

ROLE OF THE INTERNATIONAL COURT OF JUSTICE IN A CHANGING UNITED NATIONS COLLECTIVE SECURITY CONTEXT

The panel was convened by its Chair, J.M. Ruda,* at 9:30 a.m., July 6, 1991.

REMARKS BY EDWARD McWHINNEY**

Currently, the International Court of Justice (ICJ) is fulfilling its goal, as expressed in Article 9 of its Statute, of a forum for "representation of the main forms of civilization and of the principal legal systems of the world". [See generally, the trilogy of books (1979, 1987, 1991) by author on the ICJ]. Moreover, the ICJ's political and jurisprudential ideology appears to have a more global outlook. The ICJ, and its progenitor the PCIJ, have moved a long way from their European ethno-cultural particularism of the first half of the twentieth century reflected in the description of the ICJ as a "White Man's Tribunal" following the ICJ's *South West Africa* decision. [1966 ICJ 6; 5 ILM 932 (1966)]. With the changes in the ICJ's membership, from the 1960s onwards through the regular processes of election in the Security Council and General Assembly, the Court today amply reflects that larger, more inclusive world community created by the political consummation of the legal principles of decolonization and independence and self-determination. Moreover, the presence before the ICJ of new categories of client states, drawn from non-European, non-Western, former colonial states is positive. The presence of these states in the ICJ means that the result can strike a better balance between the traditional Western client states and less developed countries. The Soviet Union's recent acceptance of compulsory jurisdiction has political and symbolic importance even if limited for the moment to a small number of less important international Human Rights conventions. As the late President Nagendra Singh of the Court noted, at the time, "some acceptance of any kind is better than none at all," and President Gorbachev's initiative did, indeed, "open the door of the Court to the Eastern bloc countries" [Singh, *The Role and Record of the International Court of Justice* 19 (1989)].

This transformation of the ICJ is all the more noticeable because international institutions like the UN remain in their essential composition and internal "regional" balance, rooted in the particular space-time dimension in which the UN was historically first conceived at World War II's end in 1945. In a contemporary context, an enlarged, 15-member UN Security Council still manages to exclude from permanent membership the two economic superpowers, Germany and Japan.

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This fact puts a strain upon the necessary minimum correspondence with political reality that is supposed to underlie any truly viable system of positive law. The gap between the positive law as written in the U.N. Charter in 1945 and the effective power in the world community today was compounded in the special context of the Gulf War. More specifically, during the Gulf War, when all the key legal decisions were taken by the UN Security Council, Germany and Japan were both absent. It is ironic that it was after World War I, that the two original colonial powers, and now Permanent Members of the Security Council, Britain and France, had drawn the original lines in the desert sand from which currently, disputed territorial frontiers in the Middle East all stem, rejected U.S. President Woodrow Wilson's known preference for an independent Kurdish state after the final military defeat and dissolution of the Ottoman Empire.

The office of UN Secretary General was not utilized fully to resolve ambiguities or conflicts in the implied legal powers flowing from UN Security Council resolutions related to the Gulf Crisis. Each incumbent UN Secretary General chooses to carry out his functions and responsibilities according to his own design. The powers of the UN Secretary General may be either broad and facultative, or limited and self-restrained. During the Gulf Crisis, Dr. Perez de Cuellar avoided the Dag Hammarskjöld model, and played down any claims to his personal UN Charter mandate to uphold peace and security.

And, during the Gulf Crisis, the ICJ was not approached by either the UN General Assembly or the UN Security Council for guidance as authorized by Article 96 of the UN Charter (on Advisory Opinions).

Some ordering principles as to the ICJ's contemporary approach to its jurisdiction and to justiciability should be noted at the outset. First, the ICJ is not now legally inhibited from exercising or maintaining jurisdiction over a matter simply because some other coordinate institution of the United Nations, such as the UN Security Council or UN General Assembly, is already seized of the issue for discussion. A constitutional prohibition as to simultaneity of action is applied, in terms, under Article 12 of the UN Charter to the UN General Assembly while the UN Security Council is exercising its powers in relation to a dispute or other situation. However, no such prohibition exists in relation to the ICJ. The old-fashioned, "separation-of-powers" objections can hardly be applied to an institution like the ICJ, which has its own autonomous source of constitutional-legal power in its own statute. This statutory framework provides the ICJ with power independent of, and anterior to, the sources of power of the UN Security Council and UN General Assembly which have to be based in the UN Charter. Beyond that, ordinary pragmatism has suggested that there is no necessary, inevitable rivalry between the ICJ on the one hand, and the UN Security Council and UN General Assembly on the other hand. They possess a common interest and complementary role in solving international conflict-situations. In particular, where one or other of these institutions may be politically blocked in exercise of its constitutional-legal powers, the other institutions have the legal right, if not yet the legal duty, to fill any vacuum in world community policy-making that might otherwise result. The progressive development of the ICJ's highly functional, pragmatic approach to recognition of

its legal powers in this regard is amply evidenced in the ICJ's jurisprudence in recent years.

A second ordering principle as to the ICJ's own contemporary approach to jurisdiction is that it will no longer allow itself to become the prisoner of old-fashioned, abstract, *a priori* categories of "political questions" which have been substantially abandoned by leading municipal, national constitutional courts as subjective, self-defining, and open-ended. Instead, the ICJ will apply pragmatic tests that recognize that all great international legal disputes are inherently political in character. Whether they should be treated as justiciable, and hence ruled upon by the ICJ should turn on the consideration of whether ICJ intervention will contribute to solution of the problem in the instant case. In order to aid in fact-finding and in other areas, the UN Security Council and the UN General Assembly can provide assistance to the ICJ. Yet, the guidance of these UN bodies will merely aid the ICJ in its vital work and should not be controlling on the ICJ's decisions.

A third ordering principle in the ICJ's contemporary approach to jurisdiction goes to the degree of rigidity or flexibility to be accorded by the ICJ to the interpretation of the UN Charter, the ICJ Statute, and the Rules of Court. The ICJ has made it clear in its rulings on state acceptance of compulsory jurisdiction under the Optional clause that even though a state has decided to cancel its acceptance of such jurisdiction it still may be held to continue to be bound where there have been laches or negligence in the formal termination of such acceptance. In safeguarding the interests of third-party settlement as an aid to international problem-solving, it is not for the ICJ to have to correct failures in timely notification of termination of acceptances of jurisdiction by the professional legal staff in national foreign ministries.

A similar, beneficial approach to legal construction is to be seen in the late ICJ Judge and President, Nagendra Singh's proposals for a more widespread recourse to the ICJ's Advisory Opinion jurisdiction; and in particular, for a flexible and inclusive approach to the definition of a "legal question" for purposes of Article 65 of the ICJ Statute. [Singh, *supra*, at 26, 62, 100, 246]. Of course, a legislative approach to the same end would be to use Article 96(2) of the UN Charter and Article 65(1) of the ICJ Statute, so as to authorize the UN Secretary General, or even the UN Secretariat, as such, to request Advisory Opinions from the ICJ. [*Id.* at 100-101]. But, the same result might be achieved by way of judicial gloss on the text of Article 96 of the UN Charter and Article 65 of the ICJ Statute.

In the special circumstances of the Gulf War, which was not a UN military operation *stricto sensu*, as with the Korean War of the early 1950s, but rather, a U.S.-led, multinational force operating under a form of international law umbrella provided by the Security Council, questions arose as to the exact nature of the legal mandate provided by the UN Security Council resolutions: in particular, whether specific Allied control measures happened to be legally authorized by one or more of those resolutions. Some later questions that took shape included whether prior UN Security Council resolutions were necessary to legitimate an Allied naval blockade, or whether, instead, one could rely on a vastly extended interpretation of the right of

collective self-defense under Article 51 of the UN Charter. Earlier questions such as the issue of who should determine what items would come within the humanitarian exceptions to economic blockade measures were settled promptly by reasonably precise or explicit further UN Security resolutions. More troubling legal questions which remained related to the timing and judgement of the actual decision to have recourse to the use of armed force and to the passage from "defensive" control action, directed to the liberation of Kuwait territory as such, to "offensive" military action going beyond that objective. Finally, there was the question of the aerial bombardment of Iraq's civilian targets in ways that, on their face, seemed incompatible with the Protocols Additional to the Geneva Convention of 1949 and Protocol I (Protection of Victims of International Armed Conflicts) of 1977. [Singh and McWhinney, *Nuclear Weapons and Contemporary International Law* 519-524 (1989)]. (For different reasons, Protocol I had not been signed by either the U.S. and Iraq by the time of the Gulf War operations).

A fully representative international institution such as the ICJ would seem better placed than anyone else to give legally persuasive rulings on such questions, either after the event, or better still, contemporaneously. Neither the UN Charter nor the ICJ Statute contain provisions which disable the ICJ from giving interlocutory rulings, more particularly if the situation is deemed urgent by the ICJ. The multinational Allied forces in the Gulf War, which had sought the UN's imprimatur by way of the successive UN Security Council resolutions, would seem effectively estopped from objecting to any authoritative ruling by the ICJ as a "principal judicial organ of the United Nations" under Article 92 of the UN Charter, as to whether those UN Security Council Resolutions supplied sufficient legal support for particular measures taken by them or whether additional, and more precise resolutions might be needed to supplement or extend those already adopted.

I have discussed the Gulf crisis and the potential role of the ICJ since the title of our panel seems to focus on a new era of collective security under the UN Charter and a New World Order. It is incorrect to see the Gulf affair as a classic UN operation under Chapter VII of the Charter with the UN Secretary General having a key role and with a military commander appointed by and responsible to the UN directly. After all, there was the missing element in the actual day-to-day unfolding of the Gulf action of independent, third party reference and control of doubtful issues of interpretation and application of the legally-enabling UN Security Council resolutions. One of the anomalies of the Gulf crisis was that there would have been sufficient time to obtain an independent, third-party interpretation of the dispute *before* resort to direct military action.

The role of the UN in the Gulf crisis seemed to indicate that its long post war constitutional practice as to peacekeeping was out of date or irrelevant. The effective functioning of the UN Security Council over the whole postwar period—living with the reality of a potential legal veto by either of the superpowers or their main supporters—depended on an elaborate system of constitutional checks and balances. This was based on equilibrium of East-West political forces. The UN Security Council's overwhelming consensus in support of the Gulf War actions appeared at times more notional than substantial if the internal political debate within some

nations, including the Soviet Union, be taken into account. Yet, the political and economic pressure exercised on the members of the UN Security Council were considerable. As a result, the legal formula of an Allied coalition operating outside the UN itself, but under an international law umbrella provided by the UN Security Council resolutions, does not seem as persuasive or educational an exercise in UN Charter conflict-resolution objectives as it might have been.

Perhaps, imaginative recourse to the ICJ could have filled any gap in the UN Security Council processes and practice of the post-Cold War era. Four decades ago, in the Korean War crisis, United States jurists argued for an expanded, "policy" interpretation of UN General Assembly constitutional-legal competence in order to fill the gap as to the UN peacekeeping created by the use, or threat of use, of the Big Power veto in the UN Security Council. During the Korean War crisis, the problem was the *presence* of the veto of the Big Powers. In the Gulf crisis, its effective absence may have resulted in an inability or unwillingness of the main UN institutional actors, the UN Security Council and the UN Secretary General, to maintain a continuing, full operational control of the actual application of UN Charter legal powers. If, for various supervening political reasons, that is the way it has to be in the future with Chapter VI and VII of the UN Charter operations, then a reconciliation with fundamental principles of the UN Charter, as well as the very considerable UN Charter-based practice, could be achieved by according to the ICJ an appropriate review role in relation to any future UN Security Council role in a potential military crisis.

REMARKS BY G. SHINKARETSKAYA*

I would like to draw your attention to the legal organization of the International Court of Justice (ICJ). More specifically, I will discuss the legal environment which exists in the ICJ. Mainly, I would like to concentrate on the legal environment in that part of the earth where the former communist dictatorships existed. I will concentrate on the position of the Soviet Union which, given my background, might be interesting to you.

Why is the legal environment so important for the existence of the ICJ? Because, if you look at the experience of the Court, the decisive for its successes, you would, in the long run, conclude it was due to the world situation outside the chambers of the Court. The attitudes of the nations towards the Court was always cautious. Clearly, the Court was underestimated by most states. Basing my remarks on my Soviet experience, that underestimation stands, paradoxically, from an overestimation. More specifically, the ICJ, while a powerful body, has not been able to stop a conflict from evolving. Also, if we look at ICJ cases involving the use of force, we can see that the losing party does not comply with the ICJ decision. Furthermore, this forum is used primarily as a public stage, rather than for its indigenous capacity. Also, the underestimation, or overestimation, if you will, of the ICJ, was based on

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the legal ignorance of nations ruled by dictators. The very idea of law is foreign to dictatorship—be it a dictatorship of the proletariat or otherwise.

Now, democracy has spread throughout the world. The changes in the Soviet Union which were labelled “perestroika” have evolved and subsequently cannot be reversed. Moreover, Soviets who have the right to express themselves freely have embraced democracy close to their hearts. So too, we have learned, democracy is intrinsically linked with the rule of law. Similarly, political freedom has spread throughout the globe, including Eastern Europe and Africa.

Due to time constraints, I will simply list a number of points relevant to our overall discussion. First, legal consciousness among the masses is growing rapidly. So too, international legal consciousness is expanding. Second, the populace is exercising a resolute watch over their governments’ activities. Included among such instances is Soviet mobilization of troops into the Baltic republics in January 1991. In addition, a watchful eye on the People’s Army of Yugoslavia is currently at hand. Third, the role of international organizations, both governmental and nongovernmental, in global politics, economics and law, has augmented. Fourth, the scope and pervasiveness of international law has developed rapidly.

In conclusion, the future attitude of the Soviet Union towards the ICJ is unclear. Since, in actuality, the Soviet Union does not exist any more. Moreover, a period of a new Soviet foreign policy, which was closely linked with Mr. Shevardnadze, is over. The romantic foreign policy regime of Shevardnadze, which underscored common human interests, is in jeopardy. Nevertheless, the Soviet Union has accepted compulsory jurisdiction of the ICJ in a number of areas of law. Finally, as law penetrates more deeply into international relations, security and stability rises, and the important role of ICJ increases.

REMARKS BY STEPHEN SCHWEBEL*

I accepted an invitation not to speak at this panel, but to comment upon the speeches of others. I have had the benefit of seeing a précis of Professor McWhinney’s statement but, otherwise, have only heard what has been said just as you have. So, I shall be speaking impressionistically, rather than thoughtfully.

But, let me begin with a few prepared remarks about the theme of this morning’s panel: “The Role of the International Court of Justice in a Changing United Nations Collective Security Context”. The World Court has never played a central role in the interdiction of armed conflict or the implementation of collective security. It did not in the days—and nights—of the League of Nations. It has not in the days and nights of the United Nations. In this sense, the Court never fulfilled the hopes of some of the founders of the “peace movement” of the turn of the century, who believed that international arbitration and adjudication were a viable substitute for war, who believed that war could be forestalled or prevented by recourse to international adjudication. These early proponents of the Court saw it not so much as an instrument of collective security as a substitute for it. It did not prove to be.

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As for the Covenant of the League, it gave arbitration or judicial settlement, that is, the Permanent Court of International Justice, a dual role: as a substitute for the need to have recourse to collective security; and as an initial part of the process of collective security itself. In the event, the Court was not called upon to play either role. Had the Court so been called upon, it is not possible to say how it would have performed. The Court generally did virtually all that it was called upon to do very well. At the same time, these great roles which were projected for the Court—of acting as the substitute for recourse to arms, or as an instrument in the process of identifying the aggressor—may never have been realistic. National courts have not been notably successful in dealing with the national equivalent of the international use of force, namely civil war.

The Charter of the United Nations gives the World Court a lesser place than did the Covenant of the League give to international arbitration and adjudication. Under the Covenant, the wrongdoer, in prescribed circumstances, was the State which failed to submit its dispute to arbitration or adjudication or enquiry by the League Council or which did not accept the results. Under the Charter, the aggressor is the state which the UN Security Council finds to be the aggressor. The Charter provides in Chapter VI for the Pacific Settlement of Disputes. The parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall first of all seek a solution by peaceful means of their own choice, among which is judicial settlement. The Security Council may call upon the parties to settle their dispute by such means. And in making recommendations of appropriate procedures of pacific settlement, the Security Council shall 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." But Chapter VII of the Charter, dealing with Action with Respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression, assigns no role at all to the Court.

It could accordingly be argued, and in a controversial case in the Court was argued, that, where the applicant State complains that it is the victim of acts of aggression, it is for the Security Council, and not for the Court to deal with those acts—the more so when that State has gone to the Security Council complaining of those very same acts. The Court did not accept that argument, in my view (and Professor McWhinney's view) rightly (though there is room for difference over the reasons for that conclusion). To recognize the fact that the Court has not played a substantial part in such efforts as there have been to realize collective security through the United Nations is not to say that the Court is legally debarred from dealing with cases which may involve the use of force, the "ongoing" use of force, and aspects of collective security, whether the case simultaneously is before the Security Council or not.

At the same time, the conclusion that the Court may be entitled to deal with cases which may arise in a collective security context is not to suggest that the Court is necessarily well-suited to do so or will be regarded by States as a likely instrument for dealing with threats to the peace, breaches of the peace and acts of

aggression. Over the years, neither the Permanent Court nor today's Court has in fact been called upon to act as an instrument of collective security, with one arguable and highly controversial exception, and there is little sign, at least as yet, that States see the Court as such an instrument. What the future may hold in this regard of course cannot be predicted.

In any event, the Court may have an important part to play in more than one related respect. It is the judicial forum which may resolve disputes which, if unresolved, can lead to threats to peace, to breaches of the peace, or renewed breaches of the peace, and to acts of aggression. For example, the Court has dealt and is dealing with border disputes which have been, and continue to be, classic foci of outbreaks of fighting between States. Two of the eleven cases currently on the Court's docket are such border disputes. And the Court can deal with questions of State responsibility and reparation for international uses of force which are alleged to be unlawful—an ability which other cases now before the Court demonstrate.

It should not be understood as minimizing the effect which changes in the United Nations collective security context may have on the work of the Court. I believe that the history of the Court since 1922 suggests not that the Court will save the peace but that peace will save the Court. The great achievements of the Permanent Court of International Justice came in the 1920s, when the League was effective and when international relations were in a period of extended *détente*. Today, as the United Nations achieves a remarkable surge in effectiveness, as collective security has achievements unique in the history of international institutions, as international relations in the large have sensationally improved, the Court may well have opportunities to contribute to the just and effective settlement of international disputes, and to the progressive development of international law, which will be greater than at any time in its history. The agent of Finland this week in proceedings before the Court made the substance of this point that the litigation burgeons in a period of benign international relations when he stated:

“It is a paradox observed by sociologists of law that the stronger the consensus which exists in society, the more recourse is had to litigation in the settlement of disputes over rights. The paradox is, of course, only apparent. The more there is agreement about the basics of social life, the more confidence there is on the legitimacy of courts and the judiciary in general”.

Professor McWhinney has spoken of an expansion of the Court's competence in the rendering of Advisory Opinions. In that regard, I should like to recall that, in practice, the Permanent Court benefitted from a wider competence in one advisory respect than does this Court. The majority of requests for Advisory Opinions transmitted to the Permanent Court actually were at the instance not of the League Council—though all were formally at its instance—but at the request of international bodies which were not League agencies or organs, or at the request of States. In contrast, no Advisory Opinion has been sought of this Court by an international body other than a Specialized Agency of the United Nations (and there have been only three of those). And States have not sought to put requests for Advisory Opinions through the agency of the Security Council or General Assembly as they did

through the League Council. But the provisions of the Charter and Statute no more debar that process than did those of the League Covenant and the Permanent Court's Statute. Is there really any good reason why the OAS or INTELSTAT should not be able to request an Advisory Opinion through a United Nations conduit? Or why, if they are so inclined, two States which have a difference cannot request the General Assembly or Security Council to request an Advisory Opinion about it? These were precisely the processes, *mutatis mutandis*, which produced more requests for Advisory Opinions than the requests of the League itself.

REMARKS BY ALAIN PELLET*

Although I probably share Professor McWhinney's main aspirations and hopes, I am afraid that I do not share his very stimulating optimism as to the real future role of the International Court of Justice (ICJ) in this decade. Since, in my view, law is the art of what is possible, not of what is desirable. Rather, my views are closer to that of Judge Schwebel.

In my view, the organizers of this conference, when describing a changing security framework, were citing the end of bi-polarity. But, if there is no doubt that the international security context has effectively changed, there are strong doubts that the "new" system of international security is collective, and even more, that it is UN-oriented. Instead, the main trend is not towards a greater role for the UN, even less towards international law, but much more convincingly, towards US involvement.

Yet, there is nothing strange or shocking in this assessment. After all, if law is not mere power, it is reflection of power. When, in a given system an individual component is over-predominant, then, very logically, legal rules and institutions in this system will be a reflection of his viewpoint.

In the international system there is only one Super-Power left. While I do not say that it is bad, the influence of this Super-Power in the system is overwhelming. This has been well illustrated during the Gulf Crisis. The U.S. decided to counter Iraq's aggression against Kuwait. In addition, the U.S. had the means to do so. Moreover, the U.S. determined the date to stop the conflict as well as the conditions for it. I certainly do not mean that this U.S. involvement was unlawful. Rather, not only the whole international reaction led by the U.S. was lawful, but also legal principles played an important role in the whole process.

The roles which law played in the Gulf Crisis were severalfold. First, at least at the beginning, the Iraqis invoked international legal principles regarding claims about the border, oil and the existence of Kuwait. Second, the U.S. and its allies made important use of legal rules and instruments. More specifically, they invoked legal arguments, mainly based on the UN Charter, in an attempt to legitimize their use of force against Iraq. Third, the allies utilized international law as the basis for

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their actions. Indeed, President Bush and President Mitterrand defined the Gulf War as a struggle for international law.

While lawyers can be delighted with such a favorable disposition towards international law, I am afraid that it was coincidence. After all, in this precise case, law and power were on the same side. Yet, had that not been the case, I doubt that this would have made any difference. In fact, the last word would have been the privilege of power and not of law.

The ICJ has been totally absent from the beginning of the Gulf conflict through its conclusion. Indeed, Iraqi claims concerning its border with Kuwait and oil issues could have been resolved by adjudication at the ICJ. However, few discussed this peaceful, logical alternative to war. Nor did the UN Security Council discuss the forum of the ICJ. Thus, the ICJ does not seem to be an appropriate body to resolve disputes involving the use of force. Indeed, it is significant that while the use of the ICJ is mentioned in Chapter VI of the UN Charter, there is no concurrent mention of this forum for adjudication in Chapter VII of the UN Charter.

However, some excellent scholars have suggested that the UN Security Council and the UN General Assembly should have requested an Advisory Opinion on the subject from the ICJ. There is certainly no legal objection to such a scenario. But, what kind of questions could have been asked of the ICJ?

Also, in the aftermath of the Gulf War, the ICJ could have played a key role in fixing reparations and ascertaining boundaries. Moreover, participation by the ICJ would have facilitated Iraqi compliance. It has not been used

The above presentation exemplifies that the new security context does not foresee a key role for the UN. At the same time, the new security context will not be oriented under an international legal framework. Furthermore, I doubt that the ICJ has a special role to play in this agenda. Thus, I cannot agree with Professor McWhinney, who suggested that the ICJ should assume a new and expanded role in "hot" conflicts. After all, although ICJ judges are distinguished jurists, they cannot be a substitute for politicians. After all, judges solely apply legal rules, politicians govern.

Does this mean that the ICJ has no role to play in international relations? Of course not! I merely suggest that currently the ICJ has no role in what I call "international control", in other words, the mechanisms which are directly in charge of the world order. More specifically, the ICJ can operate only in the interstices of "international control" as exercised by powerful nations, including the Super-Power. But these interstices exist.

Noteworthy is the acceptance by the Soviet Union of ICJ compulsory jurisdiction in relation to several human rights treaties. Similarly, the "Big Five" could agree on some kind of compulsory jurisdiction. Moreover, the end of bipolarity has resulted in a spectacular increase in cases before the ICJ. In contrast, several years ago, resolution of such disputes would have been carried out through a different forum. But, at the same time it must be realized that these cases, except, maybe, the *Aozou strip* case are not "war and peace" cases.

In conclusion, the ICJ has not much to do with international peace and security. When it intervenes in a specific case, it mainly acts as a deterrent or to limit the harmful effects of an escalating conflict. Although the ICJ cannot substitute for politicians, nevertheless, ICJ Advisory Opinions have merit. Lastly, the ICJ in various instances, including the *Nicaragua* case, has demonstrated that it is capable of dealing effectively with issues of war and peace, even if this is probably exceptional.

DISCUSSION

Professor WELLENS:^{*} As Mr. Pellet already mentioned, some of the comments of Professor McWhinney regarding the utility of the International Court of Justice (ICJ) in the Gulf Crisis are not suitable. For instance, obtaining ICJ Advisory Opinions regarding aerial bombardments and their compatibility with international humanitarian law. Yet, Professor McWhinney was correct in discussing Article 51 of the UN Charter and the exception for humanitarian purposes of an economic blockade. Yet again, I disagree with Professor McWhinney's suggestions that the ICJ could have provided an Advisory Opinion regarding the use of force during the Gulf Crisis.

My question, which is addressed to Judge Schwebel, asks whether giving states the possibility of requesting Advisory Opinions would not lead to obscuring the difference between Advisory Opinions and contentious cases?

Judge SCHWEBEL: Perhaps; but as it is, both judgments and Advisory Opinions are judicial exercises. I do not think that there would be a problem with asking the ICJ for an Advisory Opinion if both parties agree to make the request.

Professor MCWHINNEY: In my address, I suggested that there was enough time and that the ICJ could have been consulted throughout the Gulf Crisis. Moreover, we must remember that all states have an interest in understanding whether their actions are in accordance with international law. International society's pressure on nation states to comply with their international law obligations should not be carried out solely on the power principle.

KOOROSH AMELI:^{**} Questions have arisen as to whether the UN Security Council had the power to pass resolutions which were not exactly in conformity with the UN Charter. What forum should interpret this query? Certainly, in my view, the ICJ would be the best arena to handle such a dispute.

Judge SCHWEBEL: Each UN organ has the right to interpret the scope of its authority. The ICJ was not given general authority to interpret the powers of other UN organs; it does not exercise "judicial review". But the Court may be requested to give Advisory Opinions which entail the interpretation of the authority of other UN organs, and it has been so requested.

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JULIE DAHLITZ:^{*} Although ICJ Advisory Opinions have no binding legal force, in practice, they constitute a judgement. Perhaps, in certain cases, the ICJ should be given the competence to give a legal overview as a point of reference to the UN Security Council. In addition, giving an overview might take up less time than in an Advisory Opinion.

Mr. PELLET: As for Advisory Opinions, we must acknowledge that strict rules are applicable regarding their use. They are not compulsory as such. In addition, I would like to add that law is a chariot of power. More precisely, there can be a discrepancy between law and power. But, in the long run, I have no doubt that the law is what the powers want it to be. Thus, in my view, the origin of any law is power.

HANS CORELL:^{**} I regret to hear that Mr. Pellet has subordinated international law to merely a matter of power. In contrast, I believe that international law should function as a break on the exercise of power. My question is posed to Professor McWhinney. I must confess that I am doubtful whether the ICJ can act in the manner that you suggested. After all, does not the risk exist that the ICJ may have to pronounce itself several times on the same question? This same question may perhaps later be brought before the Court by some of the states involved, and depending on the facts and the argumentation the Court may be forced to make apparently contradictory statements. What are your thoughts on an ICJ review or veto of a UN Security Council Resolution?

Professor McWHINNEY: A change in the composition or the political balance of the UN Security Council can lead to discontinuity in the legal reasoning and policies of the Council, as may have happened with the transition to the post Cold War era. It would be helpful if the ICJ could provide general advice. National courts now pronounce on what used to be called "political questions"; and perhaps, too, the ICJ should be accorded a larger role to carry out a similar activity. Mr. Pellet's distinction between law and power would not be accepted by most students of the legal realist and policy schools today.

Judge SCHWEBEL: I do not think that the ICJ should act as the General Counsel of the United Nations. The ICJ is not in a position to give advice on the problems of the UN as they turn up, nor certainly, is the Court suited to do so on its own initiative. It is true that, under Article 96, paragraph 2, of the Charter, the General Assembly could authorize the Secretary-General to request Advisory Opinions of the Court. However, it has not extended this authority, despite the recommendation of the Secretary-General. Perhaps it will, but if it did, I doubt that the Secretary-General would use that authority to seek the Court's "general advice".

KAREL VOSSKUHLER:^{***} From a practitioner's point of view, there are two main reasons to recommend the political process over the judicial process as a means to promote collective security. First, In this increasingly multi-polar world, consensus building is essential to promote collective security. Second, in this era, increasingly internal factors and intra-state items dominate the security arena. To

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illustrate this point, let me cite two examples. First, while Professor McWhinney suggested that an Advisory Opinion might have been helpful to interpret the question of humanitarian exceptions to the economic embargo to Iraq, I doubt the utility of such ICJ involvement. After all, resolution of this economic sanctions dilemma could be resolved based on practical decisions and not mere legal prose. Second, the present turmoil in Yugoslavia illustrates that the role of collective security in the form of the CSCE is a better route to resolve this dispute than through the use of judicial forum.

Professor McWHINNEY: The Permanent Court of International Justice (PCIJ) has been more active in cases dealing with frontier issues in the substantive sense than the ICJ. The judicial process can play a key role in reaching a solution in such matters. To reiterate, if the CSCE is able to resolve the Yugoslavian situation, then, by all means, it should receive credit. However, if it fails, would there not be a role for the ICJ?

Judge RUDA: I believe our discussion here today has analyzed quite well the title set for our discussions, "The Role of the International Court of Justice in a Changing United Nations Collective Security Context." Indeed, we need to study very closely the changing role of the ICJ in this volatile context. As history has illustrated, currently we are living in a new political environment. Critical, then, is the role which the ICJ must play in this new framework. Regarding distinctions between the ICJ and the UN Security Council, two points are essential. First, the UN Security Council is a political body which is a center of political power. Moreover, the Security Council was entrusted with the primary responsibility to maintain international peace and security. The ICJ, on the other hand, is the principle judicial organ of the UN, a center of legal reasoning, independent of political power. Thus, the ICJ should not be influenced by the political, economic, and military threats of nations.

In my view, the ICJ has a critical role for the future in a changing UN, but this role should be limited to its judicial functions. Collective security is a wider concept than judicial settlement of disputes or even than peaceful settlement of disputes. Other organs of the UN are charged with other duties concerning the maintenance of collective security. The Court should remain strictly within its judicial functions, *i.e.*, to settle disputes or to give Advisory Opinions on the basis of law. The UN was created to maintain international peace and security. To achieve this goal it must take effective collective measures for the prevention and removal of threats to peace. Moreover, aggression and other threats to peace must be stringently challenged.

APPENDICES

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