part of the present Charter."

intimate relationship between the ICJ and the UN. Such a provision did not exist in the League of Nations Covenant, under which a state could become a member of the League without adhering to the Statute of the PCIJ.⁷⁷

Art. 96 of the Charter also reflects the organic relationship between the Court and the UN. Pursuant to this article, the Court is the only competent organ among the UN's organs to give advisory opinions on any legal question referred to it by any political organ or specialised agency of the UN. In this regard it has been noted by Schwebel that this article is "central to relations between the Court and the United Nations".⁷⁸

2.1.2. The Statute of the ICJ

The integral relationship between the ICJ and the UN is reflected in several provisions. Art. 1 provides that "[t]he International Court of Justice established by the Charter of the United Nations as the principal judicial organ of the United Nations shall be constituted and shall function in accordance with the present Statute". This article is considered to be an introduction to the Statute and affirms the link between the Charter and the Statute which is derived from the integrated relationship between the ICJ and the UN. It also leads to the fact that both the Charter and the Statute are read as one instrument.

The organic relationship between the ICJ and the UN seems clear in the light of Arts. 4-14, which deal with the role of the UN with regard to the composition of the Court and the election of its judges,⁷⁹ Arts. 32 and 33, which deal with the salaries and other expenses of the Court being borne by the UN,⁸⁰ and Art. 35/1, which

⁷⁷ In this respect, it was noted by Kelsen that "the provision of Article 93, paragraph 1 ... is superfluous since this is the necessary consequence of the provision of Article 92 that the Statute forms an integral part of the present Charter". Kelsen, 1951, *supra* note 36, p. 81. This view cannot be easily accepted. Art. 92 indicates only that the ICJ is an organ of the UN, and it could not be interpreted as indicating that all member states of the UN become *ipso facto* parties to the Court's Statute.

⁷⁸ Schwebel, S., "Relations Between the International Court of Justice and the United Nations" in Virally, M. (ed.), *Le Droit International au Service de la Paix, de la Justice et du Développement*, 1991, p. 435.

⁷⁹ See pp. 32 *ff.* below.

⁸⁰ See p. 36 below.

allows all non-members of the UN to be parties to the ICJ's Statute.⁸¹ In addition, it has been noted that Art. 38 of the Statute is considered to be the most significant provision regarding the relationship between the ICJ and the UN. It states that the Court's function is "to decide in accordance with international law such disputes as are submitted to it". Accordingly, the Court, although it is an organ of the UN, is not limited to applying some sort of "UN Law", but is entitled and indeed bound to apply general international law in force between all states. It is undoubtedly for the Court to apply the purposes and principles of the UN as stated in Arts. 1 and 2 of the Charter, but it is bound to do so by giving decisions "in accordance with international law".⁸²

These articles constitute the kernel of the organic relationship between the ICJ and the UN. This position has been illustrated by several commentators and international lawyers. For instance, Mr Heald, speaking as the Attorney-General of the British Government, noted that the Charter "placed the International Court in a more powerful position than the old Permanent Court of International Justice of the League of Nations".⁸³ This organic relationship was also confirmed by the ICJ in several cases. For instance, in the *Peace Treaties* case, the Court stated that: "the reply of the Court, itself an 'organ of the United Nations', represents its participation in the activities of the Organisation."⁸⁴

2.2. The dimensions of the organic relationship between the ICJ and the UN

The integration of the ICJ within the principal organs of the UN has effects upon both the ICJ and the UN.

2.2.1. The effect on the ICJ

The position of the ICJ as the principal judicial organ and its integrated relationship with the UN has several consequences.

⁸¹ See pp. 33 *ff.* below.

⁸² Singh, *supra* note 16, p. 43.

⁸³ See GAOR, (VI), 6th, p. 27 (cited in Rosenne, *supra* note 31, p. 65).

⁸⁴ ICJ Rep., 1950, p. 71. A similar statement was made in the *Nottebohm* case (ICJ Rep., 1953, p. 119) and the *Certain Expenses of the United Nations* case (ICJ Rep., 1962, p. 155).

(i) The parties to the ICJ's Statute

Pursuant to the Charter, UN members are automatically parties to the Statute of the ICJ.⁸⁵ Art. 93/1 of the Charter lays down a fundamental coincidence of membership of the organisation and membership of the ICJ.⁸⁶ According to this article, a member state is *ipso facto* a party to the Statute of the ICJ as soon as it becomes a member of the UN and therefore there is no requirement for a separate ratification to be a party to the Court's Statute. This means that every member of the UN is entitled to the benefits of the Court from the date of their admission to the UN. In addition to the above, cessation of membership of the UN, whether by withdrawal, suspension⁸⁷ or expulsion,⁸⁸ must lead to cessation of being a party to the Statute.

It should be noted, however, that not all the parties to the ICJ's Statute are parties to the UN Charter. It is possible for a non-member state of the UN to be a party to the ICJ's Statute, as will be shown later in this chapter.⁸⁹

(ii) The domestic jurisdiction of states and the ICJ's powers

As one of the organs of the UN, the ICJ's jurisdiction is limited by the general limits imposed by the Charter upon the other organs of the UN. However, the question has arisen whether the limit of domestic jurisdiction as indicated by Art. 2/7 of the Charter could be considered to be a limit on the Court's power.⁹⁰ The

⁸⁵ Not all members of the League were parties to the PCIJ Statute. For instance, the Soviet Union became a member of the League of Nations in 1934 without ever adhering to the Statute of the PCIJ. As mentioned above, the PCIJ's Statute was constituted as a treaty distinct from the Covenant, and membership of the League did not *ipso facto* lead to membership of the Statute of the PCIJ. See pp. 12 *ff.* above.

⁸⁶ Schwebel noted that "this provision is straight forward. It is no less significant for, in contrast with the situation of the Permanent Court of International Justice, it assures the Court a constituency, the membership of the United Nations, which today is virtually universal." Schwebel, *supra* note 78, p. 434.

⁸⁷ Art. 5 of the Charter.

⁸⁸ Art. 6 of the Charter.

⁸⁹ See pp. 33 *ff.* below.

⁹⁰ Art. 2/7 provides: "[n]othing contained in the present Charter shall authorise the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII." With regard to the general literature concerning Art. 2/7 of the Charter, see, for instance, Schapiro, L., "Domestic Jurisdiction in the Covenant and the Charter", *GS*, 33, 1947, pp. 195 *ff.*; Preuss, L., "Article 2, Paragraph 7 of the Charter of the United Nations and Matters of Domestic Jurisdiction",

importance of this question is derived from the fact that some states, when accepting the Court's compulsory jurisdiction, attach reservations to their declarations whereby they do not recognise the jurisdiction of the Court over disputes "in regard to matters which essentially fall within the domestic jurisdiction".⁹¹

The ICJ was given an opportunity to address this question in the *Anglo-Iranian Oil Company* case (1952). In this case, the Court's jurisdiction was disputed on the ground of the limitation of Art. 2/7.⁹² The ICJ did not make any pronouncement on the validity of this contention since it upheld the objection that it has no jurisdiction on the basis of the reservation *ratione temporis*.⁹³

In the light of the silence of the Court, it has been noted by some lawyers that Art. 2/7 of the Charter does not *ipso jure* operate to restrict the jurisdiction of the Court.⁹⁴ This opinion is based on the fact that, although the Statute is considered as an integral part of the Charter, from which it follows that acceptance of the Charter automatically entails acceptance of the Statute of the Court, this does not preclude

RCADI, 74, 1949, pp. 553 ff.; Rajan, M., *United Nations and Domestic Jurisdiction*, 1958; Conforti, B., *The Law and Practice of the United Nations*, 1996, pp. 133 ff.

⁹¹ The first reservations of this type appeared in declarations accepting the compulsory jurisdiction of the PCIJ in September 1929, when, after mutual consultation, the UK, Australia, Canada, India, New Zealand and the Union of South Africa deposited declarations containing identically phrased reservations withholding from the compulsory jurisdiction of the Court "disputes with regard to questions which by international law fall exclusively within the jurisdiction" of the declaring states. See Briggs, H., "Reservations to the Acceptance of Compulsory Jurisdiction of the International Court of Justice", *RCADI*, 93, 1958, pp. 309-10.

In the ICJ era, this reservation was introduced for the first time by the United States in its declaration made in 1946. It is now included in several declarations. See ICJYB, 1993-4, No. 48, pp. 82 ff.; Guechi, K., *Reservations to the Acceptance of the Compulsory Jurisdiction of the International Court of Justice*, Ph.D. thesis (Glasgow University), 1988, p. 251.

⁹² In this case, Iran argued that "the Court should declare that it lacks jurisdiction *ex officio* in application of Article 2, Paragraph 7, of the Charter of the United Nations, the matter dealt with by the nationalisation laws of March 20th and May 1st, 1951, being essentially within the domestic jurisdiction of States and incapable of being the subject of an intervention by any organ of the United Nations". ICJ Rep., 1952, p. 98; ICJ Pled., 1952, pp. 292-3, 465 ff., 621 ff.; Waldock, C., "The Plea of Domestic Jurisdiction before International Legal Tribunals", *BYIL*, 31, 1954, p. 122. Conversely, the UK interpreted Art. 2/7 as applying only to the organs whose authority is derived from the Charter. Accordingly, this article does not limit the Court's jurisdiction since the Court derives its authority from the consent of the state parties and not from the Charter. See ICJ Pled., 1952, pp. 156 ff., 327 ff., 350 ff., 561 ff., 654 ff.

⁹³ ICJ Rep., 1952, pp. 103 ff.

⁹⁴ Minagawa, T., "The Principle of Domestic Jurisdiction and the International Court of Justice", *HJLP*, 8, 1979, pp. 13-14; Shihata, I., *The Power of the International Court to Determine Its Own Jurisdiction: Compétence de la Compétence*, 1965, pp. 231-2; Briggs, *supra* note 91, pp. 320-1; Rajan, *supra* note 90, p. 505.

the Charter and the Statute from constituting formally distinct and separate instruments. Moreover, the term “the present Charter” is fairly regularly used in the narrow sense to exclude the Statute of the Court. In addition, the advocates of this view note that the Court’s jurisdiction is derived from the consent of states, and neither the Charter nor the Statute gives such adjudicative powers to the ICJ; there is no provision in the Charter directly establishing the jurisdiction of the Court. They rely on the ICJ’s dictum in the *Aerial Incident of 27 July 1955* case between Israel and Bulgaria (1959),⁹⁵ in which it observed that “Article 36, contrary to the desire of a number of delegations at San Francisco, does not make compulsory jurisdiction an immediate and direct consequence of being a party to the Statute”.⁹⁶ Therefore, the advocates of this view conclude that any limits on, *inter alia*, the domestic jurisdiction of states should be derived from the states’ declarations by which they accept the ICJ’s compulsory jurisdiction and not from the UN Charter.

This view is - rightly - opposed by the majority of international lawyers, who note that Art. 2/7, as a general limitation on the UN as a whole and on each of its organs individually, applies *ipso jure* to the ICJ.⁹⁷ This view is based on Art. 7 of the Charter, which describes the Court as one of the principal organs of the UN. In addition, Art. 92 of the Charter indicates that the ICJ is the judicial organ of the UN and consequently its Statute is an integral part of the Charter, and that the Charter and the Statute are to be read as one instrument. Accordingly, the Court should respect and apply the general principles that are imposed in the Charter, *inter alia* Art. 2/7. Therefore, the state party to the Statute, having recognised the compulsory jurisdiction of the Court under Art. 36/2 of the Statute, will be able to deny the

⁹⁵ Hereinafter the *Aerial Incident* case.

⁹⁶ ICJ Rep., 1959, p. 145.

⁹⁷ Kelsen, H., “Limitations on the Functions of the United Nations”, *YLJ*, 55, 1945-6, p. 1000; Kelsen, 1951, *supra* note 36, pp. 79-80, 527-31; Rajan, *supra* note 90, p. 121; Rudzinski, A., “Domestic Jurisdiction in the United Nations Practice”, *Ind. Quer.*, 4, 1953, pp. 329-30; Christol, C., “The Jurisdiction of the International Court of Justice”, *SCLR*, 33, 1960, pp. 378-9; Bramson, A., “Problèmes de Compétence dans le Statut et la Jurisprudence de la Cour International de Justice”, *AUMCS*, 8, 1961, pp. 101-36; Wright, Q., “Domestic Jurisdiction as a Limit on International and Supra National Action”, *NULR*, 56, 1961, p. 31; Bains, J., “Domestic Jurisdiction and the World Court”, *IJIL*, 5, 1965, p. 485; Trindade, C., “The Domestic Jurisdiction of State in the Practice of the United Nations and Regional Organisations”, *ICLQ*, 25, 1976, p. 750; Rosenne, *supra* note 31, pp. 49, 65-8; Diss. Op. of Judge Schwebel in *Elehronica Sicula S.p.A.* case, ICJ Rep., 1989, pp. 96-7.

jurisdiction of the Court by virtue of Art. 2/7, claiming that the subject-matter of the dispute is essentially within its domestic jurisdiction.

In addition, it could be argued that the limit of domestic jurisdiction of the state applies to the ICJ on the ground of Art. 38 of the Statute, which stipulates that the Court must apply rules of international law. Accordingly, any matter that is deemed by international law to be a domestic affair ought to be so determined by the Court as falling within the domestic jurisdiction of the states concerned unless there is a contrary agreement. Moreover, Art. 36/2 of the Statute, which enumerates the legal disputes that would be affected by acceptance of the Court's jurisdiction, affirms such a limitation.⁹⁸ This article refers to questions that, owing to their nature and essence, pertain to the field of international law and therefore do not fall under the umbrella of the domestic jurisdiction of the states.

Finally, one may refer to the Court's opinion in the *Peace Treaties* case, where its advisory function was challenged on the basis of Art. 2/7 of the Charter. Having clarified that it was not called upon to deal with the alleged violation of the provisions of the treaties concerning human rights and fundamental freedom, the Court held that:

"The object of the Request is much more limited. It is directed solely to obtaining from the Court certain clarification of a legal nature regarding the applicability of the procedure for the settlement of disputes by the Commissions provided for in the express terms of Article 36 of the Treaty with Bulgaria ... The interpretation of the terms of a treaty for this purpose could not be considered as a question essentially within the domestic jurisdiction of a State. It is a question of international law which, by its very nature, lies within the competence of the Court."⁹⁹

The above dictum is cited to prove that the Court would accept the challenge of domestic jurisdiction stated by Art. 2/7 of the Charter and it could refuse to indicate

⁹⁸ Art. 36/2 of the Statute provides that "[t]he states parties to the present Statute may at any time declare that they recognise as compulsory *ipso facto* and without special agreement, in relation to any other state accepting the same obligation, the jurisdiction of the Court in all legal disputes concerning:

- a. the interpretation of a treaty;
- b. any question of international law;
- c. the existence of any fact which, if established, would constitute a breach of an international obligation;
- d. the nature or extent of the reparation to be made for the breach of an international obligation."

⁹⁹ ICJ Rep., 1950, pp. 70-1.

the requested opinion if it found that the question is considered to be a matter within the domestic jurisdiction of the states.

To conclude, domestic jurisdiction is considered to be one of the principles of the UN itself. It restricts the competence and authority of all UN organs, including the ICJ, which cannot exceed the limits assigned by the parent organisation, namely the UN. As a consequence, the Court's jurisdiction - advisory and contentious - is limited by the domestic jurisdiction of the state, quite apart from any reservations in the declarations accepting the Court's jurisdiction. States are not required to include the specific reservation of domestic jurisdiction in their declarations by which they accept the Court's compulsory jurisdiction.¹⁰⁰

(iii) Notification of the ICJ's procedures

Art. 40/3 of the Statute provides that the Court's Registrar should "notify the members of the UN *through* the Secretary-General" (emphasis added). This provision illustrates the relationship between the Court and the UN by which the UN should be informed about proceedings before the ICJ. At the same time, it imposes a restriction on direct communication between the Court and the non-parties to the dispute entitled to appear before the Court. This kind of communication can be made only through the UN and not directly by the Court.¹⁰¹

(iv) The depositary function

The Secretary-General of the UN has a depositary function with regard to the instruments concerning the ICJ. First, pursuant to Art. 36/4 of the Statute, the Secretary-General has a depositary function for the declarations of states in accordance with Art. 36/2 of the Statute by which they accept the ICJ's compulsory

¹⁰⁰ The reservation of domestic jurisdiction has been criticised by some lawyers on the basis that it leaves it to the reserving state to make the final decision in each case. They conclude that a declaration with this reservation cannot be valid as an instrument for submission to compulsory jurisdiction. See Hambro, E., "The Jurisdiction of the International Court of Justice", *RCADI*, 76, 1950, p. 187; Kebbon, N., "The World Court's Compulsory Jurisdiction under the Optional Clause - Past, Present and Future", *NJIL*, 58, 1989, p. 264.

¹⁰¹ Kerno, I., "L'Organisation des Nations Unies et la Cour Internationale de Justice", *RCADI*, 78, 1951, pp. 556-7.

jurisdiction. Second, the Secretary-General is a depository of the instruments of acceptance submitted by non-members of the UN to accept the Court's Statute.¹⁰²

These articles reflect the fact that the Secretary-General of the UN, and not the Registrar of the Court, acts as a depository for all instruments related to the ICJ. In these cases, the date on which these instruments and declarations come into force is the date of deposit to the Secretary-General not the date of the Court's notification.

(v) Amendment of the Statute

Because the Statute is an integral part of the Charter, Art. 69 of the ICJ's Statute provides that any amendment in the Statute is equivalent to an amendment to the Charter.¹⁰³ It requires the same process as amendment of the Charter itself.¹⁰⁴ Therefore, pursuant to Art. 108 of the Charter, the amendment of the Court's Statute requires a vote of two-thirds of the members of the GA which must be ratified by the acceptance of nine members of the SC including all the permanent members.¹⁰⁵

In this regard, it should be noted also that the GA, acting upon the recommendation of the SC, provides means for participation in the amendment process of those parties to the Statute that are not members of the UN.¹⁰⁶

(vi) Submission of the annual report

Pursuant to Art. 15/2 of the Charter, the GA receives and considers reports from the other organs of the UN. This article applies to the ICJ since it is considered as one of the UN organs. This report covers the period from 1 August of the preceding year to 31 July of the current year. It contains a short account of the cases pending before the Court and of the orders and judgments that have been made. Needless to

¹⁰² Ibid., p. 558.

¹⁰³ Pursuant to Art. 70 of the Statute, the initiative for amending the Statute may come from members of the UN or from the Court itself.

¹⁰⁴ Art. 69 of the Statute provides: "[a]mendments to the present Statute shall be effected by the same procedure as is provided by the Charter of the United Nations for the amendments to the Charter, subject however to any provisions which the General Assembly upon recommendation of the Security Council may adopt concerning the participation of states which are parties to the present Statute but are not Members of the United Nations."

¹⁰⁵ Schwelb, E., "The Process of Amending the Statute of the International Court of Justice", *AJIL*, 64, 1970, pp. 880 *ff*.

¹⁰⁶ With regard to the possibility of a non-member state of the UN being a party to the ICJ's Statute, see pp. 33 *ff*. below.

say, this submission has great importance because it contributes to a better understanding of the Court's role and its responsibilities within the UN system.¹⁰⁷ However, it is worth mentioning here that this submission does not affect the independence of the Court and does not mean that the Court is accountable to the GA in the exercise of its judicial function. This is supported by the fact that the GA just takes note of the report, and consequently has no right to discuss and approve it. It also has no right to issue directives to the ICJ where it has no such authority under other articles of the Charter or the Statute. In this regard, it has been noted by Jaenicke that, "[b]y virtue of its judicial independence, the ICJ, as the 'principal judicial organ' of the UN, clearly stands outside any hierarchical order, if indeed there is any, among the principal organs of the UN".¹⁰⁸

2.2.2. The effect on the UN

The integration of the ICJ within the UN system has several consequences upon the UN, which may be summarised as follows.

(i) The election of the ICJ's judges

The system of election of the Court's judges is designed to reflect the position of the Court within the legal and political framework of the UN and the organic relationship between them, the ICJ's judges being elected by the political organs of the UN.¹⁰⁹ They are elected by simultaneous voting in both the GA and the SC from a list of candidates nominated by the national groups of the PCA,¹¹⁰ or, in the case of UN member states that do not have such formally constituted national groups, by *ad hoc* national groups especially appointed by those UN member states for that

¹⁰⁷ It should be noted that in the earlier years of the UN no annual report had been submitted to the Assembly. The first report was submitted in 1968 and there has been one every year since, with one exception in 1975. See Lachs, M., "Problems of the World Court: A Member's Perspective", *New York University, Centre for International Studies Policy Papers*, 3, 1970, p. 18; Hilger, R., "Article 15" in Simma, B., et al. (eds.), *The Charter of the United Nations: A Commentary*, 1994, p. 291.

¹⁰⁸ Jaenicke, *supra* note 73, p. 196.

¹⁰⁹ The present method of electing judges by the SC and the GA was really born in September 1921 when the first elections were held by the Council and the Assembly of the League. With regard to the election of the ICJ's judges, see McWhinney, E., "Law, Politics and 'Regionalism' in the Nomination and Election of World Court judges", *SJILC*, 13, 1986, pp. 1 *ff*.

¹¹⁰ It was proposed during Dumbarton Oaks to entitle the GA alone to elect the Court's judges. See Rosenne, *supra* note 31, pp. 35, 170-5.

purpose. Pursuant to Art. 5 of the Statute, each “national group” may nominate up to four persons, but not more than two of them may be of the nationality of the nominating group, and the number of candidates nominated by a group may not be more than double the number of seats to be filled.¹¹¹

In the performance of this election, the GA and the SC proceed separately. Candidates are elected when they obtain an absolute majority of votes in both organs; and the vote in the SC is taken without any distinction between permanent and non-permanent members of the SC.¹¹²

The SC and GA have another role in this regard. Pursuant to Art. 4/3 of the Court’s Statute, they formulate the conditions under which a state party to the Statute and not a member of the UN may participate in the election of the Court’s judges.¹¹³

(ii) The ICJ and non-parties to the UN Charter and the Court’s Statute

In contrast to Art. 34 of the PCIJ’s Statute, which provided that “only states or Members of the League of Nations may be parties in cases before the Court”, the current draft of Art. 34/1 of the ICJ’s Statute omits the words “members of the United Nations”. According to the new draft, the ICJ’s jurisdiction allows all states of the international community to have access to the Court regardless of whether they are members of the UN or not.¹¹⁴ This may facilitate the employment of the

¹¹¹ Art. 6 of the Statute requires that, before making the nominations, each national group should “consult its highest court of justice, its legal faculties and schools of law, and its national sections of international academics devoted to the study of law”.

¹¹² It should be noted that if seats are not filled by the election, a second meeting, then a third meeting if necessary, will be held (Art. 11 of the Statute). If seats remain vacant after three meetings of the electors, a joint conference will be held for this purpose (Art. 12 of the Statute).

¹¹³ Art. 4/3 of the Statute provides: “[t]he conditions under which a state which is a party to the present Statute but is not a Member of the United Nations may participate in electing the members of the Court shall, in the absence of a special agreements, be laid down by the General Assembly upon recommendation of the Security Council.”

¹¹⁴ Nowadays, the importance of allowing non-members to the UN Charter to have access to the ICJ has little value because of the quasi-universality that the UN has achieved. As noted by Rosenne, “with the virtual universality of the contemporary United Nations, the question of participation in the Statute of states not members of the United Nations has lost most of the importance it once might have had”. Rosenne, *supra* note 31, p. 274; see also Engel, S., “States Parties to the Statute of the International Court of Justice” in Gross, L. (ed.), *The Future of the International Court of Justice*, 1976, vol. 1, p. 307; Coquia, J., “The Problem of Jurisdiction of the International Court of Justice”, *PLJ*, 52, 1977, p. 158.

ICJ in a wider field if the parties to the dispute are not members of the UN or parties to the ICJ's Statute. This importance has been reflected in practice: some states that are not members of the UN have referred their disputes to the ICJ (the *Nottebohm* case, the *Interhandel* case, and the *Certain Phosphate Lands in Nauru* case).¹¹⁵

In this regard, the Charter has entrusted the political organs of the UN, namely the GA and the SC, with the role of accepting the non-members of the UN as parties to the Statute. They also have a role in formulating the conditions under which a state that is a party neither to the Charter nor to the Statute can refer its dispute to the ICJ.¹¹⁶

(a) States not members of the UN but parties to the Statute

A state that is not a member of the UN may become a party to the ICJ's Statute subject to satisfying the conditions determined by the GA upon recommendation of the SC.¹¹⁷

In 1946, the GA laid down the conditions on which Switzerland, a non-member state to the UN, could be a party to the ICJ Statute.¹¹⁸ These conditions were subsequently applied in each case where a non-member of the UN wished to

¹¹⁵ The *Nottebohm* case was between Liechtenstein, a non-member state of the UN at this date, and Guatemala; ICJ Rep., 1953, pp. 111 ff. The *Interhandel* case was between Switzerland, a non-member state of the UN, and the United States; ICJ Rep., 1959, pp. 6 ff. The *Certain Phosphate Lands in Nauru* case was between Nauru, a non-member state of the UN, and Australia; ICJ Rep., 1992, pp. 240 ff.

¹¹⁶ Engel, *supra* note 114, pp. 287 ff.

¹¹⁷ Art. 93/2 of the Charter provides: "[a] state which is not a Member of the United Nations may become a party to the Statute of the International Court of Justice on conditions to be determined in each case by the General Assembly upon the recommendation of the Security Council."

At Dumbarton Oaks it was accepted that, although the Court was to be a principal organ of the UN, states that were not members of the organisation would be enabled to become parties to the Statute of the Court on conditions to be determined in each case by the GA upon recommendation of the SC. This view was adopted by the San Francisco Conference, where Committee IV/I had "taken into consideration the existing international situation and the present circumstances of different States, which requires that the conditions must be determined in each case". See UNCIO, 13, p. 385; Rosenne, *supra* note 31, p. 271.

¹¹⁸ On 26 October 1946, Switzerland asked what were the conditions under which it could become a party to the Statute. The request was referred to the Committee of Experts, which recommended that Switzerland might become a party after accepting, first, the provisions of the Statute; second, the obligation to comply with the decision of the International Court of Justice in any case in which it is a party; third, an undertaking to contribute to the expenses of the Court. See Bailey, S., *The Procedure of the UN Security Council*, 1988, p. 281.

become a party to the Court's Statute.¹¹⁹ In addition, the GA, upon recommendation of the SC, establishes the conditions under which these states may participate in the process of amending the Statute¹²⁰ and of electing the Court's judges.¹²¹ Currently, Switzerland and Nauru are parties to the Statute although they are not parties to the UN Charter.¹²²

(b) States not parties to the Statute to whom the Court may be open

The ICJ is open to a state that is not a party to the Statute on conditions laid down by the SC.¹²³ In 1946, the SC laid down the conditions on which the states not parties either to the Charter or to the Statute are granted the freest possible access to the ICJ.¹²⁴

In practice, several declarations were made pursuant to this article: Albania, 1947; Italy, 1953; Federal Republic of Germany, 1955, 1956, 1961, 1965 and 1971; Finland, 1953 and 1954; Italy, 1955; Japan, 1951; Laos, 1952, and Republic of Vietnam, 1952, prior to their admission to the UN.¹²⁵

¹¹⁹ These conditions were applied to Liechtenstein (1950), Japan (1954), and San Marino (1954) when they applied to be parties to the ICJ's Statute.

¹²⁰ GA Res., 2520 (XXIV), 4 December 1969.

¹²¹ GA Res., 264 (III), 8 October 1948.

¹²² ICJYB, 1993-4, No. 48, p. 69. In this regard, it should be noted that these states are on an equal footing with those that are parties to the Statute by virtue of their membership of the UN: they are entitled to appear as parties in disputes before the ICJ, they may make declarations recognising the compulsory jurisdiction of the ICJ, the Secretary-General of the UN should transmit to them copies of declarations made under 36/4; Art. 35/5 of the Statute, subject to some conditions, applies to them by which the declarations made under the PCIJ and still in force will be applied to the ICJ; Art. 37 of the Statute, subject to some conditions, also applies to the parties to the Statute, whereby the acceptance of the PCIJ's jurisdiction under treaties or conventions shall be referred to the ICJ; they may participate in electing the Court's judges; and, finally, they have the right to adopt, ratify, and bring into force amendments to the Statute. See Engel, *supra* note 114, p. 294.

¹²³ Art. 35/2 of the Statute provides: "[t]he conditions under which the Court shall be open to other states shall, subject to the special provisions contained in treaties in force, be laid down by the Security Council."

¹²⁴ SC Res. 9, 15 October 1946. See SCOR, 1st year, 2nd ser., 1946, p. 468; ICJYB, 1946-7, p. 106. It should be noted that, pursuant to Art. 35/2 of the Statute, these states have an equal position as parties to the Statute. The only requirement of the states in that case is to declare that they accept in advance, for the purpose of the dispute, the obligations of pacific settlement provided in the Charter. See Goodrich, et al., *supra* note 54, p. 555.

¹²⁵ ICJYB, 1993-4, No. 48, p. 70. Nowadays, since almost all states are members of the UN or at least are parties to the Statute, declarations made according to SC Res. 9 and Art. 35/2 of the Statute have little importance.

(iii) The budget of the ICJ

Pursuant to Art 17 of the Charter, the GA has exclusive power to determine the budget of the UN.¹²⁶ Because the ICJ is an organ of the UN, Art. 33 of the Statute provides that the ICJ has no independent budget of its own and its budget is a part of the overall UN budget and derived from it.¹²⁷

Accordingly, the Court's budget is subject to the regulations laid down by the GA for the general financial activities of the Court and the Court's budget is subject to approval by the GA. The power of the GA to allocate all expenses of the Court to the UN extends to the fixing of the judges' salaries, allowances, and compensation.¹²⁸

(iv) The enforcement of the ICJ's judgments

In the domestic field of states, the executive organs have the power to enforce the municipal courts' awards on the premise that all effective law must be supported by power. This fact was considered by the drafters of the UN Charter in respect of the ICJ's judgments. Because the Court is the principal judicial organ of the UN, Art. 94 provides a formal machinery of enforcement of its judgments.¹²⁹ It considers that failure to fulfil obligations under a judgment of the ICJ is an undermining of the judicial authority of the principal judicial organ of the UN. Therefore, the UN organs must ensure respect for the rule of law and the mission of the organisation, especially because the ICJ has no power to enforce its judgments.¹³⁰

¹²⁶ Art. 17 of the Charter provides:

"1. The General Assembly shall consider and approve the budget of the Organisation.

2. The expenses of the Organisation shall be borne by the Members as apportioned by the General Assembly.

3. The General Assembly shall consider and approve any financial and budgetary arrangements with specialised agencies referred to in Article 57 and shall examine the administrative budgets of such specialised agencies with a view to making recommendations to the agencies concerned."

¹²⁷ Art. 33 of the ICJ's Statute provides: "[t]he expenses of the Court shall be borne by the United Nations in such a manner as shall be decided by the General Assembly." Accordingly, it worth noting that the budget of the ICJ is considered as one chapter of the UN budget. For details, see Kerno, *supra* note 101, p. 559; Meron, T., "Budget Approval by the General Assembly of the United Nations: Duty or Discretion", *BYIL*, 42, 1967, pp. 107-8.

¹²⁸ Schwebel, *supra* note 78, p. 441.

¹²⁹ Art. 94/1 provides: "[e]ach Member of the United Nations undertakes to comply with the decision of the International Court of Justice in any case to which it is a party."

¹³⁰ The Washington Committee of Jurists, 1945, noted that "[i]t was not the business of the Court itself to ensure the execution of its decision". UNCIO, 14, p. 835.

Needless to say, empowering UN organs to enforce ICJ judgments represents a duty upon them to enhance the role of the Court, since the effectiveness of any legal system depends on the existence of machinery to execute and apply the law. This was affirmed by limiting the role of these organs to enforcing the ICJ's judgments only, and not the judgments of other international tribunals.¹³¹ In this regard, the UN organs have the power to recommend or decide measures should a party to a case fail to fulfil judgments rendered by the ICJ.

The SC, according to Art. 94/2,¹³² is empowered "if it deems necessary"¹³³ to recommend or decide on appropriate measures to secure compliance with a decision of the ICJ against a reluctant state.¹³⁴ In addition, the GA has the power to discuss and make recommendations in the event of non-compliance with judgments of the ICJ if there is compliance by either party, despite the fact that the Charter fails to

¹³¹ According to Art. 13/4 of the Covenant, the Council of the League was competent to enforce the decision of any international tribunal. In the light of the current draft of Art. 94, the scope of the ICJ's judgments is a subject of disagreement among international lawyers. This disagreement is related to determining whether the term "judgment" is limited to the Court's final decision or extends to its interim measures. See Elias, T., *The International Court of Justice and Some Contemporary Problems: Essays on International Law*, 1983, p. 78; Nantwi, E., *Enforcement of International Judicial Decisions and Arbitral Awards in Public International Law*, 1967, p. 150; Hudson, *supra* note 16, p. 420; Rosenne, *supra* note 31, p. 12; Al-Ashall, A., "Non-Compliance with the Interim Measures of the International Court of Justice", *REDI*, 34, 1978, pp. 317-18.

¹³² Art. 94/2 provides: "[i]f any party to a case fails to perform the obligations incumbent upon it under a judgment rendered by the Court, the other party may have recourse to the Security Council, which may, if it deems necessary, make recommendations or decide upon measures to be taken to give effect to the judgment."

¹³³ Two issues have been raised regarding the power of the SC to enforce the ICJ's judgments. The first concerns the discretion of the SC to enforce the ICJ's judgments. See Fakher, *supra* note 53, p. 67; Nantwi, *supra* note 131, p. 135; Tanzi, A., "Problems of Enforcement of Decisions of the International Court of Justice and the Law of the United Nations", *EJIL*, 6, 1995, pp. 541-3. The second issue relates to the power of the SC to review the ICJ's judgment when practising this power. See Kelsen, 1951, *supra* note 36, p. 540; Kelsen, H., "Collective Self-Defence Under the Charter of the United Nations", *AJIL*, 42, 1948, p. 790; Reisman, W., *Nullity and Revision. Review and Enforcement of International Judgments and Awards*, 1971, p. 782; Foda, E. *The Projected Arab Court of Justice*, 1957, pp. 215 ff.; Rosenne, S., *The International Court of Justice: An Essay in Political and Legal Theory*, 1957, p. 105; Fakher, *supra* note 53, p. 68; Kerley, E., "Ensuring Compliance with Judgments of the International Court of Justice" in Gross, L. (ed.), *The Future of the International Court of Justice*, vol. 1, 1976, p. 276 ff.

¹³⁴ Recently, and in the light of Libya's refusal to implement the ICJ's judgment in respect of its dispute with Chad over "Aouzou Strip", the Chad Government referred the issue to the SC. For details, see UN Doc. S/1994/296, 15 March 1994; UN Doc. S/1994/332, 24 March 1994; UN Doc. S/Res./910 1994; UN Doc. S/Res./915, 4 May 1994; UN Doc. S/Res./926, 3 June 1994; UN Doc. S/1994/424, 13 April 1994; UN Doc. S/1994/432, 13 April 1994; UN Doc. S/1994/512, 27 April 1994; UN Doc. S/Res./915, 4 May 1994; UN Doc. S/1994/657, 2 June 1994.

mention such a role specifically.¹³⁵ The power of the GA in this respect is based on Art. 10 of the Charter, which confers broad competencies to deal with any matter within “the scope of the present Charter”. In addition, the obligation to comply with the decisions of the Court is specifically provided for in para. 1 of Art. 94, which, in conjunction with Art. 92, leaves no doubt that complaints regarding non-compliance with decisions fall entirely within the scope of the Charter.¹³⁶ It should be noted however that Arts. 11/2 and 12/1 of the Charter limit the competence of the GA in this regard, such that it cannot lawfully deal with a dispute over non-compliance with a Court’s decision while the matter is pending before the SC.¹³⁷

Furthermore, it has been noted that the ECOSOC and the Trusteeship Council may have the same power within the framework of their functions.¹³⁸ This view is based on the analysis of the task of enforcement as a political issue that might be entrusted to all the political organs of the UN, not to a specific organs. In addition to the principal organs of the UN, it has been noted also that the ICJ’s judgments might be enforced by the specialised agencies of the UN in matters that fall within their limited competence.¹³⁹ For instance, Art. 33 of the Constitution of the ILO,

¹³⁵ Jenks, C., *The Prospects of International Adjudication*, 1964, pp. 694-5; Schachter, O., “Enforcement of International Judicial and Arbitral Decisions”, *AJIL*, 54, 1960, pp. 1, 6; Anand, R., *Studies in International Adjudication*, 1969, p. 283; Fakher, *supra* note 53, p. 69; Reisman, *supra* note 133, pp. 729 ff.; Kerley, *supra* note 133, p. 282; Rosenne, *supra* note 31, p. 155; O’Connell, M., “The Prospects for Enforcing Monetary Judgments of the International Court of Justice: A Study of Nicaragua’s Judgment Against the United States”, *VJIL*, 30, 1990, pp. 912-13.

¹³⁶ Nantwi, *supra* note 131, pp. 158-9. In addition to these bases it has been noted that the GA’s competence is derived from Chapter VI of the Charter. Accordingly it has been concluded that “if requests for enforcement of judgments of the Court are received by the Council as ‘dispute’ or ‘situation’ under Article 35/1, the competence of the GA to receive them under the same provision is difficult to question”. Kerley, *supra* note 133, p. 282.

¹³⁷ Art. 11/2 provides: “[t]he General Assembly may discuss any questions relating to the maintenance of international peace and security brought before it by any Member of the United Nations, or by the Security Council, or by a state which is not a Member of the United Nations in accordance with Article 35, paragraph 2, and, except as provided in Article 12, may make recommendations with regard to any such questions to the state or states concerned or to the Security Council or to both.”

Art. 12/1 provides: “[w]hile the Security Council is exercising in respect of any dispute or situation the functions assigned to it in the present Charter, the General Assembly shall not make any recommendation with regard to that dispute or situation unless the Security Council so requests.”

¹³⁸ Al-Ashall, *supra* note 131, p. 326.

¹³⁹ Anand, R., “Execution of International Judicial Awards: Experience since 1945”, *UPLR*, 26, 1965, p. 701-2; Dubisson, M., *La Cour Internationale de Justice*, 1964, pp. 251 ff.; Al-Ashall, A., *Non-Military Sanctions in the United Nations*, Ph.D. Thesis, (Cairo University), 1976, p. 273; O’Connell, *supra* note 135, p. 911.

after providing for the reference of disputes between members to a Commission of Inquiry and the ICJ, stipulates that:

“In the event of any Member failing to carry out within the time specified the recommendations, if any, contained in the report of the Commission of Inquiry or in the decision of the International Court of Justice, as the case may be, the Governing Body may recommend to the Conference such action as it may deem wise and expedient to secure compliance therewith.”¹⁴⁰

Similar articles have been embodied in the International Civil Aviation Convention, and in the Statutes of the International Atomic Energy Agency, the International Monetary Fund and the International Bank for Reconstruction and Development.

2.3. Final remarks

Having discussed the position of the ICJ within the framework of the UN, three points need to be made.

First, it is necessary to clarify the fact that the integration of the ICJ within the UN does not impair its function as the world court, or prevent it from being an independent international judicial body for the international community.¹⁴¹ It should be noted that its status as a judicial organ of the UN is different from the status of the political organs of the UN; consequently it has to some extent to distance itself from them. The ICJ is not only a principal organ of the UN but also the principal public international law court, and it is considered by international lawyers to be the central judicial body of the international community. This fact was affirmed by the Court's geographical separation from the UN's other organs - the headquarters of the UN being in New York and the European offices of the UN in Geneva.¹⁴² This special position is also marked by the fact that the staff of the Registry do not belong to the staff of the UN Secretariat. In addition, the legal position and duties of the staff members are determined in general provisions of the Statute, detailed in the rules of procedures enacted by the Court and in the staff regulations drawn up

¹⁴⁰ UNTS, 15, 1948, p. 92.

¹⁴¹ Anand, *supra* note 54, p. 24; Keith, *supra* note 40, pp. 239-40.

¹⁴² Singh, *supra* note 16, p. 37; Goodrich, et al., *supra* note 54, p. 548.

by the Registry and approved by the Court.¹⁴³ Moreover, cases decided by the Court are issued by it in its capacity as the “International Court of Justice” with no reference to the UN.¹⁴⁴ Finally, states that are not members of the UN may be parties to the ICJ’s Statute.

The second point to be clarified is that the position of the ICJ as the principal judicial organ of the UN does not mean that it is the only judicial organ within the framework of the organisation. The term “principal organ” may be interpreted as meaning that it is the only tribunal directly established by the Charter as an organ of the UN. In addition, it affirms that the Court is one of the organs of the UN and, finally, that the connection between the Court and the ICJ is organic.¹⁴⁵ But this term does not preclude the possibility of the existence of subsidiary judicial organs under UN auspices. In practice, several subsidiary judicial organs have been established within the framework of the UN; for instance the International Labour Organisation Administrative Tribunal (ILOAT) and the United Nations Administrative Tribunal (UNAT).

The third point to note is that when the Court is dealing with an issue related to the UN, such as giving advisory opinions, it will apply not only the UN Charter and the Statute, but also other sources of international law, as indicated by Art. 38/1 of the Court’s Statute.¹⁴⁶ This is based on the fact that, when the Court deals with issues as the principal judicial organ of the UN or as a court of the international community, it is a court of law. In addition, because the UN is seen as a legal entity distinct from its members, the applicability of these rules is explained as a necessary implication of legal capacity and activity in the international legal order. Finally, this is also affirmed by Art. 68 of the Statute, which provides that the Court in the exercise of its advisory function, which is considered one of the main points of its

¹⁴³ Art. 21 of the ICJ’s Statute, and part III of the Rules of the Court. See Mosler, H., “Article 92” in Simma, B., et al. (eds.), *The Charter of the United Nations: A Commentary*, 1994, p. 979.

¹⁴⁴ Amerasinghe, *supra* note 1, 161.

¹⁴⁵ Goodrich, et al., *supra* note 63, p. 447.

¹⁴⁶ Mosler, *supra* note 143, p. 991; Mosler, H., “Article 96” in Simma, B. et al. (eds.), *The Charter of the United Nations: A Commentary*, 1994, p. 1010; Morgestern, F., *Legal Problems of International Organisations*, 1986, pp. 32 ff.

relationship with the UN, shall be guided by the provisions of the present Statute that apply in contentious cases. This article is confirmed by Art. 102 of the Court's rules. This view is also confirmed by Gross, who notes that the language of Art. 38 ("the Court ... shall apply") is broad enough to encompass advisory opinions along with judgments.¹⁴⁷ Accordingly, in deciding issues related to the UN, the Court (i) applies general and particular international conventions, *inter alia* the UN Charter and its Statute;¹⁴⁸ (ii) applies the rules of international custom, the general principles of law; (iii) as an auxiliary means for determining the terms of a solution, guides itself by judicial decision and the opinions of international lawyers.¹⁴⁹ Beside these principles, the Court, if the UN requests, may decide a case *ex aequo et bono*; thus solutions of equity and compromise are also possible.

Conclusion

It seems obvious that the emergence of the notion of international organisations had an effect upon the existence of permanent international courts. As noted above, one of the major obstacles to the creation and development of a permanent international tribunal in the early stages was the fact that no international organisations were in existence. The attempts at arbitration that took place prior to 1889 failed to produce a consistent and permanent body of arbitral law because they were both irregular and spasmodic. A step forward was taken by the conclusion of The Hague Conventions of 1899 and 1907 for the pacific settlement of international disputes and the establishment of the PCA. Needless to say, despite the fact that the PCA is not a court of law *stricto sensu*, it was a great step towards the institutionalisation of

¹⁴⁷ Gross, L., "The International Court of Justice and the United Nations", *RCADI*, 120, 1967, p. 326.

¹⁴⁸ The Court has referred to the Charter provisions on several occasions: for instance, its opinion in the *International Status of South-West Africa* case, 1950, in the *Competence of the General Assembly for the Admission to the United Nations* case, 1950, and in the *Certain Expenses of the United Nations* case, 1963. It has referred to general international conventions also in its advisory opinions: for instance, its opinion in the *Peace Treaties* case, 1950, in the *Western Sahara* case, 1975, and in the *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt* case, 1980.

¹⁴⁹ It is beyond the scope of this study to throw light on whether these sources are exhaustive or not, and whether the Court could decide on the ground of other sources. On this point, see Rosenne, *supra* note 10, pp. 146 ff.

the international tribunal and a cornerstone of the idea of a true permanent court for the settlement of international disputes.

The League of Nations was the first effective move towards the organisation of a political and social order on a global scale. Its founders realised that all attempts to establish permanent international tribunals on a purely inter-states basis had not succeeded, and therefore the creation of the League should represent a new step towards the phenomenon of international adjudication. Accordingly, the establishment of a first permanent court was set in motion by the Covenant of the League. The PCIJ was considered to be the first genuine international experiment in a permanent judicial system. Despite the quasi-organic relationship between the PCIJ and the League of Nations, and despite the fact that it was an important part of the League system, it was not a principal organ of the League.

The final stage of evolution is the UN, where the establishment of the new court was to be even more linked with the UN than was the case with the League-PCIJ relationship. The new Court is fully integrated into the UN system, being itself the principal judicial organ; in other words it is considered to be part and parcel of the UN. This is affirmed by several articles in the Charter and the Statute. The integrated position of the ICJ within the framework of the UN has been demonstrated in the various impacts upon the ICJ and the several duties put upon the UN. The effect of this relationship on the ICJ is evident in the facts that: any member state of the UN becomes party to the Court's Statute; the ICJ as an organ of the UN is obliged to respect all the general limitations upon the other organs of the UN, *inter alia* the domestic jurisdiction of the states; any notification by the Court's Registrar should be done through the Secretary-General of the UN; the Secretary-General of the UN and not the Court's Registrar is the depository of any instrument related to the ICJ; any amendment to the Statute should be done in the same way as an amendment of the Charter; and, finally, the ICJ submits an annual report of its activities, as do the other organs of the UN, to the GA. The other face of the coin is the effect of this relationship upon the UN: the UN has a duty to formulate the conditions under which a non-member state of the UN can become a party to the Statute and can appear before the Court in the event that it is not a party to the

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Statute; the UN is competent to elect the Court's judges; the budget of the ICJ is determined by the UN; and, finally, the UN is responsible for enforcing the ICJ's judgments in the event of non-compliance by a party to the case.

However, as mentioned above, the Court's being the principal judicial organ of the UN does not impair its role as the World Court. Accordingly, it has a dual role: within the international community as a recognised international court, and within the UN as its principal judicial organ. In addition, the ICJ's being the principal judicial organ of the UN does not prevent the UN from establishing subsidiary judicial organs within its framework. Finally, being the principal judicial organ does not mean that the Court, when determining the law so as to enable the UN to function effectively and to achieve justice, is restricted to applying the Charter and the Statute. It can use the same sources of law as are indicated by Art. 38 of the Statute.

Chapter Two

The Advisory Role of the International Court of Justice

Introduction

The aim of this chapter is to discuss the role of the ICJ as legal adviser to the UN. This role epitomises the Court's integration into the UN family and its status as a principal judicial organ of the parent organisation. Meanwhile, the place of the ICJ within the framework of the UN has considerable bearing on its position in giving advisory opinions, and on the position of those organs requesting such opinions.

The advisory jurisdiction had its starting-point in Art. 14 of the Covenant, which provided that "[t]he Court may also give an advisory opinion upon any dispute or question referred to it by the Council or by the Assembly".¹ Similarly, the ICJ was given the jurisdiction to provide UN organs with legal opinions upon their request. This jurisdiction was provided for several reasons:² it might assist the organs and agencies in deciding on the course of action they should follow;³ it might furnish them with legal advice and guidance in respect of disputes submitted to it and for action in all future cases and situations; it might simply be a means of

¹ It should be noted the PCIJ's Statute as originally drafted contained no provisions relating to its advisory jurisdiction. See Hudson, M., *The Permanent Court of International Justice 1920-1942*, 1943, pp. 107-8, 210-13; Keith, K., *The Extent of the Advisory Jurisdiction of the International Court of Justice*, 1971, p. 13; Waldock, H., "Aspects of the Advisory Jurisdiction of the International Court of Justice", Gilberto Amado Memorial Lecture delivered on 3 June 1976, pp. 1 ff.

² Goodrich, L., et al., *The United Nations and the Maintenance of International Peace and Security*, 1955, p. 160; Koray, B., *The International Court of Justice. The Position of Third Parties Reconsidered*, Ph.D. Thesis (University of London), 1992, pp. 343-4; Pratap, D., *The Advisory Jurisdiction of the International Court*, 1972, p. 5; Brownlie, I., *Principles of Public International Law*, 1990, p. 731; Baxter, R., "The International Court of Justice: Introduction", *VJIL*, 11, 1971, pp. 291 ff.; Lachs, M., "Some Reflections on the Contribution of the International Court of Justice to the Development of International Law", *SJILC*, 10, 1983, p. 249.

³ In this regard, Mr Fitzmaurice - the UK representative on the Committee of Jurists - noted that "the frequent use of the request for advisory opinions might be made to avoid actual litigation and to resolve differences before they reached the stage of a dispute". UNCIO, 14, p. 179.

gaining time and avoiding the necessity for an immediate decision;⁴ it might help by eliminating further controversy over the legal aspects of a dispute or by having a calming effect on parties;⁵ and, finally, it might be used to review the judgments of the Administrative Tribunals acting within the framework of the UN.⁶

This chapter aims at discussing the advisory role of the ICJ. To examine this role, one needs to shed light on the mechanism laid down in the Charter resulting in consultation of the Court. Accordingly, this chapter will focus on how the advisory jurisdiction is triggered. It will not focus on the advisory opinion *per se*; rather it endeavours to answer several questions that are paramount in respect of the Court's role within the UN, namely, how an advisory opinion can be requested and the limits thereto, the ICJ's discretion to provide an opinion, and finally the legal effect of advisory opinions.

1. The legal basis of the ICJ's advisory jurisdiction

As a consequence of the ambiguity and difficulty in respect of the interpretation of Art. 14 of the League of Nations' Covenant regarding the PCIJ's advisory jurisdiction, the drafters of the UN Charter and the ICJ's Statute insisted on making the Court's advisory jurisdiction clear. The advisory role of the ICJ has been explicitly indicated in both the Charter and the Court's Statute. Art. 96 of the Charter stipulates that the GA and the SC, as well as the other political organs and specialised agencies that are authorised by the GA, have the right to request advisory opinions from the ICJ.⁷

⁴ Jimenez de Aréchaga observed that: "[a] request for an advisory opinion normally implies a postponement of a decision on the merits by the requesting organ until the answer has been received." De Aréchaga, J., "The Amendments to the Rules of Procedure of the International Court of Justice", *AJIL*, 67, 1973, p. 9.

⁵ With regard to the value of the advisory jurisdiction of the ICJ, it has been noted that advisory opinions are sometimes more important than judgments, in international relations, because the persuasive nature of advice is frequently superior to force and coercion. See Hudson, *supra* note 1, p. 524; Baxter, *supra* note 2, pp. 291 *ff*. It has been noted also by Lachs that "[a]dvisory opinions offer the Court a much greater potential to further develop the law than judgments in contentious proceedings: the former, unlike the latter, are not limited to a strict analysis of the facts and submission that are presented to the Court". Lachs, *supra* note 2, p. 249.

⁶ This issue will be examined in Chapter Six below.

⁷ Art. 96 of the Charter provides: "1. The General Assembly or the Security Council may request the International Court of Justice to give an advisory opinion on any legal question."

This article was substantially incorporated in Art. 65 of the ICJ's Statute.⁸ The inclusion of this article in the Statute was challenged in Committee IV/I, and described as "superficial" on the grounds that the Charter contains the same provision and that the Statute is an integral part of the Charter.⁹ This argument was rejected by the Committee, which decided to add a new paragraph (1) to Art. 65. This paragraph explicitly provides for the ICJ's advisory jurisdiction. In fact, the inclusion of para. 1 of Art. 65 is significant for several reasons. First, the drafters avoided the mistake made by the drafters of the PCIJ's Statute when they ignored any reference to the PCIJ's advisory jurisdiction on the ground that there was provision in the Covenant (Art. 14) with the same meaning. This situation led to great disagreement among international lawyers regarding the power of the PCIJ to give advisory opinions and whether or not it was under an obligation to reply. Second, this article is justified by the fact that not all the states parties to the ICJ's Statute are parties to the UN Charter. Third, the ICJ itself has referred in many cases to this article as the basis of its advisory jurisdiction.¹⁰ Finally, as rightly noted by Pratap, it is Art. 65, and not Art. 96, of the Charter that illustrates the discretionary power of the ICJ when dealing with a request for an advisory opinion.¹¹ Therefore, it seems clear that the inclusion of Art. 65 of the Statute was important and justifiable.

2. Other organs of the United Nations and specialised agencies, which may at any time be so authorised by the General Assembly, may also request advisory opinions of the Court on legal questions arising within the scope of their activities."

⁸ Art. 65/1 of the Statute provides: "The Court may give an advisory opinion on any legal question at the request of whatever body may be authorised by or in accordance with the Charter of the United Nations to make such a request."

⁹ Kelsen, H., *The Law of the United Nations*, 1951, p. 548; Pratap, *supra* note 2, p. 42.

¹⁰ The ICJ referred to this article alone in the *Certain Expenses of the United Nations* case as the sole basis of its jurisdiction. It stated that "[t]he power of the Court to give an advisory opinion is derived from Article 65 of the Statute" (ICJ Rep., 1962, p. 155). It also stated in the *Legality of the Threat or Use of Nuclear Weapons* that "[t]he Court draws its competence in respect of advisory opinions from Article 65, paragraph 1, of its Statute" (ICJ Rep., 1996, p. 7 - unpublished). In addition, it referred to this article alongside Art. 96 of the Charter as the basis of its advisory jurisdiction in several cases; for instance, the *Conditions of Admission of a State to Membership in the United Nations* case (ICJ Rep., 1948, p. 61); the *Competence of the General Assembly for the Admission of a State to the United Nations* case (ICJ Rep., 1950, p. 6); the *Western Sahara* case (ICJ Rep., 1975, p. 21); the *Legality of the Use by States of Nuclear Weapons in Armed Conflict* case (ICJ Rep., 1996, p. 6 - unpublished).

¹¹ Pratap, *supra* note 2, p. 117.

In addition to these articles, the Court devoted some articles in its Rules to regulating its advisory jurisdiction with a procedural character.¹²

2. Organs authorised to request advisory opinions

Pursuant to Art. 14 of the League of Nations' Covenant, only the Council and the Assembly of the League were entitled to request advisory opinions from the PCIJ.¹³ Such a limited scope was not adopted in the UN Charter. However, having decided the ICJ's jurisdiction to give advisory opinions during the *travaux préparatoires* stage,¹⁴ there was discussion regarding who would be authorised to request. The Informal Inter-Allied Committee proposed that the power of request should be more enlarged than it was in the League of Nations era, and should not be restricted only to the executive organ of the new organisation.¹⁵ This view was rejected by some participants in Dumbarton Oaks on the basis that this authority should be limited to the SC only as an exclusive competence.¹⁶ This view was rejected by other participants and, consequently, the matter was referred to the Washington Committee of Jurists, which was entrusted with drafting the Court's Statute. This

¹² Arts. 102 to 109 of the Court's Rules of 1978.

¹³ In the *Interpretation of the Caphandaris-Molloff Agreement* case, the PCIJ stated that: "[b]y the terms of Article 14 of the Covenant, the right to submit a question to the advisory jurisdiction of the Court is given only to the Assembly and to the Council of the League." PCIJ, Ser. A/B., 1932, pp. 45, 68, 87.

¹⁴ It should be mentioned here that entitling the Court to give advisory opinions was a moot point at the stage of the *travaux préparatoires*, where it was noted that the functions of the International Court should be limited to contentious jurisdiction. Accordingly, the advisory jurisdiction should be abolished because it is inconsistent with the nature and the function of a court of law, which is devoted to hearing and deciding disputes. This view was rejected by the majority, who were of the opinion that the Court's advisory jurisdiction is essential and should be wider than the advisory jurisdiction of the PCIJ. An intermediate view was adopted by some of the participants on the Committee of Jurists who announced that empowering the Court to give advisory opinions depended upon whether it would have compulsory jurisdiction or not. According to this view, the Court should be so empowered if the drafters of the Charter failed to adopt the compulsory jurisdiction system. See UNCIO, 14, p. 178; Rosenne, S., *The Law and Practice of the International Court*, 1985, pp. 655-6; Keith, *supra* note 1, p. 11; El-Rashidy, A., *The Advisory Jurisdiction of the International Court of Justice*, 1992, pp. 72-3.

¹⁵ See UNCIO, 14, p. 445.

¹⁶ In this regard it should be noted that it was proposed that "[j]usticiable disputes should normally be referred to the ICJ. The Security Council should normally be referred to the Court for advice on legal questions connected with other disputes." See UNCIO, 3, p. 14; Rosenne, S., *The Law and Practice of the International Court of Justice*, 1965, vol. 2, p. 656; Fakher, H., *The Relationships Among the Principal Organs of the United Nations*, 1951, p. 127.

committee recommended that the power to request advisory opinions should not be restricted to the SC solely, and that the GA too should have such a power.¹⁷ At the same time, it rejected the suggestion presented by some participants that other international organisations should be allowed to request advisory opinions. The committee failed to reach any acceptable solution in this regard and recommended the referral of this matter to the San Francisco Conference because it felt that the determination of the authorised organs should be left to the Charter.¹⁸

The San Francisco Conference entrusted this matter to a special Committee - Committee IV/I - which proposed extending the power to request advisory opinions from the Court to the GA in addition to the SC as regards any legal question.¹⁹ It also proposed that the Charter should empower the GA to authorise any other organ or specialised agency brought into relationship with the organisation to request opinions on any legal question arising within the scope of its activities.²⁰ These proposals were adopted by Committee IV/I on 15 June 1945.²¹ They were also incorporated in Art. 96 of the Charter and reaffirmed by Art. 65/1 of the ICJ's Statute.

Accordingly, authority to request advisory opinions from the ICJ could be classified as direct and indirect, as will be illustrated below.

2.1. Direct authorisation

The GA and the SC are directly authorised, by virtue of Art. 96/1, to request advisory opinions on any legal questions. This power has been confirmed by the ICJ in many precedents, *inter alia* the *Reservations to the Convention on the*

¹⁷ See UNCIO, 14, pp. 177-9. This view was rejected by the US representative, who noted that: "[t]he reference to the GA had been omitted from the United States' proposal since it felt that the GA would not function in an executive capacity ... However, he saw no objections for granting the GA the same right, provided the request relates to juridical questions." UNCIO, 14, pp. 177-8.

¹⁸ Rosenne, *supra* note 14, pp. 656-7.

¹⁹ See UNCIO, 13, pp. 216, 241, 385, 395, 411.

²⁰ See UNCIO, 13, pp. 13, 386, 395. Russell, R., *A History of the United Nations Charter - The Role of the United States 1940-1945*, 1958, p. 874. In this regard, it has been noted by Rosenne that "[t]here is no doubt that the San Francisco Conference also intended to maintain this type of judicial process, both for the organs of the UN and for the Specialised Agencies". Rosenne, S., "The Non-Use of the Advisory Competence of the International Court of Justice", *BYIL*, 39, 1963, p. 4.

²¹ See UNCIO, 13, pp. 96, 101; Russell, *supra* note 20, pp. 890-1.

Prevention and Punishment of the Crime of Genocide case (1951),²² where it observed:

“Article 96 of the Charter confers upon the General Assembly and the Security Council in general terms the right to request this Court to give an Advisory Opinion on any legal question.”²³

The authority of the GA and the SC to request advisory opinions was described by Bowett as an *original* right, compared with the *derivative* right of the other organs and specialised agencies.²⁴

2.2. Indirect authorisation

The other UN principal organs and specialised agencies, by virtue of Art. 96/2, may be authorised by the GA to request advisory opinions of the ICJ directly and without any previous approval. Before illustrating these organs and agencies, the nature and the scope of this authorisation will be considered.

2.2.1. The nature and limits of the authorisation

As mentioned above, Art. 96/2 empowers solely the GA to authorise the other organs and specialised agencies to request advisory opinions from the ICJ.²⁵ This provision raises an initial question regarding the reason for restricting this power to the GA. The restriction can be justified on the basis that the Charter considers the GA as the plenary organ of the UN, whereby it occupies a special position. It has, pursuant to Art. 10, a wide competence to discuss any matter or question within the scope of the Charter. In addition, it is linked to other UN organs in several ways: (i) it has a role in electing the members of other organs; (ii) it has the right to approve agreements concluded between the UN and its specialised agencies;²⁶ (iii) it

²² Hereinafter the *Reservations* case.

²³ ICJ Rep., 1951, p. 20.

²⁴ Bowett, D., *The Law of International Institutions*, 1982, pp. 277-8.

²⁵ Contrary to this fact, some lawyers have noted that this power is entrusted to the GA and the SC. For example, Stone noted that “so may other United Nations organs when authorised by the Assembly or Security Council on such questions arising within the scope of their activities”. Stone, J., *Legal Controls of International Conflicts*, 1959, p. 120.

²⁶ Art. 63/1 of the Charter provides: “the Economic and Social Council may enter into agreements with any of the agencies referred to in Article 57, defining the terms on which the

has control over the budget and administrative aspects of the organisation;²⁷ (iv) finally, it is the only organ within the UN that has the right to receive and consider reports from the other UN organs.

The Assembly's authorisation may be obtained on request by any organ or agency, or on the initiative of the GA.²⁸ For instance, the GA authorised the Economic and Social Council (ECOSOC) upon the Council's request, whereas it authorised the Trusteeship Council upon its own initiative. It may also authorise the agencies upon a recommendation by the ECOSOC. For instance, authorisations were given by the GA to UNESCO, WHO and ICAO in this way. In this regard it has been noted that a simple majority of the members "present and voting" suffices for the adoption by the GA of decisions authorising other organs and specialised agencies of the UN to request advisory opinions.²⁹

The study of the nature and the limits of the GA authorisation should be extended to focus on two issues: first, whether the Assembly's authorisation is general or *ad hoc*, and, second, its power to revoke this authorisation.

(i) General or *ad hoc* authorisation

In authorising other UN organs and specialised agencies to request an advisory opinion, should the GA make only a special authorisation with regard to each individual question, or should such authorisation have a permanent character? Before Committee IV/I, the Soviet Union proposed that the GA should authorise UN organs and specialised agencies to request advisory opinions from the Court on a case-by-case basis.³⁰ This view was rejected by the Committee on the basis that the words "in each case" can be substituted by "any time" in Art. 96/2 of the Charter.³¹

agency concerned shall be brought into relationship with the United Nations. Such agreements shall be subject to approval by the General Assembly."

²⁷ Arts. 17 and 101 of the Charter.

²⁸ Dubisson, M., *La Cour Internationale de Justice*, 1964, p. 281; Pratap, *supra* note 2, p. 77.

²⁹ Jenks, C., "The Status of International Organisations in Relation to the International Court of Justice", *GS*, 32, 1946, p. 4.

³⁰ See UNCIO, 13, p. 298.

³¹ *Ibid.*, pp. 298-9.

The Soviet Union expressed the same view on another occasion before the GA when it dealt with the request of the ECOSOC to be authorised to request advisory opinions from the ICJ. Its view was based on its interpretation of Art. 96/2 of the Charter, concluding that this authorisation should have an *ad hoc* character. This view was rejected by the GA, which drafted its resolution closely to the language of Art. 96/2, by authorising the ECOSOC to “request advisory opinions ... on any legal question arising within the scope of the activities of the Council”.³²

The GA’s interpretation of Art. 96/2 of the Charter is consistent with the attitude of Committee IV/I. There is no doubt that the Soviet Union’s view would have had the effect of nullifying para. 2 of Art. 96, because the GA would in effect be requesting every single opinion. This view would also lead to a conclusion that each request originating outside the Assembly and the Council could be challenged through the Assembly.³³ Moreover, this view did not consider the fact that normally the GA meets once a year and that the need for authorisation in between sessions of the GA would be a difficult process.³⁴

(ii) The power of the GA to revoke its authorisation

Because the right of other UN organs and specialised agencies to request advisory opinions is based on authorisation by the GA, the question which needs to be clarified here is whether the GA can revoke its authorisation unilaterally at any time. The opinion that the GA can revoke its authorisation at any time is based on the report submitted to Committee IV/I, and on the report submitted to the Sixth Committee of the GA at its first meeting.³⁵ These reports expressed the view that the GA is competent under the Charter to revoke its authorisation. In practice, this view was adopted to some extent by the GA when it authorised certain specialised agencies to be empowered to request opinions and stated its understanding that it could revoke this authorisation.

³² GA Res. 89 (I), 11 December 1946; Dubisson, *supra* note 28, p. 281.

³³ Keith, *supra* note 1, p. 39.

³⁴ Rosenne, *supra* note 16, p. 672 *ff.*; UNCIO, 17, pp. 372-3.

³⁵ Zollkofer, L., *Les Relations Prévuees entre les Institutions Spécialisées des Nations Unies et la Cour Internationale de Justice*, 1956, pp. 69-70; Elian, G., *The International Court of Justice*, 1971, pp. 73-4.

The above attitude cannot easily be accepted and should be examined. Enabling the GA to revoke its authorisation whenever it deems it appropriate would obstruct UN organs and agencies in achieving their objectives and aims. In addition, most of these authorisations are embodied in treaties between the UN and the specialised agencies. Therefore, revoking these authorisations could be considered as unilateral modification by the GA, which might constitute a breach of the agreement on the part of the UN and would give rise to the usual remedies for the violation of a treaty obligation.³⁶ Notwithstanding this fact, if the GA uses its power to revoke its authorisation, this should not affect advisory proceedings, if any, pending before the ICJ at that time, otherwise such conduct by the Assembly would result in it giving itself the opportunity to challenge the authority of the Court in that matter. In the event of any disagreement in this regard it would be for the Court itself to determine whether or not the revocation of authority by the Assembly would affect its jurisdiction.³⁷

2.2.2. Authorised organs

The determination of the authorised organs was not an easy task. This is because the draft of Art. 96/2 mentions only “other organs and specialised agencies”. This wording does not identify the precise meaning of the term “other organs”. Is it restricted to the other principal organs, pursuant to Art. 7/1 of the Charter, or does it include all UN organs? This is a matter that requires examination.

(i) Other principal organs

Pursuant to Arts. 7/1 and 96/2 of the Charter, the other principal organs are the ECOSOC, the Trusteeship Council, and the Secretariat. Their respective positions are as follows.

(a) The Economic and Social Council

The ECOSOC was the first organ which demanded authorisation from the GA to request advisory opinions from the ICJ. The GA, by its Res. 89 (I) of 11 December

³⁶ Jenks, *supra* note 29, p. 21.

³⁷ Sloan, F., “Advisory Jurisdiction of the International Court of Justice”, *CLR*, 38, 1950, p. 834.

1946, authorised the ECOSOC to request advisory opinions from the ICJ “on any legal questions within its scope, including legal questions concerning mutual relations of the United Nations and Specialised Agencies”.³⁸ The limitation of this authorisation was the subject-matter of consideration among international lawyers relating to its limitation because the Council has wide competencies pursuant to Art. 63/2 of the Charter.³⁹ In this regard, Jenks has asked whether, according to this authorisation, the Council can request an advisory opinion from the ICJ regarding any legal question related to these agencies without their consent. Jenks concluded that the situation depends on the nature of the question. If the question relates to the relationship between the specialised agency and the UN or another specialised agency, the request is considered to be within the scope of the activities of the Council in view of its co-ordinating functions. But if the matter is related to an internal organisation of the specialised agency or to its entire objectives, this matter is considered to be within the scope of the activities of the specialised agency itself rather than within the scope of the activities of the ECOSOC and therefore should be referred to the Court by the agency.⁴⁰ This view can be justified not only on the ground of the provisions of the Charter, but also on the basis of the principle of the separation of powers between the organs and specialised agencies of the UN. In this regard, it should be noted that, in the event of any disagreement regarding this issue, it should be for the Court to decide on the basis of its competence to determine its jurisdiction.⁴¹

In practice, the ECOSOC requested an opinion from the ICJ for the first time in 1989 regarding the applicability of Art. VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations.

³⁸ Rosenne, *supra* note 16, p. 669; Dubisson, *supra* note 28, p. 281.

³⁹ Art. 63/2 provides that the ECOSOC, “may co-ordinate the activities of the specialised agencies through consultation with and recommendations to such agencies and through recommendations to the General Assembly and to the Members of the United Nations”.

⁴⁰ Jenks, *supra* note 29, p. 11-2.

⁴¹ With regard the Court’s competence to determine its jurisdiction, see pp. 98 *ff.* below.

(b) The Trusteeship Council

In the GA's session in 1947 and as a consequence of its discussion related to the necessity of the use of the ICJ by the UN, upon its own initiative, the GA authorised the Trusteeship Council to request advisory opinions related to any legal question within the competencies conferred upon it by Chapters XII and XIII of the Charter.⁴² The Trusteeship Council has never used this authority. This attitude of the Council could be justified on the basis of the decrease in the Council's activities now that decolonization has almost been completed.

(c) The Secretary-General⁴³

Pursuant to Art. 7/1, the Secretariat is considered one of the principal organs of the UN. The Secretary-General, as the chief administrator of the organisation, is in a position to exercise considerable authority over the Secretariat. Therefore, if the Secretariat were so authorised, *a fortiori* the Secretary-General as head of that organ would be constitutionally and ultimately responsible for any request. In this regard, it has been asked whether the Secretariat, acting through the Secretary-General, could be authorised by the GA to request advisory opinions of the ICJ with regard to any legal question within the scope of its activities.

The Secretary-General has suggested to the GA the necessity of granting such authorisation on several occasions.⁴⁴ As early as 1950, in the Secretary-General's report on whether the Committee of Human Rights could get authorisation to request advisory opinions from the ICJ, the Secretary-General concluded that this committee has no right under Art. 96/2 to be given such authorisation because it is neither an organ of the UN nor a specialised agency. He proposed that the ECOSOC and the Secretary-General should enjoy a similar power to the GA to request such an opinion on behalf of the committee.⁴⁵ Later, as consequence of the

⁴² GA Res. 171 B (II), 14 November 1947.

⁴³ Kerno, I., "L'Organisation des Nations Unies et la Cour Internationale de Justice", *RCADI*, 78, 1951, pp. 560 ff.

⁴⁴ Dubisson, *supra* note 28, p. 281; Higgins, R., "A Comment on the Current Health of Advisory Opinions" in Lowe, V., et al. (eds.), *Fifty Years of International Court of Justice*, 1996, p. 569; Pratap, *supra* note 2, p. 68.

⁴⁵ UN Doc. E/1732, 26 June 1950, p. 7; Dubisson, *supra* note 28, p. 281; Higgins, *supra* note 44, p. 569.

ICJ's advisory opinion in the *Effects of the Awards of Compensation made by the United Nations Administrative Tribunals* case (1955),⁴⁶ the Secretary-General reminded the GA to authorise him as the head of a principal organ of the UN to request advisory opinions from the Court on legal questions concerning Administrative Tribunals' judgments.⁴⁷ Recently, in his *Agenda for Peace - Preventive Diplomacy, Peace Making, and Peace Keeping*, the Secretary-General stated that:

"I recommend that the Secretary-General be authorised, pursuant to article 96, paragraph 2, of the Charter, to take advantage of the advisory competence of the Court."⁴⁸

Despite all these attempts, the GA did not accept these suggestions of the Secretary-General.⁴⁹ This attitude has been upheld by some lawyers, who find that the Secretary-General (or Secretariat) is not eligible to be authorised to request advisory opinions from the ICJ.⁵⁰ In their view, the provisions relating to the Secretariat are ambiguous, because they refer to it sometimes as a Secretariat and sometimes as the Secretary-General, with the same meaning. In addition, this organ has a specific nature: unlike other political organs, it consists of a number of employees and not of states with the Secretary-General as the head of them. Moreover, the Secretary-General is not a "collegiate" organ, and the Court under

⁴⁶ Hereinafter the *UN Administrative Tribunal* case.

⁴⁷ Judicial Review of UNAT's Judgments, working paper submitted by the Secretary-General. See UN Doc. A/AC. 78/L.1 and Corr. 1 (1955).

⁴⁸ UN Doc. A/47/277, 1992; S/24111 (17/6/92), para. 38.

⁴⁹ However, it should be noted that the Secretary-General may indirectly seek an advisory opinion of the ICJ by asking the GA or another authorised organ to make the request. For instance, according to the Headquarters Agreement between the United Nations and the USA, either of these parties may ask the GA to request an opinion on any legal question arising in the course of arbitral proceedings concerning the interpretation or application of the agreement. This clause was applied in 1988, when the GA, having considered the reports of the Secretary-General, requested an advisory opinion from the ICJ regarding the application of this agreement. See GA Res. 42/229 B, 2 March 1988; ICJ Rep., 1988, p. 12 ff. In addition, the requests by the GA for advisory opinions in the *Reparation for Injuries Suffered in the Service of the United Nations*, *Reservations and UN Administrative Tribunal* cases were made at the instance of the Secretariat. But it should also be noted that, despite this possibility, such an indirect method would not be satisfactory in all instances in which the Secretary-General might find it desirable to consult the ICJ directly. See Sloan, *supra* note 37, p. 833.

⁵⁰ Kelsen, *supra* note 9, p. 547; Rosenne, *supra* note 16, p. 447, 673; Pratap, *supra* note 2, pp. 82-3.

Art. 65 of its Statute is empowered to give opinions only to a "body", which does not apply to the Secretariat because it cannot be considered as a "body" of the UN.⁵¹ Finally, Waldock noted that authorising the Secretariat to request advisory opinions might put it in a delicate position, because most of the requests for advisory opinions involve a political issue, and a request from the Secretariat might create undue friction with states.⁵²

The above view and the GA's attitude cannot be easily accepted and should be examined. The majority of international lawyers have already strongly recommended that the Secretary-General or the Secretariat of the UN should be authorised to request advisory opinions from the ICJ.⁵³ Such authorisation is desirable, especially with the emergence of the political functions of the Secretary-General and the recognition that his position is much more than the administrative

⁵¹ Kelsen, *ibid.*, p. 136. It also has been noted that "if the General Assembly authorises the Secretariat to request opinions within the scope of its activities, it should be the Secretariat *eo nomine*, because it is the Secretariat which is designated as the organ under Art. 7 of the Charter. However, if the Security Council or the General Assembly entrusts the Secretary General with any function under Art. 98 of the Charter ... it is arguable that he should have a right to obtain the advice of the Court on legal questions arising in the discharge thereof. In such a situation grant of competence to request opinions within the limited scope of his particular function might appear unobjectionable. But in such a situation also, he can always propose to the organ which entrusts him with the function itself to make the request." See Pratap, *supra* note 2, pp. 73-4.

⁵² Cited in Pratap, *supra* note 2, p. 73.

⁵³ In this regard, Schwebel notes that "[t]here is no reason to believe that, if the Secretary-General were accorded the authority to request advisory opinions of the Court, he would exercise the authority incautiously". Schwebel, S., "Authorising the Secretary-General of the United Nations to Request Advisory Opinions of the International Court of Justice", *AJIL*, 78, 1984, pp. 876-8. See also Sloan, *supra* note 37, p. 833; Jenks, C., *The Prospects of International Adjudication*, 1964, p. 195; Jessup, P., "To Form a More Perfect United Nations", *RCADI*, 129, 1970, p. 17; Keith, *supra* note 1, p. 38; Szasz, P., "Enhancing the Advisory Competencies of the World Court" in Gross, L. (ed.), *The Future of the International Court of Justice*, 1976, vol. 2, pp. 513, 531-2; Higgins, *supra* note 44, pp. 572-3; Kerno, *supra* note 43, pp. 555-70; Mosler, H., "The International Court of Justice at its Present Stage of Development", *DLJ*, 5, 1979, p. 563. In addition to the international lawyers' opinion in this regard, it was suggested by some states in the proceedings of the Special Committee on the Charter of the UN and on strengthening the role of the organisation that Art. 96 should be amended to authorise the Secretary-General to request advisory opinions, in these terms: "[t]he General Assembly, the Security Council, or the Secretary-General may request the International Court of Justice to give an advisory opinion on any legal question." UN Doc. A/32/33, 1976. The UN's Legal Counsel has also stated that "to receive an authoritative legal advice as to questions of international law arising within the scope of his activities, particularly in respect of disputes in which the Secretary-General has been asked to play a role such as the exercise of good office or mediation ... if the Secretary-General himself has the competence to request Advisory opinion, he would be able to do so in a quiet and discreet manner and without having to involve states not parties to the dispute i.e. states who are members of the Security Council and the General Assembly." See Report of a Special Committee on the Charter, UN Doc. A/47/33, 1992; GAOR, 47th Sess., Supp. No. 33, 1992, pp. 9-10.

head of an international civil service. The Secretary-General plays a big role through the delegation of mediator responsibilities to him by the SC and the GA. Many peace-keeping operations have been created under his executive direction as well as the establishment of permanent diplomatic missions at the UN. He also plays a role as an active diplomatic agent in the peaceful settlement of disputes, and authorising him with the power to request advisory opinions could be considered as a further diplomatic option to offer the parties. In addition, he has assumed an increasingly active and influential role. Allowing him to request advisory opinions might increase the business and utility of the Court, and might be more fruitful than a similar grant to other political organs.⁵⁴ Therefore, it seems clear that such authorisation would assist the Secretariat to achieve the objectives of the UN. It also seems obvious that the GA's attitude is not legally justified because it is contrary to the explicit provision of Art. 7/1 of the Charter. According to this article, the Secretariat is considered to be a principal organ of the UN. Moreover, enabling the Secretary-General to request advisory opinions might help to remove any uncertainties about his functions, and would give him more guidance in determining whether a decision is or is not *lex lata*. Finally, the Assembly's attitude is contrary to its Res. 171, by which it encouraged all organs of the UN to seek the help of the ICJ with regard to their legal questions. It is also contrary to a broad interpretation of Art. 96/2, which authorises many organs and specialised agencies and even subsidiary organs to request advisory opinions from the ICJ.

(ii) The subsidiary organs

According to the Charter, UN organs have the right to establish subsidiary organs.⁵⁵ In this regard, the question has been raised whether these subsidiary organs have the

⁵⁴ Jessup, *supra* note 53, p. 17; Szasz, *supra* note 53, p. 513; Dubisson, *supra* note 28, p. 282; Kelsen, *supra* note 9, p. 547.

⁵⁵ Art. 7/2 of the Charter provides: "[s]uch subsidiary organs as may be found necessary may be established in accordance with the present Charter." In respect of the GA, Art. 22 provides that, "[t]he General Assembly may establish such subsidiary organs as it deems necessary for the performance of its functions". In respect of the SC, Art. 29 provides that, "[t]he Security Council may establish such subsidiary organs as it deems necessary for the performance of its functions". With regard to the ECOSOC, Art. 68 provides: "[t]he Economic and Social Council shall set up commissions in economic and social fields and for the promotion of human rights, and such other commissions as may be required for the performance of its functions."

right to be authorised by the GA to request advisory opinions from the ICJ, or whether they may get this power only through delegation from their parent organ.⁵⁶ The key issue relates to the interpretation of Art. 96 of the Charter: it neither mentions the possibility of delegating this power to the subsidiary organs nor mentions these subsidiary organs as being included under “other organs and specialised agencies” of the UN.

It has been noted that the power to request advisory opinions could be delegated to these subsidiary organs because the parent organ is empowered to create these bodies, and there is no express provision in the Charter or in the Court’s Statute to prevent the parent organ from delegating.⁵⁷ Conversely, some lawyers have noted that there is no need to discuss the right of UN organs to delegate their power to their subsidiary organs, because the GA could authorise them to request advisory opinions from the Court directly.⁵⁸ This view is based on the fact that Art. 96/2 does not prevent the GA from authorising subsidiary organs to request advisory opinions from the ICJ. In addition, as regards the determination of to which bodies of the UN the term “organ” employed in Art. 96/2 applies, in their view Chapter III is entitled “organs” and the text of this Chapter contain provisions for the establishment of two groups of organs: “principal” and “subsidiary”. Therefore, according to this article, the term “organ” conveys the meaning of all the organs of the UN regardless of whether they are principal or subsidiary. Moreover, they note that this interpretation helps to determine the exclusive responsibility of the principal organs from the responsibility of the subsidiary organs.

In view of the above disagreement, the GA’s practice in this regard is paramount. In 1948, when the GA dealt with the renewal of the mandate of the

⁵⁶ It should be noted that some lawyers were in favour of these subsidiary organs having no right to request the Court to give advisory opinions. In their view, the Charter (Art. 96) and the Statute (Art. 65) give the right to request advisory opinions of the Court solely to organs and specialised agencies that already exist and have a personality of their own, and can in no circumstances confer such a power to subsidiary organs. This view was mentioned by Judge de Castro in his dissenting opinion in the *Application for Review of Judgment No. 158 of the United Nations Administrative Tribunal*. ICJ Rep., 1973, p. 276.

⁵⁷ Pratap, *supra* note 2, pp. 57-8.

⁵⁸ Vallat, F., “The Competence of the United Nations General Assembly”, *RCADI*, 97, 1959, p. 215; Fakher, *supra* note 16, p. 131; El-Rashidy, *supra* note 14, pp. 91-2.

Interim Committee, it had been recommended that the GA could authorise this committee to be able to request advisory opinions under the terms of Art. 96/2. This recommendation was rejected by some participants on the basis that subsidiary organs have no right to be authorised because this right is limited to the principal organs of the UN and its specialised agencies.⁵⁹ The GA, by its Res. 196 (III) of December 1948, authorised the Interim Committee to request advisory opinions pursuant to Art. 96/2.⁶⁰ This resolution was based on a broad interpretation of Art. 96/2 of the Charter whereby it interpreted this paragraph as applying to both the principal and the subsidiary organs. This broad interpretation was confirmed on 8 November 1955, when the GA authorised its subsidiary Committee for Review of the Judgments of the UN Administrative Tribunal (UNAT) to request advisory opinions from the ICJ.⁶¹ There was no argument at that time in the discussion of the GA as regards the possibility of authorising subsidiary organs pursuant to Art. 96/2.⁶² Accordingly, it seems clear that the GA found itself lacking the right to delegate its direct power to request advisory opinions to its subsidiary organs; otherwise, if it had been convinced that it had this right, it would have entitled its subsidiary organs on this basis without making such a broad interpretation of Art. 96/2 of the Charter.

In the light of the above, the practice of the GA in this regard indicates that the term “other organs of the United Nations” in Art. 96/2 includes both the principal organs according to Art. 7/1 and the subsidiary organs according to Arts. 7/2, 8, 22,

⁵⁹ For the debate during the 168th Plen. Mtg., see UN Doc. A/PV. 168, 1948, p. 32.

⁶⁰ This resolution was repeated in Res. 295/4, 21 November 1949, by which the mandate of the Interim Committee was prolonged indefinitely.

⁶¹ GA Res. 957 (X), 8 November 1955.

⁶² It should be noted that this authorisation was criticised by some lawyers; for instance, the Diss. Op. of Judge Morozov in the *Application for Review of Judgment No. 158 of the United Nations Administrative Tribunal* case, who noted that “the Committee created in 1955 cannot be considered as an organ of the United Nations within the meaning of Articles 7 and 22 of the Charter and therefore this Committee has no right to ask for advisory opinions of the Court in accordance with Article 96, paragraph 2, of the Charter ... this Committee could not request opinions of the Court, because any organ of the United Nations other than the General Assembly and the Security Council may be authorised to do so only ‘on legal questions arising within the scope of their activities’ (Art. 96, para. 2, of the Charter). But the Committee (which is not a permanent organ of the United Nations) has requested an advisory opinion not in the *scope of its own activities* but in the *scope of the activities of another body*— the United Nations Administrative Tribunal.” ICJ Rep., 1973, pp. 298-9.

29 and 68 of the Charter.⁶³ This attitude will not only help these organs to achieve their functions but also facilitate the work of these organs when they need the legal advice of the Court between the sessions of their parent organs. It seems desirable that any tribunal that is established or may be established as a subsidiary organ of the UN should be authorised to refer important questions arising in the course of their proceedings to the ICJ for its opinion.⁶⁴

In practice, subsidiary organs have requested advisory opinions of the ICJ on three occasions. All the requests were made by the Committee for Review of the Judgments of the UNAT.⁶⁵

(iii) Specialised agencies

The term “specialised agency” is applied only to an organisation or international organ that has specific objectives and has a relationship agreement with the UN. This means that organisations that are not brought into relationship with the UN are not “specialised agencies” within the meaning of the Charter.⁶⁶ The right of specialised agencies to request advisory opinion was raised for the first time before Committee IV/I, which concluded that these agencies have the right to request opinions of the ICJ after obtaining authorisation from the GA. No doubt granting this power to these agencies was considered to be a substantial modification of the relationship between the ICJ and the UN compared with the relationship between the PCIJ and the League of Nations.

Most of the specialised agencies have the power to request advisory opinions from the ICJ on any legal question arising within the scope of their activities. In

⁶³ In the light of this conclusion it seems unreasonable to prevent the Commissions established by the ECOSOC pursuant to Art. 68 of the Charter from being authorised to request advisory opinions of the ICJ (especially the Commission on Human Rights and the Sub-Commission on the Prevention of Discrimination and Protection of Minorities). See Higgins, *supra* note 44, pp. 569-70; Akhavan, P., “Enforcement of the Genocide Convention Through the Advisory Jurisdiction of the International Court of Justice”, *HRLJ*, 12, 1991, pp. 288-90.

⁶⁴ Jenks, *supra* note 29, p. 13.

⁶⁵ See Chapter Six below.

⁶⁶ The Convention on the Privileges and Immunities of the Specialised Agencies provides that the term “specialised agencies” means agencies specifically mentioned in the Convention and any other agency brought into relationship with the UN in accordance with Arts. 57 and 63 of the Charter. See ICJYB, 1947-8, p. 121; Grabowska, G., “Les Avis Consultifs de la Cour Internationale de Justice”, *PYBIL*, XVIII, 1988, pp. 22-3.

most cases they are authorised through the agreements concluded between each of them and the UN.⁶⁷ In practice, the requesting agency refers to its resolution by which it requests an advisory opinion from the Court, which is based on Art. 95 of the Charter as well as the related articles in its constitution, in addition to the relevant articles in the agreement between this agency and the UN.⁶⁸

Four requests for advisory opinions have been made by specialised agencies - one each by UNESCO⁶⁹ and the IMO,⁷⁰ and two by the WHO.⁷¹

3. Prerequisites for requesting an advisory opinion

The request for an advisory opinion is subject to the fulfilment of several conditions. These prerequisites are related to the competence of the requesting organ, the vote, the request for advisory proceedings and the subject-matter of the request.

⁶⁷ For instance, Art. XVII of the FAO constitution; Art. V, para. 11, of the UNESCO constitution; Art. 22/2 of the UNIDO constitution; Art. 76 of the WHO constitution; Art. 66 of the IMO constitution; and Art. XVII, para. B, of the IAEA constitution. See ICJYB, 1994-5, No. 49, pp. 73 ff. It is worth noting that the Universal Postal Union has a unique feature in that it is the sole specialised agency that has no authority to request advisory opinions.

⁶⁸ For instance, in its request to the ICJ for an advisory opinion in the *Legality of the Use by a State of Nuclear Weapons in Armed Conflict* case, the WHO decided, "in accordance with Article 96 (2) of the Charter of the United Nations, Article 76 of the Constitution of the World Health Organisation and Article X of the Agreement between the United Nations and the World Health Organisation approved by the General Assembly of the United Nations on 15 November 1947 in its Res. 124 (II), to request the International Court of Justice to give an advisory opinion." ICJ Rep., 1996, p. 3 (unpublished). In this regard, the Court stated that "where the WHO is concerned, the above-mentioned texts are reflected in two other provisions, to which World Health Assembly Resolution WHA 46.40 expressly refers in paragraph 1 of its operative part. There are, on the one hand, Article 76 of that Organisation's Constitution, under which: '[u]pon authorisation by the General Assembly of the United Nations or upon authorisation in accordance with any agreement between the Organisation and the United Nations, the organisation may request the International Court of Justice for an advisory opinion on any legal question arising within the competence of the Organisation'. And on the other hand, paragraph 2 of Article X of the Agreement of 10 July 1948 between United Nations and the WHO, under which: 'the General Assembly authorises the World Health Organisation to request advisory opinions of the International Court of Justice on legal questions arising within the scope of its competence other than questions concerning the mutual relationships of the organisation and the United Nations or other specialised agencies'. This agreement was approved by the United Nations General Assembly on 15 November 1947 (resolution 124 (II)) and by the World Health Assembly on 10 July 1948 (resolution [WHA1.102])." See, ICJ Rep., *ibid.*, p. 7.

⁶⁹ ICJ Rep., 1956.

⁷⁰ ICJ Rep., 1960.

⁷¹ ICJ Rep., 1980; ICJ Rep., 1996.

3.1. The competence of the requesting organ

The study has already dealt with the organs that are authorised, either directly or indirectly, to request advisory opinions.⁷² The ICJ is the competent organ to decide whether the requesting organ is substantively entitled to request or not.

In this regard, several issues related to the competence of the requesting organ should be dealt with. These issues are: the limits of this competence, the effect of a request made by an organ upon the competence of other organs, the effect of the refusal to request by one organ upon the competence of other organs, and, finally, whether the competence to request extends to withdrawal of a request already submitted to the Court.

3.1.1. Limits upon the competence to request

Art. 96 of the Charter made a clear distinction between the GA and the SC, on the one hand, and the other organs and specialised agencies, on the other, regarding the power of request. Para. 1 entitles the GA and the SC to request advisory opinions regarding “any legal question”, while para. 2 entitles the other organs of the UN and its specialised agencies to request opinions regarding “legal questions arising within the scope of their activities”.⁷³ Therefore, other UN organs and specialised agencies cannot request advisory opinions beyond the scope of their activities as expressly stated in their constituent instruments. This limit applies even if the GA welcomes or supports a request that is considered beyond the scope of their activities.⁷⁴ In order to delineate the scope of activities or the area of competence, the Court must

⁷² See pp. 47 *ff.* above.

⁷³ With regard to Art. 96/2, see note 7 above.

⁷⁴ In the *Legality of the Use by a State of Nuclear Weapons in Armed Conflict* case (WHO request), the ICJ stated that “[n]or can the Court accept the argument that the General Assembly of the United Nations, as the source from which the WHO derives its power to request advisory opinions, has, in its resolution 49/75 K, confirmed the competence of that organisation to request an opinion on the question submitted to the Court ... the General Assembly clearly reflected the wish of a majority of States that the Assembly should lend its political support to the action taken by the WHO, which it welcomed. However, the Court does not consider that, in doing so, the General Assembly meant to pass upon the competence of the WHO to request an opinion on the question raised. Moreover, the General Assembly could evidently not have intended to disregard the limits within which Article 96, paragraph 2, of the Charter allows it to authorise the specialised agencies to request opinions from the Court - limits which were reaffirmed in Article X of the relationship agreement of 10 July 1948.” ICJ Rep., 1996 (WHO request), p. 16 (unpublished).

examine the relevant rules of the organisation, in particular its constitution, where the objectives and functions of the organisation are spelled out. In practice the Court refused a request for an opinion by the WHO in the *Legality of the Use of Nuclear Weapons in Armed Conflict* case because it found that the WHO's functions did not have a sufficient connection with the question, which was not within the scope of the WHO's activities as defined by its constitution.⁷⁵ In this regard, the Court stated that:

“Indeed, the WHO is not empowered to seek an opinion on the interpretation of its constitution in relation to matters outside the scope of its function.”⁷⁶

Further it concluded that:

“[T]he Court finds that an essential condition of founding its jurisdiction in the present case is absent and that it cannot, accordingly, give the opinion requested.”⁷⁷

In addition to this limit it has been noted that the GA, being the organ with the power to authorise other organs and agencies, has an implied power to impose additional conditions whenever this authority is exercised.⁷⁸ This is based on the report of the preparatory commission of the UN, which envisaged that when the GA authorises other organs it can impose conditions. In practice, the GA has imposed two procedural limits. First, these organs and agencies should notify the ECOSOC when they request an opinion from the Court. Second, these organs and agencies cannot request advisory opinions from the Court regarding their relationship with the UN or with other agencies because such a request can be made only by the ECOSOC, which has the function of co-ordinating the activities of specialised agencies brought into relationship with the UN.⁷⁹ Accordingly, the Court has to examine not only whether the question asked falls within the scope of the activities

⁷⁵ ICJ Rep., 1996 (WHO request), pp. 7, 11 *ff.* (unpublished).

⁷⁶ *Ibid.*, p. 15.

⁷⁷ *Ibid.*, p. 16.

⁷⁸ Dubisson, *supra* note 28, p. 289; Bowett, *supra* note 24, p. 230.

⁷⁹ GA Res. 89 (I), 11 December 1946. In this regard, Hambro noted that “[t]he authority has been given to request opinions only within the scope of the specialised agency in question. This means that the organisation cannot ask for an opinion on any question whatsoever but has to limit itself to questions which are directly concerned with the powers of the organisation.” Hambro, E., “The Jurisdiction of the International Court of Justice”, *RCADI*, 76, 1950, p. 193.

of the requesting agency, but also whether it concerns the mutual relationship of the agency and the UN or the agency with any other such agencies, because they are precluded from requesting opinions concerning these matters by the terms of their authorisations.

The question of the limits upon requesting organs has been extended to discuss whether the power of the GA and SC to request advisory opinions is absolute and without any limits. One view is that the power of both organs is absolute.⁸⁰ This opinion is based on the permissive wording of para. 1 of Art. 96 of the Charter, which provides that both organs may request advisory opinions on “any legal question”. This wording is substantially different from para. 2 of the same article, which stipulates that other organs of the UN and specialised agencies may request advisory opinions on “legal questions arising within the scope of their activities”. This opinion was rejected by other lawyers who stated that both organs have limited power when requesting advisory opinions. In this regard, Kelsen noted that both organs can request advisory opinions only on legal questions which arise within the scope of their activities.⁸¹ Rosenne supported this view by stating that “[n]o organ, including the GA and the SC, can decide to request an advisory opinion except within the scope of its activities”.⁸²

Although the above two views are not without their merits and persuasive arguments have been submitted on both sides, it can be argued that this question should not be approached from a “scope of activities” point of view, for the simple fact that both organs, especially the GA, enjoy a vast scope of activities, to the extent that it is hard to find any activity within the UN that falls outside their direct or indirect scope of its activities. This was affirmed by the Court in the *Legality of the Threat or Use of Nuclear Weapons* case. In this case, it has been argued that the GA and SC are not entitled to request opinions on matters totally unrelated to their scope of activities. Therefore, it has been suggested that, as in the case of organs

⁸⁰ Lenefsky, D., “A Successful Jurisprudence of Advisory Opinions for the International Court of Justice”, *IYIA*, 15-16, 1966-7, p. 39; Gerge, E., *The International Court of Justice*, 1971, p. 77; Schwebel, *supra* note 53, p. 875; Bentwich, N., et al., *A Commentary on the Charter of the United Nations*, 1969, p. 456.

⁸¹ Kelsen, *supra* note 9, p. 546.

⁸² Rosenne, *supra* note 14, p. 660; Szasz, *supra* note 53, p. 526.

and agencies acting under Article 96, para. 2, of the Charter, and notwithstanding the differences in the wording of this provision and that of para. 1 of the same Article, the GA and SC may request an advisory opinion on a legal question only within the scope of their activities.⁸³ In its reply, the Court stated that:

“[T]he General Assembly has competence in any event to seize the Court. Indeed, Article 10 of the Charter has conferred upon the General Assembly competence relating to ‘any questions or any matters’ within the scope of the Charter. Article 11 has specifically provided it with a competence to ‘consider the general principles ... in the maintenance of international peace and security, including the principles governing disarmament and the regulation of armament’. Lastly, according to Article 13, the General Assembly ‘shall initiate studies and make recommendations for the purpose of ... encouraging the progressive development of international law and its codification’.”⁸⁴

In addition, it concluded that:

“Article 96, paragraph 1, of the Charter cannot be read as limiting the ability of the Assembly to request an opinion only in those circumstances in which it can take binding decisions.”⁸⁵

It seems clear that the Court has adopted a wide interpretation of Art. 96/1 regarding the power of the GA and the SC to request advisory opinions. However, in the writer's view, two limits upon the GA and the SC should be observed. First, in requesting advisory opinions, these organs should not exceed their competence as conferred by the Charter. Accordingly, they cannot, pursuant to Art. 2/7, request an opinion regarding an issue within the domestic jurisdiction of the member states because it is considered as a general limitation upon all UN organs, *inter alia* the GA and the SC, and should be interpreted in a narrow sense. In addition, pursuant to Art. 65/1 of the Charter, the Court is empowered to give opinions at the request of bodies authorised in accordance with the Charter.⁸⁶ This limit was supported by the ICJ dictum in the *Peace Treaties* case. In this case, it was argued that the Court was not competent to give the requested opinion because the questions put to it fell within the domestic jurisdiction of certain states. The Court did not reject this

⁸³ ICJ Rep., 1996, p. 8 (unpublished).

⁸⁴ Ibid.

⁸⁵ Ibid.

⁸⁶ It should be noted also that the Court itself is precluded from dealing with any issue considered as falling within the domestic jurisdiction of states. See p. 26 above.

argument out of hand but dealt with it on its merits and pointed out that what was submitted to the Court was a question of treaty interpretation. It stated that such a matter could not be domestic.⁸⁷ This means that the Court implicitly recognised the limit imposed by Art. 2/7 of the Charter in this regard.

A second limit emerged from the practice of the GA itself. In November 1992 some member states (all the Latin American ones, plus Spain, Portugal and Iran) demanded that the GA request an advisory opinion from the ICJ regarding the dispute between Mexico and the USA as a consequence of the findings of the US Supreme Court in the Alvarez-Machain case.⁸⁸ The sponsored states hoped that the breadth of the GA's competence under Art. 96/1 to request an opinion "on any legal question" would have been sufficient. On the recommendation of the Sixth Committee this proposal was withdrawn.⁸⁹ As noted by Higgins, this precedent gives an explicit indication that, although the phrase "any legal question" in para. 1 of Art. 96 may be wider than the phrase of para. 2, it must at least refer to a legal question under consideration within the UN.⁹⁰

Another question regarding the limits upon the GA and the SC to request opinions is whether the wording of para. 1 allows them to request advisory opinions about an act of the other organ. In other words, does it allow the GA to request an advisory opinion in respect of an action of the SC, and *vice versa*? This question has been neglected by international lawyers. It has been noted that neither organ can request an advisory opinion regarding a matter assigned to either body exclusively by the Charter.⁹¹ This opinion is based on the fact that there is an "invisible limit" upon each organ when it carries out its activities. This limitation

⁸⁷ ICJ Rep., 1950, pp. 70-1.

⁸⁸ UN DOC. A/47/249/Add. 1/Corr. 1, 24 December 1992. This dispute related to the act of the Supreme Court of the USA, which found that the abduction of Mr Alvarez-Machain (who was suspected of kidnapping, torture and murder of a US drug enforcement agent) from Mexico and his transfer to the USA to stand trial did not violate the extradition treaty between Mexico and the USA and render the US courts without jurisdiction. The draft resolution proposed for the request avoided mentioning Mr Alvarez-Machain and focused on the dispute between Mexico and the USA.

⁸⁹ GA Res. 48/414, 9 December 1993.

⁹⁰ Higgins, *supra* note 44, p. 580.

⁹¹ El-Rashidy, *supra* note 14, p. 88; Dattleir, P., "L'Article 96 de la Charte" in Cot, J-P., et al. (eds.), *La Charte des Nations Unies*, 1991, p. 1293; Pratap, *supra* note 2, pp. 122-5.

relates to the distribution of functions among the UN organs. Others have noted that it is the task of the Court to determine whether Art. 96/1 does authorise the GA to ask for an advisory opinion on an action of the SC (and *vice versa*). According to this view, however, if the Court decides that the GA or the SC can do so, it has to take a second step to decide whether it wishes to exercise its discretion in the particular case.⁹²

It can be argued that, according to the current wording of Art. 96/1, both organs, especially the GA, could request an opinion on an action of the other. This is based on the permissive wording of para. 1. If the drafters were against such a conclusion they would have clarified it, especially as they were aware of the relationship between the SC and the GA, as is clearly illustrated in the delimiting of their relationship pursuant to Art. 12/1 of the Charter. In addition, the possibility of such action might create a kind of control upon the acts of the GA and the SC, thereby helping to protect the institutional life of the organisation. Finally, this view seems to be more acceptable if such a request can be made by the GA. The GA has, pursuant to Art. 10, the power to discuss any matter within the scope of the present Charter or relating to the powers and functions of any other organs, *inter alia* the SC, provided that it respects the limit indicated by Art. 12/1 of the Charter. This view is supported by the ICJ's practice, *viz.* its willingness to render the opinion requested by the GA in the *Conditions of Admission of a State to Membership in the United Nations* case (1948)⁹³ despite the fact that this case was related to the voting procedure in the SC and did not have the SC's prior consent.⁹⁴

3.1.2. The impact of a request for an opinion by one organ upon the competence of other organs

This point deals with the possibility of concurrent requests for an advisory opinion by two organs. A distinction should be made here between the GA and the SC on the one hand and the other organs and specialised agencies on the other hand.

⁹² Higgins, *supra* note 44, pp. 577-8.

⁹³ Hereinafter the *Admission* case.

⁹⁴ ICJ Rep., 1948, pp. 60 *ff.*

With regard to the other principal organs and specialised agencies of the UN, one may note, generally, that concurrent requests for an advisory opinion cannot take place because their powers to request are limited to the scope of their activities. Accordingly, it is not possible for one of these organs or agencies to request an opinion about a matter within the scope of the activities of another organ. In addition, if the matter is related to legal questions concerning the mutual relationship of the UN and the specialised agencies, it is only the ECOSOC that can request an opinion.⁹⁵

This clear determination is not available with regard to the GA and the SC because they have a broad scope of power to request advisory opinions and because they have joint competencies in many fields. This might lead to a concurrent request either from them both or from one of them and another principal organ or specialised agency. As far as the relationship between the GA and SC is concerned, it can be concluded that there is no hindrance on either organ requesting an opinion from the Court about a question asked by the other organ. However, there is a limitation as regards requesting an opinion about a dispute or situation. According to Art. 12/1 of the Charter, the GA cannot deal with any dispute or situation before the SC.⁹⁶ Accordingly, if the matter is still pending on the SC agenda, the GA cannot discuss the matter, including a request for an advisory opinion from the ICJ. If the GA acted in contravention of the article and requested an advisory opinion, the SC might well object to the Court's giving of an opinion.

Turning to the possibility of a concurrent request by either the GA or the SC and one of the other organs and agencies of the UN, it could be argued that there is no obstacle to these organs posing questions about the same matter at the same time. In practice, there was no argument about the possibility of the GA and the WHO making concurrent requests for an advisory opinion regarding the use of nuclear weapons.⁹⁷

⁹⁵ It should be noted that the ECOSOC has no power to request an opinion regarding the internal organisation of these bodies. See Jenks, *supra* note 29, pp. 11-12.

⁹⁶ For the wording of Art. 12/1, see note 137, p. 38 above.

⁹⁷ ICJ Rep., 1996 (the *Legality of the Use by a State of Nuclear Weapons in Armed Conflict* case and the *Legality of the Threat or Use of Nuclear Weapons* case).

3.1.3. The impact of the refusal to request by one organ upon the competence of other organs

Since the power to request advisory opinions has been granted to several organs of the UN, a question may arise about whether a request for an advisory opinion by one organ is permissible after the refusal of such action by another organ. There is no precedent in the UN in respect of this question, but this question was raised before the League of Nations in connection with the Vilna dispute between Poland and Lithuania in 1923. The Council refused to request an opinion from the PCIJ about this dispute, so the government of Lithuania turned to the Assembly of the League to request an opinion. There was discussion in the Assembly about the possibility of requesting an advisory opinion in spite of the Council's refusal to do so. The Assembly - in this case - refused to request an opinion from the Court.⁹⁸

Although such a case has never been raised within the UN, it could be argued that the refusal by one organ to request an advisory opinion does not affect the competence of another to do so on the same issue.⁹⁹ This opinion is based upon the independence of each organ *vis-à-vis* the others and the fact that no organ is subordinate to the others. This view has important implications, especially if such a refusal was the result of the use of the veto by one of the SC's permanent members. In this case, the party submitting the request might not be prevented from doing so through the GA, which does not require a unanimous vote provided that it respects the limitation imposed by Art. 12/1 of the Charter.

3.1.4. The power to withdraw a request

An interesting point that needs to be examined is whether the requesting organ can withdraw a request submitted to the ICJ.

It is necessary to mention that this has never happened in the UN, but it did happen before the PCIJ in respect of the *Expulsion of the Oecumenical Patriarch* case. In this case, Greece submitted an application to the Council of the League of Nations to request an advisory opinion from the PCIJ in respect of its dispute with

⁹⁸ Pomerance, M., *The Advisory Function of the International Court in the League and UN Eras*, 1973, pp. 176-7.

⁹⁹ Pratap, *supra* note 2, p. 57.

Turkey regarding Turkey's expulsion of the Oecumenical Patriarch. The Council adopted a resolution, dated 14 March 1925, by which it requested an advisory opinion from the PCIJ. While the Court was dealing with the question, Greece and Turkey reached an agreement in this dispute. Consequently, the matter was withdrawn from the Council's agenda, and the Council informed the PCIJ that it no longer found it necessary to ask the Court to give an opinion. Accordingly, the PCIJ removed this request from its list by an administrative order.¹⁰⁰

In the light of the above it could be concluded that the requesting organ can withdraw its request from the Court either before the opening of the oral proceedings or at any time prior to the delivery of the opinion.¹⁰¹ This is based on Art. 88 of the Court's Rules, which allows the parties in contentious cases to withdraw and discontinue their cases at any time before the delivery of judgment if they conclude an agreement to settle their dispute. This article applies by analogy to the advisory jurisdiction when the requesting organ decides to withdraw the request by the required majority.

3.2. The vote

No request can be made to the Court for an advisory opinion unless the decision to make such a request is made by the necessary majority in the organ concerned. The voting procedures by which the UN organs or agencies can request an opinion are not expressly provided for either in the Charter or in the Court's Statute. Therefore, the voting procedures for requesting an opinion of the Court must be determined in accordance with the general rules of voting of these organs or agencies, for example by simple majority or other majority either of the votes cast or of the total membership.¹⁰² Therefore, a decision by which the organ requests advisory opinions is doubtless equally applicable to voting on any other decisions. Despite this

¹⁰⁰ Hudson, *supra* note 1, pp. 509-10.

¹⁰¹ Hudson, *supra* note 1, p. 509; Keith, *supra* note 1, p. 50.

¹⁰² Szasz, *supra* note 53, pp. 502, 504. It should be noted that a unanimous decision was required for the Council and the Assembly of the League to request an advisory opinion from the PCIJ. See McNair, A., "The Council's Request for an Advisory Opinion from the Permanent Court of International Justice", *BYIL*, 7, 1926, pp. 1 *ff*.

conclusion there is still scope for controversy over the vote necessary for the adoption by the GA and by the SC of a request for an advisory opinion.

With regard to the GA, the voting procedure is regulated by Art. 18 of the Charter.¹⁰³ It makes a distinction between the required vote in respect of “important questions” (para. 2) and “other questions” (para. 3). Pursuant to para. 2, the required vote for “important questions” - as enumerated and the other issues which will be decided by the GA according to para. 3 - is a two-thirds majority of the members present and voting. Pursuant to para. 3, the required vote for “other questions” is a simple majority of the members present and voting.

Because there is nothing in the Charter itself that would make a two-thirds majority mandatory when a decision is being made to request the Court for an advisory opinion, a question has been raised whether a decision to request an opinion is a decision on an important question which might be made by a two-thirds majority or a decision which may be made by a simple majority.

Before dealing with this question, it should be noted that the practice of the GA in this respect is ambiguous and cannot lead to a clear answer.¹⁰⁴ For example, in 1946 it adopted its decision to request an advisory opinion from the ICJ regarding the Treatment of Indians in the Union of South Africa by a two-thirds majority as an “important question”.¹⁰⁵ The decision in 1949 to request an opinion from the ICJ

¹⁰³ Art. 18 provides:

“2. Decisions of the GA on important questions shall be made by a two-thirds majority of the members present and voting. These questions shall include: recommendations with respect to the maintenance of international peace and security, the election of the non-permanent members of the Security Council, the election of the members of the Economic and Social Council, the election of members of the Trusteeship Council in accordance with paragraph 1(c) of Article 86, the admission of new Members to the United Nations, the suspension of the rights and privileges of membership, the expulsion of Members, questions relating to the operation of the trusteeship system, and budgetary questions.

3. Decisions on other questions, including the determination of additional categories of questions to be decided by a two-thirds majority, shall be made by a majority of the members present and voting.”

¹⁰⁴ Rosenne, *supra* note 14, pp. 661-6.

¹⁰⁵ GAOR, 1st Sess., 2nd part, 52nd Plen. Mtg., 8 December 1946, pp. 1048-61. In addition, many of the GA’s resolutions posed to the Court for advisory opinions were adopted by a majority substantially in excess of two-thirds. For instance, Res. 113 B (II), 17 December 1947 (*Admission* case); Res. 258 (III), 3 December 1948 (*Reparation for Injuries Suffered in the Service of the United Nations* case); Res. 294 (IV), 22 October 1949 (*Peace Treaties* case); Res. 296 J (IV), 22 November 1949 (*Competence of the Assembly* case); Res. 338 (IV), 6 December 1949 (*South-West Africa* case); Res. 478 (V), 16 November 1950 (*Reservations* case); Res. 785 A (VIII), 9 December

regarding the international status of South Africa was considered to be a procedural matter.¹⁰⁶ During the discussion leading to the adoption of a decision in this regard, the President of the GA referred to the action taken by the GA in 1946 as “an exceptional decision ... reached on the specific understanding that no precedent was to be established”, and he ruled that the request required a simple majority for adoption.¹⁰⁷ Finally, the GA’s resolution by which it requested the Court to give an opinion regarding the legality of the threat or use of nuclear weapons was adopted by 78 votes to 43, with 38 abstentions viz. by a simple majority.¹⁰⁸

There is no doubt that the recent practice of the GA in requesting an opinion regarding the legality of the threat or use of nuclear weapons should be upheld. In the writer’s view, the voting procedures in the decision to request an opinion should be regulated solely by para. 3 of Art. 18 as a non-important question which requires a simple majority. This view is based on several grounds: (i) the issue of requesting an advisory opinion is not enumerated with the other issues in para. 2; (ii) the GA has never decided categorically that all requests for an advisory opinion raise an “important question”; (iii) applying para. 3 would help to increase the number of requests for advisory opinions by the GA.

Similarly, with regard to the vote in the SC to request an opinion, two main questions regarding the application of Art. 27 might be raised:¹⁰⁹ (i) is it a non-

1953 (*UN Administrative Tribunal* case); Res. 904 (IX), 23 November 1954 (*South-West Africa* case); Res. 942 (X), 3 December 1955 (*South-West Africa* case); Res. 1731 (XVI), 20 December 1961 (*Expenses* case).

¹⁰⁶ GA Res. 267 (III), 14 April 1949.

¹⁰⁷ It should be noted that President’s view came as a result of a proposal from the South African representative, who pointed out that the request for an advisory opinion is a matter of importance requiring a two-thirds majority. GAOR, 4th Sess., 269th Plen. Mtg., 6 December 1949, pp. 536-7.

¹⁰⁸ GA Res. 49/75 K, 15 December 1995.

¹⁰⁹ Art. 27 provides:

“1. Each member of the Security Council shall have one vote.

2. Decisions of the Security Council on procedural matters shall be made by an affirmative vote of nine members.

3. Decisions of the Security Council on all other matters shall be made by an affirmative vote of nine members including the concurring votes of the permanent members; provided that, in decisions under Chapter VI, and under paragraph 3 of Article 52, a party to a dispute shall abstain from voting.”

procedural question on which the veto is applicable; and (ii) if it is a non-procedural question, must a state party to the dispute abstain from voting?

The question whether the request for an advisory opinion is to be regarded as a decision on a procedural matter, which requires an affirmative vote of nine of the fifteen members, or a non-procedural matter which requires an affirmative vote of nine members including the concurring votes of the permanent members, was referred by the GA to an Interim Committee for studying.¹¹⁰ The committee concluded that a request for an advisory opinion would be a procedural question and consequently it would not be subject to the veto.¹¹¹ This view was not adopted by the GA in its Res. 267 (III), where it did not include the request for an advisory opinion in the list of decisions deemed procedural.¹¹²

As far as the practice of the SC is concerned there is only one precedent. When the SC requested an advisory opinion on Namibia in 1970, the request was adopted by Res. 284 of 19 July 1970, with the abstention of Poland and two permanent members (the Soviet Union and the UK). The Court rejected the objection put forward by the Government of South Africa that the resolution was invalid as a consequence of the abstention of the two permanent members. The Court held that a decision must be deemed validly adopted when it is passed in accordance with the rules of procedure of the body entitled to make it, and that practice under Art. 27 had established “abstention by a permanent member (of the SC) as not constituting a bar to the adoption of the resolutions”.¹¹³

It has been noted that a request is not of itself procedural or non-procedural. Therefore, it is necessary to look at the subject-matter of the request. This opinion is based not only on Art. 27 of the Charter, but also on the difficulty of laying down a general rule in this regard.¹¹⁴

¹¹⁰ Report of the Interim Committee of the GA, 15 January - 5 August 1948, GAOR, 3rd Sess., Supp., No. 10, 1948, p. 14.

¹¹¹ Ibid.

¹¹² GA Res. 267 (III), 14 April 1949. Sloan, *supra* note 37, pp. 836-7; Rosenne, *supra* note 14, p. 667.

¹¹³ ICJ Rep., 1971, p. 22.

¹¹⁴ Keith, *supra* note 1, p. 47.

The above suggestion of the Interim Committee is not without merit so long as the permanent members of the SC have the right of veto. The use of this right by the permanent members can hinder the adoption of a resolution containing a question to the Court for an opinion. Therefore, it seems clear that it is better for the SC to consider this request as a procedural matter for the purposes of Art. 27, so that a negative vote by a permanent member would not prevent that request being made.

The second question is whether a party to a dispute must abstain from voting. According to Art. 27/3 of the Charter, a party to a dispute should abstain from voting on any decision to be adopted under Chapter VI and under para. 3 of Art. 52. It has been noted that the nature of the vote should be determined by the subject-matter of the request, and that no blanket determination should apply to all requests for advisory opinions. According to this view, the answer to the above question will vary: (i) if the request for an opinion is related to a procedural problem, the decision to make the request should be considered procedural and the veto should not be applicable; (ii) if the request concerns the peaceful settlement of an international dispute pursuant to Chapter VI of the Charter, Art. 27/3 should be applied and consequently a party to a dispute should be required to abstain from voting on the request for an advisory opinion; (iii) if the request concerns the taking of enforcement action or other matter under Chapter VII, the unanimous vote of the permanent members including the party to a dispute would be required.¹¹⁵

3.3. The request for advisory proceedings

The ICJ has no power to give or to offer to give an advisory opinion *proprio motu*. Advisory proceedings are initiated by a written request for an opinion addressed to the Court and transmitted to it by the Secretary-General of the UN or, as the case may be, the chief administrative officer of the requesting agency authorised to make a request.¹¹⁶ Pursuant to Art. 65/2 of the ICJ's Statute, the request should contain an

¹¹⁵ Sloan, *supra* note 37, p. 837; Pratap, *supra* note 2, p. 118.

¹¹⁶ According to Art. 104 of the Court's Rules, this submission could be referred to the ICJ either directly by the head of the requesting organ or indirectly by the Secretary-General of the UN.

“exact statement of the question upon which an advisory opinion is required”.¹¹⁷ It should also contain a comprehensive description of the matter in the text of the resolution. In addition, all documents likely to throw light upon the question should be attached.¹¹⁸ The request may contain more than one question, and may make the Court’s answer to a later question dependent upon the affirmative or negative answer to an earlier one.¹¹⁹

It should be noted in this regard that the ICJ is invariably obliged to define the exact scope of the question as a necessary preliminary to carrying out the judicial function of answering the request put before it.¹²⁰ It also has the power to reformulate - where necessary - the question submitted to it for an opinion to clarify the real meaning of the question it has to answer.¹²¹ This power can be justified on several grounds. First, the requesting organs are of a political nature and they are composed of non-legal members. This could lead to questions referred to the ICJ being badly drafted. Second, this power facilitates the fullest exposition of the

¹¹⁷ It should be mentioned that the requirement contained in Art. 65 of the PCIJ’s Statute of the 1936 that the written request be signed by the President of the Council or by the Secretary-General of the League of Nations, under instruction from the Assembly or Council, has been dropped.

¹¹⁸ In this regard, it has been noted that application of Art. 65 of the Statute has been liberal. Thus, documents can be transmitted to the Court at the same time as the request, or as soon as possible afterwards. This has been justified on the basis that, although this is a breach of the letter of the article, the documents are in fact supplied and there is no breach of the spirit of the provision. See Keith, *supra* note 1, p. 49.

¹¹⁹ Rosenne, *supra* note 14, p. 693.

¹²⁰ For instance, in the *Legality of the Threat or Use of Nuclear Weapons* case, the Court dealt with difference between the English and French draft of the question. The English text reads: “[i]s the threat or use of nuclear weapons in any circumstance permitted under international law?” whereas the French text of the question is as follows: “[e]st-il permis en droit international de recourir à la menace ou à l’emploi d’armes nucléaires en toute circonstance?”. This led some states to suggest that the Court was being asked by the GA whether it was permitted to have recourse to nuclear weapons in every circumstance, and it was contended that such a question would inevitably invite a simple negative answer. In its reply, the Court found “it unnecessary to pronounce on the possible divergence between the English and French texts of the question posed. Its real objective is clear: to determine the legality or illegality of the threat or use of nuclear weapons.” ICJ Rep., 1996, p. 12 (unpublished).

¹²¹ It should be mentioned that the Court’s power to reformulate the question has two limitations. First, the Court cannot exceed the limitations of competence and functions entrusted to the requesting organ. If it were to do so, the Court might deal with issues that cannot be dealt with by the requesting organ. Second, the Court should bear in mind the intention of the requesting organ. See Abou-El-Wafa, A., “Comment on the International Court of Justice’s Advisory Opinion in Case No. 333 of the United Nations Administrative Tribunal”, *REDI*, 43, 1987, p. 210.

Court's reasoning and the appropriate development of relevant legal issues. Finally, pursuant to Art. 36/6 of the Statute, the Court is competent to decide its jurisdiction in order to reach a fair judgment. To achieve this purpose it could discuss the related issues of the case, *inter alia* the reformulating of the requested question.¹²²

This power has been emphasised by the ICJ's practice in several cases. For instance, in the *Reparation for Injuries Suffered in the Service of the United Nations* case of (1949),¹²³ the Court had to deal with a question referring to "an international claim against the responsible *de jure* or *de facto* Government". The ICJ stated that it understood the question to be directed to claims against a state and that it would, therefore, in the opinion, use the expression "State" or "defendant State".¹²⁴ The ICJ thus brought the wording of the request into conformity with the principle that states, and not governments, are the subject of international law.

In the *Certain Expenses of the United Nations* case (1962),¹²⁵ the Court reformulated the question posed to it by the GA. The Court stated that:

"[A]lthough the Court will examine Article 17 in itself and in its relation to the rest of the Charter, it should be noted that at least three separate questions might arise in the interpretation of Paragraph 2 of this Article ... It has been asked to answer a specific question related to certain identified expenditures which have actually been made, but the Court would not adequately discharge the obligation incumbent on it unless it examined in some detail various problems raised by the question which the General Assembly has asked."¹²⁶

A similar attitude was adopted in the *Interpretation of the Agreement of 25 March 1951 between WHO and Egypt* case (1980).¹²⁷ In this case, the ICJ found that, although the question was formulated only in terms of the provisions of section 37 of the agreement on the requirement for negotiation and notice for the revision of the agreement, the true legal question submitted to the Court could be reformulated. The Court pointed out that "if it is to remain faithful to the requirements of its

¹²² With regard to the competence of the ICJ to determine its jurisdiction, see p. 98 below.

¹²³ Hereinafter the *Reparation* case.

¹²⁴ ICJ Rep., 1949, p. 177.

¹²⁵ Hereinafter the *Expenses* case.

¹²⁶ ICJ Rep., 1962, pp. 157-8.

¹²⁷ Hereinafter the *WHO and Egypt* case.

judicial character in the exercise of its advisory jurisdiction, it must ascertain what are the legal questions really in issue in questions formulated in a request".¹²⁸ The Court then proceeded to "consider its replies to the question formulated in the request on the basis that the true legal question submitted to the Court is: what are the legal principles and rules applicable to the question under which conditions and in accordance with what modalities a transfer of the regional office from Egypt may be effected".¹²⁹

In the *Application for Review of Judgment No. 273 of the United Nations Administrative Tribunal* case (1982),¹³⁰ the ICJ reformulated the question put by the Committee. It noted that the Committee adopted exactly the question formulated by the USA in its application to the Committee. The Court found that the question put to it was, on the face of it, infelicitously expressed and vague. It also found that the records and the report of the Committee cast some doubts on whether the question as framed really corresponded to the intentions of the Committee in seizing the Court. In the light of this conclusion, the Court interpreted and reformulated the question put to it in order to answer the question referred to it by the Committee.¹³¹

The Court's practice in this regard has been criticised by some lawyers and regarded as undesirable.¹³² This criticism is based on the fact that this practice might make it difficult for the Court to answer the question intended to be put. This view was pronounced by the UK Government in 1951, when it asked the GA to consider the methods and procedures for dealing with the drafting of the questions. The UK noted that it is undesirable for the Court to be obliged to determine what a request means before it is able to answer, from both the point of view of the Court and the point of view of the GA, which must be in a position to ensure that the question answered by the Court is, in fact, the question that the Assembly wants the Court to address. Therefore, the UK concluded that "it can only be done by careful and considered drafting ... in the case of questions of a legal character ... it would, of

¹²⁸ ICJ Rep., 1980, p. 88.

¹²⁹ ICJ Rep., 1980, p. 89.

¹³⁰ Hereinafter the *Mortished* case.

¹³¹ ICJ Rep., 1982, pp. 348 ff.

¹³² Rosenne, *supra* note 14, p. 695.

course, be for the Assembly to determine whether the final version of the question corresponded to its intention”.¹³³

Although it is desirable that the requesting organ should produce a sufficiently precise formulation of the question to ensure that the advisory opinion provides the necessary clarification, this does not deprive the ICJ as a judicial organ from establishing the object for which the question was put, or from establishing an interpretation of the question itself.¹³⁴

Before leaving this point, an important question should be clarified: can the Court, when reformulating a question, go beyond the scope of the request interpreted in its ordinary sense? It might be argued that the Court enjoys such a power on the basis that it is necessary to enable it to be in a position to reply to the request. However, it will be hard to accept such an argument in the light of PCIJ’s dictum in the *Greece-Turkish Agreement* of 1926, where it stated that “[i]t is essential that it should determine what this question is and formulate an exact statement of it, in order more particularly to avoid dealing with points of law upon which it was not the intention of the Council or the Commission to obtain its opinion”.¹³⁵ Accordingly, regardless of the scope of interpretation, the Court is limited by the basic elements of the question.

3.4. The subject-matter of the request

Pursuant to Art. 96 of the Charter and Art. 65 of the Statute, the requesting organ may ask only a “legal question”. The study will deal with the scope of the term “legal question”, and the distinction between legal and other questions.

¹³³ GAOR, 6th Sess., Annexes, 63, 1951, p. 2 (A/1929). See GAOR, 6th Sess., 1951, pp. 26-63 for the discussion which culminated in Res. 597 (VI), 20 December 1951.

¹³⁴ In this regard, Judge Read observed that the Court has invariably resorted to a liberal interpretation of the question when there is a possible discrepancy between the question as framed and the actual legal question as developed in the written and oral proceedings. ICJ Rep., 1956, p. 148.

¹³⁵ PCIJ, Ser. B, No. 16, 1928, p. 14.

3.4.1. The scope of the term “legal question”

Pursuant to Art. 14 of the Covenant of the League, the scope of a request for an advisory opinion was related to “any legal dispute or question”.¹³⁶ In accordance with this article, the PCIJ dealt with some requests for advisory opinions related to international disputes which were before the Council of the League¹³⁷ (for instance, the *Tunisia and Morocco Nationality Decrees* case between France and the UK,¹³⁸ and *Danube Commission* case between France, Italy, and the UK v. Rumania.)¹³⁹

Unlike the provision of Art. 14 of the Covenant, Art. 96 of the UN Charter and Art. 65/1 of the ICJ’s Statute authorises the UN organs and its specialised agencies to request advisory opinions only on a “legal question”. This new draft does not appear to have been discussed in any stage of the *travaux préparatoires*. Therefore, the reason for the new draft is not apparent.¹⁴⁰ Consequently, it can be asked whether the omission of the term “dispute” from Art. 96 of the Charter and Art. 65 of the Statute represents a limitation on requests for advisory opinions to only legal questions and excludes legal disputes. The opinion that the new draft excludes the possibility of requesting advisory opinions related to international disputes relies on the omission of the term “dispute” in Art. 96 of the UN Charter and Art. 65/1 of the Court’s Statute.¹⁴¹ According to this view, the phrase “any dispute or question” in Art. 14 of the Covenant offered an indirect method for settling international disputes without having the authority of a judgment and without obtaining the consent of the

¹³⁶ This provision was confirmed by Art. 82 of the PCIJ’s Rules adopted in 1936. It provides that, “in proceeding in regard to advisory opinions, the Court shall, in addition to the provisions of chapter IV of the Statute of the Court, apply the provisions of the article hereinafter set out. It shall also be guided by the provisions of the present Rules which apply in contentious cases to the extent to which it recognises them to be applicable, according as the advisory opinion for which the Court is asked relates, in the terms of Article 14 of the Covenant of the League of Nations, to a ‘dispute’ or to a ‘question’.” See Hudson, *supra* note 1, pp. 494-8.

¹³⁷ The PCIJ defined the term “dispute” as “a disagreement on point of law or fact, a conflict of legal views or of interests between two persons”. PCIJ, Ser. A., No. 2, 1923, p. 11.

¹³⁸ PCIJ, Ser. B., No. 1, 1923.

¹³⁹ PCIJ, Ser. B., No. 14, 1927.

¹⁴⁰ Pratap, *supra* note 2, p. 42.

¹⁴¹ Judge Azevedo observed in the *Peace Treaties* case that: “[a] mere comparison of the texts of the Covenant and the Charter suffices at once to reveal the restrictions which were placed on the Court’s advisory function.” ICJ Rep., 1950, p. 82. Similarly, Diss. Op. of Judge Krylov in the above case, pp. 106 *ff*.

interested parties, and, in order to forestall such consequences, the drafters of the Charter and the Statute limited the power of request to a “legal question” only. The advocates of this view referred also to the ICJ’s opinion in the *Peace Treaties* case, where the ICJ referred to this difference between the wording of Art. 14 of the League’s Covenant on the one hand, and the wording of Art. 96 of the Charter and Art. 65 of the Statute on the other hand, which places an explicit restriction upon the advisory jurisdiction of the ICJ.

The above view does not seem to be a persuasive one and it can be argued that the omission of the word “dispute” is without significance. The wording “legal question” is broad enough to include legal issues in dispute before the organs.¹⁴² There was no intention in the *travaux préparatoires* of the Statute to preclude the requesting organ from asking any question related to an international dispute. In addition, the conclusion that the new draft is restricted to legal questions seems inconsistent with the meaning of Art. 68 of the Statute, which provides that the Court, in exercising its advisory opinion, shall further be guided by the provisions which apply in contentious cases “to the extent to which it recognises them to be applicable”, and also Art. 102/2 of the Court’s Rules, which provides that “for this purpose it shall above all consider whether the request for the advisory opinion relates to a legal question actually pending between two or more states”. This led Judge Winiarski to note that the powers and duties of the Court in connection with its advisory functions have remained substantially the same as those of the Permanent Court.¹⁴³ Furthermore, Art. 102/3 provides that, if an opinion is requested in respect of a legal question actually pending between states, then Art. 31 of the Statute - which relates to judges *ad hoc* - should apply.¹⁴⁴ Moreover, the

¹⁴² Hambro, *supra* note 79, pp. 191-2; Sloan, *supra* note 37, p. 840; Philipe, K., *Advisory Opinions and the Jurisprudence of the International Court of Justice*, M.Phil. Thesis (University of London), 1970, pp. 78-80; Singh, N., *The Role and Record of the International Court of Justice*, 1989, p. 93; Diss. Op. of Judge Winiarski in the *Peace Treaties* case, ICJ Rep., 1950, pp. 91-2; Sugihara, T., “The Advisory Function of the International Court of Justice”, *JAIL*, 17, 1973, p. 50; Pratap, *supra* note 2, p. 89; Diss. Op. of Judge Zoricic in the *Peace Treaties* case, ICJ Rep., 1951, p. 100; Olivares, G., *Les Avis Consultatifs de la Cour de la Haye, Evolution et Aspects Récents - Analyse Doctrinale et Jurisprudentielle*, 1992, pp. 29, 40; Szasz, *supra* note 53, pp. 499 ff.

¹⁴³ ICJ Rep., 1950, p. 91.

¹⁴⁴ Art. 102/3 of the Court’s Rules.

Court's opinion in the *Peace Treaties* and *Reservations* cases upheld this view. In both cases the Court rendered the requested question despite the allegation that the Court was not competent to deal with the request because it was related to a dispute and the litigant states had not consented.¹⁴⁵

Finally, the dictum of the ICJ in the *Western Sahara* case affirms this view. This case was referred by the GA for an advisory opinion in respect of the legal status of the Western Sahara. Morocco requested the Court to appoint an *ad hoc* judge pursuant to Art. 31 of the Statute and Art. 89 of the Court's Rules of 1972,¹⁴⁶ on the ground that the Assembly's request related to a legal question actually pending between Spain on the one hand and Morocco as well as other states on the other hand, and also that the Court included upon the bench a judge of Spanish nationality.¹⁴⁷ Having heard the observations on this matter, and decided the nature of the question as a legal question actually pending between two or more states, the ICJ entitled Morocco to choose a person to sit as judge *ad hoc* in that case pursuant to Arts. 31 and 68 of the Statute and Art. 89 of its Rules.¹⁴⁸ Accordingly, it seems clear that the ICJ recognised the power of the GA to request an advisory opinion relating to inter-states disputes.

To conclude, it would appear that the omission of the word "dispute" in Art. 96 of the Charter and Art. 65 of the Statute does not affect the power of UN organs to request advisory opinions of the Court in respect of any inter-state dispute as long as the question is legal in nature.

3.4.2. Legal questions and other questions

Since it has been concluded that the main issue is the legality of the question, it seems appropriate to indicate the real extent of this term, namely whether it can

¹⁴⁵ Keith, *supra* note 1, pp. 81-2.

¹⁴⁶ Currently Art. 102/3 of the Court's Rules.

¹⁴⁷ The same request was submitted by Mauritania. See ICJ Rep., 1975, pp. 7-8.

¹⁴⁸ Although the Court accepted Morocco's request to nominate a judge *ad hoc* in this case, it dismissed a similar request by Mauritania on the basis that there was no adversarial relation between it and Spain. ICJ Rep., 1975, pp. 7-8. Okere, B., "The Western Sahara Case", *ICLQ*, 28, 1979, pp. 299-301; Wooldridge, F., "The Advisory Opinion of the International Court of Justice in the Western Sahara Case", *AALR*, 8, 1979, pp. 91-2.

relate to a political question, a question with political motivations or aspects, or a question of fact.

(i) Legal and political questions

Since the ICJ is a legal organ, it is a well-established principle that the organs and agencies of the UN cannot request opinions on purely political questions, which should be settled by political means. This principle is based on the fact that no great value could be achieved by trying to solve these questions by legal procedures.¹⁴⁹ And even if an organ did make such a request, the Court has no jurisdiction to reply and it should decline to give an opinion.¹⁵⁰ The Court made it clear that a question is considered to be a legal one if it is by its nature susceptible of a reply based on law. It seems to be necessary for the organs and agencies of the UN to obtain opinions from the ICJ as to the legal principles to be applied to issues before them. This was confirmed by the Court on several occasions; for instance, the *Admission* case (1948),¹⁵¹ the *Competence of the General Assembly for the Admission of a State to the United Nations* case (1950),¹⁵² the *Peace Treaties* case (1950),¹⁵³ the *Western Sahara* case (1975),¹⁵⁴ the *WHO and Egypt* case (1980),¹⁵⁵ the *Legality of the Use by a State of Nuclear Weapons in Armed Conflict* case (1996),¹⁵⁶ and, finally, in the

¹⁴⁹ Hambro, E., "The Authority of the Advisory Opinions of the International Court of Justice", *ICLQ*, 3, 1954, p. 19; Elias, T., *The International Court of Justice and Some Contemporary Problems*, 1983, p. 26; Elias, T., *The United Nations and the World Court*, 1989, p. 80; Greig, D., "The Advisory Jurisdiction of the International Court and the Settlement of Disputes Between States", *ICLQ*, 15, 1966, pp. 339-45.

¹⁵⁰ In the *Expenses* case, the Court stated: "[t]he Court can give an advisory opinion only on a legal question. If a question is not a legal one, the Court has no discretion in the matter; it must decline to give the opinion requested." ICJ Rep., 1962, p. 155. Rosenne also noted that the concept of a "legal question" applicable for a political organ is not necessarily the same as the concept of a legal question applicable for the Court - that the words "legal question" of Art. 96 of the Charter may not always carry the same implication as in Art. 65 of the Statute. See Rosenne, *supra* note 16, pp. 702-3; Elias (1983), *supra* note 149, p. 26; Elias (1989), *supra* note 149, p. 80; Greig, *supra* note 149, pp. 339-45.

¹⁵¹ ICJ Rep., 1948, pp. 61 ff.

¹⁵² ICJ Rep., 1950, pp. 6 ff. (hereinafter the *Second Admission* case).

¹⁵³ ICJ Rep., 1950, pp. 65 ff.

¹⁵⁴ ICJ Rep., 1975, pp. 18 ff.

¹⁵⁵ ICJ Rep., 1980, pp. 88 ff.

¹⁵⁶ ICJ Rep., 1996, pp. 7-8 (unpublished).

Legality of the Threat or Use of Nuclear Weapons case (1996).¹⁵⁷ In all of these cases, the Court clarified that the question would have a legal character if it was framed in terms of law and raised problems of international law or was related to a breach of obligations under international law even if it had political aspects. Therefore, if the Court identifies that a question is decided in accordance with the rules of law it has to consider such a question as a legal one.¹⁵⁸

(ii) The political implications or motives of the question

In many cases, the most stringent objection to the request for advisory opinions is that the question is not characterised as a “legal” one because it is based on political motives. This issue was dealt with by the ICJ as early as 1948, in the *Admission* case. In this case, the ICJ dismissed the argument that it should decline to give an answer to this question because there were “political motives and considerations and criteria which have guided many [United Nations] representatives in the discussion and voting on the admission of new Members to the United Nations”.¹⁵⁹ The Court observed that it was not concerned with any allegedly political motives that might have inspired the request for an advisory opinion by the GA. It also noted that the question before it involved the interpretation of a treaty provision and consequently it was a legal question.¹⁶⁰ This dictum was confirmed by the Court in the *Expenses* case,¹⁶¹ as well as in the *WHO and Egypt* case, where it stated:

“That jurisprudence [the settled jurisprudence of the court] establishes that if, as in the present case, a question submitted in a request is one that otherwise falls within the normal exercise of its judicial process, the Court has not to deal with the motives which have inspired the request.”¹⁶²

¹⁵⁷ ICJ Rep., 1996, p. 9 (unpublished).

¹⁵⁸ See Fitzmaurice, who observed that “if the question put [to the Court] is in itself a legal question, ... the fact that it has a political element is irrelevant”. Fitzmaurice, G., *The Law and Procedure of the International Court of Justice*, vol. 1, 1986, p. 116. The distinction between legal and political questions in the eyes of international lawyers will recur later in this study. See pp. 188 ff. below.

¹⁵⁹ ICJ Pled., 1947, p. 105.

¹⁶⁰ ICJ Rep., 1948, pp. 61-2; Penegar, K., “Relationship of the Advisory Opinions of the International Court of Justice to the Maintenance of World Minimum Order”, *UPLR*, 113, 1965, p. 544.

¹⁶¹ ICJ Rep., 1962, p. 155.

¹⁶² ICJ Rep., 1980, p. 87. In this case, see the Sep. Op. of Judge El-Erian, p. 95.

Recently, in the *Legality of the Use by a State of Nuclear Weapons in Armed Conflict* case (1996) and in the *Legality of the Threat or Use of Nuclear Weapons* case (1996), the Court has affirmed its jurisprudence in this regard. It stated that the political aspect of the question “does not suffice to deprive it of its character as a ‘legal question’ and ‘to deprive the Court of a competence expressly conferred on it by its Statute’”. In addition, the Court found that the political nature of the motives which may be said to have inspired the request and the political implications that the opinion given might have “are of no relevance in the establishment of its jurisdiction to give such an opinion”.¹⁶³

Thus, it is not for the Court to delve into the motivation that leads a duly authorised organ to request an advisory opinion on a legal question falling within the jurisdiction of that organ even when that question relates to an issue that involves important political facts or is itself essentially political.¹⁶⁴

(iii) Legal questions and questions of fact

The issue here is whether the ICJ can give an opinion on questions that embody factual elements or basis. It has been noted that the requesting organs, *inter alia* the GA and the SC, cannot request advisory opinions in respect of any question that primarily involves a determination of facts.¹⁶⁵ This opinion is based on the dictum of the PCIJ in the *Eastern Carelia* case, where it concluded:

“The Court does not say that there is an absolute rule that the request for an advisory opinion may not involve some enquiry as to facts, but, under ordinary circumstances, it is certainly expedient that the facts upon which the opinion of the Court is desired should not be in controversy, and it should not be left to the Court itself to ascertain what they are.”¹⁶⁶

¹⁶³ ICJ Rep., 1996 (WHO request), p. 8 (unpublished); ICJ Rep., 1996, p. 9 (unpublished).

¹⁶⁴ In their dissenting opinion in the *Nuclear Tests (New Zealand v. France)* case, Judges Onyeama, Dillard, de Aréchaga and Waldock noted that: “[f]ew indeed would be the cases justiciable before the Court if a legal dispute were to be regarded as deprived of its legal character by reason of one or both parties being also influenced by political considerations. Neither in contentious cases nor in requests for advisory opinions has the Permanent Court or this Court ever at any time admitted the idea that an intrinsically legal issue could lose its legal character by reason of political considerations surrounding it.” ICJ Rep., 1974, p. 518.

¹⁶⁵ Sloan, *supra* note 37, pp. 841-2.

¹⁶⁶ PCIJ Ser. B., No. 5, 1923, p. 28.

The practice of the ICJ in many cases has gone against the above opinion. In the *Admission* case, the Court's advisory jurisdiction was contended on the basis of the question's lack of legal character,¹⁶⁷ because it was essentially related to a political disagreement among UN members. In its reply, the Court concluded that the question was mainly related to interpretation of the treaty's provisions, which was considered a legal question. In the *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South-West Africa) Notwithstanding Security Council Resolution 276* case (1970),¹⁶⁸ the Court's jurisdiction was contended on the basis of the non-legality of the question because it was related to factual elements. The Court concluded that the reference in Art. 96 to a "legal question" cannot be interpreted as opposing legal to factual issues, and, normally, "to enable a Court to pronounce on legal questions, it must also be acquainted with, take into account and, if necessary, make findings as to the relevant factual issues".¹⁶⁹ In other words, the factual elements of a question do not alter its character as a legal question. Finally, in the *Western Sahara* case,¹⁷⁰ the Court dismissed Spain's objection that, according to Art. 96/1 of the UN Charter and Art. 65/1 of the Court's Statute, the Court had to decline to give an opinion because the requested question had a factual character. The Court pointed out that, although some facts might have to be determined, it could answer the question posed by the GA because it was legal.¹⁷¹ It noted that there is nothing in the Charter or in the Statute limiting the competence of the GA to request advisory opinions or the competence of the Court to give opinions in respect of a legal question on the basis that there are some factual elements in the question as long as the question is

¹⁶⁷ ICJ Rep., 1948, p. 61.

¹⁶⁸ Hereinafter the *Namibia* case.

¹⁶⁹ ICJ Rep., 1971, p. 27.

¹⁷⁰ In this case the GA requested the Court to give an opinion concerning the two following questions: "(i) Was Western Sahara (Rio de Oro and Sakeit El Hamra) at the time of colonisation by Spain a territory belonging to no one (Terra Nullius). If the answer to the question is in the negative, (ii) What were the legal ties between this territory and Kingdom of Morocco and the Mauritania entity?" ICJ Rep., 1975, p. 14. With regard to this case, see Janis, M., "The International Court of Justice: Advisory Opinion on the Western Sahara", *HILJ*, 17, 1976, pp. 609 ff.; Riedel, E., "Confrontation in Western Sahara in the Light of the Advisory Opinions of the International Court of Justice of 16 October 1975: A Critical Appraisal", *GYIL*, 19, 1976, pp. 405 ff.; Shaw, M., "The Western Sahara Case", *BYIL*, 49, 1978, pp. 121 ff.

legal as deemed by the Court. It also observed that “a mixed question of law and fact is nonetheless a legal question”¹⁷² within the meaning of Art. 96 of the Charter and Art. 65 of the Statute. Moreover, the Court pointed out that the adoption of the Spanish view would limit the scope of the ICJ’s advisory jurisdiction.¹⁷³

3.4.3. Abstract questions

A related point to the determination of the term “legal question” is whether the requesting organ may ask a question that does not fall within the context of a concrete legal or factual situation involving a specific issue, or whether this question should be related to some definite issue or circumstance. Some lawyers have noted that the UN organs and agencies may ask abstract questions not directly related to a specific dispute.¹⁷⁴ This view is based on the practice of the ICJ where it gave opinions related to abstract questions. For example, in the *Reparation* case, the abstractness of the question was mentioned in the pleadings before the Court.¹⁷⁵ Rosenne noted that the Court treated the question in an abstract fashion, without making any specific comment on the fact.¹⁷⁶ In the *Admission* case, the Court stated that: “[i]t has also been contended that the Court should not deal with a question couched in abstract terms. That is a mere definition devoid of any justification. According to Article 96 of the Charter and Article 65 of the Statute, the Court may give an advisory opinion on any legal question, abstract or otherwise.” In addition, the Court held that it is its “duty ... to envisage the question submitted to it only in the abstract form which has been given to it”.¹⁷⁷ This dictum was reiterated in the

¹⁷¹ ICJ Rep., 1975, p. 19.

¹⁷² Ibid.

¹⁷³ Ibid., pp. 19-20. Similarly, see the ICJ’s opinions in the *Application for Review of Judgment No. 158 of the United Nations Administrative Tribunal* case, ICJ Rep., 1973, p. 172; and its opinion in the *Application for Review of Judgment No. 333 of the United Nations Administrative Tribunal* case, ICJ Rep., 1987, pp. 29 ff.

¹⁷⁴ Sloan, *supra* note 37, p. 841. In this regard Judge Azevedo pointed out that “it is quite fitting for an advisory body to give an answer in *abstracto* which may eventually be applied to several *de facto* situations: *minima circumstantia facti magnam diversitatem juris*.” Sep. Op. of Judge Azevedo, ICJ Rep., 1948, p. 74.

¹⁷⁵ ICJ Pled., 1948, pp. 24, 62, 64.

¹⁷⁶ Rosenne, S., “The Advisory Competence of the International Court of Justice”, *RDISDP*, 1, 1952, p. 20.

¹⁷⁷ ICJ Rep., 1948, p. 61.

Reservations case.¹⁷⁸ Recently, in the *Legality of the Threat or Use of Nuclear Weapons* case, the Court refused to accept the argument of some states that the Assembly's request was vague and abstract and the consequent argument that there existed no specific dispute on the subject-matter of the question. The Court stated that: "it is necessary to distinguish between requirements governing contentious procedure and those applicable to advisory opinions. The purpose of the advisory function is ... to offer legal advice to the organs and institutions requesting the opinion. The fact that the question put to the Court does not relate to a specific dispute should consequently not lead the Court to decline to give the opinion requested."¹⁷⁹ The Court also noted that "it is the clear position of the Court that to contend that it should not deal with a question couched in abstract terms is 'a mere affirmation devoid of any justification' and that 'the Court may give an advisory opinion on any legal questions abstract or otherwise'"¹⁸⁰

In the light of the above it seems clear that the Court has adopted a broad interpretation of the term "legal question" in which it can be extended to abstract and theoretical questions by declaring that this does not prevent the question from being legal in character. The Court's attitude in this regard might help to increase its role as an adviser, which will have an effect on the progressive development of international law and the law of the UN.

3.4.4. Legal questions related to disputes actually pending between states

When the GA and the SC request advisory opinions relating to a legal question within the constitutional or organisational framework, there is no need for the consent of the member states of the UN. But since it became an established principle that the GA and the SC could request advisory opinions relating to inter-state disputes, it is possible for a state to propose a draft resolution in these two organs containing a question to be put to the ICJ for an opinion, and this question may directly relate to a situation or dispute between states. It is of interest here to note to what extent the consent of litigant states is necessary for the advisory

¹⁷⁸ ICJ Rep., 1951, p. 21.

¹⁷⁹ ICJ Rep., 1996, pp. 10-11 (unpublished).

¹⁸⁰ Ibid., p. 11 (unpublished).

proceedings. The importance of this point derives from the fact that the Court has no compulsory jurisdiction over states without their prior consent, and therefore no state can be compelled - without its consent - to submit its dispute with another state to international tribunals.¹⁸¹

Neither the Charter nor the Statute has offered an answer to this question. It has been noted by some lawyers that the GA and the SC cannot request advisory opinions from the ICJ concerning an international dispute without the consent of the disputant states, and the absence of this consent constitutes a condition that the Court cannot overlook.¹⁸² This view is justified on the basis that allowing UN organs to request an opinion relating to an international dispute without the consent of the litigant states means abolishing a well-established principle, namely, the necessity of the consent of the litigant states to refer their disputes to international adjudication. They also refer to Art. 68 of the Statute, which provides that when the Court exercises its advisory jurisdiction it shall be guided by the provisions that govern contentious cases, and Art. 31 of the Statute applies in respect of advisory jurisdiction. Moreover, the consent of the parties is a necessary condition because the compulsory jurisdiction of the Court had been rejected. According to this view, allowing requests for an opinion without the consent of the states involved would mean introducing compulsory jurisdiction to the Court by the back door under the guise of advisory opinions, contrary to the Charter.¹⁸³ In addition, advocates of this view referred to the PCIJ's precedent in the *Eastern Carelia* case, where it observed, *inter alia*, that the question posed to it directly concerned the main point of the dispute between Finland and Russia and its reply to that question would be equivalent to its judgment.¹⁸⁴ Consequently, the PCIJ concluded that, according to

¹⁸¹ See p. 170 *ff.* below.

¹⁸² Hudson, M., *International Tribunals; Past and Future*, 1944, p. 69; Rosenne, *supra* note 16, vol. 2, p. 709; Simpson, L., et al., *International Arbitration - Law and Practice*, 1959, p. 274; Anand, R., *Compulsory Jurisdiction of the International Court of Justice*, 1961, pp. 277-8; Diss. Op. of Judge Krylov in *Peace Treaties* case, ICJ Rep., 1950, pp. 106-7. In addition, Judge Singh stressed in his address at the commemoration of the fortieth anniversary of the Court in 1986 that the "the Court is dependent upon the consent of States for the exercise not only of its contentious but also of its advisory jurisdiction". ICJYB, 1985-6, No. 40, p. 178.

¹⁸³ Diss. Op. of Judge Winiarski, ICJ Rep., 1950, pp. 90-6.

¹⁸⁴ The *Eastern Carelia* case grew out of a dispute between Finland, a member of the League, and the Soviet Union, a non-member of the League. Arts. 12 to 16 of the Covenant laid

the rules that governed its activities as an international court, it could not give an advisory opinion so long as there was no consent given by Russia.

This view must be examined in the light of several factors.¹⁸⁵ First, it should be considered that the Court's advisory jurisdiction does not settle disputes, but it assists the requesting organ to reach a solution or adopt a resolution. Second, there was no intention in the *travaux préparatoires* to restrict the Court's advisory jurisdiction to purely non-contentious situations. Third, if the consent of litigant states is a required condition, this means that these states can hinder the interested organ from requesting an opinion from the ICJ and this would impede the work of this organ. Fourth, as Lauterpacht rightly noted, the members of the UN, by giving the Court the general power to render advisory opinions, agreed to its advisory jurisdiction on any legal question whether it involved their interests or not. In addition, he noted that there seems to be no decisive reason why the sovereignty of states should be protected from the procedure, which they have accepted in advance as members of the UN, of ascertaining the law through a pronouncement that is not

down procedures for the peaceful settlement of disputes between members only. According to these articles, members that were parties to a dispute were required, in the absence of settlement by diplomatic means, arbitration or judicial decisions, to submit the matter to the Council of the League. The Council, according to Art. 17 of the Covenant, had the power to adopt resolutions regarding disputes between member states of the League but not between members and non-members, unless a non-member state accepted the Council's intervention in the case and accepted the obligations of Arts. 12-16 of the Covenant. The *Eastern Carelia* case should be considered in the light of the above facts. The Finnish Government alleged that the Russian Government had failed to carry out its obligations under the peace treaty and under the declaration given by Russia. Accordingly, it sought inscription of its dispute with Russia on the Council's agenda. The Council of the League adopted a resolution regarding its willingness "to consider the question with a view to arriving at a satisfactory conclusion if the two parties concerned agree". On 1 February 1923, the Council was informed that Russia had rejected any invitation, claiming that this issue [Eastern Carelia] was a domestic matter. At the same meeting the Finnish Government suggested seeking an advisory opinion from the PCIJ regarding this matter since it embodied a treaty interpretation. Later on, the Council adopted a resolution by which the matter was referred to the PCIJ for an opinion. Russia denied the PCIJ's competence to deal with this request on the basis that this issue was a domestic issue. See Keith, *supra* note 1, pp. 93-4; PCIJ, Ser. B., No. 5, 1926, pp. 27-9; Lalonde, P., "The Death of the Eastern Carelia Doctrine: Has Compulsory Jurisdiction Arrived in the World Court", *FLRUT*, 37, 1979, pp. 84-5; Gilmore, G., "The International Court of Justice", *YLJ*, 55, 1946, p. 1055; Hudson, M., "Advisory Opinions of National and International Courts", *HLR*, 37, 1924, pp. 995-6.

¹⁸⁵ For more details, see Donner, R., *International Adjudication: Using the International Court of Justice, With a Special Reference to Finland*, 1988, p. 122; Szasz, *supra* note 53, pp. 499 ff.

binding upon them.¹⁸⁶ Fifth, some lawyers also rejected the PCIJ's dictum in the *Eastern Carelia* case as an irrelevant precedent because the organisation of the international community has advanced since the time of this case, so that a non-member of the UN cannot argue its non-membership as a challenge to the advisory jurisdiction of the Court.¹⁸⁷ Finally, the Court's dictum in several cases seems to support this view. It did not consider the consent of the litigant states to be a prerequisite to requesting an opinion from the Court by a UN organ.

The leading case in this respect was the *Peace Treaties* case.¹⁸⁸ In this case, the Court dismissed the contention of Rumania, Hungary and Bulgaria that the Court had no competence to give an opinion because their consents were absent.¹⁸⁹ They based their argument on the precedent of the *Eastern Carelia* case and Arts. 36 and 68 of the Court's Statute. The Court concluded that their contention confused the rules governing the Court's advisory jurisdiction with those governing its contentious jurisdiction. It also concluded that the absence of a state's consent has no effect upon the Court's advisory jurisdiction even when the request for an advisory opinion relates to an inter-state dispute. The Court based its view on the

¹⁸⁶ Lauterpacht, H., *The Development of International Law by the International Court*, 1958, pp. 355-8.

¹⁸⁷ Sloan, *supra* note 37, p. 847. As regards the examination of the PCIJ's jurisprudence in the *Eastern Carelia* case, see pp. 92 *ff.* below. In this regard, Bowett noted that "let us suppose a dispute exists in the following circumstances: (1) the dispute has been characterised by the Security Council as one the continuance of which is likely to endanger international peace and security under Chapter VI of the United Nations Charter. (2) The state, or states, involved have declined the Council's recommendation under article 36(3) that they refer their dispute to the Court. (3) The Council is not itself able to recommend terms of settlement under article 37(2) without guidance from the Court as to the respective legal rights of the parties. In those circumstances, why should *Eastern Carelia* override? Is the principle of consent so paramount that it must be respected, even though there is an incipient threat to peace, and the Council needs the Court's advice to exercise its power under Art. 37(2)?" Bowett, D., "The Court's Role in Relations to International Organisations" in Lowe, V., et al. (eds.), *Fifty Years of the International Court of Justice*, 1996, p. 184.

¹⁸⁸ The facts of this case were related to the disputes procedures established in the peace treaties concluded between Bulgaria, Hungary and Rumania on the one hand, and the Allied and Associated powers on the other. At the request of the Australian and Bolivian Governments the question of the observance of human rights in Hungary and Bulgaria was placed on the agenda of the GA. The special Political Committee of the Assembly decided that invitations be sent to the Governments of the two states, which were not then members of the United Nations, inviting them to participate in the debate without vote. The two governments, however, refused the invitation saying that the United Nations was not competent. Later on, the matter was inscribed on the agenda of the Fourth Session of the GA. The Assembly adopted a resolution requesting an opinion relating to the disputes procedure established by the treaties. Keith, *supra* note 1, p. 112.

¹⁸⁹ ICJ Rep., 1950, pp. 71 *ff.*; ICJ Pled., 1949, pp. 196-7, 203, 204.

nature of its advisory opinion, which has no binding force upon the interested states. Moreover, it pointed out that these opinions are given directly to the requesting organ and not to the states concerned. Finally, it stated that no state, whether a member or a non-member of the UN, can prevent the Court from replying to any request referred to it by a UN organ for whatever reason.¹⁹⁰ This dictum was reiterated in the *Reservations* case where the Court concluded that the principle of the consent of the disputant parties is not relevant to its advisory jurisdiction and confirmed that a reply to a request for an advisory opinion should not be refused according to this challenge.¹⁹¹ The ICJ extensively examined this issue in the *Western Sahara* case. In this case Spain argued that the ICJ was incompetent to deal with the matter because it did not give its consent to the Court, and because both Morocco and Mauritania were using the advisory jurisdiction of the Court to circumvent the principle of consent to adjudication. It also argued that the subject of the questions raised in the request for the advisory opinion was substantially identical to the questions that it had refused to submit to the Court for resolution in contentious proceedings.¹⁹² The ICJ pointed out that in contrast to the *Eastern Carelia* case - where Russia was neither a member of the League nor in the PCIJ's Statute - Spain, as a member of the UN, had accepted the Charter and the Statute, whereby it had in general given prior consent to the exercise by the Court of its advisory jurisdiction.¹⁹³ Moreover, the Court noted that the question was related mainly to the possibility of the application of GA Res. 1514 (XV). Therefore, the Court stated that the aim of this question was to assist the Assembly in fulfilling its

¹⁹⁰ ICJ Rep., 1950, p. 71; Fitzmaurice, G., "The Law and Procedure of the International Court of Justice: International Organisations and Tribunals", *BYIL*, 29, 1952, pp. 42-3. With regard to the Court's opinion in this case, it was noted by Rosenne that "[t]his ... opinion brings out one important factor. Owing to the new organic relation of the Court with the United Nations, the Court is under the duty of participating, within its competence, in the activities of the organisation, and no state can stop this participation." Rosenne, *supra* note 176, p. 30.

¹⁹¹ ICJ Rep., 1951, p. 19.

¹⁹² In this regard, Spain argued that to give a reply to the request for an advisory opinion would "[b]e to allow the advisory procedure to be used as a means of bypassing the consent of a State, which constitutes the basis of the Court's jurisdiction". ICJ Rep., 1975, pp. 22-3; see also Okere, *supra* note 148, pp. 302-4.

¹⁹³ ICJ Rep., 1975, pp. 24 *ff.*

functions, namely the decolonisation of the territories.¹⁹⁴ Further, the Court found that Spain, unlike the Soviet Union in the *Eastern Carelia* case, had actively participated in the advisory opinion proceedings before the Court and “furnished very extensive documentary evidence of the facts”, so that there was no issue of “inadequacy of the evidence”, as in *Eastern Carelia*, operating, “for reasons of judicial propriety”, to prevent the Court from giving an opinion.”¹⁹⁵ In the *Applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations* case, the Court dismissed the Rumanian allegation that the UN could not refer the matter to the ICJ for an advisory opinion without its prior consent.¹⁹⁶ The Court concluded that, since the purpose of its advisory jurisdiction is to guide the UN organs, the consent of the interested states is not a prerequisite for requesting advisory opinions. The Court based its opinion on the non-binding effect of its advisory opinions.¹⁹⁷

It can be concluded that the consent of the litigant states is not considered by the Court to be an appropriate condition for requesting an advisory opinion from the ICJ with regard to inter-state disputes. Accordingly, UN organs may bring any matter relating to an existing dispute between states before the Court for an advisory opinion.

However, does the above dictum mean that the ICJ has abandoned the precedent of the *Eastern Carelia* case decided by its predecessor the PCIJ?¹⁹⁸ It has been noted by some lawyers that the ICJ has abandoned the attitude of its predecessor, the PCIJ, which declined to give an opinion because of the absence of Russia’s consent to the Court’s exercising jurisdiction in the *Eastern Carelia* case.¹⁹⁹

This view cannot be easily accepted and should be reconsidered in the light of the PCIJ’s opinion in that case. It seems clear that the reason given by the PCIJ that

¹⁹⁴ Ibid.

¹⁹⁵ Ibid., p. 28.

¹⁹⁶ ICJ Rep., 1989, p. 188.

¹⁹⁷ Ibid., pp. 188-9.

¹⁹⁸ For the facts of the *Eastern Carelia* case, see note 184.

¹⁹⁹ Pratap, *supra* note 2, pp. 16, 157.

“answering the question would be substantially equivalent to deciding the dispute between the parties” was an additional reason because its opinion was based mainly on the fact that non-participation by Russia in the proceedings before the Court would affect its ability to arrive at a judicial conclusion.²⁰⁰ In addition, the Court seems to have established that its competence to render an opinion depended upon its view of the competence of the Council of the League to consider the dispute because Russia was not then a member of the League of Nations and had not given its consent to the solution of the dispute according to the methods provided for in the Covenant.²⁰¹ The Court found that the submission of a dispute between a state not a member of the League and a member state for solution according to the methods provided for in the Covenant could take place only by virtue of the consent of both states. The Court also found that such consent had never been given by Russia. It can be concluded that the Court’s refusal to reply to the request for an advisory opinion was based on the incompetence of the League of Nations’ Council to deal with the dispute. The Court did not state that it could not give an opinion in the absence of consent by Russia; it stated that it had been asked for an opinion in the context of a dispute settlement procedure which had been improperly set in motion in the absence of the consent of Russia, which was not a member of the League. It should thus be stressed that the Court was not directly discussing its own settlement procedures but was concerned with the Council’s settlement procedures laid down in the Covenant.²⁰² The statement by the PCIJ in this case affirms this conclusion:

“As concerns States not members of the League, the situation is quite different; they are not bound by the Covenant. The submission, therefore, of a dispute between them and a Member of the League for solution according to the methods provided for in the Covenant, could only take place only by virtue of their consent. Such consent, however,

²⁰⁰ In this regard, the PCIJ stated that “[t]he question whether Finland and Russia contracted on the terms of the Declaration as to the nature of the autonomy of Eastern Carelia is really one of fact. To answer it would involve the duty of ascertaining what evidence might throw light upon the contentions which have been put forward on this subject by Finland and Russia respectively, and of securing the attendance of such witnesses as might be necessary.” PCIJ, Ser. B, No. 5, 1923, p. 28.

²⁰¹ Lauterpacht, *supra* note 186, p. 356, n. 50; Lalonde, *supra* note 184, p. 83; Koray, *supra* note 2, p. 368; Olivares, *supra* note 142, p. 44.

²⁰² Keith, *supra* note 1, p. 94; Singh, *supra* note 142, pp. 88-9.

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has never been given by Russia ... The Court therefore finds it impossible to give its opinion on a dispute of this kind.”²⁰³

This means that the real reasons behind the Court’s refusal to give an advisory opinion were the following: (i) Russia’s refusal to give the Court the necessary documents; (ii) the lack of consent of one state, which rendered the Council incompetent and the request invalid and thus, indirectly, affected the competence of the Court. Therefore, the Court found that if it acted and gave an opinion this would be an *ultra vires* act. This conclusion was affirmed by the ICJ in the *Namibia* case, where it dismissed South Africa’s contention that, on the basis of the precedent of *Eastern Carelia*, it did not give its consent because the question was related to the actual dispute between South Africa and the other states. The ICJ held that, in the *Eastern Carelia* case, one of the states concerned was not a member of the League and did not appear before the Court. But in this case South Africa was a member of the UN and consequently was bound by Art. 96 of the Charter; moreover, it had participated throughout in any “dispute” over South West Africa.²⁰⁴ This dictum was reiterated in the *Western Sahara* case, where the Court stressed that in the *Eastern Carelia* case one party was neither a member of the League nor a party to the Court’s Statute,²⁰⁵ and therefore Russia was not bound by any of the methods of peaceful settlement provided for in the Covenant, to which it did not give express consent.

To conclude, it seems clear that the ICJ establishes that, if a question submitted in a request falls within the normal exercise of its judicial task, the Court does not have to deal with the motives which may have inspired the request.²⁰⁶ It also seems clear that the Court is the only organ that can decide whether a question is legal or not. The Court has not adopted a restrictive interpretation of the term “any legal question” incorporated in Art. 96 of the Charter and Art. 65 of the Statute; on the

²⁰³ PCIJ, Ser. B., No. 5, 1923, pp. 27-8.

²⁰⁴ ICJ Rep., 1971, pp. 23-4.

²⁰⁵ ICJ Rep., 1975, pp. 22 ff.

²⁰⁶ Elias, T., “How The International Court of Justice Deals with Requests for Advisory Opinion” in Makarczyk, J. (ed.), *Essays in International Law in Honour of Judge Manfred Lachs*, 1984, p. 373; Elian, *supra* note 35, pp. 80-1.

contrary, it has adopted a comprehensive concept of this term. It has concluded that it has no concern with the motives or the considerations that inspire the GA or the SC when they request its opinion. Nor does it consider the factual elements of a question to be an obstacle to the request for an advisory opinion by these organs so long as the question is a legal one.

4. The obligation to request advisory opinions from the ICJ

Because the UN Charter and the Court's Statute authorises the UN organs and its specialised agencies to request advisory opinions from the ICJ on any legal question, the question arises whether they are obliged to do so when they deal with a matter with a legal dimension.

From the outset, it should be noted that, under some international treaties concluded between the UN and other states or organisations, the UN is obliged to request an advisory opinion when any dispute regarding these treaties arises. For instance, the GA has to request an advisory opinion from the ICJ concerning any legal question that may arise in respect of the Immunities and Privileges of the United Nations Convention²⁰⁷ and the Headquarters Agreement between the United Nations and the United States of America.²⁰⁸ Since the obligation in these cases is derived from these agreements, the question remains unsettled in the case of the absence of such provision.

In the light of the silence of the Charter and the Statute it has been noted that UN organs are obliged to request advisory opinions from the ICJ with regard to any

²⁰⁷ Art. VIII in Section 30 provides: "[a]ll differences arising out of the interpretation or application of the present Convention shall be referred to the International Court of Justice, unless in any case it is agreed by the parties to have recourse to another mode of settlement. If a difference arises between the United Nations on the one hand and a Member on the other hand, a request shall be made for an advisory opinion on any legal question involved in accordance with Article 96 of the Charter and Article 65 of the Statute of the Court. The opinion given by the Court shall be accepted as decisive by the parties."

²⁰⁸ Art. VIII of Section 21 provides:
"(b) The Secretary-General or the United States may ask the GA to request of the International Court of Justice an advisory opinion on any legal question arising in the course of such proceeding. Pending the receipt of the opinion of the Court, an interim decision of the arbitral tribunal shall render a final decision, having regard to the opinion of the Court."

legal question arising before them, so long as the required conditions exist.²⁰⁹ This opinion is based on the view that the words “may request” in this context confer not a discretionary power but a mandatory power; that is, in some systems of law such as the Roman-Civil and the Anglo-American systems, the word “may” has been held to mean “shall” when used in connection with an act by an officer in the furtherance of justice.

This view has rightly been rejected by the majority of international lawyers, who have found that these organs are not bound to request an advisory opinion from the ICJ because this power was expressly provided to them as a faculty.²¹⁰ Therefore, these organs may - at their discretion - request advisory opinions of the Court on any legal question that may arise in the performance of their functions. This is based on the permissive wording of paras. 1 and 2 of Art. 96 of the Charter, which indicate that the GA and the SC and the other organs and specialised agencies “may”, and not “shall”, request advisory opinions of the ICJ.²¹¹ This is confirmed by the wording of Art. VIII, Section 30, of the Convention on the Immunities and Privileges of the United Nations, where the drafters used the term “shall”, which leaves the interested organs no discretion to request advisory opinions from the Court. In addition, the practice of the GA when it dealt with the issue of the “Treatment of Indians in the Union of South Africa” left no doubt in this respect. It rejected the claim of South Africa that it had the right to go to the Court for an opinion, and that the GA had a clear duty to assist it in securing such an opinion.²¹²

In the light of the above it can be concluded that, unless there is an explicit obligation upon the UN organ to request an opinion from the Court, these organs

²⁰⁹ Kelsen, *supra* note 9, pp. 264-5. Whele, L., “The United Nations By-passes the International Court as the Council’s Adviser; A Study in Contrived Frustration”, *UPLR*, 98, 1949-50, p. 291; El-Goneme, M., *International Organisations*, 1974, p. 297; Abd El-Wanise, A., *The Development of the Economic and Social Council*, 1981, p. 198.

²¹⁰ Abi-Saab, G., *Les Exceptions Préliminaires dans la Procédure de la Cour Internationale*, 1967, p. 73; Elian, *supra* note 35, p. 78; Elias, 1989, *supra* note 149, p. 126; Dubisson, *supra* note 28, p. 286; Pratap, *supra* note 2, pp. 51, 137-8; Brownlie, *supra* note 2, p. 699; Conforti, B., *The Law and Practice of the United Nations*, 1996, pp. 9, 261.

²¹¹ In respect of the difference of meaning between the term “may” and the term “shall” see Kelsen, *supra* note 9, pp. 264-5.

²¹² Repertory of the Practice of the Organs of the UN, p. 46 (cited in Pratap, *supra* note 2, p. 59).

and agencies are the ultimate authority to evaluate the appropriateness and usefulness of the requested opinion for their current and future work. If one of these organs or agencies decides to request an opinion, it is not for the Court to decide in place of that organ on the desirability or the appropriateness of the request or to overrule it when the requesting organ has already considered it desirable.

5. Is the ICJ under any obligation to give opinions?

Having explained the discretion of the UN organs and specialised agencies in requesting advisory opinions from the ICJ, the study now turns to discuss the discretion of the ICJ to give advisory opinions to requesting organs. From the outset, it is appropriate to note that discussion of this matter presupposes that all the required conditions stipulated in the Charter and the Statute are fulfilled by the requesting organ. If the Court finds that any of these conditions are not fulfilled, the Court has no discretion and has to decline to give the requested opinion on the ground of the absence of this condition. For instance, if the question involved in the request does not come within the scope of the activities of the organ or agency requesting an advisory opinion or the question is purely political and devoid of legal element, then the Court lacks jurisdiction and the question of the exercise of its discretionary power does not arise.²¹³ This was confirmed by the ICJ in the *Expenses* case, where it stated that “if a question is not a legal one, the Court has no discretion in the matter; it must decline to give the opinion requested”.²¹⁴ In addition, in the *Status of South-West Africa* case the Court concluded that “it is not for the Court to pronounce on the political or moral duties”.²¹⁵ But, supposing that all the prerequisites are fulfilled, is the ICJ obliged to answer requests put to it? Before dealing with this question, an important point should be addressed regarding the Court’s power to decide its own jurisdiction.

²¹³ In this regard Bowett noted that “[i]t would seem that when the Court is satisfied that the question posed is not a ‘legal question’, or is *ultra vires* the requesting organ (because unrelated to the scope of its activities), the Court is bound to refuse to give an opinion”. Bowett, *supra* note 187, p. 186.

²¹⁴ ICJ Rep., 1962, p. 155.

²¹⁵ ICJ Rep., 1950, p. 140.

5.1. The power of the Court to decide upon its own jurisdiction

It is a well-established principle that the ICJ, like any other international tribunal, has the right to determine its own jurisdiction (its *Compétence de la Compétence*) not only in contentious proceedings but also in its advisory jurisdiction.²¹⁶ This principle was considered by international lawyers to be a necessary condition for the proper functioning of international courts.²¹⁷ The application of this principle to the Court's advisory jurisdiction finds its basis in Art. 68 of the Court's Statute, which provides that the Court is guided in advisory cases by those provisions of the Statute that apply in contentious proceedings, to the extent to which it recognises them to be applicable. According to this principle, the ICJ may examine its jurisdiction *ex officio, proprio motu*.

In practice, the ICJ has referred to this principle in several cases. For instance, in the *Peace Treaties* case, the Court stated that it is the proper forum before which questions of competence ought to be brought. It confirmed that the proper course is to submit this matter to the tribunal itself as a preliminary objection to its jurisdiction.²¹⁸ In its judgment in the *Nottebohm* case, it observed that it could practise this power without any express provision:

²¹⁶ Art. 36/6 provides: "[i]n the event of a dispute as to whether the court has jurisdiction, the matter shall be settled by the decision of the court." In this regard, it has been noted that it is not only the right of the Court to determine its jurisdiction, but also its duty. Therefore, Judge Córdova stated in the *Administrative Tribunal of the International Labour Organisation upon Complaints Made Against the United Nations Educational, Scientific and Cultural Organisation* case that "[I] believe that the first obligation of the Court - as of any judicial body - is to ascertain its own competence and, in order to do that, it has first to determine what is the nature of the case which is brought before it." ICJ Rep., 1956, p. 163. In this regard see also Berlia, G., "La Jurisprudence des Tribunaux Internationaux en ce qui Concerne Leur Compétence", *RCADI*, 88, 1955, pp. 122 ff.; Shihata, I., *The Power of the International Court to Determine Its Jurisdiction: Compétence de la Compétence*, 1965, pp. 11-24; Simpson, et al., *supra* note 182, pp. 68 ff.; Stone, *supra* note 25, pp. 131-2; Mosler, *supra* note 53, p. 552.

²¹⁷ The roots of this principle are to be found in the *Alabama* case between Britain and the United States of America (1876). Since then it has become an established principle and embodied in most international conventions (for instance, Art. 73 of the Second Hague Convention 1907, Art. 36/4 of the Permanent Court of International Justice Statute, and Art. 36/6 of the ICJ's Statute). See Fitzmaurice, G., "The Law and Procedure of the International Court 1951-54, Question of Jurisdiction, Competence and Procedure", *BYIL*, 34, 1958, pp. 25-9; Shihata, *supra* note 216, pp. 11 ff.; Anand, *supra* note 182, pp. 259 ff.; Vallat, F., "Law in the United Nations", *ARUNA*, 1953, p. 140; Crawford, J., "Legal Effect of Automatic Reservations to the Jurisdiction of the International Court", *BYIL*, 50, 1979, p. 69; Reisman, W., *Systems of Control in International Adjudication and Arbitration*, 1992, pp. 17 ff.

²¹⁸ ICJ Rep., 1950, p. 72.

“Paragraph 6 of Article 36 merely adopted, in respect of the Court, a rule consistently accepted by general international law in the matter of international arbitration. Since the *Alabama* case, it has been generally recognised, following the earlier precedents, that, in the absence of any agreement to the contrary, an international tribunal has the right to decide as to its own jurisdiction and has the power to interpret for this purpose the instruments which govern that jurisdiction ... The judicial character of the Court and the rule of general international law referred to above are sufficient to establish that the Court is competent to adjudicate on its own jurisdiction in the present case.”²¹⁹

The above opinion was reiterated by the Court in the *Fisheries Jurisdiction* cases (1973), where jurisdiction was based on an agreement between the UK and Iceland. The ICJ established its jurisdiction by examining and rejecting various arguments concerned with the validity and scope of the treaty, before deciding the main dispute in the following year.²²⁰ In addition, in the *Border and Transborder Armed Actions* case (1988),²²¹ it affirmed its jurisdiction over the dispute pursuant to Art. 31 of the Pact of Bogota.²²²

In the light of the above, it seems obvious that the Court has the power to examine its jurisdiction and, if it finds that it has no jurisdiction because of the absence of the required conditions, it can abstain from giving an opinion.²²³ It should also be noted that the Court’s judgment on that matter, pursuant to Arts. 59 and 60 of the Statute, is final and binding.²²⁴

²¹⁹ ICJ Rep., 1953, pp. 119-20

²²⁰ ICJ Rep., 1973, pp. 8 ff.

²²¹ Hereinafter the *Border and Transborder* case.

²²² ICJ Rep., 1988, pp. 82 ff.

²²³ In this respect, Pratap noted that “it is not only the right of the Court to determine its jurisdiction, but it is also its duty”. See Pratap, *supra* note 2, pp. 117-18.

²²⁴ Art. 59 provides: “[t]he decision of the Court has no binding force except between the parties and in respect of that particular case.”

Art. 60 provides: “[t]he judgment is final and without appeal. In the event of dispute as to the meaning or scope of the judgment, the Court shall construe it upon the request of any party.”

5.2. The discretionary power of the ICJ to give advisory opinions²²⁵

During the stage of the *travaux préparatoires* of the Charter, it was suggested by Belgium and some other states that the Court should have discretionary power with regard to its advisory jurisdiction,²²⁶ but the drafters did not embody a proposal.

The wording of Art. 65/1 of the Court's Statute provides that the Court "may give" advice.²²⁷ Accordingly, it has been noted by some lawyers that the ICJ is not duty-bound to give legal advice to the requesting organ, even without mentioning the reasons behind that.²²⁸ This view is based on an abstract interpretation of Art. 65/1 of the Court's Statute, as well as the independent position of the ICJ *vis-à-vis* the other organs of the UN.²²⁹ Moreover, this view refers to the Court's practice in many cases. In the *Peace Treaties* case, the Court affirmed the permissive wording of Art. 65 of the Statute, when it stated that:

²²⁵ In the League of Nations era there was disagreement among international lawyers regarding the discretion of the PCIJ to answer a request. The basis of this disagreement was the difference between the wording of the English and French texts of Art. 14. Whereas the English text provided "[t]he Court may give advisory opinion", the French text provided "elle [la Cour] donnera aussi des avis consultatifs sur tout différend ou tout point, dont la saisira le Conseil ou l'Assemblée." Accordingly, some lawyers noted that the Court had discretion to give an opinion. This opinion was based on the permissive wording of Art. 14. Conversely, others noted that the wording of Art. 14 entitled the Court to additional jurisdiction and did not mean that the Court had any discretion in that matter. According to this opinion, the article's wording did not mean that the Court might refuse to give advisory opinions, but that the Council and the Assembly might or might not request them. This opinion was based on the French wording - which was equally authentic according to this text - that the Court had no discretion and was obliged to give an opinion to requesting organs. In this respect, see Read, H., "Advisory Opinions in International Justice", *CBR*, 4, 1925, pp. 188 ff; Négulesco, D., "L'Évolution de la Procédure des Avis Consultatifs de la Cour Permanente de Justice Internationale", *RCADI*, 57, 1936, p. 67.

In 1929 the French draft of Art. 14 was modified to become "[l]a Cour peut donner des avis consultatifs". Therefore, most of the international lawyers who consider the jurisprudence of the PCIJ, such as Fachiri and Hudson, agreed that the PCIJ has a discretion in this regard. See Fachiri, A., *The Permanent Court of International Justice*, 1932, p. 80; Pratap, *supra* note 2, pp. 6, 143-4; Keith, *supra* note 1, p. 14; El-Goneme, *supra* note 209, 289.

²²⁶ See UNCIO, 14, 1945, p. 182.

²²⁷ In the French draft it is "La Cour peut donner".

²²⁸ Fitzmaurice, *supra* note 190, p. 50; Pratap, *supra* note 2, pp. 142-4; Elian, *supra* note 35, p. 81; Kelsen, *supra* note 9, p. 549; Goodrich, L., et al., *Charter of the United Nations: Commentary and Documents*, 1969, p. 567; Rosenne, S., *The World Court - What It Is and How It Works*, 1989, p. 105; Abi-Saab, *supra* note 210, p. 15; Elias, 1983, *supra* note 149, pp. 27-8.

²²⁹ Abi-Saab, *supra* note 210, p. 15; Elias, 1983, *supra* note 149, pp. 27-8.

“Article 65 of the Statute is permissive. It gives the Court the power to examine whether the circumstances of the case are of such a character as should lead it to decline to answer the request.”²³⁰

This dictum was reiterated by the Court in many cases, such as the *Reservations* case,²³¹ the *Judgments of the Administrative Tribunal of the ILO upon Complaints made against UNESCO* case,²³² the *Expenses* case,²³³ the *Application for Review of Judgment No. 158 of the United Nations Administrative Tribunal* case,²³⁴ the *Western Sahara* case²³⁵ and the *Applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations* case.²³⁶ And most recently, the issue of the Court’s discretionary power to refuse to give the requested opinion was discussed by the Court in the *Legality of the Threat or Use of Nuclear Weapons*. In this case, the Court concluded that “the Statute leaves a discretion as to whether or not it will give an advisory opinion that has been requested of it, once it has established its competence to do so”.²³⁷

Conversely, it has been noted that, in spite of the ambiguous wording of Art. 65/1 of the ICJ’s Statute, the ICJ’s discretion is not absolute, but is circumscribed by the overriding principle of the Court’s duty.²³⁸ This opinion is based on the position of the ICJ within the UN as one of its principal organs, which should lead to the conclusion that it has no discretionary power with regard to its advisory jurisdiction. It has also been noted that, because the refusal of the ICJ to give a judgment in contentious cases is considered a “denial of justice”, this attribute, by analogy, should be extended and applied when the Court refuses to give an advisory opinion to the requesting organ since there is no difference between the two

²³⁰ ICJ Rep., 1950, p. 72.

²³¹ ICJ Rep., 1951, p. 19.

²³² ICJ Rep., 1956, p. 86 (hereinafter the *UNESCO* case).

²³³ ICJ Rep., 1962, p. 155.

²³⁴ ICJ Rep., 1973, p. 175 (hereinafter the *Fasla* case).

²³⁵ ICJ Rep., 1975, p. 21.

²³⁶ ICJ Rep., 1989, p. 189 ff. (hereinafter the *Mazilu* case).

²³⁷ ICJ Rep., 1996, p. 9 (unpublished).

²³⁸ Greig, *supra* note 149, pp. 337-8; Chehab, M., *International Organisations*, 1991, p. 354; Olivares, *supra* note 142, p. 50; Diss. Op. of Judge Weeramantry in *Legality of the Use by a State of Nuclear Weapons in Armed Conflict* case. ICJ Rep., 1996, p. 39 of his opinion (unpublished).

jurisdictions. Finally, the advocates of this opinion point out that they cannot rely on the dictum of the PCIJ in the *Eastern Carelia* case as a precedent in this respect because there is a significant difference between the position of the PCIJ as a non-organ of the League of Nations and the position of the ICJ *vis-à-vis* the UN as its principal judicial organ.²³⁹ This is also based on the Court's dictum in the *Peace Treaties* case when the ICJ itself remarked that "there are certain limits to the Court's duty to reply to advisory opinions. It is not merely an organ of the 'United Nations', it is essentially the 'principal judicial organ' of the organisation."²⁴⁰

To conclude, a distinction should be made between what exists and what should take place. There is no doubt that the current wording of Art. 65/1 of the Statute gives the Court a discretionary power to reply. But this wording seems inconsistent with the position of the Court within the framework of the UN, where its special position imposes upon it an obligation to co-operate with the UN organs and its specialised agencies. This obligation can be justified on the basis of the organic relationship between the Court and the UN whereby the Court is considered to be the judicial arm of the UN, and of the great importance of its opinions to UN organs by which it clarifies the legal norms in issues before them. Accordingly, the Court should not enjoy any discretion in this respect.²⁴¹ This is also confirmed by the practice of the Court, which has never declined to render an advisory opinion so

²³⁹ In respect of the Court's discretionary power in this regard, Conforti observe that "[i]n our view, the idea of discretionary power, even if it is moderated by the safeguards, is puzzling. The textual argument on which it is based (the 'may' in Article 65 of the Statute) is very weak and should yield to the spirit of the provision on the advisory function which testifies to the *obligatory co-operation of the Court* with the UN organs in the solution of legal questions. It is clear that the most delicate point of the whole matter is that of the connection between the advisory function and contentious or binding jurisdiction. However, it is exactly on this point that the Court should, rather than quibbling as it has done up to now, once and for all say that the existence of a dispute does not limit *in any way* its competence to render an opinion. Why should the Court be authorised to sacrifice, at its discretion, the advisory function to the contentious function and therefore sacrifice co-operation between the organs to respect for the desire of an individual State to avoid the opinion (even the non-binding opinion!) of the judicial organ? Such a sacrifice could have been justified at the time of the League of Nations and the advisory function of the old Permanent Court, but it seems anachronistic today." Conforti, *supra* note 210, p. 266.

²⁴⁰ ICJ Rep., 1950, p. 71.

²⁴¹ It has been noted that "as a logical consequence of this special relationship, as far as it is consistent with its essentially judicial character, the International Court of Justice is bound to co-operate with the organs of the United Nations and to act in conformity with the provisions of the Charter as well as those of its Statute". See Nantwi, E., *The Enforcement of International Judicial Decisions and Arbitral Awards in Public International Law*, 1967, p. 14.

long as the required conditions were fulfilled.²⁴² Moreover, the Court has insisted in its precedents on mentioning that it considers itself to be under a duty to participate in the activities of the organisation and, in principle, should not refuse to give a requested opinion unless there are “compelling reasons” for such a refusal.²⁴³ This view was confirmed in several cases such as the *Peace Treaties* case,²⁴⁴ the *UNESCO* case,²⁴⁵ the *Expenses* case,²⁴⁶ the *Namibia* case,²⁴⁷ the *Western Sahara* case,²⁴⁸ the *Mazilu* case,²⁴⁹ and, recently, the *Legality of the Threat or Use of Nuclear Weapons* case.²⁵⁰ In all these cases, the Court expressly announced that it considers itself under a duty to reply to requests for an advisory opinion. It made it clear that it is strongly inclined towards answering a request for an opinion, and that it can refuse to give an opinion only if there are “compelling reasons”. The Court did not, however, identify in any of the cases what those reasons might be. It could therefore be argued that the Court might decline to give an advisory opinion for one of the following reasons:

(i) The Court finds that giving an opinion might complicate the matter or create difficulties for another part of the UN in carrying out its responsibilities.

(ii) The Court finds that giving an opinion would be contrary to its judicial character or affect its inherited capacity as a court of law, and might damage the

²⁴² It is worth noting that the only case where the Court refused to give a requested opinion was in the *Legality of the Use by a State of Nuclear Weapons in Armed Conflict* case, 1996 (WHO request). The Court’s refusal was not based on its discretionary power to give advisory opinions, but was justified by the Court’s lack of jurisdiction in that case since it found that the WHO was not empowered to seek an opinion because the matter fell outside the scope of its activities. See ICJ Rep., 1996 (WHO request), p. 15 (unpublished).

²⁴³ Rosenne, *supra* note 14, p. 712; Schwebel, S., “Relations Between the International Court of Justice and the United Nations” in Virally, M. (ed.), *Le Droit International au Service de la Paix, de la Justice et du Développement*, 1991, p. 437.

²⁴⁴ ICJ Rep., 1950, p. 72.

²⁴⁵ ICJ Rep., 1956, pp. 86-7.

²⁴⁶ ICJ Rep., 1962, pp. 155-6.

²⁴⁷ ICJ Rep., 1971, p. 27.

²⁴⁸ ICJ Rep., 1975, p. 21.

²⁴⁹ ICJ Rep., 1989, p. 191.

²⁵⁰ ICJ Rep., 1996, pp. 9-10 (unpublished).

prestige of the Court - this was clearly demonstrated by the Court in the *Northern Cameroon* case (1964) and the *Nuclear Tests* cases (1973).

(iii) The Court finds that its opinion would be ineffective or without object. This finds its basis in the *Northern Cameroon* case and in the *Nuclear Tests* case. In the former case, the Court pointed out that “the function of the Court is to state the law, but it may pronounce judgment only in connection with concrete cases where there exists at the time of the adjudication an actual controversy involving a conflict of legal interests between the parties. The Court’s judgment must have some practical consequence in the sense that it can affect existing legal rights or obligations of the parties, thus removing uncertainty from their legal relations. No judgment on the merits in this case could satisfy these essentials of the judicial function.”²⁵¹

(iv) The Court finds that giving an advisory opinion will infringe its judicial character (for example, if the Court finds that it has insufficient information, because - as a judicial body - it must be in possession of all relevant material, or if it finds that it is necessary to hold oral hearings in order to obtain the fullest possible arguments from the parties in cases related to the interest of individuals). This was confirmed by the ICJ in the *UNESCO* case, where, after deciding that the parties were in a position of equality, it stated that, although there were no oral proceedings, it was satisfied that adequate information had been made available to it.²⁵²

6. The legal effect of advisory opinions of the Court: Are they binding?

After the requested opinion has been rendered by the Court, is it possible for the requesting organ to act in contradiction of the Court’s opinion? This question was

²⁵¹ ICJ Rep., 1963, pp. 33-4.

²⁵² ICJ Rep., 1956, p. 86. This was affirmed by the Fifth Committee of the GA when it considered the possibility of authorising the Committee for Review of the UN Administrative Tribunal, where it stated that “the Court itself would not give the opinion if it considered that one of the parties was at a disadvantage”. UN Doc. A/2909, 10 June 1955.

raised as a consequence of the absence of a similar provision to Art. 94 with regard to the advisory jurisdiction of the ICJ.²⁵³

6.1. The non-binding effect as a consequence of the absence of an express provision

It has been noted by the majority of international lawyers that the advisory opinions of the ICJ under the provisions of the Charter, as was the case previously under the Covenant, are not binding upon the requested organs and consequently there is no obligation upon them to heed the Court's advice.²⁵⁴ This opinion is based on the non-equivalent nature of the advisory opinions and the judgments of the ICJ. The nature of the Court's opinion in this regard is "advisory". That is, the binding effect is limited to the Court's judgments, which are considered to be the original competence of the Court.²⁵⁵ In addition, Judge Córdova noted that this effect does not apply to the advisory jurisdiction because it is considered to be a secondary jurisdiction.²⁵⁶

Some advocates of this view argue that the non-binding effect of the advisory opinion does not mean that it is not devoid of any legal value; they argue that advisory opinions enjoy a "legal value and moral authority".²⁵⁷ In their view, the

²⁵³ It should be noted that this point deals with the binding effect of the Court's opinion upon the requesting organ, not with the enforcement of the advisory opinion according to Art. 94 of the Charter. The applicability of this article is limited to the Court's judgments in contentious cases. See Sloan, *supra* note 37, p. 854.

²⁵⁴ Elian, *supra* note 35, pp. 91-3; Lachs, M., "Perspectives pour la Fonction Consultative de la Cour Internationale de Justice" in *Comunicazioni e Studi il Processo Internazionale Studi in Onore di Gaetano Morell I*, 1975, p. 427; Elias, T., 1989, *supra* note 149, pp. 125-6; Goodrich, et al., *supra* note 228, pp. 569-70; Gross, L., "The International Court of Justice and the United Nations", *RCADI*, 120, 1967, p. 419; Ferguson, J., *Not Them but Us in Praise of the United Nations*, 1988, p. 47; Bacot, G., "Reflexions sur les Clauses qui Rendent Obligatoires les Avis Consultatifs de la PCIJ et de la CIJ", *RGDIP*, LXXXIV, 1980, pp. 1027-30; Janis, M., "The International Court" in Janis, M., (ed.), *International Courts for the Twenty-First Century*, 1992, p. 29; Hudson, *supra* note 1, pp. 511-12; Rosenne, S., *The International Court of Justice: An Essay in Political and Legal Theory*, 1957, p. 441.

²⁵⁵ *Handbook on the Peaceful Settlement of Disputes Between States*, Office of Legal Affairs, Codification Division, United Nations, 1992, p. 75; Koray, *supra* note 2, p. 345; Hudson, *supra* note 1, p. 511.

²⁵⁶ Diss. Op. of Judge Córdova in the *UNESCO* case, ICJ Rep., 1956, pp. 158-9.

²⁵⁷ Hudson noted that "[t]hey are advisory not legal advise in the ordinary sense, not views expressed by the counsel for the guidance of client, but pronouncements as to the law applicable in given situations formulated after deliberation by the court". Hudson, M., "The Effect of Advisory Opinions of the World Court", *AJIL*, 42, 1948, p. 630; see also Bustamante, S., et al., *The World*

Court's opinions, in practice, have the same value as the judgments because they are "pronouncements" ruled by the Court regarding the applicable law in specific issues. Accordingly, they conclude that the requesting organ would not be in a very good position before the world if it paid no attention to the Court's opinion.

The above view has been challenged by some lawyers who note that the Court's advisory opinions have a binding effect upon requesting organs. According to this view, the Court's judgments and its advisory opinions are equivalent in nature, and the difference between them is no more than a difference of name.²⁵⁸ In both functions the ICJ presents legal conclusions concerning the situation being dealt with, and their weight is the same in both cases. Moreover, if advisory opinions were not binding, it would seem unnecessary to have judges *ad hoc* in respect of the Court's advisory jurisdiction.²⁵⁹ Further, they rely on the opinion of the committee which was established by the PCIJ in 1927 to prepare a report concerning the extent of Art. 31 of the PCIJ's Statute. The committee concluded that, so long as there was disagreement between the parties before the Court, the difference between the dual jurisdictions of the Court became a difference in name only. The advocates of this view also reject the view of the "moral value" of the advisory jurisdiction on the basis that the Court's opinions depend on the rules of law not on moral considerations.²⁶⁰ Finally, it has been noted that the provisions of the resolutions concerning the internal judicial practice of the Court of 17 April

Court, 1925, p. 264. Koray also notes that, "[a]lthough advisory opinions are thought not to be binding in a technical and formal sense, their persuasive character and substantive authority are considerable. This is because they are judicial pronouncements of the highest international tribunal and statements of law contained in them are of the same high quality as those contained in judgments." Koray, *supra* note 2, pp. 348-9.

²⁵⁸ Gros notes that "[t]he distinction habitually drawn between advisory opinions and judgments, whereby the former do not have the binding character of the latter, is not an absolute one". Gros, A., "Concerning the Advisory Role of the International Court of Justice" in Friedmann, W., et al. (eds.), *Transitional Law in a Changing Society. Essays in Honour of Philip Jessup*, 1972, p. 315; see also Diss. Op. of Judge Zoricic, in *Peace Treaties* case, ICJ Rep., 1950 p. 101; Hammarskjöld, M. "The Permanent Court of International Justice and Its Place in International Relations", *JRIIA*, 9, 1930, p. 79 (cited in El-Rashidy, *supra* note 14, p. 276); Benvenuti, P., *L'accertamento del Diritto Mediante Pareri Consultativi della Corte Internazionale di Giustizia*, 1984 (cited in Ago, R., "'Binding' Advisory Opinions of the International Court of Justice", *AJIL*, 85, 1991, p. 441).

²⁵⁹ Hambro, *supra* note 149, p. 6.

²⁶⁰ Sloan, *supra* note 37, p. 853; Gros, *supra* note 258, p. 315.

1976 apply - in accordance with Art. 10 - whether the proceedings before the Court are contentious or advisory.²⁶¹

6.2. The obligatory effect of the advisory opinions in exceptional cases

The above disagreement among international lawyers is irrelevant in two cases. First, the binding effect of advisory opinions may be prescribed in advance by the international instrument concerned (other than the Charter and the Statute). Such provisions are known as “advisory arbitration”, or “advisory opinion with binding force”, or “compulsive effect” opinions. The common feature of these provisions is that they characterise the opinion requested of the Court as a “decision” in relation to the dispute at issue; that is, they confer “binding force” on the opinion for the parties to the dispute.²⁶²

In practice, numerous institutions within the UN system have adopted this provision in their instruments. For instance, Art. 12 of the Headquarters Agreement between the United Nations and the United States of America indicates that the Court’s opinion has a binding effect upon the requesting organ.²⁶³ In addition, Art. VIII, Section 30, of the Convention on the Privileges and Immunities of the UN provides that, if a difference arises between the UN on the one hand and a member on the other hand concerning the interpretation or application of the convention, “request shall be made for an advisory opinion on any legal question involved in accordance with Art. 96 of the Charter and Art. 65 of the Statute of the Court. The opinion given by the Court shall be accepted as decisive by the parties.”²⁶⁴ A

²⁶¹ Donner, *supra* note 185, p. 119.

²⁶² Keith, *supra* note 1, p. 196; Pratap, *supra* note 2, p. 47; Bowett, *supra* note 24, p. 280; Rosenne, *supra* note 14, p. 682; Ago, *supra* note 258, p. 1.

²⁶³ This convention was concluded on 26 June 1947. Similar provisions have been adopted in some headquarters agreements between international organisations within the framework of the UN and the states on whose territory they carry out their activities. For instance, Art. XI, section 21, of the Agreement Regulating Conditions for Operation of the Headquarters of the UN Economic Commission for Latin America, dated 16 February 1953, between UN and Chile; Art. XIII, section 26, of the Agreement Relating to the Headquarters of the Economic Commission for Asia and the Far East, dated 26 May 1954, between UN and Thailand; Art. XVI, section 39, of the Agreement Establishing a Radio-isotope Centre in Cairo, dated 14 September 1967, between Egypt and the International Atomic Energy Agency. For more details see Ago, *supra* note 258, p. 1.

²⁶⁴ This convention was concluded on 13 February 1946. Similar provisions have been adopted in some conventions on privileges and immunities; for instance, Art. XI, section 32, of the Convention on the Privileges and Immunities of the Specialised Agencies, dated 21 November 1947;

similar provision was embodied in Art. XII/1 of the Statute of the ILOAT, Section 32 of the Convention on the Privileges and Immunities of the Specialised Agencies, and Art. 37/2 of the Constitution of the International Labour Organisation.²⁶⁵

Second, states may agree in advance that the Court's advisory opinion with regard to a special matter will be binding upon them. So far there has been no instance of such agreement in the UN era. It occurred in the League era, when Britain and France agreed to submit their dispute regarding the French Nationality legislation in Tunisia and Morocco to the Council of the League, and requested it to refer the matter to the PCIJ for advice. They also agreed to consider the Court's advice in that case as binding.²⁶⁶

In the above two cases, the Court's opinions are binding upon the organisations and concerned states. This effect is based on the prior consent of the organisation or concerned states.

6.3. The non-binding effect of the advisory opinions in the ICJ's jurisprudence

The question now is to which of these opinions did the Court hold? The ICJ has stated with the utmost finality that its opinions are not legally binding. In its opinion in the *Peace Treaties* case, the Court concluded that "the Court's reply is only of an advisory character: as such, it has no binding force".²⁶⁷ In the *UNESCO* case, it made the above statement more obvious when it referred to the differences between the legal effect of its advisory opinions according to Art. XII of the Statute of the Administrative Tribunal and the effect of its opinions according to the Charter and the Court's Statute. It described the binding effect of its advisory opinion according to the Statute of the Administrative Tribunal as going beyond the scope attributed by the Court to an advisory opinion.²⁶⁸ Therefore, it can be

Art. X, section 34, of the Agreement on the Privileges and Immunities of the International Atomic Energy Agency, of 1 July 1959.

²⁶⁵ Seyersted, F., "Settlement of Internal Disputes of Inter-governmental Organisations by Internal and External Courts", *ZaöRV*, 1964, 24, p. 113.

²⁶⁶ PCIJ, Ser. E., No. 4, pp. 7-8; Lissitzyn, O., *The International Court of Justice*, 1951, pp. 84, 88; Gross, *supra* note 254, p. 420; Pratap, *supra* note 2, pp. 36-37; Hudson, *supra* note 257, p. 631.

²⁶⁷ ICJ Rep., 1950, p. 71.

²⁶⁸ ICJ Rep., 1956, p. 84.

concluded that the Court's dictum in this respect shows that it considers its advisory opinions as having a non-binding effect upon the UN organs.

6.4. Evaluation

The non-obligatory effect of the Court's advisory opinions expressed by some lawyers and by the ICJ should be subject to examination. First, it is difficult to support the opinion of some lawyers that the Court's opinion is obligatory on the basis of moral rather than legal principle because the Court's opinion is an opinion of law and not an opinion of morals, and because the ICJ's opinion has a judicial character and its findings are more accurately described as law than as advice.²⁶⁹

Second, the Court acts as a judicial body with regard to both its advisory and its contentious jurisdiction. Its procedures in advisory cases are in large measure the same as the contentious procedures. All interested states are given special notice of the request to the Court; all are given an equal opportunity to present documents, memorials, and counter-memorials; cases are heard in public; all parties can be represented by counsel or agents and have the right to present arguments and advance evidence in oral proceedings; and, finally, the Court's composition is not different from that in contentious cases. Moreover, it applies the same rules of law, rules of voting, system of separate and dissenting opinions of the Court's judges, and delivery of an opinion as it applies in its contentious jurisdiction.²⁷⁰ This is clearly indicated by Art. 65 of the Court's Statute, which provides that cases before the Court in advisory proceedings should be treated with the same judicial guarantees as contentious cases. This has been confirmed by the ICJ in several cases. For instance, in the *Constitution of the Maritime Safety Committee of the*

²⁶⁹ It has been noted that the substance of the opinion is of the same high judicial quality as that of the judgments. See Pratap, *supra* note 2, p. 227; Sloan, *supra* note 37, p. 853.

²⁷⁰ For examples of applying the same procedures in both contentious and advisory cases, see the *Peace Treaties* case, the *Reservations* case and the *UN Administrative Tribunal* case. In this regard, Pratap notes that "the Court has applied the rules of the Statute relating to contentious cases in advisory proceedings wherever it has considered the application to be appropriate". Pratap, *supra* note 2, pp. 45-6. Gros also notes that "when the Court replies to a request for an advisory opinion it does not transform itself into a Committee of fifteen legal consultants; it continues to be the principal judicial organ of the United Nations". Gros, *supra* note 258, p. 314. Moreover, Hambro notes that "the legal reasons behind the opinions carry the same weight and are invested with the same high authority as in the case of judgment". Hambro, *supra* note 149, p. 5.

Inter-Governmental Maritime Consultative Organisation case (1960),²⁷¹ it pointed out that “[t]he Court as a judicial body is ... bound, in the exercise of its advisory function to remain faithful to the requirements of its judicial character”.²⁷² Similarly, in the *Northern Cameroon* case, the Court pointed out that “the Court’s authority to give advisory opinions must be exercised as a judicial function”.²⁷³ Accordingly, it seems clear that in the exercise of its advisory jurisdiction the ICJ has been guided by provisions of its Statute that apply in contentious cases to the extent that it recognises them to be applicable and has evolved a definite procedure designed to safeguard the judicial nature of its function.

Third, the position of the Court as the principal judicial organ of the UN means that its opinions to the other organs must be respected, because frequent non-compliance with its advisory opinions by the UN organs would affect the position of the Court. In addition, accepting the idea that the UN organs have the power to accept or refuse the Court’s opinions might give them a similar power to that of an appellate tribunal over opinions rendered by the Court. In this regard, it has been noted that, if an organ is determined to assert its power to pursue a certain course of action regardless of the outcome of a request for an advisory opinion on whether or not it has such power, it would be better for it to refrain from making the request. Therefore, the rejection by the SC of a proposal requesting an advisory opinion regarding its competence in the Indonesian situation, and the refusal by the GA to consider requests regarding the treatment of Indians in South Africa and regarding the problem of Palestine are considered by Lissitzyn to be sensible behaviour particularly if these organs were determined to act regardless of the opinion of the ICJ.²⁷⁴

Fourth, in the *Western Sahara* case, the Court permitted Morocco to appoint an *ad hoc* judge to participate to the advisory proceedings in the same way as in its

²⁷¹ Hereinafter the *IMCO* case.

²⁷² ICJ Rep., 1960, p. 153.

²⁷³ ICJ Rep., 1963, p. 30.

²⁷⁴ Lissitzyn, *supra* note 266, pp. 33, 94-5.

contentious proceedings.²⁷⁵ It could be asked why it accepted Morocco's request and allowed it to appoint an *ad hoc* judge if its opinion is not binding? If the Court's opinion is not binding, it would seem unnecessary to have judges *ad hoc*. It seems clear that the Court has assimilated the rules and practice followed in its contentious jurisdiction into its practice in its advisory jurisdiction, and, consequently, it has realised the necessity to admit judges *ad hoc*. Needless to say, such an act is an indication that the advisory opinions are, in fact, much more than advisory.

Fifth, as noted by Judge Gros, "[a]s regards the reasoning, this, in both cases, represents the Court's legal conclusion concerning the situation which is being dealt with, and its weight is the same in both cases: there are no two ways of declaring law".²⁷⁶

Sixth, the Court's dicta by which it observes that its advisory opinions are not binding are not a real proof because in all these cases it was not the binding effect of the Court's opinion that was the subject of challenge but the possibility of giving opinions without obtaining the states' consent. The Court in these cases was mainly dealing not with the legal effect of its opinions but rather with the possibility of practising its advisory jurisdiction in spite of the absence of the consent of the litigant states.

Finally, examining the response and practice of the requesting organs might be helpful. Thus far the ICJ has delivered advisory opinions in twenty-three cases, and in no case has the requesting organ rejected the Court's opinion or acted contrary to its substance; on the contrary, the Court's opinions have been received and respected by the organs.²⁷⁷ This attitude shows to what extent the Court's opinions have an effect upon these organs. The Court's opinion in the *Admission* case was noted by the GA, which recommended its members and each member of the SC to act in accordance with the opinion of the ICJ in exercising their vote on the

²⁷⁵ For the practice of the PCIJ to allow states to appoint judges *ad hoc* in advisory cases, see Gray C., *Judicial Remedies in International Law*, 1987, p. 114.

²⁷⁶ Gros, *supra* note 258, p. 315.

²⁷⁷ It should be mentioned that the PCIJ delivered twenty-seven advisory opinions. None of these opinions was ignored by the Council of the League. See Hudson, *supra* note 1, pp. 513 ff.; Pratap, *supra* note 2, pp. 235 ff.; Nantwi, *supra* note 241, p. 72.

admission of new members.²⁷⁸ The Court's opinion in the *Reparation* case was accepted by GA Res. 365 (IV), of 1 December 1949, which authorised the Secretary-General to bring claims in accordance with proposals based on the opinion of the ICJ.²⁷⁹ In addition, the opinion in the *Competence of the GA for the Admission of States in the UN* case was mentioned by the GA in its Res. 620 (VII), of 21 December 1952, in which it established a Special Committee to study the admission of new members in the light of the advisory opinions on the subject.²⁸⁰ The Court's opinion in the *Status of South-West Africa* case was accepted by the GA in its Fifth Session when it urged "the Government of the Union of South Africa to take the necessary steps to give effect to the opinion of the International Court of Justice, including the transmission of reports on the administration of the Territory of South-West Africa and of petitions from the communities or section of the population of the territory".²⁸¹ Several resolutions have been made in this regard, all of which are in accordance with the Court's opinion, for instance Resolutions 449/A (V), 570 A (VI), 749 (VIII), 934 (X), 1047 (XI), and 1452/B (XIV).²⁸² In the *Peace Treaties* case, the GA took note of the opinions in both phases of the case in its resolution of 3 November 1950, in which it condemned "the wilful refusal of the Governments of Bulgaria, Hungary and Rumania to fulfil their obligations under the provisions of the peace treaties".²⁸³ Moreover, the Court's opinion in respect of the *Reservations* case was adopted by GA Res. 596, by which it recommended all states to determine their status according to the Court's opinion and the Secretary-General was requested to make his practice conform to the advisory opinion in relation to reservations to the Genocide Convention.²⁸⁴ The

²⁷⁸ GA Res. 197 A (III), 8 December 1948. GAOR, 3rd Sess., 177th Plen. Mtg., 8 December 1948, p. 800.

²⁷⁹ GA Res. 365 (IV), 1 December 1949. Further, the Secretary-General made numerous references to this opinion in his report on injuries suffered in the service of the UN. UN Doc. A/959, 1949; GAOR, 4th Sess., 6th Committee, annexes, 1949, p. 19.

²⁸⁰ GA Res. 620 (VII), 21 December, 1952.

²⁸¹ GA Res. 449/A and B (V), 13 December 1950, GAOR, 5th Sess., Supp. 20 (A/1775), pp. 55-6; UNYB, 1950, pp. 806-22.

²⁸² Keith, *supra* note 1, p. 212.

²⁸³ GA Res. 385 (V), 3 November 1950.

²⁸⁴ GA Res. 598 (VI), 12 January 1952.

Assembly took “note” of the Court’s opinion in the *UN Administrative Tribunal* case, and provided for payments to discharged officials in accordance with the awards of the Tribunals.²⁸⁵ The Court’s opinion in the *Voting Procedure on Questions Relating to Reports and Petitions Concerning the Territory of South-West Africa* case (1955),²⁸⁶ was followed by a resolution by the GA by which it accepted and endorsed the opinion.²⁸⁷ The Court’s opinion in the *Admissibility of Hearing of Petitioners by the Committee on South-West Africa* case (1956)²⁸⁸ was accepted and endorsed by the GA, which subsequently authorised the Committee on South-West Africa to grant a hearing to petitioners.²⁸⁹ In addition, the Court’s opinion in respect of the *Expenses* case was accepted and “tak[en] into account” by the GA, which adopted Res. 1854/A (XVII).²⁹⁰ The SC agreed with the Court’s opinion in the *Namibia* case and called for certain measures for its implementation.²⁹¹

In addition to the acts of the political organs regarding the reception of ICJ advisory opinions, one may find additional support in respect of these opinions by the specialised agencies of the UN. The Court’s opinion in the *UNESCO* case was accepted by the Executive Board of UNESCO, which took note of the Court’s opinion and approved of a proposal by the Director-General regarding payment of the award granted by the ILO Administrative Tribunal. Further, the Court’s opinion in the *IMCO* case was considered by the Assembly to be authoritative in terms of the illegality of the action. The IMCO Assembly adopted a resolution by which it

²⁸⁵ GA Res. 888 (IX), 17 December 1954.

²⁸⁶ Hereinafter the *South-West Africa (voting)* case.

²⁸⁷ GA Res. 934 (X), 3 December 1955.

²⁸⁸ Hereinafter the *South-West Africa (Committee)* case.

²⁸⁹ GA Res. 1047 (XI), 23 January 1957.

²⁹⁰ GA Res. 1854 A (XVII), 19 December 1962.

²⁹¹ SC Res. 301, 20 October 1971. SCOR, 26th Year, special supp. No. 5, UN Doc. S/10330 and Corr. 1 and Add. 1, Annex (1972). It should be noted that the GA subsequently “welcome[d]” it and “condemn[ed]” South Africa for its continued refusal to terminate its “illegal occupation and administration” and for the extension of apartheid to the territory, requested the Republic to “comply” with the pertinent SC and GA resolutions, called on states to “respect strictly” the advisory opinions and resolutions of the political organs of the UN, “invite[d]” the SC to take “effective” measures to secure the withdrawal of South Africa from the territory, and reaffirmed the responsibility of the organisation with regard to Namibia and called for and requested a number of other steps to achieve an independent state. See GA Res. 2871 (XXVI), 20 December 1971. UN Doc. A/PV. 2028, 26th Sess., 20 December 1971, pp. 32-5.

decided to dissolve the Maritime Safety Committee as elected in 1959, which the Court found had not been elected in conformity with the Constitution, and decided to establish a new committee in accordance with Art. 28 of the Constitution.

From the above survey, it seems clear that so far no organ has taken action directly contrary to any advisory opinion given by the ICJ. In addition, no organ has shown any disagreement with the legal authority of the Court in this respect.

Conclusion

The Court's advisory jurisdiction was granted in order to give guidance to UN organs to enable them to determine their own future course of action in the light of the "authoritative legal guidance" rendered by the ICJ as a "legal counsel" to the UN. By giving opinions, the ICJ lends its assistance in the solution of problems confronting the UN and discharges its responsibilities as a member of the UN family.

The Court must first consider its competence to reply to a request, and it has to define whether there is any reason to decline to exercise its jurisdiction.

The number of organs and agencies authorised to request advisory opinions is much larger now than it was in the case of the PCIJ, where this authority was restricted to the Assembly and the Council of the League. The ICJ may give advisory opinions at the request of nineteen organs and agencies on legal questions. The Secretary-General is the only principal organ of the UN that has not been authorised by the GA to request advisory opinions of the ICJ.

Unless there is an obligation upon the UN organ or agency to request advisory opinions pursuant to some international instruments, they generally are not obliged to request advisory opinions of the ICJ. Their power to request in this respect is optional. Since the establishment of the ICJ, the GA has requested the ICJ thirteen times for an advisory opinion, and the SC has made this request once, as has the ECOSOC. Of the twelve specialised agencies authorised by the GA to request advisory opinions of the ICJ, only three have so far done so (UNESCO, IMCO, and WHO).²⁹² The two subsidiary organs that have this authority are the Committee on

²⁹² It should be noted that the WHO has requested the Court for advisory opinions twice.

Application of the Review the UNAT's Judgments, which has requested advisory opinions from the Court only four times, and the Interim Committee of the GA, which has never requested an opinion.

The machinery provided for invoking the advisory jurisdiction of the Court is simple. There is no requirement of unanimity to request an advisory opinion, as was necessary in the League of Nations.

The Court has confirmed its relationship with the other organs of the UN in the performance of its advisory role by affirming that it should not "in principle" refuse to give opinions requested for the purposes of the work of the UN. Therefore, it has never declined to give the opinion requested by these organs. It has also adopted a broad concept of the term "legal questions" and has not found that political motives or even the drafting of the question in abstract terms limit its responsibility in this regard. Finally, the Court has affirmed that the consent of individual states that may be affected by a request for an opinion, or that may be involved in a dispute to which that request relates, is not necessary to enable the Court to give an opinion.

In practising its advisory jurisdiction, the Court has shown that it applies all the provisions relating to its contentious procedure whenever it has considered the application to be appropriate.

With regard to the binding effect of the advisory opinion, it is an established opinion that, unless there is a specific provision giving these opinions binding effect, the Court's opinions, generally, are not binding. Despite the fact that practice has shown that the organs and agencies concerned have faithfully followed the opinions, it should be stressed that the refusal to respect an advisory opinion might impair and diminish the authority of the Court as a legal adviser in public opinion.

Finally, the practice of requesting advisory opinions of the ICJ seems to have the same as if not greater importance than cases brought by governments under the contentious jurisdiction of the Court. The ICJ has assisted the UN in resolving questions relating to its internal structure and the relationship among its political organs. It has also played an important role in assisting the UN organs to determine the proper route for achieving their objects, as will be shown in the next chapter.

Chapter Three

The Role of the International Court of Justice in Interpreting and Developing the Institutional Law of the United Nations

Introduction

Any international organisation is a functional entity established by states on the basis of an agreement. This instrument is called a constitution, treaty, or charter. The importance of this instrument is derived from the fact that it authorises the organisation to take legal actions. It also contains general rules on the distribution of competencies between the various organs and on the procedures under which they shall act.

The UN, like any other international organisation, is based on an institutional legal instrument, namely the Charter. This instrument specifies the purposes and principles which guide the UN organs and its member states. However, as with any legal instrument, there is always the difficult question of interpretation. This difficulty is derived from the fact that the Charter is drafted in a general and broad way to allow the organs of the UN to act flexibly in the light of the needs of the international community.

Courts in domestic fields have the power to interpret the rules of law and play a role in developing such rules. The question might arise regarding the role of the ICJ - as the principal judicial organ of the UN - and whether it can play a similar role in interpreting and developing the rules embodied in the Charter.

This chapter will, therefore, focus on the role of the ICJ in respect of the interpretation of the UN Charter and the extent to which the Court - through this role - has played a role in developing UN law. Because the fulfilment of such a role by the ICJ presupposes that it has the power to interpret the Charter, the study will, as a preliminary issue, throw light on the ICJ's power in this regard. Then it will discuss the Court's jurisprudence in interpreting the Charter's provisions and its role in developing the competencies of the UN organs.

From the outset, it should be noted that the Court's role in this regard concerns the interpretation and application of existing rules, not the establishment of new rules. Hence, the term "developing" must be understood as referring to instances where the ICJ has clarified existing rules of the UN and its agencies.

1. The power of the ICJ to interpret the constitutional instrument

The study in this section will focus on the ICJ's power to interpret the Charter in the light of the Charter provisions, international practice through the General Assembly's resolutions, and the dicta of the Court itself. Before doing so, the legal nature of the Charter should be addressed.

1.1. The United Nations Charter: A treaty or a constitution?

The determination of the nature of the Charter as a constitution or as an international treaty has been a controversial issue since the early days of the UN. The view adopted by most of the Eastern bloc countries during the Cold War era was that the Charter has no constitutional nature but is a special treaty *sui generis*.¹

This view should be examined because there is no reason to deny the constitutional character of the Charter on the ground that it is based on an agreement among its participants. For example, no one can deny the constitutional character of a federal constitution despite the fact that it is a treaty among its member states. The constitutional character of the Charter has been confirmed by the majority of international lawyers. In their opinions, whatever the name of this instrument - a constitution or a treaty - the UN Charter has certain basic features which distinguish it not only from bilateral treaties but from other multilateral treaties as well.² This view is based on the following. First, it is a constituent instrument - like

¹ In the *Expenses* case, Judge Winiarski described the Charter as "a multilateral treaty which was the result of prolonged and laborious negotiations, carefully created organs and determined their competence and means of action". ICJ Rep., 1962, p. 230. A similar view was adopted by Judge Koretsky, *ibid.*, p. 268; Macdonald, R., "The United Nations Charter: Constitution or Contract?" in Macdonald, R., *The Structure and Process of International Law: Essays in Legal Philosophy, Doctrine and Theory*, 1983, pp. 889 ff.; Ciobanu, D., "Impact of the Characteristics of the Charter upon its interpretation" in Cassese, A. (ed.), *Current Problems of International Law. Essays on UN Law and the Law of Armed Conflict*, 1975, pp. 3 ff.

² Sloan, B., "The United Nations Charter as a Constitution", *PUSLYIL*, 1, 1989, pp. 116-17; Watson, G., "Constitutionalism, Judicial Review, and the World Court", *HILJ*, 34, 1993, p. 3.

constitutions in domestic fields - defining the structure of the organisation and setting forth the powers and functions of its organs and the duties of its members. Second, it was intended to last not just for the present or for the foreseeable future, but for “succeeding generations”. Third, it is superior to all other treaties as a “higher law” according to Art. 103 of the Charter. Fourth, it has been noted that some of the Charter’s provisions foresee the possibility of the organisation taking measures with regard to non-member states. This attitude is considered to be in contradiction to the principle that treaties have no effect on third parties.³ Finally, the states that participated in its drafting are today outnumbered by new members. Only fifty states were represented at the San Francisco Conference, whereas the present membership is over three times this number. In this respect, Schachter has stated:

“The Charter is surely not to be construed like a lease of land or insurance policy; it is a constitutional instrument whose broad phrases were designed to meet changing circumstances for an undefined future.”⁴

In addition, Hambro noted that “[t]he Charter, like every written constitution, will be a living instrument”.⁵ Similarly, Judge de Visscher referred to the Charter of the United Nations as a treaty of a “Constitutional Character”.⁶

In the light of the above, it can be concluded that the Charter has a special character. Despite the fact that the Charter has a treaty character, this does not alter its nature as a constitution of the UN. It has a constitutional character because it authorises the UN to make decisions binding upon the member states and to exercise jurisdiction over their territories. Therefore, it needs to be interpreted from time to time and to enable these organs to achieve their objectives. Here, the question is whether or not the ICJ as the principal judicial organ of the UN has any role to play in this regard.

³ Conforti, B., *The Law and Practice of the United Nations*, 1996, p. 10.

⁴ Book Review, *YLJ*, 60, 1951, p. 193.

⁵ Pollux, “The Interpretation of the Charter”, *BYIL*, 23, 1946, p. 54.

⁶ ICJ Rep., 1950, p. 187.

1.2. The power of the ICJ to interpret the Charter

1.2.1 The silence of the Charter

The issue of the ICJ's power to interpret the Charter was raised in the San Francisco Conference. It was a moot point among the participant delegations whether this power should be given to one specific organ, either the GA or the ICJ, or to each organ of the UN as it was in the League of Nations era. The issue was referred to Committee IV/I, which refrained from setting the Court up as the exclusive organ to resolve all disputes relating to the interpretation of Charter itself; it concluded that the Court is one of several organs which have the right to interpret the Charter.⁷ It stated:

"In the course of the operations from day to day of the various organs of the organisation, it is inevitable that each organ will interpret such parts of the Charter as are applicable to its particular functions ... It will be manifested in the functioning of such a body as the General Assembly, the Security Council, or the International Court of Justice ... If two Member States are at variance concerning the correct interpretation of the Charter, they are of course free to submit the dispute to the International Court of Justice as in the case of any other treaty. Similarly, it would always be open to the General Assembly and the Security Council, in appropriate circumstances, to ask the International Court of Justice for an advisory opinion concerning the meaning of a provision of the Charter."⁸

Accordingly, the Charter was drafted without any reference to any organ authorised to interpret the Charter. Given the silence of the Charter, international lawyers have debated this issue.⁹ The view that the Court should not have the power to interpret the Charter is based on an analogy between the Supreme Court of the USA and the ICJ - the Supreme Court exercises self-denial in relation to some of the clauses of the Constitution. The ICJ should recognise the political character of the Charter's articles and consequently should leave their interpretation to the other organs of the UN. Moreover, it has been noted also that a judicial

⁷ Pollux, *supra* note 5, p. 56; Vallat, F., "The Competence of the United Nations General Assembly", *RCADI*, 97, 1959, pp. 208 ff.; Sohn, L., "The UN System as Authoritative Interpreter for its Law" in Schachter, O., et al. (eds.), *United Nations Legal Order*, vol. 1, 1995, pp. 171 ff.; Conforti, *supra* note 3, pp. 14-5.

⁸ See UNCIO, 13, pp. 653-4, 668-9, 687-8, 709-10, 719-20, 831-2.

⁹ Wright, Q., *International Law and the United Nations*, 1960, pp. 37-8; Sato, T., "Constituent Instruments of International Organisations and their Interpretative Framework: Introduction to the Principal Doctrines and Bibliography", *HJLP*, 14, 1986, pp. 2 ff.

interpretation, with its authority, its precision, and the rationalisation inherent in the judicial process, would close the door to future development more than a political interpretation.

This view is rejected by the majority of international lawyers, who are in favour of empowering the ICJ with such a function.¹⁰ In their view, there are two kinds of interpretation - political and legal. The first is made by the political organs of the UN, whereas the second should be made by the ICJ as the principal judicial organ of the UN. This view is based on the fact that the term "any legal question" in Art. 96 of the Charter and Art. 65 of the Statute covers the issue of the Charter's interpretation. In addition, it has been noted that there was no intention during the *travaux préparatoires* stage to prevent the Court from interpreting the Charter; on the contrary, the drafters insisted on empowering both the Court, as the judicial organ in the UN, and the other political organs with the right to exercise this function. Moreover, the Charter's drafters, at San Francisco, recognised the Court's role, concluding that the agencies of the UN, apart from the SC and the GA, would be able to request advisory opinions from the Court on questions relating to the interpretation of their constitutions or conventions within their fields.¹¹ Finally, they noted that since international lawyers agree that the issue of the interpretation of treaties could be referred to the ICJ, and since the Charter is considered to be a multilateral treaty, the ICJ by analogy should have the right to interpret the Charter. The advocates of this view conclude that the Court can deal with the Charter's interpretation through its contentious jurisdiction by states referring the matter, or through its advisory jurisdiction by a request of the UN organs and agencies.

1.2.2. The General Assembly's resolutions

The power of the ICJ to interpret the Charter was discussed during the meetings of the GA to adopt its Res. 171 (III), 1947, which related to the role of the ICJ within

¹⁰ Rosenne, S., *The Law and Practice of the International Court*, 1985, pp. 44 ff.; Simon, D., *L'Interpretation Judiciaire des Traités d'Organisations Internationales*, 1981, p. 51; Keith, K., *The Extent of the Advisory Jurisdiction of the International Court of Justice*, 1971, pp. 87-9; Lachs, M., "The Decision-Making Powers and the Judiciary within the United Nations" in *Essays in Honour of Prof. Stephen Verosta*, 1980, p. 395; Fakher, H., *The Relationships Among the Principal Organs of the United Nations*, 1951, p. 141.

¹¹ See UNCIO, 9, pp. 163, 246-7; UNCIO, 13, pp. 436-9, 511.

the UN. At this stage, it was suggested by some delegations that the Court has an affirmative power to interpret the Charter pursuant to the wording of Art. 96 of the Charter.¹² According to this view, the Court is given jurisdiction over “any legal question” without specific restriction and this provision extends to the interpretation of the Charter. Consequently, UN organs can ask the Court any questions relating to the meaning of the Charter’s provisions. In addition, some advocates of this view referred to Art. 34/3 of the Court’s Statute as a basis of the Court’s power, whereby a request for the Charter’s interpretation can be submitted by states.

The above view and its basis did not persuade some delegations, which insisted that the Court has no power to interpret the Charter.¹³ This view was based on the fact that, because the constitution of many states stipulates that their internal courts may perform the interpretative function, no such power is expressly provided to the ICJ to interpret the Charter. Moreover, it was argued that granting the Court such a power would amount to placing it in a more favourable position *vis-à-vis* the other organs of the UN.¹⁴ Further, the term “any legal question”, which is incorporated in Arts. 92 and 96 of the Charter and Arts. 36/2 and 65 of the Court’s Statute, does not extend to the issue of the Charter’s interpretation. According to this view, the term “any legal question” refers only to certain specific legal disputes between member states. Finally, the power of the Court to interpret international treaties does not empower it to interpret the Charter because there is a substantial legal difference between international treaties and the Charter.¹⁵

The GA passed the projected resolution, which included a reference to the interpretation of the Charter as a function within the jurisdiction of the Court. In its

¹² See GAOR, 2nd Sess., 6th Committee, 1947, Plen. mtgs., vol. II, pp. 865-7, 875-6, 886-7.

¹³ For the discussion of this issue, see UN Doc. A/459 and A/459 Corr. I, 1947; GAOR, 2nd Sess., 6 Committee, 1947, Plen. Mtgs., vol. II, pp. 862-5, 877-86.

¹⁴ In this regard, it was noted by Mr Lange of Poland that “we shall really establish the International Court of Justice in a special super-ordinate position within the structure of our organisation - a position which clearly was not intended by the Charter”. See, GAOR, *ibid.*, pp. 864-5.

¹⁵ In this regard, it was noted by Mr Vyshinsky of the Soviet Union that “we are then asked: ‘is the Charter not a treaty?’ Of course, the Charter is a treaty in the broad, everyday meaning of the word, but in the legal sense there is difference, there would be no reason for speaking of Charter and of treaties separately. But such a difference does exist. If the Charter can be called a treaty, it is a treaty of a special kind, a treaty *sui generis*.” GAOR, *ibid.*, pp. 881-2.

Res. 171 (III), 1947, the GA adopted the first view. Because of the desirability of the interpretation of the Charter by the ICJ,¹⁶ the GA recommended other UN organs and its specialised agencies to refer any question regarding the Charter's interpretation to the ICJ.¹⁷ It based its resolution on the "paramount importance" of interpreting the Charter on the basis of the recognised principles of international law. Again, in its Res. 3232 (XXIX) the GA recalled the above conclusion, recommending the UN organs and specialised agencies to seek the Court's assistance in respect of any "legal question" that arises or will arise during their activities.¹⁸

Accordingly, it seems clear that the GA gave the term "any legal question" a broad meaning so that it embodies the issue of the Charter's interpretation. It therefore affirmed the ICJ's power to interpret the Charter's provisions.

1.2.3. The practice of the ICJ: Confirmation of its interpretative power

Since 1948, the ICJ has been called upon several times to interpret the Charter. Through its jurisprudence, it seems clear that the Court did not hesitate to confirm its power in this regard either explicitly or implicitly.

The ICJ explicitly affirmed its power to interpret the Charter in the *Admission* case, where it dismissed the argument to the effect that the ICJ has no power either directly or indirectly to interpret the Charter on the following basis: (i) the PCIJ had no power to interpret the Covenant and it had never interpreted this instrument and, therefore, the PCIJ practice in this respect should be followed by its successor the ICJ; (ii) there was no provision in the Charter empowering the ICJ to interpret the Charter's provisions; (iii) since the Charter is considered to be a constitutional

¹⁶ The Sixth Committee of the General Assembly, which proposed the draft resolution, rejected the Polish amendment to the effect that all references in this resolution concerning the interpretation of the Charter be deleted on the ground that the Court has no competence to interpret the Charter. See UN Doc., A/459 and A/459 Corr I, 1947.

¹⁷ In this resolution, the GA stated that: "[c]onsidering: that the International Court of Justice is the principal judicial organ of the United Nations ... Recommends: that Organs of the United Nations and the specialised agencies should, from time to time, review the difficult and important points of law within the jurisdiction of the International Court of Justice which have arisen in the course of their activities and involve questions of principle it is desirable to have settled, including points of law relating the interpretation of the Charter of the United Nations."

¹⁸ GA Res. 3232 (XXIX), 12 November 1974.

document and not an ordinary treaty, Art. 36 of the Court's Statute does not extend to this instrument and the Court, according to this article, is empowered to interpret only treaties not constitutional instruments.¹⁹ This argument was examined extensively by the Court, which decided that it has the power to interpret the Charter because this function falls within the normal exercise of its judicial power. This dictum was based on the fact that, since the Court has the right to interpret treaties and since the Charter is considered to be a multilateral treaty, there is no doubt regarding its power to interpret the Charter. Moreover, it noted that there is no provision in the Charter precluding it, as a judicial organ of the UN, from exercising such a function.²⁰

The above dictum has been recalled by the Court in several cases, for instance the *Second Admission* case, where it stated that, according to Art. 96 of the Charter and Art. 65 of the Statute, "it may give an opinion on any legal question and that there is no provision which prohibits it from exercising ... an interpretative function".²¹

In addition, the ICJ implicitly affirmed its power to interpret the Charter in several cases. In the *Reparation* case, it interpreted the Charter as recognising the legal personality of the UN,²² and in the *International Status of South-West Africa* case it interpreted the Charter as affirming the supervisory power of the GA with

¹⁹ ICJ Pled., 1947, pp. 29, 88-90, 110-11.

²⁰ The Court observed: "[i]t has also been maintained that the Court cannot reply to the question put because it involves an interpretation of the Charter. Nowhere is any provision to be found forbidding the Court, 'the principal judicial organ of the United Nations', to exercise in regard to Article 4 of the Charter, a multilateral treaty, an interpretative function which falls within the normal exercise of its judicial powers." ICJ Rep., 1948, p. 61; Schwartz, W., "The International Court's Role as an Advisor to the United Nations", *BULR*, XXXVII, 1957, pp. 409-10.

²¹ ICJ Rep., 1950, p. 6. In this case, Judge Alvarez pointed out in his dissenting opinion that "[f]irst of all, it must be made perfectly clear that the Court has competence to interpret the Charter of the United Nations like any other instrument, without any limitations whatever". ICJ Rep., 1950, p. 15.

²² See p. 125 below. With regard to this case, it has been noted by Rosenne that "[a]lthough the *Reparation* case concerned *par excellence* the interpretation of the Charter as a whole, no question of competence was raised, either in the pleadings or in the opinion itself. The request actually defined the questions as 'legal question', a qualification accepted by the Court without further comment." Rosenne, S., "The Advisory Competence of the International Court of Justice", *RDISDP*, 1, 1952, p. 21.

regard to the administration of the territory of South-West Africa.²³ In addition, the Court interpreted the Charter in the *UN Administrative Tribunal* case as confirming the Assembly's right to establish a judicial tribunal.²⁴ In the *Expenses* case, it interpreted the Charter as affirming the GA's power in respect of the "expenses of the organisation", and in respect of the maintenance of international peace and security.²⁵ Finally, as noted by Sohn, in the *Nicaragua* case the Court interpreted the Charter by clarifying the link between the Charter and customary international law by noting that "[t]he Charter gave an expression in this field to principles already present in customary international law, and that law has in the subsequent four decades developed under the influence of the Charter, to such an extent that a number of rules contained in the Charter have acquired a status independent of it".²⁶ The Court concluded that the essential consideration was that "both the Charter and the customary international law flow from a common fundamental principle outlawing the use of force in international relations".²⁷

To conclude, it seems clear that the Court has no doubt regarding its power to interpret the Charter. It affirms that it is not the only organ for interpreting the Charter, but this does not exclude it from exercising this function. This attitude of the ICJ should be upheld. There is no doubt that the Court is the most appropriate organ to interpret the Charter. It is the principal judicial organ of the UN and it has the power to give advisory opinion and decide contentious cases.

Having confirmed the Court's power to interpret the provisions of the Charter, the study turns to focus on the role of the ICJ in interpreting and developing UN law.

2. The ICJ and the implied powers of the UN and its organs

The UN Charter - like any institutional instrument - indicates the general rules of the work of the organisation. As the UN has grown, the number of concerns has

²³ See p. 127 below.

²⁴ See p. 130 below.

²⁵ See pp. 132 *ff.* below.

²⁶ ICJ, 1984, pp. 96-7.

²⁷ *Ibid.*; Sohn, *supra* note 7, p. 176.

increased considerably, arising from the new needs of the organisation in many fields. In order to deal with the new needs, the organisation is required to expand its role by giving an expanded interpretation to its constitutional instrument. This could be done through the day-to-day work of its organs or by the interpretation of its judicial body. In practice, the ICJ has recognised several implied powers of the UN and its organs to enable them to achieve their objectives.

2.1. The international legal personality of the UN

The Court, in the *Reparation* case, was seized of an issue that was destined to become a landmark in the progressive development of the legal status of the UN. This case was referred to the Court by the GA, which asked the Court whether or not the UN had the capacity to bring an international claim against a state responsible for an injury to a UN official on duty.²⁸ The Court found that recognising this capacity requires first of all affirming the international legal personality of the UN. Therefore, it examined the Charter and found that, according to the Charter, the organisation was not “merely a centre for harmonising the actions” of its individual members. It stated that, “if the organisation is recognised as having that personality, it is an entity capable of availing itself of obligations incumbent upon its members”.²⁹ In the light of the absence of any express provisions in the Charter conferring such a capacity, the Court proceeded to inquire if such a capacity can be implied from the provisions of the Charter concerning the functions of the organisation. The Court expressly referred to the “needs of the community” and the influence of “the requirements of international life” upon the development of international law. In addition, it said that “fifty states, representing the vast majority of the members of international community, had the power, in conformity with international law, to bring into being an entity possessing objective international personality”.³⁰

²⁸ ICJ Rep., 1949, pp. 177-8.

²⁹ Ibid., pp. 178-9, 182.

³⁰ It has been noted by Lauterpacht that “the International Court has made certain assumptions about personality in other contexts. For example in the various Judgments and Opinions bearing on Namibia (South-West Africa) the Court has accepted without discussion that the League of Nations as an international person has come to an end; that in some respects it has been replaced by the United Nations; and that in consequence certain powers in relation to Namibia

It is therefore clear that the Court concluded that the organisation must be deemed to have those powers which, though not expressly provided in the Charter, are conferred upon it. It recognised for the first time in the international arena the legal personality of the UN - despite the silence of the Charter - as being an indispensable consequence of the achievement of the organisation's objectives, functions, duties, and rights.³¹ This opinion led to the confirmation that the UN possesses an international juridical personality defined as the capacity of being a subject of legal duties and legal rights, of performing legal transactions and of suing and being sued at law.

This opinion is considered to be a milestone in the doctrine of international institutional law and specifically in the life of the UN.³² Such recognition is indispensable for the fulfilment of its purposes and functions. It is an acknowledgement that the UN is capable of exercising certain rights and being subject to certain duties. This opinion also has an effect in changing the orthodox doctrine of the concept of international legal personality. According to the traditional view, such a concept is restricted to states in the international community. The Court's opinion has extended this concept to international organisations. The effect of this opinion is not restricted only to the UN. It has also affected other international organisations in the international community because they are recognised as subjects of international law. Accordingly, several powers have been recognised, such as their treaty-making power, which grants several privileges and immunities to these organisations, and their power to bring international claims, and

have devolved upon the United Nations. Again in such opinions as the *Effect of Awards of the United Nations Administrative Tribunal* or the *Application for Review of Judgment No. 158 of the United Nations Administrative Tribunal* the Court has proceeded on the basis that the United Nations is a person and is, within its special system, capable of being a party to litigation instituted by members of its staff. But neither of these decisions in terms casts any additional light on the content of the 'international personality' attributable to the organisation." Lauterpacht, E., "The Development of the Law of International Organisation by the Decision of International Tribunal", *RCDAI*, 152, 1976, p. 412.

³¹ Fitzmaurice, G., "The Law and Procedure of the International Court of Justice: International Organisations and Tribunals", *BYIL*, 29, 1952, p. 3; Martinez, M., *National Sovereignty and International Organisations*, 1996, pp. 82 ff.

³² For the legal position of the international organisations before this dictum, see Amerasinghe, C., *Principles of the Institutional Law of International Organisations*, 1996, pp. 77 ff.

finally they have convened international conferences of plenipotentiary representatives.

2.2. Supervisory competence over territories under the mandate system

The ICJ further developed the thesis of implied powers in connection with the supervisory powers of the UN over the territories which were under the mandate system of the League. The territory of South-West Africa was one of the German overseas possessions.³³ After the First World War, this territory was placed under a mandate conferred upon the Union of South Africa, which was to have full power of administration and legislation over the territory as an integral part of the Union.³⁴ The Union Government exercised an international function of administration on behalf of the League. With the dissolution of the League of Nations and the establishment of the UN, the question arose whether or not the UN has succeeded to the supervisory powers over the League mandate territories. The League made no express transfer of such powers; nor did the Charter of the UN express an obligation for member states to convert their League mandates into UN trusteeship.³⁵ The Union of South Africa alleged that the mandate had elapsed and sought the recognition of the UN of the integration of the territory of South-West Africa in the Union. It based its demand on the wishes of the vast majority of the inhabitants and therefore found itself unable to place the territory under the trusteeship system of the UN. The UN refused the allegation and invited the Union of South Africa to place the territory under trusteeship according to the provisions of Chapter XII of

³³ Zacklin, R., "The Problem of Namibia in International Law", *RCADI*, 171, 1981, pp. 234-5.

³⁴ For more details, see Rao, P., "South West Africa Case: Inconsistent Judgment from the International Court of Justice", *IJIL*, 6, 1966, p. 383; Higgins, R., "The International Court and South West Africa. The Implications of the Judgment", *Int.Aff.*, 42, 1966, p. 572; Aboul-Enein, M., "The United Nations Reaches a Deadlock in Namibia", *REDI*, 31, 1975, pp. 124-7; Zacklin, *supra* note 33, pp. 235-6.

³⁵ Art. 77 of the Charter provides:

"1. The trusteeship system shall apply to such territories in the following categories as may be placed thereunder by means of trusteeship agreements:

- (a) territories now held under mandate;
- (b) territories which may be detached from enemy states as a result of the Second World War; and
- (c) territories voluntarily placed under the system by states responsible for their administration.

2. It will be a matter for subsequent agreement as to which territories in the foregoing categories will be brought under the trusteeship system and upon what terms."

the Charter.³⁶ The Union of South Africa refused to comply with this invitation. Therefore, the GA requested the ICJ to give an opinion on the following question: “Does the Union of South Africa continue to have international obligations under the Mandate for South-West Africa and, if so, what are those obligations?”³⁷

Before the Court, South Africa argued, *inter alia*, that the mandate had dissolved with the disappearance of the League and it would no longer be under any international obligations. The Court had to consider whether or not the new international organisation created by the UN could exercise the supervisory power over the mandate that had previously been exercised by the League of Nations. The answer was in the affirmative. The Court found that the obligation incumbent upon the mandatory states to accept international supervision was an important part of the mandate system, designed to ensure the effective implementation of the “sacred trust of civilisation”. The Court also affirmed that the necessity for supervision continued despite the disappearance of the original supervisory organ, and therefore the obligation of each mandatory state to continue to submit to supervision also continued. The Court concluded that South Africa could not arbitrarily change the status of South-West Africa without the UN’s consent because the international trusteeship system of the UN was designed to meet the same necessity which led to the UN’s inheriting the power of supervision of mandate territory.

Having decided the continuity of supervision, the ICJ found that the GA is the only organ capable of operating the supervisory functions previously exercised by the League of Nations. The supervisory functions of the GA were based on the resolution of the League of Nations adopted on 18 April 1946, which stated that, although the League’s functions with respect to mandate territories were ending,

³⁶ In 1946 and 1947 South Africa submitted reports on the territory that were examined by the Trusteeship Council at the request of the General Assembly. In 1948 South Africa took the position that the United Nations had no supervisory jurisdiction over the territory, that it was under no legal obligation to submit reports, and that the previous report had been submitted on a purely voluntary basis with the stipulation that this act should not be considered as a precedent or a commitment to further action. In the General Assembly, the South African view was not accepted and there was a view that South Africa was under a legal obligation to report to the Assembly on its administration of the territory and the situation that had prevailed in South Africa under the mandate system should not be changed pending the conclusion of a trusteeship agreement. See Goodrich, L. et al., *Charter of the United Nations: Commentary and Documents*, 1969, p. 496; Rao, *supra* note 34, p. 384.

³⁷ GA Res. 338 (IV), 6 December 1949; ICJ Rep., 1950, p. 131.

Chapters XI, XII, and XIII of the UN Charter embodied principles corresponding to those set out in Art. 22 of the Covenant.³⁸ The Court referred to Art. 10 of the Charter, which gives the GA very wide powers to discuss any question or any matters within the scope of the UN, *inter alia* the exercise of international supervision.³⁹ In addition, Art. 80/1 of the Charter maintains the rights of states and the terms of existing international instruments until the territories in question are placed under the trusteeship system of the UN.⁴⁰

In the light of the above, the Court found that this supervisory function could not be effectively exercised without a duty upon the Union of South Africa to render reports to the supervisory organs, and consequently the Union remained bound by the terms of Art. 22 of the League's Covenant and the mandate system, and was under an obligation to transmit petitions from inhabitants of the territory to the UN.⁴¹

From this opinion, it seems clear that the Court has recognised that the mandate continued to exist despite the dissolution of the League of Nations. It recognised also that the obligation to submit to supervision will not disappear merely because

³⁸ In 1946, when the League Assembly met in its final session, it took note of the "expressed intention" of the mandatory powers to continue to administer the territories under mandate in accordance with the obligations contained in the mandate agreement "until other arrangements have been agreed between the United Nations and the respective mandatory Powers". LNOJ, Special Supp. 194, Annex 27, pp. 278-9; Goodrich, *supra* note 36, p. 496.

³⁹ Makarczyk notes that: "[t]he Court has given a very large interpretation of this Article, sanctioning the competence of the plenary organ to discuss every case or question belonging to the tasks of the organisation and taking measures going as far as supervision over an agreement to which the UN was not a party." Makarczyk, J., "International Court of Justice on the Implied Powers of Organisations" in Makarczyk, J. (ed.), *Essays in International Law in Honour of Judge Manfred Lachs*, 1984, p. 509.

⁴⁰ This dictum was confirmed in several cases, for instance ICJ Rep., 1956, p. 26 *ff.*; ICJ Rep., 1971, pp. 34 *ff.*

⁴¹ ICJ Rep., 1950, pp. 136 *ff.*; Vallat, *supra* note 7, p. 284; Lauterpacht, H., *The Function of Law in the International Community*, 1933, p. 437; Bastid, S., "La Jurisprudence de la Cour Internationale de Justice", *RCADI*, 78, 1951, pp. 665-6; Rao, *supra* note 34, p. 385; Shihata, I., "The Problem of the South-West Africa in the United Nations", *Al-Syisa El-dawlia*, 1, 1965, p. 60; Luard, E., *The United Nations - How It Works and What It Does*, 1979, p. 85; Zacklin, *supra* note 33, pp. 253 *ff.*; Higgins, *supra* note 34, p. 574; Chiu, H., "Succession in International Organisations", *ICLQ*, 14, 1965, pp. 103-5; Gross, L., "The Development of International Law through the United Nations" in Gross, L., *Essays in International Law and Organisation*, 1984, pp. 221-2; Baehr, P., et al., *The United Nations. Reality and Ideal*, 1984, p. 128; Dore, I., *The International Mandate System and Namibia*, 1985, pp. 75-6; Brownlie, I., *Principles of Public International Law*, 1990, p. 172.

the supervisory organ has ceased to exist, because there exists another organ which is capable of performing a similar function. Further, the Court, despite the lack of any explicit transfer of the mandate to the UN, concluded that the GA is the competent authority to exercise such a function.

2.3. The creation of subsidiary judicial organs by political organs

In addition to the above, the ICJ also developed the notion of the implied powers of the internal law of the UN in the *UN Administrative Tribunal* case. The establishment of the UN Administrative Tribunal as a subsidiary organ of the GA arose as a consequence of the referral of a question whether or not the GA had the right to refuse to give effect to an award of compensation made by the tribunal.⁴² The notion of implied powers was examined by the ICJ as a consequence of the argument in the GA about its power to establish a tribunal to render judgments binding upon the UN.⁴³ It was argued before the Court, *inter alia*, that the GA had no power to establish a judicial organ with a “legal power” of rendering judgments that would “compel” the GA to a decision involving a “legal question” without the possibility of modification. Therefore, the GA must “rely upon policy grounds” to refuse to accept the awards.⁴⁴

The Court admitted that there was no express provision regulating the establishment of judicial bodies by political organs. Nevertheless, there was no indication to the contrary. It concluded that the GA has the power to establish a

⁴² See p. 147 below.

⁴³ This United Nations Administrative Tribunal was established by GA Res. 351 A (IV), 24 November 1949, to hear and pass judgment upon an application alleging non-observance of contracts of employment of staff members of the Secretariat of the United Nations or of terms of appointment of such members. For details regarding the *travaux préparatoires* establishing this tribunal by the GA, see the written statement submitted by the UN Secretary-General to the ICJ in the *UN Administrative Tribunal* case, ICJ Pled., 1953, pp. 226 ff.; Bastid, S., “United Nations Administrative Tribunal”, *EPIL*, 5, 1983, p. 281; Amerasinghe, C., *The Law of the International Civil Service*, 1994, pp. 54-6; Amerasinghe, *supra* note 32, pp. 46-7; UN Doc. A/986, GAOR, 4th Sess., Fifth Committee, Annex, vol. 1, 1949.

⁴⁴ ICJ Pled., 1953, pp. 155, 187; Gross, L., “Some Observations on the International Court of Justice”, *AJIL*, 56, 1962, p. 56.

subsidiary organ with judicial powers to see that justice is done between the organisation and the members of its staff.⁴⁵ The Court stated:

“It would ... hardly be consistent with the expressed aim of the Charter to promote freedom and justice for individuals ... that it should afford no judicial or arbitral remedy to its own staff for the settlement of any disputes which may arise between it and them.”⁴⁶

The Court referred to Art. 7/2, which authorises the UN organs to create subsidiary organs in general, and Art. 22 of the Charter, which empowers - specifically - the GA to establish subsidiary organs to perform its functions.⁴⁷

To conclude, it seems clear that the ICJ affirmed that the powers of the UN and its organs are not limited to the express provisions, but extend to the sweeping panorama of the purposes of the organisation as contained in the Charter. The Court granted the effectiveness of the UN and its organs by affirming that their capacity proceeds not only from specific provisions of the Charter but also from all those implying any ancillary powers.

3. The determination of the relationship between the UN organs

Since the UN was established to fulfil several objectives, the drafters of the Charter felt that many organs and agencies had to be established to enable the parent organisation (the UN) to fulfil these objectives. In this regard, the Charter established many organs and distributed the functions among them. It also determined the relationship between them to avoid any overlap or disputes in achieving these objectives.⁴⁸ In practice, each organ in the course of carrying out its activities faces specific problems and difficulties, which makes a certain exercise of power or function necessary to effectuate the general purposes for which it was created.

⁴⁵ Markarczyk, *supra* note 39, p. 511; Gordon, E., “The World Court and the Interpretation of Constitutive Treaties. Some Observations on the Development of an International Constitutional Law”, *AJIL*, 59, 1965, p. 819; Martinez, *supra* note 30, pp. 86-7.

⁴⁶ ICJ Rep., 1954, p. 57.

⁴⁷ Ibid.

⁴⁸ Amer, S., *Law of International Institutional. General Theory*, 3rd ed., 1984, pp. 367 ff.

In many instances the issue of the relationship between UN organs, especially the GA and the SC, was referred to the ICJ. In the following, the study will focus on the role of the Court in determining the relationship among UN organs in respect of concurrent and joint functions.

3.1. Concurrent functions between the GA and SC in maintaining international peace and security⁴⁹

Maintenance of international peace and security is considered to be one of the main objectives of the UN. The Charter entrusted the GA and the SC as political organs with the responsibility to achieve this objective.

The SC has primary responsibility to achieve this objective, and members have agreed that the Council acts on their behalf.⁵⁰ The SC might act in accordance with Chapter VI, by which it can investigate any dispute or any situation which might lead to international friction or give rise to a dispute in order to determine whether the continuance of the dispute or situation is likely to endanger the maintenance of international peace and security; recommend appropriate procedures or methods of adjustment; establish whether the continuance of a dispute is in fact likely to endanger the maintenance of international peace and security for the purpose of deciding whether to act under Art. 36 or of making recommendations for appropriate terms of settlement; and call upon the parties to settle their disputes by the peaceful means listed in Art. 33/1, or make recommendations to them with a view to a pacific settlement of the dispute. In addition, the Council under Chapter VII is empowered to undertake a variety of actions if it affirms the existence of any threat to the peace or breach of the peace. In this event, the Council may make recommendations to a state or decide measures as stated by Arts. 41 and 42 of the Charter by which it can apply economic, diplomatic, and finally military sanctions.⁵¹

⁴⁹ Concurrent jurisdiction means that the same function can be exercised by more than one organ with the same effect.

⁵⁰ Art. 24/1 of the Charter.

⁵¹ Malinverni, G., "The Settlement of Disputes within International Organisations" in Bedjaoui, M. (ed.), *International Law: Achievements and Prospects*, 1991, p. 558; Bhuinya, N., *International Organisations (A Critical Study of League of Nations, United Nations, International Court of Justice)*, 1970, p. 82; White, N., *The United Nations and the Maintenance of International*

The GA also has a role in achieving this objective. This power is based on Art. 10, which confers a broad competence to discuss any questions or any matters within the scope of the Charter. Therefore, because the maintenance of international peace and security is the main issue of the Charter, the GA can deal with this matter. This is affirmed also by Art. 11, which deals specifically with the Assembly's power in this field by empowering it to deal with any situation that might threaten the peace or breach it or be considered as an act of aggression. In addition, Art. 14 emphasis the Assembly's power in regard to the peaceful adjustment of any situation which it deems is likely to impair the peace, general welfare or friendly relations among nations.⁵² This competence was confirmed by the practice of the GA as a consequence of its adoption of Res. 377 (V), of 3 November 1950, entitled "Uniting for Peace". This resolution provides, *inter alia*, that if the SC, because of a lack of unanimity, fails to exercise its primary responsibility in the maintenance of peace, a breach of the peace or an act of aggression, the Assembly shall consider the matter immediately, with a view to making recommendations to members for collective measures, including, in the case of a breach of the peace or an act of aggression, the use of armed force when necessary to maintain international peace and security. The GA's competence in this regard is restricted to the adoption of recommendations to restore international peace and security.

Peace and Security, 1990, pp. 62 ff.; Sonnenfeld, R., *Resolutions of the United Nations Security Council*, 1988, p. 92.

⁵² This power was also confirmed by Art. 35, which enables both member and non-member states to bring any dispute or situation, of the nature mentioned in Art. 34, to the attention of the SC or the GA. Para. 3 of this article indicates that the proceedings of the GA in respect of matters brought to its attention under this article will be subject to the provisions of Arts. 11 and 12. See Jenks, C., "Co-ordination: A New Problem of International Organisation - A Preliminary Survey of the Law and Practice of Inter-Organisational Relationship", *RCADI*, 77, 1950, p. 161; Higgins, R., *The Development of International Law Through the Political Organs of the United Nations*, 1963, p. 227; Higgins, R., "United Nations Peace-Keeping, Political and Financial Problems", *Wor.Tod.*, 21, 1965, p. 325; Kelsen, H., *Recent Trends in the Law of the United Nations (A Supplement to the Law of the United Nations)*, 1964, pp. 952 ff.; Baehr, et al., *supra* note 41, pp. 76-9; Kamel, M., *National Security and Collective Security - Some Legal Aspects*, Ph.D. Thesis (Cairo University), 1986, pp. 519 ff.; Chehab, M., *International Organisations*, 1991, pp. 261-2; Castañeda, J., "Valeur Juridique de Résolutions des Nations Unies", *RCADI*, 129, 1970, pp. 258 ff.; Hogg, F., "Peace-Keeping Costs and Charter Obligations - Implications of the International Court of Justice Decisions on Certain Expenses of the United Nations", *Col.LR*, 62, 1962, p. 1234; Bailey, S., *The General Assembly of the United Nations*, 1964, p. 17.

As a consequence of giving both organs the power to achieve the objective of the maintenance of international peace and security, and despite the existence of Art. 12/1 of the Charter which determines the relationship between the GA and the SC in this respect,⁵³ a “positive conflict” between both organs in the fulfilment of this objective may occur.⁵⁴ Such a conflict arose as a consequence of the GA’s intervention in the Spanish problem following the failure of the SC to deal with the matter. Such intervention arose also in the dispute between Greece on the one hand and Albania, Yugoslavia and Bulgaria on the other hand, in the case of Korea and in the Suez crisis.⁵⁵

In all the above cases the intervention of the GA was rejected by some states on the basis that the Assembly was breaching the limitations imposed upon it in its relationship with the SC in this regard. Here, the question might arise whether or not the ICJ had a role to interpret the common competence of the GA and the SC in maintaining international peace and security. In fact, this issue was referred to the ICJ to be dealt with in the *Expenses* case.

This case was referred by the GA to the ICJ as a consequence of the disagreement among the member states of the UN regarding the costs of the United Nations Emergency Forces (UNEF) and United Nations Operation in the Congo (ONUC).⁵⁶ The GA had attempted to fund these operations through normal

⁵³ According to this article, the GA is barred from recommending on the given issue while the SC is exercising the functions assigned to it under the Charter. See Kosonen, A., *The United Nations General Assembly and the Authority to Establish UN Forces*, 1986, pp. 18 ff.

⁵⁴ It should be noted that this conflict had its roots in the stage of the *travaux préparatoires* of the Charter. During this stage, the big powers tried to deprive the Assembly of any real power, while the smaller states represented at San Francisco insisted that all the power should not be in the hands of the Council or, more specifically, in the hands of the veto-wielding powers. In this respect, see White, *supra* note 51, p. 95.

⁵⁵ For more details regarding the practice of the GA and SC in the maintenance of peace, see White, *supra* note 51, pp. 113 ff.; Altling von Geusau, F., “Financing United Nations Peace-Keeping Activities”, *NILR*, 12, 1965, pp. 289-91; Yoder, A., *The Evaluation of the United Nations System*, 1993, pp. 40-1; Prandler, A., “Competence of the Security Council and the General Assembly” in Haraszti, G. (ed.), *Questions of International Law*, 1977, p. 154; Malinverni, *supra* note 51, p. 563; Vallat, *supra* note 7, p. 251 ff.; Luard, E., *A History of The United Nations*, vol. 1: *The Years of Western Domination, 1945-1955*, 1982, pp. 229 ff.; Kelsen, *supra* note 52, pp. 927 ff.

⁵⁶ The UNEF was established by the GA in 1956 as a consequence of the Suez crisis and the failure of the Security Council to take effective action. It was established to facilitate conditions of peace in the Middle East, under the United Nations command. Funding for the force was provided through a special account into which members were to pay their required assessment plus any voluntary contributions. The ONUC was established by the SC in 1960 as a consequence of the

apportionment to all member states, but some of them refused to pay their assessed shares. Accordingly, the GA requested an advisory opinion from the ICJ as to its authority in respect of the organisation's budget. Although the expenses of the UN were the main issue in this case, the Court found that it had to examine the power of the SC and the GA in respect of maintaining international peace and security and establishing such peace operations. It was argued before the Court that the maintenance of international peace and security is entrusted exclusively to the SC, and that the GA has no power to undertake any activities in this sphere.⁵⁷ The Court examined the respective functions of maintaining international peace and security of both organs in the light of the Charter. It specifically examined Arts. 11/2, 14 and 24 of the Charter, which cover the competence of both organs in this respect. The Court concluded that the GA has power in respect of the maintenance of international peace and security *vis-à-vis* the SC. It stated that the power of the SC in this respect does not preclude the GA from recommending measures or actions in this regard. The Court found that the word "primary" embodied in Art. 24 of the Charter means that the SC has a main but certainly not exclusive responsibility for the maintenance of international peace.⁵⁸ Consequently, it recognised that the GA might initiate measures provided that it respects the explicit limitation incorporated in Art. 12/1.⁵⁹

outbreak of violence in the Congo. See Slonim, S., "The Advisory Opinion of the International Court of Justice on Certain Expenses of the United Nations: A Critical Analysis", *HLJ*, 10, 1964, pp. 227-8; Cotton, J., "Financing Peacekeeping - Trouble Again", *CILJ*, 11, 1978, pp. 108-9; White, *supra* note 51, pp. 195 *ff.*; Hogg, *supra* note 52, p. 1231; Altling von Geusau, *supra* note 55, pp. 294 *ff.*; Simmonds, K., "The UN Assessments Advisory Opinion", *ICLQ*, 13, 1964, pp. 858-860.

⁵⁷ ICJ Pled., 1961, pp. 177-8, 399; ICJ Rep., 1962, p. 162.

⁵⁸ The Court stated: "[t]he responsibility (conferred on the Security Council by article 24) is 'primary', not exclusive ... The Charter makes it abundantly clear, however, that the General Assembly is also to be concerned with international peace and security ... Thus while it is the Security Council which, exclusively, may order coercive action, functions and powers conferred by the Charter on the General Assembly are not confined to discussion, consideration, the initiation of studies and the making of recommendations; they are not merely hortatory." ICJ Rep., 1962, pp. 163 *ff.*; see also Gross, L. "Expenses of the United Nations for Peace-Keeping Operations" in Gross, L. (ed.), *Essays on International Law and Organisation*, 1984, pp. 770-1; Amerasinghe, C., "The United Nations Expenses Case - A Contribution to the Law of International Organisation", *IJIL*, 4, 1964, p. 198; Markarczyk, *supra* note 39, p. 515.

⁵⁹ ICJ Rep., 1962, pp. 163-5, 172; Altling von Geusau, *supra* note 55, p. 287; Murphy, J., *The United Nations and the Control of International Violence - A Legal and Political Analysis*, 1983, p. 116; Schermers, H., *International Institutional Law*, 1980, p. 595; Simmonds, *supra* note

In the light of the above opinion, it can be concluded that the Court has played a significant role in confirming the powers and limits upon the GA and the SC in achieving one of the main purposes of the UN, namely the maintenance of international peace and security.

3.2. Joint competence of the political organs⁶⁰

The UN Charter refers to some joint competencies between the SC and the GA. According to the Charter, several acts or decisions should be taken by one organ upon the recommendation of the other. These issues are related to the admission of new members, their suspension, or their expulsion from the organisation, the appointment of the Secretary-General, allowing a non-member state to the UN to be party to the Court's Statute, and the determination of conditions under which a state which is a party to the statute but is not a member of the UN may participate in electing the members of the Court. The decisions in all these issues are taken by the GA upon recommendation of the SC.

The ICJ dealt with the determination of the relationship between the GA and the SC in respect of their joint competencies in the *Second Admission* case. This case was referred to the ICJ by the GA for an advisory opinion on whether or not the GA could admit a new member to the UN without a recommendation from the SC.⁶¹

It was argued before the Court that the GA could consider the absence of the Council's recommendation as a "passive recommendation".⁶² Accordingly, if the SC failed to decide in favour of a given application, the GA could decide to admit the applicant state, despite the lack of the Council's recommendation. According to

56, p. 870; Tewary, I., *The Peace-Keeping Power of the United Nations General Assembly*, 1974, pp. 40 ff.

⁶⁰ Joint competence means that the function of an organ can be effective only in conjunction with an act of the other organ.

⁶¹ During the early years of the UN it was suggested by some states that "application for membership should be placed first before the General Assembly". GAOR, 1st Sess., Supp. No. 1, 1946 II, p. 91. In addition, it was argued that: "[w]hatever the vote in the Security Council, whether with or without the veto, when a recommendation was not approved, whatever the reason might be, that decision must be transmitted to the General Assembly for final decision". GAOR, 3rd Sess., part 1, *ad hoc* Political Committee, 1946, p. 121.

⁶² ICJ Pled., 1949, pp. 123-48.

this view, the GA alone could adopt a decision to accept new members in the UN.⁶³ The Court had to interpret Art. 4/2 of the Charter, which provides that admission “will be effected by a decision of the General Assembly upon the recommendation of the Security Council”.⁶⁴ It rejected the above argument *in toto*. The Court found that it required two things to effect admission: a “recommendation” by the SC and a decision by the GA. “Both these acts”, said the Court, “are indispensable to form the judgment of the Organisation to which the previous paragraph of Article 4 refers.”⁶⁵ It concluded that the admission of a new state in the absence of the Council’s recommendation would virtually nullify the role of the SC in the exercise of one of its essential functions.

The above opinion emphasised the position of the SC *vis-à-vis* the GA with regard to the admission of new members as one of their joint competencies. This opinion was based on the fact that both the GA and the SC are equally principal organs of the structure of the UN. In addition, it noted that the words “recommendation” and “upon” implied that the recommendation of the SC was indispensable. In consequence, the Court concluded that the attempt to deprive the SC of an important power which had been entrusted to it by the Charter was rejected.⁶⁶

Some international lawyers noted, correctly, that the Court, by this opinion, preserved the autonomy of the Assembly and Council in the exercise of the powers and responsibilities conferred upon them by the Charter.⁶⁷

⁶³ Fitzmaurice, *supra* note 31, p. 25.

⁶⁴ It should be noted that the issue of admission of new members to the UN was a moot point during the *travaux préparatoires* stage of the Charter. Some participants suggested following the League’s system in this respect by which the admission of new members should be referred only to the Assembly. Conversely, other participants suggested that, since the maintenance of international peace and security is the main purpose of the UN, the SC should assume the initial responsibility of suggesting new members. See UNCIO, 7, p. 451; Goodrich, *supra* note 36, p. 93; Fakher, *supra* note 10, pp. 187-8.

⁶⁵ ICJ Rep., 1950, pp. 7-8; Khan, R., *Implied Powers of the United Nations*, 1970, pp. 146-7; Bastid, *supra* note 41, pp. 660-1; Schwarzenberger, G., *International Law as Applied by International Courts and Tribunals*, vol. III: *International Constitutional Law*, 1976, pp. 256-7; Gross, L., “Election of States to United Nations Membership” in Gross, L. *Essays in International Law and Organisation*, 1984, pp. 593-4.

⁶⁶ ICJ Rep., 1950, p. 9.

⁶⁷ Gross, *supra* note 44, p. 56.

4. The ICJ and the exercise of exclusive competence by the UN organs

The term “exclusive competence” means that each organ has a specific function and no other organ is competent to exercise this function. The UN Charter empowers each organ of the UN with such a competence. Since the jurisprudence of the ICJ in this regard is mainly related to the exclusive functions of the GA and the SC, the study will focus on the scope of their exclusive competencies and the role of the ICJ in affirming and interpreting these functions.

The GA, exclusively, has the right to discuss any questions or matters either within the scope of the Charter or relating to the powers and functions of any organs of the UN (Art. 10). It also has the competence to initiate studies and make recommendations to promote international political co-operation, the development and codification of international law, the realisation of human rights and fundamental freedoms, and international collaboration in economic, social, cultural, educational and health fields (Art. 13). In addition to the above comprehensive competencies, the Charter empowers the GA with some determined competencies. For instance, it has the right to supervise the international trusteeship system and approve agreements for areas not designated as strategic (Arts. 16, 79, 83/1, and 85/1), to supervise the ECOSOC (Art. 60), to approve the budget of the organisation, apportion the expenses among members and approve financial and budgetary arrangements (Art. 17), to approve agreements bringing the specialised agencies into relationship with the UN (Art. 63) and arrangements with specialised agencies, to authorise other organs of the UN, except the SC, and the specialised agencies to request advisory opinions and certain other matters relating to the Court (Arts. 93/2 of the Charter and Arts. 32, 33 and 69 of the Court’s Statute), and to elect the non-permanent members of the SC and the members of the Economic and Social Council (Art. 61/1).

The SC too is entrusted with some exclusive competencies. For instance, it has the right to adopt international sanctions according to Chapter VII of the Charter, restore the rights and privileges of a suspended member of the UN (Art. 5), formulate plans to be submitted to the members of the UN for the establishment of a system for the regulation of armaments (Art. 26), supervise the strategic areas in

respect of the trusteeship system (Art. 83/1), enforce the ICJ's judgments (Art. 94/1) and regulate the conditions under which the Court shall be open to other non-party states to the Statute (Art. 35/2 of the Court's statute).

The study will now turn to focus on the role of the ICJ in interpreting and developing these exclusive competencies of the GA and SC.

4.1. Interpreting and developing the competencies of the GA

The ICJ played a considerable role through its jurisprudence in interpreting and developing the exclusive competencies of the GA in many aspects.

4.1.1. Protection of human rights

The ICJ dealt with the GA's power with regard to the protection of human rights in the *Peace Treaties* case. The observance of human rights in Hungary and Bulgaria was discussed by the GA during the second part of its Third Session.⁶⁸ A year later, some states addressed notes to Rumania, alleging its violation of the human rights provisions of the peace treaties. Given the failure of efforts to settle this matter according to the dispute-settlement procedure in these treaties, the GA adopted a resolution by which the matter was referred to the ICJ for an advisory opinion.⁶⁹

In this case, it was argued that the GA had no power to deal with this matter and to request an advisory opinion, because the whole matter relates to actions carried out in their own territories and with reference to their own nationals.⁷⁰ The Court dismissed this argument and affirmed the Assembly's power in respect of the international protection of human rights. It based its opinion on the GA's interpretation of Art. 55 of the Charter under which the GA dealt with the matter. According to the Court's view, the question of human rights came within the scope of the specific provisions of the Charter, particularly Art. 55 which entitles the Assembly to promote universal respect for human rights. It is clear that, in the Court's view, the question of human rights is one of the exclusive functions of the

⁶⁸ This matter was raised by Australia and Bolivia as a consequence of the trials of Church leaders in Hungary and Bulgaria. UN Doc. A/820 and A/821, 16 and 19 March 1949.

⁶⁹ ICJ Rep., 1950; Pomerance, M., *The Advisory Function of the International Court in the League and UN Eras*, 1973, pp. 98-9.

⁷⁰ ICJ Rep., 1950, p. 70.

GA. The Court not only affirmed the Assembly's power in this respect *vis-à-vis* the member states of the UN, but went further in recognising such a power even in respect of non-member states of the UN.⁷¹

4.1.2. The power of the GA over international conventions concluded under its auspices

The Convention on the Prevention and Punishment of the Crime of Genocide was negotiated and adopted under the auspices of the GA and was opened for signature on 9 December 1948. According to this Convention, the Secretary-General was the depository of the ratification of the Convention, which would come into force upon ratification by the twentieth state. The Secretary-General, as a depository, was faced with a particular difficulty. As he noted, a number of states had ratified the Convention subject to specific reservations. Accordingly, he referred the matter to the GA to determine whether or not the reserving states were to be counted in the number required for the entry into force of the Convention.⁷² There was great disagreement among the delegations over this matter and the GA was not able to reach a conclusion. Thus, on 16 November 1950, the GA requested the ICJ to give an advisory opinion in this matter. The ICJ embodied the matter in its list as the *Reservations* case.

In this case, it was argued that the GA had no right to request an advisory opinion with regard to the Convention. According to this argument, the GA's request was considered an inadmissible interference by the Assembly as a non-party to the Convention, only parties to it having the right to interpret it or to seek an interpretation of it pursuant to Art. IX of the Convention.⁷³

⁷¹ Ibid., p. 70; De Aréchaga, E., "The Work and the Jurisprudence of the International Court of Justice 1947-1986", *BYIL*, LVIII, 1987, p. 3; Bastid, *supra* note 41, pp. 663-4.

⁷² UN. Doc. A/1372, 20 September 1950.

⁷³ Art. IX of the Convention provides: "[d]isputes between the Contracting Parties relating to the interpretation, application, or fulfilment of the present Convention, including those relating to the responsibility of a State for genocide or for any of the other acts enumerated in Article III, shall be submitted to the International Court of Justice at the request of any parties to the dispute."

In its reply, the Court affirmed the GA's right to deal with the matter and, consequently, to request an opinion with respect to the Convention.⁷⁴ The Court pointed out that not only did the GA take the initiative in respect of the Genocide Convention, draw up its terms and open it for signature and accession by the states, but express provisions of the Convention (Arts. XI and XVI) associate the GA with the life of the Convention; also the GA had actually associated itself with it by certain actions it had taken.⁷⁵ Finally, the Court noted that the power of the GA to request an opinion is concurrent with the right of the parties to the Convention; and invoking the contentious jurisdiction of the Court in accordance with the Convention does not impair their right to interpret it. The Court stated that:

"The existence of a procedure for the settlement of disputes, such as that provided by Article IX, does not in itself exclude the Court's advisory jurisdiction, for Article 96 of the Charter confers upon the General Assembly and the Security Council in general terms the right to request this Court to give an advisory opinion 'on any legal question'."⁷⁶

It seems clear that, contrary to the general principle of international law related to the position of the third party *vis-à-vis* international treaties, the ICJ recognised the role of the GA in respect of this Convention although it was not a party to it.

4.1.3. The exercise of supervisory competence over the territories under the trusteeship (mandate) system

As mentioned above, the ICJ has recognised the Assembly's power in respect of the territories which were under the mandate system despite the absence of any explicit provision in the Charter to this effect.⁷⁷ The Court's role was not limited to this recognition but it dealt with several issues related to the exercise of this competence, as will be discussed below.

⁷⁴ Akhavan, P., "Enforcement of the Genocide Convention through the Advisory Jurisdiction of the International Court of Justice", *HRLJ*, 12, 1991, p. 293.

⁷⁵ ICJ Rep., 1951, pp. 19-20; Bastid, *supra* note 41, pp. 664-5.

⁷⁶ ICJ Rep., 1951, p. 20.

⁷⁷ See p. 127 above.

(i) The degree of supervision

As a consequence of the Court's decision of 1950 - which affirmed the supervisory powers of the GA - the GA adopted what was called the "special Rule F" as regards the voting to be followed by the GA in taking decisions on questions relating to reports and petitions concerning South-West Africa. According to this rule, the GA's decisions on this matter were to be "regarded as an important question within the meaning of Article 12, paragraph 2, of the Charter of the United Nations". Before the GA it was argued that applying this rule would be contrary to the principle that in exercising its supervisory power the GA should not exceed the degree of supervision confirmed by the mandate system and followed by the Council of the League since it applied the unanimity rule when supervising the territory. Accordingly, the application of "Rule F" seemed to entail a greater "degree of supervision". In the light of this argument, the GA decided to seek an opinion of the Court about whether or not a voting procedure according to "Rule F" is a correct interpretation of the Court's opinion of 1950.⁷⁸

The ICJ affirmed that the GA, in exercising its supervision of the discharge of the mandate for South-West Africa, has a right to apply its own voting procedure, and found that the GA of the UN was bound by its own institutional provisions. It concluded that the application of "Rule F" by the GA is a correct interpretation of the ICJ's advisory opinion of 1950.⁷⁹ This implied that the consent of the mandatory states was no longer indispensable for the adoption of a valid decision, a situation that was different from that applying to the League's Covenant.

(ii) Maintenance of supervision

According to the League's practice regarding the mandate system, the Permanent Mandate Commission had not granted an oral hearing to petitioners. As a consequence of the refusal of South-Africa to forward any information to the Committee of South-West Africa established by the GA, the GA considered it

⁷⁸ Jennings, R., "The International Court of Justice on the Voting Procedure on Question Concerning South West Africa", *GS*, 41, 1956, p. 85 *ff.*; ICJ Rep. 1955, pp. 70 *ff.*

⁷⁹ ICJ Rep., 1955, p. 78; Crawford, J., "The General Assembly, the International Court of Justice and Self-Determination" in Lowe, V., et al. (eds.), *Fifty Years of the International Court of Justice*, 1996, p. 597.

necessary to obtain such information by effective means, *inter alia* an oral hearing of petitioners. An argument regarding this means was raised because it constituted a different practice from that of the League of Nations. Accordingly, the GA requested an opinion of the Court on whether or not this procedure could be considered consistent with the Court's opinion of 1950.⁸⁰ The ICJ decided that it was consistent with its opinion of 1950 for the GA to authorise a procedure for granting an oral hearing by the Committee of South-West Africa to petitioners who had already submitted written petitions as long as the GA was satisfied that such a course was necessary for the maintenance of effective international supervision of the administration of the mandate territories.⁸¹

It is clear that the Court plays a bold role in respect of the GA's exclusive competency to supervise territories under the mandate system. Although the GA was not a successor *stricto sensu* of the League of Nations in respect of its supervisory function over the mandated territories, and although there was no obligation on a mandatory state to bring a territory under the trusteeship system, the Court affirmed that the GA has the same supervisory power to continue controlling the territories which were under the mandate system as the Council of the League of Nations had. Indeed, it confirmed a higher degree of supervision. The Court found that the GA could not depart from its own voting rules, even though unanimity had been required under the League's Council.

4.1.4. The relationship between the GA and the UN Administrative Tribunal

As mentioned above, the question posed to the Court in the *UN Administrative Tribunal* case mainly concerned the determination of the relationship between the GA, the parent organ, and the Administrative Tribunal as its subsidiary organ.⁸² The Court had to answer whether the GA was legally entitled to refuse to give effect to an award of compensation made by the Administrative Tribunal.

In this case, it was argued that the GA had the power to review the judgments of the UNAT and consequently had the right to refuse to enforce them. This

⁸⁰ ICJ Rep., 1956, p. 24 *ff.*

⁸¹ Ibid.

⁸² See pp. 130 *ff.* above.

argument was based on the fact that, since the GA by establishing this tribunal did not delegate the performance of its own functions in this regard, it was exercising its power. In addition, it was argued that no subordinate organ could bind its own parent body. Therefore, it was concluded that the Assembly had the right to review the judgments of the UNAT and could refuse to give effect to them.⁸³ In its reply to the above argument, the Court stated:

“By establishing the Administrative Tribunal, the General Assembly was not delegating the performance of its own functions: it was exercising a power which it has under the Charter to regulate staff relations.”⁸⁴

Therefore, having examined the Tribunal’s Statute, the Court concluded that the Administrative Tribunal is an independent and truly judicial body pronouncing final judgments that are not revisable by any organ. It found that the Administrative Tribunal is not an advisory or subordinate organ and, consequently, its awards have a binding force on the UN.⁸⁵ Further, the Court observed that, although the Tribunal was created by the Assembly, its judgments are binding upon the GA, which has no right to refuse the execution of a decision issued by this Tribunal. The ICJ therefore advised the GA that, in the absence of a review procedure, there was no possible ground for the Assembly to refuse to abide by a judgment of the Tribunal. This opinion was based on the fact that the Administrative Tribunal is not a subordinate organ of the GA.⁸⁶

It can be concluded that, despite the fact that the Court had recognised the power of the GA to establish a subsidiary judicial organ, its power does not extend to reviewing its judgments because the Tribunal has a separate entity from that of the GA.⁸⁷

⁸³ ICJ Rep., 1954.

⁸⁴ Ibid., p. 61.

⁸⁵ ICJ Rep., 1954, p. 53.

⁸⁶ Vallat, *supra* note 7, p. 283.

⁸⁷ Lachs, M., (1979) “La Cour Internationale de Justice, Organe Juriciaire principal des Nations Unies” in *Liber Amicorum Adolf Schnitzer*, p. 279.

4.1.5. Budgetary power of the GA

As mentioned above, pursuant to Art. 17 of the Charter the GA has an exclusive power regarding the budget of the UN.⁸⁸ This exclusive power had given rise to questions related to the determination of the term “budget” of the organisation and to the authority of the GA in this respect. The ICJ through its jurisprudence dealt with the GA’s power in this regard, especially the above two issues.

(i) The scope of the term “budget”

The ICJ dealt with the scope of the term “budget” in the *Expenses* case. Despite the fact that this case was mainly related to the finance of the UNEF and ONUC, the Court had to deal with the budgetary power of the GA as a whole. In this case, it was argued that the term “budget” pursuant to Art. 17 applies strictly to the “administrative budget”. In addition, the term “expenses” stipulated in para. 2 governs only the regular or administrative expenses of the organisation. Accordingly, expenses related to operations for the maintenance of international peace and security are not expenses of the organisation within the meaning of Art. 17/2, because they cannot be described as administrative or regular expenses.⁸⁹ Further, it was argued that expenses concerning the maintenance of international peace and security fall within the exclusive competence of the SC, which has the power to decide how to finance such forces. Consequently, it was concluded that the GA has no right to decide an apportionment in this respect because its power is limited to discuss, consider, study, and recommend.⁹⁰ To reach an opinion in this case, the Court felt that it had, first, to interpret the term “budget” in para. 1 and determine the meaning of the term “expenses” in para. 2, and, second, to examine the power of the GA with regard to the expenditure resulting from the operations to maintain international peace and security.

⁸⁸ For the wording of Art. 17, see note 126, p. 36 above.

⁸⁹ ICJ Pled., 1961, p. 273.

⁹⁰ The Soviet Union argued that: “[t]he analysis of the relevant provisions of the Charter leaves no doubt that while Article 17 lays down a general rule, Article 43 contains a particular rule, a *lex specialis*, which relates to expenditures for certain actions for the purpose of maintaining international peace and security. Such actions may be undertaken in pursuance of a decision of the Security Council.” ICJ Pled., 1961, p. 404; Padelford, N., “Financing Peace-keeping: Politics and Crisis”, *Int. Org.*, XIX, 1965, p. 446.

The Court rejected the above argument and decided that there is no restriction on the Assembly's power in respect of the organisation's budget.⁹¹ This opinion was based, *inter alia*, on Art. 17, which makes a distinction between the organisation's budget (para. 1) and the administrative budget of the specialised agencies (para. 3), and if the Charter's drafters had intended to limit the budgetary powers of the GA to administrative expenses they would have expressly mentioned this matter as was done in para. 3.⁹² The Court also noted that the adjective "administrative" in para. 3 with respect to the budget of the specialised agencies is proof that the omission of this adjective in the first two paragraphs was not an oversight by the Charter's drafters.

Having decided the meaning of the term "budget", the Court turned to determine the meaning of the term "expenses of the organisation". It observed that the term "expenses" means all the expenses and not certain types of expenses. The Court based its opinion on the following: (i) Art. 17/2, which refers to the expenses of the organisation without any further explicit definition of such expenses, (ii) the practice of the organisation, whereby, from the beginning, it included in its budget items of a "non-administrative" character, (iii) other parts of the Charter, especially the provisions of Chapters IX and X, which envisage various kinds of expenses as in the field of economic and social co-operation, which have been incurred without any challenges.⁹³

In its reply to the argument about the competence to apportion expenses on the maintenance of international peace and security, the Court concluded that it could find no basis for limiting the budgetary authority to the SC alone, noting that Art. 17 is not limited by Art. 43. The Court also declared a general proposition to the effect that "the 'expenses' of any organisation are the amounts paid out to defray the

⁹¹ ICJ Rep., 1962, pp. 164 *ff.*; Slonim, *supra* note 56, p. 232; Alting von Geusau, *supra* note 55, p. 282; Gross, *supra* note 58, p. 764; Roy, S., "The World Court's Advisory Opinion of 20 July 1962 on 'Certain Expenses of the United Nations'", *ÖZÖR*, 15, 1965, p. 184; Khan, R. "Peace-Keeping Powers of the UN General Assembly: Advisory Opinion of the ICJ", *Int.Stu.*, 6, 1964, pp. 322 *ff.*; Castañeda, J., *Legal Effects of United Nations Resolutions*. (translated by Alba Amoia), 1969, pp. 40 *ff.*

⁹² ICJ Rep., 1962, p. 159.

⁹³ *Ibid.*, pp. 158, 161.

cost of carrying out its purposes”.⁹⁴ It found that the UNEF and ONUC operations were in execution of the UN’s purpose which relates to the maintenance of international peace and security pursuant to Art. 1 of the Charter.⁹⁵

To conclude, it seems clear that the Court in the above opinion determined and enhanced the GA’s power with regard to the organisation’s budget. But does such an opinion mean that the GA has an absolute power in this regard by which it could approve or disapprove any item of the UN budget?

(ii) The limits upon the budgetary powers of the GA

In the *UN Administrative Tribunal* case, the ICJ dealt with the authority of the GA over the budget of the UN. It was argued before the GA that, because the GA is expressly authorised pursuant to Art. 17/1 of the Charter to “consider and approve the budget of the Organisation”, it has a discretionary power to delete or disapprove particular items in the budget. It was concluded that any interpretation limiting this power would abridge the Assembly’s approving authority under the above article.⁹⁶ This situation led the GA to adopt its Res. 785 (VIII), of 9 December 1953, whereby it requested the ICJ to give an opinion regarding its right to refuse to give effect to an award of compensation made by the Administrative Tribunal.

In its opinion, the Court dismissed this argument on the basis that “the function of approving the budget does not mean that the General Assembly has an absolute power to approve or disapprove the expenditure proposed to it; for some part of that expenditure arises out of obligations already incurred by the Organisation, and to this extent the General Assembly has no alternative but to honour these engagements”.⁹⁷

It could be noted that the Court made a clear statement that the budgetary power of the GA is not absolute, and it has to honour the obligations already incurred by the organisation. This might be justified by the fact that, if the Court

⁹⁴ Ibid., p. 158.

⁹⁵ Ibid., pp. 164 ff.; Amerasinghe, *supra* note 58, p. 179.

⁹⁶ For the full discussion before the GA, see GAOR, 8th Sess., 420th mtg. of the 5th Committee, 3 December 1953, para. 38; *ibid.*, 421st mtg. of 4 December 1953, paras. 28, 52; *ibid.*, 423rd mtg., of 5 December 1953, paras. 14, 55; *ibid.*, 425th mtg., of 7th December 1953, paras. 21, 38; *ibid.*, 427th mtg., of 8 December 1953, para. 29.

⁹⁷ ICJ Rep., 1954, p. 59.

would allow the GA to do so, it might impair the functioning of other organs of the UN and consequently might make it impossible for them to achieve the purposes of the UN.

4.1.6. The power to terminate mandate and trusteeship agreements (self-determination)

The ICJ dealt with the power of the GA to terminate mandate and trusteeship agreements and to confirm self-determination in several cases.

In the *Northern Cameroon* case, the Court confirmed the power of the GA to grant the self-determination of the people of Northern Cameroon, who had elected to join Nigeria. In this case, the Court affirmed the correctness of the GA's termination of the Trusteeship Agreement according to Chapter XII of the Charter. The Court found that:

“Whatever the motivation of the General Assembly in reaching the conclusions contained in [Resolution 1608 XV], whether or not it was acting wholly on the political plane and without the Court finding it necessary to consider here whether or not the General Assembly based its action on a correct interpretation of the Trusteeship Agreement, there is no doubt ... that the resolution had definitive legal effect.”⁹⁸

Accordingly, it concluded, that the people of Northern Cameroon having elected to join Nigeria, the decision, approved by the GA, could not be reopened by raising legal issues relating to the earlier administration of the territory under trusteeship.⁹⁹

The Court dealt extensively with the Assembly's power in this regard in the *Namibia* case. In this case it was argued, *inter alia*, that the GA, by adopting Res. 2145 (XXI), of 25 October 1966, had no right to terminate the mandate over South-West Africa. This argument was based on the absence of any provision in the mandate agreement relating to such termination.¹⁰⁰ The Court dismissed this argument and affirmed the Assembly's decision by which it terminated the mandate on the ground that South Africa had failed to fulfil its international obligations with respect to Namibia by refusing to comply with the rules covering the mandate and

⁹⁸ ICJ Rep., 1963, p. 32

⁹⁹ Crawford, *supra* note 79, p. 598.

¹⁰⁰ ICJ Rep., 1971, p. 47.

refusing to submit reports to the Assembly.¹⁰¹ The Court based its opinion on the fact that a mandate agreement is no different from any other international treaty, and that the rules of the Vienna Convention apply to such agreements. Accordingly, the Court stated that the breach of a treaty by one of its parties entitles the other party to deem the breach of the treaty as a ground for its termination. Consequently, the Court assumed that because the GA was considered to be the successor of the Assembly of the League of Nations in respect of Namibia and had a supervisory competence over this territory, and because the Assembly had found two fundamental violations of South Africa's international obligations relating to the mandate - its failure to report to the UN and its continued policy of *apartheid* - termination of the mandate by the GA was justified.¹⁰²

Finally, in the *Western Sahara* case, the ICJ proceeded to a more detailed analysis of the principle of self-determination. The Court was, in this case, seized by a letter dated 17 December 1974 written by the Secretary-General of the UN, which came as a consequence of GA Res. 3292 (XXIX) adopted on 13 December 1974.¹⁰³ By the above resolution, the GA "reaffirmed the right of the population of the Spanish Sahara to self-determination in accordance with Resolution 1514 (XV)". The Court noted that the object of the request was to obtain from the Court an opinion which the General Assembly deems of assistance to it for the proper exercise of its functions concerning the decolonisation of the territory.¹⁰⁴

¹⁰¹ Ibid.; Soni, S., "Regimes for Namibia's Independence: A Comparative Study", *CJTL*, 29, 1991, p. 577; Cockram, G., *South-West Africa Mandate*, 1976, pp. 344 ff.; Brown, P., "The 1971 ICJ Advisory Opinion on South-West Africa (Namibia)", *VJTL*, 5, 1971, p. 217; Bollecker, B., "L'Avis Consultatif du 21 Juin 1971 dans l'Affaire de la Namibie (Sud-Est Afrique)", *AFDI*, XVII, 1971, pp. 300 ff.; Holder, W., "1971 Advisory Opinion of the International Court of Justice on Namibia (South-West Africa)", *FLR*, 5, 1972, pp. 117 ff.; Riphagen, W., "The Legal Consequences of Illegal Acts under Public International Law", *NILR*, 20, 1973, pp. 27 ff.; Heunis, J., *United Nations Versus South Africa: A Legal Assessment of United Nations and United Nations Related Activities in Respect of South Africa*, 1986, pp. 523 ff.

¹⁰² ICJ Rep., 1971, p. 47. In this regard, Crawford notes that "the court adopted a mode of co-operation with the political organs, and in particular the General Assembly, that has characterised its work in this field since ... the court has treated the 'subsequent development of international law in regard to non-self governing territories' as in large part resulting from the application of Charter norms by the political organs, and in particular the General Assembly ... it has sought whenever possible to align 'the *corpus iuris gentium*' with the policies and practice of the Assembly." Crawford, *supra* note 79, p. 591.

¹⁰³ ICJ Rep., 1975, pp. 6-7.

¹⁰⁴ Ibid., p. 27.

The Court concluded that the right of self-determination for non-self-governing territories had become a norm in international law. It examined the power of the GA in the process of the implementation of this right. The Court referred to Arts. 1/2, 55 and 56 of the Charter “and their particular relevance for non-self-governing territories, which are dealt with in Chapter XI of the Charter”. The Court also reviewed the practice of the GA through its resolutions on the question of self-determination and decolonisation, in particular GA Res. 1514 (XV), 1541 (XV) and 2625 (XXV). It affirmed the Assembly’s power in respect of decolonisation and the granting of independence to colonial countries and people. Moreover, it expressed detailed views as to the method by which Res. 1514 (XV) had become part of general customary law. Furthermore, the Court stated that GA Res. 1514 (XV) provided the basis for the process of decolonisation, which has resulted since 1960 in the creation of many states that are today members of the UN.¹⁰⁵

The above Court’s opinions supported the Assembly’s power to ensure both the self-determination of peoples and the end of colonial situations.

4.1.7. The GA and disarmament

Although the maintenance of international peace and security is a primary purpose of the UN, the Charter places little emphasis on arms control and disarmament.¹⁰⁶ Art. 11/1 of the Charter provides that the GA “may consider the general principles of cooperation in the maintenance of international peace and security, including the principles governing disarmament”. In this respect, the GA may make recommendations concerning such principles to member states and to the SC.¹⁰⁷ In practice, the GA has several times discussed the issue of disarmament and has adopted several resolutions. As early as 1946, the GA underlined the connection

¹⁰⁵ Ibid., pp. 31 ff.; Franck, T., “The Settling of the Sahara”, *AJIL*, 70, 1976, p. 694; De Aréchaga, *supra* note 71, p. 5; Goldie, L., “International ‘Constitutionality’: State Sovereignty and the Problem of Consent” in Blackshield, A. (ed.), *Legal Change: Essays in Honour of Julius Stone*, 1983, p. 322; Ofuately-Kodjoe, W., “Self-Determination” in Schachter, O., et al. (eds.), *United Nations Legal Order*, vol. 1, 1995, pp. 370-1.

¹⁰⁶ It is worth noting that arms control is to be distinguished from disarmament. The object of disarmament is to abolish war-making capacity, whereas the purpose of arms control is to keep such capacity within certain bounds. See Shearer, I., *Starke’s International Law*, p. 516.

¹⁰⁷ Murphy, J., “Force and Arms” in Schachter, O., et al. (eds.), *United Nations Legal Order*, vol. 1, 1995, p. 301; Goodrich, L, et al., *The United Nations*, 1959, p. 218.

between disarmament and peace. It also organised several conferences and established many commissions, for instance the Conference on Disarmament, the First (Political and Security) Committee of the General Assembly and the Disarmament Commission. Moreover, it placed on its agenda an item entitled “[g]eneral and complete disarmament under effective international control”.¹⁰⁸ In addition, the GA gave special attention to eliminating the use of nuclear and other mass destruction weapons.¹⁰⁹

In the *Legality of the Threat or Use of Nuclear Weapons* case, the power of the GA in respect of disarmament was challenged by some states. It was argued that the GA cannot request an opinion on this issue since it is unrelated to its duties.¹¹⁰ In its reply, the Court confirmed the power of the GA in this regard. It based its opinion on Art. 10 of the Charter, which empowers the GA with a broad competence to deal with any matters or questions within the scope of the Charter. It also referred to Art. 11, which explicitly empowers the GA to “consider the general principles ... in the maintenance of international peace and security, including the principles governing disarmament and the regulation of armament”. Moreover, it noted that the GA has, pursuant to Art. 13 of the Charter, the power to “initiate studies and make recommendations for the purpose of ... encouraging the progressive development of international law and its codification”.¹¹¹ In addition to the above basis, the Court referred to GA activities relating to the threat or use of force in international relations, the disarmament process, and the progressive development of international law. It added:

“The General Assembly has a long-standing interest in these matters and in their relation to nuclear weapons. This interest has been manifested in the annual First Committee debates, and the Assembly resolutions on nuclear weapons; in the holding of three special sessions on disarmament (1978, 1982 and 1988) by the General Assembly, and the annual

¹⁰⁸ For the GA’s activities in this regard, see Elaraby, N., “Some Reflections on Disarmament” in Tomuschat, C. (ed.), *The United Nations at Age Fifty: A Legal Perspective*, 1995, pp. 12 ff.; Baehr, P., et al., *The United Nations in the 1990s*, 1992, p. 95; Goodrich, et al., *supra* note 107, pp. 221, 224-8, 232-4.

¹⁰⁹ For the GA’s practice with regard to the disarmament, see White, *supra* note 51, pp. 143-5.

¹¹⁰ ICJ Rep., 1996, p. 8 (unpublished).

¹¹¹ *Ibid.*

meetings of the Disarmament Commission since 1978; and also in the commissioning of studies on the effects of the use of nuclear weapons.”¹¹²

4.2. The role of the ICJ in respect of the Security Council’s competencies

4.2.1. Exclusive competence to act under Chapter VII

According to Chapter VII of the UN Charter, the SC has the power to adopt enforcement actions in the event of any threat to the peace, breach of the peace or act of aggression. Pursuant to Arts. 41 and 42, the SC may decide certain measures, which may or may not involve the use of air, sea or land forces as may be necessary to maintain or restore international peace and security. However, it is noticeable that the Charter refers to the SC having an exclusive competence. Accordingly, the question has arisen regarding the role of the ICJ in this respect.

In its opinion in the *Expenses* case, the Court affirmed the exclusive competence of the SC in the field of coercive or enforcement action according to Chapter VII with respect to the maintenance of international peace and security.¹¹³ The Court concluded that only the SC can impose an obligation by a resolution in connection with the maintenance of international peace and security in regard to an aggressor.¹¹⁴ It said that:

“[I]t is the Security Council which is given a power to impose an explicit obligation of compliance if for example it issues an order or command to an aggressor under Chapter VII. It is only the Security Council which can require enforcement by coercive action against an aggressor.”¹¹⁵

Therefore, it can be concluded that, although the Court recognised the role of the GA in respect of the maintenance of international peace and security,¹¹⁶ it declared that the SC has the sole power to require enforcement by coercive action.¹¹⁷

¹¹² Ibid.

¹¹³ ICJ Rep., 1962, p. 163.

¹¹⁴ Verzijl, J., “International Court of Justice: Certain Expenses of the United Nations (Article 17, Paragraph 2, of the Charter)”, *NILR*, 10, 1963, p. 12; Amerasinghe, *supra* note 58, p. 198.

¹¹⁵ ICJ Rep., 1962, p. 163.

¹¹⁶ See pp. 132 *ff.* above.

4.2.2. Unlimited competence in maintaining international peace and security

Art. 43 of the Charter refers to a “special agreement or agreements” to enforce SC decisions against any state that infringes international peace and security. However, a question has arisen as to whether or not there is a limitation upon the SC when acting pursuant to Chapter VII. This matter was discussed by the ICJ in the *Expenses* case.

In this case, it was argued before the Court that Art. 43 of the Charter is considered as a *lex specialis* upon the Council’s powers in this regard. It refers to “agreements to be concluded between the SC and the Member States on the provision of armed forces and other assistance necessary for the purpose of maintaining international peace and security”, which are the exclusive source of power for the conclusion of agreements for financing the maintenance of international peace and security. Accordingly, the SC cannot take measures to maintain international peace and security without such agreements.¹¹⁸

The Court rejected this argument and concluded that Art. 43 does not restrict the power of the Council. The SC is not limited to financing such measures through agreements concluded under Art. 43, because it can act under some other articles of the Charter.¹¹⁹ A restrictive interpretation would leave the SC impotent in the face of an emergency situation and would restrict its discretion through a lack of funds if these agreements, under Art. 43, have not been concluded because it is not possible to make arrangements in advance for all expenses of the peace-keeping forces.¹²⁰ The Court based its opinion on two main points. First, there is nothing in the text of Art. 43 indicating that the member states are bound to agree that they will bear the entire cost of the “assistance” provided. It will be borne by the organisation and the financing of these expenditures would be governed by Art. 17/2. Second, Art. 50 provides that overburdened states, whether members of the UN or not, will consult

¹¹⁷ The Court observed: “[t]he ‘action’ which is solely within the province of the Security Council is that which is indicated by the title of Chapter VII of the Charter namely ‘Action with respect to threats to peace, breaches of the peace, and acts of aggression.’ ICJ Rep., 1962, p. 163.

¹¹⁸ ICJ Pled., 1961, pp. 167-8, 343, 418.

¹¹⁹ ICJ Rep., 1962, pp. 166-7.

¹²⁰ ICJ Rep., 1962, p. 167; Rao, T. “The Expenses Judgment of the International Court of Justice, A Critique”, *IYIL*, XII, 1963, p. 145.

the SC with regard to the solution of any special economic problems preventing them from carrying out enforcement measures. These problems cannot be covered by negotiated agreements, and, if the SC decided to give an overburdened state financial assistance, that would fall outside Art. 43 and constitute part of the “expenses of the organisation” under Art. 17/2.¹²¹

Accordingly, the Court played an important role as regards the Council’s competencies in respect of its powers under Chapter VII. It adopted a wide scope of the SC’s competencies thus assisting the Council to fulfil its functions without any obstacle.¹²²

5. Interpretation and application of agreements between the UN and its member states

Despite the fact that the UN Charter does not provide that the organisation shall have a treaty-making capacity, this power was deduced from a number of provisions of the Charter. This was clear from Art. 43 of the Charter, which stipulates the power to conclude agreements of an international character. In addition, Arts. 57-63 provide the ECOSOC with the power to conclude agreements with any agency referred to in Art. 57 of the Charter. Furthermore, Chapter XII of the Charter affirms the UN’s capacity to conclude treaties with sovereign states regarding the trusteeship system. In addition, this capacity is confirmed by international lawyers who note that the UN and its specialised agencies have the right to conclude international treaties being parties to these treaties.¹²³

The most obvious examples of agreements concluded between the UN and its specialised agencies on the one hand and the member states on the other are mainly concerned with the presence of the UN in the territories of the states. Known as

¹²¹ ICJ Rep., 1962, pp. 161 ff.; Slonim, *supra* note 56, pp. 242 ff.; Cotton, *supra* note 56, p. 112.

¹²² Slonim, *supra* note 56, p. 244.

¹²³ Abou-El-Wafa, A., *Recherches sur les Traités Conclus par les Organisations Internationales inter se ou avec des Etats (Contribution à l’étude d’une théorie de l’acte)*, Ph.D. Thesis (Université de Lyon III), 1981, pp. 65 ff.

headquarters agreements, host agreements or seat agreements,¹²⁴ these agreements regulate the diplomatic privileges and immunities of the employees of the organisation.¹²⁵ In addition, these agreements might also regulate peace-keeping operations in the territory of the member states.

As with any international agreement, the interpretation and application of these agreements might lead to disagreements between the parties. The ICJ played a role with regard to the interpretation and application of some of the treaties that were concluded by the UN or one of its specialised agencies on the one hand and a member state on the other.

5.1. The Headquarters Agreement case between the UN and the USA

In 1947 the UN and USA concluded a Headquarters Agreement, which sets out the basic rights and obligations of each of the parties. Section II of the agreement obliges various authorities within the USA not to impose impediments to transit from or to the Headquarters District upon representative members, officials of the UN, experts performing missions, representatives of the press, representatives of non-governmental organisations recognised by the UN, and “other persons invited to the Headquarters District by the United Nations”.¹²⁶ Section 21(a) of the agreement requires that any dispute between the USA and the UN concerning the interpretation and application of the agreement, “which is not settled by negotiation or other agreed mode of settlement, shall be referred for final decision to a tribunal of three arbitrators, one to be named by the Secretary-General, one to be named by the Secretary of State of the United States, and the third to be chosen by the two, or if they should fail to agree upon a third, then by the President of the International Court of Justice”.¹²⁷ As a consequence of its establishment and recognition as a “permanent observer”, the Palestine Liberation Organisation (PLO) was invited by

¹²⁴ Muller, A., *International Organisations and their Host States: Aspects of their Legal Relationship*, 1995, p. 17.

¹²⁵ For a survey of such agreements concluded by the UN and its specialised agencies on the one hand and the member states on the other hand, see Muller, *ibid.*, pp. 31-2.

¹²⁶ Agreement between the UN and the USA regarding the Headquarters of the UN, of 26 June 1947.

¹²⁷ *Ibid.*

the GA to “participate in the sessions and the work of the General Assembly in the capacity of observer”.¹²⁸ The PLO established an Observer Mission, and maintained a permanent office in New York.¹²⁹ The US enactment in 1987 of the Foreign Relations Authorisation Act for Fiscal Years 1988-89 prohibited the PLO from establishing or maintaining any office or facility within the jurisdiction of the USA. The US Attorney General ruled in March 1988 that these measures required him to order the closure of the PLO office irrespective of any US obligations under the Headquarters Agreement. The Attorney General filed suit on 22 March 1988 in a US district court to compel compliance with the closure order. The US Government indicated that it would take no action to close the PLO Mission before the district court had rendered a decision. The UN failed to persuade the USA to co-operate in initiating arbitration in accordance with the agreement’s dispute resolution mechanism.¹³⁰

As a consequence, the GA requested an advisory opinion on whether the USA was obliged to participate in arbitration as requested by the UN pursuant to the Headquarters Agreement’s dispute resolution clause.¹³¹ Before the Court, the USA argued that, because the matter was before the district court, it could not enter into the dispute settlement procedure laid down in Section 21(a).¹³²

The ICJ dealt with the request and found that the UN had exhausted the possibility of negotiation as provided by the agreement. It affirmed also that the dispute between the USA and the UN was one “not settled by negotiation” within the meaning of Section 21(a) of the agreement. The Court concluded that the USA was bound to respect the obligation stipulated in Section 21 of the agreement. The Court based its opinion on “the fundamental principle of international law that international law prevails over domestic law”.¹³³

¹²⁸ GA Res. 3237, 1974.

¹²⁹ It should be noted that the PLO is listed in UN publications as a member of a category of “organisations which have received a standing invitation from the General Assembly to participate in the sessions and the work of the General Assembly as observer”. ICJ Rep., 1988, p. 15.

¹³⁰ ICJ Rep., 1988, pp. 22 *ff*.

¹³¹ GA Res. 42/229 B, 2 March 1988.

¹³² ICJ Rep., 1988, p. 33.

¹³³ *Ibid.*, p. 34.

5.2. Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt

The WHO Regional Office for the Eastern Mediterranean was established in Alexandria, Egypt, in 1951 pursuant to an agreement between the WHO and Egypt in 1951. In 1978, the Camp David Agreement between Egypt and Israel led some Arab states to request the relocation of the Regional Office of the WHO to Amman, Jordan. The Assembly of the WHO was divided as to whether or not to allow this transfer. The question arose whether or not the transfer was governed by the 1951 Agreement between Egypt and the WHO, in particular by Section 37, which provides:

“The present Agreement may be revised at the request of either party. In this event the two parties should consult each other concerning the modification to be made in its provisions. If the negotiations do not result in an understanding within one year, the present Agreement may be denounced by either party giving two years notice.”

Egypt contended that the WHO was bound by the above section to give two years' notice if it wanted to move the Regional Office. Conversely, it was argued that a transfer of the Regional Office would result in termination of the 1951 Agreement, and that Section 37 applied to a revision of the agreement but not to its termination.¹³⁴ As a consequence of the disagreement regarding the interpretation of the convention, the WHO Assembly requested an advisory opinion from the ICJ to determine whether or not Section 37 of the agreement applied to the transfer and, if so, what the legal relationship between the WHO and Egypt should be during the two-year period between notice and termination required by Section 37.¹³⁵

To deal with the case, the Court first considered a considerable number of host agreements of different kinds concluded by states with various international organisations and containing varying provisions regarding the revision, termination or denunciation of the agreements. It took the opportunity to observe in passing that in future close attention might with advantage be given to their drafting. It also

¹³⁴ WHO Doc. A33/B/SR/6, p. 9; Al-Ashall, A., “The International Court of Justice’s Advisory Opinion in Interpreting the Agreement Between the WHO and Egypt”, *REDI*, 37, 1981, p. 213; Gray, C., “The International Court’s Advisory Opinion on the WHO-Egypt Agreement of 1951”, *ICLQ*, 32, 1983, p. 534.

¹³⁵ ICJ Rep., 1980, p. 74.

observed that those texts “must be presumed to reflect the views of organisations and host States as to the implication of the obligations in the contexts in which the provisions are intended to apply”.¹³⁶ Then the Court turned to consider the history of the relationship between Egypt and the WHO, examined the agreement and discussed the different interpretations of its provisions. It also redrafted the question posed by the WHO as follows: “What are the legal principles and rules applicable to the question, under what conditions and in accordance with what modalities a transfer of the regional office from Egypt may be effected?”¹³⁷ The Court found that the contractual legal regime gave rise to mutual obligations of co-operation and good office. It looked to general international law, the constitutions of international organisations and agreements between host states and organisations for the content of these mutual obligations, and managed to extract a number of duties, albeit of a general nature. In the light of the above, the Court found that both the WHO and Egypt were under a duty to consult together in good faith over the question under what conditions and in accordance with what modalities a transfer might be effected. The Court concluded that, if a transfer were decided on, then it should be done with a minimum of prejudice to the work of the organisation and the interest of Egypt. With regard to the period of time involved for transfer, the Court found that it was a matter for the parties to be decided in good faith in the light of the host agreements, including Section 37 of the 1951 Agreement, Art. 56 of the Vienna Convention on the law of treaties and the corresponding article in the draft of the Convention on treaties between organisations and states.¹³⁸

5.3. The application of the Convention on the Privileges and Immunities of the UN

Art. VI, section 22, of the Convention on the Privileges and Immunities of the UN specifies the privileges and immunities of experts on mission for the UN. There was a dispute between the ECOSOC and Rumania over the application of this section in the case of Mr Dumitru Mazilu. Mazilu was a special Rapporteur of the

¹³⁶ Ibid., p. 94.

¹³⁷ Ibid., pp. 94 *ff.*

¹³⁸ Ibid.

Sub-Committee on the Prevention of Discrimination and Protection of Minorities, and was asked to prepare a report on human rights and youth. When the sub-committee session opened in August 1987 no report had been received from Mr Mazilu, nor was he present. Rumania submitted a letter in which it informed the UN Office in Geneva that Mazilu had suffered a heart attack and become seriously ill in May 1987, and that at that time he had not yet begun to draw up the report entrusted to him. The UN made various attempts to contact him and provide him with materials to conclude his report and invited him to visit Geneva, but these attempts failed. In a series of letters to the UN, Mazilu stated that he had been asked by the Rumanian Ministry of Foreign Affairs to decline to submit his report to the Sub-Committee, but the authorities of his country refused to permit him to travel to Geneva, and finally he complained that strong pressure had been exerted on him and his family.¹³⁹ Consequently, several efforts were made by the UN to solve the problem. In its response, the Rumanian Government argued that the case of Mr Mazilu was an internal matter between a citizen and his government. It also maintained that “the application of the General Convention does not arise in this case”, because it did not “equate Rapporteur, whose activities are only occasional, with experts of mission for the United Nations”. Its interpretation of the convention was that an expert enjoys privileges and immunities not in the country in which he has his permanent residence but only in the country in which he is on mission.¹⁴⁰ Therefore, ECOSOC adopted Res. 1989/75 to request an advisory opinion on the applicability of Art. VI, Section 22, of the Convention on the Privileges and Immunities of the UN.¹⁴¹

In considering the request, the Court limited itself to the question of the applicability of the article. In the absence of any definition of “experts on mission”, the Court had to examine what is meant by this term as regards the applicability of Section 22. The Court found that the purpose of Section 22 is to “enable the United Nations to entrust missions to persons who do not have the status of an official of

¹³⁹ ICJ Rep., 1989, pp. 180-1.

¹⁴⁰ Ibid., pp. 184-5.

¹⁴¹ Gill, T., “Applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations”, *AJIL*, 84, 1990, pp. 742 ff.

the organisation”, and to guarantee them the privileges and immunities necessary to carry out their functions independently.¹⁴² Having interpreted the section, the Court concluded that the section applies to experts who are not permanent officials of the UN. It also pointed out that the immunities are to ensure their independence from their own countries. Therefore, the Court concluded that Art. VI, Section 22, should be respected by all states, even the states of which the “experts on mission” are nationals so long as these states, do not register reservations in this regard.¹⁴³

In the light of the above interpretation, it seems clear that the Court affirmed the application of Section 22 of the convention to Mazuli as a special Rapporteur of the Sub-Committee who had the right to enjoy the privileges and immunities provided by that convention.

To conclude, the Court played an important role in interpreting and providing guidance regarding the application of conventions concluded by the UN or its agencies, on the one hand, and the member states of these organisations, on the other hand.

6. The ICJ and the legal effect of the resolutions of the UN organs

The achievement of the organs’ objectives depends to a large degree on how their resolutions and decisions are carried out. It therefore seems appropriate to throw light on the Court’s role in respect of the legal effect of these resolutions.

6.1. The legal effect of the SC’s resolutions

Generally speaking, Art. 25 of the Charter deals with the legal effect of the Council’s resolutions. It provides that member states are bound to accept and carry out the Council’s resolutions.¹⁴⁴ The extent of the application of this article was subject to disagreement about whether or not this article covers all the Council’s resolutions without any distinction, namely whether or not the Council’s use of

¹⁴² ICJ Rep., 1989, pp. 193-4.

¹⁴³ Ibid.

¹⁴⁴ Art. 25 provides: “[t]he Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter.”

mandatory decisions is limited to Chapters VI, VII and VIII.¹⁴⁵ In answering this question, it has been noted that Art. 25 does not extend to all the Council's resolutions and consequently its binding effect is limited only to decisions adopted under Chapter VII.¹⁴⁶ This opinion was based on the wording of the Charter's provisions, which made a clear distinction between "decisions" and "recommendations" adopted by the SC. Conversely, it has been noted that Art. 25 extends to all the Council's resolutions.¹⁴⁷ This view was based on the wording of Art. 25, which refers to the Council's resolutions without any distinction between them. In addition, the advocates of this view referred to the rejection of the Belgian proposal in the *travaux préparatoires* to limit the application of Art. 25 to decisions taken according to Chapters VI, VII and VIII.¹⁴⁸ Furthermore, they note that Art. 25 stands separately from both Chapter VI and Chapter VII. It follows directly Art. 24/1, which confirms the SC's primary responsibility for the maintenance of international peace and security. In addition, para. 2 of Art. 24 states that the specific powers granted to the SC for the discharge of these duties are laid down in Chapters VI, VII, VIII, and XII. Therefore, if Art. 25 applies only to Chapter VII, it should have been located in Chapter VII. Finally, they conclude that the restricted view of the scope of Art. 25 as limited to the enforcement measures adopted pursuant to Arts. 41 and 42 means that Art. 25 would be superfluous because the effect of these articles is granted by Arts. 48 and 49. In this regard, Kelsen notes:

¹⁴⁵ The extent of obligations under Art. 25 was a debated issue during the *travaux préparatoires* stage and has never been made clear. At San Francisco, the Belgian delegation suggested limiting this obligation to decisions taken by the Security Council according to Chapters VI, VII and VIII. But this proposal was rejected. See UNCIO, 6, pp. 393-5; Goodrich, *supra* note 36, p. 208.

¹⁴⁶ According to this opinion not all the resolutions according to Chapter VII are obligatory. Goodrich, Hambro and Simons note that "[r]ecommendations by the Council under Article 39 are no more binding than recommendations under Chapter VI; but members are obliged to accept and carry out decisions by the Council calling for non-military or military measures in accordance with Articles 41 and 42". Goodrich et al., *supra* note 36, pp. 208-9; Bowett, D., *The Law of International Institutions*, 1982, p. 36; Abou-El-Wafa, A., *Law of International Organisations*, 1984, pp. 462-4; Chehab, *supra* note 52, pp. 298-9; Ganem, M., *International Organisations*, 1967, p. 214; Shaw, M., *International Law*, 1991, pp. 640, 702-3.

¹⁴⁷ Kelsen, H., *The Law of the United Nations*, 1951, pp. 95-8; Rousseau, C., *Droit International Public*, vol. I, 1970, p. 438; Higgins, R., "The Advisory Opinion on Namibia: Which UN Resolutions are Binding under Article 25 of the Charter?", *ICLQ*, 21, 1972, pp. 277-8.

¹⁴⁸ See note 145 above.

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“The Charter characterises certain decisions of the Security Council in a way which permits the interpretation that they are not intended to be binding upon the Members as, for instance, ‘recommendations’ (Articles 36, 37, 38 and 39) or ‘plans’ (Article 26). Consequently, Article 25 may be interpreted to mean the Members are obliged to carry out all resolutions of the Charter to issue with the intention to bind the members at whom they are directed; that is to say, all resolutions which the Charter does not characterise in a way which permits the interpretation that they shall not have a binding force, such as ‘recommendations’ or ‘plans’.”¹⁴⁹

In the light of the above disagreement,¹⁵⁰ one may turn to examine the Court’s role in determining the extent of Art. 25 of the Charter. In practice, the Court has dealt with the effect and the scope of the Council’s resolutions in two cases.

In the *Namibia* case, the argument of the restricted application of Art. 25 of the Charter to the enforcement measures adopted under Chapter VII (Arts. 41 and 42) was presented before the Court.¹⁵¹ The Court dismissed the argument of the restricted application of Art. 25 of the Charter and stated that it “[a]rticle 25 is not confined to decisions in regard to enforcement action but it applies to ‘the decisions of the Security Council’ adopted in accordance with the Charter”.¹⁵² It based its opinion on the following: (i) Art. 25 is not placed in Chapter VII of the Charter but comes directly after Art. 24, which deals with the powers of the SC as a whole; (ii) if Art. 25 exclusively covers decisions on enforcement actions under Arts. 41 and 42, it means that Art. 25 would be superfluous because Arts. 48 and 49 could secure the necessary effect.

Having determined the real scope of Art. 25, the Court turned to determine the scope of this article *ratione personae*. It concluded that the Council’s decisions adopted in accordance with the Charter will be binding on all UN member states who vote in favour of or against the adoption of a decision because they are obliged

¹⁴⁹ Kelsen, *supra* note 147, pp. 95-6.

¹⁵⁰ For the Council’s practice, see White, *supra* note 51, pp. 54-5.

¹⁵¹ ICJ Pled., 1970, vol. I, pp. 363-5 & vol. II, pp. 256-64; ICJ Rep., 1971, pp. 52-3; Higgins, *supra* note 147, pp. 275-7.

¹⁵² ICJ Rep., 1971, pp. 52-3; Aboul-Enein, *supra* note 34, p. 143; Mani, V., “The Advisory Opinion in *Namibia Case: A Critique*”, *IJIL*, 11, 1971, p. 477; Kooijmans, P., “The Advisory Opinion on *Namibia* of the International Court of Justice”, *NTIR*, 20, 1973, p. 23; Zacklin, *supra* note 33, p. 292; Jacque, P., “L’Avis de la Cour Internationale de Justice du 21 Juin 1971”, *RGDIP*, 76, 1972, pp. 1085-9; Bollecker, *supra* note 101, pp. 314-17; Sonnenfeld, *supra* note 51, pp. 141-2.

to accept and carry it out. Furthermore, it concluded that the binding effect of these decisions extends also to non-member states of the UN.¹⁵³

In the *Lockerbie* cases,¹⁵⁴ the Court determined the rank of international obligations derived from the SC's resolutions *vis-à-vis* obligations derived from international treaties or customary rules. In these cases, Libya referred to its rights under the Montreal Convention to enjoin the USA and the UK from taking any action through the SC to compel or coerce Libya that could prejudice its rights on the basis that they are bound to adhere to the provisions of the Montreal Convention.¹⁵⁵

The Court declined to render the Libyan requested measures on the basis that both Libya on the one hand and the USA and the UK as members of the UN are obliged to accept and carry out the decisions of the SC in accordance with Art. 25. This was based on its interpretation of Art. 103 of the Charter, whereby it concluded that obligations derived from the Council's resolutions prevail over the obligations of the parties under any other international agreement, *inter alia* the Montreal Convention.¹⁵⁶ The Court stated that:

"Whereas the Court, while thus not at this stage called upon to determine definitively the legal effect of Security Council resolution 748 (1992), considers that, whatever the situation previous to the adoption of that resolution, the rights claimed by Libya under the Montreal Convention cannot now be regarded as appropriate for protection by the indication of provisional measures."¹⁵⁷

¹⁵³ To affirm its opinion the Court recalled its opinion in the *Reparation* case, where it said: "[t]he Charter has not been content to make the Organisation created by it merely a centre 'for harmonising the actions of nations in the attainment of these common ends' (Article 1, para. 4). It has equipped that Centre with organs, and has given it special tasks. It has defined the position of the Members in relation to the Organisation by requiring them to give it every assistance in any action undertaken by it (Article 2, para. 5), and to accept and carry out the decisions of the Security Council (ICJ Rep., 1949, p. 178)." ICJ Rep., 1971, pp. 53-4.

¹⁵⁴ For the facts of this cases, see ICJ Rep., 1992, pp. 115-18; Weller, M., "The Lockerbie Case: A Premature End to the 'New World Order'?", *AJICL*, 4, 1992, pp. 302 ff.

¹⁵⁵ ICJ Pled., 1992, p. 9. In this respect, Libya argued that: "[t]he Convention provides, in particular, that a State on whose territory the alleged perpetrator of offences which the Agreement contemplates is found may, whether or not the offence has been committed on its territory, opt between submitting the case to its competent authorities for purposes of criminal prosecution, or extradite the alleged offender." ICJ Pled., 1992 (unpublished).

¹⁵⁶ Art. 103 provides that, "[i]n the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail".

¹⁵⁷ ICJ Rep., 1992, pp. 126-7; Weller, *supra* note 154, pp. 321-2; McGinley, G., "The I.C.J.'s Decision in the Lockerbie Cases", *GJICL*, 22, 1992, pp. 581-2; Gowlland-Debbas, V.,

The above dicta illustrate to what extent the Court has played a significant role in clarifying the legal effect of the SC's resolutions. In addition, it has clarified the position of states when they are faced with an obligation derived from a Council resolution and an obligation derived from other international instruments.

6.2. The legal effect of the GA's resolutions

It is well known that the Assembly's resolutions have, as a general rule, a recommendatory effect, except for some specific issues where its resolutions might have a binding effect; for instance, the approval of the expenses of the organisation and their apportionment among the member states, the consideration of reports, the approval of trusteeship agreements, the exercise of supervising functions, and the admission of states.¹⁵⁸ In addition to these exceptional cases, resolutions have a binding effect if the states agree, explicitly, to accept the Assembly's resolutions as binding.¹⁵⁹

Despite this fact, some lawyers have noted that the recommendatory effect of the Assembly's resolutions extends to all its resolutions and, should they have any effect, it will be merely moral or political.¹⁶⁰ This opinion is based on the rejection of the Philippines' proposal during the *travaux préparatoires* stage of the UN:

"Security Council Enforcement Action and Issues of State Responsibility", *ICLQ*, 43, 1994, pp. 89-90.

¹⁵⁸ Schwarzenberger, G., *A Manual of International Law*, 1967, p. 289; Tunkin, F., "The Legal Nature of the United Nations", *RCADI*, 119, 1966, pp. 34-5; Sloan, F., "The Binding Force of Recommendation of the General Assembly of the United Nations", *BYIL*, 25, 1948, pp. 23-4; Johnson, D., "The Effect of Resolutions of the General Assembly of the United Nations", *BYIL*, 32, 1955-56, pp. 121-2; Land, R., "The Effect of the Resolutions of the United Nations General Assembly" in Wood, R. (ed.), *The Process of International Organisations*, 1971, p. 210; Higgins, *supra* note 147, pp. 272-3; Ashmon, O., "The Legal Effect of Resolutions of the General Assembly", *CJTL*, 3, 1961-2, p. 220; Sep. Op. of Judge Lauterpacht in *Voting Procedure on South Africa* case, ICJ Rep., 1955, p. 115.

¹⁵⁹ This occurred when the USA, France, the United Kingdom and the Soviet Union failed to reach an agreement on the fate of the Italian colonies. They agreed that if, within one year from the entry into force of the peace treaty with Italy, they could not settle the matter, it would be referred to the GA of the UN, and they would accept the Assembly's recommendation as binding. See Schwarzenberger, *ibid.*, pp. 233-4.

¹⁶⁰ Goodrich, L., et al., *Charter of the United Nations*, 1949, pp. 151-2; Diss. Op. of Judge Winiarski in the *Expenses* case, ICJ Rep., 1962, pp. 232 ff.

“The General Assembly should be vested with the legislative authority to enact rules of international law which should become effective and binding upon the members of the organisation.”¹⁶¹

It was concluded that it is impossible to attribute a binding effect to any GA resolutions. Consequently, states cannot be held accountable if they refuse to comply with these resolutions.¹⁶² Conversely, it has been noted by some lawyers that all the Assembly’s resolutions are binding upon member states in a legislative sense.¹⁶³

In view of this disagreement, it is appropriate to illustrate the Court’s jurisprudence in this regard. The ICJ dealt with the nature of the GA’s resolutions in several cases.

In the *Expenses* case, it was argued that the GA’s resolutions may make only recommendations, and any resolutions passed by it are only recommendatory under Art. 10. In consequence, these resolutions cannot create binding legal obligations upon the member states of the organisation, being of only a political and moral rather than a legal nature.¹⁶⁴ Thus, financial resolutions related to peace-keeping operations can command no more authority than the original resolution.¹⁶⁵ The Court noted that financial resolutions imposed by virtue of Art. 17/2 are binding upon all states once the GA has apportioned those expenses among them and they have to be shared even among those who voted against them. This opinion was based on the GA’s independent authority to apportion expenses.¹⁶⁶

In the *Namibia* case, it was argued, *inter alia*, that the competence of the GA is constitutionally limited to making recommendations. Accordingly, Res. 2145 was not legally binding upon South Africa and the member states of the UN.¹⁶⁷ The Court noted that when the GA adopted its resolution it was fully intended to be

¹⁶¹ See UNCIO, 9, p. 316.

¹⁶² Khan, R., “The Legal Status of the Resolutions of the UN General Assembly”, *IJIL*, 19, 1979, p. 553.

¹⁶³ Johnson, *supra* note 158, p. 106.

¹⁶⁴ ICJ Pled., 1961, pp. 137, 207.

¹⁶⁵ Ibid., pp. 131, 273-4; Slonim, *supra* note 56, p. 247.

¹⁶⁶ Cotton, *supra* note 56, pp. 116-17.

¹⁶⁷ ICJ Rep., 1971, p. 49.

binding on the members of the UN. Accordingly, it concluded that “[i]t would not be correct to assume that, because the General Assembly is in principle vested with recommendatory powers, it is debarred from adopting, in specific cases within the framework of its competence, resolutions which make determinations or have the operative design”.¹⁶⁸ This opinion was based on several grounds: first, this resolution was not a finding on facts but the formulation of a legal situation; second, the Assembly’s resolutions relied on the Court’s decisions in 1962.¹⁶⁹

In this regard it could be argued that the Court, by its use of the term “operative design”, recognised, tacitly, that not all of the GA’s resolutions are deprived from any binding nature. If all the Assembly’s resolutions are deprived from any binding nature upon the member states, they cannot have an operative effect.

In addition to these precedents, the Court also recognised the legal value of the non-binding resolutions of the UN. In the *Legality of the Threat or Use of Nuclear Weapons* case, it was contended by some states that the GA’s resolutions which deal with nuclear weapons have no binding character on their own account. In its reply, the Court noted that, even if some GA resolutions have no binding effect in this matter, they may have normative value. The Court found that these resolutions, “in certain circumstances, provide evidence important for establishing the existence of a rule or the emergence of an *opinio juris*”. It also stated that “a series of resolutions may show the gradual evolution of the *opinio juris* required for the establishment of a new rule”.¹⁷⁰

To conclude, it seems clear that the Court’s opinion affirmed the Assembly’s mandatory powers to approve the budget and the apportionment of expenses. Therefore, it confirmed the fact that not all the GA’s resolutions have only a recommendatory effect, and that it considered that some resolutions have a binding effect and oblige the member states of the UN.

¹⁶⁸ The Court stated: “it would not be correct to assume that, because the General Assembly is in principle vested with recommendatory powers, it is debarred from adopting, in specific cases within the framework of its competence, resolutions which make determination or have operative design.” ICJ Rep., 1971, p. 50; Zacklin, *supra* note 33, p. 296; Higgins, *supra* note 147, p. 273.

¹⁶⁹ ICJ Rep., 1971, p. 50.

¹⁷⁰ ICJ Rep., 1996, p. 26 (unpublished).

Conclusion

This chapter shows how, through its power to interpret the Charter, the ICJ has enabled a progressive development of the law of the UN and participated in achieving the activities of the organisation.

Through its jurisprudence the Court has developed the doctrine of implied powers of the UN. In applying this doctrine, the Court has recognised the international legal personality of the UN, which has also been reflected upon its specialised agencies. In addition, it has invested the UN and its organs with powers not explicitly provided in the Charter. It has affirmed the power of the UN to supervise the territories which were under the mandate system of the League of Nations. Furthermore, it has confirmed the power of the political organs of the UN to create judicial subsidiary organs.

The Court has played a significant role in determining the horizontal division of powers between the UN organs in the achievement of their functions. It has considered the concurrent jurisdiction of the GA and the SC with regard to international peace and security and it noted that the SC has primary but not exclusive responsibility. Accordingly, it has affirmed that the GA has a residual or secondary concern for world peace. If peace is imperilled and if the Council is blocked and consequently fails to act, the GA is entitled both to discuss the matter and to recommend enforcement measures. The Court has supported the work of the GA in the field of the supervision of territories and decolonization. It has also dealt with the joint function of the political organs by delineating the power of the organs imposed by the Charter in relation to fundamental functions and powers of each organ.

In addition, the Court has played an important role in respect of the vertical division of powers. It has interpreted and developed the exclusive competencies of the political organs of the UN. On the one hand it has dealt with the GA's competencies and confirmed its powers to protect human rights and to deal with conventions concluded under its auspices. It has also confirmed the Assembly's powers to exercise its supervisory competence over the territories under the trusteeship system. Further, the Court has defined and determined the limits of the

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budgetary powers of the GA. Finally, it has examined and confirmed the power of the Assembly to terminate the mandate system and to grant self-determination. On the other hand, the Court has defined the powers of the SC in achieving its responsibilities pursuant to Chapter VII of the Charter and has also defined the limits of the SC in maintaining international peace and security.

The Court has expanded its role to interpret and determine the application of agreements concluded between the UN and its specialised agencies on the one hand and their member states. Finally, the Court has in many instances determined the legal effect of the decisions and resolutions of the UN organs because the actual achievement of their powers depends upon their enforcement.

Chapter Four

The Role of the International Court of Justice in Facilitating the Realisation of the Purposes and Principles of the United Nations through Its Contentious Jurisdiction

Introduction

The purposes and principles of the UN are designed to provide a guide for the conduct of the UN organs as well as of its members. The Charter devotes two articles grouped together in the first chapter of the Charter to refer to these purposes and principles and it gives the impression that there is no clear-cut distinction between these purposes and principles.¹ Art. 1 of the Charter provides that the central purpose of the organisation is the maintenance of international peace and security and sets out the means designed to achieve this purpose. It also provides that this purpose could be achieved through the development of friendly relations among nations, the achievement of international co-operation in dealing with problems of an economic, social, cultural or humanitarian character, and harmonisation of the action of members.

Since the purposes of the UN are to be pursued in accordance with the principles embodied in the Charter, Art. 2 indicates the principles that direct the organisation's activities and the conduct of its member states. Art. 2 expressly lays down the obligations of the UN and the member states to respect sovereign equality, to fulfil their obligations in good faith, to settle their disputes by peaceful means, to refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, to give the UN every

¹ Regarding the relationship between Arts. 1 and 2 of the Charter, Randelzhofer notes that, "[d]espite that partial overlap in the subject-matter, Art. 2 has considerable significance of its own, compared to Art. 1, the decisive difference between the two provisions being that Art. 1 does not give rise to a direct right or obligation, neither for the organisation nor for the member states". Randelzhofer, A., "Article 2" in Simma, B., et al. (eds.), *The Charter of the United Nations: A Commentary*, 1994, p. 73.

assistance in any action taken in accordance with the Charter, and finally not to intervene in matters essentially within the domestic jurisdiction of member states.

This chapter will discuss and examine the role of the ICJ in facilitating the achievement of these purposes and principles and its interpretation of any other relevant articles in the Charter. As a preliminary issue this chapter will discuss the contentious jurisdiction of the Court, its basis and limits.

1. The ICJ's contentious jurisdiction:² The necessity of the states' consent

Neither the Charter nor the Statute provides for the direct compulsory jurisdiction of the ICJ over all states as a result of being parties to the Court's Statute.³ The ICJ's jurisdiction is invariably based, as is that of all international tribunals, upon the consent of the disputant parties.⁴ This principle was affirmed by the ICJ in several cases.⁵ For instance, in the *Peace Treaties* case, the Court noted that: "[t]he consent of States, parties to a dispute, is the basis of the Court's jurisdiction in contentious cases."⁶ In the *Anglo-Iranian Oil Company* case, it noted that: "[t]he general rules laid down in Article 36 of the Statute ... are based on the principle that the jurisdiction of the Court to deal with and decide a case on the merits depends on the will of the parties. Unless the parties have conferred jurisdiction on the Court in

² According to the Oxford Dictionary, the term "jurisdiction" means "the administration of justice", "legal authority", "extent of power", or "district over which any authorising extends". In the opinion of international lawyers, the Court's jurisdiction means its power or authority to render a binding decision on the substance or merits of a case placed before it.

³ At the San Francisco Conference in 1945, a majority of the delegations favoured obligatory jurisdiction, but the opposition of the Soviet Union and the USA led to the retention of the principle of jurisdiction based on the consent of the parties and of the "optional clause" in Article 36 of the Charter. See UNCIO, 13, pp. 390-2, 557-9; Lissitzyn, O., *The International Court of Justice: Its Role in the Maintenance of International Peace and Security*, 1951, pp. 61-2.

⁴ Rosenne, S., *The Law and Practice of the International Court*, 1985, p. 313 ff.; Donner, R., *International Adjudication: Using the International Court of Justice, with Special Reference to Finland*, 1988, p. 16. In this regard, Fachiri noted that "there exists no superior power capable either in fact or law of creating a jurisdiction or imposing resort to it". Fachiri, A., *The Permanent Court of International Justice*, 1932, p. 70.

⁵ The PCIJ confirmed this principle in many cases. For instance, in the *Eastern Carelia* case, it observed that "it is well established in international law that no State can, without its consent, be compelled to submit its disputes with other States either to mediation or to arbitration, or to any kind of pacific settlement". PCIJ, Ser. B., No. 5, 1923, p. 27.

⁶ ICJ Rep., 1950, p. 71.

accordance with Article 36, the Court lacks such jurisdiction.”⁷ In the *Monetary Gold Removed from Rome in 1943* case (1954),⁸ the Court concluded that there is “a well-established principle of international law embodied in the Court’s Statute, namely, that the Court can only exercise jurisdiction over a State with its consent.”⁹

In the light of the above, it seems clear that the basis of the Court’s jurisdiction is entirely based on the consent of the states, which could be given in many ways.

1.1. The forms of the states’ consent

The states’ consent can be given either (i) by declaring the jurisdiction of the Court to be compulsory under the “optional clause” of Art. 36 of the Court’s Statute, or (ii) by an undertaking in any other form to recognise as compulsory the jurisdiction of the Court with respect to a class of existing or future disputes, or (iii) by an express or tacit agreement to submit a particular dispute to the Court. The Court’s jurisdiction can be obtained either prior to or after a dispute has arisen.

1.1.1. *Ante hoc* consent

The states’ consent could be given prior to the emergence of disputes either by adhering to an international convention or by accepting the Court’s jurisdiction as a compulsory *ipso facto* in relation to any other states accepting the same obligation.¹⁰

⁷ ICJ Rep., 1952, pp. 102-3.

⁸ Hereinafter the *Monetary Gold* case.

⁹ ICJ Rep., 1954, p. 32. This dictum was reiterated in the *Aerial Incident* case, where the Court observed that: “[i]t should, as it said in the case of the *Monetary Gold Removed from Rome in 1943*, be careful not to run counter to a well-established principle of international law embodied in the Court’s Statute, namely that the Court can only exercise jurisdiction over a State with its consent.” ICJ Rep., 1959, p. 142.

¹⁰ Art. 36 of the Statute provides that:

“1. The jurisdiction of the Court comprises all cases which the parties refer to it and all matters specially provided for in the Charter of the United Nations or in treaties and conventions in force.

2. The states parties to the present Statute may at any time declare that they recognise as compulsory *ipso facto* and without special agreement, in relation to any other state accepting the same obligation, the jurisdiction of the Court in all legal disputes concerning:

- a. the interpretation of a treaty;
- b. any question of international law;
- c. the existence of any fact which, if established, would constitute a breach of an international obligation;
- d. The nature or extent of the reparation to be made for the breach of an international obligation.”

(i) International conventions

Pursuant to para. 1 of Art. 36 of the Statute, the states' consent could be provided by means of a compromissory clause in a treaty, either bilateral¹¹ or multilateral.¹² Pursuant to this article, the Court's jurisdiction applies over any dispute which may arise between parties in respect of the interpretation and application of that treaty.¹³ In addition, this consent might be provided in a general or regional treaty on the organisation of dispute settlement among states. It could provide that disputes arising between or among its parties will be subject to certain procedures, including submission to the ICJ. For instance, the General Act for the Pacific Settlement of International Disputes (Geneva General Act) of 26 September 1928, and the Revised Act of 28 April 1949; the American Treaty on Pacific Settlement (Pact of Bogotá) of 13 April 1948; the European Convention for the Peaceful Settlement of Disputes of 29 April 1957.

In this regard, it should be noted that the Court is competent to decide whether or not the convention referring to the Court's jurisdiction is applicable to the dispute. This was demonstrated by the Court in the *Application of the Convention on the Prevention and Punishment of Crime of Genocide* case (1996) between Bosnia and Herzegovina v. Yugoslavia.¹⁴ Bosnia was a part of the territories of the former Socialist Federal Republic of Yugoslavia. Yugoslavia signed the Genocide Convention on 11 December 1948 and deposited its instrument of ratification,

¹¹ For instance, Art. 49 of the Consular Convention concluded between the UK and France on 31 December 1951. See ICJYB, No. 47, 1992-3, pp. 113 *ff*.

¹² For a list of these treaties, see ICJYB, *ibid*.

¹³ Szafarz notes that these clauses can be divided into three categories: first, clauses which explicitly and unambiguously provide for the compulsory jurisdiction of the ICJ (for instance, Article IX of the Convention on the Prevention and Punishment of the Crime of Genocide of 9 December 1948, and Article 10 of the Convention on the Nationality of Married Women of 20 February 1957); second, clauses which explicitly and unambiguously provide for the non-compulsory jurisdiction of the ICJ (for instance, Art. 8 of the Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages of 10 December 1962, the Antarctic Treaty of 1 December 1959, and the Convention Against Discrimination in Education of 15 December 1960); third, clauses in which the type of jurisdiction is unclear (for instance, Section 30 of the Convention on the Privileges and Immunities of the United Nations of 13 February 1946, and Article 48 of the Single Convention on Narcotic Drugs of 30 March 1961). Szafarz, R., *The Compulsory Jurisdiction of the International Court of Justice*, 1993, pp. 26-9.

¹⁴ Hereinafter the *Bosnia* case.

without reservation, on 29 August 1950.¹⁵ On 29 December 1992, Bosnia-Herzegovina transmitted to the Secretary-General of the UN, as a depositary of the Genocide Convention, a notice of succession in the following terms:

“the Government of the Republic of Bosnia and Herzegovina, having considered the Convention on the Prevention and Punishment of the Crime of Genocide, of December 9, 1948, to which the former Socialist Federal Republic of Yugoslavia was a party, wishes to succeed to the same and undertakes faithfully to perform and carry out all the stipulations therein contained with effect from March 6, 1992, the date on which the Republic of Bosnia and Herzegovina became independent.”¹⁶

On 18 March 1993, the Secretary-General communicated the following Depository Notification to the parties to the Genocide Convention: “[o]n 29 December 1992, the notification of succession by the Government of Bosnia and Herzegovina to the above-mentioned Convention was deposited with the Secretary-General, with effect from 6 March 1992, the date on which Bosnia and Herzegovina assumed responsibility for its international relations.”¹⁷

Bosnia-Herzegovina referred its dispute with Yugoslavia (Serbia and Montenegro) to the Court on the basis of Art. IX of the Genocide Convention.¹⁸ Yugoslavia (Serbia and Montenegro) objected to the Court’s jurisdiction on several grounds, *inter alia* that Bosnia-Herzegovina had not become a state party to the Convention on the Prevention and Punishment of the Crime of Genocide in accordance with the provisions of the Covenant itself.¹⁹ It argued also that, if the notice given by Bosnia-Herzegovina on 29 December 1992 had to be interpreted as constituting an instrument of accession within the meaning of Art. IX of the Convention, it could have become effective, pursuant to Art. XIII of the Convention, only on the 90th day following its deposit, that is, on 29 March 1993.²⁰

¹⁵ ICJ Rep., 1996, p. 17 (unpublished).

¹⁶ Ibid., p. 18.

¹⁷ Ibid.

¹⁸ Ibid., p. 4.

¹⁹ Ibid., p. 12.

²⁰ Ibid., p. 15.

The Court considered the above objections and concluded that Bosnia-Herzegovina is a party to the Genocide Convention as a result of succession.²¹ Then the Court turned to examine the scope of the jurisdiction *ratione temporis*. It found that the Genocide Convention - in particular Article IX - does not contain any clause the object or effect of which is to limit in such manner the scope of its jurisdiction *ratione temporis*, and nor did the parties themselves make any reservation to that end, either to the Convention or on the occasion of the signature of the Dayton-Paris Agreement. The Court rejected Yugoslavia's arguments in this regard and concluded that it had jurisdiction in this case to give effect to the Genocide Convention with regard to the relevant facts that had occurred since the beginning of the conflict in Bosnia-Herzegovina.²²

Conventions concluded prior to 1945

To preserve the conventions which conferred the jurisdiction of the PCIJ, Art. 37 of the Court's Statute stipulates that "[w]henever a treaty or convention in force provides for reference of a matter to a tribunal to be instituted by the League of Nations, or to the Permanent Court of International Justice, the matter shall, as between the parties to the present Statute, be referred to the International Court of Justice". This article was invoked by Belgium in the *Barcelona Traction, Light and Power Company, Limited* case against Spain,²³ and was examined by the ICJ in the *Aegean Continental Shelf* case.²⁴ From the opinion of the Court in these two cases, the application of Art. 37 needs two conditions to be fulfilled. First, the treaty must be binding to the dispute at the moment of the submission of the dispute to the ICJ. Second, the parties of the dispute should be parties to the ICJ's Statute. This condition was derived from the Court's statement that the terms "parties to the

²¹ Ibid., p. 18.

²² Ibid., pp. 23-4.

²³ Hereinafter the *Barcelona Traction* case. In this case, the ICJ clarified that Art. 37 requires the respondent to be a party to the Court's Statute without considering when it became a party to this instrument. It also stated that the purpose of Art. 37 is to preserve as many jurisdictional clauses as possible from becoming inoperative by reason of the prospective dissolution of the PCIJ. ICJ Rep., 1964, pp. 34-6.

²⁴ ICJ Rep., 1978, p. 14 (hereinafter the *Aegean* case).

present Statute” mean parties to the ICJ’s Statute at the time when proceedings are instituted before the Court.

(ii) The optional clause

The states’ consent might also be provided by a declaration under Art. 36/2 of the Court’s Statute. Pursuant to this article, a state may formulate a declaration unilaterally by which it accepts the Court’s jurisdiction as compulsory *ipso facto*, and, without special agreement, in relation to any other state accepting the same obligation. This declaration is known as the “optional clause”, or “compulsory jurisdiction” of the Court.²⁵ No previous agreement between the litigant states is required in order to refer the dispute to the ICJ.²⁶ Any state accepting the Court’s compulsory jurisdiction can at any time submit to the Court an application instituting proceedings against another state accepting the Court’s jurisdiction.

Two points should be briefly examined regarding the application of the optional clause: the first relates to its entry into force, and the second deals with its termination.

(a) Entry into force

The setting of the date of these declarations coming into force is important to determine the date when the obligation to accept compulsory jurisdiction comes into effect. Some declarations are valid only for future disputes and most of these declarations contain a reservation as to the time for which they are valid.²⁷ Generally, the declaration comes into force from a date specified in the state’s

²⁵ Lawson, R., “The Problem of the Compulsory Jurisdiction of the World Court”, *AJIL*, 46, 1952, p. 221; Kebbon, N., “The World Court’s Compulsory Jurisdiction under the Optional Clause - Past, Present and Future”, *NJIL*, 58, 1989, p. 258.

²⁶ In practice, several cases were submitted to the ICJ on this basis. For instance, the *Anglo-Norwegian Fisheries* case, the *Rights of Nationals of the United States of America in Morocco* case, the *Application of the Convention of 1902 Governing the Guardianship of Infants* case, the *Anglo-Iranian Oil Co.* case, the *Certain Norwegian Loans* case, the *Interhandel* case, the *Aerial Incident of 27 July 1955* case, the *Nottebohm* case, the *Right of Passage over Indian Territory* case, the *Temple of Preah Vihear* case, the *Arbitral Award Made by the King of Spain on 23 December 1906* case, the *Nuclear Tests* cases, the *Military and Paramilitary in and against Nicaragua* case, the *Transboundary Armed Actions* case, the *Maritime Delimitation in the Area between Greenland and Jan Mayen* case, the *Certain Phosphate Lands in Nauru* case, the *Arbitral Award of July 1989* case, the *East Timor* case, *Maritime Boundary* case, and the *Passage through the Great Belt* case.

²⁷ Hambro, E., “Some Observations on the Compulsory Jurisdiction of the International Court of Justice”, *BYIL*, 25, 1948, p. 140.

declaration.²⁸ If such a date is not specified, international lawyers have noted, and the Court has upheld, that the declaration is intended to take effect at the time of deposit to the Secretary-General.²⁹ This is justified on the basis that this deposit is considered to be a part of the legal act of acceptance of the jurisdiction by the state, and without it the declaration might be considered to be incomplete. In addition, these declarations could be regarded like any international treaty which, pursuant to Art. 102/3, comes into force as soon as possible by registration in the Secretariat of the UN.

The ICJ confirmed this view in the *Rights of Passage over Indian Territory* case (1957), where it pointed out that:

“It has been contended ... that as article 36 requires not only the deposit of the declaration ... with the Secretary-General but also the transmission by the Secretary-General of a copy of the declaration to the Parties to the Statute, the declaration of acceptance does not become effective until the latter obligation has been discharged. However, it is only the first of these requirements that concerns the State making the declaration. The latter is not concerned with the duty of the Secretary General or the manner of its fulfilment. The legal effect of a declaration does not depend upon subsequent action or inaction of the Secretary-General. Moreover, unlike some other instruments, Article 36 provides for no additional requirement, for instance, that the information transmitted by the Secretary-General must reach the Parties to the Statute, or that some period must elapse subsequent to the deposit of the declaration before it can become effective.”³⁰

The Court confirmed this dictum in the *Nicaragua* case, where it affirmed that the date of entry into force of a declaration is the date of its deposit with the Secretary-General, unless otherwise indicated.³¹

In the light of the above, it can be concluded that, in the absence of an express date of entry into force of these declarations, they will be enforced from the date of

²⁸ For instance, the declaration of Liechtenstein specified the dates on which those states became bound by the ICJ Statute, 29 March 1950. See ICJYB, No. 48, 1993-4, pp. 85, 100.

²⁹ Art. 36/4 of the Court's Statute provides that these declarations “shall be deposited with the Secretary-General of the United Nations, who shall transmit copies thereof to the parties to the Statute and the Registrar of the Court”. In this regard, see Hambro, *supra* note 27, p. 141; Farmanfarma, A., *The Declarations of the Members Accepting the Compulsory Jurisdiction of the International Court of Justice (The Interpretation of Article 36, Paragraph 2, of the Statute of the International Court of Justice)*, Ph.D. Thesis (Université de Genève), 1952, pp. 66-8.

³⁰ This view was confirmed by the ICJ in ICJ Rep., 1957, p. 146.

³¹ ICJ Rep., 1984, pp. 403-4.

submission of these declarations to the Secretariat of the UN regardless of the date of signature or ratification.

(b) Termination of declaration

As these declarations are made unilaterally by states, it is a well-established principle among international lawyers that these declarations expire in accordance with the period stipulated therein. In that case, the state should respect the time limit indicated in its declaration.³² Difficulties arise in determining when this termination of declaration should take effect, in the event that the declaration makes no mention of the limit. For instance, could this declaration be terminated instantly? The ICJ answered this question in the *Nicaragua* case when it rejected the argument that such declarations are terminable instantly, and determined that they are terminable only on a reasonable period of notice.³³ In addition, the Court affirmed that any determination does not affect the validity of proceedings instituted prior to the date on which the declaration ceased to be in force.”³⁴

Declarations made prior to 1945

To preserve declarations of acceptance made under Art. 36/2 of the PCIJ's Statute, Art. 36/5 of the ICJ's Statute provides for the possibility of transferring these declarations for periods of time which have not expired, and making them

³² This was confirmed by the ICJ in the *Military and Paramilitary Activities in and against Nicaragua* case 1984. In this case, the United States terminated its declaration without giving six months' notice and made a new declaration containing a reservation which covered the Nicaraguan claim. Nicaragua argued that the US termination was inconsistent with its original declaration. The Court accepted this argument and concluded that: "the six months' notice clause forms an important integral part of the United States declaration and it is a condition that must be complied with in case of either termination or modification." ICJ Rep., 1984, pp. 417-21.

³³ In this regard the Court referred to Art. 52 of the Vienna Convention on the Law of Treaties which requires twelve months' notice to terminate treaties. Despite the fact that the Court did not say that twelve months would be a reasonable period of notice for termination of a declaration made pursuant Art. 36/2, it concluded that three days - which had elapsed between the attempts to terminate the United States declaration and Nicaragua's application to the Court - would not be enough. See ICJ Rep., 1984, pp. 415-21; Merrills, J., *International Dispute Settlement*, 1991, pp. 113-14; McDougal, M., "Presentation before the International Court of Justice: Nicaragua v. United States", *Wor.Aff.*, 148, 1985, pp. 43-5.

³⁴ For instance, in the *Nottebohm* case, the Court stated that "[a]n extrinsic fact such as subsequent lapse of the Declaration, by reason of the expiry of the period or by denunciation, cannot deprive the Court of the jurisdiction already established". ICJ Rep., 1953, p. 123; Rosenne, S., *The Law and Practice of the International Court*, 1965, vol. 1, p. 322.

applicable to the jurisdiction of the ICJ.³⁵ Accordingly, the old declarations are on an equal footing with declarations deposited with the Secretary-General in accordance with Art. 36/2 of the ICJ's Statute.³⁶ The Court affirmed the applicability of this article in the *Nicaragua* case,³⁷ where it found that "Nicaragua's 1929 declaration was valid at the moment when Nicaragua became a party to the Statute of the new Court; it had retained its potential effect because Nicaragua, which could have limited the duration of that effect, had expressly refrained from doing so".³⁸

It can be concluded that acceptance of the Court's jurisdiction might be given before a dispute arises, either by granting this jurisdiction by an international convention or by accepting the Court's compulsory jurisdiction.

1.1.2. *Post hoc* consent

The Court's jurisdiction might come into effect after a dispute has arisen between states. This could be done either by concluding an agreement between the disputant states to refer the case to the Court or by accepting the Court's jurisdiction as implicit, as will be seen now.

³⁵ Art. 36/5 provides: "[d]eclarations made under Article 36 of the Statute of the Permanent Court of International Justice and which are still in force shall be deemed, as between the parties to the present Statute, to be acceptances of the compulsory jurisdiction of the International Court of Justice for the period which they still have to run and in accordance with their terms."

³⁶ It should be noted that seven of the declarations made during the PCIJ era were still in force when the ICJ was established. These declarations were of Columbia, the Dominican Republic, Haiti, Luxembourg, Nicaragua, Panama, and Uruguay. See ICJYB, 1946-7, pp. 207 *ff*.

³⁷ This article was invoked by Israel as a basis for referring its dispute with Bulgaria to the ICJ in the *Aerial Incident of 27 July 1955* case. The Court did not accept Art. 36/5 of the Statute as a basis of its jurisdiction on the ground that (i) the transformation *ipso jure* could operate only as between the original signatories of the Charter, and partly on the basis of a more general analysis of the power of states represented at an international conference in relation to states not there represented; (ii) a declaration accepting the jurisdiction of the PCIJ became devoid of object as soon as that court was no longer in existence, so that Art. 36/5 could not have effect in relation to a state which became a party to the Statute after that date, since the declaration would not be in force. As a consequence, it concluded that such an interpretation is consistent with the international legal principle that the Court can exercise jurisdiction over a state only with its consent. See ICJ Rep., 1959, p. 138; Lizzi, M., "Delimiting the World Court's Jurisdiction: Realism in the Interest of Progress", *NYLSJICL*, 12, 1991, p. 225.

³⁸ ICJ Rep., 1984, p. 404; Pax, T., "Nicaragua v. United States in the International Court of Justice: Compulsory Jurisdiction or Just Compulsion?", *BCICLR*, 8, 1985, pp. 485 *ff*.

(i) Special agreement

Consent could be given by a special agreement between the litigant parties (*compromis*) conferring jurisdiction upon the Court for the purpose of settling an existing dispute.³⁹ This method is considered to be a voluntary or *ad hoc* basis for the Court's jurisdiction.⁴⁰ This *compromis* is itself a treaty. Not only does it confer jurisdiction upon the Court, but it also defines precisely the legal questions to be set before the Court. The Court's position in this respect will be similar to any court of arbitration. Accordingly, the Court is bound by the agreement's terms; and it decides the case as it is put to it in the application.

In practice, many cases were referred to the ICJ upon this basis; for instance, the *Asylum* case (1950), the *Minquiers and Ecrehos* case (1953), the *Sovereignty over Certain Frontier Land* case (1959), the *North Sea Continental Shelf* cases (1969), the *Delimitation of the Maritime Boundary in the Gulf of Maine Area* case (1982), the *Continental Shelf between Libya and Malta* case (1982), the *Frontier Dispute between Burkina Faso and Mali* case (1986), the *Land, Island and Maritime Frontier* case (1990), and the *Territorial Dispute between Libya and Chad* (1994).

(ii) Forum prorogatum

The consent of states might also be given implicitly by the conduct of the parties. A state that submits a dispute to the ICJ accepts for its part the Court's jurisdiction to take binding decisions concerning its dispute with other states. If the other party to the dispute appears before the Court and does not raise an objection to the Court's jurisdiction on the ground of the absence of its consent, this implies acceptance of the Court's jurisdiction on its part.⁴¹ Consent by conduct may also be given by a

³⁹ Art. 40/1 of the ICJ's Statute provides: "[c]ases are brought before the Court, as the case may be, either by notification of the special agreement or by a written application addressed to the Registrar. In either case the subject of the dispute and the parties shall be indicated."

⁴⁰ Beckett, W., "Decisions of the Permanent Court of Justice on Points of Law and Procedure of General Application", *BYIL*, 11, 1930, p. 31; Donner, *supra* note 4, pp. 99-100.

⁴¹ See Anand, R., *Compulsory Jurisdiction of the International Court of Justice*, 1961, pp. 117 ff.; Rosenne, *supra* note 34, pp. 344 ff.; Sep. Op. of Judge Lauterpacht in the *Bosnia (Provisional measures)* case, September 1993, pp. 416 ff.

request for the appointment of a judge *ad hoc*.⁴² Such tacit consent may sometimes also be inferred from a declaration or an act of a state dating before the moment when the case was brought before the Court.

In practice, the Court relied on this basis in the *Corfu Channel* (preliminary objection) case, where the Court referred to the letter submitted to it by Albania in which it recognised and accepted the Court's jurisdiction in this case.⁴³ The Court held that the acceptance was effective as a voluntary and indisputable acceptance of the Court's jurisdiction. The Court observed also that "neither the Statute nor the Rules require that this consent should be expressed in any particular form".⁴⁴ The same jurisprudence was adopted by the Court in the *Haya de La Torre* case.⁴⁵

On the other hand, the Court refused to accept the argument submitted by the UK in the *Anglo-Iranian Oil Co.* case, where the UK argued that the Government of Iran had by its action conferred jurisdiction upon the Court on the basis of the principle of *forum prorogatum*. In its reply, the Court stated that:

"The principle of *forum prorogatum*, if it could be applied to the present case, would have to be based on some conduct or statement of the Government of Iran which involves an element of consent regarding the jurisdiction of the Court. But the Government of Iran has consistently denied the jurisdiction of the Court."⁴⁶

The principle of *forum prorogatum* could be used not only to confer the jurisdiction of the Court *ab initio*, but also to cover questions that fall outside the scope of the compulsory jurisdiction clause under which the dispute had been brought before the Court. This was stated by the PCIJ in the *Rights of Minorities in Upper Silesia* case between Germany and Poland. In this case the Court derived its jurisdiction from the fact that the respondent argued the merits and raised no

⁴² In this regard, it has been noted that if a state raises an objection to the Court's jurisdiction in the written pleadings and the representatives of the governments participating in the oral proceedings pass in silence over this issue, they must be assumed to have tacitly accepted the Court's jurisdiction. See Rosenne, S., *The International Court of Justice: An Essay in Political and Legal Theory*, 1957, p. 481, note 1.

⁴³ See pp. 206 *ff.* below.

⁴⁴ ICJ Rep., 1947-8, pp. 26-7.

⁴⁵ ICJ Rep., 1951, pp. 77 *ff.*; Anand, *supra* note 41, pp. 117 *ff.*; Rosenne, *supra* note 34, pp. 344 *ff.*

⁴⁶ ICJ Rep., 1952, p. 114.

objection to the jurisdiction; the objection was raised only in the rejoinder. The Court construed this conduct as an acceptance of its jurisdiction. It concluded that “[t]here seems to be no doubt that the consent of a State to the submission of a dispute to the Court may not only result from an express declaration, but may also be inferred from acts conclusively establishing it. It seems hard to deny that the submission of arguments on the merits, without making reservations in regard to the question of jurisdiction, must be regarded as an unequivocal indication of the desire of a State to obtain a decision on the merits of the suit.”⁴⁷

1.2. Limits upon the ICJ’s jurisdiction

The jurisdiction of the ICJ to settle international disputes is not absolute. There are some limits upon its role. It is limited by the domestic jurisdiction of the litigant states, by the reservations indicated by states when they accept the compulsory jurisdiction of the Court, and finally by the scope of its function, because it cannot deal with non-legal disputes. The first limitation was discussed in Chapter One of this study;⁴⁸ the other two limits will be the subject of this section.

1.2.1. Reservations upon the ICJ’s jurisdiction

Declarations of acceptance of the Court’s jurisdiction are often made subject to reservations, which may have the result of limiting the scope of these declarations. This was provided by Art. 36/3 of the ICJ’s Statute, which indicated that unilateral acceptance of the Court’s compulsory jurisdiction over disputes under the optional clause could be limited by reservations contained in these declarations.⁴⁹ The right

⁴⁷ PCIJ, Ser. A, No. 15, 1928, p. 24; Alexandrov, S., *Reservations in Unilateral Declarations Accepting the Compulsory Jurisdiction of the International Court of Justice*, p. 3.

⁴⁸ See pp. 26 ff. above.

⁴⁹ Art. 36/3 of the ICJ’s Statute provides: “[t]he declarations referred to above may be made unconditionally or on condition of reciprocity on the part of several or certain states, or for a certain time”. In this regard, it should be noted that, as a consequence of the absence of an express provision similar to the article in the PCIJ’s Statute, some lawyers have expressed the view that the insertion of reservations in declarations of acceptance of the PCIJ’s compulsory jurisdiction was not permissible. See Higgins, A., *British Acceptance of Compulsory Arbitration under the Optional Clause and Its Implication*, 1929, p. 6. This view has no ground regarding the reservations appended to declarations of acceptance of the ICJ’s compulsory jurisdiction because the Statute clearly states that a state may recognise the jurisdiction of the Court either unconditionally or conditionally. According to this draft, any state can attach reservations to its declaration because the term “condition” is equivalent to the term “reservation”, as has been used interchangeably by the ICJ in several cases, for instance the *Temple Preah Vihear* case.

to append reservations to declarations accepting the optional clause is justified on the basis that allowing states to indicate reservations to their declarations was a compromise between those who were in favour of entitling the ICJ to a true compulsory jurisdiction, and those who were in favour of retaining the exclusive consensus basis of the Court's jurisdiction.⁵⁰

Reservations can be classified according to their character into the following types: *ratione temporis*, *ratione personae*, and *ratione materiae*.

(i) Reservation *ratione temporis*

The aim of this reservation is to limit the Court's jurisdiction to a dispute arising prior to or after a given date. This date could be a previous date, the date of deposit, the date of signature, the date of entry into force of their declarations, or a particular (exclusion) date.⁵¹ As indicated by Merrills, the objectives of this type of reservation are to prevent the litigation of stale disputes or the reopening of ancient

With regard to the reservations to the acceptance of the Court's compulsory jurisdiction in international doctrine, see for example Crawford, J., "The Legal Effect of Automatic Reservations to the Jurisdiction of the International Court", *BYIL*, 50, 1979, pp. 63 ff.; Ioannou, K., "Reservations to the Acceptance of Compulsory Jurisdiction of the ICJ - A Tabular Analysis of their Procedural Treatment", *HRIR*, 1, 1980, pp. 415 ff.

⁵⁰ Sub-Committee IV/I/D of the San Francisco Conference adopted the following statement: "the question of reservation calls for an explanation. As is well known, the article has consistently been interpreted in the past as allowing states accepting the jurisdiction of the Court to subject their declarations to reservations. The Sub-Committee has considered such interpretation as being henceforth established. It has therefore been considered unnecessary to modify paragraph 3 in order to make express reference to the right of states to make such reservation." UNCIO, 13, p. 559. This passage was included in the report of Committee IV/I, *ibid.*, p. 391. In practice, the ICJ observed in the *Nicaragua* case that "[i]n making the declaration a State is equally free either to do so unconditionally ... or to qualify it with conditions or reservations". ICJ Rep., 1984, p. 418; see also Waldock, C., "Decline of the Optional Clause", *BYIL*, 32, 1955-6, pp. 248, 270; Briggs, H., "Reservations to the Acceptance of Compulsory Jurisdiction of the International Court of Justice", *RCADI*, 93, 1958, p. 233; Anand, *supra* note 41, pp. 187 ff.; Rosenne, *supra* note 34, vol. 1, p. 391; Higgins, R., "International Law and the Avoidance, Containment and Resolution of Disputes: General Course on Public International Law", *RCADI*, 230, 1991, pp. 251-3; Oda, S. "The International Court of Justice Viewed from the Bench (1976-1993)", *RCADI*, 244, 1993, pp. 41 ff.

⁵¹ For instance, the declaration by Pakistan is limited to "[l]egal disputes arising after 24 June 1948". In addition, the Spanish acceptance excluded from the Court's compulsory jurisdiction "disputes arising prior to the date on which this declaration was deposited with the Secretary General of the United Nations or relating to events or situations which occurred prior to that date, even if such events or situations may continue to occur or to have effects thereafter". See ICJYB, No. 47, 1992-3, pp. 101, 106-7, respectively; Szafarz, *supra* note 13, p. 58; De Fumel, H., *Les Réserves dans les Déclarations d'Acceptation de la Juridiction Obligatoire de la Cour Internationale de Justice*, 1962, pp. 9-11.

controversies, and to ensure that only future events that arise subsequent to the declaration can be the subject of the Court's compulsory jurisdiction.⁵²

In the event of dispute over the application of this reservation, the Court is required to consider the date of the dispute to affirm its jurisdiction in the light of this kind of reservation. This has been done by the ICJ in many cases.⁵³

(ii) Reservation *ratione personae*

This reservation aims to exclude from the Court's compulsory jurisdiction disputes with regard to some other state or certain categories of states. This reservation is based on the principle of reciprocity between states, or particular relations between a determined group of states, as in disputes that arise in regional areas.⁵⁴ It might also rely on a specified relationship among states.⁵⁵ Finally, it might rely on non-recognition or the absence of diplomatic relations.⁵⁶

⁵² Merrills, J., "The Optional Clause Today", *BYIL*, LI, 1979, pp. 96-7; Merrills, J., "The Optional Clause Revisited", *BYIL*, LXIV, 1993, pp. 213-14.

⁵³ For instance, the *Anglo-Iranian Oil Co.* case between Iran and the UK, ICJ Rep., 1952, pp. 98, 105-7; the *Interhandel* case between Switzerland and the United States, ICJ Rep., 1959, pp. 20-2; the *Right of Passage Over Indian Territory* case between Portugal and India, ICJ Rep., 1960, p. 34. Generally, see Potter, B., "Anglo-Iranian Oil Co. case", *AJIL*, 47, 1953, pp. 114-15; Briggs, *supra* note 50, pp. 247, 286-90.

⁵⁴ For instance, the US reservation dated 6 April 1984 by which it excluded from the Court's jurisdiction "its disputes with any Central American State or arising out of events in Central America, in which the disputes shall be settled in such a manner as the parties to them may agree". See ICJYB., 1984-5, No. 39, pp. 99-100.

⁵⁵ For instance, when the UK accepted the jurisdiction of the PCIJ in 1929, it excluded disputes with the Governments of the British Commonwealth of Nations. PCIJ, Ser. D., No. 6, pp. 45-6. In 1955 the declarations of the seven Commonwealth parties to the optional clause all included such a reservation. See Merrills, 1993, *supra* note 52, pp. 221 *ff.*

⁵⁶ For instance, Israel's declaration deposited in 1956 incorporated a reservation designed to cover the institution of proceedings by an unfriendly state. This reservation covered "any dispute between the State of Israel and any other State whether or not a member of the United Nations which does not recognise Israel or which refuses to establish or maintain normal diplomatic relations with Israel and the absence or breach of normal relations precedes the dispute and exists independently of that dispute". The Indian declaration of 1974 also indicated a reservation that excluded "disputes with the government of any States with which, on the date of an application to bring a dispute before the Court, the Government of India has no diplomatic relations or which has not been recognised by the Government of India". See Merrills, 1979, *supra* note 52, pp. 104-5.

(iii) Reservation *ratione materiae*

This reservation aims at excluding from the compulsory jurisdiction of the ICJ any dispute concerning particular cases as specified.⁵⁷ It mainly relates to the following types of disputes: disputes relating to the domestic jurisdiction of the declaring state; disputes relating to hostilities, whereby states exclude disputes occurring during a period of hostilities, armed conflict, individual or collective actions taken in self-defence, or resistance to aggression;⁵⁸ disputes related to state boundaries and territorial status;⁵⁹ disputes arising under a multilateral treaty;⁶⁰ disputes expressly excluded by other agreements; matters excluded by internal legislature, constitutional questions and the domestic jurisdiction of states;⁶¹ disputes related to the determination and delimitation of maritime boundaries; disputes related to the condition of islands, bays, gulfs, territorial sea, and the corresponding continental shelf and the resources thereof; disputes related to the pollution of the environment;

⁵⁷ Szaferz, *supra* note 13, pp. 51-4; De Fumel, *supra* note 51, pp. 14 ff.; Guechi, K., *Reservations to the Acceptance of the Compulsory Jurisdiction of the International Court of Justice*, Ph.D. Thesis (University of Glasgow), 1988, pp. 357-62; Rosenne, S., *The World Court - What It Is and How It Works*, 1995, p. 91.

⁵⁸ For instance, El Salvador's declaration of acceptance, of 26 November 1973 indicates that it will not include "[d]isputes relating to or connected with facts or situations of hostilities, armed conflicts, individual or collective actions taken in self-defence, resistance to aggression, fulfilment of obligations imposed by international bodies, and other similar or related acts, disputes or situation in which El Salvador is, has been or at some time be involved". The UK declaration of 2 June 1955 excluded "disputes arising out of or having reference to any hostilities, war, state of war, or belligerent or military occupation in which the Government of the United Kingdom has been involved". See Rosenne, S., *Documents on the International Court of Justice*, 1974, p. 308; Guechi, *supra* note 57, pp. 350-6.

⁵⁹ For instance, the Honduras' reservation by which it excluded from the Court's compulsory jurisdiction "disputes relating to territorial questions with regard to the sovereignty of islands, shoals and keys, internal water, bays, the territorial sea". The declarations of Surinam, India, the Philippines and Poland included similar reservations. See ICJYB, 1992-3, No. 47, pp. 85-6, 108, 87-8, 102-3, 103-4, respectively.

⁶⁰ In its declaration of 1946 the USA indicated a reservation by which it excluded "disputes arising under a multilateral treaty unless (i) all parties to the treaty affected by the decision are also parties to the case before the Court or (ii) the United States of America specially agrees to jurisdiction". This reservation was called the "Vandenberg reservation". The ICJ dealt with this reservation in the *Nicaragua* case. ICJ Rep., 1984, p. 392; ICJ Rep., 1986, pp. 32-8.

⁶¹ For instance, the US declaration excluded from the Court's compulsory jurisdiction disputes with regard to matters essentially within their domestic jurisdiction as determined by themselves. The declarations of Canada, El Salvador, the Gambia, Honduras, Pakistan, Senegal, Swaziland, India, Kenya, Malta, Mauritius, Cyprus, and Poland included similar reservations.

disputes related to airspace superjacent to its land and maritime territory; and, finally, disputes related to foreign liabilities or debts.⁶²

(iv) Final remarks

Having mentioned reservations to states' declarations as a limit upon the Court's jurisdiction, two main points should be illustrated.

First, it is appropriate to note that, in the event of a dispute relating to the applicability of a specific reservation, the matter is settled by the decision of the Court pursuant to Art. 36/6 of its Statute on the basis of its power to determine its jurisdiction.⁶³

Second, these reservations operate reciprocally.⁶⁴ Accordingly, the Court has the jurisdiction to try a case between two litigants only insofar as their acceptances are reciprocal.⁶⁵ In other words, if one party has made a reservation to the declaration, this can be relied on by the other party as well; this means any reservation made by one party can be invoked by the other on the basis of Art. 36/2.⁶⁶ One may conclude that the concept of reciprocity means that, in a dispute between two states, the state with the narrower grant of jurisdiction becomes the common denominator for both states.⁶⁷ This principle could be justified on the

⁶² For instance, the declarations by India, Honduras, and Poland. respectively. ICJYB, 1992-3, No. 47, pp. 85 *ff.*

⁶³ For the dicta of the Court in this regard and international lawyers' opinions, see p. 98 above.

⁶⁴ As Weiss notes: "[t]he condition of reciprocity in the optional clause was designed to ensure jurisdictional equality of the parties to a dispute before the Court." Weiss, E., "Reciprocity and the Optional Clause" in Damrosch, L., *The International Court of Justice at a Crossroads*, 1987, p. 98.

⁶⁵ In 1947, Jessup noted that: "[b]ecause of the reciprocal quality of declarations under Article 36 of the Statute, the US reservations may be utilised against us by any other States. Thus if we should take to the Court a case against the United Kingdom, for example, which has also deposited a declaration under Article 36, that government could bar the jurisdiction by asserting that the question was within its domestic jurisdiction." Jessup, P., "The International Court of Justice and Legal Matters", *ILRNU*, 42, 1947, p. 287; see also Jones, G., "Termination of Declarations under the Optional Clause: Military and Paramilitary Activities in and against Nicaragua", *TILJ*, 20, 1985, p. 558.

⁶⁶ In the *Interhandel* case, the ICJ observed that "[r]eciprocity enables the State which has made the wider acceptance of the jurisdiction of the Court to rely upon the reservations to the acceptance laid down by the other Party". ICJ Rep., 1959, p. 23.

⁶⁷ Weiss, *supra* note 64, p. 84; Gross, L., "Compulsory Jurisdiction under the Optional Clause" in Damrosch, L., (ed.), *The International Court of Justice at a Crossroads*, 1987, p. 28; Szafarz, *supra* note 13, pp. 44-5.

basis that a state accepts obligatory jurisdiction only in relation to any state accepting the same obligation. This principle was confirmed by the ICJ in several cases.⁶⁸ In the *Anglo-Iranian Oil Co.* case, the ICJ observed that, “jurisdiction is conferred on the Court only to the extent to which the two Declarations coincide in conferring it. As the Iranian Declaration is more limited in scope than the United Kingdom Declaration, it is the Iranian Declaration on which the Court must base itself. This is common ground between the Parties.”⁶⁹ The above dicta were recalled in the *Certain Norwegian Loans* case between France and Norway (1957),⁷⁰ where the Court accepted Norway’s reference to the “domestic jurisdiction” reservation in the French declaration.⁷¹ The ICJ also applied this principle in the *Interhandel* case, where it noted that reciprocity enables a party to invoke a condition or reservation by the other party that it has not expressed in its declaration.⁷² Finally, in *Aegean* case, the ICJ accepted the Turkish Government’s argument, which was based on the fact that the dispute was one that “relates to the territorial status of Greece” within the meaning of reservation (b) in the Greek instrument of accession to the General Act. Accordingly, it found that Turkey’s

⁶⁸ The PCIJ dealt with the concept of reciprocity under the optional clause in two cases: the *Phosphates in Morocco* case, PCIJ, Ser. A/B, No. 74, 1938; the *Electricity of Sofia and Bulgaria* case, PCIJ, Ser. A/B, No. 77, 1939.

⁶⁹ ICJ Rep., 1952, p. 103.

⁷⁰ Hereinafter the *Norwegian Loans* case

⁷¹ The Court stated that “[t]he French declaration accepts the Court’s jurisdiction within narrower limits than the Norwegian declarations; consequently, the common will of the Parties, which is the basis of the Court’s jurisdiction, exists within these narrower limits indicated by the French reservation ... In accordance with the condition of reciprocity to which acceptance of the compulsory jurisdiction is made subject in both Declarations and which is provided for in Article 36, paragraph 3, of the Statute, Norway, equally with France, is entitled to except from the compulsory jurisdiction of the Court disputes understood by Norway to be essentially within its national jurisdiction.” ICJ Rep., 1957, pp. 23-4; Iwanejko, M., “The International Court of Justice”, *PWA*, 7, 1967, pp. 236-7; Hubbard, H., “Separation of Powers Within the United Nations: A Revised Role for the International Court of Justice”, *SLR*, 38, 1985-6, p. 177.

⁷² The Court stated that “Switzerland, which has not expressed in its Declaration any reservation *ratione temporis*, while the United States has accepted the compulsory jurisdiction of the Court only in respect of disputes subsequent to August 26th, 1946, might, if in the position of Respondent, invoke by virtue of reciprocity against the United States the American reservation if the United States attempted to refer to the Court a dispute with Switzerland which had arisen before August 26th, 1946. This is the effect of reciprocity in this connection.” ICJ Rep., 1959, p. 23.

invocation of the reservation on the basis of reciprocity had the effect of excluding the dispute from the application of Art. 17 of the Act.⁷³

It should be noted that the ICJ did not extend the application of the concept to the formal conditions laid down in the declarations, *inter alia* the time limit embodied in states' declarations.⁷⁴ This was pointed out by the ICJ in the *Nicaragua* case, where it dismissed the US argument that, since Nicaragua could have terminated its declaration with immediate effect, reciprocity required that the USA should enjoy the same right.⁷⁵ The Court concluded that the US termination did not affect the Nicaraguan claim.⁷⁶ In addition, the Court observed that:

"The notion of reciprocity is concerned with the scope and substance of the commitments entered into, including reservations, and not with the formal conditions of their creation, duration or extinction. It appears clearly that reciprocity cannot be invoked in order to excuse departure from the terms of a State's own declaration, whatever its scope, limitations or condition ... It is therefore clear that the United States is not in a position to invoke reciprocity as a basis for its action in making the 1984 notification which purported to modify the content of the 1946 Declaration."⁷⁷

It is possible to conclude that the Court restricts the application of the words "condition to reciprocity" contained in Art. 36/3 to those conditions that affect the scope and substance of the declarations. That is, it does not apply this concept to the formal conditions of declarations, *inter alia* time-limits set by a declaration under Art. 36/2.

⁷³ ICJ Rep., 1978, p. 37.

⁷⁴ Briggs, *supra* note 50, p. 249; Kirgis, F., "Nicaragua v. United States as a Precedent", *AJIL*, 79, 1985, p. 654; Shihata, I., *The Power of the International Court to Determine Its Own Jurisdiction: Compétence de la Compétence*, 1965, p. 151; Rosenne, *supra* note 34, p. 417; Szafarz, *supra* note 13, p. 46.

⁷⁵ ICJ Rep., 1984, pp. 398 *ff.* The possibility of the applicability of the principle of reciprocity to formal conditions laid down in declarations, namely those relating to the entry into force, modification and termination, is a subject of disagreement among lawyers. On the one hand, Waldock notes that "in regard to the time factor ... reciprocity primarily means that the duration of the mutual obligations - the juridical bond - between any two states under the optional clauses is limited to the joint period during which both declarations are in force". On the other hand, the majority of lawyers note that the principle of reciprocity is not applicable to the formal conditions of declarations. Accordingly, every declaration must be treated individually. See Waldock, *supra* note 50, p. 278; Anand, *supra* note 41, pp. 185-6; Briggs, *supra* note 50, pp. 249, 276-7; Kirgis, *supra* note 74, p. 654; Shihata, *supra* note 74, p. 151; Weiss *supra* note 64, p. 84; Rosenne, *supra* note 34, p. 417; Szafarz, *supra* note 13, pp. 45-6; McDougal, *supra* note 33, p. 41-3.

⁷⁶ ICJ Rep., 1984, pp. 425-6.

⁷⁷ *Ibid.*, p. 419.

1.2.2. Non-legal disputes

The Court's jurisdiction is limited to "legal disputes". This principle is derived from the express provision of Art. 36/2 of the Court's Statute, which indicates that the Court's compulsory jurisdiction may be accepted "in all legal disputes concerning the interpretation of a treaty, any question of international law, the existence of any fact, and the nature or extent of the reparation to be made for the breach of an international obligation". Therefore, "political disputes" in their entirety are excluded from the Court's jurisdiction, and if such a dispute is referred to the Court it must decline to adjudicate. This is based on the fact that the normal function of a Court is to apply the law, which has the effect of preventing the ICJ from deciding disputes of a purely political character.⁷⁸

(i) The division of disputes into legal and political disputes in international doctrine

The Court is required in each case to determine whether a dispute is justiciable or not; in other words, are there any criteria to distinguish between justiciable and non-justiciable disputes which might be adopted by the Court? The attempt to find criteria to distinguish legal from non-legal disputes is a classical one and can be traced back to the Hague Conventions for the Pacific Settlement of International Disputes of 1899 and 1907.⁷⁹ These conventions recommended arbitration as a suitable means of settling disputes "in questions of a legal nature and specially in the interpretation and application of international treaties". Following this attempt, a series of bilateral and multilateral treaties included a provision for the distinction between legal and political disputes. All of these conventions failed satisfactorily to define the term "legal disputes". They used one of two methods to define legal

⁷⁸ It has been noted by Mosler that the justification for this exclusion of such disputes has its origin in the constitutional law of states organised according to the principle of the separation of power. According to this principle, courts are not competent to exercise legislative or executive functions. These matters are attributed to other institutions of government, the legislative and executive organs. They are co-ordinated, but each is limited to the scope of competence attributed to it by the constitution. Mosler, H., "Political and Justiciable Legal Disputes: Revival of an Old Controversy?" in Cheng, B., et al. (eds.), *Contemporary Problems of International Law: Essays in Honour of George Schwarzenberger on his Eightieth Birthday*, 1988, p. 228.

⁷⁹ Lachs, M., *The Law and the Peaceful Settlement of Disputes*, Gilberto Amado Memorial Lecture, 1975, p. 4; Poeggel, W., et al., "Methods of Diplomatic Settlement" in Bedjaoui, M. (ed.), *International Law: Achievement and Prospects*, 1991, p. 525.

disputes: either they enumerated legal disputes,⁸⁰ or they indicated a more general definition of disputes of a legal nature.⁸¹ These methods failed to reach a satisfactory classification or a clear distinction between legal and political disputes.

The attempt by international lawyers to determine what disputes are included in the expression “legal dispute” or “justiciable dispute” has led to a vigorous debate and considerable difference of opinion as to the utility of drawing such a distinction.⁸² Many criteria have been presented to distinguish legal from non-legal disputes. It has been noted that this distinction might be based on objective criteria whereby a dispute can be considered to be legal if there are international legal norms by which the dispute could be settled, whereas it is a political dispute if it is to be settled by application of other norms.⁸³ Alternatively, it has been suggested

⁸⁰ For instance, Art. 36/2 of the ICJ’s Statute provides for the Court’s jurisdiction in all legal disputes concerning:

- (a) the interpretation of a treaty;
- (b) any question of international law;
- (c) the existence of any fact which, if established, would constitute a breach of an international obligation;
- (d) the nature or extent of the reparation to be made for the breach of an international obligation.

⁸¹ This method was adopted by several conventions. For instance, the four arbitration treaties which form part of the Locarno Pact, 1925, provide for arbitration in the case of disputes as to “the respective rights” of the parties. The Treaty of Conciliation, Arbitration, and Compulsory Adjudication between France and Germany stated in Part I, Art. 1, that “[a]ll disputes of every kind between Germany and France with regard to which the Parties are in conflict as to their respective rights, and which it may not be possible to settle amicably by the normal methods of diplomacy, shall be submitted for decision either to an arbitral tribunal or to the Permanent Court of Justice, as laid down hereafter. It is agreed that the disputes referred to above include in particular those mentioned in Article 13 of the Covenant of the League of Nations.” See Habicht, M., *Post-War Treaties for the Pacific Settlement of International Disputes*, 1931, p. 303; Hedges, R., “Justiciable Disputes”, *AJIL*, 22, 1928, p. 561.

⁸² For the distinction between legal and political disputes in international doctrine, see for example Murty, B., “Settlement of Disputes” in Sørensen, M., *Manual of Public International Law*, 1968, pp. 677 ff.; Wagner, W., “Is a Compulsory Adjudication of International Legal Disputes Possible”, *NULR*, 47, 1952, pp. 23-5; Merrills, J., “The Justiciability of International Disputes”, *CBR*, XLVII, 1969, pp. 240 ff.; Verzijl, J., *International Law in Historical Perspective, Part VIII (Inter-State Disputes and Their Settlement)*, 1976, pp. 5 ff.; Azzam, I., “The Justiciability of International Disputes”, *REDI*, 16, 1960, pp. 52 ff.; Gordon, E., “Legal Disputes Under Article 36 (2) of the Statute” in Damrosch, L. (ed.), *The International Court of Justice at a Crossroads*, 1987, pp. 183 ff.

⁸³ As early as 1873, Goldschmidt - in his report submitted to the first meeting of the Institute of International Law - restricted legal disputes to disputes that could be settled on the basis of the existing rules of international law. He concluded that, according to this criterion, territorial claims and the interpretation of treaties are considered to be legal disputes whereas disputes over nationality, equality, or “supremacy”, determined by considerations of power, are excluded. See *Annuaire de l’Institut de Droit International*, 6, 1874, pp. 421-52 (cited in Briggs, H., *The Law of*

that the criterion is a subjective one by which the dispute can be considered to be a legal one if the litigant states declare that it is a legal dispute.⁸⁴ Legal disputes are those disputes that the parties have decided to refer to the Court, and where they are demanding the application of existing rules. According to this view, states invoke “justiciability” not because a dispute is inherently unsusceptible to judicial or arbitral resolution, but because they prefer to have the dispute resolved politically. Another criterion is based on the existence of a method for solving disputes: disputes are legal if they could be solved by legal methods, and they are political if they could be decided by political methods.⁸⁵

All the above attempts failed to come up with a general definition of a legal dispute and its distinction from other disputes. This conclusion might be justified - as will be illustrated by the ICJ - by the fact that each dispute has legal and political dimensions. But, before examining the Court’s attitude in respect of the definition of legal disputes, another aspect of the problem should be examined concerning the extent of justiciability of international disputes and the possibility of referring disputes that have a mixed character or involve the use of force to the Court.

It has been noted that the Court has no right to adjudge in respect of disputes involving alleged acts of aggression.⁸⁶ This is based on the fact that the Charter

Nations: Cases, Documents and Notes, 1953, p. 1042). See also Bloomfield, L., “Law, Politics and International Disputes”, *Int. Con.*, 516, 1958, pp. 261-3; Kelsen, H., *The Law of the United Nations*, 1951, pp. 477-9; Schachter, O., “General Course in Public International Law”, *RCADI*, 178, 1982, p. 211.

⁸⁴ Ross, A., *A Textbook of International Law, General Part*, 1947, p. 279; Oppenheim, L., *International Law, vol. II, Disputes, War and Neutrality*, 1952, pp. 3-4; David Davies Memorial Institute of International Studies, *Report of a Study Group on the Peaceful Settlement of International Disputes*, 1966, pp. 4-5; Rousseau, C., *Droit International Public*, 1968, p. 277; Khare, S., *Use of Force under UN Charter*, 1985, p. 204; Mosler, H., “The Area of Justiciability: Some Cases of Agreed Delimitation in the Submission of Disputes to the International Court of Justice” in Makarczyk, J. (ed.), *Essays in International Law in Honour of Judge Manfred Lachs*, 1984, p. 415; Hambro, E., “The Jurisdiction of the International Court of Justice”, *RCADI*, 76, 1950, p. 171.

⁸⁵ Higgins, R., “Policy Consideration and the International Judicial Process”, *ICLQ*, 17, 1968, pp. 63 ff.

⁸⁶ Gross, L., “Sources of Universal International Law” in Gross, L. (ed.), *Essays on International Law and Organisation*, vol. 1, 1984, pp. 149-55; Kaplan, M., et al., *The Political Foundation of International Law*, 1961, p. 278; Kunz, J., *The Changing Law of Nations*, 1968, pp. 586-92; Stone, J., *Legal Control of International Conflicts*, 1959, pp. 146-52; De Visscher, C., “Reflections on the Present Prospects of International Adjudication”, *AJIL*, 50, 1956, pp. 467-8; Borchard, E., “The Place of Law and Courts in International Relations”, *AJIL*, 37, 1943, pp. 46, 55.

nowhere mentions the Court's role in this regard. According to the Charter and its *travaux préparatoires*, such disputes were entrusted exclusively to the SC pursuant to Chapter VII.⁸⁷ In addition, the GA was granted a distinctly secondary role, and the Court none at all. Accordingly, even if the GA may have a role in Chapter VII disputes, it does not mean that the Court has such a role.⁸⁸ In addition, it has been concluded that some disputes are not about legal rights, but involve political or economic interests.⁸⁹ In this view, the law is not sufficient to resolve such disputes and they will remain unsolved until the underlying political and economic interests have been satisfied by agreement or force. Accordingly, only "pure disputes" between states that do not reflect underlying "tension" can be resolved by a judicial resolution, whereas, if the dispute involves a political struggle, it is considered to be a non-justiciable dispute.⁹⁰

The above view has been rejected on the grounds that the Court should never refuse jurisdiction over a case because it is political, or even preponderantly political. According to this view, there are no inherent legal barriers to the adjudication by the Court of cases involving the use of force.⁹¹ For instance, Lauterpacht stated that:

⁸⁷ Higgins, for example, in discussing the Council's designation of the Rhodesian question as a "threat to the peace" under Article 39 of the Charter, indicates that the Court might properly have declined a request to review that determination on the ground that the Charter vests jurisdiction to make such determination exclusively in the Security Council. Higgins, *supra* note 85, p. 58. Similarly, Bowett observes that the Court should never decline a case because it is political but only because authority has been committed to another UN body, such as the Council or Assembly. Bowett, D., *The Law of International Institutions*, 1982, p. 278; see also Greig, D., "The Advisory Jurisdiction of the International Court of Justice and the Settlement of Disputes between States", *ICLQ*, 15, 1966, p. 324; Gross, L., "Limitation upon the Judicial Function", *AJIL*, 58, 1964, pp. 415, 430-1.

⁸⁸ Norton, M., "The Nicaragua Case: Political Question before the International Court of Justice", *VJIL*, 27, 1987, p. 469.

⁸⁹ The advocates of this view observe that "[t]o view such disputes solely from a legal perspective is to see but one facet of a multifaceted phenomenon. To seek to resolve such a dispute solely on the basis of legal rights is an exercise in futility." See Norton, *supra* note 88, p. 499.

⁹⁰ Falk refers to the Arab-Israeli dispute, the Vietnam war, and the status of Berlin as examples of such disputes. Falk, R., "Realistic Horizons for International Adjudication", *VJIL*, 11, 1971, pp. 314, 321; see also Morgenthau, H., *Politics Among Nations. The Struggle for Power and Peace*, 1956, pp. 425-34.

⁹¹ Rosenne, *supra* note 34, p. 94; Bilder, R., "An Overview of International Dispute Settlement", *JIDR*, 1, 1986, pp. 1, 7-11; Jennings, R., *International Courts and International Politics*, Josephine Onoh Memorial Lecture, 1986, pp. 2-3; Schachter, O., "Disputes Involving the

“There is no fixed limit to the possibilities of judicial settlement; that all conflicts in the sphere of international politics can be reduced to contests of a legal nature; and that the only decisive test of the justiciability of the dispute is the willingness of the disputants to submit the conflict to the arbitrament of the law.”⁹²

In addition, he maintained that the question of the right of recourse to war in self-defence is in itself capable of judicial decision, and it is only the determination of states to have questions of this nature decided by a foreign tribunal which may be non-justiciable.⁹³ The same view was expressed by Charles De Visscher, who stated that:

“There is no firm criterion derived from the object or nature of the dispute by which to classify disputes *a priori* as political or legal, the attitude of the parties is alone decisive on the procedural plane.”⁹⁴

Thus, it can be concluded that, as the international lawyers failed to adopt any criteria to distinguish legal from political disputes, they also failed to agree regarding the possibility of settling disputes of a mixed character or disputes involving the use of force. Therefore, the Court’s dicta should be examined extensively.

(ii) The broad concept of “legal dispute” in the jurisprudence of the ICJ

The plea of the non-justiciability of a dispute has been raised in a number of cases. The Court has generally approached the question of whether a concrete dispute is legal or not by arguing that the case is not one that falls within one of the four categories as indicated in Art. 36/2 of the Statute, or that the dispute is one that cannot be decided by rules of law indicated by Art. 38 of the Statute.⁹⁵

In its capacity to give advisory opinions, the Court dealt with the allegation of the non-legality of the questions in a number of cases.⁹⁶

Use of Force” in Damrosch, L. (ed.), *The International Court of Justice at a Crossroads*, 1987, p. 223; Schachter, O., “Self-defence and the Rule of Law”. *AJIL*, 83, 1989, p. 259.

⁹² Lauterpacht, H., *The Function of Law in the International Community*, 1933, p. 164.

⁹³ *Ibid.*, pp. 179 ff.

⁹⁴ De Visscher, C., *Theory and Reality in Public International Law*, translated from the French by P. E. Corbett, 1968, p. 353.

⁹⁵ Rosenne, *supra* note 4, pp. 375-6.

⁹⁶ See pp. 82 ff. above.

The allegation of “non-justiciability” was raised in several contentious cases as well. For instance, in the *Aegean* case, the Court’s jurisdiction was challenged by Turkey on the ground that its dispute with Greece was “of a highly political nature”.⁹⁷ The Court had to decide whether the case might be said to concern a political rather than a legal dispute. It found that the parties were arguing that their dispute involved a conflict as to their respective rights. Therefore, it concluded that the dispute between the two states in respect of the delineation of their continental shelf was a legal dispute.⁹⁸ Similarly, in the *United States Diplomatic and Consular Staff in Tehran* case (1979),⁹⁹ Iran objected to the Court’s jurisdiction in its letters to the ICJ of 9 December 1979 and 16 March 1980 on the ground that the dispute was non-justiciable. It argued that the legal point of its dispute with the USA had “marginal and secondary aspects of an overall problem”. It noted that it is not possible to study the case divorced from other elements concerning, *inter alia*, more than twenty-five years of continual interference by the USA in the internal affairs of Iran, the shameless exploitation of Iran, and numerous crimes perpetrated against the Iranian people, contrary to and in conflict with all international and humanitarian norms. Iran insisted that the question of hostages was not a legal one concerning the interpretation or application of treaties, but resulted from “an overall situation containing much more fundamental and more complex elements”. Accordingly, it concluded that the Court could not deal with the American application.¹⁰⁰ The Court, having regard to the importance of the legal principle involved in the case, dismissed the argument that the case was to be considered as “secondary” or “marginal” and thus outside the Court’s jurisdiction, and found that the case fell within its jurisdiction. In addition, it dismissed the Iranian allegation that the Court could not deal with the case because of the mixed character of the dispute, and shared the perception of the USA that the dispute was justiciable. It

⁹⁷ ICJ Rep., 1978, p. 13.

⁹⁸ Ibid.

⁹⁹ Hereinafter the *Hostages* case.

¹⁰⁰ ICJ Rep., 1979, pp. 10-11; Gross, L., “The Case Concerning United States Diplomatic and Consular Staff in Tehran: Phase of Provisional Measures”, *AJIL*, 74, 1980, p. 396 ff.; Al-Ashall, A., “American Hostages in Tehran Case before the International Court of Justice”, *REDI*, 36, 1980, pp. 236-7.

based its opinion on the ground that there is no mention in the Statute or in its Rules that the ICJ should decline to deal with a case because that dispute has other aspects, however important. Consequently, the Court ordered interim measures of protection in favour of the United States.¹⁰¹ It recalled the above dictum in its judgment on the merits in 1980. It concluded that any contention intending to deprive the Court of its jurisdiction on the ground that the dispute is of a mixed character would be unacceptable. It based its opinion on the assumption that its duty is to decide legal questions and that to regard political considerations as an obstacle would be to abrogate the fundamental object for which it was created.¹⁰² The Court reasoned its judgment on the basis that:

“Legal disputes between sovereign States by their very nature are likely to occur in political contexts, and often from only one element in a wider and long-standing political dispute between the States concerned. Yet never has the view been put forward before that, because a legal dispute submitted to the Court is only one aspect of a political dispute, the Court should decline to resolve for the parties the legal questions at issue between them ... if the Court were, contrary to its settled jurisprudence, to adopt such a view, it would impose a far-reaching and unwarranted restriction upon the role of the Court in the peaceful solution of international disputes.”¹⁰³

In the *Nicaragua* case, Nicaragua claimed that US support of insurrection forces in Nicaragua, namely the Contras, was an unlawful use of armed force and an impermissible intervention in Nicaragua's internal affairs. The USA responded that Nicaragua was supporting insurgency and terrorism in the territories of its Central American neighbours, and any support by the USA of the Contras was an exercise of the right of self-defence. It denied the competence of the ICJ to deal with the dispute on the basis that, *inter alia*, the application was inadmissible because Nicaragua was asking the Court to examine only certain issues involved in the

¹⁰¹ ICJ Rep., 1979, pp. 15-16; Rafat, A., “The Justiciability of Politicised Disputes”, *RDISDP*, 1, 1983, p. 6; Przetacznik, F., “The Rightness of the Decisions of the International Court of Justice in the American Diplomatic Case in Iran”, *RDISDP*, 61, 1983, pp. 253-4.

¹⁰² Some lawyers observed that the Court, by taking jurisdiction in this case, appears to have broken new ground with regard to the classic distinction between the legal, i.e. justiciable, dispute and the political, i.e. non-justiciable, dispute. It did so by notably narrowing the scope of the latter. See Laval, R., “The Notion of International Legal Disputes and the Assumption of Jurisdiction by the International Court of Justice in the Hostages Case”, *RHDI*, 35-6, 1982-3, p. 109.

¹⁰³ ICJ Rep., 1980, p. 20.

Contadora process.¹⁰⁴ It also alleged that it was inappropriate and inherently beyond the capability of the Court to resolve disputes involving the ongoing use of armed force. This is a matter committed by the Charter solely to the SC, not to the Court.¹⁰⁵ The Court dismissed the non-justiciability argument, and concluded that Nicaragua's claims were justiciable. It stated that it should not reject an essentially judicial task merely because the issues before the Court are intertwined with political questions. It based its opinion on the ground that the ongoing use of unlawful armed force was never contemplated by the drafters of the Charter to be encompassed by Art. 36/2 of the Statute. Moreover, it referred to the *Corfu Channel* case and the *Aerial Incident* case as examples of cases in which the Court was asked to adjudicate the rights and duties of the parties with respect to matters involving the use of force and armed attacks.¹⁰⁶ Consequently, in January 1985, the US Government referred to the Court's judgment of 26 November 1984 and informed the Court that it would not participate any further in the case, and declared that those proceedings constituted a "misuse of the Court for political purposes ... the Court lacks jurisdiction and competence over such a case. The Court's decision of November 26, 1984, finding that it has jurisdiction, is contrary to law and fact." Further, "[t]he conflict in Central America ... is not a narrow legal dispute; it is an inherently political problem that is not appropriate for judicial resolution. The

¹⁰⁴ In his oral argument before the Court, Sohn noted that "it was not the United States' purpose to argue that the application must be dismissed because it presents a 'Political' question, as opposed to a Legal question". ICJ Pled., CR. 84/18, p. 67.

¹⁰⁵ ICJ Pled., Counter Memorial submitted by the USA, August 1984, pp. 183-5; ICJ Rep., 1984, p. 436; Norton, *supra* note 88, pp. 459-60.

¹⁰⁶ The Court observed that: "[t]he allegation, attributed by the United States to Nicaragua, of an ongoing conflict involving the use of armed force contrary to the Charter is said to be central to, and inseparable from, the application as a whole, and is one with which a court cannot deal effectively without overstepping proper judicial bounds. The resort to force during ongoing armed conflict lacks the attributes necessary for the application of the judicial process, namely a pattern of legally relevant facts discernible by the means available to the adjudicating tribunal, established in conformity with applicable norms of evidence and proof, and not subject to further material evolution during the course of, or subsequent to, the judicial proceedings. It is for reasons of this nature that ongoing armed conflict must be entrusted to resolution by political processes." ICJ Rep., 1984, p. 436.

conflict will be solved only by political and diplomatic means - not through a judicial tribunal.”¹⁰⁷

In its reply, the Court - in its judgment of 27 June 1986 - did not uphold the US view that the issues raised were non-justiciable because they involved an evolution of political and military considerations, which the Court is not competent or equipped to determine. It noted that its determination that an armed attack had not occurred did not involve an evolution of a military or political matter beyond the Court’s competence. It considered that the United States did not argue that the dispute was not “a legal dispute” or that international law was not controlling in a dispute of this kind. It also stated that:

“The Court can at this stage confine itself to a finding that, in the circumstances of the present case, the issues raised of collective self-defence are issues which it has competence, and is equipped, to determine.”¹⁰⁸

Similarly, in the *Border and Transborder* case, Honduras contended the Court’s jurisdiction on the basis that the political inspiration of the proceedings was inconsistent with the Court’s judicial function. The Court dismissed the allegation and affirmed that political aspects may be present in any legal dispute brought before it. It stated that:

“As regards the first aspect of this objection, the Court is aware that political aspects may be present in any legal dispute brought before it. The Court, as a judicial organ, is however only concerned to establish, first, that the dispute before it is a legal dispute, in the sense of a dispute capable of being settled by the application of principles and rules of international law, and secondly, that the Court has jurisdiction to deal with it, and that jurisdiction is not fettered by any circumstance rendering the application inadmissible. The purpose of recourse to the Court is the peaceful settlement of such disputes; the Court’s judgment is a legal pronouncement, and it cannot concern itself with the political motivation which may lead a State at a particular time, or in particular circumstances, to choose judicial settlement. So far as the objection of Honduras is based on an alleged political inspiration of the proceedings, it therefore cannot be upheld.”¹⁰⁹

¹⁰⁷ Statement of Department of State on US withdrawal from Nicaragua proceedings, 18 January 1985. See *AJIL*, 79, 1985, pp. 438, 441.

¹⁰⁸ ICJ Rep., 1986, p. 28. In this regard two separate dissenting opinions argued, for different reasons, that the Court should have rejected Nicaragua’s claim as non-justiciable. Judge Oda observed that the dispute was not justiciable because it was not a “legal” dispute. *Ibid.*, pp. 219 ff. Judge Schwebel also argued that the Court should have held the US plea of self-defence as non-justiciable. *Ibid.*, pp. 259 ff.

¹⁰⁹ ICJ Rep., 1988, p. 91.

From the above dicta, one may conclude that, although the Court has failed to identify general criteria (rigid or flexible) capable of distinguishing legal from non-legal disputes, it has never rejected a case on the ground that it involved a non-legal issue. It is inclined to take a broad legal perspective of what constitutes a justiciable dispute and to narrow the scope of political disputes. Therefore, the political aspects of an international dispute are not a bar to classifying any dispute as a legal dispute, nor do they affect the Court's jurisdiction to deal with the dispute. The Court has affirmed that all legal disputes have a political dimension and once the Court finds that a dispute raises a legal issue then it considers that this dispute is within its jurisdiction and it is entitled to proceed regardless of the political aspects of the dispute and their weight.

Having referred to the Court's contentious jurisdiction - its bases and limits - the study will turn to discuss how the Court through this jurisdiction played a role in facilitating the principles and purposes of the UN.

2. The role of the ICJ in maintaining international peace and security

The maintenance of international peace and security is considered to be one of the primary purposes of the UN. Art. 1 of the Charter calls upon UN members to "maintain international peace and security, and to that end: ... to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace".¹¹⁰ However, the Charter does not ignore the fact that disputes are a constant factor in all facets of human life. It is also recognised that peace cannot be maintained only by forbidding the use of force. Therefore, the Charter provides for certain mechanisms and procedures to facilitate the settlement of disputes in order to maintain international peace and security. It is entrusted to the political organs of the UN, namely the SC and the GA, to secure this aim insofar

¹¹⁰ Since the adoption of the Charter, the principle of peaceful settlement of international disputes has been universally recognised and proclaimed in a series of multilateral international instruments; for instance, the Pact of the League of Arab States, 1945, the Inter-American Treaty of Reciprocal Assistance 1947, and the Charter of the Organisation of African Unity, 1963. See Voitto, S., "Legal Aspects of the Peaceful Settlement of International Disputes", *Nor. TIR*, 35, 1965, pp. 73-4.

as it can be achieved. In addition, it provides for an agency, the ICJ, whose principal function is to apply legal techniques in the resolution of international controversies and to secure the purpose of maintaining international peace and security through the rule of law.¹¹¹

The importance of the role of judicial settlement was realised by Committee IV/I, which noted that, “[o]n the basis of the texts proposed for the Charter and for the Statute, the First Committee ventures to foresee a significant role for the new Court in the international relations of the future. Therefore, the judicial process has a central place in the plan of the UN for the settlement of international disputes by peaceful means.”¹¹² In this regard, Rosenne notes “the consequence which the San Francisco conference drew from the establishment of the Court as the principal organ of the United Nations, namely that this was evidence of a firm intention that an international court should play an important role in the new organisation of Nations for peace and security”.¹¹³

The settlement of international disputes by judicial means, *inter alia* the ICJ as the principal judicial organ of the UN, is confirmed by several provisions of the Charter. Art. 1 indicates that international disputes or situations which might lead to a breach of the peace should be settled in conformity with the principles of justice and international law. Art. 2/3 provides an obligation upon all members of the UN to “settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not in danger”. These means are defined by Art. 33 of the UN Charter, which states that the parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall seek a solution by one of a number of peaceful means

¹¹¹ In this regard, Lachs has expressed the view that, “in the total process of interaction between States with all its difficulties, conflicts and differences of opinions, the Court, as the principal organ of the United Nations, ought to play a real role”. Lachs, M., “La Cour Internationale de Justice, Organe Judiciaire Principal des Nations Unies” in *Liber Amicorum Adolf Schnitzer*, 1979, p. 284; see also Lauterpacht, H., *The Development of International Law by the International Court*, 1958, p. 3; Chimni, B., “The International Court of Justice and the Maintenance of Peace and Security: The Nicaragua Decision and the United States Response”, *ICLQ*, 35, 1986, p. 960.

¹¹² See UNCIO, 13, p. 393.

¹¹³ Rosenne, S., “The Non Use of the Advisory Competence of the International Court of Justice”, *BYIL*, 39, 1963, p. 32.

listed in the article, *inter alia* judicial settlement. In addition, Art. 36/3 of the Charter calls for the settlement of legal disputes through referral to the ICJ.

The Court's power in this regard has also been affirmed in a number of GA resolutions and declarations; for instance resolutions 2627 (XXV) of 24 October 1970 and 2734 (XXV) of 16 December 1970. In its Res. 3283 (XXIX) on the Peaceful Settlement of International Disputes, the GA considered that "the International Court of Justice could settle or assist in settling many disputes ... by the full application of the provisions of the Charter and of the Statute of the Court". It also recalled that "the international Court of Justice is the principal judicial organ of the United Nations and, as such, is available to Members for the settlement of legal disputes".¹¹⁴ Finally, in Res. 44/23, of 17 November 1989, by which the UN Decade of International Law was proclaimed, the GA set out four purposes for the decade, *inter alia* the promotion of means and methods for the peaceful settlement of disputes between states, including resort to and full respect for the ICJ.¹¹⁵

All the above indicate that the Court has been granted an essential role, alongside the SC and the GA, in the maintenance of peace and security by providing a judicial method of settling disputes by peaceful means. This was based on the fact that the peaceful settlement of international disputes has been regarded as an essential condition of the maintenance of international peace and security. Moreover, unsettled disputes might endanger international peace and security and contribute to international friction. Finally, it should be noted that every successful settlement of a controversy by peaceful means strengthens the structure of international peace and security. Therefore, it could be concluded that the ICJ was envisaged as a mean of settling disputes by binding decisions.

2.1. The practice of the ICJ in settling international disputes

Through its role in settling international disputes, the ICJ has played an important part in maintaining international peace and security. From the outset, it should be noted that the ICJ's power to settle disputes is unlikely to assist in establishing peace by solving conflicts of political importance and by assuming functions which

¹¹⁴ GA Res. 3283 (XXIX), 12 December 1974.

¹¹⁵ GA Res. 44/23, 17 November 1989.

are essentially of a legislative nature. Neither is it the business of the Court to prevent actual outbreaks of violence. Nevertheless, the role of the ICJ in the maintenance of peace may reveal itself in the settling of international disputes by which it creates an atmosphere of respect for law. From that point of view, the question as to the role of the Court in maintaining peace is almost tautologous.

From an overview of the practice of the ICJ with regard to the settlement of international disputes it can be concluded that the Court has reduced friction between states and enabled them to co-operate more effectively. Of the cases referred to the ICJ for judicial settlement, some involve questions of interpretation or application of treaties, such as the *Asylum* case between Colombia and Peru; the *Rights of Nationals of the USA in Morocco* case (1952) between France and the USA; the *Ambatielos* case (1953) between Greece and the UK; the *Application of the Convention of 1902 Governing the Guardianship of Infants* case (1958) between the Netherlands and Sweden; the *Hostages* case (1980) between the USA and Iran; the *Bosnia* case (1996) between Bosnia and Herzegovina on the one hand and Yugoslavia on the other.

The ICJ has dealt with cases relating to sovereignty over certain territories and frontier disputes; for instance, the *Sovereignty over Certain Frontier Land* case between Belgium and the Netherlands (1959); the *Temple of Preah Vihear* case between Cambodia and Thailand (1961); the *Frontier Dispute* between Burkina Faso and Mali (1986); the *Land, Islands and Maritime Dispute* between El Salvador and Honduras 1990.

It has also dealt with cases concerning maritime delimitation and other law of the sea disputes; for instance, the *Fisheries* case (1951) between the UK and Norway; the *North Sea Continental Shelf* cases (1969) between Germany on the one hand and the UK and the Netherlands on the other; the *Aegean* case (1978) between Turkey and Greece; the *Continental Shelf* case (1982) between Tunisia and Libya; the *Delimitation of the Maritime Boundary in the Gulf of Maine Area* case, between Canada and the USA; the *Continental Shelf* case (1985) between Libya and Malta.

In addition, the Court has dealt with disputes arising from the law of diplomatic protection of nationals abroad; for instance, the *Nottebohm* case (1955) between

Liechtenstein and Guatemala; the *Barcelona Traction* case (1970) between Belgium and Spain; and the *Elettronica Sicula S.p.A.* case (1989) between the USA and Italy.

Finally, there are cases involving the enforcement of contracts and violation of certain principles of customary international law; for instance, the *Corfu Channel* case (1949) between Albania and the UK; the *Rights of Passage over Indian Territory* case (1960) between Portugal and India; the *Nicaragua* case (1984) between Nicaragua and the USA.

2.2. The relationship between the ICJ and the political organs in settling international disputes

As noted above, the UN Charter established six principal organs, four of which are directly concerned with the maintenance of international peace and security. The ICJ as a judicial organ and the GA, the SC and the Secretary-General as political organs assume major functions of a different nature, but with important interrelations. Accordingly, it seems appropriate to focus on their relationship *inter se*.

The study of the relationship of the ICJ with the other political organs of the UN requires a preliminary brief focus on the role of the political organs in maintaining peace and security.

2.2.1. The role of the political organs with regard to the settlement of international disputes

(i) The role of the GA and the SC

As mentioned above, the Charter empowers both organs to maintain international peace and security. The SC, pursuant to Chapter VI of the Charter, deals with matters that only potentially could disturb the peace and with regard to a dispute or situation “which is likely to endanger the maintenance of international peace and security”. It also acts pursuant to Chapter VII when an international crisis constitutes a “threat to the peace, a breach of the peace, or act of aggression”. Similarly, the GA may discuss any question of a general nature regarding the

maintenance of international peace and security. It exercises the same peaceful settlement function on the basis of Chapter VI of the Charter.¹¹⁶

(ii) The role of the Secretary-General

The Secretary-General's role as head of the Secretariat is to render assistance and provide facilities to the other principal organs and all other institutions of the UN. In addition, he frequently offers his good offices or is called upon to act as mediator or conciliator to settle international disputes.¹¹⁷ His role is laid down in Arts. 98 and 99 of the Charter.¹¹⁸ Art. 98 provides that the Secretary-General shall perform those functions given to him by the consultative organs, and this opens the possibility of the delegation of responsibilities in the settlement of disputes. It was on the basis of this article that the SC and the GA made the Secretary-General a central diplomatic figure in the UN settlement of disputes.¹¹⁹ Art. 99 also entrusts the Secretary-General with express powers with regard to the peaceful settlement of disputes.¹²⁰ In the light of this article, various actions can be undertaken at the request of

¹¹⁶ See pp. 132 ff. above. For details, see White, N., *The United Nations and the Maintenance of International Peace and Security*, 1990, pp. 60 ff. (for the powers of the SC), and pp. 95 ff. (for the powers of the GA); Shearer, I., *Starke's International Law*, 1994, 572 ff.

¹¹⁷ In practice, when the SC was paralysed during the cold war era, the Secretary-General played an important role in peace-keeping by appointing special representatives, or holding consultations with the litigant parties to reach acceptable solutions. Nowadays, with the revival of the SC, the Secretary-General has been mandated by it with a leading role in organising, supervising and directing an unprecedented number of peace-keeping operations. With regard to the role of the Secretary-General in respect of the peaceful settlement of international disputes, see Zacher, M., "The Secretary-General and the United Nations' Function of Peaceful Settlement" in Wood, R. (ed.), *The Process of International Organisation*, 1971, pp. 255 ff.

¹¹⁸ Art. 97 provides: "[t]he Secretariat shall comprise a Secretary-General and such staff as the Organisation may require..."

¹¹⁹ The Secretary-General has been instructed by the GA on several occasions; for instance, China in 1955; Palestine in 1956; Afghanistan, Iran, and Pakistan since 1980. He has also been instructed by the SC to intervene in international disputes and called upon to use his good offices or to act as a mediator; for instance, India and Pakistan in 1965; the Middle East in 1967; the border dispute between Iraq and Iran in 1974; Western Sahara in 1975; Namibia in 1978.

¹²⁰ Dag Hammarskjöld noted that "[i]t is Article 99 more than any other which was considered by the drafters of the Charter to have transformed the Secretary-General of the United Nations from a purely administrative official to one with an explicit political responsibility ... legal scholars have observed that Article 99 only confers upon the Secretary-General a right to bring matters to the attention of the Security Council but that this right carries with it, by necessary implication, a broad discretion to conduct inquiries and to engage in informal diplomatic activity in regard to matters which may threaten the maintenance of international peace and security". Foote, W. (ed.), *Servant of Peace: A Selection of the Speeches and Statements of Dag Hammarskjöld*, 1962, p. 335.

interested parties, or on the Secretary-General's own initiative without authorisation from the SC or the GA.¹²¹

This power was confirmed by para. 21 of the 1988 Declaration on the Prevention and Removal of Disputes and Situations Which May Threaten International Peace and Security. This paragraph states that the Secretary-General "should consider approaching the states directly concerned with a dispute or situation in an effort to prevent it from becoming a threat to the maintenance of international peace and security".¹²² The Secretary-General does not need any further authorisation nor does he need to wait for a state to ask for his help. In addition, he may make full use of his good offices, including the sending of a representative or fact-finding mission to areas where a dispute or situation exists.¹²³

2.2.2. The dimensions of the relationship between the ICJ and the political organs of the UN

As seen above, the Charter has entrusted both the political and legal organs to achieve the central purpose of the UN, namely the maintenance of international peace and security, through their power to settle international disputes. The point here is to examine the dimensions of the relationship between these different organs. There are two aspects to this relationship. First, the power of the political organs of the UN to refer disputes with legal aspects to the Court is examined, as well as the legal consequences of their decision or resolution to refer upon the disputant parties. Second, the relationship between the ICJ as a judicial organ and the other political organs in the event of the concurrent referral of a dispute to them

¹²¹ The Secretary-General has played a role on his own initiative pursuant to this article. For instance, the agreement between Egypt and Saudi Arabia in the case concerning the Yemen (1963) was proposed on the personal initiative of the Secretary-General. He exercised his negotiating capacity in the Korean crisis (1953). He used his investigative powers regarding the Suez Canal (1956). He offered his good offices and mediation in several disputes, for instance the dispute between the Netherlands and Indonesia in respect of West Iran. He was also entrusted by the SC in 1974 with the mission aimed at reconciling Iran and Iraq. In 1986, he was invited by the SC to act over the Rainbow Warrior incident. See Malinverni, G., "The Settlement of Disputes within International Organisations" in Bedjaoui, M. (ed.), *International Law: Achievement and Prospects*, 1991, pp. 564-5; Amerasinghe, C., *Principles of the Institutional Law of International Organisations*, 1996, pp. 429-30.

¹²² GA Res. 43/51, Annex. GAOR, 43rd Sess., Supp. No. 49, 1988.

¹²³ Lee, R., "A Case for Facilitation in the Settlement of Disputes", *GYIL*, 34, 1991, pp. 161-2.

is determined and the possibility of contradiction in the conclusions reached by the political and the judicial organs of the UN.

(i) The power of the political organs to refer disputes to the ICJ

The political organs of the UN entrusted with fulfilling the objective of the settlement of disputes may direct the litigant parties to refer their dispute to one of the means indicated by Art. 33 of the Charter, *inter alia* judicial settlement. Art. 36/3 provides that “[i]n making recommendations under this Article the Security Council should also 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”.¹²⁴

Despite the fact that the Charter does not contain a provision to this effect in respect of the GA, it has been argued that the SC’s power is equally applicable to the GA.¹²⁵ This is based on Art. 10, which provides the GA with a broad competence, and Art. 11/2, which enables the GA to make any recommendations to the states concerned that it considers appropriate when a dispute is referred to it. In addition, Art. 14 of the Charter gives the GA the power to recommend measures for peaceful adjustment in respect of matters relating to the maintenance of international peace and security.

In addition to the SC and the GA, the Secretary-General of the UN, through his good offices and his intermediary and conciliatory functions, is able to suggest solutions to disputant parties, including the referral of disputes with a legal dimension to the ICJ for settlement and to clarify the legal norms that could apply to this dispute.

¹²⁴ In this regard, it should be noted that there was no similar paragraph in Art. 36 of the PCIJ’s Statute.

¹²⁵ Sohn, L., “Step-by-Step of the Jurisdiction of the International Court of Justice”, *ASILP*, 58, 1964, pp. 135-6; Steinberger, H., “The International Court of Justice” in *Judicial Settlement of International Disputes*, Max Plank Institute for Comparative Public Law and International Law; *An International Symposium*, 1974, p. 237; Weissberg, G., “The Role of the International Court of Justice in the United Nations System: The First Quarter Century” in Gross, L. (ed.), *The Future of the International Court of Justice*, 1976, p. 168.

(a) The practice of the political organs in referring disputes to the ICJ

Since the establishment of the UN, the SC has applied Art. 36/3 in only two cases:¹²⁶ first, the *Corfu Channel* case between the UK and Albania; and, second, the case concerning the Aegean dispute between Greece and Turkey.

The first case was raised as a consequence of the explosion of mines, which seriously damaged two British warships passing through the Corfu Channel.¹²⁷ This issue was referred by the UK to the SC. Albania was not, at that time, a member of the UN but it participated at the invitation of the SC pursuant to Art. 32. Albania's participation was made conditional on its acceptance of the obligations of a member of the UN in a similar case.¹²⁸ With the failure of the SC to adopt a decision as a consequence of the use of the right of veto by the Soviet Union,¹²⁹ the Council adopted Res. 22 in which it concluded that "the United Kingdom and Albanian Governments should immediately refer the dispute to the International Court of Justice in accordance with the provisions of the Statute of the Court". The president of the Council pointed out that, although Albania was not a member of the UN, it had accepted the obligations of membership as contained in the Council's invitation to participate in the discussion of the case, and that consequently Albania

¹²⁶ In 1970, Higgins justified the Council's reluctance to suggest reference to the Court as follows: "[t]he communist nations have always refused to use the Court; the newer nations have been convinced, since the South Africa judgment of 1966, that the Court cannot help in the solution of their problems and the western nations find it impolitic to urge reference to the Court." Higgins, R., "The Place of International Law in the Settlement of Disputes by the United Nations Security Council", *AJIL*, 64, 1970, p. 4.

It is appropriate to note that on two occasions proposals were made in the Security Council to refer disputes to the ICJ but they both failed. First, in 1947, Belgium proposed that the dispute over the Anglo-Egyptian Treaty of 1936 be referred to the ICJ (SCOR, 2nd Year, No. 80, 189th mtg., 20 August 1947, p. 2115); this was supported by the UK representative to the Security Council (SCOR, 2nd year, No. 86, 198th mtg., 28 August 1947, pp. 2296 ff.). However, the Council's resolution did not refer the matter to the ICJ because the Belgian proposal could not get a majority. Second, in 1960 the US proposal that the Soviet Union's complaint concerning violation of Soviet air space be referred to the ICJ was vetoed by the Soviet Union (SCOR, 15th year, 883rd mtg., 26 July 1960, p. 39). See Khare, *supra* note 84, p. 204.

¹²⁷ Munro, H., "The Case of the Corfu Minefield", *MLR*, 10, 1947, p. 363 ff.; Jones, M., "Corfu Channel Case - Jurisdiction", *GS*, 35, 1950, p. 91; ElKind, J., *Non-Appearance before the International Court of Justice. Functional and Comparative Analysis*, 1984, pp. 38-9.

¹²⁸ SCOR, 2nd Year, No. 5, 95th mtg., 20 January 1947.

¹²⁹ SCOR, 2nd Year, No. 19, 122nd mtg., 25 March 1947.

was “obliged to comply with the provisions of both the Charter and of the Statute of the International Court of Justice”.¹³⁰

The second case related to the Aegean dispute between Greece and Turkey. Greece complained that Turkey had violated the sovereign rights of Greece on its continental shelf in the Aegean, which created a dangerous situation threatening international peace and security. Accordingly, the Security Council adopted Res. 395 on 25 August 1976, whereby, pursuant to para. 4, it invited “the Governments of Greece and Turkey in this respect to continue to take into account the contribution that appropriate judicial means, in particular the International Court of Justice, are qualified to make to the settlement of any remaining legal differences which they may identify in connexion with their present dispute”.¹³¹

The GA also made a recommendation to Austria and Italy to refer their dispute to the ICJ pursuant to Arts. 33 and 36 of the Charter in respect of the *Bolzano* dispute (1960), but this recommendation was not so specific, because the parties had the option to employ other methods of their choice.¹³²

(b) The legal effect of the decision on referral

The question now is: what is the legal force of resolutions which, in certain cases, might lead the parties to a dispute to refer it to the ICJ? Do they actually establish some kind of compulsory jurisdiction of the ICJ? Needless to say, such resolutions will have a binding effect if the litigant parties accept in advance to consider such recommendations by the Assembly or the Council as binding upon themselves.¹³³ The binding effect in this regard is derived from the agreement of the states.

In the absence of such prior agreement of the parties, it has been unanimously agreed that the effect by the GA’s resolutions in this regard cannot exceed the effect of its decisions in general, which is recommendatory. The Assembly’s decision to direct the parties of a dispute to refer the matter to the ICJ

¹³⁰ SC Res. 22, of 9 April 1947; De Aréchaga, E., *Voting and the Handling of Disputes in the Security Council* (United Nations Studies No. 5), 1950, pp. 100-3; Bailey, S., *The Procedure of the UN Security Council*, 1988, , p. 285.

¹³¹ See Bailey, *ibid.*, pp. 285-6; White, *supra* note 116, p. 75.

¹³² GA Res. 1497 (XV), 31 October 1960. Khare, *supra* note 84, p. 216.

¹³³ Steinberger, *supra* note 125, pp. 237-8.

has no obligatory effect upon the litigant states. The same view could also extend to the recommendation or suggestion of the Secretary-General to the disputant parties to refer the dispute to the Court.

There is no such unanimous view in respect of the SC's resolutions.¹³⁴ Consequently, and because the only case which was referred to the Court on the basis of referral by the SC was the *Corfu Channel* case between the UK and Albania, the study will examine the Court's attitude in this case and the opinion of international lawyers in this regard.

On 13 May 1947, the Government of the UK instituted proceedings against Albania and requested the Court to decide that Albania was internationally responsible for the consequences of the Corfu incident, and should make reparation or pay compensation. The UK based the Court's jurisdiction, *inter alia*, on the Council's Res. 22 of April 1947, since the Albanian Government had accepted the Council's invitation under Art. 32 of the Charter to participate in the discussion of the dispute, and accepted the condition laid down by the SC when conveying the invitation that Albania should in the present case accept all the obligations of the UN. The UK referred to Art. 25 of the Charter, which indicates that the members of the UN agree to carry out the decisions of the SC.¹³⁵ In a letter dated 23 July 1947, addressed to the Registrar of the ICJ, the Government of Albania challenged the claim that the ICJ possesses compulsory jurisdiction and termed the action of the UK in instituting the proceedings irregular because it had no right to bring the dispute before the Court by means of a unilateral application. It also noted that Art. 25 of the Charter relates solely to decisions of the SC taken on the basis of the provisions of Chapter VII of the Charter and does not apply to recommendations

¹³⁴ It should be noted that the legal effect of the SC in this regard was discussed at the San Francisco Conference. For details, see UNCIO, 13, 279 ff. This matter was also discussed before the SC at various times. During the 127th mtg., the Australian delegate interpreted it as meaning that recommendations made by the Council are binding upon the parties, in accordance with Art. 25, according to which members have to accept and carry out the decisions of the SC (SCOR, 2nd year, No. 34, 1947, pp. 723, 726). Conversely, during the discussion of the Greek case, the interpretation of the delegates of Yugoslavia and the Soviet Union was that under Chapter VI, including Art. 34, the SC could not make decisions that are binding upon the parties but only recommendations. The Yugoslav delegate justified this view on the basis of Art. 2/7, from which he concluded that "the Charter restricts the sovereignty of states only in the case of the measures provided for in Chapter VII" (SCOR, 2nd year, 1947, No. 57, p. 1280; SCOR, *ibid.*, No. 63, 1947, p. 1520).

¹³⁵ ICJ Rep., 1948, p. 18-19.

made by the Council with reference to the pacific settlement of disputes, since such recommendations are not binding and consequently cannot afford an indirect basis for the Court's compulsory jurisdiction. Albania nevertheless informed the ICJ that it fully accepted the recommendation of the SC, and expressed its willingness to appear before the Court and, in effect, seemed to have submitted to its jurisdiction.¹³⁶

This argument reiterated in Albania's Counter-Memorial and in its oral pleadings before the Court. It argued that if the SC could really force states in dispute to appear before the Court, it would have enormous power. Moreover, it pointed out that the British Government itself, in its official commentary on the Charter of the UN, did not mention such an extraordinary power of the SC, nor had anyone in the United States spoken of such a power of the SC through a "*combination prétendue*" of Arts. 36 and 25 of the Charter. It argued that a recommendation could thus never be construed as a decision, if by a decision one meant an act, a "*declaration de volonté*", that was binding and operative. In this regard, it noted that the Charter of the UN itself makes a distinction between the terms "recommendation" and "decision". Art. 94, for instance, provides that if the SC deems it necessary it can "make recommendations or decide upon measures to be taken." Arts. 39 and 40 make a similar distinction between the two terms.¹³⁷ Finally, it was noted by Albania that Art. 25 of the Charter, providing that "the Members ... agree to accept and carry out the decision of the Security Council", did not apply to the recommendation that the British Government contended was a decision of the SC. Albania referred to the San Francisco Conference where the Belgian delegate had asked the sponsoring powers if the provision of Art. 4 of the Dumbarton Oaks Proposal (Art. 25 of the present Charter) was a "*carte blanche*", and proposed to limit the scope of the article to Chapter VII of the Charter. The Canadian delegate had subsequently asked whether or not the SC, under that article, could call upon a member to take military action not covered by a special agreement

¹³⁶ Ibid.; Jones, *supra* note 127, pp. 91-2; Donner, *supra* note 4, p. 24.

¹³⁷ ICJ Rep., 1948, pp. 19 ff.; Sloan, F., "The World Court and the United Nations", *ILR*, 4, 1948, pp. 654 ff.; Staczyk, J., "The International Court of Justice on the Competence and Function of the Security Council", *PYBIL*, 15, 1986, p. 195.

to which the member would be a party under Chapter VIII, Section B (Art. 43 of the Charter). In this regard, it was emphasised by the US delegate that “[t]he Charter must be construed in its entirety and that no single paragraph could be separated from the rest of the documents. There were special provisions which would override the general provisions, and the answer to the question was a categorical ‘no’.” Although the Belgian amendment was not adopted, everyone then understood that Art. 25 was not a “*carte blanche*”. Albania referred also to the Belgian question - during the *travaux préparatoires* - whether the term “recommend” in Chapter VIII, Section A (Chapter VI of the present Charter) comprised an obligation on states who were parties to disputes, or implied merely that the Council should offer advice, acceptance of which might be potential. The UK delegate, as well as the US delegates, again gave an assurance that no recommendation by the Security Council would in any way have binding force against the parties. The relevant Committee at the San Francisco Conference emphasised, especially with respect to Art. 36 of the Charter, that:

“Cet article, d’une façon définitive, ne comporte pas le principe de la compétence obligatoire; de plus, il n’autorise le conseil de Sécurité à porter devant la Cour aucun différend justiciable.”¹³⁸

In response, the British Government argued that the argument of the Albanian Government that Art. 25 was limited in its application to Chapter VII was untenable.¹³⁹ It noted that nowhere in the Charter would a provision be found to such effect. On the contrary, Art. 24 refers to four specific chapters (VI, VII, VIII and XII) under which the SC is granted definite powers to carry out duties in connection with the maintenance of peace on behalf of the members. Meanwhile, Chapter VII, under Arts. 40, 41, 48 and 49, creates its own obligations so far as decisions of the SC under that chapter are concerned. Moreover, the British Government argued that the Albanian observation about Art. 25 in reference to the *travaux préparatoires* was untrue. What in fact the Belgian representative had been saying was: “do not extend the obligation under this Article to everything that the

¹³⁸ ICJ Pled., vol. 3, 1947, pp. 25 ff.; Chung, Y., *Legal Problems Involved in the Corfu Channel Incident*, Ph.D. Thesis (Université de Genève), 1959, pp. 65 ff.

¹³⁹ ICJ Pled., 1947, vol. 3, pp. 72, 76-7.

SC does, but make it clear that it does not apply only to Chapter VII.” In reality, the question was, as the Canadian representative had asked, whether there would be military obligations under Art. 25 other than those that would arise under Art. 43, and the answer had, of course, been “no”. The point was that the Belgian amendment, intended as it was to restrict the scope of Art. 25, would nevertheless have made that article embargo Chapter VI as well as Chapter VII; even so it was rejected on the ground that it was too restrictive. In addition, it was argued that, since a decision of the Council is required in order to arrive at a recommendation, any recommendation is in that sense a decision, which members have agreed under Art. 25 to carry out. Furthermore, the British Government noted that the Charter itself does not make a rigid distinction between decisions and recommendations; Art. 18/2, for instance, which begins by employing the word “decision”, immediately afterwards refers to “recommendations” as being included under decisions. It therefore concluded that Art. 36/3 of the Charter, under which resolutions of the SC are adopted, is directly linked with Art. 36/1 of the Statute of the Court, and that the joint effect of the two articles would be that the Court has jurisdiction once there is a resolution by the SC recommending reference to the Court, and once that resolution has been acted upon by one of the parties. It was as if both parties had adhered to the optional clause for the purpose of the matter referred by the SC. Under Art. 24 of the Charter, the SC, in making recommendations with regard to the matter, had acted on behalf of the members of the UN, including the members who were parties to the dispute. Albania had accepted all the obligations of a member of the UN in a similar case when it accepted the invitation of the SC.¹⁴⁰

In its judgment of March 1948 on the preliminary objection, the Court avoided dealing with the main point in this case, namely the effect of the Council’s resolution by which it directed the parties to refer their disputes to the ICJ. It established its jurisdiction by applying the principle of *forum prorogatum*. It noted that the Albanian communication of July 1947 agreeing to appear before the Court was prior to its challenge of the ICJ’s jurisdiction and constituted a waiver of the

¹⁴⁰ ICJ Pled., 1947, vol. 3, pp. 72 ff.; Chung, *supra* note 138, p. 67 ff.

right to raise a preliminary objection.¹⁴¹ Finally, the Court emphasised that there is no special form that the agreement of the parties must take and that the letter constituted a decisive and indisputable acceptance of the Court's jurisdiction. The Court observed that:

"While the consent of the parties confers jurisdiction on the Court, neither the Statute nor the Rules require that this consent should be expressed in any particular form."¹⁴²

The silence of the Court regarding the binding effect of the Council's resolution has led to significant disagreement among international lawyers. Some lawyers have noted that the Court's jurisdiction might rely on an SC resolution taken pursuant to Art. 36/3 of the Charter. According to this view, if the SC concludes that a dispute constitutes a threat to international peace, it may take all measures necessary to settle it, including, of course, the transfer of the dispute to the ICJ. This view is based on the possibility of arguing that the word "decision" under Art. 25 includes, or may include, a recommendation under Art. 36; and so, where a recommendation has been made, members to whom it is addressed are under an obligation to accept it and carry it out.¹⁴³ Therefore, the advocates of this opinion find it important to consider the whole scheme of Chapter VI of the Charter in which Art. 36 is embodied. In their view, it is clear that the Council may, under that chapter, take a decision to investigate a dispute under Art. 34 or a decision whether to take action under Art. 36 or to recommend the terms of settlement. These decisions are, however, decisions of a purely formal or preliminary nature, and they must be covered by Art. 25. Art. 25 does not state which, precisely, are the

¹⁴¹ ICJ Rep., 1948, pp. 26-7.

¹⁴² Ibid. p. 27. Hambro, *supra* note 27, p. 134; Hackworth, G., "The Court, Its Jurisdiction and Work", *ARUNA*, 1949, pp. 256-9.

¹⁴³ Jones, *supra* note 127, pp. 91 ff. De Aréchaga also noted, with regard to the power of the Security Council in this respect, that "this role of the United Nations' political organs constitutes the only compulsory method of peaceful settlement under general international law". De Aréchaga, J., "International Law in the Past Third of a Century", *RCADI*, 159, 1978, p. 147; Ladyzhensky, A., et al., *Mirnye Seredstva Razresheniya Sporov Mezdu Gosudarstvami*, 1962, p. 142; Iwanejko, M., *Miedzynarodowy Tribunal Sprawiedliwosci*, 1969, p. 34 (the last two references are cited in Szafarz, *supra* note 13, p. 4). In his opinion regarding whether the SC's ability to adopt mandatory decisions is limited to Chapter VII, White notes that "[a] binding decision under Chapter VI may be rare because it is mainly concerned with recommendatory powers, *although it is not impossible*". White, *supra* note 116, p. 53 (emphasis added).

decisions referred to and made binding by that article, and *prima facie* it refers to all decisions, procedural and substantive. The general language of paras. 2 and 3 of Art. 27 strongly reinforces this conclusion. Seeing that Arts. 25 and 27 come close together in the same chapter dealing with the whole work of the SC, it would be most remarkable if the word “decision” did not bear the same meaning in both articles. In his comments on the separate opinions of the Court’s judges in the *Corfu Channel* case, Johnson notes that “this reasoning, however, seems singularly unconvincing. The fact that the form of recommendation is used is not decisive one way or the other.”¹⁴⁴ In addition, Hambro notes that:

“This conception does not rule out the possibility that the United Nations in later practice will tend to obviate the distinction between recommendations and decisions, or that the practice will develop attributing binding legal force also to recommendations voted by the General Assembly.”¹⁴⁵

Conversely, the majority of lawyers have noted that the Council’s resolution in this regard has no more than recommendatory effect and it is by no means considered compulsory jurisdiction.¹⁴⁶ This view is based on the natural and ordinary meaning of the word “recommendation”, which clearly carries no implication of a binding legal obligation. Moreover, according to the general structure of the Charter and the Statute, the Court’s jurisdiction must be founded on the consent of states. Accordingly, seven of the fifteen judges of the ICJ noted in their separate opinion in the *Corfu Channel* case that “it appears impossible to us to accept an interpretation according to which this article, without explicitly saying so, has introduced, more or less surreptitiously, a new case of compulsory

¹⁴⁴ Johnson, D., “The Effect of Resolutions of the General Assembly of the United Nations”, *BYIL*, 32, 1955-56, p. 108.

¹⁴⁵ Hambro, *supra* note 84, p. 141.

¹⁴⁶ Malinverni, *supra* note 121, p. 561; Chung, *supra* note 138, p. 75; Bowett, D., “The United Nations and Peaceful Settlement of Disputes” in *International Disputes, the Legal Aspects. Report of a Study Group of the David Davies Memorial Institute of International Studies*, 1972, pp. 183-4; Vallat, F., “The Peaceful Settlement of Disputes” in *Cambridge Essays in International Law: Essays in Honour of Lord McNair*, 1965, p. 161; Giustini, A., “Compulsory Adjudication in International Law: The Past, the Present, and Prospects for the Future”, *FILJ*, 9, 1985-6, p. 231; White, *supra* note 116, pp. 71, 74-5; Bilder, R., “Judicial Procedures Relating to the Use of Force”, *VJIL*, 31, 1991, p. 259; Szafarz, *supra* note 13, p. 4; Eagleton, C., “Law and Courts”, *ARUNA*, 1954, p. 160.

jurisdiction".¹⁴⁷ These judges clearly rejected the UK argument that Art. 36, paras. 1 and 3, should be applied in conjunction with Art. 25. This view has been confirmed by some lawyers. For instance, Jessup notes that "this recommendation neither compels submission nor in, and of, itself gives the Court jurisdiction".¹⁴⁸ In addition, Schwarzenberger notes that:

"The Court resisted the temptation to extend its jurisdiction by way of the back door. Contrary to the clear distinction in the Charter between recommendations and decisions of the Security Council - the latter exclusively under Chapter VII of the Charter - those responsible for the preparation of the British case allowed themselves to be persuaded to put forward a dubious proposition ... The World Court ... found it unnecessary to consider their remarkable argument explicitly."¹⁴⁹

Finally, Kelsen, in his analyses of Art. 25 of the Charter, concludes that recommendations made by the SC under Chapter VI will be either binding, if Art. 25 is interpreted as referring to all resolutions of the SC, or not binding if decisions under Art. 25 mean only resolutions by which binding norms are to be created; even in the latter case, however, if the SC, under Art. 39, considers non-compliance with a recommendation as a threat to peace and resorts to enforcement action against the recalcitrant state, then the recommendation may have the same character as a "decision". Nevertheless he notes that:

"Since such a recommendation may not conform with the positive law, and thus imply an infringement upon the rights of one or the other party, the Security Council having the power to enforce its recommendations may create new law in the relations between the contesting parties, a power which is not conferred upon the principal organ of the United Nations, the International Court of Justice."¹⁵⁰

Although this view seems well founded, the fact remains, however, that one is left with the Court's opinion in the *Namibia* case. In this case, the Court found the legal basis of the SC resolution in respect of *South-West Africa* (Namibia) not only

¹⁴⁷ Sep. Op. of Judges Basdevant, Alvarez, Winiarski, Zoricic, de Visscher, Badawi and Krylov in the joint separate opinion, and Judge *ad hoc* Daxner, ICJ Rep., 1948, pp. 31 ff. In this regard, Mme Bastid noted that: "Cette opinion n'est sans doute pas partie de l'arrêt, mais émise par près de la moitié des juges, elle serait sans doute la base de la jurisprudence de la Cour, si le problème se posait à nouveau devant elle." Bastid, S., "La Jurisprudence de la Cour Internationale de Justice", *RCADI*, 78, 1951, p. 591.

¹⁴⁸ Jessup, *supra* note 65, p. 285.

¹⁴⁹ Schwarzenberger, G., "Trends in the Practice of the World Court", *CLP*, 4, 1951, p. 23.

¹⁵⁰ Kelsen, H., "Settlement of Disputes by the Security Council", *ILQ*, 2, 1948, pp. 212-13.

in action in the exercise of the primary responsibility for maintaining peace, but also in Art. 24 of the Charter, whose scope in its view extends to more than merely the specific powers mentioned in Chapters VI, VII, VIII, and XII. It noted that Art. 25 is not restricted in its application to Chapter VII: “Article 25 of the Charter is not confined to decisions in regard to enforcement action but it applies to ‘*the decisions of the Security Council*’ adopted in accordance with the Charter” (emphasis added).¹⁵¹ Further, it observed:

“The language of a resolution of the Security Council should be carefully analysed before a conclusion can be made as to its binding effect. In view of the nature of the powers under Article 25, the question whether they have been in fact exercised is to be determined in each case, having regard to the terms of the resolution to be interpreted, the discussion leading to it, the Charter provisions invoked and, in general, all circumstances that might assist in determining the legal consequences of the resolution of the Security Council.”¹⁵²

In the light of the above, some international lawyers have noted - rightly - that an SC resolution aiming to direct the litigant parties to the ICJ is clearly not excluded, though care would have to be taken over its effectiveness. Therefore, the wording of the Council’s decisions plays a significant role in this regard. If the Council were only to “decide that the dispute shall be submitted to the ICJ, that would leave doubts as to the modalities of seizing the Court of the case”. On the other hand, the route to the Court might be effectively opened if the SC were to “decide that the dispute shall be referred to the ICJ for decision on the basis of an application to be submitted by the complainant state”.¹⁵³ As noted by Judge Schwebel regarding the Court’s opinion in the *Namibia* case, “the Court gave a broad, and most important construction to Article 25 of the Charter, which provides that ‘the members of the UN agree to accept and carry out the decisions of the Security Council in accordance with the present Charter’, holding that it is not confined to decisions in regard to enforcement action but applies to the decisions of

¹⁵¹ ICJ Rep., 1971, pp. 52-3; See pp. 160 *ff.* above.

¹⁵² ICJ Rep., 1971, pp. 52-3.

¹⁵³ Lauterpacht, E., *Aspects of the Administration of International Justice*, 1991, pp. 53-4.

the Security Council adopted in accordance with the Charter”.¹⁵⁴ Moreover, Higgins notes:

“Both the *travaux préparatoires* and the wording of the chapter lead one in the direction that the application of Article 25 is not limited to Chapter VII resolutions, excluding Chapter VI resolutions ... the binding or non-binding nature of these resolutions turns not upon whether they are regarded as ‘Chapter VI’ or ‘Chapter VII’ resolutions (they are in some ways a curious hybrid) but upon whether the parties intended them to be ‘decisions’ or ‘recommendations’... But much the same ends could be achieved by looking to see whether a resolution was intended as a recommendation or decision, and avoiding the somewhat artificial designation of resolutions which recommend Article 41 type measures as Chapter VI resolutions.”¹⁵⁵

Similarly, Rosenne notes that: “[i]t does not follow that the interpretation contained in this separate opinion, even were its principles later to be adopted by a majority of the Court, would exclude the possibility that the Security Council could use some other verb than ‘recommend’, and thereby reinforce the contentions that a new case of compulsory jurisdiction has been created.”¹⁵⁶

According to the above dicta of the Court and international lawyers’ views, the legal effect of an SC resolution in this regard will depend on the interpretation of the Council’s resolution. If it is interpreted as a decision, the disputant parties will be obliged to carry it out pursuant to Art. 25. If the interpretation of the Council’s resolution leads to it being considered as a recommendation, for example if the Council uses the phrase “calls upon” or “urges” or generally seeks voluntary co-operation or compliance, then the meaning of para. 3 of Art. 36 will not fall within the meaning attributed to Art. 25, and the resolution would be deprived of any binding effect.

¹⁵⁴ Schwebel, S., “Relations between the International Court of Justice and the United Nations” in Virally, M. (ed.), *Le Droit International au Service de la Paix, de la Justice et du Développement*, 1991, p. 440.

¹⁵⁵ Higgins, R., “The Advisory Opinion on Namibia: Which UN Resolutions are Binding under Article 25 of the Charter?”, *ICLQ*, 21, 1972, pp. 281-3. In addition, regarding her view of the ICJ’s opinion in the *Namibia* case, see Higgins, R., “Peace and Security Achievement and Failures”, *EJIL*, 6, 1995, p. 446.

¹⁵⁶ Rosenne, *supra* note 34, pp. 343-4. In addition it has been noted by Zuijdwijk that “[i]t now seems settled that the Security Council can indeed pass resolutions in addition to those passed under chapter VII of the Charter which will nevertheless be binding on member states. The binding character depends on the intention of the Security Council and must be determined on an ad hoc basis, according to whether the Security Council wanted its language to be recommendatory or mandatory.” Zuijdwijk, A., “The International Court and South West Africa: Latest Phase”, *GJICL*, 3, 1973, pp. 338-9.

(ii) The concurrent jurisdiction of the ICJ and political organs in settling international disputes

As a consequence of the Charter's provisions entitling both the political organs as well as the ICJ to achieve the objective of settling international disputes, the possibility of concurrent jurisdiction between these organs may arise. A dispute might be referred to both the ICJ and the political organ by one or both of the parties.¹⁵⁷

This matter was discussed by Turkey at the *travaux préparatoires* stage of the Charter. It suggested that a new paragraph should be added to Art. 36 of the Statute, to the effect that recommendations made by the SC - pursuant to Art. 36 of the Charter - should not interfere with the legal procedure in the case of a dispute that has already been submitted for judicial settlement. The aim of this suggestion - as illustrated by Turkey - was to ensure that the SC would not intervene in a case that was being heard by the ICJ.¹⁵⁸ The US delegate observed that the American understanding was that there could not be any restrictions on the action of the SC in the case of a dispute that endangered the maintenance of international peace and security.¹⁵⁹ Thus, Art. 36 of the Charter was adopted without incorporating the Turkish suggestion.¹⁶⁰ The Charter has no provision regulating the relationship between the ICJ and the other political organs in settling international disputes. There needs to be an examination of the attitude of the Court and the political organs towards the submission of closely related or identical aspects of the same dispute to the jurisdiction of these organs. In other words, did the doctrine of

¹⁵⁷ The allegation of litispendence between the PCIJ and the Council of the League arose in the *Right of Minorities in Upper Silesia (Minority Schools)* case. The case was referred to the Council in March 1927, as well as to the PCIJ. Poland objected to the dispute being adjudicated by the Court on the ground of litispendence because it had already been settled by the resolution of the Council. See PCIJ, Ser. C., No. 14-II, 1928, pp. 60-1, 78-9, 219. The Court did not uphold the above challenge of litispendence and observed that: "the jurisdiction possessed by the Council of the League of Nations ... to decide upon individual or collective petitions, is entirely distinct from, and in no respect restricts, the Court's jurisdiction to hear and determine disputes between States." PCIJ, Ser. A, No. 12, 1928, p. 23; Rosenne, *supra* note 4, p. 83.

¹⁵⁸ See UNCIO, 7, pp. 73-4.

¹⁵⁹ *Ibid.*, p. 74.

¹⁶⁰ Art. 36/2 provides: "The Security Council should take into consideration any procedures for the settlement of the dispute which have already been adopted by the parties."

litispence have a significant effect on either the practice of the Court or that of the political organs?¹⁶¹

(a) The ICJ and the GA

The issue of *South-West Africa* was included on the agenda of the 15th Session of the GA and referred simultaneously to the ICJ. The Fourth Committee of the GA dealt with this question on 14 November 1960. The representative of the Union of South Africa argued before this Committee that “[i]n those circumstances the substance of the contentious proceeding was *sub judice* and should not be discussed by the Committee. According to the *sub judice* rule, a Court should not be hindered, in any way, in the impartial exercise of its functions while a case was pending.”¹⁶² This argument was dismissed by the above Committee, and consequently by the GA.¹⁶³

In its opinion, the ICJ decided that the dispute could be seen by the ICJ and any other organs of the UN, *inter alia* the GA. This opinion was based on the fact that the dispute had a legal and a political dimension. Accordingly, it could be discussed simultaneously by both the Court and any other organ that has a political nature.¹⁶⁴

¹⁶¹ The term “litispence” is derived from the Latin *lis pendens*, meaning “while the lawsuit is pending”. Branyon, R., *Latin Phrases & Quotations*, 1994, p. 111. In legal terms, the word “litispence” means “an obsolete term for the time during which a lawsuit is going on”. *Black’s Law Dictionary*, 5th ed., p. 842. In practice, “litispence” is used for a plea that another action is pending. *Oxford Dictionary*, 1961, p. 349. This term is also often used to indicate a situation in which concurrent jurisdiction exists between two courts, or a situation in which a case is simultaneously pending before two courts. This term is used by international lawyers to describe the concurrent jurisdiction between the ICJ and the other political organs of the UN in dealing with the settlement of international disputes. In this regard, see Mabrouk, M., *Les Exceptions de Procédure devant les Juridictions Internationales*, 1966, pp. 88 ff.; Ciobanu, D., “Litispence between the International Court of Justice and the Political Organs of the United Nations” in Gross, L. (ed.), *The Future of the International Court of Justice*, 1976, p. 224; El-Dakak, S., *The Power of the International Court of Justice to Indicate Provisional Measures*, 1977, pp. 45 ff.; Elsen, T., *Litispence Between the International Court of Justice and the Security Council*, 1986, p. 1; Gill, T., “Legal and Some Political Limitations on the Power of the UN Security Council to Exercise Its Enforcement Powers under Chapter VII of the Charter”, *NYIL*, XXVI, 1995, p. 118.

¹⁶² GAOR, 15th Sess., 1048th mtg., 11 November 1960, 4th Comm., pp. 296-7.

¹⁶³ Rosenne, *supra* note 34, pp. 84-5; Ciobanu, *supra* note 161, p. 224; El-Dakak, *supra* note 161, pp. 45 ff.

¹⁶⁴ ICJ Rep., 1962, pp. 344-5.

The attitude of the GA and the Court's opinion could lead to the conclusion that the practice of the political organ's jurisdiction cannot be considered as an obstacle to the ICJ's jurisdiction. The political organs deal with an issue from a political point of view, *inter alia* the political circumstances of the dispute, whereas the legal organ, the ICJ, deals with the matter from a legal point of view. As Rosenne notes: "it is clear that a dispute that is simultaneously being dealt with by the GA and by the Court is not in itself regarded in either organ as a bar to its further action."¹⁶⁵

(b) The ICJ and the SC

The concurrent jurisdiction of the ICJ and the SC over the same dispute has a special character because both organs have been granted a unique power of being able to make substantive decisions binding upon states when they are dealing with an international dispute. Furthermore, there is no provision in the Charter to regulate their relationship. On the contrary, Art. 92 of the Charter provides that the Court "shall be the principal organ of the United Nations" and "shall function in accordance with the annexed Statute", which contains no specific provision for such a case. An interesting issue in this respect is the effect of the concurrent jurisdiction upon the competence of the SC and the ICJ. This issue can best be examined in the light of the practice of the ICJ and the SC. Several cases have been referred to both organs simultaneously,¹⁶⁶ or nearly simultaneously.¹⁶⁷ Before dealing with the practice of both organs in this regard, it seems appropriate to refer to the attempt of some states to prevent this kind of litispence between the organs and to refer to the opinion of international lawyers in this regard.

1- Pre-emption of the ICJ

At the outset, it is worthwhile noting that some states anticipated the possibility of a conflict between the ICJ and the SC. Therefore, their declarations of jurisdiction in relation to the ICJ contain a condition that a dispute may not be submitted to the

¹⁶⁵ Rosenne, *supra* note 4, p. 87.

¹⁶⁶ An example of a case being referred to both organs at the same time is the *Aegean Continental Shelf* case.

¹⁶⁷ A dispute could be referred nearly simultaneously either when a case or question is referred to the Court before it is brought before the Council (e.g. the *Anglo-Iranian* case and the *Hostages* case), or when recourse to the Court is sought after an attempt to bring the dispute before the Council (e.g. the *Nicaragua* case, the *Lockerbie* cases, and the *Bosnia* case).

Court if it is before the SC. This implies that reference to the Council must first have been attempted.¹⁶⁸ For instance, the Australian declaration contains a condition that the Court's procedure should be suspended if the same dispute is before the SC.¹⁶⁹ In the absence of an explicit condition, it might nevertheless be argued that the applicant state, if it has not previously tried to reach a solution of a dispute by referring it to the Council, has needlessly instituted proceedings before the Court and its action is inadmissible on that ground.

Here the question arises as to whether or not such a condition is acceptable in the light of the Charter's provisions regulating the settlement of international disputes, especially Arts. 33/1 and 37 of the Charter. It can be argued that such a condition is contrary to the spirit of the Charter and specifically to the above articles. According to these articles, the litigant parties are obliged *first of all* to seek a solution, *inter alia* judicial settlement, before referring the case to the SC.¹⁷⁰ In addition it seems to be contrary to GA Res. 3283 (XXIX), which, having referred to the powers of the SC, pursuant to Art. 24, and the ICJ in respect of the settlement

¹⁶⁸ This condition found its roots in the statement made by the Third Committee of the Fifth Assembly of the League of Nations in which attention was drawn to the possibility of reserving from the Court's compulsory jurisdiction "the right of laying disputes before the Council of the League of Nations with a view to conciliation in accordance with paragraph 1-3 of Article 15 of the Covenant with the provision that another party might, during the proceedings before the Council, take proceedings against the other in the Court". LNOR, Fifth Assembly, Third Committee, p. 199; Guechi, *supra* note 57, pp. 332-3. During the League of Nations era, the UK's signing of the optional clause in 1929, accepting the compulsory jurisdiction of the Court, was subject to, among others, "[t]he condition that His Majesty's Government reserve the right to require that proceedings in the Court shall be suspended in respect of any dispute which has been submitted to and is under consideration by the Council of the League of Nations, provided that the notice to suspend is given after the dispute has been submitted to the Council and is given within ten days of the notification of the initiation of the proceedings in the Court, and provided also that such suspension shall be limited to a period of twelve months or such longer period as may be agreed by the parties to the dispute or determined by a decision of all the Members of the Council other than the parties to the dispute". PCIJ, Ser. E., No. 6, 1929-30, pp. 479-80; Hudson, M., *The Permanent Court of International Justice 1920-1942*, 1943, p. 470.

¹⁶⁹ In its declaration of 1954, Australia accepted the Court's compulsory jurisdiction "provided that notice to suspend is given within ten days of the notification of the initiation of the proceedings in the Court, and provided also that the suspension shall be limited to a period of twelve months or such longer period as may be agreed by the Parties to a dispute or determined by decision of the Security Council". ICJYB, 1956-7, p. 209. This condition of an unnatural right of suspension of proceedings in the Court is found in the declarations of Austria, Belgium, the USA, Botswana, Cambodia, Canada, France, the Gambia, India, Japan, Kenya, Malawi, Malta, Mauritius, the Netherlands, New Zealand, the Sudan, Pakistan, Switzerland, Turkey and the UK. See ICJYB, 1976, No. 30, pp. 40, 42.

¹⁷⁰ Farmanfarma, *supra* note 29, pp. 132-3.

of international disputes, states that it is “[m]indful also of the continuing threat by serious disputes of various kinds and the need for early action to resolve such disputes by *resort in the first instance* to the means recommended in Article 33 of the Charter”¹⁷¹ (emphasis added). Needless to say, one of these methods is to refer the dispute to the judicial tribunal exercised by the ICJ. Furthermore, this condition can be rejected on the basis that it would lead to the Council acting as a regular agency for settling international disputes, which is contrary to its designed function as a body generally entrusted with the function of conciliation and pacific settlement of disputes. The Council might get involved in every dispute, whether minor or major, which would interfere with its primary task of maintaining international peace and security. One may recall Lauterpacht’s observation that one of the principal reasons for the failure of the League of Nations fully to develop the possibilities of Art. 24 of the Covenant was the preoccupation of the Council with matters of minor importance.¹⁷²

Therefore, it has been noted that, even if a state’s reservation specifically seeks to preclude simultaneous jurisdiction, the Court still retains the inherent authority to interpret the scope of the matters covered by the reservation in light of its overriding duty to consider a matter of *jus cogens*.¹⁷³

2- The impact of concurrent jurisdiction upon the ICJ and the SC in international doctrine

As a consequence of the absence of provisions regulating the relationship between the ICJ and the SC, some lawyers distinguish between the impact of this litispence upon the ICJ and upon the SC. They note that concurrent reference to the ICJ and the SC does not affect the SC’s jurisdiction to deal with matters falling within its competence.¹⁷⁴ Hence, the Council is not restricted in exercising its

¹⁷¹ GA Res. 3283 (XXIX), 12 December 1974.

¹⁷² Lauterpacht, H., “The British Reservations to the Optional Clause”, *Economica*, 10, 1930, p. 156 (cited in Briggs, *supra* note 50, p. 299).

¹⁷³ Scott, C., et al., “A Memorial for Bosnia: Framework of Legal Arguments Concerning the Lawfulness of the Maintenance of the United Nations Security Council’s Arms Embargo on Bosnia and Herzegovina”, *MJIL*, 16, 1994, p. 78.

¹⁷⁴ Ciobanu notes that: “[t]he Security Council or the General Assembly were not restricted from dealing with disputes falling under their jurisdiction for the sole reason that other means and procedures of peaceful settlement (among them the judicial settlement by the International Court of

functions when the same dispute is the subject of judicial proceedings before the ICJ. This view is based on the *travaux préparatoires* of the San Francisco Conference and the subsequent practice of the political organs of the UN. However, the power of the ICJ could be affected if the SC decided to deal with the issue under Chapter VII. In this case the Council could put an end to the Court's jurisdiction.¹⁷⁵ This opinion is based on the following: (i) the interpretation of the US delegation of the Turkish proposal to amend Art. 36/2 of the Charter; (ii) the substance of Art. 24/1 of the Charter conferring primary responsibility upon the Council for the maintenance of peace and security; (iii) the nature of the powers that the SC possesses when acting to preserve peace and security under Chapter VII of the Charter.

Many lawyers rightly disagree with the above opinion and conclude that it cannot be easily accepted for several reasons.¹⁷⁶ First, neither the Charter nor the Statute establishes the precedence of the SC over the Court. There is no provision in the Charter or the Statute to suspend proceedings before the ICJ while the same matter is before the SC. Second, the Court alone, pursuant to Art. 36/6 of its Statute, has the power to determine its own jurisdiction. Third, the above opinion would provide the means for one party to a dispute to suspend settlement procedures under an international convention by using the SC to decide the case and order sanctions. Fourth, there is no scope to apply the principle of litispendence in municipal law to the relationship between the Court and the Council of the UN. This principle is not a general principle of international law and is applicable only to cases with which organs of an identical or similar character are dealing simultaneously whereas the SC is a political organ and the ICJ is a judicial one.

Justice) had been adopted by the parties." Ciobanu, D., *Preliminary Objections Related to the Jurisdiction of the United Nations Political Organs*, 1975, pp. 54 ff., 121 ff.

¹⁷⁵ In his opinion in the *Anglo-Iranian Oil Co.* case, Judge Alvarez stated that, "if a case submitted to the Court should constitute a threat to world peace, the Security Council may seize itself of the case and put an end to the Court's jurisdiction". ICJ Rep., 1952, p. 134; Gill, T., *Litigation Strategy at the International Court. A Case Study of the Nicaragua v. United States Dispute*, 1989, pp. 27-8; Gill, *supra* note 161, p. 118.

¹⁷⁶ McGinley, G., "The I.C.J.'s Decision in the Lockerbie Cases", *GJICL*, 22, 1992, p. 587; Tomuschat, C., "The Lockerbie Case before the International Court of Justice", *RICJ*, 48, 1992, p. 41; Scott et al., *supra* note 173, p. 77; Graefrath, B., "Leave to the Court What Belongs to the Court: The Libyan Case", *EJIL*, 4, 1993, p. 184.

Finally, as will be mentioned later, the dicta of the Court do not support this opinion.

3- The practice of the ICJ and the SC

An examination of the practice of both the Council and the Court is required to reach a conclusion in this regard. Accordingly, the study has classified the precedents involving both relevant organs in a manner that elucidates the issue of concurrent jurisdiction. This classification is as follows:

(A) Cases dealt with by the ICJ and the SC simultaneously and suspended by the SC

The *Anglo-Iranian Oil Co.* case (1951) was referred by the UK to the ICJ for interim measures as a consequence of the nationalisation of the company by the Iranian Government and its refusal to submit the dispute to arbitration in accordance with the concession agreement.¹⁷⁷ Iran disputed the Court's jurisdiction on the basis that the matter was within its domestic jurisdiction. The ICJ indicated the requested measures to prevent the rights of the parties from being prejudiced and the situation from being aggravated without rendering judgment on the Iranian objection of domestic jurisdiction.¹⁷⁸ In view of the disregard of the Court's order by Iran, the UK referred the matter to the SC.¹⁷⁹ Iran disputed the Council's jurisdiction on the basis that the matter was within its domestic jurisdiction. As a consequence of this argument and because Iran had submitted similar arguments on the merit of the case pending before the Court, some members of the SC were reluctant to accept the Council's jurisdiction until the matter had been decided by the Court. Therefore, it was noted by some members that: "[i]t may not, therefore, be wise or proper for us to pronounce on this question while the same question is *sub judice* before the International Court of Justice."¹⁸⁰ In addition, it has been noted that it was not

¹⁷⁷ Feliciano, P., "The Anglo-Iranian Oil Dispute", *PLJ*, 26, 1951, pp. 55 *ff*; Razwy, A., "The Anglo-Iranian Oil Dispute", *PH*, 6, 1953, pp. 76-7.

¹⁷⁸ ICJ Rep., 1951, pp. 93-4.

¹⁷⁹ SCOR, 559th mtg., 1 October 1951, p. 10 (UN Doc. S/2357).

¹⁸⁰ For a detailed account, see ICJ Rep., 1951, pp. 93-4. For the details of this case before the SC, see SCOR, 559th mtg., 1 October 1951, p. 10 (Doc S/2357); SCOR, 561st mtg., 15 October 1951, p. 17; SCOR, 565th mtg., 19 October 1951, pp. 2-3; UN Doc. S/PV. 565th mtg., 19 October

necessary for the Council to go into the actual merits of the case against Iran, since it was *sub judice* before the ICJ. Therefore, it was proposed to adjourn the Council discussion on the issue until the Court had ruled on its own jurisdiction. The SC adjourned its discussion pending a final pronouncement by the ICJ on its own competence in the case submitted on 26 May by the UK against Iran.¹⁸¹

Before the ICJ, Iran disputed the Court's jurisdiction. It based its view, *inter alia*, on its reservation appended to its acceptance of the Court's compulsory jurisdiction by which it declared that "[t]he Imperial Government of Persia reserves the right to require that proceedings in the Court shall be suspended in respect of any dispute which has been submitted to the Council". Therefore it concluded that the Court's proceedings should be suspended so long as the Court and the Council were dealing with an identical issue.¹⁸² Conversely, the UK argued that the matter referred to the SC and the case submitted before the Court were not identical because the SC was merely seized of the complaint of the Iranian non-compliance with the Court's order, and, even if there is a chance of litispendence, it referred to the principle developed in the *Silesia* case, where the PCIJ did not consider the referring of the same issue to it and the Council of the League as a bar upon its jurisdiction.¹⁸³

The Court did not examine and elaborate the issue of litispendence raised before it because it decided that it had no jurisdiction in that case on different jurisdictional grounds.¹⁸⁴

1951, p. 1; ICJ Pled., 1952, pp. 367-8; ICJ Rep., 1952, pp. 114-15; Feliciano, *supra* note 177, pp. 55 ff.; Razwy, *supra* note 177, pp. 76-7.

¹⁸¹ SCOR, 565th mtg., 19 October 1951; UN Doc. S/PV. 565th mtg., 19 October. 1951. p. 1.

¹⁸² In this regard it should be noted that Iranian acceptance of the Court's compulsory jurisdiction was based on its acceptance of the PCIJ's jurisdiction of 2 October 1930. See PCIJ, Ser. E., No. 7, pp. 465-6; ICJ Pled., 1952, pp. 367-8, 477-8.

¹⁸³ ICJ Pled., 1951, pp. 367-8.

¹⁸⁴ ICJ Rep., 1952, pp. 114-15; Fenwick, C., "The Order of the International Court of Justice in the Anglo-Iranian Oil Company Case", *AJIL*, 45, 1951, pp. 723 ff.; Bishop, W., "The Anglo-Iranian Oil Company Case", *AJIL*, 61, 1967, pp. 749 ff. It is appropriate to note that Judge Carneiro in his dissenting opinion observed that, "in any event, any further proceedings should be suspended until the further decision by the Security Council of the United Nations". ICJ Rep., 1952, p. 171.

(B) Cases dealt with by both organs simultaneously and not decided by the Court

The *Aegean* case between Greece and Turkey is the only case referred simultaneously to the ICJ and the SC and not decided by the Court.¹⁸⁵

Greece filed proceedings in the Registry of the Court and subsequently requested an urgent meeting of the SC on the basis of Art. 35 of the Charter, “to avert the danger of disturbing the peace, which is being seriously threatened”.¹⁸⁶ With the participation of both Greece and Turkey, the SC discussed the question on 12, 13 and 25 August. Its decision No. 395 of 25 August 1976 appealed to the two governments to exercise restraint and to do all in their power to reduce tensions in the area and resume direct negotiations, and invited both parties to “take into consideration that appropriate judicial means, particularly the ICJ, are qualified to make to the settlement of their dispute”.¹⁸⁷

In a letter to the ICJ dated 25 August, Turkey alleged that Greece’s application was premature and that the Court lacked the jurisdiction to deal with the dispute on the ground that the same issue was before the SC, which has the responsibility to restore international peace and security and had adopted a decision in this respect. In its judgment dated 11 September 1976, the Court declined the Greek request for interim measures. It held that there was insufficient risk of irremediable prejudice to the applicant’s rights to justify the exercise of its power under Art. 41 of the Statute, the SC having met on the issue with the participation of Greece and Turkey and having recommended the parties to do anything in their power to reduce tensions in the area.¹⁸⁸

¹⁸⁵ ICJ Rep., 1976; Deloukas, N., “The Controversy Between Greece and Turkey in the Aegean Sea”, *Issues and Studies*, 16, 1980, pp. 74 ff.

¹⁸⁶ UN Doc. S/PV. 1949, 12 August 1976.

¹⁸⁷ SC Res. 395, 25 August 1976.

¹⁸⁸ The Court observed that “both Greece and Turkey ... have expressly recognised the responsibility of the Security Council for the maintenance of international peace and security ... it is not to be presumed that either State will fail to heed the recommendation of the Security Council”. ICJ Rep., 1976, p. 13; Bernhardt, J., “The Provisional Measures Procedure of the International Court of Justice through U.S. Staff in Tehran: Fiat Iustitia, Pereat Curia?”, *VJIL*, 20, 1980, pp. 589 ff.

(C) Cases dealt with by both organs simultaneously and decided by the Court

Three cases have been dealt with by both the ICJ and the SC and decided by the Court.

The first is the *Hostages* case between the USA and Iran regarding the occupation of the US Embassy in Tehran and its Consulates in Tabriz and Shiraz and the detention of the diplomatic staff. The USA referred the case to the SC on 9 November 1979, on the ground that the Iranian action endangered the maintenance of international peace and security, and urgently requested action to obtain the release of the hostages. While the issue was before the SC, the USA, by its application dated 29 November 1979, referred the case to the ICJ for interim measures.¹⁸⁹ While the case was on the Court's list, the SC adopted Res. 457 of 4 December 1979, calling on Iran immediately to release the hostages unconditionally and without delay, as well as calling on both parties to exercise restraint and resolve their differences peacefully. The SC decided to remain actively seized of the matter.¹⁹⁰

On 10 December 1979, the ICJ dealt with the USA's request relating to interim measures. Its president asked the US representative during his oral statement about the value of the SC decision and its effect from the US point of view. In his reply the US representative answered that the Council's resolution did not represent an obstacle to peaceful efforts in the other organs of the UN and it had no effect upon the US request for interim measures. On 15 December 1979, the ICJ unanimously indicated the measures requested by the USA without addressing the issue of litispendence between itself and the SC.¹⁹¹

On 22 December 1979 and while the case on merits was pending at Court, the USA called for a new meeting of the SC as a consequence of Iran's failure to comply with the earlier Council's resolutions and the Court's order for interim

¹⁸⁹ See ICJ Pled., 1979, vol. I, pp. 3-4; ICJ Rep., 1980, p. 15; Green, L., "The Tehran Embassy Incident - Legal Aspects", *Archiv des Völkerrechts*, 19, 1980-81, pp. 6 ff.

¹⁹⁰ Although the matter of the concurrent jurisdiction of the Court and the Council was not considered before the Security Council, the US representative presented a statement to the Council following the adoption of this resolution, stating that: "adoption of this resolution is not intended to displace peaceful efforts in other organs. It should not have any prejudicial impact on the US request for provisional measures at the ICJ." SC Res. 457, of 4 December 1979.

¹⁹¹ ICJ Rep., 1979, pp. 20-1.

measures. The USA requested the Council for an “enforcement action” under Chapter VII of the Charter. The SC adopted Res. 457 of 31 December 1979.

On 24 May 1980, the Court issued its judgment on merits and concluded that Iran had violated the 1961 and 1963 Vienna Conventions on Diplomatic and Consular Law, and the bilateral Friendship, Consular, and Navigation treaty. The Court also called upon Iran to comply with the terms of the order of 15 December 1979.¹⁹² In respect of its relationship with the SC, the Court observed that the fact that the dispute or tension is also simultaneously being handled by a political organ, the SC, is no bar to the action by the Court. In this regard, it stated that:

“It does not seem to have occurred to any member of the Council that there was or could be anything irregular in the simultaneous exercise of their respective functions by the Court and the Security Council.”¹⁹³

The Court based its opinion on the following. First, there is no provision in either the Charter or the Statute that prevents the Court from exercising its jurisdiction over a matter in respect of which the SC is exercising its jurisdiction. To affirm this, the Court pointed out that if such prevention had been contemplated it would have been expressly made, as it is in Art. 12 of the Charter which expressly forbids the GA to make any recommendation with respect to any dispute or situation being considered by the SC. Second, the Court, as the principal judicial organ of the UN, is empowered to resolve any legal questions that may be at issue between the parties, and the SC, pursuant to Art. 36/3, is under an obligation to take into consideration the important and decisive role of the Court in promoting the peaceful settlement of disputes.¹⁹⁴

The same dictum was adopted by the ICJ in respect of the *Nicaragua* case, which was referred by Nicaragua to both the Court and the SC.¹⁹⁵ Before the Court,

¹⁹² ICJ Rep., 1980, pp. 41 ff.

¹⁹³ Ibid., pp. 21-2.

¹⁹⁴ Ibid.; Munson, V., “The Case Concerning United States Diplomatic and Consular Staff in Tehran”, *CWILJ*, 11, 1981, pp. 558-9.

¹⁹⁵ ICJ Rep., 1984; Johnson, D., “Military and Paramilitary Activities in and against Nicaragua”, *Syd.LR*, 10, 1984, pp. 485 ff.; Briggs, H., “Nicaragua v. United States: Jurisdiction and Admissibility”, *AJIL*, 79, 1985, pp. 373 ff.; Tama, N., “Nicaragua v. United States: The Power of the International Court of Justice to Indicate Interim Measures in Political Disputes”, *DJIL*, 4, 1985,

the USA argued, *inter alia*, that the application was inadmissible because Nicaragua's allegation concerned an ongoing use of armed force, a matter committed by the Charter to the SC, which was already dealing with the matter. Moreover, under Art. 24 of the Charter, the SC has "primary responsibility for the maintenance of international peace and security".¹⁹⁶ Nicaragua argued that the view of an exclusive competence for the SC, even in matters concerning peace and security, was groundless because the Council's responsibilities in that area are primary and not exclusive. Nicaragua relied on the precedent of the PCIJ in the *Minority Schools* case, and on the ICJ's precedent in the *Hostages* case.¹⁹⁷ Moreover, it argued that the ICJ can and must contribute to the maintenance of international peace and security even though questions submitted to the Court are identical to those before the political bodies, because they are considered to be "two different disputes". In its view, the Charter does not contain a provision similar to Art. 12/1 with regard to relations between the Court and the SC because both organs are operating on different planes.¹⁹⁸

The Court dismissed the US view and concluded that a matter being before the SC could not be considered as an obstacle to the Court's jurisdiction, because "both proceedings could be pursued *pari passu*". In addition to the Court's basis given in the *Hostages* case, it noted that the SC's competence in the maintenance of peace and security - pursuant to Art. 24 of the Charter - is "primary" not exclusive. Moreover, it pointed out that the Council has functions of a political nature assigned to it, whereas the Court exercises purely judicial functions. Consequently, in its view, both organs can perform their separate but complementary functions with respect to the same event.¹⁹⁹

pp. 69 ff.; Pax, *supra* note 38, pp. 473 ff.; Rowles, J., "Nicaragua versus the United States: Issues of Law and Policy", *The International Lawyer*, 20, 1986, pp. 1249 ff.

¹⁹⁶ Counter-Memorial of USA, 1984, pp. 186 ff.

¹⁹⁷ Memorial of Nicaragua, p. 106 ff.

¹⁹⁸ Public sitting (10 October 1984), Verbatim Record, Doc. CR 84/15 (English translation), pp. 30-1.

¹⁹⁹ ICJ Rep., 1984, pp. 433-5; Singh, N., *The Role and Record of the International Court of Justice*, 1989, p. 61; Rowles, *supra* note 195, pp. 1263-4; Reisman, W., "Has the International Court Exceeded Its Jurisdiction?", *AJIL*, 80, 1986, pp. 132-3.

Finally, the ICJ affirmed this attitude in the *Bosnia (Provisional measures)* case, which was submitted to both the SC and the ICJ. The SC adopted its first resolution, No. 713, on 25 September 1991, announcing that it was acting under Chapter VII of the Charter. The SC went on to adopt several resolutions in this regard. On 20 March 1993, Bosnia and Herzegovina filed an application to the ICJ requesting interim measures against the Republic of Yugoslavia (Serbia and Montenegro), mainly in relation to the violation of the Genocide Convention. Before the ICJ, it was argued by Yugoslavia that it would be appropriate for the Court to decline to indicate the requested measures because the SC remained actively seized with the same question. It also argued that, contrary to the above precedents, the SC had been acting under Chapter VII of the Charter from the very beginning, with all its implications for all organs of the UN and for all states, whether or not members of the UN. Therefore, the Court must find that, when the SC is acting under Chapter VII of the Charter, the often-repeated view of the Court that Art. 41 of the Statute confers on the Court an “exceptional Power” should prevail, as the Court did before in respect of the *Aegean* case, 1976. Finally, it argued that, so long as the SC was actually acting under Chapter VII of the Charter, it would be premature and inappropriate for the Court to indicate the requested measures.²⁰⁰ Conversely, Bosnia-Herzegovina affirmed that the Court should feel no hesitation in acting on the request for provisional measures. This view was based on the fact that the Court has an independent responsibility under the terms of the Charter to grant the request and not to worry about an attempt being made at the SC to pre-empt the Court’s ability to exercise its power under the Charter.²⁰¹

The Court dismissed Yugoslavia’s argument and recalled its precedent in the *Nicaragua* case. It asserted that simultaneous jurisdiction does not affect its competence and, consequently, it would deal with the dispute and rule a judgment in this respect. This dictum, generally, is based on analysis of the provisions of the Charter and the Court’s Statute, where there is no provision to prevent the Court

²⁰⁰ ICJ Pled., April 1993 (CR 93/13), pp. 19, 23, 34-6; ICJ Rep., April 1993, pp. 19-20.

²⁰¹ ICJ Pled., April 1993 (CR 93/13), pp. 44-5.

from dealing with any dispute before the SC.²⁰² This attitude was confirmed by the Court's indicating the second request for provisional measures submitted by Bosnia and Herzegovina in September 1993.²⁰³ Recently, the Court confirmed its competence to adjudicate upon the case in the dispute over the applicability of the Convention on the Prevention and Punishment of the Crime of Genocide both *ratione personae* and *ratione materiae*.²⁰⁴

(D) Cases pending before the ICJ

The *Lockerbie* cases between Libya on the one hand and the UK and the USA on the other were referred to the SC by the United States and the United Kingdom, and to the ICJ by a unilateral application filed by Libya.²⁰⁵ Despite Libya's disputing the Council's jurisdiction on the basis that this matter did not endanger the peace or give rise to any issue concerning the maintenance of international peace and security, and that the dispute was a legal one concerning the possible extradition and/or prosecution of two terrorist suspects in connection with the Lockerbie incident, the SC adopted Res. 731 of 21 January 1991.²⁰⁶ During the proceedings before the Court, the USA argued that the Court had no jurisdiction to indicate interim measures because the SC was dealing with the same matter.²⁰⁷ In addition, the UK asserted that Libya was apparently seeking to use the Court to interfere with the authority of the SC, in particular with the possibility of action being taken under Chapter VII of the Charter. Conversely, Libya argued, *inter alia*, that the concurrent action between the ICJ and the SC was legally permissible. It based its

²⁰² ICJ Rep., April 1993, pp. 18-19; Mahmoud, M., *Bosnia and Herzegovina: A Case of Approved Genocide, the Legal Qualification of the Position of the Security Council and the International Court of Justice in the Case of Bosnia and Herzegovina*, 1993, pp. 65 ff.

²⁰³ ICJ Rep., September 1993, pp. 349-50.

²⁰⁴ ICJ Rep., 1996, p. 29 (unpublished).

²⁰⁵ The *Lockerbie* cases are considered to be the first precedent where each party refers its claim to the Council and the Court respectively. The USA and the UK were pressing their claims via the Security Council, while Libya referred to the Court to seek legal protection.

²⁰⁶ Letter from Libya to the Security Council of 29 November 1991, UN Doc. A/46/845, 1991; UN Doc. S/23417, 1991; Lowe, V., et al., "The Lockerbie Affairs", *ICIQ*, 41, 1992, pp. 909-10.

²⁰⁷ ICJ Pled., 1992 (CR 92/4), pp. 31 ff.

opinion on the precedents of the ICJ in this respect.²⁰⁸ While the ICJ judgment was pending, the SC held a meeting on 31 March 1992. During this meeting, Libya referred to the resolution adopted by the foreign ministers of the Arab League in their session of 22 March 1992 in which they urged the Security Council “to avoid the adoption of any decision to take economic, military or diplomatic measures against Libya, to await a decision by the International Court of Justice”. In addition, it argued that:

“In accordance with Chapter VI of the United Nations Charter, and particularly paragraphs 2 and 3 of Article 36, the Security Council should take into consideration any procedures for the settlement of the dispute which have already been adopted by the parties. The Security Council should also take into consideration that legal disputes should as a general rule be referred by the parties to the International Court of Justice.”²⁰⁹

In addition, the representatives of Cape Verde,²¹⁰ Zimbabwe and India²¹¹ insisted that in the present dispute the ICJ should be given the opportunity to make its ruling and the SC should wait until the Court had made a determination.²¹² Venezuela, although supporting the resolution, stated that “[b]oth the Council and the ICJ are indented of each other, and that each of these organs in the UN system must exercise its jurisdiction autonomously”.²¹³ Finally, some delegations thought

²⁰⁸ ICJ Pled., 1992 (CR 92/2), pp. 60 *ff.*; ICJ Pled., 1992 (CR 92/3), pp. 72-4; Evans, S., “The Lockerbie Incident Cases: Libyan Sponsored Terrorism, Judicial Review and the Political Doctrine”, *MJILT*, 18, 1994, p. 55

²⁰⁹ UN Doc. S/PV. 3063, 1992, pp. 3 *ff.*

²¹⁰ He stated: “[w]e believe it to be very important that the judicial body of this Organisation - the International Court of Justice - have a role to play whenever a legal issue is at stake, as mentioned in paragraph 3 of Article 36 of the Charter. It would be more appropriate if the Council were to act after the International Court of Justice - which is now seized of the matter - has decided on what is the applicable law, if any, as to the issue of jurisdiction.” UN Doc. S/PV. 3063, 1992, p. 4.

²¹¹ He stated: “[i]n the present case, the judicial process has not yet run its full course. Because of the far-reaching potential of this case, the considered opinion of the International Court of Justice on the legal aspects of the issues involved can only serve the cause of international law and peace. A little delay on that account in the Security Council’s moving on to the next stage of its action would, therefore, have merited positive consideration. It should be feasible for these two principal organs of the United Nations to function in tandem in a manner so as to reinforce and enhance each other’s efficacy and prestige in the cause of international peace and security.” UN Doc. S/PV. 3063, 1992, pp. 57-8.

²¹² In addition, see the comments of the representatives of Jordan, Iraq, Mauritania, and Uganda. UN Doc. S/PV. 3063, 1992.

²¹³ *Ibid.*

that the action of the SC could lead to a major institutional crisis.²¹⁴ The SC, in accordance with Chapter VII of the Charter, adopted Res. 748 by which economic sanctions were applied against Libya. The UK representative, speaking after the adoption of the resolution, asserted that:

“One of Libya’s suggestions in recent days has been that compliance with the request in resolution 731 (1992) should await the outcome of the proceedings instituted by Libya in the International Court of Justice. As the United Kingdom representative stated to the Court, he believes that Libya’s application, while purporting to enjoin action by the United Kingdom against Libya, is in fact directed at interfering with the exercise by the Security Council of its rightful functions and prerogatives under the United Nations Charter. We consider that the Security Council is fully entitled to concern itself with issues of terrorism and the measures needed to address acts of terrorism in any particular case or to prevent it in the future. Any other view would undermine the primary responsibility for the maintenance of international peace and security conferred on the Council.”²¹⁵

After the adoption of the above resolution, the Court called on the parties to make observations on the effect of this resolution.²¹⁶ Libya argued, *inter alia*, that SC Res. 748 infringed its rights under the Montreal Convention. It noted that the risk of contradiction between Res. 748 and the interim measures requested of the Court by Libya did not render the Libyan request inadmissible, because there is no competition or hierarchy between the Court and the Council, both being equal organs of the UN, exercising their own competence.²¹⁷

The Court declined to indicate the measures requested by Libya. It found that “the circumstances of the case” were not such as to require the exercise of its power under Art. 41 of the Statute to indicate provisional measures. Therefore, it stated that:

²¹⁴ The representative of Zimbabwe stated: “[t]he dispute which is the subject of the draft resolution before us is also the subject of consideration at the International Court of Justice at the Hague. The Charter provides that disputes of a legal nature should, as a general rule, be referred by the parties to the International Court of Justice. While there is no specific provision in the Charter that precludes parallel consideration of the matter by these two principal organs of our organisation, Zimbabwe believes that the authors of the Charter intended the two bodies to complement each other’s efforts rather than proceed in a manner that could produce contradictory results ... We are convinced that it would have been interests of institutional tidiness for the Security Council to await the outcome of the judicial proceedings at the International Court of Justice.” UN Doc. S/PV. 3063, 1992, p. 52-3.

²¹⁵ UN Doc. S/PV. 3063, 1992, pp. 68-9.

²¹⁶ ICJ Rep., 1992, p. 125.

²¹⁷ ICJ Rep., 1992, pp. 125-6.

“Whatever the situation previous to the adoption of that resolution, the rights claimed by Libya under the Montreal Convention cannot now be regarded as appropriate for protection by the indication of provisional measures.”²¹⁸

These cases are still pending before the Court to be decided on merits.

(E) Evaluation

Apart from the attitude of the SC in the *Anglo-Iranian Oil Co.* dispute, it is interesting to note that the doctrine of litispendence played no apparent role in either the Council’s or the Court’s handling of the disputes. Neither the Court nor the SC views the simultaneous or nearly simultaneous submission of interrelated or even identical aspects of the same dispute to them as a bar to the exercise of the jurisdiction within their sphere of activity. In addition, neither organ views any measures taken by the other organ as barring it from taking any measures that it feels are necessary and within its competence. This is because any dispute is viewed as having legal and political dimensions.

This conclusion has not been unanimously accepted by international lawyers, who argue that the Court’s dicta do not support such a conclusion. In their view, the *Aegean* case and the *Lockerbie (Provisional measures)* cases are clear examples of the Court declining to indicate the requested measures because the SC was handling the matter.

It has been argued that the Court based its opinion in the *Aegean* case on the rule *electa una via*.²¹⁹ According to this view the Court practised self-restraint with a view to preventing conflicting resolutions on the same issue by two or more organs of the world organisation.²²⁰ This is hard to accept in the light of the Court’s

²¹⁸ Ibid., pp. 126-7.

²¹⁹ Rafat, A., “The Iran Hostages Crisis and the International Court of Justice: Aspects of the Case Concerning United States Diplomatic and Consular Staff in Tehran”, *DJILP*, 10, 1980, p. 446; Coussirat, C., “Indication de Mesures Conservatoires dans l’Affaire de Personnel Diplomatique et Consulaire des Etats-Unis à Tehran”, *AFDI*, 25, 1979, pp. 297, 300.

²²⁰ In this case, Elias notes that, “[i]n the Aegean Sea Continental Shelf case, one of the important factors, indeed the most important factor, inducing the Court to decline to indicate interim measures was the earlier recommendation made by the Security Council that both parties should desist from taking action in furtherance of the disputes ... It would have been better if the Court had based its ruling squarely upon the Security Council’s prior determination in the matter rather than upon any absence of possible aggravation of the situation.” Elias, T., “The International Court of Justice and the Indication of Provisional Measures of Protection” in Gilberto Amado Memorial Lecture, 7 June 1978, pp. 14-15. Sep. Op. of Judge Tarazi, ICJ Rep., 1976, pp. 33-4; Diss. Op. of Judge *ad hoc* Stassinopoulos, ICJ Rep., 1976, pp. 38-40; Rafat, *supra* note 219, p. 447.

dictum. It did not base its rejection of Greece's request for provisional measures on the fact that the SC was simultaneously seized of the issue or on the fact that the Council resolution precluded or restricted its authority to act upon Greece's request.²²¹ In addition, in no way did the SC indicate that the Court was precluded from further activities in the case or mention that the Court's competence was limited by the fact that the Council was seized of the issue.²²² On the contrary, the SC by its Res. 395 had, *inter alia*, "invited both parties to take the appropriate judicial means into account in the resolution of their differences".²²³ The Court's attitude in this regard might be justified only on the basis of the absence of a sufficient risk, which is considered to be an appropriate condition to indicate interim measures by the Court pursuant to Art. 41 of the Statute. In this case, the Court found, as illustrated above, that Greece's rights would not be irreparably harmed by the presence and activity of the Turkish Government in the Aegean sea.²²⁴

The above argument by international lawyers was repeated as a consequence of the Court's attitude in the *Lockerbie* cases, where the Court declined to indicate the measures requested by the plaintiff (Libya). Some lawyers noted that in this case the Court deferred to the SC in the exercise of a styled "concurrent jurisdiction".²²⁵

²²¹ Lachs, M., "Thoughts on the Recent Jurisprudence of the International Court of Justice", *EILR*, 4, 1990, p. 93.

²²² In his comment on the Council's resolution in this case, Leo Gross notes that: "[t]here is no doubt that it was quite proper for the Council to deal with the tension which had arisen in the Aegean but it is another altogether for the Council to make a recommendation which, if it has any meaning at all, invites certainly Greece, and to an extent Turkey, to withdraw the case from the Court." He further notes that: "the Council should, as a general rule, encourage the parties to take legal disputes to the Court and not discourage them from so doing. But 'discourage' is precisely, in the specific circumstances of the Greek-Turkish dispute, what the Council appears to have done ... The Council has not contributed to the enhancement of the stature of the Court or the strengthening of its precarious position ... It is odd, indeed, for the Security Council to criticise a state, even though by indirection, for resorting to the Court on what it believed to be sufficient legal grounds and after extensive diplomatic efforts have proved fruitless in the search for the solution of legal problems of vital interest to it as well as to the other side." Gross, L., "The Dispute between Greece and Turkey Concerning the Continental Shelf in the Aegean", *AJIL*, 71, 1977, pp. 38-9.

²²³ SC Res. 395, 25 August 1976.

²²⁴ Gross, L., "Some Observations on Provisional Measures" in Dinstein, Y. (ed.), *International Law at a Time of Perplexity: Essays in Honour of Shabtai Rosenne*, 1989, p. 311.

²²⁵ In this respect, Judge Bedjaoui was strongly critical of the Court for its reliance on Res. 748. He viewed this as a matter extrinsic to the application and reliance on it cast doubt on the integrity of the judicial function. The Court's order was not based on its discretionary power to refuse to indicate provisional measures, but appeared to be directly linked to the decision of the Security Council, which bore directly on the very subject-matter of the dispute. See ICJ Rep., 1992,

In their view, the Court indicated that the exercise of its jurisdiction should be limited to Chapter VII of the Charter.²²⁶ This view is difficult to accept in the light of the Court's judgment. The Court did not base its opinion on the fact that the SC was dealing with the issue, or on the fact that the SC had adopted a decision pursuant to Chapter VII of the Charter. It declined to indicate the requested measures because "the circumstances of the case" were not such as to require the exercise of its power under Art. 41 of the Statute to indicate provisional measures. Therefore, the Court found that the rights claimed by Libya at that stage could not be regarded as appropriate for protection by indicating interim measures.²²⁷ In addition, the Court's attitude might be understood in the light of its interpretation of Arts. 25 and 103 of the Charter. One may rely here on the opinion of Judge Shahabuddeen, who found that the Court's attitude was a result not of conflict between the SC and the ICJ, but rather of a conflict between the obligations of Libya under the Charter and under the Convention.²²⁸ This attitude might also be based on the fact that the Court in this case was trying to avoid a constitutional crisis regarding its powers *vis-à-vis* the SC. This was illustrated by Judge Lachs, who observed that both the organs of the UN with the power to render binding decisions should act in harmony, although not in concert, without prejudicing the exercise of power by the other. The failure of the Court to act, in his view, was not an abdication of the Court's powers, but rather a reflection of the system under which the Court operates.²²⁹ At any rate, the refusal of the Court to indicate the requested measures could not be interpreted in that case as resulting from the adoption of a decision pursuant to Chapter VII.²³⁰ This was confirmed by the ICJ in

Not an abdication
This was a decision
point.

In a sense,
yes.

p. 150; Diss. Op. of Judges Weeramantry (*ibid.*, pp. 160 *ff.*) and Ajibola (*ibid.*, pp. 183 *ff.*) and Judge *ad hoc* El-Koshi, who thought that the Court could and should indicate interim measures despite Res. 748. *Ibid.*, pp. 99 *ff.*

²²⁶ McWhinney, E., "The International Court as Emerging Constitutional Court and the Coordinate UN Institutions (Especially the Security Council): Implications of the Aerial Incident at Lockerbie", *CYIL*, XXX, 1992, p. 269.

²²⁷ ICJ Rep., 1992, pp. 126-7.

²²⁸ Sep. Op. of Judge Shahabuddeen, ICJ Rep., 1992, pp. 140 *ff.*

²²⁹ Sep. Op. of Judge Lachs, ICJ Rep., 1992, pp. 138 *ff.*; the same view was adopted by Judge Ni in his declaration, *ibid.*, p. 132.

²³⁰ Tomuschat, *supra* note 176, p. 41.

the *Bosnia* case, where it twice indicated the measures requested by the plaintiff despite the fact that the SC had adopted several decisions on this case pursuant to Chapter VII of the Charter.²³¹ Otherwise acceptance of such a view might give the SC the power to determine whether or not the Court could practise its functions. In this event, the Council, under the pressure of political considerations, could adopt a decision pursuant to Chapter VII by which to pre-empt Court's role in an international disputes with considerable justiciability.

(c) The ICJ and the Secretariat

The only case dealt with by the ICJ and by the Secretary-General was the *Hostages* case. The Secretary-General was requested, pursuant to the Council's Res. 479 of 1979, to lend his good offices for the immediate implementation of the resolution. SC Res. 461/1979 to the same effect was adopted on 31 December 1979. In consequence, the Secretary-General undertook a mediation effort in Iran in January 1980, and in February announced the establishment of a Commission of Inquiry to undertake a fact-finding mission in Iran to seek an early solution of the crisis. The Court considered whether or not the establishment of the Commission of Inquiry by the Secretary-General might affect the subject of the case before it. The Court could "find no trace of any understanding on the part of either the United States or Iran that the establishment of the Commission might involve a postponement of all proceedings before the Court until the conclusion of the work of the Commission". In addition the Court observed that:

"It was not set up by the Secretary-General as a tribunal empowered to decide the matters of fact or of law in dispute between Iran and the United States; nor was its setting up accepted by them on any such basis. On the contrary, he created the Commission rather as an organ or instrument for mediation, conciliation or negotiation to provide a means of easing the situation of crisis existing between the two countries; and this, clearly, was the basis on which Iran and the United States agreed to its being set up. The establishment of the Commission by the S-G with the agreement of the two states cannot, therefore, be considered in itself as in any way incompatible with the continuance of parallel proceedings before the Court."²³²

²³¹ See pp. 228-9 above.

²³² ICJ Rep., 1980, pp. 22-3.

In the light of the above, the Court found its adjudication was compatible with the Secretary-General's exercise of his functions and with the work of the Commission established by him. It also found that the establishment of this Commission was not a bar to consideration of the same matter by the ICJ, and there was no inherent conflict between litigation and action by the Secretary-General.²³³

(d) The effect of the concurrent jurisdiction of the ICJ and the political organs

Having concluded that both the ICJ and the political organs are entitled to deal with the same case simultaneously, a question might arise as to the effect of the decision of these organs if the ICJ on the one hand and one of the political organs on the other hand reach contradictory conclusion.

The answer to this question is simple if these contradictory conclusions have been reached by the ICJ on the one hand and the GA or the Secretary-General on the other hand. These two political organs have recommendatory powers whereas the ICJ's judgment has a binding effect and will, therefore, prevail. A difficulty might arise in the event of contradiction between the ICJ and the SC because the decisions of both organs are legally binding upon the parties to a dispute. This is not a hypothetical situation - it has occurred in several cases, most recently in the *Lockerbie* and *Bosnia* cases.

Rosenne notes that it would be sensible if, in principle, political organs refrained from placing on their agenda disputes for which they have recommended judicial settlement. Equally, states that have themselves instituted proceedings in the Court should not, subsequently, introduce the same dispute in a political organ while the judicial proceedings are pending.²³⁴ Other lawyers note that, unless otherwise provided, the objection of litispendence does not have a peremptory character in the law of the UN.²³⁵ For instance, Gross announces that the matter should be left to the good sense, restraint and tact of the political organs.²³⁶ Although this might help to avoid contradictory conclusions by the SC and the ICJ,

²³³ Merrills, *supra* note 33, p. 195.

²³⁴ Rosenne, *supra* note 4, p. 87.

²³⁵ Ciobanu, *supra* note 161, p. 227.

²³⁶ Gross, L., "The International Court of Justice and the United Nations" in Gross, L. (ed.), *Essays on International Law and Organisations*, 1984, pp. 852 ff.

there is nothing in the Charter to make the political organs or the parties to the dispute follow this course of action. Therefore, should a dispute be submitted to both organs there is no reason for the Court to decline jurisdiction.²³⁷ In these circumstances, both of them might reach a different decision, so the question remains unsettled. But before attempting to answer this question, it seems appropriate to make an analysis of the Charter provisions relating the position of the ICJ *vis-à-vis* the SC in this regard.

Analysis of several provisions of the Charter leads to the conclusion that the drafters of the Charter preserved a special position for the ICJ *vis-à-vis* the SC in respect of the maintenance of international peace and security. Art. 33/1 of the Charter indicates that the parties to any dispute whose continuance is likely to endanger the maintenance of international peace and security shall, *first of all*, seek a solution by peaceful means, *inter alia* judicial settlement. In this regard Bowett notes, when dealing with the competence of the SC in light of Art. 33/1, that recourse to the SC should be regarded as a secondary means of settlement, when the primary means, *inter alia* judicial settlement, have failed.²³⁸ Moreover, Art. 37/1 imposes an obligation on the parties - *if they are unable to settle a dispute of the nature referred to in Art. 33 by the means indicated in that article* - to refer such a dispute to the SC. In addition, Art. 36/3 indicates that the SC, when making a recommendation under this article, should consider that legal disputes should, as a general rule, be referred to the ICJ. Therefore, the reference of any dispute to the SC is permitted only after the exhaustion of other means of peaceful settlement.

the parties
yes,
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One may now turn to the problem that a contradiction between the conclusion of the ICJ and that of the SC might lead to a constitutional crisis in the UN and endanger the means of preserving international peace and security. Neither the

²³⁷ Bilder, *supra* note 146, p. 265; Dinstein, Y., *War, Aggression and Self-Defence*, 1994, p. 308.

²³⁸ It should be noted that Bowett means secondary in time not in importance. Bowett, *supra* note 146, p. 180. In this regard, the Japanese representative before the GA noted that, "[b]y virtue of provisions of Article 2 and 33 of the Charter, states members of the United Nations are committed to the principle of settling international disputes by peaceful settlement. The International Court of Justice as the principal judicial organ of the United Nations represents the international means of assuring the realisation of this principle in relation to international disputes of legal character. The Court, therefore, occupies a place of vital importance in the Community of nations for the maintenance of international peace and security." UN Doc. A/8382, 15 September 1971, pp. 10-11.

Charter nor the Court's jurisprudence offers a solution for this situation, so one is left with the spirit of the Charter. Before trying to reach an answer in this regard, let us suppose the following situation. A territorial dispute between states X and Y takes place as a consequence of an act by state X. State Y claims that state X by its act has violated its international legal obligations. One of these states, or any other state, refers this dispute to the SC on the basis that the dispute is endangering international peace and security. If the same or another party refers the dispute to the ICJ simultaneously or nearly simultaneously, both organs are eligible to deal with the dispute. Here a distinction needs to be made in terms of whether or not the dispute is endangering peace and security.

On one hand, if the SC finds that the dispute is not likely to endanger the maintenance of international peace and security, it should suspend its proceedings until the ICJ judgment is rendered.²³⁹ This opinion is based not only on considerations of co-ordination among the organs of the UN and the need to avoid a constitutional crisis, but also on the fact that the scope of the SC's activity is limited to disputes, "the continuity of which is likely to endanger the maintenance of international peace and security". In addition, Art. 36/2 provides that "the Security Council should take into consideration any procedures for the settlement of the disputes which have already been adopted by the parties". There is no similar provision to limit the Court's jurisdiction if a dispute is before the political organs of the UN. In the *Anglo-Iranian Oil Co.* case, the Council suspended its proceedings until the Court had decided upon the case because the issue was not considered to be endangering international peace and security.²⁴⁰ However, as stated above, the *Anglo-Iranian Oil Co.* case was unique.

On the other hand, if the SC finds that the dispute is likely to endanger the maintenance of international peace and security, the Council has a priority to

²³⁹ One may recall the Iraqi view with regard to the question raised by the GA concerning the role of the ICJ and its effectiveness. According to this view, the prohibition of force in the Charter emphasises the absolute necessity of seeking peaceful solutions to international disputes. They observed that "if, however, such solution could not be reached by means other than judicial settlement, then the latter must be used, since leaving a dispute unresolved would be tantamount to favouring the *status quo* and the states which benefit from it". UN Doc. A/8382, 15 September 1971, p. 13.

²⁴⁰ See pp. 222-3 above.

preserve international peace and security by acting quickly. In this respect, the Council can adopt a decision pursuant to Chapter VI or Chapter VII of the Charter, saying that state X has violated international obligations regarding the territory with state Y. If the Court also exercises its jurisdiction and reaches a judgment confirming the measures taken by the Council, there is no problem. If, however, the Court's judgment is contrary to the measures taken by the Council and concludes that state X has not violated its obligations under international law, then the two states and the other states of the international community are faced with two different decisions each of which has a binding effect. It could be argued that the SC should review its decision and make the appropriate amendments to it to make it compatible with the Court's judgment. This not an attempt to create a hierarchy in the relationship between the Court and the Council, but is based on the immediate avoidance of war and the resolution of the long-term issues that have brought the nations to the brink of war. It is based also on the fact that international disputes have a legal element that can be settled only by an international tribunal.

Could it be argued that the SC should review its decision and make the appropriate amendments to it to make it compatible with the Court's judgment?

Some additional points to note are:

* The Council, as a political organ, is not restricted, as is the Court, to the consideration of proofs, facts, circumstances and laws and in most cases has to act immediately to deal with an urgent threat *prima facie* and not as a court of law. Therefore, the decisions reached by the Council may in some cases be inconsistent with existing rules of international law. Moreover, the Council is a political organ that is influenced by political motives. The members of the Council take positions in accordance with their conception of national interest. Also, because Art. 39 of the Charter can be invoked at any time, if there is an affirmative vote by the permanent members of the Council, it may be feared that further relations between states will be based on political power rather than on the law.²⁴¹

* The power of the SC relates, essentially, to procedures and methods of adjustment rather than to the terms of settlement. The ICJ is the only organ of the UN empowered by the Charter and the Statute to adopt decisions on the terms of

?
Is the ICJ the only one?

²⁴¹ Schick, F., "Council and Court of the United Nations", *Mod.LR*, 9, 1946, pp. 99-100. See also the statement by Brazil before the Security Council in the discussion of the *Corfu Channel* case. SCOR, 2nd year, 1947, No. 32, p. 687 ff.

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settlement binding on the parties to the dispute, decisions that it adopts in accordance with international law.²⁴²

* It could be argued that such a situation would never arise, and even if it did the predominance of SC resolutions might lead to justice being sacrificed for peace, especially when peace is being threatened by powerful states.²⁴³ In this regard one may ask whether the UN should prefer legal or political settlement. The insertion of the words “justice” and “international law” in Arts. 1/1 and 2/3 of the Charter as limitations upon the discretion of the SC and other organs in making decisions or recommendations for the settlement of disputes offers the answer that legal settlement is preferable to political settlement. McNair notes that the Preamble of the UN Charter expressly asserts the importance of maintaining justice and respect for the obligations arising from treaties of international law. He concludes that the UN is based on law.²⁴⁴

* The Council’s role is the preservation of peace and not the settlement of international disputes, which is considered to be the main role of the ICJ. The Council’s role should be limited to the restoration of peace, but, as noted by Dinstein, “the measures taken by the Council are not necessarily the last word on the subject. The final judgment is left to the Court.”²⁴⁵

* The Court is open to all states, which appear before it on an equal footing. There is no possibility of a veto or a blocking of the Court’s activities by one party, as could happen before the Council by the permanent members. The ICJ can make binding decisions by a simple majority vote, without the veto, and without the requirement of a predetermined number of judges in favour of the decision.²⁴⁶

* Art. 41 of the Court’s Statute indicates that the Court’s interim measures

²⁴² Bernárdez, S., “Some Considerations on the Respective Roles of the Security Council and the International Court of Justice with Respect to the ‘Prevention of Aggravation of Dispute’ in the Domain of the Pacific Settlement of International Disputes or Situations”, paper presented to the Doha Conference on International Legal Issues Arising under the United Nations Decade of International Law, 1994, p. 4.

²⁴³ Wright, Q., *International Law and the United Nations*, 1960, p. 44.

²⁴⁴ McNair, A., *The Development of International Justice*, 1953, p. 34.

²⁴⁵ Dinstein, *supra* note 237, p. 307.

²⁴⁶ Rosenne, *supra* note 4, p. 74.

should be communicated to the SC. It seems clear that the aim of this provision is to give the SC notification of the Court's measures so that it can act in the light of this opinion. Otherwise, communication to the SC becomes meaningless.

* A settlement by the ICJ offers a guarantee that the legitimate claim of one party is not left to the mercy of the other party and, in addition, its binding and final judgments contribute to the elimination of future international friction between the parties. The political, economic or military strengths of the respective parties are irrelevant in judicial proceedings.

* Once a judgment, or an opinion, is handed down, the political situation is no longer the same. A party to a dispute that has an ICJ judgment in its favour is, to say the least, in a better position than it was. The existence of an authoritative and reasoned decision on what is the correct legal position is politically, as well as legally, a very different matter from a situation in which each side claims to be in accord with the law.²⁴⁷

* The stability of the international community requires only one decision, either from the Council or from the Court. The decision of the Court should prevail. Pursuant to Art. 60 of the Statute, the Court's judgments are final, which means that they cannot be reversed or reviewed by the SC. Moreover, pursuant to Art. 94/2, the SC is expected to take measures to implement these judgments. Therefore, one may ask how the SC could adopt and enforce the Court's decision if it is different from the Council's decision on the same issue.

* Although the political organs, *inter alia* the SC, are regarded as satisfactory organs for the settlement of political disputes, they are not qualified to settle legal issues. These issues are clearly more suitable for the principal judicial organ of the UN, the ICJ. The report of the Secretary-General to the GA notes that:

"Another deficiency in the working of the system of collective security is the insufficient use of the principal judicial organ of the United Nations, the International Court of Justice. Many international disputes are justiciable; even those which seem entirely political (as the Iraq-Kuwait dispute prior to invasion) have a clearly legal component. If, for any reason, the parties fail to refer the matter to the Court, the process of achieving a fair and objectively commendable settlement and thus defusing an international crisis situation would be facilitated by obtaining the Court's advisory opinion."²⁴⁸

²⁴⁷ ICJYB, 1991-2, No. 46, p. 216.

²⁴⁸ UN Doc. A/46/1, p. 8.

* It is hard to counter this argument by stating that the SC has a primary responsibility for the maintenance of international peace and security, when, despite this fact, the ICJ is the organ designed to promote justice and to apply the law in a given issue.

* International lawyers' opinions, when considering the functions of the UN's political organs, *inter alia* the SC and the GA, may be of assistance in this regard. Higgins notes that the ICJ settles disputes by discovering the better legal position of the parties before it, drawing upon accepted sources of international law. The SC settles disputes by encouraging the parties to agree among themselves, or by recommending solutions itself. She also affirms that the SC faces a myriad of difficulties when seeking to settle disputes in accordance with international law. In consequence, she states that the use of law by the SC is very different from that of the International Court.²⁴⁹

Fakher observes that, once a dispute has been referred to the ICJ and a judgment is rendered, the dispute no longer exists. Therefore, any recommendation of the SC should not change the substance of the dispute. The judgment of the ICJ is binding, not only upon the parties to the dispute but also upon the UN itself.²⁵⁰ Moreover, we can recall Sir Francis Vallat's comment that, "[e]ven if the SC and the GA are regarded as satisfactory organs for the settlement of the political issues involved in a dispute, they are not good organs for the settlement of the legal issue. This is clearly more suitable for the principal judicial organ of the United Nations, the International Court of Justice."²⁵¹ In addition he notes: "Nations need peace ... peace needs law. Law needs the Court."²⁵²

Anand states that, "[a]lthough peace under law has always been an unattainable ideal, peace without law is unimaginable".²⁵³

²⁴⁹ Higgins, *supra* note 126, pp. 15, 17. ✓

²⁵⁰ Fakher, H., *The Relationship Among the Principal Organs of the United Nations*, 1951, p. 68.

²⁵¹ Vallat, *supra* note 146, p. 160.

²⁵² Ibid., p. 177.

²⁵³ Anand, R., "The Role of International Adjudication" in Gross, L. (ed.), *The Future of the International Court of Justice*, vol. 1, 1976, p. 1.

Lauterpacht also notes that “peace cannot, in the long run, be preserved if law is flouted in reliance on the rule that members of the community are legally in the position to deny to others the opportunity of having disputed legal rights settled through an impartial determination by a judicial authority”.²⁵⁴

Gross notes that “no minimal world order, no workable international system is conceivable without a tribunal ... it is suggested that without a Court there can be no stability, and no predictability in international relations. There can be no expectation that disputes will be decided on the basis of law and justice rather than on the basis of power.”²⁵⁵

Finally, Judge Lachs notes that “the Court’s decision in contentious cases declares the law between the parties, so that the obligation imposed is different in nature from that flowing from directives of the other organs”.²⁵⁶

3. The role of the ICJ with regard to other purposes and principles of the UN

In addition to its role in achieving the principle of the settlement of international disputes, the Court has played a role in achieving the other purposes and principles of the UN. It should be noted that the Court has played a significant role in defining these purposes and principles through its advisory jurisdiction. In this section, the Court’s role in achieving and facilitating these purposes and principles will be examined in the light of its contentious jurisdiction.

3.1 Prohibiting the threat or use of force

It is not just war that is prohibited by the Charter, but the use of force in general. Furthermore, the prohibition is not confined to the actual use of force, but extends to the mere threat of force. This is clear from the wording of Art. 2/4 of the Charter, which provides that:

²⁵⁴ Lauterpacht, H., Foreword to Lissitzyn, O., *The International Court of Justice: Its Role in the Maintenance of International Peace and Security*, 1951.

²⁵⁵ Gross, L., “The International Court of Justice”, *MLR*, 9, 1967, p. 19.

²⁵⁶ Lachs, M., “The Decision-Making Powers and the Judiciary within the United Nations” in *Essays in Honour of Professor Stephen Verosta*, 1980, p. 394.

Chapter Four

“All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purposes of the United Nations.”

The determination of the precise scope and meaning of this article has been a most controversial point among international lawyers.²⁵⁷ Different views have been expressed regarding the permissible limit for a state to use force or the threat of force in the conduct of its international relations with other states. One view is that each great power can exercise a right of collective self-defence on behalf of each of the contesting states it prefers to support, and that the language of this article permits an aggressor state to do so.²⁵⁸ Another view is that “Article 2(4) was part and parcel of a complex collective security system” and that the collapse of the system undermined the original understanding behind the sub-section. In addition, it has been noted that the use of force must be regarded as permissible under Article 2(4) in order to redress the flagrant violation of fundamental rights, which the state assailed has committed or is about to commit.²⁵⁹ Against all these and other views, one may ask whether the ICJ has played any role in clarifying and determining the meaning and the scope of the principle of the prohibition of the threat or use of force as indicated in the Charter.

The ICJ has offered strong evidence in favour of a liberal interpretation of the above article. It also affirms the obligation of states pursuant to Art. 2/4 of the Charter to abstain from the use of force in international relations. The *Corfu Channel (Merits)* case, 1949, between the UK and Albania arose from the explosion of mines laid in Albanian territorial waters which caused serious damage to some British vessels and loss of life to those on board. As a result, the British Navy carried out a minesweeping operation in Albanian territorial waters without the

²⁵⁷ For more details see Franck, T., “Who Killed Article 2(4)?”, *AJIL*, 64, 1970, pp. 809 ff.; Reisman, W., “Correction and Self-determination: Construing Charter Article 2(4)”, *AJIL*, 78, 1984, pp. 642 ff.; Elias, T., “Scope and Meaning of Article 2(4) of the United Nations Charter” in Ceng, B., et al. (eds.), *Contemporary Problems of International Law: Essays in Honour of George Schwarzenberger on his Eightieth Birthday*, 1988, pp. 70 ff.; Schachter, O., “The Legality of Pro-Democratic Invasion”, *AJIL*, 78, 1984, pp. 642 ff.; Brownlie, I., “International Law and the Activities of Armed Bands”, *ICLQ*, 7, 1958, pp. 712 ff.; Brownlie, I., *International Law and the Use of Force by States*, 1963.

²⁵⁸ Franck, *supra* note 257, p. 809.

²⁵⁹ D’Amato, A., “Israel’s Air Strike upon the Iraqi Nuclear Reactor”, *AJIL*, 77, 1983, p. 584.

consent of Albania, which considered the operation contrary to international law. As seen above, the matter was referred to the SC and the ICJ. The ICJ having confirmed its jurisdiction over the case, the UK argued that this type of minesweeping operation did not constitute a breach of the principle of the non-use or non-threat of force in international relations, within the meaning of Art. 2/4 of the Charter of the UN, because it jeopardised neither the territorial integrity nor the political independence of Albania. It argued also that Albania had suffered no territorial loss and that its political independence had remained unaffected.²⁶⁰ In addition, it alleged that a certain degree of reciprocity was necessary in the observance of the obligation to refrain from the threat or use of force and that, consequently, Albania could not invoke that rule against the UK when it had itself twice used force against the UK. The UK referred to the rights of self-defence and “self-help” and, with regard to the latter, maintained that, even if the Charter had subjected the principle to some retractions, it could nevertheless be exercised when it was urgently necessary to preserve evidence required for the administration of justice. Conversely, Albania argued that the minesweeping was a breach of Albanian sovereignty because no state was entitled to use its armed forces to carry out an operation in the territorial waters of another state that not only had not been requested by the latter but had not been undertaken without its consent and even against its will. It based its argument on Art. 2/4 of the Charter.²⁶¹

The Court affirmed that the threat or use of force for alleged purposes of “judicial” intervention, that is, to further the administration of international justice, is prohibited.²⁶² Therefore, it declared that the minesweeping operation had been illegal and constituted a breach of Albanian sovereignty.²⁶³

In the *Nicaragua* case, the Court dealt extensively with the principle of the prohibition of the threat or use of force by states. In this case, the Court applied the

²⁶⁰ ICJ Pled., 1950, vol. 3, p. 296.

²⁶¹ Ibid., p. 405.

²⁶² ICJ Rep., 1949, pp. 30 ff.

²⁶³ The Court stated that “[t]o ensure respect for international law, of which it is the organ, the Court must declare that the action of the British Navy constituted a violation of Albanian sovereignty”. Ibid., p. 35.

“multilateral treaty reservation” contained in proviso (c) to the declaration of acceptance of jurisdiction made under Art. 36/2 of the Statute of the Court by the Government of the USA. Thus the Court was precluded from applying Art. 2/4 to the case inasmuch as it forms part of the Charter of the UN. Despite that, the Court did not consider itself prevented from interpreting and applying the principle of the prohibition of the use of force in international relations as a matter of customary international law.²⁶⁴ The Court deemed that an *opinio juris* had in fact crystallised as to the binding character of that prohibition given that both parties had acknowledged that the rule embodied in Art. 2/4 of the Charter corresponded essentially to prevailing customary international law.

The Court said that such an *opinio juris* could be deduced, *inter alia*, from the attitude of the parties to the case and the attitude of states towards certain GA resolutions, particularly Res. 2625 (XXV) entitled “Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations”.²⁶⁵ The resolution had to be interpreted as an acceptance by the international community of the validity of the rule or set of rules it contained.²⁶⁶ The principles enumerated in the resolution included the prohibition of the threat or use of force, which is articulated *in extenso* over ten paragraphs. The Court noted: “[a]s regards the United States in particular, the weight of expression of *opinio juris* can similarly be attached to its support of the resolution of the Sixth International Conference of American States condemning aggression and ratification of the Montevideo Convention on Rights and Duties of States, Article 11 of which imposes the obligation not to recognise territorial acquisitions or special advantages which have been obtained by force.” The Court noted also the USA’s acceptance of prevailing principles regulating inter-states relations. Established at the 1975 Helsinki Conference on Security and Co-operation in Europe, these principles required states to abstain from the threat or use

²⁶⁴ ICJ Rep., 1986, p. 99.

²⁶⁵ Ibid., p. 100; Gray, C., “The Principle of Non-use of Force” in Lowe, V., et al. (eds.), *The United Nations and the Principles of International Law: Essays in Memory of Michael Akehurst*, 1994, pp. 41 ff.

²⁶⁶ ICJ Rep., 1986, p. 100.

of force “in their international relations in general”.²⁶⁷ Finally, the Court noted that Nicaragua had maintained in its Memorial on the merits that the prohibition enshrined in Art. 2/4 of the United Nations Charter had been recognised as a principle of *jus cogens*.²⁶⁸ The Court further stated that “the essential consideration is that both the Charter and the customary international law flow from a common fundamental principle outlawing the use of force in international relations”.²⁶⁹

3.2. The duty of non-intervention

Despite the fact that the duty of non-intervention is not spelled out among the purposes and principles enumerated in the Charter, the fact is that the principle stems from the principle of the equality of state sovereignty,²⁷⁰ which requires the member states to respect sovereignty by refraining from intervening in matters falling within the exclusive jurisdiction of another state. In addition, this duty is derived from Art. 2/4 of the Charter, which requires all members to refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purposes of the UN and Art. 2/7 of the Charter which prevent intervention in matters essentially within the domestic jurisdiction of any state by the UN and its members.²⁷¹ This duty has been explicitly recognised by the UN through its practice. For instance, the GA adopted its declaration on the “Inadmissibility of

²⁶⁷ Ibid.

²⁶⁸ Ibid., pp. 100-1.

²⁶⁹ Ibid., p. 107. In addition to these precedents, the Court defined the principle of the prohibition of use of force in its opinion regarding the *Legality of the Threat or Use of Nuclear Weapons* case, where it stated: “[t]he notion of ‘threat’ and ‘use’ of force under Article 2, paragraph 4, of the Charter stand together in the sense that if the use of force itself in a given case is illegal - for whatever reason - the threat to use such force will likewise be illegal. In short, if it is to be lawful, the declared readiness of a State to use force must be a use of force that is in conformity with the Charter.” It also stated: “the use of force, and the threat to use it, would be unlawful under the law of the Charter.” ICJ Rep., 1996, p. 19 (unpublished).

²⁷⁰ Article 2/1 of the Charter provides that “[t]he Organisation is based on the principle of the sovereign equality of all of its Members”. In this regard, it has been noted that “[t]he equality of rights and obligations is, unless otherwise expressly provided, a fundamental feature of the Charter”. Diss. Op. of Judges Lauterpacht, Wellington and Spender in the *Aerial Incident* case between Israel and Bulgaria. ICJ Rep., 1959, p. 177.

²⁷¹ Lowe, V., “The Principle of Non-Intervention: Use of Force” in Lowe, V., et al. (eds.), *The United Nations and the Principles of International Law. Essays in Memory of Michael Akehurst*, 1994, p. 68.

Intervention in Domestic Affairs of States and Protection of their Independence and Sovereignty” of 21 December 1965,²⁷² and the declaration on “Principles of International Law Concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations” of 24 October 1970.²⁷³

The ICJ has dealt with the issue of forbidding states from intervening in the internal or external affairs of other states in two cases. In the *Corfu Channel* case, the UK argued that it had swept for mines where the explosions had occurred because it suspected that mines had been laid deliberately and such sweeping was necessary to prevent the disappearance of any evidence that might justify those suspicions.²⁷⁴ It asserted that the minesweeping was legally justified inasmuch as:

“There is recognised in international law the right of a State, when a state of affairs involving a serious and flagrant breach of the law has been brought about by another State or has been permitted to come about, to intervene by direct action. The purpose of such intervention may be to prevent the continuance of the situation which is in breach of the law, or, where the intervening State has suffered any injury of a nature capable of being referred, to further the administration of international justice by preventing the removal of the evidence.”²⁷⁵

The Court dismissed this argument on the basis that it could regard the alleged right of intervention only as the manifestation of a policy of force, such as has, in the past, given rise to very serious abuses and such as cannot, whatever the present defects in international organisation, find a place in international law. It stated also that “[i]ntervention is perhaps still less admissible in the particular form it would take here; for, from the nature of things, it would be reserved for the most powerful States, and might easily lead to preventing the administration of international justice itself”.²⁷⁶

It seems clear that the Court found that the duty of non-intervention prohibits a state from acting, whether diplomatically or militarily, to impose its will on the internal or external affairs of another state. It seems also that the Court considered the principle of non-intervention to have become embodied in international law.

²⁷² UN Doc. A/Res./2131/ Rev. 1, 1966.

²⁷³ UN Doc. A/8028, 1970.

²⁷⁴ ICJ Pled., 1950, vol. 3, pp. 280-1.

²⁷⁵ Ibid., p. 282.

²⁷⁶ ICJ Rep., 1949, p. 35.

The Court dealt extensively with this matter in the *Nicaragua (Merits)* case where the USA maintained that international law permits intervention in many circumstances, especially to protect national interests or citizens abroad. Conversely, it was argued by the Latin American countries that international law prohibits any interference whatsoever within the domestic jurisdiction of states. The Court dismissed the US view and accepted the Latin American view, stating that:

“The principle of non-intervention involves the right of every sovereign State to conduct its affairs without outside interference; though examples of trespass against this principle are not infrequent, the Court considers that it is part and parcel of customary international law.”²⁷⁷

The Court also found that the element of coercion “defines, and indeed forms the very essence of, prohibited intervention”. It further noted that “[a] prohibited intervention must accordingly be one bearing on matters in which each State is permitted, by the principle of State sovereignty, to decide freely”.²⁷⁸ One of these is the choice of political, economic, social and cultural system, and the formulation of foreign policy.²⁷⁹ Therefore, the Court refused to find a “general right” of intervention “in support of an internal opposition in another state” whose cause appeared particularly worthy by reason of the political and moral values with which it was identified.²⁸⁰

3.3. The right of self-defence

A related issue to the principles of prohibition of the threat or use of force and the duty of non-intervention is to define the scope of the right of self-defence as indicated by Art. 51 of the Charter, which is considered to be an exception to the above principles.²⁸¹ Actions involving *prima facie* violation of these foregoing

²⁷⁷ ICJ Rep., 1986, p. 106; McGoldrick, D., “The Principle of Non-Intervention: Human Rights” in Lowe, V., et al. (eds.), *The United Nations and the Principles of International Law. Essays in Memory of Michael Akehurst*, 1994, pp. 91 ff.

²⁷⁸ ICJ Rep., 1986, p. 108.

²⁷⁹ Ibid.

²⁸⁰ Ibid., pp. 108-9.

²⁸¹ Art. 51 provides that “[n]othing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United

prohibitions may nonetheless be lawful if they can be justified as being undertaken in the exercise of the right of self-defence.

The scope of this right was determined by the Court in the *Nicaragua (Merits)* case. In this case, the USA justified its assistance to El Salvador, Honduras, and Cost Rica in defence against Nicaraguan aggression. It argued that it had acted in accordance with the inherent right of individual and collective self-defence as well as in conformity with the Inter-American Treaty on self-defence.²⁸²

To define the concept and the scope of the term “armed attack”, the Court stated that the Charter in Art. 51 refers to pre-existing international law, as it mentions the “inherent right” of individual or collective self-defence. The Court had to interpret Art. 51 in the light of customary international law. It stated:

“Article 51 of the Charter is only meaningful on the basis that there is a ‘natural’ or ‘inherent’ right of self-defence, and it is hard to see how this can be other than of a customary nature, even if its present content has been confirmed and influenced by the Charter. Moreover, the Charter, having itself recognised the existence of this right, does not go on to regulate directly all aspects of its content. For example, it does not contain any specific rule whereby self-defence would warrant only measures which are proportional to the armed attack and necessary to respond to it, a rule well established in customary international law.”²⁸³

Having examined Art. 51 of the Charter, the Court concluded that the above article extends not only to the right of individual states to act in self-defence, but also to the right of collective self-defence. To define the action of states in response to an armed attack, the Court referred to Art. 3, para. G, of the definition of aggression annexed to General Assembly Res. 3314 (XXIX), which reflects customary international law.²⁸⁴ The Court stated that:

“The Court sees no reason to deny that, in customary law, the prohibition of armed attacks may apply to the sending by a State of armed bands to the territory of another State, if such an operation, because of its scale and effects, would have been classified as an armed

Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.”

²⁸² ICJ Rep., 1986, p. 87.

²⁸³ Ibid., p. 94.

²⁸⁴ Ibid., p. 103.

attack rather than as a mere frontier incident had it been carried out by regular armed forces.”²⁸⁵

The Court has gone on to conclude that this concept must be understood as including not merely action by regular armed forces across an international border, but also “the sending by or on behalf of a state of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to”, *inter alia*, an actual armed attack conducted by regular forces, “or its substantial involvement therein”. The Court went further to define the concept of “armed attack” by stating that neither small-scale attacks by armed bands nor “assistance to rebels in the form of the provision of weapons or logistical or other support” constitute grounds for invoking this right.²⁸⁶ The Court concluded that, “if self-defence is advanced as a justification for measures which would otherwise be in breach both of the principle of customary international law and of that conditioned in the Charter, it is to be expected that the conditions of the Charter should be respected”.²⁸⁷

The Court also clarified that the Charter requires that “measures taken by States in exercise of [the] right of individual or collective self-defence must be ‘immediately reported’ to the Security Council”. It also stated that “the absence of a report must be one of the factors indicating whether the State in question was itself convinced that it was acting in self-defence”.²⁸⁸

With respect to the Court’s view regarding the determination of the state which could invoke the principle of self-defence, the Court stated that “it is the State which is a victim of an armed attack which must form and declare the view that it has been so attacked”. It also stated that a state is not entitled “to exercise the right of collective self-defence on the basis of its own assessment of the situation”, but has to wait until “the State for whose benefit [the right of collective self-defence] is

²⁸⁵ Ibid.

²⁸⁶ Ibid., p. 104.

²⁸⁷ Ibid., p. 105.

²⁸⁸ Ibid., p. 105. This jurisprudence was repeated by the Court in its advisory opinion regarding the *Legality of the Threat or Use of Nuclear Weapons* case. It stated: “Article 51 specifically requires that measures taken by States in the exercise of the right of self-defence shall be immediately reported to the Security Council.” ICJ Rep., 1996, p. 18 (unpublished).

invoked” has “declared itself to be the victim of an armed attack ... and has expressly requested assistance”.²⁸⁹

It seems clear that the Court interpreted the term “armed attack” as the sending of regular troops across a border or of armed bands which commit acts grave enough to amount to an armed attack. In other words, the Court has restricted the term “self-defence” to the response to an actual deployment of armed forces that cross a frontier with offensive intentions.

In addition to its interpretation and determination of the scope of this right, the Court made a clear statement that the right of self-defence has become part of customary international law, a *jus cogens* binding on all states. Therefore, it has been noted by Müllerson that the Court has “contributed significantly to a strong normative definition of the principle of refraining from the threat or use of force”.²⁹⁰

3.4. The principle of equal rights and self-determination of peoples

Self-determination is the right of all peoples to govern themselves. This principle is embodied in the purposes and principles of the UN. Article 1/2 of the Charter stipulates that one of the UN’s purposes is to “develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples”. Art. 55 of the Charter affirms this purpose in the context of friendly relations among nations and in conjunction with the “equal rights” of peoples.²⁹¹ As noted above,²⁹² this purpose was adopted in GA Res. 1514 (XV), entitled

²⁸⁹ ICJ Rep., pp. 103-5; Sohn, L., “The UN System as Authoritative Interpreter of Its Law” in Schachter, O., *United Nations Legal Order*, vol. 1, 1995, p. 180.

²⁹⁰ Müllerson, R., “The Principle of Non-Threat and Non-Use of Force in the Modern World”, 26 *Coexistence: A Review of East-West and Development Issues* 29, 1984, p. 32 (cited in Sohn, *supra* note 289, p. 180).

²⁹¹ Thornberry, P., “The Principle of Self-Determination” in Lowe, V., et al. (eds.), *The United Nations and the Principles of International Law. Essays in Memory of Michael Akehurst*, 1994, p. 177.

²⁹² See p. 150 above. In addition, the principle of self-determination is associated with human rights under Art. 1 of the UN Covenant on Civil and Political Rights and the Covenant on Economic, Social and Cultural Rights. Para 1 of the above article states: “[a]ll peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.” Para 3 of the above article also states the universal scope of self-determination by mandating states, ‘including those having responsibility for Non-Self-Governing and Trust territories’, to promote and respect self-determination. Thornberry, *supra* note 291, pp. 178-9.

“Declaration on the Granting of Independence to Colonial Countries and Peoples”.²⁹³ The scope and content of this right have nevertheless been the subject of considerable debate among international lawyers.²⁹⁴ But, as noted in Chapter Two,²⁹⁵ the ICJ has dealt with the principle of self-determination in many cases. It described the scope of this principle precisely as follows:

“The validity of the principle of self determination, defined as the need to pay regard to the freely expressed will of peoples, is not affected by the fact that in certain cases the General Assembly has dispensed with the requirement of consulting the inhabitants of a given territory. Those instance were based either on the consideration that a certain population did not constitute a “people” entitled to self determination or on the conviction that a consultation was totally unnecessary, in view of special circumstances.”²⁹⁶

In addition to this jurisprudence, the Court dealt with this principle in the *East Timor* case between Portugal and Australia.²⁹⁷ In this case, Portugal argued that the conduct of Australia in negotiating, concluding and initiating the performance of the 1989 Treaty with Indonesia constituted a breach of its obligation to treat East Timor as a non-self-governing territory.²⁹⁸ It also argued that the rights which Australia breached were rights *erga omnes* and that accordingly Portugal could require it to respect them regardless of whether another state (Indonesia) had conducted a similarly unlawful act.²⁹⁹ In this regard, the Court stated that:

“Portugal’s assertion that the right of peoples to self-determination, as it evolved from the Charter and from United Nations practice, has an *erga omnes* character, is irreproachable. The principle of self-determination of peoples has been recognised by the United Nations Charter ... it is one of the essential principles of contemporary international law.”³⁰⁰

²⁹³ GAOR, 15th Sess., Supp. 16, 14 December 1960.

²⁹⁴ Ofuatey-Kodjoe, W., “Self-Determination” in Schachter, O., et al. (eds.), *United Nations Legal Order*, vol. 1, 1995, pp. 351.

²⁹⁵ See p. 148 above.

²⁹⁶ ICJ Rep., 1975, p. 33.

²⁹⁷ In this case, Portugal requested the Court to adjudicate and declare “the rights of the people of East Timor to self-determination, to territorial integrity and unity and to permanent sovereignty over its wealth and natural resources”. ICJ Rep., 1995, p. 94.

²⁹⁸ Ibid.

²⁹⁹ Ibid.

³⁰⁰ Ibid., p. 102.

This jurisprudence shows that the Court did not only affirm or interpret one of the UN principles, namely the principle of self-determination, but it also considered that this principle has an *erga omnes* character.

3.5. The principle of good faith

The principle of good faith was adopted by the drafters of the Charter as one of the purposes and principles of the UN. Art. 2/2 of the Charter indicates that “[a]ll members, in order to ensure to all of them the rights and benefits resulting from membership, shall fulfil in good faith the obligations assumed by them”.³⁰¹ This principle was recognised by both the Vienna Convention on Law of Treaties 1969 and the 1978 Convention on Succession of States in Respect of Treaties. It was also recognised by some GA resolutions, for instance Res. 1803 (XVII) on Permanent Sovereignty over Natural Resources, which states that “[f]oreign investment agreements freely entered into by, or between, sovereign states shall be observed in good faith”.³⁰²

There is no clear definition of the nature, scope and function of this principle in international doctrine.³⁰³ Therefore, it can be said that this principle applies to treaty relations and the exercise of rights by states in the international arena. The ICJ dealt with the principle of good faith through its precedents.³⁰⁴

The Court’s jurisprudence may help to clarify the nature, scope and function of the principle. In the *Rights of Nationals of the United States of America in Morocco* case, the Court referred to the necessity of exercising a power in good faith. The Court announced that it was the duty of the customs authorities in the French Zone,

³⁰¹ It should be noted that the Dumbarton Oaks Proposal made no mention of good faith. The inclusion of this principle among the principles of the UN was proposed by Colombia. This proposal met with strong support from other states. See UNCIO, 6, pp. 71-8, 332-3; White, G., “The Principle of Good Faith” in Lowe, V., et al. (eds.), *The United Nations and the Principles of International Law. Essays in Memory of Michael Akehurst*, 1994, p. 230.

³⁰² For more examples, see White, *ibid.*, p. 232.

³⁰³ O’Connor, J., *Good Faith in International Law*, 1991, p. 36.

³⁰⁴ Since the scope of this chapter is to examine the role of the ICJ in facilitating the principles and purposes of the UN through its contentious cases, the study will be restricted to illustrating the Court’s role through this jurisdiction. However, it should be noted that the application of the principle of good faith has been dealt with by the Court in various advisory cases, for instance the *Admission* case (ICJ Rep., 1948, pp. 57 *ff.*) and the *Peace Treaties* case (ICJ Rep., 1950, pp. 221 *ff.*).

in fixing the valuation of imported goods, to have regard, *inter alia*, to reasonableness and good faith. It considered that a legal power that is exercised unreasonably and in bad faith must surely constitute an *abus du droit*.³⁰⁵

In the *Right of Passage over Indian Territory* case, Portugal argued that India must exercise its power of regulation and control in good faith.³⁰⁶ The Court affirmed the Portuguese argument by stating that “it is made clear that passage remains subject to the regulation and control of India, which must be exercised in good faith”.³⁰⁷

In the *Temple of Preah Vihear* case, the Court applied the principle of good faith extensively. The facts of this case were based on the 1904 convention between France (as a protector of Cambodia) and Siam (later Thailand) to determine the boundary in the area of Preah Vihear. The treaty provided that the boundary was to follow the watershed line and that the details were to be worked out by a mixed Franco-Siamese Commission. This Commission drew a map on which the temple was placed in Cambodia. Cambodia based its claim upon this map. Thailand argued, *inter alia*, that the map embodied a material error in that it did not follow the watershed lines as provided for in the treaty. The Court rejected this argument and stated that:

“It is an established rule that the plea of error cannot be allowed as an element vitiating consent if the party advancing it contributed by its own conduct to the error, or could have avoided it, or if the circumstances were such as to put that party on notice of possible error.”³⁰⁸

As noted by O'Connor, “at the time the case was decided, the rule as stated by the Court was only to be found as a deduction from doctrines variously referred to in international and municipal law as ‘estoppel’, ‘preclusion’, ‘forclusion’, ‘acquiescence’ or ‘recognition’”.³⁰⁹ He also noted that the majority of the Court believed that this was a situation where good faith (however designated) required

³⁰⁵ ICJ Rep., 1952, p. 212.

³⁰⁶ ICJ Rep., 1960, p. 12.

³⁰⁷ Ibid., p. 28.

³⁰⁸ ICJ Rep., 1962, p. 26.

³⁰⁹ O'Connor, *supra* note 303, p. 93.

that Thailand should not be permitted to resile from the clear and unequivocal representations it had made to Cambodia that accepted the map (and the consequences therefrom).³¹⁰

The Court applied the principle of good faith in the *Nicaragua* case, where it held that Nicaragua's reliance on the Optional Clause accepting the jurisdiction of the Court was in no way contrary to good faith or equity, so the invocation of estoppel by the USA could not be said to apply to Nicaragua.³¹¹

The ICJ extended the applicability of the principle of good faith to the negotiation phase. In the *Fisheries Jurisdiction* cases, it stated that the UK and Iceland must "in good faith pay reasonable regard to the legal rights of the other in the waters around Iceland outside the 12 mile limit, thus bringing about an equitable apportionment of the fishing resources based on the facts of the particular situation and having regard to the interests of other states which have established fishing rights in the area".³¹² It also stated in the case between Germany and Iceland that negotiations in good faith "involve in the circumstances of the case an obligation upon the Parties to pay reasonable regard to each other's rights and to conservation requirements pending the conclusion of the negotiations."³¹³ Finally, in the *Delimitation of the Maritime Boundary in the Gulf of Maine Area* case, the Court concluded that the parties were under a duty to negotiate "and to do so in good faith, with a genuine intention to achieve a positive result".³¹⁴

In the light of the above, it can be concluded that the court played a significant role to in affirming the applicability of one of the principles of the UN namely, the principle of good faith. It also adopted an extended analysis of the inherent obligation to perform the undertaking of good faith in pre-contractual negotiations.³¹⁵ Therefore, Thirlway correctly noted that "[w]here an obligation,

³¹⁰ Ibid., p. 93.

³¹¹ ICJ Rep., 1984, pp. 414-15.

³¹² ICJ Rep., 1974, p. 33.

³¹³ Ibid., p. 202.

³¹⁴ ICJ Rep., 1984, p. 299.

³¹⁵ The Court's attitude was confirmed in the *Legality of the Threat or Use of Nuclear Weapons* case. In this case the Court appreciated the full importance of the recognition by Article VI of the Treaty on the Non-Proliferation of Nuclear Weapons of an obligation to negotiate nuclear

legal or conventional, is defined by specific words, good faith requires respect not only for the words but also for the spirit; but to negotiate otherwise than in good faith is surely not to negotiate at all.”³¹⁶

Conclusion

This chapter has dealt with the role of the Court in facilitating the purposes and principles of the UN through its contentious jurisdiction. This jurisdiction is based on consensus, whereby a state gives its consent to its case being referred to the Court either prior to a dispute arising or after its emergence. It might be concluded that the ICJ cannot act unless the parties agree to submit their disputes to it.

The ICJ actively services and participates in achieving and accomplishing the purposes and principles of the UN. It plays an important role in achieving the central purpose of the UN, namely, the maintenance of international peace and security, through its constructive contribution to the peaceful settlement of disputes. A fundamental point in this regard concerns the relationship between the Court as the principal judicial organs of the UN and the other political organs of the UN in dealing with issues related to the peaceful settlement of international disputes. This point was analysed by elaborating the practice of these organs. The ICJ has made it clear that, as a principal organ of the UN, it has a duty to deal with any dispute submitted to it even if one of the political organs of the UN is dealing with the political aspects of that dispute. The Court has also confirmed that it is not subordinate to any other UN organ, concluding that the exercise by the political organs of their respective functions does not affect its own role because it works as a judicial organ, acting in accordance with the principles of law and equity.

Having examined the Court’s role in achieving the maintenance of international peace and security, the study turned to discuss the Court’s role in achieving the other purposes and principles of the UN as indicated by the Charter. The Court

disarmament in good faith. The Court stated: “[t]he legal import of that obligation goes beyond that of a mere obligation of conduct; the obligation involved here is an obligation to achieve a precise result - nuclear disarmament in all its aspects - by adopting a particular course of conduct, namely, the pursuit of negotiations on the matter in good faith.” ICJ Rep., 1996, p. 33 (unpublished).

³¹⁶ Thirlway, H., “The Law and Procedure of the International Court of Justice: 1960-1989”, *BYIL*, 60, 1989, p. 25.

delineated the scope and content of the principle of the prohibition of the threat or use of force in its jurisprudence, where it declared that such conduct is considered to be illegal whatever the justification of states. In confirming this principle the Court had to refer to this principle in the general principles of international law and in customary rules as well as in the UN Charter.

The Court's role in preserving the duty of non-intervention is derived from the principle of the sovereign equality of states and from the principle of the non-threat or non-use of force in the international arena. Through its jurisprudence the Court has affirmed that, according to this duty, states are prohibited from acting to impose their will in the internal or external affairs of other states.

The Court has stated that the right of self-determination as an exception to the principle of the prohibition of the threat or use of force and the duty of states not to intervene in the affairs of other states could be used as a response to armed attack. It has extensively defined the terms "armed attack" and "self-defence". Finally, the Court has dealt with the principle of good faith in international law, playing a role in clarifying the definition, nature, scope and function of this principle.

In the light of the above it seems clear that the Court has made a constructive contribution to facilitating the purposes and principles of the UN as a guide to the organisation and its members.

Chapter Five

The International Court of Justice as a Constitutional Court:

The Question of Judicial Review

Introduction

Any legal community is governed by law. This means that the government does not have unlimited powers, but on the contrary is subject to the law. This concept is known as the rule of law, which has developed over the centuries to be applied in most states in the international community. This concept aims to delineate the powers of government in relation to the rights and freedoms of the individual and regulate the functions and duties of the government. The rule of law in the domestic domain can be made effective only if judicial procedures are made available by which it is possible to control the observance by government of the legal rules laid down either by an act of government itself or by the parliament. The legal procedures to control the legality of governmental action not only serve to protect the interest of individuals against the government, but also serve the public interest in the maintenance of the legal order, as well as the interest of the government itself.¹

The UN, like any legal community, is governed by law. The present chapter will focus on the possibility of the ICJ, as the principal judicial organ of the UN, playing a similar role to that of the constitutional courts in the domestic domain as a guardian of the law applied within the UN by providing judicial review² of the acts

¹ Brewer-Carías, A., *Judicial Review in Comparative Law*, 1989, pp. 7 ff.; Dijk, P., *Judicial Review of Governmental Action and the Requirement of an Interest to Sue*, 1980, pp. 1 ff.; Tate, C., “Comparative Judicial Review and Public Policy: Concepts and Overview” in Jackson, D., et al. (eds.), *Comparative Judicial Review and Public Policy*, 1992, p. 4.

² It should be noted that the draft resolution 888 (IX) proposed by the Fifth Committee was further amended to replace the words “appeal against” by the word “review of”. Supporters of this amendment expressed the opinion that the word “review” was a broader term which would include appeals and other judicial procedures. Certain other representatives, in accepting the amendment, emphasised that they considered that the word “review” could mean only an appellate consideration of judgments of the Tribunal on the appeal of the parties concerned. See GAOR, 10th Sess., Annexes X, 49, 1955, p. 4.

of the organisation. The importance of the examination of this point derives from the fact that the acts of the UN may have a direct effect on its members, which raises the question of the possibility of these states challenging the acts of the organisation and/or its organs if these acts are considered, in their view, incompatible with the objects and purposes of the UN, or contrary to the express provisions of its constitution.³

In this chapter the power of the ICJ to supervise the legality of the UN organs' action is discussed. The discussion focuses on the rule of law within the UN system, the concept of judicial review in the domestic and the international domain, whether the ICJ has the power to play such a role, the judicial procedures, and finally the limits upon the ICJ's power to review the acts of the organisation.

1. The rule of law in the UN

The examination of the role of the ICJ as a constitutional court within the framework of the UN requires discussion of a preliminary issue related to determining whether the UN is governed by law, namely is there any place for the rule of law in the UN? If the answer to this question is in the affirmative, what are the sources of law in the UN?

1.1. Are the UN organs above the law?

The UN is essentially a political and dynamic institution. As a consequence, it is noted by international lawyers that the practice of their functions by its organs is influenced, if not actually guided, by strong political pressures and considerations.⁴ This raises an important question nowadays among international lawyers as to whether the UN organs are above the law when dealing with any matter.

³ Osieke, E., "*Ultra Vires* Acts in International Organisations - The Experience of the International Labour Organisation", *BYIL*, 48, 1976-7, pp. 273-4.

⁴ In this respect, Schachter notes that members of the UN "will, of course, exhibit partisanship and interest in varying degree. Governments are expected to take positions in the political organs in accordance with their conceptions of national interest and it is apparent that these conceptions will embrace considerations based on ties of alliance, friendship or political bargaining." Schachter, O., "The Quasi-Judicial Role of the Security Council and the General Assembly", *AJIL*, 58, 1964, p. 962; see also Vallat, F., "The Peaceful Settlement of Disputes" in *Cambridge Essays in International Law: Essays in Honour of Lord McNair*, 1965, p. 159.

Some international lawyers have answered this question in the affirmative. They note that the UN organs, especially the Security Council, are above the law when practising their functions. In this regard, John Foster Dulles stated that “[t]he Security Council is not a body that merely enforces agreed law. It is a law unto itself. If it considers any situation as a threat to the peace, it may decide what measures shall be taken. No principles of law are laid down to guide.”⁵ In addition, it is noted by Kelsen that the restoration of peace, as an essential mission of the Council, is not the same as the restoration of the law. In his view, the Council may wish to “enforce a decision which is considered to be just though not in conformity with existing [international] law”. Accordingly, he concludes that the Council’s decisions “may create new law for the concrete case”.⁶

These views should be examined in the light of the Charter’s provisions, which leave no doubt that its drafters intended the acts of the political organs of the UN to be limited by the rules of international law and adopted in accordance with the purposes and principles provided in the Charter. Generally speaking, Art. 1/1 of the Charter provides that the UN organs should respect international law, and consequently international disputes must be resolved “in conformity with the principles of justice and international law”.⁷ In addition, Art. 2 of the Charter provides that the “principles” of the UN shall bind “the organisation and its members”. Finally, para. 7 of this article imposes a general limitation upon the UN

⁵ Dulles, J., *War or Peace*, 1950, pp. 194-5.

⁶ Kelsen, H., *The Law of the United Nations*, 1951, pp. 294-5.

⁷ It should be noted that the initial draft presented at Dumbarton Oaks of Art. 1 (the provision that now qualifies the manner in which international peace and security are to be maintained) did not include the phrase “in conformity with the principles of justice and international law”. This phrase was added at the initiative of the Chinese delegation in response to fears concerning the enormous powers that might be wielded by the Security Council. See Russell, R., *A History of the United Nations Charter: The Role of the United States 1940-45*, 1958, p. 665; Scott, C., et al., “A Memorial for Bosnia: Framework of Legal Arguments Concerning the Lawfulness of the Maintenance of the United Nations Security Council’s Arms Embargo on Bosnia and Herzegovina”, *MJIL*, 16, 1994, pp. 119 ff.; Cassan, H., “Article 24, Paragraphes 1 et 2” in Cot, J., et al. (eds.), *La Charte des Nations Unies*, 1991, pp. 462-3. With regard to Art. 1/1 of the Charter, Judge Weeramantry noted that “a clear limitation on the plenitude of the Security Council’s powers is that those powers must be exercised in accordance with the well-established principles of international law. It is true this limitation must be restrictively interpreted and is confined only to the principles and objects which appear in Chapter I of the Charter.” ICJ Rep., 1992, p. 175.

organs under which they must not “intervene” in matters which are essentially within the domestic jurisdiction of any state.⁸

In addition to these general provisions, the Charter has some specific articles to limit the powers of the GA and the SC, which have a wide range of competencies according to the Charter. The GA’s powers are limited by Art. 12 of the Charter, under which it cannot make any recommendation to maintain international peace and security if the same dispute or situation is before the SC.⁹ Similarly, the SC is under various limitations when fulfilling its functions as provided by the Charter. Pursuant to Art. 24 the SC must discharge its duties in accordance with the purposes and principles of the UN.¹⁰ In addition, Art. 25 stipulates an implied limit upon the SC when acting on behalf of member states because the acceptance and carrying out of its decisions depend on its acting in accordance with the Charter, otherwise these decisions will be deprived of any binding effect.¹¹ Moreover, the Council’s powers under Chapters VI and VII are limited to disputes whose continuance might endanger international peace and security (Art. 33), and the SC can order sanctions or use military measures only in the case of the existence of “any threat to the peace,

⁸ It should be noted that, pursuant to this article, the principle of non-intervention in the domestic jurisdiction of states shall not prejudice the application of enforcement measures under Chapter VII of the Charter. With regard to the scope of this exception and its interpretation in practice, see White, N., *The United Nations and the Maintenance of International Peace and Security*, 1990, pp. 50-2; Gilmour, D., “Article 2/7 of the United Nations and the Practice of Permanent Members of the Security Council”, *AYIL*, 61, 1967, p. 156; Sonnenfeld, R., *Resolutions of the United Nations Security Council*, 1988, p. 92.

⁹ These limitations were confirmed by the ICJ in the *Expenses* case, see p. 135 above; White, *supra* note 8, pp. 103-5.

¹⁰ Kahng, T., *Law, Politics, and the Security Council. An Inquiry into the Handling of Legal Questions Involving International Disputes and Situations*, 1964, pp. 71 ff.; Gill, T., “Legal and Some Political Limitations on the Power of the UN Security Council to Exercise Its Enforcement Powers under Chapter VII of the Charter”, *NYIL*, XXVI, 1995, pp. 68 ff.

¹¹ In this regard, the ICJ noted in the *Namibia* case that, “when the Security Council adopts a decision under Article 25 in accordance with the Charter, it is for the member States to comply with that decision” (emphasis added). ICJ Rep., 1971, p. 54. Bowett also notes that “[i]n conferring on the Council ‘primary responsibility for the maintenance of international peace and security’, the members of the Organisation agree that it ‘acts on their behalf’. The Council thus acts as the agent of all the members and not independently of their wishes; it is, moreover, bound by the purposes and principles of the organisation, so that it cannot, in principle, act arbitrarily and unfettered by any restraints. At the same time, when it does act *intra vires*, the members of the organisation are bound by its actions and, under Article 25, they ‘agree to accept and carry out the decisions of the Security Council in accordance with the present Charter’.” Bowett, D., *The Law of International Institutions*, 1982, p. 33.

or act of aggression” (Arts. 38 and 39).¹² Finally, if the Council decides to use force, it should use it as may be necessary to maintain or restore international peace and security (Art. 42). Therefore, the Council’s exercise of its competencies is bound by all these conditions, otherwise it should refrain from taking any action.¹³ In addition to these explicit provisions, international lawyers have noted that several other limitations should be respected by the SC. Art. 52/2 of the Charter has been referred to as imposing a limit upon the SC. According to this article, the Council is under an obligation to encourage settlement of local disputes through regional arrangements.¹⁴ Finally, it has been observed that Art. 107 also limits the Council’s competence. Bowett notes that this article affected the SC in the *Berlin* case (1948) when the Soviet Union denied competence on this ground and vetoed any resolution.¹⁵

The limited powers of the UN organs have been confirmed by many other international lawyers, who agree that the freedom entrusted in the UN organs is not absolute. In this regard, Fitzmaurice notes that the limits on the powers of the SC “are necessary because of the all too great ease with which any acutely controversial international situation can be represented as involving a latent threat to peace and security, even where it is really too remote genuinely to constitute one.

¹² Bilder, R., “Judicial Procedures Relating to the Use of Force”, *VJIL*, 31, 1991, p. 258.

¹³ In this regard, it has been noted by Brownlie that: “[e]ven if the political organs have a wide margin of appreciation in determining that they have competence by virtue of Chapter VI or Chapter VII, and further, in making dispositions to maintain or restore international peace and security, it does not follow that the selection of the modalities of implementation is unconstrained by legality.” Brownlie, I., “The Decision of Political Organs of the United Nations and the Rule of Law” in Macdonald, R. (ed.), *Essays in Honour of Wang Tieya*, 1994, p. 102.

¹⁴ Papadopoulos, A., “The Maintenance of International Peace and the United Nations. A Legal Analysis”, *IRR*, 5, 1975, p. 806; Acevedo, D., “Disputes under Consideration by the U.N. Security Council or Regional Bodies” in Damrosch, L. (ed.), *International Court of Justice at a Crossroads*, 1987, p. 248.

¹⁵ Bowett, D., “The United Nations and Peaceful Settlement” in *International Disputes, the Legal Aspects. Report of a Study Group of the David Davies Memorial Institute of International Studies*, 1972, p. 181; Acevedo, *supra* note 14, p. 248, note 23. In this regard, see UN Doc. S/1020 and Add. I, SCOR, 361st mtg., 3rd year, No. 113, 4 October 1948, pp. 9-30; SCOR, 361st mtg. *ibid.*, pp. 10-14, 24, 28-9; SCOR, 362nd mtg., 3rd year, No. 114, 5 October 1948, pp. 8 *ff.* In addition, Higgins notes that the Council is not empowered to interpret the legal situation of states in a binding manner without their consent. Higgins, R., “The Place of International Law in the Settlement of Disputes by the United Nations Security Council”, *AJIL*, 64, 1970, p. 5.

Without these limitations, the functions of the Security Council could be used for purposes never originally intended.”¹⁶ Similarly, Alvarez notes:

“I consider that in virtue of the law of social interdependence this condemnation of the misuse of a right should be transported into international law. For in that law the unlimited exercise of a right by a state, as a consequence of its absolute sovereignty, may sometimes cause disturbances or even conflicts which are a danger to peace.”¹⁷

Bedjaoui observes that the political organs of the UN are under an obligation to respect the Charter and the rules of international law. He bases his view, *inter alia*, on the fact that the founding states did not invest these organs with any functions that are similar or even close to those of an international legislator or creator of new rules. He notes also that even the GA, which has the power to encourage the prospective development of international law and its codification by states, may only recommend and offer a framework and stimulus to the conclusion of international conventions, but it is the states that produce law by ratifying such conventions and bringing them into force.¹⁸ Moreover, Brownlie notes that “[t]he conclusion must be that the Security Council is subject to the test of legality in terms of its designated institutional competence”.¹⁹ He also notes that “[i]n the case of the Security Council there is no reason to assume a tension between effectiveness and the legality. Common sense would suggest that the authority of a political organ must depend on respect for the Rule of Law and that there is an essential link between operational efficacy and legality.”²⁰ Finally, it has been noted by Lissitzyn that “the long-range purposes and policies in the Charter must be given protection against the possible short-range aberrations of the political organs. Power without law is despotism.”²¹

The view that the powers of the political organs when exercising their functions are limited according to the Charter was upheld by the ICJ in the early years of the

¹⁶ Diss. Op. of Judge Fitzmaurice, ICJ Rep., 1971, p. 294. ✓

¹⁷ Sep. Op. of Judge Alvarez, ICJ Rep., 1949, p. 48.

¹⁸ Bedjaoui, M., *The New World Order and the Security Council. Testing the Legality of Its Acts*, 1994, pp. 32-5.

¹⁹ Brownlie I., *supra* note 13, p. 95.

²⁰ *Ibid.*, p. 101.

²¹ Lissitzyn, O., *The International Court of Justice: Its Role in the Maintenance of International Peace and Security*, 1951, p. 97.

UN in the *Admission* case. In this case, it was argued that, pursuant to Art. 4 of the Charter, the SC as well as the GA has “complete freedom of appreciation in connection with the admission of new Members”. In its reply, the Court pointed out that: “[t]he political character of an organ cannot release it from the observance of the treaty provisions established by the Charter when they constitute limitations on its powers or criteria for its judgment. To ascertain whether an organ has freedom of choice for its decisions, reference must be made to the terms of its constitution.”²²

To conclude, the view expressed by some lawyers that the powers of the UN organs are unlimited has no ground in the light of the Charter and in the opinion of the majority of international lawyers. These organs, especially the GA and the SC, are obliged to adhere to the principles of international law and justice, are not absolved from the duty to observe the limitations and must not be permitted to derogate from the fundamental legal norms indicated by the Charter.²³ It also seems clear that the law and justice have an important place in the Charter and, consequently, in the life of the organisation. This conclusion leads to the question whether the UN organs are governed only by the provisions of the Charter or whether any other rules could regulate their exercise of their functions. The discussion will throw light on the sources of law in the UN.

1.2. Sources of law in the UN legal system

1.2.1. The Charter

As mentioned above, the UN Charter is considered to be the basic instrument of the organisation. Its provisions are the primary source of the UN practice. It provides

²² ICJ Rep., 1948, p. 64; Lauterpacht, E., “The Development of the Law of International Organisations by the Decisions of International Tribunals”, *RCADI*, 152, 1976, p. 391.

Also, in the *Peace Treaties* and *Reservations* cases, issues relating to the *ultra vires* acts of the GA arose. In these cases the Court did not deal with this matter specifically, and it found that it suffices to determine that these allegations are inapplicable in the cases under discussion. See Rosenne, S., *The Law and Practice of the International Court*, 1985, p. 715.

²³ In this regard, El-Erian notes that, “[w]hatever the legal nature of the powers attributed to an international institution, they are specific in the sense that they may be exercised only with respect to certain subject-matters prescribed by the constituent instrument”. El-Erian, A., “The Legal Organisation of International Society” in Sørensen, M. (ed.), *Manual of Public International Law*, 1968, p. 75; Scott, et al., *supra* note 7, p. 128; Lachs, M., “The Decision-Making Powers and the Judiciary within the United Nations” in *Essays in Honour of Stephen Verosta*, 1980, p. 397.

the general rules and limits which direct the organs and agencies of the UN whenever they act. No organ or agency can exceed these rules and limits.

Does this mean that - apart from the Charter - there are no other rules to govern the acts of the organs? The answer is that there are two additional sources of law within the UN: first, the rules of procedure and, second, the general rules of international law.

1.2.2. Rules of procedure

As mentioned above, the constitutional instrument of the organisation (the Charter) consists of general rules and principles. It rarely refers to the rules of procedure needed to regulate the daily work of its organs. Therefore, it was felt that these rules should be a separate instrument which could either be drafted by the organisation itself as general rules to apply to all organs or be drafted by each organ.

These rules mainly regulate the meetings of the organs, the right of participation, the presidency of the organs, the language, the secretaryship of the organs, the discussion of issues and the rules of voting, and the budgetary and administrative issues of the organs. They also determine the rules of the subsidiary organs.

1.2.3. Rules of international law and general principles of law

In addition to the Charter's provisions and the rules of procedure which regulate the practice of the functions of UN organs, the question has been raised whether these organs, when practising their functions, are under any obligation to respect the rules of international law and the general principles of law.

From the outset it should be noted that these general rules and principles determine the obligation to carry out international agreements, the duty to make reparation for breaches of obligation, the rule of good faith in carrying out international obligations, and the rule of abuse of right. Since these rules are applicable to all international legal persons, the question is whether or not these rules could regulate the activities of the UN organs.

The question can be answered in the affirmative on the following grounds. First, these rules have become an integral part of international law, which applies

not only to relations between states but also to relations between all international legal persons. Therefore, since the UN is considered to be an international legal person, these rules should cover its activities. Second, the drafters of the Charter and the Court's Statute confirmed the importance of these principles. This is recognised by Art. 1/1 of the Charter, which provides that the settlement of international disputes should be in conformity with international law. In addition, the general principles of law recognised by civilised nations as a primary source of international law are expressly provided by the Charter pursuant to Art. 38/1(c). Third, the application of these rules to the UN cannot be rejected on the basis that they were established before it came into existence. These rules apply to any state or international legal entity from the date of recognition of their status.

The applicability of these rules to the UN organs has been affirmed by international doctrine. For instance, Fitzmaurice, when dealing with SC resolutions concerning South Africa's rights under its mandate to administer the territory of South Africa, notes that the powers of the SC are limited by principles of international law. He states that:

“Even when acting under Chapter VII of the Charter itself, the Security Council has no power to abrogate or alter territorial rights, whether of sovereignty or administration ... This is a principle of international law that is as well-established as any there can be, and the Security Council is as much subject to it (for the United Nations is itself a subject of international law) as any of its individual member States are.”²⁴

In addition, Judge de Castro notes that “the Court, as a legal organ, cannot co-operate with a resolution which is clearly void, contrary to the rules of the Charter, or contrary to the principles of law”.²⁵

The applicability of these rules to the UN organs was affirmed by the ICJ itself in the *Namibia* case. In this case, it was argued by South Africa that a right of termination, in response to breach, does not arise in the absence of a specific treaty provision to this effect. The Court dismissed this argument and held that such a view would imply that the intention of the League had been to exempt the mandate system from general principles of law. The Court said:

²⁴ ICJ Rep., 1971, p. 294.

²⁵ Ibid., p. 180.

“The silence of a treaty as to the existence of such a right [termination for misconduct] cannot be interpreted as implying the exclusion of a right which has its source outside of the treaty ... the general principle of law according to which a power of termination on account of breach, even if unexpressed, must be presumed to exist as inherent in any mandate, as indeed in any agreement.”²⁶

This dictum was confirmed by the Court in the *WHO and Egypt* case. It affirmed that international organisations, like any international legal person, should be confined by the obligations imposed by the general principles of law.²⁷

It seems clear that, as noted by international lawyers and confirmed by the ICJ’s jurisprudence, the general principles of law and the principles of international law are considered to govern the UN organs’ acts whenever they exercise their functions.

To conclude, it could be said that the powers of UN organs are not absolute and should be restricted by various rules. These rules are provided in the Charter (as the constitutional instrument of the UN), the rules of procedure, and finally the general principles of law and the rules of international law. The question is: who ultimately guarantees that these rules are respected by the UN organs? Can the ICJ play a similar role within the UN as do constitutional courts in most domestic legal systems? Before examining this question the study will consider the judicial review in the national and international domains.

2. Judicial review in the national and international domains

Discussion of the role of the ICJ in the review of the legality of the UN organs first requires defining the term “judicial review” and then throwing light on this concept in national and other international domains that seem appropriate for providing a comprehensive view of the application of this concept.

2.1. What is meant by the term “judicial review”?

Judicial review in this context means that a judicial body within a legal system of the community reviews the legality of the decisions and acts of the executive and

²⁶ ICJ Rep., 1971, pp. 47-8; Hervener, N., “The South-West African Opinion. A New International Juridical Philosophy”, *ICLQ*, 24, 1975, p. 802.

²⁷ ICJ Rep., 1980, pp. 89-90.

legislative organs in the light of the existing rules of law and the provisions of the constitution that regulate their functions either directly or indirectly.²⁸ If illegality is found, it is the function of the court to annul it, amend it, or substitute its own decisions. The main objective of the practice of review by a legal organ is to determine the legal rights and interests of the applicant *vis-à-vis* the government so that legal order is maintained in the public interest.

2.2. Judicial review by domestic courts²⁹

As mentioned above, it is a well-established principle nowadays that all states' bodies are required to adhere to the law of the state. This means that the legislative and administrative powers of states are obliged to respect the rules of law and be subject to these rules. This principle is known as the "*état de droit*" or "principle of legality" or "rule of law".³⁰ The constitutional court in the domestic field is the ultimate guarantee by reviewing the legality of the acts of states' bodies. It operates to nullify *ultra vires* acts that are not in accordance with the existing constitution or superior norms.

Despite the fact that "judicial review" by constitutional courts has become a recognised principle in most domestic legal systems, the means of providing this procedure differ from one state to another. For example, in one country this power could be practised by all the courts, whereas others permit review only by the supreme court or by a court specially created for that purpose.³¹ There are several

²⁸ The term "judicial review" differs from the term "judicial appeal"; the latter procedure is carried out by a court of appeal, which is enabled to review the correctness of the judgments rendered by lower courts. See p. 316 *ff.* below.

²⁹ It should be mentioned that in dealing with this subject some references are needed concerning domestic jurisdiction. I have used these references not in the belief that they are in any way authoritative, but because they do help point up and illuminate some of the problems which the Court faces in this matter.

³⁰ The International Commission of Jurists has defined the term 'rule of law' as being "a convenient term to summarise a combination on one hand of certain fundamental ideals concerning the purposes of organised society and on the other of practical experience in terms of legal institutions, procedures and traditions, by which these ideals may be given effect". *The Rule of Law in Free Society: A Report on the International Congress of Jurists*, 1959, p. 191 (cited in Gunn, A., "Council and Court: Prospects in Lockerbie for an International Rule of Law", *FLRUT*, 52, 1993, p. 221, note 77.

³¹ Cappelletti, M., *Judicial Review in the Contemporary World*, 1971, p. 45; Brewer-Carias, *supra* note 1, pp. 91-3; Dijk, *supra* note 1, pp. 35 *ff.*

other points of difference: (i) the moment at which control of constitutionality is performed could be prior to review of the formal enactment of the particular act, or after the act has come into effect; (ii) the methods of judicial review vary from allowing the review to be incidental to another litigious issue to allowing it to be an independent action; (iii) the extent of the legal effects of the decision resulting from review could be *in casu et inter partes*, whereby it affects only the parties in a concrete process, or an *erga omnes* effect, whereby it is applicable to all members of the society; (iv) finally, the date of the effectiveness of the court's decision of non-legality is considered by some systems as *ex tunc, pro praeterito*, whereby it is considered that the acts have never existed and have never been valid, whereas other systems consider it as *ex nunc, proc futuro*, whereby the act is considered to have produced its effect until its annulment by the court.

In the light of the above, it could be argued that judicial review by constitutional courts of the acts of the political organs of government has had to be accepted by all legal systems as a necessary price for a predictable judicial process.

2.3. The practice of judicial review by international courts

The principle of "judicial review" was recognised in the international domain by several treaties in the pre-World War II period; for instance, the Treaty of Versailles, which provided an appeals procedure by the PCIJ against the decisions of the Office for Auditing and Compensations Regarding Payment and Recovery of Enemy Debts,³² the Barcelona Convention of 1921 on shipping routes, the Convention of 23 July 1921 on the status of the Danube, the Convention of 22 February 1922 regarding the Elbe Statute, and the German-Polish Convention of 15 May 1922 on Upper Silesia. All of these conventions stipulate the possibility of referring international decisions to an international tribunal in the event of the provisions of the conventions being violated or if a particular matter did not fall within the terms of reference of the body in question.³³

³² Arts. 386, 416, 417, 418 and annex to Art. 296, No. 2.

³³ Tsoutsos, A., "Judicial Supervision of International Legality", *RHDI*, 16, 1963, p. 271; Sohn, L., "Settlement of Disputes Relating to the Interpretation and Application of Treaties", *RCADI*, 150, 1976, pp. 244 ff.

Following World War II, and as a consequence of the proliferation of international organisations and of the wide powers of their organs to fulfil important functions in legislation and administration, it was strongly felt that judicial review procedures over the organs affiliated to these institutions were needed.

Within the European Communities this possibility has been provided for to a large extent. The European Court of Justice (ECJ) has clear power to review the legality of the acts of the Community institutions.³⁴ The Treaty of Paris which established the European Coal and Steel Community (ECSC) provides in Arts. 33 and 38 the possibility of judicial review by the ECJ.³⁵ Pursuant to these articles, the Court has the power to ensure respect for the law in the interpretation and application of that treaty and its rules of execution. It also has the competence to annul the decisions and recommendations of the High Authority on the request of any member or of the Council. The request should be made within one month of the publication or notification of a challenged decision.³⁶ Similarly, the treaty of the European Economic Community (EEC) authorises, pursuant to Art. 173/1, the ECJ with the power to annul any act of the Council and the Commission upon the request of any member states, the Council, the Commission, the European Parliament, the European Central Bank, and natural and legal persons. In addition, Art. 146/1 of the European Atomic Energy (Euratom) treaty empowers the ECJ with the jurisdiction to annul any decision of the Council and the Commission.³⁷ The request for annulment should be submitted within two months of the publication or notification of the challenged decision.³⁸

The grounds of illegality that may be put forward are: lack of competence, infringement of essential procedural requirements, infringement of the relevant

³⁴ Creally, E., *Judicial Review of Safeguard Measures in the European Community*, Ph.D. Thesis (University of Edinburgh), 1991, pp. 11 ff.; Schermers, H., *Judicial Protection in the European Community*, 1987, pp. 139 ff.

³⁵ Lauterpacht, E., "The Legal Effect of Illegal Acts of International Organisations" in *Cambridge Essays in International Law. Essays in Honour of Lord McNair*, 1965, p. 96; Dijk, *supra* note 1, pp. 244-5.

³⁶ Art. 38/2 of the treaty.

³⁷ Brown, L., et al., *The Court of Justice of the European Communities*, 1994, pp. 125 ff.; Bowett, *supra* note 11, p. 306

³⁸ Art. 173/2 of the EEC treaty, Art. 146/2 of the Euratom treaty.

Community treaty or of any rule of law relating to its application, and misuse.³⁹ If the Court finds that the request is well founded, it may annul only the challenged act; it cannot modify or replace it or order that a specific decision be taken.⁴⁰ All the above institutions are obliged to take the necessary measures to comply with judgments of the Court.⁴¹

To conclude, it seems clear that these institutions are based on the rule of law, granting rights to their members. They explicitly provide for the possibility of judicial review of the legality of acts of Community institutions. There is no doubt that the adoption of this principle in the field of international institutions is considered to be an important right to the member states as regards the acts of the organs of international organisations.

3. Judicial review by the ICJ in the framework of the UN

In dealing with the power of the ICJ to review UN acts, a distinction should be made between the specialised agencies of the UN and its political organs.

3.1. Judicial review of the acts of the specialised agencies

3.1.1. Constitutional provisions

The principle of judicial review was adopted in the constitutions of some specialised agencies that have an interrelationship with the UN. The constitution of the International Labour Organisation (ILO), both the original one of 1919 and the revised one of 1946, stipulates that a government refusing to accept recommendations made by the ILO, or a Commission of Inquiry constituted by it, must, within three months after publication of the report and the recommendations, inform the Director General “whether it proposes to refer the complaint to the International Court of Justice”.⁴²

³⁹ Art. 33/1 of the ECSC treaty, Art. 173/1 of the EEC treaty, Art. 146/1 of the Euratom treaty.

⁴⁰ Dijk, *supra* note 1, pp. 245-6.

⁴¹ Art. 34 of the ECSC treaty, Art. 176 of the EEC treaty, Art. 149 of the Euratom treaty.

⁴² Art. 29.

Art. 84 of the Chicago Convention on International Civil Aviation (ICAO) also stipulates that “any disagreement” between two or more contracting parties that is not settled by negotiation shall, “on the application of any state concerned in the dispute”, be decided by the Council of the ICAO. Appeal may be made after Council action “to an *ad hoc* arbitral tribunal agreed upon with the other parties to the dispute” or, if the parties have accepted the Statute of the International Court, to that Court.⁴³

3.1.2. The jurisprudence of the ICJ as a constitutional court

The ICJ has exercised its power of judicial review over the acts of the specialised agencies in two cases.

The first case was the *IMCO* case.⁴⁴ The question posed to the Court was:

“Is the Maritime Safety Committee of the Inter-Governmental Maritime Consultative Organisation, which was elected on 15 January 1959, constituted in accordance with the Convention for the Establishment of the Organisation?”⁴⁵

The Court was clearly being asked to determine whether the Assembly had acted constitutionally when it elected the members of the Maritime Safety Committee. Before referring to the Court’s opinion it seems appropriate to note that Art. 12 of the Convention establishing IMCO provides that one of the organs of the organisation shall be the Maritime Safety Committee. Art. 28 of the Convention governs the membership of the Committee. At the first IMCO Assembly in 1959, the members proceeded to hold an “election”, adopting as the basis of voting a list of the names of member states in order of total gross registered tonnage. On this list Liberia was third and Panama eighth. In electing the eight members, which had to be the largest ship-owning nations, however, the Assembly elected neither Liberia nor Panama.

⁴³ In addition to these conventions, Art. 96 of the International Trade Organisation stipulates the possibility for reference to the ICJ for judicial review by request of an advisory opinion on any decision of the Trade Conference, at the simple request of a member state wronged by the decision. See Rubin, S., “The Judicial Review Problem in the International Trade Organisation”, *HLR*, 63, 1949, p. 78 *ff.*

⁴⁴ Now the International Maritime Organisation (IMO).

⁴⁵ ICJ Rep., 1960, p. 151.

This election led to a debate over the interpretation of Art. 28 of the Convention, as the result of which the above question was referred to the Court. Before the Court it was contended that the Assembly was entitled to refuse to elect Liberia and Panama because it had discretionary power to determine which members of the organisation have an important interest in maritime safety. It was also argued that the Assembly had discretionary power to determine which were the largest ship-owning nations.⁴⁶ The Court first examined the term “elected” in the light of the drafts of the 1946 United Maritime Consultative Council and the 1948 United Nations Maritime Conference. It then examined the meaning of the phrase “the largest ship-owning nations”. The Court concluded that the decision taken by the Assembly could not be justified by reference to the basic instrument of the organisation and decided the unconstitutionality of the election to be an unlawful act because it had failed to comply with Art. 28 of the Convention. It stated that:

“the Maritime Safety Committee of Inter-Governmental Maritime Consultative Organisation which was elected on January 15, 1959, is not constituted in accordance with the Convention for the establishment of the organisation.”⁴⁷

The second case referred to the ICJ as a constitutional court was the *Appeal Relating to the Jurisdiction of the ICAO Council* case (1972).⁴⁸ The case arose from the suspension by India of overflights of Indian territory by Pakistani civil aircraft, following an incident involving the diversion of an Indian aircraft to Pakistan. Pakistan had brought the matter to the Council of the International Civil Aviation Organisation (ICAO), the UN specialised agency regulating international civil aviation, which was established under the Chicago Convention of 1944. The Council of the ICAO assumed jurisdiction and adopted a decision on 29 July 1971 regarding the matter. India challenged this decision as a non-constitutional act because the Council had no jurisdiction and it requested the Court to declare that the Council’s decision was illegal, null and void.⁴⁹ India argued that the Chicago

⁴⁶ ICJ Rep., 1960, p. 165 *ff.*; Lauterpacht, *supra* note 35, pp. 100-1.

⁴⁷ ICJ Rep., 1960, p. 171.

⁴⁸ Hereinafter the *ICAO* case.

⁴⁹ ICJ Rep., 1972, pp. 49 *ff.*; Fitzgerald, G., “The Judgment of the International Court of Justice in the Appeal Relating to the Jurisdiction of the ICAO Council”, *CYIL*, 12, 1974, pp. 153-63;

Convention and the other international agreement on which the Council jurisdiction was based had been terminated or suspended between India and Pakistan. It contended that the parties had adopted a special agreement (Transit Agreement) on the resumption of overflights across each other's territory. Therefore it concluded that "no question of a disagreement ... relating to the interpretation or application of the Chicago Convention and its annexes" could arise. The ICJ first had to interpret the Chicago Convention and the Transit Agreement, which provide judicial recourse by way of appeal to the Court against decisions of the Council.⁵⁰ It concluded that its supervision of the validity of the Council's acts made no distinction between supervision as to jurisdiction and supervision as to merits.⁵¹ Having reached this conclusion, the Court decided that the Council of the ICAO was competent to entertain the application and consequently its act and subsequent resolutions were lawful and in accordance with the constitutional instrument.⁵²

In the light of these two precedents, it can be concluded that the ICJ does practise its power of judicial review of the acts of specialised agencies. Its decisions in these two cases as to the legality of the acts of the organs affirm that the Court is capable of playing an important role as a constitutional court and thereby is able to preserve the rule of law within the framework of the UN.

3.2. Judicial review by the ICJ of the acts of the political organs of the UN

Having referred to the constructive role of the ICJ in reviewing the constitutionality of the organs of the specialised agencies, the question is whether the ICJ has a similar role to play as regards the acts of the principal organs of the UN.⁵³ The

Rosenne, S., "The International Court of Justice and International Arbitration", *LJIL*, 6, 1993, pp. 313-18.

⁵⁰ ICJ Rep., 1972, p. 55.

⁵¹ Ibid., p. 60-1.

⁵² Ibid., p. 70.

⁵³ It should be noted that this question is restricted to the ICJ's power to examine the legality of the UN organs' acts. This means that it has no power to declare a provision of the Charter invalid or void in the way that federal and some unitary constitutions expressly empower their supreme courts to declare invalid not only the organic laws but also the constitutional provisions themselves. In this regard, Elias observes that "the nature of the organisation and of its operation would not seem to be such as to invite the inclusion in the Charter of any provision of this nature". Elias, T., *New Horizons in International Law*, 1979, pp. 89, 91.

importance of this question derives from the fact that, according to the Charter, these organs have wide powers to achieve the objectives of the UN. These powers may take various forms - from deliberations, recommendations and initiation of studies to the adoption of binding decisions.⁵⁴ In addition, these organs are under several limitations when they exercise their functions according to the Charter, their rules and the principles of international law.⁵⁵

Against this background, it is a matter of no small importance to ask whether or not the ICJ possesses the capacity to condemn acts of the UN organs as *ultra vires*. Such questions might arise despite the assertion by international lawyers and the ICJ in several cases that the resolutions of UN organs must enjoy an initial presumption of validity.⁵⁶ However, it could be argued that an act adopted by a political organ of the UN is manifestly *ultra vires* if it breaches the law or exceeds its powers. For instance, the GA could adopt a decision regarding an important question by a simple majority, contrary to the provision of Art. 18 of the Charter. The SC might also adopt a decision regarding an international dispute under Chapter VI when a party to this dispute has participated in the voting, or a decision that represents a miscarriage of justice, or a decision contrary to the objects and purposes of the UN. It can be asked what the legal consequences are if these acts are perceived by the majority of states to be unconstitutional. Considerations of justice and fairness prevent these acts from being accepted as immune from scrutiny, and indeed require them to be reviewed. Could the ICJ be considered capable of fulfilling this role?

*These are procedural violations
This issue is not controversial*

⁵⁴ See Arts. 4, 5, 6, 17, 18, 19, 25, 41, 52 and 63 of the Charter.

⁵⁵ See pp. 265 *ff.* above.

⁵⁶ In the *Expenses* case, the ICJ noted that "when the Organisation takes action which warrants that it was appropriate for the fulfilment of one of the stated purposes of the United Nations, the presumption is that such action is not *ultra vires* the organisation". ICJ Rep., 1962, p. 168. This view was subsequently affirmed by the Court in the *Namibia* case in the following terms: "[a] resolution of a properly constituted organ of the United Nations which is passed in accordance with that organ's rules of procedure, and is declared by its president to have been so passed must be presumed to have been validly adopted." ICJ Rep., 1971, p. 10. Lauterpacht addresses this point when he notes that "[the ICJ] did not seek to avoid the proposition that every act must be justified by reference to the powers of the Organisation. Instead, it stated merely that there is a presumption that an act is within the powers of the Organisation if it is done for the purposes of the Organisation ... This presumption is not an irrebuttable one." Lauterpacht, *supra* note 35, pp. 88, 110, 117.

From the outset, it should be noted that, despite the emergence of this issue in the *travaux préparatoires* stage, the Charter and the Court's Statute are silent in this respect. This silence has led to great disagreement among lawyers regarding the Court's power to exercise judicial review over the acts of the political organs. In order to form an opinion, the study considers first the discussion of this issue during the *travaux préparatoires* of the Charter, then the opinion of international lawyers, and finally the Court's attitude.

3.2.1. Judicial review of the political organs' acts in the *travaux préparatoires*

The question of review of the legality of the UN political organs was raised at the UN Conference at San Francisco. At this stage, the Belgian delegate in the Commission dealing with the question of the peaceful settlement of international disputes by the SC proposed an amendment that would give any state that is party to a dispute and up for discussion before the Council the right to request "an advisory opinion from the Court as to whether the decision respected its independence and vital rights". According to this amendment, if the Court decides that such rights have been violated or threatened, the Council would either reconsider the issue or refer it to the GA.⁵⁷ This view was upheld by Colombia, which argued that "confidence" in the SC "should not exclude confidence in the International Court of Justice".⁵⁸

These proposals were rejected by some delegations on the basis that the working drafts already required the SC to act "in accordance with the purposes and principles of the Organisation" and "with due regard to principles of justice and international law".⁵⁹ Specifically, it was noted by the Soviet Union that "the Security Council should receive the full confidence" of members of the organisation, and that "there should be no question in the minds of any delegates that the Security Council might wish in any way to infringe the rights of a sovereign

⁵⁷ See UNCIO, 3, pp. 331, 332-6

⁵⁸ See UNCIO, 12, pp. 47, 48.

⁵⁹ Caflisch, L., "Is the International Court Entitled to Review Security Council Resolutions Adopted under Chapter VII of the United Nations Charter?" in Al-Nauimi, N., et al. (eds.), *International Legal Issues Arising Under the United Nations Decade of International Law*, 1995, pp. 651-2.

state". Consequently, it concluded that the Belgian amendment would "weaken" the Council, which might even be made a "defendant before the Court".⁶⁰ The USA also noted that the Dumbarton Oaks Proposal already permitted states to appeal "on any matter which might properly go before the Court". It concluded that for both reasons the amendment was unnecessary.⁶¹ Finally, the UK rejected the proposals on the basis that this would involve the Court in political questions, not legal ones. According to this view, these proposals would cause delay at times when prompt action by the Council was required and, hence, be prejudicial to the success of the organisation.⁶²

As a consequence, the proposal was withdrawn by Belgium when it became apparent that it was not going to get majority support.⁶³ Therefore, the Charter was adopted without any reference to the Court's power as a constitutional court in the UN system. Nor did the Court's Statute refer in any of its provisions to the Court's role in reviewing the validity of other organs' acts.⁶⁴

3.2.2. Judicial review of the political organs' acts in international doctrine

Discussion of the power of the ICJ to act as a constitutional court within the UN has its roots in the early days of the UN. The question nonetheless remains unsettled and is considered to be one of the most controversial issues in international doctrine. It has been noted by some lawyers that the ICJ cannot act as a

⁶⁰ See UNCIO, 12, pp. 47, 48; Kelsen, *supra* note 6, pp. 446-7, note 8.

⁶¹ See UNCIO, 12, p. 49.

⁶² *Ibid.*, p. 65.

⁶³ Franck, T., "Remarks by Professor Thomas Franck" in *UN Checks and Balances: The Roles of the ICJ and the Security Council. ASIL/NVIR Proceedings (Contemporary International Law Issues: Opportunities at a Time of Momentous Change - Proceedings of the Second Joint Conference held in the Hague, The Netherlands: July 22-24, 1993)*, p. 282; Watson, G., "Constitutionalism, Judicial Review, and the World Court", *HILJ*, 34, 1993, pp. 4-5.

⁶⁴ In 1947, the Australian delegation presented a proposal for a resolution that the International Court of Justice be changed into an institution that would control the activity of the organs of the United Nations. The Legal Committee approved three proposals for resolutions. The General Assembly endorsed the resolution recommending that the organs of the United Nations and the special institutions "revise from time to time the difficult and grave questions falling under the jurisdiction of the International Court of Justice, that originated in the course of their activity, concerning the principal question which it is desirable to settle, including questions concerning the interpretation of the Charter of the United Nations or also its special institutions". See Azud, J., *The Peaceful Settlement of Disputes and the United Nations*, 1970, p. 140.

constitutional court in the UN. In other words, it is not the “guardian of the Charter” in the way federal constitutional courts are “guardians of the constitution” in some federal systems.⁶⁵ According to this view, once a decision is adopted by any political organ of the UN it will be immune from judicial review by the ICJ.⁶⁶ This opinion is based on the following grounds. First, a constitutional role is not needed within the UN system because the Charter gives its organs discretionary power to act. For instance, if the Council determines that it has to take action under Chapter VII and decides by a qualified majority to do so, this is considered to be a political decision and not a legal one. Therefore, this act should not be hampered by the Court’s procedures. Second, empowering the ICJ with such power would clearly be dangerous. As noted by the Australian delegation before the SC in the discussion of the Indonesian question: “in every case that has come before the Council, this question of competence or jurisdiction has been raised. If we decide on every occasion to refer a question to the International Court before we decide to take any action whatever, the result would be that we would never take any action.”⁶⁷ Third, in accordance with the principle of the separation of powers in the domestic domain, judicial review is explicitly given to domestic courts as judicial bodies because the exercise of this power by them is considered to be an exception to the above principle. By analogy, this principle should be applied to UN law and, therefore, the Court should be deprived of any power in this regard because there is no express provision entitling it to possess the power of judicial review. Fourth, it is noted that the Charter itself imposes sufficient constitutional limitations upon

⁶⁵ Rosenne, S., *The World Court - What It Is and How It Works*, 1995, p. 36; Evans, S., “The Lockerbie Incident Cases: Libyan-Sponsored Terrorism, Judicial Review and the Political Doctrine”, *MJILT*, 18, 1994, pp. 35-6; Koskenniemi, M., “The Police in the Temple. Order, Justice and the United Nations: A Dialectical View”, *EJIL*, 6, 1995, pp. 341-2.

⁶⁶ Judge Petrán noted: “a political organ is entitled to take a decision upon grounds which are admittedly of a legal nature, but the validity of which cannot be examined by the Court once the political organ has taken its decision within its proper sphere of competence.” ICJ Rep., 1971, pp. 132-3. In this respect, see Lissitzyn, O., “International Law and the Advisory Opinion on Namibia”, *CJTL*, 11, 1972, p. 50; Falk, R., *Reviving the World Court*, 1986, p. 162; Walferum, R., “The Security Council: Its Authority and Legitimacy”, *ASILP*, 87, 1993, p. 320; Gill, T., “Remarks by Terry Gill” in *UN Checks and Balances: The Roles of the ICJ and the Security Council. ASIL/NVIR Proceedings (Contemporary International Law Issues: Opportunities at a Time of Momentous Change - Proceedings of the Second Joint Conference held in the Hague, The Netherlands: July 22-24, 1993)*, pp. 284 ff.

⁶⁷ SC 19th mtg., 25 August 1947.

these organs' conduct to obviate the need for any judicial role in most circumstances. For instance, the expansion of the number of non-permanent seats on the Council in 1963 from six to ten shows that these political checks and balance are an adequate constraint on Council conduct.⁶⁸

The above view is rejected by a number of lawyers who consider that the ICJ is the "guardian of the Charter" because there is no reason to believe that the Court cannot fulfil this role.⁶⁹ This view is based on the following grounds. First, the withdrawal of the Belgian proposal can hardly be interpreted as an indication that the drafters declined to give the Court the power of judicial review. On the contrary, it simply reflects Belgium's realisation that judicial review of the SC recommendations taken under what is now Chapter VI was unnecessary because those recommendations would not be binding anyway. Withdrawal of that proposal had nothing to do with the acceptability of judicial review for binding SC decisions, such as those taken pursuant to Chapter VII of the Charter.⁷⁰ Second, there is no provision in the Charter that would hinder the Court from exercising such a jurisdiction. On the contrary, the Charter's draft and its text are indeed vital to claims that the Court enjoys a robust power to review the validity of UN acts' formal or substantive legality.⁷¹ Third, the Court's power to review the acts of the UN organs is granted as a consequence of the Charter and the Statute empowering it to give advisory opinions. Elias stresses this point and considers it to be a very important basis for the Court's role in this regard. He asserts that it would often

⁶⁸ Reisman, W., "Constitutional Crisis in the United Nations", *AJIL*, 81, 1993, p. 83. It also has been noted by White that "the veto operates as a safeguard against the adoption of *ultra vires* resolutions". White, *supra* note 8, p. 109.

⁶⁹ Gros, A., "The Problem of Redress Against the Decision of International Organisations", *GS*, 36, 1951, p. 30; Lachs, *supra* note 23, pp. 399-400; Graefrath, B., "Leave to the Court What Belongs to the Court: The Libyan Case", *EJIL*, 4, 1993, pp. 200-1, 203; Tomuschat, C., "The Lockerbie Case before the International Court of Justice", *RICJ*, 48, 1992, p. 48; Kennedy, R., "Libya v. United States: The International Court of Justice and the Power of Judicial Review", *VJIL*, 33, 1993, pp. 909 *ff.*

⁷⁰ Watson, *supra* note 63, p. 11.

⁷¹ In this regard, it has been noted by Schlochauer that the Court "occupies a special position in relation to the other five principal organs, into whose hierarchic structure it is not integrated". Schlochauer, H., "International Court of Justice", *EPIL*, 1, 1981, pp. 73-4; see also Gunn, *supra* note 30, p. 239; Kooijmans, P., "The Advisory Opinion on Namibia of the International Court of Justice", *NTIR*, 20, 1973, p. 25.

seem to be overlooked by those opposed to the Court's exercise of its judicial review.⁷² Fourth, it has been said that there should be no fear of entitling the ICJ to play such a role because it will be directed by the main purposes of the UN. Fifth, the Court's function of legitimisation should not be seen as undermining the effectiveness of the actions adopted by the political organs of the UN. Indeed, the function of the institution might well be undermined if it is not recognised as legitimate by those who are called upon to implement its decisions.⁷³ Sixth, the fear that the role of the political organs, especially the SC, would be obstructed as a consequence of judicial review by the Court is overdone. There is no question of referring to the Court *any action whatever* the Council takes in the course of its day-to-day business. This view is based on the report of Committee IV/I, which accepted the idea that each organ is entitled to interpret the Charter's provisions relevant to its own routine. Thus only important questions, ones that raise very delicate points or affect the obligations of states, would be referred to the Court for an interpretation of the relevant texts.⁷⁴ Seventh, it would be contrary to the rule of law for the political organs to be completely insulated from legal scrutiny. These organs are not infallible and, when they err, the Court, as the guardian of the legality of the UN system, must not decline to make a legal judgment. Accordingly, if member states cannot turn to the Court when their essential rights have been breached by the political organs' actions, then there is no "rule of law" within the UN system and these states can refuse to co-operate with the organisation.⁷⁵ In this regard, White states:

"Arguably one of the most important elements of the concept of the rule of law is to have a legal method of reviewing the actions of government, particularly the executive branch. If one sees the UN as a nascent form of world government with the Council as the executive body, then for the Rule of Law ideal to be established there needs to be judicial review, just as the Supreme Court of the United States can review the actions of government."⁷⁶

⁷² Elias, *supra* note 53, p. 89.

⁷³ Gowlland-Debbas, V., "The Relationship between the International Court of Justice and the Security Council in the Light of the Lockerbie Case", *AJIL*, 88, 1994, p. 677.

⁷⁴ Bedjaoui, *supra* note 18, pp. 16-17.

⁷⁵ Weller, M., "The Lockerbie Case: A Premature End to the 'New World Order'?", *AJICL*, 4, 1992, p. 324; Scott, et al., *supra* note 7, pp. 83, 128.

⁷⁶ White, N., "The Security Council and the Rule of Law", *ILACC*, 1, 1995, p. 29.

Eighth, in reply to the argument that the political checks and balances of the SC are the guardian of the Council's acts, the advocates of this view note that this opinion is premised on the existence of a Charter-mandated circle of freedom within which the SC's authority is (or should be) unfettered by external sources. There is no general hierarchical structure in the Charter as between the Council and the Court, because the operative principle is one of concurrent rather than exclusive authority. If such a system is to be effective, then by definition the checks and balances that set the bounds of each organ's authority cannot be exclusively internal to each organ. This is one of the necessary components of inter-institutional comity and the "fruitful interaction".⁷⁷ Ninth, it has been noted that the Council comprises the representatives of fifteen member states (five permanent members with ten additional members normally elected by the GA for two-year periods). It is said to be a political rather than a judicial organ because its members are not independent. The Court, by contrast, is composed of fifteen judges elected by the Assembly and the Council irrespective of their nationalities. Therefore, apart from the Secretariat, the Court is the only principal organ of the UN not composed of representatives of governments. The Court's judges are independent and are granted diplomatic privileges and immunities during their term of office. Hence, it has been argued that the impartiality of the Court is a recommendation for the organ's competence to review the validity of SC resolutions.⁷⁸ Tenth, the ICJ's power of judicial review is also based on the notion of fairness in international law. It has been noted that "the Court may have to be the last-resort defender of the system's legitimacy if the UN is to continue to enjoy the adherence of its members. This seems to be tacitly acknowledged judicial common ground, and is an elementary prerequisite of fairness in the Council's exercise of its newly ebullient powers."⁷⁹ In the same direction, Alain Pellet stressed before the ILC that the Court should always satisfy itself that any given decision of the SC is legally correct, and that SC decisions must at least comply with the norms of *jus cogens* and certainly should not be contrary to

⁷⁷ Scott, et al., *supra* note 7, p. 91.

⁷⁸ Gunn, *supra* note 30, p. 240.

⁷⁹ Franck, T., *Fairness in International Law and Institutions*, 1995, p. 244.

the Charter itself, which is definitely superior to the SC.⁸⁰ Finally, several ICJ judges have referred to the basic judicial function of the Court as a ground for justifying its power of judicial review over the acts of the political organs. For instance, Judge Spender noted that:

“The question of the constitutionality of action taken by the General Assembly or the Security Council will rarely call for consideration except within the United Nations itself, where a majority rule prevails. In practice this may enable action to be taken which is beyond power. When, however, the Court is called upon to pronounce upon a question whether a certain authority exercised by an organ of the Organisation is within the power of that organ, only legal considerations may be invoked and *de facto* extension of the Charter must be disregarded.”⁸¹

Judge Morelli also stressed that:

“It is exclusively for the Court to decide, in the process of its reasoning, what are the questions which have to be solved in order to answer the question submitted to it ... the organ requesting the opinion is quite free as regards the formulation of the question to be submitted to the Court; it cannot, once that question has been defined, place any limitations on the Court as regards the logical processes to be followed in answering it ... Any limitation of this kind would be unacceptable because it would prevent the Court from performing its task in a logically correct way.

The Court would therefore be obliged to consider either the question of the conformity of the resolutions with the Charter, or the question of the validity of the resolutions, should it recognise that it is necessary to dispose of one or other of these questions in order to answer the question of characterisation of the expenditures. Should the Court on the contrary not recognise any such necessity, it should refrain from considering the questions.”⁸²

Moreover, Judge Onyeama noted that:

“I do not conceive it as compatible with the judicial function that the Court will proceed to state the consequences of acts whose validity is assumed, without itself testing the lawfulness of the origin of those acts.”⁸³

Finally, Judge Dillard noted that:

“But when these organs do see fit to ask for an advisory opinion, they must expect the Court to act in strict accordance with its judicial function. This function precludes it from accepting, without any enquiry whatever, a legal conclusion which itself conditions the nature and the scope of the legal consequences flowing from it.”⁸⁴

⁸⁰ UN Doc. A/CN. 4/SR. 2257, 16, 8 May 1992.

⁸¹ ICJ Rep., 1962, p. 197.

⁸² Ibid., pp. 217-18.

⁸³ ICJ Rep., 1971, p. 144.

⁸⁴ Ibid., p. 151.

Despite the persuasive grounds of this view, it seems appropriate also to examine carefully the jurisprudence of the ICJ with regard to its power of judicial review to see how the ICJ has exercised its function of judicial review.⁸⁵

3.2.3. The ICJ's jurisprudence: Recognition of its power of judicial review

The allegation of the acts of the political organs being *ultra vires* has been raised in several cases before the Court since the early days of its existence. The Court's jurisprudence in this respect can be classified as explicitly and implicitly recognising its power of judicial review.

(i) Explicit recognition of judicial review

The Court has explicitly recognised its power of judicial review in several cases where it made express opinions regarding the legality and constitutionality of the acts of UN political organs.

In the *Admission* case, the Court was asked to give an opinion as a consequence of Russia conditioning its assent to the admission of Italy and Finland to the United Nations on the simultaneous admission of Bulgaria, Hungary and Rumania. Russia contended before the SC that, under the Potsdam Agreement and the Paris Peace Treaties, these five ex-enemy states should be admitted together.⁸⁶ On the other hand, Art. 4 of the Charter exclusively enumerated the conditions of admission. Therefore, the GA requested the ICJ to give an opinion regarding the vote of a member when the GA and the SC are dealing with an application for admission to the UN. The Court concluded that the enumeration of conditions in Art. 4 is exhaustive and that, if a member make its consent to the admission of a state dependent on the admission of other states, it would be introducing an extraneous condition in violation of the Charter.⁸⁷

The Court's examination of the constitutionality of the acts of UN organs was manifestly illustrated in the Court's opinion regarding the *Second Admission* case.

⁸⁵ Note that there would seem to have been no cases of judicial review undertaken by the PCIJ. The absence of any organic link between the League and the PCIJ made it unthinkable that the PCIJ should review the structure and competence of the League Council and the League Assembly if such questions were ever referred to it. See Elias, *supra* note 53, pp. 87-8.

⁸⁶ UN Doc. S/P.V. 204, 25 September 1947.

⁸⁷ ICJ Rep., 1948, p. 62

This case was referred to the Court because of the difficulties encountered in the SC in effectuating the admission of new members.⁸⁸ Therefore, the GA adopted a resolution requesting the Court to give an opinion on the question: “Can the admission of a state to membership in the United Nations, pursuant to Article 4, paragraph 2, of the Charter, be effected by a decision of the General Assembly when the Security Council has made no recommendation for admission by reason of the candidate failing to obtain the requisite majority or of the negative vote of a permanent member upon a resolution so to recommend?”⁸⁹ The Court answered the question in the negative when it stated that under Art. 4/2 of the Charter both “recommendation” by the SC and a “decision” by the GA are required to effect the admission of a state to the UN. Further, the Court pointed out that the language of Art. 4/2 is clear and unambiguous and the recommendation of the SC is indispensable.⁹⁰

In addition to the above cases, the Court’s practice in the *Expenses* case is the best example of its understanding of its role as a constitutional court.⁹¹ A proposal was made by France to request the ICJ to give an opinion on the question whether or not GA expenses relating to operations were “decided on in conformity with the provisions of the Charter”. It seems clear that this proposal was directed at enabling the Court to review the legality of the Assembly’s act. This proposal was rejected by the Assembly, which adopted a resolution to request an opinion from the Court to determine whether certain expenditures had been validly authorised by a series of GA resolutions as the “expenses of the organisation within the meaning of Article 17/2 of the Charter of the United Nations”.⁹² It could be noted that substantially there is no great difference between the final draft of the resolution and the French proposal. This fact was affirmed by the practice of the Court and its opinion, as will be illustrated below.

⁸⁸ See pp. 136 *ff.* above.

⁸⁹ ICJ Rep., 1950, p. 7 *ff.*

⁹⁰ Ibid.

⁹¹ For the facts of this case, see pp. 134 *ff.* above.

⁹² ICJ Rep., 1962, p. 152.

Before the Court, it was argued that the GA cannot impose financial obligations as a consequence of an *ultra vires* act.⁹³ In addition, it was argued that it is universally recognised in international law that none of the parties to a treaty is obliged to bear more responsibility than was assumed by it according to the treaty. Because the UNEF was set up in violation of the Charter, it was concluded that: "it is beyond any shadow of doubt that the problem of financial obligations is closely connected with that of the legality of corresponding measures under the terms of the Charter."⁹⁴ Moreover, it was contended that "the financial implications of all operations undertaken by the United Nations are inseparably linked with the legal basis on which each of the operations undertaken by it rests".⁹⁵ It was also argued that "where steps are validly taken by the organisation for the maintenance of international peace and security ... the [General Assembly] is competent under Article 17/1 of the Charter to authorise the necessary expenditure".⁹⁶ Finally, the Attorney-General of the UK expressly announced before the Court that there was no power to apportion expenditure arising out of *ultra vires* actions.⁹⁷ It seems clear from these arguments that the legality of the GA resolution was a subject of consideration before the Court and had to be decided by it.⁹⁸

Despite the Court's reference in its opinion that, under the UN Charter, no procedure exists for determining the validity of an organ's act and its statement that each organ must, in the first place at least, determine its own jurisdiction, the Court concluded that the rejection of the French proposal by the Assembly did not preclude it from deciding whether the expenditures were "decided on in conformity with the provisions of the Charter, if the Court finds such consideration appropriate". It added that "it must have full liberty to consider all relevant data available to it for an advisory opinion".⁹⁹

⁹³ ICJ Pled., 1961, pp. 132-4.

⁹⁴ Ibid., pp. 397, 402.

⁹⁵ Ibid., p. 177.

⁹⁶ Ibid., p. 242.

⁹⁷ Ibid., p. 336.

⁹⁸ Lauterpacht, *supra* note 35, p. 107.

⁹⁹ ICJ Rep., 1962, p. 157.

The Court rejected the argument that these operations were unconstitutional because they encroached on the SC's monopoly of the use of armed forces. The Court made a distinction between enforcement action under Chapter VII, which is a monopoly of the SC, and peace-keeping operations not amounting to enforcement action. It also held that:

"The Court does not perceive any basis for challenging the legality of the settled practice of including such expenses as these in the budgetary amounts which the General Assembly apportions among the Members in accordance with the authority which is given to it by Article 17, paragraph 2."¹⁰⁰

Further, it said that:

"When the Organisation takes action which warrants the assertion that it was appropriate for the fulfilment of one of the stated purposes of the United Nations, the presumption is that such action is not *ultra vires*."¹⁰¹

By this opinion the Court granted the constitutionality of the Assembly's act.¹⁰² It is clear that the Court examined the act of the GA and expressly decided its legality in the light of the objects and purposes of the UN as provided in Art. 1 of the Charter. This opinion also clarified the Court's attitude towards examining the legality of the political organs' acts even without an express request by the UN organ to that effect.¹⁰³

This express practice of judicial review was exercised by the Court in the *Namibia* case.¹⁰⁴ In the debates preceding the making of the request, some members of the SC denied the Court's power to pass comment upon the validity or otherwise of the various resolutions of the SC and the GA.

Before the Court, the validity of the GA and the SC resolutions was challenged on two grounds. First, the formal validity of these acts was challenged by some

¹⁰⁰ Ibid., p. 162.

¹⁰¹ Ibid., p. 168.

¹⁰² In this regard, Higgins notes that, "[i]n 1962, the International Court of Justice confirmed the legality of such peace-keeping action, both in Suez and in the Congo". Higgins, R., "Peace and Security Achievements and Failures", *EJIL*, 6, 1995, p. 448.

¹⁰³ Watson, *supra* note 63, pp. 15, 17; De Aréchaga, E., "The Work and the Jurisprudence of the International Court of Justice 1947-1986", *BYIL*, 58, 1987, p. 3.

¹⁰⁴ In respect of the facts of this case, see pp. 148 *ff.* above.

states. It was noted that, pursuant to Art. 32 of the Charter, any member of the UN that is a party to a dispute and is not a member of the Council should be invited to participate, without a vote, in the discussion of the Council relating to the dispute. It was argued that, because South Africa had not been invited to participate in the deliberations of the SC concerning the revocation of the mandate, the provision of this article had been violated. Furthermore, pursuant to Art. 27 of the Charter, non-procedural decisions of the SC should be made by an affirmative vote of nine members, including the concurring votes of the permanent members. It was contended that the resolution containing the request for an advisory opinion had been adopted despite the abstention of some permanent members of the Council. Moreover, these states rejected the declaration adopted by some UN organs that abstention is regarded as equivalent to concurring, and that Art. 27 has accordingly become modified by conduct. It was noted that the Charter can be amended only in a manner expressly provided for in the Charter. Further, it was contended that, even if some modifications had taken place, the countries that abstained made it clear in their contemporaneous statements that they were not concurring, and thus these abstentions could not possibly be regarded as compliance with the requirements of the Article.

Second, it was argued that the GA had acted *ultra vires* in adopting Res. 2145 (XXI), which consequently was considered to be invalid.¹⁰⁵ It was equally argued that the SC's Res. 276 was invalid and void because its very *raison d'être* was the aforesaid invalid GA resolution. In addition, it was argued that in adopting this resolution the SC was not acting under any provision of the Charter, and that a detailed analysis of the relevant chapters of the Charter would show that the SC exceeded the limits placed upon its power.¹⁰⁶

¹⁰⁵ It was argued by France that "nowhere in the text setting forth the functions of the General Assembly ... can any mention be found of a competence enabling that organ to 'decide' whether this or that territory belongs to this or that State ... The General Assembly has behaved as if it considered itself invested with legislative power on a universal scale, one which empowers it not only to formulate binding legal rules for all, even if they add to the Charter or modify it, but also to attach a power of sanction to those rules ... Thus we are faced with a decision of the General Assembly which was taken *ultra vires*." ICJ Pled., 1970, vol. I, pp. 367-8.

¹⁰⁶ ICJ Rep., 1971, p. 45; Wyk, J., "The Request for an Advisory Opinion on South West Africa, The Legal Issues", *Acta Juridica*, 1970, p. 229.

Therefore, the legality and validity of the political organs' acts were matters to be decided by the Court. From the outset, it should be noted that the Court pointed out that "[u]ndoubtedly, the Court does not possess powers of judicial review or appeal in respect of the decisions taken by the United Nations organs concerned".¹⁰⁷ Despite this statement, the Court in practice considered the validity of these acts. It reviewed the above resolutions and devoted a considerable part of its opinion to this matter.¹⁰⁸

The Court noted that "[i]n examining this action of the GA it is appropriate to have regard to the general principles of the international law".¹⁰⁹ It also observed that: "[t]he Court has therefore reached the conclusion that the decisions made by the Security Council in paragraphs 2 and 5 of the resolution 276 (1970), as related to paragraph 3 of the resolution 264 (1969) and paragraph 5 of resolution 269 (1969), *were adopted in conformity with the purposes and principles of the Charter and in accordance with its Arts. 24 and 25*"¹¹⁰ (emphasis added).

In examining the SC's actions in this case, the Court concluded that the language of Art. 32 is mandatory and consequently dismissed South Africa's claim on the grounds that, before a state is invited to participate in the Council's deliberations, the Council must first make a determination as to the existence of a dispute. It noted also that the matter was embodied in the agenda of the SC as a situation and no member had made any suggestion or proposal that the matter was a dispute.¹¹¹ The Court rejected South Africa's argument that the SC resolution seeking an advisory opinion was procedurally invalid because two permanent members had abstained and therefore had not cast "concurring votes" as required by the Charter. The Court based this opinion on the Council's general practice by

¹⁰⁷ ICJ Rep., 1971, p. 45.

¹⁰⁸ It has been noted by some lawyers that "[t]his is a strange approach. The Court denied having powers to review the resolutions and at the same time examined their legality." See Zuidwijk, A., "The International Court and the South-West Africa: Latest Phase", *GJICL*, 3, 1973, p. 326; Bos, M., "The Interpretation of Decisions of International Organisations", *NILR*, 33, 1981, pp. 7-8.

¹⁰⁹ ICJ Rep., 1971, p. 46.

¹¹⁰ *Ibid.*, p. 53.

¹¹¹ *Ibid.*, pp. 22-3.

which it treated an abstention as a concurring vote, and thus the resolution was validly adopted.¹¹² Having said that, the Court moved on to the argument relating to the legality of the SC's action in the light of Art. 27/3 of the Charter. It pointed out that the proviso also requires for its application the prior determination by the SC that a dispute exists and that certain members of the SC are involved as parties to the dispute. It rejected the arguments that the resolution was invalid because South Africa was not invited to participate in the debate and because parties to the dispute did not abstain from voting.

In addition, the Court considered the arguments regarding the validity of the SC and GA resolutions. It examined the merits of the objections to the Assembly's resolution on the termination of the mandate for South-West Africa and to the subsequent SC resolution on the same subject. The Court explicitly concluded that the GA had acted *intra vires*.¹¹³ It also affirmed that the resolutions of the SC were valid because that body had acted in the exercise of its "primary responsibilities" of maintaining peace and security, and that the resolutions were therefore binding on members of the UN in accordance with Arts. 24 and 25 of the Charter.

It seems clear that the ICJ considered itself competent to pronounce on the validity of the GA and SC resolutions. The Court held that the GA had not overstepped the bounds of its authority by declaring South Africa's presence illegal and by terminating the mandate.¹¹⁴ It also held that the SC resolutions endorsing the Assembly's actions were in accordance with the Charter. Therefore, some lawyers have rightly noted that, despite the fact that the Court had announced that it does not possess the power of judicial review or appeal in respect of decisions taken by the UN organs, it plainly considered the legality of the revocation of the mandate by the GA and the subsequent SC resolutions - a practice that is inconsistent with the view that the Court has no power to review.¹¹⁵

¹¹² Ibid., pp. 21-2.

¹¹³ Ibid., pp. 45 ff.

¹¹⁴ Ibid.

¹¹⁵ In the *Lockerbie* cases (1992), Judge *ad hoc* El-Koshi noted that the ICJ in the *Namibia* case "exercised the important function of ascertaining that the resolutions in question had been taken in conformity with the rules of the Charter". ICJ Rep., 1992, p. 207. Crawford notes that "it is sometimes said that the Court has no power of 'judicial review' of resolutions of political organs,

Having considered the opinions of the Court in the above cases, especially the *Expenses* case and the *Namibia* case, one may conclude that the ICJ's opinions lend strong additional support to its power to review the validity of certain actions of the political organs of the UN.

(ii) Implied recognition of judicial review

In addition to the express recognition and practice of the ICJ with regard to the examination of the legality of SC and GA acts, the Court implicitly recognised this power in several cases.

In the *Northern Cameroon* case, Cameroon alleged that the UK had failed to respect certain obligations directly or indirectly flowing from the Trusteeship Agreement for the territory of Cameroon under British administration, which was approved by the GA of the UN on 13 December 1946. This case was based on the fact that the GA had adopted three decisions. GA Res. 1350 (XIII), adopted on 13 March 1959, recommended that the Administering Authority, in consultation with the UN Plebiscite Commissioner, organise under the supervision of the UN separate plebiscites in the northern and southern parts of British Cameroon "in order to ascertain the wishes of the Territory concerning their future". In southern Cameroon, the plebiscite was held and registered a decision "to achieve independence by joining the independent Republic of Cameroon". In northern Cameroon a first plebiscite was held; the vote was in favour of deciding their future at a later date. GA Res. 1437 (XIV), of 12 December 1959, recommended that a second plebiscite be held in northern Cameroon in which the people would be asked whether they wished "to achieve independence" by joining the independent Republic of Cameroon or by joining the independent Federation of Nigeria. Res. 1608 (XV) included, *inter alia*, that the people of northern Cameroon had voted to

and in the sense of 'judicial review' as a separate or special institution this is of course true. But it provides no ground for thinking that the legal basis of resolutions of the SC and the GA is somehow privileged and immune from scrutiny, or that the 'presumption' of validity is more than presumption." Crawford, J., "The General Assembly, the International Court of Justice and Self-Determination" in Lowe, V., et al. (eds.), *Fifty Years of the International Court of Justice*, 1996, p. 590. For the same view, see Watson, *supra* note 63, p. 20; De Aréchaga, J., "United Nations Security Council", *EPIL*, 5, 1983, pp. 345, 347; Zuijdwijk, *supra* note 108, p. 326.

join the independent Federation of Nigeria; and decided that the Trusteeship Agreement of 13 December 1946 should be terminated.¹¹⁶

The Counter-Memorial presented by the UK stated, *inter alia*, that the real dispute was between Cameroon and the GA, and, further, that it was not intended in the scheme of the Charter of the UN that decisions of political organs - the GA and the Trusteeship Council in this case - should be subjected to judicial review at the instance of individual members of the UN.¹¹⁷ The Court pointed out that, whatever the motivation of the GA in reaching its conclusions, and whether or not it was acting wholly on the political plane, it was necessary for the Court to consider whether or not the General Assembly had based its actions on a correct interpretation of the Trusteeship Agreement, and there was no doubt - and indeed no controversy - that the resolution had definitive legal effect. With regard to the legality and validity of the Assembly's resolution, the Court noted that "[t]he Applicant here has expressly said that it does not ask the Court to revise or to reverse those conclusions of the General Assembly or those decisions as such".¹¹⁸ This means that the only reason behind the refusal of the Court to practise its power of judicial review of the legality of the GA's acts was the lack of a request by the applicant and the non-consequent jurisdiction of the Court.

This attitude by the Court can be interpreted as being for rather than against judicial review because a simpler reply by the Court could have been that it lacked such a power. But since it stated that it was not requested to give its opinion in a matter that clearly relates to judicial review, one may consider such an attitude to be an implied recognition of judicial review.

In the *Lockerbie* cases, Libya contended that the SC's resolutions were *ultra vires* and therefore invalid, on the ground that these decisions violated the fundamental principle of international law by which a state cannot be forced to

¹¹⁶ ICJ Rep., 1963, pp. 21-3.

¹¹⁷ ICJ Pled., 1961, pp. 59-63; Diss. Op. of Judge Bustamante, ICJ Rep., 1963, pp. 154 ff.; Brownlie, I., "The Justiciability of Disputes and Issue in International Relations", *BYIL*, 42, 1967, p. 126.

¹¹⁸ ICJ Rep., 1963, p. 32.

extradite its own nationals.¹¹⁹ Moreover, Libya argued that the Court is empowered to examine the legality of SC resolutions. It asked the Court to declare that the SC's resolutions were "contrary to international law" and that "the Council has employed its power to characterise the situation for purposes of Chapter VII simply as a pretext to avoid applying the Montreal Convention".

Despite the refusal of the Court to indicate the interim measures requested by Libya or to mention the validity of the Council's resolutions,¹²⁰ it did not declare itself incompetent to review the legality of the Council's action. This led some lawyers to note that the Court had left room to consider this matter on its merits.¹²¹ Judges Shahabuddeen and Bedjaoui held that Res. 748 must be taken at face value, at least "at the present stage of a request for provisional measures" - a qualification that would reserve the Court's power to examine the legality of the resolution in the proceedings on the merits.¹²²

¹¹⁹ Libya argued that, "by its resolution, the Security Council infringed, or threatened to infringe, the enjoyment and the exercise of the rights conferred on Libya by the Montreal Convention and its economic, commercial and diplomatic rights". ICJ Rep., 1992, pp. 13-14.

¹²⁰ In this respect, Franck observes that the Court's majority found that since no sufficient case of *mala fides* or *ultra vires* had been established by Libya at this preliminary stage, there were no grounds upon which the Court could order such interim relief. Franck, T., "The 'Power of Appreciation': Who is the Ultimate Guardian of UN Legality?", *AJIL*, 86, 1992, p. 521. It has been noted also by McWhinney that the "*Aerial Incident at Lockerbie*, went significantly beyond the classical separation-of-powers argument where no direct conflict or competition was in fact involved between the different UN organs; for it put the Court in the position - if it were to grant the applicant state's request for what amounted to an injunctive form of relief against the respondent United Kingdom and United States - of directly challenging the Security Council. The Court, if it had taken that step, would very clearly have crossed the constitutional Rubicon and established itself, *de facto*, as a special Constitutional Court ... with the legal competence to exercise judicial review and constitutional control over the acts of the co-ordinate United Nations institutions, the Security Council and General Assembly, so as to ensure their conformity to the United Nations Charter. As one reads the official opinion of the Court and supporting Special Opinions in *Aerial Incident at Lockerbie*, that was simply one constitutional bridge too far at this particular political moment in time, without any prior intellectual-legal canvassing or operation." McWhinney, E., "The International Court as Constitutional Court and the Blurring of the Arbitral/Judicial Processes", *LJIL*, 6, 1993, pp. 286-7.

¹²¹ Watson, *supra* note 63, p. 25; Gowlland-Debbas, *supra* note 73, p. 669.

¹²² Diss. Op. of Judge Shahabuddeen, ICJ Rep., 1992 pp. 140 *ff.*; Diss. Op. of Judge Bedjaoui, ICJ Rep., 1992, pp. 143 *ff.* In his analysis of the *Lockerbie* cases, Alvarez notes that, "[a]part from whether the Court or individual judges were threatening to issue a decision that finds the Council's action illegal, the Court Orders in *Lockerbie* warned the Council to exercise care in undertaking similar action in the future, particularly any action contrary to international legal obligations that it may take in the face of the Court's consideration of a pending case." Alvarez, J., "Judging the Security Council", *AJIL*, 90, 1996, p. 30.

In the same direction, some lawyers have analysed this case and reached the conclusion that the international trend is to move to entitle the Court to exercise the power of judicial review. For instance, Watson notes:

“The Libya decision marked the first time a significant portion of the World Court intimated it could exercise a power of judicial review in contentious cases ... The decision implies that the international community is moving toward a broader acceptance of judicial review than the framers of the UN Charter perhaps envisioned - that the subsequent practice under the Charter may have altered its interpretation.”¹²³

Frank also notes that:

“The legality of actions by any UN organ must be judged by reference to the Charter as a ‘constitution’ of delegated powers. In extreme cases, the Court may have to be the last-resort defender of the System’s legitimacy if the United Nations is to continue to enjoy the adherence of its members. This seems to be tacitly acknowledged judicial common ground.”¹²⁴

Therefore, it seems clear that neither the Court nor the lawyers who have analysed the Court’s judgment in the *Lockerbie* cases have rejected the Court’s power to practise judicial review of the Council’s acts. This conclusion was affirmed by the Court in the *Bosnia (Provisional measures)* case. In their first application for provisional measures, of 20 March 1993, Bosnia-Herzegovina contended that they had a sovereign right under Art. 51 of the Charter and customary international law to individual and collective self-defence, including the right to defend themselves by immediately obtaining weapons and troops from other states. They therefore argued that Res. 713 and subsequent resolutions by the SC imposing an arms embargo upon the former Yugoslavia were contrary to Art. 51 and the rules of customary international law.¹²⁵ In the second request for provisional measures in the same case, filed in the Registry on 27 July 1993, Bosnia-Herzegovina reiterated this argument.¹²⁶ They challenged the validity of the SC

¹²³ Watson, *supra* note 63, p. 27.

¹²⁴ Franck, *supra* note 120, pp. 519, 523.

¹²⁵ ICJ Rep., 1993, p. 6.

¹²⁶ ICJ Rep., 1993, p. 345.

action in imposing and seeking to implement a binding arms embargo against Bosnia-Herzegovina as included in the former Yugoslavia.¹²⁷

Despite the Court's judgment in these two requests, whereby it rendered the requested measures, it did not consider the issue of judicial review of the Council's acts either in its first order of 8 April 1993, or in the second order of 13 September 1993. If the Court found that it had no such power it would have declared that it was not competent to review the legality of the Council's action.

3.3. Evaluation

Having explained the opposing opinions of international lawyers and the attitude of the Court in this respect, it can be argued that observance of the principles of the UN Charter is a necessary precondition of the effectiveness of the UN. If the UN organs fail to respect the limits imposed upon them and the general spirit of the Charter they might encourage member states to ignore acts that they consider to be *ultra vires*. This conclusion results from the fact that, in the international legal system, supervision of the lawfulness of acts is not impossible. This applies equally to the UN as part of the present international system nowadays. Having accepted this conclusion, an important question arises: which organ within the UN system is eligible to review these acts?

The possibilities are as follows: it might be left to the organ whose acts have been impugned; it might be left to the unilateral decision of member states; or it might be given to an independent and impartial organ to be the judicial organ within the structure of the organisation. Before reaching a conclusion in this regard an examination of these possibilities is required.

It seems unacceptable to conclude that the political organs have the competence to make such determination. Entitling the organ itself to do so might be contrary to the general legal principle *nemo debet esse judex in propria causa*. This view was affirmed by Judge Fitzmaurice in the *Namibia* case:

"In the institutional field, the justification for the act of some organ or body may turn upon considerations of a political or technical character, or of professional conduct or discipline, and if so, the political, technical or professional organ or body concerned will,

¹²⁷ Rashkow, B., "Remarks by Bruce C. Rashkow" in *the Security Council: Its Authority and Legitimacy*, ASILP, 87, 1993, p. 315.

in principle, be competent to make the necessary determination. But where the matter turns, and turns exclusively, on considerations of a legal character, a political organ, even if it is competent to take any resulting action, is not itself competent to make the necessary legal determinations on which the justification for such action must rest. This can only be done by a legal organ competent to make such determinations.”¹²⁸

It is similarly unacceptable to leave the member states to make a unilateral decision on the legality of acts.¹²⁹ This possibility would be tantamount to making the members judges in their own cases, a situation that would be similar to entitling the organs to make the decision.¹³⁰ Consequently, it is difficult to accept the opinion announced by Judge Winiarski in the *Expenses* case:

“It is the State which regards itself as the injured party which itself rejects a legal instrument vitiated, in its opinion, by such defects as to render it a nullity ... A refusal to pay, as in the case before the Court, may be regarded by a Member State, loyal and indeed devoted to the Organisation, as the only means of protesting against a resolution of the majority which, in its opinion, disregards the true meaning of the Charter and adopts in connection with it a decision which is legally invalid.”¹³¹

This view was examined by Judge Morelli, who rightly noted that:

“It is not possible to suppose that the Charter leaves it open to any State Member to claim at any time that an Assembly resolution authorising a particular expense has never had any legal effect whatever, on the ground that the resolution is based on a wrong interpretation of the Charter or an incorrect ascertainment of situations of fact or of law.”¹³²

¹²⁸ ICJ Rep., 1971, p. 299.

¹²⁹ An example of this was the Egyptian Government’s refusal to comply with the Security Council resolution of 1951 which requested the reopening of the Suez canal to Israeli navigation. Egypt argued that the Security Council resolution was invalid because it had acted beyond its powers according to the Charter and adopted a resolution in a dispute that had a legal character.

¹³⁰ In this regard, it has been noted by Louis B. Sohn that “[t]he major issue is to make certain that grave objections to the constitutionality or legality of various decisions are properly considered and are not disposed of by the same body whose powers are in question. Thus, if a group of, for instance, 15 States should object to a proposed decision of the General Assembly on the ground that it constitutes a violation of the Charter of the United Nations, such objection should be referred by the General Assembly to some other body for a preliminary decision. As a minimum, the Legal Counsel of the United Nations, the head of the Office of Legal Affairs in the UN Secretariat, should be requested to present a statement of relevant precedents and his views on their applicability to the case in question. Whenever possible such a question should be referred to the International Court of Justice for an advisory opinion. Should there be a need for speedy action a special committee of eminent jurists might be asked for guidance.” Sohn, L., “Due Process in the United Nations”, *AJIL*, 69, 1975, p. 621. In addition, it has been noted by Koskenniemi that “[t]he right ‘of last resort’ of member states to decide, for themselves, on whether an act has been *ultra vires* is difficult to reject despite the evident problems it causes to the credibility of the collective system”. Koskenniemi, *supra* note 65, p. 342.

¹³¹ ICJ Rep., 1962, p. 232.

¹³² *Ibid.*, p. 224.

In the light of the above, and because the review of the acts of the political organs is considered to be a legal task, it could be argued that this power should be exercised only by a legal organ within the international organisation. The conclusion that the ICJ is the only suitable organ to examine the legality of the acts of the political organs is based, in addition to the justifications indicated by the lawyers in favour of judicial review by the ICJ, on several grounds:

- * The nature of the ICJ as the principal judicial organ of the UN gives it a unique position to carry out reviews. This did not arise in the case of the PCIJ because it was not an organ of the League of Nations.

- * The power of the ICJ to review the legality of the political organs' acts is a natural extension of its established power to interpret the Charter. It is difficult and often impossible to draw a line between interpretation and revision because, at the end of the day, the revision of acts still entails interpretation.

- * The *travaux préparatoires* of the Charter did not close the door to judicial review. The San Francisco statement explained: "under unitary forms of national government the determination of such a question [constitutional disputes] may be vested in the highest court or in some other national authority. However, the nature of the organisation and of its operation would not seem to be such as to invite the inclusion in the Charter of any provision of this nature."¹³³

- * The principle of the "separation of powers" cannot be claimed to prevent the Court from practising judicial review because it is not an absolute and rigid principle in the domestic field. In addition, it cannot be fully applied to international organisations because the attribution of their powers is not strictly divided into legislative, executive and judicial; their objectives are more limited and their functions cannot be separated as clearly as those performed by state organs.

- * Because the principle of judicial review has been universally recognised in the municipal law of modern and civilised nations, the Court could - by analogy - have based its power on the "general principles of law", as indicated by Art. 38/1 of

¹³³ See UNCIO, 13, p. 709; Sloan, B., "United Nations Charter as a Constitution", *PUSLYIL*, 1, 1989, pp. 73-4.

its Statute.¹³⁴ In this regard, Judge Weeramantry noted that the means by which the Charter fulfils the common purposes and principles of the UN system resemble the constitutional framework of many domestic jurisdictions.¹³⁵ The ICJ affirmed the debt of international law to municipal law in the *Barcelona Traction* case, where it acknowledged its duty to consider and refer to municipal notions of shareholder and corporate law.¹³⁶ In this regard, Judge Fitzmaurice described international law as seeking to apply private law principles on the international plane.¹³⁷

* The Court's power of judicial review of the acts of the political organs is considered to be within its jurisdiction pursuant to Art. 36/2/B of the Statute. According to this article, this function is a question of international law. Therefore, if a state contends before the Court that a decision is contrary to international law, the Court should settle this issue.

* The majority rule - either simple or two-thirds - as a basis for the adoption of the political organs' decisions justifies the power of judicial review. The application of this rule does not provide adequate safeguards for minority states, which could be faced with an act or decision with which they have to comply but that they deem to be illegal.¹³⁸ Therefore, the existence of a judicial organ to

¹³⁴ In respect of the influence of municipal law on international law, see Kaplan, M., et al., *The Political Foundations of International Law*, 1961, p. 239; Jenks, C., *The Common Law of Mankind*, 1958, p. 107; Lauterpacht, H., *Private Law Sources and Analogies of International Law, with Special Reference to International Arbitration*, 1927, pp. 5 ff.; Thirlway, H., "The Law and Procedure of the International Court of Justice: 1960-1989", *BYIL*, 60, 1989, pp. 127-8.

¹³⁵ ICJ Rep., 1992, p. 165.

¹³⁶ ICJ Rep., 1970, p. 37.

¹³⁷ *Ibid.*, p. 72.

¹³⁸ With respect to judicial review within the national field, Hans Kelsen noted that, "[i]f one sees the essence of democracy, not in the all powerful majority, but in the constant compromises between the groups represented in Parliament by the majority and the minority, and consequently in the social peace, constitutional justice appears as a means particularly proper for the achievement of this idea. This simple threat of an action to be brought before the Constitutional Court can be an adequate instrument in the hands of the minorities for preventing unconstitutional violations of juridically protected interests by the majority, and consequently being able to oppose the majority dictatorship, which is not less dangerous to social peace than the minority one." Kelsen, H., "La Garantie Juridictionnelle de la Constitution (La Justice Constitutionnelle)", *Revue du Droit Public et de la Science Politique en France et à l'Etranger*, Paris, 1928, p. 253 (cited in Brewer-Carias, *supra* note 1, p. 117). It has been also noted by Favoreu that "when the majority and the opposition conflict on important issues without having recourse to an electoral decision, it is evident that recourse to a constitutional judge to decide upon the law adopted by the majority, has the virtue of calming the debate and transforming it more serenely. In many cases, when the decision of the constitutional judge has been adopted, the controversy is extinguished." See Favoreu, L., *Le*

determine the legality or unconstitutionality of these acts seems appropriate to protect the minority states or convince them to accept and implement these decisions. It also seems important to avoid a rapid decline in the constitutional balance adopted by the Charter, because the acts approved by the majority could be submitted for review by the Court in order to determine which could be enacted according to the law, and which require a review. It is well known that member states act as decision-makers and at the same time may be the object of the decision in question. Thus a state might find itself among those having voted against a decision addressed to a group of states to which it belongs, or even to itself alone. Yet, by virtue of the constitutional provisions of the Charter and the powers of the organ in question, it may be bound by that decision *qua* member of the organisation.

* Judicial review by the Court is considered to be a safeguard for the member states and the organisational structure of the UN. On the one hand, it is considered to protect states from a threat to their interests by a decision of the political organs of the UN. In addition, the practice of judicial power by the ICJ might help to clarify the limits of these organs in the light of the Charter and thus protect their interests.

On the other hand, this procedure protects the structure of the UN by controlling the system of distribution of powers adopted by the Charter. In this regard, Kelsen pointed out that:

“A Constitution without guarantees against unconstitutional acts is not completely obligatory in a technical sense ... A Constitution in which unconstitutional acts and, particularly, unconstitutional laws, remain valid because their unconstitutionality cannot lead to their annulment, is more or less equivalent, from a judicial point of view, to a desire without obligatory force.”¹³⁹

In addition, this judicial review's procedure might play a big role in improving the procedures actually used by the political organs, and it might also help to enlarge rather than to restrain the competencies of the political organs. Finally, judicial review by the Court might support the acts of the political organs. That is,

Contrôle Juridictionnel des Lois et sa Légitimité, p. 36 (cited in Brewer-Carias, *supra* note 1, p. 122).

¹³⁹ Kelsen, *supra* note 138, p. 124.

if the Court finds that the acts brought into question before it are in accordance with the Charter (law), these acts enjoy supplementary authority.

Finally, the requirements of justice, fairness, necessity, and the interests of the UN demand a judicial organ with the power of judicial review. The existence of such an organ would encourage the member states to trust the UN, because they would then be in a position to protect their own interests by applying for the annulment by the Court of any decisions that are deemed to be *ultra vires*. The existence of such an organ may also have the advantage of increasing the effectiveness of the Charter and of the organs' decisions. In contrast, saying that the ICJ has no power to review the political organs' acts would lead to the dangerous conclusion that the idea of the rule of law in the UN would be undermined.

In the light of the above, it could be argued that, in the interests of the UN in the first place and in the interests of its member states, the political organs' acts should be revisable. The most appropriate organ within the UN system to do this is the ICJ as the principal judicial organ of the UN. This conclusion leads to a question about the means of referring acts for judicial review to the ICJ and the limits upon its power in this regard.

4. The means of referring acts to the Court

Recognition of the ICJ's power as a constitutional court has no value without clarification of the means by which the judicial review can take place. There is no established procedure for judicial review in the structure of the UN, so one has to refer to the municipal and international systems. One of the following methods could be used: first, the Court could deal with this issue *proprio motu*; second, a state may have direct recourse against an act of an international organisation; third, the Court's advisory jurisdiction could be sought; finally, the Court's contentious jurisdiction could be used. The question is, which of these methods can the ICJ use to deal with an *ultra vires* act?

4.1. *Proprio motu*

This method allows an automatic review by the Court of the decisions of the political organs. The question is, can the ICJ review the acts of the UN organs *proprio motu*?

First, if there is no case before the Court, it cannot review the acts of the UN organs *proprio motu*.¹⁴⁰ The Court may act only at the request of an organ or a state whose rights or interests are infringed by a particular act. In other words, it has no competence to exercise abstract control over the legality of the organs' acts.

Second, if there is a case before the Court, on the basis of either its contentious or its advisory jurisdiction, it could be argued that the Court may review the organs' acts without a request for review by any state party to the case, or by the organ in the case of a request for an advisory opinion, provided that a review is needed in order to render an opinion or to reach a judgment. This view is based on the Court's practice in the *Expenses* case. There the Court reviewed the legality of the GA resolutions regarding the apportionment of the budget without a specific request to do so by the Assembly.¹⁴¹ In addition, this method could be justified on the following grounds. First, the judicial character of the Court may require such a direct review,¹⁴² in that in some cases the Court cannot decide a case or render an opinion without determining the validity of the acts of the organs. Second, entitling the Court with this power is logical because it should be given the possibility of determining the best way to reach an opinion or judgment without any obstacles, otherwise it would be difficult for the Court to reach a correct and logical conclusion.¹⁴³ Third, direct intervention by the Court might help to protect the interests of the minority states in the UN because the majority could abuse the rights of the minority by wording the request for an advisory opinion without referring to the examination of the legality of the related acts.

¹⁴⁰ Graefrath, *supra* note 69, p. 204.

¹⁴¹ See pp. 285 *ff.* above.

¹⁴² In *Namibia* case, Judge Onyeama observed that "I do not conceive it as compatible with the judicial function that the Court will proceed to state the consequences of acts whose validity is assumed, without itself testing the lawfulness of the origin of those acts". ICJ Rep., 1971, pp. 144.

¹⁴³ See the Sep. Op. of Judge Morelli in the *Expenses* case, ICJ Rep., 1962, p. 217.

4.2. Direct recourse

Direct recourse involves a state complaining that an action adopted by a political organ is *ultra vires*.

Several international instruments allow direct appeal. For instance, Arts. 416, 417 and 418 of the Treaty of Versailles provided for an appeal to the PCIJ against decisions of an international organisation. The Convention of Barcelona of 20 April 1921 (Art. 10/5 of the Statute) deals with disputes based on incompetence or violation of international conventions governing navigable waterways. Art. 38/2 of the Convention of 23 July 1921 on the Statute of the Danube provides for decisions taken by the International Commission to be taken before a judge on the ground of incompetence or violation of the Convention.¹⁴⁴

Now, we turn to discuss the possibility of a decision of the UN's political organs being taken directly before the ICJ by a state demanding its annulment.

In his opinion, Gros noted that “the organisation of the procedures for establishing means of redress against the acts of international authorities does raise large technical problems. It would suffice that a Member State, party to the international organisation concerned and fulfilling all the conditions required under Art. 35 of the Statute of the International Court of Justice, should make a request against a decision taken within the organisation, and which it considers vitiated through incompetence, excess of power, or violation of the Charter of the organisation.”¹⁴⁵ The Institut de Droit International also adopted, in 1954, a decision based on a report by Max Huber, that “[i]t is a matter to widen the terms of Article 35 of the Statute, so as to grant access to the Court to international organisations ... as parties to the Statute of the Court”.¹⁴⁶

In fact, this optimistic view should be examined in the light of Art. 34 of the Court's Statute. According to this article, “only states may be parties in cases before the Court”. Consequently, international organisations, including the UN

¹⁴⁴ For more examples, see Gros, *supra* note 69, pp. 31-2.

¹⁴⁵ Gros, *ibid.*, p. 34.

¹⁴⁶ Cited in El-Kadi, A., *The Interpretation of the International Organisations' Decisions*, 1971, p. 157.

itself, are excluded from being a party in contentious proceedings.¹⁴⁷ This provision therefore limits the power of the Court to review the acts of the Assembly and the Council through direct recourse by any state that complains that their actions are *ultra vires*.¹⁴⁸

4.3. Advisory jurisdiction

Since member states are not entitled to request advisory opinions from the Court, only the political organs and specialised agencies of the UN, pursuant to Art. 96 of the Charter, may seek advisory opinions regarding their acts.

This judicial review could be *ex post*, taking place after the adoption of an action. It could also be *a priori*, taking place in advance of the promulgation of an action.¹⁴⁹ The Assembly has set a precedent in this regard in its request for an opinion in the *Expenses* case, where it referred to the ICJ a specific request to determine the validity or conformity of the resolutions in the light of the Charter.

¹⁴⁷ During the drafting of the Statute of the PCIJ it was suggested that Art. 34 could permit an international organisation, as an association of states, to be a party. This suggestion was not adopted in the Statute of the PCIJ or in the Statute of the ICJ.

¹⁴⁸ Suggestions were made to this effect when the adoption of the 1945 Statute was being discussed. The International Labour Office, for instance, in a memorandum communicated to governments by a circular letter of 13 April 1944, suggested that, in view of the trend to create a number of public international organisations with specialised functional responsibilities enjoying varying degrees of independence and likely to enter into agreements with each other analogous to treaties between states, "it would seem desirable that the permanent Court or any new Court which may be established should be empowered to assure jurisdiction of any dispute between two or more such organisations which the parties thereto may refer to it or in respect of which it may be granted jurisdiction by treaties or conventions binding upon the organisations concerned". *Official Bulletin of the International Labour Office*, vol. XXVI, 1 December 1944, p. 896. See also Jenks, C., "The Status of International Organisations in Relation to the International Court of Justice", *GS*, 32, 1946, p. 25. At the San Francisco Conference, the Venezuelan delegation submitted a proposal that the Court should be authorised to settle conflicts of jurisdiction between inter-governmental organisations. The discussion at the preliminary Conference of Jurists held in Washington in April 1945 and at the UN Conference on International Organisations held in San Francisco showed that any suggestion of giving international organisations a *locus standi in judicio* before the Court was premature. See UNCIO, 13, pp. 410, 482.

¹⁴⁹ Elias considers that the only procedure by which the Court may make a judicial determination must be an advisory opinion sought specifically for that purpose. Elias, *supra* note 53, p. 89. Similarly, Gros noted that "the Court's advisory function might provide an indirect path to a judicial supervision of the decision of organs of the UN and other international organisations". Gros, A., "Concerning the Advisory Role of the International Court of Justice" in Friedmann, W., et al. (eds.), *Transnational Law in Changing Society. Essays in Honour of Philip Jessup*, 1972, p. 324. In addition, Alvarez notes that "[i]gnoring the Court's advisory jurisdiction in this connection [judicial review] seems short-sighted in view of the importance that jurisdiction has had in developing UN institutional law". Alvarez, *supra* note 122, pp. 8, 27.

The ICJ might be asked to give advisory opinions on questions concerning the constitutionality of acts, and there are two possible ways in which this may be done: in the first place, the organs may make a direct request for the determination of the constitutionality (legality) of an act in terms of the articles of the Charter; or the Court may, in connection with other questions, be called upon to give an opinion regarding the legality of an act.

Judge Bedjaoui, in his opinion in the *Lockerbie* cases, stressed the advisory procedure as an under-used method of achieving judicial review by the Court of the acts of the Council and the Assembly.¹⁵⁰ According to his opinion, this method should be resorted to whenever the legality of a decision about to be taken is doubtful.

Thomas Franck relies on this method as an avenue for any judicial review of the decisions of the political organs. He finds that Art. 96/1 of the Charter provides the Court with an irrefutable basis of jurisdiction. Moreover, it does this in the political context of a request that in practice has to be supported by a large voting majority of the members of the organisation, thereby rebutting the otherwise inevitable charge of judicial self-aggrandisement which might be levelled were the Court to discuss the validity of the resolutions of political organs in response to the pleadings of one state. In addition, this advisory opinion procedure has already established a credible record of judicial interpretation of the Charter; it appears through the Court's precedents in the *Reparation* case, the *Second Admission* case and the *Expenses* case. Finally, an advisory opinion, being legally definitive but not necessarily binding on the political organs, does not set up so stark a confrontation between the branches of the international system as would judicial review exercised in a binding decision following adversarial litigation between individual states.¹⁵¹

¹⁵⁰ ICJ Rep., 1992, p. 152. It was also asserted by Gros that "[t]he States must first, however, apply to the organisation that its claim for an advisory opinion be granted, unless the Statute should declare this compulsory for the organisation, upon simple request of one of the member States". Gros, *supra* note 69, pp. 30-1. Elias also observed that "the International Court of Justice should, to the extent of its power of review, be able to say whether or not one of the principal organs has acted *ultra vires* in any given case, albeit by way of an advisory opinion only". Elias, T., *supra* note 53, p. 89.

¹⁵¹ Franck, T., "The Political and the Judicial Empires: Must There Be Conflict over Conflict-Resolution?" Paper presented to the Doha Conference on International Legal Issues Arising under the United Nations Decade of International Law, 22-25 March, 1994, p. 17.

It might be argued that judicial review through the advisory jurisdiction of the Court could play an important role as regards the legality of the Assembly's and the Council's acts, especially since their right to request advisory opinions extends to any legal question, pursuant to Art. 96 of the Charter. However, this route could encounter some difficulties. First, the request requires the support of the majority in the organ making the request (including non-use of the veto by the permanent members of the SC). Second, one cannot expect that the principal organs will agree to seek advisory opinions whenever a legal argument is made against a decision or a proposed decision. They are unlikely to encourage the practice of judicial review even on a non-binding basis. A political organ might, however, consider it advantageous to seek an advisory opinion in the belief that it would strengthen support for its decision or remove doubts as to its legality.¹⁵² Third, as noted by some lawyers, the proceedings involved in obtaining an advisory opinion are far too slow to allow the decisions of an organ to be referred to the ICJ at all frequently, or with any regularity.¹⁵³

However, these difficulties could be overcome. As noted by some lawyers, what is perhaps required is that greater efforts should be made to refer more cases to the Court and a means should be devised to give binding force to the opinions of the Court in these cases.¹⁵⁴ With regard to the procedural problems, these issues could be referred to a Chamber of the Court for summary procedure, according to Art. 29 of the Statute, in order to obtain decisions more rapidly.

4.4. Contentious jurisdiction

If a dispute between two or more states is referred to the Court, can it review the legality of an act of the UN organs at the request of these parties? Because the UN cannot be a party before the ICJ, the decisions of its organs can be submitted for review in contentious proceedings only in an indirect way.¹⁵⁵ Here the judicial

¹⁵² Schachter, O., "United Nations Law", *AJIL*, 88, 1994, p. 8.

¹⁵³ Gros, *supra* note 69, p. 31.

¹⁵⁴ Osieke, *supra* note 3, p. 275.

¹⁵⁵ Gros, *supra* note 69, pp. 30-7; Rideau, J., *Juridictions Internationales et Contrôle du Respect de Traités Constitutifs des Organisations Internationales*, 1969, pp. 85-9; Dijk, *supra* note 1, p. 366.

review occurs after the action has been promulgated or taken effect (*a posteriori*). This happened in the *ICAO* case¹⁵⁶ and in the *Lockerbie* cases.

In the *Lockerbie* cases, Libya brought a suit against the UK and the USA on the basis of the Montreal Convention to which they are all parties. It challenged that the SC decision imposing limited economic sanctions on Libya was invalid. Although the Court denied Libya's request for interim measures to stay the Council's action, several judges took note of this challenge and stated that the Court might be competent to pass judgment on the legality of Council action that infringed the legal rights of states under the Charter. For instance, Judge Lachs affirmed the position of the ICJ within the UN as the "general guardian of legality".¹⁵⁷ In other words, he agreed that this power should be exercised through the contentious jurisdiction of the Court. This view was affirmed by some lawyers who noted that, although the Court can practise the judicial review in this way, this power cannot extend to the Council's decisions adopted according to Chapter VII. In their view, these decisions cannot be reviewed through contentious cases.¹⁵⁸

In fact, this method of judicial review is acceptable. If it is agreed that the Court can review through its advisory competence, there is no obstacle to its so doing through its contentious competence. This opinion is based on the fact that the judicial nature of the Court's work in both competencies is identical.

However, it is noticeable that judicial review by this mean is not very effective. The lack of compulsory jurisdiction is considered to be an important obstacle to judicial review, because the Court's jurisdiction is based on the will of the states. Nowadays, less than one-third of the parties to the Court's Statute are bound by declarations accepting compulsory jurisdiction under the optional clause and many of these declarations have crippling reservations.¹⁵⁹

Consequently, it is clear that the referral of *ultra vires* acts for judicial review is restricted to the advisory and contentious jurisdiction of the Court.

¹⁵⁶ Since this case has been examined on pp. 274-5 above, the study will focus on the precedent of *Lockerbie* cases.

¹⁵⁷ Sep. Op. of Judge Lachs, ICJ Rep., 1992, p. 26.

¹⁵⁸ Caflisch, *supra* note 59, pp. 660-1.

¹⁵⁹ Sloan, *supra* note 133, pp. 72-7.

5. The scope of the judicial review

A critical point as regards the ICJ's power of judicial review of the acts of UN organs is its scope. The above precedents of the Court did not in any way illustrate the scope of this power nor in all these precedents has the Court so far declared an action to be illegal.

One may therefore ask: can the Court decide that an action is null and decide to abolish this action, or can it only return the matter to the organ to re-examine the question?

With regard to the ICJ, four questions might be relevant: first, whether or not the Court can make a judicial review *de novo* of all acts of the GA and the SC; second, whether or not the Court's power could extend to examining the facts upon which a contested decision is based; third, whether or not the Court can possess the power to declare a resolution of either the Assembly or the Council invalid or void for any reason whatsoever; finally, whether or not the Court can extend its power of judicial review to the discretionary powers of the political organs.

5.1. Judicial review *de novo*

It has been noted that it is quite clear that the Court is not going to review *de novo* every case in which the SC decides that there is a threat to the peace to see whether it really thinks there is a threat to the peace. Yet between review *de novo* and total non-jurisdiction are many different options, and it could be very fruitful to find an appropriate middle path.¹⁶⁰

In this regard, Judge *ad hoc* Lauterpacht noted in the *Bosnia* case that it could not be accepted either that "the SC can act free of all legal controls" or that the Court's power of review is unlimited. That the Court has "some power of this kind can hardly be doubted". He concluded:

"There can be no less doubt that it does not embrace any right of the Court to substitute its discretion for that of the Security Council in determining the existence of a threat to the peace, a breach of the peace or an act of aggression, or the political steps to be taken following such a determination. But the Court, as the principal judicial organ of the

¹⁶⁰ Franck, *supra* note 63, p. 283. This view is repeated by Franck in his article "The Political and the Judicial Empires: Must There Be Conflict over Conflict-Resolution?" in Al-Nauimi, N., et al. (eds.), *International Legal Issues Arising Under the United Nations Decade of International Law*, 1995, pp. 599 ff.

United Nations, is entitled, indeed bound, to ensure the rule of law within the United Nations system and, in cases properly brought before it, to insist on adherence by all United Nations organs to the rules governing their operation.”¹⁶¹

Advocates of this view consider that it is essential to the legitimacy of the UN system that the *bona fides* and *inter vires* of the Council’s and the Assembly’s actions be reviewed by a neutral umpire applying the text of the Charter. Such umpiring is no trespass by the judges on the powers of the political branches of the system. They therefore find that the limited judicial review is a “good deal” for the political branches. Moreover, they assert that the political organs of the UN system are granted wide latitude by the Charter to resolve conflicts. The Charter also imposes limits on the majority of the GA and on the SC in order to protect the weak nations against the numerically and militarily powerful. These advocates believe that these limitations are essential to the social compact. Without them, states would be tempted to flee the community that puts their self-determination and sovereignty at risk. But limitations on power cannot be left to be nurtured by practice. Something more is required - in their view, the protection of an organ devoid of power yet replete with the prestige that derives from principled impartiality.

Advocates of this opinion nonetheless admit that this is not to say that the international system needs government by judges. But they note that the rules of evidence and principles of judicial restraint will make a limited degree of judicial review acceptable in the international system, as it is in many national systems. Consequently, they expect the Court to presume the validity of the decisions of the Council adopted pursuant to Chapter VII. Accordingly, the burden of proof will be on those who would assert that the Council has acted in bad faith or beyond the boundaries of its jurisdiction as defined by the Charter. They also expect that there is great restraint upon the Court in determining that a situation regarding which the Council has invoked Chapter VII has occurred. In addition, judges should declare their respect for the widest “ambit of choice” within which policy-makers are free to exercise their political discretion.¹⁶²

¹⁶¹ ICJ Rep., 1993, p. 439.

¹⁶² Franck, T., *supra* note 151, pp. 15-17.

5.2. Examination of facts

Is the Court competent to make a pronouncement on the intrinsic correctness of the decision taken, i.e. the question whether the bases on which the organ reached its decision are valid?

It has been noted by some lawyers that interpretation of a given international convention normally includes investigation by a judge of the existence of those facts responsible for the action of the international organisation at the time when that action was taken. In doing so the judge in no way oversteps the limits of his role as an interpreter. Doubtless the judge cannot verify the expediency of the decision since his interest lies merely in ascertaining whether the facts did or did not occur. But, the nature of the facts set forth must be considered and, if it is a question of economic or financial facts, this does not render the judge incompetent. This opinion is based on the *Oscar Chinn* case between Great Britain and Belgium, which was related to a dispute over facts of an economic nature.¹⁶³ The question in this case was whether: “the measures complained of by the Government of the United Kingdom were in conflict (a) with the obligations of the Belgian Government towards the United Kingdom under the Convention of Saint-Germain?”¹⁶⁴

The advocates of this view note that the case was particularly concerned with fluvial transportation, the public utility aspect of an enterprise, and the principle of freedom and equality established under the Congo regime. In their view, the PCIJ examined all the facts at length, studied the respective reasons for the Belgian measures in dispute and thus assumed control of the existence of the facts. In this regard, Judges Gros and Fitzmaurice found no difficulty in looking to the bases and motives behind a resolution.¹⁶⁵

Conversely, some lawyers oppose this view and conclude that the review of decisions by international bodies should be limited to legal interpretation of the texts in question and procedures based on these texts. It would include charges of

¹⁶³ PCIJ, Ser. A/B, No. 63, 1934.

¹⁶⁴ Ibid., p. 68.

¹⁶⁵ ICJ Rep., 1971, Judge Fitzmaurice (p. 294 ff.) and Judge Gros (pp. 340 ff.).

power being exceeded but not the revision of facts established by an international agency or body. In this opinion, examination of the merits of facts would weaken the trend towards international co-operation in the judicial field and undermine the authority of decisions taken by international agencies. The prospect that the decisions of international agencies and bodies, which after a long struggle between divergent views were created for the purpose of international co-operation, could be contested and be liable to be annulled by a supervisory judicial body after a new investigation into the merits of the facts might well cause many governments to abstain from joining the work of these agencies and the agreements relating to such agencies and bodies. Enabling review against decisions of international bodies to be brought before the ICJ should be welcomed, provided that this right of review for the member states concerned is restricted to disputes relating to the interpretation and application of these acts, including charges of alleged excess of power. Such machinery should prove very useful in practice, because it would require no special investigations of facts, merely legal considerations.¹⁶⁶

It is appropriate to note that neither view should be rigidly applied. On the one hand, it is important for the judges to look into the facts. This importance could be justified on the basis that the facts are considered to be an integral part of the decisions based on them. Therefore, the Court should consider whether such facts were real and true or not. But, at the same time, the Court's power to examine the acts and their facts should not be such that it permits the Court to say, these being the facts, your decision should be different. Therefore, the Court should examine the legality of acts in the light of the facts.

5.3. Declaring the invalidity of an act

Does the ICJ in the exercise of its judicial review function possess the power to declare a resolution of the political organs or specialised agencies invalid or void for any reason?

It has been noted that it would not at present be easy for the Court to declare that an act of the political organs of the UN is "null and void" without an express

¹⁶⁶ Adamkiewicz, W., in his reply to Gros, see Gros, *supra* note 69, pp. 38-9.

demand for this in a relevant request to the Court. The most the Court would find is that a particular Council decision at issue is illegal.¹⁶⁷ It has also been noted that it is unlikely that the majorities that wield the decision-making power in the various inter-governmental organisations would be any more ready to confer on the Court the power of direct annulment of their acts, even if found by the Court to be illegal or unconstitutional.¹⁶⁸

5.4. Judicial review against the failure to act by the organs

If an organ fails to act upon a request by any member state, does this necessitate recourse to the Court for review on the basis that this refusal to act infringes the Charter? Some international institutional instruments allow judicial review upon the failure to act. According to the ECSC treaty, if the High Authority refuses to take a decision or make a recommendation within two months of the date on which it was invited to act, the concerned state may refer the matter to the ECJ for annulment.¹⁶⁹ Similarly, Art. 175/2 of the EEC treaty and Art. 148 (paras. 1 and 3) of the Euratom treaty indicate that the parties may institute proceedings as a consequence of the failure to act. In that event, the ECJ may pronounce the illegality of the inaction. At the same time, the Court cannot substitute its own decision or specify a particular action, but if the ECJ decides the illegality of inaction, the institution is under an obligation to take the necessary measures to comply with the judgment of the Court.¹⁷⁰

The question is, does the ICJ possess a similar power? Because the UN organs have been entrusted with various discretionary powers, and because there is no express provision in the Charter of the UN to this effect, the answer to this question could be in the negative, for two reasons.¹⁷¹ First, as mentioned above, according to

¹⁶⁷ Elias, *supra* note 53, p. 97; Alvarez, *supra* note 122, p. 5.

¹⁶⁸ Fitzmaurice, G., "Enlargement of the Contentious Jurisdiction of the Court" in Gross, L. (ed.), *The Future of the International Court of Justice*, 1976, vol. 2, p. 486.

¹⁶⁹ Art. 35/3 of the ECSC treaty.

¹⁷⁰ Arts. 34 of the ECSC treaty, 176 of the EEC treaty, 149 of the Euratom treaty. Schermers, *supra* note 34, pp. 174 *ff.*; Dijk, *supra* note 1, pp. 246 *ff.*

¹⁷¹ In this regard, Brownlie notes that "it is true that the Rule of Law experts tend to have difficulties with discretionary powers. Provided the powers have been lawfully conferred it is, so it is said, impossible to regard discretion as incompatible with the Rule of Law." Brownlie, *supra* note

the current draft of the Charter and the Court's Statute states have no direct recourse to the ICJ against an act taken by the UN organs, whether negative or positive.¹⁷² Hence, recourse to the Court in this respect could be envisaged only through a contentious case. Second, it seems clear that empowering the ICJ without an express article would deprive these organs of their discretionary powers provided by the Charter. This is confirmed by some international lawyers, who notes that, "if the organs have acted in exercise of the particular responsibility conferred on them by the Charter, the Court has only a marginal power of review".¹⁷³ Such a view makes judicial review possible only if the organ has acted beyond its discretionary powers and not because of its failure to act on the request of a state member.

Conclusion

This chapter has affirmed that the rule of law is recognised by international lawyers as applying within the UN, in a similar fashion to the domestic field and some other international organisations. The sources of law in the UN are the Charter, rules of procedures and the general principles of law.

Having recognised the application of the rule of law within the framework of the UN, the question was who can grant respect of the law in the UN system. It was noted that the Court has an explicit power provided by some constitutions of specialised agencies and the Court practised this power in the IMCO and ICAO cases.

With regard to the power of judicial review by the Court upon the political organs' acts, it was noted that, despite the fact that neither the Charter nor the Statute refers to the power of the ICJ to review the acts of the UN organs, the Court has explicitly and in some cases implicitly reviewed the acts of the UN political organs. On the one hand, it has explicitly reviewed the legality of the acts of the political organs of the UN in the *Admission* case, the *Second Admission* case, the

13, p. 96; see also Osieke, E., "The Legal Validity of Ultra Vires Decisions of International Organisations", *AJIL*, 77, 1983, pp. 247 ff.

¹⁷² See pp. 302 ff. above.

¹⁷³ Kooijmans, *supra* note 71, p. 25.

Expenses case, and the *Namibia* case. It has also implicitly recognised this power in the *Northern Cameroon* case, the *Lockerbie* cases, and the *Bosnia* case.

Having referred to the power of the ICJ to play a similar role to that of constitutional courts in the domestic field, it was noted that this power has so far been exercised through its advisory and contentious jurisdiction. The Court has no power of judicial review *proprio motu* or through direct recourse by states against the decisions adopted by the political organs of the UN. With regard to the scope of judicial review, it was noted that the Court has no power to review the UN political organs *de novo*. On the other hand, it can examine the legality of the political organs' acts whenever cases are referred to it. Finally, it has no power to exercise judicial review over the failure of the organs to act, because the Charter empowers them with discretionary powers to fulfil its objectives.

In the view of the present writer, the exercise of the power of judicial review by the ICJ would indisputably contribute to the UN's credibility and would generate a feeling of confidence and trust in the UN's acts because the purposes and objectives of the UN would be safeguarded.

Chapter Six

The International Court of Justice as a Court of Appeal

Introduction

In the previous chapters different aspects of the ICJ's judicial role have been discussed. In order to complete the analysis of the Court's role as the principal judicial organ of the UN, this chapter focuses on a different judicial function. This role relates to its position as a court of appeal over the judgments of other tribunals established within the framework of the UN.¹ From the outset it should be noted that the Court's appellate jurisdiction is restricted to the judgments of the Administrative Tribunals established within the framework of the UN.² Although this function might be of limited practical value owing to the limited number of cases received by the ICJ and the recent resolution of the GA No. 50/54,³ it is

¹ It should be noted that the ICJ's judgments are not subject to judicial appeal. This is a consequence of Art. 60 of the ICJ's Statute, which provides that the ICJ's judgments are "final and without appeal". It should be noted also that within the framework of the UN several tribunals have been established - for instance, the UN Tribunal for Libya, the UN Tribunal for Eritrea, the UN Administrative Tribunal, and the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia. These tribunals have been established on the basis that, although the ICJ is the only judicial organ directly established by the Charter, and although it enjoys a position as the principal judicial organ of the UN, this does not mean that it is the only judicial organ that may be established, either by the UN as an organisation or by its individual members. See Rosenne, S., *The World Court - What It Is and How It Works*, 1995, pp. 33-4.

² There are three Administrative Tribunals within the framework of the UN: the International Labour Organisation Administrative Tribunal (ILOAT), the United Nations Administrative Tribunal (UNAT), and the World Bank Administrative Tribunal (WBAT). The ICJ's power as a court of appeal over the judgments of the Administrative Tribunals is restricted nowadays to the judgments of the first tribunal (see note 3 below, and pp. 339 ff. below). With regard to the reasons for establishing international administrative tribunals and their role, see Akehurst, M., *The Law Governing Employment in International Organisations*, 1967, pp. 11 ff.; Bowett, D., *The Law of International Institutions*, 1982, pp. 317 ff.; Amerasinghe, C., *The Law of the International Civil Service (As Applied by International Administrative Tribunals)*, 1994, vol. 1, pp. 37 ff.

³ Until December 1995, this role covered the judgments of the UNAT and the ILOAT in cases decided by them in disputes between staff members and their organisations. But, as of January 1996, this role has been restricted to the judgments rendered by the ILOAT as a consequence of GA Res. 50/54 adopted on 11 December 1995, in which it abolished Art. 11 of the UNAT's Statute, which was considered to be the basis of the ICJ's role in this regard. For more details of this resolution, see pp. 339 ff. below.

nevertheless important because it clarifies the role of the ICJ within the framework of the UN.

This chapter will not deal with the institutional side of the Administrative Tribunals, such as their composition, the qualification of judges, and other procedural matters. It will deal exclusively with the appellate jurisdiction of the ICJ over their judgments.

Accordingly, consideration is given to the meaning of appellate jurisdiction and its distinction from the other judicial procedures. The legal basis of the ICJ's jurisdiction as a court of appeal, the procedures of judicial appeal, the scope and grounds of the appellate jurisdiction of the ICJ, the parties to the appellate procedure, and the practice of the ICJ as a court of appeal will all be discussed. Finally, a study of GA Res. 50/54, by which Art. 11 of the UNAT's Statute was abolished, will be provided.

1. Judicial appeal and other judicial activities

1.1. Judicial appeal

At the apex of any state's legal system lies its final court of appeal, which receives and adjudicates appeals on major questions emanating from the courts below. The court of appeal deals with a dispute that has been before the lower courts on the request of one party to reconsider the judgment.

This is an effective means of ensuring the lower courts' adherence to the law, and it is a means of challenge when failure to comply with jurisdictional requirements or principles of fair procedure occurs.⁴ The judicial appeal is based on a guarantee to the parties to the dispute of due process. The appellate court has the right to decide either to confirm the judgment of the lower court or to render a new judgment.

There is a vast spectrum of types of judicial appeal, which could be directed to procedures or to errors in law or principle.

⁴ Walker, R., et al., *English Legal System*, 1985, p. 125.

1.2. The distinction between judicial appeal and other judicial procedures

Judicial appeal has some characteristic elements. First, its subject is a judgment rendered by another tribunal. Accordingly, the review of a legislative or executive act is not a judicial appeal in its *strict sense*. Second, it is carried out by a different tribunal from the one that rendered the judgment. Third, the appellate court deals with the same cases that were presented before the lower court. Judicial appeal is therefore, substantially different from other forms of judicial procedures.

It differs from a request for interpretation of the court's judgment, whose aim is to clarify and/or interpret the meaning or the scope of a judgment in the event of a dispute arising in respect of a given judgment.⁵ This procedure is undertaken by the court that rendered the judgment, and not by another court. This procedure does not involve an appeal either on the facts or on the law.⁶

Judicial appeal also differs from the procedure of revision of a court's judgment. This procedure might be made only upon the discovery of a fact that was unknown to the court when the judgment was rendered and also to the party claiming revision, provided that this fact is of the utmost relevance to the case and could have changed the judgment had it been presented to the court. However, ignorance of this fact should not be due to the negligence of the claiming party. This procedure allows the court to revise its judgments on the basis of the discovery of a material error of fact or of new material facts of decisive importance.⁷

⁵ Stanczyk, J., "Application for Interpretation of a Judgment by the International Court of Justice", *PYBIL*, 17, 1988, pp. 193 ff.

⁶ The ICJ, pursuant to Art. 60 of its Statute, has such a power in the event of a dispute arising as to the meaning or scope of its judgment. Accordingly, Art. 98 of the Rules of the Court stipulates that the request for interpretation may be made by means either of a special agreement between the parties or of an application by one or more of the parties. In practice, two applications for interpretation of the ICJ's judgment have been made, by Colombia in respect of the *Asylum* case (1950), and by Tunisia in respect of the *Continental Shelf* case between Tunisia and Libya (1985).

⁷ The ICJ, pursuant to Art. 61 of the Statute, has the power of revision of its judgment in the case of "the discovery of some fact of such a nature as to be a decisive factor, which fact was, when the judgment was given, unknown to the Court and also to the party claiming revision, always provided that such ignorance was not due to negligence". Art. 99 of the ICJ's Rules provides: "A request for the revision of a judgment shall be made by an application containing the particulars necessary to show that the conditions specified in Article 61 of the Statute are fulfilled. Any documents in support of the application shall be annexed to it." In practice, the ICJ was invited by Tunisia to revise to its judgment in the *Continental Shelf* case between Tunisia and Libya. See ICJ Rep., 1985, p. 192.

Finally, judicial appeal differs from judicial review, where the power of the court is to decide upon the constitutionality of the acts adopted by the legislative or the executive organs. In this regard, the competent court has the power to declare an act unconstitutional by declaring it null and void or by annulling it, and as a result refusing to enforce it.⁸

2. The legal basis of the ICJ's appellate jurisdiction over the Administrative Tribunals' judgments⁹

As mentioned above, the appellate jurisdiction of the ICJ is restricted to judgments issued by some Administrative Tribunals within the UN framework. It therefore seems appropriate to illustrate the legal basis of the principal judicial organ of the UN as a court of appeal.¹⁰

2.1. The Charter and the ICJ's Statute

At the San Francisco Conference in 1945 it was proposed to confer on the Court an appellate jurisdiction over the judgments of the Administrative Tribunals. In this respect, the Venezuelan delegation proposed the insertion of the following paragraph in Art. 34 of the Statute:

“(2) As a Court of Appeal, the Court will have jurisdiction to take cognisance over such cases as are tried under original jurisdiction by international administrative tribunals dependent upon the United Nations when the appeal would be provided in the Statute of such Tribunals.”¹¹

⁸ See pp. 268 *ff.* above.

⁹ This role has been rejected by some lawyers who claim that the ICJ has no jurisdiction as an appellate court. This opinion is based on the refusal of the participants in the *travaux préparatoires* stage of the UN to empower the ICJ with this role. See Rosenne, S., *The Law and Practice of the International Court*, 1965, vol. 2, p. 689.

¹⁰ Ostrihansky, R., “Advisory Opinions of the International Court of Justice as Review of Judgments of International Administrative Tribunals”, *PYBIL*, XVII, 1988, pp. 102 *ff.*

¹¹ See UNCIO, 13, p. 482. The original Venezuelan proposal was as follows:

“(2) Upon request from any of the inter-governmental international organisations or offices dependent on the United Nations, the Court shall settle conflicts of jurisdiction which may arise among them. As a Court of Appeal, the Court shall have cognisance over such cases as are tried under original jurisdiction by international administrative tribunals dependent upon the United Nations.” UNCIO, 13, p. 480.

This proposal was voted down after discussion of this matter in Committee IV/I.¹² Summarising the discussion, the chairman of this Committee, Mr Gallagher, stated: “[t]he principle involved in Article 34 was that States, but not private individuals or international organisations, might be parties to cases.”¹³ Accordingly, both the Charter and the ICJ’s Statute were drafted without a specific provision for any system of judicial appeal to the ICJ.

2.2. The Statutes of the Administrative Tribunals

The appellate jurisdiction of the ICJ was founded on the relevant provisions of the Statute of the ILOAT and the Statute of the UNAT.¹⁴ It is accordingly necessary to consider closely the pertinent provisions of these Statutes.

2.2.1. Art. XII of the Statute of the ILOAT

As a consequence of the dissolution of the League of Nations in 1946, the International Labour Conference, acting on the request of the League Assembly, took over the League of Nations’ Administrative Tribunal after reconstituting it with some modifications to its Statute.¹⁵ The ILOAT’s Statute was ratified by the ILO’s Assembly on 9 October 1946.¹⁶

¹² See UNCIO, 13, p. 482.

¹³ See UNCIO, 14, p. 141.

¹⁴ Nada, G., *International Employee: A Comparative Study in the International Administrative Law*, 1986, pp. 273, 300.

¹⁵ International Labour Conference, Records of Proceedings, 29 Sess., 1946, pp. 341-3.

¹⁶ During the early years of the League of Nations attempts were made to establish a judicial body to settle disputes between the international organisation and its employees. As a consequence, a draft of a Statute of the Administrative Tribunal was formulated in 1927, and adopted by a resolution of the Assembly of the League on 26 September 1927 (LNOJ, 9th Year, No. 58, 1928, p. 751, Annex I). According to its Statute, the Administrative Tribunal of the League of Nations was created to hear complaints alleging “non-observance, in substance or in form, of the terms of appointment of officials” and of relevant provisions of the staff regulations of the International Labour Office and of other international organisations that have recognised the competence of the Tribunal. On the legislative history of the creation of this tribunal, see the memorandum submitted by the ILO to the ICJ in the *UN Administrative Tribunal* case (1954), ICJ Pled., 1953, pp. 51 ff.; the written statement of the Secretary-General of the UN to the ICJ in this case, *ibid.*, pp. 218 ff.; the written statement of UNESCO to the ICJ in the *UNESCO* case, ICJ Pled., 1955, pp. 33 ff.; Friedmann, W., et al., “The United Nations Administrative Tribunal”, *Int.Org.*, 11, 1957, p. 15; Akehurst, *supra* note 2, pp. 13-14; Knapp, B., “International Labour Organisation Administrative Tribunal”, *EPIL*, 5, 1982, p. 94; Amerasinghe, *supra* note 2, vol. 1, pp. 49-52.

In the same year, the ILOAT rendered two awards in favour of two former officials of the ILO. When the matter of the payment of these awards came before the Governing Body of the ILO, some members expressed the view that the ILO should not enforce these judgments. The chairman of the Governing Body stated that it was important to ensure that no difficulty arose regarding the execution of judgments of the Administrative Tribunal in the future. The chairman therefore suggested that a new provision might perhaps be made for “a court of appeal”, for example the ICJ.¹⁷ Accordingly, the Staff Questions Committee was asked “to consider the arrangements concerning the functioning of the Administrative Tribunal in order to secure to the fullest degree possible that no difficulty might arise in the future as regards the execution of any future judgment the tribunal might hand down”.¹⁸ A paper submitted to the Staff Questions Committee took the position that amending the Statute of the ILOAT by including a new article providing for an appellate procedure was advisable. It was concluded that the power to consider the Tribunal’s judgments should belong to the highest existing judicial authority, namely the ICJ. It was also proposed that “the Governing Body of the ILO or the Administrative Board of the Pension Fund might be enabled to appeal to the International Court of Justice against decisions of the Tribunal on the grounds that it had exceeded its jurisdiction or where the procedure followed has been vitiated by a fundamental fault”.¹⁹ Accordingly, a new article (Art. XII) was added to the Statute of the ILOAT. This article reads as follows:

“1. In any case in which the Governing Body of the International Labour Office or the Administrative Board of the Pension Fund challenges a decision of the Tribunal confirming its jurisdiction, or considers that a decision of the Tribunal is vitiated by a fundamental fault in the procedure followed, the question of validity of the decision

¹⁷ The ILO Memorandum submitted to the ICJ in the *UN Administrative Tribunal* case (1954) ICJ Pled., 1954, p. 71. It should be noted that the possibility of judicial appeal was not provided with regard to the judgments of the ILO’s predecessor, the Administrative Tribunal of the League of Nations. Pursuant to Art. VI of its Statute, its judgments were “final and without appeal”. The report of the Supervisory Commission of this tribunal stated: “No provision for the revision of judgments of the Tribunal is inserted in the Statute. It is considered that, in the interests of finality and of the avoidance of vexatious proceedings, the tribunal’s judgments should be final and without appeal, as is provided in Article VI, paragraph I.” LNOJ, 9th Year, Special Supp., No. 58, 1928, p. 254.

¹⁸ ICJ Pled., 1953, p. 72.

¹⁹ Ibid., pp. 72-3.

given by the Tribunal shall be submitted by the Governing Body, for an advisory opinion, to the International Court of Justice.”²⁰

Similarly, the executive boards of other inter-governmental organisations that accepted the ILOAT’s Statute were granted the power to appeal against ILOAT judgments.²¹

2.2.2. Art. 11 of the Statute of the UNAT²²

As mentioned in Chapter Three, the UNAT was established by GA Res. 351 A (IV), of 24 November 1949. According to the Statute, the UNAT is competent “to hear and pass judgment upon applications alleging non-observance of contracts of employment of staff members of the Secretariat of the United Nations or of the terms of appointment of such staff members”. To achieve this aim, the Tribunal is open to any staff member of the Secretariat even after his or her employment has ceased; to any person who succeeded to the staff member’s right on his or her death; and to any other person who can show that he or she is entitled to rights under any contract or terms of appointment.²³ The original draft of the Statute had no provision corresponding to Art. XII of the ILOAT’s Statute, which provides the possibility of reviewing the ILO Administrative Tribunal’s judgments. This was justified by the fear that this procedure would cause further delay and would adversely affect staff morale.²⁴ Therefore, Art. 10/2 stated that the Tribunal’s judgments are “final and without appeal”.

²⁰ International Labour Conference, Records of Proceedings, 29 Sess., 1946, pp. 341-3.

²¹ In 1949, Art. XII of the ILOAT’s Statute was amended to permit inter-governmental organisations to use the ILOAT. See International Labour Conference, Records of Proceedings, 32 Sess., 1949, pp. 435-6. At present 25 other organisations are subject to the jurisdiction of the ILOAT under this provision: WHO, including PAHO, UNESCO, ITU, WMO, FAO, CERN, ICITO-GATT, IAEA, WIPO, Eurocontrol, UPU, EPO, ESO, CIPEC, EFTA, IPU, EMBL, WTO, CAFRAD, OTIF, CIEPS, OIE, INIDO, Interpol and IFAD. See Amerasinghe, *supra* note 2, p. 53.

²² Despite the fact that this article was abolished by GA Res. 50/54, it is worth mentioning it because it was a basis of the Court’s appellate jurisdiction for about four decades.

²³ Elias, T., *United Nations Charter and the World Court*, 1989, p. 156.

²⁴ The only discussion of the possibility of reviewing the United Nations Administrative Tribunal’s judgments appeared at the twenty-fifth meeting of the Fifth Committee on 15 November 1946 when the representative of Belgium asked the Rapporteur of the Fifth Committee whether the decisions of the Administrative Tribunal would be final or whether they would be subject to revision by the GA. The Rapporteur replied that, according to the draft Statute, there could be no appeal from the judgment of the Administrative Tribunal. The Advisory Committee feared an adverse effect on the morale of the staff if appeal beyond the Administrative Tribunal delayed the final

In 1953, a number of cases were decided by the UNAT that resulted in lengthy discussion in the GA. Certain members of the GA questioned the correctness of several judgments rendered by the Tribunal and proposed that the awards made by the Tribunal should not be enforced. In response to those proposals the GA, by its Res. 785 A (VIII) of 9 December 1953, decided to request an advisory opinion of the ICJ on the questions whether or not the GA has the right on any grounds to refuse to give effect to an award of compensation made by the Tribunal and what the principal grounds are on which the Assembly could lawfully exercise such a right.²⁵ In its advisory opinion, adopted on 13 July 1954, the ICJ concluded that the GA has no right, on any grounds, to refuse to give effect to an award of compensation.²⁶

During the discussion in the Fifth Committee of the above opinion, it was pointed out that the judgments of the Administrative Tribunal should be subject to review to obviate “miscarriages of justice” in the future.²⁷ The majority of the Committee also believed that cases that had arisen in the League of Nations, in the specialised agencies, and in the UN had indicated a need for a judicial appeal procedure if a representative organ of the UN believed that the organisation’s interests demanded such a review. To support this view, the US representative drew the attention of the Committee to the following passage of the advisory opinion:

“The Statute of the Administrative Tribunal has not provided for any kind of review of judgments, which according to Article 10, paragraph 2, shall be final and without appeal ... In order that the judgments pronounced by such a judicial tribunal could be subjected to review by any body other than the tribunal itself, if would be necessary, in the opinion of the Court, that the statute of that tribunal or some other legal instrument governing it should contain an express provision to that effect. The General Assembly has the power to amend the Statute of the Administrative Tribunal by virtue of Article 11 of that Statute and to provide for means of redress by another organ.”²⁸

decision in a case that had already been heard before organs within the Secretariat created for that purpose. See GAOR, 10th Sess., Annexes X, 49, 1955, p. 19.

²⁵ *Effect of Awards of Compensation Made by the United Nations Administrative Tribunal* case, ICJ Rep., 1954.

²⁶ With regard to the Court’s opinion in this case, see pp. 130-1 above.

²⁷ GAOR, 9th Sess., 5th Committee, pp. 271-2; UN Doc. A/C.5/SR. 474, 1954.

²⁸ ICJ Rep., 1954, pp. 54, 56.

Accordingly, a draft resolution was submitted by Argentina and the USA to the Fifth Committee proposing the establishment of machinery for judicial appeal through amendment of the Tribunal's Statute.²⁹ On 17 December 1954, the GA adopted Res. 888 B (IX), in which it accepted, "in principle", judicial appeal of the Tribunal's judgments and established a Special Committee that was to study the question of a procedure for such review "in all its aspects", and to report back to the 10th session of the GA.³⁰

On 8 November 1955, the GA adopted Res. 957 (X), by which it decided to add Art. 11 to the Statute of the UNAT in accordance with the Special Committee's recommendation.³¹ This article introduced a procedure for appeal to the ICJ.³² In

²⁹ GAOR, 9th Sess., Annexes, Agenda Item No. 48, 1954, p. 3; UN Doc. A/C.5/L.317, 3 December 1954.

³⁰ Part B of this resolution reads as follows:

"2. Accepts in principle judicial review of judgments of the United Nations Administrative Tribunal;

3. Requests Member States to communicate to the Secretary-General before 1 July 1955, their views on the establishment of a procedure to provide for review of the judgments of the Administrative Tribunal and to submit any suggestions which they may consider useful;

4. Invites the Secretary-General to consult on this matter with the specialised agencies concerned;

5. Establishes a Special Committee composed of Argentina, Australia, Belgium, Brazil, Canada, China, Cuba, El Salvador, France, India, Iraq, Israel, Norway, Pakistan, Syria, the Union of Soviet Socialist Republics, the United Kingdom of Great Britain and Northern Ireland and the United States of America, to meet at a time to be fixed in consultation with the Secretary-General to study the question of the establishment of such a procedure in all its aspects and to report to the General Assembly at its tenth session;

6. Requests the Secretary-General to notify all Member States of the date on which the Special Committee shall meet." GAOR, 10th Sess., Annexes, Agenda Item No. 49, 1955, p. 1; UN Doc. A/2909, 10 June 1955.

³¹ Art. 11 provides: "A member state, a Secretary-General or a person in respect to whom a judgment has been rendered by the Tribunal (including anyone who has succeeded to that person's rights on his death) may object to the judgment on certain prescribed grounds and make a written application to the Committee."

³² Although the members of this Committee were in agreement that the reviewing organ should be an independent, permanent, judicial body composed of highly respected jurists, there was a difference of opinion on whether the reviewing organ should be the ICJ, through its advisory procedure, or a new tribunal of the highest stature created specifically for the purpose of reviewing Administrative Tribunal judgments, or a panel within the framework of the Administrative Tribunal itself. The majority were in favour of the use of the advisory procedure of the ICJ as a means of appeal. This view was based on the experience of the ILO Tribunal, which was accepted by a number of specialised agencies. It was also pointed out that the position of the ICJ as the principal judicial organ of the UN justifies this authority. In addition, it was considered that it would be undesirable to create a new organ that would compete with the ICJ as a final arbiter on questions of UN law. For instance, see the statements of the UK, GAOR, 10th Sess., UN Doc. A/C.5/SR. 493, p. 36; and of Pakistan, GAOR, 10th Sess., UN Doc. A/C. 5/SR. 495, 1955, p. 48.

the light of this amendment, the UNAT's judgments were subject to a review procedure similar to that provided in the ILOAT's Statute.

One may conclude that, despite the fact that neither the Charter nor the ICJ's Statute empowers the ICJ with an appellate jurisdiction over the Administrative Tribunals' judgments, the Statutes of both the UNAT and the ILOAT have granted this power to the ICJ. This led to several doubts being raised as to the legality of conferring competence upon the ICJ by documents other than the Charter and the

Other representatives considered that the ICJ should not play any role in this regard, and the creation of a new organ would be desirable. In their view, the ICJ had been established to decide questions of international law in disputes between states, and consequently it should not be asked to adjudicate between the Secretary-General and a staff member. It was also noted that, pursuant to Art. 34 of the ICJ's Statute, only states might be parties in cases before the Court, and any attempt to use the advisory procedure for the review of Administrative Tribunal judgments would be contrary to the spirit of that Statute. Furthermore, the advocates of this opinion considered that the use of the term "advisory opinion" in the UN Charter and the Court's Statute clearly indicates that such an opinion is not binding on the organs concerned. Therefore, they believed that the use of an advisory procedure to review binding judgments would be an anomaly. Finally, it was noted that the use of the advisory procedure of the ICJ would present a practical difficulty related to the participation of a staff member in proceedings before the Court. A staff member had no *locus standi* before the ICJ and it would be inequitable to deny a party the right to appear before the reviewing body. For instance, see the statements of Syria, GAOR, 10th Sess., UN Doc. A/C.5/SR. 495, p. 47; Yugoslavia, *ibid.*, pp. 48-9; South Africa, *ibid.*, p. 50; India, GAOR., 10th Sess., UN Doc. A/C.5/SR. 496, p. 57; and Sweden, *ibid.*, p. 57.

In answer to these objections, it was pointed out by those representatives favouring the use of the ICJ that, under the Charter, the GA and other organs so authorised can request opinions of the Court on legal questions. It was noted that the Court's Statute is fully compatible with a request for an advisory opinion on legal questions that might be raised by a judgment of the Administrative Tribunal. It would be an advisory opinion and not an indirect means of settling a question in dispute. In addition, it was considered that, although there are difficulties in using the advisory procedure of the ICJ, these would not in practice prove substantial if the grounds of review were kept within narrow limits such as those laid down in Art. XII of the ILOAT's Statute. Furthermore, it was considered that provision could be made for acceptance in advance of advisory opinions. Some representatives referred to the authoritative character and moral force of the advisory opinions of the ICJ. Finally, with respect to the position of a staff member before the Court, it was believed that no injustice would result from the lack of complete formal equality. Adequate arrangements could be made for the presentation of a written memorandum by staff members to the Court as had been proposed by the Council of the League of Nations in a case concerning former officials of the Governing Commission of the Saar Territory. Further, it was believed that there would always be at least one state prepared to support the position of a staff member before the ICJ. It was also suggested that the review procedure might be restricted to the consideration of documents and written briefs. It was pointed out that no one had objected to the position of staff members under the procedure provided in Art. XII of the ILOAT's Statute or to the fact that staff members had not been able to participate in proceedings when an advisory opinion had been requested by the GA in 1953 on questions directly affecting staff members of the UN. For instance, see the Canadian statement represented to the Special Committee on the Application for Review of Administrative Tribunal Judgments, GAOR, 10th Sess., UN Doc. A/C.5/SR. 493, 1955, p. 40; the statement of Uruguay, GAOR, 10th Sess., UN Doc. A/C.5/SR. 494, 1955, p. 45; the statement of the USA, GAOR, 10th Sess., UN Doc. A/C.5/SR. 498, 1955, p. 66; the statement of Cuba, *ibid.*, p. 67; and the statement of Poland, GAOR, 10th Sess., UN Doc. A/C.5/SR. 499, 1955, p. 72.

Statute of the Court. It was argued that international organisations, whether the International Labour Organisation or the GA of the UN, have neither the capacity nor the right to impose such a function upon the ICJ except through an amendment to the Court's Statute or the Charter.³³

To consider this view, the Court's jurisprudence in this regard should be examined. The above doubts were raised in the early stages of drafting Art. 11 of the UNAT's Statute and it was proposed that the answer to this question should be left to be decided by the ICJ. In practice, the ICJ had on several occasions recognised its jurisdiction and concluded that it possessed competence. In its opinion in the *UNESCO* case, it stated that the Executive Board exercised a power conferred upon UNESCO by Art. XI of the Agreement between that organisation and the United Nations, approved by the GA on 14 December 1946. The Court referred to the amendment of Art. V of the UNESCO Constitution made by the General Conference by which UNESCO authorised the Executive Board to exercise that power between sessions of the General Conference. The Court complied with the request because it realised that the requested question was legal and concerned issues within the scope of the activities of UNESCO.³⁴

In addition, the ICJ noted in the *Fasla* case, that, "[i]f a request for advisory opinion emanates from a body duly authorised in accordance with the Charter to make it, the Court is competent under Article 65 of its Statute to give such opinion on any legal question arising within the scope of the activities of that body".³⁵ Similar statements were made by the ICJ in the *Mortished* case³⁶ and the *Application for Review of Judgment No. 333 of the United Nations Administrative Tribunal* case (1987).³⁷

It therefore seems clear that the Court recognised its appellate jurisdiction and relied on its advisory jurisdiction as provided by Art. 96/2 of the Charter and Art. 65

³³ Choi, W., "Judicial Review of International Administrative Tribunal Judgments" in Buergenthal, T. (ed.), *Contemporary Issues in International Law. Essays in Honour of Louis B. Sohn*, 1984, p. 355.

³⁴ ICJ Rep., 1956, pp. 83-4.

³⁵ ICJ Rep., 1973, p. 172.

³⁶ ICJ Rep., 1982, pp. 333-4.

³⁷ ICJ Rep., 1987, pp. 30-1 (hereinafter the *Yakimetz* case).

of the Statute. It saw no difficulty in its advisory jurisdiction being used for the review of judgments rendered by the Administrative Tribunals within the framework of the UN in cases involving disputes between the organisation and its officials.³⁸

3. Procedures of judicial appeal

From the outset, it should be noted that the ICJ cannot examine the Administrative Tribunals' judgments and adjudicate upon them *proprio motu*. The authorised person also cannot refer an application of appeal against the Administrative Tribunals' judgments directly to the ICJ.

Therefore, as stated by the Statutes of the Administrative Tribunals, the only way to refer an application of appeal to the ICJ is through a special committee, usually referred to as the "Screening Committee".³⁹ Once the Committee receives the request, it is required to decide whether or not there is a "substantial basis" for the application to request an advisory opinion of the ICJ to review the judgment of the Administrative Tribunal. If the Committee's opinion is that there is a substantial basis for application, it may request an advisory opinion of the ICJ; otherwise it takes no action.

Pursuant to Art. 11/4 of the UNAT's Statute, a Committee on Applications for Review of Administrative Tribunal Judgments was established and its powers defined.⁴⁰ This Committee was established as a subsidiary organ of the GA pursuant to Art. 22 of the Charter. It is composed of the representatives of all member states on the GA of the most recent regular session of the GA.⁴¹ This Committee is authorised by the GA, pursuant to Art. 96/2 of the Charter, to request advisory

³⁸ Diss. Op. of Judge Schwebel, ICJ Rep., 1982, p. 458.

³⁹ Art. 11 of the UNAT's Statute stipulates that the authorised person has to make a written application to the Committee within 30 days.

⁴⁰ UN Doc. At/11 Rev. 2 (UN pub. 62.X.3).

⁴¹ GA Res. 957 (X), 8 November 1955. It should be noted that this amendment was challenged on the basis that it undermined the "cornerstone of the Court's Statute which provides that only states could be parties before the Court but not private individuals". Diss. Op., of Judge Morozov in the *Application for Review of Judgment No. 273 of the United Nations Administrative Tribunal*, ICJ Rep., 1982, pp. 325, 435.

opinions of the ICJ in cases in which it finds a substantial basis for the application made to it.⁴²

Pursuant to Art. XII of the ILOAT's Statute, the judgments of the ILOAT may be referred to the ICJ only by the Governing Body of the ILO⁴³ or by the equivalent boards of the other organisations that accept the jurisdiction of the ILOAT.⁴⁴

It seems clear that the function of this Screening Committee is to receive applications challenging the judgments of the Administrative Tribunals on one or more of the grounds set out in their Statutes, and to decide whether or not there is a substantial basis for the application. If it finds such a basis it may request an advisory opinion of the ICJ. In this regard, the ICJ defined the primary function of this Committee as "not the requesting of advisory opinions, but the examination of objections to judgments in order to decide in each case whether there is substantial basis for the application so as to call for a request for an advisory opinion. If it finds that there is not such a substantial basis for the application the Committee rejects the application without requesting an opinion of the Court."⁴⁵

In the light of the above, one may describe the task of this Committee as a filter. It is not charged with the duty of reviewing the judgments of the Administrative Tribunals. It is - as noted by Judge Ago - a machinery to: (i) sift and examine the applications received for review of judgments of the Administrative Tribunals; (ii) decide whether or not there is "substantial basis" for each application;

⁴² The ICJ pointed out in its opinion in the *Fasla* case that "the Committee on Applications for Review of Administrative Tribunal Judgments is an organ of the United Nations, duly constituted under Articles 7 and 22 of the Charter, and duly authorised under Article 96, paragraph 2, of the Charter to request advisory opinions of the Court for the purpose of Article 11 of the Statute of the United Nations Administrative Tribunal. It follows that the Court is competent under Article 65 of its Statute to entertain a request for an advisory opinion from the Committee made within the scope of Article 11 of the Statute of the Administrative Tribunal." ICJ Rep., 1973, p. 175.

⁴³ Although there exists a similarity between the Governing Body of the ILO and the Screening Committee of the UN with regard to their power to refer a request for judicial appeal to the ICJ, there are some differences. The Governing Body is the executive committee of the ICJ, but the Screening Committee of the UN is not the executive committee of the UN nor would its composition be comparable with that of the ILO Governing Body, which is a tripartite organ. See the statement presented by India to the Special Committee on Application for Review of Administrative Tribunals Judgments, GAOR, 10th Sess., UN Doc. A/C.5/SR. 496, 1955, p. 56.

⁴⁴ With regard to the international organisations that accept the jurisdiction of the ILOAT, see note 21, p. 320 above.

⁴⁵ ICJ Rep., 1973, p. 174.

(iii) select, among the various grounds for review laid down in the Statute of the Administrative Tribunal, those that it considers applicable to the case in hand, thereby taking responsibility for excluding the others outright; (iv) request, in such cases, an advisory opinion of the ICJ on the grounds not rejected.⁴⁶

4. The scope and grounds of judicial appeal

Appeal procedures in domestic judicial systems suggest a great variety in the scope of review. One possibility is a review of the broadest scope. This would involve a complete review of the case in all its aspects, including both the law and the facts. In reviewing the findings of facts, some systems provide for an examination by the reviewing tribunal of the evidence gathered by the lower court but do not permit the taking of new evidence by the reviewing body, whereas other systems give the reviewing tribunal the power to hear new evidence or even to retry the case *ab initio*. A second possibility is a review of errors of law only. This includes the interpretation of the general rules and regulations and the general principles of law that might be involved. A third possibility is a more restricted review, allowing appeals to review specific issues such as the lack of jurisdiction of the lower tribunal, or a fundamental fault in the procedures followed.

The questions now are: what scope does the ICJ have in dealing with the review of the Administrative Tribunals' judgments, or can the ICJ formulate its own scope of appeal?

The issues with respect to which a review of judgments of the Administrative Tribunals may be requested of the Court are stated precisely in the ILOAT's and the UNAT's Statutes.

Pursuant to Art. XII of the ILOAT's Statute, two grounds for judicial appeal are provided: first, lack of jurisdiction in the tribunal; second, a fundamental defect in the procedure followed. This means that all other aspects of such judgments remain "final and without appeal". Accordingly the request for an advisory opinion under Art. XII is not in the nature of an appeal on the merits of the judgment. Errors of

⁴⁶ See the Sep. Op. of Judge Ago in the *Yakimetz* case, ICJ Rep., 1987, p. 108.

fact or of law on the part of the ILOAT in its judgment on the merits cannot be the subject of judicial appeal to the ICJ.

This limited scope was not adopted by Art. 11 of the UNAT's Statute,⁴⁷ which laid down four grounds on which a judgment may be challenged: excess of, or failure to exercise, jurisdiction, an error on a question of law relating to the Charter, or a fundamental error of procedure causing a failure of justice.⁴⁸

The first two grounds indicated in the UNAT Statute and the ILOAT Statute for judicial appeal are identical. They are concerned with the jurisdiction of the Tribunals or with questions of procedure.

The new ground provided by Art. 11 extended the scope of appeal to any important question of law. Its purpose was to determine whether the UNAT had correctly applied the law to the merits of a dispute.⁴⁹ In this regard, it was noted that appeal under the new ground included not only a case where the Tribunal might be considered to have misinterpreted the Charter, but also a case where the Tribunal's interpretation and application of staff regulations were inconsistent with the provisions of Chapter XV of the Charter.⁵⁰ This is based on the preparatory work on

⁴⁷ The scope of judicial appeal over the UNAT was a matter of comprehensive discussion during the drafting of Art. 11 of the UNAT's Statute. See the Report of the Special Committee on Application for Review of Administrative Tribunal Judgments, GAOR, 10th Sess., Annexes X, 49, 1955, pp. 4-5, 8; Choi, *supra* note 33, p. 356.

⁴⁸ In this regard it has been noted by Singh that the grounds of such an appeal must be one of the following: "that the tribunal has exceeded its jurisdictional competence or that the tribunal has failed to exercise jurisdiction vested in it, or has erred on a question of law relating to the provisions of the Charter of the United Nations, or has committed a fundamental error in procedure which has occasioned a failure of justice." Singh, N., *The Role and Record of the International Court of Justice*, 1989, p. 163.

⁴⁹ Accordingly, the US view regarding the range of legal issues on which appeal may be sought includes: "a question such as whether the Secretary-General's judgment should be upheld in regard to the conduct of a staff member under United Nations standards of efficiency, competence, and integrity prescribed in accordance with Article 101 of the Charter; or a question whether the Secretary-General's action should be sustained in giving directions to the staff member or taking disciplinary action against him, in view of the Secretary-General's position as Chief Administrative Officer of the organisation under Article 97; or a question involving the staff member's duty to refrain from any action which might reflect on his position as an international official responsible only to the organisation under Article 100, Paragraph 1." GAOR, 10th Sess., UN Doc. A/C.5/SR. 494, 1955, pp. 44-5.

⁵⁰ Choi, *supra* note 33, p. 358. In this regard it was noted by Judge de Castro that "[a]n important divergence from Article XII of the Statute of the ILO Administrative Tribunal was introduced in the third ground of challenge laid down in Article 11 of the Statute of the United Nations Administrative Tribunal. In place of a 'fundamental fault in the procedures followed' there is reference to the tribunal having 'committed a fundamental error in procedure which has

the UNAT Statute, which concluded that “the words ‘relating to the provisions of the Charter’ covered not only interpretations of the provisions of the Charter but also the interpretation or application of staff regulations deriving from chapter XV of the Charter”.⁵¹ This article was, therefore, considered to be an important innovation.

In practice, the above grounds for appeal were used by the Screening Committee as a basis for its requests. In the *UNESCO* case, the ILOAT’s judgment was challenged on two bases: (i) the ILOAT had no jurisdiction to decide cases referred to it by staff members of UNESCO; (ii) the ILOAT had no competence to determine the powers of the Director-General of UNESCO.⁵² The ICJ’s opinion with regard to the first challenge affirmed the jurisdiction of the ILOAT in respect of the four judgments submitted for its review on the ground, *inter alia*, of the possible non-observance of staff regulations on the part of the Director-General of UNESCO. The Court declined to answer the second allegation on the ground that it was beyond the scope of the Court’s function in reviewing the judgments of ILOAT under Art. XII of the Statute.⁵³

The UNAT’s Judgment No. 158 was challenged by the applicant on the basis that the UNAT “failed to exercise its jurisdiction vested in it ... the Tribunal committed a fundamental error in procedure which has occasioned a failure of justice”.⁵⁴

The UNAT’s Judgment No. 333 was also referred by the Committee to the ICJ for review on the grounds that “the Administrative Tribunal had failed to exercise jurisdiction vested in it” and that “the tribunal had erred on a question of law relating to the provisions of the Charter of the United Nations”.⁵⁵

occasioned a failure of justice’. The source of the mention of ‘failure of justice’ was an amendment proposed by India and accepted without discussion. The effect thereof is far-reaching: the formula enables the Court, in the advisory opinion requested, to examine the question whether the decision of the Administrative Tribunal on the merits is just.” ICJ Rep., 1973, p. 283.

⁵¹ UN Doc. A/AC. 78/SR. 10, p. 3.

⁵² ICJ Rep., 1956, p. 79.

⁵³ Ibid., p. 98 ff.

⁵⁴ ICJ Rep., 1973, p. 167.

⁵⁵ In this case, Mr Yakimetz, the applicant, urged the Committee on Applications on 21 June 1984 to request an advisory opinion of the ICJ on four grounds as follows:

In this regard, a question that needs to be examined is whether the ICJ, while dealing with a request for appeal, can retry a case?

In the *Fasla* case, the ICJ established a principle that its role in the review proceedings is not to retry the case. The Court also noted that it is not therefore entitled to substitute its own opinion for that of the Tribunal on the merits of the case adjudicated by the Tribunal. Further, the Court observed that under Article 11 of the Statute of the United Nations Administrative Tribunal a challenge to a decision for alleged failure to exercise jurisdiction or fundamental error in procedure cannot properly be transformed into a proceeding against the substance of the decision. Finally, the ICJ pointed out that Art. 11 does not mean that in an appropriate case, where the judgment has been challenged on the ground of an error on a question of law relating to the provisions of the Charter, the Court may not be called upon to review the actual substance of the decision.⁵⁶

The Court reiterated this passage in its opinion on the *Mortished* case. The Court carefully examined the question of its role when asked for an advisory opinion on the ground of an error on a question of law relating to provisions of the Charter. It re-emphasised that “the Court’s proper role is not to retry the case and to attempt to substitute its own opinion on the merits for that of the Tribunal”.⁵⁷ The ICJ added that, “[i]n any event, the Court clearly could not decide whether a judgment about the interpretation of Staff Regulations or Staff Rules has erred on a question of law relating to the provisions of the Charter, without looking at that judgment to see what the Tribunal did decide ... It is not the business of the Court ... itself to get involved in the question of the proper interpretation of the Staff Regulations and the Staff Rules, as such, further than is strictly necessary in order to

“(i) The tribunal has exceeded its jurisdiction and competence.

(ii) The tribunal has failed to exercise jurisdiction vested in it.

(iii) The majority judgment of the tribunal errs on questions of law relating to provisions of the Charter.

(iv) The tribunal has committed fundamental errors of procedure which have resulted in a miscarriage of justice.”

The Committee based its request for an advisory opinion upon grounds (ii) and (iii). See UN Doc. A/AC. 86/30, paras. 10 and 11; ICJ Rep., 1987, pp. 19 *ff*.

⁵⁶ ICJ Rep., 1973, pp. 187-8.

⁵⁷ ICJ Rep., 1982, p. 356.

judge whether the interpretation adopted by the Tribunal is in contradiction with the requirements of the provisions of the Charter of the United Nations.”⁵⁸

The ICJ was guided by this principle in the *Yakimetz* case. The ICJ determined the scope of its role, and decided not to deal with the problems raised by certain administrative steps taken by the Secretariat, and which had been the subject of criticism, at the same time as the Tribunal’s Judgment No. 333. The Court pointed out that it “should not express any view of the correctness or otherwise of any finding of the Tribunal in Judgment No. 333, unless it is necessary to do so in order to reply to the questions put to it”.⁵⁹

In the light of the above dicta it seems obvious that the ICJ took into account the limits upon its competence laid down by Art. 11 of the UNAT’s Statute. The Court did not attempt to substitute its own opinion on the merits for that of the administrative tribunals.⁶⁰

Is the ICJ a court of appeal?

Having looked at the scope and grounds of judicial appeal of the ICJ in the light of the Administrative Tribunals’ Statutes and the jurisprudence of the ICJ it is clear that the ICJ, as the principal judicial organ within the framework of the UN, plays a role similar to that of a court of appeal within domestic judicial systems. Accordingly, one may find it difficult to accept the description of some international lawyers from civil law systems that the ICJ’s role in “this process resembles the continental system of *Cassation* - review and not appeal - and no question relating to the facts can brought in”.⁶¹ Art. XII of the ILOAT Statute and Art. 11 of the

⁵⁸ Ibid., 1982, p. 358.

⁵⁹ ICJ Rep., 1987, pp. 33-4.

⁶⁰ In this regard, it was noted by Judge de Castro in his dissenting opinion in the *Fasla* case that “[i]t should be observed that the grounds on which the judgment may be objected to are questions of law, the only questions on which the Court may give an opinion (Charter, Art. 96; Statute, Art. 65). The Court has no jurisdiction to consider all the complaints made by the person who challenges the judgment. It has no power to re-examine the evidence laid before the Administrative Tribunal, still less to consider facts or evidence which were not laid before the tribunal, or which were not taken into account by it.” ICJ Rep., 1973, p. 281.

⁶¹ In this regard, it has been noted by Basted that “la cour internationale de justice a, dans un avis consultatif, confirmé leur caractère juriciaire, en tirant argument, tout à la fois, de la situation faite à leurs membres et des pouvoirs qui leur sont conférés. On a vu plus haut que les tribunaux des Nations Unies et de l’O.I.T. relèvent par une sorte de recours en cassation de la cour de justice.” Basted, P., *La Justice dans les Relations Internationales. La Justice*, 1961, p. 445 (emphasis added).

UNAT Statute do not restrict the role of the ICJ to reviewing faults in the interpretation or application of the law (the Charter) by the lower court. On the contrary, its role is extended to errors of procedure and the jurisdiction of the lower court. In addition, the ICJ's dictum in the *Fasla* case held that the Court does not regard itself as precluded from examining in full liberty the facts of the case or from checking the Tribunal's appreciation of the facts.⁶²

To conclude, it might be argued that, despite the restricted scope of the ICJ's power to review the judgments of the Administrative Tribunals, there is no doubt that the ICJ has acted as an appellate court.

5. The parties to judicial appeal

Who should have the right to initiate appellate procedures? Pursuant to Art. XII of the ILOAT's Statute, the right to challenge a judgment of the ILOAT and request an appeal is restricted to the Governing Body of the ILO, the Administrative Board of the Pensions Fund, or the Executive Board of a specialised agency. Accordingly, as regards ILOAT's judgments rendered in disputes between the international organisation and its staff members, only the organisation is accorded the right to challenge the validity of these decisions. The other party to the dispute, the staff member, has no corresponding right to request an appeal against these judgments.⁶³ Although this article might have its justification, there is no doubt that it is contrary to the fundamental principle of judicial procedure *audiatur et altera pars*, which provides that the right to request judicial appeal must be open to both parties.⁶⁴ The

It has been noted also by Planty that "Quoique n'aboutissant pas à de véritables jugements, ces voies de recours exceptionnelles et rarement utilisées s'apparentent à la cassation que connaissent divers systèmes juridiques contemporains". Planty, A., *Droit et Pratique de la Fonction Publique Internationale*, 1977, p. 455. In this regard it seems relevant to note that the Court of Cassation in civil law systems has a similar role to that of the House of Lords in the English legal system. It is the highest court in the judicial system. It hears appeals on law from the courts of appeal. These courts may decide only whether or not the judgment of the tribunal of origin is valid. If this decision is in the negative, then it quashes or annuls the judgment, but does not give a new judgment. Such a decision may in some cases settle the matter, for example if the judgment were annulled for lack of jurisdiction. In other cases, however, for example where there is an error in procedure, the case must be retried by the lower tribunal.

⁶² ICJ Rep., 1973, p. 207.

⁶³ Knapp, *supra* note 16, p. 96.

⁶⁴ Gross, L., "Participation of Individuals in Advisory Proceedings before the International Court of Justice: Question of Equality between the Parties", *AJIL*, 52, 1958, pp. 18 ff.

ICJ, in the *UNESCO* case, considered the question of equality between UNESCO and the officials. It said that:

“the advisory proceedings which have been instituted in the present case involve a certain absence of equality between Unesco and the officials both in origin and in the progress of those proceedings ... However, the inequality thus stated does not in fact constitute an inequality before the Court. It is antecedent to the examination of the question by the Court. It does not affect the manner in which the Court undertakes that examination. Also, in the present case, that absence of equality between the parties to the Judgments is somewhat nominal since the officials were successful in the proceedings before the Administrative Tribunal and there was accordingly no question of any complaint on their part. This being so, it is not necessary for the Court to express an opinion upon the legal merits of Article XII of the Statute of the Administrative Tribunal.”⁶⁵

Although the Court found that equality between the parties before the ICJ had been achieved through the forwarding to the Court of a statement of the observations of the staff members’ legal adviser by the Executive Board of UNESCO,⁶⁶ it admitted that inequality exists in the initial stages of appeal proceedings because the right to pre-trial the appeal procedure is conferred exclusively upon the Executive Board.⁶⁷

The former Art. 11 of the UNAT’s Statute marked an improvement over Art. XII of the ILOAT. It placed the states, the Secretary-General and the staff members in a relatively equal position in initiating appeal procedure. Staff members were allowed to initiate a request for an advisory opinion by making an application to the Committee. Art. 11 also granted the procedural equality of staff members before the Court by requiring the Secretary-General to transmit the individuals’ views to the Court. In addition, to achieve equality between the parties before the ICJ, para. 2 of the GA resolution whereby it adopted the above article recommended that

⁶⁵ ICJ Rep., 1956, pp. 85-6.

⁶⁶ It should be noted that this equality between the parties was achieved because no oral proceedings were held in this case. See ICJ Rep., 1956, pp. 85-7.

⁶⁷ Judge Winiarski noted in his Sep. Op. in the *UNESCO* case that: “Unesco alone may apply to the Court to challenge the judgments of the Administrative Tribunal. It was legally impossible to confer the same right to the officials. They won their case before the Tribunal; had they lost it, no remedy would have been available to them.” ICJ Rep., 1956, p. 108. Judge Klaestad also noted that “[t]he provisions of Article XII have thus established a manifest inequality between the parties to a dispute decided by the Administrative Tribunal. The Article has introduced a review procedure which fails to observe fundamental principles of equality of justice and impartiality of procedure. This lack of equality and impartiality is aggravated by the fact that the right to challenge the validity of a decision rendered by the Administrative Tribunal, while granted to the international organisation, is denied to the weaker party.” ICJ Rep., 1956, p. 111 (emphasis added).

member states and the Secretary-General should refrain from making oral statements in any proceedings before the Court. It established the right of the Secretary-General as well as the individual staff member concerned (including anyone who has succeeded to that person's rights on his or her death) to initiate an appeal procedure before the Screening Committee. This article was applied in the *Fasla* and in the *Mortished* cases, where the applications for appeal were presented by staff members. This article extended this right to request an appeal to the member states of the organisation.⁶⁸ This right was granted to them even if they did not participate in the proceedings of the UNAT, whether the staff member was one of its nationals or not, and even if both parties to the case, the staff member and the Secretary-General, accepted the judgment. Therefore, it should also be noted that

⁶⁸ It should be noted that conferring the right on member states to initiate the appeal caused much debate among the participants on the Special Committee. On the one hand, it was concluded by some representatives that this right should be restricted to the Secretary-General and the staff member concerned. The advocates of this opinion believed that a right of initiation by member states might derogate from the international character of the Secretariat, because staff members would look to their governments for protection in disputes with the Secretary-General. It was also noted that such authorisation to member states would be contrary to both the paragraphs of Art. 100 of the Charter. In addition, it was noted that to permit member states to initiate a review would introduce a new party which had not participated in the original proceedings before the Administrative Tribunal, which would be contrary to generally accepted judicial principles. It was also believed that this would introduce a political element into what should be a strictly judicial procedure. Furthermore, it was considered that, since a member state could not act for the organisation as a whole, there was no interest in the proceedings before the Administrative Tribunal that could properly be represented by a member state. Staff members acted in their own interests and the Secretary-General acted both in his own interest and in the interests of the organisation as a whole. The intervention of a member state would indicate a lack of confidence in the Secretary-General and would lower his prestige. For instance, see the statements presented by the representatives of Norway, GAOR, 10th Sess., UN Doc. A/C.5/SR. 493, 1955, p. 38; Egypt, *ibid.*, p. 40; the Netherlands, GAOR, 10th Sess., UN Doc. A/C.5/SR. 494, 1955, p. 43; Syria, GAOR, 10th Sess., UN Doc. A/C.5/SR. 495, 1955, p. 47; Yugoslavia, *ibid.*, p. 49; Soviet Union, *ibid.*, p. 50; and India, GAOR, 10th Sess., UN Doc. A/C.5/SR. 496, 1955, p. 55.

On the other hand, some representatives held the view that member states should also have some part in the initiation of review. According to this opinion, member states have legitimate and important interests which should be given expression. In addition, it was noted that, although the legitimate interests of a staff member and the position of the Secretary-General have to be safeguarded, those are not the only considerations involved and the review procedure would fail in its purpose if those considerations alone were taken into account. Cases that had arisen in the League of Nations, in the specialised agencies and, recently, in the UN had indicated a need for a judicial review procedure when a representative organ of the UN believes that the organisation's interests demand such a review. Certain interests of the organisation could be represented only by sovereign member states. Furthermore, it was indicated that a right of initiation by member states would not be contrary to Arts. 100 and 101 of the Charter, and could not impair the position of the Secretary-General. For instance, see the statements presented by Canada, GAOR, 10th Sess., UN Doc. A/C.5/SR. 493, 1955, p. 40; and Argentina, GAOR, 10th Sess., UN A/C.5/SR. 495, 1955, p. 50.

this right did not mean that the state became a party to the litigation. The state had the right only to ask the Committee to make the request.

In practice, this power was used by the United States in the *Mortished* case, 1982.⁶⁹ Mr Mortished, who claimed in his written statement that “allowing a third party to raise objections to a judgment in which it has no legal right nor interest and to seek a review of the judgment is contrary to fundamental principles of judicial process”. The ICJ dealt with this claim and observed that, although a member state of the UN may not be a party to a judgment rendered by the UNAT in a dispute between a staff member and the organisation, it may well have a legal interest in initiating a review of the judgment. It also observed that the role of the states in this regard is to initiate the Committee’s discussion of the submitted application, but that the request comes from the Committee and not from the member state, once it has decided that there is a substantial basis.⁷⁰

6. The ICJ’s practice as a court of appeal

Thus far the ICJ has acted as a court of appeal in four cases, one of them rendered by the ILOAT and the other three rendered by the UNAT.⁷¹ In none of these cases did the Court find that the Administrative Tribunals had erred.

The *UNESCO* case was the first occasion for the ICJ to practise its role as a court of appeal. UNESCO, which had accepted the jurisdiction provided by the Statute of the ILOAT for the purpose of settling certain disputes that might arise

⁶⁹ The USA addressed a letter to the Acting Legal Counsel of the UN by a way of application to the Committee on Applications for Review of the UNAT’s Judgment No. 273 pursuant to Art. 11/1 of the Statute of the Tribunal. The application read as follows: “[t]he United States requests the Committee on Applications for Review of Administrative Tribunal Judgments to request an advisory opinion of the International Court of Justice on the matter of Judgment No. 273 of the Administrative Tribunal.” ICJ Rep., 1982, p. 343.

⁷⁰ Ibid., p. 335. In his Sep. Op., Judge Lachs observed that “the General Assembly’s 1955 decision to admit the possibility of an application for review being submitted by a member State constituted recognition that a member State, as a representative of the organisation, can have a legitimate interest in questioning the Tribunal’s decision on a matter concerning the staff member’s rights and obligations *vis-à-vis* his ultimate employer, the organisation. On such occasions it is, I believe, misleading to visualise such an application as amounting to an intervention in a relationship between two other persons.” Ibid., p. 413.

⁷¹ For comprehensive details of these cases, see Elias, T., “The International Court of Justice in Relation to the Administrative Tribunals of the United Nations and the International Labour Organisation” in De Cooker, C., *International Administration: Law and Management Practices in International Organisations*, 1995, part V, pp. 6 ff.

between the organisation and its staff members,⁷² brought a case to the ICJ through its Executive Board. This appeal was to review a judgment rendered by the ILOAT in favour of four UNESCO staff members.⁷³ UNESCO challenged this judgment on the basis that, pursuant to Art. II of ILOAT's Statute, it lacked the jurisdiction to deal with the case.

In its advisory opinion of 23 October 1956, the ICJ held that Art. VI, para. 1, of the Tribunal's Statute, which stipulates that the opinions of the Tribunal are "final and without appeal", is subject to the provisions of Article XII, para. 1, of the Statute, which confers upon the Executive Board the right to challenge a decision of the Tribunal confirming its jurisdiction. With regard to the competence of the Tribunal to decide the case, the Court disregarded the allegation that the Tribunal committed an excess of jurisdiction and acted *ultra vires* in the decision it gave. Accordingly, it held that the ILOAT was competent to hear the complaint in question.⁷⁴

Since then, the ICJ has dealt with three cases rendered by the UNAT. The request for an advisory opinion in these cases was submitted by the Committee on Applications for Review of Administrative Tribunal Judgments.

In 1972, this Committee requested the ICJ, for the first time, to give an advisory opinion regarding the UNAT's Judgment No. 158, rendered on 28 April

⁷² UNESCO accepted the competence of the ILOAT to settle disputes that might arise between the organisation and its staff members. It further provides that the Tribunal's judgments shall be final and without appeal, subject to the right of the organisation to challenge them. Finally, it provides that in the event of such a challenge the question of the validity of the decision shall be referred to the ICJ for an advisory opinion, which will be binding.

⁷³ The facts of this case are that four staff members held fixed-term appointments with the organisation that were due to expire on 31 December 1954 and 14 February 1955. The Director-General of UNESCO having refused to offer them further appointments when their current appointments expired, the employees concerned complained to the UNESCO Appeals Board. The Board gave its opinion that the decisions refusing to renew the contracts should be rescinded. The Director-General did not adopt the Board's opinion. So an application was made by the staff members to the ILOAT, whose jurisdiction had been recognised by UNESCO for the purpose of settling disputes involving staff employment.

The ILOAT held that the Director-General had acted illegally and that the contracts had to be reinstated or compensation should be paid.

⁷⁴ ICJ Rep., 1956, p. 101; Cheng, B., "Revision of Judgments of the I.L.O. Administrative Tribunal by the International Court of Justice", *The Solicitor*, 24, Part I, April, 1957, pp. 102 ff.; Part II, May, 1957, pp. 132 ff.

1972.⁷⁵ The ICJ, in its opinion of 12 July 1973, decided to comply with the Committee's request. It observed that, "although [it] does not consider the review procedure provided by Article 11 as free from difficulty, it has no doubt that, in the circumstances of that case, it should comply with the request by the Committee on Applications". With regard to the substance of the request, the Court found that the UNAT had not failed to exercise the jurisdiction vested in it, as contended in the applicant's application to the Committee, and that the Tribunal had not committed a fundamental error in procedure which had occasioned a failure of justice, as contended in the applicant's application.⁷⁶

Eight years later, the Committee requested the ICJ to review UNAT Judgment No. 273 on the eligibility for reparation grants of retiring UN employees, and the effect on the "acquired rights" of such employees of two successive UN GA resolutions conditioning eligibility for such grants upon evidence of the actual location of the employees concerned in their original home countries.⁷⁷ The ICJ decided to grant the requested opinion. It found that the UNAT had not erred on a question of law relating to the provisions of the Charter. It considered also that the UNAT's jurisdiction included staff regulations and rules, and concluded that the UNAT had not exceeded its jurisdiction or competence when it dealt with the case.⁷⁸

The last and most recent opinion of the ICJ as a court of appeal was the *Yakimetz* case.⁷⁹ The ICJ was asked to review the UNAT judgment based on the

⁷⁵ The ICJ was asked to decide two questions: "1. Has the Tribunal failed to exercise jurisdiction vested in it as contended in the applicant's application to the Committee on Applications for Review of Administrative Tribunal Judgments? 2. Has the Tribunal committed a fundamental error in procedure which has occasioned a failure of justice as contended in the applicant's application to the Committee on Applications for Review of Administrative Tribunal Judgments?" ICJ Rep., 1973, p. 167.

⁷⁶ ICJ Rep., 1973, pp. 183, 213.

⁷⁷ For the facts of this case, see ICJ Pled., 1981, pp. 7-8.

⁷⁸ ICJ Rep., 1982, pp. 365-6; Abou-El-Wafa, A., "Comment on the International Court of Justice's Advisory Opinion in Case No. 273 of the United Nations' Administrative Tribunal", *REDI*, 38, pp. 229 *ff*.

⁷⁹ The ICJ was asked the following questions: "1. In its judgment No. 333 of 8 June 1984 did the United Nations Administrative Tribunal fail to exercise the jurisdiction vested in it by not responding to the question whether a legal impediment existed to the further employment in the United Nations of the applicant after the expiry of his contract?"

decision of the UN Secretariat not to extend a fixed-term appointment of a Soviet national who was an interpreter in the Russian translation service of the UN. The Court decided to comply with the request for an advisory opinion and proceeded to find that, in its Judgment No. 333, the UNAT had not failed to exercise the jurisdiction vested in it by not responding to the question whether a legal impediment existed to the further employment in the UN of the applicant after the expiry of his fixed-term contract on 26 December 1983. Having said that, the Court considered the allegation that the Tribunal had “erred on the question of law concerning” the Charter, and considered closely the provisions of the Charter covering the employment of staff by the Secretary-General and his powers and duties. The ICJ found that the UNAT had not erred on any question of law relating to the provisions of the Charter of the UN.⁸⁰

Comments on the ICJ’s practice

A criticism may be directed at the Court for the minimal role that it has played as a court of appeal over the judgments of the Administrative Tribunals. This criticism is not valid because the ICJ has no right to review the judgments of the Administrative Tribunals *proprio motu*. It is the task of the Screening Committee to refer a request for judicial appeal to the ICJ, and this Committee adopted a strict or even a rigorous view of the existence of a “substantial basis” for requesting advisory opinions from the ICJ. This attitude can be justified on several grounds. First, the ICJ’s opinion in the *UN Administrative Tribunals* case indicated that those cases in which the validity of an award, and not its justice, is challenged constitute, *ex definitione*, “exceptional circumstances”.⁸¹ Second, the Secretary-General suggested, in the *travaux préparatoires* stage, that the appeal procedures should serve as an “outlet” only in exceptional circumstances and should not be applied to all cases as a matter of course. In his view, the success of the review procedure

2. Did the United Nations Administrative Tribunal in its judgment No. 333 err on a question of law relating to the provisions of the Charter of the United Nations.” ICJ Pled., 1984, pp. 77 *ff.*; ICJ Rep., 1987, p. 20.

⁸⁰ ICJ Rep., 1987, p. 72.

⁸¹ ICJ Rep., 1954, p. 55.

might actually be measured by the infrequency of its use.⁸² Third, the Staff Council's view was that the advisory procedure of the ICJ should not be devised for regular use; it should serve only in exceptional cases and should not invite unnecessary and unwarranted appeals.⁸³

7. GA Resolution 50/54:⁸⁴ A new trend and evaluation

7.1. GA Res. 50/54

At the 48th session of the GA in 1993, the representatives of Australia, Benin, France and Ireland submitted a memorandum expressing their dissatisfaction with the appellate procedure against the UNAT's judgments. This memorandum indicated that "in recent years several members of the Committee on Applications have, in the course of the Committee's deliberations, voiced criticisms of the procedure under Article 11 as not furnishing an adequate means for review of the judgments of the Tribunal ... Criticism has also been voiced in the Fifth Committee of the General Assembly." It was further noted that several delegations had undertaken consultations on the issue prior to the 48th session of the Assembly and that a clear majority of those delegations considered that the procedure under Art. 11 should be abolished because it would not be feasible to render it adequate by adjusting it.⁸⁵

Consequently, the GA, by its decision 48/415 of 9 December 1993, requested the Secretary-General to carry out a review of the procedure provided for under Art. 11 of the Statute of the UNAT, and to report thereon to the GA at its 49th session. It also decided to include the matter entitled "Review of the procedures provided for under Article 11 of the Statute of the Administrative Tribunal of the United

⁸² Report of the Special Committee, UN Doc. A/C.5/SR. 493, 1955. This view was expressed in several statements by states before the Special Committee on Applications for Review of Administrative Tribunal Judgments for instance the statement of Argentina, GAOR, 10th Sess., UN Doc. A/C.5/SR. 495, 1955, p. 50.

⁸³ GAOR, 10th Sess., Annexes X, 49, 1955, p. 4.

⁸⁴ GA Res. 50/54, 11 December 1995.

⁸⁵ UN Doc. A/48/232, 17 September 1993.

Nations” on its provisional agenda for the 49th session of the GA. Later on, the GA decided to include the item on its agenda and to allocate it to the Sixth Committee.

The Sixth Committee considered the report of the Secretary-General containing the views submitted by governments pursuant to GA decision 48/415,⁸⁶ as well as a report of the Secretary-General on the same decision, which contained a review of the procedure provided for under Art. 11 of the Statute of the UNAT.⁸⁷

The written statements submitted by member states indicated that Art. 11 of the UNAT’s Statute should be abolished. These statements can be classified according to the grounds of their opinions.

First, some states based their opinion on the terms of reference of the Committee on Applications. It was noted that this Committee does not play a useful role in the adjudication of staff disputes, owing to the restrictive nature of its terms of reference set out in para. 1 of Art. 11 of the Statute.⁸⁸ Accordingly, some representatives noted that, in cases where the Committee discovers certain deficiencies in the Tribunal’s judgments that do not fall under one of the four grounds mentioned in para. 1 of Art. 11 of the Statute, the Committee should be entrusted with the authority to correct those deficiencies. In the light of the above, it was suggested that either the work of the Committee should be brought to an end or the Committee should be given the capacity to perform judicial or quasi-judicial functions. Finally, with regard to the issue of the competence of the Committee, some representatives noted that staff members did not appreciate the strictly limited scope of the review procedure and that there was an increasing tendency on the part of staff members to apply to the Committee in cases where there was no prospect whatsoever of success.⁸⁹

Second, most of the statements relied on the political nature and composition of the Committee.⁹⁰ They expressed the view that the Committee was a political body,

⁸⁶ Pursuant to GA decision 48/415, the Secretary-General invited, by a note dated 28 February 1994, the governments of member states to submit the required replies. See UN Doc. A/49/258, 15 July 1994.

⁸⁷ UN Doc. A/C.6/49/2, 1994.

⁸⁸ *Ibid.*, p. 5.

⁸⁹ UN Doc. A/C.6/SR. 36, 1994.

⁹⁰ UN Doc. A/C.6/49/2, 1994, p. 6.

consisting of member states, which was being asked to perform quasi-judicial functions by taking decisions that had clear legal implications. Accordingly, it was noted that this Committee, as a political body, had the potential to politicise cases. Furthermore, it was commented that, owing to the political composition of the Committee, its votes were sometimes explainable in terms more of geographical solidarity than of legal logic. In addition, it was mentioned that not all representatives attending sessions of the Committee were legally trained and, consequently, even from a practical point of view, the Committee was not equipped with the necessary expertise to perform its functions adequately. It was also observed that the composition of the Committee as a political body made applications by staff dependent on the will of a political body.

Third, some representatives based their opinion on the appropriateness of involving the ICJ in staff disputes. They stated that the matters that were subject to the Tribunal's judgments did not seem to be such as to justify the involvement of the Court. They also pointed out that application of the review procedure provided for in Art. 11 resulted in the Court being seized of questions of civil service law that lay outside its usual purview. Moreover, it was felt that such matters ought not to be assigned the level of significance that the Court customarily deals with, namely primary matters between states. Furthermore, it was noted that the advisory procedure envisaged by the Statute of the Court did not provide an appropriate adversarial procedure necessary for an appeal tribunal, which was the Court's present role in this process.⁹¹

Finally, representatives did not favour the creation of any new costly procedure, providing for the establishment of another judicial body that would be empowered to review judgments of the Administrative Tribunal and that would further complicate an already elaborate appeals system.

At the 35th meeting, on 9 November, the chairman of the Sixth Committee introduced a draft resolution in which the GA was recommended to delete Art. 11 of the Statute of the UNAT.⁹²

⁹¹ UN Doc. A/C.6/ 49/2, 1994, p. 6.

⁹² With regard to this draft, see UN Doc. A/50/645, 16 November 1995.

In the light of the Sixth Committee's recommendation, the GA, at its 84th plenary meeting on 9 December 1994, decided to consider this issue in its 50th session and included it on its provisional agenda. On 11 December 1995, the GA adopted Res. 50/54, which reads as follows:

“Noting that the procedure provided for under article 11 of the Statute of the Administrative Tribunal of the United Nations has not proved to be a constructive or useful element in the adjudication of staff disputes within the organisation, and noting also the views of the Secretary-General to that effect,

1. Decides to amend the Statute of the Administrative Tribunal of the United Nations with respect to judgments rendered by the Tribunal after 31 December 1995 as follows:

(a) Delete article 11.”⁹³

The UNAT judgments rendered as far January 1996 would be final and without appeal.

7.2. Evaluation

Since the main basis of GA Res. 50/54 was related to the Screening Committee, it will help to consider first the importance of this Committee in the appellate procedures of the ICJ. This Committee played a great role as a filter. It was designed to avoid frivolous or unjustified objections being brought before the ICJ. It also helped in saving the time and effort of the Court's judges. Further, as a consequence of granting this role to the ICJ, this Committee was needed to refer an application for an appeal to the ICJ on the basis of requesting an advisory opinion. Because the contentious function of the ICJ is strictly limited, pursuant to Art. 34/1 of the ICJ's Statute, to disputes between states, it cannot deal with cases involving individuals without the intervention of the Committee; therefore the ICJ could not fulfil its role as a court of appeal.⁹⁴

The study now turns to discuss the bases of the GA resolution by which Art. 11 of the UNAT's Statute was abolished.

⁹³ GA Res. 50/54, 11 December 1995.

⁹⁴ It has been observed by Keith that the establishment of this Committee was “doubtless accepted in this form to evade Article 34(1) of the Statute: ‘Only States may be parties in cases before the Court’. The result of this evasion is that cases which are contentious in nature but involve disputants other than States - a dispute between the staff member and the organisation - come before the Court in its advisory jurisdiction.” Keith, K., *The Extent of the Advisory Jurisdiction of the International Court of Justice*, 1971, p. 171.

First, with reference to the criticism of the composition of the Committee as a political body, vested with functions that are “normally discharged by a legal body” and are to be regarded as “quasi-judicial in character”, it could be argued that this is unfounded in the light of the ICJ’s jurisprudence. In the *Fasla* case, the ICJ concluded that “there is no necessary incompatibility between the exercise of these functions by a political body and the requirements of judicial process ... [T]he compatibility or otherwise of any given system of review with the requirements of the judicial process depends on the circumstances and conditions of each particular system.” The ICJ also observed that:

“the Rules which the Committee has adopted take account of the quasi-judicial character of its functions. Thus, these Rules provide that the other party to the proceedings before the Administrative Tribunal may submit its comments with respect to the application, and that, if the Committee invites additional information or views, the same opportunity to present them is afforded to all parties to the proceedings. This means that the decisions of the Committee are reached after an examination of the opposing views of the interested parties.”⁹⁵

The Court therefore denied that “there is anything in the character or operation of the Committee which requires the Court to conclude that the system of judicial appeal established by General Assembly resolution 957 (X) is incompatible with the general principles governing the judicial process”.⁹⁶ One may also recall the observations by some states during the *travaux préparatoires* of drafting Art. 11 that this Committee would decide only whether there was a genuine application within the grounds specified in Art. 11/1, and, if it found that an application was genuine, it would be under an obligation to request an advisory opinion. This

⁹⁵ ICJ Rep., 1973, p. 176.

⁹⁶ Ibid., p. 177. In his Sep. Op., Judge de Aréchaga noted that “[a]s to the political composition of the Committee on Applications, this criticism may be exaggerated and the negative consequences which are deduced from it are in my view unjustified. We are, after all, concerned with international awards affecting member States, since those member States are finally bound to pay, directly or indirectly, any amounts awarded. In respect of international awards in general, the States affected by them possess under international law an undeniable right to challenge their validity, if they consider that there are grounds justifying such a challenge, subject of course to a general obligation to submit the dispute to a method of peaceful settlement. No criticism has ever been voiced in this respect on the ground that the challenge emanates from a political body - which the State undoubtedly is. In the case of awards of the Administrative Tribunal, some progress has been made as a result of Article 11 of the Statute of the Administrative Tribunal. Instead of each State concerned retaining its individual power of challenge, it is an organ of the United Nations which is called upon to decide by a majority vote whether or not there is a substantial basis for the challenge which is requisite to seize the Court of the matter.” ICJ Rep., 1973, pp. 244-5.

Committee would have no further discretion and could not for itself decide whether it was desirable to request an advisory opinion. Therefore, there would be no question of the influence of political considerations.⁹⁷

Even if this criticism is sound, another suggestion could be adopted. This Committee could be replaced by a selected group of jurists and experts appointed to exercise a kind of judicial or quasi-judicial function. It would be better if the GA established a study group to submit the necessary changes to the composition of this Committee instead of abolishing Art. 11 of the UNAT's Statute.

Second, the criticism that the appeals procedure would involve additional expenses for the organisation is also to be considered. One of the reasons for empowering the ICJ with the appellate function was to avoid unnecessary expenses by not establishing a new organ with this role.⁹⁸ Even if this ground holds true nowadays, the aim of reducing any additional expenses could be achieved in several other ways, such as limiting the size of written pleadings and reducing the cost of referring a question to the Court.

Third, with regard to the appropriateness of the use of the Court's advisory opinions in reviewing judgments of the Administrative Tribunals, one may find a reply in the ICJ's dicta. The ICJ addressed the appropriateness of the appellate procedures provided by Art. 11 of the UNAT's Statute in the *Fasla* case. In this case, the Court stated that:

"The Committee on Applications for Review of Administrative Tribunal Judgments is an organ of the United Nations, duly constituted under articles 7 and 22 of the Charter, and duly authorised under article 96, paragraph 2, of the Charter to request advisory opinions of the Court for the purpose of Article 11 of the Statute of the United Nations Administrative Tribunal. It follows that the Court is competent under article 65 of its Statute to entrain a request for an advisory opinion from the Committee made within the scope of Article 11 of the Statute of the Administrative Tribunal."⁹⁹

⁹⁷ See the statement presented by Lord Fairfax, the representative of the UK, GAOR, 10th Sess., UN Doc. A/C.5/SR. 493, 1955, p. 36; statement presented by the representative of the United States, GAOR, 10th Sess., UN Doc. A/C.5/SR 494, 1955, p. 44.

⁹⁸ See the Cuban statement submitted to the Special Committee on Applications for Review of Administrative Tribunal Judgments, GAOR, 10th Sess., UN Doc. A/C.5/SR. 493, 1955, p. 39; and the Greek statement, GAOR, 10th Sess., UN Doc. A/C.5/SR. 494, 1955, p. 45.

⁹⁹ ICJ Rep., 1973, p. 175.

The ICJ also stated in the *Yakimetz* case that:

“That conclusion presupposes that in any specific case the conditions laid down by the Charter, the Statute, and the Statute of the Administrative Tribunal are complied with, and in particular that a question on which the opinion of the Court is requested is a ‘legal question’ and one ‘arising within the scope of [the] activities’ of the requesting organ.”¹⁰⁰

Several other reasons could be presented to argue against the GA’s resolution and to keep the role of the ICJ as a court of appeal on the UNAT’s judgments. First, as a result of this resolution, officials will be at the mercy of the organisation in the absence of a legal instrument to prevent the organisation from treating the UNAT’s judgments as null and void. Under Art. 11, the organisation could treat a judgment as invalid only if it had been found to be so by the ICJ. For forty years Art. 11 has stood out as the only safeguard giving effective protection to officials against arbitrary action by the organisation. Second, this resolution seems inconsistent with the purpose for which this process was originally instituted. In fact, this procedure was initiated to enable member states to challenge UNAT’s judgments that they consider as unacceptable and to do so before the principal judicial organ of the UN. It was also instituted as a direct consequence of the difficulties that had arisen both in the League Assembly and in the GA with regard to the implementation of the judgments of the Administrative Tribunals. No one can pretend that this difficulty has disappeared or will not arise in the future. Third, one may recall the statements by some international lawyers regarding the importance of this procedure. For instance, Judge de Aréchaga observed that the existence of the system of judicial appeal has beneficial effects, “because of the care which must be exercised by the Administrative Tribunal in each of its judgments”. In his opinion, an organ of first instance does not know in advance which of its decisions is going to be scrutinised later by a higher tribunal.¹⁰¹ One may also recall the Secretary-General’s conclusion in his report dated 17 October 1994. In his opinion, the adoption of the majority

¹⁰⁰ ICJ Rep., 1987, p. 30.

¹⁰¹ Sep. Op. of Judge de Aréchaga in the *Fasla* case, ICJ Rep., 1973, p. 244.

opinion in the Committee to abolish Art. 11 of the UNAT's Statute "might in the long run endanger the authority of the [administrative] tribunals themselves".¹⁰²

Therefore, there is no doubt that GA Res. 50/54 could be considered to be a backward step because it restricts the appellate role of the ICJ as a court of appeal within the framework of the UN. Instead of deleting Art. 11, it would be better for the GA either to suggest an amendment to Arts. 34 and 66 of the Statute or to lay down the rules for fulfilling the appeal functions under Art. 11.

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Granting an appellate jurisdiction to the ICJ over the judgments of the Administrative Tribunals of the ILO and the UN was considered to be a development in the role of the ICJ and an extension of its functions as the principal judicial organ within the framework of the UN.

As illustrated above, the institution of appellate procedures in regard to the judgments of both the ILO and the UN Administrative Tribunals was a direct consequence of the difficulties that had arisen both in the Executive Board of the ILO (and previously in the Assembly of the League of Nations) and in the UN General Assembly over the implementation of the judgments of their Administrative Tribunals. Accordingly, this power was given to the ICJ as the highest judicial authority in matters of UN law, and on the basis that it should be the final arbiter.¹⁰³ Art. XII of the ILOAT Statute and the former Art. 11 of the UNAT Statute allow a *de facto* appeal from the judgment of the Tribunal, and give individuals indirect access to the ICJ.

The ICJ has contributed to confirming this role. It has affirmed that its appellate jurisdiction is in conformity with its nature as a judicial tribunal, and it sees no problem in its advisory jurisdiction being used for the review of contentious proceedings, to which individuals are parties, that have taken place before the Administrative Tribunals.

¹⁰² UN Doc. A/C.6/49/2, 1994.

¹⁰³ See the statement presented by New Zealand to the Special Committee on Applications for Review of Administrative Tribunal Judgments, GAOR, 10th Sess., UN Doc. A/C.5/SR. 496, 1955, p. 53.

Through its dicta and the judges' opinions, the Court has played an important role, either by its own findings or by its attitude to the findings of the Administrative Tribunals in the relevant cases, in the application, clarification and development of the rules of international administrative law. It seems obvious that this role has enhanced the position of individuals before the Court in advisory proceedings and may be deemed to have been yet another step towards making individuals the subject of the international legal order. Moreover, it enhanced the efficient functioning of the Secretariat, in accordance with Arts. 100 and 101 of the Charter, by giving both the organisation and staff members an additional guarantee of an equitable application of the relevant provisions, regulations and rules governing staff employment and conditions of service.¹⁰⁴ In addition, the ICJ was able to afford judicial protection of the rights of staff members of the UN and its specialised agencies. Through its appellate function, the Court has played an important role in contributing to the effectiveness of the UN.

Despite the fact that the Court had some problems with this role in the beginning, in the past few years the ICJ has been doing very well. For instance, the last opinion presented some very important legal principles, thus contributing to the development of what may be called the "employment law" or "administrative law" of the UN.

The GA resolution has resulted in restricting an established role for the ICJ and making the judgments of the UNAT final. There is now no procedure that will allow the parties to the proceedings before the Tribunal to challenge its judgments.

It could be argued that it would be better for the GA to take a step forward by improving the role and removing the suspicions surrounding it, than to take a step backwards by abolishing it. It would also be better for the GA to promote requests for advisory opinions, which are, as we have seen lately, a very helpful way of dealing with certain legal issues related to the function of the international organisations.

If there is no possibility that the GA resolution will be reconsidered, one hopes that this resolution will not affect the procedures established under the ILOAT's

¹⁰⁴ ICJ Rep., 1987, p. 63.

Statute, which allow the executive bodies of the ILO and specialised agencies accepting the ILOAT's Statute to request advisory opinions from the ICJ concerning judicial appeal procedures.¹⁰⁵ Otherwise, the appellate jurisdiction of the ICJ will disappear, to the detriment of the organisation.

¹⁰⁵ Because the grounds for the GA's resolution might be found in respect of the ILOAT too.

General Conclusions and Suggestions

1. General evaluation of the Court's role

Having analysed the different aspects of the Court's role within the framework of the UN, which relate to its power to give advisory opinions, interpreting and developing the UN law, its role in facilitating the realisation of the purposes and principles of the UN through its contentious jurisdiction, its role as a constitutional court within the UN, and finally its role as a court of appeal upon some tribunals established within the framework of the UN, an evaluation of the Court's overall role seems relevant. On the whole, it may be argued that the role played by the Court has been carried out in a satisfactory manner, if one compares it with the expectations of the founders of the court. However, the major drawback might be that this role was limited in scope. That is to say, although its role was carried out satisfactorily, there remains much to be desired. The Court, it is argued, has not satisfied its full potential, and the ever-changing needs of the institution have, in the final analysis, not been met.

The above statement requires elucidation, therefore an overall evaluation of the different roles carried out by the Court and discussed by the study is given below.

If one were to analyse in more detail the role of the Court as a legal adviser to the UN organs and agencies, the record of the Court's work shows that, since its establishment, it has rendered twenty-three opinions. In all these cases, the Court adopted a broad view of its jurisdiction as the judicial arm of the UN. It has adopted a broad definition of the term "legal question", it has considered that the absence of the consent of any given state does not deprive it of its power to render opinions, and finally, despite the power given to the Court by the Statute to refuse to render advisory opinions, the Court has never exercised this right, on the basis that its assistance to the requesting organs is of great importance to both the requesting organ and the UN as whole. Through its advisory role, the Court has played a substantial role in the interpretation and development of UN law. It has applied the doctrine of implied powers to affirm some powers to the UN and its organs that were not explicitly provided by the Charter. This has been reflected in the

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expansion and development of the competence and functions of the UN's organs. The ICJ has also affirmed the powers of the organs of the UN by specifying their roles in accordance with the Charter, and the limits imposed upon them in fulfilling their objectives. Finally, through this role, the Court has clarified the importance of its existence within the UN as one of its principal organs and it has also affirmed that its advisory jurisdiction is not a secondary function compared with its contentious jurisdiction.

On the other hand, the figure of twenty-three advisory opinions rendered over a period of fifty years is *per se* a clear manifestation of how limited this role has been. The fact that the number of authorised organs and agencies that currently have the power to request advisory opinions from the ICJ is over twenty, whereas they were only two in respect of the PCIJ, has not expanded the role of the ICJ as an adviser in the UN system. It is interesting to note, in respect of the total number of opinions rendered, that in its first decade the Court rendered eleven opinions, which represent almost half of the total opinions rendered, whereas in its second decade it rendered only two opinions. In its third decade, the Court rendered three opinions; in its fourth decade, the Court rendered two opinions; and finally, in its fifth decade, it rendered five opinions. There might be different causes for these figures. The effects of the cold war were reflected in the continued refusal of the Eastern bloc to support any attempts in the UN organs to request opinions from the Court. Another cause might be the lack of confidence on the part of the developing countries in the role of the Court.

Currently, the limited reference to the advisory jurisdiction, might be caused by the fact that the Court's procedures result in a reply taking on average nine to twelve months. Hence, an organ might be reluctant to request an opinion from the Court.

In addition to its role as a legal adviser to the UN organs and agencies, the Court has played a satisfactory role in facilitating the realisation of the purposes and principles of the UN through its contentious jurisdiction. Despite the fact that its contentious jurisdiction depends upon the consent of the states, the ICJ as the principal judicial organ of the UN has contributed to the relaxation of tension

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between states and the promotion of peace, which is the primary purpose of the UN. It has also defined and explained the other purposes and principles of the UN through its judgments in different cases between states. Through this role, the Court has made a very positive and substantial contribution to building international law. For instance, many clauses and provisions embodied in international treaties are based on the jurisprudence of the Court.

Despite this considerable role, one may note that there are some obstacles to the Court's role in this regard. These obstacles are that the majority of states reject the compulsory jurisdiction of the Court,¹ and those that have accepted it have appended to their acceptance of the Court's compulsory jurisdiction significant reservations that in effect deprive this acceptance of any value. Moreover, the high costs involved might deter some states, especially developing countries, from accepting the Court's jurisdiction. This limited role may also be the result of an inadequate system for enforcing the Court's judgments.

The Court plays a similar role to that of constitutional courts in the domestic field. It has confirmed its role as a constitutional court in relation to the acts of the specialised agencies that have recognised this power to the Court. Moreover, and despite the absence of any provision in the Charter allowing the ICJ to review the legality of the UN's political organs, it has reviewed this legality in several cases. It has explicitly affirmed its power of judicial review over these acts in some cases, and it has confirmed this power implicitly by its refusal to uphold the arguments presented by some states denying its power of judicial review.

There nonetheless exists a threat to this role of the Court as a consequence of the silence of the Charter and in the light of the disagreement among international lawyers regarding the Court's power to review the acts of the UN's political organs.

The Statutes of the Administrative Tribunals established within the ILO and the UN have granted the Court, as the highest judicial tribunal within the framework of the UN, the power of an appellate tribunal. Despite the limited number of cases referred to the Court as a court of appeal, it has acted satisfactorily in all the cases

¹ It is worth noting that only 59 out of the 185 of member states of the UN have accepted the compulsory jurisdiction of the Court.

referred to it. In the 1970s and 1980s, about one-third of the Court's opinions concerned the review of the Administrative Tribunals' judgments.

Since the adoption of Res. 50/54 by the GA in 1995, this role is now restricted to the judgments rendered by the ILO Administrative Tribunal. According to this resolution, the GA has revoked the authority of the Committee on Applications for Review of Judgments of the UNAT to request the ICJ to review such judgments. This approach indeed limits the role of the Court in this respect.

2. Suggestions to enhance the Court's role as the principal judicial organ of the UN

Having analysed and evaluated the Court's role as the principal judicial organ of the UN, some suggestions can be presented for enhancing and increasing the Court's role. These suggestions are important because they aim at modernising and updating the UN Charter and the ICJ Statute, which were drafted fifty years ago and were based to a large degree on the Covenant of the League and the PCIJ's Statute, which were drafted seventy-five years ago. The underlying objective of these suggestions is to maintain and expand the role of the Court within the UN, because respect for the role of law can be achieved only through an efficient, reliable and trusted Court.

Before mentioning to these suggestions, some observations should be clarified.

(i) These suggestions will be limited to matters related to the role of the ICJ within the UN system. Many other suggestions have been made to enhance the role of the Court generally as a world court.²

(ii) These suggestions will be dealt with concisely, because a detailed account of most of these suggestions was the subject of examination in the study.

(iii) It should be understood that the implementation of these suggestions depends upon the will of the member states of the UN, and their belief in the Court's role as the principal judicial organ of the UN.

² See, for instance, Bowett, D., et al., "The International Court of Justice: Efficiency of Procedures and Working Methods", Report of the Study Group established by the British Institute of International and Comparative Law as a Contribution to the UN Decade of International Law, *ICLQ*, 45, 1996; Jennings, R., "The United Nations at Fifty: The International Court of Justice after Fifty Years", *AJIL*, 89, 1995, pp. 493 ff.

Having mentioned these observations, some suggestions can now be presented.

2.1. The Court's advisory jurisdiction

First, efforts should be made to grant the Secretary-General the authority to request advisory opinions, so as to enjoy a similar authority to that of other principal organs. As mentioned in Chapter Three, this suggestion is based on the fact that the Secretary-General is the one in charge of issues involving the UN's day-to-day activities. The need to grant such a power to the Secretary-General is supported by the fact that there is a new trend which aims at increasing the political functions of the Secretary-General and that the importance of the Secretary-General's role is currently recognised in the international forum.

Secondly, since the expansion of the scope of the organs and agencies authorised by the GA to request advisory opinions was considered an improvement in the early stages of the establishment of the Court, this scope should be reconsidered. As we have seen in this study, the Court's advisory role is significant in assisting the UN organs and agencies to decide issues with legal dimensions before them. Therefore, it seems that there is no reason nowadays to entitle the GA to exercise its discretion as to who should and should not have this power. Accordingly, a further step should be taken to authorise all UN organs, agencies and subsidiary organs to have direct power without the need for authorisation from any other organ within the UN. This suggestion would help to avoid any disagreement regarding the right of some organs or agencies to have such a power. It might also help to avoid any possibility of revocation of this authority by the GA at its discretion.

Thirdly, as mentioned above, the limited use of the advisory jurisdiction by the organs and agencies of the UN might be the result of the length of the procedures of the Court when dealing with a request for an advisory opinion. Therefore, it could be suggested that the Court might annually form, as regards its contentious jurisdiction, a permanent Chamber, pursuant to Arts. 26-29 of the Statute, to deal with requests for advisory opinions. This could be based on Art. 68 of the Statute, which indicates that "in the exercise of its advisory functions the Court shall be guided by the provisions of the present Statute which apply in contentious cases to

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the extent to which it recognises them to be applicable”.³ In the writer’s view, such a Chamber, with rapid procedures, might help to encourage the organs and agencies to request opinions from the Court, which could lead to the Court being used as a legal adviser to the UN *in toto*.⁴

2.2. The Court’s contentious jurisdiction

The UN organs and agencies should first endeavour to embody a clause for the settlement of disputes by the ICJ in the international conventions adopted under their auspices or at conferences directly sponsored by them. It is interesting to note that, despite there being more than 300 treaties that stipulate that in the event of a dispute between the signatories in relation to the application or interpretation of the treaty the matter shall be referred to the ICJ, a considerable number of such treaties do not include provisions for settling disputes through the compulsory jurisdiction of the ICJ. The Geneva Convention on the Law of the Sea, 1958, and the Law of the Sea Convention, 1982 are but two examples of conventions that do not refer to the Court’s jurisdiction, despite the fact that the ICJ has a significant jurisprudence in settling disputes in this area. The absence of the Court’s jurisdiction in this regard could be justified on the basis that such disputes have a special nature and should be left to specialised tribunals. In the writer’s view, in the light of the long history and significant jurisprudence of the Court in this area, the ICJ is capable of playing a role in settling such disputes. In addition, the increasing of number of treaties that ignore the Court’s jurisdiction in some areas of international law and establish specialised courts for them might result in the demise of the role of the Court. In this regard, one may recall Bowett’s statement that “the establishment of the Law of the Sea Tribunal will, in time, lead to a reduction in the number of the cases being referred to the Court. It is by no means certain that this will happen.”⁵ Moreover, the trend to establish specialised tribunals to deal with a certain type of

³ Jenks, C., “The Status of International Organisations in Relation to the International Court of Justice”, *GS*, 32, 1946, p. 24.

⁴ These Chambers have been used by states to settle inter-states disputes since 1982. In that year, an order constituted the Chamber for dealing with the case concerning the delimitation of the maritime boundary in the Gulf of Maine area.

⁵ Bowett, et al., *supra* note 2, p. S2, note 4.

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dispute is questionable: it might lead to the establishment of a considerable number of courts, causing confusion, when the ICJ is in fact competent to deal with disputes of different natures. The best example might be the number of cases referred to it in the past decade on different aspects of international law.

Secondly, it can be submitted that some member states of the UN do not welcome the system of optional clauses. It is the writer's view that member states should consider the "optional clause" system for acceptance of the compulsory jurisdiction of the Court, which was one of the most promising innovations of 1920, as a half-way house on the road to a complete system of international compulsory jurisdiction. The absence of compulsory jurisdiction is considered nowadays to be a fundamental defect in the organisation of the international community. In the writer's view, the Court's compulsory jurisdiction should apply to all member states of the UN. The Court's practice shows that acceptance of its compulsory jurisdiction does not make it a supranational organ. In addition, member states should recognise that acceptance of compulsory jurisdiction does not prejudice their sovereignty,⁶ although there is no persuasive reason why the sovereignty of states should undermine the prevailing principle of the primacy of law in the international community. This is confirmed by the European Communities' conventions, where the jurisdiction of the European Court of Justice is not dependent on the consent of the states concerned. Through the mere fact of their accession to the EC the member states have accepted its jurisdiction as compulsory and binding.⁷ In the light of the above, an amendment to the Statute can be suggested to the effect that all parties to the Statute would be deemed *ipso facto* to have accepted the Court's compulsory jurisdiction unless they gave notice to the contrary, namely a "contracting-out" instead of the "contracting-in" process. Two factors favour

⁶ In this regard, it should be noted that, in his speech before the ICJ in its celebration of fifty years, the president of the GA stated that "we have been witnessing a change in the defining parameters of the concept of sovereignty and it is undeniable, today, that the old doctrine of absolute and exclusive sovereignty no longer stands". He also stated that the submission to international jurisdiction and international law by all states must be left out of the defining parameters of modern states' sovereignty. Speech by Diego Freitas de Amaral, president of the UN GA. ICJ Communiqué 96/15, 19 April 1996.

⁷ Arts. 40/3 and 87 of the treaty of the ECSC; Arts. 183 and 219 of the EEC treaty; Arts. 155 and 193 of the Euratom treaty.

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acceptance of the compulsory jurisdiction of the ICJ: (i) if the ICJ became more involved this might give rise to greater confidence in it; (ii) the codification and progressive development of international law is also one of the results of the involvement of the Court.

Alternatively, and in the light of the current provisions, states should be required to increase the number of declarations pursuant to Art. 36/2 of the Statute.⁸ They should also be required to withdraw earlier reservations to judicial clauses embodied in international treaties. In this regard, the permanent members of the SC should lead member states by example in accepting the Court's compulsory jurisdiction. It is most unfortunate that currently the only state of the five permanent members of the SC accepting the Court's compulsory jurisdiction is the UK.⁹ This attitude is difficult to appreciate in the light of the intention of the Charter's founders, who envisaged that these five states would have a predominant role in maintaining international peace and security in the post-war future. This role can be achieved, *inter alia*, by making the role of adjudication prevail.

Thirdly, Art. 34 of the Statute should be reconsidered. The present state of affairs, in which the UN and its specialised agencies have no *locus standi* before the Court, is unsatisfactory.¹⁰ The wording of Art. 34 reflects what has been referred to as the orthodox doctrine of international law. According to this doctrine, international law is a law governing the relationship between states and states alone are capable of holding rights, being subject to duties and possessing a *persona standi in judicio*. Needless to say, this article represents an obstacle in the present system of the administration of justice, because it does not cover all subjects of international law. Therefore, Art. 34 of the Statute should be amended to allow

⁸ In this regard one may recall the statement by Kunz that "compulsory jurisdiction adjudication is of the utmost importance, should be the object of our greatest efforts, would constitute the greatest and the deepest single advance. But it alone cannot eliminate war, it can decide but not believe that it ever will be possible to transfer world history into nothing but a court procedure". Kunz, J., "Compulsory International Adjudication and Maintenance of Peace", *AJIL*, 38, 1944, p. 678.

⁹ It is worth noting that the Soviet Union (Russia) and China, two of the permanent members of the SC, have never used the ICJ in contentious cases. France withdrew its acceptance of the Court's compulsory jurisdiction after the *Nuclear Test* cases in 1974. The USA, too, after the *Nicaragua* case, withdrew its acceptance of the Court's jurisdiction.

¹⁰ Bowett, et al., *supra* note 2, pp. S24-S25; Jenks, *supra* note 3, pp. 24 ff.

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international organisations, *inter alia* the UN and its specialised agencies, to appear as a party in contentious cases before the ICJ.¹¹ This suggestion is justified by several factors.¹² First, it has been confirmed by lawyers that the UN possesses an international juridical personality. This was confirmed by the ICJ in the *Reparation* case, when it affirmed the right of the UN to sue any state for damages caused to the organisation itself. It also held that the UN can bring a claim for damages suffered by its agents.¹³ This opinion was confirmed by the ICJ in the *WHO and Egypt* case.¹⁴ It would therefore be anachronistic to have only states as parties to contentious litigation before the Court.¹⁵ Second, recent activities of the UN and its specialised agencies have witnessed the growing participation and influence of the UN in international fields. The UN organs are entering into an increasing number of agreements with states and with one another and it seems regrettable that, in the event of a dispute concerning the interpretation or application of such an agreement, the UN should lack the procedural capacity to be a party in contentious proceedings before the ICJ. Third, international relations have developed, and the financial and property relationships between states and the UN and its specialised agencies are tending to become increasingly complex. Fourth, permitting the UN and its specialised agencies to appear before the Court would enlarge the role of the ICJ's contentious jurisdiction and open up a new area of competence in a manner that the ICJ is perfectly capable of dealing with (as evidenced by various subjects settled by

¹¹ It should be noted that it has been suggested by some international lawyers that this article should be amended also to extend the Court's jurisdiction to individuals, corporations and legal entities other than states. See Jennings, *supra* note 2, p. 504.

¹² In this regard, it has been noted by Fitzmaurice that "it would seem anomalous that an entity then found by the Court to have the capacity to sustain an international claim in the assertion of its own rights should not be able to be a party to a case before that same Court in which, precisely, it might wish to assert such rights". Fitzmaurice, G., *The Future of Public International Law and of the International Legal System in the Circumstances of Today*, 1973, p. 295 (cited in Jennings, *supra* note 2, p. 505). Jenks also points out that the Statute "generalises, and thereby places in a new perspective, the principle that public international organisations have an *amicus curiae* function and responsibilities in cases relating to their activities". Jenks, C., *The Prospects of International Adjudication*, 1964, pp. 208-9. Julliy expressed the hope that the revision of Art. 34 would be one of the first tasks to be undertaken as being capable of bringing about an important improvement in this special province of international law. Julliy, L., "Arbitration and Judicial Settlement - Recent Trends", *AJIL*, 48, 1954, p. 391.

¹³ ICJ Rep., 1949, pp. 181-4, 187.

¹⁴ ICJ Rep., 1980, pp. 73, 89-90.

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the ICJ through its advisory jurisdiction). Fifth, enabling the UN to be a party in contentious cases has been introduced by the UN itself in its acceptance of the binding advisory opinions provided for in the former Art. 11 of the UNAT's Statute, section 30 of the Convention on the Privileges and Immunities of the UN, and section 21 of the Agreement between the UN and the USA regarding the headquarters of the UN. These represent the first steps towards a form of contentious procedure. Sixth, as Bowett notes, "[t]he idea that the Court might be unsuitable because, as a UN organ, it would lack impartiality in disputes between a UN and a third party is not to be entertained seriously: the Court's independence has been demonstrated beyond question".¹⁵ Seventh, it is not sufficient to say that the UN and its agencies could use advisory opinions as an alternative to amendment of Art. 34, because in some cases the use of advisory opinions cannot be considered to be a completely satisfactory solution to the problem, either in principle or in practice, as long as the Court's opinion is not a judgment and, technically, has no binding effect. Even if the UN and the other member states refer in the international conventions to the binding advisory opinion clauses in these treaties, this is inconsistent with the principle of equality, because the other parties have no similar power to request an advisory opinion. Finally, keeping Art. 34 unchanged might lead to disputes between the UN and its members being referred to arbitral tribunals. This method of settling such disputes has many precedents under the constitutions of the specialised agencies or under agreements concluded between them and one or more of their members. For instance, Art. XIII(c) of the Fund Agreement provides that, if "a disagreement arises between the Fund and a member which has withdrawn or between the Fund and any member during the liquidation of the Fund", such a disagreement is to be "submitted to arbitration by a tribunal of three arbitrators, one appointed by the Fund, another by the member or withdrawing member, and an umpire". Art. XI of the Bank Agreement provides a similar method for settling disputes between the Bank and its members. Needless to say,

¹⁵ Bedjaoui, M., *The New World Order and the Security Council*, 1994, pp. 115-16.

¹⁶ Bowett, D., "The Court's Role in Relations to International Organisation" in Lowe, V. et al. (eds.), *Fifty Years of the International Court of Justice*, 1996, p. 189. A similar view has been expressed by Lauterpacht. Lauterpacht, E., *Aspects of International Administration*, 1991, pp. 60-6.

such provisions would enhance the role of the ICJ as the principal judicial organ of the UN.

2.3. The determination of the relationship between the ICJ and the other principal organs of the UN

Although the drafters of the Charter succeeded in drawing a line between the GA and the SC as regards the settlement of international disputes, the same result was not achieved in respect of the ICJ's relationship with the SC and the GA. As discussed in Chapter Four, problems have already arisen and are anticipated to occur more often in the future as a consequence of the increase in the activities of these organs in settling international disputes. Therefore, consideration should be given to adding a new provision to the Charter whereby the judicial organ and the political organs of the UN can work in concert. The determination of this relationship between the Court as a judicial organ and the political organs in concurrent fields should grant the primacy of the law in preserving peace and promoting justice. Judicial settlement should be regarded as the major means of settling disputes, at least if the dispute has a legal dimension. It should be noted that if more disputes were settled on the basis of general and objective criteria, more states would resort to this means of settlement. It should be realised that the Court can contribute positively to the maintenance of international peace; as Vallat stated: "Peace needs law. Law needs the Court."¹⁷

2.4. The enforcement of the Court's judgments

Non-compliance with the Court's judgments affects its position as an instrument for settling international disputes by peaceful means, which at the end of the day affects, indirectly, the ability of the UN to achieve one of its important purposes and principles. Accordingly, Art. 94 of the Charter should be reviewed and reconsidered. Pursuant to this article, the SC can act neither *proprio motu*, nor upon the request of other members of the UN. The SC acts only when one party to a dispute does not act in conformity with a decision of the ICJ and the other party

¹⁷ Vallat, F., "The Peaceful Settlement of Disputes" in *Cambridge Essays in International Law. Essays in Honour of Lord McNair*, 1965, p. 177.

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seeks the Council's assistance.¹⁸ Therefore, the SC should have the power to consider an issue on its own authority when the situation resulting from the non-enforcement of a Court's judgment is sufficiently serious.¹⁹

In addition, the wording of Art. 94 gives the SC a discretionary power in this matter; in other words, the SC is not obliged to take action when requested to do so. Thought should therefore be given to amending the wording of Art. 94 to replace the word "may" by "should" in order to abolish the SC's discretion to act.

The scope of the Court's judgments should be well defined. The wording of Art. 94 refers in para. 1 to decisions, and in para. 2 to judgments, of the Court. This raises a question whether this power extends to the Court's interim measures.²⁰ It is suggested that this power should explicitly cover all the Court's decisions, both judgments and interim measures.

In addition, the organs empowered to enforce the Court's judgments should be explicitly expanded to entitle all the UN organs and specialised agencies to play a role in this respect, given that all these agencies play a significant role in international relations and can provide a number of mechanisms for obtaining compliance with judgments.²¹

Finally, it is suggested that Art. 94 should explicitly stipulate that a member of the Council that is a party to a litigation before the Court should abstain from voting in the SC while it is considering a draft resolution to take action to enforce the ICJ's judgment. Otherwise, a situation of manifest conflict of interest could arise, with

¹⁸ Art. 13/4 of the Covenant reads as follows: "[t]he Members of the League agree that they will carry out in full good faith any award or decision that may be rendered and that they will not resort to war against a Member of the League which complies therewith. In the event of any failure to carry out such an award or decision, the Council *shall propose what steps should be taken to give effect thereto*" (emphasis added).

¹⁹ During the *travaux préparatoires* stage of the Charter and the Court's Statute it was noted that "the Security Council shall make recommendations or decide upon measures to be taken to give effect to the judgment". UNCIO, 4, p. 695; UNCIO, 13, pp. 508, 510.

²⁰ There have been two cases concerning the SC's enforcement of the Court's interim measures: the *Anglo-Iranian Oil Co.* case (SCOR., 6th year, Supp. for October, November and December, at 1 and 2, S/2357; 560th mtg., paras. 28-39 and 43-67; 559th mtg., paras. 69-76; 562nd mtg., para. 48, S/2380; 563rd mtg., paras. 135 ff.; 565th mtg., para. 62); and the *Bosnia* case (UN Doc. 25616; SC Res. 819, of 16 April 1993).

²¹ With regard to the specialised agencies of the UN that have a role in this regard, see pp. 38-9 above.

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the member state refusing to enforce the Court's judgment, yet at the same time being a voting member of the Council while it discusses what sort of action can be taken against the party refusing enforcement. The *Nicaragua* case is the best example in this regard.²² Therefore, Art. 27/3 of the Charter, which provides that a party to a dispute should abstain from voting on this dispute before the SC, should be extended and applied to cases brought to the SC pursuant to Art. 94.²³ Such amendments would give the SC the authority to enforce the Court's decisions against any non-complying party, even if that party is a permanent member of the SC.²⁴

A related point is to consider the possibility of abolishing the use of the veto by the permanent members of the SC in such proceedings. Using the veto power deprives the Court's decision of any legal effect. The suggestion is that non-compliance with a Court's decision should either be considered as a procedural matter under Art. 27/2 of the Charter, which gives non-permanent members of the SC a way of exercising their veto power, or be considered as a non-procedural issue, in which case Art. 27/3 of the Charter should be applied whereby a party to the litigation should abstain from voting. Therefore, Art. 27/3 of the Charter should be amended to refer to the resolutions adopted to enforce the Court's judgments as well as to resolutions based on Chapter VI.²⁵ There is no doubt that the use of the veto by a permanent state that is a party to a dispute settled by the Court in order to

²² The non-compliance of the USA with the ICJ's judgment in the *Nicaragua* case was examined by the SC pursuant to Art. 94/2. The draft resolution calling upon the USA to comply with the judgment was supported by eleven states, with three abstentions and one veto by the USA. UN Doc. S/18428. Therefore, the resolution was not adopted. The GA dealt with this matter, and a similar draft resolution was passed upon the request of Nicaragua. In all, 94 states voted for its adoption, 3 states voted against, and 47 states abstained. In 1988, when the same draft resolution was voted upon in the GA, it was supported by 89 states, with the USA voting against. Moreover, the US representative announced that his country would never comply with the judgment. See UN Doc. A/41/L.22; UN Doc. A/41/PV. 53, 1986.

²³ It has been noted also that Art. 94 is not located in the chapters on peace and security, therefore the use of the right of veto has no ground in this respect. See O'Connell, M., "The Prospects for Enforcing Monetary Judgments of the International Court of Justice: A Study of Nicaragua's Judgments against the United Nations", *VJIL*, 30, 1990, p. 908; Fakher, H., *The Relationships Among the Principal Organs of the United Nations*, 1951, p. 68.

²⁴ Reilly, P., "While the United Nations Slept: Missed Opportunities in the New World Order", *LLAICLJ*, 17, 1995, pp. 958 ff.

²⁵ See Tanzi, A., "Problems of Enforcement of Decisions of the International Court of Justice and the Law of the United Nations", *EJIL*, 6, 1995, pp. 551 ff.

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prevent the SC from enforcing the Court's judgements deprives the Court of any value. This was realised as a consequence of the use of the veto by the United States against attempts to enforce the ICJ's judgment in the *Nicaragua* case. This led some lawyers to note that "the United States *predictably* used its power of veto to defeat draft resolutions urgently calling for full and immediate compliance with the World Court's judgment"²⁶ (emphasis added).

2.5. The constitutional role of the Court.

The review of the legality of the UN organs' acts by the ICJ should be explicitly reconsidered. As noted in Chapter Five, the role of the ICJ as a constitutional court within the UN is still a matter of argument. It should be admitted that, even in the internal affairs of states, acceptance of the idea that the acts of the executive and legislative authority could be subject to judicial control by tribunals involves a long and arduous process. It is not surprising, therefore, that governments are reluctant to accept such control in international affairs

Therefore, any amendment to the Charter and the Statute should empower the Court to review the acts of the political organs, especially the GA and the SC. The importance of this suggestion depends, as has been mentioned earlier, on the fact that the rule of law cannot be separated from the idea of peace and justice. Providing the ICJ with powers similar to those of the constitutional courts in the domestic field would be good for the rule of law in international affairs and good for the UN. It should not be forgotten that entitling the ICJ to review the constitutionality of the political organs' acts and granting the primacy of the law in the UN system would lead to more respect for the organisation and for the decisions adopted by its organs. In addition, the Court's judicial review is a gratifying sign of the maturity of the system. Finally, in justifying such an explicit role for the Court, one may note that this will not be a new precedent in the international arena. For example, the European Court of Justice has the explicit power to decide whether the organs of the European Communities' institutions have acted within the competencies conferred upon them by their constitutional instruments. The practice

²⁶ White, N., *The United Nations and the Maintenance of International Peace and Security*, 1990, p. 14.

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has shown that this Court has played a significant role in reviewing the acts of the political organs without endangering the achievement of their objectives.²⁷

This new role could be implemented by means of the advisory jurisdiction of the ICJ, through the establishment of a standing GA committee empowered to request advisory opinions on application by states challenging the legality of the political organs' acts. In addition, the review of constitutionality could be achieved through the contentious jurisdiction of the Court. If explicit provision is to be embodied in the Charter or the Statute, a new paragraph should be added to Art. 59 of the Charter whereby the Court's judgment regarding the constitutionality of an act by a UN organ should have an *erga omnes* effect.

2.6. The Court's judges

The system of election of the Court's judges should also be reconsidered. The current system raises doubts in the eyes of some states about the judges' independence from political influence, especially as the SC, with its limited membership, plays a role in this respect. These doubts have been explicitly affirmed by one of the Court's judges, who notes that "judges of the Court are elected by the General Assembly and Security Council. That the process of election has its powerful political elements is undeniable."²⁸ Therefore, amendment of the current methods should be considered to avoid any concern about influence by the permanent members of the SC when dealing with the election or renewal of the ICJ's judges.²⁹ In addition, under the current method of election, a state represented

²⁷ See pp. 271-2 above.

²⁸ Schwebel, S., "Relations Between the International Court of Justice and the United Nations" in Virally, M. (ed.), *Le Droit International au Service de la Paix, de la Justice et du Développement*, 1991, p. 441.

²⁹ It should be noted that the current system is based upon the system adopted in 1920 for the election of the PCIJ's judges. Needless to say, this system was designed to protect the interests of the Great Powers, which were assumed to predominate in the smaller electoral organ and therefore to be in a position to exert influence over it. It has also been held that the necessity of each Judge being elected by the Council as well as by the Assembly would secure the permanent representation of particular states as could fairly expect it. There is no need for this nowadays because the GA represents all members of the UN, and the results of the election should reflect tendencies prevalent in the UN. It has also become well established that the permanent members of the SC should have judges on the bench of the Court. See Rosenne, S., *The Law and Procedures of the International Court of Justice*, 1985, p. 185. For the report of the Informal Inter-Allied Committee on the Future of the Permanent Court of International Justice, see *AJIL*, 39, supp., 1945, p. 7.

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in the SC has a double vote, because it is also represented in the GA. Accordingly, the election of the Court's judges should be left only to the GA.

If this suggestion is not welcomed on the ground that the SC should play a role in this regard, an alternative suggestion is that the tenure of judges could be extended and the possibility of re-election removed.³⁰ As Leigh and Ramsey note, "these frequent elections tend to increase the political pressure on the judges and decrease the perception of judicial decision made without political motives".³¹ This suggestion was made as early as 1954 when a proposal adopted by the Institute of International Law at its session in Aix-en-Provence concluded that, "[w]ith a view to reinforcing the independence of the judges, it is suggested that members of the Court should be elected for 15 years and should not be re-eligible ... But it should be noted that if it is felt that 15 years is too long, a compromise period of 12 years might be agreed on, with the result that the interval for regular rotation would be fixed at four years."³²

Having referred to these suggestions, it is worth noting that the achievement of some of these suggestions depends on the amendment of some provisions in the Charter and the Court's Statute. In the writer's view, the amendment of these instruments is not entirely impossible. For instance, the UN Charter has been amended several times. In 1963, Arts. 23, 27 and 61, relating to the composition of the SC and the ECOSOC, were amended: the membership of the SC was increased from eleven to fifteen and that of the ECOSOC from eighteen to twenty-seven. In 1971, the composition of the ECOSOC was again increased from twenty-seven to

³⁰ Pursuant to Art. 13 of the Statute, the Court's judges are elected for nine-year terms, and may be re-elected.

³¹ Leigh, M., et al., "Confidence in the Court: It Need Not Be a 'Hollow Chamber'" in Damrosch, L. (ed.), *The International Court of Justice at a Crossroads*, 1987, p. 109; Kelsen, H., *The Law of the United Nations*, 1951, pp. 466-75; Lauterpacht, H., *The Function of Law in the International Community*, 1933, pp. 237-41.

³² *Annuaire de l'Institut de Droit International*, 45 (II), p. 290. In his comments on this proposal, Judge Schwebel notes "that would be a wise revision of the Statute, were the Statute to be revised - a process which, however, might risk more than it would be likely to gain". Schwebel, *supra* note 28, p. 441. It should be noted that, when the GA dealt with the role of the ICJ, it was suggested by Cyprus that "with regard to the term of office of the judges probably a fixed period instead of partial renewal would tend to securing more stability and continuity in the litigation". UN Doc. A/8382, 15 September 1971, p. 40.

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fifty-four. Moreover, Art. 109 of the Charter relating to the review conference was amended in 1965. In addition, between 1945 and 1966 sixty-one amendments were made by the specialised agencies of the UN to their constitutions.³³

3. Concluding remarks

There is no doubt that the Court's activities are expanding and that confidence in the Court will be maintained. This is illustrated by the changes that have occurred in the past decade. These changes give grounds for optimism as concerns an effective role for the ICJ within the framework of the UN in the future. Among these changes are:

(i) The new approach adopted by the so-called "Eastern bloc" states. For instance, Russia (Soviet Union) has removed the reservations it had lodged with respect to six compromise clauses found in treaties concluded between 1948 and 1984 in the field of human rights law.³⁴ A number of former Eastern bloc countries have also withdrawn their reservations to the compromise clauses and have thus provided jurisdiction to the ICJ in many conventions related to human rights. Further, several former allies of the Soviet Union, such as Poland, Bulgaria and Hungary, have made declarations accepting the Court's compulsory jurisdiction.³⁵ Moreover, Hungary and the Slovak Republic have concluded a special agreement for the litigation of a series of difficult problems concerning the flow of the River Danube and measures for its protection against pollution.³⁶

³³ For details see Schwelb, E., "Amendments to Article 23, 27 and 61 of the Charter of the United Nations", *AJIL*, 59, 1965, p. 834; Schwelb, E., "The 1963/65 Amendments to the Charter of the United Nations: An Addendum", *AJIL*, 60, 1966, p. 371; Schwelb, E., "The 1971 Amendment to Article 61 of the United Nations Charter and Arrangements Accompanying It", *ICLQ*, 12, 1972, p. 497; Amerasinghe, C., *Principles of the Institutional Law of International Organisations*, 1996, pp. 405 ff.; Phillips, L., "Constitutional Revision in the Specialised Agencies", *AJIL*, 62, 1968, pp. 657 ff.

³⁴ This new attitude was illustrated by Petrovski, Deputy Foreign Minister of the USSR, speaking on 6 October 1989, in the Sixth Committee of the GA, where he stated that "[t]he Soviet Union has launched a process of withdrawing its earlier reservations regarding the compulsory jurisdiction of the International Court of Justice on a large number of treaties. As a first step, the Soviet Union dropped its reservations to human rights agreement." UN Doc. A/42/574; S/19143, 1987).

³⁵ Jennings, *supra* note 2, pp. 494-5; Tyagi, Y., "The World Court after the Cold War" in Pathak, J. et al. (eds.), *International Law in Transition: Essays in Memory of Judge Nagendra Singh*, 1992, p. 241.

³⁶ ICJ Rep., 1994.

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(ii) The increasing confidence of states in the Court.³⁷ There has been a growth in the number of declarations accepting the compulsory jurisdiction of the ICJ under Art. 36/2 of the Court's Statute (see Figure 1, p. 368 below). Moreover, many states have withdrawn their reservations against jurisdiction clauses in treaties, which is an important and welcome tendency. In addition, the developing countries have shown greater understanding of the ICJ's role. This has been reflected in the increasing number of cases referred by states to the Court and decided by the Court in the past decade as well as in the impressive number of cases pending before the ICJ. (see Figure 2, p. 369 below).³⁸ Finally, there has been an increase in the number of requests for advisory opinions by the organs and agencies of the UN in the past decade (see Figure 3, p. 370 below).

(iii) The Manila Declaration, unanimously adopted by the GA on 15 December 1982. This urges the international community to make greater use of the advisory and compulsory jurisdiction of the ICJ and affirms that legal disputes as a general rule should be referred to the ICJ.³⁹

(iv) The establishment of a Trust Fund in 1989. The purpose of the Fund is to provide financial assistance in order to encourage states to seek a solution to their legal disputes through the ICJ.⁴⁰ The availability of external resources can be extremely helpful in states' search for peaceful means of settling disputes through the Court.

(v) The change in the composition of the Court. Currently, many judges from developing countries, *inter alia* the current president, are on the bench.

³⁷ Lutz, R., "Perspectives on the World Court, the United States, and the International Disputes Resolution in a Changing World", *The International Lawyer*, 25, 1991, pp. 689 ff.

³⁸ During the past decade many cases referred to the Court were between developing countries, including African states, such as Tunisia, Libya, Burkina Faso, Malawi, Chad, Namibia, and Botswana. See ICJ Rep., 1994-5, No. 49, p. 250 ff.; Lachs, M., "Thoughts on the Recent Jurisprudence of the International Court of Justice", *EILR*, 4, 1990, pp. 79-80.

³⁹ Part II, para. 5, of the declaration. See GA Res. 37/10, 1982.

⁴⁰ The Secretary-General announced the establishment the Secretary-General's Trust Fund at the meeting of the UN held on 1 November 1989. The purpose of the fund is to provide, in accordance with the terms of reference, guidelines and rules, financial assistance to states for expenses incurred in connection with (i) a dispute submitted to the ICJ by way of a special agreement, or (ii) the execution of a judgment of the Court resulting from such special agreement. See *ILM*, 28, 1589 (1989).

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All of these grounds for optimism reflect the fact that states perceive the ICJ to be the most valuable instrument yet available to the international community. It is the duty of the states, the UN and the Court to co-operate to make the Court an adequate forum that meets the needs of a changing world.

Figure 1: The acceptance of the Court's compulsory jurisdiction in the period of 1946-96

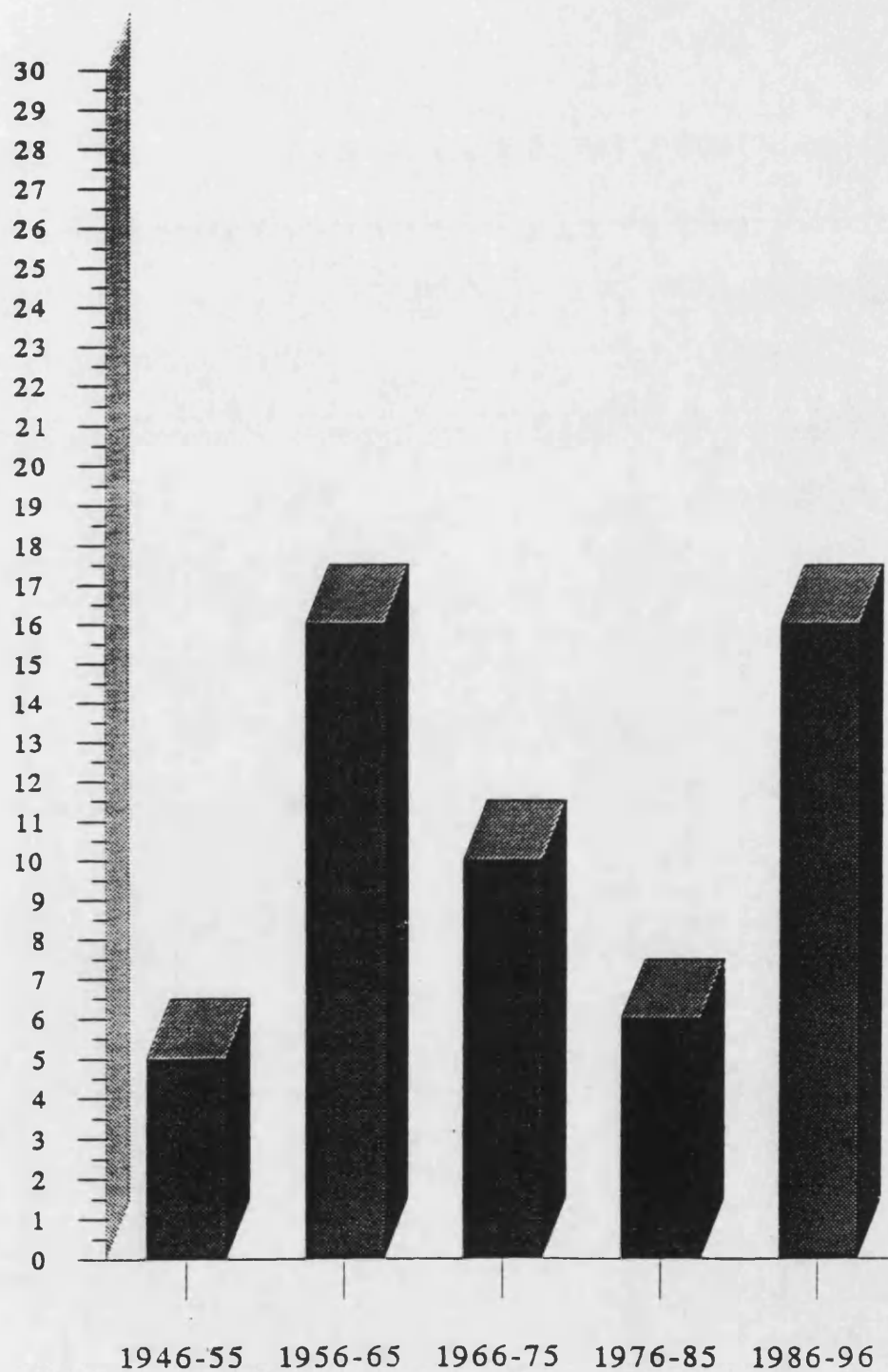


Figure 2: Contentious cases referred to the Court by states in the period of 1946-96

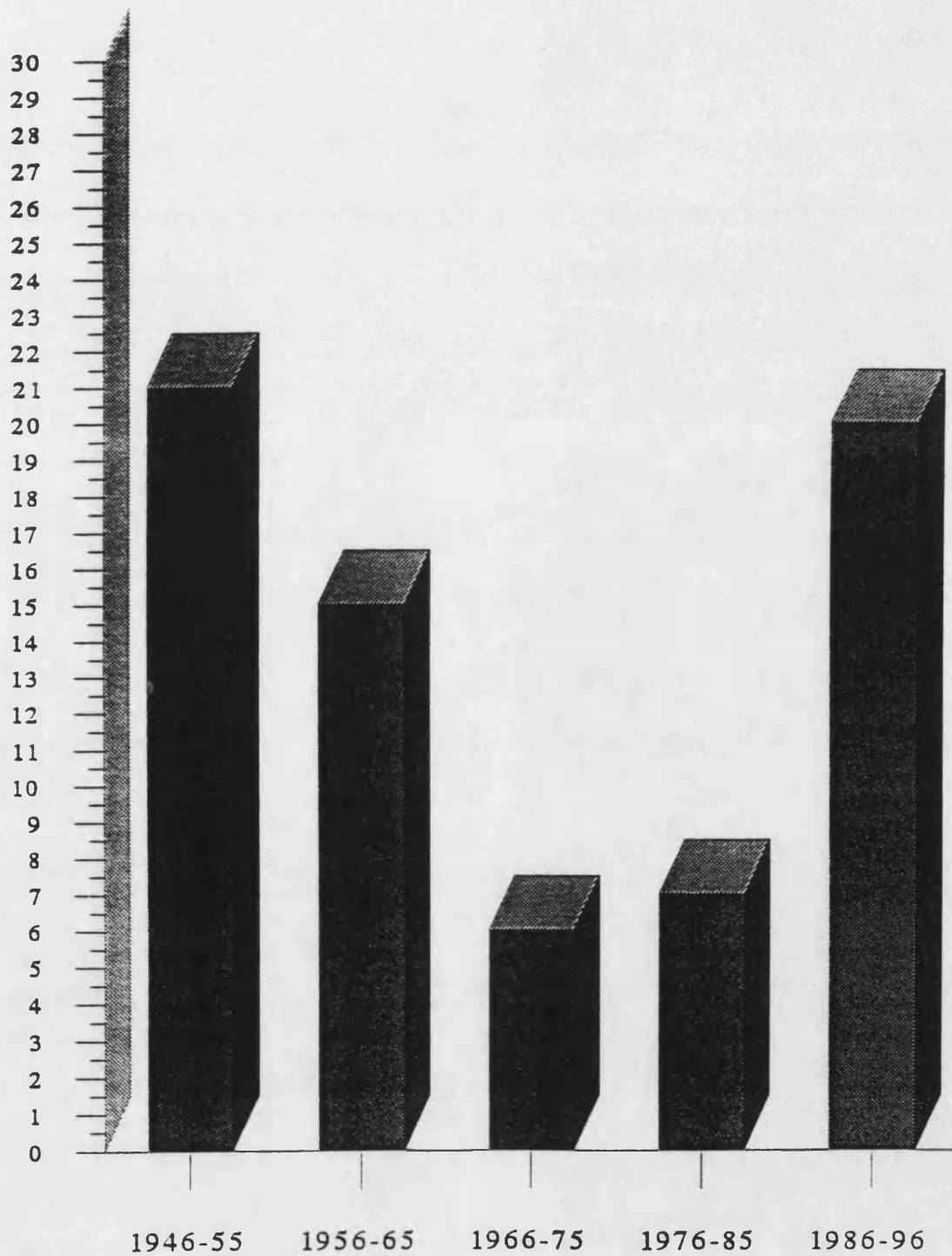
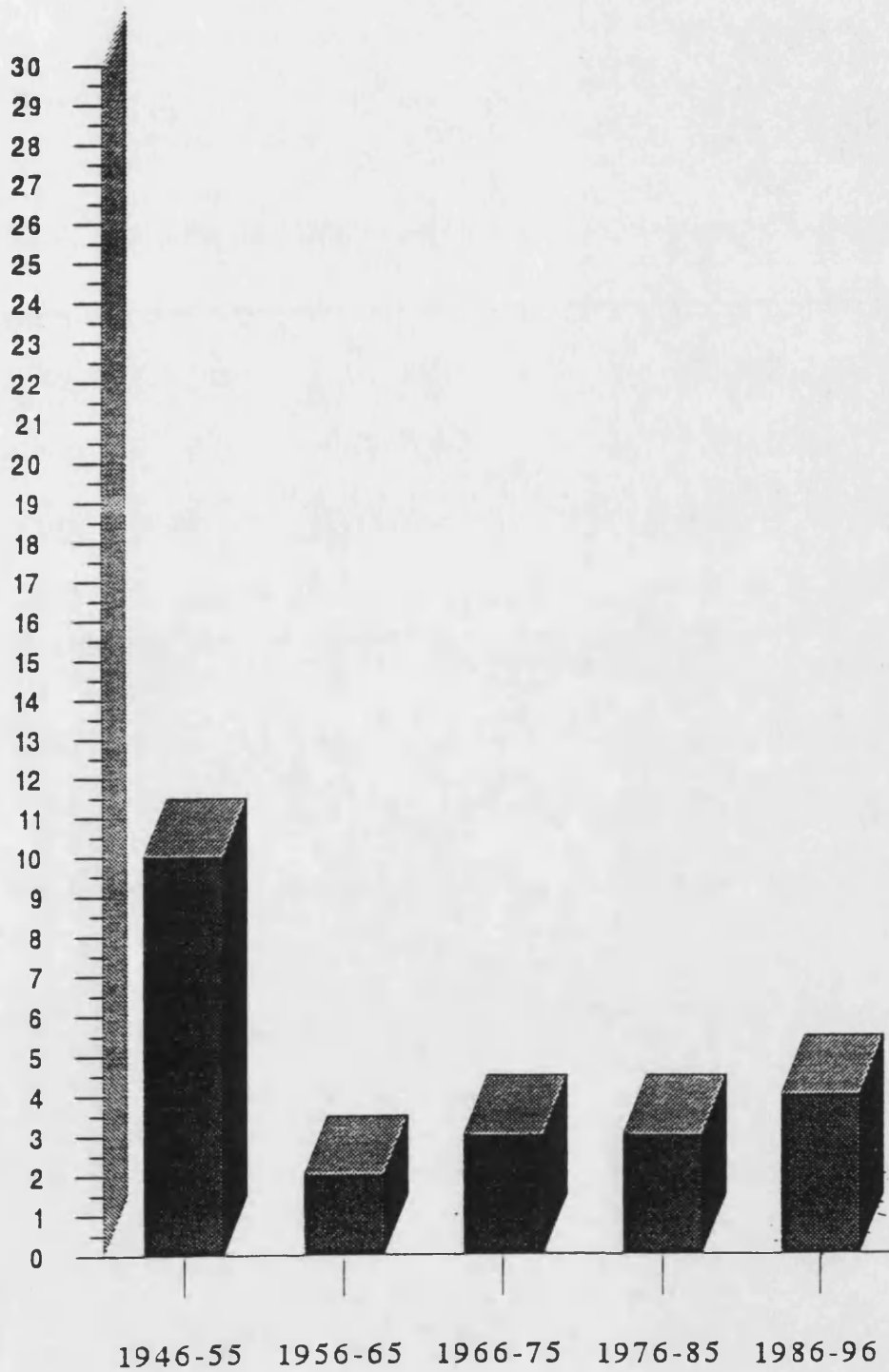


Figure 3: Requests for advisory opinions in the period of 1946-96



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