

SPEECH BY H.E. JUDGE PETER TOMKA, PRESIDENT OF THE INTERNATIONAL COURT OF JUSTICE, TO THE LEGAL ADVISERS OF UNITED NATIONS MEMBER STATES

Introductory remarks at the Seminar on the Links between the Court and the other Principal Organs of the United Nations

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Mr. Under-Secretary-General and Legal Counsel,
Legal Advisers and distinguished guests,

I am pleased to address the seminar organized by the United Nations Office of Legal Affairs. This year's seminar topic is devoted to Links between the International Court of Justice (hereinafter "ICJ" or "Court") and other Principal Organs of the United Nations (hereinafter "UN"). I would like to offer a few reflections on these links while keeping in mind that UN organs work in concert with a view to, *inter alia*, maintaining international peace and security and promoting fundamental human rights. Within this framework, the ICJ's primary role is to settle international disputes between States submitted to it within the confines of its jurisdiction, and in accordance with international law¹.

The Court's Role within the UN Framework

The Court is one of the six main organs of the UN and constitutes its principal judicial organ pursuant to Article 92 of the UN Charter². Contrary to its predecessor, the Permanent Court of International Justice, which, while instituted by the League of Nations was not legally part of that entity, the ICJ was fully integrated into the institutional architecture of the newly created UN. However, the framers of the UN, as they devised this organization in San Francisco in 1945, remained mindful of the need for jurisprudential continuity and evolution: as a result, the Court's Statute enables the ICJ to rely on the jurisprudence of its predecessor, as this text is expressly based on the PCIJ's own statute.

Two significant consequences flow from the Court's complete integration into the UN framework. On one hand, when carrying out its judicial functions — be they in the context of contentious or advisory proceedings — the Court must remain guided by the purposes and principles enshrined in Articles 1 and 2 of the UN Charter. In fact, a key principle laid down in Article 1 is intimately connected with the Court's mission, namely "to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace".

The Court has recognized the importance of its advisory function within the broader UN framework. Thus, in the *Wall Advisory Opinion*, the Court acknowledged that in light of "its responsibilities as the "principal judicial organ of the United Nations", "the Court should in principle not decline to give an advisory opinion"³. More relevantly, the Court thereby echoed the

¹For seminal accounts on the Court and its activities, see Shabtai Rosenne, *The Law and Practice of the International Court, 1920-2005*, Vol. 4, 4th ed. (Leiden, Martinus Nijhoff, 2006); Robert Kolb, *The International Court of Justice* (Oxford, Hart Publishing, 2013) pp. 1362.

²This provision reads as follows: "The International Court of Justice shall be the principal judicial organ of the United Nations. It shall function in accordance with the annexed Statute, which is based upon the Statute of the Permanent Court of International Justice and forms an integral part of the present Chapter." On its role in this capacity, see Mohamed S. M. Amr, *The Role of the International Court of Justice as the Principal Judicial Organ of the United Nations* (The Hague, Kluwer Law International, 2003).

³*Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004 (I)*, p. 156, para. 44.

remarks it made earlier in its *Interpretation of Peace Treaties Advisory Opinion*, dating back some years, where it recognized that fulfilling its advisory function “represents its participation in the activities of the Organization, and, in principle, should not be refused”⁴. More recently, in the *Kosovo Advisory Opinion*, the Court once again equated its advisory function with direct participation in the activities of the UN⁵.

The Court’s adjudicative function as a complement to Other UN Organs

There is no doubt that the Court plays an important role in the dispute settlement system envisaged by the UN Charter, and that ICJ involvement helps advance the broader goals and principles of the UN. For instance, Article 2 (3) of the Charter states that all UN Member States “shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered”.

While it is true that the Court’s jurisdiction remains based on the consent of States appearing before it, with proposals aiming to institute compulsory jurisdiction having been rejected in San Francisco in 1945, the UN Charter nonetheless carves out an exceedingly important judicial function for the Court in adjudicating international disputes. This observation is particularly applicable to the resolution of disputes susceptible of endangering the maintenance of international peace and security, which constitutes the exclusive focus of Chapter VI of the Charter. It is imperative to keep in mind that Article 36 of the Charter vests the Security Council with the power to recommend appropriate procedures or methods of adjustment to States parties to an international dispute, the extension or aggravation of which are susceptible of jeopardizing international peace and security. Paragraph 3 of that article states the following:

“In making recommendations under this Article the Security Council should also take into consideration that legal disputes should as a general rule be referred by the parties to the International Court of Justice in accordance with the provisions of the Statute of the Court”.

Indeed, the restoration of harmonious relations between States sometimes hinges on the judicial resolution of their disputes by the Court. This possibility becomes particularly compelling when seen through the prism of Chapter VI of the UN Charter, which addresses the pacific settlement of disputes likely to endanger the maintenance of international peace and security. Thus, the prospect of the Security Council recommending to parties to refer their dispute to the Court may have a stabilizing impact on the relations between the parties or defuse tensions between them, a feature that often characterizes proceedings before the Court. This is particularly true with respect to disputes involving competing claims to sovereignty or maritime zones. In the absence of fruitful avenues of resolution by means of mediation or negotiation, or where creative solutions such as joint management and exploitation régimes may not be devised, recourse to the Court remains a viable and peaceful settlement option for disputing States. The Security Council has not frequently used its power to recommend to the parties that they refer their dispute to the ICJ; the best known example is the seminal case concerning the *Corfu Channel (United Kingdom v. Albania)*.

The Security Council can also play a role in ensuring compliance with the Court’s decisions, although such role is infrequently invoked given that the Court’s decisions have generated a strong record of compliance by parties. The Court does not concern itself with enforcing its own judgments, as parties to a dispute before it undertake to comply with its decisions by virtue of Article 94, paragraph 1, of the Charter. In the rare event that such compliance is unfulfilled, a party

⁴*Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase, Advisory Opinion, I.C.J. Reports 1950*, p. 71.

⁵*Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, I.C.J. Reports 2010 (II)*, p. 416, para. 30.

seeking to enforce the Court's judgment may seize the Council of the matter pursuant to Article 94, paragraph 2. That provision states that "[i]f any party to a case fails to perform the obligations incumbent upon it under a judgment rendered by the Court, the other party may have recourse to the Security Council, which may, if it deems necessary, make recommendations or decide upon measures to be taken to give effect to the judgment".

Alternatively, any UN Member State may bring the matter to the attention of the Council under Article 35 of the Charter, provided they are satisfied that a dispute or situation exists "which might lead to international friction or give rise to a dispute". I should also like to recall that the Security Council does not enjoy a monopoly over recommending compliance with decisions of the Court. Under the terms of Article 10 of the UN Charter, the General Assembly may also put forward such a recommendation. This was one avenue Nicaragua pursued in 1986 regarding the Court's Judgment in the case concerning *Military and Paramilitary Activities in and against Nicaragua*, after its earlier attempts to seize the Security Council of the matter resulted in two draft resolutions being vetoed by a Permanent Member. Ultimately, the General Assembly adopted a resolution urging immediate compliance with the Judgment.

The jurisdiction of each principal organ of the UN is delineated by the Charter; with respect to the Court's own area of competence, I should like to underscore that the Statute of the ICJ forms an integral part of the UN Charter. Despite the division and allocation of respective powers to the principal organs under the Charter, no provision analogous to Article 12 of the Charter⁶, which would somehow delimit the jurisdiction of the Court or govern the interaction between it and other UN organs, appears in either the Charter or the Court's Statute. As such, the Court's jurisprudence on this front demonstrates two broad trends. On the one hand, the fact that either the General Assembly or the Security Council is exercising in respect of a dispute the functions assigned to it by the Charter will not impede the prospect of States submitting the very question under consideration for adjudication by the Court⁷. On the other hand, the Court's exercise of the primary judicial role under the Charter system also brings the organic complementarity of its own mission to the work carried out by other UN organs into sharp relief.

Thus, in the *Tehran Hostages* case, the Court underscored that the Security Council was "actively seized of the matter" and

"that the Secretary-General was under an express mandate from the Council to use his good offices in the matter when . . . the Court decided unanimously that it was competent to entertain the United States' request for an indication of provisional measures, and proceeded to indicate such measures"⁸.

The Court further declared that,

⁶Article 12 reads as follows:

- "1. While the Security Council is exercising in respect of any dispute or situation the functions assigned to it in the present Charter, the General Assembly shall not make any recommendation with regard to that dispute or situation unless the Security Council so requests.
2. The Secretary-General, with the consent of the Security Council, shall notify the General Assembly at each session of any matters relative to the maintenance of international peace and security which are being dealt with by the Security Council and shall similarly notify the General Assembly, or the Members of the United Nations if the General Assembly is not in session, immediately the Security Council ceases to deal with such matters."

⁷See also: Krzysztof Skubiszewski, "The International Court of Justice and the Security Council" in A. Vaughan Lowe et al (eds), *Fifty Years of the International Court of Justice: Essays in Honour of Sir Robert Jennings* (Cambridge, Cambridge University Press, 1996), pp. 606-629; Alain Pellet, "Strengthening the Role of the International Court of Justice as the Principal Judicial Organ of the United Nations" (2004) 3, *The Law and Practice of International Courts and Tribunals* pp. 159-180.

⁸*United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran)*, Judgment, I.C.J. Reports 1980, p. 21, para. 40.

“[w]hereas Article 12 of the Charter expressly forbids the General Assembly to make any recommendation with regard to a dispute or situation while the Security Council is exercising its functions in respect of that dispute or situation, no such restriction is placed on the functioning of the Court by any provision of either the Charter or the Statute of the Court”⁹.

Ultimately, the Court confirmed the primacy of its role in ensuring the peaceful judicial settlement of international disputes in the following terms:

“The reasons are clear. It is for the Court, the principal judicial organ of the United Nations, to resolve any legal questions that may be in issue between parties to a dispute; and the resolution of such legal questions by the Court may be an important, and sometimes decisive, factor in promoting the peaceful settlement of the dispute.”¹⁰

The links between the Court’s judicial function and the activities carried out by the other principal UN organs was further developed in the case concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States)*. At the jurisdiction and admissibility phase of the case, the Court reproduced the contents of Article 24 of the Charter to emphasize that, while the Security Council is vested with the primary responsibility for the maintenance of international peace and security within the UN system, that responsibility is by no means exclusive¹¹.

The Court further remarked that

“[w]hile in Article 12 there is 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”¹².

Highlighting some of the links that have brought us together here today, the Court went on to declare “that the fact that a matter is before the Security Council should not prevent it being dealt with by the Court and that both proceedings could be pursued *pari passu*”¹³.

Furthermore, the Court recalled that it “never shied away from a case brought before it merely because it had political implications or because it involved serious elements of the use of force” before again reiterating the organic links that bind the Court and other principal UN organs in the furtherance of common purposes and objectives: “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 events.”¹⁴

⁹*United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran)*, Judgment, I.C.J. Reports 1980, p. 22, para. 40.

¹⁰*Ibid.*

¹¹*Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984, p. 434, para. 95. See also: *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion*, I.C.J. Reports 2004 (I), para. 26; *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion*, I.C.J. Reports 2010 (II), pp. 419-420, para. 40.

¹²*Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984, pp. 434-435, para. 95.

¹³*Ibid.*, p. 433, para. 93.

¹⁴*Ibid.*, p. 435, paras. 95-96.

Similarly, this time in the *Lockerbie* cases, the Court stressed that, should it have jurisdiction to entertain a dispute at the time the application instituting proceedings was submitted to it, subsequent Security Council resolutions and intervention would have no bearing on that jurisdiction, once established¹⁵. The Court's conclusion on this front remained congruent with its earlier remarks in the *Tehran Hostages* case when it had observed that "legal disputes between sovereign States by their very nature are likely to occur in political contexts, and often form only one element in a wider and longstanding political dispute between the States concerned"¹⁶.

Consequently, the Court indicated that

"never has the view been put forward before that, because a legal dispute submitted to the Court is only one aspect of a political dispute, the Court should decline to resolve for the parties the legal questions at issue between them. Nor can any basis for such a view of the Court's functions or jurisdiction be found in the Charter or the Statute of the Court ; if the Court were, contrary to its settled jurisprudence, to adopt such a view, it would impose a far-reaching and unwarranted restriction upon the role of the Court in the peaceful solution of international disputes."¹⁷

This undoubtedly prompted the Court to reassert, in the 2004 *Wall Advisory Opinion*, that the political nature of a question submitted for its consideration would not constitute a bar to establishing its jurisdiction. In the Court's view, it followed that the fact that a legal question also had political aspects was insufficient to deprive it of its character as a "legal question", or to prevent the Court from exercising jurisdiction over the matter¹⁸.

The relationship between the Court and the General Assembly

I should also like to point out that the Court's activities and programme of work also depend, to a significant extent, on General Assembly involvement. This involvement takes on various forms, primarily with respect to the Court's budget and electoral process. For instance, under the Court's Statute the General Assembly approves the Court's budget and the conditions of service of its Members (Articles 32 and 33). It is also interesting to underscore that since 1968, and of its own initiative, the Court submits an annual report on its activities to the General Assembly. With respect to the Court's electoral process, the General Assembly, together with the Security Council, elects the Members of Court from the list of candidates nominated by the members of the Permanent Court of Arbitration (Articles 5, 7, 8 and 10).

On a more substantive level, the General Assembly can and has rather frequently requested that the Court deliver an advisory opinion on a particular legal question, in the hope that the judicial organ will illuminate the work of the relevant international organization(s) in the future. Moreover, the General Assembly also disposes of the ability to authorize — by way of resolution — other international organizations to request advisory opinions from the Court.

¹⁵*Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United Kingdom), Preliminary Objections, Judgment, I.C.J. Reports 1998*, pp. 22-24; *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United States of America), Preliminary Objections, Judgment, I.C.J. Reports 1998*, pp. 127-29.

¹⁶*United States Diplomatic and Consular Staff in Tehran, Judgment, I.C.J. Reports 1980*, p. 20, para. 37.

¹⁷*Ibid.*

¹⁸*Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004 (I)*, p. 155, para. 41.

The role of the Secretary-General

Last, I should stress that many of the Court's activities benefit from efficient co-ordination with the UN Secretary-General. For instance, the Secretary-General submits budgetary proposals prepared by the Court necessary for its operations. In addition, the Secretary-General takes on a significant role in the context of the election of Members to the Court, thereby addressing requests to the members of the Permanent Court of Arbitration belonging to the States which are parties to the Court's Statute, and to members of the national groups appointed under the same instrument so as to seek nominations of candidates for judicial office (Article 5); preparing a list of candidates and presenting it to the General Assembly and Security Council (Article 7); and issuing invitations for nominations when a judicial vacancy occurs at the Court (Article 14). Moreover, the Secretary-General acts as a depository of Article 36 (2) declarations made by States recognizing as compulsory *ipso facto* and without special agreement the jurisdiction of the Court. Such declarations are deposited with the Secretary-General, "who shall transmit copies thereof to the parties to the Statute and to the Registrar of the Court" (Article 36 (4)).

The Secretary-General has also been instrumental in the efforts to enhance and strengthen the Court's ability to adjudicate international disputes taking root in all parts of the globe. A more widely recognized jurisdiction of the principal judicial organ of the UN will enable the Court to fulfil its primary function by encouraging UN Member States to contemplate the pacific judicial settlement of their disputes as a viable avenue, thereby also further advancing the objectives of the UN Charter, particularly the maintenance of international peace and security. In that regard, the Secretary-General launched a campaign aiming to increase Article 36 (2) declarations among the UN membership, which constitutes a welcome and forward-looking initiative. As distinguished and privileged counsel and advisers working specifically in the field of public international law, you are particularly well situated when advising your respective Ministers on international affairs. I also invite you to envisage promoting both dispute settlement by the Court and greater adherence to its compulsory jurisdiction as ways to achieve peaceful conflict resolution and more harmonious inter-State relations.

Concluding remarks

The picture that emerges as regards the respective mandates of the ICJ and other principal UN organs is one of complementarity and common investment in the promotion and maintenance of international peace and security and justice. Within this framework, the ICJ has been vested with the principal responsibility of delivering international justice, through judicial means, which typically translates into the pacific settlement of disputes between States in contentious proceedings and, less frequently, into the delivery of advisory opinions.

Mr. Under-Secretary-General and Legal Counsel, Legal Advisers and distinguished guests,

I have attempted to demonstrate how various UN organs may simultaneously or sequentially address different aspects of the same international disputes, each one playing an important role in furthering the purposes and principles of the UN common to all of its organs. Within this system, through its judgments and advisory opinions the Court has made several significant contributions not only to the peaceful resolution of international disputes, but also to the development of international law.

I look forward to the exchanges that will follow. Thank you very much for the opportunity to address you today.
