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A Primer on the Relationship between the Security Council and the International Court of Justice

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EXECUTIVE SUMMARY

The Security Council and the International Court of Justice both play a crucial role in the pacific settlement of disputes and, thereby, in the maintenance of international peace and security. In recent years, the Security Council has been perceived by many as faltering in this role, while States have increasingly placed their trust in the Court. The Charter of the United Nations provides for ways in which the Council and the Court can interact to reinforce the international rule of law, to promote peace and security, and to enhance each other's legitimacy. Many of these avenues for interaction remain underutilized since the establishment of the United Nations.

The Council and the Court are both principal organs of the United Nations. The Security Council's primary responsibility is the maintenance of international peace and security, while the Court serves a legal function as the United Nations' principal judicial organ. Both have the power to impose binding obligations on Member States: the Security Council through its decisions, and the Court through its judgments and orders.

These organs interact in several ways. The Security Council plays an important role in electing individuals to serve as judges at the Court and in opening the Court to States that are not Members of the United Nations. In interpreting the Charter of the United Nations, the Court has helped to define the Security Council's powers and responsibilities. Although it has no formal power of judicial review, the Court has also interpreted Security Council resolutions.

The Security Council may recommend that parties to a dispute that poses a threat to international peace and security refer their dispute to the Court. The Security Council may also request from the Court an advisory opinion on any legal question, though, in over seventy years, it has done so only once. The Security Council also has the power to make recommendations or decide upon measures to give effect to a judgment of the Court when a party to a case fails to perform its obligations under that judgment. Yet, notably, the Council has never exercised that power.

States elected to the Security Council may wish to consider how they can leverage their position to utilize underused provisions in the Charter concerning the relationship between the Security Council and the International Court of Justice. For example, States may consider employing the Security Council's power to help give effect to judgments of the Court and to request advisory opinions from the Court. Non-permanent members of the Security Council may also wish to benefit from the increased influence that members of the Security Council possess, as compared to the General Assembly, during elections of judges to the Court.

CREDITS

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About This Primer Series

Despite the extraordinary authority placed in the United Nations Security Council, relatively little is known about its day-to-day workings outside its five permanent members and UN support staff. Indeed, the permanent members benefit from decades of continuous experience, as well as relatively large teams in New York and at their respective capitals devoted to international law and policy matters. Members elected for a two-year term at the Council often do not possess equivalent expertise, resources, and personnel. In a series of primers, HLS PILAC seeks to help fill an arguable informational gap concerning international law and the Council between the permanent and elected members. Building off a 2020 general primer for elected members published by HLS PILAC, these new analyses are intended to furnish elected members with important additional information that they can use as they see fit. The primary target audience includes current and future elected members of the Council, in particular those States' legal and policy advisers. The series' objective is not to proscribe or prescribe particular approaches but, rather, to apprise States of certain key issues that may be borne in mind in navigating engagements with and at the Security Council.

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INTRODUCTION

The Charter of the United Nations provides for several ways in which the Security Council and the International Court of Justice (ICJ) can interact. Certain provisions in the U.N. Charter may facilitate the Security Council and the Court cooperating to settle international disputes peacefully, as a way of maintaining international peace and security. However, many of these provisions, although legally in force, remain underused in practice.

The Security Council and the ICJ are the only organs of the United Nations that have the power to issue binding obligations on Members. The U.N. Charter accords this power so that these organs may play their respective roles in the peaceful settlement of international disputes. Under the Charter, the Security Council bears primary responsibility for maintaining international peace and security, and the ICJ provides States with an avenue for settling disputes without recourse to force. The U.N. Charter marked the departure from a public international law that could countenance the use of force as a means of resolving international disputes. These organs are emblematic of that and are instrumental in giving effect to a system that prioritizes peace.

These organs fundamentally differ. The Security Council is made up of States, some permanently present, with political interests, charged with exceptional powers to promote and preserve peace. The Court, on the other hand, is composed of independent and impartial individuals serving terms as judges interpreting and applying international law. Nevertheless, there is much scope for interaction between the two organs. In addition to helping give effect to the ICJ's judgments, the Security Council can refer disputes and questions of international law to the Court. The ICJ, meanwhile, has frequently interpreted Security Council powers and responsibilities under the U.N. Charter, as well as texts adopted by the Council.

In practice, the Council and the Court do not interact as much as they could. Indeed, many of the relevant provisions of the U.N. Charter have been arguably underutilized since the establishment of the U.N. For instance, while the Council can compel States to comply with the Court's judgments, some of the Court's most high-profile decisions remain unenforced. At a time when the international rule of law is widely seen as waning, it is important to recall that members of the Security Council are uniquely positioned to help ensure that the ICJ is as impactful as possible.

Certain provisions of the U.N. Charter and of the ICJ Statute articulate the role of the Court and its relationship to the Security Council. These provisions concern such issues as referrals to the Court, recourse to the Council if ICJ judgments are not implemented, the Council requesting advisory opinions from the Court, and the Security Council allowing non-U.N. Members into the Court's proceedings.

More specifically, under Article 7 (1) of the U.N. Charter, the Security Council and the ICJ are both among the "principal organs of the United Nations".¹ Pursuant to Article 36 (3) of the U.N. Charter, the Security Council, when recommending procedures for the pacific settlement of disputes, "should [. . .] 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."² As set out in Article 92 of the U.N. Charter, the "International Court of Justice shall be the principal judicial organ of the United Nations. It shall function in accordance with" its Statute, which is annexed to, "and forms an integral part of," the U.N. Charter.³ Under Article 94 (1) of the U.N. Charter, "[e]ach Member of the United Nations undertakes to comply with the decision of the International Court of Justice in any case to which it is a party."⁴ In addition, under Article 94 (2), "[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."⁵ Further, according to Article 96 (1) of the U.N. Charter, "[t]he General Assembly or the Security Council may request the International Court of Justice to give an advisory opinion on any legal question."⁶ And, as set out in Article 35 (2) of the I.C.J. Statute, the Security Council shall lay down the "conditions under which the Court shall be open to" States that are not states parties to the Statute.⁷

This primer reviews select legal aspects and policy issues concerning the

¹ U.N. Charter art. 7, ¶ 1.

² *Id.* art. 36, para. 3.

³ *Id.* art. 92.

⁴ *Id.* art. 94, ¶ 1.

⁵ *Id.* art. 94, ¶ 2.

⁶ *Id.* art. 96, ¶ 1.

⁷ Statute of the International Court of Justice art. 35, ¶ 2.

relationship between the Security Council and the ICJ. In particular, this primer highlights the respective positions of both organs within the U.N. system, as well as the complementary roles of the organs in promoting the peaceful settlement of disputes. This primer also discusses the ability of the Security Council to seek advisory opinions from the Court and to help enforce judgments of the Court that are not being complied with.

The purpose of this primer is to help equip current and future Security Council elected members with information that may be useful in connection with the responsibility of the Council to maintain international peace and security, particularly through increasing the efficacy of the Court. This primer has been developed with reference to a range of primary materials, including U.N. and ICJ documents, as well as through informal consultations with experts and ICJ officials. With respect to these and to secondary sources reviewed, it should be noted that this primer is based on a non-comprehensive review of publicly available sources published in English or French.

1. STATUS AND ROLE OF THE SECURITY COUNCIL AND THE INTERNATIONAL COURT OF JUSTICE WITHIN THE UNITED NATIONS

The U.N. Charter sets out the relative positions and purposes of the Security Council and the ICJ within the U.N. Organization. Under Article 7 (1) of the U.N. Charter, both are established as principal organs of the U.N.⁸ In this respect, neither has international legal personality separate from that of the U.N. itself.⁹ Rather, they function alongside each other, albeit in different locations,¹⁰ as parts of a wider international organization.

As principal organs of the U.N., the Security Council and the ICJ serve different functions. Under Article 24 (1) of the U.N. Charter, the Security Council has “primary responsibility for the maintenance of international peace and security”.¹¹ The Security Council is frequently referred to as a

⁸ U.N. Charter art. 7, ¶ 1. The other principal organs of the U.N. are the General Assembly, the Economic and Social Council, the Trusteeship Council, and the Secretariat. *Id.*

⁹ See Michael Wood and Eran Sthoeger, *THE UN SECURITY COUNCIL AND INTERNATIONAL LAW* 9 (2022).

¹⁰ The ICJ, located in The Hague, the Netherlands, is the only principal organ of the U.N. to be based outside the U.N. Headquarters in New York.

¹¹ U.N. Charter art. 24, ¶ 1.

political organ, including by the ICJ.¹² This is largely to distinguish it from judicial, technical, and administrative organs.¹³ Meanwhile, under Article 92 of the U.N. Charter, the Court is the “principal judicial organ of the United Nations.”¹⁴ Article 38 (1) of the ICJ Statute provides that the ICJ’s “function is to decide in accordance with international law such disputes as are submitted to it.”¹⁵ In addition, when called upon to issue its opinion on legal questions duly submitted to it, the ICJ serves an advisory function.¹⁶

To fulfill their different functions, the Security Council and the ICJ have different powers. The Security Council may, among other powers, make recommendations, decide on measures, initiate investigations, and even authorize armed force. Under Article 25 of the U.N. Charter, Members “agree to accept and carry out the decisions of the Security Council in accordance with the [. . .] Charter.”¹⁷ The ICJ may issue judgments and provisional measures that, under Article 94 (1) of the U.N. Charter, entail binding obligations on the States concerned. Arguably, the widest scope for possible interaction between the powers of the Security Council and the ICJ concerns the pacific settlement of disputes (see Section 2 below), the referral of legal questions for advisory opinions (see Section 3 below), and the enforcement of ICJ judgments (see Section 4 below).

The Security Council and the ICJ may also interact in ways that relate less to their respective functions and more to their respective place within the U.N. system. The following subsections describe the role played by the Security Council in elections of judges to the Court, opening the Court to States that are not Members of the U.N., and the role played by the ICJ in interpreting the Security Council’s powers and responsibilities under the U.N. Charter.

¹² *E.g.*, *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, Advisory Opinion, 2010 I.C.J. 403, ¶ 46 (July 22). The ICJ also refers to the General Assembly in the same manner. *E.g.*, *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, 1974 I.C.J. 16, ¶ 102 (June 21).

¹³ *See* Wood & Sthoeger, *supra* note 9, at 10–11.

¹⁴ U.N. Charter art. 92.

¹⁵ Statute of the International Court of Justice art. 38, ¶ 1.

¹⁶ *See id.* art. 65, ¶ 1.

¹⁷ *Id.* art. 25. *See also* 1974 I.C.J. 16, ¶ 113 (“Article 25 is not confined to decisions in regard to enforcement action but applies to ‘the decisions of the Security Council’ adopted in accordance with the Charter.”).

1.1. Elections of Members of the Court

The Security Council plays a significant role in the organization of the Court. Under Article 4 (1) of the ICJ Statute, “[t]he members of the Court shall be elected by the General Assembly and by the Security Council” from a list of nominated persons.¹⁸ Pursuant to Article 8 of the Statute, “[t]he General Assembly and the Security Council shall proceed independently of one another to elect the members of the Court.”¹⁹ Under Article 10 (1) of the Statute, “[t]hose candidates who obtain an absolute majority of votes in the General Assembly and in the Security Council shall be considered as elected.”²⁰ Article 10 (2) of the Statute provides that “[a]ny vote of the Security Council [. . .] shall be taken without any distinction between permanent and non-permanent members of the Security Council.”²¹

Under Article 10 (2) of the ICJ Statute, permanent and non-permanent members of the Security Council possess the same voting power for the election of judges to the ICJ.²² This marks one of the few instances in which States elected to the Security Council wield an equally effective vote as compared to the permanent members, which possess a veto in votes on all but “procedural” matters.²³ Furthermore, as one of 15, the vote of each member of the Security Council bears more weight than the vote of the same State in the General Assembly. Moreover, a State on the Security Council will vote twice: once in the Security Council and once in the General Assembly.

As such, States elected to the Security Council have relatively more formal influence on the election of judges to the ICJ, as compared to States that are only in the General Assembly. Such elections occur every three years, as well

¹⁸ Statute of the International Court of Justice art. 4, ¶ 1.

¹⁹ *Id.* art. 8.

²⁰ *Id.* art. 10, ¶ 1. “If, after the first meeting held for the purpose of the election, one or more seats remain to be filled, a second and, if necessary, a third meeting shall take place.” *Id.* art. 11. If, after the third meeting, one or more seats still remain unfilled, then either the Security Council or the General Assembly may request the formation of a “joint conference of six members, three appointed by the General Assembly and three by the Security Council” to vote for each vacant seat. *Id.* art. 12, ¶ 1. If the joint conference is satisfied that it cannot reach a successful vote, then the Security Council will fix a period for Members of the Court who have already been elected to fill the vacant seats by selecting from candidates who have already obtained votes either in the General Assembly or the Security Council. *Id.* art. 12, ¶ 3.

²¹ *Id.* art. 10, ¶ 2.

²² *Id.*

²³ Compare U.N. Charter art. 27, ¶ 2 (“Decisions of the Security Council on procedural matters shall be made by an affirmative vote of nine members.”), with *id.* ¶ 3 (“Decisions of the Security Council on all other matters shall be made by an affirmative vote of nine members including the concurring votes of the permanent members.”).

as upon the resignation or death of an incumbent member the Court. There is therefore at least a 50-percent chance that elected members will have the opportunity to contribute their influence to the outcome.

1.2. Opening the Court to Non-Member States

The Security Council is involved in opening the Court to States that are not Members of the U.N. Under Article 35 (1) of the ICJ Statute, “[t]he Court shall be open to the states parties to the present Statute.”²⁴ Pursuant to Article 93 (1) of the U.N. Charter, “[a]ll Members of the United Nations are ipso facto parties to the Statute of the International Court of Justice.”²⁵ The Court is open, therefore, to all U.N. Member States.

In the rare instance where a State that is not a member of the U.N. would seek to appear before the ICJ, per Article 93 (2) of the U.N. Charter, “[a] state which is not a Member of the United Nations may become a party to the Statute of the [ICJ] on conditions to be determined in each case by the General Assembly upon the recommendation of the Security Council.”²⁶ Under Article 35 (2) of the ICJ Statute, “[t]he conditions under which the Court shall be open to other states shall [. . .] be laid down by the Security Council.”²⁷

In 1946, the Security Council adopted resolution 9, according to which the Court would be open to a State that is not a party to the ICJ Statute if “such State shall previously have deposited with the Registrar of the Court a declaration by which it accepts the jurisdiction of the Court [. . .] and undertakes to comply in good faith with the decision or decisions of the Court and to accept all the obligations of a Member of the United Nations under Article 94 of the Charter.”²⁸ Such a declaration may be made with respect to a particular dispute or disputes or as a general recognition of the Court’s jurisdiction as compulsory in all disputes.²⁹ The question of whether an entity submitting such a declaration is a State is to be decided by the Court.³⁰

²⁴ Statute of the International Court of Justice art. 35, ¶ 1.

²⁵ U.N. Charter art. 93, ¶ 1.

²⁶ *Id.* art. 93, ¶ 2.

²⁷ Statute of the International Court of Justice art. 35, ¶ 2.

²⁸ S.C. Res. 9 (Oct. 15, 1946), ¶ 1.

²⁹ *Id.* ¶ 2.

³⁰ Shabtai Rosenne, *THE LAW AND PRACTICE OF THE INTERNATIONAL COURT, 1920-2005*, at 616–617 (4th ed. 2006).

This aspect of the relationship between the Council and the Court may seem dormant, given that the overwhelming majority of States are Members of the U.N. and that every Member of the U.N. is ipso facto party to the Statute. However, it is noteworthy that, at the time of writing, there are cases pending at the Court that include Palestine,³¹ which is not a Member of the U.N. Palestine has cited Article 35 (2) of the ICJ Statute and Security Council resolution 9 (1946) in declarations recognizing the jurisdiction of the ICJ with respect to those cases.³² States may emerge in the future that may not, at least not immediately, be Members of the U.N. Therefore, this avenue of interaction between the Security Council and the ICJ remains live, if rarely applied.

1.3. The Court's Interpretation of the Security Council's Powers and Responsibilities

The ICJ has had occasion to opine on certain legal aspects relating to the Security Council, not least in the context of the Court's advisory opinions. For example, the Court has compared the functions of the Security Council to those of the General Assembly. The ICJ has consistently concluded that, while the Security Council has "primary responsibility for the maintenance of international peace and security" under Article 24 of the U.N. Charter, that responsibility is not "exclusive".³³ Rather, in the view of the Court, the General Assembly "is also to be concerned with international peace and security."³⁴

As another example, the Court has confirmed that resolutions of the

³¹ At the time of writing, Palestine is the Applicant in *Relocation of the United States Embassy to Jerusalem (Palestine v. United States of America)* and has sought to intervene in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v. Israel)*.

³² Declaration Recognizing the Competence of the International Court of Justice, 4 July 2018, *Relocation of the United States Embassy to Jerusalem (Palestine v. U.S.)*, Application Instituting Proceedings, Annex 5, at 40, <https://www.icj-cij.org/sites/default/files/case-related/176/176-20180928-APP-01-01-EN.pdf>; Declaration Recognizing the Competence of the International Court of Justice, Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (S. Afr. v. Isr.), Request for Intervention and Declaration of Intervention of the State of Palestine, at 1 (May 31, 2024), <https://www.icj-cij.org/sites/default/files/case-related/192/192-20240603-int-01-00-en.pdf>.

³³ Certain Expenses of the United Nations, Advisory Opinion, 1962 I.C.J. 151, at 163 (July 20). See also, e.g., Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, ¶ 26 (July 9) ("However, the Court would emphasize that Article 24 refers to a primary, but not necessarily exclusive competence.")

³⁴ 1962 I.C.J. 151, at 163.

Security Council can create obligations binding on U.N. Member States.³⁵ In *Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter)*, the Court held that the Security Council has the “power to impose an explicit obligation of compliance” and that it alone “can require enforcement by coercive action”.³⁶ More recently, in *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, the Court reaffirmed that “Security Council resolutions can be binding on all Member States, irrespective of whether they played any part in their formulation.”³⁷ The Court has also sought to clarify that a given Security Council resolution may be “a mere recommendation without binding effect”.³⁸ In the view of the Court, “[t]he language of a resolution of the Security Council should be carefully analysed before a conclusion can be made as to its binding effect.”³⁹

There is some debate as to whether the ICJ has the power of judicial review over Security Council decisions. The Court itself has held that, “[u]ndoubtedly, the Court does not possess powers of judicial review or appeal in respect of the decisions taken by the United Nations organs concerned.”⁴⁰ Nevertheless, the Court has also held that, while the interpretation and application of a decision of the Security Council is, in the first place, the responsibility of that organ, the Court may consider the interpretation and legal effects of such decisions.⁴¹ This stems in large part from the Court’s establishment as the principal judicial organ of the U.N.⁴²

Some commentators point out that the U.N. Charter and the ICJ Statute do not expressly provide for the Court to review the actions of other organs and assert that those organs would not necessarily be bound by the Court’s

³⁵ *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, 1949 I.C.J. 174, at 178 (Apr. 11).

³⁶ 1962 I.C.J. 151, at 163.

³⁷ *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, Advisory Opinion, 2010 I.C.J. 403, ¶ 94 (July 22) (citing *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, 1971 I.C.J. 16, ¶ 116 (June 21)).

³⁸ *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libya v. U.S.)*, Preliminary Objections, Judgment, 1988 I.C.J. 115, ¶ 43 (Feb. 27).

³⁹ 1971 I.C.J. 16, ¶ 114 (“In view of the nature of the powers under Article 25, the question whether they have been in fact exercised is to be determined in each case, having regard to the terms of the resolution to be interpreted, the discussions leading to it, the Charter provisions invoked and, in general, all circumstances that might assist in determining the legal consequences of the resolution of the Security Council.”).

⁴⁰ *Id.* ¶ 89.

⁴¹ 2010 I.C.J. 403, ¶¶ 46–47.

⁴² *See id.*

interpretation of the U.N. Charter or of the decisions of U.N. organs. It has been argued that the ICJ is not a constitutional court of the U.N. system and has no power of judicial review over decisions and actions of any other organ or agency.⁴³ Others point out that, in practice, the Court has indeed reviewed decisions of both the Security Council and the General Assembly.⁴⁴ In this respect, it has been argued that part of the Court's role is to "act as a restraining factor in tracing the limits of Security Council action in terms of both the Charter and international law."⁴⁵ Certain proponents of this view, however, posit that the Court's review of Security Council decisions can occur only when such decisions incidentally come before the Court as part of a case duly submitted to it.⁴⁶

2. PACIFIC SETTLEMENT OF DISPUTES

The U.N. Charter provides for the Security Council and the ICJ to cooperate in certain respects to facilitate the pacific settlement of disputes. Under Article 36 (1) of the U.N. Charter, "[t]he Security Council may [. . .] recommend appropriate procedures or methods of adjustment" to the parties of any dispute that is likely to endanger the maintenance of international peace and security.⁴⁷ Article 36 (2) provides that "[t]he Security Council should take into consideration any procedures for the settlement of the dispute which have already been adopted by the parties."⁴⁸ And, pursuant to Article 36 (3), the Security Council should, in making recommendations under that article, "also take into consideration that legal disputes should as a general rule be referred by the parties to the [ICJ]"⁴⁹

Although it has the power to do so under Article 36 of the U.N. Charter,

⁴³ E.g., Terry Gill, *Remarks*, in CONTEMPORARY INTERNATIONAL LAW ISSUES: OPPORTUNITIES AT A TIME OF MOMENTOUS CHANGE 283, 284 (René Lefebvre ed., 1994).

⁴⁴ E.g., Wood & Stoen, *supra* note 9, at 175.

⁴⁵ Vera Gowlland-Debbas, *The Relationship between the International Court of Justice and the Security Council in the Light of the Lockerbie Case*, 88 AM. J. INT'L L. 643, 662 (1994). See also Thomas Franck, *UN Checks and Balances: The Role of the ICJ and the Security Council*, in CONTEMPORARY INTERNATIONAL LAW ISSUES: OPPORTUNITIES AT A TIME OF MOMENTOUS CHANGE 280–83 (René Lefebvre ed. 1994); W. Michael Reisman, *The Development of the Role of the Security Council*, in THE DEVELOPMENT OF THE ROLE OF THE SECURITY COUNCIL 399, 412–413 (René-Jean Dupuy ed. 1993).

⁴⁶ E.g., Gowlland-Debbas, *supra* note 45, at 664, 671.

⁴⁷ U.N. Charter art. 36, ¶ 1. Cf. *id.* art. 33.

⁴⁸ *Id.* art. 36, ¶ 2.

⁴⁹ *Id.* art. 36, ¶ 3.

the Security Council has only rarely recommended that States refer, or consider referring, their dispute to the ICJ. In a 1947 resolution, the Security Council recommended that Albania and the United Kingdom immediately refer their dispute to the Court, which led to the *Corfu Channel* case.⁵⁰ In 1976, the Security Council adopted a resolution in which it called upon Greece and Turkey to “take into account the contribution that appropriate judicial means, in particular the [ICJ], are qualified to make to the settlement of any remaining legal differences” between those States, though it stopped short of making a formal recommendation.⁵¹ This nevertheless ultimately led to the *Aegean Sea Continental Shelf* case, instituted by Greece but discontinued after the Court found that it did not have jurisdiction absent Turkey’s consent.⁵²

Members of the Security Council may wish to consider that recommendations for referral of disputes to the ICJ could further bolster respect for the international rule of law, particularly if used alongside the Security Council’s power to help give effect to the Court’s judgments. At the same time, members would do well to bear in mind that the Court’s jurisdiction is based on the consent of States, and that compelling States to submit their disputes to the Court may undermine that consent-based system. Nevertheless, already in 2006, the then-President of the ICJ, Rosalyn Higgins, noted in an open debate in the Security Council on the rule of law that, with respect to Article 36 (3) of the U.N. Charter, “the Security Council has failed to make use of this provision for many years. This tool needs to be brought to life and made a central policy of the Security Council.”⁵³ Despite that appeal, Article 36 (3) has remained unused.

Members of the Security Council could further consider that the Council has on occasion urged States to continue pursuit of judicial settlement of disputes. In a meeting on 4 September 1980, the Security Council discussed political tensions between Libya and Malta with regard to maritime delimitation.⁵⁴ The Council did not reach agreement on what action to take, but the discussion was reportedly a factor leading to the joint submission of the case

⁵⁰ U.N. SCOR, 2nd Sess., 127th mtg., U.N. Doc. S/PV.127 (Apr. 9, 1947).

⁵¹ S.C. Res. 395 (Aug. 25, 1976).

⁵² *Aegean Sea Continental Shelf (Greece v. Turk.)*, Judgment, 1978 I.C.J. 3 (Dec. 19).

⁵³ U.N. SCOR, 61st Sess., 5474th mtg., at 8, U.N. Doc. S/PV.5474 (June 22, 2006).

⁵⁴ U.N. SCOR, 25th Sess., 2246th mtg., U.N. Doc. S/PV.2246 (Sept. 4, 1980).

to the Court.⁵⁵ In 1996, amid clashes between Cameroon and Nigeria, the President of the Security Council wrote a letter to those States, saying that “[t]he members of the Council urge you to redouble your efforts to reach a peaceful settlement through the [ICJ].”⁵⁶ Members of the Security Council may therefore consider that, while formal recommendations under Article 36 might not always be attainable, bringing such topics to debate may nonetheless lead to similar outcomes.

2.1. Jurisdiction of the Court over Disputes Referred by the Security Council

Whether the Security Council refers or urges referral of disputes to the Court, there arises the question of the Court’s jurisdiction over such disputes. Article 36 (3) of the U.N. Charter, while urging the referral of disputes to the ICJ, contains the words “in accordance with the provisions of the Statute of the Court.”⁵⁷ The provisions of the ICJ Statute set out the scope of the Court’s jurisdiction. Under Article 36 (1) of the Statute, the Court’s jurisdiction includes “all cases which the parties refer to it.”⁵⁸ Therefore, if parties to a dispute were themselves to refer the dispute to the ICJ on the recommendation of the Security Council, such a dispute would likely fall within the Court’s jurisdiction. Furthermore, Article 36 (2) of the Statute also provides the option for States to accept as compulsory the jurisdiction of the Court.⁵⁹ Disputes referred to the ICJ involving parties that have recognized the Court’s jurisdiction as compulsory under Article 36 (2) of the ICJ Statute would fall squarely within the Court’s jurisdiction. The Court would also likely have jurisdiction over disputes concerning the interpretation and application of a treaty containing an applicable compromissory clause.

It is less clear whether the Security Council could compel the referral to the ICJ of a dispute involving parties that do not consent to the Court’s jurisdiction. Article 36 (1) of the ICJ Statute provides that the Court’s jurisdiction also comprises “all matters specially provided for in the Charter of the United

⁵⁵ Rosenne, *supra* note 30, at 138.

⁵⁶ President of the Security Council, Letter Dated 29 May 1996 from the President of the Security Council Addressed to the Secretary-General, U.N. Doc. S/1996/150 (Feb. 29, 1996). *See also* Rosenne, *supra* note 30, at 138.

⁵⁷ U.N. Charter art. 36, ¶ 3.

⁵⁸ Statute of the International Court of Justice art. 36, ¶ 1.

⁵⁹ *Id.* art. 36, ¶ 2.

Nations”⁶⁰ It has been argued that this would confer jurisdiction over disputes referred to the Court by the Security Council, even without the consent of the parties, under Article 36 of the U.N. Charter.⁶¹ In *Corfu Channel*, the United Kingdom contended that the Court had jurisdiction over the dispute following the Security Council’s recommendation under Article 36 (3) of the U.N. Charter that the parties refer their dispute to the ICJ.⁶² The Court did not rule on this issue, finding that it had jurisdiction over the dispute on other grounds.⁶³ Seven judges wrote in a joint separate opinion that they were not convinced that Article 36 (3) of the U.N. Charter could constitute a basis of the Court’s compulsory jurisdiction.⁶⁴ While this opinion may be persuasive, it is not necessarily conclusive of the issue, and the question has not arisen again.⁶⁵

3. ADVISORY OPINIONS

The Security Council is authorized under the U.N. Charter to request advisory opinions from the Court. Under Article 65 (1) of the ICJ Statute, “[t]he Court may give an advisory opinion on any legal question at the request of whatever body may be authorized by or in accordance with the Charter of the

⁶⁰ *Id.* art. 36, ¶ 1.

⁶¹ *Cf.* Wood & Sthoeger, *supra* note 9, at 162–163 (“However, it remains an open question whether the Court would accept that the Council is empowered to override the fundamental principle of international law that states can be required to submit to the jurisdiction of an international court or tribunal only if they consent to do so.”).

⁶² The United Kingdom maintained that Albania had accepted the Security Council’s invitation to participate in the discussion of the dispute on the condition that it accepts all the obligations that a Member of the U.N. would have to assume in a similar case. *Corfu Channel (U.K. v. Alb.)*, Preliminary Objections, Judgment, 1948 I.C.J. 15, at 21 (Mar. 25). The United Kingdom further argued that Article 25 of the U.N. Charter provides that Members of the U.N. agree to accept and carry out the decisions of the Security Council. *Id.* In the view of the United Kingdom, therefore, the Court had jurisdiction over the dispute, as a matter specially provided for in the U.N. Charter, given that the Security Council had recommended both States to refer the dispute to the ICJ. *Id.*

⁶³ In the view of the Court, Albania had voluntarily and indisputably accepted the Court’s jurisdiction in a letter addressed to the Court. *Id.* at 27.

⁶⁴ *Id.* at 31–32 (separate opinion by Basdevant, Alvarez, Winiarski, Zoričić, de Visscher, Badawi Pasha, & Krylov, JJ.). In reaching this view, the judges had regard to “the normal meaning of the word recommendation”, to the “general structure of the Charter and of the Statute which founds the jurisdiction of the Court on the consent of States”, and to “the terms used in Article 36, paragraph 3, of the Charter and to its object which is to remind the Security Council that legal disputes should normally be decided by judicial methods.” *Id.* at 32.

⁶⁵ Rosenne, *supra* note 30, at 671 (“It does not follow that the interpretation contained in that separate opinion, even were its principles later to be adopted by a majority of the Court, would exclude the possibility that the Security Council, acting under Chapter VII of the Charter, could not use some other verb than *recommend*, and in that way reinforce the contentions that a new case of compulsory jurisdiction has been created.”).

United Nations to make such a request.”⁶⁶ Article 96 (1) of the U.N. Charter provides that “[t]he General Assembly or the Security Council may request the [ICJ] to give an advisory opinion on any legal question.”⁶⁷ As such, the Security Council is authorized to request the Court’s advisory opinion on legal questions that it may refer to it.

Although the Security Council is expressly authorized to request advisory opinions from the Court, of the 29 advisory opinions issued by the ICJ, only one was requested by the Security Council: *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276*.⁶⁸ The General Assembly had terminated South Africa’s right to administer the territory of South West Africa (now Namibia). The Security Council called upon South Africa to withdraw its administration, declared South Africa’s continued presence illegal, and called upon all States to refrain from dealing with South Africa in any manner incompatible with that declaration. The Security Council then requested an advisory opinion from the Court on the legal consequences for all States of South Africa’s continued presence in the territory.

Members of the Security Council may wish to utilize the authority to request advisory opinions from the Court. Such requests must be formulated as “legal questions”—that is, questions framed in terms of law, susceptible of a reply based on law.⁶⁹ Advisory opinions provide authoritative interpretations of international law. While the Court’s decisions are binding on parties to contentious cases, advisory opinions do not by themselves have binding effect. That said, the Security Council may call upon Member States to give effect to conclusions of the Court in advisory opinions, as it did following the Court’s Advisory Opinion in *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security*

⁶⁶ Statute of the International Court of Justice art. 65, ¶ 1.

⁶⁷ U.N. Charter art. 96, ¶ 1. Legal questions, as defined in the Court’s jurisprudence, include a request for an advisory opinion “to examine a situation by reference to international law”, *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, Advisory Opinion, 2019 I.C.J. 95, ¶ 58 (Feb. 25), or a “question which expressly asks the Court whether or not a particular action is compatible with international law.” *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, Advisory Opinion, 2010 I.C.J. 403, ¶ 25 (July 22). More generally, legal questions are those which are “framed in terms of law and raise problems of international law” and “are by their very nature susceptible of a reply based on law.” *Western Sahara*, Advisory Opinion, 1975 I.C.J. 12, ¶ 15 (Oct. 16).

⁶⁸ For instances where the Security Council considered but declined to submit questions to the Court for advisory opinions, see *Rosenne*, *supra* note 30, at 318–320.

⁶⁹ See *supra* note 67 and accompanying text.

Council Resolution 276.

Members of the Security Council may also wish to consider instances in which the Court has held that the Security Council bears a particular responsibility with respect to a given situation. Most recently, for example, in its 2024 advisory opinion on the *Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem*, the Court found that “the precise modalities to bring to an end Israel’s unlawful presence in the Occupied Palestinian Territory is a matter to be dealt with by the General Assembly [. . .] as well as the Security Council.”⁷⁰ The ICJ concluded that “it is for the General Assembly and the Security Council to consider what further action is required to put an end to the illegal presence of Israel, taking into account the [Court’s] Advisory Opinion.”⁷¹

4. ENFORCEMENT

The Court does not have the means to enforce its own decisions, but the U.N. Charter provides for the Security Council to help fulfill this role in certain respects. Pursuant to Article 94 (1) of the U.N. Charter, “[e]ach Member of the United Nations undertakes to comply with the decision of the [ICJ] in any case to which it is a party.”⁷² In the event that any party to a case fails to perform the obligations incumbent upon it under a judgment rendered by the Court, Article 94 (2) provides that “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.”⁷³

⁷⁰ *Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem*, Advisory Opinion, ¶ 281 (July 19, 2024), <https://www.icj-cij.org/sites/default/files/case-related/186/186-20240719-adv-01-00-en.pdf>.

⁷¹ *Id.* See also *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, 1974 I.C.J. 16, ¶ 120 (June 21) (“The precise determination of the acts permitted or allowed—what measures are available and practicable, which of them should be selected, what scope they should be given and by whom they should be applied—is a matter which lies within the competence of the appropriate political organs of the United Nations acting within their authority under the Charter. Thus it is for the Security Council to determine any further measures consequent upon the decisions already taken by it on the question of Namibia.”). Cf. 2019 I.C.J. 95, ¶ 180 (“The Court considers that, while it is for the General Assembly to pronounce on the modalities required to ensure the completion of the decolonization of Mauritius, all Member States must co-operate with the United Nations to put those modalities into effect.”).

⁷² U.N. Charter art. 94, ¶ 1.

⁷³ *Id.* art. 94, ¶ 2.

At least two debates remain unsettled in relation to Article 94 of the U.N. Charter. One debate concerns whether the Security Council may make recommendations and decide upon measures only with respect to judgments of the Court or whether it may also do so with respect to orders indicating provisional measures.⁷⁴ It is notable, in this regard, that while Article 94 (1) uses the term “decision”, which encompasses both judgments and orders, Article 94 (2) uses the term “judgment”. Second, it is unclear whether the “recommendations” and “measures” referred to in Article 94 (2) would be taken by the Security Council under Chapter VI or Chapter VII of the U.N. Charter or, perhaps, under Article 94 (2) in its own right.⁷⁵

The enforcement of ICJ decisions is a way of potentially promoting the international rule of law while simultaneously fortifying the legitimacy of both the Security Council and the ICJ. The Security Council has never used its power to enforce an ICJ judgment, although, notably, most of the Court’s decisions are complied with.⁷⁶ Parties to contentious cases have requested the Security Council to act under Article 94 (2) of the U.N. Charter. For example, following the Court’s 1986 judgment in *Military and Paramilitary Activities in and Against Nicaragua*, Nicaragua requested an emergency meeting to consider the failure of the United States to comply.⁷⁷ The United States ultimately vetoed a draft resolution calling for its full and immediate compliance.⁷⁸ After the Court’s 1992 judgment in *Land, Island and Maritime Frontier Dispute (Honduras/El Salvador)*, Honduras submitted a letter to the Security Council, asking it to intervene to ensure execution of the judgment.⁷⁹ The Security Council made no such recommendation.

Members of the Security Council could call for the application of Article 94 (2) of the Charter in instances where parties do not comply with a judgment of the Court. It is unclear whether the words “the other party may have recourse to the Security Council” requires that one of the parties to a case must first call upon the Security Council to act. Nevertheless, the words “the

⁷⁴ Provisional measures indicated by the ICJ create binding obligations for the parties which they concern. *LaGrand (Ger. v. U.S.)*, Judgment, 2001 I.C.J. 466, ¶ 109 (June 27).

⁷⁵ See Wood & Sthoeger, *supra* note 9, at 178.

⁷⁶ See *id.* at 168; How the Court Works, INTERNATIONAL COURT OF JUSTICE, <https://www.icj-cij.org/how-the-court-works> (last visited Nov. 15, 2024) [<https://perma.cc/D5YZ-D7RP>].

⁷⁷ Wood & Sthoeger, *supra* note 9, at 168.

⁷⁸ *Id.*

⁷⁹ Letter Dated 22 January 2002 from the Chargé d’Affaires of the Permanent Mission of Honduras to the United Nations Addressed to the President of the Security Council, U.N. Doc. S/2002/108 (Jan. 22, 2002).

Security Council may, if it deems necessary” suggest that the Security Council has discretionary power to call upon parties to a case to give effect to a judgment by the Court.

Members of the Security Council may also consider that, short of taking action under Article 94 (2) of the U.N. Charter, the Council may refer to decisions of the Court in its own resolutions. Indeed, the Security Council has done so on occasion, having included in its resolutions a reference to provisional measures indicated by the Court in, as examples, *United States Diplomatic and Consular Staff in Tehran*⁸⁰ and *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*.⁸¹

CONCLUDING REMARKS

As a matter of law, the U.N. Charter equips the Security Council with powers to promote and maintain international peace and security. In reality, however, the Security Council often fails to act effectively in that very collective interest. Member States of the U.N., especially those elected to the Security Council, may seek the use of the tools described in this primer to help ensure that the Court’s decisions are complied with, that international disputes are resolved peacefully, and that the Security Council fulfills its responsibility. Members elected to the Security Council should consider that the U.N. Charter permits the Council to request advisory opinions from the Court, to refer disputes to the Court, and to help enforce the Court’s judgments. Any political impediments to the effective implementation of certain provisions of the U.N. Charter are to be dealt with in the political organ—that is, the Security Council. For its part, the Court is available to the Council—as well as to the General Assembly, in certain respects—as a partner organ for the pacific settlement of disputes and the maintenance of international peace and security.

⁸⁰ S.C. Res. 461 (Dec. 31, 1979).

⁸¹ S.C. Res. 819 (Apr. 16, 1993).

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