Cooperation and Competition between the International Court of Justice and the Security Council

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Introduction

The International Court of Justice is meant to interact with other United Nations bodies, especially the Security Council. The latter may, in accordance with Article 96, paragraph 1, of the UN Charter, request an advisory opinion from the ICJ. It has done so only once, in 1970.[1] The Security Council may also provide support in the implementation of the Court's judgments upon the request of a party.[2] Under Article 94, paragraph 2, of the UN Charter, it may make recommendations or impose particular measures on the parties. However, it cannot be said that the Security Council exercises its powers in order to support the Court's functions. It rather has recourse to the Court in order to legitimise its own activities.[3]

Besides the two procedures mentioned above, the UN Charter provides the possibility for the Security Council to recommend that States refer their disputes to the ICJ. Article 36, paragraph 3, of the Charter 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.

This article reflects the idea that the ICJ can have an important role in the peaceful settlement of international disputes.

In practice, although one may find some implicit references to this article,[4] the Security Council has explicitly referred a dispute to the Court only once, the *Corfu Channel* case, through a resolution of 9 April 1947. This led to the ICJ judgment of 9 April 1949. The

·Research and Teaching Fellow at University of Paris I (Panthéon-Sorbonne).

[1] See *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, ICJ Reports 1971, p. 16.

[2] In UNSC Res. 819 (1993) of 16 April 1993, the Security Council took note of the provisional measures indicated by the ICJ in its order of 8 April 1993 in the case concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia (Serbia and Montenegro))*. The Security Council also promoted the respect of the ICJ judgment in the territorial dispute between Libya and Chad in 1994. See UNSC Res. 915 (1994) of 4 May 1994, which led to the establishment of the United Nations Aouzou Strip Observer Group.

[3] Philippe Weckel, "Les suites des décisions de la Cour internationale de Justice," *Annuaire Français de Droit International* 42 (1996): 442-443.

[4] *Repertory of Practice of United Nations Organs*, Supplements no. 7-9 (1985-1999), volume III, paras. 1, 3 and 4.

Security Council never explicitly *recommended* again that States submit their dispute specifically to the ICJ. Later, it only *invited* States to use 'preventive mechanisms' to settle their disputes, while discreetly mentioning the ICJ.[5] The nuance is important. There is a great difference between a general invitation, which is more in the nature of a suggestion, and a specific recommendation,[6] which could be a real incentive. The Security Council has also sometimes prompted States parties to a dispute to resort to the ICJ through informal actions, without adopting any recommendation.[7] However, such examples are rare and even hard to ascertain, as there may be no written evidence. The Security Council could contribute to increasing the wider confidence in the Court by applying Article 36, paragraph 3, instead of letting it sink into oblivion.

The first reason that might explain the infrequent recourse to Article 36, paragraph 3, is the propensity of States to resort to negotiations rather than to a judicial settlement of their disputes. As the ICJ itself has recognised, negotiations are "the most appropriate method" for the settlement of many disputes.[8] Sir Gerald Fitzmaurice rightly observed that

> apart from the natural reluctance to litigate felt by almost everyone, governments prefer to deal with disputes by political means rather than by submission to adjudication, and fight shy of the commitment involved by going to law: they dislike the loss of control that is entailed over the future of the case, the outcome of which they can no longer influence politically once it is before a court of law, since this will then depend upon legal considerations with which they do not find themselves at home. They much prefer a political forum such as the United Nations in which leverage can be exercised through the influence of majorities.[9]

The Security Council would then have no need to recommend to the parties the referral of their dispute to the ICJ – as Article 36, paragraph 3, provides – considering that the Council could prompt diplomatic negotiations to reach a solution without resorting to adjudication.

The reluctance of the Security Council to apply Article 36, paragraph 3, expressly also shows its wish not to share the responsibility for the maintenance of international peace and security. By taking care of all disputes, including the legal ones, the Security Council indirectly contributes to keeping low the number of cases that could be submitted to the Court. This is not the principal reason for the rarity of cases submitted to the Court. However,

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[5] UNSC Res. 395 (1976), para. 4, and UNSC Res. 1366 (2001), para. 10.

[6] Giovanni Distefano and Etienne Henry, "The International Court of Justice and the Security Council: Disentangling Themis from Ares," in *The ICJ and the Evolution of International Law: The Enduring Impact of the Corfu Channel Case*, ed. Karine Bannelier, Theodore Christakis, and Sarah Heathcote (London: Routledge, 2012), 68.

[7] In the dispute between Cameroon and Nigeria in 1994, after some informal and friendly discussions with certain Security Council members (France and the UK), the parties finally decided to submit their dispute to the World Court. See the intervention of Ambassador Yáñez-Barnuevo at the ICJ Conference on "The ICJ in the Service of Peace and Justice," September 23, 2013, available at http://www.icj-cij.org/ (accessed February 20, 2014).

[8] *Fisheries Jurisdiction (Federal Republic of Germany* v. *Iceland)*, Merits, Judgment, ICJ Reports 1974, p. 201, para 65. See John G. Merrills, *International Dispute Settlement* (Cambridge: Cambridge University Press, 2005), 18-28.

[9] Institut de Droit International, *Livre du Centenaire 1873–1973: Evolution et perspective du droit international* (Basel : Editions S. Karger, 1973), 279.

the Security Council has contributed to this trend. While Article 36, paragraph 3, requires the Security Council to recommend to States the use of the ICJ for their "legal disputes,"[10] in practice, the Council tends to ignore the possible distinction between purely political aspects and legal issues of the dispute,[11] thus neglecting to promote the use of the Court.

It also has been argued that the wording of Article 36, paragraph 3, is one of the reasons for its rare application. Some authors have wondered whether the replacement of the term 'justiciable' – a term that had been preferred in the Dumbarton Oaks proposals – by the term 'legal' – which was eventually selected –[12] contributed to this underutilisation.[13] However, since it is the World Court that determines whether its jurisdiction covers the dispute submitted to it, the reference to 'justiciable disputes' would not have been appropriate.[14]

The great importance given to State consent by the World Court also contributes to the 'slumber' of Article 36, paragraph 3. The need for the parties to accept the Court's jurisdiction,[15] possibly through a special agreement, may also explain the rare application of this article,[16] given that Article 36, paragraph 3, clearly does not provide for the compulsory jurisdiction of the Court.

These observations concerning Article 36, paragraph 3, lead one to consider some issues concerning the nature and evolution of the relationship between the World Court and the Security Council. While the Court could play a complementary role, Article 36, paragraph 3, also reflects a potential competition between the two organs, and the under-utilisation of the Court could be the manifestation of the emergence of 'drifts' of the Security Council.

The Complementarity between the ICJ and the Security Council

[10] The UN Charter is conspicuously silent on the definition of a 'legal dispute', but Article 36 of the ICJ Statute can help to define it.

[11] The distinction implicitly introduced in Article 36, paragraph 3, of the UN Charter between 'legal dispute' and 'political dispute' is artificial. Indeed, no one ignores the potential transversality of international disputes, which can mix both political and legal issues. Sometimes legal disputes may have political effects, and political problems may have legal implications. As Pierre-François Gonidec observed, "*le juridique et le politique ne forment pas un couple antithétique, mais vivent en symbiose car ils se pénètrent mutuellement*". See Pierre-François Gonidec and Robert Charvin, *Relations internationales*, 3rd edition (Paris: Montchrestien, 1981), 398.

[12] André Salomon, *Le Conseil de sécurité et le règlement pacifique des différends: Le chapitre VI de la Charte des Nations Unies* (Paris: Éditions internationales, 1948), 106: It appeared to the drafters of the Charter that the terminology 'justiciable' was "inadequate and defective".

[13] Hersch Lauterpacht, "The Security Council and the Jurisdiction of the International Court of Justice," in *International Law, Collected Papers: Disputes, War, Neutrality*, ed. Elihu Lauterpacht, vol. 5 (Cambridge: Cambridge University Press, 2004), parts IX-XIV, 226.

[14] Shabtai Rosenne, "The Role of the International Court of Justice in Inter-State Relations Today," *Revue belge de droit international* 20 (1987): 284-285: "It is of course a truism to say that the distinction between legal and non-legal or between justiciable and non-justiciable disputes is not really one which the law can make, although it is often one which courts may be called upon to make (to some extent the idea is the invention of the Supreme Court of the United States, interpreting the Constitution)."

[15] ICJ jurisdiction is optional, meaning that the exercise of its functions remains largely dependent on the will of States. See Articles 35 and 36 of the ICJ Statute.

[16] Pieter Kooijmans, "The ICJ in the 21st Century: Judicial Restraint, Judicial Activism, or Proactive Judicial Policy," *International and Comparative Law Quarterly* 56 (2007): 747; Jean-Marc Thouvenin, "Le rôle du juge international dans le règlement pacifique des différends," in *XXX Curso de Derecho Internacional – 2003* (Washington, D.C.: OAS General Secretariat, 2004), 69-70: The author points out that obstacles, such as the importance given to State consent, restrict, to some extent, the role of the Court, but notes that these limits are gradually overcome thanks to the audacity of the judges and States.

Article 36, paragraph 3, of the UN Charter highlights the complementarity of the Security Council and the ICJ in respect of the pacific settlement of disputes. The rare interactions between the Security Council and the Court should encourage their further collaboration. Sometimes, instead of complementing the activities of the Security Council, the Court's function could replace the role of the Council.

An Underexploited Collaboration

The UN Charter does not introduce a hierarchy among the six principal organs of the Organisation, but the Security Council and the ICJ are the only ones who can, in principle, adopt binding decisions.[17] The Charter also assigns to the Security Council "primary responsibility for the maintenance of international peace and security."[18] However, as recalled by the ICJ, that responsibility is not exclusive.[19] Article 36, paragraph 3, of the UN Charter illustrates this idea of shared responsibility for the maintenance of international peace and security. By mentioning the ICJ in the chapter related to the peaceful settlement of disputes, the Charter provides a reminder that the Security Council is not the only UN organ competent in this field, and not the only one which can provide an effective contribution to the settlement of disputes.

Article 36, paragraph 3, cannot be interpreted as subordinating the ICJ to the Security Council. Rather, it points to the need for collaboration between the two UN organs in the field of peaceful settlement of disputes. By suggesting to the Security Council that it recommend that States refer their legal disputes to the ICJ, this provision reflects the complementary action of these two organs. The Court also emphasised such complementarity in its judgment of 1984 concerning the *Military and Paramilitary Activities in and against Nicaragua.*[20] The notion of cooperation in Article 36, paragraph 3, has to be understood as the achievement of common aims. According to this article, the Security Council should promote the use of the ICJ so that both organs strive together, simultaneously or not, to maintain peace and security on the international scene. Indeed, they should work together in the pursuit of international peace and security. Article 36, paragraph 3, encourages the Security Council to support the respect and the development of international law.

The UN Charter generally seeks to uphold a strong cooperation between the UN organs in achieving the Organisation's aims. For instance, the Security Council, the General Assembly and also "[o]ther organs of the United Nations and specialised agencies, which may at any time be so authorised by the General Assembly" are entitled to request an advisory opinion from the ICJ.[21] This possibility encourages collaboration between the ICJ

[17] In the context of disputes, Article 94 imposes the respect of ICJ decisions. See Alain Pillepich, "Article 94," in *La Charte des Nations Unies, Commentaire article par article*, ed. Jean-Pierre Cot, Alain Pellet and Mathias Forteau, 3rd edition (Paris: Economica, 2005), 1994. As far as the Security Council is concerned, Article 25 of the UN Charter recognises the binding nature of its decisions.
[18] Article 24 of the UN Charter.
[19] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America)*, Jurisdiction and Admissibility, Judgment, ICJ Reports 1984, p. 434, para. 95.
[20] Ibid., pp. 434-435, paras. 95 and 96.
[21] See Article 96, para. 2, of the UN Charter.

and the other principal UN organs. As regards Article 36, paragraph 3, the rule is rather flexible.[22] The Security Council cannot impose a judicial settlement on the parties to a legal dispute,[23] and it does not have the obligation to recommend this method of dispute settlement. Such an obligation would have restricted the powers of the Security Council. It would also have strengthened the role of the ICJ in maintaining international peace and security.

Collaboration between the Security Council and the ICJ also takes place when the Court indicates interim measures. This decision is immediately notified not only to the parties but also to the Security Council.[24] Moreover, in case of non-compliance with an ICJ judgment, the Security Council can intervene under Article 94, paragraph 2, of the UN Charter, by making recommendations or imposing measures. The Security Council is thus empowered to support the Court's activities, to strengthen its role. Article 94 also reinforces the idea that the Security Council cannot act like a judge settling a dispute; it may, at most, give support to the enforcement of an ICJ judgment.[25] The ICJ has generally conceived its judicial function as a means to facilitate the activities of the other UN organs.[26]

Judicial Settlement as an Alternative to the Security Council's Intervention in the Settlement of International Disputes

Also in a perspective of cooperation, Article 36, paragraph 3, reflects the possibility for the ICJ to replace the Security Council in the settlement of international disputes. The Security Council is not the most appropriate organ to decide on the legal issues of a dispute. The idea that the judicial settlement of international disputes can substitute other means of resolution, especially diplomatic negotiations,[27] is not new. The Permanent Court of International Justice already said in 1929 that

> the judicial settlement of international disputes, with a view to which the Court has been established, is simply an alternative to the direct and friendly settlement of such disputes between the Parties.[28]

Article 36, paragraph 3, attributes to the ICJ a limited role in the general field of peaceful settlement of international disputes. Its function may appear as 'subsidiary though not

[22] Because of its formulation, Article 36, para. 3, logically has no binding character. Luigi Condorelli denounces this character as a "vœux timide" towards the Security Council. See Luigi Condorelli, *L'autorité de la décision des juridictions internationales permanentes dans la juridiction internationale permanente* (Lyon: Pedone, 1987), 283.

[23] Besides, Chapter VI of the UN Charter does not confer on the Security Council the power to impose any peaceful means of dispute settlement, except enquiry, which is sometimes made compulsory under Chapter VII.

[24] Article 41, para. 2, of the ICJ Statute.

[25] See Catherine Denis, *Le pouvoir normatif du Conseil de sécurité des Nations Unies: portées et limites* (Brussels: Bruylant, 2004), 223.

[26] Mohammed Bedjaoui, "Les relations entre la Cour internationale de Justice et les autres organes principaux des Nations Unies, pour des rapports de seconde génération," in *Boutros Boutros-Ghali Amicorum discipulorumque liber: paix, développement, démocratie* (Brussels: Bruylant, 1998), 198-199.

[27] Parties to a dispute usually try to resolve it first by negotiations. The intervention of a third party is not automatic. Some writers defend the idea that there is an obligation to first negotiate in case of international disputes. See Charles de Visscher, *Aspects récents du droit procédural de la Cour internationale de Justice* (Paris: Pedone, 1966), 81.

[28] *Case of the Free Zones of Upper Savoy and the District of Gex*, Order of 19 August 1929, PCIJ, Series A, No. 22, p. 13.

subordinate' to the Security Council's role in the area of peaceful dispute settlement insofar as the latter has the primary responsibility.[29] While Article 12, paragraph 1, of the UN Charter provides that the General Assembly shall await a request from the Security Council to make a recommendation on a dispute if the latter has already been seized, no provision states such a subordinate relationship between the Security Council and the ICJ with regard to the settlement of a dispute. Logically, the ICJ may decide a dispute submitted to it by the parties without taking into account the position of the Security Council, otherwise its independence and impartiality would be impaired.

As far as *legal* disputes are concerned, the function of the ICJ is less secondary.[30] In case of legal disputes, the ICJ should not be perceived as an alternative to the Security Council's intervention, but as the most appropriate method to resolve them. This method should be applied as a matter of priority when the dispute is not a threat to international peace and security. A joint reading of Article 37, paragraph 1, which provides that "[s]hould the parties to a dispute of the nature referred to in Article 33 fail to settle it by the means indicated in that Article, they shall refer it to the Security Council" and Article 36, paragraph 3, could support this idea.

Likewise, the ICJ may substitute an action of the Security Council but should do so only if it deems it necessary. When the World Court observes that some measures have already been adopted by the Security Council which are sufficient to contain any risk of aggravation of the dispute, it could decide, for example, not to indicate interim measures, thereby preventing the probability of a conflict.[31]

Here appears the risk of competition between the ICJ and the Security Council entailed by Article 36, paragraph 3, when the powers of the two organs are exercised in relation to the same dispute.

The Potential Competition between the Security Council and the World Court

Many writers have emphasised that conflicts may arise in the relationship between the Security Council and the Court in respect of actions of the Security Council under Chapter VI which could be seen as judicial.[32] An ambiguity stems from the revision of the Dumbarton

[29] Alain Pellet, "The ICJ and the Political Organs of the UN – Some Further but Cursory Remarks," in *Il ruolo del giudice internazionale nell'evoluzione del diritto internazionale e comunitario – Atti del Convegno di Studi in Memoria di Gaetano Morelli*, ed. Francesco Salerno (Padua: CEDAM, 1995), 117.

[30] Many writers support a more important role of the ICJ. See, e.g., Takane Sugihara, "The International Court of Justice – Towards a Higher Role in the International Community," in *Liber Amicorum Judge Shigeru Oda*, ed. Nisuke Ando, Edward McWhinney and Rüdiger Wolfrum, vol. 1 (The Hague: Kluwer Law International, 2002), 227-235.

[31] *Aegean Sea Continental Shelf (Greece* v. *Turkey),* Provisional Measures, Order of 11 September 1976, ICJ Reports 1976, p. 3. See Mario Bettati, "L'affaire du Plateau continental de la mer Egée devant la Cour internationale de Justice. Demande en indication de mesures conservatoires. Ordonnance du 11 septembre 1976," *Annuaire Français de Droit International* 22 (1976): 112. As the author emphasised, "[l]a saisine concurrente du Conseil de sécurité sur la même question a permis à la Cour de renvoyer les parties à l'application de la résolution adoptée par celui-ci le 25 août 1976, pendant que se déroulaient les audiences à la Haye."

[32] Kathleen Renée Cronin-Furman, "The International Court of Justice and the United Nations Security Council: Rethinking a Complicated Relationship," *Columbia Law Review* 106 (2006): 438 writes: "While usually

Oaks proposals, which were not all reconsidered.[33] Chapter VI does not give genuine judicial powers to the Security Council, and it is not possible to interpret any article of this Chapter in this sense.[34] One may only consider that the Security Council has been given quasi-judicial powers.[35]

It has been said that

> [i]n Article 36(3) the Council is exhorted to encourage States to refer legal disputes to the Court, so that the clear implication is that legal disputes are not the business of the Council.[36]

But the Security Council is not prevented from dealing with legal disputes. Article 36, paragraph 3, intends to strengthen collaboration between the Court and the Security Council for the peaceful settlement of international disputes. However, from this shared mission, the shadow of a potential rivalry appears. Indeed, if the functions of the Court and the Security Council can be complementary, they are also likely to be competing when the two organs have to intervene in the same dispute. Aware of this risk of competition, the ICJ noted in the *Military and Paramilitary Activities in and against Nicaragua* case that

> the fact that a matter is before the Security Council should not prevent it being dealt with by the Court and that both proceedings could be pursued *pari passu*.[37]

The Court considered that both organs could exercise their functions simultaneously. This is a position also adopted by its predecessor, the Permanent Court of International Justice, in its relations with the Council of the League of Nations.[38] Thus, as Shabtai Rosenne observed, there is a 'parallelism of functions' between these two UN organs.[39]

Insofar as what matters is to achieve an effective settlement of international disputes in order to prevent a threat to international peace and security, all efforts should converge. The use of a particular method of settlement should not be an obstacle to the other initiatives

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referred to as one of the 'political organs' of the United Nations, the Council has a role that eludes easy classification and frequently seems to include adjudicative powers. Much of the confusion about the relationship between Council and Court stems from the Council's seemingly judicial Chapter VI powers."

[33] See N.D. White, *The United Nations and the Maintenance of International Peace and Security* (Manchester: Manchester University Press, 1990), 61.

[34] Veijo Heiskanen, "The United Nations Compensation Commission," *The Hague Academy Collected Courses* 296 (2002): 307 notes: "Under Chapter VI, the Security Council is only authorised to make legally non-binding recommendations to the parties with a view to a pacific settlement of the dispute but has no legal authority to impose its views on them. In other words, under the scheme established by the Charter, the Security Council is an executive body that has no authority to exercise judicial (binding dispute-settlement) functions."

[35] White, *The United Nations and the Maintenance of International Peace and Security*, 61, states: "The addition of Articles 37 and 38 to the proposals were intended to invest the Council with quasi-judicial powers." See also Hans Kelsen, *The Law of the United Nations: A Critical Analysis of Its Fundamental Problems* (New York: F.A. Praeger, 1950): 476-477.

[36] Derek Bowett, "The Impact of Security Council Decisions on Dispute Settlement Procedures," *European Journal of International Law* 5 (1994): 90.

[37] Judgment, ICJ Reports 1984, p. 433, para. 93.

[38] See *Interpretation of the Statute of the Memel Territory*, Preliminary Objection, Judgment of 24 June 1932, PCIJ, Series AB, No. 47, pp. 248-249; *Rights of Minorities in Upper Silesia (Minority Schools)*, Judgment of 26 April 1928, PCIJ, Series A, No. 15, pp. 23 and 29.

[39] Shabtai Rosenne, *The Law and Practice of the International Court* (Dordrecht: Martinus Nijhoff, 1985), 87.

of pacific settlement. Thus, the ICJ had to deal with several disputes that the Security Council was concerned with in their political dimension, for example, the *Aegean Sea Continental Shelf* case of 1978.[40] As remarked by Judge Lachs in his separate opinion in that case, there are some disputes for which negotiations are sufficient in order to find a solution, but for many others, given their 'multi-dimensional' nature, several methods of settlement must be used.[41] Therefore, resort, more or less simultaneously, to the ICJ and the Security Council is not only possible but may even be necessary. One can consider that "the intention of the founders [of the UN Charter] was not to encourage a blinkered parallelism of functions but a fruitful interaction".[42] Thus, Article 36, paragraph 3, can also be interpreted as defending the parallel exercise of the respective powers of the Security Council and the Court, an exercise that should benefit from positive interactions between them.

If Article 36, paragraph 3, of the UN Charter had required the Security Council to recommend resort to the ICJ to the parties in case of a legal dispute, the potential competition or rivalry between the two UN organs would have been reduced. Instead, the Security Council, which is a deeply political organ, sometimes seems to 'brazenly adorn itself with the judge's robe'. This image reflects the increasing tendency of the Security Council to expand its powers in the judicial sphere even if it is far from providing the guarantees of independence and impartiality offered by international justice.

Although there is no doubt that the Security Council has implied powers[43] based on a dynamic interpretation of the UN Charter, there is no provision that could be interpreted as granting the Council judicial powers. Its political nature prevents such an interpretation.[44] This does not mean that the Council does not apply international law.[45]

Apparently exceeding the framework of its powers, the Security Council has sometimes ruled on the international responsibility of a State party to a dispute under Chapter VII of the Charter. For example, the Security Council defined the consequences relating to the responsibility of Iraq after the occupation of Kuwait in 1990-1991. Much like a judge could have done, the Security Council stated in its Resolution 686 (1991) that

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[40] *Aegean Sea Continental Shelf (Greece* v. *Turkey)*, Judgment*,* ICJ Reports 1978, p. 3; UNSC Res. 395 (1976) of 25 August 1976.

[41] *Aegean Sea Continental Shelf (Greece* v. *Turkey)*, Judgment, Separate Opinion of Judge Lachs, ICJ Reports 1978, p. 52: "The frequently unorthodox nature of the problems facing States today requires as many tools to be used and as many avenues to be opened as possible."

[42] *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya* v. *United Kingdom)*, Provisional Measures, Order of 14 April 1992, Separate Opinion of Judge Lachs, ICJ Reports 1992, p. 26.

[43] Terry D. Gill, "Legal and Some Political Limitations on the Power of the UN Security Council to Exercise its Enforcement Powers under Chapter VII of the Charter," *Netherlands Yearbook of International Law* 26 (1995): 70; Erika de Wet, *The Chapter VII Powers of the United Nations Security Council* (Portland: Hart Publishing, 2004), 193.

[44] Maurizio Arcari, "De l'action parajudiciaire du Conseil de sécurité," in *La sécurité collective entre légalité et défis à la légalité*, ed. Maurizio Arcari and Louis Balmond (Milan: Giuffrè Editore, 2008), 83-84; Malcolm N. Shaw, "The Security Council and the International Court of Justice: Judicial Drift and Judicial Function," in *The International Court of Justice: Its Future Role After Fifty Years*, ed. Sam Muller, David Raič and Johanna M. Thuránszky (The Hague: Martinus Nijhoff, 1997), 219-259.

[45] Rosalyn Higgins, "The Place of International Law in the Settlement of Disputes by the Security Council," in *Themes and Theories. Selected Essays, Speeches, and Writings in International Law* (Oxford: Oxford University Press, 2009), 174-192.

> Iraq […] is liable under international law for any direct loss, damage – including environmental damage and the depletion of natural resources – or injury to foreign Governments, nationals and corporations as a result of its unlawful invasion and occupation of Kuwait.[46]

Iraq's responsibility may have been obvious, but a political organ is not always the most adapted body to pronounce on it. In the case of Iraq, the Security Council also considered the issue of the delimitation of the frontier between Iraq and Kuwait by ruling on the legal issues without providing reasons or an opportunity for the States to present their arguments, as would have done the ICJ. Resolution 687 (1991) has rightly been criticised.[47]

The Security Council also had to deal with several territorial disputes. These kind of issues are often examined by the ICJ,[48] quite recently for instance in the judgment concerning the dispute between Burkina Faso and Niger of April 2013.[49] These disputes also have political aspects but they can generally be settled only under international law. A solution based on the precise determination of the applicable law – without any economic, political or geostrategic influences – may increase the chances of a peaceful settlement and lead to the parties' satisfaction. The Security Council can benefit from the assistance of experts by creating a subsidiary organ with the special mandate to discuss frontier delimitation,[50] as it did in relation to the dispute between Iraq and Kuwait in 1991, but some political considerations could interfere and undermine the achievement of a fair solution for the parties involved. When the Security Council decided the dispute in 1991, it did not sufficiently justify its decision under the law.[51] Thus, when parties to a frontier dispute request the Security Council's assistance, the latter should apply Article 36, paragraph 3, and recommend that the States resort to the ICJ. Although the judicial settlement of such disputes may raise

[46] UNSC Res. 687 (1991) of 3 April 1991.
[47] Serge Sur, "La résolution 687 (3 avril 1991) du Conseil de Sécurité dans l'affaire du Golfe: Problèmes de rétablissement et de garantie de la paix," *Annuaire Français de Droit International* (1991): 25-97; David K. Nanopoulos, "Remarques sur l'incidence d'une réforme du Conseil de sécurité sur la Cour internationale de Justice," *African Yearbook of International Law* 13 (2005): 215-233.
[48] Some examples of frontier disputes before the ICJ: *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua* v. *Honduras)*, Judgment, ICJ Reports 2007, p. 659; *Frontier Dispute (Benin/Niger)*, Judgment, ICJ Reports 2005, p. 90; *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, Preliminary Objections, Judgment, ICJ Reports 2007, p. 832; *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening)*, Judgment, ICJ Reports 1992, p. 351.
[49] *Frontier Dispute (Burkina Faso/Niger)*, Judgment of 16 April 2013.
[50] Article 7, para. 2 and Article 29 of the UN Charter.
[51] Denis, *Le pouvoir normatif du Conseil de sécurité des Nations Unies*, 222.

difficulties, as in the dispute between Cameroon and Nigeria,[52] the ICJ, due to its high legal expertise, independence and impartiality, still appears to be the most suitable forum.[53]

The Security Council may be tempted to interfere with the functions of the ICJ. When a State requests the Security Council to exercise its powers in order to settle a dispute and at the same time the ICJ is also seized, the Security Council should not harm the credibility of the UN's judicial organ. For example, in the *Lockerbie* case, the adoption of Resolutions 686 (1991) and 748 (1992) by the Security Council clearly showed that this political organ can hamper the independent exercise of international justice. In the manner of a judge, the Security Council ruled on the responsibility of a State and imposed sanctions related to this responsibility. When it adopted these resolutions, the Security Council was aware of the legal issues that were still discussed in the proceedings before the ICJ, at the stage of the request for the indication of provisional measures. But instead of waiting for the ICJ's decision, the Security Council promptly took a decision under Chapter VII of the UN Charter, without taking into consideration the risk of conflict that could then arise between its resolution and the ICJ judgment. This attitude has been labelled an '*excès de pouvoir*'.[54]

The Court admitted the pre-eminence of Resolution 748 (1992) of the Security Council by considering it *prima facie* valid and did not indicate any provisional measures.[55] But as Judge Bedjaoui noted, the ICJ would have been competent to decide this case even though the Security Council had also taken a decision on the dispute.[56] The ICJ should exercise its functions without being restricted by the Security Council's concomitant initiatives. If a legal dispute is before the ICJ, the latter should not capitulate because the Security Council is also examining the case. The Court should fully assume its role without faltering before the power of the Security Council. The *Lockerbie* case was the first to vigorously illustrate the difficulties that can emerge between the ICJ and the Security Council, but the relationship between the UN judicial organ and the most important political organ of the Organisation remains complicated.[57]

By being a forum providing discussions and convergence of member States and attributing an international authority to their collective decisions, the Security Council is the

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[52] This dispute has occupied the ICJ from 1994 to 2002. The Court's decision was at first not implemented. Under the auspices of the UN, Cameroon and Nigeria then agreed to establish a Joint Commission in 2002 to remedy this state of affairs and try to implement the Court's judgment. After ten years of existence of this Commission, positive developments have been observed. See *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria: Equatorial Guinea intervening)*, Preliminary Objections, Judgment*,* ICJ Reports 1998, p. 275 and Judgment, ICJ Reports 2002, p. 303; *Request for Interpretation of the Judgment of 11 June 1998 in the Case concerning the* Land and Maritime Boundary between Cameroon and Nigeria (Cameroon *v.* Nigeria) *(Nigeria* v. *Cameroon)*, Preliminary Objections, Judgment, ICJ Reports 1999, p. 31; Mohamed Salah, "La Commission mixte Cameroun/Nigeria, un mécanisme original de règlement des différends interétatiques," *Annuaire Français de Droit International* 51 (2005): 162-184.

[53] Géraldine Giraudeau, *Les différends territoriaux devant le juge international: Entre droit et transaction* (Leiden: Martinus Nijhoff, 2013), 53.

[54] Order of 14 April 1992, Dissenting Opinion of Judge *ad hoc* El-Kosheri, ICJ Reports 1992, p. 105, para. 33. Judge *ad hoc* El-Kosheri considered that the '*excès de pouvoir*' of the Security Council arises from the adoption of paragraph 1 of resolution 748 (1992), which violates Article 92 of the UN Charter which makes the ICJ "the principal judicial organ of the United Nations."

[55] Order of 14 April 1992, ICJ Reports 1992, p. 3.

[56] Order of 14 April 1992, Dissenting Opinion of Judge Bedjaoui , ICJ Reports 1992, pp. 33-49.

[57] Pellet, "The ICJ and the Political Organs of the UN," 115-116.

most active UN organ for the settlement of international disputes.[58] During the last twenty years, especially relying on the gravity of certain disputes, the Security Council has expanded its prerogatives based on Chapter VII of the UN Charter. Sometimes acting like a 'World Government', a legislator or a judge, the Security Council has been pushing the limits imposed on its functions.[59] Under Chapter VII, the Security Council may, under certain conditions, establish a subsidiary organ invested with such judicial powers.[60] This subsidiary organ would have functions that the Security Council would not be able to exercise itself.[61] Furthermore, it would be possible for the Security Council to deal with legal disputes under Chapter VII and go further than a simple recommendation.[62] But Chapter VII could also be used as a pretext in order to take precedence over the Court and exercise some prerogatives that could be exercised by judges. Any legal dispute could be considered a threat to international peace and security by the Security Council, which could then act as a judge and avoid making a recommendation under Article 36, paragraph 3. One may argue that if the Security Council, under Chapter VII, determined the parties' rights and settled a legal dispute, this could blur the distinction between Chapters VI and VII of the UN Charter.[63] The question of the potential violation of international law by the Security Council[64] raises the issue of the review of its decisions.

Concluding Remarks

Notwithstanding the limited application of Article 36, paragraph 3, of the UN Charter, this provision maintains its relevance as it highlights the role of the ICJ in the maintenance of international peace and security and the need for cooperation between the Court and the Security Council. The application of this article deserves to be enhanced so as to allow the ICJ to play a more significant role in the peaceful settlement of disputes. This ultimately depends on the willingness of States.

[58] Serge Sur, "Éloge du Conseil de sécurité," *Annuaire français de relations internationales* VI (2005): 76.
[59] François Voeffray, "Le Conseil de sécurité de l'ONU: Gouvernement mondial, législateur ou juge? Quelques réflexions sur les dangers de dérives," in *Promoting Justice, Human Rights and Conflict Resolution through International Law: Liber Amicorum Lucius Caflisch*, ed. Marcelo G. Kohen (Leiden: Martinus Nijhoff, 2007), 1195-1209.
[60] Article 7, para. 2 and Article 29 of the UN Charter. For a discussion see, e.g., Danesh Sarooshi, "The Legal Framework Governing United Nations Subsidiary Organs," *British Year Book of International Law* 27 (1996): 413.
[61] de Wet, *The Chapter VII Powers of the United Nations Security Council*, 339.
[62] Michael C. Wood, "The Security Council as a Law Maker: The Adoption of (Quasi)-Judicial Decisions," in *Developments of International Law in Treaty Making*, ed. Rüdiger Wolfrum and Volker Röben (Berlin: Springer, 2005), 227-235.
[63] Denis, *Le pouvoir normatif du Conseil de sécurité des Nations Unies*, 218.
[64] Evelyne Lagrange, "Le Conseil de sécurité des Nations-Unies peut-il violer le droit international?," *Revue belge de droit international* (2004): 568-591.