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Second-Guessing the Security Council: The International Court of Justice and Its Powers of Judicial Review

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ARTICLES

SECOND-GUESSING THE SECURITY COUNCIL: THE INTERNATIONAL COURT OF JUSTICE AND ITS POWERS OF JUDICIAL REVIEW

Ken Roberts†

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INTRODUCTION

In the four decades following the end of World War II, the East-West political divide played a central role in the functioning of the United Nations (hereinafter U.N.). The world balance of power during this period, reflected in the structure of the Security Council's (hereinafter Council) permanent membership, often frustrated the Council's ability to act quickly and effectively to deal with perceived threats to the peace. With either side able to veto the use of armed force, it was only in unique situations such as the U.N. action in Korea that the Council was able to function as originally envisaged.¹ However, events in recent years have transformed the global political arena quickly and drastically. The collapse of the 'iron curtain' and the movement of Russia and other former Soviet Republics towards democracy has led to tangible reductions in nuclear and conventional weapons and a marked decline in East-West tension. The stage has been set for the emergence of a new world order, one in which there will likely be a greater role to be played by supranational institutions, particularly the U.N. The Secretary-General of the U.N. acknowledged this development in his report, *An Agenda for Peace*, addressing the changing

¹ The Council was able to authorize a U.N. force to act in Korea due to the absence of the Soviet delegate at that meeting. The Soviet delegate was protesting the representation of China in the U.N. by the Nationalist Chiang Kai-Shek. If the Soviet delegate had been present at that meeting, he would have certainly used his veto power to block the resolution. See LELAND M. GOODRICH, *KOREA: A STUDY OF U.S. POLICY IN THE UNITED NATIONS* 114 (1956).

context of international relations and the need for the U.N. to play a greater role in the prevention and resolution of conflicts and the preservation of peace.²

One of the main beneficiaries of these developments has been the Council, which emerged from under the shadow of the permanent stalemate in existence since its creation. No longer paralyzed by superpower vetoes, the Council has displayed an unprecedented activism in the past five years,³ including a key role in the Gulf War. Some analysts portray this activism as proof of the emergence of a new world order in which our international institutions will function quickly and effectively. Others claim that no new world order has yet emerged to replace that of the Cold War. According to this line of reasoning, the Council was established based on the premise of a Soviet-Western bipolar model of world order, with the resultant balance of power between the Soviet bloc states and the Western states and their allies.⁴ No other checks were provided for at that time because no need was seen. Following the demise of the bipolar model, no political equilibrium has emerged to replace these lost checks and balances. It has been suggested by many that such checks will be necessary to prevent infringements on state sovereignty and to balance an unleashed Council determined to take advantage of its new found power in traditional or other ways.⁵ Iraq took this view with

² BOUTROS BOUTROS-GHALI, AN AGENDA FOR PEACE 7-8 (1992).

³ See e.g. S.C. Res. 748, U.N. SCOR, 47th Sess., 3063d mtg. at 2-3, U.N. Doc. S/RES/3063 (1992) (economic and diplomatic sanctions on Libya); S.C. Res. 678, U.N. SCOR, 45th Sess., 2963d mtg. at 27, U.N. Doc. S/RES/2963 (1990) (authorizing the use of force to expel Iraqi troops from Kuwait); S.C. Res. 770, U.N. SCOR, 47th Sess., 3106th mtg., U.N. Doc. S/RES/3106 (1992) (authorizing peacekeeping for humanitarian purposes in Bosnia and Herzegovina).

⁴ Edward McWhinney, *The International Court as Emerging Constitutional Court and the Coordinate UN Institutions (Especially the Security Council): Implications of the Aerial Incident at Lockerbie*, 30 CAN. Y.B. INT'L L. 261 (1992).

⁵ The Council issued the following statement at the summit meeting of Jan. 31, 1992:

The absence of war and military conflicts amongst States does not in itself ensure international peace and security. The non-military sources of instability in the economic, social, humanitarian and ecological fields have become threats to peace and security. The United Nations membership as a whole, working through the appropriate bodies, needs to give the highest priority to the solution of these matters.

U.N. Doc. S/PV. 3046, 143 (1992).

regard to the Council's resolutions during and after the Gulf War.⁶

In light of these concerns the International Court of Justice (hereinafter the Court) has become the focus of much attention. As the principal judicial organ of the U.N.,⁷ it has been championed as a possible check on unbridled Council power, the missing link in order to restore some kind of balance to the U.N. system. There is some uncertainty with regard to the legal basis for this suggestion. The question of whether the Court has the competence to review the legality of a Council decision has been considered. It was generally accepted for years by many experts that Council resolutions could not in fact be reviewed by the Court.⁸ However, recently it appears there has been a shift in popular opinion, largely based on the Provisional Measures decision in *Lockerbie*,⁹ towards a view that the Court may indeed possess a power of judicial review.

Before beginning an analysis of possible Court power in this area, it is necessary to clarify the sense in which the term 'judicial review' is being used. In the U.K., this term connotes an accepted power of the High Court to supervise the activities of government bodies on the basis of principles of public law.¹⁰ The power to review decisions is not with reference to a written constitution, but rather dependent on the decision being 'irrational' or 'unreasonable.' The question of how 'unreasonable' a decision or rule must be before it is liable to be quashed was dealt with in the 1948 King's Bench decision, *Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation*.¹¹ Lord

⁶ See Geoffrey Watson, *Constitutionalism, Judicial Review, and the World Court*, 34 HARV. INT'L L.J. 1 (1993).

⁷ U.N. CHARTER art. 92. By virtue of Article 92, "[t]he International Court of Justice shall be the principal judicial organ of the United Nations." *Id.*

⁸ See e.g. SHABTAI ROSENNE, *THE LAW AND PRACTICE OF THE INTERNATIONAL COURT* 74 (1985). Some authors today still reject the idea of the Court attempting to fill any gap in law-making power within the U.N. system by acting as a sort of constitutional check against the newly unleashed power of the Council. See McWhinney, *supra* note 4, at 262.

⁹ Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libya v. U.K.; Libya v. U.S.), 1992 I.C.J. 3, 114 (Apr. 14) [hereinafter known as *Lockerbie*].

¹⁰ For further discussion of judicial review in the U.K., see PETER CANE, *AN INTRODUCTION TO ADMINISTRATIVE LAW* (1986).

¹¹ *Associated Provincial Picture Houses Ltd. v. Wednesbury Corp.*, 1 K.B. 223 (1948).

Greene MR stated that if an authority's decision was "so unreasonable that no reasonable authority could ever have come to it, then the courts can interfere."¹²

There is no suggestion that the concept of judicial review at the international level has the U.K. connotation of reasonableness. Rather, it is generally accepted to reflect a power akin to the U.S. Supreme Court's ability to determine the constitutionality of a rule or decision and strike it down if determined to be unconstitutional. In *Marbury v. Madison*,¹³ an early 19th century U.S. Supreme Court case, the Supreme Court, while upholding the legality of a disputed act of a political branch of government, gave itself the ultimate power to determine whether the political branch has acted constitutionally in any particular instance. The U.S. Supreme Court let President Jefferson win the case at hand by agreeing that his executive discretion to issue or withhold commissions was constitutionally unlimited. In so doing, it also staked out a general power of the court to determine, by its ultimate role as constitutional umpire, the boundaries within which that unfettered political discretion could be exercised. Within the context of this paper, I will be using the term judicial review to connote a U.S. style Supreme Court power to review the constitutionality of decisions.

In this paper, I will argue that the Court does in fact currently possess powers of judicial review, but that these are very limited with respect to binding Chapter VII Council decisions. I will support my argument by examining four possible sources of power for the Court: the Charter of the United Nations (hereinafter the Charter); the Statute of the International Court of Justice (hereinafter the Statute); the negotiating history, or travaux préparatoires of the Charter; and finally the relevant Court decisions and opinions on the subject. I will then discuss the question of whether the Court should possess stronger powers of review. While related to the existence of a review power, this question is in fact a separate issue, a point often missed in analyses of judicial review. In this discussion, I will examine possible alternatives to judicial review, problems with its implementation, and what scope an increased power should have.

¹² *Id.*

¹³ *Marbury v. Madison*, 5 U.S. 137 (1803).

I. SOURCES OF JUDICIAL REVIEW

A. *Charter of the United Nations*

Chapter XIV of the Charter deals specifically with powers attributed to the Court; therefore, this a good place to begin a search for a power of judicial review. Article 92 states that the Court shall be the principal judicial organ of the U.N., and shall function in accordance with the annexed Statute, which will be examined separately. By virtue of Article 94(1), members of the U.N.¹⁴ each undertake to comply with any decision by the Court to which it is a party. Other provisions in Chapter XIV entitle members to use other international tribunals, and entitle the Council, the General Assembly (hereinafter the Assembly), or other U.N. agencies to request an advisory opinion from the Court on any legal question.¹⁵

It is apparent that no judicial review power is directly attributed to the Court in Chapter XIV of the Charter. However, it has been argued that the term 'principal judicial organ' in Article 92 might imply a power of judicial review if most states agree that there should be a judicial body with the authority to examine the validity of acts of other organs of government.¹⁶ Such agreement would be most likely to come from states which have some domestic judicial body with powers of judicial review, either decentralized in courts of general jurisdiction, as in the U.S., or centralized in constitutional courts, as in France. It is possible that the U.S. and a European country such as France might interpret the Charter differently. The U.S. Constitution does not specifically authorize judicial review. Such power was arrogated by the U.S. Supreme Court onto itself in *Marbury v.*

¹⁴ "All members of the United Nations are *ipso facto* parties to the Statute of the International Court of Justice." U.N. CHARTER art. 93, ¶ 1.

¹⁵ See U.N. CHARTER art. 95 stating, "[n]othing in the present charter shall prevent Members of the United Nations from entrusting the solution of their differences to other tribunals by virtue of agreements already in existence or which may be concluded in the future."

See also U.N. CHARTER art. 96 which reads:

1. The General Assembly or the Security Council may request the International Court of Justice to give an advisory opinion on any legal question. 2. Other organs of the United Nations and specialized agencies, which may at any time be so authorized by the General Assembly, may also request advisory opinions of the Court on legal questions arising within the scope of their activities.

¹⁶ See Watson, *supra* note 6, at 5-6.

Madison. By way of contrast, France does have an explicit constitutional review power. With no hard evidence of an international consensus on this point, however, it is unlikely that Article 92 might be used as a legal basis for judicial review.

With no implicit or explicit power of judicial review in Chapter XIV, it becomes necessary to examine the possibility that such a power may be inferred from other Charter provisions. Chapter V of the Charter covers the composition, functions and powers of the Council. The Council is given primary responsibility for the maintenance of international peace and security by virtue of Article 24(1), and is empowered to take decisions binding on all member states by virtue of Article 25. Much attention has been given to a possible limitation on Council power in the latter provision: "The Members of the United Nations agree to accept and carry out the decisions of the Security Council *in accordance with the present Charter*." (emphasis added)¹⁷ Some analysts have suggested that this allows the Court to disregard decisions of the Council which are not substantively in accordance with the aims of the Charter.¹⁸ This would imply that the Court has the power to review Council decisions in order to determine whether or not they are *intra vires*.¹⁹ Although this is an intellectually supportable argument, it does not appear to have been followed in practice, as will become apparent later in the discussion of the case law. Instead, the phrase 'in accordance with the present Charter' appears to have been interpreted as procedural, referring to the manner in which the states accept and carry out the decisions.

This does not mean that the Council is left completely free of restraint in the exercise of its powers. Article 24(2) states that the Council's power must be exercised "... in accordance with the [p]urposes and [p]rinciples of the United Nations."²⁰ These purposes and principles are expanded upon in Chapter I of the Charter. In one specific limitation, the purposes of the U.N. are to be carried out "... by peaceful means, and in con-

¹⁷ U.N. CHARTER art. 25.

¹⁸ See Professor D. Bowett, Lecture at the British Institute for International and Comparative Law, *Judicial and Political Functions of the Security Council and the International Court of Justice* (Feb. 17, 1994).

¹⁹ *Intra vires* is defined as an act which is 'within the power' of a person or a corporation. BLACK'S LAW DICTIONARY 823 (6th ed. 1990).

²⁰ U.N. CHARTER art. 24, ¶ 2.

formity with the principles of justice and international law²¹

While these general provisions provide for some restraint, substantive and procedural standards for review of binding Chapter VII actions are more difficult to pinpoint in the Charter. Article 39 authorizes the Council to determine ". . . the existence of any threat to the peace, breach of the peace, or act of aggression"²² The Council's ability to make such a determination, which is a precondition for any application of sanctions, has in the past been challenged by sanctioned states or those that felt that the finding of a threat to the peace was inappropriate in the circumstances.²³ However, the determination of a threat to the peace has more often been viewed as a non-reviewable competence given to the Council.²⁴

It seems that realistically, any implied restraints on the Council's Chapter VII powers which are found in the Charter may well have more to do with the interpreter's political yearnings than to do with truly implied restraints.²⁵ The absence of any specific restraints in a context in which a great deal of power is assigned to the Council might be interpreted as one of the strongest arguments against an existing judicial review function. The possibility remains that a more limited power of judicial review might be inferred in a situation in which the Council merely makes recommendations, as opposed to taking binding decisions. There is a role provided for the Court in a Chapter VI type situation in Article 36(3) of the Charter: "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

²¹ U.N. CHARTER art. 1, ¶ 1.

²² U.N. CHARTER art. 39.

²³ For e.g., when Rhodesia's minority government unilaterally declared independence from the United Kingdom, both Portugal and South Africa disagreed with the Council's decision that this constituted a threat to the peace. See S.C. Res. 221, U.N. SCOR, 21st Sess., ¶ 1, U.N. Doc. S/RES/221 (1966); S.C. Res. 232, U.N. SCOR, 21st Sess., ¶ 1, U.N. Doc. S/RES/232 (1966).

²⁴ ROSALYN HIGGINS, Q.C., *THE NEW U.N.: APPEARANCE AND REALITY* 10 (The Josephine Onoh Memorial Lecture, Feb. 22, 1993) (transcript available through The Univ. of Hull Press).

²⁵ Michael Reisman, *The Const. Crisis in the U.N.*, 87 AM. J. INT'L L. 93 (1993).

of the Court.”²⁶ This article, while giving the Court a role, does not delegate a specific power of judicial review over recommendations for the peaceful settlement of disputes.

B. *Statute of the International Court of Justice*

The next possible source of a judicial review power to be examined is the Statute of the International Court of Justice. The connection between the Charter and the Statute is formalized by Article 92 of the Charter which states that the Statute is an ‘integral’ part of the Charter. There appear to be at least two possible interpretations of what this integral status means.²⁷ The first is that the Statute is essentially independent of the Charter. The second, and more accepted view, is that any problems of interpretation are to be solved on the basis that the Court exists and functions in line with the general existence and functioning of the U.N. This does not imply a subordinate status for the Statute, something which was expressly rejected by not calling it an ‘Annex.’²⁸ Following this argument, the Statute would certainly be able to support a power of judicial review even if it does not exist in the Charter. The Statute confirms that the Court is the principal judicial organ of the U.N. in Article 1. The Court’s competence is outlined in Chapter II, and its jurisdiction specifically addressed in Article 36. However, no mention is made of any power of judicial review. There does not even appear to be any scope for arguing that such power may be inferred from any of the provisions.

C. *Negotiating History*

The Charter has a constitutional character but is also a treaty and is, therefore, governed by treaty law, specifically the *Vienna Convention on the law of treaties* (hereinafter the *Vienna Convention*).²⁹ Article 31 of the Vienna Convention provides that the interpretation of a treaty should rest primarily on

²⁶ U.N. CHARTER art. 36, ¶ 3.

²⁷ See ROSENNE, *supra* note 8, at 65-68.

²⁸ The fact that the Statute was annexed to the Charter was merely for drafting convenience. ROSENNE, *supra* note 8, at 67.

²⁹ Vienna Convention on the law of treaties, concluded May 23, 1969, 1155 U.N.T.S. 331.

its text.³⁰ However, Article 32 gives some scope to examine the negotiating history if the text leaves the meaning "ambiguous or obscure."³¹ While there is not much question regarding the Statute, some of the Charter's provisions are arguably ambiguous regarding judicial review, thus allowing an examination of their negotiating history in order to find out the intention of the framers.

The travaux préparatoires of the Charter present the strongest arguments against a power of judicial review.³² At the 1945 San Francisco Conference on International Organization (hereinafter the Conference) to set up the U.N. system, the proposal to confer the point of preliminary determination of each organ's competence upon the Court was specifically rejected, allowing instead each organ to interpret its own competence.³³

At the Conference, Belgium championed the idea of a judicial review power for the Court.³⁴ The Belgian delegate proposed that:

[a]ny state, party to a dispute brought before the Security Council, shall have the right to ask the Permanent Court of International Justice whether a recommendation or a decision made by the Council or proposed in it infringes on its essential rights. If the Court considers that such rights have been disregarded or are threatened, it is for the Council either to reconsider the question or to refer the dispute to the Assembly for decision.³⁵

This proposed amendment was to be incorporated into the Charter's Chapter VI on the Pacific Settlement of Disputes. The purpose of the First Belgian Amendment according to the Belgian delegate was to ensure that no state would be obliged to abandon an essential right of statehood derived from positive international law if the Council ruled against them.³⁶

³⁰ *Id.* art. 31.

³¹ *Id.* art. 32.

³² For an in depth analysis of the negotiating history on this issue, see Watson, *supra* note 6, at 8-14.

³³ See RICHARD FALK, *REVIVING THE WORLD COURT* 162 (1986) (concludes for this reason there is no power of judicial review).

³⁴ Watson, *supra*, note 6, at 8-14.

³⁵ Doc. 2, G/7(k)(1), 3 U.N.C.I.O. Docs. 335, 336 (1945).

³⁶ Doc. 433, III/2/15, 12 U.N.C.I.O. Docs. 47, 48 (1945).

The First Belgian Amendment prompted a great deal of discussion among the drafters. Three states awaiting a place on the Permanent Council spoke against the amendment, and thus in their own self-interest. The Soviet delegate voiced his concern that the Security Council should receive the full confidence of the members of the Organization, and added that there would be no desire on the part of the Council to infringe on states' sovereign rights. The proposed Belgian amendment, it was asserted, would weaken the Council too much.³⁷ The American delegate argued that the draft requirement of the Council to work in accordance with the principles of the Organization and with due regard for the principles of justice and international law was sufficient to keep the Council in line, especially since states could already appeal to go before the Court.³⁸ The French delegate argued against a dispersal of responsibilities in the Organization and suggested that the drafting committee ensure to the fullest extent possible that the Council accomplish its task according to law and justice.³⁹ South African and British delegates also spoke against the amendment, for reasons such as an unacceptable delay to the advantage of an aggressor state.⁴⁰

In favor of the amendment, the delegate from Columbia (not expected to be a permanent council member) pointed out that having confidence in the Council "should not exclude confidence in the International Court of Justice," and that "no question was more legal than one concerning the essential rights of a state."⁴¹

In the end Belgium withdrew the amendment. However, this was not because the framers had reached a consensus that a judicial review power was unnecessary with regard to binding Chapter VII Security Council decisions.⁴² It was withdrawn because under what was to become Chapter VI, the Council's power to recommend a solution to disputes would be merely advisory and not possess any obligatory effect.

³⁷ *Id.* at 49.

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ Doc. 498, III/2/19, 12 U.N.C.I.O. Docs. 65, 66 (1945).

⁴¹ Doc. 433, *supra* note 36, at 50.

⁴² Watson, *supra* note 6, at 11.

Belgium later raised the issue again in the form of the Second Belgian Amendment. The Belgian delegate argued, on May 29, 1945, that the Committee on Legal Problems should determine a proper interpretative organ for certain parts of the Charter, with the Court being an obvious possibility.⁴³ After debate in which it was variously suggested that the Assembly, the Court, or ad hoc committees of experts could fill this role,⁴⁴ the Belgian proposal was rejected. While it may be argued that the idea of judicial review was not rejected per se, it was clearly rejected as an established procedure.⁴⁵ A subcommittee of the Committee on Legal Problems prepared a report concluding that no provision regarding interpretation of powers was necessary in the Charter. Instead it encouraged organs in conflict to seek advisory opinions from the Court, and states to bring disputes before the Court or to use ad hoc committees or conferences to find solutions. The report concluded that if an interpretation by an organ or committee is "not generally acceptable it will be without binding force."⁴⁶

A situation envisaged in the report in which the Court reviews only certain disputes referred to it while the day to day disputes are dealt with by the organs concerned is not incompatible with judicial review. It is in fact somewhat similar to the decentralized system in the U.S. Thus, it could be argued that the text and travaux préparatoires of the Charter do not rule out all forms of judicial review, but suggest that the Court has the power to ignore a 'generally unacceptable' interpretation of the Charter by another organ.⁴⁷ However, this implicit endorsement of a general standard of review was not elaborated upon. In practice there could be some confusion as to how the Court might determine that an interpretation of an organ's powers was not generally acceptable. There is perhaps the implication that a majority of states would have to reject an interpretation.

While the Charter and the travaux préparatoires do not conclusively resolve the issue, they certainly do not favor a

⁴³ Doc. 664, IV/2/33, 13 U.N.C.I.O. Doc. 633 (1945).

⁴⁴ *Id.*

⁴⁵ Doc. 843, IV/2/37, 13 U.N.C.I.O. Doc. 645 (1945).

⁴⁶ Doc. 933, IV/2/42 (2), 13 U.N.C.I.O. Docs. 709, 710 (1945).

⁴⁷ Watson, *supra* note 6, at 14.

power of judicial review, rejecting it in an institutionalized form. Further insight into the issue may be gained by an examination of how it has developed in practice.

D. *The Development of Judicial Review in Case Law*

The Vienna Convention provides that the interpretation of treaties should take into account “[a]ny subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation.”⁴⁸ Thus, the next step in the search for a power of judicial review is to examine any relevant decisions of the Court, for states themselves may have established judicial review through their acquiescence in the Court’s de facto use of such a power. *Marbury v. Madison* is a precedent, albeit from a national jurisdiction, for a situation in which the Court might size a power of judicial review through one of its own decisions.

1. *The Certain Expenses Case*⁴⁹

In 1961, the Assembly requested an advisory opinion from the Court on whether member states were responsible for expenses relating to U.N. operations in the Congo in 1960-61 and in the Middle East in the 1950s.⁵⁰ This was because Article 17(2) of the Charter provides that the “expenses of the Organization shall be borne by the Members as apportioned by the General Assembly.”⁵¹ The legal question was whether the expenses in the Congo and the Middle East fit within the meaning of this Article.

The opinion of the Court in this case has often been cited in support of the view that each organ within the U.N. system must determine its own jurisdiction.⁵² The Court expressly rejected the idea that it might possess a power of judicial review:

⁴⁸ Vienna Convention on the law of treaties, *supra* note 29, art. 31 (3)(b).

⁴⁹ Certain Expenses of the U.N., 1962 I.C.J. 151 (July 20) [hereinafter CERTAIN EXPENSES CASE].

⁵⁰ G.A. Res. 1731, U.N. GAOR, 16th Sess., Supp. No. 17, at 54, U.N. Doc. A/5062 (1961).

⁵¹ U.N. CHARTER art. 17, ¶ 2.

⁵² See Bernhard Graefrath, *Leave to the Court What Belongs to the Court: The Libyan Case*, 4 EUR. J. INT’L L. 184, 201 (1993).

In the legal systems of States, there is often some procedure for determining the validity of even a legislative or governmental act, but no analogous procedure is to be found in the structure of the United Nations. Proposals made during the drafting of the Charter to place the ultimate authority to interpret the Charter in the International Court of Justice were not accepted; the opinion which the Court is in the course of rendering is an *advisory* opinion. As anticipated in 1945, therefore, each organ must, in the first place at least, determine its own jurisdiction.⁵³

Despite this apparently clear statement, there is some support for the view that it is not necessary to interpret this passage as a complete rejection of judicial review by the Court. It has been argued that talk of determining jurisdiction in the first place leaves open the possibility that there is a second place, which might be the domain of the Court.⁵⁴ It has also been suggested that the denial of ultimate authority does not mean the denial of all authority to interpret the Charter.⁵⁵

Stronger arguments in favor of judicial review highlight the Court's referral to a rejected French amendment to the Assembly resolution calling for the Court to decide first whether the expenditures authorized by the Council and the Assembly were in conformity with the Charter. Despite the fact that this request was not sent to the Court in the final version of the resolution,⁵⁶ the Court reserved for itself the power to decide if the expenditures were authorized in conformity with the Charter if it so wished.⁵⁷ In so doing, the Court asserted a power of judi-

⁵³ *Certain Expenses Case*, 1962 I.C.J. at 168.

⁵⁴ Graefrath, *supra* note 52, at 201.

⁵⁵ See Watson, *supra* note 6, at 16. Watson argues that this may signify that the Court's opinion would only be binding on those parties before it, just as its decisions in contentious cases are binding only on those parties before it. Watson *supra* note 6, at 16.

⁵⁶ The final resolution asked whether,

" . . . the expenditures authorized in General Assembly resolutions . . . relating to U.N. operations in the Congo undertaken in pursuance of the Security Council resolutions . . . and General Assembly resolutions . . . and the expenditures authorized in General Assembly resolutions . . . relating to the operations of the United Nations Emergency Force undertaken in pursuance of General Assembly resolutions . . . constitute 'expenses of the Organization' within the meaning of Article 17, paragraph 2, of the Charter of the United Nations?"

Certain Expenses Case, 1962 I.C.J. at 153.

⁵⁷ *Certain Expenses Case*, 1962 I.C.J. at 157.

cial review in a situation in which the Assembly had clearly opted against offering such power to the Court.⁵⁸ This apparent contradiction between the words and actions of the majority of the Court has left some room for debate.

Further support for judicial review is found in the Court's statement that where U.N. action is for the fulfillment of one of the Conference's stated purposes, "the presumption is that such action is not *ultra vires*" ⁵⁹ This would appear to suggest that the Court reserved for itself a right of judicial review when the Council is not acting to fulfill one of its stated purposes, the action thus being *ultra vires*. This 'presumption of validity' has since served as the Court's standard of review, replacing the drafters' suggested standard of 'without binding force if not generally acceptable.'⁶⁰

In the foregoing analysis, all arguments in favor of judicial review have been implied from statements of the Court majority, going against their explicit views on the issue. However, Judge Bustamante in his separate opinion categorically rejected any possibility of a complete absence of judicial review, stating that, "[i]t cannot be maintained that the resolutions of any organ of the United Nations are not subject to review: that would amount to declaring the pointlessness of the Charter or its absolute subordination to the judgment, always fallible, of the organs."⁶¹

In the separate opinion of Judge Morelli, it was directly argued that the Court should have a narrow power of review to deal with questions of the validity of the acts of the U.N.:

It is exclusively for the Court to decide, in the process of its reasoning, what are the questions which have to be solved in order to answer the question submitted to it. While . . . the organ requesting the opinion is quite free as regards the formulation of the question to be submitted to the Court, it cannot, once that question has been defined, place any limitations on the Court as regards the logical processes to be followed in answering it. That

⁵⁸ Watson, *supra* note 6, at 15.

⁵⁹ *Certain Expenses Case*, 1962 I.C.J. at 168; *Ultra Vires* is defined as an act performed 'without any authority' to act on the subject. BLACK'S LAW DICTIONARY 1522 (6th ed. 1990).

⁶⁰ Watson, *supra* note 6, at 17.

⁶¹ *Certain Expenses Case*, 1962 I.C.J. at 304 (dissenting opinion of Judge Bustamante).

organ cannot, therefore, exclude the possibility of the Court's dealing with a question which the Court might consider it necessary to answer in order to perform the task entrusted to it Any limitation of this kind would be unacceptable because it would prevent the Court from performing its task in a logically correct way

Therefore, even according to the request for advisory opinion, the Court is free to consider or not consider the question of the conformity of the resolutions with the Charter⁶²

Judge Morelli's analysis focused on judicial review in the sense of whether the proper organ had exercised power in any particular case. This type of review differs from the type most commonly discussed, as discussed here, in which the correct organ has exercised but possibly exceeded its own powers. Judge Morelli's support of a Court power to review a decision in order to establish whether it was taken by the correct body today probably benefits from a certain consensus. In fact, it is arguable that the question presented in the *Namibia Case*⁶³ fits into this category of review, the Court deciding whether or not the Council was the correct organ to revoke the mandate as it was held by the Assembly.

Thus, a certain amount of individual support may be found in favor of a power of judicial review in the *Certain Expenses Case*, particularly in a situation in which there is a question of which organ may properly exercise the power. However, support for review power over decisions by the correct organ must be considered to be tempered by the outright rejection of such a power by the Court's majority.

2. *The Namibia Case*

Following World War I, the League of Nations authorized South Africa to administer a Mandate for Namibia (known at the time as South-West Africa). The system of apartheid imposed there by South Africa was held by the Court in 1950 to be

⁶² *Certain Expenses Case*, 1962 I.C.J. at 217 (separate opinion of Judge Morelli).

⁶³ *Legal Consequences for States of the Continued Presence of S. Afr. in Namib. (S. W. Afr.) Notwithstanding Security Council Resolution 276 (1970)*, 1971 I.C.J. 16 (June 21) [hereinafter *Namibia*].

in violation of its duties in the terms of the Mandate.⁶⁴ Despite this Advisory Opinion, South Africa continued to illegally impose apartheid upon its neighbor. Following the General Assembly's lead,⁶⁵ the Council declared that South Africa had violated the Mandate, declared the Mandate to be terminated, and ordered South Africa to withdraw from South-West Africa.⁶⁶ The Council then requested an advisory opinion from the Court on the legal consequences for states of South Africa's continued presence in South-West Africa, notwithstanding Council Resolution 270.⁶⁷

During its consideration of the *Namibia* case, the Court observed that both South Africa and France had argued in the General Assembly that the Assembly's resolutions terminating the Mandate were *ultra vires*.⁶⁸ The Court stated that this argument would also apply to Council resolutions. On the issue of its ability to review the validity of these resolutions, the Court pronounced:

[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. The question of the validity or conformity with the Charter of General Assembly resolution 2145 (XXI) or of related Security Council resolutions does not form the subject of the request for advisory opinion. However, in the exercise of its judicial function and since objections have been advanced the Court, in the course of its reasoning, will consider these objections before determining any legal consequences arising from those resolutions.⁶⁹

In the course of its normal judicial procedure, the Court employed this practice by reviewing whether the Council reso-

⁶⁴ See Int'l Status of S.W. Afr., 1950 I.C.J. 128, 134 (July 11). The Court rejected South Africa's argument that they were no longer bound by the terms of the mandate as that had been established by the League of Nations which was no longer in existence.

⁶⁵ G.A. Res. 2145, U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6316 (1966).

⁶⁶ S.C. Res. 264, U.N. SCOR, 24th Sess., U.N. Doc. S/RES/264 (1969); S.C. Res. 269, U.N. SCOR, 24th Sess., U.N. Doc. S/RES/269 (1969); S.C. Res. 276, U.N. SCOR, 25th Sess., U.N. Doc. S/RES/276 (1970).

⁶⁷ S.C. Res. 284, U.N. SCOR, 25th Sess., 1550th mtg., U.N. Doc. S/RES/284 (1970).

⁶⁸ *Namibia*, 1971 I.C.J. at 45.

⁶⁹ *Id.*

lution was in conformity with the Charter. The Court concluded that "the decisions made by the Security Council . . . were adopted in conformity with the purposes and principles of the Charter and in accordance with its Articles 24 and 25."⁷⁰ After ruling that the Council's acts were valid and in accordance with the Charter, the Council concluded that South Africa had not acted in accordance with the Council's resolutions and that other states were bound to follow these resolutions and not recognize South Africa's occupation of Namibia.⁷¹

In rendering its opinion, the Court appears to have plainly contradicted itself. Despite its categorical initial rejection of a judicial review power, the Court proceeded to affirm a competence to decide whether a Council decision is in conformity with the Charter when this arises in the normal course of its judicial function.

In his separate opinion, Judge Petren argued that the Court has the responsibility to review the validity of the acts in question, because "[s]o long as the validity of the resolutions upon which Resolution 276 (1970) [was] based [had] not been established, it is clearly impossible for the Court to pronounce on [its] legal consequences"⁷² Underlining the need for some sort of judicial review, Judge Dillard stated, "[i]t may not be presumptuous to suggest that as a political matter it is not in the long-range interest of the United Nations to appear to be reluctant to have its resolutions stand the test of legal validity when it calls upon a court to determine issues to which this validity is related."⁷³ Perhaps the most ringing endorsement of judicial review came from Judge Fitzmaurice in his dissent in which he directly attacked the validity of Council's resolutions.⁷⁴

In opposition to any power of judicial review for the Court Judge Nervo stated that, "the Court will have to assume the validity of . . . Security Council and General Assembly . . . [resolutions] and that . . . [t]he Court should not assume powers of judicial review of the action of principal organs of the United

⁷⁰ *Id.* at 53.

⁷¹ *Id.* at 54-56.

⁷² *Namibia*, 1971 I.C.J. at 131 (separate opinion of Judge Petren).

⁷³ *Id.* at 151-52 (separate opinion of Judge Dillard).

⁷⁴ *Id.* at 292-93 (dissenting opinion of Judge Fitzmaurice).

Nations without specific request to that effect.”⁷⁵ Even this leaves some room for judicial review at the request of one of the U.N. organs.

The Court’s opinion in *Namibia* reflects the view that once the Court is asked about the effect of a U.N. organ’s resolution, it cannot avoid considering whether the resolution is valid in the first place. However, despite the clear support for judicial review expressed by some of the judges, most of this came in the form of general statements. With no strict legal basis given for such a power, it remains unclear at best, whether such a power exists.

3. Lockerbie (*Provisional Measures*)

Lockerbie is an important case because it coincided with the revival of the Council and the breakdown of the political checks and balances that had operated during the Cold War. It was also triggered by an innovative use of the Charter concept of ‘threat to the peace.’ It is considered very significant in that it is the first time a significant portion of the Court has intimated that it could exercise a power of judicial review in contentious cases. This decision more than any other source has fueled the recent debate on the existence of judicial review.

On December 21, 1988, a bomb planted on Pan Am flight 103 exploded over Lockerbie, Scotland, killing all 258 people on board and at least 15 on the ground. Investigations into the disaster led the U.S. and the U.K. to the conclusion that two Libyan intelligence agents were involved. These two states requested the surrender of the agents⁷⁶ but Libya refused. The Council responded on January 21, 1992, by adopting Resolution 731 calling on Libya ‘to provide a full and effective response’ to requests for surrender.⁷⁷ The resolution affirmed, “. . . the right of all States, in accordance with the Charter of the United Nations and relevant principles of international law, to protect

⁷⁵ *Id.* at 105 (separate opinion of Judge Nervo).

⁷⁶ See the Declaration of the U.S., Fr. & Gr. Brit. on Terrorism, 31 I.L.M. 723 (1992) (demanding surrender of the agents).

⁷⁷ S.C. Res. 731, U.N. SCOR, 47th Sess., 3033d mtg., U.N. Doc. S/RES/731 (1992).

their nationals from acts of international terrorism that constitute threats to international peace and security"⁷⁸

Libya's initial response to Resolution 731 conditioned compliance on the establishment by the Secretary-General of a committee of impartial judges to lead the inquiry into the charges against the two Libyan suspects.⁷⁹ In addition, the accused state demanded that the suspects be extradited not to the U.S. or the U.K., but to a third party. Libya later changed its argument, however, stating that its domestic law forbade the extradition of its own nationals and that compliance was, therefore, not possible.⁸⁰ If such a prohibition indeed exists in Libyan law, it begs the question of why this argument was not advanced immediately.

On March 3, 1992, Libya filed separate suits against the U.S. and the U.K. with the Court, seeking a judgment that both these states had violated the *Montreal Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation (Sabotage)* of 1971⁸¹ by continuing to attempt to gain custody over the two Libyan nationals. The applicant claimed that the Court possessed jurisdiction to hear the case by virtue of Article 14 of the Montreal Convention, arguing that as the parties had been unable to arrange an arbitration, recourse to the Court was open.⁸²

⁷⁸ *Id.*

⁷⁹ For details of Libya's response, see the letter from Ibrahim M. Bishari, Secretary of the People's Comm. for Foreign Liaison and Int'l Cooperation, to the Secretary-Gen., reprinted in 31 I.L.M. 737 (Feb. 27, 1992).

⁸⁰ Letter from Ibrahim M. Bishari, Secretary of the People's Comm. for Foreign Liaison and Int'l Cooperation of the Libyan Arab Jamahiriya, to the Secretary-Gen., reprinted in 31 I.L.M. 739 (Mar. 2, 1992).

⁸¹ Montreal Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation (Sabotage), Sept. 23, 1971, 24 U.S.T. 565 [hereinafter *Montreal Convention*].

⁸² *Id.* art. XIV, 24 U.S.T. at 572.

Any dispute between two or more Contracting States concerning the interpretation or application of this Convention which cannot be settled through negotiation, shall, at the request of one of them, be submitted to arbitration. If within six months from the date of the request for arbitration the Parties are unable to agree on the organization of the arbitration, any one of those parties may refer the dispute to the International Court of Justice by request in conformity with the Statute of the Court.

Id. art. XIV (1), 24 U.S.T. at 572.

Libya claimed that the Council resolutions ordering extradition were *ultra vires* and, therefore, invalid because they disregarded Article 7 of the Montreal Convention. This provision embodies a fundamental principle of international law, *aut dedere aut judicare*, which allows the state of nationality of an alleged offender the choice either to extradite the alleged offender for trial in a foreign jurisdiction or to choose to have its own authorities prosecute. Ironically, this provision was included in the Montreal Convention expressly at the request of the western states which drafted and negotiated it.⁸³ Libya asserted that it had already taken measures necessary to comply with the Montreal Convention by submitting the case for prosecution to its own competent authorities,⁸⁴ and asked "the Court to indicate . . . provisional measures to enjoin [both states] from taking any action against Libya calculated to coerce or compel Libya to surrender the accused individuals to any jurisdiction outside of Libya"⁸⁵

Libya also asked the Court to find that the Council had exceeded its Charter-delegated powers by infringing or threatening to infringe through the use of economic, air and other sanctions, the enjoyment and the exercise of the rights conferred on Libya by the Montreal Convention.⁸⁶

Three days after the close of legal hearings, but before the Court had reached a decision, the Council increased the pressure on Libya. Resolution 748, adopted March 31, 1992, and taken expressly under Chapter VII powers, imposed universal and mandatory commercial and diplomatic sanctions on Libya, effective April 15, to secure compliance with the surrender order.⁸⁷ In support of the resolution, the U.S. and the U.K. both argued that Libya could not conduct a fair trial because it was purportedly involved in the terrorism.⁸⁸

The respondents here argued that the requisite negotiations to set up an arbitration had not taken place and that the Court, therefore, did not have jurisdiction until the six month period specified in the provision had ended.

⁸³ McWhinney, *supra* note 4, at 263-64.

⁸⁴ *Lockerbie* (Libya v. U.K.), 1992 I.C.J. at 5.

⁸⁵ *Id.* at 8.

⁸⁶ *Id.* at 7.

⁸⁷ S.C. Res. 748, U.N. SCOR, 47th Sess., 3063d mtg. at 2-3, U.N. Doc. S/RES/748 (1992).

⁸⁸ *Lockerbie* (Libya v. U.K.), 1992 I.C.J. at 29 (separate opinion of Judge Shahabuddeen). During the course of the orders, however, Judge Shahabuddeen

The Court, the composition of which was altered to take account of the parties to the action, issued orders on April 14, 1992, rejecting Libya's request for preliminary relief by a vote of 11-5.⁸⁹ It ruled that whatever the situation prior to Council resolution 748, "the rights claimed by Libya under the Montreal Convention . . . [were not] appropriate for protection by the indication of provisional measures: . . . an indication of the measures requested by Libya would be likely to impair the rights which appear *prima facie* to be enjoyed by the [two respondent states] by virtue of Security Council Resolution 748 (1992)"⁹⁰ The majority declined to rule on the U.S. contention that because the Montreal Convention called for a six month delay before submission to the Court, there was a manifest lack of jurisdiction to allow interim measures.⁹¹ In all there were eleven written opinions, reflecting the novelty of the issues in question. This proliferation from the bench has stimulated the most debate over the issue of judicial review since the framers originally tackled the question in 1945. While the Court's order was only an award of interim measures and not some more general statement on the relationship between the Court and the Council,⁹² it is still worthwhile noting the different views raised.

The Court brought the question of judicial review into full relief with the separate opinion of Judge Shahabuddeen. After

pointed out that the official announcements of those governments made it clear that they could not provide a fair trial as guilt has already been determined by them as States. *Id.* at 31.

⁸⁹ *Lockerbie* (Libya v. U.K.), 1992 I.C.J. at 15. The composition of the Court was altered to take account of the parties to the action. The President of the Court, Judge Jennings, was a U.K. national and as such prevented from fulfilling his presidential duties by virtue of Article 32 (1) of the Rules of the Court. Libya, unrepresented on the Court, was able to name an ad-hoc judge by virtue of Article 31 (2) of the Court's Statute.

⁹⁰ *Id.*

⁹¹ *Id.* Some of the judges did, however, consider the issue in their separate opinions. Judge Ni accepted the American argument that the Court lacked jurisdiction until the expiration of the six months dictated in the *Montreal Convention*. Had there been jurisdiction for the Court, however, Judge Ni suggested that the Court would have had to consider the matter regardless of whether it was before the Council at the same time. See *Lockerbie* (Libya v. U.K.), 1992 I.C.J. at 23 (separate opinion of Judge Ni).

⁹² HIGGINS, *supra* note 24, at 10.

citing *Namibia* as support for the principle that Council resolutions are entitled to a presumption of validity, he stated:

[t]he question now raised by Libya's challenge to the validity of resolution 748 (1992) is whether a decision of the Security Council may override the legal rights of States, and, if so, whether there are any limitations on the power of the Council to characterize a situation as one justifying the making of a decision entailing such consequences. Are there any limits to the Council's powers of appreciation? In the equilibrium of forces underpinning the structure of the United Nations within the evolving international order, is there any conceivable point beyond which a legal issue may properly arise as to the competence of the Security Council to produce such over-riding results? If there are limits, what are those limits and what body, if other than the Security Council, is competent to say what those limits are?⁹³

A similar issue was raised by Judge Weeramantry in his dissent, "does. . .the Security Council discharge its variegated functions free of all limitations, or is there a circumscribing boundary of norms or principles within which its responsibilities are to be discharged?"⁹⁴ Both Judges were obviously concerned with the need to enforce limits on the power of the Council. In fact, both majority and dissenting opinions in *Lockerbie* seem to express sentiments that there are limits to the Council's powers and that they cannot be left exclusively to the Council itself to interpret. Judge Weeramantry found that an examination of the travaux préparatoires of the Charter clearly provided for some limitation in that the Council's powers must be exercised in accordance with the purposes and principles found in Chapter I.⁹⁵

⁹³ *Lockerbie* (Libya v. U.K.), 1992 I.C.J. at 32 (separate opinion of Judge Shahabuddeen).

⁹⁴ *Lockerbie* (Libya v. U.K.), 1992 I.C.J. at 61 (dissenting opinion of Judge Weeramantry).

⁹⁵ *Id.* at 65.

The history of the U.N. Charter thus corroborates the view that a clear limitation on the plentitude of the Security Council's powers is that those powers must be exercised in accordance with the well-established principles of international law. It is true this limitation must be restrictively interpreted and is confined only to the principles and objects which appear in Chapter I of the Charter The restriction, nevertheless, exists and constitutes an important principle of law in the interpretation of the U.N. Charter.

Id.

Some of the judges attempted to couch the issues raised by *Lockerbie* in terms which would avoid the need to come up with difficult answers. Cognizant of the possible conflict between the Court and the Council, acting President Oda stated in his declaration that he would have preferred to avoid the problems stemming there from by making the ruling on grounds of sovereign rights. He suggested that while no state is obliged to extradite its nationals unless there is a treaty obligation to that effect, extradition may be sought on terms of international criminal jurisdiction, therefore, making the question one of protection of sovereign rights under general international law and not one of Libya's rights under the Convention.⁹⁶ Judge Shahabuddeen also attempted to avoid any conflict between the organs by considering the problem to be a conflict not between the Court and the Council, but between Libya's obligations under the Charter and the Convention.⁹⁷ It should be noted that this argument reflects an assumption that there are relevant obligations under the Convention, however, whether this is applicable law remains to be decided on the merits.

It is possible to infer that some judges, albeit tentatively, did go so far as to indicate that under certain circumstances, a decision by the Council might be declared invalid by the Court. Acting President Oda stated that "a decision of the Security Council, properly taken in the exercise of its competence, cannot be summarily reopened"⁹⁸ This stipulation that the Council act within its competence could be taken to imply some leeway for Court review if the Council acted outside this competence. In his dissenting opinion, Judge Bedjaoui asserted that a resolution which prevents the Court from exercising its judicial function would give cause for consideration regarding its lawfulness.⁹⁹ He did not, however, go on to give terms of reference for what exactly the Court's judicial functions might be. This lack of specificity is a problem that reappears time and again in the arguments advanced in favor of judicial review.

One author has argued that the Libyan application left the Court with three possible options, the first two of which would

⁹⁶ *Lockerbie* (Libya v. U.K.), 1992 I.C.J. at 18 (declaration of Judge Oda).

⁹⁷ *Id.* at 29 (separate opinion of Judge Shahabuddeen).

⁹⁸ *Id.* at 17 (declaration of Judge Oda).

⁹⁹ *Id.* at 44 (dissenting opinion of Judge Bedjaoui).

mean the implicit assumption of some form of judicial review power.¹⁰⁰ The first choice was to hold "... that the sanctions ordered by Resolution 748 should be suspended until such time as the Court ascertained, at the merits stage, that Libya's claim was groundless."¹⁰¹ The second option was to hold that Libya had not established a sufficient case of *mala fides* or *ultra vires* at this stage, and therefore "... there were no grounds upon which the Court could order such interim relief."¹⁰² The third option would have been to hold "... that no relief would be forthcoming at any stage of the proceedings if granting that relief would require the Court to make a finding that a chapter VII decision of the Council exceeded its lawful authority."¹⁰³ This last option of rejecting any possibility of judicial review relies upon the binding nature of Council resolutions under Charter Article 25.

The proponent of this argument then asserts that the Court appears to have elected the second option and in so doing affirmed a power of judicial review in such situations.¹⁰⁴ It is at best unclear as to how this decision was reached. A straight forward analysis of the decision, in which the Court relies on Article 25 without subjecting Resolution 748 to any kind of review, would seem to indicate that in fact it is the third option which was actually chosen by the Court.

It has been similarly argued that, as in *Marbury*, the Court accedes to the power of the political branch but does so not by abstaining but rather by using its decision-making powers.¹⁰⁵ The Council's action in imposing sanctions is judged *intra vires* because the majority appear to agree that Article 103 of the Charter prevails over any rights Libya might have under the terms of the Montreal Convention, and thus frees the Council to apply sanctions as a suitable remedy in an exercise of its Chapter VII powers. Following this argument, the possibility remains that if Libya had come up with "... a more general ground of *ultra vires* - [for instance], that a coercive demand for

¹⁰⁰ Thomas Franck, *The "Powers of Appreciation:" Who is the Ultimate Guardian of U.N. Legality?*, 86 AM. J. INT'L L. 519, 521 (1992).

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

extradition of a state's own national 'could be deemed contrary . . . to protection of sovereign rights under general international law' -then, . . . " there might have been another decision by the Court.¹⁰⁶

This conclusion does not seem to mesh with the facts. The majority opinion did not consider whether the Council resolution might be ultra vires, but instead just relied on it, holding that the parties are obliged to carry out the Council decision by virtue of Article 25. The idea of a presumption of validity for Council resolutions is supported explicitly by Judge Shahabuddeen.¹⁰⁷ At least one other author clearly asserts that the Court ". . . did not assert judicial competence to determine whether purported legislative acts or actions of the Security Council complied with the constitutional law of the United Nations Charter" ¹⁰⁸

In fact, despite drawing attention to the issue of judicial review, most of the judges stopped short of explicitly endorsing such a power. Judge Weeramantry, clearly desirous of some limitation on the Council's power, would not claim this role for the Court, stating that it has not been vested with a review power as the highest courts have in some domestic jurisdictions.¹⁰⁹

Overall, the interim measures decision appears to represent an attempt by the Court to balance its judicial functions with the Council's political power. Judge Bedjaoui, in dissent, indicated that there should be a degree of balancing taking place, and that the Court should not be displaced from exercising its primary judicial functions. Realistically, in Chapter VII cases this balance appears to have been struck in favor of the Council. Judge Lachs states that "[w]hile the Court has the vocation applying international law as a universal law, operating both within and outside the United Nations, it is bound to re-

¹⁰⁶ *Id.* at 522.

¹⁰⁷ *Lockerbie (Libya v. U.K.)*, 1992 I.C.J. at 28 (separate opinion of Judge Shahabuddeen).

¹⁰⁸ McWhinney, *supra* note 4, at 270.

¹⁰⁹ *Lockerbie (Libya v. U.K.)*, 1992 I.C.J. at 55 (dissenting opinion of Judge Weeramantry).

spect, as part of that law, the binding decisions of the Security Council.¹¹⁰

Judicial Review advocates have suggested that Judge Lachs' choice of the word 'respect,' instead of a phrase such as 'defer to,' implies that a fair balancing between the organs is taking place.¹¹¹ Such an argument seems to ignore the very basis for the Court's decision which rests ultimately on the existence of a Council decision under Chapter VII, preempting, at least for the duration of its operation, potential judicial action based on the Montreal Convention. The Court supported its decision on two formal bases. First, Council decisions taken under Chapter VII are accepted by member states in advance as obligations by virtue of Article 25 of the Charter. Second, obligations under the Charter prevail over obligations under any other international agreement (in this case, the Montreal Convention) by virtue of Charter Article 103. This formalistic approach " . . . precludes, in blanket fashion, the exercise of judicial jurisdiction whenever and simply because the Council is in a Chapter VII decision mode."¹¹² Following the argument that Articles 103 and 25 of the Charter must always trump rights from other agreements, the only way for the other rights to survive would be if they reappeared in a situation in which the Chapter VII decision is terminated.¹¹³

It might be contended that Article 103 only trumps Libya's rights for the purposes of interim measures. However, there does not appear to be much support for this argument. It was in fact previously brought up by the U.S. in the *Nicaragua Case* (Merits)¹¹⁴ but rejected by the Court.

The majority ruling would appear to be a solid argument against the view discussed earlier, that judicial review powers

¹¹⁰ *Lockerbie* (Libya v. U.K.), 1992 I.C.J. at 26 (separate opinion of Judge Lachs).

¹¹¹ See Franck, *supra* note 100, at 522.

¹¹² Reisman, *supra* note 25, at 90.

¹¹³ Reisman, *supra* note 25, at 90. Reisman cloaks the same argument in different terms, suggesting that the Court was not shouldered aside by a Chapter VII decision, as asserted by Judge Shahabuddeen in his separate opinion, but rather that the applicant state loses whatever conventional or customary legal basis it may have had for making its application before the Chapter VII decision. Reisman, *supra* note 25, at 90.

¹¹⁴ Case Concerning the Military and Paramilitary Activities in and Against Nicar., 1992 I.C.J. 14 (June 27) [hereinafter *Nicaragua Case*].

are based in Article 25 of the Charter. This argument interprets the Article 25 requirement that Council decisions be "... in accordance with the present Charter ..." as a substantive requirement, rather than a procedural one. In fact, only the ad hoc judge appointed by Libya actually followed this line of reasoning, declaring the Council Resolution 748 imposing sanctions as invalid for violating Libya's right of sovereignty under Charter Article 2(7). Judge El-Kosheri argued that Article 25 cannot render binding a decision which is substantively not in accordance with the present Charter.¹¹⁵ This argument applied to the case at hand because it is the Charter, not the Council, which prevails over inconsistent treaty law. None of the other judges went so far as to draw this conclusion.

After determining that Charter obligations prevailed over those in the Convention, the Court added that at that stage it was not "called upon to determine definitively the legal effect of the Security Council Resolution 748 (1992)"¹¹⁶ It has been suggested that the implication of this is that when the Court deals with the merits of a case it may determine the legal effects of Council Resolutions.¹¹⁷ It would seem that a more straightforward interpretation would be that the Court will later review, "on the merits, what exactly was the legal effect of the substantive provisions of the resolution"¹¹⁸ This is altogether something other than determining whether the Council was or was not entitled to decide that a threat to the peace existed.

While the Court's competence to review Chapter VII decisions appears to be suspect at best, the balance of power with regard to Council Resolutions which are based in Chapter VI is far less clear. The Court decision was based on Resolution 748 and carried with it the implication that had the Council relied solely on Resolution 731, which was cast very much in the recommendatory language of Chapter VI, this would not have been enough to prevail over treaty-based Court jurisdiction. Unfor-

¹¹⁵ *Lockerbie* (Libya v. U.K.), 1992 I.C.J. at 99 (dissenting opinion of Judge El-Kosheri).

¹¹⁶ *Lockerbie* (Libya v. U.K.), 1992 I.C.J. at 15.

¹¹⁷ See Graefrath, *supra* note 52, at 185. See also Gerald McGinley, *The ICJ's Decision in the Lockerbie Cases*, 22 GA. J. INT'L & COMP. L. 577, 582 (1992).

¹¹⁸ HIGGINS, *supra* note 24, at 11.

tunately, this possibility was not delved into in sufficient detail to draw any hard conclusions.

This examination of separate opinions and declarations would be incomplete without a passing but important reference to the joint declaration of Judges Evensen, Tarassov, Guillaume and Aguilar. In this declaration the judges show unified support for the majority decision to rely on Resolution 748 without considering whether it was *intra vires* Council powers. This only serves to reinforce the conclusion that when the Council acts under its Chapter VII powers, the Court lacks a power of judicial review. While key questions were raised regarding the existence of and need for a judicial review power, there was no ringing endorsement of such a power. Instead, it appears that the majority, while mindful of the dangers of an unchecked Council, came closer to a reaffirmation of the idea of a "presumption of validity" for Chapter VII Council resolutions.¹¹⁹ While the power to review non-binding Council decisions may be the first step on the road to arrogating a much stronger judicial review power onto the Court, it would be inaccurate to portray *Lockerbie* as the international equivalent of *Marbury*.

4. Bosnia v. Yugoslavia (*Serbia and Montenegro*)¹²⁰

In March, 1993, the Republic of Bosnia and Herzegovina instituted proceedings against the Federal Republic of Yugoslavia (Serbia and Montenegro; hereinafter "Yugoslavia") seeking provisional measures from the Court in order to stop what it claimed to be acts of genocide on the part of Yugoslavia. Bosnia-Herzegovina contended that a series of acts between April, 1992 and the date of Application were committed at the direction of, the behest of, and with the assistance of the government of Yugoslavia that amounted to genocide. The Applicant asked the Court to indicate provisional measures which would end the genocidal acts and allow Bosnia-Herzegovina to seek and receive support from other states.

On April 8th, the Court issued its order calling for a cessation of any genocidal acts and indicating further measures.¹²¹

¹¹⁹ Watson, *supra* note 6, at 28.

¹²⁰ Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Provisional Measures, *Bosnia v. Yugo.*, 1993 I.C.J. 3 (Apr. 8).

¹²¹ *Id.*

However, due to a lack of progress in halting the violence, on July 27, 1993, Bosnia-Herzegovina filed another request for further measures, leading to a second order of the Court on September 13, 1993.¹²²

One of the central issues considered by the Court was Council Resolution 713 (1991), which imposed an arms embargo upon Yugoslavia. Acting under its Chapter VII powers, the Council had decided:

[t]hat all states shall, for the purpose of establishing peace and stability in Yugoslavia, immediately implement a general and complete embargo on all deliveries of weapons and military equipment to Yugoslavia until the Security Council decides otherwise following consultation between the Secretary-General and the Government of Yugoslavia.¹²³

Bosnia-Herzegovina argued that, as they had ceased to be a part of Yugoslavia, this embargo should not apply to them. They argued further that it should not affect their inherent right to self-defense under Charter Article 51 and customary international law. They submitted, "[t]hat the Government of Bosnia and Herzegovina must have the means 'to prevent' the commission of acts of genocide against its own people as required by Article I of the Genocide Convention."¹²⁴

This submission by Bosnia-Herzegovina gave rise to some commentary relevant to the issue of judicial review. In his separate opinion, ad hoc Judge Lauterpacht stated that the request for access to the means to prevent the commission of acts of genocide was essentially a request for the Court to challenge the validity of the Council resolution. This was particularly true in light of the fact that the Council had on a number of later occasions reaffirmed the embargo, thus interpreting it to include Bosnia-Herzegovina.¹²⁵ Acknowledging that the embargo worked unequally, as the Serbs still had access to the arms stocks of the former Yugoslav national army, Judge Lauterpacht, nonetheless, asserted that the Court does not have the

¹²² Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Provisional Measures Order (hereinafter *Bosnia v. Yugo.*), 1993 I.C.J. 325 (Sept. 13).

¹²³ U.N. GAOR, 47th Sess., ¶ 6, U.N. Doc. S/RES/713 (1992).

¹²⁴ *Bosnia v. Yugo.*, 1993 I.C.J. at 332.

¹²⁵ *Bosnia v. Yugo.*, 1993 I.C.J. at 438 (separate opinion of Judge Lauterpacht).

right to substitute its discretion for that of the Council in determining the existence of a threat to the peace, a breach of the peace or an act of aggression.¹²⁶

Judge Lauterpacht also raised the issue of the Court's ability to review a Council decision which conflicts with a principle of *jus cogens*.¹²⁷ The *ad hoc* Court member carefully distinguished the case at hand from that of *Lockerbie*, in which the decision of the Council had prevailed over any treaty obligation by virtue of Article 103. The distinguishing factor in *Bosnia v. Yugoslavia* was the fact that the prohibition against genocide has long been established as a principle of *jus cogens*.¹²⁸ Because the concept of *jus cogens* is superior to both treaty and customary international law, the relief offered in *Lockerbie* by Article 103 did not apply. Insofar as Resolution 713 unwittingly supported the perpetration of genocide contrary to an established rule of *jus cogens*, Judge Lauterpacht suggested that the decision might become legally null and void. With regard to the elimination of the arms embargo vis-à-vis Bosnia-Herzegovina, he went as far as stating that he would be prepared to indicate the following provisional measure: "[t]hat as between the Applicant and the Respondent the continuing validity of the embargo in its bearing on the Applicant has become a matter of doubt requiring further consideration by the Security Council."¹²⁹

While going so far as to indicate a potential power of review for the Court, Judge Lauterpacht stopped short of any arrogation of power, structuring his suggested measure in terms which would allow the Council to do the actual reviewing. While the majority of the Court did not make any statement regarding judicial competence to review a Council decision which conflicts with a principle of *jus cogens*, Judge Lauterpacht's commentary may well be an indication of one direction in which the Court may increase its powers in the future.

¹²⁶ *Id.* at 439.

¹²⁷ The term *jus cogens* connotes a rule of law which is peremptory because it is binding irrespective of the will of the individual parties. ENCYCLOPAEDIC DICTIONARY OF INTERNATIONAL LAW 201 (1986).

¹²⁸ *Bosnia v. Yugo.*, 1993 I.C.J. at 440.

¹²⁹ *Id.* at 442.

II. SHOULD THERE BE A POWER OF JUDICIAL REVIEW?

Although it seems possible to conclude that the Court currently possesses at most a limited power of judicial review, there is little doubt that there has been an recent trend in support of increasing such a power. As already shown, this support is found in the obiter dicta of existing case law and in academic commentary. Support may also be found in other places, such as legal reform bodies. For example, the issue of whether there should be a power of judicial review over Chapter VII decisions was brought up before the International Law Commission by Professor Alain Pellet in May 1992.¹³⁰ He stated that the Court should always satisfy itself as to the legal validity of a Council decision, and that these decisions should at least comply with the norms of jus cogens and should not be contrary to the Charter itself.

While the view favoring expanded powers of judicial review does not as yet have the legal basis to make it law, it is worth considering whether full judicial review could or perhaps should be introduced. If this is to happen by conscious decision rather than by case law based incremental change, it is not simply a matter of deciding that judicial review would be good in principle. Such an increase requires an understanding of how it might best be achieved, the scope of review, problems to be overcome, and the legal effect of a broader review power.

A. *Traditional Arguments for and against Judicial Review*

The issue of judicial review has already received extensive debate at the domestic level in countries such as the U.S. It is perhaps valuable to consider the arguments proffered at this level as well as an examination of how some of the same arguments might apply at the international level.

1. *The U.S. Example*

The U.S. Supreme Court arrogated the power of judicial review upon itself in the famous case of *Marbury v. Madison*, referred to earlier. Far from symbolizing a political and legal

¹³⁰ U.N. GAOR, 44th Sess., Add. 3, at 8, 16, U.N. Doc. A/CN.4/SR.2257 (1992).

consensus in the U.S., the decision was greeted by controversy and debate.¹³¹

Those who argued against judicial review pointed out that American judges are unelected and unaccountable, and thus uncontrollable. The Legislature and the Executive are, on the other hand, both elected and directly accountable to the people. The decisions of the two political branches can be overturned, whereas the decisions of constitutional courts are very difficult to overturn. Detractors of judicial review further argued that judicial interpretation of constitutional questions is often merely the politics of power in the guise of legal reasoning. Force and will play a more important part than judgment in constitutional decision-making.

Defenders of judicial review asserted that the problem of undemocratic courts was greatly overexaggerated. American judges are appointed and confirmed by elected officials, and are not necessarily any less trustworthy than their elected counterparts in political office. Some legitimacy may also be drawn from the interpretation of a democratic document, the Constitution, adopted by the people. Moreover, the Court has overruled its own decisions in the past, and the Constitution has been amended (albeit only four times) to overrule Supreme Court decisions.

Judicial review today serves a crucial role in the U.S. system of checks and balances, policing the democratic process. But would it also function well on a global scale?

2. *The International Court of Justice*

The Anti-Majoritarian Problem¹³² arises at the international level and is similar to that of the legitimacy of unelected U.S. judges. World Court judges are in fact elected by the Council and the General Assembly, in accordance with the two following provisions of the Court's Statute:

2. The Court shall be composed of a body of independent judges, elected regardless of their nationality from among persons of high moral character, who possess the qualifications required in their

¹³¹ My discussion regarding this debate is based upon the excellent analysis of the issue in Watson's article. Watson, *supra* note 6, at 28-30.

¹³² Watson, *supra* note 6, at 28-30.

respective countries for appointment to the highest judicial offices, or are jurisconsults of recognized competence in international law.

4(1). The members of the Court shall be elected by the General Assembly and by the Security Council from a list of persons nominated by the national groups in the Permanent Court of Arbitration, in accordance with the following provisions.

There is thus a sense of democratic legitimacy that can be said to differentiate the Court from the domestic situation such as that found in the U.S. However, detractors point out that the election process can be intensely political,¹³³ and although there is no Charter or Statute provision for it, the permanent members tend to be represented on the Court.¹³⁴ There are several points in favor of judicial review at this level. While there is no popular ballot for judges, the election is still more democratic than, for example, the election of Council members, five of whom hold permanent positions. There is no life tenure for these judges. They must step down or run for re-election every nine years.¹³⁵ This means that judges can be removed and decisions re-examined in a way that is not possible in the U.S. In addition, it is not possible for one country to 'pack the court' as it would be contrary to the provisions of the Statute.¹³⁶

It appears therefore that the Anti-Majoritarian problem is not as big an issue as it was domestically in the U.S., due to the sense of democratic legitimacy governing the election of judges. The problem on this level is more a question of encouraging all states to accept the Court's compulsory jurisdiction.

Other problems mirroring those in the U.S., such as that of an unchecked political power, were traditionally dealt with by the set up of the Council, containing as it did a political system of checks and balances enforced by the veto power. These problems have now come to the fore in the search for a new world order.

¹³³ For a good analysis of the politics of judicial elections at the Court, see THOMAS FRANCK, *JUDGING THE WORLD COURT* (1986).

¹³⁴ Watson, *supra* note 6, at 31.

¹³⁵ STATUTE OF I.C.J. art. 13, ¶ 1.

¹³⁶ *Id.* art. 3, ¶ 1. Specifically stating: "[t]he Court shall consist of fifteen members, no two of whom may be nationals of the same state."

B. A New World Order

The delegates to the Conference rejected an institutionalized power of judicial review partly because the checking function was already served by the political balance of power on the Council. The political situation of the 1990s differs greatly from that of the mid-1940s, and perhaps necessitates the introduction of a judicial review power to reflect this. At the time of the *Namibia Case* there were fears regarding an unchecked Council:

[L]imitations on the powers of the Security Council are necessary because of the all too great ease with which any acutely controversial international situation can be represented as involving a latent threat to peace and security, even where it is really too remote genuinely to constitute one. Without these limitations, the functions of the Security Council could be used for purposes never originally intended. . . .¹³⁷

These fears are without question even more relevant in today's post-Cold War political climate in which the existing checks have all but disappeared. While this view of Council intentions is certainly a pessimistic one, and ignores the fact that effective Council action might necessitate the absence of a review power in order to act quickly, there are states which would agree with it.

A good example of this problem is the relations between the five permanent members of the Council and the rest of the U.N. membership in *Lockerbie*. Were the permanent members simply allowed to decide on their vision of a world order and enforce it? Or would there develop some system of checks and restraints on this executive power? Most states would not disagree with the outcome of *Lockerbie*, but there has undoubtedly been some discomfort as to the manner of conduct of the involved permanent five members. Libya felt that three of the permanent members of the Council, the U.K., U.S., and France, exploited their powers under the Charter to deprive Libya of its rights under conventional and customary international law.¹³⁸

¹³⁷ *Namibia*, 1971 I.C.J. at 294 (dissenting opinion of Judge Fitzmaurice). See also *Lockerbie* (Libya v. U.K.), 1992 I.C.J. at 43 (dissenting opinion of Judge Bedjaoui).

¹³⁸ Reisman, *supra* note 25, at 87. It must be said in defense of the U.S., U.K. and Fr. that they did not use any powers that they did not have, and that other

Libya's complaint goes to the heart of the current decision-making procedure. The Council is now believed to contain smaller 'mini-Councils' which meet in secret and keep no records.¹³⁹ The new practice moves in stages, from private meetings of the U.S., U.K. and France away from the U.N. premises, then to the five permanent members who may come up with a draft resolution, and finally to soliciting the views of the nonpermanent members of the Council, working towards a resolution acceptable to all.¹⁴⁰

This sequence of events has been criticized for reasons of both substance and procedure. The perception is that Council decisions are in reality being taken by the permanent members, and even more specifically by the U.S. This results in a feeling of exclusion from the decision-making process for the third-world countries in particular, but also for developed countries which are not the closest allies of the U.S.¹⁴¹ These excluded countries point to specific cases of effort expended being disproportionate to the result sought. *Lockerbie*, by way of example, took place at a time when the Secretary-General was reluctant to commit peacekeeping forces to the former Yugoslavia, argued by many to be a more deserving case.¹⁴² The U.S. and U.K. reject this charge but the perceptions remain and the importance of this should not be underestimated. These perceptions relate closely to the desire of many states for a structured power of judicial review.¹⁴³ Certainly some of the smaller states would be more comfortable with the introduction of some structural restraints in the form of a modern constitution rather than, as they perceive it, depending on the good will of the more powerful nations.¹⁴⁴ The implication of *Lockerbie* is the need for such restraints, even if the effect of the decision was perhaps to clarify that they do not yet exist.

member states on the Council did have the opportunity to vote against their initiative in this matter. Thus, it cannot fairly be said that they 'exploited' their powers. Libya's frustrations are understood best in the context of the reality of world politics in which many states choose not to oppose the initiatives of the more powerful permanent members of the Council. Reisman, *supra* note 25, at 87.

¹³⁹ Reisman, *supra* note 25, at 85.

¹⁴⁰ Reisman, *supra* note 25, at 85; See also HIGGINS, *supra* note 24, at 8.

¹⁴¹ HIGGINS, *supra* note 24, at 8.

¹⁴² HIGGINS, *supra* note 24, at 8-9.

¹⁴³ HIGGINS, *supra* note 24, at 9.

¹⁴⁴ HIGGINS, *supra* note 24, at 9.

This desire on the part of many of the less powerful nations for an institutionalized power of judicial review must also be understood in the context of a world which has rapidly changed, leading to demands that the structure of the Council itself should be reviewed.¹⁴⁵ During the period in which the Council was paralyzed because of its ideological divide and reciprocal use of the permanent power vetoes, the Assembly expanded greatly with the addition of many newly independent states. The changing face of the U.N. led to some states calling for a change in the structure of the Council, with suggestions ranging from the elimination of the veto power completely to a restructuring of the membership of the Council itself to take account of changes in the world's political makeup since 1963, the date of the last structural revision of the Council. These challenges are now being heard.¹⁴⁶

It could well be argued then that the end of the Cold War has brought with it the need for the implementation of judicial review, to avoid a Council free to operate outside the boundaries of international law. However, this ignores the political argument against judicial review. Now that the end of the Cold War has finally allowed the Council to emerge from the shadow of its permanent checkmate, why should we rush to ensure that its freedom is once again put in shackles in the form of an activist court? This is a relevant question, as even most advocates of judicial review would not wish to return to a situation in which the Council is again rendered virtually useless. The assumption upon which this question is based is that if the Court is given a broad scope for review they will strike down everything

¹⁴⁵ See G.A. Res. 47/62, U.N. GAOR, 47th Sess., U.N. Doc. A/47/26 (1992). Here, the Assembly requested that the Secretary-General invite Member States to submit written comments on a possible review of the membership of the Council.

¹⁴⁶ This debate is presently being staged in the U.N. See U.N. GAOR, 48th Sess., U.N. Doc. A/48/264 (1993); U.N. GAOR, 48th Sess., U.N. Doc. A/48/264/Add.1 (1993); U.N. GAOR, 48th Sess., U.N. Doc. A/48/264/Add.2 (1993); U.N. GAOR, 48th Sess., U.N. Doc. A/48/264/Add.3 (1993); U.N. GAOR, 48th Sess., U.N. Doc. A/48/264/Add.4 (1993). The replies of Member States regarding their views on restructuring the Council are contained in the aforementioned documents. Boutros Boutros-Ghali referred to this issue in his 1993 Report as being of "crucial importance" and foresaw that it would be resolved by the time of the U.N.'s 50th anniversary; BOUTROS BOUTROS-GHALI, REPORT ON THE WORK OF THE ORGANIZATION FROM THE FORTY-SEVENTH TO THE FORTY-EIGHTH SESSION OF THE GENERAL ASSEMBLY, 12 (1993).

in sight. While there is really very little chance of this happening, noting that it has not occurred in the U.S., perhaps the best alternative is to deal with this problem by identifying a narrow scope for review. This is a difficult issue which will undoubtedly require some kind of compromise to satisfy all parties.

C. *Review by the Council Itself*

Several ideas have already been advanced with regard to using the Council structure itself to achieve the desired effect of review, thus avoiding the need to make any changes in the Court-Council relationship. The first idea implies that a potential restraint exists already within the Council in the form of the de facto representation of the smaller states' interests by some of the permanent members.¹⁴⁷ This assertion may be dismissed because realistically, little evidence suggests that this functions as any kind of restraint. China has in the past portrayed itself as the representative of the third world, but it has been known to cease this representation upon having some special interest of its own satisfied by the other permanent members.¹⁴⁸

A second suggestion has been that the potential veto power held by the non-permanent members could be a limitation on Council powers.¹⁴⁹ The members would need to vote as a bloc for this to work, and this has historically not been the case, leaving the power balance in the Council as originally envisaged.

A third possibility would be to increase the number of non-permanent members of the Council. This would likely result in an unwieldy body, unable to take decisions quickly and effectively so as to bring the enforcement machinery of Chapter VII of the Charter into action whenever international peace and security was threatened.¹⁵⁰ There would be more restraints on the Council's actions but at the cost of an effective Council. An increase in the number of permanent members is a realistic

¹⁴⁷ Reisman, *supra* note 25, at 96.

¹⁴⁸ Reisman, *supra* note 25, at 96.

¹⁴⁹ Reisman, *supra* note 25, at 96.

¹⁵⁰ This is an essential feature of the U.N. See D. BOWETT, *THE LAW OF INT'L INSTITUTIONS* 26 (4th ed. 1982); See also U.N. CHARTER art. 24, which speaks of ensuring "prompt and effective action by the United Nations." U.N. CHARTER art. 24.

possibility, and one that may result from the aforementioned pressures being brought to bear by an ever increasing Assembly membership. The addition of such potential candidates as Japan and Germany, however, would not necessarily produce the kind of limitations on Council action sought by members of the Assembly.¹⁵¹ There is already a certain community of interest between these two powers and three of the present permanent members, all part of the economic Group of Seven. Another possibility would be the addition of leading developing countries such as Brazil or India, but again, there is no assurance that once included they would ensure limitations on what in effect would have become their own power.¹⁵²

D. *Security Council Interference with Court Functions*

It seems that restructuring the Council may not in itself provide an adequate substitute for judicial review. If this power must lie with the Court, then as an initial step it would be very helpful to strengthen the delineation between what is a judicial function, and thus the responsibility of the Court, and what falls within the scope of Council powers. The Council has already showed a penchant for encroachment on judicial powers which it does not possess. This point was touched upon by a Special Rapporteur to the International Law Commission in 1992:

[a]s stipulated unambiguously in the Charter, the Security Council's powers consisted of making non-binding recommendations, under Chapter VI, which dealt with dispute settlement, and also binding decisions under Chapter VII, which dealt with measures of collective security. The main point was that, according to the doctrinal view - which did not appear to be seriously challenged either in the legal literature or in practice - the Security Council would not be empowered, when acting under Chapter VII, to impose settlements under Chapter VI in such a manner as to transform its recommendatory function under VI into binding settlements of disputes or situations.¹⁵³

¹⁵¹ Reisman, *supra* note 25, at 96.

¹⁵² Reisman, *supra* note 25, at 96.

¹⁵³ See *Report of Special Rapporteur G. Arangio-Ruiz*, U.N. GAOR, 44th Sess., at 3, 30, U.N. Doc. A/CN.4/SR.2277/Add. 3 (1992).

Perhaps the best example of this was in the course of the recent *Lockerbie* incident. It has been suggested that in Resolution 731, the Council simply decided the dispute in favor of the U.S. and the U.K. without actually giving an explanation as to why Libya would be obliged to surrender its nationals or pay compensation for an act which had not at that point been legally attributed to it.¹⁵⁴ The 'judgment' was reached before Libya even entered the argument, since it was ensured in advance, by means of private consultations, that the resolution would be adopted.¹⁵⁵

The determinations in the preamble of Resolution 748, upon which the decisions in that resolution are predicated, present a similar story. The demand that Libya renounce terrorism "by concrete actions" presupposes guilt. Therefore, the resolution is based on an assumption of guilt that would be rejected by any judge in a Court of a democratic state, according to Judge El-Kosheri in *Lockerbie*.¹⁵⁶ The Council may have effectively acted as a dispute-settlement mechanism in deciding this dispute, and resolved the substantive issues in favor of the U.S. and the U.K. By endorsing their requests the Council recommended their terms as appropriate to settle the dispute, thus transforming the terms of a settlement recommended under Chapter VI power into a binding dispute settlement under Chapter VII.¹⁵⁷

Thus, the proper channels for dispute resolution may be avoided whenever one party manages to secure a Council decision in its favor. This would not appear to be in accordance with the purposes and principles of the Charter, but there are no procedural safeguards against it happening. Arguably, on grounds of natural justice and procedural due process, some institutionalized constitutional checks might be necessary.¹⁵⁸ This is not to argue that the Court and the Council cannot consider an issue concurrently. It just puts into question to what extent the

¹⁵⁴ Graefrath, *supra* note 52, at 191.

¹⁵⁵ Graefrath, *supra* note 52, at 191. Again, while this is a commonly held perception, it ignores the reality in which the other member states of the Council could have voted against the resolution.

¹⁵⁶ *Lockerbie* (Libya v. U.K.), 1992 I.C.J. at 92 (dissenting opinion of Judge El-Kosheri).

¹⁵⁷ See Graefrath, *supra* note 52, at 196.

¹⁵⁸ McWhinney, *supra* note 4, at 270.

Council may interfere with Court procedures, thereby rendering them meaningless.

The argument has been made that regardless of whether the Council exercises quasi-judicial functions, its decisions never reach the quality of a judicial decision and therefore cannot replace them and make the Court superfluous.¹⁵⁹ While this may be so, such actions by the Council do result in uncertainty and conflict, and are best avoided altogether.

E. Scope of Judicial Review

The most difficult stage in the implementation of a stronger judicial review power would undoubtedly be the establishment of some parameters for its exercise. How broad should the scope for review be?

One view argues that a broad scope of review is essential. Supporters of this view propose that whenever a matter is properly brought before the Court, that is either by a party to a dispute or when the Court is requested to give an advisory opinion, the Court's jurisdiction should not be questioned, even if it has been called on to decide on the legality of a Council Resolution.¹⁶⁰ The opposite view would be that what little review powers the Court currently possesses in Chapter VI situations are probably sufficient. The necessity for change thus ranges from none or very little to possibly a significant amount.

Any suggested scope of review will obviously reflect an individual's views regarding the ideal balance between Council effectiveness and states' rights. To allow the Court unlimited powers of review would undoubtedly increase the likelihood that states' rights would not be trampled by an unchecked Council. Unfortunately, such an all-encompassing scope of review would also ensure that any state which found itself the focus of Council action could mount a legal defense in front of the Court, possibly gaining interim measures and thus frustrating the speed and efficiency necessary in Council actions intended to avoid or defuse a threat to security.¹⁶¹ This would be

¹⁵⁹ Graefrath, *supra* note 52, at 204.

¹⁶⁰ Graefrath, *supra* note 52, at 204.

¹⁶¹ The same problems would likely be relevant to the suggestion that a review function could be fulfilled by the creation of a special ad hoc tribunal for Judicial Review.

problematic in the post-Cold War era where there is a need for some new checks on Council power to be introduced for reasons already discussed.

On what grounds then should questions be admitted for review? Should it be possible for the Court to review the Council's delegated power to determine the existence of any threat to the peace, breach of the peace, or act of aggression? Presently, the case law seems to indicate support for the view that this is a non-reviewable competence given to the Council, based on Article 39 of the Charter.¹⁶² While allowing the review of such Council decisions would alleviate fears that the Council might 'create' trumped up threats to the peace, amendments to this power would also most likely sacrifice any credible collective security function to be exercised by the Council. To submit every determination of a threat to review would provide for interminable delay in situations requiring fast and efficient action.¹⁶³

It seems that at this initial stage it is very important to allow the Council to operate as currently provided for in the Charter. Any increase in the scope of review should come when the Council has determined the threat and is ready to act or has already acted.

Where the Council has identified a breach and proposes to act, it is possible to suggest a quasi-political power of judicial review as a new alternative. Under this 'veto-reference' power, before the Council actually acted it would be possible for any Council member state (veto or non-veto) to ask the Court for an advisory opinion on the legality of the proposed action. If the Court found the act to be *ultra vires* the Council's power, the state would have effectively 'vetoed' the use of that action.¹⁶⁴

In a situation in which the Council has already acted it is perhaps worth reconsidering review based on Article 25 of the Charter. As it stands, the requirement that members carry out Council decisions 'in accordance with the present Charter' has been interpreted as a procedural limitation. If it was agreed

¹⁶² Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Provisional Measures Order, *Bosnia v. Yugo.*, 1993 I.C.J. 325 (Sept. 13).

¹⁶³ See HIGGINS, *supra* note 24, at 10.

¹⁶⁴ The notion of "veto reference" power stems from a discussion I had with Professor Donald Buckingham, Associate Professor at the University of Western Ontario Faculty of Law (London, Ontario), on November 12, 1994.

that in the future this was to be interpreted as a substantive limitation, it would permit the Court to review Council decisions to ensure they are intra vires Council power. There are several advantages to increasing the scope for review in this way. First, no Charter revisions would be necessary as the present wording of Article 25 would suffice. Only an agreement regarding interpretation need be concluded. Second, the only limitation provided for would be that decisions be in accordance with the present Charter. This presents without a doubt the most problems. Substantively, it is not always readily apparent what it means to be 'in accordance with the present Charter,' as is evident from the lack of concrete discussion on this point by members of the Court. Keeping these problems in mind, the use of this new interpretation of Article 25 focuses upon the Charter, an area with which the Court is already familiar. Finally, such a limitation would likely be sufficient to satisfy any concerns that states might have about unchecked Council power.

Another positive step would be to allow the Court to review Council decisions which conflict with principles of *jus cogens*, as suggested in the earlier discussion of the *Bosnia v. Yugoslavia* orders. Since the Charter is a treaty, it is reasonable to conclude that it cannot authorize acts which would violate these customary norms.¹⁶⁵ Such a power would not be without its problems, namely that it may not be entirely clear whether or not certain principles may be classified as *jus cogens* (certain accepted norms are that states may not enter into treaties to perpetuate apartheid, slavery, or to commit genocide).¹⁶⁶ Given the importance of principles of this kind, however, such a problem seems to be a better solution than allowing the Council to overtly contradict accepted peremptory norms of international law.

It has been suggested that certain questions should not fall within an increased scope of review.¹⁶⁷ Differences in purely political judgment should probably be excluded, leaving that role to the Council. There is some question of what constitutes 'purely political judgment,' as discussed earlier when consider-

¹⁶⁵ See Vienna Convention on the law of treaties, *supra* note 29, at art. 53; providing that a treaty is void if it conflicts with a principle of *jus cogens*.

¹⁶⁶ Watson, *supra* note 6, at 37.

¹⁶⁷ Bowett, *supra* note 18.

ing the problem of judicial activity by the Council, and this would no doubt be the cause of some problems. Procedural irregularities could also be excluded from review, as the Council has its own rules of procedure and is master of such. An exception could be made in a case in which a procedural irregularity denies a state a fair hearing.

One important issue is how the changes should be brought about. Should the Court simply attempt to arrogate power through its decisions in the manner of *Marbury v. Madison*? To arrogate such power incrementally might prevent a flood of review requests. Realistically, however, the legal basis for such a move does not seem to exist, and the Court has shown a definite reluctance to clash with defined powers of the Council. In the interests of clarity and certainty there needs to be an explicit international agreement to this effect.

F. *Problems with Implementation*

An increased power of judicial review would necessarily lead to a larger role in defining the Charter, which could cause some problems. The Charter is both a Constitution, in that it establishes organs of U.N. government, rules of governmental procedure, and some substantive norms for international conduct, as well as a mere treaty, outlining fundamental substantive norms by which states must conduct themselves.¹⁶⁸ As such, the Charter is the obvious place for the Court to start when interpreting the actions of other U.N. organs. While the text is unquestionably dispositive on some matters,¹⁶⁹ the guidance is less clear in cases in which the Council violates substantive fundamental norms.

The problem is particularly evident in the area of interpreting states' rights. This is partly due to important internal qualifications such as that regarding internal sovereignty:

2(7). Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present

¹⁶⁸ Watson, *supra* note 6, at 33.

¹⁶⁹ See U.N. CHARTER art. 25. This article contains the binding nature of the Council's decisions.

Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII.¹⁷⁰ (emphasis added)

Qualifications such as this make the process of interpretation an extremely difficult one. Other particular problems with the interpretation of states' sovereign rights include Articles 1(2) and 55 of the Charter which discusses equal rights clauses for states.¹⁷¹ These were both used by Judge El-Koshi in his dissent in *Lockerbie* to defend Libya's sovereign right not to extradite its nationals.¹⁷²

Apart from these norms there appear to be few specifics on which the Court could rely to analyze questions of states' rights. There are no provisions regarding due process or free speech as found in the U.S. Constitution.¹⁷³ When one looks outside the Charter to see if the Court could find its guidance there, it rapidly becomes evident that most 'rights' treaties focus on human, and not states' rights.¹⁷⁴ In any case, Charter Article 103's supremacy provision would make it hard to rely on a treaty provision if anything could be found to the contrary in the Charter itself.

G. *The Effects of Judicial Review*

Once the scope for review is established, it remains to consider the effect of such review, that is to say the effect of a Court finding that a Council Resolution was *ultra vires*. Would such a resolution then be void *ab initio* (inoperative as though it had never been passed) or would the Court's decision be binding on the parties to the suit but no one else? The text of the Statute supports the latter view. Article 59 states: "[t]he decision of the Court has no binding force except between the parties and in respect of that particular case." This explicit limitation would seem to be the best guideline available. The view is reinforced

¹⁷⁰ U.N. CHARTER art. 2, ¶ 7.

¹⁷¹ U.N. CHARTER art. 1, ¶ 2. On the purposes of the U.N., the article specifically reads: "[t]o develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace." See also U.N. CHARTER art. 55.

¹⁷² *Lockerbie* (Libya v. U.K.), 1992 I.C.J. at 101 (dissenting opinion of Judge El-Koshi).

¹⁷³ Watson, *supra* note 6, at 35.

¹⁷⁴ See *The Universal Declaration of Human Rights*, G.A. Res. 217, U.N. GAOR, 3rd Sess., at 71, U.N. Doc. A/810 (1948).

when it is considered that the Court does not have the same tradition of *stare decisis* as many domestic courts.¹⁷⁵

Even a decision that binds only the parties to it, may in practice have broad effects. If, for example, Libya had been successful in its quest to have the Court strike down the Council resolutions ordering extradition of its nationals and imposing worldwide sanctions, all other countries previously bound to uphold these sanctions would no longer be so bound. In that situation it would even be possible for Libya to persuade the Court to order a state to stop enforcing the sanctions against Libya, based on the overruled resolutions.¹⁷⁶ In any case, a doctrine favoring the traditional balance between a weak Court and a strong Council will likely be more acceptable to the permanent members of the Council.¹⁷⁷

CONCLUSION

There is little doubt that there exists a solid base of support for the existence of a power of judicial review. However, it is important to distinguish between the desirability of such a power and its legal existence. While the case law shows strong signs that it is desirable, most judges stop short of actually attributing powers of judicial review in Chapter VII situations to the Court. This is because the provisions of the Charter clearly delegate sole authority to determine threats to the peace to the Council, and make its decisions binding by virtue of Article 25. In addition, the Charter's *travaux préparatoires* expressly reject any institutionalized powers of review for the Court.

Have we seen the first real signs that the Court will arrogate the power on itself, despite the absence of a legal basis for such action? Although *Lockerbie* clearly raised the question, to interpret this case as some have done as the international equivalent of *Marbury v. Madison* would be to read too much into the individual opinions expressed by some of the judges. What this case does show is that such a power is now clearly considered to be desirable in the post-Cold War era. Concerns regarding the protection of state sovereignty have made room for an increased role for the Court at a time when the Council

¹⁷⁵ Watson, *supra* note 6, at 40.

¹⁷⁶ Watson, *supra* note 6, at 41-42.

¹⁷⁷ Watson, *supra* note 6, at 43.

has seen its powers blossom. Unquestionably, a more activist Court would turn into an international institution of major political importance.

How should the deliberate omission of a review power from the Charter be rectified? In the interests of certainty a clear revision to Charter powers would seem to be the best solution, rather than an immediate or gradual arrogation by the Court. However, this still leaves the problem of determining the scope for review. This problem more than any other may prevent any changes to the status quo in the near future. In the meantime, the Court will continue to voice its concern over unchecked Council power, virtually powerless to review the Council's Chapter VII decisions.