GLOBAL CONSTITUTIONALISM AND GLOBAL GOVERNANCE: TOWARDS A UN-DRIVEN GLOBAL CONSTITUTIONAL GOVERNANCE MODEL*

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Since the mid-20th century, we have witnessed the transition of the community of states towards a human world society (global community) based on global constitutional principles.1

In the intense and extensive debate on the concept and characteristics of “global constitutionalism”,2 internationalist lawyers have described the UN Charter as a milestone in the development of today’s basic principles specifically aimed at protecting common values and goods as well as at promoting objective safeguard mechanisms and procedures.

The phenomenon of global constitutionalization, characterized by the development of common constitutional principles,3 has given impetus to new dialogue between the UN organs and agencies as well as between the UN and other organizations and institutions, public and private. The UN are launching a governance model inspired by the basic tenets of constitutionalism4 complementing as well as going beyond the post-war normative and institutional structure of the Charter. The model is based on respect for certain generally accepted constitutional principles. These include world peace and security, the fundamental rights of individuals and peoples, the collective management of

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common goods, the implementation of constitutional concepts of rule of law, democracy, separation of powers, checks and balances, and judicial review.

Transcending their structure, the United Nations are developing on behalf of the global community the substantive and procedural rules/principles for the development of global governance that they take part in but do not replace.

On 24 September 2012, the UN General Assembly adopted the historic “Declaration on the rule of law at the national and international levels”. The Declaration stressed the inter-relationship between the rule of law and the three pillars of the United Nations: peace and security, development, and human rights. For the first time, Member States agreed on different aspects to be included in the basic profiles of rule of law and the need for greater coordination and coherence among the United Nations Agencies and Bodies and with donors and recipients (regional, sub-regional and other intergovernmental organizations, as well as the relevant civil society actors, including non-governmental organizations). This echoes the call of Professor Bassiouni in his Statement to the Assembly “to embrace specificity in their rule of law programs and focus on increasing their effectiveness.”

Substantially, the UN organs are focusing on respect of individual rights, thereby foreseeing an extension of their powers. The 1945 UN Charter, based on the legal subjectivity of states, programmatically established the principle of the protection of human rights and entrusted responsibility of the matter to the General Assembly (GA) without however attributing it binding decision-making powers. Binding decision-making power is vested in the Security Council in connection with the maintenance of international peace. In the matter of human rights, we are today witnessing the redefinition of the powers of the UN organs. Globalization, by shifting the focus on the human person, has brought to the fore the protection of individual rights, which has overtaken the protection of communities and issues of security. This shift in priorities has entailed the SC expanding its powers to ensure protection of human rights through the adoption of binding measures not only against states but also against individuals and groups deemed culpable of serious violations of the fundamental rights of individuals. The SC has achieved this by ascribing the violation of these rights under the "threat to peace" heading, whereby the binding sanctions are applied under the Charter according to Chapter VII. From this expansion of power derived the SC practice to adopt smart sanctions against individuals and groups deemed responsible for acts of international terrorism or other atrocities against individuals and core violations of human rights. Nevertheless, the UN Counter-Terrorism system established by the SC presents serious problems of legitimacy. The tendency of the SC to expand its powers has also affected other constitutional issues not entrusted to the competence of the SC. This, and in order to control the expansion and correctness of the powers of the political organs in accordance with the Charter and general international law, has provoked the parallel expansion of powers of the International Court of Justice (ICJ) in matters relating to individual human rights and peace to foster a just global society. The UN’s new constitutional governance model primarily engages the International Court of Justice (ICJ). The criticality of constitutional dialogue in the United Nations does not only concern human rights and peace. The UN organs are committed to redefining the content of constitutional principles that are - or are not - protected by the Charter, but also the way in which the allocation of

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5 A/RES 67/L.1, Declaration of the High-Level Meeting of the General Assembly on the Rule of Law at the National and International Levels (Sept. 24, 2012).
8 See infra note 160 and corresponding text.
powers and functions is interpreted and implemented given the GA’s lack of binding powers, the SC’s ineffectiveness due to veto, and the lack of definition in the Charter of rules designed to prevent and/or settle conflicts of jurisdiction between its organs (between public organs and between these and the highest judicial organ) and provide judicial control over GA acts and SC decisions.

The Court has recently ruled in several cases dealing with human rights and international peace and security issues (matters respectively under the competence of the GA and the SC). In doing so, and prompted by the constitutional principle of cooperation, it has emphasised the separation of powers between the principal political organs of the United Nations and the judicial organ, as expressed in the functional parallelism principle.

The Court’s forays into human rights and maintenance of peace matters create expectations of new directions the Court may take. Organs and states increasingly turn to the Court for advice and provisional measures. The Court strengthens and broadens its advisory and provisional functions to address individual constitutional rights as well as public interests and values. This trend is common to the current work of international courts and tribunals. Professor Merrills has stressed that “it is possible to see how the scope of adjudication has visibly broadened, as law is extended to embrace more and more aspects of international life, as well as a wider clientele.” Especially - as Judge Cançado Trindade stated - the dialogue established between courts has “reassuringly enhanced the position of individuals as subjects of the International Law of Human Rights, with full procedural capacity”.

As we will explore in this essay, in the LaGrand case, the Court interpreted at length Article 41 of its Statute and stated the binding effect of provisional measures. Continuing its efforts to safeguard human rights, the Court stated that the part of Article 94 (1) of the Charter stating that the decisions of the Court are binding, applies to any decision it takes, thus also to its orders indicating provisional measures. In preceding decisions, the Court had already expanded the ambit of procedural norms regulating the exercise of provisional powers under Article 41 of the Statute and Article 75 (1) of the Rules of Procedure (hereinafter Rules), making their exercise independent from the will of the parties. For instance, the Court can indicate measures that partly or entirely differ from those requested. It can examine motu proprio whether the circumstances warrant provisional

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10 J. G. Merrills, Reflections on International Adjudication in the Light of Recent Case Law, in Global Trends, cit. supra note 4, 231, at 246.


12 LaGrand (Germany v. United States of America), Judgment (June 27, 2001), paras. 109-110, ICJ Reports, 2001, at 466 ss., at 506. See also infra, Paragraph 2.1, note 32 and corresponding text.

13 Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria), Order (March 15, 1996), para. 41, ICJ Reports, 1996, at 13 ss., at 22; Armed Activities in the Territory of the Congo (Democratic Republic of the Congo v. Uganda), Provisional Measures, Order (July 1, 2000), para. 44-45, ICJ Reports, 2000, at 111 ss., at 128. The Court has claimed the power to indicate provisional measures to prevent the worsening or spreading of a dispute independently from any such request by the parties “whenever it considers that circumstances so require” (see Frontier Dispute (Burkina Faso/Republic of Mali), Requests for Indication of Provisional Measures, Order (Jan. 10, 1986), para. 18, ICJ Reports, 1986, at 3 ss., at 9; Certain Criminal Proceedings in France (Republic of the Congo v. France), Request for the Indication of Provisional Measures, Order (June 17, 2003), para. 39, ICJ Reports, 2003, at 102 ss., at 111).
measures.\textsuperscript{14} According to the interpretation of the Statute and the Rules, in case of extreme urgency, it can also indicate provisional measures without holding oral hearings.\textsuperscript{15}

The innovative position assumed by the Court in the \textit{Construction of a Wall} opinion is part of this trend. Consistent with this idea, repeatedly affirmed in principle, of the “judicial character” of its advisory function,\textsuperscript{16} the Court gave impetus to greater cooperation with UN political organs to safeguard human rights; it strongly urged them to give effect to its findings.\textsuperscript{17} Heeding the call of international legal scholars,\textsuperscript{18} the Court has finally acted on the idea that when exercising advisory functions it does not act as a mere expert body but rather as a judicial organ.\textsuperscript{19} As the Permanent Court did at the time of the Society of Nations, the Court has denied the downgrading of advisory functions to mere cooperation of the Court with the other organs of the UN.\textsuperscript{20}

The Court’s aim was (and is) to ensure effective protection of constitutional values. The most appropriate way to meet this challenge was to apply to the relationship between the UN organs, in view of the silence of the Charter, the key concepts of constitutional checks and balances and judicial review. The concept of balance of powers between political and judicial organs is one of the ways in which constitutional law introduces the idea of the absolute limit beyond which there is arbitrariness of political power. The balance of powers acknowledges participation of the courts in the legislative/normative functions and in those exercised by the political power. As is apparent from its \textit{obiter dicta}, what the Court wants to obtain by balancing the institutional functions between the organs is not the separation of powers in the strict sense - namely, the specialized-political power organs (CS-AG) exercising their respective functions on one hand and judicial power (the Court itself) on the other - but for non-specialized organs to contribute to their exercising for better functioning. The goal is clearly to force every organ, which by itself would tend only to increase its power, to prevent one branch from gaining too much power, and exercise it in conjunction with the others. As will be seen further on, the Court-Council cooperation model announced by the Court in the Nicaragua case creates a new notion of complementarity.

The analysis presented here draws on around twenty years of observations of international courts and tribunals - and especially of the ICJ - involved in building a global community.\textsuperscript{21} Therefore in the following we will focus our attention on those reflections which allow us to determine how the International Court of Justice is expanding its competencies and powers beyond the UN Charter and the Statute. It has committed itself to the protection of human rights and the maintenance of peace/constitutional values (Paragraph 2), cooperating with the UN organs (Paragraph 3), and affirms control over them, especially on SC decisions (Paragraph 4). Even in the absence of a clear

\hspace{1cm} 14 \textit{Armed Activities (Congo v. Uganda)}, cit. supra note 13, para. 38, at 127.

\hspace{1cm} 15 \textit{LaGrand} (Germany v. United States of America), Provisional Measures, Order (March 3, 1999), para. 21. ICJ Reports, 1999, at 9 ss., at 14.


\hspace{1cm} 17 Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion (July 9, 2004), paras. 160-161, ICJ Reports, 2004, at 136 ss., at 200. See also infra, notes 37-38 and corresponding text.


\hspace{1cm} 19 M. Bennouna, \textit{The Advisory Function of the International Court of Justice in the Light of Recent Developments}, in \textit{Global Trends}, cit. supra note 4, at 95.

\hspace{1cm} 20 See Judges Loder, Moore and Anzilotti, PCIJ Series E, No. 4, at 72 ss., at 75 ss.

separation of powers in the United Nations, and the lack of judicial review system under the Charter, the relationships the Court is building with global and national governance bodies largely determine the features of the emergent global constitutional governance model (Paragraph 5).


The ICJ plays a vital role in the constitutionalization process through widening its advisory and interim functions for the protection of constitutional values. This tool, together with the competence claimed by the Court over issues such as the use of force and the violation of human rights, provide a useful means to foster respect for rule of law and legality more generally.

2.1. - The ICJ’s New Approach to Human Rights Protection.

In recent provisional measures involving cases dealing with human rights issues, the Court has assumed a bold position. It did so because it is acutely aware of its indispensability to a community that is evolving towards a universal human society (global community) but which is also still lacking an adequate system of safeguards due to the UN General Assembly’s lack of binding powers and the ineffectiveness of specific human rights institutions, both global (Human Rights Committee) and regional (European and Inter-American Courts for human rights) vis-à-vis some powerful states. The Court follows the lead of the Universal Declaration of Human Rights when it intervenes with provisional measures to ensure the judicial protection of human rights for peoples, groups and also individuals. As stated by Judge Higgins, it does not fail to recognize “the humanitarian realities behind disputes” between states.

The Court was asked to indicate provisional measures meant to safeguard the life of certain individuals in three distinct cases filed against the United States for the infringement of the 1963 Vienna Convention on Consular Relations (i.e., Paraguay v. United States of America; Germany v. United States of America; and Mexico v. United States of America). The provisional measure indicated in this circumstance, justified by the “extreme urgency” of the matter (Article 41 of the Statute) and pending the decision on the merits, was the suspension of the application of death-sentences against nationals of the applicants. Consistently with the rise on the international scene of individuals as “new actors”, the Court has interpreted Article 36 of the Vienna Convention on Consular Relations as conferring on individuals the right to receive consular assistance. Hence, it construed non-compliance with this provision as a violation of an individual’s rather than a states’ rights, thus departing from the traditional approach that granted diplomatic

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27 LaGrand, cit. supra note 12.
28 Avena and Other Mexican Nationals (Mexico v. United States of America), Provisional Measures, Order (Feb. 5, 2003), ICJ Reports, 2003, at 77 ss.
protection and entrusted the state the right to protect its citizens abroad.30 Despite the ICJ’s stated refusal to act as an “ultimate court of appeal in national criminal proceedings”,31 in practice the Court has become a virtual “universal supreme court” in respect to U.S. courts in these particular cases.

The request for suspension of executions in these three cases is evidence of the Court’s determination to safeguard the public values/interests of the global community, even when it means limiting states’ sovereignty (in this case the sovereignty of the world’s most powerful state). This resolve is particularly evident when the general values/interests at stake are respect for fundamental human rights. This attitude acquires a tangible effect when it is coupled with the fact that in the LaGrand case the Court stated that its provisional measures are indeed binding.32 This was the first time the Court felt compelled to pronounce itself on the binding/non-binding nature of provisional measures under Article 41 of the Statute since, for too long, as the Court said, the issue “has been the subject of extensive controversy in the literature”.33 The Court did not consider the power and influence of the U.S. or the fact that executions had ultimately been carried out as an obstacle. Nor was there an obstacle over the disagreement – not smoothed, but rather emphasised34 – with the U.S. Solicitor General, whose “categorical statement” on the implementing measures was harshly criticized.35 In the merits phase, stating the binding nature of provisional measures, the Court found that the U.S. had committed a breach of international law for having disregarded the provisional measures order that demanded the U.S. adopt “all measures at its disposal to ensure that Walter LaGrand is not executed pending the final decision in these proceedings”.36 Subsequently, the Court demanded that the U.S. reconsider any other similar rulings against German/foreign citizens carried out in violation of Article 36 (1) (b) of the Vienna Convention on Consular Relations.37

In the case concerning Ahmadou Sadio Diallo, the Court, in its judgment of 30 November 2010, ruled once again on the violation of individual human rights,38 finding that in carrying out the arrest, detention and expulsion of Mr. Diallo, the Democratic Republic of Congo (DRC) violated his fundamental rights under the International Covenant on Civil and Political rights (ICCPR) and the African Charter on Human and Peoples’ Rights. The Court confirmed its distance from the traditional conception of the institution of diplomatic protection stating that by not informing Mr. Diallo without delay upon his detention of “his rights” under Article 36, paragraph 1(b) of the Vienna Convention, the DRC had violated Mr. Diallo’s direct rights under this subparagraph. The subsequent judgment of 19 June 2012 with regard to the question of compensation from the DRC to the Republic of Guinea for the above-mentioned violations of Mr. Diallo’s rights is disappointing.39 The Court has decided to step boldly into the field of human rights, despite the statutory limitations

31 LaGrand, cit. supra note 12, para. 52, at 485-486.
32 Id., paras. 109-110, at 506. The Court has reaffirmed that its “orders on provisional measures under Art. 41 have binding effect” (see Case Concerning Armed activities on the territory of the Congo (Democratic Republic of Congo v. Uganda), Judgment (Dec. 19, 2005), para. 263; Request for Interpretation of the Judgment of 15 June 1962 in the Case Concerning the Temple of Preah Vihear (Cambodia v. Thailand), Request for the Indication of Provisional Measures, Order (July 18, 2011), para. 67.
34 See Avena and Other Mexican Nationals, cit. supra note 28, para. 14, at 81.
35 LaGrand, cit. supra note 12, para. 115, at 508.
37 LaGrand, cit. supra note 12, para. 128 (7), at 516. See also Avena and Other Mexican Nationals (Mexico v. United States of America), Judgment (March 31, 2004), para. 153.11, ICJ Reports, 2004, at 12 ss., at 73.
and the opinions of several scholars who consider it an “inappropriate forum” to discuss human rights, due to the incompatibility between its primary judicial function – to settle disputes between states – and the judicial safeguarding of individual rights in addition to the Court’s limited power to enforce its own decisions. The ICJ’s jurisdiction in contentious cases is limited to disputes between states; it has no jurisdiction over individuals. Its decisions are only enforceable through the Security Council.

Scholars have also accused the Court of not doing enough to safeguard human rights and have criticized it for having placed limits (i.e., immunities attached to official capacities) in the Arrest Warrant case to the principle of universal jurisdiction and for having deemed international prosecution “a viable substitute” for prosecution before foreign national courts of incumbent state officials accused of having committed core crimes. We rather think that the Court’s approach to the universality of jurisdiction in this case signals a global vision of the international legal order. The ruling in the Arrest Warrant case focused on balancing two interests equally safeguarded by the new international criminal law of the global community: on the one hand, the necessity of a fair process guaranteed by the internationalization of the judicial means of human rights safeguards, and, on the other hand, the need to punish and deter the most serious international crimes. The Court has been careful in ensuring the ultimate fairness of the prosecution of perpetrators of international crimes and, at the same time, has shown concern for the possible instrumental use of extraterritorial jurisdiction, especially when applied to incumbent state officials. Because of this, it has come to the conclusion that in the case of incumbent high state officials, prosecution by unbiased international courts is a better option. Again, the Court has striven to strike a compromise between two principles: the judge’s impartiality and the fairness of the process protecting human rights. It has done so on the one hand by advocating the prosecution of incumbent state officials by unbiased international organs such as an ad hoc criminal court or the International Criminal Court, and on the other hand by stating that immunity does not mean impunity, thus reaffirming the principle of universality and prompting national courts to carry it out in cases other than those involving incumbent high state officials and when the mandate of these officials has been terminated. Thus, the Court’s overall approach is very balanced. In the present state of the still uncertain functioning of international criminal institutions, this could thwart the activity of international courts and, ultimately, the achievement of the objective of the international system: the punishment of serious violations of human rights. The Court again had occasion to rule on state immunity with respect to serious violations of human rights or international humanitarian law in the Case Concerning Jurisdictional Immunities of the State between Germany and Italy. Here the Court’s reasoning on the relationship between

41 Duxbury, Saving Lives cit. supra note 22, at 171.
46 Case Concerning Jurisdictional Immunities of the State (Germany v. Italy; Greece Intervening), Judgment (Feb. 3, 2012), ICJ Reports 2012, at 99 ss.
immunity and *jus cogens* is unconvincing.\(^{47}\) Another contribution to the protection of human rights, both from a regulatory/substantive and a procedural standpoint, is the advisory opinion on the *Construction of a Wall*. By using the advisory function that has assumed a quasi-legislative character, the Court has reinterpreted certain principles of humanitarian law and the norms of the Geneva conventions, stating the cogent nature of many of these and the *erga omnes* character of those obligations.\(^{48}\) Further, by strengthening its advisory functions, it created a mechanism that can be used to safeguard human rights and peace even when the Security Council is blocked. This process can be activated by the General Assembly, acting on the basis of the *Uniting for Peace* precedent (Resolution 377/V (1950)). With this opinion, the Court has reactivated the UN (blocked by veto). It has asked the political organs of the Organization – the SC and the GA – to address the situation of illegality created by Israel in the occupied territories and to “consider what further action is required to bring to an end the illegal situation”.\(^{49}\) In this way, it has worked with other organs to achieve the aims of the institution. This is a historical and innovative opinion. However, it is also true that the Court could have done more for the protection of human rights in times of armed conflicts.\(^{50}\)

2.2. - **Maintenance of Peace and Court-Council Functional Parallelism.**

The Court strongly asserts its jurisdiction in the field of maintenance of peace.\(^{51}\) Whenever asked not to meddle in questions regarding the use of force under consideration by the Security Council, the Court has stressed the political nature of the Council’s functions, as opposed to the judicial nature of its own functions, concluding that they can be exercised in parallel. As the Court stated in the *Hostages* case:

“[…] there was or could be anything irregular in the simultaneous exercise of their respective functions by the Court and the Security Council. Nor is there in this any cause for surprise. […] 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. This is indeed recognized by Article 36 of the Charter, paragraph 3 of which specifically provides that: ‘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.’”\(^{52}\)

Scholars talk about “functional parallelism”, meaning that both organs (ICJ and SC) have the competence to deal with the same issues.\(^{53}\) The Court’s advisory function and provisional powers play an important role in the field of


\(^{52}\) *United States Diplomatic and Consular Staff*, cit. *supra* note 9, paras. 39-40, at 3 ss., at 21-22.

maintenance of peace. In the Hostages case,\(^5^4\) when indicating provisional measures, the Court embraced Resolution 457 (1979) with which the Council had demanded the immediate liberation of the hostages (in the preamble to Resolution 461 (1979), the Security Council expressly took into account the Court’s Order of 15 December 1979 indicating provisional measures). The same happened in the Bosnia-Herzegovina v. Yugoslavia case, where the Court’s incidental ruling strengthened the Council’s actions.\(^5^5\) In the first series of the 1999 Armed Activities cases, filed by the Republic of Congo against its neighbours,\(^5^6\) the Court relied on Council Resolution 1034 of 16 June 2000, stating that the situation in Congo “continues to constitute a threat to international peace and the security in the region”,\(^5^7\) to ascertain the “urgency” of the situation (which is the prerequisite for the Court to be able to indicate provisional measures, under Article 41 of the Statute\(^5^8\)). Further, the provisional measures eventually ordered both parties (Congo and Uganda) to refrain from armed actions, to conform to international obligations and to comply with the Council’s Resolution.\(^5^9\) Finally, in the cases Use of Force and Armed Activities (New Application), although the Court rejected the request for provisional measures due to “lack of jurisdiction” prima facie, it reaffirmed its competence in the field of maintenance of peace by acknowledging the Council’s main responsibility in the field and by warning the parties against violating their obligations under international law, the UN Charter, and, above all, humanitarian law.\(^6^0\) The most alert scholars noted the issuing of this warning.\(^6^1\) This practice suggests that there is an actual ongoing collaboration between the Court and the Council.

However, there is always the concrete possibility of conflict between the decisions of the two organs whenever the Court is involved in situations under the scrutiny of the Council. For instance, the Court could be requested to indicate provisional measures that contradict the actions of the Council.\(^6^2\) Thus, considering the binding nature of provisional measures of the Court, states violating resolutions to comply with provisional measures would not be in breach of international law.

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\(^{54}\) United States Diplomatic and Consular Staff in Tehran, cit. supra note 9, para. 23, at 15.

\(^{55}\) See Resolution 819 (April 16, 1993), with which the Council acknowledges the provisional measures adopted by the Court in the 8 April 1993 decision, which the government of the Yugoslavian Republic “should immediately take”, and decides to dispatch a mission of its members to assess and report on the situation (ILM 931 (1993)).


\(^{57}\) Armed Activities (Congo v. Uganda), cit. supra note 13, paras. 44-45, at 128.

\(^{58}\) Id., para. 39, at 127; see also LaGrand, cit. supra note 15, paras. 22-23, at 15.

\(^{59}\) Armed Activities (Congo v. Uganda), cit. supra note 13, para. 47, at 129.

\(^{60}\) Case Concerning Legality of Use of Force (Yugoslavia v. Spain), Request for the Indication of Provisional Measures, Order (June 2, 1999), paras. 17, 19, 33, 39, 40, ICJ Reports, 1999, at 761 ss., at 768-774; Case Concerning Legality of Use of Force (Yugoslavia v. United States of America), Request for the Indication of Provisional Measures, Order (June 2, 1999), paras. 17, 19, 25, 33, 34, ICJ Reports, 1999, at 916 ss., at 922-926; Case Concerning Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda), Request for the Indication of Provisional Measures, Order (July 10, 2002), paras. 55, 56, 89, 93, 94, ICJ Reports, 2002, at 219 ss., at 241, 249, 250; in the former cases the Court, concluding that it “manifestly lacked jurisdiction”, removed the case from the list. However, it did not do so in the latter case when it denied Rwanda’s request. See J. Merrills, Introductory Note. The International Court of Justice in 2004, in Global Community YILJ 5 (2005-I), 353 ss., at 355-361.


\(^{62}\) On several occasions, the Court has been requested to indicate provisional measures in cases involving UN political organs. See, for instance, Anglo-Iranian Oil Co. Case, Interim Protection, Order (July 5, 1951), ICJ Reports, 1951, at 89 ss.; Aegean Sea Continental Shelf, Interim Protection, Order (Sept. 11, 1976), ICJ Reports, 1976, at 3 ss.; United States Diplomatic and Consular Staff, cit. supra note 9; Military and Paramilitary Activities (Nicaragua v. United States of America), Provisional Measures, Order (May 10, 1984), ICJ Reports, 1984, at 169 ss.
In the *Lockerbie* case, the two organs almost conflicted.\(^{63}\) In fact, Libya’s request for provisional measures to safeguard its rights under the Montreal Convention, that is to say, to not extradite Libyan citizens suspected of international terrorism to the authorities in the U.S. and the UK, contrasted with the measures adopted by the Council with Resolution 731 (1992), which had “recommended” the surrender of the alleged terrorists.\(^{64}\) Had the Court exercised its provisional powers, it would have interfered with the Council’s powers in the field of peace and security. By the same token, adoption by the Council of Resolution 748 (1992), which imposed the surrender of the alleged terrorists, while the Court was about to pronounce on the provisional measures, trampled the Court’s powers by interfering with the exercise of its judicial functions.\(^{65}\) Evidence of this is the fact that the Court justified the refusal to indicate provisional measures by stressing both the binding nature and primacy over the Montreal Convention of Resolution 748.\(^{66}\) According to the Court, the Resolution had modified the legal situation. Once adopted, under Articles 25 and 103 of the Charter, the rights claimed by Libya under the Convention could no longer be regarded “as appropriate for protection” because provisional measures would interfere with superior rights that Resolution 748 (1992) seemed, \textit{prima facie}, to have granted to the U.S. This Resolution, which, in the interim phase was to be presupposed valid, would have nullified the rights claimed by Libya under the Convention.\(^{68}\) The Court rejected the Libyan request by literally interpreting Article 41 of the Statute and by relying on its case law according to which the goal of provisional measures is to safeguard “the respective rights of each party”.\(^{69}\) By focusing on the conflict between norms, the Court eschewed the crucial question: “si un organe peut agir de telle manière à rendre impossible la mission de l’autre”.\(^{70}\)

Once again, the Court evaded the problem of the difficult issue of its relationship with the Council. In domestic legal systems, the problems of concurrent jurisdiction are avoided by the application of several principles and norms. In the judicial context, the principle of litispendence carries out this function. Litispendence is the principle whereby simultaneous proceedings pertaining to the same matter are prevented by establishing that a matter pending before one tribunal may not be brought before or decided by another tribunal. On the international level, the principle of litispendence is also, in a way, applicable.\(^{71}\) For instance, some sort of litispendence principle is incorporated in the Charter. Article 12 regulates the intersection of the competence of the principal political organs of the UN: General Assembly and Security Council.\(^{72}\) Yet, the Charter lacks a similar article on the relationship between the Council and the Court. In the well-known \textit{Certain Expenses} opinion,\(^{73}\) the Court clarified that the expression “principal responsibility” in Article 24 of the Charter does not mean the Council’s exclusive responsibility. Moreover, it highlighted that while Article 12

\(^{63}\) In the 14 April 1992 ruling relative to the *Lockerbie* case, the Court rejected the Libyan request to indicate provisional measures because such measures would have prejudiced the rights that Resolution 748 (March 31, 1992) seemed to have \textit{prima facie} given to the United States (*Lockerbie* (Libyan Arab Jamahiriya v. United States of America), cit. supra note 9, paras. 42, 44, at 126-127).

\(^{64}\) On this point, see the individual opinion of Judge Lachs, ICJ Reports, 1992, at 138.

\(^{65}\) See SC Res. 748 (March 31, 1992). Resolution 748 is believed to be \textit{ultra vires} because it conflicts with Art. 92 of the Charter. On this point, see the dissenting opinion of Judge El-Kosheri, ICJ Reports 1992, at 210. Judge Bedjaoui wrote about “chevauchement d’attributions” because the Council addressed the question of extradition, an issue that was under consideration by the Court, \textit{id.} at 143 ss., 144 ss., 150 ss.

\(^{66}\) *Lockerbie* (Libyan Arab Jamahiriya v. United Kingdom), cit. supra note 9, paras. 37, 39, at 14.

\(^{67}\) \textit{Id.}, para. 40, at 15.

\(^{68}\) See the dissenting opinion of Judge Bedjaoui, cit. supra note 65, at 156.

\(^{69}\) See the individual opinion of Judge Shahabuddeen, \textit{id.}, at 148.

\(^{70}\) See Judge Bedjaoui, cit. supra note 65, at 155.


\(^{72}\) On concurrent jurisdiction between the United Nations political organs, see ICJ \textit{Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo}, Advisory Opinion (July 22, 2010), paras. 39-40.

expressly forbids the GA from making recommendations on disputes or situations under the scrutiny of the SC, a similar restriction does not apply to the Court. There is no hierarchy between Court and Council.74

As previously pointed out, the Court deems the simultaneous exercise of each organ’s respective functions on the same issue perfectly appropriate. 75 Functional parallelism is a governing principle of relations between the main political organs of the United Nations on one hand and the ICJ as its principal judicial organ (and as a global Court) on the other. This principle gives the ICJ judicial independence and impartiality.

3. - The Principle of Separation of Powers and the New Concept of Complementarity Between UN Organs.

Once it embraced the principle of functional parallelism, the Court enunciated the constitutional principle of complementarity. As the Court stated in the Nicaragua case:

“The [Security] 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.” 76

Traditionally, the Court has been respectful of the constitutional principle of complementarity between UN organs. 77 In the Court’s view, the relationship between institutions is based on coordination and cooperation aimed at achieving the Organization’s goals rather than competition and mutual exclusion. 78

Scholars point out that the Court-Council model creates a new complementarity notion, unlike domestic constitutional models, which are inspired by competition between institutions. 79

In an essay on the Lockerbie case, we touched upon several aspects of this complex issue. 80 The Court needs to clarify the concept of complementarity. It needs to make clear whether the concept implies full separation of the two organs’ powers. If so, the activity of each would be “separated”. 81 although both would be structurally required for the functioning of the Organization and the achievement of its goals. Or whether it means that their respective activities overlap and that there is a “duty” to cooperate. It needs to specify the terms of such duty for the constitutional organs and to decree the limits on their discretion, keeping in mind they are applicable in the case of both the SC and the Court.

In the case of the Court, one needs to consider the impact of such duty on the question of the evaluation of the circumstances that must exist for provisional measures to be granted. If duty to cooperate with the Council exists, this could restrict the discretionary powers in this field that Article 41 of its Statute gives the Court. The Court could be obliged to refuse to “indicate” requested measures or could be obliged to “indicate” measures (even when not requested or different from those requested) to honour the duty to cooperate with other institutional organs. In

74 United States Diplomatic and Consular Staff, cit. supra note 9, para. 40, at 21-22; Military and Paramilitary Activities, cit. supra note 9, para. 93, at 433-434.
75 See supra, Paragraph 2.2.
76 Military and Paramilitary Activities, cit. supra note 9, para. 95, at 434-435.
77 See supra, note 9
78 Judge Lachs outlined that the Charter’s drafters, when creating the main organs, “did not effect a complete separation of powers, nor indeed is one to suppose that such was their aim”. He asserts that the system implies that the two organs (Court and Council) act in a “fruitful interaction”, so that neither of them impinges on the exercise of powers by the other organ (ICJ Reports, 1992, at 139 ss.).
81 In this sense, Judge Ni, ICJ Reports, 1992, at 134.
the Court’s jurisprudence, the key to avoiding conflicts between the two organs during the provisional measures phase is the correct use of the discretionary powers granted by Article 41 of the Statute, which gives the Court competence to examine in the merits phase the validity of the Council’s resolutions.⁸² Mutatis mutandis, this approach recalls a distinction made by the Court on other occasions between competence and opportunity to exercise its functions.⁸³ One thing must be clear, the Court cannot give up its role as supreme guarantor of law. For this reason, in some circumstances, the Court distanced itself from the UN organs in accordance with the "law". In its Order of 8 April 1993, in the Bosnia case, involving the jus standi of the Federal Republic of Yugoslavia (FRY), the Court found, inter alia, that the solution adopted by General Assembly Resolution 47/1 (on recommendation of Security Council Resolution 777 (1992))⁸⁴ was “not free from legal difficulties”.⁸⁵

**Overcoming Veto Rule**

The issues raised by the Court-Council relationship are crucial. According to the Court, both organs can carry out their respective functions, distinct but complementary, regarding the same events. As far as maintenance of peace is concerned, the widening of the Court’s provisional/interim powers (and the binding nature of its provisional measures) is a harbinger of great developments, provided the Court consolidates and uses these to overcome the Charter’s deficiencies and the permanent members’ veto in the spirit of functional parallelism and complementarity. Since the Court, consistently with its case law, has reiterated its competence to adjudicate on matters of which the Council is seized⁸⁶ nothing bars it from ascertaining violations of peace and acts of aggression, and adopting provisional measures even in respect of a situation in which permanent UN members are themselves threatening or violating world peace. In these cases, through exercising the right of veto, they can block the collective security system foreseen by Chapter VII. In fact, resolutions adopted under Chapter VII of the Charter fly in the face of the nemo judex in re sua principle, since the UN Charter (Article 27 (3)) states that “a party to a dispute shall abstain from voting in decisions under Chapter VI”.

In the *Use of Force* cases,⁸⁷ the Court rejected Yugoslavia’s request for provisional measures to impose upon NATO members (U.S. and Spain) the suspension of bombing and other military

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⁸² See *Lockerbie case*, cit. *supra* note 9, para. 40, at 22-23. In the dispute between Greece and Turkey on the Aegean Sea, Greece requested the Court to indicate provisional measures to prevent the deterioration or the widening of the dispute. Yet, the Security Council, with Resolution 395 (Aug.16, 1976), had already adopted these kinds of measures. Although the Court did not address the question of whether Art. 41 of the Statute confers on it the power to indicate such measures, it rejected the request because it held that the “circumstances” in the specific case made it clear that the Security Council had already taken concrete steps (albeit mere recommendations, lacking binding power) to maintain peace and security, and because the parties are bound to respect the Charter.


⁸⁴ On 22 September 1992 the General Assembly adopted resolution 47/1, having received the recommendation of the Security Council of 19 September 1992 that the Federal Republic of Yugoslavia (Serbia and Montenegro) should apply for membership in the United Nations and that it shall not participate in the work of the General Assembly (S/RES 777 (1992)).


⁸⁶ *ib.*, para. 33


⁸⁸ See *supra* note 60.
activities, because it deemed its own jurisdiction manifestly absent. Be that as it may, it restated its responsibility in the maintenance of peace and its competence to adjudicate on states’ compliance with international law, thus sowing the seeds of future provisional pronouncements/rulings on activities violating fundamental international norms, even when committed by the Security Council’s permanent members. This especially applies to violations of peace, in which permanent members are de facto legibus soluti, for the Council cannot condemn and sanction their unlawful behaviours because of their veto power.

To safeguard global fundamental values and peace, the Court strengthens its advisory functions: it has resorted to advisory opinions to ascertain violations of *erga omnes* obligations and to define their judicial consequences not only for the responsible state but also for all other states and UN organs. In the important opinion *Construction of a Wall*, once the illegality of the wall and the legal consequences deriving from it were assessed, the Court stressed the “definitive” character of the ascertainment of Israel’s responsibility and demanded the UN organs adopt all necessary measures to bring violations of international law to an end, “taking due account” of its own conclusions. In this specific case, the use of the advisory function to further the fundamental values of the global community is evident, bypassing the veto of the permanent members. The request for an advisory opinion on the construction of the wall in the occupied Palestinian territory had a double effect: it gave the Court the chance to ascertain Israel’s international legal responsibility with effects *erga omnes*, and made it possible for the General Assembly to adopt the coercive measures outlined in the opinion, thereby bypassing vetoes blocking the Security Council. Thus, the Court’s opinion strengthened the power of the Assembly.

The Court could be expected to act as a guardian of legality and fulfil its judicial role to impartially judge disputes on the basis of law and the circumstances surrounding the case, and use such provisional measures to protect global values in the spirit of the principle of complementarity, to counteract serious and systematic violations of fundamental human rights in their stead when the political organs (the Security Council) are unable to do so genuinely. Respecting functional parallelism and complementarity in these cases, the Court, GA and SC must ensure that all atrocities are addressed in each specific situation.

The Court’s ascertainment of violations of fundamental obligations by way of advisory opinions and its provisional activities to safeguard peace do not contradict each other but are rather complementary to the Council’s activity pursuing the Charter’s objectives. They integrate the Charter and transcend it, filling the institutional loophole created by the voting system under Article 27 (3) on Chapter VII decisions.

4. - An Embryonic System of Checks and Balances: Judicial Review of Global and National Governance Bodies.

*ICJ Control over The Activities of UN Organs*

The Court exercises control over the legality of the acts of UN organs. This seems to be a trend of the Court’s jurisprudence, but is not supported by either the Charter or the Statute. In the advisory opinion on *South-West Africa*, despite recognizing that the Charter does not give it powers of judicial control or of appeal over UN organs’ decisions, the Court nonetheless examined the

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88 Id.
89 Id.
91 GA Res. ES-10/14 (Dec.8, 2003).
93 Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970), Advisory Opinion (June 21, 1971), para. 89, ICJ Reports, 1971, at 16 ss., at 45. Also, the International Criminal Tribunal for the former Yugoslavia (ICTY), asserted competence to scrutinize the legality of the act by which the Security Council created the ICTY itself (Prosecutor v. Duzko Tadic,

Be that as it may, these are episodes. The trend is still very unclear. The Court has generally eluded pronouncing itself on the issue of control over the legality of the Security Council’s acts.\footnote{Id., at 438-439.} The question is still debated amongst scholars.\footnote{Eschewed the question in the advisory opinion on the legality of the non-Application of the Genocide Convention (Sept. 1993), cit. supra note 93, para. 20, at 22.} We dwelt on the issue of the powers the Court attributed itself and the powers it claims over UN organs because the consolidation of this trend has great impact on safeguarding global values. In previous writings on this point, we expressed the increasingly popular opinion that both the Charter and general international law limit the Council’s sanctionary powers under Chapter VII (concerning the adoption of coercive measures under Articles 41 and 42). Specifically, these limits are: proportionality, necessity and respect of jus cogens.\footnote{Northern Cameroons, cit. supra note 83, at 33.} In the Bosnia case,\footnote{In the Lockerbie case (cit. supra note 9, paras. 25 and 155) examination of this matter was deferred to the merits phase. On this point, see specifically Judges Bedjaoui and Ajbola (id., at 156, 196 respectively). On this question, see, amongst scholars, Bernhard Graefrath, Leave to the Court What Belongs to the Court, The Libyan Case, 4 EJIL 184 (1993); Vera Gowlland-Debbo, The Relationship Between the International Court of Justice and the Security Council in the Light of the Lockerbie Case, 8 AJIL 643 (1994), at 667. Likewise, Bosnia-Herzegovina raised before the Court the question of the legality of SC Resolution 713 of 25 September 1991, imposing an arms-trade embargo on and with the whole of Yugoslavia, thus violating Bosnia-Herzegovina’s right of self-defence under Art. 51 of the Charter (Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia), Provisional Measures, Order (Sept. 13, 1993) [hereinafter Application of the Genocide Convention (Sept. 1993)], para. 2, ICJ Reports, 1993, at 325 ss., at 326 and, in favour of a revision, see the separate opinion of Judge ad hoc Lauterpacht in the Court’s Order of 13 September 1993, paras. 99-104, id., at 439-441). Finally, the Court eschewed the question in the advisory opinion on the legality of the use of nuclear weapons (cit. supra note 24). See M. G. Cohen, L’Avis Consultatif de la CIJ sur la Liceité de la Menace ou de l’Emploi d’Armes Nucléaires et la Fonction Judiciaire, 8 EJIL 337 (1997), at 357. In general, on this subject see Shabtai Rosenne, The World Court. What It Is and How It Works, 5th ed., 1995, at 37.} Judge Lauterpacht expressed a separate opinion in favour of the ICJ’s power to review a Chapter VII decision of the Security Council that conflicts with a principle of jus cogens.\footnote{94 South West Africa, cit. supra note 93, para. 89, at 45. Judges Ammoun, Onyema, Fitzmaurice and Gros (id., respectively at 72, 143, 226, 331) supported the control of the lawfulness of the Council’s decisions under Chapter VII. 95 Certain Expenses of the United Nations, cit. supra note 73, at 168. 96 South West Africa, cit. supra note 93, para. 20, at 22. 97 Be that as it may, these are episodes. The trend is still very unclear. The Court has generally eluded pronouncing itself on the issue of control over the legality of the Security Council’s acts. The question is still debated amongst scholars. We dwelt on the issue of the powers the Court attributed itself and the powers it claims over UN organs because the consolidation of this trend has great impact on safeguarding global values. In previous writings on this point, we expressed the increasingly popular opinion that both the Charter and general international law limit the Council’s sanctionary powers under Chapter VII (concerning the adoption of coercive measures under Articles 41 and 42). Specifically, these limits are: proportionality, necessity and respect of jus cogens. In the Bosnia case, Judge Lauterpacht expressed a separate opinion in favour of the ICJ’s power to review a Chapter VII decision of the Security Council that conflicts with a principle of jus cogens.}
The question of the power of the Court to review the Chapter VII Council decisions that include not only the finding of a threat or violation of peace or an act of aggression, but also the finding of a specific violation by a specific state or non-state entity of a fundamental international legal obligation (i.e., violation of the principles of self-determination, non-use of force, democracy, human rights, humanitarian law) is still undetermined. The question was raised in the Lockerbie case, where Council Resolution 748, whose legality was disputed by Libya, determined the responsibility of that state by indicating it was responsible for the bombing of flights Pan Am 103 and UTA 772, thus in violation of Article 2 (4) of the Charter, and the general international law against terrorist acts.103

In this case, the crucial question is whether the Court can scrutinize the legality of determinations of responsibility undertaken by the Council when acting under the Charter’s Article 39. This article does indeed give the Council full discretion in evaluating threats to peace. It is a political evaluation, and it can be subjected to the scrutiny of the Court only when abused (i.e., excess of competence). However, when the Council determines a state’s legal responsibility - verifying that state’s behaviour against fundamental norms of international law - it carries out a legal determination, not a political one. Such a determination, even when carried out by a political organ with different methods than those applied by the Court, is subject to control by the Court, the guardian of legality of both the UN system and the global system. In these cases, the Court cannot resort to the concept of “inherent limitations”,104 which it has used before to avoid stepping into political issues, even when its jurisdiction is established, to avoid compromising its judicial functions. The Court could agree with the Council on the question of the state’s responsibility, which would reinforce the determination made by the political organ. However, should there be disagreement, Court-Council cooperation cannot be invoked, for they would both be acting beyond the ambit of their discretionary power. The powers of the SC are constrained by international law and the UN Charter, as mandated by Charter Articles 1 (1) and 24 (2). These limits to the Council’s activity, and, at the same time, the Court’s role as supreme judicial organ, are to be kept in mind while considering the Court’s obligation to cooperate and give maximum effect to the UN political organs’ decisions. In the exercise of its functions, the Court is independent from the other UN organs but, in any event, subject to the application of international law.105

Scholars have paid insufficient attention to the question of the legal consequences of the Court’s finding of illegality of UN organs’ ultra vires acts. Although this is not the place to debate this issue, let us just outline some concerns that have been expressed in literature. First, the Court’s control functions are limited by its informal nature. Second, advisory opinions are not binding. Third, the Court’s rulings are, in principle, binding only for the disputing parties and the particular case.106 We dealt with these issues in a previous study, where we argued that advisory opinions,

103 SC Res. 748 (March 31, 1992).
105 Judge Weeremantry has particularly stressed the need for the Court to preserve its independence. Citing the separate opinion of Judge Tarazi (ICJ Reports, 1976, at 33), and the principles that he believes should inform the role of the Court, including the principle whereby “[t]he Court, if the circumstances so require, ought to collaborate in the accomplishment of this fundamental mission” (i.e., maintenance of peace and security), he argued that “[t]he judge of the question whether the circumstances so require is surely the Court in the exercise of its independent judgment” (ICJ Reports, 1992, at 168, 176).
which are judicial acts that authoritatively declare the law, while not binding *per se*, could have a “definitive” character with *erga omnes* effects.\(^{107}\) This means that the illegality (or legality) of actions or behaviours determined by the Court’s opinions is binding in any other judgment where it might arise, even incidentally. The recent opinion, *Construction of a Wall*,\(^{108}\) confirmed the definitive, general *erga omnes* value of the determination of responsibility contained in advisory opinions. The Court held that, because the construction of the wall violated Israel’s international obligations, “it follows that the responsibility of that state is engaged under international law”.\(^{109}\) The definitive character of the opinion can be inferred by analogy from Article 60 of the Court’s Statute and by the fact that advisory opinions are decisions made by a judicial organ in the exercise of a judicial function. Advisory opinions state the law and are neither binding for states nor are they actionable.\(^{110}\) However, the Court maintains that the lack of binding force does not transform its judicial activity into a merely consultative one. Being judicial acts, advisory opinions have a legitimizing effect: given that findings by the Court are supported by a presumption of legality, we believe that states’ behaviour violating political organs’ resolutions regarded as unlawful by the Court in advisory proceedings ought to be considered lawful. This applies both to the recommendations and to the binding decisions of the Security Council.

As for the use of contentious proceedings to ascertain the lawfulness of UN organs’ actions, Article 59 of the Statute limits the binding effects of the Court’s decision to the disputing parties. Nevertheless, the Court has claimed that, Article 59 of the Statute notwithstanding, its own pronouncements on the validity of a legal act “may have implications in the relations between States other than [the Parties]”.\(^{111}\) Referring to the Permanent Court’s jurisprudence, it deemed “indisputable” the right to pass “in an appropriate case” a judgment holding “a continuing applicability”.\(^{112}\) Such a judgment is “to ensure recognition of a situation at law, once and for all …so that the legal position thus established cannot again be called in question in so far as the legal effects ensuing therefrom are concerned”.\(^{113}\) It thus seems that the Court’s pronouncement on the

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\(^{108}\) *Construction of a Wall*, cit. supra note 17.

\(^{109}\) In the words of the Court: “Since the Court has concluded that the construction of the wall … and its associate régime are contrary to various of Israel’s international obligations it follows that the responsibility of that State is engaged under international law”. *Id.*, para. 147, at 197.

\(^{110}\) When rendering advisory opinions, the Court does not demand States to carry out specific acts. It simply states the law and the norms applicable in a determinate situation, and the rights and duties arising therefrom.

\(^{111}\) *Aegean Sea Continental Shelf* (Greece v. Turkey), Judgment (Dec. 19, 1978), para. 39, *ICJ Reports*, 1978, at 3 ss., at 16-17. In this case, the Court had to determine whether the 1928 General Act for the Peaceful Settlement of Disputes was still in force, and what its legal status was.

\(^{112}\) *Northern Cameroons*, cit. supra note 83, at 37. The declaratory character of judgments of the Court about the legality or illegality of acts is also evidenced by the advisory opinion on *Reservations to the Genocide Convention*. In that opinion the Court declared that its eventual finding of incompatibility of a given reservation with the object and aim of a treaty would imply the exclusion of the State making the given reservation from the Convention. This means that the Court’s findings in advisory proceedings do transcend the mere relationship between the State making the reservation and the States objecting it in the specific case (Reservations to the Convention on Genocide, *Advisory Opinion* (May 28, 1951), *ICJ Reports*, 1971, at 15 ss., at 26-27).

\(^{113}\) *Interpretation of Judgments Nos. 7 and 8 (Factory at Chorzów)*, Judgment No. 11 (Dec. 13, 1927), *PCIJ Series A*, No. 11, 1927, at 20; *Northern Cameroons*, cit. supra note 83, at 37.
legal validity of the UN organs’ resolutions has the character of a declaratory judgment and mutatis mutandis, in the Court’s words, “that the Court make a declaration ... which would clarify the legal situation for the entire international community”. Therefore, it must be accorded an effect beyond that of the disputing parties. Of course, a judgment declaring a Security Council’s decision “illegal” does not nullify the decision; nonetheless, the declaration of illegality is opposable to all states. Besides, consistently with the duty of cooperation between UN organs, the Court’s decision should induce the political organ to reconsider the illegal act.

Judicial Review over SC Decisions by Regional and National Courts

The stance in favour of judicial review of SC decisions is supported by the role/attitude of national and regional courts in the matter especially concerning smart sanctions/individually targeted sanctions imposed by the SC under Chapter VII in the fight against terrorism that directly affect individual rights. In its judgement of 3 September 2008 in the Kadi case, the Court of Justice of the European Union (CJEU) ruled that EU legal acts, even those that implement UN Security Council obligations, must conform to the EU’s standards of lawfulness based on fundamental rights. Therefore, “the Community judicature must [...] ensure the review [...] of the lawfulness of all Community acts in the light of the fundamental rights [...]”, including review of Community measures which [...] are designed to give effect to the resolutions adopted by the Security Council under Chapter VII of the Charter of the United Nations”. Another important CJEU pronouncement in the matter of protecting individual rights concerns the Abdulrahim case, where the Court declared the applicant’s interest in bringing proceedings for the annulment of UE Regulation No 1330/2008 (including him in the list of persons and entities whose funds and other economic resources must be frozen following SC resolutions on the situation in Afghanistan, even though with Regulation No 36/2011 the Commission had deleted the entry from the list relating to Mr Abdulrahim’s name), insofar as concerned him and securing, should his action be upheld, his rehabilitation and, thus, “some form of reparation for the non-material harm suffered by him”. The European Court of Human Rights (ECtHR) also pronounced in favour of a judicial review of SC decisions in the Al-Dulimi case, affirming that individuals and entities suspected of terrorism included in the lists drawn up by the SC Sanctions Committee “should be authorised to request the review by the national courts of any measure adopted pursuant to the sanctions regime” in order to...
ensure the right of access to a court, as guaranteed by Article 6 § 1 of the European Convention of Human Rights (ECHR).\footnote{ECHR, Al-Dulimi and Montana Management Inc. v. Switzerland, Application No. 5809/08, Judgement (Nov. 26 2013), paras. 134-135.} The ECtHR also underlined that such a remedy was essential “for as long as there is no effective and independent judicial review, at the level of the United Nations, of the legitimacy of adding individuals and entities to the relevant lists”, pushing in the direction of a change in the UN system to combat terrorism that ensures the right to effective judicial review.\footnote{See infra text accompanying notes 157-160.} The dynamism of regional and national courts in reviewing the legitimacy of decisions of global institutions is growing and can only be a stimulus to increasing the legality of the global decision-making process\footnote{In general on this topic, see E. Benvenisti, Reviewing Global Governance (from “The Law of Global Governance” (forthcoming) GlobalTrust Working Paper 7/2014 http://globaltrust.tau.ac.il/publications. \footnote{Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights, Advisory Opinion, (April 29, 1999), 1999 ICJ Reports 62, para. 62, at 87–88.} Id., para. 63, at 88. \footnote{Id., para. 65, at 88.} Jurisdictional Immunities of the State, cit. supra note 46.} and the formation of common constitutional principles inspired by the protection of human rights and to assist in the transition to global constitutional governance. Moreover, the fact that the protection of individual fundamental rights has risen to the global parameter for constitutional legitimacy, influencing governmental, intergovernmental and global decision-making processes, lays the foundations for a human global community.

The ICJ’s Control over State Organs
The ICJ increasingly consolidates its authority over state organs, as it specifically demands they perform certain tasks. By invoking the principle stating that the conduct of a state’s organ, “even an organ independent from the executive”\footnote{Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium), Judgment (Feb. 14, 2002), 2002 ICJ Reports 3. \footnote{Law Concerning the Punishment of Grave Breaches of International Humanitarian Law of 16 June 1993, as amended by Law of 10 February 1999, Belgian Official Gazette, 5 August 1993 and 23 March 1999.} must be considered an act of the state itself, thus implying its responsibility, the Court declares violations of international law committed by executive and judicial national organs alike, and dictates the behaviour they are to adhere to.

In the advisory opinion Immunity from Legal Process, the Court scrutinized the actions of Malaysian organs, and pointed out the violation of Article VIII, Section 30, of the 1946 General Convention on the United Nations’ Privileges and Immunities both by the Malaysian Government and Courts.\footnote{Eventually it ordered the Malaysian Government to communicate to the national courts the advisory opinion so that Malaysia’s international obligations would be given effect.\footnote{Also in the case Jurisdictional Immunities of the State, with a huge majority (fourteen votes to one) the Court ruled that the Italian Republic “must, by enacting appropriate legislation, or by resorting to other methods of its choosing, ensure that the decisions of its courts and those of other judicial authorities infringing the immunity which the Federal Republic of Germany enjoys under international law cease to have effect.”} At times, states respond to the heightened prestige of the Court by increasingly trusting it and submitting to its authority. In the Arrest Warrant case, the Court decided that the arrest warrant issued by a Belgian investigating judge against the incumbent Congolese Foreign Minister constituted a violation of international customary law.\footnote{Accordingly, the Court ordered Belgium to cancel the warrant and to forward the judgment to the authorities of those states to whom the warrant was circulated so that restitutio in integrum could be effectuated. The ruling in the Arrest Warrant case had an immediate impact on the domestic level as the 1999 Belgian law on Universal Jurisdiction was amended in 2003.\footnote{However, before the law was amended, the ICJ’s ruling profoundly changed the interpretation of the international rule of immunity by Belgian courts, eventually it ordered the Malaysian Government to communicate to the national courts the advisory opinion so that Malaysia’s international obligations would be given effect.\footnote{Also in the case Jurisdictional Immunities of the State, with a huge majority (fourteen votes to one) the Court ruled that the Italian Republic “must, by enacting appropriate legislation, or by resorting to other methods of its choosing, ensure that the decisions of its courts and those of other judicial authorities infringing the immunity which the Federal Republic of Germany enjoys under international law cease to have effect.”} \footnote{Also in the case Jurisdictional Immunities of the State, with a huge majority (fourteen votes to one) the Court ruled that the Italian Republic “must, by enacting appropriate legislation, or by resorting to other methods of its choosing, ensure that the decisions of its courts and those of other judicial authorities infringing the immunity which the Federal Republic of Germany enjoys under international law cease to have effect.”}}
which, obvious difficulties notwithstanding, implemented the ICJ’s ruling by interpreting the 1999 law accordingly. Conversely, the US responded in a different way in the LaGrand case, in which the Court found a breach of international law committed by domestic executive and judicial organs. In the perspective of the evolution of the global community and firmer control over domestic organs, through its advisory power the Court extensively charges states with increasingly specific behaviours, going as far as contemplating the obligation of responsible states to repair material damages caused to individuals. In the advisory opinion on the Construction of a Wall, after having ascertained Israel’s responsibility for having illegally built the wall on occupied Palestinian land, the Court specifies the legal consequences of that act. Reinterpreting the obligation to repair affirmed by the PCIJ, the ICJ, in accordance with the applicable rules of international law, included the obligation to compensate “all natural or legal persons having suffered any form of material damage as a result of the wall’s construction” and demanded “appropriate compensation for individuals whose homes or agricultural holdings have been destroyed”.

5. - The Crucial Choices to be Made in the Development of Global Constitutional Governance.

As the foregoing has shown, the ICJ contributes to the protection of the constitutional values and interests of the emerging global community and strengthens its judicial powers by working towards building constitutional global governance. Aware of the weakness of the international system to ensure compliance with international obligations, it expands its powers under Article 41 of its Statute, both in regard to the legal effects for the parties and the discretion it has in indicating provisional measures. By stating the binding force of such measures, and by decoupling its power to indicate them from the will of the parties, the Court has given itself an extraordinary tool to safeguard human rights and international peace.

In particular, the Court strives to protect the human life of individual human beings by using provisional measures. In so doing, the Court attempts to address two fundamental weaknesses: the facultative and non-binding nature of interim measures under the Optional Protocol to the International Covenant on Civil and Political Rights (Articles 2 and 5), and the regional nature of the European and Inter-American human rights systems. Furthermore, the strengthening of the Court’s interim and advisory powers open new ways to the future exercise of such powers for the maintenance of peace, even when the collective security system under Chapter VII of the UN Charter is paralyzed by veto and the SC is unable to determine the existence of a threat or violation of international peace and security and to take measures against the responsible state.

The Court’s rocky journey towards the protection of the constitutional tenets has begun. It is known that the ICJ’s advisory opinions lack binding effect and that Article 41 of the Court’s Statute has limitations. Individuals cannot request provisional measures: under Article 41 of the Court’s Statute, only states can do so, and this is a large limitation when it comes to human rights. Besides, provisional measures are often disregarded and their implementation is difficult to monitor. By way of what looks like obiter dicta, the Court established that the Charter’s Article 94 (2) refers....

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  \item[131] LaGrand, cit. supra note 15, para. 29, at 16.
  \item[132] Construction of a Wall, cit. supra note 17.
  \item[133] Factory at Chorzów, Merits, Judgment No. 13, (Sept. 13, 1928), PCIJ, Series A, No. 17, 1928, at 47.
  \item[134] Construction of a Wall, cit. supra note 17, para. 153.
  \item[135] Id., para. 145.
  \item[136] See supra notes 12, 33 and corresponding text.
  \item[137] See supra note 13-15 and corresponding text.
  \item[139] See supra, Paragraphs 2.1, 2.2.
  \item[140] E. L. Kerley, Ensuring Compliance with Judgments of the International Court of Justice, in The Future of the International Court of Justice, cit. supra note 71, at 276.
\end{itemize}
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“only to judgments”. It can therefore be gathered that the provision of this Article whereby “[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” applies only to judgments and not to provisional measures. The Court today participates more actively in the implementation of its own decisions, which can be held to be its prerogative, and, recently, it demanded that states, according to Article 78 of the Rules, keep it informed of the measures adopted to implement its rulings. The Court can and must strengthen its powers of implementation and enforcement of its own decisions, and scholars have repeatedly called attention to the problem (i.e., silence of the statute on the matter and lack of advanced procedures for judicial enforcement) and have suggested possible solutions. A possible improvement could be the strengthening of remedies against violations of decisions in contentious proceedings. “Guarantees of non-repetition” are to be welcomed. The Court should also heed, in the merits phase, requests to recover damages caused by use of force (as it did in 2005 in the Armed activities judgment). The Court leads the organization of international power and seeks to redistribute international legal authority. It consolidates its authority over international and national institutions. It declares its responsibility in areas over which the UN Charter gives competence to the GA and the SC; it is inspired by the principle of cooperation and, despite the silence of the Charter, it claims power of control on the acts of these organs. After all, the power of judicial control on the legality of decisions of political organs is typical of domestic Constitutions and is on the rise. Legal certainty and rule of law, in the constitutional design of the emerging structure of the global society, demand that the judicial supremacy claimed by the Court over global and national governance bodies is formally defined, procedures to raise issues of international constitutionality are established and time limits are set for judicial review. Finally, the Court needs to be conferred powers erga omnes. Until the day these reforms are enacted, the “final” character of advisory opinions, and the legitimacy effect arising therefrom, are definitively assets; so is the power of the Court to adjudicate on the legality of acts of political organs, with declaratory effects that - as the Court itself asserted - can go beyond the parties to the dispute.

143 LaGrand, cit. supra note 15, para. 29, at 16; Case Concerning the Temple of Preah Vihear (Cambodia v. Thailand), Request for the Indication of Provisional Measures, Order (July 18 2011), para. 69 (C).
146 See supra, note 32. The Court did not follow up on Cameroon’s request to award on damages caused by the occupation of Bakassi by Nigeria. It held the eviction order imparted to Nigeria a sufficient remedy for the “injury suffered by Cameroon by reason of the occupation of its territory” (Case Concerning the Land and Maritime Boundary Between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea Intervening), Judgment (Oct. 10, 2002), para. 319, ICJ Reports, 2002, at 303 ss., at 452).
The formalization of the Court’s power to review the acts of the Security Council, invoked by many scholars, is the keystone of the legitimacy of the global governance order and crucial to overcoming the imperfect system of the UN Charter through the evolution of global constitutional governance. This evolution centres on balancing the powers between UN organs, and between UN organs vis-à-vis the Security Council. If an organized global society is to be built, checks and balances need to limit the Security Council’s power, which is tantamount to subjecting the power of Superpowers to controls and restrictions; their powers need to be limited and those of the GA and the Court itself need to be strengthened.

This is what the ICJ did in the abovementioned opinion, *Construction of a Wall*. The Court was seized of the matter by the General Assembly, while the Security Council was “unable to make a decision” using the landmark and unorthodox procedure created by the *Uniting for Peace* resolution. In the opinion, the Court restated its power of control over the legality of acts of UN organs by examining the powers of the General Assembly in the field of maintenance of peace and security. It extended the powers of the General Assembly by resorting to an evolutionary interpretation, in light of the Assembly’s practice, of the relevant Articles of the Charter (i.e., Articles 12 and 14). It judicially endorsed the practice of the General Assembly to take over functions in the field of maintenance of peace and security when the Security Council is unable to decide due to the veto of one of its permanent members. In so doing, it struck a balance between the powers of the two organs. By determining the admissibility of the request for the advisory opinion and the regularity of the meeting of the General Assembly - where the request was adopted - the Court did not fail to specify the conditions under which the *Uniting for Peace* procedure can be resorted to.

The Court’s mounting scrutiny of the acts of the GA and the SC provide a solid basis for the legitimacy of global governance. It is also vital for the UN to create a defined and stable relationship with other international, intergovernmental and non-governmental organizations, state organs and civil society, which are increasingly involved in the management of common goods and values. This is also important since it is taking place at a time when the Security Council is increasingly acting as the decision-making authority of fundamental interests of the global community, and when the General Assembly is widening its normative and enforcement powers in several fields relating to these interests. It seems appropriate to consider that in establishing, with Resolution 1267 (1999) and subsequent measures, a sanctions regime against terrorism placed under its immediate responsibility, the SC

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151 See, amongst others, the solution proposed by Sohn, *How New Is the New International Legal Order* cit. supra note 148.
154 *Construction of a Wall*, cit. supra note 17, para. 31, at 151.
155 *Supra*, Paragraph 2.1.
has interpreted the trend in the international community to shift from an inter-state community to a universal human community. It has faced the evil of global terrorism by creating and imposing a targeted sanctions regime against individuals and entities. Through binding resolutions, adopted in accordance with Chapter VII of the Charter, the SC has placed itself as the “world public authority” over individuals and entities suspected of involvement in acts of terrorism and/or belonging to terrorist networks deciding upon and setting up procedures for imposing targeted sanctions. It has targeted suspects’ goods and interests by ordering states and international institutions to freeze funds belonging to suspected individuals and entities and preventing the movement of terrorists. SC public authority has become more and more prominent, spreading all over various legal systems, in such a way as to be exercised through interaction between national, regional, and global institutions. The sanctions system which is centred on the SC and the Sanctions Committee, its subsidiary body, is a clear expression of global governance which, however, is not provided with minimum due process guarantees. Various states and judicial organs have expressed concerns about the lack of fairness of listing and de-listing procedures. That is why our “proposal for eliminating deficiencies” of the UN counter-terrorism regime is aimed at providing “a system of judicial remedy based on the UNAT-ICJ Model”. Additionally, on 27 March 2014, the General Assembly, with an overwhelming majority of states in support, adopted a resolution declaring the mid-March referendum in Crimea that led to Russia’s annexation of Crimea as “having no validity”. It called upon states, international organizations and specialized agencies “not to recognize” any alteration of the status of the Crimea Region. The adoption of the resolution was preceded by the unsuccessful attempts of the Security Council. Russia blocked Security Council action where it has veto power. Through its advisory function, the ICJ may confirm the declaration of invalidity of the referendum in Crimea as it did in similar cases when the Court recognized the illegality of certain situations in accordance with relevant General Assembly and Security Council resolutions.

6. - Conclusion.
In conclusion, the ICJ highly contributes to global constitutionalism. Its activity is based on several essential elements:

1) Interpreting and applying the basic tenets of modern constitutionalism and adapting them on a global level through its quasi-legislative advisory function. These include substantive constitutional principles - most notably, those that prohibit serious violations of peace, human rights and international humanitarian law - as well as common provisions used to maintain the rule of law including separation of powers, balance of powers and judicial review.

2) Ensuring more effective modes of implementing emergent global constitutional values through strengthening its advisory and ad interim powers.

3) Providing, in view of the silence of the Charter, institutional balance between global bodies according to the constitutional principle of the balance of powers with a view to containing the power of the SC, enhancing the autonomy of the judiciary with respect to political organs and establishing judicial review.

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159 See on this point, supra text accompanying notes 117-122.
161 A/RES/68/262, paras. 5 and 6.
162 See Legal Consequences, cit. supra note 93, para. 126; Construction of a Wall, cit. supra note 17, paras. 145, 146, 162.
4) Affirming its authority as a global constitutional court in declaring violations of compulsory international law committed by national executive as well as judicial organs, and dictating the behaviour they are to adhere to.

The importance of the Court’s activities in constructing a global governance model is notable if sharing the view - as set out in the book The Pillars of Global Law - that the UN political organs (and not only the Court) currently play a dual role as organs of the UN and of the global community, integrating public functions (i.e., activities of a public nature performed by states, other non-state actors and private actors) of the global community that lacks its own organs. By protecting life and individual human beings and subordinating the relationship between the judicial and political organs to key concepts rooted in the constitutional tradition, the Court shows its willingness to construct the rules for a global constitutional model that transcends the boundaries of the UN Charter and to arrive at a global governance model “understood as the overall process of regulating and ordering issues of public interest”.

The development of the UN governance process-model provides the basic constitutional framework for an integrated system of global governance that unifies the different legal systems under constitutional principles and procedures that respect pluralism and their overall diversity. It is however evident that any system of global governance requires a broader range of mechanisms to enable the meaningful involvement of new actors in decision-making, given the failure of the inclusion mechanisms implemented thus far in the intergovernmental UN system. It is therefore clear that the new model that is being developed should be seen as only the beginning of a global constitutionalization process.

**Abstract**

Il dibattito dottrinale sul costituzionalismo globale verte sul punto se, al pari degli Stati, il diritto globale e la governance stiano sviluppando un processo di adeguamento ai principi del costituzionalismo ed a quali di essi.

L’Autore sostiene che la globalizzazione abbia dato impulso ad un ampio processo di fondazione di una costituzione globale e che a guidarlo sia l’ONU attraverso un dialogo nuovo tra i suoi organi, aperto e partecipativo, nel quale sono coinvolte organizzazioni e istituzioni, pubbliche e private, a vari livelli. L’ONU sta lanciando un modello di governance ispirato a idee costituzionaliste che completa e supera la struttura normativa e istituzionale della Carta. Soprattutto la Corte internazionale di giustizia, principale organo giurisdizionale delle Nazioni Unite e Corte globale, è impegnata in questa sfida e sta enunciando principi costituzionali globali, sostanziali e procedurali. Questi includono la pace e la sicurezza mondiale, i fondamentali diritti degli individui e dei popoli, la gestione collettiva dei beni comuni, l’attuazione dei concetti di legalità, democrazia, separazione e bilanciamento dei poteri e controllo giurisdizionale.

L’Autore tuttavia esclude che i segnali finora emersi facciano pensare ad un modello-Nazioni Unite in evoluzione che si imponga sul piano globale per costituire esso stesso un governo mondiale. L’idea invece è quella che le Nazioni Unite, andando oltre la Carta ed operando per conto della

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163 See supra, note 1, at 77, 86, 102, 251.
167 George Modelski, Evolutionary Global Politics, in Global Trends, cit. supra note 4, at 469.
Doctrinal debate on global constitutionalism focuses on whether similarly to States, global law and governance are accepting and implementing the principles of constitutionalism and if so which of these.

The Author argues that globalization has galvanized the process of establishing a global constitution, a UN-driven process through new, open and participative dialogue between its Agencies and Bodies including various national and international organizations and institutions. The UN is launching a governance model inspired by constitutionalist ideas that complement and go beyond the post-war institutional and regulatory framework of the Charter. In particular, the International Court of Justice, as the principal judicial organ of the United Nations and the global Court, is committed to this challenge and is developing substantive and procedural global constitutional principles. These include world peace and security, the fundamental rights of individuals and peoples, the collective management of common goods, the implementation of constitutional concepts of rule of law, democracy, separation of powers, checks and balances, and judicial review.

The Author, however, considers that the signals that have thus far emerged do not suggest an evolving UN-model imposed on the global plan to establish itself as a world government. The concept instead is that the United Nations - in going beyond the Charter and acting on behalf of the global community - is elaborating the basic principles "for" the development of global governance that it is part of but does not replace.

The historic Declaration of the General Assembly of the United Nations of 24 September 2012 on "the rule of law at the national and international levels" testifies to the UN’s primary interest in creating a constitutional framework that is common to national and international legal systems in order to build an integrated system of global governance. It is clear, however, that the new model should only be seen as the beginning of a global constitutionalization process.