CHAPTER 23

What's Wrong with the Relationship between the International Court of Justice and the Security Council?

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Introduction

In 1945, the drafters of the United Nations Charter provided that, whenever the UN Security Council ("Council") needed advice on any legal question, it could always ask the International Court of Justice ("Court") for an advisory opinion. And whenever the Council, when maintaining international peace and security, encountered a typically legal inter-State dispute, it could always refer the States involved to the Court for peaceful settlement of that dispute in accordance with international law. Unfortunately, in the actual practice between 1945 and 2014, the Security Council has not made much use of the Court's legal services and expertise. Only once did the Council seek the legal counsel of the Court; and only once did it suggest to States involved in a legal dispute to bring their quarrel to the Court. If this Liber Amicorum's purpose is to unveil what is wrong with international law, then the limited role of the Court – the legal guardian of the UN system and of international law in general – in the Council's efforts to maintain international peace and security, is certainly an issue worth devoting some time to.

In the next section of this contribution, the intentions of the founding fathers in 1945 will be studied in some detail (II), followed by an analysis of the relationship between the Security Council and the Court in the period between 1945 and 2014 (III). In the fourth Section (IV), some lessons for the future will be provided. This article has modest intentions. It is not about the Court's competence to judicially review the resolutions of the Security Council at the request of States, individuals, the Court itself, or other UN organs.[1] In fact, the

1 Belgium suggested that any State, party to a dispute brought before the Security Council, should have the right to ask the Court whether a recommendation or a decision made by the Council infringed on the State's essential rights. See United Nations Conference on International Organization (UNCIO) of 1945 vol. 3, 333–336. See also UNCIO vol. 12, 66; see also UNCIO vol. 13, 645. The Soviet Union opposed. See Summary of Eighth Meeting, UNCIO of 12 April 1945 vol. 14, 181. And the proposal was rejected. See Fifteenth Meeting of Committee IV/1, UNCIO of 30 May 1945 vol. 13, 235.

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infamous *Lockerbie* case will not even be mentioned in what follows below.[2] This article is also not about the law-making powers of the Council.[3] It is solely about the role of the Court as the assistant or legal *advisor* of the Security Council. According to the provisions in the UN Charter, the Court can assist the Council by judicially settling inter-State disputes threatening the peace, and it may provide the Council with advice on any legal question. But then the Council must trust the Court, and actually refer disputes to it and ask it for legal advice.[4]

Intentions of the Founding Fathers in 1945

In 1945, the United States of America ("US") invited fifty States to come to San Francisco and participate in the founding conference of the United Nations Organization. It is worth taking a detailed look at some of the discussions in San Francisco about the possibilities of the Court to advise the Council and to assist it by settling peace-threatening legal disputes between States.

The delegates at San Francisco had before them a first draft of the UN Charter, prepared by the Soviet Union, China, the United Kingdom and the US at a meeting in a mansion near Washington, called Dumbarton Oaks. These

2 See the *Order on the Request for the Indication of Provisional Measures*, 14 April 1992, and the *Judgment* (*Preliminary Objections*), 27 February 1998, in the ICJ *Case Concerning Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie* (Libyan Arab Jamahiriya v. United States of America) 1998. There are many articles on the Lockerbie case, e.g. T.M. Franck "The 'Powers of Appreciation': Who is the Ultimate Guardian of UN Legality?" (1992) 86 *American Journal of International Law*; V. Gowland-Debbas "The Relationship Between the International Court of Justice and the Security Council in the Light of the Lockerbie Case" (1994) 88 *American Journal of International Law* 643–677; J.E. Alvarez "Judging the Security Council" (1996) 90 *American Journal of International Law* 1–39.

3 This topic was analyzed extensively in K. Wellens "The Legal Significance Given to the Security Council in the Court's Jurisprudence Since Lockerbie" (2012) 55 *Japanese Yearbook of International Law* 134–175.

4 This article will look only at the Council's competence to ask the Court for advice, not proposals to give a similar competence to the Assembly and other UN organs (a proposal which was accepted) and States (which was rejected). The UK suggested that States should also be permitted to ask the Court for an advisory opinion on legal matters. See United Kingdom Proposals regarding the Statute of the Permanent Court of International Justice, UNCIO vol. 14, 319. See also the Summary of the Eighth Meeting, UNCIO of 12 April 1945 vol. 14, where the suggestion was discussed.

so-called Dumbarton Oaks proposals constituted the basis for discussion at San Francisco. According to these Dumbarton Oaks proposals,

> Justiciable disputes should normally be referred to the International Court of Justice [and] the Security Council should be empowered to refer to the Court, for advice, legal questions connected with other disputes.[5]

This provision was meant to be included in the UN Charter's chapter on the peaceful settlement of international disputes and the role of the principal UN organs therein. The idea was that there were two types of disputes that might threaten international peace and security: justiciable disputes and other – i.e. non-justiciable – disputes. Justiciable disputes could, of course, be settled by the Court; and the Council should thus, as a rule, refer States involved in a justiciable dispute to the Court. But even in non-justiciable disputes legal questions might arise, and then the Court could provide the Council with advice on these legal questions.

In San Francisco, the Dumbarton Oaks proposal cited above was split into two. The first part, on how to deal with justiciable disputes, ended up in Article 36(3) UN Charter. This article as finally adopted proclaims that, when making recommendations in response to a dispute the continuance of which is likely to endanger the maintenance of international peace and security, 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" (emphasis added). In practice, this means that the Council can suggest to the States involved in a particular dispute which is largely legal in character, that they themselves bring their dispute before the Court. The Council cannot oblige States to do so, or bring them before the Court against their will and without their explicit consent. Article 36(3) UN Charter did not purport to create a referral mechanism like that of the International Criminal Court.[6] The United Nations Security Council does not *oblige* States, involved in an international dispute threatening international peace and security, to accept the contentious jurisdiction of the International Court of Justice. The Council has never used its powers to issue binding decisions under Chapter VII of the UN Charter in this way. It was made abundantly clear in San Francisco that "the Council was not authorized to insist that the parties to such a dispute [i.e. a

5 Dumbarton Oaks Proposals for a General International Organization, UNCIO vol. 3, 14.

6 Cf. Article 13 *Rome Statute of the International Criminal Court* 1998 (Italy).

justiciable dispute threatening international peace and security] must refer it to the Court."[7]

The second part of the Dumbarton Oaks provision, on the Court's role in dealing with non-justiciable disputes, ended up in Article 96 UN Charter, according to which "the Security Council may request the International Court of Justice to give an advisory opinion on any legal question." The reference to "other disputes," i.e. non-justiciable disputes, thus disappeared from the text, which was a wise decision. The distinction between justiciable and non-justiciable disputes has been criticized from the start in the literature. The Court itself also consistently rejected the view that there might be justiciable or legal disputes, and non-justiciable or political disputes. For example, in a case between Nicaragua and Honduras, the latter argued that Nicaragua's application to the Court was "a politically-inspired, artificial request." The Court responded as follows:

> 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 [...] 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.[8]

In theory, it is difficult to imagine an international dispute which is *not* capable of being settled by the application of principles and rules of international law. The determining factor is whether (one of) the parties, or the Council, decides to frame the dispute in a legal way, i.e. as an attributable breach of an international legal obligation, and if this is done, the dispute is justiciable. In other words, the Council may decide to refer any dispute to the Court for judicial settlement (Article 36(3) UN Charter), or ask advice on legal issues related to the dispute (Article 96 UN Charter). This is a policy decision to be taken by the Council.

The Dumbarton Oaks provision quoted earlier authorized the Court to provide advice to the Council only when the latter was dealing with a particular dispute. Such advice could be called *dispute-settling advice*. But Article 96 UN Charter permits the Council to put *any* legal question, regardless of whether it is connected to a particular dispute, to the Court.

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7 Twelfth Meeting of Committee III/2, UNCIO of 29 May 1945, vol. 12, 108, and Thirteenth Meeting of Committee III/2, UNCIO of 15 June 1945 vol.12, 125.

8 ICJ *Border and Transborder Armed Actions* (Nicaragua v. Honduras), Jurisdiction of the Court and Admissibility of the Application 1988, paras. 51–52.

It is interesting to look briefly at the reasons why the Council's competence to ask for legal advice was enlarged in this way. At San Francisco, the Norwegian delegation suggested broadening the Court's advisory competence. It proposed that the Council should have the authority to ask the Court for an advisory opinion on "any legal question where it needs an authoritative opinion, including questions relating to the interpretation of the Charter," and including "legal questions unconnected with any particular dispute."[9] Most States agreed, and the Dumbarton Oaks provision was changed accordingly. The Court was thus given a more general competence to give an advisory opinion on *any* legal question put to it by the Council.[10] This means the Court can give two types of advisory opinions at the request of the Security Council: it can give advice on legal aspects related to a particular dispute the Council is trying to settle peacefully (*dispute-settling advice*), and it can give advice on general or abstract legal questions, primarily about the interpretation of the UN Charter and the scope of the Council's powers. The latter type of advice provided by the Court to the Council could be called *constitutional advice*, because it primarily relates to settling legal questions on the correct interpretation of the constitutional document of the UN (the UN Charter), and the powers of the main UN organs.

There is a marked difference between Court-Council interaction under Article 36(3) and 96 UN Charter. When the Council refers the States involved in an inter-State dispute to the Court, and these States indeed bring their case to the Court, this will lead to a legally binding judgment. That is the Article 36(3) procedure. On the other hand, if the Council asks the Court for an advisory opinion on any legal question relating to a particular dispute or the correct interpretation of the Charter, the Court's opinion will not bind the Council, the States involved, or anyone else. That is the procedure under Article 96 UN Charter. The Council can accept the Court's advisory opinion, but it can also reject it.

This difference between legally binding judgments and non-binding advisory opinions was already stressed by the Advisory Committee of Jurists in 1920, which was tasked with the drafting and revision of the Statute of the Permanent Court of International Justice, the predecessor of the International Court of Justice. In the Committee's view, "whereas a judgment of the Court [...] is binding and has the force of *res judicata*," through an advisory opinion

9 Official Comments Relating to the Statute of the Proposed International Court of Justice, UNCIO vol. 14, 446–447.

10 Draft Report of the Rapporteur of Committee III/2, UNCIO vol. 12, 145.

"the Court does not pass judgment, it merely advises."[11] Even "the Court [itself] must not be bound by this [advisory] opinion, should the question come before it as a concrete case [in a contentious proceeding]; otherwise the opinion ceases to be advisory."[12] And:

> In order to avoid the possibility of the Court being forced to contradict or repeat itself, it must be differently constituted [when giving an advisory opinion], and consequently reduced, for the performance of this function, to a smaller number, say from 3 to 5 of its members, as may be decided in the rules of the Court.[13]

The reader is reminded that the Council can ask two kinds of advisory opinions: those relating to a particular dispute, and those relating to so-called constitutional issues. The Report stressed that the low-key procedure described in the quotation above was suitable only for advisory opinions in which the Court provided constitutional advice. Advisory opinions of the dispute-settling kind were so much like judgments in contentious proceedings, that the normal procedure ought to be followed. An opinion on an actual dispute

> Would nevertheless [despite its non-bindingness] have the moral force attaching to all its decisions; and, if the Council or Assembly adopt it, it would have the same wholesome effect on public opinion. Whenever therefore an existing dispute is in question, the Court must take its decision in the same manner as if an action had actually been brought before it.[14]

These suggestions were in the end not reflected in the Statute.[15] But the idea that the Court should use a less formal procedure when responding to a request for an advisory opinion on a theoretical or constitutional question is worth exploring. It might persuade the Council to make more frequent use of the procedure. It is true that the International Court has on various occasions put emphasis on the harmlessness of its advisory opinions, by stressing that

11 League of Nations Advisory Committee of Jurists *Proces-Verbaux of the Proceedings of the Committee* (Van Langenhuysen Brothers, The Hague: 1920) 730.

12 Ibid.

13 Ibid.

14 Ibid., 731.

15 See J.A. Frowein and K. Oellers-Frahm "Article 65" in A. Zimmermann, C. Tomuschat and K. Oellers-Frahm (eds) *The Statute of the International Court of Justice: A Commentary* (Oxford University Press, Oxford: 2006) 1403–1405.

they should be regarded as *only advice*, and not binding judgments.[16] At the same time, the opinions are published and formatted in the same way as the judgments in the contentious proceedings are. And they are read at a public sitting of the Court, just like judgments. There is a vote on the operative paragraphs, just like judgments, and judges may issue dissenting or concurring individual opinions.[17] If the Court would treat its advisory opinions – both the dispute-settling and constitutional kind – more like suggestions or advice, and make them look like harmless memoranda instead of judgments, then perhaps the Council would not hesitate so much before requesting an opinion from the Court.

In the next section, we will look at what use the Council has made of its competence to refer the quarreling States to the Court for judicial settlement of their dispute, and of its competence to seek the legal advice of the Court on any legal question – regardless of whether it is a general question or a question related to a particular international legal dispute – the Council is faced with.

Functioning of the Court in Practice (1946–2014)

Australia proposed in San Francisco to include in the UN Charter a commitment that "the Security Council shall avail itself to the maximum extent of the services of the Court in the settlement of disputes of a legal character."[18] This proposal was not adopted in the end. And subsequent practice of the Council reflects this rejection: the fact of the matter is that the Council has almost never availed itself of the Court's services in the settlement of legal disputes. Below, four incidents will be examined in order to find out why.

First, we will examine the only time the Council ever successfully referred two States, involved in a dispute threatening international peace and security, to the contentious jurisdiction of the Court. This was in the early days, in 1947. We will then look at a failed attempt to have the Council suggest to two other

16 K. Oellers-Frahm "Article 96" in A. Zimmermann, C. Tomuschat and K. Oellers-Frahm (eds) *The Statute of the International Court of Justice: A Commentary* (Oxford University Press, Oxford: 2006) 1186. See also J. Sloan and G.I. Hernández "The Role of the International Court of Justice in the Development of the Institutional Law of the United Nations" in C. Tams and J. Sloan *The Development of International Law by the International Court of Justice* (Oxford University Press, Oxford: 2013) 198.

17 See Rule 107 *Rules of the Court* 1978 (The Netherlands). See also Oellers-Frahm, note 16 at 1188.

18 Amendments to the Dumbarton Oaks Proposals Submitted on Behalf of Australia, UNCIO vol. 3, 551.

States to choose the same way out of their dispute some twenty years later. Both these situations thus refer to the scenario described in Article 36(3) of the United Nations Charter.

Second, we will examine the only time the Council ever asked the Court for an advisory opinion on a legal question. It was a question relating to a particular dispute between South Africa and the people of Namibia. It was thus an advice of the dispute-settling and not the constitutional kind. The Council has never asked the Court for constitutional advice. That is remarkable, especially considering the fact that the Advisory Committee of Jurists considered this the least controversial or intrusive involvement of the Court in the Council's work. A failed attempt to get the Council to ask the Court for constitutional advice will be examined, to find out why such questions were never put to the Court.

The failures are as illuminating as the successful attempts, or perhaps even more, but these stories of failures have received far less attention in the literature.

Corfu Channel

Let us start with a success story. Only once has the Council successfully suggested to the parties in a particular dispute to bring their dispute to the Court, and this was a long time ago.[19] In fact, the first case in the history of the Court came before it at the request of the Council. This was the case between the United Kingdom and Albania regarding the mining of the Corfu Channel.[20] As explained above, a referral of a dispute by the Security Council to the Court does not in and of itself give the Court jurisdiction to deal with the merits of the case.[21] The Council could thus only *suggest* to Albania and the UK that they take their dispute to the Court. Formally then, the Court's jurisdiction was based on a Special Agreement concluded between the two States on March 25th, 1948. But this Special Agreement was "drawn up as a result of [a] Resolution of the Security Council." In this resolution, the Council "recommend[ed] that the United Kingdom and Albanian Governments should immediately refer the dispute to the International Court of Justice."[22] This they

19 G. Distefano and E. Henry "The International Court of Justice and the Security Council: Disentangling Themis from Ares" in K. Bannelier, T. Christakis and S. Heathcote (eds) *The ICJ and the Evolution of International Law: The Enduring Impact of the "Corfu Channel" Case* (Routledge, London: 2012). See also T. Stein "Article 36" in B. Simma, H. Mosler and A.L. Paulus (eds) *The Charter of the United Nations: A Commentary* 2nd (Oxford University Press, Oxford: 2002) 627.

20 Distefano and Henry, note 19.

21 Stein, note 19 at 625.

22 S/RES/22 of 9 April 1947.

did, and on 9 April 1949, the Court delivered its judgment on the merits in what became known as the *Corfu Channel* case between the United Kingdom and Albania.

This promising start has not become the beginning of an intense and fruitful cooperation between the two principal organs of the UN. After 1947, the Council never again successfully proposed that two or more States, involved in a dispute which threatened international peace, take their quarrel to the Court.

The Shooting Down of a US Airplane by the Soviets

In order to understand why this referral of 1947 was not followed by more such referrals, it might be illuminating to look briefly at one of the failed attempts. The United States of America and the Soviet Union had a dispute about the (legal) responsibility for the shooting down, allegedly done by the Soviets, of a US Air Force RB-47 airplane. The US came with the proposal to let the Security Council suggest to the parties that they refer the question of legal responsibility for the incident to the Court. According to the Tunisian delegate at the Security Council, who supported the US proposal, such a referral of the dispute to the Court "could enable us [i.e. the members of the Council] to obtain some impartial findings on the disputed events and then to examine the case thoroughly and to decide it with full knowledge of the facts."[23]

According to the Soviet Union, there was no need to refer the dispute to the Court, because "the facts placed before the Security Council, and the data contained in the Soviet Government's notes, supply exhaustive evidence of the aggressive nature of the acts engaged in by the United States RB-47 bomber."[24] In view of the Soviet delegate, the proposal to refer the incident to the Court was put forward by the US "solely in order to distract attention from acts of aggression, confuse a perfectly clear-cut issue, and mislead world opinion."[25] Furthermore, it was "an attempt to deprive the Soviet Union of its sovereign right to take whatever steps are necessary to ensure the inviolability of its frontiers, and to transfer that right to [...] the International Court."[26] The Soviet delegate openly wondered "what self-respecting State would agree to so glaring an infringement of its sovereign rights."[27] The proposal was put to the vote, and due to a Soviet veto, the resolution did not pass.

23 S/PV.883 of 26 July 1960, 11.

24 Ibid., 24.

25 Ibid.

26 Ibid.

27 Ibid.

Immediately after the vote, the US delegate exclaimed that

> When an impartial investigation was offered them [i.e. to the Russians] and supported by an overwhelming majority of the Council, they [the Soviets] blocked it with their veto, which shows to every person that they do not believe their own charge, because if they believed it they would welcome the investigation. He who comes into Court with clean hands has nothing to fear, and he can have an investigation and stand it.[28]

This exchange at the Council of course must be seen in the context of the Cold War, in which hypocritical statements were continuously made on both sides. But it does show why it is so difficult for the Council to refer justiciable disputes to the Court. The reason is quite obvious: most legal disputes between States are part of a bigger story of political interests and tensions between them. And especially when the permanent members of the Security Council are themselves involved, it is hard to get all permanent members to agree to isolate a particular legal question from this bigger story and bring that to the Court. At the same time, it must be noted that the *Corfu Channel* case also involved a permanent member – the UK – and also related to an incident which was part of a bigger story. But the UK was very sure it would prevail if the dispute was approached from a purely legal point of view, and it in fact did win its case before the Court. The difference between the two case studies was that the Soviet Union was also a permanent member of the Council endowed with veto powers, and Albania was not.

Namibia

After all this talk about failures and political tensions, it is time for another success story. As explained above, if the Council is faced with a particular dispute which, in the Council's view, cannot be settled by the Court alone – because it is not a justiciable dispute *pur sang* – then the Council can still ask the Court for advice on any legal aspects pertaining to such a non-justiciable dispute. The Council can ask such advice, even without the consent of the States involved in the dispute.

Such advice does not bind anyone, and this justifies why the consent of the States involved is not required. Already in 1950, the Court explained the difference between a judgment and an advisory opinion relating to an inter-State dispute:

> The Court's reply [to a request for an advisory opinion] is only of an advisory character: as such, it has no binding force. It follows that no State,

28 Ibid., 40.

> whether a Member of the United Nations or not, can prevent the giving of an Advisory Opinion which the United Nations considers to be desirable in order to obtain enlightenment as to the course of action it should take. The Court's Opinion is given not to the States, but to the organ which is entitled to request it [...][29]

In other words, "the sole object" of such an advisory opinion is to "enlighten" the UN organ requesting it.[30] The Advisory Committee of Jurists already predicted, in 1920, that an advisory opinion in practice might turn out to have the same "moral force" as a judgment, and it might have the same "wholesome effect on public opinion." This prediction of 1920 appears to have come true. As Sloan concluded almost a hundred years later, "member states appear, in the main, to treat the findings of the Court [in advisory opinions] as more or less binding *de facto*."[31]

In 1962, for the very first time – and so far the only time – the Council actually managed to ask the Court for an advisory opinion.[32] The question put to the Court was about the legal consequences of a failure of South Africa to comply with a particular Security Council resolution.[33]

The idea to ask the Court for advice about the legal aspects of this particular dispute – a dispute between South Africa and the people of Namibia – came from Finland. One of the motivations for the proposal was

> The need to reactivate the International Court of Justice itself. It is one of the principal organs of the United Nations, and the highest international authority on law. [...] An organ which is left unused is in danger of atrophy. The decline in the authority of the Court is damaging to the interests of the United Nations system as a whole and to the structure of international law. The request for an advisory opinion on a question of great interest to the international community would reactivate the Court at a particularly difficult time in its existence.[34]

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29 ICJ *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania*, Advisory Opinion of 30 March 1950, 71.

30 Ibid., 72.

31 Sloan and Hernández, note 16 at 219.

32 ICJ *Legal Consequences for States of the Continued Presence of South Africa in Namibia* (*South West Africa*) *notwithstanding Security Council Resolution 276* (*1970*), Advisory Opinion 1971.

33 The exact question was as follows: "What are the legal consequences for States of the continued presence of South Africa in Namibia, notwithstanding Security Council resolution 276 (1970)?" See S/RES/284 of 29 July 1970.

34 S/PV.1550 of 29 July 1970, 5.

Not only would the request for an advisory opinion give the Court something to do[35]; it also provided the Court with an opportunity to erase some of the bad memories it had left when it *had* attempted to contribute to resolving the question of Namibia in the past, and failed miserably.[36] This request for an advisory opinion about the question of Namibia could thus, in the view of the Zambian delegate at the Council, "give the Court a crucial opportunity to restore world public confidence in its very existence."[37] It was an example of one principal organ with a bad reputation assisting another.

The Soviet Union was not so enthusiastic about the Finnish proposal. In its view, "the adoption of such a decision [to request an advisory opinion] would only delay the solution of the Namibian problem and create false illusions as to the possibility of solving it by legal means, rather than by serious political action on the part of the Security Council."[38]

The draft resolution was nonetheless adopted by 12 affirmative votes and 3 abstentions: the United Kingdom, Poland and the Soviet Union abstained.[39] The US delegation remarked that this was indeed the first time that the Council made use of the opportunity to request and advisory opinion, and the US was "most pleased at this historic development," because it was a US belief that "the international community ha[d] indeed a serious need for impartial and authoritative legal advice on the question of Namibia."[40]

The merits of the opinion do not concern us here. Suffice it to say that the Council got the opinion it hoped for, and "agreed" with it.[41] And overnight the Court's reputation had improved significantly. The delegate of Burundi at

35 In the 1960s, only four cases were brought before the Court: the South West Africa cases between Liberia/Ethiopia and South Africa, the North Sea Continental Shelf cases between Germany and Denmark/Netherlands, the Barcelona Traction case between Belgium and Spain, and the Northern Cameroons case between Cameroon and the United Kingdom. After the Court declined to deal with the merits of the first-mentioned case in 1966, it became particularly quiet for some years.

36 In 1950, the Court had reaffirmed that South Africa was not legally obliged to put South West Africa – now Namibia – under the United Nations Trusteeship system. See ICJ *International Status of South West Africa* Advisory Opinion 1950. This was followed by the Judgment of the Court in 1966, in which it did not allow Liberia and Ethiopia to bring a case "on behalf of" Namibia. See ICJ *South West Africa* (*Liberia and Ethiopia v. South Africa*), ICJ Reports 1966.

37 S/PV.1550 of 29 July 1970, 12.

38 Ibid., 14.

39 Ibid., 16.

40 Ibid., 17.

41 Sloan and Hernández, note 16 at 222.

the Security Council wished to "pay a highly deserved tribute to the distinguished judges who discharged their obligations with dignity and equity."[42]

The Indonesian Question

Let us now turn to a story of failure. The advisory opinion referred to above was of the dispute-settling kind; it mostly dealt with the rights and obligations of a State – South-Africa – and not of the Council itself. The Council has never asked the Court for an advisory opinion of the constitutional kind. But the Council did come close to doing so already a long time ago, at the time all the UN organs were busy discovering the limits of their own powers.

The Netherlands plays a rather unfortunate role in this story. The story is about the so-called "Indonesian Question," i.e. the hostilities between the armed forces of The Netherlands and the Republic of Indonesia in the 1940s. On 1 August 1947, The Netherlands, not itself a Security Council member but invited by the Council to participate in the discussions, contested the competence of the Security Council to deal with this so-called Indonesian question, arguing that this question fell within the domain of Dutch domestic affairs. This issue was then discussed extensively among the members of the Council. Some agreed with The Netherlands, and others strongly disagreed. How could this debate be settled? France at some point proposed that the Council adopt the following resolution:

> The Security Council,
>
> *Noting* with concern the hostilities which are taking place in Java and Sumatra,
>
> *Reserving* entirely the question of the Council's competence as regards the application of the Charter but prompted by a wish to see the cessation of bloodshed in the two islands,
>
> *Calls upon* the parties concerned to put an end to hostilities.[43]

This resolution clearly reflected the insecurities of the Council as to how far it could go while remaining within the constitutional limits of its powers set by the Charter. The resolution could be summarized as follows: "we don't really know if we are allowed to do so, but we call upon the parties to put an end to the hostilities anyways." France proposed that this resolution be accompanied by a request by the Council to the Court, asking it what exactly the Council was entitled to do in this particular situation.

42 S/PV.1584 of 27 September 1971.

43 S/PV.173 of 30 April 1986, 1678.

It could be argued that such a resolution would show to the world a shy and insecure Council, not sure of the extent of its own powers, at a time when self-confidence and resolve were required. For this reason, the Colombian delegate proposed that the Council should not adopt a resolution "expressly stating that this Council is not sure whether it is competent to adopt such a resolution." Instead, Colombia proposed that

> If it is necessary to discuss at length whether or not the Council is competent to pass the resolution, why not give the matter, which is of sufficient importance, all the necessary time? Why not stay here a little later this afternoon, or stay in the evening, or have another meeting tomorrow, if necessary? But let us not establish the precedent of passing resolutions with a clear understanding or statement to the effect that we do not know whether or not we are competent to pass them.[44]

In any case, added Colombia, if The Netherlands wanted to challenge the constitutionality of the Council's resolution after its adoption, The Netherlands could always "apply to the Court to test the legality of the [Security Council] resolution"; that was, according to the Colombian delegate, "the ordinary course."[45] In response, The Netherlands correctly explained that this was not the ordinary course at the UN. The Netherlands could not go to the Court and ask it to test the legality of the Security Council resolution, "as advisory opinions can be requested only by a body authorized to that effect by or in accordance with the Charter of the United Nations," and thus, explained Eelco van Kleffens (the Dutch delegate), "the Security Council or certain other organs can, but a Member State cannot."[46] Essentially, this means the UN system does not have an opportunity for its Member States to challenge the constitutionality of the decisions of the UN's principal organs; there is no such judicial review mechanism at the UN.

No State can thus challenge the Council's determination of the limits of its own powers. But what if the members of the Security Council themselves were deeply divided on the issue, as was the case here? Would it not be wise then to ask the Court for some expert legal advice? Was this not the purpose of the advisory procedure?

Some meetings later (on 22 August 1947), the members of the Council were still debating whether the Indonesian question fell within the competence of

44 Ibid., 1693.
45 Ibid., 1693.
46 Ibid., 1695.

the Council. Belgium then formally proposed, as France had done earlier but only informally, that the Security Council request the International Court of Justice for an advisory opinion on the matter.[47] This way, the Council could make use of the "source of enlightenment put at its disposal by the Charter," i.e. the Court.[48] According to the Belgian delegate, "it [was] consistent with the traditional policy of Belgium to try to settle difficulties of this kind by submitting them to an impartial court."[49] In doing so, the Council would "affirm its faith in the principle that international justice is the essential condition for any durable and fruitful organization of the community of States."[50]

In support of the Belgian resolution, the French delegate remarked that "the first duty of any body having functions, powers and responsibilities is to have a proper respect for its own competence," and that "respect for its competence is an absolute rule and a prerequisite for every organization."[51] The Council should thus have a clear idea of its competence, and an advisory opinion on the matter by the Court would be most welcome.

Australia opposed the resolution. The Australian delegate complained that "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 could never take any action."[52] China also opposed. The Chinese delegate described the request for an advisory opinion as "a leap in the dark." And,

> In the case of an institution as young as the Security Council, I think one should be very careful about taking a leap in the dark. A legal opinion rendered to the Council might turn out to be a very tight straitjacket. Once it was presented to us, we could not very well disregard it. Legally, we are not bound to accept such an opinion; morally, however, it would be a very grave matter indeed if such an opinion were to be set naught by the Council. If we put on this straitjacket, we may find it very inconvenient when we attempt to face the problems of a world which is changing very rapidly.[53]

And what kind of a Council would voluntarily put on a straitjacket, and find itself bound to wear it for the rest of its life?

47 S/PV.517 of 30 October 1950.
48 S/PV.194 of 25 August 1947, 2194.
49 Ibid.
50 Ibid.
51 S/PV.195 of 26 August 1947, 2215.
52 Ibid., 2217.
53 Ibid.

In support of the Belgian proposal, the UK representative explained that, instead of a leap in the dark, he regarded it as an "effort to emerge from the obscurity in which I, at least, find myself."[54] He argued that an opinion from the International Court of Justice "may help in time to build up a body of rules or standards by which we should be able to judge exactly whether the Council does have competence in a given matter."[55]

In response to the straitjacket-argument of the Chinese delegate, the Belgian delegation made the following comments:

> I do not see why the Security Council should not be subject to legal rules which it could ask an impartial Court to enunciate and define. The Council cannot act outside the sphere of law and that, incidentally, applies to all civilized societies. They are subject to rules of law and they do not usually call those rules a "straitjacket."[56]

When the Belgian proposal was put to the vote, it got four votes in favor, one against (Poland) and six abstentions.[57] So that is how close we got to the first request by the Council of an advisory opinion of the constitutional kind from the Court. If this resolution had passed, and if the Court had produced a meaningful advisory opinion on the Council's competence under the UN Charter, it could have set a very nice precedent indeed. Similar advisory opinions could have solved many pertinent legal questions. The Court could have advised the Council on the legality of its sanctions regimes; it could have guided the Council in its interpretation of what constitutes a threat to the peace; it could have shed some light on the constitutionality of certain measures the Council took to maintain the peace, such as the creation of international criminal tribunals, the establishment of United Nations interim administrations and other forms of international civil and military presence in (former) conflict areas, and so on and so forth. But the resolution did not pass…

Conclusion and Some Suggestions for the Future

In 1945, much was expected of the International Court of Justice. To illustrate this, we need only cite the words of a rapporteur of one of the working committees at San Francisco, who was in a particularly poetic mood:

54 Ibid., 2219.
55 Ibid., 2218–2219.
56 Ibid., 2224.
57 Ibid.

> In establishing the International Court of Justice, the United Nations hold before a war-stricken world the beacons of Justice and Law and offer the possibility of substituting orderly judicial processes for the vicissitudes of War and the reign of brutal force.[58]

But the Council never saw the Court as the Belgian delegate did in 1947: as a "source of enlightenment put at its disposal by the Charter." China's objection, that such a request for enlightenment was in actual fact more like taking a leap in the dark, might explain this. Before you know it, warned China, the Council finds itself forever strapped tightly into a straitjacket of international law, unable to move freely.

We can accept this as a reality, and accept that the Court has no role to play as the Council's legal advisor. But we can also think about ways to improve the relationship between the two organs. Most domestic governments have political as well as legal advisors, and both kinds of advice are taken into account when a policy decision is made. And what the Court does is just that: it gives advice; it does not dictate what the Council ought to do. It might be difficult for world public opinion to distinguish a binding judgment from a non-binding advice, and the Council will have some explaining to do when it sets aside an advisory opinion of the Court. But this is a problem of education, outreach and explanation.

Sloan referred to an "intra-institutional dialogue" between the Court and the Council. The Court's role is "to contribute to, but not to resolve, issues of a wider significance to the United Nations and its non-judicial organs, or issues falling more directly within the competence of those organs."[59] By "engaging in a meaningful dialogue" with the Council, through its advisory opinions, the Court could indeed play the role of the Council's "trusted advisor."[60]

There is much work to do. As illustrated in this article, in the past seventy years, the Council almost never involved the Court in its work. Besides the *Corfu Channel* case and the *Namibia* advisory opinion, the Council never successfully referred the parties to a dispute to the Court, and it never asked the Court for legal advice, even though there have been many opportunities where some legal advice could have been useful.[61] It is illustrative that it was only at the 4212th (!) meeting of the Security Council, held on 31 October 2000, that the President of the International Court of Justice was for the first time in UN his-

58 Draft Report of the Rapporteur of Committee IV/1, UNCIO vol. 13, 316.

59 Sloan and Hernández, note 16 p. 226.

60 Ibid., 233.

61 S. Yee "The Dynamic Interplay Between the Interpreters of Security Council Resolutions" (2012) 11 *Chinese Journal of International Law* 613–622.

tory invited to come to the Council to inform it of the Court's work.[62] Since then, it has become somewhat of a tradition, so things do change. On 28 October 2013, Judge Peter Tomka, President of the International Court of Justice, had an "exchange of views" with the Council.[63] At this meeting, the Australian delegate remarked that "the work of the Council and the Court were always intended to be complementary [and thus] the question before us is really how much greater that contribution could be if we as a Council were more cognizant of the complementary role the Court could play in situations on the Council's agenda."[64] He continued by noting that "in the almost seventy years of parallel existence of the Council and the Court, the Court has proven its effectiveness in dispute resolution, as demonstrated by its growing docket, yet referrals to the Court by the Council have been minimal [and] perhaps this is an instrument we could use more."[65] Hear, hear!

62 S/PV.4212 of 31 October 2000. It was a private session, so we do not know what was said at this meeting.

63 S/PV.7051 of 28 October 2013. Official communiqué of the 7051st (closed) meeting of the Security Council.

64 Statement by HE G. Quinlan *The Relationship Between The International Court of Justice and the Security Council* (United Nations Security Council: 2013) available at <http://australia-unsc.gov.au/2013/10/the-relationship-between-the-international-court-of-justice-and-the-security-council/>.

65 Ibid.