

# **‘... To Save Succeeding Generations from the Scourge of War’: The Role of the International Court of Justice**

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## **What the International Court of Justice Is**

The International Court of Justice is the judicial arm of the United Nations. It is the institution to which certain organs of the United Nations and certain specialised agencies may turn to seek legal advice. And it is the tribunal to which States may (indeed, according to Article 36 of the Charter, should) refer their legal disputes for resolution.

The Court - which is the successor to the old Permanent Court of International Justice, functioning at the time of the League of Nations - has its seat in The Hague, in the remarkable Peace Palace. The provenance of the Court is both interesting and not widely known. In 1893 the Czar of Russia had proposed, against a background of deteriorating international relations, a Conference on Peace and Disarmament. The invitations went out to Paris, Berlin, London and Washington. He suggested eight agenda items, with the eighth being the development of a uniform system for mediation and arbitration as a means of dispute settlement. In 1898 the first Peace Conference did take place, in The Hague, at the Dutch Royal Palace.

In due course there were established a Permanent Court of Arbitration (which still exists to this day), the Permanent Court of International Justice and then the International Court of Justice. Its founding history, and the place the post-war ICJ has under the Charter, means that it has always been closely involved

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with issues of war and peace. Fifteen Judges, representing all the major legal systems, are elected for nine-year terms by simultaneous vote in the Security Council and the General Assembly. The present Bench comes from China, Madagascar, France, Sierra Leone, the Russian Federation, the United Kingdom, Venezuela, the Netherlands, Brazil, Jordan, the United States of America, Egypt, Japan, Germany and Slovakia.

### **The Court's Role in Keeping International Peace and Security**

Chapter VII of the Charter ascribes the primary responsibility for peace and security to the UN Security Council. But the Charter, in its principles and purposes, identifies what must be done to achieve peace - securing of human rights and fundamental freedoms, economic and social development, peaceful settlement of disputes. These tasks are ascribed to different organs of the UN (and other functional bodies have been added over time). The ICJ's contribution to peace and security is not to set itself up as an alternative Security Council; it is to settle legal disputes. How exactly this is to be done is laid out in the Statute of the ICJ (which is attached to the Charter) and in the Rules of Court which the ICJ has drawn up itself (and periodically updates). Article 36 (6) of the Charter says that 'legal disputes should as a general rule be referred by the parties to the ICJ in accordance with the provisions of the Statute of the Court'.

From 1946 to 1966 the International Court of Justice had a moderate but meaningful docket. In the early seventies - for a dozen years in fact - it was hardly used at all. By contrast, it now has a very heavy docket. The end of the Cold War is part of the story of the current heavy use of the International Court, but certainly not all of it. The upturn in recourse to the Court began in the first half of the 1980s, several years before the arrival of *glasnost* and *perestroika*. Many former colonial States who had achieved their independence in the early 1960s had by the 1980s begun to see that international law served their own ends as much as those of the developed countries. But, finally, in the late 1980s, the Marxist doctrine by virtue of

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which there were no neutral men - and hence no place for impartial judicial recourse - was coming to an end.

The evidence that today the Court's work is drawn from States around the world is not hard to find. The Court's current or very recent docket consists of cases concerning Romania and Ukraine; Mexico and the United States; Germany and the United States; Malaysia and Singapore; Republic of Congo and France; El Salvador and Honduras; Benin and Niger; Democratic Republic of Congo and Uganda and Rwanda; Nicaragua and Colombia; Liechtenstein and Germany; Bosnia-Herzegovina and Yugoslavia; Iran and the United States; Hungary and Slovakia; Cameroon and Nigeria; Indonesia and Malaysia; Guinea and the Democratic Republic of the Congo; and Yugoslavia and various NATO States.

As the developing States have come to recognise that international law secures their interests, as much as that of the First World, and as the old rigidities of the Cold War lose their grip, it is quite clear for all to see that States are 'getting the litigation habit'.

Honesty requires us to acknowledge that the treasured ideal of the early peace movement of this century - that resort to international adjudication would prevent the outbreak of war - is unrealistic. Far from international adjudication generally preventing war, it is peace that lends strength to the settlement of international disputes by adjudication. The Permanent Court of International Justice flourished in the 1920s, in a decade of *détente*, and declined in the 1930s with the rise of the international tensions provoked by the Axis Powers. Since the end of the Cold War, the ICJ has had a heavier docket than ever before.

### **What the Court Can Do**

Its role is to settle disputes between States and also to give advice, when that is requested, to designated UN organs and specialised agencies. Contrary to general supposition, compliance with Judgements or Advisory Opinions is not

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a significant problem. It is true that, like the Pope, the Court has no divisions. There is provision for recourse to the Security Council for the enforcement of judgements. Given the politics in the Security Council (and especially when the State concerned might have the right of veto), this is not a promising mechanism. But the problem is in fact a very small one. States have to consent to have recourse to the Court (and I shall say more on that shortly). To give that consent is already to accept that it has been given even for circumstances that one might later regret. Accordingly, the Court's judgements are nearly always complied with. Indeed, the Court has now dealt with 105 cases since 1946, and compliance has only been a problem in about five of them.

### **Examples in the Peace and Security Area**

The case law of the Court is replete with disputes that affect international peace and security. Sometimes, of course, two States can be locked in a dispute of the greatest importance to them, and it is desirable for every reason of good sense that the Court resolve them, but even so there is no real risk of military conflict. The bitter conflict in the 1990s between Slovakia and Hungary about the hydroelectricity on the Danube was one such example; the case between Spain and Canada, which concerned fishing off Newfoundland, was another such.

But there are other cases in which the Court's role is not merely to settle disputes that adversely affect international relations, but to contribute to the maintenance or restoration of international peace and security.

The *Corfu Channel* case (*United Kingdom v. Albania*), 1949, arose out of the explosions of mines by which some British warships suffered damage while passing through the Corfu Channel in 1946, in a part of the Albanian waters which had been previously swept. Ships were severely damaged and members of the crew were killed. The United Kingdom accused Albania of having laid or allowed a third State to lay the mines after mine-clearing operations had been carried out by the Allied naval authorities. The Court found that Albania

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was responsible under international law for damage and loss of life, which had ensued. It did not accept the view that Albania had itself laid the mines or the purported connivance of Albania with a mine-laying operation carried out by the Yugoslav Navy at the request of Albania. On the other hand, it held that the mines could not have been laid without the knowledge of the Albanian Government. Albania accused the UK of having violated Albanian sovereignty by sending warships into Albanian waters after the explosions. The Court found that the UK had exercised the right of innocent passage through international straits. On the other hand, it found that the minesweeping had violated Albanian sovereignty, because it had been carried out against the will of the Albanian Government. In particular, it did not accept the notion of 'self-help' asserted by the United Kingdom to justify its intervention.

The *Hostages* case (*United States v. Iran*), 1981, was brought by the United States following the occupation of its Embassy in Tehran by Iranian militants on 4 November 1979, and the capture and holding as hostages of its diplomatic and consular staff. It pointed out that while, during the events of 4 November 1979, the conduct of militants could not be directly attributed to the Iranian State - for lack of sufficient information - that State had however done nothing to prevent the attack, stop it before it reached its completion or oblige the militants to withdraw from the premises and release the hostages. The Court noted that, after 4 November 1979, certain organs of the Iranian State had endorsed the acts complained of and decided to perpetuate them, so that those acts were transformed into acts of the Iranian State. The Court gave judgement against Iran.

In the *Frontier Dispute* case (*Burkina Faso/Mali*), 1986, Burkina Faso (then known as Upper Volta) and Mali notified to the Court a Special Agreement referring to a Chamber of the Court the question of the delimitation of part of the land frontier between the two States. Following grave incidents between the armed forces of the two countries at the very end of 1985, both Parties submitted parallel requests to the Chamber for the indication of interim measures of protection (an interim injunction). The Chamber indicated such

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measures by an Order of 10 January 1986. This dealt with the use of force. And its Judgement on the merits was delivered on 22 December 1986 (this dealt with the territorial entitlement).

The *Military and Paramilitary Activities in and against Nicaragua* case (*Nicaragua v. United States*), 1986 was of considerable importance. Nicaragua filed an Application instituting proceedings against the United States of America, together with a request for the indication of provisional measures concerning a dispute relating to responsibility for military and paramilitary activities in and against Nicaragua. On 10 May 1984 the Court made an Order indicating provisional measures. One of these measures required the United States immediately to cease and refrain from any action restricting access to Nicaraguan ports, and in particular the laying of mines. The Court also indicated that the right to sovereignty and to political independence possessed by Nicaragua, like any other State, should be fully respected and should not be jeopardised by activities contrary to the principle prohibiting the threat or use of force and to the principle of non-intervention within the domestic jurisdiction of a State. On 27 June 1986, the Court delivered its Judgement on the merits. The findings included a rejection of the justification of collective self-defence advanced by the United States concerning the military or paramilitary activities in or against Nicaragua in part because no evidence was shown of a request for such assistance. It decided that the United States was under a duty immediately to cease and to refrain from all acts constituting breaches of its legal obligations, and that it must make reparation for all injury caused to Nicaragua by the breaches of obligations under customary international law and the 1956 Treaty.

In the *Territorial Dispute* case (*Chad/Libya*), 1994, Chad filed an Application instituting proceedings against the Libyan Arab Jamahiriya. The Court delivered its Judgement on 3 February 1994. It proceeded by embarking upon a detailed study of the instruments relevant to the case. The Court then described the line resulting from those relevant international instruments. Considering the attitudes adopted subsequently by the Parties with regard to their frontiers, it reached the conclusion that the existence of a settled frontier

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had been accepted and acted upon by the Parties. Lastly, referring to the provision of the 1955 Treaty according to which it was concluded for a period of 20 years and could be terminated unilaterally, the Court indicated that that Treaty had to be taken to have determined a permanent frontier, and observed that, when a boundary has been the subject of agreement, its continued existence is not dependent upon the continuing life of the Treaty under which that boundary was agreed.

On 8 July 1991, Qatar filed an Application instituting proceedings against Bahrain with respect to sovereignty over certain islands and shoals and the delimitation of maritime areas. This was the *Maritime Delimitation and Territorial Questions* case (*Qatar v. Bahrain*), 2001. Although there was no fighting, there were great tensions between the two States. In its Judgement of 16 March 2001, the Court divided the disputed territory between Qatar and Bahrain and indicated a single maritime boundary. Both parties fully accepted the Judgement and declared the following day a national holiday to celebrate the end of the dispute and better relations between the two countries.

The *Oil Platforms* case (*Iran v. USA*), 1997, started on 2 November 1992, when the Islamic Republic of Iran filed in the Registry of the Court an Application instituting proceedings against the United States of America with respect to the destruction of Iranian oil platforms. In its application, Iran alleged that the destruction caused by several warships of the United States Navy, in October 1987 and April 1988, of three offshore oil production complexes, owned and operated for commercial purposes by the National Iranian Oil Company, constituted a fundamental breach of various provisions of the Treaty of Amity and of international law. The United States submitted counter-claims alleging aerial attacks on ships flying its flags and other illegalities. On 6 November 2003, the Court delivered its Judgement on the merits. It found the attacks by the United States did not violate a 1955 commerce treaty between the United States and Iran since the attacks did not adversely affect freedom of commerce between the territories of the parties. The Court also rejected the United States' counter-claims. At the

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same time, the military action of the United States could not be justified under a clause in the Treaty exempting certain actions from obligations contained in the Treaty. The Judgement confirmed the applicability of the international law criteria of necessity and proportionality in relation to the use of force in alleged self-defence.

The *Genocide* case (*Bosnia & Herzegovina v. Yugoslavia*): On 20 March 1993, the Republic of Bosnia and Herzegovina instituted proceedings against the Federal Republic of Yugoslavia in respect of a dispute concerning alleged violations of the Convention on the Prevention and Punishment of the Crime of Genocide. The Court concluded that there was a legal dispute, and that it did indeed fall within the provisions of Article IX of the Convention. It found, *inter alia*, that it followed from the object and purpose of the Convention that the rights and obligations enshrined by it were rights and obligations *erga omnes*. During 1993, the Court issued and then confirmed provisional measures requiring Yugoslavia to take all measures within its power to prevent commission of the crime of genocide. In 1997, the Court admitted Yugoslav counter-claims charging that Bosnia and Herzegovina had breached its obligations under the Genocide Convention through actions principally against Bosnian Serbs. These counter-claims were later withdrawn by Yugoslavia in 2001. The *Genocide* case is now awaiting a hearing on the merits.

The *Cameroon v. Nigeria* case, 2002: On 29 March 1994, Cameroon filed an Application instituting proceedings against Nigeria with respect to the question of sovereignty over the Bakassi Peninsula. On 12 February 1996, Cameroon, referring to the 'grave incidents which [had] taken place between the ... forces ... in the Bakassi Peninsula since ... 3 February 1996' asked the Court to indicate provisional measures. By an Order dated 15 March 1996, the Court indicated a number of provisional measures aimed principally at putting an end to the hostilities. Nigeria raised preliminary objections challenging the jurisdiction of the Court and the admissibility of Cameroon's claims, but the Court found it had jurisdiction to deal with the merits of the case. In its Judgement of 10 October 2002, the Court determined the boundary

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between Cameroon and Nigeria from Lake Chad to the sea, decided that the Bakassi Peninsula belonged to Cameroon, and requested both parties to withdraw their military, police, and administration from the affected areas 'expeditiously and without condition'. At the request of the Presidents of both countries, the United Nations set up the Nigeria/Cameroon Joint Border Commission to facilitate the implementation of the Judgement. It has been moving step by step to do this.

There are many other cases in which past conflict forms the background to the Court's task, or which, should they be allowed to fester on, have the potential for conflict. I will simply briefly mention the *Western Sahara* case; the *Aegean Sea* case and the *Namibia* case.

### **Limits to the Court's Contribution to Peace and Security**

#### *Need for Consent to Jurisdiction*

The Court is available for sovereign States to settle their disputes; but they cannot be compelled to use it. It may seem desirable to make reference to the Court of legal disputes a mandatory obligation. But the Court itself has no power to achieve this. So, for the moment, the consent of States is required. But there are several ways in which that consent can be expressed. Two States may have reached the end of the road in trying to settle a dispute diplomatically. They may decide to let the Court resolve the matter: We have such examples in the litigation between Slovakia and Hungary over the dam project on the Danube; and between Namibia and Botswana over their frontier. The States concerned may have been urged by a regional organisation to have a mutually agreed recourse to the Court. It was upon the insistence of the OAU that Libya and Chad finally came to the Court with the problem of the famous Aouzou Strip. The consent-based jurisdiction of the Court may be founded in another way - by becoming party to a treaty which contains a clause whereby it is agreed that, if there is a dispute as to the application or interpretation of any of the provisions of the treaty, recourse shall be had to the Court. Jurisdiction for the case brought by the United

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States against Iran over the hostages taken at the Tehran Embassy, was based on the Vienna Convention on Diplomatic Relations, to which both States were party. And the case which Bosnia and Herzegovina is bringing against Serbia and Montenegro is based upon an ICJ clause in the Genocide Convention.

There is a further method of expression of consent to the Court's jurisdiction, known to international lawyers as 'the Optional Clause' under the Statute. This consists, essentially, of formally notifying agreement to be taken to Court by any other State accepting the same commitment. This has had a special significance in the recent Kosovo cases, which I return to below.

Of course, wherever consent is not given directly, there will be room for denying that the consent given in the treaty, or under the Optional Clause, applies in the particular case. The combination of the need for consent in a world of sovereign States, and the potential for controversy as to the meaning and scope of any consent given in advance, means that a sizeable part of the Court's case law is directed to the determination of its own jurisdiction. In that context, the growing tendency for *ad hoc* agreed references to the Court, which go straight to the merits, is very welcome. The Court should ideally be contributing to world peace by resolving the substance of cases, rather than having to satisfy itself that sovereign States have given their consent to it settling their disputes, one way or another.

The recent cases concerning Kosovo illustrate the point exactly. The dreadful columns of refugees who were expelled after the NATO bombing began are so sharply and distressingly in our minds that we are perhaps apt to forget what had gone on before - what indeed had led to the attempts to improve matters through peaceful means at Rambouillet. I refer to the atrocities by Serb military and paramilitaries against the ethnic Albanians, which had already gone on for all too long. They were being killed and pushed out of their villages long before the NATO action. But with the NATO action a new variation on the horror began - not only killings and destruction, without care as to where the Kosovars should go, but now their positive expulsion from Kosovo, and the destruction of their identity papers so that they should never

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return.

The NATO States eventually decided the situation could only be dealt with by force. Whereas it had previously been NATO's firm policy to act as the military arm of the UN, when the Security Council called upon it (as in Bosnia), it now decided that the stance of the Russian Federation and of China meant that the Security Council would never make that call. There *were* resolutions deploring events in Kosovo, but the position of certain States in the Security Council meant that there would never *be* a resolution calling for military action to stop the atrocities. NATO therefore decided that it would act alone, without UN authorisation. I do not want to offer any public pronouncement on the legality of this action, because that matter is still technically before the Court. I simply quote the phrase used by the International Court in its ten Orders of 2 June 1999: 'the use of force in Kosovo raises very serious issues of international law'.

Yugoslavia's main concern was to get the bombing stopped. It asked the Court for 'provisional measures' - that is to say, an international injunction. But, in the International Court, as in any court of law, you can't come and ask for an Order that a State or States desist from certain action unless there is a case, a litigation, that demand attaches to. Otherwise a court can have no idea whether or not to issue an injunction. In all courts - and the International Court is no exception - injunctions are ordered when there is a real risk that the subject matter of the dispute will otherwise physically disappear, or that events will occur which will make any eventual judgements pointless.

So Yugoslavia brought a case, claiming first, that the bombing by ten named NATO States was unlawful, both in terms of lack of Security Council authorisation and in terms of types of bombs being used, and the fact that some civilian targets were being hit. Second, Yugoslavia claimed that each of the defendant States (USA, UK, France, Netherlands, Portugal, Canada, Belgium, Spain, Italy and Germany) was committing genocide of the Serb people.

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When it receives a case the Court cannot immediately decide the merits - that requires a certain time for carefully prepared legal argument, both written and oral. The point of asking for provisional measures (an injunction) is not to wait for the substance of the case to be decided, but rather to get your 'stop' order at once, and the Court will only give this if it feels that it may have jurisdiction, in due course, to go on and decide the merits of the case.

The Court thought it unlikely that there would be a legal basis for genocide claims against the NATO respondents. As for the jurisdiction over the claims alleging illegal use of force, Yugoslavia's *own* acceptance of the court's jurisdiction (which it had made three days earlier on 25 April 1999, specifically to bring this case) presented considerable problems. This was because (and here I must be a little technical) Yugoslavia had specified that it would agree to litigation before the Court of 'disputes arising' and 'events occurring' after 25 April. It clearly did not want the Court to pronounce upon its own earlier actions in Kosovo. But although the bombing continued, and there were indeed relevant 'events occurring' after 25 April, the dispute had surely arisen before 25 April. The bombing had been going on for over a month, and the dispute between NATO and Yugoslavia about the rights and wrongs of it had been fully argued out by all concerned in the Security Council on 24 and 26 March.

So the Court found that, *prima facie*, it did not seem to have been given the jurisdiction by Yugoslavia to hear the issues on their merits and therefore could not consider whether to order an injunction on the bombing. In two cases in particular (those concerning the United States and Spain) there were technical legal considerations which made it clear beyond all doubt that the cases simply could not proceed. In the other eight cases (including that against the UK), Yugoslavia still remains at liberty to try to show that the Court really *does*, after all, have jurisdiction to determine the merits of that case. These eight cases are now back before the Court, which is currently deciding on the preliminary objections to jurisdiction and admissibility advanced by the NATO States and on other technical matters, which Yugoslavia (now Serbia and Montenegro) has raised.

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Should the Court find that it has the necessary jurisdiction, then the Court will make its contribution to peace and security by clarifying this complex interface between the restraints of Chapter VII of the Charter on the use of force and the moral imperative not to ignore systematic slaughter and displacement of ethnic or religious groups.

### **The Question of Lacunae**

Can it be the case that the International Court is thwarted in its wish to contribute to international peace and security by another factor, namely, the non-existence of an answer in international law? The question of whether or not there are ‘gaps’ in the substance of international law is known to international lawyers as the question of ‘*lacunae*’. There are many aspects to this interesting problem.

To some international lawyers, international law is a body of rules, which over the years have become more and more developed and dense. Nonetheless, in the view of these lawyers, there are not yet legal rules to govern every legal situation or problem. In such a circumstance, they argue, the judge should state so, and declare a *non liquet* - that is, pronounce that international law does not yet provide an answer.

There is a good example of this in the position taken by Judge Vereshchetin (the Russian judge) in the ICJ's case on *Legality of the Use of Nuclear Weapons*. Looking at the key question of whether it could ever be lawful to use nuclear weapons, if the very existence of a State or its peoples was in issue, he stated that international law did not yet provide an answer and that a *non liquet* was the honest response.

There is, however, a totally different way of looking at this issue, and it is the way I prefer. First, law is not really ‘rules’. It is rather a *process* by which authorised decision-makers (judges of the ICJ and other international tribunals, legal advisers of foreign offices, UN legal officials) make normative

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decisions. This view of international law rejects the classic idea of law as being 'neutral'. The decisions to be taken are unashamedly for the realisation of values. The values of the international law system include such matters as peace, stability and the realisation of human dignity regardless of race, sex, creed, gender, or colour. The decision maker, faced with a very difficult question, looks at the available legal authority (past cases, treaties) and applies them to the new problematic circumstances in the way most consistent with the attainment of these values or policy objectives.

I have to say that I do not, in any event, understand the *lacunae* argument as it is said by some to apply to the question of nuclear weapons. One cannot expect a specific 'rule' to deal with every single unthought of question any more than one can in domestic law. All one needs are relevant norms - that is, guides to lawful behaviour - that one can then apply to the circumstances to which a court has not *yet* been called to apply them. As the Court made clear in its Advisory Opinion on the use of Nuclear Weapons, the relevant law is on the one hand the law of the Charter (which governs when force may be resorted to) and on the other, humanitarian law (which governs how force may be used, that is, with what effects, with what protected targets, and so on). It seems exactly the judge's role to apply these governing principles of law to the question of nuclear weapons. I see no *lacunae* in the law.

### **Relations with the Security Council**

I would like to explore briefly the question of whether the Court's contribution to international peace and security is constrained in any way by the work of the Security Council. The Court's relationship with the UN generally is a delicate one. It must be independent and non-political. Yet, as a main organ of the United Nations, it too must have the objects and purposes of the UN always in view. Nor, in the real world, can the Court be unaware of the political context to which the litigation is brought, or an advisory opinion sought.

The Court has insisted, in various cases (e.g. the *Aegean Sea* dispute between

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Greece and Turkey; and the 'Contras' dispute between Nicaragua and the United States) that the fact that a matter is before the Security Council does not preclude the Court simultaneously dealing with the legal aspects of the matter. The Court is aware that the political organs have, under the Charter, *their* job to do. The ideal outcome is for the Court to be able to contribute, on a parallel track, to the same Charter ends as all UN organs must seek to realise. There are many examples of such mutually reinforcing action. The crisis that surrounded the taking of hostages at the US Embassy in Iran by the revolutionary guards was one such - the political work in the Security Council and the legal adjudication on the issue in the Court occurred side by side. The same phenomenon has been at work on matters relating to Bosnia. And the Security Council established an observer group to oversee compliance with the Court's Judgement in *Chad v. Libya*, with very successful results, as Libya withdrew its army from Chad within four months of the Judgement.

Today, though, we live in a unipolar world, where predominant power lies with one of the Permanent Members of the Security Council. Although nothing whatever has changed in the voting rules of the Security Council, and the same majorities are still required for action to be agreed upon, there are some who feel that power nonetheless has its silent effect. They argue that, accordingly, action by the Security Council is not always lawful and that the ICJ must be the ultimate guarantor of the legality of acts by the UN, including the Security Council.

This issue came very much into focus with the *Lockerbie* affair. After the atrocity of the explosion on Pan Am 103, which killed so many people and caused devastation in the village of Lockerbie, a meticulous forensic investigation was carried on over months by a team of scientists. They came to the conclusion that two persons, said to be the agents of the Libyan security service, had placed a bomb on the plane at a stop it had made in Frankfurt. Under international law, a country where a crime has been committed has jurisdiction over those charged with the crime. If a plane or a ship is destroyed, the flag country of that plane or ship also is entitled to carry out a trial. Both the UK and the US therefore asked Libya to release the named

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suspects to them for trial. When there was no response they invoked the support of the Security Council, placing before it the scientific report that led them to believe these persons were responsible. The Security Council (which had an existing long-term interest in the question of terrorism and international peace) passed a resolution calling for the persons to be released for trial in either the USA or Scotland. When there was no response, the Security Council passed a second resolution, ordering the release for trial upon penalty of sanctions. Sanctions were then put in place.

Libya brought an action in the ICJ against the USA and the UK. It claimed that these countries were violating its (Libya's) rights to try any alleged air terrorist, itself, in its own country. It invoked a particular air piracy treaty, the *Montreal Convention*, in support of its position.

Its argument necessarily put in question the legality of the Security Council resolutions, because it was not the USA and the UK alone who wanted trial on one of those countries, but the entire Security Council. In the initial phase of the case the UK argued that it was enough for the Court to know that the Security Council had passed a binding resolution under Chapter VII of the Charter. That was, for the Court, the beginning and end of the matter, and, said the UK, the Court should dismiss the case.

The Court declined to dismiss Libya's claim. It said it would decide the merits of the argument and the UK's arguments could be reviewed later as part of that process. It was not clear whether this would entail what national lawyers call 'judicial review' - a review by a judicial body of the legality of acts of the executive. The problems are complex.

The Court probably has the authority to decide if decisions by UN bodies are constitutional, in the sense of taken within the bounds of procedural regularity. Some take the view that the Court must also be able to determine if decisions of the Security Council (or any other UN organ) are compatible with the objects and purposes of the UN and with international law more generally.

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But are there categories of decisions that simply may *not* be reviewed by the Court - *exactly because* the Charter, in its stated distribution of powers, intended otherwise? Put differently, are the decisions of the Security Council in the area of peace and security (a role specifically given to that body) definitive? Can the Court ever challenge a finding by the Security Council that the actions of a State have caused a threat to international peace? And, even if not, can it examine the measures taken by the Security Council, to ensure their proportionality to the wrong done or their compatibility with other legal obligations?

The answer to these difficult questions, so relevant to the Court's role in the area of peace and security, will have to wait for another case. I put it that way because, the two named suspects were eventually, with the active assistance of the Secretary-General of the UN, brought into custody for trial by a Scottish Court - not in Scotland, but, under special arrangements, a Scottish Court sitting in the Netherlands. That, of course, was a criminal trial in which the individuals were the accused; it is different from the inter-State case in which the UK and the USA are the defendants. The latter case was removed from the Court's List at the joint request of the Parties on 9 September 2003. Libya, which has acknowledged responsibility for the bombing, has also agreed to pay compensation to families of the victims.

Two recent decisions of the International Court have shown further ways of contributing to peace and security. First, in the *Palestine Wall* Advisory Opinion in 2004, the Court found that the 'wall' or 'security barrier' built by Israel violated various international obligations, that the wall must be dismantled immediately, and that Israel must make reparation for any damage caused to Palestinian property. Although advisory opinions are in principle non-binding, this non-binding character does not mean that such opinions are without legal effect. The *Palestine Wall* Opinion contained important legal reasoning on international humanitarian law, was accepted by an overwhelming vote of the General Assembly, and contributes to the framework for peace in the Middle East. Second, a pending case - the *Armed Activities on the territory of the Congo (Congo v. Uganda)* - is also

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of significance for peace and security. The case involves a claim by the Democratic Republic of the Congo against Uganda alleging aggression and massive breaches of humanitarian and human rights law. The hearing was postponed because of negotiations between the Parties, but the case is likely to come back to the Court before long. The issues are of the greatest contemporary importance, as they touch on the interface of the contemporary law of intervention and violations of human rights and humanitarian law.

### **Concluding Remarks**

We live in an era of decentralisation of international judicial authority. The International Court of Justice no longer stands alone: there are human rights courts, a new Law of the Sea Tribunal in Hamburg, the World Trade Organization Panel, and International Criminal Courts.

Some topics that the International Court can deal with are now dealt with elsewhere, but it is busier than ever. It alone is the Court that can deal with issues directly affecting peace and security. The Court is very conscious of the fact that it is the main judicial organ of the United Nations and will continue to make its contribution to saving succeeding generations from the scourge of war.

(Delivered 18 June 1999)