CHAPTER 23

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

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Introduction

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

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

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1 Belgium suggested that any State, party to a dispute brought before the Security Council, should have the right to ask the Court whether a recommendation or a decision made by the Council infringed on the State’s essential rights. See United Nations Conference on International Organization (UNCIO) of 1945 vol. 3, 333–336. See also UNCIO vol. 12, 66; see also UNCIO vol. 13, 645. The Soviet Union opposed. See Summary of Eighth Meeting, UNCIO of 12 April 1945 vol. 14, 181. And the proposal was rejected. See Fifteenth Meeting of Committee IV/1, UNCIO of 30 May 1945 vol. 13, 235.
Infamous Lockerbie case will not even be mentioned in what follows below.² This article is also not about the law-making powers of the Council.³ It is solely about the role of the Court as the assistant or legal advisor of the Security Council. According to the provisions in the UN Charter, the Court can assist the Council by judicially settling inter-State disputes threatening the peace, and it may provide the Council with advice on any legal question. But then the Council must trust the Court, and actually refer disputes to it and ask it for legal advice.⁴

**Intentions of the Founding Fathers in 1945**

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

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

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

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