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Baydas, Lana (2001) *In search of the rule of law: review in the United Nations system.*

PhD thesis

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**In Search of the Rule of Law:
Judicial Review in the United Nations System**

By

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**A THESIS SUBMITTED IN PART FULFILMENT FOR THE
DEGREE OF DOCTOR OF PHILOSOPHY TO THE SCHOOL OF
LAW, UNIVERSITY OF GLASGOW**

JULY 2001

Abstract

The New World Order revives interest in the relationship between law and politics in international relations. This relation has always been discussed. But, with the considerable activism displayed by the Security Council over the last years and its dynamic and selective application of its powers under Chapter VII of the Charter, this relation has taken on a new dimension viewed from the perspective of the United Nations. Such a dimension underlines a "constitutional" approach to the United Nations framework: a quest for judicial review with the International Court of Justice as the ultimate guardian of the United Nations. The analysis of judicial review has generally been discussed in the light of the experience of municipal constitutional courts, specifically, of the United States Supreme Court. This constitutional approach should be viewed with caution. The peculiarities of the international system and of the United Nations system determine both a different scope and context for judicial review.

Acknowledgements

I would like first to thank my supervisor, Dr. Iain Scobbie, for his comments and support. Without his help, this work would not have been materialised.

I am also grateful for my family, especially for my late father, for their trust that they put in me and for their support. I am indebted for my friends for their help and encouragement all way through my research years.

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Introduction

1 What is Judicial Review?

Judicial review is the power of courts to decide upon the constitutionality of legislative and executive acts. Judicial control of the constitutionality of the legislative and executive acts forms, nowadays, the most distinctive feature of almost all constitutional systems in the world. All over the world, special constitutional courts or ordinary courts have the powers to declare a law unconstitutional by declaring it null and void or by annulling it, and as a result refusing to enforce it.

The idea of judicial review stems from the notion of the *State according to the rule of law*; i.e. not only State's powers are established by the laws but they are limited by the law. According to this concept, the law becomes, as far as the State is concerned, not only the instrument whereby attributions of its bodies and officials are established, but also the instrument limiting the exercise of those functions.

Therefore, judicial review simply means the power of a court or a system of courts to examine an act of either a constitutional organ of government, or of a statutory body or official, with a view to determine whether or not the act is consistent with the provisions of the constitution, a statute or other sources of law and/or whether the said act is void and thus incapable of producing any lawful effect.¹ Where the Court is satisfied that the act is in violation of the law, constitutional or otherwise, the decision of the court will have the effect of nullifying the unlawful act; but direct formal annulment is not crucial to the

notion of judicial review.² While it is conceded that this description is not by any means complete, it is nonetheless useful insofar as it serves to identify the main aspects of the doctrine of judicial review.

However, some reference is needed to the most significant features of judicial review. In municipal legal systems, two different general spheres of the law can be identified. One can find judicial review of the kind in which problems of constitutional law are uppermost, while in other systems, one can find judicial review in which principles of administrative and other spheres of the law are primarily involved.³ While in the first category, the validity of legislation, acts and decisions are tested with reference to principles of constitutional law, in the latter, the acts of the three branches of government are examined with reference to ordinary legislation and principles of law.⁴ This is a truism, as such a distinction is not sharp and there can be an overlap between the two categories, as the points of distinction between administrative law or other kind of law, on the one hand, and the constitutional law on the other hand vary from one State to another. For example, matters of judicial review concerning questions of fair trial, hearings, and procedure could be part of ordinary legislation in one State while those very questions could be matters of constitutional law in another. Thus, Article 103 of the Basic Law of Germany provides that in court every individual is entitled to a hearing in accordance with the law; and that no one may be punished for the same act more than once under criminal legislation. By contrast, guarantees and rights

¹ J. Supperstone & J. Goudie, *Judicial Review* (1992) at 16

² K. Kaikobad, *The International Court of Justice and Judicial Review* (2000) at 11

³ See generally, A. R. Brewer-Carías, *Judicial Review in Comparative Law* (1989)

⁴ M. Shaprio, "The Success of Judicial Review" 193 at 197-203 in S. J. Kenney *et al.*, *Constitutional Dialogues in Comparative Perspective* (1999)

of this kind were traditionally part of the principles of common law in the United Kingdom before they were reinforced and clarified by the 1998 Human Rights Act.⁵

This kind of distinction will help us in understanding the different forms of judicial review. In certain domestic systems, judicial review does not extend to all actions of the different branches of the government. For instance, in France, the 1958 constitution precludes constitutional review of parliamentary legislation, but it provides a comprehensive system of judicial review of administrative and judicial decisions. Moreover, Article 61 allows the *Conseil Constitutionnel* to review the validity of legislative bills relating to organic law before they secure the assent of the President of the Republic. A bill which fails this test cannot become a statutory enactment. Therefore, the system in France is *previewing* as opposed to *reviewing* the parliamentary, but not the executive, acts.⁶

Another feature of judicial review is that different systems of constitutional review prevail in various States today. Two systems of judicial review exist; one centralised and the other decentralised. In the first system, the power of judicial review is invested in one *particular tribunal*, normally called a *constitutional court*. This particular court is precluded from dealing with cases that do not involve constitutional issues. Ordinary or regular courts are precluded from determining cases which involve questions of interpretation and application of the constitution. This system of judicial review is mostly adopted in Europe,

⁵ M. Supperstone & J. Goudie, *Judicial Review* (1992) at 16- 23

⁶ Bell, *French Constitutional Law* (1992) at 30-33

such as in Italy, Germany, Russia, Belgium, Cyprus, and Portugal, to name a few.⁷

However, it is worth mentioning that though the French Republic does not, as mentioned above, have a designated constitutional court, the *Conseil d'Etat*, the supreme administrative court of France, has the power to review law made by the executive under Article 37 of the French Constitution.⁸ The *Conseil d'Etat* can, in fact, review all executive acts, decrees, and ordinances, and even those legislative in nature, in adversary, party-initiated proceedings for conformity with the Constitution or with the general principles of law, these principles being derived from the Constitution and the Declaration of the Rights of Man.⁹

On the other end of the spectrum, one can find the decentralised system of judicial review. As opposed to the centralised system, there is no appointed court empowered exclusively to examine the validity of legislative and executive actions, and judicial decisions involving constitutional law. These decisions and other related questions can be determined by any court in the ordinary judicial system.¹⁰ The United States, which was the first to implement the doctrine of constitutional review as it is known and practised nowadays, constitutes a good example of the decentralised system of judicial review. A law not in conformity with the constitution may be set aside by the ordinary courts of the United States

⁷ See generally, A. R. Brewer-Carías, *Judicial Review in Comparative Law* (1989)

⁸ M. Cappelletti, *Judicial Review in the Contemporary World* (1989) at 155. See also, K. Kaikobad, *The International Court of Justice and Judicial Review* (2000) at 19

⁹ See generally, Bell, *French Constitutional Law* (1992); M. Cappelletti, *Judicial Review in the Contemporary World* (1989) at 16- 19; M. Shapiro, "The Success of Judicial Review" 193 in S. J. Kenney *et al.*, *Constitutional Dialogues in Comparative Perspective* (1999)

¹⁰ A. R. Brewer-Carías, *Judicial Review in Comparative Law* (1989)

judicial system in accordance with the appropriate laws. It is worth mentioning that although there is no specialist court appointed to review the validity of legislation, cases which involve questions of repugnancy with the US Constitution will, in most cases, be finally determined by way of appeal to the United States Supreme Court.¹¹

By identifying the main features of judicial review in municipal systems, we come to the point of questioning the importance of judicial review in any legal/political system.

2 Why Judicial Review?

Having a system of judicial review will touch all aspects of public activity of the society concerned. These include relatively ordinary acts carried out at the local administrative level such as the grant or refusal of permits, licenses, and writs by the authorities; but it also extends to more fundamental national issues, for example, problems caused by unlawful administrative and legislative action, including the violation of an individual's human rights and civil liberties. At highest level, the notion of judicial review will extend to essential constitutional matters involving the powers and functions of the various organs of the State.

These incidents are not, of course, exhaustive, but merely to provide an illustration of some of the vast range of cases which can and do come before the courts in domestic legal systems by way of judicial review. A glance of these activities provides an understanding of the various significance and importance of judicial review, which can be identified in two aspects.

In the first place, the role of the court as a guardian of the legality of all kind of governmental acts and decisions is perhaps the most familiar face the

¹¹ See below chapter II for detailed discussion on judicial review in the United States.

judiciary has acquired. Without an effective judicial review system, there would be no way of providing a check against the abuse of power. Where the executive organs of a State act in a manner not in conformity with their given competences; where the legislature makes laws which infringe constitutionally-protected civil liberties and human rights; or where courts and tribunals deliver judgments tainted by errors of law and procedure, judicial review may be used to provide relief to the aggrieved parties, such as natural and legal individuals, and statutory and administrative bodies.

Secondly, the judiciary might play the role of final arbiter in resolving constitutional disputes among various organs of the government. This role of the judiciary might extend to nullify laws incompatible with the constitution in concrete issues, particularly issues dealing with provisions based in the doctrine of separation of powers, or might extend to provide statements of law in abstract legal terms to resolve differences between various branches of administration.

By way of recapitulation, the observations made above with respect to judicial review in municipal law are intended to provide a general background for this work. It is appropriate to examine the doctrine of judicial review in the context of international law.

3 Judicial Review in the International Legal System?

As the world enters the twenty-first century, one of the greatest uncertainties facing international law scholars is the future of the international system. With the demise of the cold war, many commentators began to speak of the emergence of the "New World Order". The concept expressed a hope that the

international system was becoming more peaceful and just.¹² One institution that has figured prominently in the literature on the New World Order has been the United Nations. In the wake of recent developments, this organisation, which during most of the Cold War had played a relatively minor role in high politics, was suddenly at the centre of global affairs. In such a system, many assumed the beginning of an era of the rule of law in the United Nations in managing and solving international conflicts.

But, with the UN handling of the Gulf War, Somalia, Balkans and Lockerbie, the expectations for a better international system seemed premature.¹³ The Security Council, in particular, was accused of acting unconstitutionally in dealing with these international situations. It was accused of overstepping its constitutional limitations enumerated in the UN Charter. In the midst of these turbulent uncertainties, an increasing amount of scholarship has been devoted to the study of the possibility of the International Court of Justice reviewing the UN political organs' decisions and actions. The justification for this search is to guard the legitimacy of the United Nations system as a whole, and to inaugurate a New World Order. Judicial review of the UN political organs' actions is an old but new debate. The international legal community has been engaged in this issue since the time of establishing the new international organisation at the San Francisco Conference.

The United Nations Conference on International Organisation (UNCIO), which opened in San Francisco in 1945, faced not only the problems of

¹² See A. C. Arend, "The United Nations and the New World Order" 81 *Georgetown L. J.* 491(1993)

¹³ M. Weller, "The Lockerbie Case: A Premature End to the 'New World Order'?" 4 *African Journal of International and Comparative Law* 302 (1992)

reconciling conflicting positions among States but also problems of effective organisation, and national pride and prestige. Proposals by States were advanced to maximise their benefit from the new organisation. Arguments were raised and discussed to have a world organisation, not a “great powers” organisation. Many participating States attempted to diminish the influence of big powers acting through the Security Council by increasing the importance of the General Assembly and the International Court of Justice.¹⁴

One of the proposals, advanced to strengthen the role of the International Court and to provide a safeguard against the “great powers” influence in the Security Council, was the Belgian proposal. It read:

“before a project for settlement of difference, drawn up by the Council or by any other body became final, each of the States concerned should be able to ask for an advisory opinion from the International Court of Justice as to whether the decision respected its independence and vital rights.”¹⁵

In explaining the rationale behind his proposal, the Belgian delegate saw the Security Council as a political organ and that the deliberations taking place in it would be of a political character, so in that context, the essential rights of a State might be disregarded by the discussions of the Security Council due to political pressures or manipulation.¹⁶

Although the aim of the Belgian proposal was to ensure that the sovereign rights of States were protected, a surge of debate against the proposal was raised in the seventh meeting of Committee III/2. To begin with, the United States

¹⁴ A. L. Bennett, *International Organizations Principles and Issues* (6th ed.) (1995) at 51-52

¹⁵ Doc.2 G/7 (k), 3 UNCTAD Docs. 331 at 333

¹⁶ *Ibid.*

delegate showed dissatisfaction with the Belgian proposal. He believed that Security Council was bound to act in accordance with the principles of justice and international law by the virtue of Article 1 of the Charter. For him, all UN organs were also bound to act in conformity with the Principles and Purposes of the United Nations.¹⁷ Thus such an amendment, in his point of view, was not deemed necessary.

The Soviet Union expressed the view that such a proposal would weaken the Security Council's authority to maintain international peace and security. In the Soviet Union delegate's opinion, the Security Council would not in any way infringe the rights of sovereign States, since it was established to protect the States' rights.¹⁸

The United Kingdom delegate believed that the Belgian proposal would seriously impair the success of the Court as a judicial body. According to the British delegate, the proposal "would result in the decision of the International Court of Justice of political questions"¹⁹. Besides, he believed that proposal would provide "a powerful weapon" in the hands of any State contemplating aggression. He shared with the Soviet delegate the point that such an amendment would paralyse the Security Council in fulfilling the legitimate role of maintaining peace that was intended for it.²⁰

The only supporter for the Belgian proposal was Colombia. The Colombian delegate, who did not expect his country to be a permanent member in the Security Council, expressed the view that "the confidence generally felt in the

¹⁷ Doc.433 III/2/15, 12 UNCIO Docs. 47 at 49

¹⁸ *Ibid.*

¹⁹ Doc. 498 III/2/19, 12 UNCIO Docs 65 at 65

Security Council should not exclude confidence in the International Court of Justice...noting that a justiciable dispute should be referred to Court"²¹. He continued to argue that there would be no question more eminently legal than one concerning the essential rights of a State.

In response to this surge of criticism, the Belgian delegate clarified the main objective of the proposal. He pointed out that: "it was not in any sense the purpose of this amendment to limit the legitimate powers of the Security Council. It would, however, be desirable to strengthen the juridical basis of a Security Council decision."²² The Belgian delegate asked what the term "recommend" in Chapter VIII Section A [now Chapter VI] would mean. He questioned whether it would entail binding obligations for States or it would offer only advice, which might or might not be accepted. He had been assured that "in Section A no compulsion or enforcement was envisaged."²³ At the end, the Belgian delegate withdrew its proposal after having been informed that the Security Council's powers would be advisory and the recommendation under this Chapter did not possess any obligatory effect.²⁴

Later, a new Belgian proposal was introduced. This proposal suggested that since the Security Council was authorised to request an advisory opinion from the International Court, in case of disagreement between the principal organs as to the interpretation of a provision of the Charter, the matter should be

²⁰ *Ibid.*

²¹ Doc.433 III/2/15, 12 UNCIO Docs. 47

²² *Ibid.*

²³ Doc. 498 III/2/19, 12 UNCIO Docs 65 at 66

²⁴ *Ibid.*

submitted to the Court, as the guarantor of objectivity and uniformity of jurisprudence.²⁵

The second Belgian proposal shared the same fate of the first proposal. It was rejected by the Committee IV/2 on Legal Problems. Instead, the Committee adopted a report on the interpretation of the Charter, which provided that:

"if two organs are at variance concerning the correct interpretation of the Charter they may either ask the Court for an advisory opinion, establish an ad hoc committee of jurists to examine the question and report its views, or have recourse to a joint conference."²⁶

The report suggested that the Security Council, the General Assembly, and the International Court of Justice, as organs functioning within the framework of the Charter, should each interpret the parts that are applicable to its own particular functions.²⁷ This is to leave the determination of the extent of competence to the discretion of each organ.

The statement expressed the view that there is no need to include provisions on the Charter's authoritative interpretation in the Charter since the Charter defines the functions and the powers of each organ.²⁸ In addition, the statement concluded that if an interpretation by an organ "is not generally acceptable it will be without binding force."²⁹ The statement of the Committee implied that the relationship among the principal UN organs is characterised by the principles of specialisation, equality, and non-subordination. The Committee

²⁵ Doc.843 IV/2/37, 13 UNCIO Docs. 645 at 645

²⁶ *Ibid.* at 646

²⁷ Doc.933 IV/2/42 (2), 13 UNCIO Docs. 703 at 709

²⁸ *Ibid.*

affirmed that the UN Charter endowed each organ with a particular mission or a range of special tasks with corresponding means and powers. That special mission of each organ calls for autonomy of conduct and that autonomy establishes the fact that each organ should be autonomous in interpreting the provisions of the Charter related to its work. Although each principal UN organ enjoys a complete independence in conducting its actions, co-ordination is needed in order to achieve the overall purposes of the United Nations.

The *travaux préparatoires* did not then rule out the possibility of judicial review from the outset. The discussion in the San Francisco showed that the International Court of Justice might make determinations of the competence and powers of the UN organs by the way of an advisory opinion sought specifically for that purpose. According to the statement of the Committee IV/2, the Court could review the legality and the validity of the Security Council's resolutions, decisions, and interpretations, which are "generally unacceptable", through its advisory competence.³⁰ The negotiating history allowed the International Court of Justice to review the "generally unacceptable" actions of the UN organs in a way that would guarantee each organ its own jurisdiction and competence without any infringement of the other organ's competence. In other words, the *travaux préparatoires* did not indicate that a hierarchy exists among the UN organs but established the fact that the UN organs actions could be reviewed if they were generally unacceptable.

This would suggest that a power of review could be thought of, not in the sense of a power to overrule decisions, as discussed earlier, but rather a power to

²⁹ *Ibid.* at 710.

³⁰ Doc 933, IV/2/42 (2), 13 UNCIO Docs. 703, at 709-710

say that a given decision did not have the effect which its authors intended it to have, and thought that it did have. This thesis proposes a middle-way judicial review, a middle way between no judicial review and compulsory judicial review. Middle-way judicial review means that the International Court could have the capacity to determine whether or not a UN political organ has acted in contrary to the UN Charter without overruling that action or decision.

In the light of this, this thesis seeks to accomplish four main goals. First, it will attempt to demonstrate the existence of the doctrine of *ultra vires* in international institutional law, and therefore, the existence of a basis for judicial review. To do this, it will discuss the doctrine of implied powers and its limitations, and it will show that the doctrine of *ultra vires* begins with the end of the doctrine of implied powers. Second, this work will reject the idea of modelling "international" judicial review with an analogy to that of decentralised system of judicial review, in particular that of the United States. Third, it will seek to demonstrate that there are limitations on the powers of the Security Council, even when it is acting under Chapter VII of the UN Charter. Fourth, it will examine the alternative procedure for the realisation of judicial review in the international system.

In order to accomplish these tasks, this thesis is divided into four chapters. Chapter I will examine judicial review in relation to the doctrine of *ultra vires* and the doctrine of implied powers. Chapter II will discuss a comparison between the International Court of Justice and the United States Supreme Court. Chapter III will examine the institutional dilemma in the context of the relationship between the UN Security Council and the International Court of Justice. Chapter IV will examine the possible procedure to realise judicial review. Finally, the work will

be concluded with the point that judicial review has a place in the UN system, and its realisation could be through the International Court of Justice advisory competence.

Chapter I:

Judicial Review and the International Court of Justice

1 Introduction

One commentator has described the United Nations Security Council in a metaphoric way,

"as a whale which, for reasons known and unknown, lay quietly somewhere on the high seas for most of its life. Some ten years ago, the whale awoke and turned over once or twice, sending waves to distant shores which, in turn, set in motion the ships and boats and canoes of legal science."¹

With the demise of the Cold War and with the end of reciprocal vetoes between the permanent members, the Security Council assumed its intended powers, especially its powers under Chapter VII, which were rarely used before the nineties. The Security Council showed that it could be a guardian of international peace and security when it ended the Iraqi invasion of Kuwait and took coercive measures under Chapter VII to reach this end.² But it also used these powers when the threat to international peace was far less apparent. It intervened in many conflicts for humanitarian purposes, such as in the case of Somalia.³ The Security Council applied Chapter VII without discussing how the situation constituted a threat to international peace and security, the constitutional limitation on the Security Council's authority under Chapter VII. The

¹ B. Fassbender, "Review Essay Quis judicabit? The Security Council, Its Powers and Its Legal Control" 11:1 *EJIL* 219 (2000) at 219.

² C. Greenwood, "New World Order or Old? The Invasion of Kuwait and the Rule of Law" 55:2 *The Modern Law Review* 153 (1992)

determination of a threat of the peace was mentioned in the preambular part of resolution 733. It appeared that the adoption of the resolution was motivated by humanitarian concerns although there was a slight reference to the consequences on the stability and peace in the region. SC Res. 733 (1992) stipulated that:

"The Security Council,...[g]ravelly alarmed at the rapid deterioration of the situation in Somalia and the heavy loss of human life and widespread material damage resulting from the conflict in the country and aware of its consequences on stability and peace in the region,...[d]ecides, under Chapter VII of the Charter of the United Nations, that all States shall, for the purposes of establishing peace and stability in Somalia, immediately implement a general and complete embargo on all deliveries of weapons and military equipment to Somalia until the Council decides otherwise;"⁴

In resolution 794, the Security Council authorised the use of force to facilitate humanitarian assistance but it failed to mention how the situation had changed from domestic to international and why it considered the situation in Somalia a threat to international peace and security. The resolution simply stated that:

"[t]he magnitude of the human tragedy caused by the conflict in Somalia, further exacerbated obstacles being created to the distribution of humanitarian assistance, constitutes a threat to international peace and security."⁵

³ SC Res. 733 UN SCOR (1992). Unanimously adopted. No objections were raised against it. See UN Doc. S/1992/PV.3039

⁴ SC Res. 733 UN SCOR (1992)

⁵ SC Res. 794 UN SCOR (1992)

A number of Member States expressed the view that this was a collective humanitarian intervention.⁶ As for other Member States, the concerns appeared to be more related to the United Nations, versus U.S., control over the operation, rather than whether this was an internal matter.⁷ However, this resolution was adopted unanimously.

Again, when the Security Council in July 1994 authorised Member States to form a multinational force “to use all necessary means” to help Haiti to get rid of its military dictatorship and to foster a return to democracy⁸, only a few voices in the Security Council debated and questioned whether the situation constituted a threat to international peace.⁹ The general atmosphere was in support of the adoption of resolution 940.¹⁰ The representative of the legitimately elected Haitian government stated that:

"[t]he ongoing situation is only exacerbating the destruction of the country and increasing the suffering of the people, who have no recourse but to flee the country in any way they can, thus creating a refugee problem for the entire region...the draft resolution before the Security Council...contains elements that will enable the international community to respond appropriately to the challenge issued by a handful of unscrupulous soldiers who for more than three years have been contributing to the destruction of their own country."¹¹

⁶ UN Doc. S/1992/PV. 3145 See for instance the statements of the Representatives, of Belgium at 23, of France at 28, of the United Kingdom at 34, and of the United States at 36

⁷ See for example UN Doc. S/1992/PV. 3145 See the statements of the Representatives, of China at 17 and of Zimbabwe at 7

⁸ SC Res. 940 UN SCOR (1994).

⁹ See UN Doc. S/1994/PV.3413 See for instance the statements of the Representative of Brazil, Mexico and China

¹⁰ *Ibid.* See for example the Statements of the Representatives of Canada at 7-8, of Venezuela at 8, and of Nigeria at 10-11

¹¹ *Ibid.* at 3

However, the representative of Mexico was explicit in finding the situation did not amount to the application of Chapter VII measures. He stated:

"the crisis in Haiti...is not a threat to the peace, a breach of the peace or an act of aggression such as would warrant the use of force in accordance with Article 42 of the Charter."¹²

The representatives of Brazil and China, who abstained from voting, shared the same views. Both considered that the situation did not give rise to "threat to the peace, a breach of the peace or an act of aggression".¹³

The Security Council also applied Chapter VII in its approach to international terrorism. In January 1992, the Security Council condemned the bombing of Pan Am Flight 103 over Lockerbie, and asked the Libyan Government to respond effectively to the United States and the United Kingdom requests to surrender the two suspects. Resolution 731(1992) did not impose Chapter VII sanctions, but it led two months later to one that did. The Libyan Government began proceedings in the International Court of Justice, and shortly after the close of the hearings, the Security Council adopted resolution 748(1992) under Chapter VII, imposing sanctions on Libya. Many argued that the situation did not constitute a threat to international peace, especially as the incident happened three years before resolution 748 was adopted.¹⁴

¹² *Ibid.* at 4

¹³ *Ibid.* at 9, 10

¹⁴ See e.g. Judge Bedjaoui dissenting Opinion in Case Concerning Questions of Interpretation and Application of 1971 Montreal Convention Arising From Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United Kingdom) 1992 *ICJ Rep.* 3 at 42- 43; K. Kaikobad, "The Court, the Council and Interim Measures: a Commentary on the Lockerbie Order of 14 April 1992" 17 *Australian Yearbook of International Law* 87 (1996) at 155; P. H. Kooijmans, "The Enlargement of the Concept of 'A Threats to the Peace'" 111 at 117 in R. J. Dupuy (ed.) *The Development of the Role of the Security Council* (1993)

The actions of the Security Council in handling these international crises gave rise to a surge of scholarly debate.¹⁵ The issues of the competence of the Security Council, the limitations on its powers under Chapter VII, its capacity to act *ultra vires*, and the powers of the International Court to review the Council's actions were at the centre of the debate. It is worth mentioning that during the first decade of the life of the United Nations, certain writers and learned societies of international law paid attention to the doctrinal issues of the competence of the United Nations.¹⁶

However, the realities of international relations at that time left the topic dormant. With changes in the international political equation, the question of judicial review has been reinvigorated, and it acquires not only an academic interest but also engages the attention of national and international political concerns.¹⁷ Now that judicial review has come to the fore, clarity is needed on the

¹⁵ See e.g., J. E. Alvarez, "The Once and Future Security Council" 10:2 *Washington Quarterly* 5 (1995); M. Bedjaoui, *The New World Order and the Security Council: Testing the Legality of its Acts* (1994); D.D. Caron, "The Legitimacy of the Collective Authority of the Security Council" 87 *AJIL* 552 (1993); T. M. Franck, "The 'Powers of Appreciation': Who is the Ultimate Guardian of UN Legality?" 86 *AJIL* 519 (1992); T. M. Franck & F. Patel "UN Police Action in Lieu of War: 'The Old Order Changeth'" 85 *AJIL* 63 (1991); H. Freudenschub, "Article 39 of the UN Charter Revisited: Threats to the Peace and the Recent Practice of the UN Security Council" 46 *Austrian Journal of Public and International Law* 1 (1993); M. J. Glennon, "The Constitution and Chapter VII of the United Nations Charter" 85 *AJIL* 74 (1991); M. J. Glennon, "Sovereignty and Community After Haiti: Rethinking the Collective Use of Force" 89 *AJIL* 70 (1995); R. Gorden, "United Nations Intervention in Internal Conflicts: Iraq, Somalia, and Beyond" 15 *Mich. J. Int'l. L.* 519 (1994); F. L. Kirgis Jr. "The Security Council's First Fifty Years" 89 *AJIL* 506 (1995); W. Michael Reisman, "The Constitutional Crisis in the United Nations" 87 *AJIL* 83 (1993); W. Michael Reisman, "Haiti and the Validity of International Action" 89 *AJIL* 82 (1995); A. P. Rubin, "Libya, Lockerbie and the Law" 4:1 *Diplomacy & Statecraft* 1 (1993); M. Seara-Vazquez, "The UN Security Council at Fifty: Midlife Crisis or Terminal Illness?" 1 *Global Governance* 285 (1995); B. Simma, "From Bilateralism to Community Interest" 250 *RDC* 229 (1994); B. H. Weston, "Security Council Resolution 678 And Persian Gulf Decision Making: Precarious Legitimacy" 85 *AJIL* 516 (1991)

¹⁶ See e.g., "Report of Special Committee on Reference to the International Court of Justice of Questions of the United Nations Competence" *Proc. Am. Int'l. L.* 256 (1950); For a summary account of the work of the learned societies of international law see M. Bedjaoui, *The New World Order and the Security Council Testing the Legality of its Acts* (1994) at 55-61

¹⁷ K. Kaikobad, *The International Court of Justice and Judicial Review* (2000) at 4

scope and the extent of judicial review, including the basis necessary for judicial review to be exercised.

Generally speaking, the notion of judicial review, in terms of international law, could be understood as the power of an international tribunal to pass upon questions dealing with the validity of international action and decisions in the light of various principles of law, mainly those originating in the relevant constitutive instruments of the international organisations; and as far as the latter instruments are concerned, those provisions which deal with the competence, powers and functions of international organisations and their respective organs are of particular importance. Other sources of law against which the validity of acts and decisions may be examined are treaties and conventions, while customary international law and the general principles of law will also play a part in all appropriate circumstances.¹⁸ Thus, like its municipal counterpart, an international judicial body may be called upon to decide matters regarding the validity of administrative, legislative and judicial action adopted by one or more organs of an international institution. Where the impugned action is considered to be inconsistent with the law, customary, conventional or general, it will stand nullified, provided of course that the international tribunal is empowered to annul the action or decision in question. This is, of course, a simplistic understanding of judicial review in international law and the actual picture is more complex. For present purposes, it will suffice to apply these concepts to the International Court of Justice with a view to providing a look at the nature, extent and scope of the rudimentary judicial review system operated by the principal judicial organ of the United Nations. Clearly, any study of this system must take into account the

¹⁸ This will be discussed in detail in chapter III

Court's powers exercised in its contentious and advisory proceedings. An account of this kind, which serves to provide the essential contextual background against which the judicial review system can be evaluated, is provided in the following chapters.

In order to fully understand the notion of judicial review in the context of international law and the powers the International Court enjoyed, it will be necessary to identify the various elements which are usually found such a notion in one form and degree or another. These are the grounds for nullity and other legal difficulties with the act or decision, and the nature and effect of the Court's decision. These elements are elaborated in detail below.

2 Grounds of Nullity

This is central to the notion of judicial review because it is this fact, amongst other things, which sets it apart from the concept and process of appeal. The latter will normally lie on the merits of a case in terms of being a challenge against a judicial decision allegedly flawed in its application and interpretation of the law and facts; while in judicial review the main thrust of the challenge is that the acts or decision itself, whether executive, legislative or judicial, is invalid, and hence a nullity in terms of law. It follows therefore that, in general terms, the petitioner in judicial review is less concerned with the substance of the impugned measures than the grounds of law allegedly nullifying the decision or act. The general claim thus is that as a nullity in law, the measure is incapable of creating or affecting the legal rights and obligations of the relevant parties. The grounds on which a claim is based are many and varied. International law scholars have

identified three categories: *ultra vires*, procedural irregularities, and procedural impropriety in terms of a breach of principles of natural justice.¹⁹

There is no established procedure in either the UN Charter or the Statute of the International Court of Justice to review the acts and the decisions of the organs of the UN, and therefore, the doctrine of *ultra vires* has no place in the international legal system.²⁰ But, the question introduces itself: whether the UN and its organs possess the capacity to commit *ultra vires* acts, i.e. decisions and acts in excess of their competence and the authority conferred upon them by the UN Charter?

It appears that the International Court adopted the view, when it faced the question of the legal status of executive or legislative action, that a resolution of a properly constituted organ of the United Nations which is passed in accordance with the organ's rules of procedure, and which is declared by its President to have so passed, must be presumed to have been validly adopted.²¹ In the *Certain Expenses Advisory Opinion*²², the International Court of Justice was asked to give its opinion on whether certain expenditures, which were authorised by the General Assembly to cover the costs of the United Nations operations in the Congo and in the Middle East, constituted "expenses of the Organisation" within the meaning of Article 17 para.2 of the UN Charter. It was argued before the Court that the expenses, that resulted from operations for the maintenance of

¹⁹ K. Kaikobad, *The International Court of Justice and Judicial Review* (2000) at 36; See generally, E. Osieke, "Unconstitutional Acts in International Organisations: the Law and the Practice of the ICAO" 28 *ICLQ* 1(1979); E. Osieke, "Legal Validity of *Ultra Vires* Decisions of International Organisations" 77 *AJIL* 239 (1983); F. Morgenstern, "Legality in International Organisations" 48 *BYIL* 241 (1976-7)

²⁰ See *Namibia Advisory Opinion* 1971 *ICJ Rep.* 16 at 284 (Judge Fitzmaurice dissenting opinion)

²¹ *Ibid.* at 22

²² *Certain Expenses Advisory Opinion* 1962 *ICJ Rep.* 151

international peace and security, were not “expenses of the organisation within the meaning of Article 17 para.2 of the Charter, inasmuch as they fall to be dealt with exclusively by the Security Council, and more especially through agreements negotiated in accordance with Article 43 of the Charter.”²³ It was argued further that since the General Assembly’s power is limited to discussing, considering, studying and recommending, it cannot impose an obligation on members to pay the expenses which result from the implementation of its recommendations, and therefore the General Assembly acted *ultra vires*.²⁴

In considering these objections, the Court declared that:

“when the Organisation takes action which warrants the assertion that it was appropriate for the fulfilment of one of the stated purposes of the United Nations, the presumption is that such action is not *ultra vires* the organisation.”²⁵

This approach of the Court to *ultra vires* decisions has led some scholars, arguably, to believe that the doctrine of *ultra vires* is not applicable to international organisations, and that they have the capacity to commit acts not explicitly authorised by the United Nations Charter.²⁶ But it must be stressed that the Court only *presumes* that the action is *intra vires* and that it leaves itself the room and the option of being able to declare future actions *ultra vires*, if it is

²³ *Ibid.* at 162

²⁴ *Ibid.* at 162-63

²⁵ *Ibid.* at 162

²⁶ E. Osieke, “Unconstitutional Acts in International Organisations: the Law and the Practice of the ICAO” 28 *ICLQ* 1(1979) at 3; E. Osieke, “Legal Validity of *Ultra Vires* Decisions of International Organisations” 77 *AJIL* 239 (1983); F. Morgenstern, “Legality in International Organisations” 48 *BYIL* 241 (1976-7) at 241

given the chance.²⁷ As Shaw has noted: “the concept of a presumption of validity bears with it the seeds of a finding of invalidity, at least potentially.”²⁸

Judge Spender, in his separate opinion in *Certain Expenses*, asserted that the Court has the right to rule on the constitutionality of the action taken by UN organs if the Court was asked to do so:

“The question of constitutionality of action taken by the General Assembly or the Security Council will rarely call for consideration except within the United Nations itself, where a majority rule prevails. In practice this may enable action to be taken which is beyond power. When, however, the Court is called upon to pronounce upon a question whether certain authority exercised by an organ of the Organisation is within the power of that organ, only legal considerations may be invoked and *de facto* extension of the Charter must be disregarded.”²⁹

Judge Spender had affirmed that certain acts and decisions might be reviewed if objections had been made.³⁰ This opinion established a distinction between raising the issue of judicial review within the context of the advisory jurisdiction and in contentious proceedings. According to Judge Spender, the request of an advisory opinion represents the rule of majority, which could allow the extension of powers and competence of the Court to rule on the constitutionality of the UN organs' actions, whereas in its contentious jurisdiction, the Court settles disputes between two States or more, which limit the extension of its powers to the questions presented. In its advisory competence, the Court has the role of “an organ of the United Nations” as opposed to its role as “an organ of international

²⁷ N.D. White, *The Law of International Organisations* (1996) at 119

²⁸ M.N. Shaw, “The Security Council and the International Court of Justice: Judicial Drift and Judicial Function” 219 at 257 in A.S. Muller et al (eds.) *The International Court of Justice* (1997)

²⁹ *Certain Expenses Advisory Opinion* 1962 ICJ Rep. 151 at 197

³⁰ *Ibid.* at 196

law” obtaining in its contentious jurisdiction.³¹ Reisman has characterised the role of the Court in its advisory mode as a “type of international constitutional tribunal or as a *cour de cassation* for international organizations.”³² In that sense, the International Court could review action taken and consider if a particular organ has exceeded its delegated powers. In contentious proceedings, the Court could review decisions and actions of UN organs if doubts and questions raised during the proceedings formed an essential part of the dispute.³³

On the basis of this case, that has been often cited to state the Court's position on the doctrine of *ultra vires*, it has been argued that all acts undertaken by the UN, no matter how irregular in procedure, are valid and binding.³⁴ This argument could partially be correct. Here, one should draw a distinction between *ultra vires* and procedural irregularities. The United Nations Charter is notorious for its vagueness in its separation of powers and functions. An organ could overstep other organ's functions and still regarded *intra vires*.³⁵ However, it would amount for an act to be considered *ultra vires* in the case of the organ exceeding the powers vested in it by the Charter, or acting to the contrary of the Charter's objectives.³⁶ UN organs' powers are not unbridled and uncontrolled.³⁷ Their

³¹ L. Gross, “The International Court of Justice and the United Nations” 121 *RDC* 313 (1967-1) at 320

³² W. Michael Reisman, “The Other Shoe Falls: The Future of Article 36 (1) Jurisdiction in the Light of Nicaragua” 81 *AJIL* 166 (1987) at 168

³³ See for example, *Appeal Relating to the Jurisdiction of ICAO Council (India v. Pakistan)* 1972 *ICJ Rep.* 42; *Arbitral Award of 31 July 1989 (Guinea Bissau v. Senegal)* 1991 *ICJ Rep.* 53

³⁴ E. Osieke, “Legal Validity of *Ultra vires* Decisions of International Organisations” 77 *AJIL* 239 (1983)

³⁵ See the Court's opinion in *Certain Expenses Advisory Opinion* 1962 *ICJ Rep.* 151 at 162

³⁶ *Constitution Of The Maritime Safety Committee Of The Inter-Governmental Maritime Consultative Organisation Advisory Opinion* 1960 *ICJ Rep.* 150

³⁷ See below Chapter III

functions and powers flow from the Charter. It is, however, possible that, in the pursuit of their objects and purposes, UN organs may engage in activities which are not authorised by the Charter, and may adopt decisions in a manner which does not correspond entirely to the governing procedures, but they cannot exercise powers against the spirit of the Charter.³⁸

In the *IMCO Advisory Opinion*, in that respect, the International Court asserted the fact of the existence of the doctrine of *ultra vires* in the legal system of international organisations. In this case, the International Court of Justice was asked by the First IMCO Assembly to give an advisory opinion on the following question:

"Is the Maritime Safety Committee of the Inter-Governmental Maritime Consultative Organisation, which was elected on 15 January 1959, constituted in accordance with the Convention for the Establishment of the Organisation?"³⁹

By nine votes to five, the Court gave a negative answer to the question. The Court found that the decision of not including Liberia and Panama as members of the Maritime Safety Committee was *ultra vires* Article 28(a) of the Convention, which read as follows:

"The Maritime Safety Committee shall consist of fourteen Members elected by the Assembly from the Members governments of those nations having an important interest in maritime safety, of which not less than eight shall be the largest ship-owning nations, and the remainder shall be elected so as to ensure adequate representation of Members, governments of other nations with an important interest in maritime safety, such as nations interested in the supply of large numbers of crews

³⁸ see below the discussion on the doctrine of implied powers

³⁹ *Constitution Of The Maritime Safety Committee Of The Inter-Governmental Maritime Consultative Organisation* Advisory Opinion 1960 ICJ Rep. 150

or in the carriage of large numbers of berthed and unberthed passengers, and of major geographical areas."⁴⁰

The Court, in its opinion, stated that "the Maritime Safety Committee of IMCO which was elected...is not constituted in accordance with the Convention for the establishment of the Organization."⁴¹ In other words, the Court found that the decision could not be justified by reference to the basic instrument of that organisation and it held that the election was unconstitutional and unlawful.⁴²

The acts were declared unconstitutional rather than *ultra vires*. Although many consider that these two concepts are interchangeable, the answer to this difficult and complex question cannot be found by reference to any general principle or rule of international law, or to the constitutions of most of those international organisations. There is also no consensus among international lawyers on the subject.⁴³ To declare an act unconstitutional rather than *ultra vires* could be linked to the fact that most of the claims brought to the Court have often contended that the particular international organisation and its organs had not acted in conformity with the provisions of its constitution, so that the Court answered the question affirmatively or negatively and would not go further to determine the consequences of its findings.

⁴⁰ *Ibid.* at 154

⁴¹ *Ibid.* at 171

⁴² *Ibid.* at 170-171

⁴³ E. Osieke, "Legal Validity of *Ultra Vires* Decisions of International Organisations" 77 *AJIL* 239 (1983) at 262

The International Court has, in almost all the relevant cases, found the contested acts *intra vires*. Only in two cases⁴⁴, did it find the relevant acts to be *ultra vires*. The invalidity of relevant organ's action was established on the ground of clear non-observance of substantive provisions of the constitution of the organisation concerned. It is however worth mentioning that the issues had been brought before the International Court to provide interpretations of the law rather than to review the legality of a certain act or decision.⁴⁵

On the other hand, the failure to observe that procedure could constitute a ground for a review body to invalidate the resulting act or decision. Most of the claims of irregular procedural acts have been made because a certain act was adopted by the wrong organ within the organisation.

The attitude of review bodies to procedural irregularities appears to be somewhat flexible. The International Court of Justice has been reluctant to admit that such irregularities could amount to the invalidation of a decision of an international organisation on the condition that these irregularities did not result in the adoption of wrong decision or in a miscarriage of justice.⁴⁶ It considered this kind of irregularity as a matter of the internal law of the organisation, which would not justify declaring the act invalid. In *Certain Expenses*, the International Court decreased any potential in challenging procedurally wrong acts and decisions. It stated:

⁴⁴ One during the days of the PCIJ *The Competence of the ILO to Regulate Agricultural Production* Case, PCIJ Series B. No. 3; and one by the ICJ *Constitution Of The Maritime Safety Committee Of The Inter-Governmental Maritime Consultative Organisation* Advisory Opinion 1960 ICJ Rep. 150

⁴⁵ C.F. Amersinghe, *Principles of the Institutional Law of International Organisations* (1996) at 181

⁴⁶ See the Opinion of Judge Dillard in *Appeal Relating to the Jurisdiction of ICAO Council* 1972 ICJ Rep. 4 at 100

“If it is agreed that the action [of the General Assembly] in question is within the scope of the functions of the Organisation but it is alleged that it has been initiated or carried out in a manner not in conformity with the division of functions among the several organs which the Charter prescribes, one moves to the internal plane, to the internal structure of the Organisation. If the action was taken by the wrong organ, it was irregular as a matter of that internal structure, but this would not necessarily mean that the expense incurred was not an expense of the Organisation. Both national and international law contemplate cases in which the body corporate or politic may be bound, as to third parties, by an *ultra vires* act of an agent.”⁴⁷

In the *Appeal Relating to the Jurisdiction of the ICAO Council* case, the Government of India contended before the Court that the decisions of the ICAO Council were vitiated by procedural irregularities and errors.⁴⁸ The Court used the same reasoning as it had employed in *Certain Expenses* and declared that:

“The Court however does not deem it necessary or even appropriate to go into this matter, particularly as the alleged irregularities do not prejudice in any fundamental way the requirements of a just procedure. The Court’s task in the present proceedings is to give a ruling as to whether the Council has jurisdiction in the case. This is an objective question of law, the answer to which cannot depend on what occurred before the Council. Since the Court held that the Council did and does have jurisdiction, then, if there were in fact procedural irregularities, the position would be that the Council would have reached the right conclusion in the wrong way. Nevertheless, it would have reached the right conclusion. If, on the other hand, the Court had held that there was and is no jurisdiction, then, even in the absence of any irregularities, the Council’s decision to assume it would have stood revised.”⁴⁹

⁴⁷ *Certain Expenses Advisory Opinion* 1962 ICJ Rep. 151 at 168

⁴⁸ *ICAO Council case* 1972 ICJ Rep. 4 at 69

⁴⁹ *Ibid.*

It would appear, therefore, that procedural irregularities do not normally constitute a ground for declaring certain acts and decisions of an international organisation invalid, unless these irregularities lead to a miscarriage of justice. Judge Dillard pointed out in *ICAO* case that: "[i]t is, of course, not impossible to contemplate a situation of gross abuse of procedural requirements leading to a miscarriage of justice. In such a situation the validity of the decision adopted by a subordinate adjudicating body may be legitimately challenged on appeal."⁵⁰

Similarly, Article 11 of the Statute of the United Nations Administrative Tribunal contemplates an error of procedure which results in a failure of justice. In *Review of Judgment No.273*⁵¹, the Court found that the Committee on Applications for Review of Administrative Tribunal Judgments had committed an error of procedure in the composition of the Administrative Tribunal. The Court posed the question why, when the three regular members of the Tribunal had been available to sit and had sat, it had not been thought appropriate to allow an alternate member to sit, who in fact appended a dissenting opinion to the judgment.⁵² But, the Court noted that it had not been asked to consider whether the Tribunal might have committed a fundamental error in procedure having occasioned a failure of justice. Accordingly, it did not consider the matter further.⁵³

⁵⁰ *Ibid.* at 100 Judge Dillard (Separate Opinion)

⁵¹ *Application for Review of Judgement No.273 of the United Nations Administrative Tribunal* 1982 ICJ Rep. 325 (*Mortished case*)

⁵² *Ibid.* at 340

⁵³ *Ibid.*

Osieke questioned what amounts to a miscarriage of justice. His answer was that it depends on the special circumstances of each case.⁵⁴ A straightforward example of an irregularity that would lead to a miscarriage of a justice is where the rules stipulate that a certain decision should be adopted by two-third majority and the organ adopts the decision by a simple majority, which violates the constitutional rights of some member States. The procedural irregularities could be identified as a "serious departure from a fundamental rule of procedure."⁵⁵

It is correct in general principle that in cases of judicial review it is not the substance of the acts or decision which is of primary concern, but the validity in law of that measure. However, where the measure is challenged on the ground of *ultra vires*, the substance of the said measure will normally play a crucial role. For here the very essence of the challenge is based on questioning whether the public body, or international organisation, or organ thereof, was empowered to adopt that measures. And to translate this into the language of the United Nations, the challenge is based on whether the General Assembly or the Security Council was empowered by the Charter to adopt such measures. The vagueness and indefinite nature of the UN Charter has established a leeway to escape this dilemma. The scope of the UN organs' competence has been often widened by implying powers from expressed powers or from the purposes and principles of the Charter.

⁵⁴ E. Osieke, "Legal Validity of *Ultra Vires* Decisions of International Organisations" 77 *AJIL* 239 (1983) at 247

⁵⁵ Article 35(C) of the Model Rules on Arbitral Procedure see 1958 *Yearbook of the ILC*. Vol II at 12

3 The Doctrine of Implied Powers

The doctrine of implied powers found its place slowly but progressively in the law of international organisations.⁵⁶ It is generally known that the notion of implied powers originated in legal municipal system. The United States Supreme Court spoke of the doctrine of implied powers during its early days. *McCulloch v. Maryland case*⁵⁷ arose when the Congress of the United States passed in April 1816, 'an act to incorporate the subscribers to the Bank of the United States'. The General Assembly of Maryland, in response, passed 'an act to impose a tax on all banks, or branches thereof, in the state of Maryland, not chartered by the legislature' in February 1818. After the First Bank of the United States (1791) had folded in 1811 due to a lack of congressional support, inflation in the years following the War of 1812 compelled Congress to establish a new national bank. The Second Bank of the United States was authorised by Congress to help control the unregulated issuance of currency by state banks. Many continued to oppose the bank's constitutionality, and Maryland set an example by imposing a tax on all banks not chartered by the state. When the U.S. branch bank in Baltimore refused to pay taxes, Maryland brought suit for collection from the bank, and challenging the constitutionality of the US National Bank.

Chief Justice John Marshall, in deciding the case, dealt with the issue of the constitutionality of a congressional act. He held that:

"the powers of the government are limited, and that
its limits are not to be transcended...the sound

⁵⁶ See A. I. L. Campbell, "The Limits of Powers of International Organisations" 32 *ICLQ* 523 (1983)

⁵⁷ The United States Supreme Court, *McCulloch v. Maryland*, 17 U.S. 316 (1819); See D. Alfange Jr., "Marbury v. Madison and Original Understandings of Judicial Review: In defense of Traditional Wisdom," 7 *The Supreme Court Review* 329 (1993); C. Eisgruber, "John Marshall's Judicial Rhetoric" 10 *The Supreme Court Review* 439 (1996); B. Schwartz, *A History of the Supreme Court* (1993)

construction of the constitution must allow to the national legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional. . .”⁵⁸

The chartering of a bank, according to the Court, was a power implied from the constitutional power over Federal fiscal operations. Because the State cannot impede constitutional Federal laws, the Maryland tax was voted unconstitutional.⁵⁹

Chief Justice Marshall continued to state that when there is no prohibition in the Constitution, the implied powers would be constitutional, but “[s]hould Congress, in the execution of its powers, adopt measures which are prohibited by the constitution; or should Congress, under the pretext of executing its powers, pass laws for the accomplishment of objects not entrusted to the government; it would become the painful duty of this tribunal, should a case requiring such a decision come before it, to say that such an act was not the law of the land.”⁶⁰

This opinion gave trenchant expression to the doctrine of implied powers. It showed that these powers could be implied to fulfil a legitimate end, if the constitution does not prohibit the new measures.⁶¹

⁵⁸ *McCulloch v. Maryland*, 17 U.S. 316 (1819)

⁵⁹ *Ibid.*

⁶⁰ *Ibid.*

⁶¹ C. Eisgruber, "John Marshall's Judicial Rhetoric" 10 *The Supreme Court Review* 439 (1996) at 449; B. Schwartz, *A History of the Supreme Court* (1993) at 45-46

The same notion of implied powers was incorporated in and introduced into international institutional law. The Permanent Court of International Justice, for example, in the *European Commission of the Danube* opinion⁶², laid down the proposition that an international organisation has *in principle* only the powers conferred on it by its constituent instrument. But it went further to note that “[a]s the European Commission is not a State, but an international institution with a special purpose, it only has the functions bestowed upon it by the Definitive Statute with a view to the fulfilment of that purpose, but it has power to exercise those functions to their full extent, in so far as the Statute does not impose restrictions upon it.”⁶³

It was argued that even the most prescient founders of an organisation could not have foreseen the developments that have occurred since the establishment of the organisation, and restricting the organisation to the express provisions of its constituent instrument would paralyse it from playing an effective role in the world affairs, and from performing its functions and powers.⁶⁴

The doctrine establishes that international organisations are deemed to have certain powers, which are additional to those expressly stipulated in their constituent instruments. These additional powers are necessary or essential for the fulfilment of the tasks or purposes of the organisation, or for the performance of its functions, or for the exercise of the powers explicitly granted.

The relationship between *ultra vires* and the doctrine of implied powers should be seen from the perspective that the doctrine of implied powers could be used to determine the extent of *ultra vires*. An international organisation always needs to

⁶² 1927 *PCIJ*, Series B, No. 14

⁶³ *Ibid.* at 64

justify its action and to demonstrate that it is using its powers judiciously, as a part of its contractual relation with Member States.⁶⁵ As it is never possible to lay down an exhaustive list of powers of an organisation in its constituent instrument and it is impossible to foresee subsequent developments at the time of the organisation's establishment, the doctrine of implied powers helps to establish a legal foundation for an act when there is no express provision to support it.

The International Court of Justice stated, in the *Reparations for Injuries suffered in the Service of the United Nations* opinion, that:

“Under international law, the Organization must be deemed to have those powers, which though not expressly provided for in the Charter, are conferred upon it by necessary implication as being essential to the performance of its duties.”⁶⁶

Implied powers are, therefore, those powers which are not expressly granted, but are implied either from express provisions or from the purposes and the functions of the organisation, for a necessary fulfilment of the objectives of the organisation. The foundation of implied powers is the constituent instrument of the organisation. Both express powers and implied powers are related to the constituent instrument. Express powers remain the source of, and framework for, the implication of powers.

Occasionally, a distinction is made between powers implied from explicit powers as opposed to powers implied from the purposes and functions of the organisation. Many argue that powers can only be implicated from existing powers, i.e. those expressly conferred by the constituent instrument of the

⁶⁴ N. D. White, *The Law of International Organisations* (1996) at 129

⁶⁵ E. Lauterpacht, "The Development of the Law of International Organisations by the Decisions of International Tribunals" 152 *RDC* 387 (1976-IV) at 416

organisation.⁶⁷ Schermers and Blokker express the view that: “many powers can only be exercised on the basis that other powers exist...”⁶⁸ However, they continue further to state that implied powers can be also derived from the general principles and purposes of the organisation such as those found in the preamble of the UN Charter.⁶⁹ It is difficult to separate the purposes and functions of an organisation from its existing powers, and to treat them as distinct bases of implication.⁷⁰ In a number of judicial decisions, purposes, functions, and explicit powers have been used in combination to justify the implication of powers. The use of differentiation between implication from existing powers and implication from purposes and functions of the organisation has proved to be unclear in practice. As Skubiszewski has explained:

“[f]unctions relate to the subject matter of the activity and stand, therefore, close to the tasks of the organization. Powers are more concentrated on measures that the organisation can or must take and which produce legal effects for the organisation and/ or its Members. Where a function of the organization becomes the basis for implying a power, i.e. where a power is said to be necessary to carry out a particular function, the link between function and power is inevitable.”⁷¹

⁶⁶ *Reparations for Injuries Suffered in the Service of the United Nations, Advisory Opinion*: 1949 ICJ Rep. 174 at 182.

⁶⁷ G. Tunkin, “Legal Bases of International Organization Action” 261 at 265-267 in R. J. Dupuy (ed.), *A Handbook of International Organizations* (1988) Tunkin argued that powers cannot be implied from the “institutional effectiveness” or the objects and purposes of an organisation but only from concrete provisions of its constituent instrument.

⁶⁸ Schermers & Blokker *International Institutional Law: Unity within Diversity* (1995) at 233

⁶⁹ *Ibid.*

⁷⁰ K. Skubiszewski, “Implied Powers of International Organisations” 857 in Y. Dinstein (ed.), *International Law at a Time of Perplexity* (1989)

⁷¹ *Ibid.* at 858.

Bowett also related implied powers to functions, purposes, and explicit powers.

He stated that:

“great care is taken to restrict implied powers to those which may reasonably be deduced from the purposes and functions of the organisation in question. Therefore, the test is a functional one; reference [should be made] to the functions and powers of the organisation exercised on the international plane...”⁷²

Such wide implication of powers could leave the international organisation with a considerable scope for extension of its powers in practice. The International Court of Justice, however, often related implied powers more broadly to the carrying out of the functions, and to the fulfilment of objects and purposes of the organisation. It has stressed that the implication of powers should be limited to deductions from the purposes and functions of the organisations.

Almost at very commencement of its activity the Permanent Court of International Justice was called upon to decide the question whether the International Labour Organisation possessed the competence for an inter- state regulation of conditions of labour of persons employed in agriculture.⁷³ The Court, in giving an affirmative answer to the question put to it by the Council of the League of Nations, rejected the view that the term "industry" constantly mentioned in Part XIII of the Treaty of Versailles⁷⁴ referred to industry in the limited meaning of the word to the exclusion of agriculture and navigation. This

⁷² D. W. Bowett, *The Law of International Institutions* (1982) at 337

⁷³ *The Competence of the International Labour Organisation with Respect to Agricultural Labour*, 1922 *PCIJ*, Series B., No.2

⁷⁴ On June 28, 1919, Germany and the Allied Nations (including Britain, France, Italy and Russia) signed the Treaty of Versailles, formally ending the war. The Treaty of Versailles included the Covenant of the League of Nations and Constitution of ILO (Part XIII) among other agreements to establish peace in the world.

answer was determined by the consideration that the failure to regulate conditions of work in agriculture by way of international agreement might frustrate the purpose of the Treaty by acting as a check upon the adoption of more humane conditions of labour and by constituting a "handicap against the nations which had adopted them, and in favour of those which had not, in the competition of the markets of the world."⁷⁵

However, the Court was criticised for basing its answer on "grammatico-logic" grounds rather than on the genesis of the Treaty of Versailles.⁷⁶ Another criticism was that the Court should have based its argument on the Treaty provisions, as they were contractual.⁷⁷ In other words, Member States signed the Treaty because they agreed upon its provisions, so that the provisions cannot be interpreted without any regard to the intentions of the parties.⁷⁸

Nevertheless, the Court adopted a broad understanding of the word "industry". By that, it determined the scope and extent of the work of ILO⁷⁹, and it extended the organisation's competence for necessary execution of its purposes.

The PCIJ was subsequently involved in determining the ILO's competence to draw up and propose labour legislation which, in order to protect certain classes of workers, regulated the same work when performed by employer himself. The problem began with a proposal to prohibit night work in bakeries. Objections were raised in connection with whether the ILO had competence to

⁷⁵ *The Competence of the International Labour Organisation with Respect to Agricultural Labour*, 1922 PCIJ, Ser. B., No.2 at 25

⁷⁶ J. H. W. Verzijl, *The Jurisprudence of the World Court* (Vol. I) (1965) at 33

⁷⁷ *Ibid.*

⁷⁸ *Ibid.*

⁷⁹ H. Lauterpacht, *The Development of International Law by the International Court* (1958) at 267

regulate the work of those who were not employees. The question before the Court was whether, in the absence of express provisions to regulate the work of employers, the ILO possessed in these circumstances an implied power to do so.

The PCIJ gave an affirmative answer. It stated that:

“the High Contracting Parties clearly intended to give ILO a very broad power of co-operating with them in respect of measures to be taken in order to ensure humane conditions of labour and the protection of workers. It is not conceivable that they intended to prevent the Organisation from drawing up and proposing measures essential to the accomplishment of that end. The Organisation, however, would be so prevented if it were incompetent to propose for the protection of wage-earners a regulative measure to the efficacious working of which it was found to be essential to include to some extent work done by employers.”⁸⁰

The PCIJ emphasised that the ILO needed to expand its powers by implication in order to fulfil the purposes of the organisation effectively. Here, the PCIJ examined the intention of the parties to the Treaty of Versailles to show what the purposes of the organisation were, and found that the ILO acted within its competence that stemmed from the essential purpose for the establishment of the ILO, that is the protection of the workers. The Court went further to state that:

"it should be left to the Labour Conference itself to decide if and in what degree it is necessary and opportune to embody in a proposed Convention provisions destined to secure its full execution."⁸¹

The International Court of Justice has, similarly, adopted the doctrine of the implied powers to broaden the scope of the competence of UN organs. By that, it aimed at facilitating the work of the United Nations. In the *Reparation*

⁸⁰ *Competence of the ILO to Regulate, incidentally, the Personal Work of the Employer*, 1926 PCIJ, Series B. No.13 at 18

Advisory Opinion, the General Assembly asked the International Court of Justice to give an advisory opinion on the question whether the United Nations could raise a claim against *de jure* or *de facto* governments in the event of the damage caused to a UN agent.⁸² The Court explained that such a question meant that the United Nations was a subject of international law and capable of possessing international rights and duties, and that it had the capacity to maintain its rights by bringing international claims.⁸³ The Court concluded that the UN possessed, as well as rights and obligations, a large measure of international personality and the capacity to operate upon an international plane, but it was not a super-State. The International Court found that the notion of “international personality” to the international organisation was necessary and “indispensable” to achieve the purposes and principles of the UN Charter.⁸⁴

After asserting the international personality of the United Nations, the International Court had to consider whether the provisions of the Charter relating to the functions of the UN implied that the latter was empowered to assure its agents limited protection. The Court confirmed that these powers, which were essential to the performance of the functions of the organisation, should be regarded as a necessary implication arising from the Charter. The Court went further to note that, in discharging its functions, the UN could find it necessary to entrust its agents with important missions to be performed in disturbed parts of the world. These agents should be ensured of effective protection. It was only in

⁸¹ *Ibid.* at 23

⁸² *Reparations for Injuries Suffered in the Service of the United Nations Advisory Opinion* 1949 ICJ Rep. 174

⁸³ *Ibid.* at 179.

⁸⁴ *Ibid.*

this way that the agent would be able to carry out his duties satisfactorily. The Court reached the conclusion that the organisation has the capacity to exercise functional protection in respect of its agents.⁸⁵ However, Judge Hackworth, in his dissenting opinion, criticised the Court's approach. He stated that:

“[t]here can be no gainsaying the fact that the Organisation is one of delegated and enumerated powers. It is to be presumed that such powers as the Member States desired to confer upon it are stated either in the Charter or in complementary agreements concluded by them. Powers not expressed cannot freely be implied. Implied powers flow from a grant of expressed powers, and are limited to those that are “necessary” to the exercise of powers expressly granted. No necessity for the exercise of power here in question has been shown to exist. There is no impelling reason, if any at all, why the Organisation should become the sponsor of claims on behalf of its employees.”⁸⁶

The difference between the approach adopted by the International Court and that of Judge Hackworth shows “the doctrinal confusion of what exactly is meant by implied powers.”⁸⁷

The opinion of judge Hackworth showed the fear that the international organisation might abuse the doctrine of implied powers and exceed its constituent powers, and violate Member States' rights. The International Court of Justice, on the other hand, stressed that flexibility is required for the fulfilment of the purposes and objectives of the United Nations, and the limitation could be derived from the condition of necessary implication.⁸⁸ That might provide a functional test for the extent of the implied powers. In other words, this shows a

⁸⁵ *Ibid.* at 182-183.

⁸⁶ *Ibid.* at 198.

⁸⁷ N. D. White, *The Law of International Organisations* (1996) at 129.

conflict between narrow and broad interpretations of UN powers. However, the broad approach looks at the "necessary implication" as the test or the limitation on the scope of implied powers.⁸⁹

In the *Effect of Awards Advisory Opinion*, the International Court had to deal with a case where the competence of a UN organ was an issue. It was asked to give its opinion on whether:

“the General Assembly has the right on any grounds to refuse to give effect to an award of compensation made by that Tribunal in favour of a staff member of the United Nations whose contract of service has been terminated without his assent?”⁹⁰

The Court did not involve a consideration of implied powers in its line of reasoning at first. The Court found that the General Assembly had intended to create a tribunal possessed of truly judicial characters and that these included the characteristic of giving awards which were binding on the parties, and which were final without appeal. But in dealing with a number of arguments put forward in support of the view that the General Assembly might be justified in refusing to give effect to awards of the Tribunal, the International Court had to examine whether the General Assembly had the power to establish the Tribunal in the first place.

The Court, after identifying the necessity to recruit a Secretariat and to establish a judicial or arbitral remedy to settle disputes between the UN and the Secretariat, concluded that:

⁸⁸ *Reparations for Injuries Suffered in the Service of the United Nations*, Advisory Opinion: 1949 ICJ Rep. 174 at 182.

⁸⁹ See below the assessment of the functional test at 47-53

⁹⁰ *Effect of Awards of Compensation Made by the United Nations Administrative Tribunal* Advisory Opinion 1954 ICJ Rep. 47 at 51

“in these circumstances...the powers to establish a tribunal, to do justice as between the Organization and the staff members, was essential to ensure the efficient working of the Secretariat...Capacity to do this arises by necessary intendment out of the Charter.”⁹¹

The Court had to deal further with the question of whether the General Assembly could establish a tribunal with the authority to make decisions binding on the General Assembly itself. The International Court of Justice argued that the General Assembly was bound by the decisions of an Administrative Tribunal created by it, since it had intended to create a judicial organ with the power to take binding decisions. One of the reasons for this exception was that the General Assembly had not delegated powers which it could have exercised itself but had created the Administrative Tribunal under its general power to regulate staff relations.⁹²

It argued that there is a difference between establishing an organ in order to delegate to it the performance of the principal organ's functions, and establishing an organ the existence and activity of which is necessary for the performance of the functions of the principal organ. In the latter case, delegation does not have to take place. In other words, if for the General Assembly and other organs to function effectively the creation of a new body is necessary, then this body's existence will be "necessary for the proper performance of functions" of those organs, although it will exercise functions not vested in the main organ.⁹³

⁹¹ *Ibid.* at 57

⁹² *Ibid.* at 55

⁹³ *Ibid.* at 57

However, in the *Certain Expenses Advisory Opinion*⁹⁴, the Court implicated power from the function and purposes of the organisation, and from the intentions of the framers. In that case, the International Court of Justice argued that the development of a power to create and mandate peacekeeping forces by the General Assembly was necessary for the fulfilment of the express provisions of the Charter.⁹⁵ It insisted on the fact that the necessity for the fulfilment of UN purposes justified the act of the General Assembly.⁹⁶

Although the central issue in that opinion was the meaning of a Charter provision, the Court opted to use the doctrine of implied powers, though in a minimal way, to clarify the issue of "Organisation expenditure".⁹⁷ Thus, the Court argued that the text of Article 17, paragraph 2, referred to "the expenses of the Organisation" without any further explicit definition. The interpretation of the word "expenses" had been linked with the word "budget" in paragraph 1 of that Article and it had been contended that in both cases the qualifying adjective "regular" or "administrative" should be understood by implication. According to the Court this would be possible only if such qualification must necessarily be implied from the provisions of the Charter.

The Court, also, implied from what the drafters intended to mean by the word "budget". Concerning the word "budget" in paragraph 1 of Article 17, the Court found that the distinction between "administrative budgets" and "operational budgets" had not been absent from the minds of the drafters of the Charter since it was provided in paragraph 3 of the same Article that the General

⁹⁴ 1962 *ICJ Rep.* 151

⁹⁵ *Ibid.* at 167-168

⁹⁶ *Ibid.* at 163

Assembly "shall examine the administrative budgets" of the specialised agencies. Thus, if the drafters had intended that paragraph 1 should be limited to the administrative budget of the United Nations itself, the word "administrative" would have been inserted in paragraph 1 as it had been in paragraph 3.⁹⁸

It is apparent that the wider the wording of the UN Charter is, or that of any institution's constituent treaty, the greater the international organisation will rely on implied powers.⁹⁹ Clearly, the Court accepted this fact and used the doctrine of implied powers to interpret the vague express powers in order for the UN to efficiently fulfil its goals.

In the *Namibia Advisory Opinion*¹⁰⁰, the International Court of Justice, for instance, did not solely trace the competence of the international organisation to its purposes and functions, but also to its express powers.¹⁰¹

The International Court, in the course of its examination of the case, studied the arguments raised against the competence of the UN organs (the General Assembly and the Security Council), and against the validity of their resolutions.¹⁰² The Court observed that, according to a general principle of international law (incorporated in the Vienna Convention on the Law of Treaties), the right to terminate a treaty on account of breach must be presumed to exist in respect of all treaties, even if unexpressed.¹⁰³ In addition, it pointed out that the

⁹⁷ *Ibid.* at 159-162

⁹⁸ *Ibid.* at 160

⁹⁹ N. D. White, *The Law of International Organisations* (1996) at 130

¹⁰⁰ *Namibia Advisory Opinion* 1971 ICJ Rep. 9

¹⁰¹ K. Skubiszewski, "Implied Powers of International Organisations" 857 at 859 in Y. Dinstein (ed.), *International Law at a Time of Perplexity* (1989)

¹⁰² *Namibia advisory opinion* 1971 ICJ Rep. 16 at 22-23

¹⁰³ *Ibid.* at 47

United Nations, as a successor to the League, acting through its competent organ, must be seen above all as the supervisory institution competent to pronounce on the conduct of the Mandatory; and that the General Assembly was not making a finding on facts, but formulating a legal situation; it would not be correct to assume that, because it is in principle vested with recommendatory powers, it is debarred from adopting, in special cases within the framework of its competence, resolutions which make determinations or have operative design.¹⁰⁴ Although the competence to revoke a mandate had not been expressly provided for in any of the applicable instruments, the Court insisted that the necessity for the fulfilment of UN purposes and principles justified the power of the General Assembly to terminate the mandate to be implied.¹⁰⁵

From that perspective, the Court implied the supervisory power of the United Nations with regard to Namibia. The Court granted the supervision by necessary implication. Nevertheless, it was not the sole ground on which the Court based its argument. It found confirmation of its views in Article 80 (1) of the Charter, which maintained the obligations of the mandatory.¹⁰⁶

The International Court of Justice has also had to imply powers to solve problems between the General Assembly and the United Nations Staff, and between the United Nations staff and Member States.

In 1973, the ICJ fully confirmed the propriety of the establishment and functioning of the United Nations Administrative Tribunal system. The Court followed a similar line as it did in 1954. It pointed out that Article 22 of the Charter "specifically leaves it to the General Assembly to appreciate the need for

¹⁰⁴ *Ibid.* at 47-48

¹⁰⁵ *Ibid.* at 49-50

any particular organ," the sole restriction being the necessity for performance of its functions.¹⁰⁷ The Court admitted that here there had been no instance of delegation of functions, relying once again (as it had done with regard to UNAT) on Article 101(1) of the Charter to conclude that:

"it necessarily follows that the General Assembly's power to regulate staff relations also comprises the power to create an organ designed to provide machinery for initiating the review of judgments of such a tribunal."¹⁰⁸

In this case, the International Court applied the doctrine of implied powers to expand its own powers. The Court had to examine a number of criticisms addressed to Article 11¹⁰⁹ of the UNAT Statute procedure, and in particular of the fact that the Committee on Application for Review "being composed of member States, the Committee is a political organ", yet discharged "functions which, in the Court's view, are normally discharged by a legal body."¹¹⁰ Ultimately, the

¹⁰⁶ *Ibid.* at 37

¹⁰⁷ *Application for Review of Judgement No. 158 of the United Nations Administrative Tribunal, 1973 ICJ Rep. 166 (July 12) (Falsa Case)* at 172-173

¹⁰⁸ *Ibid.* at 173

¹⁰⁹ Article 11 provides: "1. If a Member State, the Secretary-General or the person in respect of whom a judgement has been rendered by the Tribunal (including any one who has succeeded to that person's rights on his death) objects to the judgement on the ground that the Tribunal has exceeded its jurisdiction or competence or that the Tribunal has failed to exercise jurisdiction vested in it, or has erred on a question of law relating to the provisions of the Charter of the United Nations, or has committed a fundamental error in procedure which has occasioned a failure of justice, such Member State, the Secretary-General or the person concerned may, within thirty days from the date of the judgement, make a written application to the Committee established by paragraph 4 of this article asking the Committee to request an advisory opinion of the International Court of Justice on the matter.

2. Within thirty days from the receipt of an application under paragraph 1 of this article, the Committee shall decide whether or not there is a substantial basis for the application. If the Committee decides that such a basis exists, it shall request an advisory opinion of the Court, and the Secretary-General shall arrange to transmit to the Court the views of the person referred to in paragraph 1."

¹¹⁰ *Application for Review of Judgement No. 158 of the United Nations Administrative Tribunal, 1973 ICJ Rep. 166 (July 12) (Falsa Case)* at 176

Court, however, considered that it should give an advisory opinion at the request of the Committee established under Article 11. It noted that:

"A refusal by the Court to play its role in the system of judicial review set up by the General Assembly would only have the consequence that this system would not operate precisely in those cases in which the Committee has found that there is a substantial basis for the objections which have been raised against a judgement."¹¹¹

The Court affirmed this conclusion in subsequent applications for review. In the *Yakimetz Case*¹¹², the Court pointed out that its competence to deliver an advisory opinion at the request of the Committee on Applications for Review of Administrative Tribunal Judgements was derived from several provisions: Article 11, paragraphs 1 and 2, of the Statute of the Tribunal, Article 96 of the Charter and Article 65, paragraph 1, of the Statute of the Court. Citing the *Falsa* case and the *Mortished* case¹¹³, it concluded that it possessed competence, and its view was that the questions, in this case, addressed to it were clearly legal questions arising within the context of the Committee's activities.¹¹⁴

The International Court of Justice has also implied powers to deal with a dispute between a United Nations member of staff and a Member State. In the *Mazilu* case¹¹⁵, the question that was before the Court was whether, in principle, Article VI, section 22 of the so-called General Convention--a provision

¹¹¹ *Ibid.* at 177

¹¹² *Application for Review of Judgement No. 333 of the United Nations Administrative Tribunal* 1987 ICJ Rep. 18 (*Yakimetz case*)

¹¹³ *Application for Review of Judgment No. 273 of the United Nations Administrative Tribunal* 1982 ICJ Rep. 325 (*Mortished case*)

¹¹⁴ *Application for Review of Judgement No. 333 of the United Nations Administrative Tribunal* 1987 ICJ Rep. 18 (*Yakimetz case*) at 29-33

¹¹⁵ *Applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations* 1989 ICJ Rep. 177 (*Mazilu case*)

concerning the privileges and immunities of "Experts on mission" for the United Nations--was applicable to a person (Mr. Mazilu) who had the status of a special rapporteur of the Sub-Commission (of the Commission on Human Rights) on Prevention of Discrimination and Protection of Minorities. The Court unanimously answered in the affirmative. Applying the same principle as the *Reparations advisory opinion*, the Court found that the term "experts" could be included in the category of special rapporteurs. It stated:

"The purpose of Section 22 is nevertheless evident, namely, to enable the United Nations to entrust missions to persons who do not have the status of an official of the Organization, and to guarantee them 'such privileges and immunities as are necessary for the independent exercise of their functions'."¹¹⁶

The Court was subsequently asked to give its advisory opinion on *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*.¹¹⁷ The question was whether the Special Rapporteur of the Commission on Human Rights on the Independence of Judges and Lawyers enjoyed immunity from legal process. In his capacity as Special Rapporteur, Mr. Dató Param Kumaraswamy commented on certain litigation that had been carried out in Malaysian Courts in an interview with a commercial magazine. Many companies in Malaysia filed legal suits against him. Arguing for the immunity from legal process of the Special Rapporteur, the United Nations Economic and Social Council asked for the Court advisory opinion on the applicability of Article VI (22) of the Convention on the Privileges and

¹¹⁶ *Ibid.* at 194 (para.47)

¹¹⁷ *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights* 1999 ICJ Rep. 62

Immunities of the United Nations. Citing the *Reparation for Injuries Suffered in the Service of the United Nations*¹¹⁸, the Court affirmed that immunity could be implied as it was necessary for the independent and satisfactory performance of the Special Rapporteur's duties.¹¹⁹

However, the International Court, in the *Legality of the Use by a State of Nuclear Weapons in Armed Conflict* (WHO request)¹²⁰, rejected the WHO request for an advisory opinion on the basis that the request did not fall within its scope of activities. The International Court of Justice asserted that "[i]nternational organisations are governed by the 'principle of speciality', that is to say, they are invested by the States which create them with powers, the limits of which are a function of the common interests whose promotion those States entrust them."¹²¹ According to the Court, the WHO was a specialised agency whose functions are restricted to the sphere of public health and the Court could not see any relation between WHO's function and the legality of the use of the nuclear weapons.¹²²

The International Court stated that:

"to ascribe to the WHO the competence to address the legality of the use of nuclear weapons- even in view of their health and environmental effects- would be tantamount to disregarding the principle of speciality; for such competence could not be deemed a necessary implication of the Constitution

¹¹⁸ *Reparation for Injuries Suffered in the Service of the United Nations* 1949 ICJ Rep. 174

¹¹⁹ *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights* 1999 ICJ Rep. 62 at 84-86 <<http://www.icj-cij.org>>

¹²⁰ *Legality Of The Use By A State Of Nuclear Weapons In Armed Conflict Advisory Opinion* 1996 ICJ Rep. 66 (World Health Organisation Request)

¹²¹ *Ibid.* at 78-89

¹²² *Ibid.* at 80

of the Organisation in the light of the purposes assigned to it by its member States."¹²³

The International Court rejected the WHO's request, as it could not find the request necessary for the fulfilment of its purposes.

It is noteworthy that the International Court of Justice has invoked the principles of "necessity" and "essentiality" as safeguards or limitations of the doctrine of implied powers. In other words, if a power is to be implied it has to be essential and necessary for the fulfilment of the functions and purposes of the organisation. Many have argued that these two principles are wide and broad enough to be subjectively determined. What is the meaning of *necessary* and *essential*? Do these factors form safeguards to define the limit of implied powers? And who will determine measures are "necessary" and "essential"?

4 What is Essential or Necessary?

What the Court has usually looked for, according to Lauterpacht, is evidence that the power to be implied would enable the UN to function to its full capacity as expressed in its objects and purposes.¹²⁴ The principle of functional necessity could be understood in its most general pronouncement, "*an entity shall be entitled to (no more than) what is strictly necessary for the exercise of its functions in the fulfilment of its purposes.*"¹²⁵

The principle of functional necessity differs from the theory of functionalism, which presents an external and ideological point of view of

¹²³ *Legality Of The Use By A State Of Nuclear Weapons In Armed Conflict Advisory Opinion* 1996 ICJ Rep.66 (World Health Organisation Request) at 79

¹²⁴ E. Lauterpacht, "The Development of the Law of International Organisations by the Decisions of International Tribunals" 152 RDC 387 (1976, IV) at 432

international co-operation and organisation.¹²⁶ Advocates of the theory of functionalism propose that an increasing range of functions should be carried out at the interstate level to promote the goals of world peace and enhanced social welfare.¹²⁷ Archer explained that:

"[t]he Lilliputian ties of international functional co-operation would pin down the giant of conflict, weakening the urge to destruction and warfare by the promise of construction and co-existence."¹²⁸

However, the theory of functionalism studies the external façade of an international organisation while the principle of functional necessity tackles the internal mechanism of an international organisation. Indeed, Bekker rightly explains the difference between the two principles. He states:

"[w]hile the theory of functionalism is at the macro level and addresses the concept of the international organisation, i.e., what instrumental value international organisations in general should have in society, functional necessity is a micro concept related to the identifiable purposes and functions of any given organisation,..."¹²⁹

For that reason, it is not the place here to discuss the theory of functionalism in depth.

A study of the international organisations' competence coincides with the study of function. "Competence designates the object itself of function, namely

¹²⁵ P.H.F. Bekker, *The Legal Position of Intergovernmental Organisations: A Functional Necessity Analysis of their Legal Status and Immunities* (1994) at 39 (emphasis in original)

¹²⁶ *Ibid.* at 43

¹²⁷ For account summary on the belief and assumptions behind the theory see C. Archer, *International Organisations* (2nd ed.) (1992) at 88-94

¹²⁸ C. Archer, *International Organisations* (2nd ed.) (1992) at 91

¹²⁹ P.H.F. Bekker, *The Legal Position of Intergovernmental Organisations: A Functional Necessity Analysis of their Legal Status and Immunities* (1994) at 44. For more discussion on the

the range of activities which the international organisation is entitled to undertake, and the conditions attached thereto, in the pursuit of its purposes."¹³⁰ In that sense, international organisations may perform any act that is necessary in the exercise of their functions to achieve the goals for which they were created. It could also have negative implication that international organisations must not perform any act that goes beyond the fulfilment of their purposes.¹³¹

The principle of functional necessity can be best illustrated in the context of the privileges and immunities of international organisations. International organisations have been accorded privileges and immunities to enable them to function properly, and to fulfil their purposes. However, these privileges and immunities are limited to those are necessary for the organisation to fulfil its functions-in that respect they are functional.¹³² Functional in the sense that international organisations exercise powers within the framework of their functions, which depends on the purposes assigned to them by Member States.¹³³

The International Court of Justice has left the terms "necessary" and "essential" undefined. The Court invoked the "principle of functional necessity" that may require construing the UN Charter in order to enhance the effectiveness of the UN as a whole, and to reach to the right conclusion. It left the concept to be subjectively determined, "varying estimates may be given of what is necessary or essential for the accomplishment of a task or function, or for the exercise of an

theory of functionalism see I. L. Claude, Jr., *Swords into Plowshares- the problems and Progress of International Organisation* (3rd ed.) (1964) at 344-351

¹³⁰ P.H.F. Bekker, *The Legal Position of Intergovernmental Organisations: A Functional Necessity Analysis of their Legal Status and Immunities* (1994) at 75

¹³¹ *Ibid.* at 76

¹³² I. Scobbie, "International Organisations and International Relations" 831 in Rene'-Jean Dupuy (ed.), *A Handbook on International Organisations* (1998) at 840, 842.

¹³³ UN Doc. A/CN. 4/Ser. A/ 1985/ Add. 1 (Part 1) para. 62

explicit power.”¹³⁴ It has been suggested that the boundaries of what is essential or necessary depend closely on the law of the specific organisation.¹³⁵ In his dissenting opinion in the *Reparation advisory opinion*, Judge Hackworth who called for implication only from expressly granted powers, stated:

“[p]owers not expressed cannot freely be implied. Implied powers flow from a grant of expressed powers, and are limited to those that are ‘necessary’ to the exercise of powers expressly granted.”¹³⁶

In *Certain Expenses advisory opinion*, Judge Koretsky warned that:

“the necessity of the strict observation and proper interpretation of the provisions of the Charter, its rules, without limiting itself by reference to the purposes of the Organization; otherwise one would have to come to the long ago condemned formula: ‘The end justifies the means’.”¹³⁷

Nearly three decades ago, Lauterpacht tried to find a concrete definition for the word ‘essential’. In his discussion of the *Reparations and the Effect of Awards advisory opinions*, he suggested that the meaning of the word ‘essential’ is “something more than ‘important’, but less than ‘indispensably requisite’.”¹³⁸ He also observed that the Court, in determining what was essential to the performance of the functions of the United Nations as a basis for implying a

¹³⁴ K. Skubiszewski, "Implied Powers of International Organisations" 857 at 861 in Y. Dinstein (ed.), *International Law at a Time of Perplexity* (1989)

¹³⁵ *Ibid.*

¹³⁶ *Reparations for Injuries Suffered in the Service of the United Nations, Advisory Opinion: 1949 ICJ Rep.* 174 at 198 (Judge Hackworth dissenting opinion)

¹³⁷ *Certain Expenses of the United Nations, 1962 ICJ Rep.* 151 at 268 (Judge Koretsky dissenting opinion)

¹³⁸ E. Lauterpacht, "The Development of the Law of International Organisations by the Decisions of International Tribunals" 152 *RDC* 387 (1976, IV) at 431

power, had not considered the criterion of essentiality as meaning 'absolutely essential' or 'indispensable'.¹³⁹

Therefore, the term "necessary" for independent function cannot be pre-determined precisely in advance, as it depends on the circumstances of each case.¹⁴⁰ Lauterpacht noted that the International Court avoided the problem of the exact definition of what is 'essential' by holding "the precise nature and scope of the measures was a matter for determination" by the organ concerned.¹⁴¹

Evidently, the determination that it is essential to imply a power rests with the organ which adopts a resolution reflecting the assumption that the claimed power exists. So, 'necessity' or 'essentiality' is still subjectively determined, and the problem of abuse of powers looms in the horizon. As Judge Gros, in his dissenting opinion in the *Namibia advisory opinion*, stated:

"to say that a power is necessary, that it logically results from a certain situation, is to admit the non-existence of any legal justification. Necessity knows no law, it is said; and indeed to invoke necessity is to step outside the law."¹⁴²

Skubiszewski has insisted on the fact that: "the organ assumes a new, i.e. implied, power always enjoys a measure of freedom: it belongs to the intrinsic nature of the doctrine. But the organ's activity remains to be governed by the law of the organisation and the lawfulness of the implication can be checked. The organ cannot abuse its competences, and if implication of powers amounts to a

¹³⁹ *Ibid.* at 432

¹⁴⁰ Schermers & Blokker, *International Institutional Law: Unity within Diversity* (1995) at 236.

¹⁴¹ E. Lauterpacht, "The Development of the Law of International Organisations by the Decisions of International Tribunals" 152 *RDC* 387 (1976, IV) at 432

¹⁴² *Namibia advisory opinion* 1971 *ICJ Rep.* 9 at 339 (Judge Gros dissenting opinion)

détournement de pouvoir the organ's activity is unlawful."¹⁴³ Therefore, the abuse of the term 'necessity' could be leading to an unlawful implication, and it could be considered *ultra vires*.

The Court has limited its scrutiny to the character of the measure rather than to its scope and its extent. The Court left the scope of the meaning of 'necessity' and 'essentiality' to be subjectively determined by the organs concerned. In the *Effect of Awards advisory opinion*, the International Court stated:

"There can be no doubt that the General Assembly in the exercise of its power could have set up a tribunal without giving finality to its judgements. In fact, however, it decided, after along deliberation, to invest the Tribunal with power to render judgements which would be 'final and without appeal' and which would be binding on the United Nations. *The precise nature and scope of the measures by which the power of creating a tribunal was to be exercised, was a matter for determination by the General Assembly alone.*"¹⁴⁴

Lauterpacht has observed that: "the restraint demonstrated by the Court appears to accord with the idea that the Organisation is the best judge of what circumstances require and to this extent, therefore, the Court's restraint is directed towards the more effective fulfilment of the objectives of the Organisation."¹⁴⁵ In other words, the limit to the scope and the extent of the 'necessity' and 'essentiality' is part of the fulfilment of the purposes and the functions of the organisation in an effective

¹⁴³ K. Skubiszewski, "Implied Powers of International Organisations" 857 at 862 in Y. Dinstein (ed.), *International Law at a Time of Perplexity* (1989)

¹⁴⁴ *Effect of Awards of Compensation Made by the United Nations Administrative Tribunal* 1954 ICJ Rep. 4 at 58 (emphasis added).

¹⁴⁵ E. Lauterpacht, "The Development of the Law of International Organisations by the Decisions of International Tribunals" 152 RDC 387 (1976, IV) at 430

way. Indeed, in the course of the ILC's study of the limitations on international organisations' competence, it has been pointed out that:

"Legal doctrine and jurisprudence show a marked tendency to recognise that, although international organisations enjoy international legal competence, that enjoyment is neither general nor complete. It has certain limitations, since, unlike States, international organisations are not sovereign entities. These limitations are defined by the purposes for which the organisation was established. The legal regime of the limitations is determined by the special function of the organisation. The organisation is a medium for carrying out the purposes of general interest of its creators..."¹⁴⁶

Back to the initial aim of this chapter, which was to understand *ultra vires*, as a ground of nullity, an element of judicial review, it was essential to determine the scope of the competence of the UN or of any other international organisation. The International Court's formulation has both positive and negative implications. Positive in the sense that it states the powers of the UN and other international organisations, and transcends its constituent instrument; and negative in as much as these powers are limited by considerations of functional necessity.¹⁴⁷ From that point, one can conclude that any consideration of *ultra vires* can be established when the UN or any other international organisation exceeds the functional necessity limitations. The limitations could be seen in the context of the organisation's purposes and in the strict understanding of the words "necessary" and "essential". As Bekker points out: "acts may be challenged which have been performed in order to attain aims covered in the constituent instrument on the basis that such acts were not *strictly necessary or essential* to achieve these aims...[these conditions] should be applied literally, i.e., in accordance with the

¹⁴⁶ UN Doc. A/CN. 4/391 and Add. 1 (1985)

¹⁴⁷ UN Doc. A/CN. 4/ Ser. A/ 1987 para. 33

normal meaning of the term "necessary" or "essential" used by the Court"¹⁴⁸. That would provide the trigger to challenge the constitutionality of a certain act or decision on the ground of *ultra vires*.

5 The Doctrine of Inherent Powers

Some have argued that the consequence of the International Court's approach, in implying from expressly granted powers and from the general purposes of the organisation, is to suggest that international organisations have inherent powers to perform any acts which are directed at attaining the aims of the organisation.¹⁴⁹ This view was pioneered by Seystersted. He argued that:

“Indeed, it appears that while intergovernmental organisations, unlike States, are restricted by specific provisions in their constitutions as to the aims for which they shall work, such Organisations are, like States, in principle free to perform any sovereign act, or any act under international law, which they are in a factual position to perform to attain these aims, provided that their constitutions do not preclude such acts. While a minority of the members will always have the right to challenge the legality, from an internal point of view, of acts performed to attain aims other than those defined in the constitution, the minority cannot challenge acts performed in order to attain aims covered in the constitution merely on the basis that such acts were not ‘essential’ or ‘necessary’ to attain these aims. Thus, it is not necessary to look for specific provisions in the constitution, or to resort to strained interpretations of texts and intentions, or to look for precedents or constructions to justify legally the performance by an intergovernmental organisation of a sovereign or international act not specifically authorised in its constitution. As an

¹⁴⁸ P.H.F. Bekker, *The Legal Position of Intergovernmental Organisations: A Functional Necessity Analysis of their Legal Status and Immunities* (1994) at 83

¹⁴⁹ F. Seystersted, “United Nations Forces: Some Legal Problems” 37 *BYIL* 351 (1963) at 453-460; F. Seystersted, *United Nations Forces in the Law of Peace and War* (1966) at 155

intergovernmental organisation it has an *inherent power* to perform such acts.”¹⁵⁰

According to this school of thought, the criteria to control the international organisations’ powers are, firstly, to act within their aims and purposes; secondly, to not perform acts which are expressly prohibited; thirdly, to act through the proper organs; and fourthly, the principle that these organisations do not have general inherent jurisdiction over the Member States.¹⁵¹

The supporters of inherent powers have argued that the International Court of Justice has utilised the same line of reasoning. According to the International Court, the purposes of the organisation and the effectiveness of its operations in carrying out its functions are the main restrictions, as explained in *Certain Expenses advisory opinion*. Action which can be shown to contribute to the fulfilment of the purposes and the functions of the organisation is within the competence of the organisation as long as it is not expressly precluded from performing this action.¹⁵²

However, this school of thought has been subject to criticism. In his article “International Legal Personality and Implied Powers of International Organisations”¹⁵³, Rama- Montaldo’s criticism was made mainly on the basis that this school of thought fails to distinguish between the powers that are necessary consequences of international legal personality which are possessed by all international organisations, and the powers that must be implied because they are

¹⁵⁰ F. Seyersted, *United Nations Forces in the Law of Peace and War* (1966) at 155

¹⁵¹ *Ibid.* at 156-160

¹⁵² D. Akande, “The Competence of International Organizations and the Advisory Jurisdiction of the International Court of Justice” 9:3 *EJIL* 437 (1998) at 446; N. D. White, *The Law of International Organisations* (1996) at 132

necessary to implement functions provided for in a particular organisation's constitution. In his reply to Seyersted's argument that the International Court adopted the doctrine of inherent powers rather than of implied powers, Rama-Montaldo pointed out:

“the Court did not have recourse to the concept of personality of the organisation as the foundation of the legality of the operation of the United Nations Forces and of the right of the organisation to create them...On the contrary, the Court expressly took note of the purposes and functions of the organisation to uphold the legality of the action as well as the right to establish the forces and gave the concept of function a decisive importance...”¹⁵⁴

In other words, the International Court based the foundation of legality in the fulfilment of the functions of the organisation. The establishment of armed forces is not an inherent power arising from international personality, but instead it is a function which “must be expressly or impliedly recognised in the constitutive document”¹⁵⁵. Bowett shares the same opinion. He notes that “...the test is a functional one, reference to the functions and powers of the organization exercised on the international plane, not to the abstract and variable notion of personality, will alone give guidance on what powers may properly be implied.”¹⁵⁶

However, this observation establishes the fact that the doctrine of implied powers and the doctrine of inherent powers are close but not similar. Both approaches restrict the organisation's rights to fulfilment of its purposes and functions. The difference might, nevertheless, draw on the scope of personality of

¹⁵³ M. Rama Montaldo, “International Legal Personality and Implied Powers of International Organisations” 44 *BYIL* 111(1970) at 118-124.

¹⁵⁴ *Ibid.* at 122

¹⁵⁵ *Ibid.*

¹⁵⁶ D. W. Bowett, *The Law of International Institutions* (1982) at 337

the organisation. As White has argued: “Rama- Montaldo starts from the proposition that the personality of organisations is much less than that of States but their rights can be added to by a wide approach to implied powers, whilst Seyersted starts from the position that the personality of organisations is the same as that of States, but that its inherent rights are limited by the provisions of the constitutions.”¹⁵⁷

The doctrine of inherent powers obviously begs the question. It considers that international organisations are sovereign entities. However, by contrast to States, international organisations lack sovereignty and depend, as concerns their legal status, on the purposes for which they were created. They do not have inherent powers to perform any act whatsoever.¹⁵⁸ That stems from the nature of the international organisations' personality. An international organisation's personality is not primary but rather it is of a secondary nature, in the sense that, its personality has been conferred on it for the fulfilment of the purposes of the organisation as a whole.¹⁵⁹ In the light of this, international organisations cannot have inherent powers to act the way they want, without having their actions subject to any check or limitations.

6 Legal Remedies and Legal Effects of the Decisions of the Court on *Ultra Vires* Acts

The central issue, here, is what are the procedures available for Member States to challenge an international organisation's decisions? In the absence of

¹⁵⁷ N. D. White, *The Law of International Organisations* (1996) at 133

¹⁵⁸ P.H.F. Bekker, *The Legal Position of Intergovernmental Organisations: A Functional Necessity Analysis of their Legal Status and Immunities* (1994) at 83

¹⁵⁹ J. Sztucki, “International Organizations as Parties to Contentious Proceedings before the International Court of Justice” 141 at 144 in A. S. Muller et al. (eds.), *The International Court of Justice* (1997); see below at 64- 65

compulsory judicial review, the mechanism to raise an objection against a decision already taken by an organ of the United Nations is limited to either the advisory jurisdiction of the International Court of Justice; a unilateral challenge of the decision; or through the Court's contentious proceedings. However, the latter could be only done by an indirect challenge, as international organisations have not been granted *locus standi* before the Court in contentious proceedings.¹⁶⁰ It follows from defining the legal remedies the nature and effect of the reviewing body's decisions on the illegal acts.

The United Nations Charter does not contain express provisions authorising Member States to challenge its acts and decisions on the grounds of excess of authority or procedural irregularity. In practice, however, Member States have frequently challenged the validity and the legality of the decisions and acts of the UN unilaterally, and this approach has mostly, although controversially, been accepted. Member States often unilaterally resort to disregard decisions of international organisation, which they considered to be *ultra vires*. For example, the Soviet Union in *Certain Expenses* showed its rejection of General Assembly resolutions obliging Member States to pay for the expenses of the United Nations operations in Congo and the Middle East, by withholding the payment of its share, although it ran the risk of losing its vote in the General Assembly.¹⁶¹

¹⁶⁰ See below Chapter II for the discussion on Article 34 of the ICJ Statute at 130-132

¹⁶¹ See generally the discussion in J. E. Alvarez, "Legal Remedies and the United Nations á La Carte Problems" 12 *Mich. J. Int'l. L.* 229 (1991); G. Arangio-Ruiz, "The 'Federal Analogy' and UN Charter Interpretation: A Crucial Issue" 8 *EJIL* 1 (1997); E. Zoller, "The 'Corporate Will' of The United Nations and the Rights of the Minority" 81 *AJIL* 610 (1987)

States' right to unilaterally challenge "unlawful" decisions or acts is derived from the premise that the constitutions of international organisations are nothing but international treaties. Oseike has stated that:

"The right of member states...appears to derive from the consensual nature of the constitutions concerned. Because they are international treaties, each party possesses an inherent right to supervise their implementation to ensure that the organisations do not adopt decisions that would be incompatible with their objects and purposes, or that would be detrimental to the interests of the member states in excess of what they had accepted as the basis for membership."¹⁶²

Upon a close look, one can find the issue at hand is the interpretation of the Charter. In the absence of an impartial third party to interpret the Charter, it is difficult to determine the right interpretation. Dan Ciobanu is right in pointing out that:

"dissenting Member States may claim that their interpretation of the Charter (and generally of the law of the United Nations) is the correct one, and decline to comply with decisions made by the political organs on the basis of their own interpretation of the Charter States possess, under the law of the United Nations as it stands at present, the so-called 'right of last resort'."¹⁶³

The "right of last resort" has found some kind of encouragement in the individual opinions of the International Court judges. Judge Winiarski, then president of the International Court, in his dissenting opinion in the *Certain Expenses advisory opinion* stated that:

"[i]n the international legal system,...there is, in the absence of the agreement to the contrary, no

¹⁶² E. Oseike, "Legal Validity of *Ultra Vires* Decisions of International Organisations" 77 *AJIL* 239 (1983) at 240.

¹⁶³ D. Ciobanu, *Preliminary Objections Related to the Jurisdiction of the United Nations Political Organs* (1975) at 74

tribunal competent to make a finding of nullity. It is the State which regards itself injured party which itself rejects a legal instrument vitiated, in its opinion, by such defects as to render it a nullity. Such decision is obviously a grave one and one to which resort can be had only in exceptional cases, but one which is nevertheless sometimes inevitable and which is recognized as such by general international law.

A refusal to pay, as in the case before the Court, may be regarded by a Member State, loyal and indeed devoted to the Organization, as the only means of protesting against a resolution of the majority which, in its opinion, disregards the true meaning of the Charter and adopts in connection with it a decision which is legally invalid;..."¹⁶⁴

Judge Gros, in his separate opinion, took a similar view in the *WHO/*

Egypt case. He stated:

"[a] decision of the WHO which is contrary to international law does not become lawful because a majority of States has voted in favour of it. The WHO and, in particular, its Assembly were created by the member States in order to carry out that which they had decided to do together, and that alone; member States are not bound to implement an unlawful act if that is what they hold it to be, and the practice of international organizations has shown that recourse is had in such circumstances to a refusal to carry out such act. Consequently nothing is settled by a decision taken by a majority of member States in matters in which a specialized agency oversteps its competence. Numbers cannot cure a lack of constitutional competence."¹⁶⁵

Unilateral challenge is linked to the absence of an already established mechanism that would help Member States to refer challenges to an *ultra vires*

¹⁶⁴ *Certain Expenses advisory opinion* 1962 ICJ Rep. 151 at 232

¹⁶⁵ *Interpretation of the Agreement of March 25, 1951 Between the Who and Egypt advisory opinion* 1980 ICJ Rep. 73 at 104

decision to the International Court of Justice, in contrast to the situation in the European Union.¹⁶⁶

The EC Treaty established “a complete system of legal remedies and procedures designed to permit the Court of Justice to review the legality of measures adopted by the institutions.”¹⁶⁷ The European Court of Justice can entertain cases brought by the organisation, Member States, and even by individuals. Article 230 (Art. 173 formerly) of the EC Treaty, as amended by the Treaty of Amsterdam¹⁶⁸, stipulates that:

“The Court of Justice shall review the legality of acts adopted jointly by the European Parliament and the Council, of acts of the Council, of the Commission and of the European Central Bank, other than recommendations and opinions, and of acts of the European Parliament intended to produce legal effects *vis-à-vis* third parties.”

Accordingly, the European Court may thus review the legality of the acts of the Community institutions. The phrase “other than recommendations and opinions” implies that only acts and decisions that impose binding obligations are subject to judicial review.¹⁶⁹ However, the European Court of Justice, in *ERTA Case*¹⁷⁰, stated that: “[a]n action for annulment must... be available in the case of all

¹⁶⁶ E. Zoller, "The "Corporate Will" of The United Nations and the Rights of the Minority" 81 *AJIL* 610 (1987) at 625-626

¹⁶⁷ *Les Verts v. European Parliament*, Case 294/83 (1986) *ECR* 1339 para. 23

¹⁶⁸ The Treaty of Amsterdam was signed in 1997 and entered into force in 1999. The Treaty of Amsterdam has a significant impact on the European Court of Justice as it conferred new powers on the Court, and changed the scope of the Court's jurisdiction, see for example, A. Albers-Llorens, "Changes in the Jurisdiction of the European Court of Justice after the Treaty of Amsterdam" 35:6 *CMLRev* 1273 (1998); A. Arnall, *The European Union and Its Court of Justice* (1999)

¹⁶⁹ L.N. Brown & T. Kennedy *The European Court of the European Communities* (4th ed.) (1994) at 125

measures adopted by the institutions, whatever their nature or form, which are intended to have legal effects”¹⁷¹. In that sense, the European Court asserted that the general scheme of the Treaty is to make a direct action available against any measure adopted by the institutions of the European Union which was intended to have legal effect.¹⁷²

Article 230 did not grant the ECJ the power to bring an action to annul *ex proprio motu*. It enumerates a Member State, the Council or the Commission as competent to bring an action to annul.¹⁷³ They are accepted as having a sufficient legal interest to give them *locus standi* for such an action. For an individual to bring an action, Article 230(4) states that:

“Any natural or legal person may, under the same conditions, institute proceedings against a decision addressed to that person or against a decision which, although in the form of a regulation or a decision addressed to another person, is of direct and individual concern to the former.”

The Court of Justice can review all or part of an item of Community legislation, and individuals may seek the annulment of a legal measure which is of direct and individual concern to them. The requirement for “direct and individual concern” is to limit the flow of the suits brought by individuals for annulment.¹⁷⁴

¹⁷⁰ ERTA Case, Case 22/70 Commission v. Council (1971) *ECR* 263. The Commission sought the annulment of the conclusions reached by the Council concerning the negotiating position to be adopted by the Member States in discussion on a European road transport agreement.

¹⁷¹ *Ibid.* at 42

¹⁷² A. Arnall, *The European Union and Its Court of Justice* (1999) at 35

¹⁷³ Article 230 of EC Treaty

¹⁷⁴ L.N. Brown & T. Kennedy *The European Court of the European Communities* (4th ed.) (1994) at 134

Where an application under Article 230 is successful, the European Court declares the contested act void.¹⁷⁵ A declaration that an act or measure is void has the immediate effect of restoring the status quo, in legal terms, “by destroying the existence in law of the annulled act *ab initio*”¹⁷⁶. However, the European Court cannot order the defendant institution to take any particular steps, but the institution is required by the Treaty to do what is necessary to comply with the judgment.¹⁷⁷

Contrariwise, in the United Nations system, there is no clear provision empowering the International Court of Justice to exercise judicial review. However, it is apparent, from what it has been discussed above, that most of the review cases have been brought before the International Court under its advisory jurisdiction. Although it was generally implicit, the Court examined the legality of the acts under question as a part of the discharge of its judicial function.¹⁷⁸ Besides, it is sometimes the case that a challenge could be raised indirectly against a UN organ's action or that of any other international organisation in the course of the contentious proceedings.¹⁷⁹

International organisations today participate in international relations almost as much as States. It is inherent in the notion of an international

¹⁷⁵ Article 231 EC

¹⁷⁶ K. P. E. Lasok, *The European Court of Justice: Practice & Procedure* (2nd ed.) (1994) at 541

¹⁷⁷ Article 233 EC; A. Arnulf, *The European Union and Its Court of Justice* (1999) at 33; K. P. E. Lasok, *The European Court of Justice: Practice & Procedure* (2nd ed.) (1994) at 542

¹⁷⁸ See for example, *Certain Expenses and Namibia advisory opinions* The advisory jurisdiction of the ICJ will be discussed extensively below in Chapter IV

¹⁷⁹ *Arbitral Award of the King of Spain* 1960 ICJ Rep. 192; *Appeal Relating to the Jurisdiction of ICAO Council* 1972 ICJ Rep. 42; *Arbitral Award of 31 July 1989 (Guinea Bissau v. Senegal)* 1991 ICJ Rep. 53; and *Aerial Incident of 3 July 1988* 1996 ICJ Rep. 6 (In this case, Iran filed an application against the United States in the form of appeal under Article 86 of the Chicago

organisation that it will be able to summon Member States to comply with the commitments they accepted when adhering to the organisation. International organisations, as they have international personality, can also conclude treaties in their own name. Some organisations also have officials and representatives in their Member States. Thus, disputes may well arise between an organisation and a State.¹⁸⁰ As the UN Secretary General has stated:

“disputes relating to the law governing co-operation will tend to become more numerous. As a consequence of that development, such disputes will ever more frequently involve groups of States and international organizations as well as States individually...”¹⁸¹

So far as international organisations are concerned, by reason of Article 34 of the ICJ Statute, they have no standing as parties in contentious cases before the International Court. Article 34 establishes the fact that only States might be parties in cases before the Court. There have been pleas for the amendment of Article 34 to grant *locus standi* to international organisations before the International Court of Justice.¹⁸² These calls stem from the International Court of Justice’s recognition of international organisations’ international personality in the *Reparations* advisory opinion. However, it has been argued that while international organisations may have international personality and the capacity to

Convention on International Civil Aviation Organisation against the decision of the ICAO Council of 7 March 1989. The case discontinued in Feb. 1996)

¹⁸⁰ I. Seidl-Hoenveldern, "Access of International Organisations to the International Court of Justice" 189 at 189 in A.S. Muller *et al.* (eds.), *The International Court of Justice* (1997)

¹⁸¹ UN Doc. A/45/430 (1990) at 66.

¹⁸² For Instance, J. Sztucki, "International Organizations as Parties to Contentious Proceedings before the International Court of Justice" 141 at 142-43 in A. S. Muller *et al.* (eds.), *The International Court of Justice* (1997); See below Chapter II at 118-120 for extensive presentation and discussion on the amendment of Article 34 of the ICJ Statute

have rights and obligations in international law, they are not states.¹⁸³ Sztucki has pointed out a difference between primary and secondary international personality. In his opinion, primary international personality is only given to States by the very fact of the acquisition of statehood.¹⁸⁴ However, international organisations have secondary international personality, since it conferred upon them by primary subjects of international law, i.e. Member States.¹⁸⁵

From that difference, one might say that since they have different categories of international personality, international organisations and Member States are different, and have different rights and tasks.¹⁸⁶ International organisations cannot have an equal footing with Member States in the context of access to the International Court of Justice in contentious proceedings. However, that will not determine the issue of granting international organisations access to contentious proceedings. In the words of Sztucki: “[G]ranteeing the *ius standi* [to the international organisations] seems to depend upon practical considerations rather than on doctrinal solution to the problem of the specific characteristics of the international personality of international organizations and their impact on the question of modes of access to the Court.”¹⁸⁷

Practice shows that it is possible to have international organisations, albeit indirectly, as parties to contentious cases when constitutional issues and questions of legality of decisions arise in the proceedings between states, as in *Jurisdiction*

¹⁸³ C. F. Amerasinghe, *Local Remedies in International Law* (1990) at 375

¹⁸⁴ J. Sztucki, “International Organizations as Parties to Contentious Proceedings before the International Court of Justice” 141 at 144 in A. S. Muller et al. (eds.), *The International Court of Justice* (1997)

¹⁸⁵ *Ibid.*

¹⁸⁶ *Ibid.*

¹⁸⁷ *Ibid.* at 147

of ICAO Council (India v. Pakistan)¹⁸⁸ recently in the *Lockerbie* cases¹⁸⁹, and *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*¹⁹⁰.

International organisations have been asked to the bar as defendants, and the Court could review the constitutionality or the legality of international organisations' decisions in due process¹⁹¹, as it is apparent in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosnia and Herzegovina v. Yugoslavia).

Such an indirect challenge to international organisations' *ultra vires* decisions can perform a remedial function. Although the indirect claims against international organisation are sometimes unsuccessful, they offer Member States a widespread exposure of their claims.¹⁹² Bringing the case and provoking a debate on the constitutional limitations of the international organisation and its organs is a gain for the aggrieved state. However, the main setback in asking the International Court of Justice for a remedy, through its contentious proceedings, is the long time that the Court needs to deal with a particular dispute.¹⁹³

¹⁸⁸ *Appeal Relating to the Jurisdiction of the ICAO Council* (India v. Pakistan), 1972 ICJ Rep. 4 at 61-70

¹⁸⁹ *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie* (Libyan Arab Jamahiriya v. United States of America) and (Libyan Arab Jamahiriya v. United Kingdom) 1992 ICJ Rep. 3

¹⁹⁰ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosnia and Herzegovina v. Yugoslavia) 1993 ICJ Rep. 325

¹⁹¹ J. Sztucki, "International Organizations as Parties to Contentious Proceedings before the International Court of Justice" 141 at 158 in A. S. Muller et al. (eds.), *The International Court of Justice* (1997)

¹⁹² J. G. Merrills, "Reflections On The Incidental Jurisdiction of the International Court of Justice" 53 at 54-56 in M. Evans (ed.), *Remedies in International Law: The Institutional Dilemma*, (1998)

¹⁹³ R. Higgins, "Remedies and the International Court of Justice: an Introduction" 1 at 9 in M. Evans (ed.), *Remedies In International Law: the Institutional Dilemma*, (1998)

Nevertheless, the indirect challenge of *ultra vires* acts of international organisations, it has been argued, is the only way available to Member States, until the amendment of Article 34 to grant *locus standi* to international organisations is achieved.¹⁹⁴

The issue of the legal consequences of *ultra vires* decisions and acts is the other side of the coin, and it proved to be controversial. It is generally accepted that *ultra vires* decisions or actions cannot be declared null and void, as this greatly depends first on the general structure of the United Nations system.¹⁹⁵ Specifically speaking, there is, in strict terms, no hierarchy among the principal organs of the UN, each of which is supreme in its own sphere of competence. It may be that some of these individual spheres of competence are more or less important in terms how fundamental the functions are with respect to the principles and purposes of the United Nations. None of the principal organs of the United Nations is able to override or supersede the acts adopted by the other. It follows that while the Court cannot declare null and void an act of the Security Council or the General Assembly, the latter two organs cannot, by the same token, purport to annul a judgment or an opinion of the Court.

Secondly, the nature of the decisions adopted by the Court is of itself indicative of why the Court lacks the power to annul the acts of the organs of the UN. Judgments are binding only on States which agree to request the Court to adjudicate, and these decisions cannot produce direct legal effects in terms of

¹⁹⁴ See below chapter III at 119-120 for the debate on the amendment of Article 34. See also E. Lauterpacht, *Aspects of the Administration of International Justice* (1991) at 66; J. Sztucki, "International Organizations as Parties to Contentious Proceedings before the International Court of Justice" 141 at 167 in A. S. Muller et al. (eds.) *The International Court of Justice* (1997); P. C. Szasz; "Granting International Organizations *Ius Standi* in the International Court of Justice" 169 at 188 in A. S. Muller et al. (eds.) *The International Court of Justice* (1997);

nullification of any act of an international organisation, including the United Nations. Similarly, advisory opinions, which are not binding, cannot, in principle, affect or create legal rights or obligations either for the organisation whose act has been "declared" null and void by the Court in its opinion; or for Member States who dispute the validity of the act.

The question of whether these acts are void *ab initio* or they are only voidable depends on the existence of reviewing machinery. As mentioned above, the machinery of review could be either compulsory, as in the case of the European Union, or advisory, as in the case of the United Nations system. If it is compulsory, the *ultra vires* act will be annulled. Until the decision is taken by the reviewing organ, the parties affected by the allegedly illegal act should continue to comply with it on the assumption that it is valid. On the other hand, if the machinery of judicial review is advisory, the situation is totally different. In a well-known article, Lauterpacht has noted that "a conflict between the principle that an illegal act is null *ab initio* and the principle that the mere assertion by an interested party that the act is unlawful should not conclusively determinative of that question"¹⁹⁶ is to be faced. There is as yet no adequate answer to the question of the legal consequences of illegal acts of international organisations when there is no machinery for compulsory judicial review.¹⁹⁷

¹⁹⁵ E. Osieke, "Legal Validity of *Ultra Vires* Decisions of International Organisations" 77 *AJIL* 239 (1983) at 243

¹⁹⁶ E. Lauterpacht, "The Legal Effect of Illegal Acts of International Organisations" 88 at 115 in *Cambridge Essays in International Law: Essays in Honour of Lord McNair* (1965)

¹⁹⁷ E. Lauterpacht, "The Legal Effect of Illegal Acts of International Organisations" 88 at 115 in *Cambridge Essays in International Law: Essays in Honour of Lord McNair* (1965); See also D. Akande, "The International Court of Justice and the Security Council: Is there room for judicial control of decision of the political organs of the United Nations?" 46 *ICLQ* 309 (1997) at 335; V. Gowlland-Debbas, "The Relationship Between the International Court of Justice And the Security Council in the Light of the Lockerbie Case" 88 *AJIL* 643 (1994) at 672

The International Court of Justice in the *Certain Expenses* opinion, as noted earlier, drew a distinction between two categories of illegal acts that may occur within an organisation. First, there are those acts that are unlawful because they exceed the powers and the boundaries of the organisation as a whole. These acts are with no legal effect. The second category is the acts that, though within the competence of the organisation, are unlawful because they are carried out by the wrong organ. These may be irregular as a matter of internal structure, but have legal effect.

However, Lauterpacht has given another interpretation to the Court's conclusion. He pointed out that the Court distinguished between these two categories of illegal acts by reference not to their consequences, but rather to the force of presumption operating in favour of the legality of each class of act.¹⁹⁸

Lauterpacht took the view that the Court has "been prepared to acknowledge that if an action (whether "external" or "internal") could be truly established as *ultra vires*, it would be without legal force as a basis for further action by the organisation, its organs or its staff."¹⁹⁹ The Court has been reluctant to admit that such irregularities might constitute the basis of invalidating a decision of an international organisation, when it examined the nature of the operations of the United Nations Emergency Forces.

Lauterpacht went further to declare that, as a matter of principle, "illegal acts ought not to give rise to valid and permanently effective consequences in law."²⁰⁰ There may be degrees of invalidity, or a finding by the Court of invalidity

¹⁹⁸ E. Lauterpacht, "The Legal Effect of Illegal Acts of International Organisations" 88 at 111 in *Cambridge Essays in International Law: Essays in Honour of Lord McNair* (1965)

¹⁹⁹ *Ibid.*

²⁰⁰ *Ibid.* at 115

could render the decision voidable at the discretion of the organ concerned.²⁰¹ The International Court has never been called upon to determine this point. However, Judge Morelli, in his separate opinion in *Certain Expenses advisory opinion*, stated:

"[i]n the case of acts of international organizations, and in particular the acts of the United Nations, there is nothing comparable to the remedies existing in domestic law in connection with administrative acts. The consequence of this is that there is no possibility of applying the concept of voidability to the acts of the United Nations. If an act of an organ of the United Nations had to be considered as an invalid act, such invalidity could constitute only the *absolute nullity* of the act."²⁰²

But he stated that "[i]t is only in exceptionally serious cases that an act of the Organization could be regarded as invalid, and hence an absolute nullity."²⁰³ This suggests that certain unauthorised acts might go totally unsanctioned.²⁰⁴

7 Conclusion

The question of whether the International Court of Justice is entitled to review the United Nations organs' decisions presupposes the legal possibility that these organs may act unlawfully.²⁰⁵ It is possible that the United Nations, as a subject of international law, and bound by international law, might overstep or disregard substantive rules of the United Nations Charter while discharging its

²⁰¹ J. Alvarez, "Judging the Security Council" 90 *AJIL* 1 (1996) at 6-7

²⁰² 1962 *ICJ Rep.* 151 at 222 (emphasis original)

²⁰³ *Ibid.* at 223

²⁰⁴ H. Thirlway, "The Law and Procedure of the International Court of Justice 1960- 1989" 67 *BYIL* 1 (1996) at 55

²⁰⁵ K. Doehring, "Unlawful Resolutions of the Security Council and Their Legal Consequences" 91 at 108 in J. A. Frowein & R. Wolfrum (eds.), *Max Planck Yearbook of United Nations Law*, (vol.1) (1998).

duties and functions.²⁰⁶ Seidl-Hohenveldern rightly argued that: “the field of action of the international organisation in international law is limited by the powers which the Member States bestow on it. An organisation may thus act *ultra vires*.”²⁰⁷

It is believed that the UN organs are free to determine the scope of their functions²⁰⁸. This argument is based on the belief that the international legal system is a system of pure co-ordination and opposed to any subordination.²⁰⁹

That means that UN organs alone can determine their rights and powers.

However, this suggests a contradiction with the constitutional foundations of the United Nations. The United Nations was established on a consensual basis.

Member States delegated powers to the United Nations in order that it should function with the purpose of realising the international community's common goods. The organisation's powers are enumerated in its constituent instrument. It has, however, been argued that to ensure the effectiveness of the organisation in dealing with the developments of the international community, a mechanism of new powers' implication should be utilised under the condition of the necessity and essentiality to fulfil the organisation's objectives and purposes. However, the broad meaning of the words "necessary" or "essential" raised, as been shown above, certain concern, specifically, to what extent the international organisations can abuse this powers. The limitations, it was argued, could be derived from the

²⁰⁶ *Ibid.*

²⁰⁷ I. Seidl-Hoenveldern, “Access of International Organizations to the International Court of Justice” 189 at 194 in A.S. Muller et al. (eds.), *The International Court of Justice*, (1997)

²⁰⁸ Doc. 933 IV/2/42 (2), 13 UNCIO Docs. 703 at 709

²⁰⁹ K. Doehring, “Unlawful Resolutions of the Security Council and Their Legal Consequences” 91 at 93 in J.A. Frowein & R. Wolfrum (eds.), *Max Planck Yearbook of United Nations Law*, (vol.1) (1998)

criteria of the functional necessity, as the words should be understood in their strict and literal meaning. In the light of this, an action is *ultra vires* when the newly implied powers exceed the boundaries of the functional necessity.

What follows after the determination of the grounds of nullity such as *ultra vires* is how Member States can challenge illegal acts of the international organisations. It was argued that the issue could be raised through the International Court's advisory jurisdiction; unilateral challenge; or through contentious proceedings. However, determining the legal consequences of illegal acts is the other side of judicial review. There is no coherent theory on that but it was argued that invalid action could lead to absolute nullity.²¹⁰

As it was discussed in the introduction, there are different models of judicial review that are available in the different municipal legal systems. As for the international legal system, the question of the model of judicial review has recently been extensively debated. Many call to have the United States Supreme Court as a model to establish judicial review in the international legal system.²¹¹ To what extent will such model be functional and successful? The following chapter explores the model of judicial review that the International Court of Justice should adopt. The argument will focus on a comparison between the United States Supreme Court and the International Court of Justice to establish the fact that the international legal system, in the form of the United Nations system, already has the mechanism, which differs from the municipal mechanism, but it is ignored by the international community.

²¹⁰ See above at 58- 70

²¹¹ See for example T. M. Franck, "The "Powers of Appreciation": Who is the Ultimate Guardian of UN Legality?" 86 *AJIL* 519 (1992)

Chapter II: The United States Supreme Court & The International Court of Justice

1 Introduction

It has been claimed that the idea of the International Court of Justice was "fathered" in the United States and "born of the success of the United States Supreme Court".¹ As early as 1899, the United States proposed for the world the idea of a World Court in the First Hague Conference. This was inspired by the political success of the US union. The US argument was if the United States people were able to overcome their differences, combine in a federal union, and settle their disputes by referring them to a national Supreme Court, why could not the sovereign nations around the world do likewise?²

The outcome of the Hague Conference was, however, the Permanent Court of Arbitration instead. This body was criticised for being a court in name only.³ The Permanent Court of Arbitration allows each state to have four eminent persons who should hold themselves ready to serve as arbitrators in disputes upon the invitation of the disputing states. The disputant states have the right to select their own arbiters from a panel of names, who could be, in a way or another, motivated by the disputant states' interests.

¹ D. F. Fleming, *The United States and The World Court* (1945) at 23

² *Ibid.* at 15

³ D. S. Patterson, "The United States and the Origins of the World Court", 91:2 *Political Science Quarterly* 279 (1976) at 281

This panel did not fulfil the American dream, which was looking for a permanent court, in the real sense, with obligatory jurisdiction, composed of judges who were judicial officers, who had no other occupation, and who would solve international disputes in accordance with the rules and disciplines of international law.

The Americans pushed hard in the Second Hague Conference of 1907 to achieve this dream, and the Conference "recommend[ed] the establishment of a court of arbitral justice, which would be permanent to the extent that it was to meet once every year..."⁴ But nothing was put into action. States were still in favour of arbitration; treaties still contained clauses agreeing on *ad hoc* arbitration to settle their future disputes.

During and after the First World War, American statesmen began thinking of a way to change the old European diplomacy of force to a new diplomacy of co-operation and understanding.⁵ In every sense, they wanted a larger model of their society, where justice, neighbourly and friendly relations would prevail.⁶ However, the Americans in their search for world peace had two schools of thought. Whereas one school argued for the establishment of a political body to settle disputes arising in international society through negotiations and mediation, the other was in favour of a judicial body or a World Court to deal with disputes.

⁴ D. F. Fleming, *The United States and The World Court* (1945) at 19

⁵ A. Zimmern, *The American Road to World Peace* (1953) at 61

⁶ *Ibid.* at 30

It is well known that the idea of a political organisation was championed by President Wilson. President Wilson emphasised the fact that there would be no place for peace in the world unless a stable balance of power could be guaranteed. He stressed further the need not just for a stable balance of power, but rather for "a community of power, not organized rivalries, but an organized common peace." To President Wilson, the outbreak of the War in Europe was for a political reason in the narrow sense. The problem could be solved by the exercise of a political technique that was used in formulating the American Constitution.⁷ In his view, the concept of sovereignty dominated the atmosphere in Europe at that time, and it blocked any opportunity for the Europeans to regard each other as friends and neighbours. For him, it prevented the Europeans of thinking of establishing democratic institutions in terms of political and social co-operation rather than of competition for power. President Wilson worked hard for the Europeans to accept his idea of a "democratic and co-operative" league to enforce world peace, and they did, but he failed to convince his country to be part of the "American approach" to world peace problems.⁸

On the other end of the spectrum, there was the "legalist" school, to a certain extent led by a well-known American jurist, Republican Senator Elihu Root. Senator Root urged the Wilson administration to include a clause for the establishment of an international court in any future League of Nations.⁹ He shared with most of the American legalists the desire for the creation of an

⁷ *Ibid.* at 62

⁸ D. F. Fleming, *The United States and The World Court* (1945) at 27

⁹ M. Dunne, *The United States and the World Court, 1920-1935* (1988) at 21

international court. However, Senator Root was the only legalist to reflect fully during the war on the post-war arrangements for preserving world peace.¹⁰ The outbreak of World War I convinced him that the breach of world peace was a matter of concern to all nations. He believed that nation states should develop rules, rights, and responsibilities for international conduct.¹¹ Fully aware of the interdependence of states' obligations and rights, he called for the establishment of a world court and a political council, which would convene automatically during international crises.¹² He believed that such bodies would provide a forum for the discussion of controversies. While the political council would deal with political disputes, the World Court would tackle justiciable questions. In other words, he maintained that having a World Court was a sufficient remedy, but moved by the war, he saw that political organisation would also be essential.¹³

Senator Root was appointed as the representative of the United States in the Commission of Jurists, which was established upon the recommendation of the League of Nations Council to elaborate a plan for the creation of the World Court. According to Root's biographer, Phillip C. Jessup, Root took the lead in the discussions.¹⁴ The Commission faced many difficulties, in particular in deciding how to select judges and the jurisdiction of the Court. He approached these problems in a way showing how much he was influenced by the American

¹⁰ D. F. Fleming, *The United States and The World Court* (1945) at 36; A. Zimmern, *The American Road to World Peace* (1953) at 92

¹¹ P. Jessup, *Elihu Root*, Vol II (2nd ed.)(1964) at 373

¹² *Ibid.* at 374

¹³ D. F. Fleming, *The United States and The World Court* (1945) at 25, see also P. Jessup, *Elihu Root*, Vol. II (2nd ed.)(1964) at 375

government's experience and that of the Supreme Court.¹⁵ Although he succeeded in the first, he failed to achieve a general consensus on the issue of the jurisdiction of the Court.¹⁶ The method of selecting the judges was solved by an analogy with the American system where the smaller states are given equal representation in the Senate while the larger states have a representation in the House proportionate to their size.¹⁷ The establishment of the League of Nations Council and Assembly cleared the way for such an analogy.¹⁸ Root proposed that in the League the two bodies should vote concurrently but separately on the list of candidates and majority of votes should be achieved in each body to elect the judges.¹⁹ In the case of deadlock, a committee of representatives of both bodies should be composed, similar to that of both Houses of the Congress. The plan was adopted, remained intact, and is still in use.²⁰

The setback for Root was the determination of the nature and scope of the jurisdiction of the World Court. A proposal was put forward of giving this new permanent judicial body, a power to render advisory opinions. Root opposed this proposal.²¹ His argument was clearly influenced by the American Supreme Court. The grounds for his objections were that Root aimed at having a Court which

¹⁴ See generally P. Jessup, *Elihu Root*, Vol. II (2nd ed.)(1964) at 418-422

¹⁵ *Ibid.* at 420

¹⁶ *Ibid.* at 421- 22

¹⁷ *Ibid.* at 420

¹⁸ *Ibid.*

¹⁹ *Ibid.* at 421

²⁰ *Ibid.*

²¹ M. Pomerance, *The United States and The World Court As A 'Supreme Court of the Nations': Dreams, Illusions and Disillusion* (1996) at 74

would be able to determine its own jurisdiction for a given dispute, and he maintained that this determination should be made on the basis of international law and accepted precedent, the method that the United States Supreme Court used.²² For the Court to render an advisory opinion upon the request of a political body, the League Council or Assembly, to a dispute to which it was not a party, would destroy the Court's position and make it subordinate to a political authority, in contrast with the United States Supreme Court, which was coordinated with the legislative and executive branches of the government.²³ Root anticipated that giving the World Court the power to render advisory opinions would endanger the development of the law through precedents, since the judgment would be of an uncertain nature.²⁴ Finally, for many Americans, the advisory function would give the Court a political character rather than a judicial one, a "League Court" rather than a "World Court"; and a non-American rather than an American inspired product.²⁵

Any discussion of the advisory function of the World Court would not be complete without looking at the debate on the Court's competence to render advisory opinions presented by John Bassett Moore. Moore was appointed as a

²² Minutes of 1920 Advisory Committee of Jurists at 584

²³ M. Dunne, *The United States and the World Court, 1920-1935* (1988) at 38; See also M. O. Hudson, "Advisory Opinions of National and International Courts" 37 *Harvard Law Review* 970 (1924)

²⁴ M. Dunne, *The United States and the World Court, 1920-1935* (1988) at 38; See also M. Pomerance, "The United States and the Advisory Function of the Permanent Court of International Justice" 567 in Y. Dinstein (ed.), *International Law at A Time of Perplexity: Essays in Honour of Shabtai Rosenne* (1989)

²⁵ M. Pomerance, "The United States and the Advisory Function of the Permanent Court of International Justice" 567 at 574 in Y. Dinstein (ed.), *International Law at A Time of Perplexity: Essays in Honour of Shabtai Rosenne* (1989)

full judge in the first bench in September 1921.²⁶ Moore supported the idea of the new Permanent Court of International Justice, but he was against American membership of the League.²⁷ He was working on getting the United States to adhere to the new World Court in order to give the Court an independent and global character. However, Moore thought that the advisory function of the Court would jeopardise the Court's status. He presented his arguments to the 1922 Committee of Jurists in a long memorandum. Opposing the Court's advisory function, Moore argued that this function would hamper the character and reputation of the Court, as its opinions would have an advisory character, they would lose their effective force.²⁸ Moreover, he argued that this function raised the dangerous possibility of states' intervening in the Court's conduct of an advisory opinion for fear a judgment on either a pending dispute or hypothetical question might prejudice established rights or traditional claims. The other worry that Moore expressed was that the advisory function would demean the Court as it would be seen as touting for quasi-judicial business from a litigious League.²⁹ Moore's colleagues were not persuaded by his arguments. They saw that there was no way to avoid the provisions of Article XIV of the Covenant which created the advisory jurisdiction. Moore's colleagues showed that they were not concerned

²⁶ M. Dunne, *The United States and the World Court, 1920-1935* (1988) at 61, 102

²⁷ *Ibid.* at 61

²⁸ Moore's Memorandum, "The Question of Advisory Opinions", 18 February 1922, PCIJ Series D:2 383 (Annex 58a) at 383

²⁹ *Ibid.* at 393

with whether or not the advisory function would affect the judicial character of the Court.³⁰

Later, by the spring of 1925 when the Senate agreed to debate the protocol to adhere to the Court, the Permanent Court of International Justice had delivered only five contentious cases in contrast to ten advisory opinions. That led the opponents to the idea of adherence to re-affirm their original charges that the Court would be subordinate to the League.³¹

The debate continued and the United States advanced reservation after reservation. Finally, the US Congress refused to let the United States to be part of the Court on the ground that the advisory function would give a free hand for the Court to call the United States to appear in any dispute even if that dispute would jeopardise its national interests. Throughout the battle from 1923-1935, the advisory function of the Permanent Court was the centre of controversy. As noted earlier, the advisory jurisdiction stamped the Court as “a *political* ‘League Court,’ rather than a *judicial* ‘World Court’... a supergovernmental agency which might violate U.S. Sovereignty...; and a threat to the traditional American policies of non-entanglement in Europe’s ills...”³² In the opinion of the Senators opposing the US membership in the Permanent Court of International Justice, the US membership of the Court would be the thin edge of full adhesion to the League’s

³⁰ M. Dunne, *The United States and the World Court, 1920-1935* (1988) at 103

³¹ *Ibid.* at 104

³² M. Pomerance, *The United States and The World Court As A ‘Supreme Court of the Nations’: Dreams, Illusions and Disillusion* (1996) at 91 (emphasis in original)

collective security arrangements and involvement in the problems of Europe.³³ In their perspective, the Permanent Court of International Justice was associated with the League of Nations. The League organs participated in the establishment of the Court, its financing, the elections of its judges, and the most crucial association is that the League political organs could request advisory opinions from the Court-“membership in such a Court meant membership in the League via the ‘back door’.”³⁴

After the Second World War, although the International Court of Justice was empowered with the competence of rendering advisory opinions, the United States decided to participate in the new Court. As Pomerance noted that it was “only after World War II that the United States ‘swallowed the whole whale of membership’ in a collective security organisation...”³⁵ The threat of the advisory function to its national interests appeared less menacing.³⁶ The difference, between before World War II and after, was the establishment of a political organisation with a detailed “Constitution”³⁷. For many Americans, the League of Nations was merely a form of alliance between the Great Powers, and its Covenant was just a treaty.³⁸ With the creation of the United Nations, the

³³ M. Pomerance, “The United States and the Advisory Function of the Permanent Court of International Justice” 567 at 592 in Y. Dinstein (ed.), *International Law at A Time of Perplexity: Essays in Honour of Shabtai Rosenne* (1989)

³⁴ M. Pomerance, *The United States and The World Court As A ‘Supreme Court of the Nations’ : Dreams, Illusions and Disillusion* (1996) at 66

³⁵ *Ibid.*

³⁶ *Ibid.*

³⁷ See below the discussion on the nature of the UN Charter, Chapter III at 142-158

³⁸ A. Zimmern, *The American Road to World Peace* (1953) at 208-209

American idea (President Wilson's idea) of an institution governed by a detailed constitution was somehow crystallised.³⁹

This review of the history of the Court and the influence of the United States' thinking shows that although the Americans tried to model the Court on the United States Supreme Court, the international system determined that the Court have different characteristics. International society, during the days of the establishment of the League of Nations and the Permanent Court of International Justice, was not able to separate itself from the old diplomacy totally. The Great Powers, then, were still swinging between the old diplomacy, that of force, and the new diplomacy, that of co-operation. It seems that it was still "unnatural" for sovereign States to "go before a court and submit the question whether their actions and their views accord with the principles of justice."⁴⁰ Still, there was a long way ahead for the Great Powers to accept any threat to their sovereignty and to be under the scrutiny of an autonomous judicial power, as is the case with the United States Supreme Court, which has the power to review the legality of a decision or an order taken by the legislative and executive branches. It will be argued here that although the International Court and the US Supreme Court have some points in common, for the Court to follow the same path as the US Supreme Court in asserting powers of judicial review will be full of difficulties and setbacks. The issue of resemblance between the two courts resurfaced when the International Court of Justice dealt with the *Lockerbie Cases*. It was argued that

³⁹ *Ibid.*

⁴⁰ E. Root, "The Importance of Judicial Settlement" *Proceedings of the American Society of Judicial Settlement of International Disputes* 9 (1910) at 13-14, cited in M. Pomerance, *The*

two centuries ago, the United States Supreme Court had the opportunity in *Marbury v. Madison* to assert its power of judicial review, and the same opportunity was given to the International Court of Justice in the *Lockerbie Cases* (Interim measures).⁴¹ However, such a comparison disregards the fact that the International Court of Justice has its own peculiarities and characteristics that make it difficult for the Court to follow the exact way of the US Supreme Court.⁴² The International Court still has not established itself as an independent organ of the United Nations. It still works closely with the other organs of the UN. In contrast, at the domestic level, the judiciary has achieved its independence from the other branches of the government. Besides, the problems facing the Court on the international level are totally different from those facing the national judiciary on the national level. Municipal courts and the International Court have different natures and different factors are relevant.

Nonetheless, that does not mean that the International Court of Justice's powers of judicial review could not be established. The argument of this chapter will be, however, that the International Court of Justice should, in order to establish the competence of judicial review, choose alternative attitudes and paths.

This chapter will start by showing the similarities between the two Courts. It will make clear how both are subject to a combination of law and politics when the two Courts consider their cases. In the light of this, *Marbury v. Madison* will

United States and The World Court As A 'Supreme Court of the Nations': Dreams, Illusions and Disillusion (1996) at 12

⁴¹ T. Franck, "The 'Powers of Appreciation': Who is the Ultimate Guardian of UN Legality?" 86 *AJIL* 519 (1992); W. M. Reisman, "The Constitutional Crisis in the United Nations" 87 *AJIL* 83 (1993)

⁴² J. Alvarez, "Judging the Security Council" 90 *AJIL* 1 (1996) at 4-6

be discussed in detail with the aim of highlighting the political issue involved. On the other hand, the practice of the International Court of Justice in dealing with provisional measures applications shall be discussed exhaustively, aiming to make it clear that the International Court has other considerations, specifically political, in indicating provisional measures other than the “official” criteria of urgency, irreparable damage, and the establishment of the Court’s jurisdiction. The reason behind discussing the Court’s jurisprudence in dealing with provisional measures is to set the scene for the discussion of the *Lockerbie Cases*. To determine its analogy with *Marbury v. Madison*, i.e the relation between law and politics in tackling the case, it is necessary to discuss the case law of the Court’s interim measures to compare and to establish influence of the political factors in the *Lockerbie Cases*. The conclusion to be drawn is that though the International Court and the Supreme Court share certain characteristics and to a certain extent behave in a similar way, the International Court cannot follow the same path of the United States Supreme Court in asserting a competence of judicial review.

2 Marbury v. Madison

Marbury v. Madison marks the beginning of judicial review as a power in the hands of the United States Supreme Court. This case shows how the Supreme Court established a place for itself away from the political tension that was taking place at that time. However, that does not mean that the Supreme Court established that place without entering the circle of political crisis. The Jeffersonians, the Republicans, were then controlling the government, while the Federalists were in control of the Supreme Court since the judges of the Supreme Court were all Federalists. Nevertheless, other scholars have claimed that the

Supreme Court in this case attempted to rise above the bickering of party politics, which had engulfed the other branches of government, and to show that the Court would rule in accordance with the Constitution.⁴³

As a beginning, it is useful to look at *Marbury v. Madison* and how the US Supreme Court was able to handle the issues involved in a very diplomatic way without undermining either its power or that of the government. Why should *Marbury v. Madison*, in particular, be discussed? Because, for many US legal historians, *Marbury v. Madison*'s ruling made judicial review positive constitutional doctrine.⁴⁴

Marbury v. Madison arose out of the adoption of the Judiciary Act of 1801 which provided for the appointment of a large number of Federal judges during the final days of President Adams. The passage of this law angered President Jefferson who was about to assume office. President Jefferson ordered his Secretary of State, James Madison, not to deliver the commissions of office to Adams' appointees. Among the appointees was William Marbury, selected by President Adams as a Justice of the Peace in Washington. Marbury unsuccessfully tried to retrieve his commission from the Secretary of State. About a year after Jefferson assumed his office, Marbury filed an action in the Supreme Court, asking the Supreme Court to order Madison to deliver his commission, since the Judiciary Act of 1789 authorised the Supreme Court "to issue writs of mandamus

⁴³ See P. W. Kahn, *The Reign of Law: Marbury v. Madison and the Constitution of America* (1997); B. Schwartz, *A History of The Supreme Court* (1993)

⁴⁴ B. Schwartz, *A History of The Supreme Court* (1993) at 40; H.H. Burton "Marbury v. Madison: The Cornerstone of Constitutional law" 14 in J.H. Choper (ed.) *The Supreme Court And Its Justices* (1987)

in cases warranted by the principles and usages of law, to any courts appointed, or persons holding office, under the authority of the United States.”⁴⁵

Justice Marshall was then the Chief Justice of the Supreme Court. He clearly saw the problem as far more complicated than merely whether the Court could issue a mandamus against the Secretary of State. Justice Marshall considered that if he dismissed Marbury’s action, he would have abdicated the judicial powers of the Court. On the other hand, if he ordered the Secretary of State to deliver a writ to Marbury, and declared the Court’s authority to hold the government to the law, the court itself would be unable to enforce this, and by that the Court would have lost its credibility.⁴⁶ However, Justice Marshall chose neither of these considerations. He chose to escape from this dilemma by ruling that the Court lacked jurisdiction. The Judiciary Act of 1789 authorised the Supreme Court to issue writs of mandamus in cases where the Court had jurisdiction. However, the Court argued that, in this case, it had no jurisdiction since Article III of the American Constitution allows the Court only to take original jurisdiction in cases involving states or emissaries of foreign governments. Furthermore, the Court chose to escape jurisdiction on the ground of the unconstitutionality of Section 13 of the Judiciary Act of 1789. After close textual reading of Section 13 of the 1789 Act and also Article III of the Constitution, it ruled that Section 13 of the 1789 act was unconstitutional. The Congress could not add to the Court’s jurisdiction as Section 13 did, because

⁴⁵ *Marbury v. Madison* 5 U.S. (1 Cranch) 137; 2 L. Ed. 60 (1803)

⁴⁶ B. Schwartz, *A History of The Supreme Court* (1993) at 41

Article III had already established the Court's jurisdiction.⁴⁷ The Court considered that the Constitution has its own supremacy and could not be altered by ordinary law formed by the Congress. The Court then ruled that Section 13 of the Judiciary Act of 1789 exceeded the authority allotted the Court originally under Article III of the Constitution and was therefore null and void.⁴⁸

Alfange has pointed out that: "[b]y choosing this way (ruling on the unconstitutionality of Section 13 of Judiciary Act of 1789) of avoiding the assumption of jurisdiction, the Court could assert the power of judicial review."⁴⁹ Thus, the Court refused Marbury's application not because the Executive Branch was above the law, but because the Court had no jurisdiction to issue the writ that Marbury had requested.⁵⁰ By this opinion, the Supreme Court established its power to rule on the validity of an Act of the Congress, although the US constitution is silent on the Court's power of judicial review.⁵¹ John Marshall's opinion, representing the whole bench, was divided in two parts. The first part discussed whether Marbury's claim could be sustained on the basis of the vested rights doctrine, that is the claim that certain rights are so fundamental that they are beyond the government's control. The Court pointed out that the Court was under an obligation to protect such fundamental rights. The second part took back what the Court gave to Marbury in the first half of the opinion. It said that the Court

⁴⁷ D. Alfange, Jr., "Marbury v. Madison and Original Understandings of Judicial Review: In Defense of Traditional Wisdom" *The Supreme Court Review* 329 (1993) at 366

⁴⁸ B. Schwartz, *A History of The Supreme Court* (1993) at 41

⁴⁹ D. Alfange, Jr., "Marbury v. Madison and Original Understandings of Judicial Review: In Defense of Traditional Wisdom" *The Supreme Court Review* 329 (1993) at 366

⁵⁰ *Marbury v. Madison* 5 U.S. (1 Cranch) 137; 2 L. Ed. 60 (1803)

could not issue the writ, since section 13 of the Judiciary Act of 1789 was unconstitutional. It went on to say that Congress could not add to the Court's jurisdiction, because Article III of the Constitution had already established the Court's jurisdiction fully.⁵²

However, it is necessary to examine why Chief Justice Marshall proceeded to invalidate the Judiciary Act 1789. When the Chief Justice showed some readiness to inquire into the conduct of affairs by the executive, as manifested by the order of the Supreme Court to Madison to show why a writ of mandamus should not be delivered, the consequences were more than dire. Jefferson and his Republican allies in the Congress were able to enact legislation repealing the Federalists' Judiciary Act of 1801, thus keeping the Supreme Court out of session for over a year.⁵³ He therefore needed to find a reason for invalidation that would not anger the Republicans.

Justice Marshall was more than sure that he and his Supreme Court could no more issue a writ of mandamus than they could declare the Repeal Act unconstitutional and order the circuit court judges and the Supreme Court judges restored to their office.⁵⁴

The Supreme Court found a way to announce and establish the principle of judicial review over the legislative and the executive branches of the government without making an immediate application of it hostile to the then

⁵¹ B. Schwartz, *A History of The Supreme Court* (1993) at 41(quoting Charles Warren)

⁵² *Marbury v. Madison* 5 U.S. (1 Cranch) 137; 2 L. Ed. 60 (1803)

⁵³ See J. M. O'Fallon, "Marbury" 44 *Stan. L. Rev.* 219 (1992) at 222-224

⁵⁴ D. Alfange, Jr., "Marbury v. Madison and Original Understandings of Judicial Review: In Defense of Traditional Wisdom" *The Supreme Court Review* 329 (1993) at 366

Administration.⁵⁵ In other words, the decision of that case suppressed any potential institutional conflict among the branches of the government as it outlined the boundaries of the competence of each branch. The boundaries were drawn with respect to the Constitution, as Justice Marshall stated in his opinion "[t]he government of the United States has been emphatically termed a government of laws, and not of men."⁵⁶ However, Justice Marshall kept on asserting that the Court had the responsibility to determine what the Constitution meant. "It is emphatically the province and the duty of the judicial department," he wrote, "to say what the law is...If two laws conflict with each other, the courts must decide on the operation of each."⁵⁷

It was shown earlier that the US Supreme Court was the model for the International Court.⁵⁸ The success of the US Supreme Court furnished and encouraged the debate to establish the "World Court" using the Supreme Court's model.⁵⁹ Ironically, as the US Supreme Court had to face in its early stages a dispute involving government political branches, the International Court was put in, relatively, the same position while it was dealing with the *Lockerbie cases*.

⁵⁵ H.H. Burton, "Marbury v. Madison: The Cornerstone of Constitutional law" 14 at 18 in J.H. Choper (ed.), *The Supreme Court And Its Justices* (1987)

⁵⁶ *Marbury v. Madison* 5 U.S. (1 Cranch) 137; 2 L. Ed. 60 (1803)

⁵⁷ *Ibid.* at 177

⁵⁸ See above at 69-70

⁵⁹ M. Pomerance, *The United States and The World Court As A 'Supreme Court of the Nations': Dreams, Illusions and Disillusion* (1996) at 12

3 Lockerbie Cases

It is a tragic story, and one with which most are familiar. In 1988, the American flight Pan Am 103 exploded over the Scottish sky, taking 270 lives. The American and the British investigations⁶⁰ led to the belief that two Libyans were guilty in connection with the bombing of the Pan Am flight. A United States Federal grand jury indicted the two Libyan nationals on charges of having caused the bomb to be placed on Pan Am 103. The 193-count indictment identified the two accused as officials of Libyan Arab Airlines and members of Libya's intelligence organisation. Simultaneously, charges were laid by the Lord Advocate of Scotland against the two men for conspiracy, murder, and contravention of the *Aviation Security Act* of 1982.⁶¹

Later, the American and the British governments issued a joint declaration demanding the Libyan government to surrender the two suspects to stand trial in either the United States or Scotland, and to pay appropriate compensation.⁶² Libya refused to surrender the suspects, claiming that it had no extradition treaties with the UK or US and that, in any case, Libyan law prohibited the extradition of its

⁶⁰ Speculation about who would want to plant a bomb abroad has included pro-Iranian groups as a revenge for the US downing of an Iranian airliner over the Persian Gulf in July 1988. The speculation has also included Syrian involvement. See M. David, "Passport to Justice: Internationalizing the Political Question Doctrine for Application in the World Court" 40:1 *Harv. J. Int'l L.* 81 (1999) at 83; S. Evans, "The Lockerbie Incident Cases: Libyan- Sponsored Terrorism, Judicial Review And The Political Question Doctrine" 18:1 *MD Journal of International Law And Trade* 21 (1994) at 27

⁶¹ Announcement by the Lord Advocate of Scotland on 14 November 1991 *reprinted in* 31 *I.L.M.* 718 (1992).

⁶² Joint Declaration of the United States and the United Kingdom *reprinted in* 31 *I.L.M.* 723 (1992)

own nationals. Libya doubted the fairness of any trial held in the United States and the United Kingdom.⁶³

Unsatisfied with these responses, the United States and the United Kingdom, with the support of France, went to the United Nations Security Council. Under its powers under Chapter VI, the Security Council adopted Resolution 731.⁶⁴ Although the resolution does not explicitly indicate that it was adopted under the Council's Chapter VI powers, the absence of the language of Chapter VII, that is the determination of the existence of "threat to the peace, breach of the peace, or act of aggression", suggests that Resolution 731 was adopted under Chapter VI of the UN Charter. Both Judge Bedjaoui and Judge Weeramantry argued that the Security Council adopted resolution 731 under its powers of Chapter VI.⁶⁵ However, Judge *ad hoc* El-Kosheri argued, in his dissenting opinion, that resolution 731 was adopted under Chapter VII⁶⁶, he noted that the wording used in drafting resolution 731 could be regarded as referring to Chapter VII. The resolution started with the condemnation of international terrorism and the determination to eliminate it. Resolution 731 urged the Libyan government to surrender the two suspects. This resolution is noteworthy in one

⁶³ Annex to Letter, 8 January 1992 From the Permanent Representative of the Libyan Arab Jamahiriya to the United Nations addressed to the Secretary General, S/ 23436 *reprinted in* 31 *I.L.M.* 724 (1992)

⁶⁴ Sec. Res. 731 UN SCOR (1992) 21 January 1992

⁶⁵ Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United Kingdom) 1992 *ICJ Rep.* 3; Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United States of America) 1992 *ICJ Rep.* 3 (Judge Bedjaoui dissenting Opinion) at 41 and (Judge Weeramantry dissenting Opinion) at 53-55

⁶⁶ *Lockerbie Cases* 1992 *ICJ Rep.* 3 at 97 (Judge *ad hoc* El-Kosheri dissenting opinion). The argument of Judge *ad hoc* El-Kosheri discussed below at 109-110

aspect. It was the first time that the Security Council had been asked to call for the extradition of the citizens of one country to stand trial in another.⁶⁷

In the meantime, Libya instituted proceedings in the International Court of Justice against the United States and the United Kingdom. Libya claimed that the matter was governed by an international agreement, the Montreal Convention of 23 September 1971. The Court was asked to adjudge and declare that:

1. Libya had fully complied with all of its obligations under the Montreal Convention;
2. The United States and the United Kingdom had breached, and were continuing to breach, their legal obligations to Libya under Article 5(2), 5(3), 7, 8(2) and 11 of the Montreal Convention; and
3. The United States and the United Kingdom were under a legal obligation immediately to cease and desist from such breaches and from the use of any and all force or threats against Libya, including the threat of force against Libya, and from all violations of the sovereignty, territorial integrity, and the political independence of Libya.⁶⁸

In addition, Libya asked the Court to indicate provisional measures. Libya asked the Court to enjoin the United States and the United Kingdom from taking any action against Libya calculated to coerce or to compel Libya to surrender the two suspects to any jurisdiction outside Libya, and to ensure that no steps would be taken to prejudice in any way the rights of Libya with respect to the legal proceedings. Libya, along with this application, offered to hand the two accused to

⁶⁷ See V. Gowlland-Debbas, "The Relationship Between The International Court of Justice and the Security Council in the Light of the Lockerbie Case" 88 *AJIL* 643 (1994) at 663 (discussing the Security Council overstepped its limits in that request)

⁶⁸ Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United Kingdom) 1992 *ICJ Rep.* 3; Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United States of America) 1992 *ICJ Rep.* 114

a neutral country for trial. However, the offer was dismissed by the American and the British governments.

Three days after the close of the hearings, the Security Council adopted resolution 748. The Security Council, acting explicitly under Chapter VII of the UN Charter, imposed economic and diplomatic sanctions on Libya.⁶⁹ The International Court of Justice asked the parties involved to return and make their submissions on the resolution. Both respondents submitted that, because the resolution bound Libya, it precluded any conflicting order by the Court.⁷⁰ On the other hand, Libya submitted that because no hierarchy existed between the Security Council and the International Court of Justice within the United Nations, and because each exercised its own competence, the risk of conflicting decisions by the two bodies did not render the Libyan claim inadmissible.⁷¹ Libya went further to claim that the two Security Council resolutions were contrary to international law, and criticised the Security Council's invocation of Chapter VII as a pretext to elude application of the Montreal Convention.⁷² The turning point in the dispute was when the International Court of Justice ruled on Libya's application for interim measures.

⁶⁹ Security Council Resolution 748, 31 March 1992 "The Security Council determines that: in this context... the failure by the Libyan Government to demonstrate by concrete actions its renunciation of terrorism and in particular its continued failure to respond fully and effectively to the requests in resolution 731 (1992) constitutes *a threat to international peace and security*." (Emphasis added)

⁷⁰ *Lockerbie Cases* 1992 ICJ Rep. 3 at 14 para. 37

⁷¹ *Ibid.* para. 36

⁷² *Ibid.*

By 11 votes to 5,⁷³ the Court held that the circumstances of the cases did not require the exercise of its power under Article 41 of the Statute of the International Court of Justice to indicate provisional measures. The Court found it could not make, in accordance with Article 41, definitive findings either of fact or of law on the issues relating to the merits; the Court's decision therefore did not affect the parties' rights to contest such issues at the stage of the merits. The most controversial paragraph in the International Court of Justice's Order was paragraph 39. The Court ruled that:

“ whereas both Libya and the United Kingdom [the United States], as Members of the United Nations, are obliged to accept and carry out the decisions of the Security Council in accordance with Article 25 of the Charter; whereas the Court,...,considers that *prima facie* this obligation extends to the decision contained in resolution 748(1992); and whereas, in accordance with Article 103 of the Charter, the obligations of the Parties in that respect prevail over their obligations under any other international agreement, including the Montreal Convention;...”⁷⁴

The Court feared that such protection would likely to impair the rights that *prima facie* were enjoyed by the respondents by virtue of resolution 748 (1992).

However, the Court's Order established the fact that the rights of the parties to submit arguments at the merits stage would remain unaffected when it stated that the Court had not been called on to determine the question of its jurisdiction to entertain the merits of the case.

⁷³ *Lockerbie Cases* 1992 ICJ Rep.3.(In favour: Vice-President Oda, Acting President; President Sir Robert Jennings; Judges Lachs, Ago, Schwebel, Ni, Evensen, Tarassov, Guillaume, Shahabuddeen, Aguilar Mawdsley; Against: Judges Bedjaoui, Weeramantry, Ranjeva, Ajibola; Judge ad hoc El-Kosheri)

⁷⁴ *Lockerbie Cases* 1992 ICJ Rep.3 at 15

Although the request for provisional measures was rejected, Libya did not comply with the Security Council resolutions 731 and 748. The United Nations renewed its demands for Libya to hand over the two suspects,⁷⁵ which Libya rejected. It was thought that a breakthrough had been made in early 1994, when Libya agreed on the proposal of a trial in a neutral venue before a panel of international judges. Britain and America refused to accept this compromise, demanding a trial in either Scotland or the United States. This deadlock remained till 1998.

It became crystal-clear at the beginning of 1998 that, despite sanctions, the two Libyans would not be surrendered for trial. On 24 August, the British and the American governments, went back to the Security Council, proposing that the trial should be held in the Netherlands before a panel of three Scottish judges and with no jury.⁷⁶ This offer was broadly accepted by Libya, which said that it was for the two suspects and their legal advisers to decide whether they would appear in the Netherlands for trial.⁷⁷ The two accused surrendered themselves on 5 April 1999 and the trial began on May 3rd, 2000. The Scottish Court residing in Camp Zeist in the Netherlands gave its verdict of finding one of the suspects to be guilty and the other not guilty.⁷⁸ Sanctions were suspended in April 1999 following the surrender

⁷⁵ SC Res. (883) UN SCOR (1993)

⁷⁶ Security Council Resolution 1192 (1998) 27 August 1998; see also the Joint letter of the United Kingdom and the United States S/1998/795 24 August 1998

⁷⁷ The Letter of the Libyan Government S/1998/808 26 August 1998

⁷⁸ For the Verdict check <<http://www.scotcourts.gov.uk/download/lockerbiejudgement.pfd>>31 January 2001

of the two accused Libyans.⁷⁹ On 7 July 1999, the British Foreign Secretary, addressing the House of Commons, announced that the UN sanctions on Libya were suspended.⁸⁰ However, three days later, the US vetoed the permanent lifting of sanctions by the Security Council against Libya.⁸¹ The then US President, Bill Clinton, in his report to the Congress on Lockerbie asserted that while the development over the last few months indicated Libyan co-operation, the extent of it could not be fully judged until the trial was at least under way. In the light of this, the US unilateral sanctions would remain in force as long as appropriate.⁸² The UN Security Council, in its Press Release, showed that it was the UN wish that sanctions should be lifted permanently as soon as possible.⁸³ However, the United States, after the verdict, stated that the sanctions would not be lifted until Libya accepted responsibilities for the bombing and paid compensation.⁸⁴

The Court is currently considering the arguments on the merits of the *Lockerbie Cases*. It is still unclear whether the Court, in its judgment, will discuss the constitutionality of the Security Council resolutions or not. For instance, one commentator has advanced the argument that with the Security Council resolution 1192 (to entice Libya to give up suspects and end sanctions) and with Libyan consent to give the two suspects to the Scottish Court for trial, the International

⁷⁹ Press Release SC/6664 8 April 1999

⁸⁰ Statement By The Foreign Secretary On Relations With Libya, House Of Commons, London, Wed. 7 July, 1999 <<http://www.fco.gov.uk/news/newstext.asp?2622>>

⁸¹ Press Release SC/6700 9 July 1999

⁸² Clinton Report to Congress on Libya National Emergency 20 July 1999
<<http://www.un.int/usa/99lib719.htm>>

⁸³ Press Release SC/6700 9 July 1999

⁸⁴ 20th April 2001 *Washington Post* at A20

Court of Justice cannot review resolutions 731, 748, 883, as the parties have resolved the dispute by themselves.⁸⁵ However, the International Court, in its course of dealing with a case, often looks and considers all the relevant facts and data as part of discharging its judicial function.⁸⁶ Therefore, the possibility is there for the Court to deal with the Libyan argument on the constitutionality and validity of the Security Council resolutions, because they are affecting the legal rights and obligations of the concerned parties.

4 Law and Politics In the Two Courts

4.1 *In The United States Supreme Court*

According to one commentator, the importance of *Marbury v. Madison* lies in its judicial politics. Professor Franck has stated:

“The judicial ‘politics’ of *Marbury* were simple but brilliant: let President Jefferson win by agreeing that his executive discretion to issue or withhold commissions was constitutionally unlimited, but also stake out the 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.”⁸⁷

⁸⁵ D. D'Angelo, "The 'Check' on International Peace and Security Maintenance: the International Court of Justice and Judicial Review of Security Council Resolutions" 23:2 *Suff. Transnat'l. L. Rev.* 561 (2000) at 592

⁸⁶ See *Conditions of Admission of a State to Membership in the United Nations (Article 4 of the Charter) (1947-1948)* 1947 ICJ Rep. 57, *The Reparations for injuries* 1949 ICJ Rep. 174; *Certain Expenses Advisory Opinion* 1962 ICJ Rep.151; *Namibia Advisory Opinion* 1971 ICJ Rep.9

⁸⁷ T. Franck, "The 'Powers of Appreciation': Who is the Ultimate Guardian of UN Legality?" 86 *AJIL* 519 (1992) at 519

It is impossible to understand this decision without an understanding of the politics surrounding it at that time. American politics were tense with partisan struggles, the Republicans took control over the Presidency and the Congress, while the Federalists put their hands on the Supreme Court and the Circuit Courts.⁸⁸ In other words, *Marbury v. Madison* was a creature of the politics of that period, and political considerations were part of the deliberations in the Supreme Court.⁸⁹

Marbury v. Madison arose at the time when Jefferson's Republicans had defeated Adams and the Federalists. The change was not just a change of administration or change in officeholders, it was the first time that one party, the Republicans, took control over the two political branches of the government, the Presidency and the Congress⁹⁰, while the other party, the Federalists, controlled the judiciary. President Adams was convinced that Judiciary Act of 1801 was his last chance, before leaving the office, to have a Federalists' presence in the Republicans' administration. Thus, when Marbury filed the action in the Supreme Court, the matter appeared to the Republicans as a purely partisan measure.⁹¹

⁸⁸ D. Alfange, Jr., "Marbury v. Madison and Original Understandings of Judicial Review: In Defense of Traditional Wisdom" *The Supreme Court Review* 329 (1993) at 349.

⁸⁹ See generally R. G. McCloskey, *The American Supreme Court* (2nd ed.) (1994) at 4-5; R. J. McKeever, *The United States Supreme Court: A Political and Legal Analysis* (1997) at 47-66

⁹⁰ P. W. Kahn, *The Reign of Law: Marbury v. Madison and the Constitution of America* (1997) at 10

⁹¹ J. M. O'Fallon, "Marbury" 44 *Stan. L. Rev.* 219 (1992) at 219-220

It has been argued that it is misleading to locate *Marbury v. Madison's* brilliance in the assertion of a political strategy that accomplished its end of empowering the Court while avoiding any command to the executive.⁹² To consider judicial review as a political power and *Marbury v. Madison* as a successful seizure of this power by the Court, and to see Justice Marshall as a political actor competing with other political actors, is also misleading.⁹³ Instead, the significance of the case, it has been argued, lies in the distinction of law from political action.⁹⁴ In Kahn's words, *Marbury v. Madison* is not a step "toward the political empowerment of the Court but the displacement of political action by the rule of law."⁹⁵ Nevertheless, considering the case out of its political context is also misleading. The political tension was the catalyst of *Marbury v. Madison*. Jefferson's refusal to deliver the commission to Justices of the Peace cannot be understood as anything but a political action. The Supreme Court's acceptance of the case and order to Secretary of State Madison to show the reasons had been seen from a political point of view. Well before *Marbury v. Madison*, federal law and federal courts were viewed by Jefferson and the Republicans generally as the expression of a partisan lawlessness.⁹⁶ Thus, *Marbury v. Madison* gave both parties the chance to hit each other politically.

⁹² *Ibid.*; R. G. McCloskey, *The American Supreme Court* (1960) at 40

⁹³ C. L. Eisgruber, "John Marshall's Judicial Rhetoric" *The Supreme Court Review* 439 (1996) at 440

⁹⁴ P. W. Kahn, *The Reign of Law: Marbury v. Madison and the Constitution of America* (1997) at 10-11

⁹⁵ *Ibid.* at 16

⁹⁶ *Ibid.* at 13

The Supreme Court in this case used a brilliant strategy using law and politics equally in reaching its decision. As noted earlier, the Supreme Court did not grant Marbury the writ of mandamus on the basis that it lacked jurisdiction. That does not seem as a political choice; however, the choice of the Judiciary Act of 1789 was. Why did the Supreme Court choose that law? First, the Supreme Court chose this law, as it was not of essential interest to the Republicans. The Republicans were, on the contrary, more than pleased to see more limits on the “federal” court.⁹⁷ Second, it might be thought that its invalidation as a denial by the Court of its own authority. It was argued that Chief Justice Marshall took advantage of political circumstances to deflect attacks upon the Supreme Court and to secure useful precedents. In *Marbury v. Madison*, it was argued that John Marshall worked his argument for judicial review with an effective manoeuvre. He exercised judicial review to strike down a law that would have increased the judicial power and thus enabled the Federalist judiciary to protect a Federalist appointee.⁹⁸ In other words, the Chief Justice John Marshall tamed the Republicans’ reaction by invalidating a law that would help advancing the Federalists’ powers.

Although it might be thought that that law's invalidation was a denial of the Supreme Court's own power, and thus it could not be considered as a politically intelligent choice, it was not, because Section 13 was only held

⁹⁷ D. Alfange, Jr. "Marbury v. Madison And Original Understanding of Judicial Review: In Defense of Traditional Wisdom" *The Supreme Court Review* 329 (1993) at 368

⁹⁸ C. L. Eisgruber, "John Marshall's Judicial Rhetoric" *The Supreme Court Review* 439 (1996) at 446

unconstitutional as applied in this case.⁹⁹ Therefore, the Court retained full power under the law to issue writs of mandamus whenever it found it proper to do so in a case within the scope of its constitutional jurisdiction.¹⁰⁰ But the greater achievement of the Supreme Court, in this case, was that it seized the opportunity to declare an act of Congress unconstitutional. Therefore, it is no wonder that many consider the *Marbury v. Madison* opinion as "a masterpiece of political strategy".¹⁰¹

4.2 In The International Court Of Justice

Controversies and question marks have always surrounded the indication of provisional measures of protection in cases before the International Court of Justice. Both the Permanent Court of International Justice and the International Court of Justice have had to face the problem of provisional measures of protection in their case law. The power to indicate provisional measures of protection is contained in Article 41¹⁰² of the Court's Statute, which provides:

1. The Court shall have the power to indicate, *if it considers that circumstances so require*, any provisional measures, which ought to be taken to *preserve the respective rights* of either party.
2. Pending the final decision, notice of the measures suggested shall forthwith be given to the parties and to the Security Council. (Emphasis added)

⁹⁹ D. Alfange, Jr. "Marbury v. Madison And Original Understanding of Judicial Review: In Defense of Traditional Wisdom" *The Supreme Court Review* 329 (1993) at 368

¹⁰⁰ *Ibid.*

¹⁰¹ *Ibid.*

¹⁰² Article 41 is substantially the same as Article 41 of the Permanent Court of International Justice Statute with minor differences. The reference to the Council of the League of Nations changed to the United Nations Security Council. The word "reserve" in the English text changed to "preserve". See B. H. Oxman, "Jurisdiction and The Power to Indicate Provisional Measures" 323 at 324 in L.F. Damrosch (ed.), *The International Court of Justice At A Crossroad* (1987)

Article 41 is notoriously ambiguous.¹⁰³ It leaves questions concerning the scope and the basis for the indication of provisional measures unanswered; it opens the door for wide interpretations of these concerns.¹⁰⁴ Although the Rules of the Court have answered certain problems concerning provisional measures¹⁰⁵, the case-law of the Court is still the only way to understand the basis and scope of Article 41.¹⁰⁶

Provisional measures of protection are designed to deal with those situations where waiting for the International Court to render its final judgment may cost either party to the dispute irreparable damage. The criteria most often used to indicate provisional measures are the existence of the factors of urgency and irreparable damages. The jurisprudence of the Court has supported these factors to indicate provisional measures of protection. In the *Interhandel case*¹⁰⁷, the International Court denied a Swiss application for provisional measures against the United States on the grounds that the situation was not urgent and the US Federal Court proceedings would reach a “speedy conclusion”.¹⁰⁸ However, if

¹⁰³ However, the International Court of Justice, recently, established that orders on provisional measures have binding character. See *LaGrand Case (Germany v. the United States)* <<http://www.icj-cij.org/icjwww/idocket/igus/igusframe.htm>> at paras. 102, 103

¹⁰⁴ J.G. Merrills, “Interim Measures of Protection in the Recent Jurisprudence of the International Court of Justice” 44 *ICLQ* 90 (1995) at 90

¹⁰⁵ Articles 73-78 of the 1978 Rules deal with provisional measures procedure: the timing of the filing of a request for provisional measures, priority of consideration of provisional measures requests, the authority of the President of the Court pending the convening of the Court, the authority of the Court to act *proprio motu*, and modification or revocation of provisional measures.

¹⁰⁶ *Ibid.*, see also J. Sztucki, *Interim Measures in the Hague Court* (1983) at 231; B. H. Oxman, “Jurisdiction and The Power to Indicate Provisional Measures” 323 at 323 in L.F. Damrosch (ed.), *The International Court of Justice At A Crossroad* (1987)

¹⁰⁷ *Interhandel Case (Switzerland v. United States)* 1957 *ICJ Rep.* 105 (Interim Measures Order of Oct. 24th)

¹⁰⁸ *Ibid.* at 112

the damage is not irreparable, the dispute can be settled by a final award of compensation or money damages, as an adequate protection of any rights prejudiced.¹⁰⁹ In the *Sino-Belgian Treaty case*, the President of the Court noted that the possible damage by China's unilateral denunciation of the treaty in issue "could not be made good simply by the payment of indemnity or by compensation or restitution in some other material form."¹¹⁰

The criteria of granting provisional measures of protection further include rather an important factor, that of the Court's jurisdiction. The Permanent Court of International Justice did not face objections against its jurisdiction; the International Court of Justice, on the contrary, often has to deal with the respondents' objections against the Court's jurisdiction to adjudicate the claim. The question that manifests itself here is: what is the relationship between Article 41 and the substantive jurisdiction? Sztucki sees the answer to this question as primarily one of jurisprudential policy. He argues that: "[i]ts solution much depends on the underlying legal philosophy and tradition as confronted with extra-legal realities."¹¹¹ The International Court of Justice, since the *Anglo-Iranian Oil Case*¹¹², has adopted criteria on the relationship between Article 41 and the substantive jurisdiction.¹¹³

¹⁰⁹ *Aegean Sea Continental Shelf Case* (Greece v. Turkey) 1976 ICJ Rep. 3 (Interim Measures order of Sept. 11th) at 16

¹¹⁰ *Sino-Belgian Treaty* (Belgium v. China), 1927 PCIJ Ser. A, No. 8, at 6,7 (Provisional Measures Order of Jan. 8th)

¹¹¹ J. Sztucki, *Interim Measures in the Hague Court* (1983) at 231

¹¹² *Anglo-Iranian Oil Co.* (United Kingdom v. Iran), 1951 ICJ Rep. 89

¹¹³ J. Sztucki, *Interim Measures in the Hague Court* (1983) at 251

In this case, Britain challenged Iran's plan to nationalise the British-owned Anglo-Iranian Oil Company Ltd. Invoking both States' declarations under Article 36 (2) as a basis for the Court's jurisdiction, Britain requested the Court to indicate provisional measures to forestall the nationalisation pending the final judgment. The Iranian government contested the jurisdiction of the Court. In its reply to the notification of the British request, the Iranian Foreign Minister stated that: "the Iranian Government hopes that the Court will declare that the case is not within its jurisdiction because of the legal incompetence of the complainant and because of the fact that exercise of the right of sovereignty is not subject to complaint. Under these circumstances, the request for interim measures of protection would be naturally be rejected."¹¹⁴ The Court indicated extensive provisional measures to the extent that "no measure of any kind should be taken designed to hinder the carrying on of the industrial and commercial operations of' the company and that "the Company's operations in Iran should continue under the direction of its management as it was constituted prior to May 1st, 1951".¹¹⁵

Iran subsequently filed a formal preliminary objection to the jurisdiction of the Court. In a judgment of 22 June 1952 the Court, by nine votes to five, found itself without jurisdiction in the case. The *Anglo-Iranian Oil Co.* was the only instance that the Court formally declared that it lacked jurisdiction after indicating extensive provisional measures of protection. The Court stated that the order on

¹¹⁴ *Ibid.*

¹¹⁵ *Ibid.* at 93

provisional measures “ceases to be operative upon the delivery of this judgment”.¹¹⁶

The International Court of Justice has subsequently followed certain rules of conduct. The Court may only indicate provisional measures if it is able to hold, even provisionally, that it will be competent to entertain the case on the merits.¹¹⁷ The Court set itself a standard that has been repeated in many cases¹¹⁸, which it generally restates with a slight difference in wording with respect to the nature of the case: “on a request for provisional measures the Court need not, before indicating them, finally satisfy itself that it has jurisdiction on the merits of the case, yet it ought not to act under Article 41 of the Statute if the absence of jurisdiction on the merits is manifest”.¹¹⁹ In the *Passage Through The Great Belt case*¹²⁰ (Finland v. Denmark), Denmark raised an argument that, before provisional measures were indicated, Finland should substantiate the right it claimed to the point where a reasonable prospect of success on the merits existed. Finland maintained that Denmark’s demand required the Court to go into the

¹¹⁶ *Anglo-Iranian Oil Co. (Preliminary Objections)* 1952 *ICJ Rep.* 93

¹¹⁷ S. Rosenne, *The Law and Practice of the International Court 1920-1996* (1997) at 1444

¹¹⁸ See *Fisheries Jurisdiction Cases* (United Kingdom v. Iceland; Federal Republic of Germany v. Iceland) 1972 *ICJ Rep.* 12 (Provisional Measures order of Aug.17) at 15-16; *Nuclear Tests Cases* (Australia v. France, New Zealand v. France) 1973 *ICJ Rep.* 99, 106 (provisional measures) Order of Jun. 22) at 101; *United States Diplomatic and Consular Staff in Tehran* (United States v. Iran) 1979 *ICJ Rep.* 7 (Provisional Measures Order of Dec.15), at 13; *Military and Paramilitary Activities in and against Nicaragua* (Nicaragua v. United States of America) 1984 *ICJ Rep.* 169 (Provisional Measures Order of May 10), at 179-80; *Legality of Use of Force (Yugoslavia v. NATO Members)*, <<http://www.icj.law.gla.ac.uk/icjwww/idocket/iybe/iybeframe.htm>> (Provisional Measures Order of June 2), Para. 21

¹¹⁹ *Fisheries Jurisdiction Cases* (United Kingdom v. Iceland; Federal Republic of Germany v. Iceland) 1972 *ICJ Rep.* 12 (Provisional Measures order of Aug.17) at 15-16

¹²⁰ *Case Concerning Passage Through The Great Belt* (Finland v. Denmark) 1991 *ICJ Rep.* 12 (Provisional Measures Order of July 29th)

merits, and Finland's legal right of free passage could not be considered *prima facie* unfounded. However, as the International Court dealt with Denmark's objection very briefly, perhaps the Court recognised that Finland's request would be denied on other grounds. The Court noted that the existence of a right of Finland of passage through the Great Belt was not challenged, the dispute between the Parties being over its nature and extent, and concluded that such a disputed right may be protected by provisional measures if the circumstances so required.¹²¹

Judge Shahabuddeen thoroughly discussed Denmark's submission in his separate opinion. He pointed out that Denmark's argument could be summarised as, to justify a grant of interim measures, Finland was required, *inter alia*, to show a *prima facie* case as to the existence of the right sought to be preserved. In his view, Finland had indeed been obliged to demonstrate the existence of the specific right of passage claimed in respect of drill ships and oil rigs of over 65 metres' clearance height.¹²² Finland had established the existence of the rights sought to be protected.¹²³ In addition, Judge Shahabuddeen asserted that since the effect of provisional measures was to impose a temporary restraint, which will often affect the disputing parties unequally, it is reasonable to make an order only if the applicant can show some possibility of success on the merits.¹²⁴

As mentioned above, the Court did not discuss the Danish argument thoroughly, because there was another reason, a lack of urgency, for not granting

¹²¹ *Ibid.* at 17

¹²² *Ibid.* at 28 (Judge Shahabuddeen separate opinion)

¹²³ *Ibid.* at 36 (Judge Shahabuddeen separate opinion)

¹²⁴ *Ibid.* at 30-35 (Judge Shahabuddeen separate opinion)

the provisional measures to Finland.¹²⁵ However, Judge Shahabuddeen's separate opinion, with reference to the Court's conduct and the arguments of counsel in previous cases, reinforced the relevance between this factor and the proceedings under Article 41. The International Court of Justice's standard of setting the *prima facie* test for jurisdiction is thus well established.

In the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide Case*¹²⁶ [Bosnia and Herzegovina v. Yugoslavia (Serbia and Montenegro)], the Court further clarified its standard of *prima facie* jurisdiction over the merits:

“Whereas on a request for provisional measures the Court need not, before deciding whether or not to indicate them, finally satisfy itself that it has jurisdiction on the merits of the case, yet it ought not to indicate such measures unless the provisions invoked by the Applicant or found in the Statute appear, *prima facie*, to afford a basis on which the jurisdiction of the Court might be established; whereas this consideration embraces jurisdiction both *ratione personae* and *ratione materiae*, even though, inasmuch as almost all States are today parties to the Statute of the Court, it is in general only the latter which needs to be considered.”¹²⁷

With regard to this tendency in the International Court of Justice's practice to emphasise establishing a *prima facie* jurisdiction, as Szutcki anticipated and observed almost two decades ago:

¹²⁵ *Case Concerning Passage Through The Great Belt* (Finland v. Denmark) 1991 ICJ Rep. 12 at 17 (Provisional Measures Order of July 29th)

¹²⁶ *Application of the Convention on the prevention and punishment of the Crime of Genocide* (Bosnia and Herzegovina v. Yugoslavia (Serbia and Montenegro)) 1993 ICJ Rep. 3 at 12 (Provisional Measures Order of 8 April)

¹²⁷ *Ibid.* at 11

“...both by the [Court’s] practice and by slight but steady modifications in the same direction of the language used in the motives of its orders, it slowly but consistently glides towards the recognition of rather safe prospects of substantive jurisdiction as a necessary basis for its action under Article 41.”¹²⁸

A recent case showed that the Court is more and more dependent on the jurisdictional factor to grant or deny the provisional measures. The *Legality of Use of Force Cases*¹²⁹ (Yugoslavia v. certain NATO Members) were the first cases in the Court’s history in which the requests for provisional measures were denied on the ground of lack of *prima facie* jurisdiction.¹³⁰ Although the situation was an urgent case and the damage involved irreparable, the International Court of Justice denied the Yugoslav request on the basis of a lack of jurisdiction.¹³¹

Therefore, from the jurisprudence of the International Court of Justice, and its predecessor the Permanent Court of International Justice, one can say that the three factors that determine the granting of provisional measures of protection are urgency, irreparable damage, and the existence of the Court’s jurisdiction.

Looking back at *Lockerbie Cases*, perhaps the most interesting point that can be raised is whether any other factor can play a role in the Court’s decision whether or not to grant the request for provisional measures? To begin with, it is

¹²⁸ J. Sztucki, *Interim Measures in the Hague Court* (1983) at 251

¹²⁹ *Legality of Use of Force (Yugoslavia v. NATO Members)*

<<http://www.icj.law.gla.ac.uk/icjwww/idocket/iybe/iybeframe.htm>> (Provisional Measures Order of June 2nd) (1999)

¹³⁰ P.H.F. Bekker & C.J.Borgen, “World Court Rejects Yugoslav Requests to Enjoin Ten NATO Members From Bombing Yugoslavia” ASIL Insights (June 1999)

¹³¹ *Legality of Use of Force (Yugoslavia v. NATO Members)*

<<http://www.icj.law.gla.ac.uk/icjwww/idocket/iybe/iybeframe.htm>> (Provisional Measures Order of June 2nd) para. 37

necessary to determine whether the *Lockerbie Cases* fulfilled the three essential requirements.

Libya requested the International Court to indicate provisional measures of protection to enjoin the United States of America and the United Kingdom from imposing any sanctions or considering any use of force against Libya. The threat of jeopardising the sovereignty of Libya, through the resolutions of the Security Council in which the two respondents are permanent members, was seen by Libya¹³² as an element of urgency. The respondents rejected the Libyan claims of urgency. For the respondents, the Libyan government failed to prove that there were measures, including possible recourse to the use of armed force, contemplated by the respondents against it.¹³³ The respondents argued that Security Council Resolution 731(1992)¹³⁴ did not amount to coercive measures.¹³⁵

To establish the element of urgency, it is necessary to understand the nature of the Resolution 731. By this resolution, the Security Council urged Libya to respond to the requests made to establish responsibility for the terrorist acts in question. The terms of this resolution are important: terrorism was condemned and Libya was *requested* to co-operate. The Security Council *urged* all States to provide assistance in order to induce the Libyan authorities to respond to the

¹³² *Lockerbie Cases* 1992 ICJ Rep. 3 at 10; See also J.G. Merrills "Interim Measures of Protection in the Recent Jurisprudence of the International Court of Justice" 44 *ICLQ* 90 (1995) at 111; M. David, "Passport to Justice: Internationalizing the Political Question Doctrine for Application in the World Court" 40:1 *Harv. J. Int'l L.* 81 (1999) at 136

¹³³ *Lockerbie Cases* 1992 ICJ Rep. 3 at 11

¹³⁴ The disputants discussed the Security Council Resolution 731 at length before the International Court of Justice. Libya asked the Court for provisional measures after the adoption of that resolution.

¹³⁵ *Lockerbie Cases* 1992 ICJ Rep. 3 at 12

request for co-operation made by the United States and the United Kingdom.¹³⁶

The Security Council requested but did not require, so the terminology used did not make the resolution mandatory. Furthermore, the resolution cannot amount to Chapter VII wording. It lacked an Article 39 determination; that of the existence of a threat to peace or a breach of the peace and international security.¹³⁷

Accordingly, the situation did not fulfil the factor of urgency, which is essential for the Court to establish in order to indicate provisional measures of protection.

However, Judge Bedjaoui, in his dissenting opinion, saw the resolution differently, that although the Security Council resolution 731 was adopted under Chapter VI¹³⁸, the element of urgency was still there. He stated that:

“As regards the question of urgency, which is another element the case-law of the Court traditionally takes into account in deciding whether or not to indicate provisional measures, it is abundantly clear that this urgency does exist in the case in point. Libya is asked to reply "immediately", or "without any further delay" to the requests of the two Respondent States, particularly as regards the extradition of its nationals.”¹³⁹

Judge Ajibola argued that the urgency in this case was without doubt. He indicated that new developments during the proceedings [the adoption of Security

¹³⁶ SC Res. 731 UN SCOR (1992)

¹³⁷ *Ibid.* The Security Council did not make any reference to Chapter VII in this resolution.

¹³⁸ 1992 *ICJ Rep.*3 (Judge Bedjaoui dissenting opinion) at 41-42; (Judge Weeramantry dissenting opinion) at 53-55

¹³⁹ *Ibid.* at 39 (Judge Bedjaoui dissenting opinion)

Council Resolution 748 (1992)] made it more obvious that the Court had to take an immediate action and “to give Libya’s request the priority that it deserves...”¹⁴⁰

On the other hand, Judge *ad hoc* El-Kosheri showed that the language of the resolution 731(1992) gave the impression that the resolution was adopted under Chapter VII rather than under Chapter VI. He considered that:

“The text of the resolution itself, as well as the interventions of those who participated in the debates, clearly indicates unanimous, general and deep concern at the "worldwide persistence of acts of international terrorism in all its forms", particularly "illegal activities directed against international civil aviation", and the Security Council's determination "to eliminate international terrorism". Specifically, with regard to the attacks carried out against Pan Am flight 103 and UTA flight 772, the Council expresses a deep concern "over results of investigations, which implicate officials of the Libyan Government", and after strongly deploring "the fact that the Libyan Government has not yet responded effectively to the above requests [of France, the United Kingdom and the United States of America] to co-operate fully in establishing responsibility for the terrorist acts" in question, the Council, in a key paragraph:

‘3. Urges the Libyan Government immediately to provide a full and effective response to those requests so as to contribute to the elimination of international terrorism.’ ”¹⁴¹

Judge El-Kosheri indicated that beside the fact that the resolution 731 was adopted under Chapter VII, the adoption of resolution 748 made the situation extremely urgent. He maintained that the circumstances of this case required the indication of provisional measures, and the Court had “to act to avoid the coming

¹⁴⁰ *Ibid.* at 82 (Judge Ajibola dissenting opinion)

¹⁴¹ *Ibid.* at 97 (Judge *ad hoc* El-Kosheri dissenting opinion)

into force of the sanctions adopted by the Security Council under certain paragraphs of resolution 748 (1992), a decision taken by the Security Council in the exercise of its powers under Chapter VII, hence outside the scope of the legal issue pending before the Court.”¹⁴² One commentator noted that:

“[I]n the *Lockerbie cases* it might have been possible to demonstrate the necessary element of urgency was present . . . , but when the Court rejected the request on the basis of Article 103 of the Charter, this point became irrelevant.”¹⁴³

Therefore, we can safely say that there was an element of urgency, but the International Court of Justice did not recognise this, perhaps because it knew that it would refuse the Libyan request on the basis of Article 103 of the United Nations Charter.

The International Court of Justice has often used, as mentioned above, the irreparable damage factor to determine the indication of provisional measures of protection. Did the *Lockerbie Cases* fulfil that factor?

The risk of irreparable damage constitutes an important part of the criteria to determine the indication of provisional measures of protection. The respondents argued against the existence of any risk or possibility of irreparable prejudice to Libya’s rights.¹⁴⁴ The United Kingdom argued further that since the parties were

¹⁴² *Ibid.* at 110

¹⁴³ J.G. Merrills “Interim Measures of Protection in the Recent Jurisprudence of the International Court of Justice” 44 *ICLQ* 90 (1995) at 111

¹⁴⁴ 1992 *ICJ Rep.* 3 at 11

already under an obligation to avoid any irreparable prejudice to the potential judgment of the Court and to irreparable harm to the rights claimed, the indication of provisional measures of protection was unnecessary.¹⁴⁵

The dissenting judges, on the other hand, gave clearer arguments. They made a differentiation between irreparable harm or irreparable prejudice and the possibility or the risk of irreparable harm or prejudice, which they claimed it was the case in the *Lockerbie Cases*. Judges Bedjaoui¹⁴⁶, Ranjeva¹⁴⁷, Ajibola¹⁴⁸ and El-Kosheri¹⁴⁹ pointed out to the fact that the Libya's request could have been successful had not the Security Council acted.

Their argument was that if Libya was forced to surrender the two suspects, it would lose its rights under the Montreal Convention to try them, and there was a risk that Libya would be subject to force or coercion by the respondents. All the dissenting judges agreed that the Security Council's action changed the situation completely. Resolution 748 had its binding effects that prevailed over any other conventional obligations by virtue of Article 103 of the United Nations Charter. In other words, it was argued that if the Court had not had to reject the request for provisional measures on the basis of Article 103 of the United Nations Charter, it

¹⁴⁵ *Ibid.*

¹⁴⁶ *Ibid.* at 39

¹⁴⁷ *Ibid.* at 73

¹⁴⁸ *Ibid.* at 84-85

¹⁴⁹ *Ibid.* at 109

could have decided that the respondents were likely to take action against Libya to coerce it to surrender the suspects, and granted Libya the requested provisional measures.¹⁵⁰

So far, it can be said that the *Lockerbie Cases* fulfilled two criteria that were set out under Article 41 of the Statute. However, it is already known that the establishment of a *prima facie* jurisdiction over the merits is another factor in determining the indication of provisional measures of protection.

The International Court had to face the question of jurisdiction in the *Lockerbie Cases*. Libya argued that the International Court of Justice had jurisdiction on the basis of Article 14 (1) of the Montreal Convention. Article 14 (1) provides that in case of disputes between the contracting parties, concerning the application and the interpretation of the convention, which could not be settled by negotiations, the matter should be referred to the Court. Libya claimed that this provision *prima facie* established a basis for the Court's jurisdiction. However, the respondents contested the Court's jurisdiction. The United States and the United Kingdom maintained that the six-month period for negotiation and arbitration prescribed in this provision had not then elapsed for the dispute be referred to the International Court of Justice, and that Libya had failed to demonstrate that the two respondents had refused to arbitrate.¹⁵¹ The Court did not make any finding concerning its jurisdiction on the ground that the request could be refused on the basis of Article 103 of the United Nations Charter. However, the matter of jurisdiction was fully discussed by judges in their individual opinions.

¹⁵⁰ 1992 *ICJ Rep.* 3 at 31 (Judge Bedjaoui dissenting opinion)

All five dissenting judges shared the opinion that the Article 14 (1) provided a possible basis for jurisdiction.¹⁵² Similarly, Judge Oda, in his declaration, indicated that there was no convincing ground for asserting that the Court's jurisdiction was lacking.¹⁵³ On the other hand, Judge Ni held that the Court's jurisdiction was lacking.¹⁵⁴ It is quite significant that six judges out of seven who examined the issue saw no jurisdictional objection to indicate the requested provisional measures. More interestingly, the objections of the respondents appeared to be of a type that the Court has not usually treated as defeating a finding of *prima facie* jurisdiction. Judge Oda pointed out that:

“[t]he Respondent asked that the Court should decline to indicate provisional measures on the ground that the Court lacked jurisdiction...since the requirements of Article 14 paragraph 1, of the Montreal Convention had not been fulfilled... through the Court's jurisprudence it is established that, if the Court appears *prima facie* to possess jurisdiction, it may...indicate provisional measures, and this rule has always been interpreted most generously in favor of the applicant...The possibility of indicating provisional measures may be denied *in limine* only in a case where the lack of jurisdiction is so obvious as to require no further examination of the existence of jurisdiction in a later phase.”¹⁵⁵

¹⁵¹ 1992 *ICJ Rep.* 3 at 10

¹⁵² 1992 *ICJ Rep.* 3 (Judge Bedjaoui dissenting Opinion) at 35-37; *Ibid.* (Judge Ranjeva dissenting Opinion) at 74-76; *Ibid.* (Judge Ajibola dissenting Opinion) at 80, 82-84; *Ibid.* (Judge El-Koshi dissenting Opinion) at 107-108

¹⁵³ *Ibid.* at 18-19 (Judge Oda Declaration.)

¹⁵⁴ *Ibid.* at 22-23 (Judge Ni Declaration)

¹⁵⁵ See *Ibid.* at 19 (Judge Oda Declaration)

It should be remembered that the Court's power to indicate provisional measures is always discretionary.¹⁵⁶ However, it was suggested that had not there been the Security Council resolution 748(1992), the Court might have found *prima facie* jurisdiction sufficient to indicate the provisional measures requested.¹⁵⁷

Libya's request for provisional measures of protection did, to a certain extent, fulfil the three elements of the criteria to indicate provisional measures. Urgency was seen in the risk that the United States and the United Kingdom might use force against Libya. The element of irreparable damage lay the risk that Libya would lose its rights under Montreal Convention. In addition, the ground for *prima facie* jurisdiction was founded on the basis of Article 14(1) of the Montreal Convention. However, these elements were outweighed by the fact that the Security Council had acted and eliminated the rights that Libya could enjoy under the Montreal Convention. Are there any other factors or elements that the International Court should consider before indicating provisional measures of protection?

It is not unusual to have the International Court of Justice and the Security Council simultaneously dealing with the same dispute. The Court can sometimes

¹⁵⁶ J. Sztucki, *Interim Measures in the Hague Court* (1983) at 111

¹⁵⁷ See for example, S. Bortz, "Avoiding a Collision of Competence: the Relationship between the Security Council and the International Court of Justice in Light of *Libya v. United States*" 2 *J. Transnat'l. L. & Pol.* 353 (1993) at 375; M. David, "Passport to Justice: Internationalizing the Political Question Doctrine for Application in the World Court" 40:1 *Harv. J. Int'l L.* 81 (1999) at 103-104; K. H. Kaikobad, "The Court, the Council and Interim Protection: A Commentary on the *Lockerbie* Order of 14 April 1992" 17 *Aust. Y. Int'l. L.* 87 (1996) at 154-155; J.G. Merrills "Interim Measures of Protection in the Recent Jurisprudence of the International Court of Justice" 44 *ICLQ* 90 (1995) at 95

be faced with a situation in which one party is seeking a judicial solution but the other is referring the matter to the other UN organ.¹⁵⁸ Whenever different procedures are being pursued simultaneously, the Court has obviously to deal with the questions of jurisdiction and admissibility.

The Court has to answer these questions before it can proceed to the merits. If the Court has to deal with a request for provisional measures of protection, the relationship between legal and political means of settlement may also present issues under Article 41 of the Statute.¹⁵⁹

The case law of the International Court of Justice shows that there is no objection to refer a case to the Court while another UN organ, in particular the Security Council, is already seized the issue. But the question here is whether the simultaneous seizure of the case would affect the Court's decision to indicate provisional measures?

In the *Aegean Sea Continental Shelf Case*¹⁶⁰, the International Court of Justice cited Security Council resolution 395 (1976) of 25 August 1976 as a part of its justification for denying the Greek government's request for provisional measures.¹⁶¹ On the other hand, the Court did unanimously grant the United States' request for provisional measures in the *United States Diplomatic and*

¹⁵⁸ See the discussion below Chapter III on the doctrine of litispendency at 180-185

¹⁵⁹ *Ibid.* at 125

¹⁶⁰ *Aegean Sea Continental Shelf Case* (Greece v. Turkey) 1976 ICJ Rep. 3 (Provisional Measures Order of Sept. 11th)

¹⁶¹ *Ibid.* at 11

*Consular Staff in Tehran Case*¹⁶², although the Security Council had already entertained the case, and passed a resolution on the matter. In its judgment on the merits, the Court, after noting that: “there can be no doubt at all that the Security Council was ‘actively seized of the matter’...when...the Court decided unanimously that it was competent to entertain the United States’ request for provisional measures, and proceeded to indicate such measures,” stated that: “whereas Article 12 of the Charter expressly forbids the General Assembly to make any recommendation with regard to a dispute or situation while the Security Council is exercising its function in respect of that dispute or situation, no such restriction is placed on the functioning of the Court by any provision of either the Charter or the Statute of the Court.”¹⁶³ That implies that the Court does not count the role of the political organs as a part of the criteria for indicating provisional measures, or not.

The Court has again had to face the same questions in its recent jurisprudence. The relationship between the procedures that were instituted in the Security Council and before the Court was raised in the *Lockerbie Cases*. The respondents argued that the Court should not entertain and indicate the provisional measures because the Security Council was already seized of the dispute.¹⁶⁴ Furthermore, the United Kingdom contended that the requested provisional measures were designed to fetter the Security Council from exercising its proper

¹⁶² *United States Diplomatic and Consular Staff in Tehran* (United States v. Iran) 1979 ICJ Rep. 7 (Provisional Measures Order of Dec.15)

¹⁶³ *United States Diplomatic and Consular Staff in Tehran* (United States v. Iran) 1980 ICJ Rep.3 (Merits-Judgment of May 24th) at 21-22

¹⁶⁴ *Lockerbie Cases* 1992 ICJ Rep. 3 (Provisional Measures Order of May 14th) at 14

powers in combating international terrorism.¹⁶⁵ When the Security Council adopted resolution 748 under Chapter VII of the UN Charter, the situation totally changed. Article 25 of the UN Charter holds all the UN Member States responsible and bound to carry out Security Council decisions. On the other hand, Article 103 of the UN Charter stipulates that:

“In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.”

Therefore, the Court had to reject the Libyan request for provisional measures not on the ground that the Security Council had already dealt with the issue, but rather because of a conflict between the treaty obligations and Charter obligations. Had Libya placed its argument on its sovereign rights generally under international law or on *jus cogens* rules rather than upon treaty rights in the Montreal Convention, the International Court might have given a different order.¹⁶⁶ It has been argued that the UN Charter takes priority over any other treaty but not over *jus cogens* rules.¹⁶⁷ Judge Lauterpacht in the *Genocide case* made it clear that Article 103 does not extend to a conflict between the Security Council resolution and *jus cogens*.¹⁶⁸

¹⁶⁵ *Ibid.* at 11

¹⁶⁶ *Ibid.* at 20 (Declaration of Judge Oda)

¹⁶⁷ See the argument in Chapter III below

¹⁶⁸ *Application of the Convention on the prevention and punishment of the Crime of Genocide* (Bosnia and Herzegovina v. Yugoslavia (Serbia and Montenegro) 1993 ICJ Rep. 325 at 439 (Provisional Measures Order of 8 April))

The Court's decision not to grant Libya the provisional measures was based mainly on Article 103 of the Charter, on the conflict between the rights under the UN Charter and the rights under the Montreal Convention.

The Court has maintained on several occasions¹⁶⁹ that the involvement of the Security Council is not to be treated as a decisive consideration for refusing provisional measures.¹⁷⁰ However, the political organs' intervention could have some significant effects, especially when it could render provisional measures ineffective. What the Security Council did in the *Lockerbie Cases*, as several judges pointed out, was that it created a situation where Libya's rights under the Montreal Convention were no longer significant and capable of being protected by provisional measures.¹⁷¹

The practice of the International Court in dealing with requests for provisional measures suggests that the Court has a great deal of discretionary powers in indicating them and that it, sometimes, considers other factors, which are highly dependent on political appropriateness. Macdonald observed the reason behind the Court's rejection of Libya's request for provisional measures was that:

“[t]he rationale of the decision could have been either that an indication of the provisional measures requested would have had no effect or that the Court

¹⁶⁹ *Aegean Sea Continental Shelf Case* (Greece v. Turkey) 1976 *ICJ Rep.* 3 (Provisional Measures Order of Sept. 11th); *United States Diplomatic and Consular Staff in Tehran* (United States v. Iran) 1979 *ICJ Rep.* 7 (Provisional Measures Order of Dec. 15); Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United Kingdom) 1992 *ICJ Rep.* 3; Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United States of America) 1992 *ICJ Rep.* 113

¹⁷⁰ J.G. Merrills, “Interim Measures of Protection in the Recent Jurisprudence of the International Court of Justice” 44 *ICLQ* 90 (1995) at 132

¹⁷¹ *Lockerbie Cases* 1992 *ICJ Rep.* 3 (Judge Shahabuddeen separate opinion) at 28; (Judge Bedjaoui dissenting opinion) at 41; (Judge Ajibola dissenting Opinion) at 88

felt that it should avoid making a determination that would conflict with a binding resolution of the Security Council.”¹⁷²

The *Lockerbie Cases* fulfilled the essential conditions¹⁷³, but still provisional measures were not granted. The involvement of the Security Council in the case, especially resolution 748, played a significant role. It ruined Libya’s claim of rights under the Montreal Convention. Thus, the Court could have gone to the extreme and examined the Security Council’s resolution. As one commentator pointed out: “[o]nce the Security Council had taken action under Chapter VII, compliance with Libya’s requests could have been based only on a finding that Resolution 748 was unconstitutional.”¹⁷⁴ The International Court of Justice avoided getting itself into the position that it needed to review explicitly the Security Council’s actions by finding that it lacked jurisdiction, similar to the position the Supreme Court chose in *Marbury v. Madison*.

Moreover, the International Court of Justice, in the *Genocide Convention Case*, avoided Bosnia’s request to indicate, as part of provisional measures, that Security Council resolution 713¹⁷⁵ was *ultra vires*, by ruling that this aspect of the request lay outside its jurisdiction under the Genocide Convention.¹⁷⁶

¹⁷² R.St.J. Macdonald, “Changing Relations between the International Court of Justice and the Security Council of the United Nations” 31 *Can. YB. Int’l. L.* 3 (1993) at 21

¹⁷³ As it was established by some of the Court’s judges and some commentators, see above 109-114

¹⁷⁴ J.G. Merrills, “Interim Measures of Protection in the Recent Jurisprudence of the International Court of Justice” 44 *ICLQ* 90 (1995) at 131

¹⁷⁵ SC Res. 713 (1991) 25 Sept. 1991 Para.6 reads as follows:

“the Security Council...decides, under Chapter VII of the Charter of the United Nations, that all States shall, for the purposes of establishing peace and stability in Yugoslavia, immediately implement a general and complete embargo on all deliveries of weapons and military equipment to

Therefore, the International Court of Justice uses its discretionary powers to indicate provisional measures as a way of self-restraint or as a way to avoid possible confrontations with UN political organs.

5 Marbury v. Madison, Lockerbie Compared

The International Court of Justice in the *Lockerbie cases* faces the same dilemma that the US Supreme Court faced in *Marbury v. Madison* around two hundred years ago. The problem could be understood from the perspective of the two courses Justice Marshall had to deal with. Should the Court dismiss Libya's application, the Court would abrogate its powers to address a legal question concerning an interpretation of a treaty. Should the Court rule in Libya's favour, that would directly undermine the Security Council's authority, but at the same time it would undermine the Court's accountability and credibility if the decision was left without enforcement. The International Court of Justice, while discussing granting Libya's provisional measures request, chose neither course and instead decided that since there was no sufficient case of *ultra vires* and urgency, the Court could not establish the necessary grounds for granting Libya interim relief. In other words, the International Court of Justice examined and reviewed the Security Council resolutions, and after that it reached its decision. This, for many, appeared as an implicit assertion of the right of judicial review.¹⁷⁷ Thus, some

Yugoslavia until the Security Council decides otherwise following consultation between the Secretary-General and the Government of Yugoslavia;..”

¹⁷⁶ *Application of the Convention on the prevention and punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia (Serbia and Montenegro))* 1993 ICJ Rep. 3 (Provisional Measures Order of 8 April)

¹⁷⁷ M. Bedjaoui, *The New World Order and the Security Council: Testing the Legality of its Acts* (1994); T. Franck, "The 'Power of Appreciation': Who is the Ultimate Guardian of the United

scholars have referred to the *Lockerbie cases* as the *Marbury v. Madison* of the UN legal system.¹⁷⁸ Like the US Supreme Court in *Marbury v. Madison*, the International Court of Justice in the *Lockerbie Cases* could seize the power to determine whether any United Nations political organ acted *ultra vires*.¹⁷⁹ It is primarily for this reason that these two cases are often compared.¹⁸⁰ However, Thomas Franck saw another reason for the resemblance. In the words of Franck:

“[m]ost significant, however, as also in *Marbury v. Madison*, is what the Court left unsaid. As in *Marbury*, the Court superficially appears to accede to the broad discretionary power of the system’s political “branch.” But, as in *Marbury*, it accedes not by refusing to decide, but by exercising its power of decision.”¹⁸¹

Even though the International Court did not grant Libya the provisional measures requested, that did not mean that the Court abolished its right to decide.

Nations Legality?" 86 *AJIL* 519 (1992), T. Franck, "The Security Council and "Threats to the Peace" Some Remarks on Remarkable Developments" 83 at 107-110 in René-Jean Dupuy, *Development of the Role of the Security Council Colloque July 21-23, 1992* (1993); B. Graefrath, "Leave to the Court What Belongs to the Court- Libyan Case" 4 *EJIL* 184 (1993); E. McWhinney, "The International Court of Justice as Emerging Constitutional Court and the Co-ordinate UN Institutions (Especially the Security Council): Implications of the Aerial Incident at Lockerbie" 30 *Can. YB. Int'l. L.* 261 (1992); K. Roberts, "Second-Guessing the Security Council: the International Court of Justice and its powers of Judicial Review" 7 *Pace Int'l. L. Rev.* 281 (1995); B. Simma, "From Bilateralism to Community Interest" 250 *RDC* 229 (1994)

¹⁷⁸ M. David, "Passport to Justice: Internationalizing the Political Question Doctrine for Application in the World Court" 40:1 *Harv. J. Int'l L.* 81 (1999) at 91

¹⁷⁹ T. Franck, "The 'Powers of Appreciation': Who is the Ultimate Guardian of UN Legality?" 86 *AJIL* 519 (1992) at 520

¹⁸⁰ M. David, "Passport to Justice: Internationalizing the Political Question Doctrine for Application in the World Court" 40:1 *Harv. J. Int'l L.* 81 (1999) at 91; S. Evans, "the Lockerbie Incident cases: Libya-Sponsored Terrorism, Judicial Review and the Political Question Doctrine" 18 *MD. J. Int'l. L. & T.* 21 (1994) at 65-67; T. Franck, "The 'Powers of Appreciation': Who is the Ultimate Guardian of UN Legality?" 86 *AJIL* 519 (1992); M. J. Herdegen, "The 'Constitutionalization' of the UN Security System" 27 *Vand. J. Transnat'l. L.* 135 (1994) at 149; R. Kennedy, "Libya vs. United States: The International Court of Justice and the Powers of Judicial Review" 33 *Va. J. Int'l. L.* 899 (1993) at 915; G.R. Waston, "Constitutionalism, Judicial Review, and the World Court" 34 *Harv. Int'l. L. J.* 1 (1993)

The Court's decision not to grant Libya the provisional measures was based on the reasoning that Article 103 of the Charter overrides all rights Libya could have under Montreal Convention. According to Acting President Judge Oda, had Libya argued on more general principles, for example, had it argued on the ground that the Security Council resolution was not in conformity with its sovereign rights which it enjoys under general international law, the International Court of Justice would have granted Libya the provisional measures it requested.¹⁸² Judge Oda was of the opinion that the rejection of Libya's application had nothing to do with the adoption of the Security Council resolution 748 (1992). On the contrary, he stated:

“...[the] mismatch between the object of the Application and the rights sought to be protected ought...to have been the main reason for the Court to decline to indicate provisional measures. On that basis, the Court would have come to the same negative conclusion, even before 31 March 1992, the date on which the Security Council resolution 748 (1992) was adopted.”¹⁸³

More interesting are the legal issues suggested by some judges in their individual opinions. Judge Lachs, for example, insisted on the fact that since “the Court has the vocation of applying international law as a universal law, operating both within and outside the United Nations, it is bound to respect, as part of that law, the binding decisions of the Security Council”¹⁸⁴. Judge Lachs saw this

¹⁸¹ T. Franck, “The ‘Powers of Appreciation’: Who is the Ultimate Guardian of UN Legality?” 86 *AJIL* 519 (1992) at 521

¹⁸² 1992 *ICJ Rep.* 3 at 20 (Declaration of Acting President Judge Oda)

¹⁸³ *Ibid.*

¹⁸⁴ 1992 *ICJ Rep.* 3 at 27 (Judge Lachs separate opinion)

“respect”, however, “should not be seen as an abdication of the Court’s powers.”¹⁸⁵

On the other hand, Judge Shahabuddeen’s separate opinion, concurring in the majority’s result, showed clearly the Court’s “carefully crafted nonabdication”¹⁸⁶. Judge Shahabuddeen asked whether the authority of the Security Council is unlimited, and stated that:

“The 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 overriding results? If there are any limits, what are those limits and what body, if other than the Security Council, is competent to say what those limits are?”¹⁸⁷

The questions raised by Judge Shahabuddeen suggest that there should be limits on the Security Council’s decisions and acts. These limits cannot be left exclusively to the Security Council powers of interpretation. Judge Weeramantry, in his dissenting opinion, expressed the same views raised by Judge Shahabuddeen. He questioned: “does...the Security Council discharge[] its

¹⁸⁵ *Ibid.*

¹⁸⁶ T. Franck, “The ‘Powers of Appreciation’: Who is the Ultimate Guardian of UN Legality?” 86 *AJIL* 519 (1992) at 522

¹⁸⁷ 1992 *ICJ Rep.* 3 at 33 (Judge Shahabuddeen separate opinion)

variegated functions free of all limitations, or is there a circumscribing boundary of norms or principles within which its responsibilities are to be discharged?"¹⁸⁸

Therefore, *Marbury v. Madison* and the *Lockerbie cases* have shared characteristics. Most significant is the attitudes of the respective courts, or to put it in another context, how the courts were able to avoid direct conflict with the political branch, but at the same time, the US Supreme Court and the International Court of Justice were able to raise the issue of judicial review in these two cases. The United States Supreme Court in *Marbury v. Madison* was, however, able to raise the issue of judicial review and assert it aggressively.¹⁸⁹ The International Court of Justice in *Lockerbie Cases*, although the majority and dissenting opinions of the Court's judges insisted on the need for some limits on the powers of the Security Council, was able to raise the issue of judicial review without any serious assertion of this power.¹⁹⁰

6 The International Court of Justice and the US Supreme Court

The silence on the question of judicial review in both the United States Constitution and the United Nations Charter is the only feature that unites the United States Supreme Court and the International Court of Justice. Solely because of that, many scholars have seen in the US Supreme Court the most

¹⁸⁸ 1992 *ICJ Rep.* 3 at 62 (Judge Weeramantry dissenting opinion)

¹⁸⁹ K. L. Hall, *The Supreme Court and Judicial Review in American History* (1985) at 13

¹⁹⁰ W. M. Reisman, "The Constitutional Crisis in the United Nations" 87 *AJIL* 83 (1993) at 88-90

appropriate model to compare with the International Court of Justice.¹⁹¹

Nevertheless, others have argued that such a comparison is misplaced since each Court has its own special different characteristics.¹⁹² Each Court has its own procedure, peculiar forms for its judgments, and operates in its own system. In this section, the argument will be that it is difficult for the International Court of Justice to follow footsteps of the US Supreme Court in asserting its competence of judicial review. However, the focal point of this section will be that the International Court has an alternative path through which it could establish its power of judicial review.

To begin with, many scholars who have supported the comparison between the US Supreme Court and the International Court of Justice see their similarities lying in the ambiguity of the role they have to play.

Article III of the United States Constitution establishes that, “the judicial power of the United States shall be vested in one Supreme Court”, and roughly outlines its role in the government. The Supreme Court has the power over all cases, “arising under th[e] Constitution”, including controversies concerning the United States, separate states, citizens of separate states, and foreign powers. This is certainly ambiguous as the Supreme Court’s role in the government is left otherwise undefined.¹⁹³ Nothing said about the Court’s institutional role in the government,

¹⁹¹ T. Franck, “The ‘Powers of Appreciation’: Who is the Ultimate Guardian of UN Legality?” 86 *AJIL* 519 (1992), M. David, “Passport to Justice: Internationalizing the Political Question Doctrine for Application in the World Court” 40:1 *Harv. J. Int’l L.* 81 (1999)

¹⁹² J. E. Alvarez, “Judging the Security Council?” 90 *AJIL* 1 (1996) at 5

¹⁹³ US Constitution Article III § 2 stipulates: “The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;--to all Cases affecting Ambassadors, other public ministers and Consuls;--to all Cases of admiralty and maritime Jurisdiction;--to Controversies to

everything is left for interpretation. In *Marbury v. Madison*, the Supreme Court took the initiative and defined its role and position in the United States government.

Similarly, Chapter XIV of the United Nations Charter establishes the International Court of Justice “as the principal judicial organ of the United Nations”. The International Court of Justice has the power to decide disputes between States on questions concerning: a. the interpretation of a treaty; b. any question of international law; c. the existence of any fact which, if established, would constitute a breach of an international obligation; d. the nature or extent of the reparation to be made for the breach of an international obligation.¹⁹⁴

Moreover, the Court can give its advisory opinions to the United Nations organs and its specialised agencies on legal questions raised within their scope of activities and competence. It is certainly clear that the role of the International Court of Justice (like that of the other UN principal organs) is left open for wide interpretation. Unfortunately, the United Nations Charter says nothing about judicial review, neither to reject it nor to accept it in the United Nations system. However, the characteristics of each Court differ. One of the differences is that the International Court of Justice, unlike the US Supreme Court, cannot admit other organs of the United Nations as a party in contentious proceedings.¹⁹⁵ In other words, the International Court of Justice cannot make the Security Council, for

which the United States shall be a Party;--to Controversies between two or more States;--between a State and Citizens of another State;--between Citizens of different States;--between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.”

¹⁹⁴ Article 36 of the International Court of Justice Statute

¹⁹⁵ Article 34 of the International Court of Justice Statute

example, a party to a binding judgment. In addition, the Court relies on the Security Council for the enforcement of its decisions.¹⁹⁶ That difference makes it rather difficult for the International Court of Justice to follow the path of the US Supreme Court in asserting its power of judicial review, since the US Supreme Court has a jurisdiction over cases that involve other branches of the government and their officials.¹⁹⁷ It can be, however, argued that in *Marbury v. Madison*, Congress was not a party to the case and the Court ruled against the constitutionality of its act. However, the US Constitution does not restrain the Supreme Court from admitting the executive and legislative branches in its binding proceedings, as is the case in the ICJ Statute.¹⁹⁸

On the other hand, unlike the Supreme Court, which has no power of rendering advisory opinions¹⁹⁹, the International Court of Justice could have the chance to challenge the validity of UN action through advisory proceedings. The International Court of Justice can be requested by a counterpart UN organ to give an advisory opinion concerning the acts of another UN organ.²⁰⁰ However, such a request will not result in a binding decision. The enforcement and the

¹⁹⁶ Article 94 of the UN Charter

¹⁹⁷ US Constitution Article III § 2

¹⁹⁸ There is no prohibition in Article III § 2 of the US Constitution for the federal government to appear before the Supreme Court. See for example, *Dugan v. United States*, 16 U.S. 172 (1818). *United States v. San Jacinto Tin Co.*, 125 U.S. 273 (1888); *United States v. Beebe*, 127 U.S. 338 (1888); *United States v. Bell Telephone Co.*, 128 U.S. 315 (1888); *United Steelworkers v. United States*, 361 U.S. 39 (1960), *United States v. Raines*, 362 U.S. 17 (1960)

¹⁹⁹ Chief Justice John Jay and his associates declined a request of President Washington to tender him advice respecting legal issues growing out of United States neutrality between England and France in 1793. B. Schwartz, *A History of the Supreme Court* (1993) at 25

²⁰⁰ D. Akande, "The International Court of Justice And the Security Council: Is there Room for Judicial Control of Decision of the Political Organs of the United Nations?" 46 *ICLQ* 309 (1997) at 327

implementation of the International Court's opinions are left totally to the concerned organ, because of non-binding nature of the advisory opinion.

Therefore, these limits of the ICJ Statute, which rule out contentious cases against UN organs, or against any international organisation, and vest the Security Council with the responsibility for enforcement "make the judicial leap required to reach the legality of action by the [Security] Council all the greater."²⁰¹

Moreover, it is still unclear what the legal effects of the International Court of Justice's determinations would be if the Court established the fact that a certain act is illegal. That makes it more difficult for the ICJ to adopt the practice of the US Supreme Court. There is no clearly articulated theory of the legal effects of an ICJ decision that a certain organisational act is invalid. As Elihu Lauterpacht argued decades ago, international law has barely developed the law concerning the consequences of a determination of illegal action by an international organisation, whether it will be null and void, or whether it will just be illegal.²⁰² It is still unclear whether the International Court could determine that a UN organ's act is void with retroactive effect, void from the time of its decision, or just voidable at the option of the organisation.²⁰³ Since the chance of having an international organisation in contentious proceedings is impossible, and since the International

²⁰¹ J. E. Alvarez, "Judging the Security Council?" 90 *AJIL* 1 (1996) at 5

²⁰² E. Lauterpacht, "The Legal Effect of Illegal Acts of International Organisations" 88 in *Cambridge Essays in International Law in Honour of Lord MacNair* (1965); See above Chapter I for more discussion on the issue

²⁰³ E. Lauterpacht, "The Legal Effect of Illegal Acts of International Organisations" 88 in *Cambridge Essays in International Law in Honour of Lord MacNair* (1965); V. Gowlland-Debbas, "The Relationship Between the International Court of Justice and the Security Council in the Light of the Lockerbie case" 88 *AJIL* 643 (1994) at 669; D. Akande, "The International Court of Justice And the Security Council: Is there Room for Judicial Control of Decision of the Political Organs of the United Nations?" 46 *ICLQ* 309 (1997) at 327

Court of Justice relies on the Security Council for the enforcement of its judgments, the development of a clear theory of the legal effect of *ultra vires* acts by the Court is difficult. The International Court of Justice often avoids answering what the legal effects of illegal acts are, and it adopted “the presumption of validity” as a way of avoiding this kind of determination.²⁰⁴ In the *Certain Expenses opinion*, for example, the International Court of Justice stated clearly that the international organisations’ activities should have a presumption of validity. The International Court, in replying to the objections of certain Member States to the legality and validity of the acts, pointed out the fact that “when the international Organisation takes action which warrants the assertion that it was appropriate for the fulfilment of one of the stated purposes of the United Nations, the presumption is that such action is not *ultra vires* the Organisation.”²⁰⁵ The US Supreme Court has not adopted the same approach, it directly tackled the legal effects of illegal acts long ago. In *Marbury v. Madison*, Justice Marshall pointed out that an unconstitutional act is void.²⁰⁶ John Marshall, before he had been appointed as Chief Justice, insisted at the 1788 Virginia Ratifying Convention that: “[i]f Congress were to make a law not warranted by any of the powers enumerated, it would be considered by the judges as an infringement of the

²⁰⁴ E. Lauterpacht, “The Legal Effect of Illegal Acts of International Organisations” 88 at 111 in *Cambridge Essays in International Law in Honour of Lord MacNair* (1965)

²⁰⁵ *Certain Expenses of the United Nations* 1962 ICJ Rep. 151 at 168, See above for extensive discussion on the issue in Chapter I

²⁰⁶ *Marbury v. Madison* 5 U.S. (1 Cranch) 137; 2 L. Ed. 60 (1803)

Constitution which they are to guard...They would declare it void.”²⁰⁷ And he adopted the same approach in *Marbury v. Madison*.

Therefore, establishing judicial review as one of the competences of the International Court of Justice, adopting the US Supreme Court’s methods, could be misleading. At the very least, it requires significant changes and reforms to the Statute of the International Court of Justice to enable any international organisation to become as a party in contentious proceedings.

The amendment of Article 34²⁰⁸ of the ICJ Statute has attracted a good deal of debate. Many international law scholars and international law societies are and were calling for the amendment of Article 34 of the Statute to grant *ius standi* to international organisations before the International Court.²⁰⁹ The issue was up for debate in the fifty second session of the General Assembly in 1997 when two working papers were submitted for discussion in the Special Committee on the Charter of the United Nations and on the Strengthening of the Role of the

²⁰⁷ See K. L. Hall, *The Supreme Court and Judicial Review in American History* (1985) at 11

²⁰⁸ Article 34 of ICJ Statute reads as follows:

- “1. Only states may be parties in cases before the Court.
2. The Court, subject to and in conformity with its Rules, may request of public international organizations information relevant to cases before it, and shall receive such information presented by such organizations on their own initiative.
3. Whenever the construction of the constituent instrument of a public international organization or of an international convention adopted thereunder is in question in a case before the Court, the Registrar shall so notify the public international organization concerned and shall communicate to it copies of all the written proceedings.”

²⁰⁹ See J. Sztucki, "International Organisations as Parties to Contentious Proceedings Before The International Court of Justice?" 141 at 151-154 in A.S. Muller et al.(ed.), *The International Court of Justice at Fifty*, (1997)

Organisation.²¹⁰ The working papers asked for an amendment of Article 34 paragraph 1, but agreement was not achieved on that issue.²¹¹

Those arguing for this amendment claim that new developments in international society definitely require international organisations to become parties in contentious proceedings.²¹² They claim that the involvement of an international organisation in relations with the Member States or other international organisations necessitates the amendment of Article 34(1) to grant access to international organisations to the International Court of Justice in contentious proceedings.

Long ago, Jenks called for the amendment of Article 34 of the ICJ statute to grant international organisations access to the International Court of Justice's contentious jurisdiction.²¹³ Since the days of the Permanent Court of International Justice²¹⁴, there has been a persistent call for this amendment, but all those efforts were rejected on the basis that the amendment was unnecessary.²¹⁵ However, with the new developments in the scope of international organisations' activities, especially in the United Nations, the amendment of Article 34 appears to be rather

²¹⁰ 52 GAOR sup. 33(A/ 52/33)

²¹¹ S. Rosenne, *The Law and Practice of the International Court 1920-1996* (1997) at 1865

²¹² "[D]isputes relating to the law governing co-operation will tend to become more numerous. As a consequence of that development, such disputes will ever more frequently involve groups of states and International Organisations as well as States individually." See UN Doc. A/45/430 at 66 and UN Doc. A/49/ PV 29 at 5

²¹³ C. W. Jenks, *The Prospects of International Adjudication* (1964) at 220

²¹⁴ P.C. Szasz, "Granting International Organizations *Ius Standi* in the International Court of Justice" 169 at 169 in A.S. Muller et al.(ed.), *The International Court of Justice at Fifty*, (1997)

²¹⁵ For a comprehensive account of the attempts and proposals for the amendment of Article 34 of the Statute See J. Sztucki, "International Organisations as Parties to Contentious Proceedings

necessary as long as controversies between States and international organisations occur in practice.

Although international society has repeatedly called for the amendment of Article 34, nothing has been done so far.²¹⁶ There have been, and still are, doubts whether the strengthening or expanding of the International Court of Justice's jurisdiction to include international organisations as parties to its contentious proceedings would be the right choice. For many, having international organisations as parties to contentious proceedings before the International Court of Justice would open the doors for the question of judicial review. Getting international organisations to the stand as plaintiffs or as defendants would surely lead to the issue of reviewing the legality of international organisations' decisions or actions. Some scholars see the two questions are inseparable. Nonetheless, others see that the two issues are related but not inseparable.²¹⁷ Their argument is based on the fact that in the jurisprudence of the International Court of Justice there have been incidents of judicial review raised in advisory opinions, e.g. in the *Admission to the United Nations*, *Effects of Awards*, *UN Administrative Tribunal*, *IMCO*, *Certain Expenses*, and *Namibia* advisory opinions.²¹⁸

Therefore, the exclusion of international organisations from the International Court of Justice's contentious proceedings does not rule out the idea

Before The International Court of Justice?" 141 at 148 -160 in A.S. Muller et al.(ed.), *The International Court of Justice at Fifty* (1997)

²¹⁶ See J. Sztucki, "International Organisations as Parties to Contentious Proceedings Before The International Court of Justice?" 141 at 154 in A.S. Muller et al.(ed.), *The International Court of Justice at Fifty*, (1997)

²¹⁷ *Ibid.* at 158-159

²¹⁸ *Ibid.* at 154

of judicial review from the outset. On the contrary, that only means that the International Court of Justice should follow a different path from that of the United States Supreme Court to assert its right of judicial review. The International Court of Justice could invalidate a decision of a UN organ through its advisory opinion, as in the case of IMCO, but without any compulsory outcomes. In the IMCO case²¹⁹, the Court declared that an election was invalid. The Court did not see the measures as null but rather voidable. As Lauterpacht stated:

“It is evident...that if there had been no advisory opinion, the Organisation would have proceeded, on the basis that the election was valid and effective...In other words, the Assembly action is equally consistent with the view that until an opinion has been obtained and accepted, the allegedly unlawful act is effective. Thereafter, it would seem that the task of the Assembly is to give effect to the opinion as at the date when the opinion is accepted.”²²⁰

It is clear that if there had been no advisory opinion and no members had challenged the IMCO Committee election, the organisation would have proceeded on the basis that the election was valid. So, the Court’s findings are with certain importance, though they are noncompulsory in nature. In addition, the International Court of Justice does not have a direct jurisdictional connection with the Security Council or other UN organs, and is most unlikely to annul the

²¹⁹ Constitution of the Maritime Safety Committee of the Inter-Governmental Maritime Consultative Organization (1959-1960) 1960 *ICJ Rep.* 150 at 171

²²⁰ E. Lauterpacht, “The Legal Effect of Illegal Acts of International Organisations” 88 at 105 in *Cambridge Essays in International Law in Honour of Lord MacNair* (1965)

decision.²²¹ However, it is unlikely for the United Nations organs to continue maintaining a decision that the Court declares *ultra vires*. Akande pointed out: “[a]ny State seeking such a decision would probably be more interested in the public relations effect of the decision of the Court than in its legal effect.”²²² Thus, the importance of any Court finding that a political organ’s decision was illegal does not lie only in its legal effects, but rather in its effect on the legitimacy of the political organs’ decisions.²²³

Therefore, although the Court has not worked on developing the consequences of the legal effects of *ultra vires* decisions, in contrast to the US Supreme Court, whether they are null and void or just voidable, it still could review the decision, and its findings will be treated with respect; otherwise the concerned organ would lose its legitimacy.²²⁴ As Lauterpacht observed, noncompulsory machinery of judicial review could be a middle way between no review at all, and compulsory review.²²⁵

²²¹ *Ibid.* at 115

²²² *Ibid.*

²²³ D. Akande, “The International Court of Justice And the Security Council: Is there Room for Judicial Control of Decision of the Political Organs of the United Nations?” 46 *ICLQ* 309 (1997) at 327, see also below the discussion on legitimacy in Chapter V.

²²⁴ V. Gowlland-Debbas, “The Relationship Between the International Court of Justice and the Security Council in the Light of the Lockerbie case” 88 *AJIL* 643 (1994) at 673

²²⁵ E. Lauterpacht, “The Legal Effect of Illegal Acts of International Organisations” 88 at 113 in *Cambridge Essays in International Law in Honour of Lord MacNair* (1965)

7 Conclusion

The idea of a World Court was born of the success of the United States Supreme Court.²²⁶ The United States pushed hard to model the new World Court as the Supreme Court. The Americans had fought to have a strong and independent Court that would ensure the application of law and justice. The impetus for the World Court came from lawyers who wanted the United States to lead the quest for pacific settlement of international disputes.²²⁷ However, they were reluctant to have their nation join in boldly innovative schemes of world order involving potentially far reaching limitations on national sovereignty.²²⁸ The United States failed to participate in the birth of the World Court, the Permanent Court of Justice, because of the fear of the advisory function of the new Court. The Americans feared that such competence would threaten their national interests and sovereignty.²²⁹

The International Court and the United States Supreme Court continue to be considered similar. The American influence was so obvious in modelling the World Court. Nonetheless, the International Court has drifted away from the Supreme Court due to the peculiar characteristics of the international community. The international community was not ready to accept the idea that it should

²²⁶ D. F. Fleming, *The United States and The World Court* (1945) at 23

²²⁷ P. Jessup, *Elihu Root* (2nd ed.) (1964) at 423; M. Pomerance, *The United States and The World Court As A 'Supreme Court of the Nations': Dreams, Illusions and Disillusion* (1996) at 9-21

²²⁸ D. S. Patterson, "The United States and the Origins of the World Court", 91:2 *Political Science Quarterly* 279 (1976) at 295

²²⁹ *Ibid.*; For a summary account for the debate on the Court's advisory jurisdiction in the United States see M. Pomerance, *The United States and The World Court As A 'Supreme Court of the Nations': Dreams, Illusions and Disillusion* (1996) at 70-138

subordinate its own sovereignty to the Court. The idea of litigation was considered and is still considered as a threat to the sovereignty of the state. Therefore, the International Court's competence was shaped in a way that suits the international system.

In the *Lockerbie Cases*, the International Court of Justice faced the same dilemma as that that faced the United States Supreme Court in *Marbury v. Madison*. Both Courts chose to escape from being hostile to the "executive" or political branch, but at the same they did not abolish their judicial power. Both gave a decision with implicit indication of judicial review. They were able to assert their judicial powers without risking any institutional conflict.

To follow the path of the US Supreme Court, the Statute of International Court of Justice would require significant amendments. Accepting UN organs or any international organisation in the Court's contentious proceedings would be one of the necessary changes. Nevertheless, any change will not be an easy task. The UN members, especially the Security Council permanent members who are happy with the current situation, will vote against this amendment. They will not accept any changes; they will not change of the situation of "a strong Council and a weak Court".²³⁰

However, that does not rule out the issue of judicial review from the International Court of Justice's competence. The peculiarities of the International Court of Justice leave it with no choice but to find its own way to assert its right of judicial review. The International Court of Justice has often used its advisory

²³⁰ G. R. Waston, "Constitutionalism, Judicial Review, and the World Court" 34 *Harv. Int'l. L. J.* 1 (1993) at 40

opinions to discuss the validity of organisations' acts. Although such determinations have a noncompulsory character, and although the implementation of the Court's opinion depends on the will of the concerned organ, such opinions have usually an implemented authority. The non-compliance with the Court's opinion will cost the organ concerned its legitimacy.

But still, as Zimmern explained almost fifty years ago, "the transformation from the old-sovereign-ridden international law to become law for the peoples of the United Nations in the true sense and be recognised"²³¹ will take some time. Moreover, he claimed that there would come the time when the International Court of Justice would produce spokesmen that would do for it and for the world what John Marshall had done for the Supreme Court.²³² But the International Court of Justice should wait for the right timing, and should work on a careful interpretation for a document like the United Nations Charter, which is open for wide and contradictory interpretations.²³³

The discussion that has been advanced in the first two chapters on the applicability of judicial review to the United Nations system and on the best model that the International Court of Justice should follow to assert its competence of judicial review, presupposes that there are limits on the United Nations political organs, and presupposes that the International Court of Justice is the potential branch to see if the UN organs have respected these limits in their actions and decisions. The next chapter will discuss the limits, if there are any, on

²³¹ A. Zimmern, *The American Road to World Peace* (1953) at 264

²³² *Ibid.*

²³³ *Ibid.*

the powers on the UN political organs, the Security Council in particular. From that point, the discussion will explore the relationship between the International Court of Justice and the Security Council.

Chapter III:

Institutional Dilemma:

The Relationship between the International Court of Justice and the Security Council

1 Introduction

The *Lockerbie Cases*¹ opened the door for a surge of speculation on the relationship between the International Court of Justice and the Security Council. The facts of the case were discussed in the previous chapters. The most important and crucial part of the cases for the current purposes is the Court's order concerning the Libyan request for provisional measures. The Court did not grant Libya the provisional measures requested on the basis that the Security Council Resolution 748 (1992) had been adopted. By this binding resolution, Libya's rights under the Montreal Convention were overridden.

International law scholars divided into two schools of thought.² The first school allied itself with the Security Council. This school invoked the idea that the Security Council's decisions, adopted under Chapter VII, take supremacy over other international treaty obligations, by virtue of Article 103 of the United Nations Charter. Its decisions have a *prima facie* binding effect on the basis of

¹ Lockerbie Cases 1992 *ICJ Rep.* 3 and 114

Article 25 of the Charter. For this school, the Security Council's decisions are not subject to law. The Security Council has the sole authority to determine its actions.³ This school appears to believe that if the Security Council is in one way or another policing international relations and it is acting under the restraints of the urgency of the situation, so it cannot be bound by law since there are no legal rules to review the legality of a Chapter VII determination. The Security Council is a "law unto itself"; opportunistic flexibility is the key to its success.⁴ Thus, for this school, or as Alvarez called it the "realist"⁵ school, the Charter is a hierarchical collective security scheme with the Security Council at its apex. For this reason, whenever the Security Council and the International Court of Justice are seized of the same dispute and the Security Council acts under Chapter VII, the International Court of Justice should decline to continue entertaining the case.

On the other hand, the other school of thought, termed "judicial romantic"⁶ by Alvarez, considers that the International Court of Justice is not subordinate to the Security Council. For judicial romantics, the Court is the principal judicial organ of the United Nations and it considers only what is "judicial". The Court should not be involved in political controversies. The Court could entertain any dispute that is legal simultaneously with the Security Council, which will be

² J.E. Alvarez, "Theoretical Perspectives on Judicial Review By the World Court" 85 *ASIL Proceedings* 1995 at 85

³ D. Sarooshi, *The United Nations And the Development of Collective Security* (1999) at 3

⁴ T.D. Gill, "Limitations on UN Enforcement Powers" XXVI *NYIL* 33 (1995)

⁵ J.E. Alvarez, "Theoretical Perspectives on Judicial Review By the World Court" 85 *ASIL Proceedings* 1995 at 85

⁶ *Ibid.*

looking at the political aspects of the same dispute. The relationship between the two organs is of a “functional parallelism” character.⁷ However, the judicial romantics find in the Court the last resort defender of the United Nations system’s legitimacy.⁸ By virtue of this fact, the Court should have seized the opportunity in the *Lockerbie Cases* to rule on the constitutionality of the Security Council Resolution 748, as it is a court of international law and it is not concerned with any political facts surrounding the disputes.

The judicial romantics are of the idea that the Security Council, even if it is acting under Chapter VII, should take into account the principles and purposes of the Charter, and the rules of general international law and *jus cogens*. They have invoked the idea of strict control over the Security Council’s actions, and especially over its determinations under Article 39, by which the Security Council has broad discretionary powers to characterise or not to characterise the situation as threat to the peace, breach of the peace or act of aggression.

As this chapter will demonstrate, the two schools of thought are rather too extreme and to a certain extent unrealistic. To begin with the arguments advanced by the realist school, having the Security Council unbound by at least the principles and purposes of the United Nations Charter defies what the nature of the Charter would suggest. The UN Charter is a “constituent instrument” with limited and enumerated powers. The Security Council was created by the UN

⁷ V. Gowlland-Debbas “*The Relationship Between the International Court of Justice And the Security Council in the Light of the Lockerbie Case*” 88 *AJIL* 643 (1994) at 658- 661

⁸ T. M. Franck, “ ‘The powers of Appreciation’: Who is the Ultimate Guardian of UN Legality?” 86 *AJIL* 519 (1992)

Charter and it is under the obligation to observe the limitations on its delegated powers. Besides, it cannot be argued that the Security Council, acting under Chapter VII, could preclude the International Court of Justice from exercising its jurisdiction, if it happened that both organs were simultaneously seized of the same matter. It is an established fact that the UN system lacks hierarchy among its principal organs. Each organ has different assigned functions, the Court was given the function to deal with a “judicial” nature of the dispute while the Security Council was given the function to deal with the dispute’s “political” aspects. The International Court has often rejected the doctrine of *litispendency* in its relation with the Security Council.⁹

Nevertheless, that does not mean that the arguments forwarded by the judicial romantic school are fully persuasive. The judicial romantics have approached the relationship between the International Court of Justice and the Security Council from the perspective of the American Supreme Court, and its decision in *Marbury v. Madison*.¹⁰ However, we have argued in the previous chapter that the model of the Supreme Court should not be applied to the International Court of Justice, as it has its own peculiarities, such as its advisory competence, and the lack of *locus standi* for international organisations in its contentious competence.

The arguments that will be advanced in this chapter are, however, that the two schools of thought do not understand the scope of the relationship between

⁹ *Aegean Sea Continental Shelf Case* 1976 ICJ Rep. 3, *Hostages Case* 1980 ICJ Rep. 3, and *Nicaragua Case* 1984 ICJ Rep. 169

the International Court of Justice and the Security Council. This chapter will show that there should be a middle way between the two schools of thought. It is not acceptable to have an unleashed Security Council, unbound by the law of the United Nations Charter, or the rules of the general international law. An unaccountable Security Council will hinder the legitimacy of the United Nations as a whole. However, it is also unacceptable to go back to the days of the Cold War, where the Security Council was crippled by the East-West rift. It has been argued that too many constraints on the Security Council would hinder its efficiency in responding to disturbances of international peace and security. This chapter will argue that although the Security Council is the sole judge in its determinations under Article 39, it is bound to observe the law in its consequential measures taken under Chapter VII.¹¹

The point of departure for this chapter is to determine the nature of the UN Charter. It will be argued that the Charter is a treaty with special characteristics. It is more than a treaty but less than a constitution.¹² From that point, the discussion that follows will focus on the fact that since the UN Charter is a multilateral treaty, and the Security Council is the creation of this treaty, the Security Council should be bound by the rules of its “constituent instrument”.

After determining the competence of the International Court of Justice and the Security Council, the relationship between the two organs and the doctrine of

¹⁰ *Marbury v. Madison*, 5 U.S. 137 (Cranch) (1803)

¹¹ M.N. Shaw, “The Security Council and the International Court of Justice: Judicial Drift and Judicial Function” 219 at 227 in A.S. Muller et al., *The International Court of Justice*, (1997)

litispendency will be discussed. The aim of the last section is to show that the two organs have separate but complementary functions, and that the two organs need to co-operate, and rather than compete, in order to achieve legitimacy in the United Nations system.

2 The United Nations Charter: Treaty or Constitution?

Much discussion of judicial review presupposes the nature of the United Nations Charter as a constitution that defines the powers and competence of the relevant United Nations organs. One commentator pointed out:

“[t]he concern for the institutional balance within the United Nations and the quest for justiciable restraints upon the [Security] Council underlines a “constitutional” approach to the United Nations framework: the Charter is conceived as a kind of constitution for the community of states with the International Court of Justice as the ultimate guardian of its legality vis-à-vis the Council.”¹³

The issue of whether the United Nations Charter is a multilateral treaty or a constitution has been debated in the past¹⁴, and it has not yet been settled.

It is evident that the Charter was brought into existence in the form of an international treaty. The Charter establishes the functions and the obligations of not only the United Nations organs but also of other actors in international society. It sets the organisation’s obligations and rights in discharging its

¹² J. Crawford, “The Charter of the United Nations as a Constitution” 3 in H. Fox (ed.), *The Changing Constitution of The United Nations* (1997)

¹³ M. J. Herdegen, “The “Constitutionalization of the UN Security System” 27 *Vand. J. Trans. L.* 135 (1994) at 135

¹⁴ A. Ross, *Constitution of the United Nations: Analysis of Structure and Function* (1950)

mandate, in particular, with regard to the maintenance of international peace and security and the contributions of the United Nations to the development of the international protection of human rights, including the right of self-determination. The Charter establishes the sovereign rights of Member States including the rights of self-defence, but at the same time it defines the obligations arising against States which violate international law, and sets the collective obligations of Member States to help the United Nations and the international community in combating aggressor States.

It has been argued that the United Nations Charter has had a constitutional quality *ab initio*,¹⁵ and that quality in the last fifty years has been strengthened and confirmed.¹⁶ Tomuschat noted that:

“It has become obvious in recent years that the United Nations Charter is nothing else than the Constitution of the international community...Now that universality has been almost reached, it stands out as the paramount instrument of the international community, not to be compared to any other international agreement.”¹⁷

From that point of view, the question arises: to what extent does the United Nations Charter exhibit the characteristics of a constitution? There are main characteristics that the UN Charter should possess to be considered as a

¹⁵ B. Fassbender, “The United Nations Charter As Constitution of the International Community” 36 *Columbia Journal of Transnational Law* 529 (1998) at 531.

¹⁶ *Ibid.*

constitution as this concept is understood in the municipal legal framework. The constitution should correspond to the core elements of normativity, supremacy and the separation of powers.¹⁸

The concept of normativity poses the question whether the UN Charter provides a defined structure for the powers and functions for the United Nations which represents the international community. Besides, this concept is interrelated to the question whether the UN Charter does embody all the “substantial principles of paramount importance for the international community”¹⁹, that will provide sufficient guidance for international governance.

To begin with, it is a truism that the Charter defines the structure of the organisation and sets forth the competences of its organs and the duties of the Member States. Articles 1 and 2 of the Charter define the aims and principles of the organisation.²⁰ They deal with the maintenance of peace and security²¹, which

¹⁷ C. Tomuschat (ed.), *The United Nations at Age Fifty: A Legal Perspective* (1995) cited in P. M. Dupuy, “The Constitutional Dimension of the Charter of the United Nations Revisited” 1 at 2 in J. A. Frowein & R. Wolfrum, 1 *Max Planck Yearbook of United Nations Law* (1997)

¹⁸ B. Fassbender, “The United Nations Charter As Constitution of the International Community” 36 *Columbia Journal of Transnational Law* 529 (1998) at 531, E. De Wet, “Judicial Review as an Emerging General Principle of Law and Its Implications for the International Court of Justice” XLVII *NILR* 181 (2000) at 189; P. M. Dupuy, “The Constitutional Dimension of the Charter of the United Nations Revisited” 1 in J. A. Frowein & R. Wolfrum, 1 *Max Planck Yearbook of United Nations Law* (1997)

¹⁹ P. M. Dupuy, “The Constitutional Dimension of the Charter of the United Nations Revisited” 1 at 4 in J. A. Frowein & R. Wolfrum, 1 *Max Planck Yearbook of United Nations Law* (1997)

²⁰ P. M. Dupuy, “The Constitutional Dimension of the Charter of the United Nations Revisited” 1 at 5 in J. A. Frowein & R. Wolfrum, 1 *Max Planck Yearbook of United Nations Law* (1997); E. De Wet, “Judicial Review as an Emerging General Principle of Law and Its Implications for the International Court of Justice” XLVII *NILR* 181 (2000) at 190; B. Simma, “From Bilateralism to Community Interest in International Law”, 250 *RDC* 217 (1994-VI) at 261

²¹ Article 1 para. 1

goes along with the prohibition of the use of force²², the peaceful settlement of disputes²³, the principles of equal rights and self-determination of peoples²⁴, the principle of co-operation which extends to every field of international problems; in particular those concerned with an economic, social cultural or humanitarian character²⁵, the promotion of respect for human rights and for fundamental freedoms without any form of discrimination²⁶; and the respect of the sovereign equality of all States.²⁷

The Charter has been supplemented by *jus cogens*, which is defined in the Vienna Convention on the Law of Treaties as peremptory norms of general international law which are accepted by the international community of states as a whole, from which no derogation is permitted, and which can only be modified by a subsequent norm of general international law having the same character.²⁸

From this definition, it could be argued that the scope of the rules that these norms set is wider than those of the Charter.²⁹ However, there is a partial

²² Article 2 para.4

²³ Articles 1 para.1, 2 para.3, and Article 33

²⁴ Article 1 para.2

²⁵ Article 1 para.3

²⁶ Article 1 para.3

²⁷ Article 2 para.1

²⁸ Article 53 of the Vienna Convention on the Law of Treaties, see B. Fassbender, "The United Nations Charter As Constitution of the International Community" 36 *Columbia Journal of Transnational Law* 529 (1998) at 589

²⁹ B. Fassbender, "The United Nations Charter As Constitution of the International Community" 36 *Columbia Journal of Transnational Law* 529 (1998) at 531, 589

overlap between *jus cogens* and certain Charter norms.³⁰ In some cases, a principle may have developed as a peremptory norm because of its inclusion in the Charter, as the case of the prohibition of the use of force.³¹ In other cases, a norm could have existed as a peremptory norm before its enunciation in the Charter, such as the right of self-defence and the sovereign equality of states.³² In looking at the right of self-defence, the International Court of Justice, in the *Nicaragua case*, did not explicitly qualify that right as a peremptory norm before it stated that:

“...with regard to the existence of [the right of self-defence], [the Court] notes that in the language of Article 51 of the United Nations Charter, the inherent right which any state possesses in the event of an armed attack, covers both collective and individual self-defence. Thus, the Charter itself testifies to the existence of the right of collective self-defence in customary international law.”³³

The Court did not say whether the right of self-defence belongs to the category of *jus cogens*. However, one commentator pointed out that: “the ICJ

³⁰ B. Fassbender, “The United Nations Charter As Constitution of the International Community” 36 *Columbia Journal of Transnational Law* 529 (1998) at 531; E. De Wet, “Judicial Review as an Emerging General Principle of Law and Its Implications for the International Court of Justice” XLVII *NILR* 181 (2000) at 189; P. M. Dupuy, “The Constitutional Dimension of the Charter of the United Nations Revisited” 1 at 7 in J. A. Frowein & R. Wolfrum, 1 *Max Planck Yearbook of United Nations Law* (1997); E. De Wet, “Judicial Review as an Emerging General Principle of Law and Its Implications for the International Court of Justice” XLVII *NILR* 181 (2000) at 191

³¹ P. M. Dupuy, “The Constitutional Dimension of the Charter of the United Nations Revisited” 1 at 7-8 in J. A. Frowein & R. Wolfrum, 1 *Max Planck Yearbook of United Nations Law* (1997)

³² *Ibid.*

³³ *Military and Paramilitary Activities in and Against Nicaragua* (Nicaragua v. United States) merits, 1986 *ICJ Rep.* 95 at 102

insists on the “inherent” character of that right, an affirmation which suggests that this right could not be derogated by way of treaty.”³⁴

In other cases, a customary rule could become peremptory without being enunciated in the Charter, as it is the case in the domain of human rights such as the prohibition of slavery and genocide and apartheid.³⁵ The Charter does not contain all the norms and principles of general international law. However, one scholar has stated that:

“...even if it is true that the Charter cannot pretend to list explicitly each and every existing peremptory norm of modern international law, it remains evident that all of them benefit from a substantial link with [the Charter].”³⁶

This line of reasoning suggests that the rules could be derived from “logical implications of the generic rules established in the Charter”.³⁷ That is the Charter provides the basis on which this kind of rules could develop, and the Charter “is the ethical and legal *matrix* for every rule able to be qualified as peremptory.”³⁸

³⁴ P. M. Dupuy, “The Constitutional Dimension of the Charter of the United Nations Revisited” 1 at 8 (Footnote) in J. A. Frowein & R. Wolfrum, 1 *Max Planck Yearbook of United Nations Law* (1997)

³⁵ E. De Wet, “Judicial Review as an Emerging General Principle of Law and Its Implications for the International Court of Justice” XLVII *NILR* 181 (2000) at 191

³⁶ P. M. Dupuy, “The Constitutional Dimension of the Charter of the United Nations Revisited” 1 at 11 in J. A. Frowein & R. Wolfrum, 1 *Max Planck Yearbook of United Nations Law* (1997)

³⁷ *Ibid.*

³⁸ *Ibid.*

However, this claim begs the question. During the UN Charter drafting, the notion of *jus cogens* was still under development.³⁹ The drafters were aiming to have a Charter in the real sense of the word that it would give guidance to the newly defined community, and that instrument would be supplemented by norms of *jus cogens* and the principles of general international law.⁴⁰ The concept of constitution, in municipal systems, has the element of normativity. It provides the structure of rights and obligations for the State and the individuals.⁴¹ Most municipal constitutions today provide a framework for the political life of a community for an indefinite time.⁴² They present a complex of fundamental norms governing the organisation and performance of governmental functions in a given State and the relationship between State authorities and citizens.⁴³

However, the Charter, as noted, does not contain each and every peremptory norm to govern the international community. With this observation, the Charter cannot be considered as a “constitution”, it does not fulfil the condition of normativity.

Moreover, for the Charter to be qualified as a constitution has to be supreme; that is, it must of paramount importance for every member of the social

³⁹ L. Hannikainen, *Peremptory Norms (Jus Cogens) in International Law: Historical Development, Criteria, Present Status* (1988) at 151

⁴⁰ G. Arangio-Ruiz, “The ‘Federal Analogy’ and UN Charter Interpretation: A Crucial Issue” 8 *EJIL* 1(1997) at 17

⁴¹ B. Fassbender, “The United Nations Charter As Constitution of the International Community” 36 *Columbia Journal of Transnational Law* 529 (1998) at 553

⁴² *Ibid.* at 536

⁴³ *Ibid.* at 534

community ruled by it.⁴⁴ The UN Charter enjoys some degree of supremacy in the sense that it binds the UN Members. Article 103 of the UN Charter makes obligations under the Charter superior to every other treaty obligation that States may have incurred. Moreover, since the United Nations includes almost all States and the few which remain outside⁴⁵ have recognised its fundamental principles, the Charter would bind all members of the international community.⁴⁶

Here, the question manifests itself: what is the relation between Charter obligations and *jus cogens* norms, in the sense of which rule should prevail. The Charter is silent on the relation between Charter obligations and *jus cogens* norms. It has been argued, however, that there is no possibility of having such a conflict because:

“[T]he Charter was designed to serve as comprehensive updating of previously established customs. At the same time it would also inspire future customary and peremptory norms, these rules would never be substantially incompatible with the norms established in the Charter.”⁴⁷

⁴⁴ P. M. Dupuy, “The Constitutional Dimension of the Charter of the United Nations Revisited” 1 at 28 in J. A. Frowein & R. Wolfrum, 1 *Max Planck Yearbook of United Nations Law* (1997); E. De Wet, “Judicial Review as an Emerging General Principle of Law and Its Implications for the International Court of Justice” XLVII *NILR* 181 (2000) at 193; T. M. Franck, “The Political and the Judicial Empires: Must there be a Conflict over Conflict Resolution?” 627 in N. Al-Nauimi and R. Meese, (eds.), *International Legal Issues Arising Under the United Nations Decade of International Law* (1995)

⁴⁵ The only countries that are not members of the United Nations are Switzerland (it has just voted to join UN), Taiwan, State of the Vatican City, Kiribati, Tavula, Tonga and Nauru. See B. Fassbender, “The United Nations Charter As Constitution of the International Community” 36 *Columbia Journal of Transnational Law* 529 (1998) at 567

⁴⁶ *Ibid.* at 542

⁴⁷ E. De Wet, “Judicial Review as an Emerging General Principle of Law and Its Implications for the International Court of Justice” XLVII *NILR* 181 (2000) at 194

The concept of *jus cogens* has long been part of international law.⁴⁸

However, as a result of its inclusion in 1969 Vienna Convention on the Law of Treaties between States and in 1986 Vienna Convention on the Law of Treaties between States and International Organisations or Between International Organisations, the concept has been widely accepted.⁴⁹

Article 53 deals with the effect of derogation from *jus cogens* norms. It reads: "[a] treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law." However, for the sake of this argument, the question arises whether the concept applies to acts of States and international organisations. In other words, whether the concept operates in international law within treaty law only or with regard to other sources of law as well.

The terms of Article 53 prescribe the effect of invalidity for treaties only, but perhaps it has expanded beyond treaty law. However, that should not lead to the conclusion that the implications of *jus cogens* norms are confined only to invalidating treaties which are in conflict with them. During the drafting of 1969 Vienna Convention, the ILC stated in its commentary on Article 61(now Article 64)⁵⁰ that "a rule of *jus cogens* is an overriding rule depriving any act or situation

⁴⁸ M. Byers, "Conceptualising the Relationship Between *Jus Cogens* and *Erga Omnes* Rules" 66 *Nordic Journal of International Law* 211 (1997) at 213-14; See also M. Byers, *Custom, Power and the Power of Rules* (1999) at 183

⁴⁹ L. Hannikainen, *Peremptory Norms (Jus Cogens) in International Law: Historical Development, Criteria, Present Status* (1988) at 2

⁵⁰ Article 64 reads: "[i]f a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates."

which is in conflict with it of legality"⁵¹. That led Hannikainen to believe that "'the prohibition of derogation' [under Article 39]...is to be understood to prohibit *any acts* conflicting with a given norm."⁵²

It has been suggested that an action, although taken in pursuant to a valid treaty but in violation of a *jus cogens* norm, would be clearly contrary to international law notwithstanding the validity of the treaty.⁵³ This was the basis of the separate opinion of Judge Lauterpacht in the *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide*⁵⁴. He applied the concept of *jus cogens* to the arms embargo that the Security Council, acting under Chapter VII, had imposed on Bosnia- Herzegovina.⁵⁵ Lauterpacht stated:

“[T]he prohibition of genocide...has generally been accepted as having the status not of an ordinary rule of international law but of *jus cogens*...The relief which Article 103 of the Charter may give the Security Council in case of conflict between one of its decisions and an operative treaty obligation cannot-as matter of simple hierarchy of norms-extend to a conflict between a Security Council resolution and *jus cogens*.”⁵⁶

⁵¹ ILC Report 1966, UN Doc. A/6309/ Rev.1 at 89

⁵² L. Hannikainen, *Peremptory Norms (Jus Cogens) in International Law: Historical Development, Criteria, Present Status* (1988) at 7

⁵³ O. Schachter, *International Law in Theory and Practice* (1991) at 343-44

⁵⁴ 1993 *ICJ Rep.* 325

⁵⁵ SC Res 713, UN SCOR (1991)

⁵⁶ 1993 *ICJ Rep.* 325 at 440 (Judge Lauterpacht separate opinion). For support that prohibition of genocide is *jus cogens* norm see *ILC Report on the Work of its 18th Session* reprinted in 2 *Yearbook of the International Law Commission* 172 at 248; L. Alexidze, "Legal Nature of *Jus Cogens* in Contemporary International Law" 172 *RDC* 219 (1981-III) at 262

That will lead to the conclusion that in the case of a conflict between UN organs' actions and decisions with *jus cogens* norms, the *jus cogens* norms have supremacy. The United Nations organs cannot derogate from *jus cogens* norms for the reason that they are created by States. They derive their normative powers from Member States.⁵⁷ As States cannot transfer more powers than they possess themselves, it would logically follow that they would not be able to permit organs such as the Security Council to violate norms which they cannot violate themselves.⁵⁸ That means that the *jus cogens* norms have the supremacy over the Security Council decisions.

Another essential element of the legal framework provided by the modern municipal constitution is a separation of powers among the principal branches of government.⁵⁹ In the municipal system, such a separation of powers is a necessary prerequisite for having a system of checks and balances among the different branches of the government. The question that arises here is whether the division of functions that exists within the United Nations amounts to a separation of powers.

One commentator, in discussing the Security Council's role within the constitutional framework of the United Nations Charter, has stated:

“Constitutional lawyers accustomed to the checks and balances and separation of powers...will look

⁵⁷ T. M. Franck, "The Political and the Judicial Empires: Must there be a Conflict over Conflict-Resolution?" 627 at 662 in N. Al-Naumi & R. Meese (eds.), *International Legal Issues Arising under the United Nations Decade of International Law* (1995)

⁵⁸ E. De Wet, "Judicial Review as an Emerging General Principle of Law and Its Implications for the International Court of Justice" XLVII *NILR* 181 (2000) at 193-94

⁵⁹ *Ibid.* at 194

in vain for parallel mechanisms in the United Nations Charter.”⁶⁰

This argument for the lack of “separation of powers” is based on the fact that the United Nations only exercises certain limited delegated functions that do not amount to a complete set of competencies.⁶¹ The General Assembly and the Security Council are not comparable respectively to the legislature and to the executive in a domestic government system.

The General Assembly cannot be considered as a world legislature as it has limited competence. Article 10 of the Charter confers on it the general competence to make recommendations on all questions within the scope of the United Nations Charter, with the exception of when the Security Council is seized of a particular matter.⁶² The General Assembly exercises a certain degree of control over the other organs through their annual and special reports submitted in accordance with Article 15. Although as a general rule the General Assembly recommendation can have no legally binding effect on the members, there are some circumstances in which a recommendation may create direct legal obligations for members, for example the Assembly’s approval of the budget which creates an obligation on a States to pay its contribution or by decisions on elections to various organs or admission to membership. However, these matters

⁶⁰ F. Patel King, “Sensible Scrutiny: The Yugoslavia Tribunal’s Development of Limits on the Security Council’s Powers Under Chapter VII of the Charter” 10 *Emory Int’l. L. Rev.* 2 (1996) at 4 <<http://www.law.emory.edu/EILR/volumes/win96/king.html>>

⁶¹ *Ibid.*

⁶² Article 12 of the UN Charter

relate normally to the internal working of the United Nations, which are distinct from a recommendation addressed to a member. Besides, the General Assembly often assumes a “quasi-legislative” role in its resolutions. Although these resolutions cannot create direct legal obligations for Member States, they can embody a consensus of opinion about what the law is so that, indirectly, they become evidence of international law.⁶³ Generally speaking however, the General Assembly cannot legislate for Member States, and hence, it is very difficult to qualify the General Assembly as a legislature for the international community; it does not have any direct control over the Security Council and the Member States.⁶⁴

The Security Council cannot be considered as a world executive. It is a truism that the Security Council can take binding decisions and by virtue of Article 25 of the Charter, Member States are under responsibility to accept and carry out the Security Council’s decisions. However, there is no system of compelling Member States to execute these decisions. No State can be obliged to render military support.⁶⁵ Contrariwise, under a national constitution, everybody can be forced to participate in common affairs and efforts when the community

⁶³ One of the clear examples is the right of Self-determination. See also resolution 1803 (XVII) on permanent sovereignty over natural resources, resolution 2131 (XX) on non-intervention, and resolution 2312 (XXIX) on territorial asylum

⁶⁴ B. Simma, “From Bilateralism to Community Interest in International Law”, 250 *RDC* 217 (1994-VI) at 262-63

⁶⁵ See generally J. A. Frowein, “On Article 43” 636 in B. Simma (ed.), *The Charter of the United Nations: A Commentary* (1994)

cannot otherwise be protected against perils.⁶⁶ Additionally, the Security Council is under no strict duty to act when the community of nations is endangered; it is left with wide discretion, unlike a national government which is always under the duty to exercise its competences.⁶⁷ The Security Council cannot be regarded as a world government.⁶⁸

Although the UN Charter prescribes and distributes the functions and competence among the United Nations principal organs, it is still “far from a closed system of competences in which the application of constitutional concepts really makes sense”⁶⁹.

European Union experience could provide a clear example of what it is meant by a complete set of competences. The European Union exercises competencies conferred on it by Member States. The political organ is the Council of Ministers, which makes decisions usually on the basis of majority rule. The Community Treaties explicitly recognise the European Court of Justice as the guardian of the legality of the actions of the Union organs. The European Court possesses a clear-cut constitutional power to interpret the Community treaties and

⁶⁶ K. Doehring, “Unlawful Resolutions of the Security Council and their Legal Consequences” 1 *Max Planck Yearbook of United Nations Law* 96 (1997) at 97

⁶⁷ *Ibid.*

⁶⁸ B. Simma, “From Bilateralism to Community Interest in International Law”, 250 *RDC* 217 (1994-VI) at 264

⁶⁹ M. J. Herdegen, “The ‘Constitutionalization’ of the UN Security System” 27 *Vand. J. Trans. L.* 135 (1994) at 150

to annul decisions adopted by other EU organs.⁷⁰ In *France v. Commission*, the

Court stated that:

“Even though the Commission has the power, internally, to take individual decisions applying the rules of competition, a field covered by the Agreement, that internal power is not such as to alter the allocation of powers between the Community institutions with regard to the conclusion of international agreement, which is determined by Article 228 of the Treaty.”⁷¹

In this case, the ECJ concluded that the action taken (concluding an agreement) by the Commission was void. With system like that, it is plausible to invoke the concept of separation of powers and what it entails of the system of checks and balances, as the European Court has done to reinforce the judicial protection of the European Parliament as the embodiment of democratic principles.⁷²

In the UN system, the separation of powers is not, however, clear. For example, in establishing UN forces, the General Assembly, when it was argued, exceeded its functions and usurped other organs’ responsibilities, namely the Security Council⁷³, the ICJ declared in its opinion, in the *Certain Expenses*, that:

“If it is agreed that the action in question is within the scope of the functions of the Organisation but it is alleged that it has been initiated or carried out in a manner not in conformity with the division of

⁷⁰ See above chapter I at 60-62

⁷¹ Case C-327/91, *France v. Commission* 1994 ECR I-3641 at 3678

⁷² Case 138/79, *SA Roquette Frères v. Council* 1980 E.C.R 3333 at 3360; Case C-70/88, *Council v. Parliament* 1990 ECR 2041 at 2072

⁷³ *Certain Expenses advisory opinion* 1962 ICJ Rep. 151 at 163-64

functions among the several organs which the Charter prescribes, one moves to the internal plane, to the internal structure of the Organisation. If the action was taken by the wrong organ, it was irregular as a matter of that internal structure, but this would not necessarily mean that the expense incurred was not an expense of the Organisation.”⁷⁴

In short, the United Nations Charter does not possess any of the characteristics necessary to qualify it as a constitution. However, giving it the status of mere treaty would not do justice to its outstanding role in the development of international peace and security after World War II till the present time. The Charter should be characterised as more than a treaty but less than a constitution.

The notion of a constitution has been introduced to the Charter as an attempt to distinguish it from thousands of other international agreements.⁷⁵ Article 5 of the Vienna Convention on the Law of Treaties, however, calls the treaty establishing an institution a “constituent instrument”. It has been agreed that even the International Court of Justice “took into account that [the UN Charter] was a constituent instrument...”⁷⁶ That terminology does not change the notion that the United Nations Charter is an international treaty and does not give

⁷⁴ *Ibid.* at 168

⁷⁵ B. Fassbender, “The United Nations Charter As Constitution of the International Community” 36 *Columbia Journal of Transnational Law* 529 (1998) at 531; E. De Wet, “Judicial Review as an Emerging General Principle of Law and Its Implications for the International Court of Justice” XLVII *NILR* 181 (2000) at 189. Here, the author pointed out that the notion of constitution introduced to the international law to distinguish treaties establishing an institution from other international agreements.

⁷⁶ L. Gross, “The International Court of Justice and the United Nations” 120 *RDC* 313 (1967-I) at 414

the organisation the characteristic of a super-state or super-government.⁷⁷ On the other hand, it shows that the United Nations Charter is not a normal treaty and that it has evolved beyond a mere treaty. Professor Rosenne pointed out that even those who do not accept the implications of the Charter as a constitution usually do not submit that it is for all purposes to be measured by the yardstick of the normal law of treaties only.⁷⁸ In *Certain Expenses*, the International Court of Justice asserted the nature of the United Nations by stating:

“...when the Court has had to interpret the Charter of the United Nations, it has followed the principles and rules applicable in general to the interpretation of treaties, since it has recognized that the Charter is a multilateral treaty, albeit a treaty having certain special characteristics.”⁷⁹

Thus, the United Nations Charter is a constituent instrument for the international community of nations and for the United Nations and its organs. It is not a normal treaty and it is not a constitution. The UN Charter brought into existence the United Nations as an entity and it has a high degree of universality. The UN Charter was created in the *form of an international treaty* (as member States agreed on the functions and powers to be delegated to the new

⁷⁷ See *Reparation for Injuries advisory opinion* 1949 ICJ Rep. 174 at 179 See also, E. De Wet, “Judicial Review as an Emerging General Principle of Law and Its Implications for the International Court of Justice” XLVII *NILR* 181 (2000) at 189; P. M. Dupuy, “The Constitutional Dimension of the Charter of the United Nations Revisited” 1 at 30 in J. A. Frowein & R. Wolfrum, 1 *Max Planck Yearbook of United Nations Law* (1997)

⁷⁸ S. Rosenne, *Developments in the Law of Treaties 1945-1986* (1989) at 194

⁷⁹ *Certain Expenses advisory opinion* 1962 ICJ Rep. 151 at 157

organisation).⁸⁰ It establishes permanent organs and lays down the rules by which they can function. In that sense, the UN organs are functioning in the scope of the UN Charter as it establishes the competences that have been delegated to them. The powers of the UN organs are based on a treaty. Therefore, there are insurmountable limitations upon the conferment and the exercise of the competence flowing from the Charter.⁸¹ Judge El-Erian observed that:

“Whatever the legal nature of the powers attributed to an international institution, they are specific in the sense that they may be exercised only with respect to certain subject matters prescribed by the constituent instrument.”⁸²

On many occasions, the International Court of Justice has asserted that UN organs are under an obligation to observe the UN Charter’s provisions and they cannot exceed the competence that has been delegated to them. Recently, in the *Legality of the Use of Nuclear Weapons Case* (the WHO request), the Court affirmed that: “[international organisations] are invested by the States which create them with powers, the limits of which are a function of the common interests whose promotion those States entrust to them.”⁸³

In the light of this, it must conclude that being delegated, the powers of the UN organs are limited. UN organs are under obligations to observe the

⁸⁰ B. Fassbender, “The United Nations Charter As Constitution of the International Community” 36 *Columbia Journal of Transnational Law* 529 (1998) at 531

⁸¹ M. J. Herdegen, “The ‘Constitutionalization’ of the UN Security System” 27 *Vand. J. Trans. L.* 135 (1994) at 156

⁸² A. El Erian, “The Legal Organization of International Society” 55 at 75 in M. Sørensen, *Manual of Public International Law* (1968)

provisions of the UN Charter. In addition, UN organs cannot exceed the competence conferred on them by the constituent instrument, namely the United Nations Charter.⁸⁴

3 The Competence of the ICJ and the Security Council

As a point of departure, and before discussing the competence of the Security Council and the limitations on it, it is essential to tackle the competence of the International Court of Justice as a way of paving the way to discussing the relation between the principal organs of the United Nations. The determination of the scope of the competence of UN organs and the way their powers is regulated in the Charter facilitates the understanding of the relationship between the principal UN organs and the International Court of Justice.⁸⁵

3.1. The Competence of the International Court of Justice

The International Court of Justice is by virtue of the Article 92 of the Charter and Article 1 of the Statute, “the principal judicial organ of the United Nations.” Its status as a “principal” organ places it on equal footing with all other major organs of the United Nations.⁸⁶ The International Court of Justice was brought into being by the Charter of the United Nations (Articles 7(1), 36(3) and

⁸³ *The Legality of the Use by a State of Nuclear Weapons in Armed Conflict (WHO Request)* 1996 ICJ Rep. 66 at 79

⁸⁴ The doctrine of implied powers was discussed Chapter I, and the conclusion that has been reached that the UN has powers which are conferred upon it by necessary implication as being essential to the performance of its duties.

⁸⁵ V. Gowlland-Debbas, “The Relationship Between the International Court of Justice And the Security Council in the Light of the Lockerbie Case” 88 *AJIL* 643 (1994) at 643

92-96). A formal result of this organic relationship is that the Statute is an integral part of the Charter. A substantive corollary is that all members of the United Nations are *ipso facto* parties to the Statute of the Court according to Article 93 (1) of the Charter. The essence of the Court's functions is to resolve disputes in accordance with law and to apply international law.⁸⁷ As the principal judicial organ, the Court's sphere of responsibility is necessarily defined by a conception of what is "judicial"; "the function of the Court is to state law"⁸⁸ and it can only establish its decisions on the basis of law.⁸⁹

Peace and justice in international relations are the two primary objectives of the United Nations expressed in the Article 1 of the Charter. Therefore, Article 33(1) of the Charter imposes an obligation on the Security Council to seek first of all a peaceful solution by various means including judicial settlement. This surely refers to settlement by the International Court of Justice. Besides, by virtue of Article 33(2), when the Security Council deems it necessary, it shall call upon disputant States to seek a settlement of their dispute by the peaceful means stated in Article 33(1). In addition, the Security Council may make recommendations to refer a dispute to the Court under Article 36(3). However, the Court ought not to give an opinion that is tantamount to deciding an issue in dispute between States

⁸⁶ S. Rosenne, *The World Court: What it is and how it Works*, (5th ed.) (1995) at 32

⁸⁷ Article 38 of ICJ Statute

⁸⁸ *The Northern Cameroons case* 1963 ICJ Rep. 15 at 33

⁸⁹ *The Lockerbie cases* 1992 ICJ Rep. 3 at 55

where those States have not consented to its jurisdiction since the jurisdiction of the Court in contentious cases depends on disputing States' consent.⁹⁰

Peaceful settlement of disputes through contentious proceedings is not the only function of the judicial organ. Another aspect of the Court's competence is the rendering of advisory opinions on legal issues, a competence specifically granted under Article 96 of the Charter and 65 (1) of the ICJ Statute. Article 65(1) of the Court's Statute empowers the Court to give an opinion on any legal question at the request of whatever body is authorised "to make such a request".⁹¹ The authorisation referred to seems to relate both to the body and to the subject of the question: in other words, the Court is authorised to answer any legal question if the requesting organ is itself authorised to ask that question.⁹² However, the Court is under no obligation to give an advisory opinion, even if the requesting organ is fully *intra vires* in requesting it, the language of Article 65 of the Statute is permissive rather than mandatory.⁹³ The Court itself noted in the *Interpretation of the Peace Treaties* that: "Article 65 of the Statute is permissive. It gives the Court the power to examine whether the circumstances of the case are of such a character as should lead it to decline to answer the Request."⁹⁴

⁹⁰ See for example, *Status of Eastern Carelia* 1923 PCIJ, Series B, No.5, 7; K.J. Keith, *The extent of Advisory Jurisdiction of the International Court of Justice*, (1971) at 89

⁹¹ M. Bedjaoui, *The New World Order and the Security Council: Testing the legality of its Acts*, (1994) at 85

⁹² *Ibid.* See also *The Legality of the Use by a State of Nuclear Weapons in Armed Conflict (WHO Request)* 1996 ICJ Rep. 66

⁹³ D.W. Bowett, "The Court's Role in Relation to International Organisations" 181 at 186 in Lowe & Fitzmaurice (ed.) *Fifty Years of The International Court of Justice* (1996)

⁹⁴ *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania*, 1950 ICJ Rep. 65 at 72

However, the perception of the role of the International Court has changed in the United Nations era in comparison with that during the League of Nations days.⁹⁵ Professor Bowett compared the use of the International Court in the League of Nations and the United Nations eras, stating that: “the Permanent Court of International Justice acted as legal adviser to the Council of the League of Nations in its handling of disputes, and the Council routinely adopted the Court’s advice in its reports on disputes before it,”⁹⁶ however, he continued “[t]he Security Council has never seen the role of the ICJ [as a legal adviser], nor has it wanted to see such role for the Court.”⁹⁷ The comparative decline in the use of the Court’s advisory function was part of the Cold War tension. The Soviet Camp considered the Court at the beginning of the Cold War as a Western Court whereas the western camp made relatively more use of the Court.⁹⁸ The turning point was *Nicaragua* case, where there was a shift in the approach to the Court between these two camps. Since this case, the United States has showed some ambivalence towards the International Court, and it withdrew from the Court’s compulsory jurisdiction.⁹⁹

⁹⁵ See below Chapter IV

⁹⁶ D.W. Bowett, “The Court’s Role in Relation to International Organisations” 181 at 182 in Lowe & Fitzmaurice (ed.) *Fifty Years of The International Court of Justice* (1996)

⁹⁷ *Ibid.*

⁹⁸ S. Rosenne, *The Law and Practice of the International Court 1920-1996* (1997) at 187- 194

⁹⁹ D.W. Bowett, “The Court’s Role in Relation to International Organisations” 181 at 182 in Lowe & Fitzmaurice (ed.) *Fifty Years of The International Court of Justice* (1996)

3.2. The Competence of the UN Security Council

The Security Council is the body upon which the UN Charter places the primary responsibility for the maintenance of international peace and security. The United Nations' founders devoted four Chapters to the role and the power of the Security Council: Chapter V on its composition, functions and procedures; Chapter VI on the pacific settlement of disputes; Chapter VII on threats to or breaches of the peace and acts of aggression; and Chapter VIII on regional arrangements.¹⁰⁰ Chapter VI and Chapter VII were designed to help the Security Council to work effectively in achieving and maintaining international peace and security either using peaceful means or enforcement measures respectively. As Chapter VI of the Charter cannot produce a binding decision, the focus here will be on Security Council decisions adopted under Chapter VII because of their binding nature.

Chapter VII empowers the Security Council to take binding decisions in situations where international peace and security are in danger. By virtue of Article 25 of the Charter, Member States agree to "accept and carry out" these decisions. Under Chapter VII, the Charter gives the Security Council a very broad discretion, and there are no explicit limits on the exercise of this discretion. At the core of the Security Council's authority in this realm is its powers under Article 39.

Article 39 provides that in order to take enforcement measures under Chapter VII, the Security Council must follow a two-step process. It states:

“The Security Council *shall determine the existence of any threat to the peace, breach of peace or act of aggression and shall make recommendations, or decide* what measures shall be taken in accordance with Article 41 and 42, to maintain or restore international peace and security.”¹⁰¹

Accordingly, the Security Council first must determine whether a threat to the peace, breach of the peace, or act of aggression exists.¹⁰² Thereafter, the Council must decide what measures, if any, to take in order to maintain and restore international peace and security. The permissible measures that the Security Council could take under Chapter VII range from measures that do not involve any use of force such as economic and diplomatic sanctions (Article 41) to measures that entail the use of force (Article 42).

Article 39 has recently been the source of the controversy and debate in scholarly international law circles. Article 39, on its face, does not put any restrictions on the discretion of the Security Council to determine the existence of threat to the peace, breach of the peace, or act of aggression.¹⁰³ The terms “threat to the peace, breach of the peace, or act of aggression” are not defined in the

¹⁰⁰ S. D. Baily & S. Daws, *The Procedures of the UN Security Council*, 3rd edition (1998) at 3

¹⁰¹ Article 39 of the UN Charter (emphasis added)

¹⁰² V. Gowlland-Debbas, “Security Council Enforcement Action and Issues of State Responsibility” 43 *ICLQ* 55 (1994) at 61; B. Simma, *The Charter of the United Nations: A Commentary* (1994) at 612-613; H. Freudenschuß, “Article 39 of the UN Charter Revisited: Threats to the Peace and the Recent Practice of the UN Security Council” 46 *Austrian J. Publ. Int’l. L.* 1 (1993)

¹⁰³ H. Kelsen, *The Law of the United Nations*, (1951) at 727

Charter. While an “act of aggression” is amenable to legal determination, “threat to the peace” is more of a political concept and it is at the Security Council’s discretion to determine its extent and scope.¹⁰⁴

The Security Council has found that a wide range of situations meets the threshold of Article 39. On several occasions, the Security Council has found that a threat to the peace exists in situations where there were massive violations of human rights. The Security Council decided that Iraq’s repression of its Kurdish and Shiite minorities, and the resulting flow of refugees to neighboring countries and cross-border incursions, was a threat to the peace.¹⁰⁵ It decided that the civil war in Somalia, which involved “heavy loss of human life and widespread material damage”, was a threat to international peace.¹⁰⁶ The violation of humanitarian law in the conflict in the former Yugoslavia constituted a threat to international peace and security.¹⁰⁷ The lack of democracy in Haiti was considered to be a threat to international peace and security.¹⁰⁸ Indeed, when Libya was accused of bombing of Pan Am 103 flight and refused to hand over the two accused, the Security Council found a threat to the peace existed even though the incident happened four years before the Security Council considered the

¹⁰⁴ See Resolution of General Assembly Concerning the definition of “Act of Aggression”, GA Res 3314 (XXIX) 1974; see S. Lamb, “Legal Limits to the United Nations Security Council Powers” 361 at 375 in G.S. Goodwin-Gill & S. Talmon (eds.), *The Reality of International Law: Essays in Honour of Ian Brownlie* (1999)

¹⁰⁵ SC Res. 688, UN SCOR (1991); See also S. D. Murphy, “The Security Council, Legitimacy, and the Concept of Collective Security After the Cold War” 32 *Colum. J. Transnat’l. L.* 201 (1994) at 230-231

¹⁰⁶ SC Res. 733, UN SCOR (1992)

¹⁰⁷ SC Res. 808, UN SCOR (1993)

situation.¹⁰⁹ These situations, or as Franck calls them “hard cases”¹¹⁰, raised a surge of debates on whether the Security Council determinations under Article 39 are unlimited.¹¹¹

From this brief glimpse of the Security Council’s recent practice it could be assumed that if the Security Council makes a determination of the existence of a threat to the peace, a breach of the peace, or an act of aggression, it assumes an unlimited consequential power.¹¹² Nevertheless, and while it is clear from the text that the Security Council exercises a wide discretion under Article 39, this does not mean that its powers are unlimited. Professor Brownlie has noted that there is no necessary dichotomy between discretionary powers and legality. Discretion can only exist within the law.¹¹³ This means that the Security Council cannot claim its discretion under Article 39 without exercising it within its legal limits.

On the other hand, it has been argued that as the Security Council is a political organ it cannot be held to a strict observance of law, as this would hinder

¹⁰⁸ SC Res. 841 UN SCOR (1993)

¹⁰⁹ SC Res. 748 UN SCOR (1992)

¹¹⁰ T.M. Franck, *Fairness in International Law and Institutions*, (1995) at 224 Franck defined hard cases as cases that the Security Council considered “as a threat to the peace even though they did not involve actual or imminent international military hostilities”.

¹¹¹ Among others, T.M. Franck, “The Security Council and “Threats To the Peace”: Some Remarks on Remarkable Recent Development” 83 in René- Jean Dupuy, *The Development of the Role of the Security Council* (1993), V. Gowlland-Debbas, “The Relationship Between the International Court of Justice And the Security Council in the Light of the Lockerbie Case” 88 *AJIL* 643 (1994), M. J. Herdegen, “The ‘Constitutionalization’ of the UN Security System” 27 *Vand. J. Trans. L.* 135 (1994), P. H. Kooijmans, “The Enlargement of the Concept of “Threat To the Peace” ” 111 in René- Jean Dupuy, *The Development of the Role of the Security Council* (1993), M. Koskeniemi, “The Place of Law in Collective Security” 17 *Mich. J. Int’l. L.* 455 (1996)

¹¹² I. Brownlie, “International Law at the Fiftieth Anniversary of the United Nations, General Course on Public International Law” 255 *RDC* 9 (1995) at 214

its immediate reaction to urgent situations.¹¹⁴ Kelsen, in his oft-cited work, *the Law of the United Nations*, pointed out that: “the purpose of the enforcement action under Article 39 is not to maintain or restore the law but to maintain or restore the peace...”¹¹⁵ Rubin has also argued that “it is certainly within the legal authority of the Security Council to act irrationally and make ‘decisions’ that reflect its political balance in disregard of the substantive law”.¹¹⁶ However, there is no contradiction between the political character of the Security Council and its obligation to respect applicable rules.¹¹⁷ As the International Court of Justice stated, in its opinion in the *Admission Case*:

“The political Character of an organ cannot release it from the observance of the treaty provisions established by the Charter when they constitute limitations on its powers or criteria for its judgment. To ascertain whether an organ has freedom of choice for its decisions, reference must be made to the terms of its constitution.”¹¹⁸

Moreover, in section 1, it was argued that the United Nations Charter is a multilateral treaty, which delegates to UN organs certain powers and functions. As the Security Council is an organ of the United Nations, established by an

¹¹³ *Ibid.* at 217

¹¹⁴ D. D’Angelo, “The ‘Check’ on International Peace and Security Maintenance: The International Court of Justice and Judicial Review of Security Council Resolutions” 23:2 *Suffolk Transnational Law Review* 561 (2000) at 590

¹¹⁵ H. Kelsen, *the Law of the United Nations: A Critical Analysis of Its Fundamental Problems*, (1951) at 294

¹¹⁶ A. P. Rubin, “Libya, Lockerbie and the Law” 4:1 *Diplomacy & Statecraft* 1 (1993) at 10

¹¹⁷ L. Gross, “The United Nations and the Role of Law” 19:3 *International Organizations* 537 (1965) at 538

¹¹⁸ *Conditions of Admission of a State to Membership in the United Nations* 1948 ICJ Rep. 57 at 64

international treaty, it is bound by the provisions of the UN Charter substantively and procedurally.¹¹⁹

This was clear in the opinion of the ICTY Appeals Chamber in *Prosecutor v. .* The issues of this case were raised by the defence's challenge to the competence of the Tribunal on the ground that the Security Council in establishing the International Tribunal and in adopting its Statute has exceeded its powers and hence the Tribunal was not duly established by law and could not try the accused. In its opinion, in which it endorsed the possibility of judicial review even when Chapter VII powers had been invoked by the Security Council, the Appeal Chamber stated that:

“Obviously, the wider the discretion of the Security Council under the Charter of the United Nations, the narrower the scope for the International Tribunal to review its actions, even as a matter of incidental jurisdiction. Nevertheless, this does not mean that the power disappears altogether, particularly in cases where there might be a manifest contradiction with the Principles and Purposes of the Charter.”¹²⁰

Nevertheless, although it can be agreed that some limitations on the Security Council's powers must exist, there are still conflicting ideas on the nature of these limitations. Are these limitations derived from the Principles and Purposes of the Charter, from the principles of general international law and *jus*

¹¹⁹ B. Martenczuk, “The Security Council, the International Court and Judicial Review: What lessons from Lockerbie?” 10:3 *EJIL* 517 (1999) at 541

¹²⁰ Appeals Chamber in the *Prosecutor v. .* (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction), 2 October 1995, Case No. IT-94-1-AR72, reprinted in 35 *ILM* 32 (1996) paras. 20-1

cogens, or from the text of Article 39?¹²¹ The next section will explore the limitations on the Security Council's powers of determination under Chapter VII. However, it is important to make it clear that although it is self-evident that any determination under Article 39 is of a political nature¹²², and the Security Council under the Charter has been granted a wide discretion, whether the same discretion extends to all actions taken consequent upon that determination is another issue.¹²³

The existence of these limitations will pave the path to judicial review, although the argument will still be which organ has the competence to review the legality of the actions and the binding decisions of the Security Council.

3.2.1. The Limitations on the Security Council's Powers:

3.2.1.a. The Purposes and Principles of the United Nations Charter:

As discussed, the powers of the Security Council under Article 39 are based on a broad discretion. Judge Weeramantry wrote in his dissenting opinion in the *Lockerbie Cases*:

“the determination under Article 39 of the existence of any threat to the peace, breach of the peace or act of aggression, is one entirely within the discretion of the Council. It would appear that the Council and no other is the judge of the existence of

the state of affairs which brings Chapter VII into operation... Once that decision is taken, the door is

¹²¹ B. Martenczuk, “The Security Council, the International Court and Judicial Review: What lessons from Lockerbie?” 10:3 *EJIL* 517 (1999) at 540

¹²² H. Freudenschuß, “Article 39 of the UN Charter Revisited: Threats to the Peace and the Recent Practice of the UN Security Council” 46 *Austrian J. Publ. Int'l. L.* 1 (1993) at 36

¹²³ M.N. Shaw, “The Security Council and the International Court of Justice: Judicial Drift and Judicial Function” 219 at 227 in A.S. Muller et al., *The International Court of Justice*, (1997)

opened to the various decisions the Council may make under that Chapter.”¹²⁴

Nevertheless, it is self-evident that an organ created by a treaty is subject to that instrument in its very existence, its mission and its powers.¹²⁵ Being the creation of the United Nations Charter, being a principal organ of the United Nations, the Security Council has to act in conformity with the goals and the objectives of the UN Charter. Article 24 paragraph 2 of the UN Charter supports this view: “the Security Council shall act in accordance with the Purposes and the Principles of the United Nations for the discharge of these duties are laid down in Chapters VI, VII, VIII, and XII”.

The Purposes and Principles of the United Nations are stated in Article 1. Article 1(1) provides:

“the Purposes of the United Nations are: [t]o maintain international peace and security, and that end: to take effective collective measures for the prevention and removal of threats to the peace and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace.”

It has been argued that observing the principles of justice and international law are applicable to the adjustment or settlement of international disputes by

¹²⁴ *Lockerbie Cases* 1992 ICJ Rep. 3 at 66

¹²⁵ M. Bedjaoui, *The New World Order and the Security Council: Testing the legality of its Acts*, (1994) at 14

peaceful means, but not to enforcement measures.¹²⁶ By this way of reasoning, reading this Article with Article 24(2) of the UN Charter suggests that “when the [Security Council] discharges its duties under its primary responsibility, it need not act in conformity with international law or the principles of justice.”¹²⁷

Nevertheless, this interpretation is too wide. It is true that during San Francisco Conference most attempts to limit the powers of the Security Council’s competence under Chapter VII were rejected on the basis that this would hinder the effectiveness of the policing powers of the Council. Logically, it could not be the intention of the drafters to exclude the Security Council’s competence under Chapter VII from respecting the purposes and principles of the UN Charter. Besides, it is well-known that powers attributed to United Nations organs may be exercised only with respect to the subject-matter prescribed by the constituent instrument.¹²⁸ Moreover, in *Tadić*, the ICTY Trial Chamber affirmed that: “the Security Council is an organ of an international organisation, established by a treaty which serves as a constitutional framework for that organisation. The

¹²⁶ G.H. Oosthuizen, “Playing the Devil’s Advocate: the United Nations Security Council is Unbound by Law” 12 *LJIL* 549 (1999) at 552; See also, J.G. Gardam, “Legal Restraints On Security Council Military Enforcement Action” 17 *Mich. J. Int’l. L.* 285 (1996) at 297

¹²⁷ G.H. Oosthuizen, “Playing the Devil’s Advocate: the United Nations Security Council is Unbound by Law” 12 *LJIL* 549 (1999) at 552

¹²⁸ S. Lamb, “Legal Limits to the United Nations Security Council Powers” 361 at 370 in G.S. Goodwin-Gill & S. Talmon (eds.), *The Reality of International Law: Essays in Honour of Ian Brownlie*, (1999)

Security Council is thus subject to certain constitutional limitations, however broad its powers under the constitution may be.”¹²⁹

Furthermore, the UN Charter sets borderlines on the power of the Security Council. By virtue of Article 25 of the Charter members are obliged to carry out the decisions of the Security Council. However, the Article provides a condition for such obligation. Member States are obliged to carry out the Security Council decisions only if they are taken in accordance with the Charter.¹³⁰ It, therefore, seems clear that Article 25 does not mean that the Member States are obliged to carry out all decisions of the Security Council. This reinforces the obligation upon the Security Council to adhere to the legal limits set by the Charter. Thus, there is room for the view that only resolutions that are *intra vires* the UN Charter acquire binding force. This position is supported by Professor Bowett who notes that:

“when it [the Security Council] does act *intra vires*, the members of the Organisation are bound by its actions and, under Article 25, they agree to accept and carry out the decisions of the Security Council in accordance with the present Charter.”¹³¹

This implies that even though the Security Council has a wide and broad discretion under Chapter VII concerning its determination of the existence of the threat of the peace, it is not omnipotent. The Security Council has to observe the

¹²⁹ Appeals Chamber in the *Prosecutor v.* (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction), 2 October 1995, Case No. IT-94-1-AR72, reprinted in 35 *ILM* 32 (1996) para. 28

¹³⁰ See V. Gowlland-Debbas, “The Relationship Between the International Court of Justice And the Security Council in the Light of the Lockerbie Case” 88 *AJIL* 643 (1994) at 662

¹³¹ D. Bowett, *The Law of International Institutions*, (4th ed.) (1982) at 33

principles and purposes of the UN Charter in its execution of its powers under Chapter VII.

3.2.1.b. Norms of *Jus Cogens*:

Jus Cogens norms are peremptory norms of international law, from which, by definition there is no derogation.¹³² They are overriding norms of the international legal order that they take precedence over all other norms. It was argued above that the effect of *jus cogens* norms apply not only to agreements and treaties, but also to all other acts and situations.¹³³ This means that the acts of States and international organisations must be in conformity with the norms of *jus cogens*.¹³⁴ The application of Chapter VII enforcement measures cannot, therefore, be unfettered where the exercise by the Security Council of its coercive powers conflicts with peremptory norms of international law.

Bosnia's challenge to the Security Council resolution 713¹³⁵ is a good illustrative example of the potential conflict between *jus cogens* norms and the Security Council's resolutions. In this case, Bosnia, by the virtue of the Genocide Convention, asked the International Court of Justice to indicate provisional

¹³² Articles 53 and 64 of the 1969 Vienna Convention on the Law of Treaties and identical Articles of 1986 Vienna Convention on the Law of Treaties Between States and International Organisations and Between Organisations

¹³³ See above at 145-151

¹³⁴ L. Hannikainen, *Peremptory Norms (Jus Cogens) in International Law: Historical Development, Criteria, Present Status* (1988) at 7

¹³⁵ SC Res. 713 UN SCOR (1991)

measures, on the basis that Resolution 713, as it imposed an arms embargo on Bosnia, assisted in the commission of genocide in Bosnia.¹³⁶

Judge *ad hoc* Lauterpacht, in his separate opinion, did consider the consequences of a conflict between the exercise of Chapter VII coercive powers and norms of *jus cogens*. He noted that the prohibition of genocide has long been accepted as a matter of *jus cogens*, and the Resolution 713 “can be seen as having in effect called on members of the United Nations, albeit unknowingly and assuredly unwillingly, to become in some degree supporters of genocidal activity and in this manner and to that extent to act contrary to a rule of *jus cogens*.”¹³⁷ He concluded that:

“[I]n strict logic, when the operation of paragraph 6 of the Security Council Resolution 713 (1991) began to make members of the United Nations accessories to genocide it ceased to be valid and binding in its operation against Bosnia Herzegovina and that members of the United Nations then became free to disregard it.”¹³⁸

It was argued that the norms of *jus cogens* could not prevail over the Security Council’s power of appreciation by virtue of Article 103 of the UN Charter.¹³⁹ However, Judge Lauterpacht pointed out that the effect of Article 103 could not be extended to norms of *jus cogens*, as they are at the apex of the

¹³⁶ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina) v. (Serbia and Montenegro)* 1993 ICJ Rep. 325 at 328

¹³⁷ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina) v. (Serbia and Montenegro)* 1993 ICJ Rep. 325 at 441 (Lauterpacht separate opinion)

¹³⁸ *Ibid.*

hierarchical pyramid of international legal norms.¹⁴⁰ In addition, it is commonly accepted that *jus cogens* norms constrain the Security Council's actions because these peremptory norms are by their very nature binding on States. As the Security Council derives its powers from Members States, and as States cannot derogate from *jus cogens* norms themselves, States cannot transfer powers that they do not possess.¹⁴¹ The advocate general of the European Court of Justice affirmed, in *SAT Fluggesellschaft v. Eurocontrol*, that what States cannot do individually, they cannot do through international organisation. He stated:

"if...Member States themselves, in so far as they carry on an economic activity, are under an obligation to respect the provisions of Article 85 et seq. of the [EEC] Treaty, they might not escape that obligation by entrusting that activity to an international organization."¹⁴²

To sum up, Article 103 is much more straightforward where the countervailing rights in question are ordinary principles of international law. One commentator has noted that: "[s]hould a clash occur between a binding Security

¹³⁹ G.H. Oosthuizen, "Playing the Devil's Advocate: the United Nations Security Council is Unbound by Law" 12 *LJIL* 549 (1999) at 558-9

¹⁴⁰ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina) v. (Serbia and Montenegro)* 1993 *ICJ Rep.* 325 at 411 (Lauterpacht Separate Opinion) See also *Lockerbie Cases* 1992 *ICJ Rep.* 3 at 47 (Judge Bedjaoui Dissenting Opinion)

¹⁴¹ I. Brownlie, *Principles of Public International Law*, (4th ed.) (1990) at 513 who notes that, *jus cogens* are "rules of customary law which cannot be set aside by treaty or acquiescence but only by the formation of a subsequent customary rule of contrary effect."; See also F. Patel King, "Sensible Scrutiny: The Yugoslavia Tribunal's Development of Limits on the Security Council's Powers Under Chapter VII of the Charter" 10 *Emory Int'l. L. Rev.* 2 (1996) at 22 <<http://www.law.emory.edu/EILR/volumes/win96/king.html>>, See also the discussion above at 137

¹⁴² Case C-364/92 *SAT Fluggesellschaft MBH v. European Organisation for the Safety of Air Navigation (Eurocontrol)* 1994 *ECR* I-43 at 49

Council resolution and peremptory norm of international law, the entire question of the hierarchy of norms within the United Nations system would thus have to be carefully rethought.”¹⁴³

3.2.1.c. Principles of General International Law:

An example of where the Security Council adopted a measure that was incompatible with general international law is provided in the demarcation of boundaries following the Gulf War. The Security Council in the aftermath of the conflict, determined that the situation constituted a “threat to the peace”, and was thus entitled to adopt a whole array of measures in response, including the direction that the question of boundary between Kuwait and Iraq be settled. The Security Council has been criticised on seizing this question as the demarcation of boundaries is once again an area which is carefully regulated by well-established principles of international law.¹⁴⁴ As Professor Brownlie has noted:

“it is probable that the alignment as such was disputed and that, therefore, the adoption of a particular alignment by the Security Council involved rather more than a ‘demarcation’. If this is correct, then the Security Council adopted a role which is inappropriate and incompatible with general international law...It is one thing to effect a restoration of Kuwaiti sovereignty on the basis of the *status quo* prior to Iraq’s invasion. It is quite another to impose a boundary in the absence either of bilateral negotiation and agreement or an

¹⁴³ S. Lamb, “Legal Limits to the United Nations Security Council Powers” 361 at 374 in G.S. Goodwin-Gill & S. Talmon (eds.), *The Reality of International Law: Essays in Honour of Ian Brownlie* (1999)

¹⁴⁴ K. Harper, “Does UN Security Council Have the Competence to Act as Court and Legislature?” *New York University Journal of International Law and Politics* 103(1994-1995); W. Wengler, “International Law and the Concept of a New World Order” 122 at 124-125 in McWhinney, Zaslove, Wolf (eds.), *Federalism-in-the-Making: Contemporary Canadian and German Constitutionalism, National and Transnational* (1992)

arbitration or reference to the International Court.”¹⁴⁵

This opinion presupposes that the Security Council is bound by general international law. As discussed earlier, Article 24 of the UN Charter obligates the Security Council to act in accordance with the “Purposes and Principles of the United Nations”. This refers back to Article 1(1) of the Charter, which makes it clear that the action of the Security Council must be pursued “in conformity with the principles of justice and international law”.

In the *Lockerbie Cases*, Judges Weeramantry and Bedjaoui specifically referred to these provisions and expressed the view that they require the Security Council to respect and to act in accordance with the fundamental principles of international law.¹⁴⁶ Kelsen argued, however, that the Security Council is not under an obligation to observe the principles of justice and international law when it is under an obligation to decide on collective measures for the maintenance or restoration of peace, i.e. when it is acting under Chapter VII.¹⁴⁷ In such a situation the Security Council may wish “to enforce a decision which it considered to be just though not in conformity with existing [international] law.”¹⁴⁸ Judge Oda, in his declaration in the *Lockerbie Cases* (provisional measures), stated:

¹⁴⁵ I. Brownlie, “International Law at the Fiftieth Anniversary of the United Nations, General Course on Public International Law” 255 *RDC* 9 (1995) at 220

¹⁴⁶ *Lockerbie Cases* 1992 *ICJ Rep.* 114 Judge Weeramantry (dissenting Opinion) at 171; Judge Bedjaoui (dissenting opinion) at 155-56

¹⁴⁷ H. Kelsen, *The Law of the United Nations* (1951) at 294

¹⁴⁸ *Ibid.*

“[U]nder the positive law of the United Nations Charter, a resolution of the Security Council may have binding force, irrespective of the question whether it is consonant with international law derived from other sources. There is certainly nothing to oblige the Security Council, acting within its terms of reference, to carry out a full evaluation of the possibly relevant rules and circumstances before proceeding to the decisions it deems necessary...”¹⁴⁹

This argument was based on the ground that the urgent nature of the situation, which constitutes “threat to the peace, breach of the peace, or act of aggression”, would not allow the Security Council to determine the legal position of the parties.¹⁵⁰

Nevertheless, being an organ of the United Nations, the Security Council, as all the principal organs of the United Nations, must not only respect the Charter but also international law itself because they do not possess the power to create new rules of law.¹⁵¹ The Security Council must act in accordance with international law because it lacks the authority to create international law. That

¹⁴⁹ *Lockerbie Cases*, 1992 ICJ Rep. 114 at 129 (Judge Oda Declaration)

¹⁵⁰ B. Martenczuk, “The Security Council, the International Court and Judicial Review: What lessons from Lockerbie?” 10:3 *EJIL* 517 (1999) at 545

¹⁵¹ M. Bedjaoui, *The New World Order and the Security Council: Testing the legality of its Acts*, (1994) at 32; G. Tunkin, “Legal Bases of International Organization Action” 261 in R. J. Dupuy (ed.), *A Handbook of International Organizations* (1988) who argued that States create norms of International law. Compare with H. G. Schermers, “The Legal Bases of International Organization Action” 401 in R. J. Dupuy (ed.), *A Handbook of International Organizations* (2nd ed.) (1998) who rejected this idea and found it inapplicable for the contemporary international legal system. “there are rules of international law which States cannot amend, which are valid not only between States but above them.”

authority rests exclusively with States.¹⁵² Bedjaoui asserted that there is no indication in the Charter to show that States "abdicated to the organs of the United Nations their exclusive power to create new customs through their concordant, consistent and undisputed practice."¹⁵³

Additionally, the United Nations organs have international personality, and as a result, they are subject to international law. Judge Fitzmaurice expressed the view in *Namibia opinion*¹⁵⁴ that because the United Nations is itself a subject of international law, the Council is as much subject to the principles of international law as any individual Member States.¹⁵⁵ He observed that:

"Even when acting under Chapter VII of the Charter itself, the Security Council has no power to abrogate or alter territorial rights, whether of sovereignty or administration...[T]his is a principle of international law that is well-established... and the Security Council is as much subject to it."¹⁵⁶

The implication of this view is that the Security Council is bound by the boundaries of its competence drawn by the UN Charter, and it is bound to respect general international law.

¹⁵² M. Bedjaoui, *The New World Order and the Security Council: Testing the legality of its Acts*, (1994) at 32

¹⁵³ *Ibid.*

¹⁵⁴ *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)* 1971 ICJ Rep. 16

¹⁵⁵ *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)* 1971 ICJ Rep. 16 at 294 (Judge Fitzmaurice, dissenting opinion)

¹⁵⁶ *Ibid.*

3.2.1.d. Textual Approach to Article 39:

It was advanced earlier that the limitations on the Security Council's powers under Chapter VII only apply to the enforcement measures adopted rather than to its initial determination of the existence of a "threat to the peace, breach of the peace, or act of aggression". It has been argued that these terms cannot be subject to legal determination. Rather, they are subject to political appreciation.¹⁵⁷

Few have discussed any limitations on the Security Council's power arguing through the terms of Article 39. One commentator has explained that "international peace and security within the meaning of Article 39 only refers to the absence of armed violence in international relations."¹⁵⁸ In that sense, the Security Council is the guardian of the minimum conditions of peaceful coexistence in the international community; it is not a super-government.¹⁵⁹ For this reason, the Security Council can act under Chapter VII only when there is "a demonstrable link to the use of armed force in international relations"¹⁶⁰. It has been argued that the Council should wait until an armed conflict takes place. However, the competence of the Security Council under Chapter VII does have a

¹⁵⁷ T.D. Gill, "Limitations on the UN Enforcement Powers", XXVI *NYIL* 33 (1995) at 39- 46

¹⁵⁸ B. Martenczuk, "The Security Council, the International Court and Judicial Review: What lessons from Lockerbie?" 10:3 *EJIL* 517 (1999) at 543; Ciechanski pointed out that: "...the UN founders...had a clear sense of the material limits of the Security Council actions under Chapter VII, which were to be restricted to transborder aggressions among sovereign nations." J. Ciechanski, "Enforcement Measures Under Chapter VII of the UN Charter: UN Practice after the Cold War" 3:4 *International Peacekeeping* 82 (1996) at 83

¹⁵⁹ B. Martenczuk, "The Security Council, the International Court and Judicial Review: What lessons from Lockerbie?" 10:3 *EJIL* 517 (1999) at 543 at 544

¹⁶⁰ *Ibid.*

preventive component¹⁶¹, which means that a certain use of force may constitute a degree of “threat to the peace” if it is of a seriousness that might increase the possibility of the likelihood of armed international conflict. In this sort of situation, the Security Council could employ Chapter VII enforcement measures. According to this interpretation, the textual approach to Article 39 would not restrict the competence of the Security Council, and the term “threat to the peace” is still flexible enough to include all major forms of “international misconduct”.

On this basis, it should be accepted that the determination under Article 39 is of a political nature, and a legal interpretation to these terms is precluded. What could be controllable are the measures taken as a consequence to the existence of “threat to the peace, breach of the peace, or act of aggression”. As Shaw explains:

“It could well be argued that some of these consequential activities, more correctly defined as secondary level actions after the initial response has been taken to restore international peace and security, should not also fall within the wide discretion of the Council...”¹⁶²

To sum up, the Security Council appears to have its unlimited powers in its determinations under Article 39. However, the realist school arguments of unlimited powers of the Security Council are not totally correct as it has been shown that the Security Council is bound by law in dealing with the consequential measures of these determinations. It is essential now to turn and discuss the shape of the relationship between the International Court of Justice and the Security

¹⁶¹ Y. Dinstein, *War, Aggression, and Self-defence*, (2nd ed.) (1994) at 279

Council to see whether the arguments of the judicial romantic school could fit into the UN system.

4 The Relationship between the International Court of Justice and the Security Council

4.1 The Relation in the context of the UN Charter and the ICJ Statute:

The relationship between the International Court of Justice and the United Nations is a relation with special characteristics. The International Court of Justice is in an organic relation with the United Nations. It is the principal judicial organ of the United Nations. Its Statute forms an integral part of the United Nations, but it is controversial whether the United Nations Charter is a part of the ICJ Statute.¹⁶³ This organic relation between the International Court of Justice and the United Nations has been seen as a step forward in more coherent and legalistic United Nations in comparison to the relation between the Permanent Court of International Justice and the League of Nations.¹⁶⁴ The founders of the United Nations asserted the fact that an effective organisation should have its judicial organ, which must be kept independent in the exercise of its substantive functions, but at the same time, it must have a close relation with the other organs.¹⁶⁵

¹⁶² M. N. Shaw, "The Security Council and the International Court of Justice: Judicial Drift and Judicial Function" 219 at 227 in A.S. Muller et al., *The International Court of Justice*, (1997)

¹⁶³ L.Gross, "The International Court of Justice and the United Nations" 120 *RDC* 313 (1967-I) at 323

¹⁶⁴ S. Rosenne, *The Law and the Practice of the International Court 1920-1996*, (1997) at 104

¹⁶⁵ 17 UNCTAD 37, 47, 49, 408; see also S. Rosenne, *The Law and the Practice of the International Court 1920-1996*, (1997) at 104

It has been argued that the Permanent Court of International Justice was closer to the League of Nations, in the context of the course of activities, than is the case between the International Court of Justice and the United Nations.¹⁶⁶ As the League of Nations approached the Court for legal advice and guidance, the Permanent Court of International Justice “had to play a dual role. It was available as a part of the machinery at the League’s disposal, a role that was mainly performed through the advisory opinions.”¹⁶⁷ For Professor Rosenne, the “organic” link between the League and the Court existed, but in the United Nations system, this link is much more pronounced.¹⁶⁸ During the days of the San Francisco Conference, it was stressed that the International Court was not established upon any different basis than the General Assembly and the Security Council.¹⁶⁹ It was integrated into the organisation, it did not form a “autonomous institution” in the real sense of the word.

As mentioned earlier, the International Court of Justice is empowered to render advisory opinions to the United Nations principal organs and its specialised agencies by virtue of Article 96 of the United Nations Charter, and Article 65(1) of the ICJ Statute. The Court is to give legal guidance to the United Nations on any legal issue raised within the activities and the competence of UN

¹⁶⁶ L.Gross, “The International Court of Justice and the United Nations” 120 *RDC* 313 (1967-I) at 324

¹⁶⁷ S. Rosenne, *The Law and the Practice of the International Court 1920-1996*, (1997) at 101

¹⁶⁸ *Ibid.* at 102-104

¹⁶⁹ 17 UNCTAD 37, 47, 49, 408

organs and the specialised agencies.¹⁷⁰ The International Court of Justice considers itself as a UN organ such that it must participate in the organisation's activities and co-operate in the attainment of the aims of the organisation. Judge Azevedo observed that the Court "has been raised to the status of a principal organ and thus more clearly geared to the mechanism of the United Nations Organisation", and that it "must do its utmost to co-operate with the other organs with a view of attaining the aims and principles that have been set forth."¹⁷¹

During the Cold War era, the Court was not popular with UN organs.¹⁷² The Court did not have the opportunity to fully participate in the United Nations, the use of the Court by the UN principal organs, in particular the Security Council, was minimal.¹⁷³ The Security Council has made a recommendation under Article 36 (3) of the UN Charter to refer a legal dispute to the International Court of Justice only once.¹⁷⁴ The Security Council exercised its competence to ask for the Court's advisory opinion on any legal question only in one instance, in the *Namibia opinion*.

In this section, we are not dealing with the relationship between the Security Council and the International Court of Justice in the context of the

¹⁷⁰ *The Legality of the Use by a State of Nuclear Weapons in Armed Conflict (WHO Request)* 1996 ICJ Rep. 66

¹⁷¹ *Peace Treaties (1st Phase)* 1950 ICJ Rep. 65 at 82 Judge Azevedo (Separate Opinion)

¹⁷² See generally S. Rosenne, *The Law and Practice of the International Court 1920- 1996* (1997) at 121-138

¹⁷³ Under the League of Nations, over a period of nineteen years, twenty-nine requests were received by the Permanent Court of International Justice, and twenty-seven opinions were delivered. Under the UN and over a period of fifty-five years, twenty-three opinions were requested and delivered.

requests for advisory opinions¹⁷⁵, but rather with the simultaneous consideration of the same dispute, where both organs could render binding decisions. The Charter implies no hierarchical relationship between the principal organs. This indicates that the simultaneous consideration of a dispute does not bar any organ from dealing with a dispute within its sphere of competence. Procedures before the International Court of Justice and any UN political organ “are complementary and can be pursued simultaneously or successively.”¹⁷⁶ It has been excessively discussed in scholarly works that there is no problem of having a simultaneous consideration of the same dispute, as the Court and the Security Council operate on different planes that complement each other.¹⁷⁷ The Court would deal with the dispute from the legal perspective, while the political organs deal with the dispute adopting political methods. Both organs should co-ordinate and co-operate rather than compete. That was the essence of Judge Lachs’ opinion. For him, the Court

¹⁷⁴ *Corfu Channel Case* 1947 ICJ Rep. 4

¹⁷⁵ This will be discussed below in Chapter IV

¹⁷⁶ T. J. H. Elsen, *Litispence between the International Court of Justice and the Security Council*, (1986) at 49

¹⁷⁷ Among others, D. Akande, "The International Court of Justice and the Security Council: Is there a Room for Judicial Control of Decisions of the Political Organs of the United Nations?" 46 *ICLQ* 309 (1997), M. Bedjaoui, *The New World Order and the Security Council: Testing the Legality of its Acts* (1994), M.N. Shaw, "The Security Council and the International Court of Justice: Judicial Drift and Judicial Function" 219 in A.S. Muller et al. *The International Court of Justice* (1997), K. Skubiszewski, "The International Court of Justice and the Security Council" 606 at 606-610 in V. Lowe & M. Fitzmaurice (eds.), *Fifty Years of The International Court of Justice* (1996), T. Sugihara, "The Judicial Function of the International Court of Justice with respect to Disputes Involving Highly Political Issues" 117 in A.S. Muller et al. *The International Court of Justice* (1997), E. Zubel, "The Lockerbie Controversy: Tension Between the International Court of Justice and the Security Council" *5 Annual Survey of International & Comparative Law* 259 (1999)

and the Security Council could perform their “separate but complementary functions with respect to the same events.”¹⁷⁸

However, certain arguments have been advanced to argue that the Court cannot consider a dispute already seized by the Security Council under Chapter VII, since the UN Charter confers on the Security Council the primary responsibility for the maintenance of international peace and security.¹⁷⁹ This kind of argument is based on the allocation of responsibilities between the organs of the United Nations. Nevertheless, it can be counter-argued that the Charter confers on the Security Council the primary but not the exclusive responsibility for the maintenance of peace and security.¹⁸⁰ Certainly, there are no provisions in the Charter, which suggest that, in cases where the Security Council is seized of the matter under Chapter VII, the Court should be constrained not to assume jurisdiction.¹⁸¹ The Court, as will be shown below, has rejected this kind of objection, and it has insisted that even in disputes involving a threat to international peace the Court will not defer to the Security Council.¹⁸² However, in a situation where the Security Council is acting under Chapter VII, there is a

¹⁷⁸ *Aegean Sea Continental Shelf* 1978 ICJ Rep. 3 at 52 (Judge Lachs separate opinion)

¹⁷⁹ J. Delbrück, "Article 24" 397 in B. Simma (ed.), *The Charter of the United Nations: A Commentary* (1994); G.H. Oosthuizen, "Playing the Devil's Advocate: the United Nations Security Council is Unbound by Law" 12 *LJIL* 549 (1999) at 551

¹⁸⁰ *Nicaragua Case* 1984 ICJ Rep. 392 at 434-35; see also *Lockerbie Cases* 1992 ICJ Rep. 3 at 22 (Declaration of Judge Ni)

¹⁸¹ T. Sugihara, "The Judicial Function of the International Court of Justice with respect to Disputes Involving Highly Political Issues" 117 at 125 in A.S. Muller et al. *The International Court of Justice*, (1997)

possibility that the two organs could reach different and conflicting conclusions, with both potentially having a binding force upon the States concerned. In that case, does the concept of *litispendency* apply? i.e. Does the Security Council's seizure of the dispute bar the International Court of Justice from exercising its competence to determine the same dispute?

4.2 The Relation in Practice:

The UN Charter's drafters intended to create a functional separation among the different UN principal organs.¹⁸³ The principal organs were designed to have separate but complementary functions. These functions are different in nature and methods of operation.¹⁸⁴ The differences are as Professor Gowlland-Debbas pointed out, reflected in the nature of their responsibilities, composition, methods of operation and power.¹⁸⁵ There is a clear division of responsibilities. The Court is the principal judicial organ of the United Nations, set up to function in accordance with its Statute, and it has to deal with everything that is of a legal nature.¹⁸⁶ On the other hand, the Security Council is a political organ, it has the responsibility for the maintenance of international peace and security under Article 24 of the Charter, and the General Assembly is a political and

¹⁸² For example, *Aegean Sea Continental Shelf Case*, *the Hostages Case*, *Nicaragua Case*, See Also T. J. H. Elsen, *Litispence between the International Court of Justice and the Security Council*, (1986) at 63

¹⁸³ Doc.933 IV/2/42 (2), 13 UNCIO Docs. 703 at 709

¹⁸⁴ *Lockerbie Case* 1992 *ICJ Rep.* 3 at 96 Judge El-kosheri (dissenting opinion)

¹⁸⁵ V. Gowlland-Debbas, "The Relationship Between the International Court of Justice And the Security Council in the Light of the Lockerbie Case" 88 *AJIL* 643 (1994) at 653

¹⁸⁶ Article 92 of the UN Charter

administrative organ of the United Nations. However, the intention of the United Nations founders was not “to encourage a blinkered parallelism of functions but a fruitful interaction”¹⁸⁷.

Therefore, it is not unusual¹⁸⁸ for a dispute to be entertained by the judicial organ and the political organs of the UN.¹⁸⁹ As noted in the previous section, it is possible to have the simultaneous consideration of a dispute in two organs and it has its basis in the law of the United Nations. The International Court of Justice appears to have approached the issues in a spirit of “co-operation with the Security Council, not of competition, and not on the basis of any hierarchical relationship between [these] two principal organs,”¹⁹⁰ which are the only organs of the United Nations with the power to make decisions which are binding on States.

However, the relationship is given a different shape with the concept of *litispendency* blooming in the air. It has been argued that the concept of *litispendency* has no place in the United Nations system.¹⁹¹ However, it has been claimed that the existence of Article 12 of the Charter means that the Charter

¹⁸⁷ *Lockerbie Cases* 1992 ICJ Rep. 114 at 138 (Judge Lachs separate opinion)

¹⁸⁸ Professor Shaw has pointed out: “...co-ordinate or parallel consideration of the same factual situation by different legal and political organs is the rule rather than the exception”. M. N. Shaw, “The International Court of Justice: A Practical Perspective” 46 *ICLQ* 831 (1997) at 835

¹⁸⁹ Article 12 of the UN Charter restrains the General Assembly from considering a dispute that the Security Council is dealing with. But there is no provision in the Charter to regulate the relation between the International Court of Justice and the political organs.

¹⁹⁰ S. Rosenne, *The Law and the Practice of the International Court 1920-1996*, (1997) at 137

¹⁹¹ Rosenne and Gill, *The World Court What It is and How It works* (4th ed.) (1989) at 32-33; D.

Ciobanu, “Litispendency Between the International Court of Justice and the Political Organs of the United Nations” 209 at 219 in L. Gross (ed.), *The Future of the International Court of Justice* (1976) (stating that “It is not certain that the doctrine of litispence is a component part of the law of the United Nations”)

embodies a concept of *litispendency* that co-ordinates the jurisdiction of the principal political organs of the United Nations.¹⁹² By definition, the concept of *litispendency* legally precludes an organ from exercising jurisdiction in its respective sphere of activity simply because the other organ is simultaneously seized of the same question.¹⁹³

However, in relation between the Court and the Security Council there is no such a provision as Article 12 of the Charter. Leo Gross stated: “[n]o comparable provision (Article 12) has been inserted with respect to matters pending before the political organs and the judicial organ.”¹⁹⁴ That indicates that the concept of *litispendency* does apply to the relationship between the political organs, but not to the relationship between the International Court of Justice and the political organs of the United Nations. The Charter opens the possibility of numerous cases of simultaneous seizing of the same dispute.¹⁹⁵ A party to a dispute or any other State¹⁹⁶ or the Secretary-General¹⁹⁷ may bring a dispute to the attention of the Security Council, which might embark on enforcement action

¹⁹² T. J. H. Elsen, *Litispendence between the International Court of Justice and the Security Council*, (1986) at 49

¹⁹³ Rosenne and Gill, *The World Court What It is and How It works* (4th ed.) (1989) at 32-33; See also T. J. H. Elsen, *Litispendence between the International Court of Justice and the Security Council*, (1986) at 1

¹⁹⁴ L. Gross, “The International Court of Justice and the United Nations” 120 *RDC* 313 (1967- I) at 328

¹⁹⁵ M. Bedjaoui, *The New World Order and the Security Council: Testing the legality of its Acts*, (1994) at 61

¹⁹⁶ Article 35 (1) (2) of the Charter

¹⁹⁷ Article 99 of the UN Charter

under Chapter VII, and at the same time the party or parties may refer the dispute to the Court.

The simultaneous consideration of a dispute arose in the *Aegean Sea Continental Shelf Case*. In this case, while the Security Council was dealing the dispute between Turkey and Greece concerning the Aegean Sea continental shelf, the Court simultaneously entertained proceedings in the dispute.¹⁹⁸ Objections were raised against such concurrent jurisdiction. However, the Court expressed its belief that the simultaneous treatment of one matter by multiple UN organs was unproblematic, and “neither of those two organs must wait for the other to assert jurisdiction over a case.”¹⁹⁹

Similarly, the objection of *litispendency* was raised by the respondent, the United States, in the *Nicaragua Case*. The facts of the case have already been discussed in an earlier Chapter. The United States argued that the Court should decline to entertain the case as the Security Council was dealing with the dispute at the same time. The Court denied that the mere presence of an issue before any other United Nations organ should preclude another organ from simultaneously considering the issue.²⁰⁰ It was argued that when the Security Council seized the matter under Chapter VII, the International Court of Justice should decline to

¹⁹⁸ *Aegean Sea Continental Shelf (Greece v. Turkey)* 1976 ICJ Rep. 3

¹⁹⁹ D. E. Acevedo, “Disputes Under Consideration By the UN Security Council or Regional Bodies” 242 at 255 in L.F. Damrosch. (ed.), *The International Court Of Justice at Crossroads*, (1987); see also *Aegean Sea Continental Shelf (Greece v. Turkey)* 1976 ICJ Rep. 3 at 11

²⁰⁰ *Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Jurisdiction and Admissibility)* 1984 ICJ Rep. 392 at 432-5

entertain the dispute.²⁰¹ However, Rosenne observed that: “[t]here is... no express authority in the Charter or in the Statute for the proposition that, if a case submitted to the Court should constitute a threat to world peace, the Security Council may seize itself to the case and thereby put an end to the Court’s jurisdiction.”²⁰²

It is obvious and normal that in the Court the relief sought is always legal, which on the other hand, in the Security Council the remedy sought is political in nature. It is understood that a degree of complementarity exists between those organs from the perspective of their powers and competence.²⁰³ Mr. Owen, the agent of the United States, stated in the *United States Diplomatic and Consular Staff in Tehran Case*:

“The Security Council is a political organ which has responsibility for seeking solutions to international problems through political means. By contrast, this Court is a judicial body with the responsibility to employ judicial methods in order to resolve those problems which lie within its jurisdiction. There is absolutely nothing in the United Nations Charter or in this Court’s Statute to suggest that action by the Security Council excludes action by the Court, even if the two actions might in some respects be parallel.”²⁰⁴

The International Court itself asserted this conclusion, and observed that:

²⁰¹ *Case Concerning Military and Paramilitary Activities in and Against Nicaragua* (Provisional Measures) 1984 *ICJ Rep.* 169 at 185

²⁰² S. Rosenne, *The Law and Practice of the International Court 1920- 1996* (1997) at 131

²⁰³ V. Gowlland-Debbas, “The Relationship Between the International Court of Justice And the Security Council in the Light of the Lockerbie Case” 88 *AJIL* 643 (1994) at 648

²⁰⁴ *United States Diplomatic and Consular Staff in Tehran Pleadings* 1 at 29

“it does not seem to have occurred to any member of the [United Nations Security] Council that there was or could be anything irregular in the simultaneous exercise of their respective functions by the Court and the Security Council. Nor is there in this any cause of surprise...It is for the Court, the principal judicial organ of the United Nations, to resolve any legal questions that may be in issue between parties to a dispute; and the resolution of such legal questions by the Court may be important, and sometimes decisive, factor in promoting the peaceful settlement of the dispute. This is indeed recognised by Article 36 of the Charter...”²⁰⁵

This case, as noted earlier, showed that even in disputes that involve a threat to international peace, the Court will not defer to the Security Council.²⁰⁶ A division of functional responsibilities between the International Court and the other UN organs does not preclude the simultaneous application of political and legal methods to a given dispute.

Nevertheless, the most debatable situation is when the two organs reach conflicting or contradicting conclusions. The Security Council, in the *Lockerbie Cases*, suppressed or restricted the decision of the Court by the adoption of the Resolution 748. This case certainly presented a situation in which the binding determinations of the Court and the Security Council could be in conflict with respect to the same matter. The political processes of the Security Council had produced a decision, Resolution 748, that obliged Libya to extradite its two accused suspects, while a judicial pronouncement on the interpretation of the

²⁰⁵ *Case Concerning United States Diplomatic and Consular Staff in Tehran (USA v. Iran)* 1980 *ICJ Rep.* 3 at 21-2

Montreal Convention of 1971 could, supposing that the Court had not adopted the tentative approach of denying Libya provisional measures, have held that Libya was under no legal obligation to extradite the suspects contrary to its domestic law.²⁰⁷ It is striking, however, that the International Court, in its opinion, left this issue unclear and opened speculations as to whether the Court was right in exercising self-restraint.

Professor Macdonald observed that the reason behind the reason for the Court's rejection of Libya's request for provisional measures could be either that:

“[t]he rationale of the decision could have been either that an indication of the provisional measures requested would have had no effect or that the Court felt that it should avoid making a determination that would conflict with a binding resolution of the Security Council.”²⁰⁸

As the functions and the spheres of competence of the International Court and the Security Council are different, there was no clear reason why contrary determinations should undermine the decisions of either body. The Court could have decided the legal extradition issue while the Security Council was dealing with the State's international terrorism.²⁰⁹

One commentator argued that the Court's decision in the *Lockerbie Cases* (provisional measures) helped in defining “the hierarchy of competence in the

²⁰⁶ T. J. H. Elsen, *Litispence between the International Court of Justice and the Security Council*, (1986) at 63

²⁰⁷ R. St. J. Macdonald, “Changing Relations Between The International Court Of Justice and The Security Council of The United Nations” 31 *Can. Y. Int'l L.* 3 (1993) at 17

²⁰⁸ *Ibid.* at 21

United Nations, and held that certain resolutions of the Security Council precluded the Court from taking judicial action.”²¹⁰ However, as mentioned above, the Charter does not create any hierarchical relationship between the principal organs of the United Nations. Besides, the precedents of the relation between the International Court and the Security Council established the fact the doctrine of *litispendency* does not apply to their relation. Instead, the simultaneous and concurrent jurisdiction on the same dispute is what colours that relation.

However, it is essential to note that the Court’s order not to grant Libya the requested provisional measures does not mean that the Security Council did preclude the Court from exercising its jurisdiction. The Court did not find that Libya’s rights under Montreal Convention could not be protected. The Court could have given a different conclusion had Libya used its rights under general international law as the basis for its request for provisional measures.²¹¹

This section rejects the arguments that deny the Court's capabilities of handling the same dispute simultaneously with the Security Council. However, it, at the same time, raises the problem of the non-justiciability that is often advanced against the Court's jurisdiction and competence to settle disputes. For more than a century, the justiciability of international disputes has been among

²⁰⁹ *Lockerbie Cases* 1992 ICJ Rep. 3 at 34 (Judge Bedjaoui dissenting opinion)

²¹⁰ S.I. Bortz, “Avoiding a Collision of Competence: The Relationship between the Security Council and the International Court of Justice in the Light of *Libya v. United States*” 2 *Journal of Transnational Law and Policy* 353 (1993) at 353

²¹¹ Judge Oda’s Declaration, *Lockerbie Cases*, 1992 ICJ Rep. 3 at 18-19

the most vigorously debated issues in international law.²¹² The essence of the doctrine of justiciability is that there are some disputes that are too political, or too complex and remote from the legal forum, to be comprehended through the ordinary judicial process. This relates to the nature of the questions that the Court is able to entertain. It has been argued that the Security Council is deemed competent to decide political matters, whereas the Court is accorded primacy in legal matters. The International Court of Justice has often mentioned that the political aspects of a particular dispute do not preclude it from entertaining the legal aspects of the dispute.²¹³ The next section will give a wider picture of the doctrine of non-justiciability. In the light of this, it will then examine the jurisprudence of the International Court dealing with this issue.

5 Dichotomy Between the Legal and Political Disputes

5.1 The Philosophy behind the Doctrine of Non-Justiciability:

The doctrine of non-justiciability is an expression of the doctrine of state sovereignty. A sovereign state does not acknowledge any authority above itself; it recognises itself as a sole judge of its actions, especially in matters concerning its relations with other sovereign states. As early as the First Hague Conference

²¹² H. Lauterpacht, *The Function of Law in the International Community*, (1933); R.Y. Jennings, "Reflections on the Term 'Dispute'" 401 at 405 in R. St. J. Macdonald (ed.), *Essays in Honour of Wang Tieya* (1994); R. Higgins, "Policy Considerations and the International Judicial Process" 17 *ICLQ* 58 (1968); T. Sugihara, "The Judicial Function of the International Court of Justice with Respect to Disputes Involving Highly Political Issues" 117 at 117–119 in A.S. Muller et al. (eds.), *The International Court of Justice* (1997)

²¹³ See for example the International Court of Justice Opinions in *United States Diplomatic and Consular Staff in Tehran (United States v. Iran)* 1980 *ICJ Rep.* 3 at 20; *Case Concerning Military*

when the idea of compulsory arbitration began to emerge, the distinction between legal and political disputes was introduced. It was thought that such a distinction might help to overcome the general unwillingness of States to submit their disputes to an international tribunal for judicial settlement and to preserve the sovereignty of States.²¹⁴

It has been noted that the doctrine of non-justiciability connotes that, by the very nature of international relations, there are certain types of international disputes that are not suitable for judicial settlement, “in particular for judicial settlement following upon obligation undertaken in advance within the framework of so-called “compulsory” or “obligatory” arbitration.”²¹⁵

The notion of inherent limitations on the scope of the international judicial process is comparatively recent. Lauterpacht has traced this notion to a distinction first drawn in the mid-eighteenth century by the Swiss jurist Vattel. In his attempt to reconcile the right of sovereignty with the recognition of a legal order among nations, Vattel’s views were that the possibility of arbitration could be seen only in disputes that did not affect the safety of the States.²¹⁶ It therefore becomes necessary to distinguish essential rights and less important ones in order to determine where arbitration would be useful. In practice, essential rights were construed as only those that would constitute threats to a State’s very survival. Governments have frequently held to the view that judicial settlement of disputes

and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America) (Jurisdiction and Admissibility) 1984 ICJ Rep. 392 at 433

²¹⁴ H. Lauterpacht, *The Function of Law in the International Community* (1933) at 5

²¹⁵ *Ibid.* at 4

must be confined to small issues that do not affect the vital interests of States. However, the use of the concept of vital interests is very problematic. A State may subjectively determine the scope of its vital interests.²¹⁷ It is capable of being expanded to include any dispute to which that State does not want to see the application of international law. Justifying the doctrine of non-justiciability on the basis of important issues or the vital interests of a State aims to reserve to that State the freedom of action of which it alone the judge.²¹⁸

Towards the beginning of the twentieth century, international legal scholars sought to revive Vattel's views by enhancing the class of essential rights, substituting broader notions of sovereign prerogative for that of national survival. The distinction between political and legal disputes has, however, been given other connotations. In his 1873 speech at the first meeting of the Institute of International law, Goldschmidt believed that: "there are no grounds for a judicial decision, nor consequently for an arbitral decision, in differences which are not of a legal character... and whose nature does not admit of a judgement according to rules of law."²¹⁹ Accordingly, legal disputes are those in which rules of law can be applied and political disputes are those in which the rule of law finds no place. In

²¹⁶ *Ibid.*

²¹⁷ See the United States' practice in Nicaragua and how wide was the interpretation of "vital interests". *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)* (Jurisdiction and Admissibility) 1984 ICJ Rep. 392 at 398-99

²¹⁸ H. Lauterpacht, *The Function of Law in the International Community* (1933) at 61

²¹⁹ "Draft Regulations for International tribunals. Preliminary Remarks" cited in J.B.Scott *Resolutions of the Institute of International Law* (1916) at 207 cited in H. Lauterpacht, *The Function of Law in the International Community* (1933) at 52

other words, arbitration is suitable only for matters that are capable of juridical analysis.²²⁰

Since 1899, this distinction has been included in most international conventions for the peaceful settlement of disputes.²²¹ It appeared in Article 13 of the Covenant of the League of Nations whose substance was incorporated in Article 36(2) of the Statute of the Permanent Court of International Justice. This Article became in turn, with slight modification, Article 36(2) of the Statute of the International Court of Justice. Despite the distinction's complexity and longevity, neither the UN Charter nor the ICJ Statute explicitly define the term "legal disputes", and nor are there objective criteria in either instrument by which such "legal disputes" can be distinguished from others. Article 36(2) of the Statute simply lists the categories of "legal disputes" in respect of which the obligation of compulsory adjudication exists.²²²

Implementing objective criteria for distinguishing between what is a legal dispute and what is a political dispute is rather controversial. The parties in dispute are always independent States asserting public claims, implicating the policy choices of their respective sovereign governments. It is impossible to qualify any dispute to be legal, because States do not have clear criteria of when

²²⁰ H. Lauterpacht, *The Function of Law in the International Community* (1933) at 140

²²¹ Compare with Article 15 of the Hague Convention For the Pacific Settlement of Disputes, 1899. H. G. Darwin, "General Introduction" 57 at 58-62 in *International disputes : the legal aspects ; report of a study group of the David Davies Memorial Institute of International Studies* (1972)

²²² E. Gordon, "Legal Disputes Under article 36(2) of the Statute" 183 at 183 in L.F. Damrosch(ed.) *The International Court of Justice At A Crossroads* (1987)

they will give a dispute the qualifier “political”. Instead, Lauterpacht pointed out that any dispute is a combination of legal and political aspects:

“While it is not difficult to establish the proposition that all disputes between states are of a political nature, inasmuch as they involve more or less important interests of states, it is equally easy to show that all international disputes are disputes of a legal character in the sense that, so long as the rule of law is recognised, they are capable of an answer by the application of legal rules.”²²³

Lauterpacht observed that by looking at the international community’s practice one could easily be struck by two contradictory sets of facts. One tended to show that international disputes, while capable of legal decision, are of a political nature; the other that important political disputes are amenable to a legal process. This controversy relies on the fact that there is no clear definition of the terminology of what constitutes a legal dispute. Lauterpacht saw the real definition of a legal dispute as rooted within the will of States. It is the refusal of the State to submit the dispute to judicial settlement, and not the nature of the conflict, which makes it political. The willingness of the State to submit the dispute to a third party settlement is the only test of justiciability of the dispute.²²⁴

On the other hand, scholars have argued that there is no difference between legal and political questions. As Higgins explains “what is relevant is the

²²³ H. Lauterpacht, *The Function of Law in the International Community* (1933) at 158

²²⁴ *Ibid.* at 164

distinction between a political method and a legal method of disputes.”²²⁵ Judge

Jennings has also noted that:

“the rubric of ‘legal dispute’ should be understood as indicating not only something about the objective character of a dispute submitted to a court, but much more the highly technical procedure whereby the court and the parties together reduced their dispute into a form which renders it manageable in an adversarial procedure in a court of law; in a word, made ‘justiciable’...”²²⁶

Accordingly, there seems to be no category of exclusively political or non-justiciable disputes.²²⁷ If a claim is brought before the Court, it can be refined and reduced to specific facts of law so that rational argument and judicial determination can be applied.²²⁸

The International Court of Justice has never accepted the political question doctrine as an excuse to preclude it from exercising its competence. The jurisprudence of the International Court of Justice is full of cases in which there are political overtones significant enough to raise a question over the ability to accept “political” question. It has consistently rejected the assertions that the combination of legal and political issues in a request for advisory opinion or in a particular dispute brought before the Court would constitute a legitimate reason to

²²⁵ R. Higgins, “Policy Considerations and the International Judicial Process” 17 *ICLQ* 58 (1968) at 74

²²⁶ R.Y. Jennings, “Reflections on the Term ‘Dispute’” 401 at 405 in R. St. J. Macdonald (ed.), *Essays in Honour of Wang Tieya* (1994)

²²⁷ See generally M. Koskeniemi, “The Politics of International Law” 1 *EJIL* 4 (1990)

²²⁸ T. Sugihara, “The Judicial Function of the International Court of Justice with Respect to Disputes Involving Highly Political Issues” 117 at 128 in A.S. Muller et al. (eds.), *The International Court of Justice*, (1997)

refuse to decide the legal issues presented. The following section will discuss an exposé of the Court's jurisprudence to explore the International Court's approach to the doctrine of non-justiciability.

5.2 The International Court of Justice and the Doctrine of non-Justiciability:

The International Court of Justice did not have to wait long to get its first case with important political issues. In 1948, the *Conditions of Admission of a State to Membership in the United Nations* case arose out of disagreement among the members of the Security Council over the admission of five states to the United Nations. The majority of the Security Council agreed to admit Italy and Finland, but was not in favour of admitting Bulgaria, Hungary and Romania. The Soviet Union agreed to give its vote in favour of admitting all five- conditioning its affirmative vote on the first two on the admission of the last three. The debate was highly political, revolving around the increasing polarisation of the post-war period. The General Assembly asked the International Court to give an advisory opinion. The question posed was:

“Is a Member of the United Nations which is called upon, in virtue of Article 4 of the Charter, to pronounce itself by its vote, either in the Security Council or in the General Assembly, on the admission of a State to membership in the United Nations, juridically entitled to make its consent to the admission dependent on conditions not expressly provided by paragraph I of the said Article? In particular, can such a Member, while it recognizes the conditions set forth in that provision to be fulfilled by the State concerned, subject its affirmative vote to the additional condition that

other States be admitted to membership in the United Nations together with that State?”²²⁹

Many participants contended that the dispute was a political one falling outside the jurisdiction of the Court. The Court responded:

“The Court cannot attribute a political character to a request which, framed in abstract terms, invites it to undertake an essentially judicial task, the interpretation of a treaty provision [Article 4(1) of the Charter]. It is not concerned with the motives which may have inspired this request, nor with the considerations which, in the concrete cases submitted for examination to the Security Council, formed the subject of the exchange of views which took place in that body.”²³⁰

In his concurring opinion, Judge Azevedo observed that the then-prevailing opinion was that “the abolition of *non-justiciable* dispute has not yet been obtained.”²³¹ However, he added: “[b]y applying an objective criterion faithfully, any legal question can be examined without considering the political elements which may in some proportion, be involved.”²³²

This quotation confirms what Judge Jennings observed. The International Court of Justice applied a “value free” or objective approach to the problem. It had shorn the question of its political context and reduced it into a justiciable form, i.e. the interpretation of Article 4(1) of the United Nations Charter. The

²²⁹ *Conditions of Admission of a State to Membership in the United Nations (Article 4 of Charter)*, 1948 ICJ Rep. 57

²³⁰ *Ibid.* at 61

²³¹ *Ibid.*

²³² *Ibid.*

Court analysed Article 4(1) and found that the Member States were not permitted to make their consent to membership dependent on any other conditions than those provided in Article 4.²³³

A similar approach was adopted in the *Certain Expenses* opinion, when it was argued that the question put to the Court was intertwined with political questions and that for this reason the Court should refuse to give an opinion. The General Assembly asked the Court to give its opinion on whether the United Nations peacekeeping operations in Congo and the Middle East were normal expenses of the Organisation within the meaning of Article 17(2) of the Charter. In responding to the quotation, the Court ruled:

“It is true that most interpretations of the Charter of the United Nations will have political significance, great or small. In the nature of things it could not be otherwise. The Court, however, cannot attribute a political character to a request which invites it to undertake an essentially judicial task, namely, the interpretation of a treaty provision.”²³⁴

The Court had once again reduced the question to be one of law, and deprived it of its political context. It showed that a dispute could be separated into political and legal components, each to be dealt with separately.

In the *Namibia opinion*, the Court was asked to give its advisory opinion on the following question: “[w]hat are the legal consequences for States of the

²³³ *Ibid.* at 65

²³⁴ *Certain Expenses of the United Nations (Article 17, paragraph 2 of the Charter)*, 1962 ICJ Rep. 151 at 155

continued presence of South Africa in Namibia notwithstanding Security Council resolution 276 (1970)?”²³⁵ The Court decided that the continued presence of South Africa in Namibia was illegal and that South Africa was under an obligation to withdraw its administration immediately. It went further to declare that Member States of the United Nations were under an obligation to recognise the illegality of the South African presence and to provide no assistance or support to this presence and administration.²³⁶

During the course of the advisory opinion, the Government of South Africa contended, however, that, as a matter of judicial propriety, the Court should refuse to exercise its competence since the question of the South African presence in Namibia would involve “political pressure” to which the Court had been or might be subjected.²³⁷ In rejecting this contention, the Court affirmed that as a court of law, it could act only on the basis of law, “independently of all outside influences or interventions whatsoever, in the exercise of the judicial function entrusted to it alone by the Charter and its Statute.”²³⁸

The International Court of Justice has maintained the same attitude in exercising its competence in contentious proceedings. It has frequently stated that

²³⁵ *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South-West Africa) Notwithstanding Security Council Resolution 276 (1970)*, 1971 ICJ Rep. 16

²³⁶ *Ibid.* at 58

²³⁷ Written Statement of the Government of the Republic of South Africa, *Namibia Pleadings* 337, at 425-450

²³⁸ *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South-West Africa) Notwithstanding Security Council Resolution 276 (1970)*, 1971 ICJ Rep. 16 at 23

the mixture of legal and political issues in a dispute brought before it would not prevent it from exercising its competence as a judicial body, and addressing the legal issues involved.

The alleged unsuitability of the International Court to deal with political questions was advanced in the case concerning *US Diplomatic and Consular Staff in Tehran* (US v. Iran). On November 4th, 1979, several hundred young supporters of a theologically- based political faction in Iran took control of the American Embassy compound in Tehran and the sixty-three Americans inside, most of them accredited diplomats. After making sure that there was no other possible way to handle the issue through the United Nations Security Council because of the Soviet veto²³⁹, the United States instituted proceedings against Iran before the International Court of Justice, which unanimously made an order on December 15th, 1979, indicating provisional measures pending the Court's final decision.²⁴⁰ That Order provided that: "the Government of Islamic Republic of Iran should ensure the immediate release, without any exception, of all persons of United States nationality who are or have been held in the Embassy of the United States of America or in the Ministry of Foreign Affairs in Tehran, or have been held as hostages elsewhere."²⁴¹

²³⁹ The United States drafted a resolution under which the Security Council should impose a sweeping embargo on Iran. This resolution failed of adoption because of the negative vote of the Soviet Union. See A. P. Rubin, "The Hostages Incident: The United States and Iran" *36 YearBook of World Affairs* 213 (1982) at 216

²⁴⁰ *United States Diplomatic and Consular Staff in Tehran (United States v. Iran)* (provisional measures) 1979 ICJ Rep. 7

²⁴¹ *Ibid.*

The non-justiciable character of the dispute was underscored by the Government of Iran in its letter of December 9, 1979, to the Court. Iran urged the Court “not [to] take cognisance of the case” which “only represents a marginal and secondary aspect of an overall problem.” Iran argued that the problem is “not one of interpretation and application of the treaties upon which the American Application is based” and that any examination of the numerous repercussions of the Islamic revolution is “a matter essentially and directly within the national sovereignty of Iran.”²⁴² The Government of Iran further considered that the Court “cannot examine the American Application divorced from its proper context, namely the whole political dossier of the relations between Iran and the United States.”²⁴³

On Dec. 15th, 1979, the Court decided on the Government of Iran’s preliminary objection and found that it did indeed have the right to deal with this question which fell within its competence. In the words of the Court:

“The seizure of the United States Embassy and consulates and the detention of internationally protected persons as hostages cannot be considered as something “secondary” or “marginal”, having regard to the importance of the legal principles involved.”²⁴⁴

The Court pointed to the fact that no provision of the Statute or Rules contemplates that it should decline to take cognisance of one aspect of a dispute

²⁴² *Ibid.* at 8-9

²⁴³ *Ibid.*

²⁴⁴ *Ibid.* at 19

merely because that dispute has other aspects, however important.²⁴⁵ It continued to maintain that since this dispute involved the interpretation or application of multilateral conventions, it was “one which by its very nature falls within international jurisdiction.”²⁴⁶ In its 1980 judgment, the Court emphasised that:

“Legal disputes between sovereign states by their very nature are likely to occur in political disputes, and often form only one element in a wider and longstanding political dispute between the states concerned. Yet never has the view been put forward before that, because a legal dispute submitted to the Court is only one aspect of a political dispute, the Court should decline to resolve for the parties the legal questions at issue between them. Nor can any basis for such a view of the Court’s functions or jurisdiction be found in the Charter or the Statute of the Court; if the Court were, contrary to its settled jurisprudence, to adopt such a view, it would impose a far-reaching and unwarranted restriction upon the role of the Court in the peaceful solution of international disputes.”²⁴⁷

This answer fits the Court’s previous pronouncements in this issue very closely. Even where there is a political context to a dispute, the Court will deal with those legal aspects presented to it. The International Court of Justice showed that it is willing to separate the two spheres.

²⁴⁵ *Ibid.* at 15

²⁴⁶ *Ibid.* at 16

²⁴⁷ *United States Diplomatic and Consular Staff in Tehran (United States v. Iran)* 1980 ICJ Rep.3 at 20

The *Nicaragua case* was highly political and volatile. The political intensity in this case led the United States to question the professional quality of the Court's judicial work.²⁴⁸

Nicaragua charged the United States with using military force against Nicaragua and intervening in its internal affairs in violation of Nicaragua's sovereignty, territorial integrity and principles of international law. In May 1984, the International Court, at the request of Nicaragua, indicated provisional measures.²⁴⁹

The United States Government contended that the Nicaraguan application should be declared inadmissible on the ground that the dispute involved an ongoing armed conflict involving the use of force contrary to the United Nations Charter. The US claimed that this was an issue with which the Court could not deal effectively without overstepping proper judicial bounds.²⁵⁰

The Court unanimously, in its provisional measures order, ordered the United States to cease and refrain from its military activities in the Nicaraguan ports and requested the parties not to undertake action that might aggravate the situation or prejudice the rights of the other party.²⁵¹ In November 1984, the Court decided on the preliminary objections raised by the United States. The Court

²⁴⁸ Abram Chayes, "Nicaragua, The United States, and the World Court" 85:2 *Colum. L. Rev.* 1445(1985) at 1447 See Judge Lachs' Reply, M. Lachs, "A Few Thoughts on the Independence of Judges of the International Court of Justice" 25 *Colum. J. Transnat'l. L.* 593 (1987)

²⁴⁹ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)* (provisional measures) 1984 *ICJ Rep.* 169 at 187

²⁵⁰ *Ibid.*

²⁵¹ *Ibid.*

found that it did indeed have jurisdiction in terms of Article 36(2) and (5) of its Statute, and also in terms of the US-Nicaragua Treaty of Friendship, Commerce, and Navigation of 1956.²⁵²

By a vote of 15 to 1 (with the US judge dissenting), the Court asserted that it had jurisdiction to proceed to the merits stage and thus to the hearing of the substantive international law issues involved in the Nicaraguan complaint against the United States. The Court, at the same time, directed that its interim Order of early 1984 and the provisional measures indicated in it should remain in force pending the final judgement on the merits.²⁵³ At the merits stage, the US Government announced, in January 1985, that the United States would not participate any further in the case and that it would reconsider the United States acceptance of the compulsory jurisdiction of the Court.²⁵⁴ The text accompanying its announcement of January 1985 declared that those proceedings constituted:

“[a] misuse of the Court for political purposes...the Court lacks jurisdiction and competence over such case. The Court’s decision of November 26, 1984, finding that it has jurisdiction, is contrary to law and fact...

The conflict in Central America... is not a narrow legal dispute; it is inherently political problem that is not appropriate for judicial resolution. The conflict will be solved only by political and diplomatic means...not through a judicial tribunal. The International Court of Justice was never intended to resolve issues of collective security and

²⁵² *Ibid.* at 180

²⁵³ *Nicaragua Case*, (Jurisdiction and Admissibility) 1984 *ICJ Rep.* 392

²⁵⁴ “Statement of Department of State on US Withdrawal from Nicaragua Proceedings, 18 January 1985” reprinted in 24 *International Legal Materials* 246 (1985)

self-defence and is patently unsuited for such a role.”²⁵⁵

The US Government went further to charge the Court with making:

“a marked departure from its past, cautious approach to jurisdictional questions. The Court’s decision [of November 26, 1984, on *Jurisdiction and Admissibility*] raises a basic issue of sovereignty. The right of a state to defend itself or to participate in collective self defence against aggression is an inherent sovereign right cannot be compromised by an inappropriate proceedings before the World Court...the decision of November 26 represents an over-reaching of the Court’s limits, a departure from its tradition of judicial restraint, and a risky venture into treacherous political waters.”²⁵⁶

The United States Government argued that such a dispute is non-justiciable because only the state concerned can decide on the necessity and proportionality of its defensive action. The US Government considered that the dispute fell rather under its inherent rights of self-defence. Rostow²⁵⁷ argued that there are political-legal “No Man’s Lands”, involving what States may choose to consider as touching their own vital interests, into which the Court will venture only at its extreme legal, and political, peril. Nevertheless, it is recognised that self-defence is a legal right, which constitutes a deviation from the general prohibition on the use of force. The question of the legality of self-defence loses

²⁵⁵ “Statement of Department of State on US Withdrawal from Nicaragua Proceedings, 18 January 1985” 79 *AJIL* 438 (1985) at 441

²⁵⁶ *Ibid.*

its essential meaning if the answer is left solely to the judgement of the State purporting to use this right.²⁵⁸ As Judge Schwebel maintained in his dissenting opinion, Article 51 “cannot reasonably be interpreted to mean that only the State exercising a claimed self-defence is the judge of the legality of its actions.”²⁵⁹

Moreover, the US Government raised an objection on the ground that the Court lacked the competence to deal with disputes involving the use of force and armed attack. But the use of force against a sovereign State violates a legal obligation, which gives rise to international responsibility, which is on its face, a legal question.²⁶⁰

One author questioned the impartiality of international adjudication. He argued that States prefer to use other means of dispute resolution other than adjudication, because of the potential risks, especially “some [ICJ] judges take direct orders from their respective ministries”²⁶¹, which led many States not to trust international adjudication. Judge Lachs, in his reply to these allegations, argued that the Court’s bench consisted of well-accredited judges, and that the lack of confidence in international courts stems from “the nature of the State

²⁵⁷ E. Rostow, “Disputes Involving the Inherent Right of self-defence” 81 *AJIL* 264 (1987); see for criticism E. McWhinney, “Judicial Settlement of Disputes Jurisdiction and Justiciability” 221 *RDC* 9 (1990) at 67

²⁵⁸ O. Schachter, “Disputes Involving The Use Of Force” 223 at 230 in L.F. Damrosch(ed.), *The International Court of Justice At A Crossroads* (1987)

²⁵⁹ *Nicaragua case* (Jurisdiction and Admissibility)1984 *ICJ Rep.* 392 para 46 at 558 (Judge Schwebel dissenting opinion)

²⁶⁰ *Ibid.* See also para.45 and 47-50 at 591-593 (Judge Schwebel dissenting opinion)

²⁶¹ P. M. Norton, “The *Nicaragua Case*: Political Questions Before the International Court of Justice” 27 *Va. J. Int’l L.* 459 (1987) at 502

parties involved, which traditionally recognised no superior authority.”²⁶²

Therefore, not to resort to international adjudication has nothing to do with the ICJ judges and their “biased” attitude, it is rather another way for States to show their unwillingness to apply legal rules to their disputes.

Just as the Court rejected the Iranian objections for the non-justiciability of the dispute in the *Hostages* case, it rejected the US objections in the *Nicaragua* case. It disregarded the US refusal to participate in the proceedings, and the Court proceeded to hear the Nicaraguan argument on the merits. In June 1986, the Court announced its judgment on the Merits, in which, by 12-to-3 vote on the main issues, the Court upheld the substance of the Nicaraguan legal charges against the US Government.²⁶³

It can be concluded that the claim of non-justiciability of a dispute is nothing but an expression of the wish of a State to substitute its own will for its legal obligation. The cases examined, especially the *Hostages* case and the *Nicaragua* case verify what Lauterpacht had established long before. All conflicts in the sphere of international politics can be reduced to contests of a legal nature; and that the only decisive test of justiciability of disputes is “the willingness of the disputants to submit the conflict to the arbitrament of law.”²⁶⁴

²⁶² M. Lachs, "A Few Thoughts on the Independence of Judges of the International Court of Justice" 25 *Colum. J. Transnat'l. L.* 593 (1987) at 594

²⁶³ *Nicaragua case* (merits) 1986 *ICJ Rep.* 14

²⁶⁴ H. Lauterpacht, *The Function of Law in the International Community* (1933) at 158,164

6 Conclusion

The aim of this chapter was to delineate a middle way approach between the realist school and judicial romantic school. The chapter started with the premise that the UN Charter is a treaty but has developed well beyond any normal multilateral treaty.²⁶⁵ It established an organisation that in one way or another is doing its best to gear the international community towards peace and security. The UN Charter created UN organs and delegated powers to assist them in achieving common interests.²⁶⁶ UN organs cannot act outside the contours of the powers delegated to them. UN organs should act in accordance with the objectives of their constituent instrument. Besides, as the United Nations has been granted international personality²⁶⁷, the United Nations and its organs, by this fact, are subject to international law. Therefore, they have to observe the rules of *jus cogens* and general international law.

However, the realist school, as mentioned in the introduction of this chapter, advanced the argument that the Security Council, acting under Chapter VII of the UN Charter, does not have to be bound by law. To certain degree, it was accepted that the Security Council under Article 39 enjoys a broad discretionary power, and it is difficult to apply legal means for such

²⁶⁵ B. Fassbender, "The United Nations Charter As Constitution of the International Community" 36 *Columbia Journal of Transnational Law* 529 (1998)

²⁶⁶ S. Lamb, "Legal Limits to the United Nations Security Council Powers" 361 at 370 in G.S. Goodwin-Gill & S. Talmon (eds.), *The Reality of International Law: Essays in Honour of Ian Brownlie*, (1999); see also I. Brownlie, "International Law at the Fiftieth Anniversary of the United Nations, General Course on Public International Law" 255 *RDC* 9 (1995) at 220

²⁶⁷ *Reparation for Injuries Suffered in the Service of the United Nations* 1949 *ICJ Rep.* 174

determinations. However, the Trial Chamber in *Prosecutor v. [redacted]* indicated that the Security Council cannot act arbitrarily or for an ulterior purpose while determining the existence of the threat of the peace.²⁶⁸ Although the array of the meaning of “arbitrary” and “an ulterior purpose” is still broad enough to accommodate any international situation, these standards mark the start of the belief that “neither the text nor the spirit of the Charter conceives of the Security Council as *Legibus Solutus* (unbound by law)”²⁶⁹.

This makes our argument drift towards the judicial romantic school. The judicial romantic school looked at the recent situation of the United Nations from domestic legal system perspective. This school saw in the International Court of Justice the new “World Supreme Court”. The followers of this school looked at the relationship between the International Court of Justice and the Security Council from the angle of the municipal constitutional system, where the separation of powers is much clearer, and the judiciary has its share of checks and balances.²⁷⁰ It is repeatedly noted that the United Nations system does not provide for a system of hierarchy. The UN system constitutes a system of separate functions. Each organ has its own competence and functions. Nevertheless, this system could be characterised as a system of separate but complementary functions. Each organ employs its function in co-ordination with other organ’s

²⁶⁸ See also F. Patel King, “Sensible Scrutiny: The Yugoslavia Tribunal’s Development of Limits on the Security Council’s Powers Under Chapter VII of the Charter” 10 *Emory Int’l. L. Rev.* 2 (1996) at 16 <<http://www.law.emory.edu/EILR/volumes/win96/king.html>>

²⁶⁹ Appeals Chamber in the *Prosecutor v. [redacted]* (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction), 2 October 1995, Case No. IT-94-1-AR72, reprinted in 35 *ILM* 32 (1996) at 42

functions in order to achieve the UN objectives. Thus, it is not unusual to have the International Court and the Security Council²⁷¹ simultaneously seized of the same matter.²⁷² The Charter has opened the channels for such interactions²⁷³ as a way of settling all the legal and political, aspects of the dispute.

Therefore, the “middle way” approach argued for throughout this chapter is for more co-operation between these two principal organs. The “middle way” approach argues that albeit the Security Council’s determinations under Article 39 are of a political nature, the consequential measures of such determinations are subject to law. The question here is: which organ could be competent to make the Security Council accountable to its limits? The obvious and potential organ is the principal judicial organ of the United Nations. Nevertheless, we have argued that there is no hierarchical relation between the International Court and the Security Council. Each organ is on equal footing with the other organ. The discussion on the competence of the International Court showed that it has not been granted the competence to judicially review the Security Council’s actions. The discussion, however, led us to explore that the Court has the function, that is usually overlooked, the advisory competence of the Court.

²⁷⁰ *Marbury v. Madison*, 5 U.S. 137 (Cranch) (1803)

²⁷¹ Article 12 precludes the General Assembly from intervening in the Security Council’s prerogatives.

²⁷² J. Stanczyk, “The International Court of Justice on the Competence and Function of the Security Council (Related to the Cases brought before it)” 15 *Polish Yearbook of International Law* 193 (1986) at 206

²⁷³ Article 36 (3) of the UN Charter, See also D.W. Bowett, “Judicial and Political functions of the Security Council and the International Court of Justice” 73 at 73 in H. Fox (ed.), *The Changing Constitution of the United Nations* (1997)

From that point, the advisory competence could be the starting point of having an accountable Security Council and that will not undermine the matrix on which the United Nations system operates. The Court, under this jurisdiction, will not disturb the no-hierarchy foundations in the United Nations and at the same time it will strengthen the legitimacy of the United Nations.

The next Chapter will argue that judicial review could be realised through the Court's advisory jurisdiction. To accomplish this, a comparison between the jurisprudence of the International Court of Justice and that of its predecessor, the PCIJ will be the starting point. The aim of this comparison is to show the difference in the approach towards this function by their respective political organisations, the United Nations and the League of Nations. Through this, the discussion will show that during the League of Nations, the Court was used as a legal adviser and reviewed the competence of the political organs of the organisation.

Chapter IV:

The United Nations, the International Court of Justice and its Advisory Jurisdiction

1 Introduction

The earlier chapters rejected the arguments of modelling judicial review powers of the International Court on the basis of the experience of national municipal systems, in particular that of the United States Supreme Court. Further, the previous chapters argued that international organisations can act *ultra vires* and there are limits on the actions of United Nations organs in general, and on those of the Security Council in particular. However, the argument from the start has been that judicial review can be realised through the Court's advisory jurisdiction. The aim was that since the Charter and Statute do not provide for judicial review in the domestic legal system sense, the International Court should use its advisory jurisdiction as a means of clarifying any legal doubts regarding UN organs' actions, instead of providing a compulsory judicial review which would require a revision of the Charter and Statute.

The advisory function's roots go back to Article 14 of the League of Nations Covenant. During the drafting of the Covenant, proposals were advanced to initiate a sort of reference to the Court by one or more organs of the League of Nations. Among the others, the British proposal implanted the seeds of the Court's advisory jurisdiction. The British draft convention of 1919 was:

"Where the Conference or the Council finds that the disputes can with advantage be submitted to a court of international law, or that any particular question involved in the dispute can with advantage be referred to a court of international law, it may submit the question or the particular question accordingly, and may formulate the questions for

decision, and may give such directions as to procedure as it may think desirable. In such case, the decision of the Court shall have no force or effect unless it is confirmed by the Report of the Conference or Council."¹

However, provision for an advisory function did not appear in any of the early working drafts of the League Covenant.² The idea of advisory jurisdiction was not left dormant for long, as the Wilson-Cecil proposal put forward an addition to Article 12 of Hurst- Miller draft³, which was as follows: "[t]he Executive Council will formulate plans for the establishment of a Permanent Court of International Justice, and this Court will be competent to hear and determine any matter which the parties recognise as suitable for submission to it for arbitration under the foregoing article." The words to be added were "and also any issue referred to it by the Executive Council or Body of Delegates."⁴ However, there was no mention of the effect of the Court's pronouncements in an advisory form, which led Miller, the American Member in the Commission on the League of Nations, to be with the view that the new provision went "the whole length of permitting the Executive Council or Body of Delegates to compel arbitration."⁵

Upon these objections, a revision was introduced for the provision to read as: "and also to advise upon any legal questions referred to it by the Executive

¹D. H. Miller, *The Drafting of the Covenant* (1928) vol. 2 at 111

² *Ibid.*

³ *Ibid.* at 311

⁴ *Ibid.* at 585

⁵ *Ibid.* vol.1 at 290

Council or Body of Delegates."⁶ However, as advisory jurisdiction was still not mentioned, Miller remained dissatisfied, because he thought that the language of the clause would have made the Court a legal adviser of the Council or the Body of Delegates, a function that did not envisage the duty to give advisory opinions.⁷ Moreover, he saw that the function to be exercised was to be a judicial one, but at the same time the pronouncement would not constitute a judgment and thus would not attract the obligation of compliance.⁸ As a result, the term "advisory opinion" was introduced to read as "[t]he Court may also give an advisory opinion upon any dispute or question referred to it by the Assembly". The incorporation of this sentence as a separate addition in the Court's competence provision indicated that the advisory jurisdiction was to be distinct from its primary jurisdiction of deciding disputes brought directly by States.⁹

In the view of the history of the drafting of Article 14, the advisory jurisdiction was "derived from the political jurisdiction of the League"¹⁰, in the sense that the intention behind granting the advisory jurisdiction was to assist the League Council and Assembly 'in the discharge of their duties of conciliation'¹¹. Michla Pomerance has maintained that "at the very outset the Permanent Court's advisory function was to aid the League in the settlement of disputes that had

⁶ *Ibid.* at 290, 391; *Ibid.* vol. 2 at 662

⁷ *Ibid.* vol.1 at 391-2

⁸ *Ibid.* at 406

⁹ *Ibid.*

¹⁰ D. Pratap, *The Advisory Jurisdiction of the International Court* (1972) at 5

¹¹ D. H. Miller, *The Drafting of the Covenant* (1928) vol. 1 at 416

already arisen."¹² This view has changed in the Permanent Court's successor, the International Court of Justice. Although the contours of the advisory jurisdiction have not changed, except of the scope of the authorisation to request has been enlarged, UN organs have not made use of this function to the same extent as was the case in the days of the League. The League Council used the Court's advisory jurisdiction to settle peacefully disputes between States and questions arising within the activities of the organisation, and within the activities of other international bodies. In addition, the League Council referred to the Court cases that involved a challenge to its own competence.¹³

The focal point of the argument, advanced in this chapter, is that the League Council referred to the Permanent Court of International Justice critical questions and disputes, and the Permanent Court was able to settle the legal issues of disputes peacefully without jeopardising its judicial character. Referring legal doubts and legal questions arising from actions taken by the political organs to the Court proved that it was a successful means to determine the legality and validity of the actions already taken.¹⁴

The point of departure is the practice of the Permanent Court of International Justice, and how the League of Nations Council made use of that Court's advisory jurisdiction. Following this, the International Court of Justice's practice and how UN political organs approached this function will be discussed.

¹² M. Pomerance, *The Advisory Function of the International Court in the League and UN Eras* (1973) at 9

¹³ See *Eastern Carelia* opinion 1923 PCIJ, Series B, No. 5, 7; *Mosul Question* opinion 1925 PCIJ, Series B, No. 12, 6

¹⁴ See for example *Settlers of German Origin in the Territory Ceded by Germany to Poland* opinion & the *Mosul Question* opinion. In those opinions, the League Council's competence was challenged. The Council resorted to the Court to determine the appropriateness of its actions. These opinions will be discussed below

This chapter aims at determining the possibility of having the International Court act as a legal adviser to the UN. To accomplish this, a selective exposé of both the Permanent Court of International Justice's, and the International Court of Justice's jurisprudence will be discussed. The purpose of this discussion is to show the difference of approach toward the Court's advisory jurisdiction in the League of Nations and the United Nations periods.

Then the discussion will lead us to the reasons of why the general perception of the advisory opinions has changed, away from its original idea to "aid [the organisation] in the settlement of disputes". The conclusion to be reached is that judicial review or the function of legal adviser could be realised through the advisory jurisdiction (as it was used in the League of Nations era) if the political organs changed their approach to this function to rebuild the confidence of Member States in the Court's advisory jurisdiction.

2 The Permanent Court of International Justice: Advisory Jurisdiction

The bare outlines of the advisory jurisdiction were given in Article of 14 of the Covenant of the League of Nations, it provided:

"The Council shall formulate and submit to the Members of the League for adoption plans for the establishment of a Permanent Court of International Justice. The Court shall be competent to hear and determine any dispute of an international Character which the Parties thereto submit to it. *The Court may also give an advisory opinion upon any dispute or question referred to it by the Council or by the Assembly.*" [Emphasis added]

The third sentence of Article 14 was rather the start of controversies and confusions.¹⁵ The advisory jurisdiction was an innovation in the field of international law.¹⁶ It was something new introduced to international judicial tribunals, but the first Statute of the Permanent Court contained no provisions concerning its advisory jurisdiction. When the Court, therefore, started to function, it was faced with many questions and controversies regarding the scope and nature of the advisory jurisdiction. Many questions were raised whether the opinions the Court would give would have a binding nature or an advisory one. Also, if the opinions had no binding effect, what would the effects on the Court's judicial character be? However, these profound hesitations and confusions faced earlier the distinguished 1920 Advisory Committee of Jurists¹⁷, appointed by the League Council to draft the Statute to "put flesh on the skeleton provision in Article 14 of the Covenant"¹⁸, and they could be found later in the League Assembly's deletion of the Committee's provision from the original Statute.¹⁹

The 1920 Advisory Committee of Jurists' proposed article on advisory jurisdiction was as follows:

"The Court shall give an advisory opinion upon any question or dispute of an international nature referred to it by the Council or Assembly. When the Court shall give an opinion on a question of an international nature which does not refer to any

¹⁵ M. Pomerance, *The Advisory Function of the International Court in the League and UN Eras* (1973) at 5

¹⁶ D. Prapat, *The Advisory Jurisdiction of the International Court* (1972) at 1

¹⁷ It is worth mentioning that the Committee also faced uncertainties concerning the Court's compulsory jurisdiction. See for more details L. Lloyd, *Peace Through Law: Britain and the International Court in the 1920s* (1997) at 1-20

¹⁸ M. Pomerance, *The Advisory Function of the International Court in the League and UN Eras* (1973) at 10

¹⁹ M. O. Hudson, *The Permanent Court of International Justice 1920-1942: A Treatise* (1943) at 212

dispute that may have arisen, it shall appoint a special Commission of from three to five members. When it shall give an opinion upon a question which forms the subject of an existing dispute, it shall do so under the same conditions as if the case had been actually submitted to it for decision."²⁰

The Advisory Committee of Jurists thus proposed dual advisory procedures. First, the Committee proposed that the Court, when considering a request concerning an existing dispute, follow the same procedure as if the matter had been submitted to it for a decision in the contentious proceedings. Although the opinion would not be binding, it would have the moral force attaching to all the Court's decisions, so the procedure had to be assimilated to that followed in contentious cases.²¹ On the other hand, the Committee proposed a different procedure for hypothetical questions, which would be considered by a special commission of three to five members which would not use a trial-like procedure. The intention appears to have been to prevent the Court being embarrassed if that question were subsequently brought before the Court in an actual dispute.²² In other words, that was to give the Court a leeway to reconsider, if it had to, its opinions.²³

However, this distinction and the consequential differences in procedure were deleted from the Court's Statute by the Assembly of the League. The major reason for the rejection of the proposal was on the ground that such differentiation

²⁰ Minutes of the 1920 Committee of Jurists, PCIJ Series D, No.2 at 732

²¹ *Ibid.* at 731

²² *Ibid.* at 731

²³ As yet, it has not happen that the Court has changed its previously taken opinions. However, the Court has mentioned, in *South West Africa (Ethiopia v. South Africa; Liberia v. South Africa) (Preliminary Objections)* case, that it might, upon providing new facts, change its opinion. 1962 ICJ Rep. 319 See below the discussion on the question of *res judicata* at 274- 278

was "lacking clearness and likely to give rise to practical difficulties".²⁴ Some voiced reservations against the full assimilation of one category of advisory opinions to judgments, and others opposed the apparently non-judicial character of the other category of the advisory opinions. But almost all agreed on the point of the vagueness of the criteria of differentiating the two categories.

Upon the decision of the League Assembly to delete the draft article and not to provide an alternative article, the Court left with no option except to "grapple with the questions left unresolved earlier"²⁵ when the time came to draft the Rules of Court.

This soon arose for the Court. The uncertainties on the advisory function highlighted during the Statute's drafting were mirrored during the framing of the 1922 Rules of Court. Fears and uncertainties formed the focal points of Judge Moore memorandum on the "Question of Advisory Opinions". Judge Moore commenced his statement:

"No subject connected with the organisation of the Permanent Court of International Justice has caused so much confusion and proved to be so baffling as the questions whether and under what conditions the Court shall undertake to give 'advisory' opinions. This state of doubt and uncertainty may in large measure be ascribed to the nature of the proposal."²⁶

²⁴ Documents on Adoption of PCIJ Statute. at 211 reproduced in M. Pomerance, *The Advisory Function of the International Court in the League and UN Eras* (1973) at 13

²⁵ M. Pomerance, "The Advisory role of the International Court of Justice and its 'judicial' Character: Past and Future Prisms" 271 at 274 in A.S. Muller et al. (eds.), *The International Court of Justice* (1997)

²⁶ 'The Question of Advisory Opinions', Memorandum By Mr. Moore, 18 Feb. 1922, Permanent Court of International Justice, *Acts and Documents Concerning the Organisation of the Court*, Series D, No. 2 at 383

Judge Moore maintained that the rendering of non-binding advice was incompatible with the judicial character of the Court as that function would tend to frustrate the realisation of its primary function of adjudicating disputes and developing international law. He argued that:

"The emission...of opinions avowedly have no binding force, would tend not only to obscure but also to change the character of the Court...[It] would necessarily diminish the opportunities for the exercise by the Court of its judicial functions, since, if the opinions were treated by the Court as binding upon it, they would tend to preclude the subsequent submission of disputes for decision, while, if treated as mere utterances and freely discarded, they would inevitably bring the Court into disrepute...The emission of such opinions would, for the same reasons, also tend to prevent the Court from performing what had been conceived to be one of its primary functions- that of contributing through its jurisprudence, to the development of international law."²⁷

While the Court had the power to render advisory opinions, Moore insisted that there could be no question of any obligation to do so, particularly given the absence of any provision on advisory function in the Statute and with the permissive language of Article 14 of the Covenant.²⁸ Judge Moore went on to propose omitting any reference to advisory opinions in the Rules to discourage requests, and leaving the Court to deal with an application for an advisory opinion 'according to what should be found to be the nature and merits of the case'.²⁹

The Court did not accept Moore's suggestions. It rejected proposals would have resulted in a sharp distinction between the advisory and contentious

²⁷ *Ibid.* at 397- 398

²⁸ *Ibid.* at 384-385

²⁹ *Ibid.* at 398

jurisdictions. Thus, secret requests and secret opinions were ruled out. The view of rendering secret opinions was put forward by Judge Anzilotti, who argued "that the Council should, in the interests of the peace of the world, have the right to ask the Court for secret advice". However, Judges Finlay and Moore rejected this view and considered that rendering secret decisions by the Court was incompatible with the Statute, and such practice "would be a death blow to the Court as a judicial body".³⁰ Also, the Court did not accept the possibility of opinions to be given by less than a full quorum of judges. Accordingly, the Court adopted four provisions on the advisory jurisdiction. The Rules specified that advisory opinions were to be given after deliberation by the full Court (Article 71); notice of the request was to be given to members of the Court, members of the League, and any international organisation likely to be able to furnish information on the question (Article 73); and that advisory opinions were to be published in a special collection (Article 74).

The Court's refusal to make a distinction between advisory opinions and judgments in the matter of the Court's composition, and also its refusal to accept secret requests and render secret opinions, were intended to protect the judicial character of the Court, as noted by Moore during the revision of the Rules in 1926:

"By the rules adopted at its Preliminary Session in 1922 the Court unmistakably indicated that in rendering advisory opinions it would follow judicial methods and preserve the same independence as the world would necessarily expect it to maintain in deciding differences brought before it in a contentious case."³¹

³⁰ 1922 PCIJ, Series D, No. 2 at 160

³¹ 1926 PCIJ, Series D, No. 2 (Add.) at 294

Despite this uncertain beginning, the very large majority of cases brought to the Court in its earliest years were requests for advisory opinions.³² That led the Court to codify some of its advisory practice in the 1926 revision of the Rules. The Court had established a well- defined advisory practice, and many provisions of the Statute and the Rules related to contentious cases were applied by analogy to advisory requests. In *Eastern Carelia* case the Court refused the Council's request for an advisory opinion on the ground of Russia's non-consent.³³ The consensual requirement for the Court to give an advisory opinion was a notable degree of assimilation to contentious proceedings.³⁴

With the 1926 revision, notice of the request was now to be given to the additional category of "any States entitled to appear before the Court", and besides the general notice, "a special and direct communication" was to be sent to any State "admitted to appear before the Court, or "to any international organisation considered" as likely to be able to furnish information on the question," as notification that the Court would be prepared to receive written statements and to hear oral statements relating to the question.³⁵ A State which failed to receive such a communication might "express a desire to submit a written statement, or to be heard", and the Court would decide.³⁶ States and

³² Between 1922 and 1926, the Court delivered 12 advisory opinions in comparison with only 7 judgments.

³³ 1923 PCIJ, Series B, No.5, 7

³⁴ See the discussion in M. Pomerance, *The Advisory Function of the International Court in the League and UN Eras* (1973) at 16

³⁵ 1926 PCIJ, Series D, No. 2 (add.) at 226

³⁶ *Ibid.* at 295

organisations which had presented statements were to be admitted to comment on the statements of other States or organisations, and, to this end, the Registrar was to communicate those statements to them.³⁷

Pomerance, commenting on 1926 revision of the Rules, has stated that:

"In adopting the limited revision of its Rules, the Court rejected, on the one hand, suggestions that it reverse its course of assimilation and establish a clearer distinction between the advisory and contentious functions, and, on the other hand, the suggestion that it crystallise its previous practice more fully by enumerating the articles of the Statute and Rules which were applicable by analogy to advisory procedure...in 1926 the Court manifested satisfaction with the way it had handled its advisory function in the past and the desire to maintain a measure of freedom and flexibility in the future."³⁸

By 1929, when the revision to the Statute was undertaken, it was accepted that it should be amended to incorporate the substance of the provisions of the Rules of Court respecting advisory opinions. In addition, Article 68 was accepted; it provided that "[i]n the exercise of its advisory functions, the Court shall further be guided by the provisions of the Statute which apply in contentious cases to the extent to which it recognises them to be applicable."

The revised Statute of 1929 entered into force in 1936, as did the revised Rules of Court of 1936 which brought the process of assimilation of the advisory to contentious procedure as close to completion as was possible.³⁹ They provided for full publicity of requests for opinions, the opportunity to be heard, the right to appoint a judge *ad hoc* to the Court, written and oral proceedings, that opinions

³⁷ *Ibid.* at 303-316

³⁸ M. Pomerance, *The Advisory Function of the International Court in the League and UN Eras* (1973) at 18

were to be given by the full Court, after secret deliberation and by majority vote, and to be read in open Court after notice had been given, and for the Court's power to decide disputes as to whether it had jurisdiction in any given advisory case.⁴⁰

The practice of the Court in its first sixteen years explained to a certain extent the notion behind the 1936 revision of Rules, in particular Article 82, that led to the progressive assimilation of its advisory jurisdiction to the contentious one in matters of procedure and judicial guarantees.⁴¹ This led Hudson to note that:

"on the actual record one may say that the Court itself has conceived of its advisory jurisdiction as a judicial function, and in its exercise of this jurisdiction it has kept within the limits which characterise judicial action."⁴²

As we shall see in the next section, the practice of the Permanent Court of International Justice formed to a certain degree the contours of the Court's advisory jurisdiction in respect to procedure, nature and judicial safeguards.

3 Practice of the Permanent Court of International Justice

With this uncertain start, the Permanent Court of International Justice was occupied to establish a stable ground for its advisory jurisdiction and to keep this jurisdiction away from any abuse or misuse on the part of the League of Nations.

³⁹ D. Pratap, *The Advisory Jurisdiction of the International Court* (1972) at 35

⁴⁰ For more information see M. O. Hudson, *The Permanent Court of International Justice 1920-1942: A Treatise* (1943) at 293-300

⁴¹ G. Abi-Saab, "On Discretion: Reflections on the Nature of the Consultative Function of the International Court of Justice" 36 at 41 in L. B. de Chazourmes & P. Sands (eds.), *International Law, the International Court of Justice and Nuclear Weapons* (1999)

It maintained its liberal but at the time cautious approach in dealing with requests for advisory opinions. The reasons behind this approach, as Professor Abi-Saab points out, were: "this new activity of the Court was not clearly perceived. There were doubts as to its compatibility with the judicial function and whether it constituted part of that function, and fears lest it would undermine the credibility and prestige of the Court, particularly if it had to answer any question put to it by [the League of Nations] political organs in whatever form and on whatever subject"⁴³.

The League Council often tended to refer legal issues of disputes between States to the Court's advisory jurisdiction, as it was the case in *Nationality Decrees Issued in Tunis and Morocco (French Zone) case*⁴⁴. The case arose as a result of nationality decrees issued in the French protectorates of Tunis and Morocco which would have had the effect of conferring French nationality on persons born in those protectorates but regarded by Great Britain as British nationals (in particular the Anglo-Maltese community). Britain strongly opposed these measures and it suggested submitting the dispute to the Court. However, this proposal was rejected by France.

When Britain decided to resort to the League Council by the virtue of Article 15(1) of the Covenant, France contended that in accordance with Article 15(8)-the domestic jurisdiction clause- the Council was incompetent to deal with the dispute. However, when the Council met, both governments agreed on submitting

⁴² M. O. Hudson, *The Permanent Court of International Justice 1920-1942: A Treatise* (1943) at 511

⁴³ G. Abi- Saab, "On Discretion: Reflections on the Nature of the Consultative Function of the International Court of Justice" 36 at 38 in L. B. de Chazournes & P. Sands (eds.), *International Law, the International Court of Justice and Nuclear Weapons* (1999)

⁴⁴ 1923 PCIJ, Series B, No.4, 7

the preliminary question of domestic jurisdiction to the Court for an advisory opinion and agreed to attribute a binding effect to the resultant opinion. They further agreed that if the opinion declared that the matter was not solely one of domestic jurisdiction, the whole dispute would be referred to arbitration or judicial settlement under conditions to be agreed upon between the two governments.⁴⁵ The Court gave its opinion that this dispute was not by international law solely a matter of domestic jurisdiction. The importance of this case lies not in the Court's opinion but rather in the parties' approach to the Court. The parties agreed to resort to the Court's advisory jurisdiction as a substitute to contentious proceedings as a peaceful means of dispute settlement.

The League Council showed a tendency to refer to the Court under its advisory jurisdiction, disputes that involved challenge to the Council's competence. In the *Settlers of German Origin in the Territory Ceded by Germany to Poland case*⁴⁶, for example, the dispute involved questions regarding the competence of the League Council under the Polish Minorities Treaty of 1919. The question was whether the Polish government, in view of the provisions of the Polish Minorities Treaty, was entitled to take certain measures of expulsion with regard to the settlers and leaseholders of German origin in the territories that had passed from Germany to Poland.

The matter was brought before the League Council by Germany. The League Council devoted its efforts toward gathering more information on the question, and toward clarification of the legal issues through the employment of a Committee of Jurists. The Committee of Jurists dealt with the legal questions

⁴⁵ *Ibid.* at 7-8

⁴⁶ 1923 PCIJ, Series B, No.6, 6

involved in the disputes, its opinion was unfavourable to Poland, which made it clear that Poland would not accept the Committee's opinion and it would refuse to grant any respite to the petitioners. Upon that, Poland challenged the competence of the League Council to deal with the dispute. Poland claimed that the League Council was incompetent because the minorities matter had not been brought before the Council by a Member of the Council as the Covenant and Minorities Treaty required.⁴⁷

Before answering the question advanced to it by the Council, the Court dealt with Poland's contentions. The Court said:

"If, as Poland has claimed, the subject-matter of the controversy is not within the competency of the League, the Court would not be justified in rendering an opinion as to the rights of the settlers. The Court therefore will first consider the question of competency."⁴⁸

The Court stated that matters covered by a resolution of the Council involved international obligations of the kind referred to in the Polish Minorities Treaty and therefore came within the competence of the League of Nations.⁴⁹

The Court went on to answer the question at hand in the negative, stating that the measures taken by the Polish government "[were] not in conformity with its international obligations."⁵⁰ Poland accepted the opinion and the Council adopted a resolution stating that the question would be settled on the basis of the Court's

⁴⁷ *Ibid.* at 21-23

⁴⁸ *Ibid.* at 19

⁴⁹ *Ibid.* at 21-23

⁵⁰ *Ibid.* at 6-7

opinion. Negotiations ensued under the guidance of the Council. In 1924, the Council took note of a settlement of the question.⁵¹

The importance of this case lies in the Court's initial determination of whether the Council had competence or not. That could be interpreted that unless the Council was competent, the Court would not be justified in delivering opinions.⁵² In other words, the Court asserted the Council and the Assembly could ask the Court for advisory opinions only on matters that they had competence to deal with.

The *Eastern Carelia* case played a major role in shaping the Court's advisory jurisdiction and its relation with the League organs⁵³. In this case, the Court refused for its advisory function to be used as a "roundabout means of introducing compulsory jurisdiction" by which it maintained the integrity of its judicial function.⁵⁴ The League Council was concerned with the question of whether Article 10 and 11 of the Peace Treaty between Finland and Russia concluded on 14 October 1920 at Dorpat, as well as the related declaration of the Russian delegation concerning the autonomy of Eastern Carelia, formed obligations of an inter-State character which obliged the then Soviet Union *vis-à-vis* Finland to observe the provisions. The League Council made an attempt to ask for the Court's opinion with respect to a Finno-Soviet dispute without Russia's

⁵¹ League of Nations Official Journal, 1924, at 359-66

⁵² H. Lauterpacht, *The Development of International Law by the International Court* (1958) at 107; see also K. J. Keith, *The Extent of the Advisory Jurisdiction of the International Court of Justice* (1971) at 125-126

⁵³ 1923 PCIJ, Series B, No.5, 7

⁵⁴ G. Abi-Saab, "On Discretion: Reflections on the Nature of the Consultative Function of the International Court of Justice" 36 at 41 in L. B. de Chazournes & P. Sands (eds.), *International Law, the International Court of Justice and Nuclear Weapons* (1999)

consent, which was not a member of the League. The Court refused to render an opinion as it considered that the Council's incompetence to recommend any solution in a dispute in which a non-consenting non-member of the League was involved a major obstacle to answer the request for an advisory opinion. The Court additionally found it difficult to elucidate disputed facts without Russia's testimony.⁵⁵

It is difficult to understand the importance of this opinion without discussing briefly⁵⁶ the general political scene that was prevailing at that time. There was then an overwhelming debate on the United States joining the Permanent Court of International Justice. The main obstacle to this was the Court's advisory function. There were fears that this function was the other side of the "compulsory jurisdiction" coin.⁵⁷ Also, through this function, the Court was seen as the League's Court not as the World Court.⁵⁸ However, with the *Eastern Carelia* opinion, the Court asserted its independence and pacified the fears and the uncertainties. As Judge Moore noted, the decision:

"refut[ed] the forecasts and... dispel[ed] the apprehensions of those who have reiterated that the Court would, as the creation or creature of the League, enforce the League's organic law, the Covenant, above all other law, without regard to the rights under international law of nations not members of the League."⁵⁹

⁵⁵ 1923 PCIJ, Series B, No.5, 7 at 8

⁵⁶ See the discussion on the debate in the United States on the Court's advisory jurisdiction in Chapter II

⁵⁷ M .Dunne, *The United States and the World Court, 1920-1935* (1988) at 110- 111

⁵⁸ *Ibid.*

⁵⁹ J.B. Moore, *Collected Papers* (1944) Vol. VI at 103 See also Vol. V at 360-370

Thus, ensuring its independence, the Permanent Court was able to raise confidence in its ability to be an impartial forum. Although the United States did not join the Permanent Court, this opinion gave an interesting twist to the debate that was then going on in the United States.⁶⁰ The opinion was often used as an assurance that the advisory function would not be used to introduce compulsory jurisdiction in a roundabout way.⁶¹ In other words, the *Eastern Carelia opinion* reduced the degree of uncertainty towards the exercise of the advisory jurisdiction.

Political organs were ready to utilise the advisory function of the Permanent Court to deal with disputes. Not only had inter-state cases been referred to the Court, but also disputes and questions that arose within the activities of international organisations and commissions, had been referred to the Court for clarification. Although only the League Council and Assembly had been authorised to request an advisory opinion, international bodies and organisations used the forum of the two organs⁶² as a conduit to request the Court's opinion.⁶³ In the *Exchange of Greek and Turkish Populations case*⁶⁴, the Court's opinion was requested by the Council of the League of Nations at the request of the Mixed Commission for the Exchange of Greek and Turkish Populations, with the purposes of clarifying the Article 2 of the Convention of Lausanne of 1923. At issue was the interpretation of Article 2 which provided exemption from

⁶⁰ See M. Pomerance, *The United States and the World Court as a 'Supreme Court of the Nations': Dreams, Illusions and Disillusion* (1996) at 77-78 & at 98-100

⁶¹ *Ibid.* at 98

⁶² All the requests for advisory opinion were channelled through the Council.

⁶³ S. M. Schwebel, "Was the Capacity to request an advisory opinion wider in the Permanent Court of International Justice Than it is in the International Court of Justice?" 62 *BYIL* 77 (1991) at 84

compulsory exchange for two classes of persons: Greeks "established" in Constantinople before certain date and Muslims "established" in Western Thrace.

The term "established" was the centre of this controversy. While the Turkish delegates in the Mixed Commission maintained that the term "established" equated to the legal term "domiciled" as it was applied in Turkish law, the Greek delegates saw the term related solely to a situation of facts. With these divergent views, the three neutral members of the Commission were called to give their opinions.⁶⁵ They upheld the Greek point of view unanimously. The Turkish delegation rejected the opinion and requested that the matter be referred to the legal section of the Commission. The Commission complied with the request. The legal section confirmed the previous opinion. Turkey rejected the legal section's opinion. As tension arose between the two parties and no agreement was reached on the meaning of "established", the Commission decided to ask the Council to request an advisory opinion. The Court gave its opinion confirming the earlier interpretation of the term "established", and considered that it referred to a situation of facts.⁶⁶

It is interesting to note the confidence and trust that had been vested in the Court in general and in its advisory jurisdiction in particular. It is apparent that the Commission referred to the Court for legal advice on a question of treaty interpretation. With the referral to the Permanent Court, the Commission hoped to draw not only on the Court's greater judicial knowledge but also on that Court's authority, "an authority which might cause the Court's pronouncement to be more

⁶⁴ 1925 PCIJ, Series B, No.10, 6

⁶⁵ *Ibid.* at 18-19

⁶⁶ *Ibid.* at 20-21

favourably received than were the earlier opinions of the Mixed Commission and its Legal Section".⁶⁷

The relationship between the Permanent Court of International Justice and the League of Nations Council was well- defined. Organs were ready to compromise their decision-making power for a dispute to be settled. For example, in the *Polish Postal Service in Danzig*⁶⁸ case, the League Council delegated its own powers as a court of appeal in Polish- Danzig differences to the Permanent Court of International Justice.

The subject of controversy was the nature and the extent of the postal service which Poland was entitled to establish in the port of Danzig. In particular, the question was raised as to whether the Polish postal service in the port of Danzig had the right to be extended beyond the building assigned to it and whether it could be open to the public as well as to Polish authorities and officials. The matter was intensified when Poland, without prior consultation with the Danzig Senate, set up mailboxes in the streets of Danzig bearing the Polish emblem. The controversy revolved on the Free City's sovereignty and Poland's right of access to the sea, its only outlet on the Baltic.⁶⁹ The Free City immediately asked the League's High Commissioner at Danzig for a decision on the matter. The High Commissioner stated that the matter had already been settled in Danzig's favour by the preceding High Commissioner. Poland appealed this decision to the Council. The Council's Rapporteur suggested that an advisory

⁶⁷ M. Pomerance, *The Advisory Function of the International Court in the League and UN Eras* (1973) at 73

⁶⁸ 1925 PCIJ, Series B, No.11, 6

⁶⁹ *Ibid.* at 11

opinion be requested. Poland had some misgivings about the request for an advisory opinion, as it was argued by Poland that Article 39 of Treaty of Paris⁷⁰ was clear and that it was only to the Council, not to the Court that the parties could appeal. In replying, the President noted that what was involved "was not an appeal by Poland or Danzig to the Permanent Court of International Justice but a point of great difficulty on which the Council desired to have the advice of the Court. It would be for the Court to call before it anyone whom it wished to hear before giving its opinion."⁷¹

However, the Court did play the role of court of appeal, as is evident in its opinion. The Court held that the points at issue had not been covered by the decision of the High Commissioner. It pointed out that Poland had the right to set up the mailboxes and collect and deliver postal matters outside its premises, and finally the use of such service could be opened to the public and was not confined to Polish authorities and officials.⁷²

*Interpretation of Article 3, Paragraph 2, of the Treaty of Lausanne (Frontier between Turkey and Iraq)*⁷³ was related to a territorial dispute, however, its similarities with *Eastern Carelia* could not be missed. The opposition by one of the disputants to request an advisory opinion; and the opposing State's nonmembership in the League were the key points of similarities. Nevertheless,

⁷⁰ The Article provided for the submission of Polish- Danzig differences to the decision of the High Commissioner; the right of the parties to appeal from that decision to the League Council; and the right of the High Commissioner to submit controversial matters to the Council. (The Peace Treaty of Paris of 1920 [6 League of Nations Treaty Series 189]) Poland did not seriously object the request for the advisory opinion.

⁷¹ League of Nations Official Journal, 1925, at 472

⁷² 1925 PCIJ, Series B, No.11, 6 at 41

⁷³ 1925 PCIJ, Series B, No.12, 6

the Court's examination of the case produced quite a difference between the two cases.

In this case, the Court had to settle the disposition of the region of Mosul between Great Britain (as mandate power for Iraq) and Turkey. By virtue of Article 3(2) of the Treaty of Lausanne, the Iraqi-Turkish what was supposed to be settled by direct negotiation between the parties, and in the case of the failure to reach an agreement within five months, the matter was to be referred to the League Council. After the negotiations reached a deadlock, the British government asked the Council to consider the matter. Turkey accepted that the matter should be considered in the Council and participated in the proceedings.⁷⁴ The Council decided to set up a Commission of Inquiry to investigate the local conditions and the sentiments of the local population in the disputed territory.

The Commission's report indicated two solutions: either to give the entire territory to Iraq, provided Iraq continued under a mandatory regime for another twenty five years, or if the mandate was to be terminated, that Turkey should be awarded the territory. However, Turkey showed no satisfaction with the Commission's report.⁷⁵

When the Council came to consider the Commission's report, the Turkish representative challenged the Commission's report on the ground that the conclusions reached were *ultra vires*, and he also denied the Council could exercise anything more than a mediatory role. He firmly maintained that no binding decision could be taken without the consent of the parties involved in the

⁷⁴ *Ibid.* at 15-17

⁷⁵ *Ibid.* at 17

dispute.⁷⁶ While the British representative maintained that the Council should “act as arbitrator”, the Turkish representative saw the submission of the question was rather an “impartial examination” by the Council. Given these views, the Council appointed a subcommittee to examine the Commission's report. With Turkey's challenge to the Council's competence, the subcommittee recommended the referral of two questions to PCIJ for an advisory opinion.⁷⁷ The questions put forward to the Court were:

1. What is the character of the decision to be taken by the Council in virtue of Article 3, paragraph 2, of the Treaty of Lausanne- is it an arbitral award, a recommendation, or a simple mediation?
2. Must the decision be unanimous or may it be taken by a majority?
3. May the representatives of the interested Parties take part in the vote?⁷⁸

The proposal was strongly opposed by the Turkish representative.⁷⁹ For him, there was no necessity to request judicial advice, since the drafting history of the Treaty of Lausanne clearly indicated that the good offices of the League Council were contemplated. Moreover, the question was extremely political.⁸⁰ With these considerations, Turkey put the Council on notice that it would not accept any opinion unfavourable to its contentions. However, the Council proceeded to request the Court's opinion.

⁷⁶ *Ibid.* at 18

⁷⁷ *Ibid.*

⁷⁸ *Ibid.* at 6-7

⁷⁹ League of Nations Official Journal, 1925, at 1307-37

⁸⁰ League of Nations Official Journal, 1925, at 1380-81

The Court in the *Mosul Question* drifted from its previous attitude in the *Eastern Carelia* case, with respect to the necessity of the consent of the disputants to the request for the Court's advisory opinion. However, the context of the Council's motives and competence were different with comparison with *Eastern Carelia*. In the *Eastern Carelia* case, the Council in requesting the advisory opinion aimed at getting a kind of declaratory judgment regarding Russia's obligations without Russia's consent. Moreover, the Council's incompetence to recommend any solution to the dispute was another issue, on the basis of which the Court rejected the Council's request for an advisory opinion. But in the *Mosul Question*, although Turkey was not a member of the League and it did not consent to the request for an advisory opinion, the Court did not find these issues as precluding it from giving an advisory opinion. What mattered for the Court was that the Council had competence to deal with the issue and its opinion was likely "to aid in the solution of the substantive problem of the dispute"⁸¹. In other words, the Permanent Court of International Justice stressed the necessity for it, before rendering its opinion, to establish the competence of the requesting body.⁸²

So far, in most of the cases that the Permanent Court had to deal with, political implications were there but not as evident as in *Customs Regime between Austria and Germany case*⁸³. The Permanent Court of International Justice had hardly dealt with such controversial and difficult circumstances as it did in the

⁸¹ M. Pomerance, *The Advisory Function of the International Court in the League and UN Eras* (1973) at 78

⁸² H. Lauterpacht, *The Development of International Law by the International Court* (1958) at 107; see also K. J. Keith, *The Extent of the Advisory Jurisdiction of the International Court of Justice* (1971) at 126

⁸³ 1931 PCIJ, Series A/B, No.41, 37

Customs Regime between Austria and Germany case.⁸⁴ The case began with the announcement in March 1931 that Germany and Austria had signed a Protocol designed to institute a customs union between them. This move was seen by many European States as a disturbance to the existing balance of power; and that this economic unity was an intended prelude to political unity- Anschluss- that the Allied Powers had prevented in 1919.

As such, it would have been possible for the European States concerned, most notably France and Czechoslovakia, to deal with the problem in the Council's forum as a political matter, which "threaten[ed] to disturb international peace or the good understanding between nations upon which peace depends."⁸⁵ However, they laid the matter before the Council as a legal question, as an interpretation of specific treaty provisions. The States concerned turned to the treaty obligations designed to preserve Austrian independence and to bar the dreaded political unity. Article 88 of the Treaty of Saint Germain was the starting point; it stipulated:

"The independence of Austria is inalienable otherwise than with the consent of the Council of the League of Nations. Consequently, Austria undertakes in the absence of the consent of the said Council to abstain from any act which might directly or indirectly or by any means whatever compromise her independence, particularly, and until her admission to the membership of the League of Nations, by participation in the affairs of another Power."⁸⁶

⁸⁴ J.H.W. Verzijl, *The Jurisprudence of the World Court: a case by case Commentary* (1965) at 257

⁸⁵ Article 11(2) of the League of Nations Covenant

⁸⁶ 1931 PCIJ, Series A/B, No.41, 37

The government of Austria, moreover, declared, upon the acceptance of financial aid from the League of Nations, in Protocol No.1 of 1922, that it:

"undertakes, in accordance with the terms of Article 88 of the Treaty of Saint Germain, not to alienate its independence; it will abstain from any negotiations or from any economic or financial engagement calculated directly or indirectly to compromise this independence. This undertaking shall not prevent Austria from maintaining, subject to the provisions of the Treaty of Saint Germain, her freedom in the matter of customs tariffs and commercial or financial agreements, and, in general, in all matters relating to her economic regime or her commercial relations, provided always that she shall not violate her economic independence by granting to any State a special regime or exclusive advantages calculated to threatened this independence."⁸⁷

However, the debate in the Council intensified with the idea of the Council dealing with the "legal" question. The French memorandum to the Council entered into a lengthy discussion of the consequences of the customs union and gave an indication of the considerations with which the Council would be forced to grapple should it attempt to resolve the matter itself.⁸⁸ The British representative spoke of the necessity of referring the matter to the Permanent Court of International Justice for an advisory opinion even though the matter borne important economic and political questions.⁸⁹ Everyone in the League Council agreed that the Court was the proper forum for the consideration of the question at hand.⁹⁰ Moreover, France, Czechoslovakia, Italy, and Yugoslavia maintained that the 'legal' question was a preliminary one and that would leave

⁸⁷ *Ibid.*

⁸⁸ League of Nations Official Journal, 1931, at 1163-72

⁸⁹ *Ibid.* at 1068

⁹⁰ See Mr. Briand Statement *Ibid.* at 1079

the Council free subsequently to deal the issue on a political basis.⁹¹ The British draft resolution was unanimously adopted, requesting the Court's opinion on the compatibility of the proposed customs regime with Article 88 of the Treaty of Saint Germain and Protocol No.1 of 1922.⁹²

The Court found that the provisions of the 1922 Protocol created for Austria obligations not to compromise its independence through any kind of economic or financial arrangements.⁹³ The Court confirmed that Austria still maintained its independence although it shared with Germany uniform tariffs and customs.⁹⁴ However, it went further to state that: "if the regime projected by the Austro-German Protocol of Vienna in 1931 be considered as a whole from the economic standpoint adopted by the Geneva Protocol of 1922, it is difficult to maintain that this regime is not calculated to threaten the economic independence of Austria,"⁹⁵ and to declare the incompatibility of the customs regime with Article 88 and Protocol No. 1.

Two days before the opinion handed down, the representatives of Germany and Austria informed the Committee of Enquiry for European Union that it was not their intention to proceed with the establishment of the proposed customs regime.⁹⁶

As a way of recapitulation, the issues that faced the Permanent Court of International Justice shaped the contours of the advisory jurisdiction. Maintaining

⁹¹ League of Nations Official Journal, 1931, at 1072-73, 1075-80

⁹² *Ibid.* at 1080

⁹³ 1931 PCIJ, Series A/B, No.41, 37 at 49

⁹⁴ *Ibid.* at 52

⁹⁵ *Ibid.*

its judicial character was the main goal of the Court. Even though it was advisory, the advisory jurisdiction was to be based on the consent of the parties involved as long as the requesting organs had the competence to deal with the issue, and advisory opinions could not be given on abstract questions.⁹⁷ The Permanent Court did not allow itself to slide into the trap of being a private lawyer to the Council, as it was evident in the *Eastern Carelia* case. Full publicity was to be given to the request and the opinion, notices would be given to States and international organisations, and all advisory opinions were to be given after deliberation by the full Court. No distinction was made between "disputes" and "questions".⁹⁸

It was successful in preserving the judicial character of the advisory jurisdiction throughout its short life. The Court moved progressively in its practice toward eliminating the line between its advisory function and its contentious function. It maintained the necessity to establish the consent of the States involved in a certain dispute before dealing with the matter. Besides, it increasingly looked behind the façade of the dispute and to the real interests involved.

The exercise of the advisory jurisdiction vanquished all the uncertainties that accompanied its beginning. The Court handled well this revolutionary new insertion in the international legal field. It built confidence in judicial advisory

⁹⁶ League of Nations Official Journal, 1931, at 2185-2190

⁹⁷ The Permanent Court refrained from answering abstract questions in these opinions: *Monastery of Saint Naoum*, 1924 PCIJ, Series B., No.9, 6 at 21; *Polish Postal Services in Danzig*, 1925 PCIJ, Series B., No.11, 6 at 32; *Jurisdiction of the European Commission on the Danube*, 1927 PCIJ, Series B, No. 14, 6 at 37 See also, H. Lauterpacht, *The Development of International Law by the International Court* (1958) at 79

⁹⁸ K. J. Keith, *The Extent of the Advisory Jurisdiction of the International Court of Justice* (1971) at 80; S. Rosenne, *The Law and Practice of the International Court, 1920- 1996* (1997) at 279-286

procedure as a peaceful means to settle international disputes. International bodies and States through the League of Nations Council turned to the Court to clarify legal aspects of disputes. Hardly any advisory opinion was disregarded. The Court's advisory opinions were granted the authoritative force of a decision, as the President of the Greco-Bulgarian Mixed Emigration Commission stated that, thanks to the Court's advice⁹⁹, the Commission was in possession of an "authoritative opinion which would be of great assistance in its work."¹⁰⁰ The advisory jurisdiction of the Court was utilised to get an authoritative determination of the legal aspects of highly volatile political issues.

When the time came for the creation of the International Court of Justice, the satisfaction that the PCIJ was able to achieve in its exercise of the advisory jurisdiction led for this jurisdiction to be bequeathed to the new Court. The PCIJ's practice in handling requests for advisory opinions and its success in dealing with this innovation made the continuation of this function in the new Court more feasible. The discussion was, as we shall see, tense when the time came to determine whether or not to keep the advisory function. Some considered the advisory function caused more harm than good to the Court's judicial character. Others regarded the function as rather useful but that more safeguards should be considered.

4 The International Court of Justice: Advisory Jurisdiction

The first stage of the reconsideration of the Court's Statute took place in the Informal Inter-Allied Committee on the Future of the Permanent Court of

⁹⁹ *Greco-Bulgarian 'Communities'* opinion, 1930 PCIJ, Series B, No.17, 4

¹⁰⁰ League of Nations Official Journal, 1930, at 1300

International Justice which met in London in 1943-44.¹⁰¹ Among members of the Committee, there were some who felt that the advisory jurisdiction was "anomalous and ought to be abolished, mainly on the ground that it was incompatible with the true function of a court of law, which was to hear and decide disputes." It was argued that "the existence of this jurisdiction tended to encourage the use of the Court as an instrument for settling issues which were essentially of a political rather than of a legal character." Other objections argued that the advisory jurisdiction had been used to promote "a tendency to avoid the final settlement of disputes by seeking opinions"; and the rendering of "general pronouncements of law...not (or not sufficiently) related to a particular issue or set of facts"¹⁰². Notwithstanding these contentions and arguments, the Committee concluded that the advisory jurisdiction should be not only retained but also enlarged¹⁰³, by granting the right to request opinions to "all international associations of an inter-State or inter-governmental character possessing the necessary status" and to "any two or more States acting in concert"¹⁰⁴. It was noted that, in several municipal systems, the advisory jurisdiction was deemed judicial and was "of undoubted utility"; and that the new general international organisation would undoubtedly require "authoritative legal advice on points affecting its constitution". Empowering States to request opinions would give them the opportunity of clarifying their legal rights before differences "ripened into an issue or definite dispute"; of aiding them to reach a firm basis for

¹⁰¹ IIAC Report, 10 February 1944 issued as British Parliamentary Paper, Cmd. 6531, Misc. No.2(1944) reproduced in 39 *AJIL* 1, Supp. (1945)

¹⁰² *Ibid.* para.65

¹⁰³ *Ibid.* para.66

negotiations; and of achieving all this without incurring the hostilities often imputed to litigant States in contentious proceedings.¹⁰⁵

Accompanying these recommendations were some suggestions to prevent the abuse of the advisory jurisdiction and to preserve the judicial character of the Court. The Court was not to be asked questions of "general or abstract" nature. The questions to be referred should be related "to some definite issue or circumstance, and be based on an agreed and stated set of facts". Otherwise, the Court might "be used for making pronouncements on political issues, or in a semi-legislative capacity for making general statements or declarations of law". Above all, the Court was to be granted the requisite jurisdiction to decline to deal with inappropriate and "non-justiciable" matters- including questions "of too general" character; and requests presented to the Court "as a means of reopening questions already judicially determined"¹⁰⁶.

On the relationship between the new Court and the new general international organisation, the Committee believed that the Court had "to some extent suffered in the past from its organic connection with the League, which, whether logically or not, resulted in its prestige being dependent to some extent upon the varying fortunes of the League". And that close connection was responsible for the unwillingness of some States to join the Court and its Statute.¹⁰⁷ It therefore recommended that the new Court would not have that "organic connection". Instead, the Court was to be regarded "as part of the

¹⁰⁴ *Ibid.* paras. 142-143

¹⁰⁵ *Ibid.* paras. 66-68

¹⁰⁶ *Ibid.* paras. 69-75 and 144-145

¹⁰⁷ Mainly the United States of America. See above the discussion in Chapter III

machinery at the disposal of the Organisation".¹⁰⁸ The Court would be open for the new organisation to make use of it through the advisory jurisdiction or through referring disputes among States, assuming that they were justiciable.¹⁰⁹

The Dumbarton Oaks Proposals in 1944, which came next, contained a chapter on the pacific settlement of disputes, the sixth paragraph of which stated that:

"Justiciable disputes should normally be referred to the International Court of Justice. The Security Council should be empowered to refer to the Court for advice legal questions connected with other disputes."¹¹⁰

The refinement of the bare and vague Dumbarton Oaks Proposals was left to the Washington Committee of Jurists, which convened two weeks before the San Francisco Conference.

When the United Nations Committee of Jurists (known the Washington Committee of Jurists) came to consider the Dumbarton Oaks Proposals, it did not find any difficulties in recommending that the authorisation to request an advisory opinion be extended to the General Assembly as well as the Security Council.¹¹¹ This proposal was advanced by China, and it was accepted unanimously. At the same time, however, the Committee of Jurists recognised that it was for the

¹⁰⁸ IIAC Report, 10 February 1944 issued as British Parliamentary Paper, Cmd. 6531, Misc. No.2(1944) reproduced in 39 *AJIL* 1, Supp. (1945) paras.12-20 and para. 116

¹⁰⁹ *Ibid.* para. 17

¹¹⁰ 3 UNCIO at 14

¹¹¹ 14 UNCIO at 177, 445-7

Charter and not for the Statute to determine which organs of the United Nations would be qualified to request advisory opinions.¹¹²

A further proposal was put forward by Venezuela¹¹³ and the United Kingdom¹¹⁴ to empower specialised agencies and States to request advisory opinions, but this was not approved.¹¹⁵ Objections were raised by various representatives on the grounds that the proposed authorisation would overload the Court's docket with "trivial" individual applications, detract the Court from its more important duties; and that the function of the Court was not to play the role of general adviser.¹¹⁶ In addition, the proposed authorisation would jeopardise the work of the Security Council and the General Assembly in their handling of disputes, and the result of direct requests to the Court might be confusion and chaos.¹¹⁷

At the San Francisco Conference on International Organisation, the draft prepared by the Washington Committee of Jurists was considered by Committee I of Commission IV (Commission on Judicial Organisation). It was agreed to add to the Charter the provision, now Article 96(1), providing that: "the General Assembly or the Security Council may request the International Court of Justice to give an advisory opinion on any legal question".¹¹⁸ It was likewise agreed to

¹¹² *Ibid.* at 179, 850

¹¹³ *Ibid.* at 373, 447

¹¹⁴ *Ibid.* at 182, 319

¹¹⁵ *Ibid.* at 183

¹¹⁶ *Ibid.* at 181

¹¹⁷ Comments By Mr. Hackworth (the Chairman of the Committee) *Ibid.* at 183

¹¹⁸ 13 UNCIO at 241

insert a complementary provision in the Court's Statute (now Article 65).¹¹⁹ It was also agreed on empowering agencies authorised by the General Assembly to request advisory opinions, but it was restricted to intergovernmental agencies brought into a formal relationship with the United Nations (i.e. Specialised Agencies).¹²⁰ Article 96 (2) was considered an innovation although it was based on the experience of the League of Nations, especially with respect to the ILO requests.¹²¹ The provision for such an authorisation was approved but with a safeguard of "within the scope of their activities".¹²²

The Venezuelan proposal for empowering two or more States acting in concert to request advisory opinions was renewed¹²³, but it failed for the lack of a two-thirds majority.¹²⁴

The Charter, as adopted, empowered the General Assembly and the Security Council to request advisory opinions "on any legal question", a broader formulation than that of the League Covenant. However, the Specialised Agencies could only request advisory opinions of the Court on legal questions arising within the scope of their activities. Although it could be considered a limitation, the idea behind this was to provide the Court with safeguard against any abuse of

¹¹⁹ *Ibid.* at 242

¹²⁰ 9 UNCIO at 161-2, & 13 UNCIO at 298

¹²¹ M. Pomerance, "The Advisory role of the International Court of Justice and its 'judicial' Character: Past and Future Prisms" 271 at 288 in A.S. Muller et al. (eds.), *The International Court of Justice* (1997)

¹²² 13 UNCIO at 247

¹²³ It was first introduced in Informal Inter-allied Committee. See IIAC Report, 10 February 1944 issued as British Parliamentary Paper, Cmd.6531, Misc. No. 2 (1944) reproduced in 39 *AJIL* 1, Supp. (1945) at 68- 75

¹²⁴ IIAC Report 39 *AJIL* 1, Supp. (1945) at 235

its advisory jurisdiction, and to leave the necessary control to be exercised by the Court itself.¹²⁵

The most important change introduced at the San Francisco was the formal relationship between the Court and the new international organisation. Although it was not directly linked to the advisory jurisdiction, here it has had the most effect as can be seen in the subsequent practice of the Court. Under Article 92, the International Court is now "the principal judicial organ of the United Nations". This new status provides the basis for "a judicial 'duty-to-co-operate' doctrine which entailed the overlooking and overcoming of difficulties"¹²⁶ to assist the organs and the agencies of the UN. One commentator interprets the new status of the Court as an evidence of "the intentions of the founders of the United Nations to emphasise to a much greater degree... the extent to which the judicial process should be considered an avenue for peaceful resolution of disputes..."¹²⁷

One could not have expected any drastic change in the exercise of the advisory function, if anything, corresponding to the introduction of the new provisions broadening the scope of the advisory jurisdiction, extensive use of this function could be predicted. However, the UN practice was to prove these expectations wrong.

¹²⁵ *Ibid.* paras. 69, 73

¹²⁶ M. Pomerance, "The Advisory role of the International Court of Justice and its 'judicial' Character: Past and Future Prisms" 271 at 290 in A.S. Muller et al. (eds.), *The International Court of Justice* (1997)

¹²⁷ T. J. Bodie, *Politics and the Emergence of An Activist International Court of Justice* (1995) at 58

5 The Practice of the International Court of Justice

The numerical decline of the requests for advisory opinions during the days of the United Nations has been remarkable. In nineteen years of active life (1922-1940), the Permanent Court of International Justice gave twenty-seven advisory opinions, while the International Court of Justice in its fifty-five years has given twenty-three advisory opinions. This is despite the fact that the capacity to request advisory opinions is wider under the United Nations Charter and the ICJ Statute than it was under the Covenant of the League of Nations and the PCIJ Statute.

The first case to face the new Court was highly political and volatile. It was the *Conditions of Admission of a State to Membership in the United Nations (Article 4 of the Charter)*¹²⁸. The question that was put to the Court concerned the interpretation of Article 4 of the Charter. The whole new international organisation was caught in between the divergent views of the two camps of the Cold War. Each camp within the UN employed its weapons at its disposal for excluding the admission of members of the other Camp; the West used its majority in the General Assembly, while the East used the veto weapon in the Security Council.

A surge of opposition was raised against the request of the Court's advisory opinion. The objection concerned the motivation behind the request, claiming that it was political and the request dealt with an abstract interpretation of the Charter.

¹²⁸ 1948 *ICJ Rep.* 57 at 60

Assertions were made that the request was just "an effort to clarify the conduct of certain Members rather than...to interpret the Charter."¹²⁹

Despite these objections, the General Assembly proceeded to request the Court's opinion. However, the bloc opposing the request informed the Assembly that it would not accept the judicial clarification, and thus that clarification, under these circumstances, was bound to be pointless.¹³⁰

The Court started off its opinion by determining the objections. It maintained that it had competence to deal with the question even if it was abstract. It stated: "Article 96 of the UN Charter and Article 65 of the Statute [established that] the Court may give an advisory opinion on any legal question, abstract or otherwise."¹³¹ As for the motives behind the request, the Court said that: "it is not concerned with the motives which may have inspired this request, nor with the consideration which, in the concrete cases submitted for examination to the Security Council, formed the subject of the exchange of views which took place in that body."¹³² The Court went on to give its opinion stating that the conditions of admission under Article 4 were exhaustive, and no State was obliged to explain its vote in any case. The Court pointed out that the matter went down to the question of good faith and motives, neither of which was subject to judicial control.¹³³

¹²⁹ GAOR (II), Plenary, 118th Mtg., 17 November 1947, at 1071

¹³⁰ See the statement of the representative of Poland GAOR (II), Plenary, 99th Mtg., 7 November 1947 at 345 and GAOR (II), Plenary, 117th Mtg., 17 November 1947 at 1046; See the statement of the representative of USSR GAOR (II), Plenary, 117th Mtg., 17 November 1947 at 1048

¹³¹ 1948 *ICJ Rep.* 57 at 61

¹³² *Ibid.*

¹³³ H. Lauterpacht, *The Development of International Law by the International Court of Justice* (1958) at 150

The International Court of Justice was bound to be involved in Cold War tensions as was the United Nations in general. *Interpretation of Peace Treaties with Bulgaria, Hungary, and Romania*¹³⁴ was rather an explicit attack from one camp on the other through the International Court, as the Court was used for propaganda purposes.¹³⁵ In 1949, the United Kingdom and the United States had addressed notes to the governments of Bulgaria, Hungary, and Romania, alleging violations of human rights provisions of their respective Peace Treaties. All efforts for settling the human rights questions in accordance with the dispute-settlement procedures of the Peace Treaties had proven unsuccessful.¹³⁶ The three "communist" governments denied the allegations and rejected all western diplomatic interference in their domestic affairs.¹³⁷ Similarly, they denied the existence of any dispute between them and the Allied and Associated Powers and refused to designate representatives to the treaty commissions provided for in the Peace Treaties.¹³⁸

Under these circumstances, the General Assembly led by the "western" camp decided to continue the consideration of the issue in the area of public opinion.¹³⁹ It turned to the Court to request an advisory opinion. Four questions were to be put to the Court. First, did the diplomatic exchanges between the three States and certain Allied and Associated Powers disclose disputes subject to the

¹³⁴ 1950 *ICJ Rep.* 65 (1st phase)

¹³⁵ S. Rosenne, "On the non-use of the Advisory Competence of the International Court of Justice" 39 *BYIL* 1 (1963)

¹³⁶ For diplomatic exchanges, see *Peace Treaties Pleadings* at 30-69, and 77-104

¹³⁷ *Ibid.*

¹³⁸ *Ibid.*

¹³⁹ A/Res/272 (III) (4th mtg), see also 1950 *ICJ Rep.* 65 at 66

provisions for the settlement of disputes contained in the Treaties? Second, in the event of an affirmative reply, were the three States obligated to carry out the provisions of the Articles in the Peace Treaties for the settlement of disputes, including the provisions for the appointment of their representatives to the Commissions?

Third, in the event of an affirmative reply to the second question and if within thirty days from the date when the Court delivered its opinion the designation has not been made, was the Secretary-General of the United Nations authorised to appoint the third Member of the Commissions? Fourth, in the event of an affirmative reply to the third question would a Commission so composed be competent to make a definitive and binding decision in settlement of a dispute?¹⁴⁰

The competence of the General Assembly to request an advisory opinion, and even to consider the matter at all, was challenged by the then Soviet bloc. The grounds that they based their challenges on were: first, the right to interpret, or seek interpretation of a treaty appertained exclusively to the parties. Without the consent of all the parties the Assembly could not seek, and the Court could not render an interpretation.¹⁴¹ Second, since peace treaties were involved, the UN was barred, under Article 107 of the Charter, from dealing with the issue.¹⁴² Third, the peace treaties contained their own procedures for dispute settlement, and these procedures had not been exhausted.¹⁴³ Fourth, the dispute settlement procedures were applicable only when all the Allied and Associated Powers (including the

¹⁴⁰ 1950 *ICJ Rep.* 65 at 67-68

¹⁴¹ *Ibid.* at 70-71

¹⁴² *Peace Treaties Pleadings* at 92-93

¹⁴³ *Ibid.*

then Soviet Union) were in dispute with the defeated States.¹⁴⁴ Fifth, as was already mentioned, the General Assembly's discussions and dealings with the matter constituted interference in domestic affairs of Bulgaria, Hungary, and Romania.¹⁴⁵ Finally, it was objected that political elements rather than legal elements were decisive in the subject matter of the controversy, and it was for political reasons and motives that the matter found its way to the Court.¹⁴⁶

In defence of the General Assembly's competence to seek advice from the Court, it was argued that the questions which were put forward to the Court were not substantive questions of human rights, but rather they were procedural questions concerning the applicability of the treaties' dispute settlement procedures.¹⁴⁷ It was argued that referring the issue to the Court should not be considered as interference with the domestic jurisdiction of States, since the observation of treaties' obligations was not a domestic matter.¹⁴⁸ By promoting respect for treaties and facilitating the use of the dispute settlement mechanism provided for in the treaties, it was claimed that the General Assembly was not only acting within its competence, but also it was discharging a positive duty under Article 33 of the Charter.¹⁴⁹

Moreover, it was argued although it could be thought that the recourse to the International Court could be thought of as a political action, this political

¹⁴⁴ *Ibid.*

¹⁴⁵ *Ibid.* at 52

¹⁴⁶ *Ibid.* at 199

¹⁴⁷ 1950 *ICJ Rep.* 65 at 70

¹⁴⁸ *Ibid.*

action was based on undoubted legal foundations, which would be efficacious in impressing on the three governments the propriety as well as the strength of the World's interest in their behaviour.¹⁵⁰ With these divergent views, the Assembly proceeded to adopt the resolution asking the Court for an advisory opinion.

In the first phase of the case, the Court answered in affirmative the first two questions, but it did not proceed to answer the last two questions.¹⁵¹ The Court pointed out on the one hand that disputes existed because certain charges had been brought against certain States, which the latter rejected, and on the other hand that these disputes were subject to the provisions of the Articles for the settlement of disputes contained in the Peace Treaties. In answering the second question, it stated that Bulgaria, Hungary and Romania were under an obligation to carry out the Articles of the Peace Treaties concerning the settlement of disputes, including the obligation to appoint their representatives to the Treaty Commissions.¹⁵² In the second phase, the Court answered the third question in the negative and held that it was not necessary to deal with the fourth question.¹⁵³

The request in the *Certain Expenses of the United Nations (Article 17(2) of the Charter)*¹⁵⁴ opinion was stamped with an "organisational" character as, to great extent, was the *Admission opinion*. It dealt with the interpretation of Article 17(2) of the Charter. The subject matter of the controversy was disagreement over

¹⁴⁹ See the representatives' arguments, GAOR(IV), Ad Hoc Political Committee 7th Mtg. 1949 at 27-31; GAOR (IV) 9th Mtg. 1949 at 36-39; GAOR (IV) 10th Mtg. 1949 at 41; GAOR(IV) 11th Mtg. 1949 at 44, 56

¹⁵⁰ see for example the statements of the British representative GAOR(IV) 9th Mtg. 1949 at 36; Lebanese representative GAOR (IV) 11th Mtg. 1949 at 46

¹⁵¹ 1950 *ICJ Rep.* 65 at 70-77

¹⁵² *Ibid.* at 77

¹⁵³ 1950 *ICJ Rep.* 221 (2nd phase) at 230

the organisation's finances, and the UN role in peace keeping. This case also fell in the Cold War tensions category. There was East- West conflict of interests with regard to the two areas of the UN peace keeping operations in the Middle East and Congo.

The International Court of Justice was asked to give its opinion on whether certain expenditures, which were authorised by the General Assembly to cover the costs of the United Nations operations in the Congo and in the Middle East, constituted "expenses of the Organisation" with the meaning of Article 17 para.2 of the UN Charter. It was argued before the Court that the expenses, that resulted from operations for the maintenance of international peace and security, were not "expenses of the organisation within the meaning of Article 17 para.2 of the Charter, inasmuch as they fell to be dealt with exclusively by the Security Council, and more especially through agreements negotiated in accordance with Article 43 of the Charter".¹⁵⁵ It was argued further that since the General Assembly's power was limited to discussing, considering, studying and recommending, it could not impose an obligation on members to pay the expenses which resulted from the implementation of its recommendations.

The Court started its opinion by discussing and rejecting all the contentions. The Court examined the view that it should take into consideration the rejection of a French amendment to the request for advisory opinion. The amendment would have asked the Court to give an opinion on the question whether the expenditures related to the indicated operations had been "decided on in conformity with the

¹⁵⁴ 1962 *ICJ Rep.* 151

¹⁵⁵ *Ibid.* at 162

provisions of the Charter". On this point the Court observed that the rejection of the French amendment did not

“constitute a directive to the Court to exclude from its consideration the question whether certain expenditures were 'decided on in conformity with the Charter', if the Court found such consideration appropriate. Nor could the Court agree that the rejection of the French amendment had any bearing upon the question whether the General Assembly had sought to preclude the Court from interpreting Article 17 in the light of other articles of the Charter, that is, in the whole context of the treaty.”¹⁵⁶

The Court rejected the objections and answered the question at hand in the affirmative.

Despite the Court's opinion, the opposing States continued to refuse to pay their contribution of the organisation's budget.¹⁵⁷ With this opinion and the *Peace Treaties* opinion, it was clear that recalcitrant attitude of States would not be likely to be overcome by legal opinions.

After the *Certain Expenses* opinion, the International Court of Justice went into a period of disuse, which lasted till 1970. With the *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*¹⁵⁸ opinion, the Court marked the renewal in the use of its advisory function. Moreover, this case demonstrated the use of the Court's advisory function by the Security Council. It

¹⁵⁶ *Ibid.* at 157

¹⁵⁷ France and the Soviet Union refused to accept the ICJ opinion: See for in depth analysis J. E. Alvarez, "Legal Remedies and the United Nations' à la Carte Problem" 12 *Mich. J. Int'l. L.* 229 (1991) at 282; L. Gross, "Expenses of the United Nations for Peace-Keeping Operations: the Advisory Opinion of the International Court of Justice" 17 *International Organization* 1 (1963) at 4

¹⁵⁸ 1971 *ICJ Rep.* 16

was the first time, in nearly a quarter century of its existence, that the Security Council employed its powers to ask the International Court for its opinion.

The South West Africa dispute between the Republic of South Africa and the United Nations, which was on the Court's docket in one form or another for more than two decades. The matter was brought before the Court in the form of four advisory opinions, and one contentious proceeding.

In 1949, when the first opinion¹⁵⁹ was requested, the Western powers sought clarification of the legal issues on the status of South West Africa, and other States favoured submission to the Court apparently because they wanted to have the doubts of the Western States resolved. After the *International Status of South West Africa* opinion, the General Assembly requested two advisory opinions on *Voting Procedure on Questions relating to Reports and Petitions concerning the Territory of South West Africa*¹⁶⁰, and on *Admissibility of Hearings of Petitioners by the Committee on South West Africa*¹⁶¹. These two requests involved attempts at the interpretation and clarification of the main ruling and initially concerned with procedural matters regarding the administration of South West Africa.

The contentious South West Africa case should be briefly noted. Ethiopia and Liberia raised claims related to the continued existence of the Mandate for South West Africa and the duties and performance of South Africa as Mandatory assuming that the Mandate for South West Africa was still in force. Under such circumstances, the Court was asked whether the Mandatory's obligation to furnish

¹⁵⁹ *International Status of South West Africa* opinion 1950 ICJ Rep. 128

¹⁶⁰ 1955 ICJ Rep. 67

¹⁶¹ 1956 ICJ Rep. 23

annual reports on its administration to the Council of the League of Nations had become transformed into an obligation so to report to the General Assembly of the United Nations. They also questioned whether the respondent had, in accordance with the Mandate, promoted to the utmost the material and moral well-being and the social progress of the inhabitants of the territory. The applicants also questioned whether South Africa had contravened the provision in the Mandate that it (the Mandate) could only be modified with the consent of the Council of the League of Nations, by attempting to modify the Mandate without the consent of the United Nations General Assembly by failing to transmit petition from the inhabitants of South West Africa to the General Assembly, and to render to the General Assembly Annual Reports.¹⁶² In 1962, the Court in the Preliminary Objections found its jurisdiction to "adjudicate upon the merits of the dispute"¹⁶³. However, in 1966, the Court rejected the claims of the two States on the basis that they could "not be considered to have established any legal right or interest appertaining to them in the subject-matter of the present claims"¹⁶⁴.

After considering the Court's pronouncement, the General Assembly adopted resolution 2145 (XXI) of 1966, indicating that South Africa had violated its obligations under the mandate. The Assembly declared that South Africa did not live up to its obligations and had thus disavowed the mandate. The General Assembly went further to declare that the mandate was terminated and that henceforth, South West Africa "comes under the direct responsibility of the

¹⁶² *South West Africa (Ethiopia v. South Africa; Liberia v. South Africa) (Preliminary Objections)* case 1962 ICJ Rep. 319 at 324-25

¹⁶³ *Ibid.* at 347

¹⁶⁴ *South West Africa (Ethiopia v. South Africa; Liberia v. South Africa) (second Phase) case 1966 ICJ Rep. 6 at 51*

United Nations".¹⁶⁵ Six subsequent Security Council resolutions were adopted within three years.¹⁶⁶ These resolutions took note of the General Assembly's resolution and stated the measures were taken to implement the resolution.

Upon the non-compliance of South Africa, the Security Council threatened to apply Chapter VII measures. However, the Council did not get the necessary support of three permanent members, namely France, the United Kingdom and the United States, which abstained in the vote of resolution 269 to adopt enforcement measures under Chapter VII.¹⁶⁷ Thus, the Security Council turned to ask the International Court for an advisory opinion, seeking "legal sanctions for political decisions which had already been taken"¹⁶⁸. The Court complied with the Council's request and found that South Africa maintained an illegal situation and it was under "obligation to withdraw its administration from Namibia immediately and thus put an end to its occupation of the territory"¹⁶⁹, and that United Nations members were under obligation to recognise the illegality of the continued presence of South Africa in Namibia and to refrain from giving any support or assistance to the South Africa administration.¹⁷⁰

It was clear that there was not any high expectation that any judicial pronouncement would succeed in solving the matter, as South Africa remained

¹⁶⁵ GA Res 2871 (XXVI) 20 Dec. 1971 reprinted in 11 *I.L.M.* 220 (1972)

¹⁶⁶ S.C. Res. 301 UN SCOR (1971), 309 UN SCOR (1972); 310 UN SCOR (1972); 319 UN SCOR (1972); 323 UN SCOR (1972); 342 UN SCOR (1973)

¹⁶⁷ S.C. Res 269 UN SCOR (1969) 1497th mtg adopted with 11 votes and 4 abstentions (Finland, France, United Kingdom, and the United States of America).

¹⁶⁸ G. Weissberg, "The Role of the International Court of Justice in the United Nations System: the First Quarter Century" 131 at 141 in L. Gross (ed.), *The Future of the International Court of Justice* (1976)

¹⁶⁹ 1971 *ICJ Rep.* 16 at 55

¹⁷⁰ *Ibid.*

determined not to accept any international solution to the dispute.¹⁷¹ In addition, the Security Council sought the Court's opinion just to legitimise its actions, not to seek advice for what would be the best solution. The opinion was sought as "a means of strengthening the Council's efforts and of adding to their legitimisation"¹⁷².

The advisory function of the International Court was not used as a clarification for a genuine legal problem, or as a means of problem solving. It was used instead as a means of propaganda between the two Cold War blocs.

However, with the demise of the Cold War, expectations were raised to have the advisory jurisdiction as a means to guide the international organisations in executing their duties legally,¹⁷³ and hopes were raised to have the rule of law in international relations.¹⁷⁴ However, the advisory jurisdiction has seen another twist toward political struggle, as it was evident in the *Legality of the Threat or Use of Nuclear Weapons* proceedings¹⁷⁵. Two advisory opinions were requested from the Court; by the World Health Organisation, and by the United Nations General Assembly.

The International Court exercised its discretion to reject an advisory opinion request, and it refused to answer the WHO request on the ground that the

¹⁷¹ M. Pomerance, *The Advisory Function of the International Court in the League and UN Eras* (1973) at 157

¹⁷² *Ibid.*

¹⁷³ L. B. De Chazournes & P. Sands, "Introduction" 1 at 16 in L.B. De Chazournes & P. Sands (eds.), *International Law, the International Court of Justice and Nuclear Weapons* (1999)

¹⁷⁴ *Ibid.* at 19; see also D. D. Caron, "Iraq and the Force of Law: Why Give a Shield of Immunity" 85 *AJIL* 89 (1991); I. J. Gassama, "World Order in the Post- Cold War Era: the Relevance and the Role of the United Nations" 20 *Brook. J. Int'l. L.* 255 (1994); R. L. Gaines, "On the Road to a Pax U.N.: Using the Peace Tools at our Disposal in a Post-Cold War World" 25 *N.Y. U. J. Int'l. L. & Pol.* 543 (1993); W. M. Reisman, "International Law after the Cold War" 84 *AJIL* 859 (1990)

¹⁷⁵ 1996 *ICJ Rep.* 67 (WHO Request); 1996 *ICJ Rep.* 226 (General Assembly Request)

question was not related to its scope of activities.¹⁷⁶ As for the General Assembly, the Court co-operated and accepted its request. The General Assembly question was: "[i]s the threat or use of nuclear weapons in any circumstance permitted under international law?"¹⁷⁷ The Court considered the matter and came to the conclusion that:

"the threat or use of nuclear weapons would generally be contrary to the rules of international law applicable in armed conflict, and in particular the principles and rules of humanitarian law; However, in view of the current state of international law, and of the elements of fact at its disposal, the Court cannot conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defence, in which the very survival of a State would be at stake."¹⁷⁸

The opinion raised many interesting questions. Many questioned that indecisive nature of the Court's opinion, and the Court's involvement in this highly political volatile question. While others regarded the opinion as an unprecedented behaviour on the part of the General Assembly and the International Court of Justice.¹⁷⁹

¹⁷⁶ 1996 *ICJ Rep.* 67 (WHO Request) at 74-77

¹⁷⁷ 1996 *ICJ Rep.* 226 (General Assembly Request) at 228

¹⁷⁸ *Ibid.* at 266

¹⁷⁹ D. Akande, "The Competence of International Organizations and the Advisory Jurisdiction of the International Court of Justice" 9 *EJIL* 437 (1998); R. Falk, "Nuclear Weapons, International law and the World Court: a Historical Encounter" 91 *AJIL* 417 (1997); L. Heffernan, "The Nuclear Weapons Opinions: Reflections on the Advisory Procedures of the International Court of Justice" 28 *Stetson L. Rev.* 133 (1998); E. Kristjansdottir, "The Legality of the Threat or Use of Nuclear Weapons Under Current International Law: the Arguments behind the World Court's Advisory Opinion" 30 *N.Y. U. J. Int'l. L. & Pol.* 291 (1997-1998); K. Keith, "The Advisory Jurisdiction of the International Court of Justice: Some Comparative Reflections" 17 *Aust. YB. Int'l. L.* 39 (1996); K. Ouchi, "The Threat or Use of the Nuclear Weapons Discernible Legal Policies the Judges of the International Court of Justice" 13 *Conn. J. Int'l. L.* 107 (1998)

However, the opinion showed a rather different approach to a request for an advisory opinion. This request did not arise from any specific situation but rather it presented a wholly hypothetical question. Previous requests to the ICJ for advisory opinions had typically related to specific situations in which concrete legal issues had arisen among states or within an international organisation. For example, in the *Namibia opinion*, the Court dealt with the dispute over the South African occupation and administration of the territory of Namibia. The previous requests were related to a specific question about the interpretation of a particular agreement or instrument rather than to a very abstract and vague question about international law in general. Previous requests had typically focused on specific provisions of an international agreement, or of the statutes and rules of an international organisation. For example, in *Certain Expenses opinion*, the Court dealt with the specific question of the application of Article 17(2) of the UN Charter to certain expenses incurred by the organisation.

However, the question posed by *the Legality of Nuclear Weapons* request was much more like an invitation to the Court to discourse generally on an abstract field of law as a means of achieving a political objective than like a request to resolve a concrete operational legal problem.¹⁸⁰ The Court could not apply the law to any specific set of facts, because none was indicated by the question posed. Nonetheless, the Court did not reject this request.

In short, the International Court of Justice has shown inconsistency in its advisory function during the fifty-five years. Its approach to the requests for advisory opinions differs from that of its predecessor the Permanent Court of

International Justice, in particular with regard to the preservation of its judicial character. The PCIJ was more occupied with the idea of preserving its judicial character. It shaped the advisory function to defeat the uncertainties by which it was haunted at the beginning. Whilst the PCIJ tried to get itself away from the League of Nations stamp, the ICJ has drifted, especially during the Cold War, toward the organisational stamp. The inconsistency has arisen because the ICJ is not able to establish a clear position for itself, whether it is a court of law or a United Nations Court.¹⁸¹

However, the requesting organs' approach to the Court's advisory jurisdiction has also differed in the two eras. The whole picture has changed. During the League of Nations era, the only authorised organs were the League Council and Assembly. In the United Nations, authorisation was enlarged but still safeguards were minimal which opened the door for abuse for this function.

The next section offers an explanation and a comparison between the two eras. It compares the approach of PCIJ to the issues of the consent, and the nature of the questions. It proceeds to study the behavioural changes in the requesting organs and their approach toward advisory jurisdiction.

6 Change of behaviour

The discussion of the jurisprudence of the Permanent Court of International Justice and that of the International Court of Justice has pinpointed changes in the requests for advisory opinions. Two segments of attitude should be looked at. On the one hand, the International Court of Justice has deviated from

¹⁸⁰ See Generally W. M. Reisman, "The Political Consequences of the General Assembly Advisory Opinion" 473 in L.B. De Chazournes & P. Sands (eds.), *International Law, the International Court of Justice and Nuclear Weapons* (1999)

the practice set by the Permanent Court of International Justice in dealing with the requests for advisory opinions. On the other hand, changes of attitude in the requesting organs and in their voting procedures to request advisory opinions have made the perception of advisory opinions differ in the days of the ICJ from those of the PCIJ.

6.1. Different Practice:

The first obvious difference in practice between the two Courts is the "consent" issue. The absence of consent of one member or more characterised most of the requests addressed to the International Court for advisory opinions. It was even an issue during the days of the Permanent Court. The Permanent Court, however, faced the issue only in two requests. The issue is not whether or not the two Courts faced this dilemma, but rather lies in the two Courts' different approach to the issue.

The Permanent Court's approach was characterised, to certain extent, with an overwhelming attempt to preserve the judicial character of the advisory jurisdiction. It was evident in its dealing with the *Eastern Carelia opinion*. As was discussed above¹⁸², the Permanent Court tried to avoid appearing as a legal counsellor to the League of Nations. It stressed its position as a judicial organ dealing with legal issues with the consent of States involved. The Permanent Court refused to render an opinion in this case as it considered that the League

¹⁸¹ See generally L. Gross, "ICJ and UN" 120 *RDC* 313 (1967-I)

¹⁸² See the practice of the PCIJ at 226- 242

Council did not have any competence to deal with the matter and one of the disputants did not consent to seek the Court's opinion.¹⁸³

However, the Permanent Court did render an advisory opinion without the consent of one party involved in the dispute when it dealt with the *Mosul Question opinion*. However, the Court made it clear that its answer was rendered when it was evident that the League Council had competence to deal with the issue at the first place.¹⁸⁴ What differentiates this opinion from that of *Eastern Carelia* was the motive of the League Council, as it was trying in *Eastern Carelia* to introduce compulsory jurisdiction in a roundabout approach, which the Court refused to allow. Besides, the Permanent Court, as Jennings noted, made "the procedure for advisory opinions as near as possible to the procedure in contentious jurisdiction cases, as it was anxious not to be regarded as the League Council's counsellor."¹⁸⁵

The International Court of Justice's approach to the lack of consent has been controversial. It has been caught between the notion of being "a principal judicial organ" of the United Nations and its attempt to preserve its judicial character in the advisory function. In other words, the International Court, to certain degree, has been under an obligation to participate in the organisation's activities as a whole. Therefore, it has not considered the attainment of the parties' consent essential since it was replying to the question put forward by a "fellow" organ of the United Nations. In the *Peace Treaties opinion*, the Court pointed this point out clearly. It stated that:

¹⁸³ 1923 PCIJ, Series B, No.5, 7

¹⁸⁴ 1925 PCIJ, Series B, No.12, 6

¹⁸⁵ R. Y. Jennings, "The Role of the International Court of Justice" 68 *BYIL* 1 (1997) at 2

"[t]he consent of States parties to a dispute, is the basis of the Court's jurisdiction in contentious cases. The situation is different in regard to advisory proceedings even where the Request for an Opinion relates to a legal question actually pending between States. The Court's reply is only of an advisory character: as such, it has not binding force. It follows that no State, whether a Member of the United Nations or not, can prevent the giving of an Advisory Opinion which the United Nations considers to be desirable in order to obtain enlightenment as to the course of action it should take. The Court's Opinion is given not to the States, but to the organ which is entitled to request it; the reply of the Court, itself an "an organ of the United Nations", represents its participation in the organisation, and, in principle, should not be refused."¹⁸⁶

The Court has stressed the "organisational" aspects of the requests for advisory opinions, in order to overcome the objections based on the absence of consent. It has regarded that the advisory jurisdiction as a means for enlightenment for the organisation, or a way for "a guidance...to conduct their activities in accordance with law."¹⁸⁷ The Court has repeatedly characterised the requests as organisational in order to deny the consensual basis to deal with the requests. In the *Namibia opinion*, the International Court stated that:

"[i]t is not the purpose of the request to obtain the assistance of the Court in the exercise of the Security Council's functions relating to the peaceful settlement of a dispute pending before it between two or more States. The request is put forward by a United Nations organ with reference to its own decisions and it seeks legal advice from the Court on the consequences and implications of these decisions."¹⁸⁸

¹⁸⁶ 1950 ICJ Rep. 65 at 71

¹⁸⁷ *Applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations* 1989 ICJ Rep. 177

¹⁸⁸ 1971 ICJ Rep. 16 at 24

"The object of this request," the Court continued, quoting from the *Reservations opinion*¹⁸⁹, "is to guide the United Nations in respect of its action".¹⁹⁰

With this assertion, the International Court of Justice built up a wall between the advisory and the contentious jurisdictions that the Permanent Court of International Justice tried to eliminate.¹⁹¹ With this approach, the International Court deprived the advisory opinions their moral force. It has led Member States to disregard its opinion in several occasions.¹⁹² For the International Court to consider the absence of consent irrelevant has deprived these judicial pronouncements the chance to be accepted by the Member States and to solve the matter peacefully.¹⁹³

The second difference lies in the question whether the Court should deal with abstract questions in exercising its advisory function. It has been argued that unless the Court is consulted on concrete issues, its role becomes "political" and one related to the legislative function of policy setting.¹⁹⁴

On many occasions, the Permanent Court refrained from answering hypothetical points in advisory opinions.¹⁹⁵ Nor did the Permanent Court deliver

¹⁸⁹ *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, 1951 ICJ Rep. 15 at 19

¹⁹⁰ *Namibia opinion* 1971 ICJ Rep. 16 at 24

¹⁹¹ M. Pomerance, *The Advisory Function of the International Court in the League and UN Eras* (1973) at 169

¹⁹² *Peace Treaties* 1950 ICJ Rep. 65 (Soviet Bloc); *Certain Expenses opinion* 1962 ICJ Rep. 151 (France and Soviet Union); *Namibia opinion* 1971 ICJ Rep. 16 (South Africa)

¹⁹³ M. Pomerance, *The Advisory Function of the International Court in the League and UN Eras* (1973) at 163

¹⁹⁴ IAC Report, 10 February 1944 issued as British Parliamentary Paper, Cmd. 6531, Misc. No.2 (1944) reproduced in 39 *AJIL* 1, Supp. (1945) at para. 69

¹⁹⁵ *Monastery of Saint Naoum*, 1924 PCIJ, Series B., No.9, 6 at 21; *Polish Postal Services in Danzig*, 1925 PCIJ, Series B., No.11, 6 at 32; *Jurisdiction of the European Commission on the Danube*, 1927 PCIJ, Series B, No. 14, 6 at 37

any opinion on an "abstract" question. The League of Nations Council did not present the Court with abstract questions. Rather, the requests were based on actual disputes, or related to a given dispute, as in the *Nomination of the Netherlands Workers' Delegate*¹⁹⁶. Although the dispute had been settled, the Court gave its opinion in order to fix the facts under which the interpretation applied. However, in the *Eastern Carelia opinion*, the Permanent Court referred to the "abstract question" issue in a way that would imply that it would have rendered an opinion to an abstract question had it been so asked. It stated that:

"[t]he Court is aware of the fact that it is not requested to decide a dispute, but to give an advisory opinion. This circumstance does not modify the above considerations. The question put is not one of abstract law, but concerns directly the main point of controversy between Finland and Russia and can only be decided by an investigation into the facts underlying the case."¹⁹⁷

The League Council was cautious and exercised a degree of checking before putting the questions forward to the Court. During its discussion of the Corfu dispute between Greece and Italy, for example, there were some proposals that questions on the general nature of the dispute should be referred to the Court. Nonetheless, these proposals were rejected on the ground that the request would have the characteristics of an abstract question. In the end, the Council did not request the opinion.¹⁹⁸

¹⁹⁶ 1922 PCIJ, Series B, No.1

¹⁹⁷ *Status of Eastern Carelia*, 1923 PCIJ, Series B, No.5, 7 at 28-29

¹⁹⁸ The League of Nations Official Journal, 1923, at 1321

In the *Interpretation of the Statute of Memel* case¹⁹⁹, the Permanent Court, however, answered general theoretical questions that had been placed before it. The case was between Great Britain, France, Italy, and Japan v. Lithuania over the interpretation of the Memel convention of 1924²⁰⁰. After the Governor of Memel removed the President of the Directorate of Memel, the German government raised the issue in the League Council. A report adopted by the Council suggested resort to the Court by the parties to the Memel Convention, but the Council refrained from voting in favour of asking the Court for an advisory opinion.²⁰¹ The general questions that the Court was asked for judgment were: whether the Governor was entitled to dismiss the President of the Directorate, if so in what conditions and under what circumstances; and whether the dismissal of the President meant the dismissal of the other members of the Directorate. The Court concluded that the Governor, in order to protect the interests of the State, was entitled to dismiss the President of the Directorate, but only under serious circumstances of such a nature that caused prejudice to the sovereignty of Lithuania. As for the last question, the Court found the dismissal of the President did not entail the discharge of the other members of the Directorate from their functions.²⁰²

Although the Court in this contentious case answered abstract questions, it did relate the questions posed to the actual facts of the case, and it did specify the

¹⁹⁹ 1932 PCIJ, Series A/B, No. 49, 294

²⁰⁰ 29 League of Nations Treaty Series 85

²⁰¹ League of Nations Official Journal, 1932, at 540

²⁰² 1932 PCIJ, Series A/B, No. 49, 294 at 319-323

circumstances under which the Governor of Memel could dismiss the President of the Directorate.²⁰³

As the PCIJ had to face uncertainties surrounding the advisory jurisdiction, it was cautious in handling the requests for advisory opinions. The PCIJ was occupied in preserving its judicial character while dealing with requests for advisory opinions. That explains why the PCIJ had to adopt safeguards from insisting on acquiring the parties' consent to determining the nature of the question.

The picture has totally changed during the days of the International Court of Justice. The International Court has been asked to answer abstract questions brought before it by the UN political organs. However, the International Court has not declined to answer most of the requests that were stamped with "abstract" characteristics.

In the *Admission opinion*, arguments were raised against the Court's answering abstractly worded questions, but the Court dismissed them by stating "the Court may give an advisory opinion on any legal question, abstract or otherwise"²⁰⁴. It dealt with the case adopting a very abstract approach, in that it ignored all the circumstances involved in the case. Judge Zoricic rejected the Court's manner in this case, he pointed out that:

"[i]n human life, all activity is based on concrete considerations or facts. To attempt to judge and explain such acts in the abstract would be to...work in a vacuum, and to misunderstand the meaning of real life. This is still more evident in the case of a

²⁰³ *Ibid.* See also J.H.W. Verzijl, *The Jurisprudence of the World Court: a case by case Commentary* (1965) at 305

²⁰⁴ 1948 *ICJ Rep.* 57 at 61

Court of Justice whose first duty is to decide whether certain acts are in accordance with law."²⁰⁵

In the *Reparations opinion*, the Court did not express any opinion on the statement of the representative of the Secretary- General that the questions were abstract and general questions.²⁰⁶ The Court answered the request and it dealt with the questions in the abstract without referring to the facts.²⁰⁷ In the *Reservations opinion*, the Court itself admitted that the questions were "purely abstract".²⁰⁸ But the Court had to consider all the circumstances and the concrete reasons leading to the request. The Court, however, affirmed, citing the *Admission opinion*, the fact that it "may give an advisory opinion on any legal question, abstract or otherwise"²⁰⁹.

In *Legality of the Use of the Nuclear Weapons*²¹⁰, the International Court was faced with objections against the nature of the questions put before the Court, in particular the abstractness and the vagueness of the questions.²¹¹ The Court in its discussion of these contentions asserted the difference between the requirements applicable to contentious proceedings and those applicable to the advisory opinions. Citing the *Peace Treaties opinion*, the Court affirmed that the advisory function "is not to settle- at least directly- disputes between States, but to

²⁰⁵ *Ibid.* at 96

²⁰⁶ *Reparations for Injuries Pleadings* at 64

²⁰⁷ 1949 *ICJ Rep.* 174 at 215

²⁰⁸ 1951 *ICJ Rep.* 15 at 21

²⁰⁹ *Admission opinion* 1948 *ICJ Rep.* 57 at 61

²¹⁰ 1996 *ICJ Rep.* 226 (General Assembly Request)

²¹¹ *Ibid.* 236

offer legal advice to the organs and institutions requesting the opinion."²¹²

Therefore, the Court continued "the fact that the question put to the Court does not relate to a specific dispute should consequently not lead the Court to decline to give the opinion requested."²¹³

Requesting organs have used the technique of formulating abstract questions as a means of playing down the political elements involved in the dispute²¹⁴, for example in the *Legality of the use of the Nuclear Weapons*.

However, this tendency did not do any good to enhance the general dissatisfaction with the advisory function. An opinion on an abstract question has a wider and uncertain scope of application and as such can deter States and organisations from requesting advisory opinions.²¹⁵ Further, an abstract consideration of a question, aloof from reality decreases the likelihood of the resolution of the problem.²¹⁶

6.2. The Requesting Organs: A Comparison

While the substance of the concept of an advisory opinion remained unchanged in the League of Nations Covenant and the UN Charter, the aspects of voting procedures in the requesting organs have suffered drastic change. The

²¹² *Ibid.*

²¹³ *Ibid.*

²¹⁴ "Trends in the Work of the International Court of Justice" (Notes), 65 *Harvard Law Review* (1951-52) at 666

²¹⁵ L. Gross, "the International Court of Justice: Consideration of Requirements for Enhancing its Role in the International Legal Order" 22 at 34 in L. Gross (ed.), *The Future of the International Court of Justice* (1976); K. J. Keith, *The Extent of the Advisory Jurisdiction of the International Court of Justice* (1971) at 237-38; M. Koskenniemi, "Advisory Opinions of the International Court of Justice as an Instrument of Preventive Diplomacy" 599 at 612-613 in N. Al-Nauimi & R. Meese (eds.), *International Legal Issues Arising under the United Nations Decade of International Law* (1995)

²¹⁶ *Admission opinion* 1948 *ICJ Rep.* 57 at 96; see also M. Koskenniemi, "Advisory Opinions of the International Court of Justice as an Instrument of Preventive Diplomacy" 599 at 602-603, 612-

twenty-eight requests submitted to the Permanent Court were all made by the League Council which generally adopted its decision to request an opinion by unanimous vote, with exception of four cases.²¹⁷ In these four cases, objections to the requests were because of the Council's lack of competence or because of considering the subject matter of the dispute as an internal and domestic issue. Generally speaking, the practice of unanimity meant to the Permanent Court more effective advisory opinions. It decreased the chances of having the Court's advisory opinions disregarded.²¹⁸ Achieving the approval of Members to request an opinion meant an acceptance of the Court's opinion ahead, and gaining the support and co-operation of Member State. This gave the opinion the authoritativeness needed for it to be implemented.²¹⁹

Unfortunately, unanimity has been substituted with the system of majority voting characteristics of the Charter. To date, only two requests for advisory opinions have been adopted unanimously, namely the *Reparations* and *IMCO* opinions. The UN abandonment of the unanimity rule of voting meant "that the United Nations now...[had] at its disposal an effective procedure for requesting advisory opinions but not a procedure for effective advisory opinions".²²⁰ As a consequence of the voting procedures in the UN, the International Court has to face a situation the Permanent Court never encountered, namely the necessity to

613 in N. Al-Nauimi & R. Meese (eds.), *International Legal issues Arising under the United Nations Decade of International Law* (1995)

²¹⁷ With exception of *Eastern Carelia* 1923 PCIJ Series B, No.5, 7; *Acquisition of Polish Nationality* 1923 PCIJ Series B, No. 7, 6; *Mosul Question* 1925 PCIJ Series B, No. 12, 6; *Expulsion of Oecumenical Patriarch* 1925 PCIJ Series E, No.1, 237

²¹⁸ See generally M. Pomerance, *The Advisory Function of the International Court in the League and UN Eras* (1973) at 164

²¹⁹ D. Pratap, *The Advisory Jurisdiction of the International Court* (1972) at 99-104

²²⁰ L. Gross, "ICJ and UN" 120 *RDC* 313 (1967-I) at 369

reply to a contested request of an advisory opinion.²²¹ It has also been argued that the new voting tendency was the critical factor behind having "a large crop of ineffectual opinions"²²².

The voting procedure was not the only difference between the requesting organs in the days of the PCIJ and those in the days of the ICJ. Another aspect of difference is the motive of the request itself. What is meant by the motives of the request is why the requesting organs asked the Court for its advisory opinion. The typical League request was sought on an avowedly legal question and as part of a truly problem-solving approach. In seeking the Permanent Court's opinion, the League Council did not expect or prefer a particular ruling from the Court.²²³

However, this has not been the case in the UN. The International Court's advisory function is frequently sought not for the purpose of real law-clarification or problem solving, but rather for propaganda advantages, and as a means of legitimisation of a measure already taken.²²⁴ The requesting organs have the tendency to expect a particular and "correct" answer from the Court otherwise the advisory opinion tends to be ignored.²²⁵ In addition, in the cases in which the International Court's opinion was sought *post factum* regarding a measure already taken by the requesting organs, the request sometimes appeared to state, rather

²²¹ S. Rosenne, "On the non-use of the Advisory Competence of the International Court of Justice" 39 *BYIL* 1 (1963) at 35-36

²²² M. Pomerance, "The Advisory role of the International Court of Justice and its 'judicial' Character: Past and Future Prisms" 271 at 281 in A.S. Muller et al. (eds.), *The International Court of Justice* (1997)

²²³ M. Pomerance, *The Advisory Function of the International Court in the League and UN Eras* (1973) at 166

²²⁴ M. Pomerance, "The Advisory role of the International Court of Justice and its 'judicial' Character: Past and Future Prisms" 271 at 295 in A.S. Muller et al. (eds.), *The International Court of Justice* (1997)

²²⁵ *Ibid.*

than query, the legal premises upon which the Court was to proceed to answer the questions posed.²²⁶

The abandonment of the old League rules regarding the use of the advisory jurisdiction was led to a wide range of challenges once the requests reached the International Court. The abandonment of the unanimity rule of voting, and the insensible use of the political organs costs the International Court its effectiveness. The Court lost the confidence of Member States in the advisory function as a means of peaceful settlement, and as a means of settling a problem between member States and the UN or any other international organisation.²²⁷

7 The Nature of the Advisory Opinions

The above discussion outlines the concept and the procedure of advisory jurisdiction. However, it has not provided a clear and real contour of the advisory function of the Court. The advisory function has always been attacked on the ground that it is nothing but advisory. It is truism that advisory opinions lack binding force. The Court has been explicit in stating that they have no binding force.²²⁸ There is no obligation on the requesting organs to give effect to them and nor are States likely to be affected as they are not legally bound to implement them in action, as was the fate of the *Certain Expenses opinion*.²²⁹ However, it could be argued that advisory opinions could have some binding force when they

²²⁶ See for example, *Certain Expenses opinion* 1962 *ICJ Rep.* 151, *Namibia opinion* 1971 *ICJ Rep.* 16

²²⁷ M. Pomerance, *The Advisory Function of the International Court in the League and UN Eras* (1973) at 169

²²⁸ *Peace Treaties opinion* 1950 *ICJ Rep.* 65 at 71, *South West Africa case* (Preliminary Objections) 1962 *ICJ Rep.* 319 at 337

²²⁹ See for example the unilateral rejection of the ICJ advisory opinion by the Soviet Union and France

indicate that a certain course of action would be contrary to international law or to the Charter. In that sense, neither the requesting organs nor the States concerned could adopt a prohibited action. In the *South West Africa opinions*, although the South African government rejected the Court's advisory opinions and refused to implement them, it refrained from absorbing the territory into that of South Africa, a course which the International Court had declared illegal.²³⁰

Though advisory opinions lack binding force, they do have an authoritative character. As they are judicial pronouncements of the highest international tribunal, the statements of law contained in them is of the same high quality as those contained in judgment. In the *Eastern Carelia opinion*, the Permanent Court stated that the effect of an opinion was "substantially equivalent" of that of judgment.²³¹ Judge Zoricic, in the *Peace Treaties* case, stated that: [i]n practice, an advisory opinion...in regard to a dispute between States is nothing else than an unenforceable judgment"²³².

One commentator has pointed out that "although...the framers of the Charter were careful to stress the non-obligatory nature of advisory opinions, there has always existed a widespread feeling that such weighty pronouncements by the Court have some greater moral value and deserve greater attention than is usually accorded to mere 'legal advice'."²³³ For instance, the UN General Assembly has often asserted in the preamble of the resolutions to request advisory opinions the "authoritativeness" of the opinions. In the *Peace Treaties* and

²³⁰ D. Prapat, *The Advisory Jurisdiction of the International Court* (1972) at 252

²³¹ *Eastern Carelia* opinion 1923 PCIJ, Series B, No.5, 7 at 29

²³² *Peace Treaties* opinion 1950 ICJ Rep. 65 at 71-72

Certain Expenses opinions, the Assembly stated its need for the authoritative advice of the Court.²³⁴ As a result of the Court's position as the principal judicial organ of the UN, the correctness of its advisory opinions cannot be questioned by the requesting organs. The opinions are regarded by the requesting organs as an authoritative expression of existing law.²³⁵ Advisory opinions are authoritative in this sense as well.²³⁶

The subject-matter of advisory opinions is not *res judicata*. The doctrine of *res judicata* applies only to the Court's judgments. The 1920 Committee of Jurists, drafting the Statute of the Permanent Court, cited the rule of *res judicata* as a clear example of "a general principle of law recognised by civilised nations".²³⁷ However, the 1920 Committee of Jurists did not intend that advisory opinions should have the force of *res judicata*. The Committee was of the view that the Court's advisory function was something 'apart from its judicial competence', and that the opinion should be given in such a way so as not to restrain the parties from bringing the matter subsequently before the Court; and for the same reason, the Court itself should not be bound by its own advisory opinion when a concrete case came before it.²³⁸

²³³ D. W. Greig, "The advisory jurisdiction of the International Court and the settlement of disputes between States" 15 *ICLQ* 325 (1966) at 361

²³⁴ 1950 *ICJ Rep.* 65 at 67; 1962 *ICJ Rep.* 151 at 155

²³⁵ H. Lauterpacht, *The Function of Law in the International Community* (1933) at 336

²³⁶ D. Prapat, *The Advisory Jurisdiction of the International Court* (1972) at 232

²³⁷ Minutes of the 1920 Committee of Jurists, PCIJ Series D, No.2 at 294 et seq.; see for more discussions, e.g., H.C. Gutteridge, "The Meaning of the Scope of Art. 38(1)(c) of the Statute of the International Court of Justice" 38 *Transactions of the Grotius Society* 127 (1952); J. R. Stevenson, "South West Africa Cases (Ethiopia v. South Africa, Liberia v. South Africa), second Phase" 61 *AJIL* 116 (1969) at 166-67

²³⁸ Minutes of the 1920 Committee of Jurists, PCIJ Series D, No.2 at 732

Even States do not accord the advisory opinions the force of *res judicata*. In the *Jurisdiction of the European Commission of Danube between Galatz and Bralia*²³⁹, Romania rejected the submission of the dispute to the Permanent Court for judgment, but it agreed on its submission for an advisory opinion, on the condition that it would not have a binding force and if subsequent negotiations had not resolved the dispute, the parties preserved their full liberty of action.²⁴⁰ Had there been a contentious case subsequent to the advisory opinion, the Court would have had jurisdiction to deal with the matter anew because of the non-binding character of the opinion.

However, advisory opinions can be binding and final when the parties to the disputes agree to this in advance. This happened with the *Nationality Decrees opinion*, when France and Britain agreed to respect the advisory opinion as final and binding.²⁴¹ But this kind of arrangement does not give advisory opinions any binding force under Article 59 of the Statute.²⁴² The International Court affirmed that such an arrangement between the parties does not change the nature of advisory opinions. It is not something coming from Statute but rather from temporary arrangement. In the *Difference relating to immunity from legal process of a Special Rapporteur of the Commission on Human Rights*²⁴³, the International

²³⁹ 1927 PCIJ, Series B, No.14, 6

²⁴⁰ J.H.W. Verzijl, *The Jurisprudence of the World Court: a case by case Commentary* (1965) at 121

²⁴¹ 1923 PCIJ, Series B, No.4, 7; see also *Delimitation of the Polish-Czechoslovakian Frontier (Question of Jaworzina)* 1923 PCIJ, Series B., No. 8, 6 (the parties agreed in advance to recognise the finality of the opinion)

²⁴² S. Rosenne, *The Law and Practice of the International Court, 1920-1996* (3rd ed.) (1997) at 1656; for general discussion on the issue of *res judicata* arising from arrangement aliens to the Statute see R. Ago, "'Binding' Advisory Opinions of the International Court of Justice" 85 *AJIL* 439 (1991)

²⁴³ April 29th, 1999, <<http://www.icj-cij.org>> para. 25, 1999 *ICJ Rep.* 1

Court ruled that the agreement to refer the dispute to the Court Article VIII, section 30, of the 1946 Convention on the Privileges and Immunities of the United Nations, and the binding opinion that would result, "does not change the advisory nature of the Court's function, which is governed by the terms of the Charter and of the Statute." The International Court went on to state that:

"A distinction should thus be drawn between the advisory nature of the Court's task and the particular effects that parties to an existing dispute may wish to attribute, in their mutual relations, to an advisory opinion of the Court, which, "as such, . . . has no binding force" . . . These particular effects, extraneous to the Charter and the Statute which regulate the functioning of the Court, are derived from separate agreements; in the present case Article VIII, Section 30, of the General Convention provides that "[t]he opinion given by the Court shall be accepted as decisive by the parties".²⁴⁴

It may be the subject matter of an advisory opinion comes before the Court subsequently in a contentious case. In the *South West Africa* cases, Liberia and Ethiopia, for example, used the Court's 1950 advisory opinion as the legal basis for their argument. South Africa argued that the earlier advisory opinion did not have the force of *res judicata* and the Court should reconsider the advisory opinion. However, the Court, in its judgment, held that

"the unanimous holding of the Court in 1950 on the survival and continuing effect of Article 7 of the Mandate, continued to reflect the Court's opinion today. Nothing had since occurred which would warrant the Court reconsidering it. All important facts were stated or referred to in the proceeding before the Court in 1950."²⁴⁵

²⁴⁴ *Ibid.* para. 25

²⁴⁵ *South West Africa* (Ethiopia v. Union of South Africa and Liberia v. Union of South Africa) 1962 ICJ Rep. 319 at 334

The Court's insistence on the rejection of re-arguing the earlier advisory opinions has been interpreted as "the inarticulate affirmation of an equally inarticulate and innovatory doctrine of *res judicata* arising from advisory opinions"²⁴⁶.

However, the International Court, in general, maintains that the advisory opinions are not binding and they do not have the force of *res judicata*. The logic behind denying advisory opinions the force of *res judicata* is that if the subject matter of an advisory opinion comes up before the Court subsequently in its contentious proceedings, the Court will have the freedom to deal and settle the matter with a binding judgment, and with the consent of the parties involved.²⁴⁷ In that sense, it is not clear whether the judgment will be different from the advisory opinion already taken. It was, however, argued that the same law could not be applied differently by the same Court in the same case.²⁴⁸ Therefore, after the opinion has been given, the same question, addressed in the advisory opinion, is brought before the Court in its contentious proceedings for a judgment by the States affected by the earlier opinion, the Court's judgment should be substantially the same as the opinion. This is, of course, subject to the qualification that no new and critical evidence has been produced by the parties involved, otherwise, in the case of new arguments, the judgment might be materially different from the opinion.²⁴⁹

²⁴⁶ I. Scobbie, "Res Judicata, Precedent and the International Court" 20 *Aust. YB. Int'l. L.* 299 (1999) at 314

²⁴⁷ See IIAC Report, 10 February 1944 issued as British Parliamentary Paper, Cmd. 6531, Misc. No.2(1944) reproduced in 39 *AJIL* 1, Supp. (1945) para.68

²⁴⁸ D. Pratap, *The Advisory Jurisdiction of the International Court* (1972) at 255

²⁴⁹ B. F. Sloan, "Advisory Jurisdiction of the International Court of Justice" 38 *California Law Review* 830 (1950) at 852

8 Conclusion

These problems surrounding advisory opinions have led to the belief that the advisory function was not a function to settle disputes and solve problems. However, the practice of the Permanent Court of International Justice established the fact that these problems could be overcome. During the days of the Permanent Court, the advisory function played an essential role in settling disputes and giving guidance to the League of Nations organs and other international bodies. This follows from the sensible use of this important jurisdiction of the Court. The League Council, after the *Eastern Carelia opinion*, learned its lesson not to involve the Court in political tensions. After that episode, the League Council exercised a sort of check before bringing any dispute or question before the Court.

Unfortunately, the scene has changed during the early days of the International Court of Justice. The role that the requesting organs played in getting the International Court involved in the Cold War struggle was the main change. Instead of being used as a forum to solve problems, the Court was used for propaganda purposes.

In that sense, the problem is not with the advisory jurisdiction itself. There are some setbacks in the advisory jurisdiction, such as the ineffectual character of advisory opinions (as they do not contribute to the settlement of the underlying dispute).²⁵⁰ But this is not related to the advisory jurisdiction, it is rather the problem of the international community in general, and the requesting organs and States involved, in particular. The advisory function should be thought of as an

²⁵⁰ M. Koskenniemi, "Advisory Opinions of the International Court of Justice as an Instrument of Preventive Diplomacy" 599 at 602 in N. Al-Nauimi & R. Meese (eds.), *International Legal issues Arising under the United Nations Decade of International Law* (1995)

asset to dispute settlement. However, the problem rests in the hand of the "clients" of the Court, as Pomerance has pointed out:

"on the basis of the experience of both World Courts with the advisory jurisdiction, it would appear that the key to its constructive revival lies primarily with the Court's clients and only secondary with the Court itself."²⁵¹

Changing the attitude toward this jurisdiction rests in the hands of the principal organs of the United Nations. The experience of the United Nations has shown that a great reluctance by UN organs to use the International Court's advisory function in comparison with the frequent use of this function by the League Council and Assembly. One commentator has related this tendency to "the jealousy of the UN organs with respect to their own decision-making powers"²⁵².

In that sense, reconciliation between the political organs and judicial organ is needed.

The Secretary-General has called for more co-operation among the UN organs and he has encouraged the use of the Court's advisory function to promote the rule of law in international relations,

"[t]he rule of law in international affairs should also be promoted by a greater recourse to the International Court of Justice...in rendering advisory opinions on the legal aspects of a dispute."²⁵³

²⁵¹ M. Pomerance, "The Advisory role of the International Court of Justice and its 'judicial' Character: Past and Future Prisms" 271 at 323 in A.S. Muller et al. (eds.), *The International Court of Justice* (1997)

²⁵² M. Pomerance, *The Advisory Function of the International Court in the League and UN Eras* (1973) at 171

²⁵³ Report of the Secretary-General on the Work of the Organisation, UNGA Doc. A/45/1, 16 September 1990, Part III, at 7

The Secretary-General linked the use of the International Court to the Charter system of collective security and pointed out that many disputes that seem predominantly political have legal components suitable for referral to the Court for a "fair and objectively commendable settlement and thus defusing an international crisis situation"²⁵⁴.

The advisory function is useful to attain effective advice in legal problems that are raised in day-to-day activities of the various organs of the United Nations.²⁵⁵ The International Court has in fact exercised some kind of judicial review, or a sort of legal advisor function, in handling requests from the United Nations Administrative Tribunal. The Court reviewed the UNAT judgments.²⁵⁶ Indeed, in these opinions the International Court reviewed the judgments and examined the competence of UNAT.

Although the Permanent Court did not face that challenge, to rule on the validity and the competence of League organs, the practice of the Permanent Court indicated that its advisory function was used to clarify doubts on legal issues that arose within the activities of the political organs or other international organisations. The International Court, on the other hand, has been explicitly asked to rule on the validity of political organs' resolutions, in the *Certain*

²⁵⁴ Report of the Secretary-General on the Work of the Organisation, UNGA Doc. A/46/1, 6 September 1991, Part V, at 8

²⁵⁵ M. Pomerance, *The Advisory Function of the International Court in the League and UN Eras* (1973) at 9

²⁵⁶ See *Application for Review of Judgement No. 158*, 1973 ICJ Rep. 166; *Application for Review of Judgement No. 273*, 1982 ICJ Rep. 325; *Application for Review of Judgement No. 333*, 1987 ICJ Rep. 18

Expenses opinion, the *Namibia opinion*, and in the *Lockerbie cases*²⁵⁷ (in the Court's contentious proceedings). The International Court has maintained that it lacks the power of judicial review, but it reviewed the resolution concerned, as part of considering all relevant legal data to answer the request.²⁵⁸ It could be concluded that, from the discussion advanced in this chapter, the advisory jurisdiction could be the link to establish a middle way judicial review; i.e. between compulsory judicial review, as in the domestic legal systems, and no judicial review at all. In that sense, the UN Security Council or Assembly could use the International Court's advisory function to clarify any legal doubts raised by the Member States on action already taken, as intended for the advisory jurisdiction and as this function was utilised by the League of Nations' political organs.²⁵⁹ One commentator has argued that:

"Ultimately, the absence of a power of 'review' seems to mean no more than this: that the Court has no initiative in the matter. If requested by a principal organ to say whether a given decision, to be taken by that organ or already taken, is valid, it may give a reply; and if the question of the validity of a decision arises as a necessary part of the chain of reasoning required to arrive at a decision in a contentious case- or on a request for advisory opinion..., then the Court is bound to satisfy itself of such validity."²⁶⁰

The problem is that judicial review will be only exercised under the discretion of the political organs. In other words, as the International Court cannot

²⁵⁷ *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United Kingdom)* 1992 ICJ Rep. 3, (*Libyan Arab Jamahiriya v. United States of America*) 1992 ICJ Rep. 231

²⁵⁸ *Certain Expenses opinion* 1962 ICJ Rep. 151 at 157; *Namibia opinion* 1971 ICJ Rep. 16 at 45

²⁵⁹ See above at 218- 242

give an advisory opinion *proprio motu*, (as any court), it cannot exercise judicial review through the advisory jurisdiction unless the political organs requests its opinion.²⁶¹ But the permissive language of Article 96 (1) of the UN Charter should be understood as mandatory, since "the Charter does not afford any other way for the legal question to reach the Court in furtherance of justice; its framers must have intended the [UN political organs] to be under mandate to request the Court's opinion"²⁶².

²⁶⁰ H. Thirlway, "The Law and Procedure of the International Court of Justice 1960-1989" 67 *BYIL* 1 (1996) at 51

²⁶¹ M. O. Hudson, *The Permanent Court of International Justice 1920-1942: A Treatise* (1943) at 486; P. Szasz, "Enhancing the Advisory Competence of the World Court" 499 at 501 in L. Gross (ed.), *The Future of the International Court of Justice* (1976)

²⁶² L. B. Wehle, "The UN bypasses the International Court of Justice as the Council's adviser, A study in contrived frustration" 98:3 *University of Pennsylvania Law Review* 285 (1950) at 295

Conclusion

Judicial review of the legality of the acts of international organs is still at a rudimentary and tentative stage; its outlines are vague, its limits quickly reached. Nobody doubts that the maintenance of international peace and security must have priority. But it is important to begin appreciating that "*observance of laws and of the Charter is not the enemy of peace and does not necessarily compromise its rightful priority.*"¹ Nobody should deny the right of international political organs, especially the Security Council, to the full exercise of their individual powers to interpret the Charter in their activities from day to day, and to take their decisions in the light of their own interpretation.

The very first article of the UN Charter gives the absolute priority to peace and security. And it is the Security Council which has been given a virtual monopoly in the settlement of questions to do with the maintenance of peace. There can be no denying the Security Council's need for discretionary power in the areas entrusted to it by the Charter, especially where it has to decide whether there is a "threat to peace" or to characterise a "situation".

It should not deny, on the other hand, that Member States have a right to challenge a decision. The Charter of the United Nations has organised a certain level of cohesion of international society, but it would be superficial to imagine that the situation created corresponds to some kind of integration. In fact the United Nations remains a free association of States. That being so, it must be considered as an international institution which cannot impose its decisions on its sovereign member States in every area but only in some very limited, well-defined

¹ M. Bedjaoui, *The New World Order and the Security Council: Testing the Legality of its Acts* (1994) at 127 (Emphasis in original)

and strictly interpreted areas concerning the maintenance of peace. From that very point, there is nothing unusual in the idea that Member States should have a "remedy", in the broad sense, against any decision of a political organ of the United Nations likely to impinge upon the rights or obligations contracted by Member States under the Charter.

Nowadays, one can often hear voices raised against the legitimacy of the Security Council resolutions and actions in dealing with an international crisis under Chapter VII of the UN Charter. In objecting to a draft Security Council resolution to impose sanctions on it for failing to extradite the two suspects in the Lockerbie air crash case, Libya declared:

"What we find today in the draft resolution before the Council is an example of the abuse of the Security Council by some permanent members through the imposition of resolutions that not only run counter to international legitimacy but also are in flagrant violation of that legitimacy. This could lead to a situation in which the very principles and objectives of the United Nations are threatened. These are dangers the consequences of which cannot be predicted. "²

In the same debate, Zimbabwe supported Libya's view, stating that Security Council actions must withstand the scrutiny of the 160 States that are Members of the United Nations but not of the Security Council, and that

"[t]his is only possible if the Council insists on being guided in its decisions and actions by the Charter and other international conventions. Any approach that assumes that international law is created by majority votes in the Security Council is bound to have far-reaching ramifications which could cause irreparable harm to the credibility and

² See debate in the Security Council on Res. 748, U.N. Doc. S/1992/PV.3063 (statement of Mr. Elhouderi, Libya) at 18

prestige of the Organisation, with dire consequences for a stable and peaceful world order."³

The new activities of the Security Council have been apprehended by many with caution as there has been a fear of abuse of its collective enforcement powers by its permanent members, in particular the United States. The change of the world scene from bipolar to unipolar led many to raise the alarm and to call for a check on the legitimacy of the Security Council actions.⁴ In the words of Professor Abi-Saab,

"[t]his tendency [the use of the collective security enforcement measures] bears enormous risks of 'excess' or 'abuse of power' by the executors, given the Security Council's lack of means of control (or their paralysis by veto) over execution of the mandate to act once it has been given. In a wider political sense, the risk is that of the abuse of collective legitimisation and the collective framework to serve the undeclared private ends of those states carrying out the mandated action or for legitimating new hegemonies; in other words, the risk of putting the collective interests at the service of the private rather than the other way around."⁵

On the other hand, others have asserted that law does not have a place in the Security Council's powers under Chapter VII of the United Nations Charter. Adopting the Kelsenian approach, this camp of scholars insists on the fact that the Security Council is not concerned with law and justice in dealing with "threats to international peace and Security".⁶

³ *Ibid.* at 54-55 (statement of Mr. Mumbengegwi, Zimbabwe).

⁴ See the literature above in Chapter III on the Limitations on the Powers of the Security Council

⁵ G. Abi-Saab, "Whither the International Community" 9 *EJIL* 248 (1998) at 265

⁶ H. Kelsen, *The Law of the United Nations: A Critical Analysis of Its Fundamental Problems* (1951) at 727

In this controversy, in the words of Koskenniemi, "law and politics keep deferring to each other in an endless search for authority and normative closure: texts constrain (law)- but need to be interpreted (politics); interpretative principles need to be applied (law)- but they are conflicting and ambiguous (politics)."⁷

In short, the tension between law and politics in international relations and international community has been transferred to a new forum, the United Nations. As many have asserted the need to put the Security Council under scrutiny, the attention turns to the International Court of Justice to be the guardian of the legitimacy of the United Nations system as a whole. As Franck has stated:

"the Court may have to be the last-resort defender of the system's legitimacy if the United Nations is to continue to enjoy the adherence of its Members. This seems to be tacitly acknowledged judicial common ground, and is an elementary prerequisite of fairness in the Council's exercise of its newly ebullient powers."⁸

It is a fair call, however, that what went wrong with these proposals is that they see the relationship between law and politics as having a hierarchical nature. Law is sovereign or superior to politics, which if translated into the United Nations language, means that the International Court of Justice should be superior to the Security Council. However, throughout this thesis, the argument has been that the International Court of Justice should exercise a kind of judicial review through its advisory competence.

If the Security Council strayed from following the Charter only in ways that did not violate the rights of States, as, for example, by devising peacekeeping,

⁷ M. Koskenniemi, "The Place of Law in Collective Security" 17 *Mich. J. Int'l. L.* 455 (1996) at 484

⁸ T. M. Franck, "Fairness in the International Legal and Institutional System" 240 *RDC* 23 (1993 III) at 220-21

the harm would not be serious. The problem is that the deviations from the Charter have largely been at the instigation of, and for the benefit of, a single state.⁹ It is this aspect that most seriously diminishes the legitimacy of the Security Council.

As discussed in chapter IV, a mechanism of judicial review could be employed through the advisory competence of the International Court of Justice. The Court enjoys competence under the U.N. Charter to issue advisory opinions "on any legal question," at the request of the Security Council or General Assembly. Thus, all the issues raised above of conformity of conduct to the Charter are subject to judicial oversight of a non-binding character. If broader use were made of this procedure, the legitimacy of Security Council action could be considerably enhanced. Either the Security Council or the General Assembly could, for example, ask the Court for an advisory opinion about the legality of any controversial resolutions.

The Court's history in issuing advisory opinions gives reason to believe that the Court would approach such issues seriously and with caution. As recounted in previous chapters, the Court has given an expansive reading to the Charter and has been sensitive to the concern that adhering to the Charter's strict letter may keep the Security Council from taking needed action. At the same time, the Court could be expected to find limits in the Charter and thus to encourage the Security Council not to stray so far that it loses legitimacy. The Court, in short, could provide a corrective mechanism.

Law and politics could operate in an interactive relationship. The Security Council asks for the International Court's clarification of its position, the Security

⁹ J. Quigley, "The United Nations Security Council: Promethean Protector or Helpless Hostage?" 35 *Tex. Int'l. L. J.* 129 (2000) at 168

Council, assuming good faith, takes account of the Court's opinion, applies it. As Rosenne has pointed out:

"[t]he ability of the General Assembly and the Security Council to ask the ICJ for an advisory opinion on any legal question, if carefully used, enables legal differences between the United Nations and a State to be resolved with the assistance of the Court."¹⁰

Therefore, The Court could serve a useful function in terms of public perception of Security Council action. If it were to find lawful a particular Security Council approach, the Council would be perceived to be acting properly.¹¹

The role of law relating to the UN organs' decisions and actions in the area of peace and security is the most controversial and challenging domain of the UN activities. Understanding the role of law in this kind of setting leads to an inquiry into the link between effectiveness and legitimacy. It has been argued that the Security Council cannot observe legal rules while acting in emergency cases, especially situations under Chapter VII. To illustrate this point, the Security Council's response to Iraq's aggression against Kuwait elicited a range of differing responses. Those pre-occupied with the short-run effectiveness tended to be indifferent to the rule of law considerations¹², while those more concerned with the

¹⁰ S. Rosenne, "The Contribution of the International Court of Justice to the United Nations" 35 *Indian J. Int'l. L.* 67 (1995) at 70

¹¹ See for example V. Gowlland-Debbas, "The Relationship Between The International Court of Justice and the Security Council in the Light of the Lockerbie Case" 88 *AJIL* 643 (1994)

¹² See for example, J. E. Alvarez, "Judging the Security Council?," 90 *AJIL* 1 (1996); H. Freudenschuß, "Article 39 of the UN Charter Revisited: Threats to the Peace and the Recent Practice of the UN Security Council" 46 *Aust. J. Publ. Int'l. L.* 1 (1993); T. D. Gill, "Limitations on UN Enforcement Powers," XXVI *NYIL* 33 (1995); M. J. Herdegen, "The 'Constitutionalization' of the UN Security System" 27 *Vand. J. of Transna'l. L.* 135 (1994)

long-term effectiveness were generally distressed by this indifference.¹³ In other words, effectiveness and legitimacy are not easily reconcilable.

However, effectiveness and legitimacy can be reconciled through a closer relation between UN political organs and the International Court of Justice. Using the Court as a legal advisor, through its advisory jurisdiction, would provide guidance for the requesting organs in connection with an action already taken or a planned course of action, as it was essentially intended for the advisory competence to provide. Besides, Article 96(1) of the UN Charter and Article 65 (1) of the ICJ Statute do not exclude having the General Assembly asking the Court whether the Security Council actions conform to the Charter or vice-versa.¹⁴ To ensure legitimacy and therefore effectiveness, the political organs should establish the constitutionality of their actions to be generally accepted in the international community. To accomplish this, the political organs could refer legal issues to the International Court of Justice. A final word, the UN principal organs should work in harmony and in a complementarily way to ensure legitimacy and through which effectiveness could be established. Judge Bedjaoui pointed out: "[i]t is found increasingly inadmissible that international political organs should take liberties with the Charter or adopt a relaxed attitude towards international law

¹³ See for example, K. Harper, "Does UN Security Council Have the Competence to Act as Court and Legislature?" 27 *N. Y. U. J. of Int'l L. & Pol.* 103 (1994-1995); J. Quigley, "The United Nations Security Council: Promethean Protector or Helpless Hostage?" 35 *Tex. Int'l. L. J.* 129 (2000); O. Schachter, "United Nations Law in the Gulf Conflict" 85 *AJIL* 452 (1991); B. H. Weston, "Security Council Resolution 678 and Persian Gulf Decision Making: Precarious Legitimacy" 85 *AJIL* 516 (1991)

¹⁴ L. Caflisch, "Is the International Court Entitled to Review Security Council Resolutions Adopted Under Chapter VII of the United Nations Charter" 633 at 635 in N. Al-Nauimi & M. Meese (eds.), *International Legal Issues Arising Under the United Nations Decade of International Law* (1995)

when it is they, surely, even more than States, that have been given the duty of fortifying international law's credibility and reliability."¹⁵

¹⁵ M. Bedjaoui, *The New World Order and the Security Council: Testing the Legality of its Acts* (1994) at 130

Appendices

U.S. Supreme Court

MARBURY v. MADISON, 5 U.S. 137 (1803)

5 U.S. 137 (Cranch)

WILLIAM MARBURY

v.

JAMES MADISON, Secretary of State of the United States.

February Term, 1803

AT the December term 1801, William Marbury, Dennis Ramsay, Robert Townsend Hooe, and William Harper, by their counsel [5 U.S. 137, 138] severally moved the court for a rule to James Madison, secretary of state of the United States, to show cause why a mandamus should not issue commanding him to cause to be delivered to them respectively their several commissions as justices of the peace in the district of Columbia.

This motion was supported by affidavits of the following facts: that notice of this motion had been given to Mr. Madison; that Mr. Adams, the late president of the United States, nominated the applicants to the senate for their advice and consent to be appointed justices of the peace of the district of Columbia; that the senate advised and consented to the appointments; that commissions in due form were signed by the said president appointing them justices, &c. and that the seal of the United States was in due form affixed to the said commissions by the secretary of state; that the applicants have requested Mr. Madison to deliver them their said commissions, who has not complied with that request; and that their said commissions are withheld from them; that the applicants have made application to Mr. Madison as secretary of state of the United States at his office, for information whether the commissions were signed and sealed as aforesaid; that explicit and satisfactory information has not been given in answer to that inquiry, either by the secretary of state, or any officer in the department of state; that

application has been made to the secretary of the senate for a certificate of the nomination of the applicants, and of the advice and consent of the senate, who has declined giving such a certificate; whereupon a rule was made to show cause on the fourth day of this term. This rule having been duly served-- [5 U.S. 137, 139] Mr. Jacob Wagner and Mr. Daniel Brent, who had been summoned to attend the court, and were required to give evidence, objected to be sworn, alleging that they were clerks in the department of state, and not bound to disclose any facts relating to the business or transactions of the office.

The court ordered the witnesses to be sworn, and their answers taken in writing; but informed them that when the questions were asked they might state their objections to answering each particular question, if they had any.

Mr. Lincoln, who had been the acting secretary of state, when the circumstances stated in the affidavits occurred, was called upon to give testimony. He objected to answering. The questions were put in writing.

The court said there was nothing confidential required to be disclosed. If there had been, he was not obliged to answer it, and if he thought any thing was communicated to him confidentially he was not bound to disclose, nor was he obliged to state any thing which would criminate himself.

The questions argued by the counsel for the relators were, 1. Whether the supreme court can award the writ of mandamus in any case. 2. Whether it will lie to a secretary of state, in any case whatever. 3. Whether in the present case the court may award a mandamus to James Madison, secretary of state.

[5 U.S. 137, 153]

Mr. Chief Justice MARSHALL delivered the opinion of the court.

At the last term, on the affidavits then read and filed with the clerk, a rule was granted in this case, requiring the secretary of state to show cause why a mandamus [5 U.S. 137, 154] should not issue, directing him to deliver to William Marbury his commission as a justice of the peace for the county of Washington, in the district of Columbia.

No cause has been shown, and the present motion is for a mandamus. The peculiar delicacy of this case, the novelty of some of its circumstances, and the real difficulty attending the points which occur in it, require a complete exposition of the principles on which the opinion to be given by the court is founded.

These principles have been, on the side of the applicant, very ably argued at the bar. In rendering the opinion of the court, there will be some departure in form, though not in substance, from the points stated in that argument.

In the order in which the court has viewed this subject, the following questions have been considered and decided.

1. Has the applicant a right to the commission he demands?
2. If he has a right, and that right has been violated, do the laws of his country afford him a remedy?
3. If they do afford him a remedy, is it a mandamus issuing from this court?

The first object of inquiry is,

1. Has the applicant a right to the commission he demands?

His right originates in an act of congress passed in February 1801, concerning the district of Columbia.

After dividing the district into two counties, the eleventh section of this law enacts, 'that there shall be appointed in and for each of the said counties, such number of discreet persons to be justices of the peace as the president of the

United States shall, from time to time, think expedient, to continue in office for five years. [5 U.S. 137, 155] It appears from the affidavits, that in compliance with this law, a commission for William Marbury as a justice of peace for the county of Washington was signed by John Adams, then president of the United States; after which the seal of the United States was affixed to it; but the commission has never reached the person for whom it was made out.

In order to determine whether he is entitled to this commission, it becomes necessary to inquire whether he has been appointed to the office. For if he has been appointed, the law continues him in office for five years, and he is entitled to the possession of those evidences of office, which, being completed, became his property.

The second section of the second article of the constitution declares, 'the president shall nominate, and, by and with the advice and consent of the senate, shall appoint ambassadors, other public ministers and consuls, and all other officers of the United States, whose appointments are not otherwise provided for.'

The third section declares, that 'he shall commission all the officers of the United States.'

An act of congress directs the secretary of state to keep the seal of the United States, 'to make out and record, and affix the said seal to all civil commissions to officers of the United States to be appointed by the president, by and with the consent of the senate, or by the president alone; provided that the said seal shall not be affixed to any commission before the same shall have been signed by the president of the United States.'

These are the clauses of the constitution and laws of the United States, which affect this part of the case. They seem to contemplate three distinct operations:

1. The nomination. This is the sole act of the president, and is completely voluntary.

2. The appointment. This is also the act of the president, and is also a voluntary act, though it can only be performed by and with the advice and consent of the senate. [5 U.S. 137, 156]

3. The commission. To grant a commission to a person appointed, might perhaps be deemed a duty enjoined by the constitution. 'He shall,' says that instrument, 'commission all the officers of the United States.' The acts of appointing to office, and commissioning the person appointed, can scarcely be considered as one and the same; since the power to perform them is given in two separate and distinct sections of the constitution. The distinction between the appointment and the commission will be rendered more apparent by adverting to that provision in the second section of the second article of the constitution, which authorises congress 'to vest by law the appointment of such inferior officers as they think proper, in the president alone, in the courts of law, or in the heads of departments;' thus contemplating cases where the law may direct the president to commission an officer appointed by the courts or by the heads of departments. In such a case, to issue a commission would be apparently a duty distinct from the appointment, the performance of which perhaps, could not legally be refused.

Although that clause of the constitution which requires the president to commission all the officers of the United States, may never have been applied to officers appointed otherwise than by himself, yet it would be difficult to deny the legislative power to apply it to such cases. Of consequence the constitutional distinction between the appointment to an office and the commission of an officer

who has been appointed, remains the same as if in practice the president had commissioned officers appointed by an authority other than his own.

It follows too, from the existence of this distinction, that, if an appointment was to be evidenced by any public act other than the commission, the performance of such public act would create the officer; and if he was not removable at the will of the president, would either give him a right to his commission, or enable him to perform the duties without it.

These observations are premised solely for the purpose of rendering more intelligible those which apply more directly to the particular case under consideration. [5 U.S. 137, 157] This is an appointment made by the president, by and with the advice and consent of the senate, and is evidenced by no act but the commission itself. In such a case therefore the commission and the appointment seem inseparable; it being almost impossible to show an appointment otherwise than by proving the existence of a commission: still the commission is not necessarily the appointment; though conclusive evidence of it.

But at what stage does it amount to this conclusive evidence?

The answer to this question seems an obvious one. The appointment being the sole act of the president, must be completely evidenced, when it is shown that he has done every thing to be performed by him.

Should the commission, instead of being evidence of an appointment, even be considered as constituting the appointment itself; still it would be made when the last act to be done by the president was performed, or, at furthest, when the commission was complete.

The last act to be done by the president, is the signature of the commission. He has then acted on the advice and consent of the senate to his own nomination. The

time for deliberation has then passed. He has decided. His judgment, on the advice and consent of the senate concurring with his nomination, has been made, and the officer is appointed. This appointment is evidenced by an open, unequivocal act; and being the last act required from the person making it, necessarily excludes the idea of its being, so far as it respects the appointment, an inchoate and incomplete transaction.

Some point of time must be taken when the power of the executive over an officer, not removable at his will, must cease. That point of time must be when the constitutional power of appointment has been exercised. And this power has been exercised when the last act, required from the person possessing the power, has been performed. This last act is the signature of the commission. This idea seems to have prevailed with the legislature, when the act passed converting the department [5 U.S. 137, 158] of foreign affairs into the department of state. By that act it is enacted, that the secretary of state shall keep the seal of the United States, 'and shall make out and record, and shall affix the said seal to all civil commissions to officers of the United States, to be appointed by the president:' 'provided that the said seal shall not be affixed to any commission, before the same shall have been signed by the president of the United States; nor to any other instrument or act, without the special warrant of the president therefor.' The signature is a warrant for affixing the great seal to the commission; and the great seal is only to be affixed to an instrument which is complete. It attests, by an act supposed to be of public notoriety, the verity of the presidential signature. It is never to be affixed till the commission is signed, because the signature, which gives force and effect to the commission, is conclusive evidence that the appointment is made.

The commission being signed, the subsequent duty of the secretary of state is prescribed by law, and not to be guided by the will of the president. He is to affix the seal of the United States to the commission, and is to record it.

This is not a proceeding which may be varied, if the judgment of the executive shall suggest one more eligible, but is a precise course accurately marked out by law, and is to be strictly pursued. It is the duty of the secretary of state to conform to the law, and in this he is an officer of the United States, bound to obey the laws. He acts, in this respect, as has been very properly stated at the bar, under the authority of law, and not by the instructions of the president. It is a ministerial act which the law enjoins on a particular officer for a particular purpose.

If it should be supposed, that the solemnity of affixing the seal, is necessary not only to the validity of the commission, but even to the completion of an appointment, still when the seal is affixed the appointment is made, and [5 U.S. 137, 159] the commission is valid. No other solemnity is required by law; no other act is to be performed on the part of government. All that the executive can do to invest the person with his office, is done; and unless the appointment be then made, the executive cannot make one without the co- operation of others. After searching anxiously for the principles on which a contrary opinion may be supported, none have been found which appear of sufficient force to maintain the opposite doctrine.

Such as the imagination of the court could suggest, have been very deliberately examined, and after allowing them all the weight which it appears possible to give them, they do not shake the opinion which has been formed.

In considering this question, it has been conjectured that the commission may have been assimilated to a deed, to the validity of which, delivery is essential.

This idea is founded on the supposition that the commission is not merely evidence of an appointment, but is itself the actual appointment; a supposition by no means unquestionable. But for the purpose of examining this objection fairly, let it be conceded, that the principle, claimed for its support, is established.

The appointment being, under the constitution, to be made by the president personally, the delivery of the deed of appointment, if necessary to its completion, must be made by the president also. It is not necessary that the livery should be made personally to the grantee of the office: it never is so made. The law would seem to contemplate that it should be made to the secretary of state, since it directs the secretary to affix the seal to the commission after it shall have been signed by the president. If then the act of livery be necessary to give validity to the commission, it has been delivered when executed and given to the secretary for the purpose of being sealed, recorded, and transmitted to the party.

But in all cases of letters patent, certain solemnities are required by law, which solemnities are the evidences [5 U.S. 137, 160] of the validity of the instrument. A formal delivery to the person is not among them. In cases of commissions, the sign manual of the president, and the seal of the United States, are those solemnities. This objection therefore does not touch the case.

It has also occurred as possible, and barely possible, that the transmission of the commission, and the acceptance thereof, might be deemed necessary to complete the right of the plaintiff.

The transmission of the commission is a practice directed by convenience, but not by law. It cannot therefore be necessary to constitute the appointment which must precede it, and which is the mere act of the president. If the executive required that every person appointed to an office, should himself take means to procure his

commission, the appointment would not be the less valid on that account. The appointment is the sole act of the president; the transmission of the commission is the sole act of the officer to whom that duty is assigned, and may be accelerated or retarded by circumstances which can have no influence on the appointment. A commission is transmitted to a person already appointed; not to a person to be appointed or not, as the letter enclosing the commission should happen to get into the post-office and reach him in safety, or to miscarry.

It may have some tendency to elucidate this point, to inquire, whether the possession of the original commission be indispensably necessary to authorize a person, appointed to any office, to perform the duties of that office. If it was necessary, then a loss of the commission would lose the office. Not only negligence, but accident or fraud, fire or theft, might deprive an individual of his office. In such a case, I presume it could not be doubted, but that a copy from the record of the office of the secretary of state, would be, to every intent and purpose, equal to the original. The act of congress has expressly made it so. To give that copy validity, it would not be necessary to prove that the original had been transmitted and afterwards lost. The copy would be complete evidence that the original had existed, and that the appointment had been made, but not that the original had been transmitted. If indeed it should appear that [5 U.S. 137, 161] the original had been mislaid in the office of state, that circumstance would not affect the operation of the copy. When all the requisites have been performed which authorize a recording officer to record any instrument whatever, and the order for that purpose has been given, the instrument is in law considered as recorded, although the manual labour of inserting it in a book kept for that purpose may not have been performed.

In the case of commissions, the law orders the secretary of state to record them. When therefore they are signed and sealed, the order for their being recorded is given; and whether inserted in the book or not, they are in law recorded.

A copy of this record is declared equal to the original, and the fees to be paid by a person requiring a copy are ascertained by law. Can a keeper of a public record erase therefrom a commission which has been recorded? Or can he refuse a copy thereof to a person demanding it on the terms prescribed by law?

Such a copy would, equally with the original, authorize the justice of peace to proceed in the performance of his duty, because it would, equally with the original, attest his appointment.

If the transmission of a commission be not considered as necessary to give validity to an appointment; still less is its acceptance. The appointment is the sole act of the president; the acceptance is the sole act of the officer, and is, in plain common sense, posterior to the appointment. As he may resign, so may he refuse to accept: but neither the one nor the other is capable of rendering the appointment a nonentity.

That this is the understanding of the government, is apparent from the whole tenor of its conduct.

A commission bears date, and the salary of the officer commences from his appointment; not from the transmission or acceptance of his commission. When a person, appointed to any office, refuses to accept that office, the successor is nominated in the place of the person who [5 U.S. 137, 162] has declined to accept, and not in the place of the person who had been previously in office and had created the original vacancy.

It is therefore decidedly the opinion of the court, that when a commission has been signed by the president, the appointment is made; and that the commission is complete when the seal of the United States has been affixed to it by the secretary of state.

Where an officer is removable at the will of the executive, the circumstance which completes his appointment is of no concern; because the act is at any time revocable; and the commission may be arrested, if still in the office. But when the officer is not removable at the will of the executive, the appointment is not revocable and cannot be annulled. It has conferred legal rights which cannot be resumed.

The discretion of the executive is to be exercised until the appointment has been made. But having once made the appointment, his power over the office is terminated in all cases, where by law the officer is not removable by him. The right to the office is then in the person appointed, and he has the absolute, unconditional power of accepting or rejecting it.

Mr. Marbury, then, since his commission was signed by the president and sealed by the secretary of state, was appointed; and as the law creating the office gave the officer a right to hold for five years independent of the executive, the appointment was not revocable; but vested in the officer legal rights which are protected by the laws of his country.

To withhold the commission, therefore, is an act deemed by the court not warranted by law, but violative of a vested legal right.

This brings us to the second inquiry; which is,

2. If he has a right, and that right has been violated, do the laws of his country afford him a remedy? [5 U.S. 137, 163] The very essence of civil liberty certainly

consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection. In Great Britain the king himself is sued in the respectful form of a petition, and he never fails to comply with the judgment of his court.

In the third volume of his Commentaries, page 23, Blackstone states two cases in which a remedy is afforded by mere operation of law.

'In all other cases,' he says, 'it is a general and indisputable rule, that where there is a legal right, there is also a legal remedy by suit or action at law whenever that right is invaded.'

And afterwards, page 109 of the same volume, he says, 'I am next to consider such injuries as are cognizable by the courts of common law. And herein I shall for the present only remark, that all possible injuries whatsoever, that did not fall within the exclusive cognizance of either the ecclesiastical, military, or maritime tribunals, are, for that very reason, within the cognizance of the common law courts of justice; for it is a settled and invariable principle in the laws of England, that every right, when withheld, must have a remedy, and every injury its proper redress.'

The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right.

If this obloquy is to be cast on the jurisprudence of our country, it must arise from the peculiar character of the case.

It behoves us then to inquire whether there be in its composition any ingredient which shall exempt from legal investigation, or exclude the injured party from legal redress. In pursuing this inquiry the first question which presents itself, is,

whether this can be arranged [5 U.S. 137, 164] with that class of cases which come under the description of *damnum absque injuria*-a loss without an injury. This description of cases never has been considered, and it is believed never can be considered as comprehending offices of trust, of honour or of profit. The office of justice of peace in the district of Columbia is such an office; it is therefore worthy of the attention and guardianship of the laws. It has received that attention and guardianship. It has been created by special act of congress, and has been secured, so far as the laws can give security to the person appointed to fill it, for five years. It is not then on account of the worthlessness of the thing pursued, that the injured party can be alleged to be without remedy.

Is it in the nature of the transaction? Is the act of delivering or withholding a commission to be considered as a mere political act belonging to the executive department alone, for the performance of which entire confidence is placed by our constitution in the supreme executive; and for any misconduct respecting which, the injured individual has no remedy.

That there may be such cases is not to be questioned; but that every act of duty to be performed in any of the great departments of government constitutes such a case, is not to be admitted.

By the act concerning invalids, passed in June 1794, the secretary at war is ordered to place on the pension list all persons whose names are contained in a report previously made by him to congress. If he should refuse to do so, would the wounded veteran be without remedy? Is it to be contended that where the law in precise terms directs the performance of an act in which an individual is interested, the law is incapable of securing obedience to its mandate? Is it on account of the character of the person against whom the complaint is made? Is it

to be contended that the heads of departments are not amenable to the laws of their country?

Whatever the practice on particular occasions may be, the theory of this principle will certainly never be main- [5 U.S. 137, 165] tained. No act of the legislature confers so extraordinary a privilege, nor can it derive countenance from the doctrines of the common law. After stating that personal injury from the king to a subject is presumed to be impossible, Blackstone, Vol. III. p. 255, says, 'but injuries to the rights of property can scarcely be committed by the crown without the intervention of its officers: for whom, the law, in matters of right, entertains no respect or delicacy; but furnishes various methods of detecting the errors and misconduct of those agents by whom the king has been deceived and induced to do a temporary injustice.'

By the act passed in 1796, authorizing the sale of the lands above the mouth of Kentucky river, the purchaser, on paying his purchase money, becomes completely entitled to the property purchased; and on producing to the secretary of state the receipt of the treasurer upon a certificate required by the law, the president of the United States is authorized to grant him a patent. It is further enacted that all patents shall be countersigned by the secretary of state, and recorded in his office. If the secretary of state should choose to withhold this patent; or the patent being lost, should refuse a copy of it; can it be imagined that the law furnishes to the injured person no remedy?

It is not believed that any person whatever would attempt to maintain such a proposition.

It follows then that the question, whether the legality of an act of the head of a department be examinable in a court of justice or not, must always depend on the nature of that act.

If some acts be examinable, and others not, there must be some rule of law to guide the court in the exercise of its jurisdiction.

In some instances there may be difficulty in applying the rule to particular cases; but there cannot, it is believed, be much difficulty in laying down the rule.

By the constitution of the United States, the president is invested with certain important political powers, in the [5 U.S. 137, 166] exercise of which he is to use his own discretion, and is accountable only to his country in his political character, and to his own conscience. To aid him in the performance of these duties, he is authorized to appoint certain officers, who act by his authority and in conformity with his orders.

In such cases, their acts are his acts; and whatever opinion may be entertained of the manner in which executive discretion may be used, still there exists, and can exist, no power to control that discretion. The subjects are political. They respect the nation, not individual rights, and being entrusted to the executive, the decision of the executive is conclusive. The application of this remark will be perceived by adverting to the act of congress for establishing the department of foreign affairs. This officer, as his duties were prescribed by that act, is to conform precisely to the will of the president. He is the mere organ by whom that will is communicated. The acts of such an officer, as an officer, can never be examinable by the courts.

But when the legislature proceeds to impose on that officer other duties; when he is directed peremptorily to perform certain acts; when the rights of individuals are

dependent on the performance of those acts; he is so far the officer of the law; is amenable to the laws for his conduct; and cannot at his discretion sport away the vested rights of others.

The conclusion from this reasoning is, that where the heads of departments are the political or confidential agents of the executive, merely to execute the will of the president, or rather to act in cases in which the executive possesses a constitutional or legal discretion, nothing can be more perfectly clear than that their acts are only politically examinable. But where a specific duty is assigned by law, and individual rights depend upon the performance of that duty, it seems equally clear that the individual who considers himself injured has a right to resort to the laws of his country for a remedy.

If this be the rule, let us inquire how it applies to the case under the consideration of the court. [5 U.S. 137, 167] The power of nominating to the senate, and the power of appointing the person nominated, are political powers, to be exercised by the president according to his own discretion. When he has made an appointment, he has exercised his whole power, and his discretion has been completely applied to the case. If, by law, the officer be removable at the will of the president, then a new appointment may be immediately made, and the rights of the officer are terminated. But as a fact which has existed cannot be made never to have existed, the appointment cannot be annihilated; and consequently if the officer is by law not removable at the will of the president, the rights he has acquired are protected by the law, and are not resumable by the president. They cannot be extinguished by executive authority, and he has the privilege of asserting them in like manner as if they had been derived from any other source.

The question whether a right has vested or not, is, in its nature, judicial, and must be tried by the judicial authority, If, for example, Mr. Marbury had taken the oaths of a magistrate, and proceeded to act as one; in consequence of which a suit had been instituted against him, in which his defence had depended on his being a magistrate; the validity of his appointment must have been determined by judicial authority.

So, if he conceives that by virtue of his appointment he has a legal right either to the commission which has been made out for him or to a copy of that commission, it is equally a question examinable in a court, and the decision of the court upon it must depend on the opinion entertained of his appointment.

That question has been discussed, and the opinion is, that the latest point of time which can be taken as that at which the appointment was complete, and evidenced, was when, after the signature of the president, the seal of the United States was affixed to the commission.

It is then the opinion of the court,

1. That by signing the commission of Mr. Marbury, the president of the United States appointed him a justice [5 U.S. 137, 168] of peace for the county of Washington in the district of Columbia; and that the seal of the United States, affixed thereto by the secretary of state, is conclusive testimony of the verity of the signature, and of the completion of the appointment; and that the appointment conferred on him a legal right to the office for the space of five years.
2. That, having this legal title to the office, he has a consequent right to the commission; a refusal to deliver which is a plain violation of that right, for which the laws of his country afford him a remedy.

It remains to be inquired whether,

3. He is entitled to the remedy for which he applies. This depends on,

1. The nature of the writ applied for. And,
2. The power of this court.
3. The nature of the writ.

Blackstone, in the third volume of his Commentaries, page 110, defines a mandamus to be, 'a command issuing in the king's name from the court of king's bench, and directed to any person, corporation, or inferior court of judicature within the king's dominions, requiring them to do some particular thing therein specified which appertains to their office and duty, and which the court of king's bench has previously determined, or at least supposes, to be consonant to right and justice.'

Lord Mansfield, in 3 Burrows, 1266, in the case of *The King v. Baker et al.* states with much precision and explicitness the cases in which this writ may be used.

'Whenever,' says that very able judge, 'there is a right to execute an office, perform a service, or exercise a franchise (more especially if it be in a matter of public concern or attended with profit), and a person is kept out of possession, or dispossessed of such right, and [5 U.S. 137, 169] has no other specific legal remedy, this court ought to assist by mandamus, upon reasons of justice, as the writ expresses, and upon reasons of public policy, to preserve peace, order and good government.' In the same case he says, 'this writ ought to be used upon all occasions where the law has established no specific remedy, and where in justice and good government there ought to be one.'

In addition to the authorities now particularly cited, many others were relied on at the bar, which show how far the practice has conformed to the general doctrines that have been just quoted.

This writ, if awarded, would be directed to an officer of government, and its mandate to him would be, to use the words of Blackstone, 'to do a particular thing therein specified, which appertains to his office and duty, and which the court has previously determined or at least supposes to be consonant to right and justice.'

Or, in the words of Lord Mansfield, the applicant, in this case, has a right to execute an office of public concern, and is kept out of possession of that right.

These circumstances certainly concur in this case.

Still, to render the mandamus a proper remedy, the officer to whom it is to be directed, must be one to whom, on legal principles, such writ may be directed; and the person applying for it must be without any other specific and legal remedy.

1. With respect to the officer to whom it would be directed. The intimate political relation, subsisting between the president of the United States and the heads of departments, necessarily renders any legal investigation of the acts of one of those high officers peculiarly irksome, as well as delicate; and excites some hesitation with respect to the propriety of entering into such investigation. Impressions are often received without much reflection or examination; and it is not wonderful that in such a case as this, the assertion, by an individual, of his legal claims in a court of justice, to which claims it is the duty of that court to attend, should at first view be considered [5 U.S. 137, 170] by some, as an attempt to intrude into the cabinet, and to intermeddle with the prerogatives of the executive.

It is scarcely necessary for the court to disclaim all pretensions to such a jurisdiction. An extravagance, so absurd and excessive, could not have been entertained for a moment. The province of the court is, solely, to decide on the rights of individuals, not to inquire how the executive, or executive officers,

perform duties in which they have a discretion. Questions, in their nature political, or which are, by the constitution and laws, submitted to the executive, can never be made in this court.

But, if this be not such a question; if so far from being an intrusion into the secrets of the cabinet, it respects a paper, which, according to law, is upon record, and to a copy of which the law gives a right, on the payment of ten cents; if it be no intermeddling with a subject, over which the executive can be considered as having exercised any control; what is there in the exalted station of the officer, which shall bar a citizen from asserting, in a court of justice, his legal rights, or shall forbid a court to listen to the claim; or to issue a mandamus, directing the performance of a duty, not depending on executive discretion, but on particular acts of congress and the general principles of law?

If one of the heads of departments commits any illegal act, under colour of his office, by which an individual sustains an injury, it cannot be pretended that his office alone exempts him from being sued in the ordinary mode of proceeding, and being compelled to obey the judgment of the law. How then can his office exempt him from this particular mode of deciding on the legality of his conduct, if the case be such a case as would, were any other individual the party complained of, authorize the process?

It is not by the office of the person to whom the writ is directed, but the nature of the thing to be done, that the propriety or impropriety of issuing a mandamus is to be determined. Where the head of a department acts in a case in which executive discretion is to be exercised; in which he is the mere organ of executive will; it is [5 U.S. 137, 171] again repeated, that any application to a court to control, in any respect, his conduct, would be rejected without hesitation.

But where he is directed by law to do a certain act affecting the absolute rights of individuals, in the performance of which he is not placed under the particular direction of the president, and the performance of which the president cannot lawfully forbid, and therefore is never presumed to have forbidden; as for example, to record a commission, or a patent for land, which has received all the legal solemnities; or to give a copy of such record; in such cases, it is not perceived on what ground the courts of the country are further excused from the duty of giving judgment, than if the same services were to be performed by a person not the head of a department.

This opinion seems not now for the first time to be taken up in this country.

It must be well recollected that in 1792 an act passed, directing the secretary at war to place on the pension list such disabled officers and soldiers as should be reported to him by the circuit courts, which act, so far as the duty was imposed on the courts, was deemed unconstitutional; but some of the judges, thinking that the law might be executed by them in the character of commissioners, proceeded to act and to report in that character.

This law being deemed unconstitutional at the circuits, was repealed, and a different system was established; but the question whether those persons, who had been reported by the judges, as commissioners, were entitled, in consequence of that report, to be placed on the pension list, was a legal question, properly determinable in the courts, although the act of placing such persons on the list was to be performed by the head of a department.

That this question might be properly settled, congress passed an act in February 1793, making it the duty of the secretary of war, in conjunction with the attorney general, to take such measures as might be necessary to obtain an adjudication of

the supreme court of the United [5 U.S. 137, 172] States on the validity of any such rights, claimed under the act aforesaid.

After the passage of this act, a mandamus was moved for, to be directed to the secretary at war, commanding him to place on the pension list a person stating himself to be on the report of the judges.

There is, therefore, much reason to believe, that this mode of trying the legal right of the complainant, was deemed by the head of a department, and by the highest law officer of the United States, the most proper which could be selected for the purpose.

When the subject was brought before the court the decision was, not, that a mandamus would not lie to the head of a department, directing him to perform an act, enjoined by law, in the performance of which an individual had a vested interest; but that a mandamus ought not to issue in that case-the decision necessarily to be made if the report of the commissioners did not confer on the applicant a legal right.

The judgment in that case is understood to have decided the merits of all claims of that description; and the persons, on the report of the commissioners, found it necessary to pursue the mode prescribed by the law subsequent to that which had been deemed unconstitutional, in order to place themselves on the pension list.

The doctrine, therefore, now advanced is by no means a novel one.

It is true that the mandamus, now moved for, is not for the performance of an act expressly enjoined by statute.

It is to deliver a commission; on which subjects the acts of congress are silent.

This difference is not considered as affecting the case. It has already been stated that the applicant has, to that commission, a vested legal right, of which the

executive cannot deprive him. He has been appointed to an office, from which he is not removable at the will of the executive; and being so [5 U.S. 137, 173] appointed, he has a right to the commission which the secretary has received from the president for his use. The act of congress does not indeed order the secretary of state to send it to him, but it is placed in his hands for the person entitled to it; and cannot be more lawfully withheld by him, than by another person.

It was at first doubted whether the action of detinue was not a specific legal remedy for the commission which has been withheld from Mr. Marbury; in which case a mandamus would be improper. But this doubt has yielded to the consideration that the judgment in detinue is for the thing itself, or its value. The value of a public office not to be sold, is incapable of being ascertained; and the applicant has a right to the office itself, or to nothing. He will obtain the office by obtaining the commission, or a copy of it from the record.

This, then, is a plain case of a mandamus, either to deliver the commission, or a copy of it from the record; and it only remains to be inquired,

Whether it can issue from this court.

The act to establish the judicial courts of the United States authorizes the supreme court 'to issue writs of mandamus, in cases warranted by the principles and usages of law, to any courts appointed, or persons holding office, under the authority of the United States.'

The secretary of state, being a person, holding an office under the authority of the United States, is precisely within the letter of the description; and if this court is not authorized to issue a writ of mandamus to such an officer, it must be because the law is unconstitutional, and therefore absolutely incapable of conferring the authority, and assigning the duties which its words purport to confer and assign.

The constitution vests the whole judicial power of the United States in one supreme court, and such inferior courts as congress shall, from time to time, ordain and establish. This power is expressly extended to all cases arising under the laws of the United States; and consequently, in some form, may be exercised over the present [5 U.S. 137, 174] case; because the right claimed is given by a law of the United States.

In the distribution of this power it is declared that 'the supreme court shall have original jurisdiction in all cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be a party. In all other cases, the supreme court shall have appellate jurisdiction.'

It has been insisted at the bar, that as the original grant of jurisdiction to the supreme and inferior courts is general, and the clause, assigning original jurisdiction to the supreme court, contains no negative or restrictive words; the power remains to the legislature to assign original jurisdiction to that court in other cases than those specified in the article which has been recited; provided those cases belong to the judicial power of the United States.

If it had been intended to leave it in the discretion of the legislature to apportion the judicial power between the supreme and inferior courts according to the will of that body, it would certainly have been useless to have proceeded further than to have defined the judicial power, and the tribunals in which it should be vested.

The subsequent part of the section is mere surplusage, is entirely without meaning, if such is to be the construction. If congress remains at liberty to give this court appellate jurisdiction, where the constitution has declared their jurisdiction shall be original; and original jurisdiction where the constitution has

declared it shall be appellate; the distribution of jurisdiction made in the constitution, is form without substance.

Affirmative words are often, in their operation, negative of other objects than those affirmed; and in this case, a negative or exclusive sense must be given to them or they have no operation at all.

It cannot be presumed that any clause in the constitution is intended to be without effect; and therefore such construction is inadmissible, unless the words require it.

[5 U.S. 137, 175] If the solicitude of the convention, respecting our peace with foreign powers, induced a provision that the supreme court should take original jurisdiction in cases which might be supposed to affect them; yet the clause would have proceeded no further than to provide for such cases, if no further restriction on the powers of congress had been intended. That they should have appellate jurisdiction in all other cases, with such exceptions as congress might make, is no restriction; unless the words be deemed exclusive of original jurisdiction.

When an instrument organizing fundamentally a judicial system, divides it into one supreme, and so many inferior courts as the legislature may ordain and establish; then enumerates its powers, and proceeds so far to distribute them, as to define the jurisdiction of the supreme court by declaring the cases in which it shall take original jurisdiction, and that in others it shall take appellate jurisdiction, the plain import of the words seems to be, that in one class of cases its jurisdiction is original, and not appellate; in the other it is appellate, and not original. If any other construction would render the clause inoperative, that is an additional reason for rejecting such other construction, and for adhering to the obvious meaning.

To enable this court then to issue a mandamus, it must be shown to be an exercise of appellate jurisdiction, or to be necessary to enable them to exercise appellate jurisdiction.

It has been stated at the bar that the appellate jurisdiction may be exercised in a variety of forms, and that if it be the will of the legislature that a mandamus should be used for that purpose, that will must be obeyed. This is true; yet the jurisdiction must be appellate, not original.

It is the essential criterion of appellate jurisdiction, that it revises and corrects the proceedings in a cause already instituted, and does not create that case. Although, therefore, a mandamus may be directed to courts, yet to issue such a writ to an officer for the delivery of a paper, is in effect the same as to sustain an original action for that paper, and therefore seems not to belong to [5 U.S. 137, 176] appellate, but to original jurisdiction. Neither is it necessary in such a case as this, to enable the court to exercise its appellate jurisdiction.

The authority, therefore, given to the supreme court, by the act establishing the judicial courts of the United States, to issue writs of mandamus to public officers, appears not to be warranted by the constitution; and it becomes necessary to inquire whether a jurisdiction, so conferred, can be exercised.

The question, whether an act, repugnant to the constitution, can become the law of the land, is a question deeply interesting to the United States; but, happily, not of an intricacy proportioned to its interest. It seems only necessary to recognise certain principles, supposed to have been long and well established, to decide it. That the people have an original right to establish, for their future government, such principles as, in their opinion, shall most conduce to their own happiness, is the basis on which the whole American fabric has been erected. The exercise of

this original right is a very great exertion; nor can it nor ought it to be frequently repeated. The principles, therefore, so established are deemed fundamental. And as the authority, from which they proceed, is supreme, and can seldom act, they are designed to be permanent.

This original and supreme will organizes the government, and assigns to different departments their respective powers. It may either stop here; or establish certain limits not to be transcended by those departments.

The government of the United States is of the latter description. The powers of the legislature are defined and limited; and that those limits may not be mistaken or forgotten, the constitution is written. To what purpose are powers limited, and to what purpose is that limitation committed to writing; if these limits may, at any time, be passed by those intended to be restrained? The distinction between a government with limited and unlimited powers is abolished, if those limits do not confine the persons on whom they are imposed, and if acts prohibited and acts allowed are of equal obligation. It is a proposition too plain to be contested, that the constitution controls any legislative act repugnant to it; or, that the legislature may alter the constitution by an ordinary act.

Between these alternatives there is no middle ground. The constitution is either a superior, paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts, and like other acts, is alterable when the legislature shall please to alter it.

If the former part of the alternative be true, then a legislative act contrary to the constitution is not law: if the latter part be true, then written constitutions are absurd attempts, on the part of the people, to limit a power in its own nature illimitable.

Certainly all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation, and consequently the theory of every such government must be, that an act of the legislature repugnant to the constitution is void.

This theory is essentially attached to a written constitution, and is consequently to be considered by this court as one of the fundamental principles of our society. It is not therefore to be lost sight of in the further consideration of this subject.

If an act of the legislature, repugnant to the constitution, is void, does it, notwithstanding its invalidity, bind the courts and oblige them to give it effect? Or, in other words, though it be not law, does it constitute a rule as operative as if it was a law? This would be to overthrow in fact what was established in theory; and would seem, at first view, an absurdity too gross to be insisted on. It shall, however, receive a more attentive consideration.

It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each. [5 U.S. 137, 178] So if a law be in opposition to the constitution: if both the law and the constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the constitution; or conformably to the constitution, disregarding the law: the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty.

If then the courts are to regard the constitution; and the constitution is superior to any ordinary act of the legislature; the constitution, and not such ordinary act, must govern the case to which they both apply.

Those then who controvert the principle that the constitution is to be considered, in court, as a paramount law, are reduced to the necessity of maintaining that courts must close their eyes on the constitution, and see only the law.

This doctrine would subvert the very foundation of all written constitutions. It would declare that an act, which, according to the principles and theory of our government, is entirely void, is yet, in practice, completely obligatory. It would declare, that if the legislature shall do what is expressly forbidden, such act, notwithstanding the express prohibition, is in reality effectual. It would be giving to the legislature a practical and real omnipotence with the same breath which professes to restrict their powers within narrow limits. It is prescribing limits, and declaring that those limits may be passed at pleasure.

That it thus reduces to nothing what we have deemed the greatest improvement on political institutions—a written constitution, would of itself be sufficient, in America where written constitutions have been viewed with so much reverence, for rejecting the construction. But the peculiar expressions of the constitution of the United States furnish additional arguments in favour of its rejection.

The judicial power of the United States is extended to all cases arising under the constitution. [5 U.S. 137, 179] Could it be the intention of those who gave this power, to say that, in using it, the constitution should not be looked into? That a case arising under the constitution should be decided without examining the instrument under which it arises?

This is too extravagant to be maintained.

In some cases then, the constitution must be looked into by the judges. And if they can open it at all, what part of it are they forbidden to read, or to obey?

There are many other parts of the constitution which serve to illustrate this subject.

It is declared that 'no tax or duty shall be laid on articles exported from any state.'

Suppose a duty on the export of cotton, of tobacco, or of flour; and a suit instituted to recover it. Ought judgment to be rendered in such a case? ought the judges to close their eyes on the constitution, and only see the law.

The constitution declares that 'no bill of attainder or ex post facto law shall be passed.'

If, however, such a bill should be passed and a person should be prosecuted under it, must the court condemn to death those victims whom the constitution endeavours to preserve?

'No person,' says the constitution, 'shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or on confession in open court.'

Here the language of the constitution is addressed especially to the courts. It prescribes, directly for them, a rule of evidence not to be departed from. If the legislature should change that rule, and declare one witness, or a confession out of court, sufficient for conviction, must the constitutional principle yield to the legislative act?

From these and many other selections which might be made, it is apparent, that the framers of the consti- [5 U.S. 137, 180] tution contemplated that instrument as a rule for the government of courts, as well as of the legislature.

Why otherwise does it direct the judges to take an oath to support it? This oath certainly applies, in an especial manner, to their conduct in their official character.

How immoral to impose it on them, if they were to be used as the instruments, and the knowing instruments, for violating what they swear to support!

The oath of office, too, imposed by the legislature, is completely demonstrative of the legislative opinion on this subject. It is in these words: 'I do solemnly swear that I will administer justice without respect to persons, and do equal right to the poor and to the rich; and that I will faithfully and impartially discharge all the duties incumbent on me as according to the best of my abilities and understanding, agreeably to the constitution and laws of the United States.'

Why does a judge swear to discharge his duties agreeably to the constitution of the United States, if that constitution forms no rule for his government? if it is closed upon him and cannot be inspected by him.

If such be the real state of things, this is worse than solemn mockery. To prescribe, or to take this oath, becomes equally a crime.

It is also not entirely unworthy of observation, that in declaring what shall be the supreme law of the land, the constitution itself is first mentioned; and not the laws of the United States generally, but those only which shall be made in pursuance of the constitution, have that rank.

Thus, the particular phraseology of the constitution of the United States confirms and strengthens the principle, supposed to be essential to all written constitutions, that a law repugnant to the constitution is void, and that courts, as well as other departments, are bound by that instrument.

The rule must be discharged.

U.S. Supreme Court

McCulloch v. Maryland 17 U.S. 319 (1819)

4 Wheaton 316 (1819)

Mr. Chief Justice Marshall delivered the opinion of the Court.

In the case now to be determined, the defendant, a sovereign State, denies the obligation of a law enacted by the legislature of the Union, and the plaintiff, on his part, contests the validity of an act which has been passed by the legislature of that State. The constitution of our country, in its most interesting and vital parts, is to be considered; the conflicting powers of the government of the Union and of its members, as marked in that constitution, are to be discussed; and an opinion given, which may essentially influence the great operations of the government. No tribunal can approach such a question without a deep sense of its importance, and of the awful responsibility involved in its decision. But it must be decided peacefully, or remain a source of hostile legislation, perhaps of hostility of a still more serious nature; and if it is to be so decided, by this tribunal alone can the decision be made. On the Supreme Court of the United States has the constitution of our country devolved this important duty.

The first question made in the cause is, has Congress power to incorporate a bank?

It has been truly said that this can scarcely be considered as an open question, entirely unprejudiced by the former proceedings of the nation respecting it. The principle now contested was introduced at a very early period of our history, has been recognized by many successive legislatures, and has been acted upon by the judicial department, in cases of peculiar delicacy, as a law of undoubted obligation. . . .

The power now contested was exercised by the first Congress elected under the present constitution. The bill for incorporating the bank of the United States did not steal upon an unsuspecting legislature, and pass unobserved. Its principle was completely understood, and was opposed with equal zeal and ability. After being resisted, first in the fair and open field of debate, and afterwards in the executive cabinet, with as much persevering talent as any measure has ever experienced, and being supported by arguments which convinced minds as pure and as intelligent as this country can boast, it became a law. The original act was permitted to expire; but a short experience of the embarrassments to which the refusal to revive it exposed the government, convinced those who were most prejudiced against the measure of its necessity, and induced the passage of the present law. It would require no ordinary share of intrepidity to assert that a measure adopted under these circumstances was a bold and plain usurpation, to which the constitution gave no countenance.

These observations belong to the cause; but they are not made under the impression that, were the question entirely new, the law would be found irreconcilable with the constitution.

In discussing this question, the counsel for the State of Maryland have deemed it of some importance, in the construction of the constitution, to consider that instrument not as emanating from the people, but as the act of sovereign and independent States. The powers of the general government, it has been said, are delegated by the States, who alone are truly sovereign; and must be exercised in subordination to the States, who alone possess supreme dominion.

It would be difficult to sustain this proposition. The Convention which framed the constitution was indeed elected by the State legislatures. But the instrument, when

it came from their hands, was a mere proposal, without obligation, or pretensions to it. It was reported to the then existing Congress of the United States, with a request that it might "be submitted to a convention of delegates, chosen in each State by the people thereof, under the recommendation of its legislature, for their assent and ratification." This mode of proceeding was adopted; and by the convention, by Congress, and by the State legislatures, the instrument was submitted to the people. They acted upon it in the only manner in which they can act safely, effectively, and wisely, on such a subject, by assembling in convention. It is true, they assembled in their several States -- and where else should they have assembled? No political dreamer was ever wild enough to think of breaking down the lines which separate the States, and of compounding the American people into one common mass. Of consequence, when they act, they act in their States. But the measures they adopt do not, on that account, cease to be the measures of the people themselves, or become the measures of the State governments.

From these conventions the constitution derives its whole authority. The government proceeds directly from the people; is "ordained and established" in the name of the people; and is declared to be ordained, "in order to form a more perfect union, establish justice, ensure domestic tranquility, and secure the blessings of liberty to themselves and to their posterity." The assent of the States, in their sovereign capacity, is implied in calling a convention, and thus submitting that instrument to the people. But the people were at perfect liberty to accept or reject it; and their act was final. It required not the affirmance, and could not be negatived, by the State governments. The constitution, when thus adopted, was of complete obligation, and bound the State sovereignties. . . .

Although, among the enumerated powers of government, we do not find the word "bank," or "incorporation," we find the great powers to lay and collect taxes; to borrow money; to regulate commerce; to declare and conduct a war; and to raise and support armies and navies. The sword and the purse, all the external relations, and no inconsiderable portion of the industry of the nation, are entrusted to its government. It can never be pretended that these vast powers draw after them others of inferior importance, merely because they are inferior. Such an idea can never be advanced. But it may with great reason be contended, that a government, entrusted with such ample powers, on the due execution of which the happiness and prosperity of the nation so vitally depends, must also be entrusted with ample means for their execution. The power being given, it is the interest of the nation to facilitate its execution. It can never be their interest, and cannot be presumed to have been their intention, to clog and embarrass its execution by withholding the most appropriate means. . . require it) which would impute to the framers of that instrument, when granting these powers for the public good, the intention of impeding their exercise by withholding a choice of means? If, indeed, such be the mandate of the constitution, we have only to obey; but that instrument does not profess to enumerate the means by which the powers it confers may be executed; nor does it prohibit the creation of a corporation, if the existence of such a being be essential to the beneficial exercise of those powers. It is, then, the subject of fair inquiry, how far such means may be employed. . . .

We admit, as all must admit, that the powers of the government are limited, and that its limits are not to be transcended. But we think the sound construction of the constitution must allow to the national legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution,

which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional. . . .

It being the opinion of the Court, that the act incorporating the bank is constitutional; and that the power of establishing a branch in the State of Maryland might be properly exercised by the bank itself, we proceed to inquire -- Whether the State of Maryland may, without violating the constitution, tax that branch?

That the power of taxation is one of vital importance; that it is retained by the States; that it is not abridged by the grant of a similar power to the government of the Union; that it is to be concurrently exercised by the two governments: are truths which have never been denied. But, such is the paramount character of the constitution, that its capacity to withdraw any subject from the action of even this power, is admitted. The States are expressly forbidden to lay any duties on imports or exports, except what may be absolutely necessary for executing their inspection laws. If the obligation of this prohibition must be conceded, the same paramount character would seem to restrain, as it certainly may restrain, a State from such other exercise of this power; as is in its nature incompatible with, and repugnant to, the constitutional laws of the Union. . . .

On this ground the counsel for the bank place its claim to be exempted from the power of a State to tax its operations. There is no express provision for the case, but the claim has been sustained on a principle which so entirely pervades the constitution, is so intermixed with the materials which compose it, so interwoven

with its web, so blended with its texture, as to be incapable of being separated from it, without rending it into shreds.

This great principle is, that the constitution and the laws made in pursuance thereof are supreme; that they control the constitution and laws of the respective States, and cannot be controlled by them. From this, which may be almost termed an axiom, other propositions are deduced as corollaries, on the truth or error of which, and on their application to this case, the cause has been supposed to depend. These are, 1st. that a power to create implies a power to preserve. 2nd. That a power to destroy, if wielded by a different hand, is hostile to, and incompatible with these powers to create and to preserve. 3d. That where this repugnancy exists, that authority which is supreme must control, not yield to that over which it is supreme. . . .

If we apply the principle for which the State of Maryland contends, to the constitution generally, we shall find it capable of changing totally the character of that instrument. We shall find it capable of arresting all the measures of the government, and of prostrating it at the foot of the States. The American people have declared their constitution, and the laws made in pursuance thereof, to be supreme; but this principle would transfer the supremacy, in fact, to the States. . . .

The Court has bestowed on this subject its most deliberate consideration. The result is a conviction that the States have no power, by taxation or otherwise, to retard, impede, burden, or in any manner control, the operations of the constitutional laws enacted by Congress to carry into execution the powers vested in the general government. This is, we think, the unavoidable consequence of that supremacy which the constitution has declared. . . .

Chief Justice Marshall delivered the opinion of the Court.

In the case now to be determined, the defendant, a sovereign State, denies the obligation of a law enacted by the legislature of the Union, and the plaintiff, on his part, contests the validity of an act which has been passed by the legislature of that State. The constitution of our country, in its most interesting and vital parts, is to be considered; the conflicting powers of the government of the Union and of its members, as marked in that constitution, are to be discussed; and an opinion given, which may essentially influence the great operations of the government. No tribunal can approach such a question without a deep sense of its importance, and of the awful responsibility involved in its decision. But it must be decided peacefully, or remain a source of hostile legislation, perhaps of hostility of a still more serious nature; and if it is to be so decided, by this tribunal alone can the decision be made. On the Supreme Court of the United States has the constitution of our country devolved this important duty.

The first question made in the cause is, has Congress power to incorporate a bank?

It has been truly said that this can scarcely be considered as an open question, entirely unprejudiced by the former proceedings of the nation respecting it. The principle now contested was introduced at a very early period of our history, has been recognized by many successive legislatures, and has been acted upon by the judicial department, in cases of peculiar delicacy, as a law of undoubted obligation. . . .

The power now contested was exercised by the first Congress elected under the present constitution. The bill for incorporating the bank of the United States did not steal upon an unsuspecting legislature, and pass unobserved. Its principle was

completely understood, and was opposed with equal zeal and ability. After being resisted, first in the fair and open field of debate, and afterwards in the executive cabinet, with as much persevering talent as any measure has ever experienced, and being supported by arguments which convinced minds as pure and as intelligent as this country can boast, it became a law. The original act was permitted to expire; but a short experience of the embarrassments to which the refusal to revive it exposed the government, convinced those who were most prejudiced against the measure of its necessity, and induced the passage of the present law. It would require no ordinary share of intrepidity to assert that a measure adopted under these circumstances was a bold and plain usurpation, to which the constitution gave no countenance.

These observations belong to the cause; but they are not made under the impression that, were the question entirely new, the law would be found irreconcilable with the constitution.

In discussing this question, the counsel for the State of Maryland have deemed it of some importance, in the construction of the constitution, to consider that instrument not as emanating from the people, but as the act of sovereign and independent States. The powers of the general government, it has been said, are delegated by the States, who alone are truly sovereign; and must be exercised in subordination to the States, who alone possess supreme dominion.

It would be difficult to sustain this proposition. The Convention which framed the constitution was indeed elected by the State legislatures. But the instrument, when it came from their hands, was a mere proposal, without obligation, or pretensions to it. It was reported to the then existing Congress of the United States, with a request that it might "be submitted to a convention of delegates, chosen in each

State by the people thereof, under the recommendation of its legislature, for their assent and ratification." This mode of proceeding was adopted; and by the convention, by Congress, and by the State legislatures, the instrument was submitted to the people. They acted upon it in the only manner in which they can act safely, effectively, and wisely, on such a subject, by assembling in convention. It is true, they assembled in their several States -- and where else should they have assembled? No political dreamer was ever wild enough to think of breaking down the lines which separate the States, and of compounding the American people into one common mass. Of consequence, when they act, they act in their States. But the measures they adopt do not, on that account, cease to be the measures of the people themselves, or become the measures of the State governments.

From these conventions the constitution derives its whole authority. The government proceeds directly from the people; is "ordained and established" in the name of the people; and is declared to be ordained, "in order to form a more perfect union, establish justice, ensure domestic tranquility, and secure the blessings of liberty to themselves and to their posterity." The assent of the States, in their sovereign capacity, is implied in calling a convention, and thus submitting that instrument to the people. But the people were at perfect liberty to accept or reject it; and their act was final. It required not the affirmance, and could not be negatived, by the State governments. The constitution, when thus adopted, was of complete obligation, and bound the State sovereignties. . . .

of this fact on the case), is, emphatically, and truly, a government of the people. In form and in substance it emanates from them. Its powers are granted by them, and are to be exercised directly on them, and for their benefit.

This government is acknowledged by all to be one of enumerated powers. The principle, that it can exercise only the powers granted to it, [is] now universally admitted. But the question respecting the extent of the powers actually granted, is perpetually arising, and will probably continue to arise, as long as our system shall exist. . . .

Among the enumerated powers, we do not find that of establishing a bank or creating a corporation. But there is no phrase in the instrument which, like the articles of confederation, excludes incidental or implied powers; and which requires that everything granted shall be expressly and minutely described. Even the 10th amendment, which was framed for the purpose of quieting the excessive jealousies which had been excited, omits the word "expressly," and declares only that the powers "not delegated to the United States, nor prohibited to the States, are reserved to the States or to the people"; thus leaving the question, whether the particular power which may become the subject of contest has been delegated to the one government, or prohibited to the other, to depend on a fair construction of the whole instrument. The men who drew and adopted this amendment had experienced the embarrassments resulting from the insertion of this word in the articles of confederation, and probably omitted it to avoid those embarrassments. A constitution, to contain an accurate detail of all the subdivisions of which its great powers will admit, and of all the means by which they may be carried into execution, would partake of the prolixity of a legal code, and could scarcely be embraced by the human mind. It would probably never be understood by the public. Its nature, therefore, requires, that only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects be deduced from the nature of the objects themselves. That

this idea was entertained by the framers of the American constitution, is not only to be inferred from the nature of the instrument, but from the language. Why else were some of the limitations, found in the ninth section of the 1st article, introduced? It is also, in some degree, warranted by their having omitted to use any restrictive term which might prevent its receiving a fair and just interpretation. In considering this question, then, we must never forget that it is a *constitution* we are expounding.

Although, among the enumerated powers of government, we do not find the word "bank," or "incorporation," we find the great powers to lay and collect taxes; to borrow money; to regulate commerce; to declare and conduct a war; and to raise and support armies and navies. The sword and the purse, all the external relations, and no inconsiderable portion of the industry of the nation, are entrusted to its government. It can never be pretended that these vast powers draw after them others of inferior importance, merely because they are inferior. Such an idea can never be advanced. But it may with great reason be contended, that a government, entrusted with such ample powers, on the due execution of which the happiness and prosperity of the nation so vitally depends, must also be entrusted with ample means for their execution. The power being given, it is the interest of the nation to facilitate its execution. It can never be their interest, and cannot be presumed to have been their intention, to clog and embarrass its execution by withholding the most appropriate means. . . require it) which would impute to the framers of that instrument, when granting these powers for the public good, the intention of impeding their exercise by withholding a choice of means? If, indeed, such be the mandate of the constitution, we have only to obey; but that instrument does not profess to enumerate the means by which the powers it confers may be executed;

nor does it prohibit the creation of a corporation, if the existence of such a being be essential to the beneficial exercise of those powers. It is, then, the subject of fair inquiry, how far such means may be employed.

It is not denied, that the powers given to the government imply the ordinary means of execution. That, for example, of raising revenue, and applying it to national purposes, is admitted to imply the power of conveying money from place to place, as the exigencies of the nation may require, and of employing the usual means of conveyance. But it is denied that the government has its choice of means; or, that it may employ the most convenient means, if, to employ them, it be necessary to erect a corporation. . . .

The government which has a right to do an act, and has imposed on it the duty of performing that act, must, according to the dictates of reason, be allowed to select the means; and those who contend that it may not select any appropriate means, that one particular mode of effecting the object is excepted, take upon themselves the burden of establishing that exception. . . . The power of creating a corporation, though appertaining to sovereignty, is not like the power of making war, or levying taxes, or of regulating commerce, a great substantive and independent power, which cannot be implied as incidental to other powers, or used as a means of executing them. It is never the end for which other powers are exercised, but a means by which other objects are accomplished. . . . The power of creating a corporation is never used for its own sake, but for the purpose of effecting something else. No sufficient reason is, therefore, perceived, why it may not pass as incidental to those powers which are expressly given, if it be a direct mode of executing them.

But the constitution of the United States has not left the right of Congress to employ the necessary means, for the execution of the powers conferred on the government, to general reasoning. To its enumeration of powers is added that of making "all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this constitution, in the government of the United States, or in any department thereof."

The counsel for the State of Maryland have urged various arguments, to prove that this clause, though in terms a grant of power, is not so in effect; but is really restrictive of the general right, which might otherwise be implied, of selecting means for executing the enumerated powers. . . .

Almost all compositions contain words, which, taken in their rigorous sense, would convey a meaning different from that which is obviously intended. It is essential to just construction, that many words which import something excessive should be understood in a more mitigated sense -- in that sense which common usage justifies. The word "necessary" is of this description. It has not a fixed character peculiar to itself. It admits of all degrees of comparison; and is often connected with other words, which increase or diminish the impression the mind receives of the urgency it imports. A thing may be necessary, very necessary, absolutely or indispensably necessary. To no mind would the same idea be conveyed by these several phrases. This comment on the word is well illustrated by the passage cited at the bar, from the 20th section of the 1st article of the constitution. It is, we think, impossible to compare the sentence which prohibits a State from laying "imposts, or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws," with that which authorizes Congress "to make all laws which shall be necessary and proper for carrying into

execution" the powers of the general government, without feeling a conviction that the convention understood itself to change materially the meaning of the word "necessary," by prefixing the word "absolutely." This word, then, like others, is used in various senses; and, in its construction, the subject, the context, the intention of the person using them, are all to be taken into view.

Let this be done in the case under consideration. The subject is the execution of those great powers on which the welfare of a nation essentially depends. It must have been the intention of those who gave these powers, to insure, as far as human prudence could insure, their beneficial execution. This could not be done by confiding the choice of means to such narrow limits as not to leave it in the power of Congress to adopt any which might be appropriate, and which were conducive to the end. This provision is made in a constitution intended to endure for ages to come, and, consequently, to be adapted to the various *crises* of human affairs. To have prescribed the means by which government should, in all future time, execute its powers, would have been to change, entirely, the character of the instrument, and give it the properties of a legal code. It would have been an unwise attempt to provide, by immutable rules, for exigencies which, if foreseen at all, must have been seen dimly, and which can be best provided for as they occur. To have declared that the best means shall not be used, but those alone without which the power given would be nugatory, would have been to deprive the legislature of the capacity to avail itself of experience, to exercise its reason, and to accommodate its legislation to circumstances. If we apply this principle of construction to any of the powers of the government, we shall find it so pernicious in its operation that we shall be compelled to discard it. . . .

The result of the most careful and attentive consideration bestowed upon this clause is, that if it does not enlarge, it cannot be construed to restrain the powers of Congress, or to impair the rights of the legislature to exercise its best judgment in the selection of measures to carry into execution the constitutional powers of the government. If no other motive for its insertion can be suggested, a sufficient one is found in the desire to remove all doubts respecting the right to legislate on that vast mass of incidental powers which must be involved in the constitution, if that instrument be not a splendid bauble.

We admit, as all must admit, that the powers of the government are limited, and that its limits are not to be transcended. But we think the sound construction of the constitution must allow to the national legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional. . . .

Should Congress, in the execution of its powers, adopt measures which are prohibited by the constitution; or should Congress, under the pretext of executing its powers, pass laws for the accomplishment of objects not entrusted to the government; it would become the painful duty of this tribunal, should a case requiring such a decision come before it, to say that such an act was not the law of the land. But where the law is not prohibited, and is really calculated to effect any of the objects entrusted to the government, to undertake here to inquire into the degree of its necessity, would be to pass the line which circumscribes the judicial

department, and to tread on legislative ground. This court disclaims all pretensions to such a power.

After this declaration, it can scarcely be necessary to say that the existence of State banks can have no possible influence on the question. No trace is to be found in the constitution of an intention to create a dependence of the government of the Union on those of the States, for the execution of the great powers assigned to it. Its means are adequate to its ends; and on those means alone was it expected to rely for the accomplishment of its ends. To impose on it the necessity of resorting to means which it cannot control, which another government may furnish or withhold, would render its course precarious, the result of its measures uncertain, and create a dependence on other governments, which might disappoint its most important designs, and is incompatible with the language of the constitution. But were it otherwise, the choice of means implies a right to choose a national bank in preference to State banks, and Congress alone can make the election.

After the most deliberate consideration, it is the unanimous and decided opinion of this Court, that the act to incorporate the Bank of the United States is a law made in pursuance of the constitution, and is a part of the supreme law of the land. . . .

It being the opinion of the Court, that the act incorporating the bank is constitutional; and that the power of establishing a branch in the State of Maryland might be properly exercised by the bank itself, we proceed to inquire --

2. Whether the State of Maryland may, without violating the constitution, tax that branch?

That the power of taxation is one of vital importance; that it is retained by the States; that it is not abridged by the grant of a similar power to the government of the Union; that it is to be concurrently exercised by the two governments: are truths which have never been denied. But, such is the paramount character of the constitution, that its capacity to withdraw any subject from the action of even this power, is admitted. The States are expressly forbidden to lay any duties on imports or exports, except what may be absolutely necessary for executing their inspection laws. If the obligation of this prohibition must be conceded, the same paramount character would seem to restrain, as it certainly may restrain, a State from such other exercise of this power; as is in its nature incompatible with, and repugnant to, the constitutional laws of the Union. . . .

On this ground the counsel for the bank place its claim to be exempted from the power of a State to tax its operations. There is no express provision for the case, but the claim has been sustained on a principle which so entirely pervades the constitution, is so intermixed with the materials which compose it, so interwoven with its web, so blended with its texture, as to be incapable of being separated from it, without rending it into shreds.

This great principle is, that the constitution and the laws made in pursuance thereof are supreme; that they control the constitution and laws of the respective States, and cannot be controlled by them. From this, which may be almost termed an axiom, other propositions are deduced as corollaries, on the truth or error of which, and on their application to this case, the cause has been supposed to depend. These are, 1st. that a power to create implies a power to preserve. 2nd. That a power to destroy, if wielded by a different hand, is hostile to, and incompatible with these powers to create and to preserve. 3d. That where this

repugnancy exists, that authority which is supreme must control, not yield to that over which it is supreme. . . .

That the power of taxing by the States may be exercised so as to destroy it, is too obvious to be denied. But taxation is said to be an absolute power, which acknowledges no other limits than those expressly prescribed in the constitution, and like sovereign power of every other description, is trusted to the discretion of those who use it. But the very terms of this argument admit that the sovereignty of the State, in the article of taxation itself, is subordinate to, and may be controlled by, the constitution of the United States. How far it has been controlled by that instrument must be a question of construction. In making this construction, no principle not declared, can be admissible, which would defeat the legitimate operations of a supreme government. It is of the very essence of supremacy to remove all obstacles to its action within its own sphere, and so to modify every power vested in subordinate governments, as to exempt its own operations from their own influence. This effect need not be stated in terms. It is so involved in the declaration of supremacy, so necessarily implied in it, that the expression of it could not make it more certain. We must, therefore, keep it in view while construing the constitution.

The argument on the part of the State of Maryland is, not that the States may directly resist a law of Congress, but that they may exercise their acknowledged powers upon it, and that the constitution leaves them this right in the confidence that they will not abuse it.

Before we proceed to examine this argument, and to subject it to the test of the constitution, we must be permitted to bestow a few considerations on the nature and extent of this original right of taxation, which is acknowledged to remain with

the States. It is admitted that the power of taxing the people and their property is essential to the very existence of government, and may be legitimately exercised on the objects to which it is applicable, to the utmost extent to which the government may choose to carry it. The only security against the abuse of this power, is found in the structure of the government itself. In imposing a tax the legislature acts upon its constituents. . . .

The sovereignty of a State extends to everything which exists by its own authority, or is so introduced by its permission; but does it extend to those means which are employed by Congress to carry into execution powers conferred on that body by the people of the United States? We think it demonstrable that it does not. Those powers are not given by the people of a single State. They are given by the people of the United States, to a government whose laws, made in pursuance of the constitution, are declared to be supreme. Consequently, the people of a single State cannot confer a sovereignty which will extend over them.

If we measure the power of taxation residing in a State, by the extent of sovereignty which the people of a single State possess, and can confer on its government, we have an intelligible standard, applicable to every case to which the power may be applied. We have a principle which leaves the power of taxing the people and property of a State unimpaired; which leaves to a State the command of all its resources, and which places beyond its reach, all those powers which are conferred by the people of the United States on the government of the Union, and all those means which are given for the purpose of carrying those powers into execution. We have a principle which is safe for the States, and safe for the Union. We are relieved, as we ought to be, from clashing sovereignty; from interfering powers; from a repugnancy between a right in one government to

pull down what there is an acknowledged right in another to build up; from the incompatibility of a right in one government to destroy what there is a right in another to preserve. We are not driven to the perplexing inquiry, so unfit for the judicial department, what degree of taxation is the legitimate use, and what degree may amount to the abuse of the power. The attempt to use it on the means employed by the government of the Union, in pursuance of the constitution, is itself an abuse, because it is the usurpation of a power which the people of a single State cannot give.

We find, then, on just theory, a total failure of this original right to tax the means employed by the government of the Union, for the execution of its powers. The right never existed, and the question whether it has been surrendered, cannot arise.

But, waiving this theory for the present, let us resume the inquiry, whether this power can be exercised by the respective States, consistently with a fair construction of the constitution?

That the power to tax involves the power to destroy; that the power to destroy may defeat and render useless the power to create; that there is a plain repugnance, in conferring on one government a power to control the constitutional measures of another, which other, with respect to those very measures, is declared to be supreme over that which exerts the control, are propositions not to be denied. But all inconsistencies are to be reconciled by the magic of the word CONFIDENCE. Taxation, it is said, does not necessarily and unavoidably destroy. To carry it to the excess of destruction would be an abuse, to presume which, would banish that confidence which is essential to all government.

But is this a case of confidence? Would the people of any one State trust those of another with a power to control the most insignificant operations of their State government? We know they would not. Why, then, should we suppose that the people of any one State should be willing to trust those of another with a power to control the operations of a government to which they have confided their most important and most valuable interests? In the legislature of the Union alone, are all represented. The legislature of the Union alone, therefore, can be trusted by the people with the power of controlling measures which concern all, in the confidence that it will not be abused. This, then, is not a case of confidence, and we must consider it as it really is.

If we apply the principle for which the State of Maryland contends, to the constitution generally, we shall find it capable of changing totally the character of that instrument. We shall find it capable of arresting all the measures of the government, and of prostrating it at the foot of the States. The American people have declared their constitution, and the laws made in pursuance thereof, to be supreme; but this principle would transfer the supremacy, in fact, to the States. If the States may tax one instrument, employed by the government in the execution of its powers, they may tax any and every other instrument. They may tax the mail; they may tax the mint; they may tax patent rights; they may tax the papers of the custom-house; they may tax judicial process; they may tax all the means employed by the government, to an excess which would defeat all the ends of government. This was not intended by the American people. They did not design to make their government dependent on the States. . . .

The Court has bestowed on this subject its most deliberate consideration. The result is a conviction that the States have no power, by taxation or otherwise, to

retard, impede, burden, or in any manner control, the operations of the constitutional laws enacted by Congress to carry into execution the powers vested in the general government. This is, we think, the unavoidable consequence of that supremacy which the constitution has declared.

We are unanimously of opinion, that the law passed by the legislature of Maryland, imposing a tax on the Bank of the United States, is unconstitutional and void.

This opinion does not deprive the States of any resources which they originally possessed. It does not extend to a tax paid by the real property of the bank, in common with the other real property within the State, nor to a tax imposed on the interest which the citizens of Maryland may hold in this institution, in common with other property of the same description throughout the State. But this is a tax on the operations of the bank, and is, consequently, a tax on the operation of an instrument employed by the government of the Union to carry its powers into execution. Such a tax must be unconstitutional.

Source: 4 Wheaton 316 (1819).

We admit, as all must admit, that the powers of the government are limited, and that its limits are not to be transcended. But we think the sound construction of the constitution must allow to the national legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional. . . .

Should Congress, in the execution of its powers, adopt measures which are prohibited by the constitution; or should Congress, under the pretext of executing its powers, pass laws for the accomplishment of objects not entrusted to the government; it would become the painful duty of this tribunal, should a case requiring such a decision come before it, to say that such an act was not the law of the land. But where the law is not prohibited, and is really calculated to effect any of the objects entrusted to the government, to undertake here to inquire into the degree of its necessity, would be to pass the line which circumscribes the judicial department, and to tread on legislative ground. This court disclaims all pretensions to such a power.

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