

ALAIN PELLET

THE INTERNATIONAL COURT OF JUSTICE AND THE
POLITICAL ORGANS OF THE UNITED NATIONS
SOME FURTHER BUT CURSORY REMARKS

estratto da:

**IL RUOLO DEL GIUDICE INTERNAZIONALE NELL'EVOLUZIONE
DEL DIRITTO INTERNAZIONALE E COMUNITARIO**

Atti del Convegno di Studi in memoria di

Gaetano Morelli

organizzato dall'Università di Reggio Calabria

a cura di

FRANCESCO SALERNO



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SUMMARY: I. THE COURT IS AN ORGAN OF THE UNITED NATIONS — II. THE COURT IS A JUDICIAL ORGAN.

1. The relationship between the International Court of Justice and the political organs of the United Nations, and especially the Security Council raises a great many legal as well as political problems. And, indeed, the more general question of the relations between law on the one hand and the maintenance of international peace and security stands out in profile behind this apparently more limited problem. It is of course neither the purpose nor ambition of the present short paper to exhaust such a huge and important question ⁽¹⁾. My only wish is to try to raise some of the related issues and to point out some of the ways for a more extensive consideration.

2. Several recent cases have made clear both the importance and the difficulty of our problem, in particular the *Lockerbie* case and the Bosnian requests for interim measures. But I think that one should not fall into the trap of becoming prisoner of this burning issue: the relationship between the Court and the politi-

(*) The author wishes to express thanks to Mr. John S. Towle, who kindly reviewed the English text of this paper.

⁽¹⁾ I have expanded more in « Le glaive et la balance. Remarques sur le rôle de la C.I.J. en matière de maintien de la paix et de la sécurité internationales », *International Law at a Time of Perplexity. Essays in Honour of Shabtai Rosenne*, Dordrecht, 1989, p. 539-577, and I have, since then, completed these views in « Peut-on et doit-on contrôler les actions du Conseil de sécurité? », *Société française pour le Droit international, Colloque de Rennes, Le Chapitre VII de la Charte des Nations Unies*, Paris, 1995, p. 221-238.

cal organs of the United Nations has been a difficult question since the very adoption of the Charter.

Indeed, Judge Morelli had several opportunities to discuss the problem, in particular in his separate opinions in *Certain Expenses of the United Nations* ⁽²⁾ or in the *Northern Cameroons* case ⁽³⁾.

3. At first glance, it might seem a valuable exercise to trace the problem back to the time of the League of Nations. However, on closer examination, it is apparent that the nature of the problem was different. Unlike the United Nations which is exclusively « peace oriented », the League of Nations was, at least in part, « law oriented », and the Covenant was not as unconcerned by law as is the Charter. Above all, contrary to the Permanent Court of International Justice, created in application of Article 14 of the Covenant but also by a distinct treaty, the International Court of Justice has been established as « the principal judicial organ of the United Nations » by Article 92 of the Charter itself. This makes an enormous difference and it is submitted that any reflection on our problem must start from this twofold (legal) fact: (I) the Court is an *organ* of the United Nations; (II) it is the « principal *judicial* organ of the United Nations ».

I. THE COURT IS AN ORGAN OF THE UNITED NATIONS

4. As an organ of the United Nations, the International Court of Justice clearly constitutes part of the mechanism for the maintenance of peace and international security as was conceived at San Francisco in 1945. However its qualification as a « principal organ » is misleading if it implies that it is to be placed on an equal footing with the political organs of the United Nations or, at least, as far as the maintenance of peace is concerned, with the Security Council.

⁽²⁾ *I.C.J. Reports* 1962, pp. 217-224.

⁽³⁾ *I.C.J. Reports* 1963, pp. 137-138.

In this respect, it must be kept in mind that, according to Article 24 of the Charter, the Members of the Organization « confer on the Security Council primary responsibility for the maintenance of international peace and security ». If the responsibility of the Council is « primary », hence, the responsibility of the Court, as well as of the General Assembly can only be, in this respect, « secondary » or « subsidiary ».

5. Subsidiary, but not subordinate.

If one still has some doubts about the respective positions of the Security Council and the General Assembly, the same cannot be said of the Council on the one hand and the Court on the other hand. Unlike the General Assembly but like the Security Council, the Court can adopt binding decisions, and this, without the threat of paralysis through the veto. And, in this respect, it might be interesting to recall the words of the Agent of Nicaragua who, during his pleading against the United States in 1984, made clear that Nicaragua lodged its Application before the Court because its case had been « vetoed » in the Security Council ⁽⁴⁾.

In this respect, the Court might appear as a kind of substitute to the Security Council, although it must be noted that *Nicaragua* is the only clear case in this sense.

Another major difference between the Court and the General Assembly in their relations with the Security Council is that, unlike the Assembly, which is prevented by Article 12 of the Charter from making « any recommendation [even a mere recommendation...] with regard to [any] dispute or situation » while that dispute or situation is being dealt with by the Council, the Court may, and must even examine such a dispute or situation provided it has jurisdiction to do so, although it must be stressed that contrary to both the Assembly and the Council, the Court is not the master of its own « agenda »: they choose their

⁽⁴⁾ Cf. *Compte-Rendu*, 84/8 (25 April 1984) and 84/20 (17 October 1984).

cases; the Court cannot; it is entirely in the hands of hypothetical parties (or of the organs of the United Nations as far as its advisory functions are concerned).

6. This being said, even if there was some doubt in the past regarding the possibility for the Court passing judgment on cases still pending before the Security Council, this is no longer the case today. I have dealt with this question in some detail elsewhere ⁽⁵⁾. Suffice it to say here that there is no exception of « litispence » in this respect, and that, on the contrary, the Court is bound to adjudicate when it is competent to do so, even if the General Assembly or the Security Council are dealing with the same case. This is clearly established by well-established tradition including the *Aegan Sea Continental Shelf* case, the *Hostages* case and *Nicaragua* case. In this last case, the Court has observed that, while there is in the Charter « a provision for a clear demarcation of functions between the General Assembly and the Security Council, in respect of any dispute or situation, that the former should not make any recommendation with regard to that dispute or situation unless the Security Council so requires, there is no similar provision anywhere in the Charter with respect to the Security Council and the Court. The Council has functions of a political nature assigned to it, whereas the Court exercises purely judicial functions. Both organs can therefore perform their separate but complementary functions with respect to the same event » ⁽⁶⁾.

Interestingly enough the Court has reiterated the whole of this passage in its Order of 8 April 1993, about the provisional measures requested by Bosnia and Herzegovina ⁽⁷⁾, even though it was absolutely superfluous to the arguments presented.

⁽⁵⁾ See « Le Glaive et la Balance... », prec., in particular pp. 545-550.

⁽⁶⁾ *I.C.J. Reports* 1984, p. 435.

⁽⁷⁾ Case concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, *I.C.J. Reports* 1993, p. 19.

7. Of course this « functional parallelism »⁽⁸⁾ raises a lot of legal and practical problems.

Let us take just one example: what if the Council on the one hand and the Court on the other hand take opposite views in the same case? For sure, this would be annoying, but less so than it seems at first sight. As the Court itself has recognized, their functions differ respectively: the spheres in which they act and exercise their influence are different; their perspectives are different: the Court applies law; the Council maintains peace. Of course, it must be presumed that both functions are not incompatible and that, in many instances, in applying international law, the Court will contribute to strengthening international peace and security.

Nevertheless it could happen that at times this would not be the case, and that, in applying the law (i.e., as a way of definition, in enforcing a conservative solution since legal rules are, by essence, conservative), the Court would, on the contrary, not threaten the peace but, reluctantly, aggravate the tensions. In such a case, even if this is not a very comfortable position for a lawyer, it is suggested that the Council would have the last word — and this is not a mere arbitrary position: it follows from the general orientation of the Charter (the maintenance of international peace and security is the first purpose of the United Nations) and, more specifically, from the drafting of Article 94, par. 2: « If any party to a case fails to perform the obligations incumbent upon it under a judgment rendered by the Court, (...) the Security Council (...) *may, if it deems necessary*, make recommendations or decide upon measures to be taken to give effect to the judgment ».

How restrictive the terms of this provision are! But for good reasons: the drafters of the Charter had a coherent global design: all and everything is subordinate to the maintenance of peace. As an organ of the United Nations the Court is an element of this global design. If it does not contribute to this general purpose,

⁽⁸⁾ ROSENNE, *The Law and Practice of the International Court*, Dordrecht, 1985, p. 87.

the Charter is rather suspicious both of international law and the Court.

This is a bitter lesson which should instill modesty amongst lawyers!

II. THE COURT IS A JUDICIAL ORGAN

8. Be that as it may, the above considerations compromise the true importance of the question of the control of the acts of the political organs of the United Nations by the Court, even if this question causes great excitement among the ranks of the international lawyers today: whatever the theoretical answer to this question, it seems clear — maybe unfortunately(?) — that in cases of strong opposition, the last word will lie with the Security Council — or the General Assembly —, not the Court.

This is, however, not a sufficient reason for ignoring the question: not only is it theoretically interesting (and I share the excitement of my colleagues about it!), but it can also have concrete consequences. The worst position is not always secure ... and one can think (at least hope) that if the Court finds a resolution of the political organs invalid, the General Assembly or the Security Council would draw the consequences from these findings.

9. Now, the question remains: may the Court make such a finding?

At the very least, it must be said that the Court itself does not seem very sure whether or not it has such a power. Sometimes it even gives the impression of being certain that it does not have such a power! By way of proof, just think of the *dictum* of the Court in the 1971 opinion in the *Namibia* case: « undoubtedly, the Court does not possess powers of judicial review or appeal in respect of the decisions taken by the United Nations organs concerned »⁽⁹⁾ (*i.e.* the General Assembly and the Security Council).

⁽⁹⁾ *I.C.J. Reports 1971*, p. 45.

More recently, in the *Lockerbie* cases and the « *Bosnian* » case, the Court had three opportunities to express itself about the validity of resolutions of the Security Council. In the two Orders issued in the *Bosnian* case (8 April and 13 September 1993) the Court remained silent on the problem, while in the order of 14 April 1992 in the *Lockerbie* cases it took a position which was no less than ambiguous: « whereas both Libya and the United Kingdom, as Members of the United Nations, are obliged to accept and carry out the decisions of the Security Council in accordance with Article 25 of the Charter, whereas the Court which is at the stage of the proceedings on the provisional measures, considers that *prima facie* this obligation extends to the decision contained in resolution 748 (1992); and whereas in accordance with Article 103 of the Charter, the obligations of the Parties in that respect prevail over their obligations under any other international agreement including the Montreal Convention... »⁽¹⁰⁾.

10. It can certainly be maintained that no absolute consequence can be drawn from this passage since it stressed that *at this stage* — i.e. the stage of the provisional measures — there is a *prima facie* presumption in favour of the validity of the decision of the Security Council. This can be held to be reasonable — even if the Court's willingness to give its blessing to the resolution of the Security Council which was adopted *after* the closing of the hearings (as several dissenting Judges have stressed) is questionable⁽¹¹⁾.

In any case, the above-mentioned *dicta* of the Court are certainly not reassuring — and this is indeed an understatement — since, after having emphasized the fact that the proceedings were at the stage of the provisional measures, the Court went a stage further and invoked Article 103 of the Charter.

Why is this disturbing? Because it was absolutely superfluous. It adds nothing to the reasoning⁽¹²⁾, rather, it might imply that,

⁽¹⁰⁾ I.C.J. Reports 1992, p. 15.

⁽¹¹⁾ See in particular the dissenting opinion of Judge Bedjaoui, *ibid.*, p. 41.

⁽¹²⁾ Significantly, the joint declaration of Judges Evensen, Tarassov, Guillaume

when it examines the substance of the case — if it actually chooses to do so! — the Court will entrench itself behind Article 103 in order to avoid an appreciation of the validity of resolution 748 (992) of the Security Council.

11. This might turn out to be mere speculation, but, if it happens to be true, such a position would be highly controversial.

As any organ of any international organization, the Security Council is a legal entity, created by a legal text — the Charter — and bound at least by the requirements of this convention, failing which it would have no legal existence and would lose its very legitimacy.

Now, this argument can be taken a step further: it is perfectly admissible that, in accordance with Articles 25 and 103, the decisions made by the Security Council, supersede the « basic » conventional law (including the Montreal Convention) and even « general » international law. But it would be unthinkable for them to supersede the Charter itself or the *jus cogens* principles, yet it is regrettable that the Court has not, at least, hinted at this possibility.

12. It is true, of course, that the very idea that a resolution of the Security Council could contradict a peremptory norm seems odd at first sight and, since the Council can be seen as an emanation of « the international community of States as a whole », this could seem contrary to the definition itself of *jus cogens*.

However, as Judge *ad hoc* Elihu Lauterpacht has very aptly shown in his separate opinion appended to the Court's Order of 13 September 1993 in the case concerning *Application of the Genocide Convention*, « the possibility that a Security Council resolution might inadvertently or in an unforeseen manner lead to such a situation [contradicting a *jus cogens* norm] cannot be

and Aguilar Mawdsley, who share the views of the majority does not mention Article 103, which makes their opinion more persuasive and less ambiguous than the Order itself (*ibid.*, pp. 24-25).

excluded » (13). This, at least, was pleaded by Bosnia and Herzegovina in this case and it would be a real pity if the Court did not scrutinize this argument during the examination of the merits of the case; (whether it accepts or rejects it is quite another story).

13. The arguments to the contrary are poor.

It has been sustained that if the Court verifies the validity of the resolutions of the General Assembly or the Security Council, it would « paralyze » their actions; or that this would amount to a challenge to the sovereignty of the States which make decisions through the political organs of the Organization; or also that, in doing so, the Court would interfere in the political sphere and abandon its judicial nature; etc.

These are mere quibbles. There are a lot of arguments against them, but the short — and convincing — answer has been given by the Court itself forty-five years ago: « The political character of an organ cannot release it from the observance of the treaty provision established by the Charter [and of the prescriptions of *jus cogens*] when they constitute limitations on its power or criteria of judgment » (14).

And, indeed, it is the duty of the Court to ascertain that these provisions and prescriptions are respected. Any claim to the contrary would empty the notion of « judicial organ » of any content: the International Court of Justice would cease to be a Court, and become a mere registry office.

14. Could such an examination of the validity of the resolutions of the political organs of the United Nations endanger their efficiency? Certainly not: as said above (n° 5), the Court is not the master of its own agenda: a matter can only be referred to it either by States in contentious cases, or, by the interested organs themselves through requests for advisory opinions.

(13) *I.C.J. Reports 1993*, p. 441.

(14) Advisory opinion of 28 May 1948, *Conditions of Admission of a State to Membership in the United Nations*, *I.C.J. Reports 1947-1948*, p. 64.

In none of these hypothesis, excesses are to be feared. In the second case, if an advisory opinion has been requested, this means that at least a majority of the members of the concerned organ have doubts about the legal answer to a difficult question and that they feel a need for some legal help — it is the duty of the « principal judicial organ of the United Nations » to give this help in examining the problem under all its aspects and, in all its advisory opinions, the Court has always insisted that it must give such assistance; and, in the last resort, it belongs to the political organs to determine the consequences of the opinion — not the decision — given by the Court.

Regarding the contentious cases, the problem is somewhat different since the Court could recognize that a resolution adopted by a political organ of the United Nations is not valid outside any expression of will by this organ. But it must be noted: i) that such a circumstance is highly improbable; ii) that, if it happens, Articles 34 of the Statute and 69 of the Rules guarantee that the Organization will have a possibility to submit its observations; and iii) that, in any case, in conformity with Article 59, « the decision of the Court has no binding force except between the parties... ».

15. Of course, it is to be hoped, that in such a case, the interested organ or organs would take full account of the Court's findings and, indeed, the same is true in case of an advisory opinion...

But it is to be stressed that, in both cases, the political organs are expected to react on a purely voluntary basis. There is nothing wrong in this: the Court ascertains the law; the political organs are inspired by political considerations. Hopefully — but this is the maximum optimism I can show... — law is part of these considerations.