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Geoffrey R. Watson

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Recommended Citation

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

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Constitutionalism, Judicial Review, and the World Court

Geoffrey R. Watson*

With the end of the Cold War, the U.N. Security Council has suddenly sprung to life. No longer paralyzed by superpower vetoes, the Council has embarked on an era of unprecedented activism. In its resolutions on the Iraq-Kuwait crisis, the Council went far beyond anything it might have adopted just five years ago: it condemned the invasion of Kuwait, imposed stiff economic sanctions on Iraq, and eventually authorized the use of force to expel Iraqi troops from Kuwait.¹ More recently, the Council has imposed economic and diplomatic sanctions on Libya,² taken an active role in the peace process in Cambodia,³ and authorized the use of force for humanitarian purposes in Bosnia and Herzegovina.⁴

Some states are concerned that the Security Council's newfound activism goes too far—that it infringes on state sovereignty. This contention has been a running theme of Iraqi complaints about the Council's resolutions on the Gulf War.⁵ Similarly, several states have expressed concerns about the Council resolutions ordering Libya to extradite two Libyans accused of terrorism where extradition may not have been required by international law and where Libyan law, like that of many civil-law states, forbids the extradition of Libyan nation-

* Assistant Professor of Law, University of Puget Sound School of Law; B.A. Yale University, J.D. Harvard Law School; Attorney-Adviser, U.S. Department of State, 1987–1991. I would like to thank Robert Menanteaux, senior research librarian at the University of Puget Sound School of Law, and Elizabeth Lee, my research assistant, for their invaluable assistance. I would also like to thank Jonathan B. Schwartz, Assistant Legal Adviser for Near Eastern and South Asian Affairs at the U.S. Department of State, for his helpful comments.

1. See S.C. Res. 660, U.N. SCOR, 45th Sess., 2932d mtg. at 19, U.N. Doc. S/INF/46 (1990) (condemning invasion); S.C. Res. 661, U.N. SCOR, 45th Sess., 2933d mtg. at 19, U.N. Doc. S/INF/46 (1990) (imposing embargo); S.C. Res. 678, U.N. SCOR, 45th Sess., 2963d mtg. at 27, U.N. Doc. S/INF/46 (1990) (authorizing use of force).

2. See S.C. Res. 748, U.N. SCOR, 47th Sess., 3063d mtg. at 2–3, U.N. Doc. S/RES/748 (1992), *reprinted in* 31 I.L.M. 750 (1992).

3. See S.C. Res. 766, U.N. SCOR, 47th Sess., 3099th mtg. (1992) (demanding that all Cambodian parties cooperate with the U.N. transitional authority in Cambodia).

4. See S.C. Res. 770, U.N. SCOR, 47th Sess., 3106th mtg. (1992) (authorizing use of force to facilitate humanitarian relief); *see also* S.C. Res. 771, U.N. SCOR, 47th Sess., 3106th mtg. (1992) (relating to war crimes in Bosnia).

5. See, e.g., Paul Lewis, *No Hint of Arms Found in Iraqi Ministry*, N.Y. TIMES, July 30, 1992, at A8, (reporting that Iraq, citing its "sovereignty," refused U.N. officials access to Iraqi ministries notwithstanding Security Council authorization).

als.⁶ As one U.N. official observed, "the critical question is the possible conflict between preventive diplomacy and the issue of national sovereignty when the U.N. intervenes in a country's internal affairs."⁷

In many legal systems, a mechanism of judicial review resolves disputes about the proper scope of legislative acts.⁸ The U.N. Charter, however, does not explicitly authorize its principal judicial organ, the International Court of Justice (the World Court), to review the validity of acts by the law-making branches of the organization. Chapter 14 of the Charter, like article III of the U.S. Constitution, is silent on the question. Since certain passages in the negotiating history of the Charter do suggest the omission of judicial review was deliberate,⁹ some leading commentators have concluded that the World Court lacks any power of judicial review.¹⁰

Libya recently challenged this view by initiating an action in the World Court to enjoin the United States from pressing its claim for the extradition of the two Libyan nationals accused in the 1988 bombing of Pan Am flight 103 over Lockerbie, Scotland.¹¹ Libya contended that the Security Council resolutions ordering extradition were *ultra vires* (and therefore invalid) because they disregarded a fundamental principle of international law—that a state cannot be forced to extradite its own nationals. While a majority of the Court rejected Libya's request for provisional relief, a number of concurring and dissenting judges expressed a willingness to examine the validity of Security Council actions.¹² The majority opinion thus averted a

6. See *United Nations: Growing Concerns over Role of Security Council*, Inter Press Service, Apr. 23, 1992, available in LEXIS, Nexis Library, Omni File, at *1 (noting that "[a]nimosity towards the Security Council has surfaced again following the application of sanctions against Libya"); S.C. Res. 731, U.N. SCOR, 47th Sess., 3033d mtg. at 2, U.N. Doc. S/RES/731 (1992) (calling on Libya to provide a "full and effective response" to requests for extradition), reprinted in 31 I.L.M. 732 (1992); S.C. Res. 748, *supra* note 2, at 2-3 (imposing aviation sanctions on Libya in the event it does not extradite the suspects), reprinted in 31 I.L.M. 750 (1992). See also *infra* part II.C (discussing Libya case in more detail).

7. *United Nations: Growing Concerns over Role of Security Council*, *supra* note 6, at 1 (quoting James Jonah, a former special U.N. envoy to Somalia).

8. See, e.g., *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803); ALLAN R. BREWER-CARLAS, *JUDICIAL REVIEW IN COMPARATIVE LAW* 1-4, 185-88 (1989) (describing European systems of judicial review).

9. See *infra* part I.B (discussing relevant negotiating history of Charter).

10. See, e.g., RICHARD FALK, *REVIVING THE WORLD COURT* 162 (1986); Oliver J. Lissitzyn, *International Law and the Advisory Opinion on Namibia*, 11 COLUM. J. TRANSNAT'L L. 50, 51 (1972).

11. Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libya v. U.S.), 1992 I.C.J. 114 (Provisional Measures Order of Apr. 14) [hereinafter *Libya v. United States*].

12. See *id.* at 127 (majority holding); *id.* at 131 (Oda, J., concurring) (noting that Libya argued that the Council's "coercive reinforcement" of the extradition request violated Libya's "sovereign rights," but asserting that such a claim would constitute "a totally different litigation" and that jurisdiction over such a claim would be "certainly a different matter"); *id.* at 142 (Shahabuddeen, J., concurring) ("Are there any limits to the Council's powers of appreciation?

potential constitutional confrontation between two organs of the United Nations, but the concurring and dissenting opinions suggest that such a confrontation is possible in the future.

This Article considers whether the World Court can and should review the validity of acts of the Security Council and General Assembly. Part I argues that the text and negotiating history of the U.N. Charter leave room for the World Court to exercise at least some power of judicial review but do not delineate the precise scope or effect of such review. Part II asserts that the World Court has in fact repeatedly exercised a power of judicial review, albeit deferentially, over acts by the Security Council and the General Assembly. Part III argues that the World Court can review the validity of acts by other U.N. organs without jeopardizing its own legitimacy and explores the proper scope of review in "constitutional" cases. Finally, Part IV examines the legal effect of a World Court judgment holding another organ's act to be *ultra vires*. This Part considers whether the text and negotiating history of the U.N. Charter support a "Jeffersonian" model of judicial review, under which the Court's decisions would be binding only on the specific parties and U.N. organs involved in the particular case, or a "judicial supremacy" model, under which the Court's decisions would also be binding on all parties in all future cases. The Article concludes by examining the political ramifications of judicial review by the World Court.

I. THE U.N. CHARTER, THE STATUTE OF THE INTERNATIONAL COURT OF JUSTICE, AND JUDICIAL REVIEW

A threshold question is whether the U.N. Charter and the Statute of the International Court of Justice support any form of judicial review. Although the Charter and Statute have a constitutional character, they are also treaties, and their interpretation is governed by principles of treaty law. Under established principles, interpretation

. . . If there are any limits, what are those limits and what body other than the S.C. is competent to say what those limits are?"); *id.* at 156 n. 1 (Bedjaoui, J., dissenting) (asserting that "one might be led to ponder seriously over the lawfulness of" a resolution that prevents the Court's exercising its "judicial function"); *id.* at 196 (Ajibola, J., dissenting) (noting that the Court will have to consider the validity of resolution 748 at the merits stage, and expressing doubts on that question); *id.* at 210 (El-Koshi, J., dissenting) (describing resolution 745 as "*ultra vires*").

The Court has not yet rendered a decision on the merits. According to State Department sources, Libya has requested a delayed briefing schedule, and its first brief is not due until late 1993. This timetable suggests that Libya has in mind a negotiated settlement.

of a particular treaty should rest primarily on its text.¹³ Article 32 of the Vienna Convention on the Law of Treaties nonetheless permits recourse to the negotiating history (*travaux préparatoires*) of the treaty if the text “[l]eaves the meaning ambiguous or obscure.”¹⁴ Accordingly, this Part first analyzes the text of the relevant instruments before considering their negotiating history.

A. *The Text of the U.N. Charter and the Statute of the International Court of Justice*

Neither the U.N. Charter nor the Statute of the International Court of Justice directly addresses the question of judicial review.¹⁵ Chapter IV of the U.N. Charter authorizes the General Assembly to make non-binding “recommendations” to member states or the Security Council¹⁶ and suggests some limits on the Assembly’s authority to make such recommendations,¹⁷ but it does not mention whether the validity of Assembly recommendations can be reviewed by the World Court. Chapter V empowers the Security Council to make decisions binding on all states¹⁸ and suggests that this power is limited by the “Purposes and Principles of the United Nations”¹⁹—which include

13. Article 31 of the Vienna Convention on the Law of Treaties provides that “[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.” Vienna Convention on the Law of Treaties, May 23, 1969, art. 31, 1155 U.N.T.S. 331, 340.

The United States is not party to the Convention but generally regards it as reflecting customary international law. See generally Maria Frankowska, *The Vienna Convention on the Law of Treaties Before United States Courts*, 28 VA. J. INT’L L. 281 (1988).

14. Vienna Convention on the Law of Treaties, *supra* note 13, art. 32. The American Law Institute has suggested that these provisions reflect “inhospitality” to the use of *travaux préparatoires*. See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 325 cmt. e (1987) [hereinafter RESTATEMENT] (arguing that this “reluctance” to permit use of supplementary materials is “not at all” consistent with the practice of U.S. courts). Other commentators, however, read article 32 as authorizing complete resort to *travaux* “in accordance with the American judicial tradition.” Frankowska, *supra* note 13, at 335.

15. In this respect they do not differ from the constitutions of most international organizations. See Ebere Osieke, *Ultra Vires Acts in International Organizations—The Experience of the International Labour Organization*, 48 BRIT. Y.B. INT’L L. 259, 261 (1976–77) (noting that the charters of most international organizations are silent on the question); *id.* at 262 (noting that the International Labour Organisation Constitution is silent on the question). One notable exception is the European Community, which has established a procedure for judicial review of “legislative measures” promulgated by the European Council and Commission. See generally Thomas B. Roberts, *Judicial Review of Legislative Measures: The European Court of Justice Breathes Life into the Second Paragraph of Article 215 of the Treaty of Rome*, 26 COLUM. J. TRANSNAT’L L. 245 (1988); Christopher Harding, *The Review of EEC Regulations and Decisions*, 19 COMMON MKT. L. REV. 311 (1982).

16. U.N. CHARTER art. 10, art. 13, para. 1, art. 14.

17. See *id.* art. 12, para. 1 (prohibiting Assembly recommendations while the Security Council is handling a “dispute or situation”).

18. See *id.* art. 25.

19. See *id.* art. 24, para. 2.

compliance with international law²⁰—but it does not indicate whether the World Court can review Council decisions for conformity to these “Purposes and Principles.” Chapter VI, which contemplates recommendations (as opposed to binding decisions) by the Council and the Assembly for the peaceful settlement of disputes, does envision some role for the Court.²¹ Article 36(3) provides that in making recommendations, the Security Council “should also take into consideration that legal disputes should as a general matter be referred by the parties to the International Court of Justice.” This provision, however, obviously falls far short of an explicit power of judicial review over Security Council and General Assembly recommendations for peaceful settlement of disputes.²² Chapter VII, which empowers the Security Council to either make recommendations or decide on measures necessary to maintain international peace and security, says nothing about any role for the Court in reviewing Council resolutions. Indeed, it does not mention the Court at all.

The only part of the U.N. Charter that deals with the Court in any detail is Chapter XIV, entitled “The International Court of Justice.” Even this Chapter speaks in only the most general terms. Article 92 declares the Court to be “the principal judicial organ” of the United Nations. Article 93 provides that all states party to the U.N. Charter are *ipso facto* parties to the Statute of the Court. Article 94 obliges states party to disputes before the Court to abide by its judgments and allows the prevailing party to seek assistance from the Security Council in the event the losing party fails to comply with the judgment. Article 95 permits states to use other international tribunals to resolve disputes. Article 96 authorizes the political organs of the United Nations to seek advisory opinions from the Court on various questions. No provision of Chapter XIV explicitly addresses judicial review.

Nevertheless, the term “principal judicial organ” in article 92 might imply a power of judicial review,²³ particularly if most states agree

20. See *id.* art. 1, para. 1; *id.* art. 2, para. 3.

21. See *id.* art. 36, para. 3; see generally *id.* arts. 33–38.

22. The drafters of this Chapter apparently saw no need for judicial review over these recommendations since they would not be binding. See *infra* part I.B (describing Belgian proposal to insert explicit power of judicial review into this portion of the draft Charter).

23. The term “principal” also implies that other U.N. organs share the judicial power. It is indeed well-accepted that other organs may “interpret” the Charter, at least insofar as is necessary to define the limits of their own authority. See Doc. 933, IV/2/42(2), 13 U.N.C.I.O. Docs. 703, 709 (1945) (noting that each organ will inevitably interpret the Charter in the course of its day-to-day work); see also Ebere Osieke, *The Legal Validity of Ultra Vires Decisions of International Organizations*, 77 AM. J. INT’L L. 239, 242 (1983). Such a system of “concurrent review” is not inconsistent with a “Jeffersonian” concept of judicial review, in which the Court’s decisions are only binding on the parties and relevant organs in the case at hand. See *infra* part IV. In any event, the term “principal” is most likely designed to permit the establishment of other judicial

that some "judicial" body must have the authority to examine the validity of acts of other organs of government. Many of the states that signed and ratified the Charter do in fact endow one or more of their domestic "judicial" bodies with the power of judicial review.²⁴ Some states permit decentralized judicial review in courts of general jurisdiction (as in the United States), while others confine judicial review to one or more central "constitutional courts" (as in France).²⁵ It is unusual, however, for a state's courts to exercise judicial review when the constitution or another legislative enactment does not clearly authorize them to do so;²⁶ the U.S. experience is probably the exception and not the rule.²⁷ It is possible, then, that a European lawyer might be more inclined to view the Charter's silence as forbidding the exercise of judicial review than an American lawyer. More likely, though, the term "principal judicial organ" simply does not resolve the issue one way or the other.

Other provisions of the U.N. Charter provide little additional guidance on whether the Court can exercise any power of judicial review. Article 103 of the Charter, a sort of international supremacy clause, provides that "obligations under the present Charter" shall "prevail" over conflicting treaty obligations, but nothing in the text of the provision suggests it is to be enforced only by the Court. Moreover, the provision by its terms applies to the obligations of states, not the acts of U.N. organs. Thus, the Court has sometimes invoked article 103 to find that pre-existing rights and obligations under treaties have been superseded by a Security Council resolution,²⁸ but it has not had occasion to strike down a Security Council resolution as inconsistent with the Charter.

or quasi-judicial tribunals in the United Nations system, for example a U.N. Court of Human Rights, or to allow for the establishment of regional courts such as the European Court of Human Rights. It seems unlikely that the word "principal" alone was meant to preclude the World Court from exercising judicial review.

24. See EDWARD MCWHINNEY, *SUPREME COURTS AND JUDICIAL LAW-MAKING: CONSTITUTIONAL TRIBUNALS AND CONSTITUTIONAL REVIEW* 1 (1986) (asserting that judicial review "is one of the more striking trends in constitutionalism and constitution-making of the post-World War II era").

25. See BREWER-CARÍAS, *supra* note 8, at 168-94 (contrasting centralized with decentralized systems).

26. See Mauro Cappalletti, *Fundamental Guarantees of the Parties in Civil Litigation: Comparative Constitutional, International, and Social Trends*, 25 STAN. L. REV. 651, 654-59 (1973).

27. Even in the United States, the framers failed to mention judicial review in the Constitution only because they assumed courts would exercise it. See, e.g., 2 MAX FARRAND, *RECORDS OF THE FEDERAL CONVENTION OF 1787*, at 28 (rev. ed. 1966) (reporting that Gov. Morris stated that federal courts would be able to invalidate state laws that "ought to be negated"); *id.* at 76 (reporting that Luther Martin observed that the "[c]onstitutionality of laws" would come before judges); *id.* at 78 (reporting that George Mason declared that "[j]udges" could declare an unconstitutional law void").

28. See, e.g., *Libya v. United States*, 1992 I.C.J. at 124 (noting that S.C. Res. 748 supersedes whatever rights Libya may have had under the 1971 Montreal Convention).

It might be argued that article 103 implicitly authorizes the World Court to invalidate treaties inconsistent with the Charter, and that this authorization in turn implies a power to invalidate Security Council or General Assembly acts that are *ultra vires*.²⁹ Even assuming that the Court can declare treaties invalid, there is again no reason to suppose that it is the only U.N. organ that can do so.³⁰ And even if the Court does have the primary authority to declare treaties invalid, it does not necessarily follow that the Court also has the authority to declare resolutions of the Security Council and General Assembly invalid. "Vertical" supremacy over the acts of sovereign states does not necessarily imply "horizontal" supremacy over the acts of coequal organs of the United Nations.³¹ The former would appear to be crucial to a U.N. system that strives for universal adherence to agreed principles of international law. Judicial review of coequal organs might serve important goals—eliminating confusion in the law and protecting the rights of "minority states"³²—but it is not as essential to the establishment of a system of international law binding on individual states.³³

The Statute of the International Court of Justice says no more about judicial review than the U.N. Charter. Article 1 of the Statute emphasizes the Court's position as the "principal judicial organ" of the United Nations.³⁴ The thirty remaining articles of Chapter I are devoted to the organization of the Court: election of judges, duration of terms, salary, and so forth. Chapter II, entitled "Competence of the

29. Some commentators have suggested that the Supremacy Clause of the U.S. Constitution (art. VI, cl. 2), which by its terms applies to state officials, implies federal judicial power to invalidate acts of Congress that violate the Constitution. See Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 3-5 (1959); CHARLES L. BLACK, JR., *THE PEOPLE AND THE COURT* 6 (1960). The more accepted view, however, is that the language of the Supremacy Clause is "perfectly consistent with a view that treats congressional enactment as conclusive of constitutionality." LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 24 n.4 (2d ed. 1988) (citing ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH* 11-12 (1962)).

30. See *supra* note 23.

31. Commentators have reached much the same conclusion in the U.S. context. See, e.g., TRIBE, *supra* note 29, at 24 n.4; BICKEL, *supra* note 29, at 11-12.

32. See *infra* parts III-IV.

33. Indeed, U.S. courts have invalidated state statutes much more frequently than federal laws. See TRIBE, *supra* note 29, at 13 n.7; CHARLES L. BLACK, JR., *STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW* 67-77 (1969). Some commentators have argued that judicial review of federal statutes—the procedure authorized by *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803)—is less important than review of state statutes—the procedure authorized by *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304 (1816) (Story, J.). See TRIBE, *supra* note 29, at 13 n.7. Thus Holmes quipped: "I do not think the United States would come to an end if we lost our power to declare an Act of Congress void. I do think the Union would be imperiled if we could not make that declaration as to the laws of the several States." OLIVER WENDELL HOLMES, JR., *COLLECTED LEGAL PAPERS* 295-96 (1920).

34. Statute of the International Court of Justice, June 26, 1945, art. 1, 59 Stat. 1055, 1055, 3 Bevans 1179, 1179.

Court," is largely concerned with jurisdiction. Article 34, for example, provides that only states may be parties to contentious cases, and article 36 describes the circumstances in which states may submit themselves to the jurisdiction of the Court. The Statute says nothing about judicial review.

In sum, the Charter and Statute do not clearly indicate whether the Court has the power of judicial review and certainly do not indicate how thorough such review might be. The texts are sufficiently "ambiguous" to permit recourse to their *travaux préparatoires*—their negotiating history.³⁵

B. The *Travaux Préparatoires* of the Charter and Statute

The strongest argument that the World Court lacks the power of judicial review stems from certain passages in the negotiating history of the U.N. Charter. Judicial review is said to be impermissible because Belgian proposals to permit such review were rejected by the United Nations at the Conference on International Organization in 1945.³⁶ This assertion merits closer examination.

1. The First Belgian Amendment

During the Conference, Belgium repeatedly suggested that the World Court play a significant role in the peaceful settlement of disputes. On February 5, 1945, in its suggestions on the Dumbarton Oaks Proposals,³⁷ Belgium urged that whenever the Security Council intervened to settle a dispute, its action should become "final" only after the parties had an opportunity to "ask an advisory opinion from the International Court of Justice as to whether the decision respected its independence and vital rights."³⁸ Later the Belgian delegation developed this suggestion into a proposed amendment to the "Chapter on Pacific Settlement of Disputes" in the draft U.N. Charter. The amendment, the first of two formal proposals on interpretation eventually advanced by Belgium, provided:

35. See *supra* notes 13–14 and accompanying text (describing relevant rules of treaty interpretation).

36. See, e.g., *Certain Expenses of the United Nations*, 1962 I.C.J. 151, 168 (Advisory Opinion of July 20) [hereinafter *Certain Expenses Case*] (noting that proposals to give the World Court the last word in constitutional interpretation were "not accepted" during the drafting of the Charter); FALK, *supra* note 10, at 162; Lissitzyn, *supra* note 10, at 51.

37. In the autumn of 1944 several of the Allied Powers gathered at Dumbarton Oaks, in Washington, D.C., to develop general proposals for a new international organization to replace the League of Nations. The resulting proposals, published on October 9, 1944, became the basis for the U.N. Charter that was negotiated and adopted by the San Francisco Conference in the late Spring of 1945. See generally LELAND M. GOODRICH, *THE UNITED NATIONS IN A CHANGING WORLD* 40–45 (1974).

38. Doc. 2, G/7(k), 3 U.N.C.I.O. Docs. 331, 332–33 (1945).

Any State, party to a dispute brought before the Security Council, shall have the right to ask the Permanent Court of International Justice whether a recommendation or a decision made by the Council or proposed in it infringes on its essential rights. If the Court considers that such rights have been disregarded or are threatened, it is for the Council either to reconsider the question or to refer the dispute to the Assembly for decision.³⁹

The Belgian delegate pressed this amendment at the seventh meeting of the Committee on Peaceful Settlement⁴⁰ on May 19, 1945, arguing that the amendment was necessary if the Security Council's power to "recommend" solutions to disputes meant that a state "might be obliged to abandon a right granted to it by positive international law as an essential right of statehood."⁴¹ The purpose of the amendment, the Belgian delegate reiterated, was to allow a state to seek an "advisory opinion" from the World Court if that state believed that a Security Council recommendation "infringed on its essential rights."⁴² The Belgian delegate noted that the amendment merely provided that the matter would be remanded to the Security Council or the General Assembly after the Court's decision, indicating that the amendment would not "limit" the powers of the Security Council, but rather would "strengthen the juridical basis" of Security Council decisions.⁴³

Three states, all of which expected they would become permanent members of the Security Council,⁴⁴ spoke against the Belgian amendment. The Soviet delegate "felt that the Security Council should receive the full confidence" of the members of the organization, and that "[t]here should be no question in the minds of any Delegates that the Security Council might wish in any way to infringe the rights of a sovereign state."⁴⁵ The Belgian amendment, according to the Soviet delegate, would "weaken" the Council, which might even be made a "defendant before the Court."⁴⁶ The U.S. delegate noted that the working drafts already required the Security Council to act "in

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

40. The Committee was a subcommittee of the Commission on the Security Council, established to prepare the relevant Charter provisions on that organ. *See id.*

41. Doc. 433, III/2/15, 12 U.N.C.I.O. Docs. 47, 48 (1945). The Committee's report of the ensuing debate is also set out in HANS Kelsen, *THE LAW OF THE UNITED NATIONS* 446-47 n.8 (1954).

42. Doc. 433, *supra* note 41, at 49.

43. *Id.*

44. The original framework for the Charter, the Dumbarton Oaks Proposals, included as permanent members of the Security Council the United States, the United Kingdom, the Soviet Union, the Republic of China, and France. *See* Dumbarton Oaks Proposals, ch. VI, sec. A, reprinted in LELAND M. GOODRICH ET AL., *CHARTER OF THE UNITED NATIONS* 667-68 (3d ed. 1969).

45. Doc. 433, *supra* note 41, at 49.

46. *Id.*

accordance with the purposes and principles of the Organization" and "with due regard for principles of justice and international law."⁴⁷ Moreover, the Dumbarton Oaks Proposals already permitted states to appeal "on any matter which might properly go before the Court."⁴⁸ For both these reasons, the amendment was unnecessary. France expressed "sympathy" with the amendment, but argued it would be ineffective, "especially since it involved a dispersal of responsibilities in the Organization."⁴⁹ The French delegate suggested clarification of the difference between Security Council recommendations and decisions, and suggested that the subcommittee on drafting "endeavor to give the most complete guarantees possible that the Security Council accomplish its task according to law and justice."⁵⁰

One state did speak in favor of the Belgian proposal. The delegate of Colombia, a state that did not expect to be a permanent member of the Security Council, argued that "confidence" in the Security Council "should not exclude confidence in the International Court of Justice."⁵¹ The Colombian delegate, noting that the Dumbarton Oaks Proposals provided that justiciable disputes should normally be referred to the Court, "suggested that no question was more eminently legal than one concerning the essential rights of a state."⁵²

Three days later, at the final meeting on the Belgian proposal, three more states spoke against the amendment. The delegate of the United Kingdom, another future Council member, argued that the amendment would involve the Court in political questions, not legal ones.⁵³ It would also, according to the British delegate, engender delay, perhaps to the advantage of "a state contemplating aggression."⁵⁴ Finally, the British delegate called for trust in the Security Council, noting that a majority of its members would be composed of "small states."⁵⁵ The South African delegate agreed with this last point, adding that it was "fair to assume that decisions representing agreement among the great powers would be reasonable" because they would

47. *Id.* Similar provisions became part of the final Charter. See U.N. CHARTER art. 24, para. 2 ("the Security Council shall act in accordance with the Purposes and Principles of the United Nations"); *id.* art. 1, para. 1 (the United Nations, in fulfilling its purpose, shall act "in conformity with the principles of justice and international law").

48. Doc. 433, *supra* note 41, at 49.

49. *Id.* at 50.

50. *Id.* The record, which consists of a summary of remarks of delegates, does not indicate that any other state spoke against the amendment.

51. *Id.*

52. *Id.*

53. Doc. 498, III/2/19, 12 U.N.C.I.O. Docs. 65, 65 (1945). Much of the relevant report is reprinted in KELSEN, *supra* note 41, at 447-48 n.8.

54. Doc. 498, *supra* note 53, at 65.

55. *Id.*

be influenced by world opinion as well as by other states with which they had "close relationships."⁵⁶

Finally the Belgian delegate asked whether the Security Council's power to "recommend" a solution to disputes would bind the parties to a dispute, or whether it was merely advisory. Having been informed that the Council's power would be only advisory, the Belgian delegate withdrew the amendment since "it now was clearly understood that a recommendation made by the Council under [what is now Chapter VI] did not possess obligatory effect."⁵⁷

The withdrawal of the Belgian proposal can hardly be interpreted as a determination by the framers that judicial review was unacceptable. Instead, it simply reflects Belgium's realization that judicial review of Security Council recommendations taken under what is now Chapter VI was unnecessary since those recommendations would not be binding anyway.⁵⁸ Withdrawal of that proposal had nothing to do with the acceptability of judicial review for binding Security Council decisions, such as those taken pursuant to Chapter VII of the Charter.

Although some of the comments of states opposed to the Belgian amendment may reflect broader opposition to increased power for the Court, no state went so far as to suggest that the Court should always uphold acts of the Security Council, even those that are manifestly *ultra vires*. Indeed, shortly thereafter the delegates to the U.N. Conference made it clear that no U.N. organ—including the World Court or the Security Council—is required to enforce another organ's decision if it is not "generally acceptable."

2. The Second Belgian Amendment

Belgium later sponsored a second amendment. On May 29, 1945, Belgium argued that the Committee on Legal Problems, a subset of the Commission on Judicial Organization, "should determine the proper interpretative organ for the several parts of the Charter."⁵⁹ During debate, some delegations suggested that the General Assembly was the proper organ.⁶⁰ Others preferred the Court, arguing that it would rule objectively and promote "uniformity of jurisprudence."⁶¹ Still others argued for a "joint conference" or an ad hoc "committee of experts" to resolve conflicts over interpretation,⁶² and some states thought that interpretation should be left to the organ most directly

56. *Id.* at 66.

57. *Id.*

58. *See id.*

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

60. *Id.*

61. *Id.*; *see also* Doc. 843, IV/2/37, 13 U.N.C.I.O. Docs. 645, 645 (1945).

62. Doc. 664, *supra* note 59, at 633.

concerned.⁶³ Finally, some states argued it was unnecessary to insert any provisions in the Charter on the question because "practice would determine the method of interpretation."⁶⁴ The absence of a formal procedure would, it was said, preserve "flexibility."⁶⁵

The new Belgian proposal did not prevail. The Committee eventually decided to "reject [Belgium's] suggestion of referring interpretation disagreements on the Charter between organs to the Court *as an established procedure*."⁶⁶ Instead, it resolved that member states should be free to submit disputes to the Court, and that two disputing organs could seek an advisory opinion from the Court, establish an ad hoc committee of jurists, or resort to a joint conference.⁶⁷ A subcommittee drafted a report finding it "inevitable that each organ will interpret such parts of the Charter as are applicable to its particular functions" and declaring it unnecessary to insert a provision in the Charter to this effect.⁶⁸ The report continued:

Under unitary forms of national government the final determination of such a question may be vested in the highest court or in some other national authority. However, the nature of the Organization and its operation would not seem to be such as to invite the inclusion in the Charter of any provision of this nature.⁶⁹

Without elaborating on this point, the report encouraged states and organs to bring disputes before the Court and endorsed the use of ad hoc committees or joint conferences to settle disputes over interpretation.⁷⁰ The report concluded that if an interpretation by any organ or committee "is not generally acceptable it will be without binding force," in which case the report stated, the Charter should be amended to resolve the conflict.⁷¹

The defeat of the second Belgium proposal does suggest that the framers did not wish the Charter to authorize judicial review "as an established procedure." But the report on interpretation did not rule

63. *Id.* at 634.

64. *Id.*

65. Doc. 843, *supra* note 61, at 645.

66. *Id.* (emphasis added).

67. *Id.* at 646; *see also* Doc. 873, IV/2/37(1), 13 U.N.C.I.O. Docs. 653, 653-54 (1945) (slightly amended version of original report in the revised summary report of the 14th meeting).

68. Doc. 933, IV/2/42(2), 13 U.N.C.I.O. Docs. 703, 709 (1945). Essentially identical earlier versions of this report can be found in WD 269, IV/2/42, 13 U.N.C.I.O. Docs. 681, 687-88 (1945); Doc. 887, IV/2/39, 13 U.N.C.I.O. Docs. 668, 668-69 (1945); and Doc. 750, IV/2/B/1, 13 U.N.C.I.O. Docs. 831, 831-32 (1945).

69. Doc. 933, *supra* note 68, at 709.

70. *See id.* at 709-10.

71. *Id.* at 710.

out judicial review altogether; it held instead that if an organ produced an interpretation that was not “generally acceptable,” it would be “without binding force.”⁷² Plainly this statement implies that the Court would not be required to give effect to a Security Council decision based on an interpretation that was not “generally acceptable” and therefore “without binding force.” Moreover, the report clearly stated that the Court might be called on to resolve disputes over interpretation and implied that the Court’s word would be final, at least in that particular dispute and with respect to those parties.⁷³

The report suggested that each U.N. organ would interpret the Charter in the course of its day-to-day affairs, and that interpretation disputes might sometimes be resolved not only by the Court, but also by ad hoc committees or joint conferences.⁷⁴ But such an arrangement is hardly incompatible with judicial review. A number of states, including the United States, possess a decentralized system of constitutional development and interpretation in which dozens or hundreds of entities—courts, legislatures, and executive departments—can construe the Constitution.

A more difficult question is whether the Conference’s report on interpretation rejected the doctrine of judicial supremacy—the doctrine that the World Court’s pronouncements on the meaning of the Charter are binding on all states and all U.N. organs in all future cases. That question is explored in greater detail in Part IV. For now, suffice it to say that the institution of judicial review can exist without a doctrine of judicial supremacy. It is conceivable that the World Court’s interpretation of the Charter in a dispute might be binding only on the parties, including relevant organs, and only in that particular case.⁷⁵

One final aspect of the Conference report merits attention. By directing the Court and other organs to disregard interpretations that are not “generally acceptable,” the framers implicitly endorsed a general standard of review in “constitutional” cases. This standard of review was, on its face, quite deferential. The report did not explain precisely how the Court or other organ might determine that an organ’s interpretation of the Charter was “not generally acceptable.” The term implies that at least a majority of states, or perhaps a majority of

72. *Id.*

73. *See id.* at 709–10.

74. *Id.* at 709. The report also suggested that such disputes might be resolved by amendment of the Charter. *See supra* note 71 and accompanying text. One problem with such a system is that the Charter, like the U.S. Constitution, is not easily amended. Amendments must be approved by two-thirds of the members of the General Assembly and ratified by two-thirds of the members of the United Nations, including all five permanent members of the Security Council. *See U.N. CHARTER* art. 108.

75. *See infra* part IV.

U.N. organs or international jurists, would have to reject an interpretation to leave it "without binding force." As the next Part suggests, the Court itself has also developed a deferential standard of review, but it relies on a somewhat different formulation—a "presumption" that the acts and interpretations of other organs are valid.

In sum, the text and negotiating history of the relevant U.N. instruments do not rule out all forms of judicial review. Instead, they suggest that any U.N. organ, including the Court, should ignore a "generally unacceptable" interpretation of the Charter by another organ. The next Part explores the evolution of the Court's own thinking on the question of judicial review.

II. THE DEVELOPMENT OF JUDICIAL REVIEW IN WORLD COURT PRACTICE

As we have seen, the text of the U.N. Charter does not directly address the issue of whether the International Court of Justice may invalidate resolutions of coequal organs of the United Nations.⁷⁶ The *travaux préparatoires* of the Charter suggest that the framers may have intended to withhold at least some powers of judicial review from the International Court of Justice, but the law of treaties permits recourse to more than just the text and *travaux préparatoires* of a treaty like the U.N. Charter.⁷⁷ Article 31(3)(b) of the Vienna Convention on the Law of Treaties provides that interpretation should take into account "any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation." Actual exercise of judicial review by the World Court, it seems, would constitute this sort of "subsequent practice." Indeed, states themselves may have established a "subsequent practice" by their unanimous acquiescence in the Court's de facto exercise of judicial review.

The Court has addressed the question of judicial review in three major cases. They are considered below.

A. *The Certain Expenses Case*

In late 1961 the General Assembly requested an advisory opinion from the Court on whether member states were responsible for expenses relating to U.N. operations in the Congo in 1960–61 and in the

76. See *supra* part I.A.

77. See *supra* part I.B.

Middle East in the late 1950s.⁷⁸ Article 17(2) of the U.N. Charter provides that “[t]he expenses of the Organization shall be borne by the Members as apportioned by the General Assembly.” The legal question posed by the General Assembly was whether expenses for the Congo and Middle East operations were “expenses of the Organization” within the meaning of article 17(2).⁷⁹

At the outset of its opinion, the Court noted that the Assembly had rejected a French amendment to the resolution requesting an advisory opinion. The amendment would have asked the Court to decide whether the expenditures were “decided on in conformity with the provisions of the Charter”—that is, whether the Assembly and the Security Council had acted *ultra vires* in authorizing the expenditures—and only thereafter to consider whether the expenditures were “expenses of the Organization” within article 17(2).⁸⁰ The Court stated that rejection of the French amendment did not preclude it from considering whether the expenditures were “decided on in conformity with the provisions of the Charter, if the Court finds such consideration appropriate.”⁸¹ The Court added that it “must have full liberty to consider all relevant data available to it in forming an opinion on a question posed to it for an advisory opinion.”⁸² Essentially, the Court asserted a power of judicial review, even though the Assembly apparently intended that the Court not do so.

Having made this assertion of authority, the Court went on to undermine it. In upholding the Assembly and Council resolutions in question, the Court said:

In the legal systems of States, there is often some procedure for determining the validity of even a legislative or governmental act, but no analogous procedure is to be found in the structure of the United Nations. Proposals made during the drafting of the Charter to place the *ultimate authority to interpret the Charter* in the

78. G.A. Res. 1731, U.N. GAOR, 16th Sess., Supp. No. 17, at 54, U.N. Doc. A/5062 (1961). The operations had been authorized by resolutions of both the General Assembly and the Security Council. See, e.g., G.A. Res. 1633, U.N. GAOR, 16th Sess., Supp. No. 17, at 46, U.N. Doc. A/4943 (1961); G.A. Res. 1619, U.N. GAOR, 15th Sess., Supp. No. 16A, at 14, U.N. Doc. A/4740 (1961); G.A. Res. 1595, U.N. GAOR, 15th Sess., Supp. No. 16A, at 13, U.N. Doc. A/4714 (1961); G.A. Res. 1590, U.N. GAOR, 15th Sess., Supp. No. 16, at 57, U.N. Doc. A/4658 (1960); G.A. Res. 1583, U.N. GAOR, 19th Sess., Supp. No. 16, at 52, U.N. Doc. A/4676 (1980); S.C. Res. 4387, U.N. SCOR, 15th Sess., 873d mtg., U.N. Doc. S/4387 (1960); S.C. Res. 4405, U.N. SCOR, 15th Sess., 879th mtg., U.N. Doc. S/4405 (1960); S.C. Res. 4426, U.N. SCOR, 15th Sess., 886th mtg., U.N. Doc. S/4426 (1960); S.C. Res. 4741, U.N. SCOR, 15th Sess., 942d mtg., U.N. Doc. S/4741 (1960); S.C. Res. 5002, U.N. SCOR, 16th Sess., 982d mtg., U.N. Doc. S/5002 (1961).

79. See G.A. Res. 1731, *supra* note 78, at 54.

80. *Certain Expenses Case*, 1962 I.C.J. at 156.

81. *Id.* at 157.

82. *Id.*

International Court of Justice were not accepted; the opinion which the Court is in the course of rendering is an advisory opinion. As anticipated in 1945, therefore, each organ must, *in the first place at least*, determine its own jurisdiction.⁸³

This statement is sometimes cited as evidence that the Court believes it lacks a power of judicial review.⁸⁴ Such a cramped reading of the passage is unwarranted. The Court did not deny that it might have *some* authority to interpret the Charter—only that it did not have the *ultimate* authority to do so. It left open the possibility, in other words, that its interpretation might be binding only on the parties before it, just as its decisions in contentious cases are binding only on the parties before it.⁸⁵ If each organ must determine its own jurisdiction “in the first place at least,” it seems plausible that some other organ might pass on jurisdictional questions after a political organ makes a *prima facie* determination that it has jurisdiction to act. Moreover, the Court stressed that this was an advisory opinion, in which any decision of the Court—constitutional or otherwise—has little or no binding force.⁸⁶

The Court gave other indications that it might consider exercising a power of judicial review. In particular, the Court held that “when the Organization takes action which warrants the assertion that it was appropriate for the fulfillment of one of the stated purposes of the United Nations, the presumption is that such action is not *ultra vires*.”⁸⁷ Presumptions can certainly be overcome. The Court’s language suggests that such a presumption might not apply to action that is not “appropriate for the fulfillment of one of the stated purposes” of the United Nations—that is, action that is “manifestly *ultra vires*.”⁸⁸ The Court seemed to imply, it might decline to give effect to such an action.

In so doing, the Court quietly established its own standard of review for “constitutional” cases. Without explaining its reasoning, the Court transformed the “not generally acceptable” language of the *travaux préparatoires* into legal language more familiar to lawyers—the language

83. *Id.* at 168 (emphasis added).

84. See, e.g., FALK, *supra* note 10, at 102.

85. See Statute of the International Court of Justice, June 26, 1945, art. 59, 59 Stat. 1055, 1062, 3 Bevens 1179, 1190.

86. Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, 1950 I.C.J. 65, 71 (Advisory Opinion of Mar. 30). There is some authority to suggest that an advisory opinion may bind the organ that requests it. See 1 GERALD FITZMAURICE, THE LAW AND PROCEDURE OF THE INTERNATIONAL COURT OF JUSTICE 123 (1986) (asserting that advisory opinions “cannot be officially or formally questioned by the organ to which they are rendered,” but noting that the Court’s opinions may be disregarded in actual practice).

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

88. See Oseike, *supra* note 23, at 249.

of presumptions. One plausible explanation of the Court's rejection of the "acceptance" test may be that it smacked too much of a political popularity contest, while a "presumption" standard fit more comfortably with the Court's role as "principal judicial organ" of the United Nations. Whatever its origin, the "presumption of validity" has retained its vitality as the Court's standard of review.⁸⁹

Writing separately, several Judges of the Court asserted that the Court retained some power of judicial review. In his separate concurring opinion, for example, Judge Morelli argued that it was necessary to examine the validity of the resolutions establishing the Emergency Force in the Middle East as well as those authorizing the operations in the Congo.⁹⁰ In his view, the case raised "the rather delicate problem of the validity of the acts of the United Nations," a problem that he felt could not be avoided.⁹¹ Judge Morelli argued that the Court's power of review should be a narrow one since the effectiveness of acts of the political organs would otherwise be "laid open to perpetual uncertainty."⁹² His proposed standard of review was very deferential:

It is only in especially serious cases that an act of the Organization could be regarded as invalid, and hence an absolute nullity. Examples might be a resolution which had not obtained the required majority, or a resolution vitiated by a manifest *excès de pouvoir* (such as, in particular, a resolution the subject of which had nothing to do with the purposes of the Organization).⁹³

In 1962, in sum, the Court apparently envisioned a limited power of judicial review for itself. But rather than adopt the test implicitly proposed by the drafters—that an organ's act be "without binding force" if "not generally acceptable"—the Court endorsed a more "legal" standard: a presumption of validity. Hints of ambivalence about the Court's power to exercise judicial review resurfaced a decade later in the *Namibia Case*.

B. The Namibia Case

Following World War I, the League of Nations authorized South Africa to administer a Mandate for Namibia, then known as South-West Africa. Like any Mandatory power, South Africa was to act for the benefit of the people of South-West Africa, to promote their "well-being and development," and to behave in accordance with the "sacred

89. See *infra* part II.B-C (noting that the presumption reappeared in later cases).

90. *Certain Expenses Case*, 1962 I.C.J. at 221 (Morelli, J., concurring).

91. *Id.*

92. *Id.* at 223.

93. *Id.*

trust" envisioned by the League of Nations system.⁹⁴ The League collapsed after World War II, but South Africa continued its presence in South-West Africa, maintaining a system of apartheid there. South Africa defended this system by arguing it was no longer bound by the terms of the Mandate since the League was defunct.⁹⁵ In 1950, however, the World Court held that the supervisory responsibilities imposed by the Mandate survived as part of the new U.N. trusteeship system and that South Africa's policy of racial discrimination in South-West Africa violated those responsibilities.⁹⁶

South Africa nonetheless continued its policy of apartheid in South-West Africa, which led the General Assembly to declare in 1966 that South Africa had violated the Mandate, that the Mandate was therefore terminated, and that "South Africa [had] no other right to administer the Territory."⁹⁷ The Security Council followed suit, declaring South Africa's continued presence in South-West Africa illegal, recognizing that the General Assembly would assume responsibility for the Territory, and calling upon South Africa to withdraw.⁹⁸ When South Africa refused to comply, the Security Council asked the International Court of Justice for an advisory opinion on the legal consequences of South Africa's continued presence in South-West Africa, now known as Namibia.⁹⁹

In its opinion, the Court repeatedly considered the validity of both the General Assembly and Security Council resolutions. The Court first rejected South Africa's argument that the Security Council resolution seeking an advisory opinion was procedurally invalid because two permanent members abstained and therefore did not cast "concurring votes" as required by the Charter.¹⁰⁰ Reiterating its previous statements that resolutions of U.N. organs are entitled to a presump-

94. See *South-West Africa (Eth. v. S. Afr.; Liber. v. S. Afr.)*, 1962 I.C.J. 319, 329 (Preliminary Objections, Judgment of Dec. 21) (summarizing the purposes of the Mandate system).

95. See *International Status of South-West Africa*, 1950 I.C.J. 127, 133 (Advisory Opinion of July 11); *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)*, 1971 I.C.J. 16, 33 (Advisory Opinion of June 21) (noting that South Africa renewed this argument in the 1971 case) [hereinafter *Namibia Case*].

96. "Since [the Mandate's] fulfillment did not depend on the existence of the League of Nations, it could not be brought to an end merely because this supervisory organ ceased to exist." *International Status of South-West Africa*, 1950 I.C.J. at 133.

97. G.A. Res. 2145, U.N. GAOR, 21st Sess., Supp. No. 16, para. 4, at 2, U.N. Doc. A/6316 (1966).

98. S.C. Res. 264, U.N. SCOR, 24th Sess., at 1, U.N. Doc. S/INF/24/Rev. 1 (1969). See also S.C. Res. 269, U.N. SCOR, 24th Sess., at 2, U.N. Doc. S/INF/24/Rev. 1 (1969); S.C. Res. 276, U.N. SCOR, 25th Sess., at 1, U.N. Doc. S/INF/25 (1970); S.C. Res. 283, U.N. SCOR, 25th Sess., at 2, U.N. Doc. S/INF/25 (1970) (reaffirming earlier resolution).

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

100. See *Namibia Case*, 1971 I.C.J. at 21-22.

tion of validity, the Court held that the Council's "general practice" was to treat an abstention as a concurring vote, and thus that the resolution was validly adopted.¹⁰¹ The Court also rejected arguments that the resolution was invalid because South Africa was not invited to participate in the debate and because "parties" to the "dispute" did not abstain from voting.¹⁰²

Turning to the merits, the Court described South Africa's renewed argument that it was not bound by the Mandate after World War II¹⁰³ and South Africa's alternative argument that it had a continued right to administer the Territory because it had conquered Namibia, had acquired sovereignty over the Territory by virtue of lengthy occupation, had in fact pursued the "sacred trust" established by the Mandate, and had benefited the inhabitants of the Territory.¹⁰⁴ The Court then noted that the General Assembly and Security Council had issued resolutions negating all of these arguments.¹⁰⁵ The Court observed that both France and South Africa had argued that the General Assembly had acted *ultra vires* in adopting its resolution purporting to terminate the Mandate for Namibia and declaring South Africa's presence illegal.¹⁰⁶ This argument, the Court noted, also called into question the validity of related Security Council resolutions.¹⁰⁷ Presented with its own *Marbury v. Madison*, the Court decided to consider the validity of the resolutions stating equivocally:

Undoubtedly, the Court does not possess powers of judicial review or appeal in respect of the decisions taken by the United Nations organs concerned. The question of the validity or conformity with the Charter of General Assembly resolution 2145 (XXI) or of related Security Council resolutions does not form the subject of its request for advisory opinion. However, in the exercise of its judicial function and since objections have been advanced *the Court, in the course of its reasoning, will consider these objections* before determining any legal consequences arising from those resolutions.¹⁰⁸

The Court went on to pass explicitly on the validity of the acts in question, holding that the General Assembly did in fact have the

101. *Id.* at 22.

102. *Id.* at 22–23. The Court also denied South Africa's request for the appointment of a Judge ad hoc. *Id.* at 23–27.

103. *Id.* at 35–43; see *supra* text accompanying note 95.

104. *Id.* at 43–45.

105. *Id.* at 45.

106. *Id.*

107. See *id.*

108. *Id.* (emphasis added).

power to terminate the Mandate¹⁰⁹ and did not overstep the boundaries of its authority by declaring South Africa's presence illegal.¹¹⁰ The Court also held that even though the Assembly has no power to make binding decisions,¹¹¹ the Assembly could adopt resolutions that "make determinations or have operative design," such as the resolution declaring that South Africa had no residual right to administer Namibia by virtue of conquest or long occupation.¹¹² Finally, the Court held that the Security Council resolutions endorsing the Assembly's actions were in accordance with the Charter.¹¹³ Concluding that South Africa's conduct did not comply with the Council's resolutions, the Court noted that other states were also bound by the Council's resolutions and were therefore required to abstain from recognizing South Africa's occupation of Namibia.¹¹⁴ In rendering this decision, the Court plainly considered the validity of the acts of other U.N. organs—a practice inconsistent with the view that the Court has no power of review.

Several concurring Judges argued more explicitly than the majority that the Court not only had the right, but also the responsibility, to review the validity of the acts in question. Judge Petren, for example, declared that "[s]o long as the validity of the resolutions upon which Resolution 276 (1970) was based had not been established, it was clearly impossible for the Court to pronounce on [its] legal consequences," and noted that it seemed to him the majority should have expressed itself on that point more precisely and firmly.¹¹⁵ Similarly, Judge Onyeama argued that the Court could not determine the legal consequences of the resolutions without first passing on their validity and that the Court, in fact, had a duty to do so unless otherwise instructed in the request for an advisory opinion.¹¹⁶ Judge Dillard, too, argued that the Court had no choice but to inquire into the validity of the resolutions once asked to pass on their legal consequences. He underscored his point with surprising bluntness:

[I]t may not be presumptuous to suggest that as a political matter it is not in the long-range interest of the United Nations to appear to be reluctant to have its resolutions stand the test of legal validity when it calls upon a court to determine issues to which this validity is related.¹¹⁷

109. *Id.* at 45–49.

110. *Id.* at 49–50.

111. See U.N. CHARTER art. 10.

112. *Namibia Case*, 1971 I.C.J. at 50.

113. *Id.* at 51–53.

114. *Id.* at 54–58.

115. *Id.* at 131 (Petren, J., concurring).

116. *Id.* at 143–45 (Onyeama, J., concurring).

117. *Id.* at 151–52 (Dillard, J., concurring).

Judge de Castro, concurring, observed that "[t]he Court, as a legal organ, cannot co-operate with a resolution which is clearly void, contrary to the rules of the Charter, or contrary to the principles of law."¹¹⁸ Finally, Judge Fitzmaurice, dissenting, directly attacked the validity of the Council and Assembly resolutions as beyond the competence of those bodies,¹¹⁹ asserting that the Court had the right to "examine the assumptions" underlying any request for an advisory opinion.¹²⁰

At least one concurring judge, however, expressed opposition to a doctrine of judicial review. Judge Nervo, writing separately, asserted that "the Court will have to assume the validity" of the actions of the Council and Assembly and that "[t]he Court should not assume powers of judicial review of the action of principal organs of the United Nations without specific request to that effect."¹²¹ Yet even this statement left room for judicial review at the request of another organ.

This chorus of support for judicial review in the *Namibia Case* may have had only limited precedential value. Like the *Certain Expenses Case*, *Namibia* was an advisory opinion with little or no binding effect¹²²—though there is some authority to suggest an advisory opinion may bind the U.N. organ in question.¹²³ The *Namibia* opinion reflects a common-sense view that once the Court is asked about the effect of a U.N. organ's resolution, it cannot avoid considering whether the resolution is valid in the first place. Indeed, one Judge stressed that when the Security Council debated whether to submit the issue to the Court, only five Council members expressed the view that the Court should not pass on the validity of the resolutions, while ten members either took the opposite view or took no position at all.¹²⁴

The *Namibia* advisory opinion did not necessarily imply that the Court would exercise judicial review in a contentious case. Contentious cases are distinguishable from advisory opinions because the requested inquiry into a U.N. organ in a contentious case comes from an individual state rather than from the organ itself. In advisory cases,

118. *Id.* at 180 (de Castro, J., concurring); see also *id.* at 180 n.2 (quoting *Certain Expenses Case*, 1962 I.C.J. 216, at 223 (Morelli, J., concurring)).

119. *Id.* at 278–95 (Fitzmaurice, J., dissenting).

120. *Id.* at 301–04.

121. *Id.* at 105 (Nervo, J., concurring). Judge Ammoun, also writing separately, did not explicitly address the question of judicial review. See *id.* at 67–100 (Ammoun, J., concurring).

122. Competence of the General Assembly for the Admission of a State to the United Nations, 1950 I.C.J. 4, 78 (Advisory Opinion of Mar. 3).

123. See FITZMAURICE, *supra* note 86, at 123.

124. *Namibia Case*, 1971 I.C.J. at 151. (Dillard, J., concurring). One wonders whether the Court would have considered the validity of the resolutions had it been expressly instructed not to do so. The *Certain Expenses* opinion, which exercised a power of review notwithstanding the Assembly's apparent opposition, suggests that the Court might have considered the validity of the resolutions anyway.

the U.N. organ understands it might be second-guessed when it submits a question to the Court for resolution. In contentious cases, by contrast, the organ's acts are challenged without its consent. This difference was a possible basis for limiting the scope of the *Namibia* opinion—at least until *Libya v. United States*.¹²⁵

C. *Libya v. United States*

On December 21, 1988, a bomb planted on Pan Am flight 103 exploded over Lockerbie, Scotland, killing all 258 people on board and at least fifteen people on the ground.¹²⁶ Subsequent evidence linked two Libyan intelligence agents to the sabotage. In late 1991, the United States and the United Kingdom indicted the suspects and requested their extradition.¹²⁷ Libya refused, asserting it was investigating the charges and, if necessary, would try its nationals itself.¹²⁸ Libya also asked the United States and the United Kingdom for evidence to assist in the Libyan investigation.¹²⁹

On January 21, 1992, the Security Council unanimously adopted resolution 731, which criticized Libya for failing to respond effectively to the extradition requests and "urge[d]" Libya to "provide a full and effective response to those requests."¹³⁰ In response, Libya informed the Secretary-General on February 27 that it had "no objection in principle" to handing over the two subjects, but would do so only if the Secretary-General established a committee of impartial judges to inquire into the charges against the two suspects, and only if the suspects were extradited to a "third party."¹³¹ On March 2, Libya further explained its failure to extradite by noting that "Libyan law which [had] been in force for more than 30 years does not permit the

125. *Libya v. United States*, 1992 I.C.J. 114.

126. See Edward Cody, *Pan Am Jet Crashes in Scotland, Killing at Least 273*, WASH. POST, Dec. 22, 1988, at A1.

127. See Joint Declaration of the U.S. and U.K., Nov. 27, 1991, reprinted in 31 I.L.M. 723 (1992) (demanding extradition).

128. See Letter from Ali Ahmed Elhoudeiri, Libyan Permanent Rep. to the U.N., to the Secretary-General, (Jan. 8, 1992) reprinted in 31 I.L.M. 725, 726 (1992).

129. *Id.* at 726.

130. S.C. Res. 731, *supra* note 6, at 2. Interestingly, all parties to the dispute, even Libya, seem to have assumed that the resolution amounts to an order that Libya should extradite the fugitives. Yet the resolution merely "urges" Libya to provide a "full and effective" response; it does not "demand" or "call on" Libya to "extradite" the two men. *Cf.* S.C. Res. 660, *supra* note 1, at 19 ("[d]emand[ing]" that Iraq withdraw from Kuwait). The stronger language of Security Council Resolution 748, which imposed economic sanctions on Libya, may have made this point moot. But even Resolution 748 is ambiguous. It "[d]ecides" that Libya "must now comply without any further delay with paragraph 3 of Resolution 731," which itself merely urged Libya to provide an "effective response." See S.C. Res. 748, *supra* note 2, at 2.

131. Letter from Ibrahim M. Bishari, Secretary of the People's Comm. for Foreign Liason and Int'l Cooperation, to the Secretary-General, (Feb. 27, 1992), reprinted in 31 I.L.M. 737, 737-38 (1992).

extradition of Libyan nationals."¹³² Libya argued that such a law "cannot be altered by a decision of the Security Council, whether a recommendation or a binding resolution."¹³³

The next day, March 3, Libya filed suit against the United States in the World Court¹³⁴ seeking a judgment that U.S. efforts to obtain custody of the fugitives violated the Montreal Convention on aircraft sabotage, which provides that a requested state may choose either to extradite a fugitive charged with sabotage or submit that person to its own authorities for prosecution.¹³⁵ Libya also sought an order "indicating provisional measures"—that is, an order temporarily restraining the United States from taking any further steps against Libya, such as the imposition of economic sanctions.¹³⁶ On March 31, while Libya's suit was pending, the Security Council adopted Resolution 748, which imposed sanctions on Libya effective April 15, including

132. Letter from Ibrahim M. Bishari, Secretary of the People's Comm. for Foreign Liaison and Int'l Cooperation, to the Secretary-General, (Mar. 2, 1992), *reprinted in* 31 I.L.M. 739, 740 (1992).

133. *Id.* The Libyan law prohibiting extradition of Libyan nationals appears to be statutory, not constitutional as in some civil-law states. The Libyan "Constitutional Proclamation" of 1969 prohibits the extradition of "political refugees," but not Libyan nationals. Constitutional Proclamation of the Revolutionary Command Council, Dec. 11, 1969, art. 11, *reprinted in* 9 ALBERT P. BLAUSTEIN & GIBERT H. FLANZ, *CONSTITUTIONS OF THE COUNTRIES OF THE WORLD* 3 (1974).

Moreover, the 1969 Declaration may have been at least partly supplanted by Islamic law. *See id.* at 2 (1981 supplement) (noting that Col. Qaddafi has since declared that the "Holy Kuran is the constitution" of Libya); MUAMMAR AL-QADDAFI, *THE GREEN BOOK* 32 (1980) (asserting that "law . . . is an eternal human heritage" and "drafting of a constitution . . . [on law] is farcical"). Traditional Islamic law has little to say about extradition of nationals. *See generally* *THE ISLAMIC CRIMINAL JUSTICE SYSTEM* (M. Cherif Bassiouni ed., 1982). For a recent discussion of Libyan law, see HELEN CHAPIN METZ, *LIBYA: A COUNTRY STUDY* 192-98, 212-16 (1989).

134. *See Libya v. United States*, 1992 I.C.J. 114. Libya filed a similar suit against the United Kingdom. *See* Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (*Libya v. U.K.*), 1992 I.C.J. 3 (Provisional Measures Order of Apr. 14).

135. *See* Convention for the Suppression of Unlawful Acts Against the Safety of Civilian Aircraft, Sept. 23, 1971, art. 7, 24 U.S.T. 564, 571, 974 U.N.T.S. 177, 182 [hereinafter "the Montreal Convention"].

Libya also argued that the U.S. position violated article 8 of the Montreal Convention, which permits the requested state to refuse extradition if there is no relevant bilateral extradition treaty in force and if the requested state's law conditions extradition on the existence of an extradition treaty. *See Libya v. United States*, 1992 I.C.J. at 116. It is not entirely clear from the record, however, that Libyan law does condition extradition on the existence of an extradition treaty.

Libya further argued that the United States had violated article 11 of the Montreal Convention, which calls on states party to provide legal assistance to states prosecuting saboteurs. In addition, Libya argued that the United States had violated article 5, which authorizes states to establish jurisdiction over saboteurs, by interfering with Libya's ability to prosecute the offenders. *Id.* at 116-17.

The Court declined to rule on any of Libya's claims under the Montreal Convention on the ground that they were superseded by the Security Council resolutions calling for extradition of the two suspects. *See id.* at 126-27.

136. *Id.* at 118-19.

the cessation of all air travel to Libya and the withdrawal of diplomatic personnel.¹³⁷

On April 14, 1992, the World Court handed down its decision on Libya's request for preliminary relief, rejecting the application by a vote of eleven to five.¹³⁸ The majority declined to rule on the U.S. contention that the Court lacked jurisdiction because the Montreal Convention called for a six-month delay before submission of a dispute to the Court,¹³⁹ concluding it could rule on the application for the indication of provisional measures without deciding whether it had jurisdiction to hear the merits.¹⁴⁰ The majority then held that Libya was not entitled to provisional relief. Stressing article 103 of the U.N. Charter, which provides that obligations under the Charter prevail over treaty obligations such as those in the Montreal Convention, the Court held that "[w]hatever the situation previous to the adoption of [Security Council Resolution 748], the rights claimed by Libya under the Montreal Convention cannot now be regarded as appropriate for protection by the indication of provisional measures."¹⁴¹ The Court

137. See S.C. Res. 748, *supra* note 2.

138. *Libya v. United States*, 1992 I.C.J. at 114.

139. *Id.* at 122 (citing art. 14, para. 1 of the Montreal Convention).

140. *Libya v. United States*, 1992 I.C.J. at 127.

In fact, the United States had a fairly strong argument that Libya's suit was premature and jurisdiction was lacking. Article 14(1) of the Montreal Convention provides:

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

The United States argued that it had not "refused to arbitrate" within the meaning of the clause and that the six-month period was a waiting period that had not yet expired. *Libya v. United States*, 1992 I.C.J. at 122. Libya asserted that it had requested arbitration and that the United States had rejected its request. It is not clear from the opinion whether Libya construed the six-month period as contemplating that a suit be initiated *no later than* six months after the request for arbitration. *Id.* at 121.

The plain meaning of the term "within" would appear to support such an interpretation: "within six months" would normally mean "during the next six months." But the context of the provision may support the U.S. view. Its purpose may have been to require the parties to spend a minimum of six months attempting to negotiate a solution—a purpose in accordance with the United Nations's preference for peaceful resolution of disputes. See generally U.N. CHARTER arts. 33–38 (endorsing pacific settlement of disputes). A requirement that suit be filed no later than six months after the initial request for arbitration would not encourage a negotiated settlement.

The Court may have been moved by Libya's suggestion that the "urgency" of the matter conferred jurisdiction. *Libya v. United States*, 1992 I.C.J. at 121. The six-month waiting period invoked by the United States struck Acting President Oda, and perhaps other Judges, as "too legalistic." *Id.* at 129 (Oda, J., concurring). As Judge Oda put it, the Court's jurisprudence permits it to take jurisdiction over an application for provisional relief if "the Court appears *prima facie* to possess jurisdiction." *Id.*

141. *Libya v. United States*, 1992 I.C.J. at 126–27.

added that the indication of provisional measures would "be likely to impair" U.S. rights under the Council resolution.¹⁴²

The majority opinion thus relied on the Council resolution without addressing whether it might be *ultra vires*. Nonetheless, the majority left room for Libya to argue in future pleadings that the Council had violated a fundamental principle of general international law, rather than a "mere" treaty like the Montreal Convention. Article 103, relied on so heavily by the majority, provides that Charter obligations prevail over "other international agreements"; it does not provide that Charter obligations prevail over *jus cogens* and other forms of customary international law.¹⁴³

The brief majority opinion reveals less about the Court's thinking than the separate opinions of individual Judges. Several of the Judges were satisfied that the Security Council resolutions were controlling; these Judges apparently saw no need to inquire into the validity of the Council's acts. Judges Evensen, Tarassov, Guillaume and Aguilar Mawdsley signed an opinion that endorsed the reasoning of the majority opinion without exploring the Charter basis for the Council's resolutions. Acting President Oda, too, asserted in his concurring opinion that the Security Council resolution was dispositive.¹⁴⁴ But even he hinted that the Court might have to exercise a power of judicial review if a state argued that the Council had deprived it of "sovereign rights" under general international law.¹⁴⁵

Several Judges, moreover, felt obliged to clarify their belief that the rejection of Libya's application for provisional relief did not imply that the Court was "abdicate[ing]" its role as the chief judicial organ of the United Nations.¹⁴⁶ Judge Lachs accepted the majority's reasoning, but called for cooperation between the Court and the Council, noting that these are the only two U.N. organs with authority to issue binding decisions.¹⁴⁷ Judge Ni, concurring in the result, accepted the U.S. argument that the Court lacked jurisdiction until the expiration of the six-month period established in the Montreal Convention.¹⁴⁸ In *dictum*, however, he argued that once jurisdiction was established, the Court should not shrink from considering the case simply because the matter was also pending before the Security Council.¹⁴⁹

142. *Id.* at 127.

143. See Thomas M. Franck, *The "Powers of Appreciation": Who Is the Ultimate Guardian of UN Legality?*, 86 AM. J. INT'L L. 519, 521-22 (1992).

144. *Libya v. United States*, 1992 I.C.J. at 129-31 (Oda, J., concurring).

145. *Id.* at 131 (Oda, J., concurring); see Franck, *supra* note 143, at 521-22.

146. *Libya v. United States*, 1992 I.C.J. at 138-39 (Lachs, J., concurring).

147. *Id.* at 139.

148. *Id.* at 134-35 (Ni, J., concurring).

149. *Id.* at 132-34.

A number of other Judges believed the Court should at least consider whether the Council's acts were valid. Citing the *Namibia Case*, Judge Shahabuddeen concluded that the Council resolution at issue was entitled to a presumption of validity.¹⁵⁰ Relying on this presumption, and mindful of the preliminary procedural posture of the case, he concurred in the majority opinion but clearly implied that the Court should have some role in enforcing the limits of Security Council power:

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?¹⁵¹

Judge Bedjaoui expressed similar reservations, also conceding that the Council resolution imposing sanctions on Libya was entitled to a presumption of validity, particularly because the case had not yet reached the merits phase.¹⁵² Judge Bedjaoui added, however, that even at the preliminary stage of the suit the resolution should not be considered *prima facie* binding if its "object" or "effect" was "to prevent the exercise, by the Court itself, of the judicial function."¹⁵³ Judge Ajibola staked out a similar position, conceding that the resolution was *prima facie* valid but reserving fuller consideration of its validity for the merits phase.¹⁵⁴ Judge Weeramantry echoed this view, noting that the framers clearly intended the Security Council to operate in accordance with the Charter.¹⁵⁵ He seemed less certain, however, that the Court should play any role in reviewing Council acts. Citing the *Namibia Case*, he asserted that the Court "is not vested with the review or appellate jurisdiction often given to the highest courts within a domestic framework,"¹⁵⁶ but also added that "[t]he interpretation of

150. *Id.* at 140 (Shahabuddeen, J., concurring) (citing the *Namibia Case*, 1971 I.C.J. at 22).

151. *Id.* at 142.

152. *Id.* at 156 (Bedjaoui, J., dissenting).

153. *Id.* at 156 n.1. Judge Bedjaoui dissented not because he thought the Council resolution was *prima facie* invalid—though he clearly had doubts on that score—but because he thought the Court could indicate provisional measures other than those requested by Libya. *Id.* at 158. In particular, he argued that the Court could order both parties to refrain from any action that might extend or aggravate the dispute. *Id.*

154. *Id.* at 192–93, 196 (Ajibola, J., dissenting). Like Judge Bedjaoui, Judge Ajibola dissented because he believed the Court could nonetheless order the parties to refrain from aggravating the dispute. *Id.* at 198.

155. *Id.* at 174–75 (Weeramantry, J., dissenting).

156. *Id.* at 165.

Charter provisions is primarily a matter of law [I]n the international arena, there is no higher body charged with judicial functions and with the determination of questions of interpretation and application of international law."¹⁵⁷

Only Judge El-Kosheri, the ad hoc Judge named by Libya, went so far as to declare invalid the Security Council's resolution imposing sanctions. First, he asserted that states had the right to disobey Council resolutions lacking a basis in the Charter, since article 25 provided that states agree to obey Council decisions "in accordance with the present Charter."¹⁵⁸ Next, Judge El-Kosheri argued that the Court had the power to invalidate Council acts inconsistent with the Charter. Citing a number of the opinions in the *Namibia Case*, as well as Judge Morelli's argument for judicial review in the *Certain Expenses Case* for support,¹⁵⁹ Judge El-Kosheri concluded that the Council resolution imposing sanctions was *ultra vires* because it violated Libya's rights of "sovereignty" under the Charter.¹⁶⁰ He relied in particular on article 1(2) and article 55 of the Charter, which speak of "equal rights and self-determination" of peoples, as well as article 2(7), which forbids the United Nations to "intervene in matters which are essentially within the domestic jurisdiction of any state"¹⁶¹ Judge El-Kosheri added that he would have indicated two provisional measures: that neither party aggravate the dispute, and that pending a final decision of the Court, the fugitives be transferred to a third state "that could ultimately provide a mutually agreed and appropriate forum for their trial."¹⁶²

In sum, the *Libya* decision marked the first time a significant portion of the World Court intimated it could exercise a power of judicial review in contentious cases. This development is important not simply because a contentious case has arguably greater precedential value than an advisory case; it also suggests that the Court does not think judicial review should be exercised only when implicitly or explicitly endorsed by a U.N. organ seeking an advisory opinion on the effect of that organ's acts. The decision implies that the international community is moving toward a broader acceptance of judicial review than the framers of the U.N. Charter perhaps envisioned—that subsequent practice under the Charter may have altered its interpretation. Such a shift is permissible under treaty law, at least if the world community

157. *Id.* at 166.

158. *Id.* at 206–07 (El-Kosheri, J., dissenting).

159. *Id.* at 207–10; see *supra* text accompanying notes 90–93.

160. *Libya v. United States*, 1992 I.C.J. at 210–12.

161. U.N. CHARTER art. 2, para. 7; see *Libya v. United States*, 1992 I.C.J. at 211.

162. *Libya v. United States*, 1992 I.C.J. at 217.

acquiesces,¹⁶³ and this aspect of the *Libya* decision has not been widely rejected by states as of yet.¹⁶⁴

But even if the *Libya* Court has impliedly recognized a power of judicial review, it has not adopted a very stringent standard. Many of the opinions in *Libya v. United States* reaffirm the "presumption of validity" established by the *Certain Expenses* and *Namibia Cases*, a very deferential standard of review. More importantly, the *Libya* Court did not go so far as to endorse a doctrine of judicial supremacy. While it suggested it might review the validity of the acts of other organs in a particular case, it did not hold that its interpretation of the Charter would be final and binding on all states and all U.N. organs in the future. The next Part explores the appropriate standard for review and the effect (if any) of invalidation of a Council or Assembly resolution, with reference to U.S. constitutional practice. First, however, that Part considers whether the Court should exercise any power of judicial review at all, again with reference to the United States, a state with a well-established practice of judicial review.

III. THE LEAST DANGEROUS U.N. ORGAN?

In the United States, judicial review is considered suspect for many reasons. Judges are unelected, unaccountable, and uncontrollable. The legislative and executive branches are more directly responsible to the people, and their decisions have a democratic imprimatur lacking in court decisions.¹⁶⁵ Decisions of legislators and executive branch officials can be overturned through the political process; decisions of constitutional courts are practically impossible to overturn, protected from attack except by the extraordinarily difficult process of constitutional amendment.¹⁶⁶ Judicial efforts to interpret the text of a constitution, even if sincere, are likely to fail since most constitutional questions are not as easily resolved as early American advocates of judicial review

163. See Vienna Convention on the Law of Treaties, May 23, 1969, art. 31, para. 3(b), 1155 U.N.T.S. 331, 340.

164. World reaction has focused more on the U.N. sanctions than on the Court's decision itself. See, e.g., R.C. Longworth, *A New World View: Bush's Status Abroad Has Suffered in a Year*, CHI. TRIB., June 21, 1992, at C1 (noting that Arab states "chafe" at the Libya sanctions).

165. See Jan G. Deutsch, *Neutrality, Legitimacy, and the Supreme Court: Some Intersections Between Law and Political Science*, 20 STAN. L. REV. 169, 185-87 (1968).

166. Cf. U.S. CONST. art. V (establishing amendment process). The permanence of constitutional decisions has persuaded the Supreme Court that the doctrine of *stare decisis* should be applied less stringently in constitutional cases. See *Rutan v. Republican Party of Ill.*, 497 U.S. 62, 78 (1990) (Scalia, J., dissenting) (citing *Glidden Co. v. Zdanok*, 370 U.S. 530, 543 (1962) (Harlan, J., plurality opinion)). But cf. *Planned Parenthood of S.E. Pa. v. Casey*, 112 S. Ct. 2791, 2808-16 (1992) (emphasizing *stare decisis* while reaffirming *Roe v. Wade*, 410 U.S. 113 (1973)).

believed they would be.¹⁶⁷ Legal reasoning is often a flimsy disguise for the politics of power; force and will, not judgment, frequently characterize constitutional decisionmaking.¹⁶⁸ Judicial review should, at most, merely ensure that statutes are not adopted by an unrepresentative democratic process.¹⁶⁹

Defenders of judicial review in the United States have ready responses to these criticisms. In their view, the assertedly undemocratic character of courts is exaggerated: judges are appointed and confirmed by elected officials, and the "federal judiciary may be more capable of adapting to changes in the political consensus than the notion of an independent judiciary would immediately suggest."¹⁷⁰ The decisions of judges also derive legitimacy from the democratic character of the document they interpret, the Constitution, which was adopted by the people.¹⁷¹ If the undemocratic, conniving judge is an inaccurate caricature, so too is the democratic, noble legislator: the Congress responds only imperfectly to the people's will, as Congress's consistently low approval ratings suggest.¹⁷² Even the permanence of constitutional decisions is overstated; the Constitution has been amended four times to overrule Supreme Court decisions,¹⁷³ and the Court itself has overruled its own decisions on a number of occasions.¹⁷⁴ Judicial review,

167. Compare JOHN HART ELY, *DEMOCRACY AND DISTRUST* 11–41 (discussing the "Impossibility of a Clause-Bound Interpretivism") (1980) with THE FEDERALIST No. 78, at 398 (Alexander Hamilton) (Max Beloff Blackwell ed., 1987) (presuming there will be an "irreconcilable variance" between the Constitution and unconstitutional statutes).

168. Cf. THE FEDERALIST No. 78, *supra* note 167, at 399 (arguing that judges should adhere to "judgment," not "will").

169. See, e.g., ELY, *supra* note 167, at 181 (arguing that judicial review "can appropriately concern itself only with questions of participation, and not with the substantive merits of the political choice under attack").

170. TRIBE, *supra* note 29, §§ 3–6, at 64. Pointing to the political nature of the appointment process and to the ability to override judicial interpretation by constitutional amendment, Tribe says the "[c]ourt's power to move beyond a current consensus is circumscribed by its institutional incapacity to lead where others are reluctant to follow." *Id.* Moreover, the power of constitutional interpretation is not vested in the judiciary alone; it is exercised by all three branches of government. See *id.* at 66.

171. Cf. THE FEDERALIST No. 78, *supra* note 167, at 398 (arguing that in cases of conflict between "the will of the legislature" expressed in a statute and the "that of the people" declared in the Constitution, "the judges ought to be governed by the latter").

172. See, e.g., Robert Shogan, *GOP Scrambles to Shore up Sinking Support*, L.A. TIMES, Aug. 19, 1992, at A1 (describing "public disgust" with Congress); Lou Cannon, *Washington State Activists See Approval of Sweeping Initiative on Term Limits*, WASH. POST, Nov. 3, 1991, at A4 (describing popular measure to limit the terms of members of Congress).

173. See U.S. CONST. amend. XI (restricting the application of *Chisolm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793), to forbid certain suits against states in federal court); *id.* amend. XIV, § 1 (overruling *Scott v. Sanford*, 60 U.S. (19 How.) 393 (1857)); *id.* amend. XVI (overruling *Pollock v. Farmers' Loan and Trust Co.*, 157 U.S. 429 (1895), which invalidated unapportioned federal income tax); *id.* amend. XXVI (overruling *Oregon v. Mitchell*, 400 U.S. 112 (1970), which held that Congress could not set the minimum voting age in state elections).

174. See, e.g., *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985) (overruling *Nat'l League of Cities v. Usery*, 426 U.S. 833 (1976)); *Brown v. Board of Ed.*, 347 U.S. 497 (1954) (overruling *Plessy v. Ferguson*, 163 U.S. 537 (1896)).

moreover, serves an important "checking" function: it polices the democratic process and protects minorities from invidious discrimination.¹⁷⁵ It also serves an important "legitimizing" function: it "imprint[s] governmental action with the stamp of legitimacy"¹⁷⁶—the stamp of constitutional approval. In addition, it may provide "cues" to the other branches of government, which must routinely assess the constitutionality of their own acts.¹⁷⁷

The traditional arguments for and against judicial review take on a different shape in the international sphere. This Part evaluates the arguments most relevant to the prospect of judicial review by the World Court—the anti-majoritarian problem and related questions of institutional legitimacy, and special problems posed by interpretation of the U.N. Charter.

A. *The Anti-Majoritarian Problem*

The anti-majoritarian problem—that is, the legitimacy of unelected judges—seems, on balance, less pronounced in the international system than in the U.S. legal system, though it is still a significant concern. Unlike U.S. Supreme Court justices, World Court judges are indeed elected, albeit by the Security Council and General Assembly rather than by popular ballot.¹⁷⁸ The election process can be intensely political: candidates have been known "to campaign openly in the United Nations' halls"¹⁷⁹

At first blush, this process may seem no more representative than the quasi-democratic process by which the U.S. Senate confirms nominees to the U.S. Supreme Court. The Senate process, too, can be openly political,¹⁸⁰ but while the Senate confirmation process is clearly less democratic than the popular election of representatives to Con-

175. See *United States v. Carolene Products*, 304 U.S. 144, 152–53 n.4 (1938).

176. BLACK, *supra* note 29, at 223.

177. See PHILIP BOBBITT, *CONSTITUTIONAL FATE* 192–95 (1982). Professor Bobbitt also suggests that constitutional review serves an "expressive" function, giving "concrete expression to the unarticulated values of a diverse nation." *Id.* at 211.

178. See Statute of the International Court of Justice, June 26, 1945, art. 2, 59 Stat. 1055, 1055, 3 Bevens 1179, 1179 (providing generally for election of World Court judges); *id.* art. 4, para. 1, 59 Stat. at 1055, 3 Bevens at 1179–80 (providing for election by Council and Assembly); *id.* arts. 5–12, 59 Stat. at 1055–56, 3 Bevens at 1180–81 (establishing procedures for nomination and election of judges).

179. THOMAS M. FRANCK, *JUDGING THE WORLD COURT* 7 (1986); see also Abraham D. Sofaer, *Statement to the Senate Foreign Relations Committee*, Dec. 4, 1985, reprinted in BARRY CARTER & PHILLIP TRIMBLE, *INTERNATIONAL LAW* 299 (1991) (mentioning "electioneering" by candidates for judgeships).

180. Cf. LAURENCE TRIBE, *GOD SAVE THIS HONORABLE COURT* 93–105 (1985) (arguing that Senators should not hesitate to vote against a Supreme Court nominee based on the nominee's judicial philosophy). Indeed, politicization of the appointments process, sometimes criticized as a relatively new practice, was actually the norm in the early days of the Republic. See *id.* at 77–92 (discussing the "myth of the spineless Senate").

gress, the World Court selection process is clearly *more* democratic than the selection of members in the Security Council, the law-making body of the United Nations. Five of the fifteen members of the Security Council are permanent and possess veto power over all Security Council decisions.¹⁸¹ The Charter does not, however, guarantee any of the five permanent members of the Security Council representation on the World Court.¹⁸² No state is guaranteed a seat, and, unlike the justices of the U.S. Supreme Court who enjoy life tenure, each World Court judge must step down or run for re-election every nine years.¹⁸³ If the Court exercises judicial review in the future, it will be at least partly insulated from charges that its constitutional rulings will be carved in stone; the authors of unpopular opinions can be removed after their terms expire and their decision re-examined. Nor is "court-packing" by any one state a possibility since the Court's statute provides that no two judges may be nationals of the same state.¹⁸⁴ If the benchmark of judicial legitimacy is the legitimacy of the selection process, the World Court has at least as strong a claim to legitimacy as the U.S. Supreme Court.

To date, the chief criticism of the Court is not that it is an anti-majoritarian institution wielding too much power, but instead that it is a weak, idle tribunal unable to enforce its own judgments.¹⁸⁵ This

181. See U.N. CHARTER art. 23, para. 1 (providing for permanent members); *id.* art. 27, para. 3 (requiring "concurring vote" of all five permanent members on substantive questions). With the renaissance of the Security Council, the primacy of the Permanent Five is inevitably leading to calls for reform. See Franck, *supra* note 143, at 523 (predicting that increased activity by the Council will increase pressure for reform).

182. FRANCK, *supra* note 179, at 7 (noting that the Charter does not guarantee permanent members of the Council a seat on the Court). It is true that, in practice, each of the five permanent members of the Security Council has almost always been represented on the Court, the exception being China shortly after World War II. *Id.* at 7. But these states also account for a sizeable portion of the world's population, and in any event, their presence on the Court is never guaranteed. With the change in governance in Moscow, the Soviet seat is now held by Russia.

The five permanent members of the Security Council now are China, France, Russia, the United Kingdom, and the United States. Cf. U.N. CHARTER art. 23, para. 1 (naming the Soviet Union, not Russia, as one of the five).

183. See Statute of the International Court of Justice, June 26, 1945, art. 13, para. 1, 59 Stat. 1055, 1056, 3 Bevens 1179, 1181-82.

184. See *id.* art. 3, para. 1 at 1055, 3 Bevens at 1179. It is always possible, of course, that a cabal of states would team up to pack the Court with like-minded judges from countries of similar political orientation, but this possibility is greatly dampened by the diverse character of the General Assembly and the rotating membership of the Security Council. See U.N. CHARTER art. 9 (providing that all Members of the United Nations be represented in the Assembly); *id.* art. 23, para. 1 (providing for election of non-permanent members of the Council by the Assembly); Statute of the International Court of Justice, June 26, 1945, art. 4, para. 1, 59 Stat. 1055, 1056, 3 Bevens 1179, 1179-80 (providing for election of Court members by the Assembly and the Council).

185. See Jonathan I. Charney, *Disputes Implicating the Institutional Credibility of the Court: Problems of Non-Appearance, Non-Participation, and Non-Performance*, in THE INTERNATIONAL COURT OF JUSTICE AT A CROSSROADS 288 (Lori Fisler Damrosch ed., 1987) (arguing that in

perception, however, may be changing; more states are accepting the Court's compulsory jurisdiction,¹⁸⁶ and the Court's docket has grown in recent years.¹⁸⁷ And it may change further if the Court asserts a power of judicial review more aggressively than it has in the past. The Court's greatest challenge is simply to get states to take it more seriously—to accept that the Court has enough authority to interpret the Charter and challenge the other organs of the United Nations.

To be sure, the Court has its partisans,¹⁸⁸ but it also has more than its share of critics,¹⁸⁹ many of whom will probably resist any expansion of its power. Yet the Court may suffer most from the indifference and ignorance of the international community. Most people (including politicians) are unaccustomed to the idea of the Court playing a significant role in international politics. Of course, the same might have been said of the Security Council prior to the invasion of Kuwait. The Council's improved political standing suggests there is hope for the Court as well.

In any event, until the Court attains greater stature than it currently enjoys, it is hard to imagine that it could fulfill the same "expressive" function sometimes ascribed to the U.S. Supreme Court—that of inspiring individual constituents with a vision of the Constitution.¹⁹⁰ The prestige of the U.S. Supreme Court is so great that holdings like *Brown v. Board of Education*¹⁹¹ and *Miranda v. Arizona*¹⁹² have become part of U.S. popular culture.¹⁹³ The World Court, by contrast, has

order to foster respect in the world community and improve its institutional viability, the World Court should build a solid record of success in noncontroversial matters); see also Mary Helen O'Connell, *The Prospects for Enforcing Monetary Judgments of the International Court of Justice*, 30 VA. J. INT'L L. 891 (1990); cf. Statement of the U.S. Dept. of State, Jan. 18, 1985, reprinted in CARTER & TRIMBLE, *supra* note 179, at 297 (announcing that the United States "has decided not to participate in further proceedings" in Nicaragua's suit relating to U.S. support for the contras); United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran), 1980 I.C.J. 3 (Judgment of May 24) (ordering Iran to release its hostages).

186. See, e.g., Paul Lewis, *World Court Plan Meets Difficulties*, N.Y. TIMES, June 24, 1990, at A9 (reporting that eight countries had recently decided to accept the World Court's compulsory jurisdiction).

187. See Keith Highet, *The Peace Palace Heats Up: The World Court in Business Again?*, 85 AM. J. INT'L L. 646, 646 (1991) (noting that the "docket is crammed").

188. See, e.g., Franck, *supra* note 143, at 523 (stating that it is "reassuring" that the International Court of Justice has "marked its role as the ultimate arbiter of institutional legitimacy"); Thomas M. Franck, *Let's Not Abandon the World Court*, N.Y. TIMES, July 17, 1986, at A23 (arguing that the Court's decisions have, by and large, been fair).

189. See, e.g., Sofaer, *supra* note 179, at 298–99 (noting that only a minority of states accept the Court's compulsory jurisdiction, and that a number of judges come from states that do not accept the Court's compulsory jurisdiction).

190. See BOBBITT, *supra* note 177, at 218–19 (describing the "expressive" function of the U.S. Supreme Court).

191. 347 U.S. 483 (1954).

192. 384 U.S. 436 (1966).

193. See Eric Rieder, *The Right of Self-Representation in the Capital Case*, 85 COLUM. L. REV. 130, 141 n.76 (1985) (noting that *Miranda* "has become deeply ingrained in the popular consciousness" through exposure on television shows).

rarely caught the imagination of the international community of states, much less that of individual constituents within those states.¹⁹⁴

A more activist World Court could transform itself from a U.N. backwater into an institution of major political importance. This prospect has political implications for the more privileged members of the current international legal order—in particular, the permanent five members of the Security Council. Part IV considers this point in greater detail. For now, it seems reasonable to conclude that whatever the political objections to a greater role for the Court, the anti-majoritarian critique is not fatal.

B. Interpreting the U.N. "Constitution": The Charter and Other Sources

Apart from the anti-majoritarian difficulty, a newly activist World Court faces another set of daunting obstacles: the problem of defining what is the "constitution" of the United Nations, and the even greater problem of interpreting that constitution. The U.N. Charter is, in one sense, a constitutive document; it establishes the organs of U.N. government, it lays down rules of governmental procedure, and it provides some substantive norms for international conduct. In another sense, the Charter is just another treaty; other sources of international law, both predating and postdating the Charter, establish in much more detail the "fundamental" substantive norms by which states must conduct themselves. Long before the Charter, for example, customary international law prohibited piracy and genocide; those customary norms are stronger than ever today.¹⁹⁵ Indeed, peremptory norms of customary international law, or *jus cogens*, more closely resemble the foundational norms in the U.S. Bill of Rights than any provision of the Charter itself.

Still, even if it does not embody the entire U.N. "constitution," the text of the Charter does provide a viable starting-point for the Court's review of an act by another U.N. organ. On some procedural questions, the Charter's text is often dispositive. The General Assembly can pass only hortatory resolutions,¹⁹⁶ and important questions in the Assembly require a two-thirds majority.¹⁹⁷ Decisions of the Security Council, by contrast, are binding on member states.¹⁹⁸ Security

194. This is so in part because only states, and not individuals, may be parties before the World Court, Statute of the International Court of Justice, June 26, 1945, art. 34, para. 1, 59 Stat. 1055, 1059, 3 Bevans 1179, 1186, which means it is unlikely that the Court will directly affect individual lives. But the Court's opinions could still seep into popular consciousness as the Court plays a more active role.

195. See RESTATEMENT, *supra* note 14, § 404, at 255 n.1.

196. U.N. CHARTER art. 10.

197. *Id.* art. 18, para. 2.

198. *Id.* art. 25.

Council decisions on non-procedural matters require nine votes, including the concurring votes of the permanent five members.¹⁹⁹

Unfortunately, the Charter offers much less clear guidance as to when Council and Assembly resolutions violate substantive, foundational norms.²⁰⁰ The World Court appears to be at a disadvantage on this question when compared with the U.S. Supreme Court. For all the apprehension about the pitfalls of interpretivism, the U.S. Constitution is easier to interpret than the U.N. Charter. As Professor Ely has observed, the U.S. Constitution contains provisions "ranging from the relatively specific to the extremely open-textured," and at least some of the specific provisions are straightforward in application.²⁰¹ The Bill of Rights may seem hopelessly vague to students of the U.S. Constitution, but it is a model of clarity and detail compared with the corresponding provisions of the U.N. Charter.

Indeed, the Charter has no Bill of Rights for states at all.²⁰² A few provisions purport to protect states' rights, but they do so only in the most general terms. Chief among them is article 2(7), which provides that "[n]othing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state" Even this protection is limited by the last clause of the same paragraph, which provides that "this principle shall not prejudice the application of enforcement measures under Chapter VII." Other provisions are equally imprecise. Article 1(2) asserts that the purpose of the United Nations is to "develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples"—an equal protection clause for states. The beginning of article 55 repeats this language. Judge El-Kosheri, dissenting in *Libya v. United States*, invoked these three articles in defending Libya's "sovereign rights" not to extradite its own nationals.²⁰³ If the World Court is to exercise

199. *Id.* art. 27, para. 3. Even this fairly clear provision has required a little creative interpretation. A permanent member can "concur" by abstaining. See *Namibia Case*, 1971 I.C.J. at 22.

200. It may be that by omitting substantive norms from the Charter, the framers sought to distinguish between "substantive" and "procedural" invalidity. Cf. Osieck, *supra* note 23, at 243 (arguing that international review bodies sometimes distinguish between "substantive" and "procedural" *ultra vires* acts). However, as in the domestic sphere, the difference between "substantive" and "procedural" norms can be difficult to determine. See *id.* at 244. Moreover, the framers seem to have envisioned that any interpretation of the Charter, whether on a substantive or procedural point, would be void if not "generally acceptable." See *supra* part I.B.

201. ELY, *supra* note 167, at 13.

202. The Charter does contain two important provisions on individual human rights, but even these speak in general terms. See U.N. CHARTER arts. 55–56. The provisions have not had great influence in U.S. courts, at least not as of yet. See, e.g., *Sei Fujii v. California*, 242 P.2d 617 (1952) (holding that the provisions are not self-executing).

203. *Libya v. United States*, 1992 I.C.J. at 211 (El-Kosheri, J., dissenting).

judicial review in the name of states' sovereign rights, its chief textual support in the Charter must come from these general provisions.

The "equal protection" norms in article 1(2) and article 55 do provide some solid textual basis for "constitutional" review. The U.S. Supreme Court has filled volumes in construing an equal protection clause that is hardly more precise than these provisions. The equal protection clause of the U.S. Constitution is "self-executing": it commands states not to deny any person equal protection of the law.²⁰⁴ Article 1(2) and article 55 are framed in a less prohibitory fashion; they hold that the "purpose" of the United Nations is to act "based on respect" for equal rights and self-determination of peoples.²⁰⁵ It is unlikely that the framers would ever have approved a Charter permitting the United Nations to discriminate arbitrarily against individual states. Nevertheless, this "equal protection" language is firm enough to form the basis for a robust equal protection jurisprudence.

Apart from the "equal protection" norms, however, there is little raw material in the Charter with which the Court can analyze questions of states' rights. Article 2(7), which forbids the United Nations to interfere in matters within a state's "domestic jurisdiction," is the closest thing in the Charter to a states' Bill of Rights, but it obviously lacks specifics. It does not expressly say that states should not be subject to "cruel and unusual punishment." It does not expressly assure states "due process" if their territory is taken, or if they are punished for unlawful behavior—rights asserted by Iraq in the Gulf War. It does not provide that states have a right of "free speech"—a right to express their views without fear of retribution.²⁰⁶ Nor does article 2(7), or any other provision of the Charter, expressly provide that states are never bound to extradite their own nationals—a right asserted by Libya in the Lockerbie case. Most importantly, article 2(7) is itself limited in scope. It provides that "this principle shall not prejudice the application of enforcement measures under Chapter VII." Yet these are precisely the kinds of "measures" most likely to be challenged in contentious cases, since they are the only ones that are binding.²⁰⁷ In light of this, the World Court can hardly rely on article

204. U.S. CONST. amend. XIV, § 1 ("nor shall any State . . . deny to any person the equal protection of the laws").

205. Some U.S. authorities hold that a treaty provision is self-executing if it provides that "certain acts shall not be done, or that certain limitations or restrictions shall not be disregarded or exceeded by the contracting parties . . ." *Commonwealth v. Hawes*, 76 Ky. (13 Bush) 697, 702-03 (1878), cited with approval in *United States v. Rauscher*, 119 U.S. 407, 427-28 (1886).

206. Indeed, other sources of international law, directed as much to states as to individuals, restrict some state "speech," such as "propaganda for war." See International Covenant on Civil and Political Rights, Dec. 19, 1966, art. 20, para. 1, 999 U.N.T.S. 171.

207. See U.N. CHARTER art. 25. The important resolutions on Iraq, Libya, and Bosnia were adopted pursuant to Chapter VII. See, e.g., S.C. Res. 661, *supra* note 1 (invoking Chapter VII to impose economic sanctions on Iraq).

2(7) alone to invalidate Security Council decisions adopted pursuant to Chapter VII. The Court will have to look beyond the Charter in such cases.

It is unlikely that the Court will rely heavily on treaty sources to measure the validity of Security Council resolutions. For one thing, most international instruments on "rights" focus on individual human rights, not states' rights. Examples include the Universal Declaration of Human Rights²⁰⁸ and the international covenants on human rights.²⁰⁹ The United Nations General Assembly Declaration on Friendly Relations Among States does contain some general provisions on states' rights,²¹⁰ but it is a non-binding declaration of the General Assembly rather than a full-fledged treaty.²¹¹ Although this declaration may be evidence of customary international law, which can be binding, it is not binding as a treaty per se.²¹² Article 103 of the Charter would make it difficult for the Court to rely solely on a treaty provision to invalidate a decision of the Security Council since article 103, the "supremacy clause," provides that Charter obligations prevail over states' obligations under international agreements.²¹³

Interestingly, however, article 103 says nothing about customary international law, leaving open the possibility that Charter obligations may not always supersede obligations under customary law. At first blush, the omission of customary law from article 103 seems odd; the usual view is that treaties are at least as important a source of law as customary law, if not more important.²¹⁴ The omission makes more

208. G.A. Res. 217, U.N. Doc. A/810, at 71 (1948).

209. International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 171; International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3. Articles 55 and 56 of the Charter are also devoted to individual rights, although article 55 also contains the states' "equal protection" clause previously described.

210. See G.A. Res. 2625, U.N. GAOR, 25th Sess., Annex ¶ 1, U.N. Doc. A/RES/2625 (1970), reprinted in IAN BROWNIE, BASIC DOCUMENTS IN INTERNATIONAL LAW 35, 40 (1983) (providing that states shall not encourage terrorism or subversion in other states).

211. See BROWNIE, *supra* note 210, at 35 (describing the declaration as evidence of state practice). The fairly general "states rights" listed in the declaration should not "be construed as affecting" obligations under the Charter, especially those relating to international peace and security. See G.A. Res. 2625, *supra* note 210, ¶ 1.

212. See Oscar Schachter, *International Law in Theory and Practice*, 178 RECUEIL DES COURS 111-21 (1982-V) (arguing that Assembly declarations may constitute evidence of customary international law); cf. Hiram Chodosh, *Neither Treaty nor Custom: The Emergence of Declarative International Law*, 26 TEX. INT'L L.J. 87 (1991) (arguing that declarations should have some binding effect).

213. U.N. CHARTER art. 103.

214. See Phillip Trimble, *A Revisionist View of Customary International Law*, 33 UCLA L. REV. 665, 684-87 (1986) (arguing that U.S. courts have applied treaty law much more readily than customary law); cf. Statute of the International Court of Justice, June 26, 1945, art. 38, para. 1, 59 Stat. 1055, 1060, 3 Bevans 1179, 1187 (describing both treaty and customary law as sources of international law without suggesting that one overrides the other). Indeed, there are suggestions in the domestic law of the United States and other countries that treaty law is superior to customary law. See, e.g., *The Paquete Habana*, 175 U.S. 677, 700 (1900) (holding that customary law controls "where there is no treaty").

sense, however, when one considers the doctrine of *jus cogens*—the rule that states cannot agree by treaty to violate certain peremptory norms of customary international law.²¹⁵ Indeed, the framers of the Charter seem to have had such a limitation in mind when they wrote that an interpretation of the Charter that was “generally unacceptable” would be “void.”²¹⁶ It is quite reasonable to conclude that the U.N. Charter, itself a treaty, does not authorize acts that violate peremptory norms of international law. Precisely what these peremptory norms are is a matter of dispute. It is generally agreed, however, that states cannot enter into treaties to commit genocide, to perpetuate slavery, to engage in illegal aggression, or to perpetuate apartheid.²¹⁷ The test is whether a very large majority of states believes that a practice is unacceptable in any circumstances.²¹⁸

Judge Oda, concurring in the *Libya* case, may have been considering the principle of *jus cogens* when he suggested that Libya might have challenged the Security Council resolution by asserting “sovereign rights under general international law.”²¹⁹ It seems doubtful, however, that the non-extradition of nationals is a peremptory norm of international law; states frequently vary that default rule in extradition treaties.²²⁰ Libya might have argued that *jus cogens* should be defined more broadly than it is, since non-extradition of nationals is a widely accepted norm. But that argument would have required stretching the traditionally narrow boundaries of the doctrine.

It is also possible that Judge Oda believed Libya could attack the Security Council resolution with any rule of customary international law, not only *jus cogens*. Thus Libya might have argued that the widespread practice of refusing to extradite nationals, while not a peremptory norm of international law, was nonetheless a rule of customary law important enough to override a command under the Charter.²²¹ It may be that the Court views certain aspects of customary

215. See Vienna Convention on the Law of Treaties, May 23, 1969, art. 50, 1155 U.N.T.S. 331, 344 (providing that a treaty is “void” if it conflicts with a principle of *jus cogens*); *id.* art. 61 (providing that a treaty “becomes void” if it conflicts with an emerging principle of *jus cogens*). For a discussion of the doctrine of *jus cogens*, see EDWIN MCWHINNEY, UNITED NATIONS LAW MAKING 73–76 (1984).

216. See *supra* part I.B.

217. See RESTATEMENT, *supra* note 14, § 102, cmt. k, at 28 (describing *jus cogens* generally); *id.* § 102, at 34 n.6 (listing examples).

218. See *id.* § 102, at 34 n.6.

219. *Libya v. United States*, 1992 I.C.J. at 131 (Oda, J., concurring).

220. See, e.g., Treaty of Extradition, June 8, 1972, U.S.-U.K., art. I, 28 U.S.T. 227 (providing for extradition of all offenders regardless of nationality).

221. In fact many states, and most civil-law states, consistently refuse to extradite their own nationals; many are constitutionally forbidden to do so. See generally 6 MARJORIE WHITEMAN, DIGEST OF U.S. PRACTICE IN INTERNATIONAL LAW § 18, at 865–84 (1968) (describing state practice opposing extradition of nationals). Most such states have established nationality-based criminal jurisdiction, which permits them to try their own nationals for serious crimes committed

law—those dealing with the fundamental attributes of sovereignty, such as territorial integrity and disposition of a state's nationals—as more fundamental than rules not directly related to state sovereignty, such as customary law of the sea. If this is the case, then the scope of review of Security Council resolutions will be greatly broadened. In effect, the Council could be forbidden not only to order genocide or slavery, but also to alter expectations built up over years of consistent state practice. Thus, Libya could challenge a Council resolution ordering it to extradite its own nationals by pointing to state practice on extradition. Similarly, Iraq could challenge some Council resolutions by pointing to the customary law requirement that force be “necessary and proportionate,” even when some use of force is justified.²²²

Nevertheless, it would seem paradoxical to rely on “ordinary” customary law (as opposed to *jus cogens*), but not treaty law, as a basis for “constitutional” review. Why should customary expectations be “constitutionally” protected while treaty-based expectations are not?²²³ Treaty norms are often accorded more weight than customary norms. Treaty law is easier to “find” than customary law: it is written down for all to see, whereas customary law exists in the often unascertainable practice of states. Why should Libya be permitted to challenge a Security Council resolution that runs counter to the extradition practices of many (but not all) states and yet be precluded from challenging the same resolution by resort to the Montreal Convention? These considerations support a more limited scope of review, one that looks to the text of the Charter as well as peremptory norms of international law—*jus cogens*—but not to “ordinary” customary international law.

Political considerations also argue for a limited scope of review, at least in the short term. The existing permanent members of the Security Council, at last freed from the restraints of Cold War geopolitics, are not anxious to see their resolutions blocked by a new obstacle. If the Court were to jump suddenly from a deferential “presumption of validity” to a close scrutiny of whether Council

abroad. See, e.g., LOUIS HENKIN ET AL., *INTERNATIONAL LAW: CASES AND MATERIALS* 836 (1987) (citing examples from France and Germany). The United States, however, has long declined to establish nationality-based criminal jurisdiction, insisting instead that states should extradite their own nationals. See generally Geoffrey R. Watson, *Offenders Abroad: The Case for Nationality-Based Criminal Jurisdiction*, 17 *YALE J. INT'L L.* 41, 54–84 (1992) (arguing that nationality jurisdiction is necessary to prosecute Americans who would otherwise escape punishment for serious crimes committed abroad).

222. See Abraham D. Sofaer, *Terrorism, the Law, and National Defense*, 126 *MIL. L. REV.* 89, 97 (1989) (noting that “limitations of necessity and proportionality are traditional, civilizing constraints on the use of force”).

223. See *supra* text accompanying note 213 (noting that article 103 would seem to prevent the Court from invalidating a Council resolution solely on the basis of a treaty).

resolutions conform with a broad range of customary law, it might jeopardize the gains it has already made by moving cautiously toward judicial review. Whatever the legal basis for a searching standard of review, political reality argues for caution.²²⁴

Political and legal considerations inform the debate over the legal effect of a Court decision invalidating an act of another U.N. organ. This issue is considered in Part IV.

IV. THE QUESTION OF JUDICIAL SUPREMACY

What is the legal effect of a World Court judgment that a Security Council decision is *ultra vires*?²²⁵ Is the invalidated act void *ab initio*—“as inoperative as though it had never been passed”?²²⁶ Or instead is the result that “[t]he parties to that suit are concluded by the judgment, but no one else is bound”?²²⁷ In other words, should the international community accept a doctrine of judicial supremacy under which the “constitutional” holdings of the Court are binding on all other organs of the United Nations in all future cases?²²⁸ Or should it accept a “Jeffersonian” doctrine of “concurrent review”²²⁹—that no one organ of the United Nations has the final say on the interpretation

224. See Franck, *supra* note 143, at 523 (commending the court for its restraint).

225. This question need not be asked of *ultra vires* General Assembly resolutions since they have no binding effect. See U.N. CHARTER art. 10 (providing that Assembly may make “recommendations”).

226. Norton v. Shelby County, 118 U.S. 425, 442 (1886), *quoted in* TRIBE, *supra* note 29, at 27.

227. Shepherd v. City of Wheeling, 30 W. Va. 479, 4 S.E. 635, 637 (1887), *quoted in* TRIBE, *supra* note 29, at 27–28.

228. According to Professor Engdahl, this is the view that prevails in today’s U.S. constitutional discourse. See David E. Engdahl, *John Marshall’s “Jeffersonian” Concept of Judicial Review*, 42 DUKE L.J. 279 (1992). In Engdahl’s view, Chief Justice Marshall’s opinion in *Marbury v. Madison* actually “states *not* the Federalist, but the ‘Jeffersonian’ concept of the practice now commonly called ‘judicial review’”—that the Court’s opinion on a constitutional question is respected in a particular case, but no branch is bound by another’s view on such a question thereafter. *Id.* at 279–80 (emphasis added).

Cooper v. Aaron, 358 U.S. 1 (1958) and *Oregon v. Hass*, 420 U.S. 714 (1975), exemplify Engdahl’s view that modern jurists have construed *Marbury* as endorsing the view that the Supreme Court’s opinions are binding on all other parties in all future instances. See also TRIBE, *supra* note 29, at 34–42 (arguing that the Constitution “on various occasions gives the Supreme Court, Congress, the President, or the states, the last word in constitutional debate”).

229. See CRISTOPHER WOLFE, *THE RISE OF MODERN JUDICIAL REVIEW* 94 (1986); Mendelson, *Jefferson on Judicial Review: Consistency Through Change*, 29 U. CHI. L. REV. 327 (1962); Engdahl, *supra* note 228, at 280–81 and accompanying notes (elaborating on this terminology). Jefferson described his view this way:

Where different branches have to act in their respective lines, finally and without appeal, under any law, they may give to it different and opposite constructions . . . From these different constructions of the same act by different branches, less mischief arises than from giving to any one of them a control over the others.

Letter of Thomas Jefferson to G. Hay, June 2, 1807, 11 THE WRITINGS OF THOMAS JEFFERSON 213 (Monticello ed. 1907). See also Letter of Thomas Jefferson to William C. Jarvis, Sept. 28, 1820, 15 *id.* at 277–78 (describing judicial supremacy as “a very dangerous doctrine indeed”).

of the Charter and that a decision of the Court must be respected in the case that it resolves but not necessarily in future cases?

Although some commentators assert that the World Court should act as the final "umpire" of interpretation of the Charter,²³⁰ the text and *travaux préparatoires* of the Charter do not clearly support this view. As discussed in Part I, these sources do support the notion that the Court can exercise *some* power of judicial review. The Charter provides that the Court is the "principal judicial organ" of the United Nations, implying some power to pass on the validity of the acts of other organs, while the *travaux préparatoires* provide that a "generally unacceptable" decision by a political organ could be ignored by other organs, implying that the Court might decline to enforce such an act.²³¹ These sources, however, do not provide much insight into the appropriate legal effect of a Court opinion invalidating another organ's decision.

Some constitutive language supports the "Jeffersonian" view. Article 59 of the Court's Statute states that "[t]he decision of the Court has no binding force except between the parties and in respect of that particular case." No such limitation appears in article III of the U.S. Constitution. Moreover, the World Court did not inherit the common-law tradition of law-making that helped persuade early Americans to endorse judicial supremacy.²³² While the World Court has treated its decisions as binding precedent, and these days appears to cite them with increasing frequency, the Court's formal jurisprudence leans more toward a European civil-law model than a common-law *stare decisis* model.²³³

The U.N. framers themselves seem to have endorsed the "Jeffersonian" view. The U.N. Conference's official report on interpretation of the Charter contained the following language:

Difficulties may conceivably arise in the event that there should be a difference of opinion among the organs of the Organization

230. See, e.g., Franck, *supra* note 143, at 523 (welcoming the prospect that the Court might become the "ultimate arbiter of institutional legitimacy").

231. See *supra* parts I.A & B. Moreover, the three major World Court decisions on judicial review also seem to endorse inquiry into the validity of acts of the political organs, but again without specifying the consequence of their invalidity. See *supra* parts II.A, B & C. The Court did not reach that issue in any of these cases since it upheld the acts in question.

232. See Engdahl, *supra* note 228, at 294-97 (describing the influence of the common-law tradition on the early development of the doctrine of judicial supremacy). Professor Engdahl identifies two other factors that bolstered the doctrine: the naive assumption that constitutional interpretation would be clear-cut, and Engdahl's conclusion that juries, in whom the Founders had great faith, were often obligated to decide questions of law and not merely issues of fact. See generally *id.* at 289-94.

233. But cf. BREWER-CARÍAS, *supra* note 8, at 193-94 (asserting that European states are moving toward a centralized constitutional court that can invalidate legislative acts *erga omnes*—that is, so that the law is not enforceable "anywhere or in any case").

concerning the correct interpretation of a provision of the Charter. Thus, two organs may conceivably hold and may express or even act upon different views. Under unitary forms of national government the final determination of such a question may be vested in the highest court or in some other national authority. However, the nature of the Organization and of its operation would not seem to be such as to invite the inclusion in the Charter of any provision of this nature.²³⁴

This apparent commitment to "concurrent review" is not entirely clear. The report stressed that states or U.N. organs could submit Charter disputes to the Court for resolution,²³⁵ implying that the Court's view on an interpretation question would be dispositive. Still, this language does not necessarily mean that the Court's view would be controlling in all future cases, but only that it would be controlling in that particular case. Moreover, the report also suggested that the Council or Assembly could choose a different method of resolving disputes, such as an "ad hoc committee of jurists" that would "report its views," a "joint conference," or various other "expedients" that were "neither necessary nor desirable to list or to describe in the Charter."²³⁶ Such a multiplicity of authoritative interpretive bodies hardly seems consistent with a full-bodied doctrine of judicial supremacy.

If, following article 59 of the Statute and the (admittedly ambiguous) intention of the framers, the Court's interpretation of the Charter has "no binding force except between the parties and in respect of that particular case," the Court's interpretation might still bind other organs quite broadly in practice. In public international law, as in much public law, a "case" is often a complex and multifaceted problem, not a simple bipolar dispute.²³⁷ A decision that is binding only in one "case" may still bind much of the world.

The Libyan case provides a good example. Suppose that Libya eventually succeeds in persuading the Court to strike down the Security Council resolutions ordering Libya to extradite its two nationals and imposing worldwide aviation and diplomatic sanctions on Libya. Even if those resolutions are invalidated only with respect to "that particular

234. Report of the Rapporteur of Comm. IV/2, Doc. 933, IV/2/42 (2), 13 U.N.C.I.O. Docs. 703, 709 (1945).

235. *Id.* (providing that states are free to submit Charter disputes to the World Court "as in the case of any other treaty," and that "it would always be open to the General Assembly or to the Security Council, in appropriate circumstances, to ask the International Court of Justice for an advisory opinion" on the meaning of the Charter).

236. *Id.* at 709-10.

237. Cf. Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1284 (1976) (arguing that many federal civil suits no longer resemble the traditional bipolar model, but instead feature both "sprawling and amorphous" party structures and complex remedies).

case," their invalidation will change the rights and duties of every country in the world, all of whom presently must refrain from certain aviation and diplomatic interchange with Libya. A state not party to the original suit might argue that the decision bound only "the parties"—the United States and Libya—but if Libya were to seek a judgment ordering *that* state to stop enforcing the sanctions, the Court would almost certainly follow its own decision and rule for Libya. The Security Council might pass a new resolution, imposing similar sanctions, but a renewed Libyan court challenge would prevail again. Even if the Security Council were free to adopt similar resolutions a year later against another state on similar grounds, that state would surely seek World Court review and would most likely win, assuming proper jurisdiction.

The formal limits on the effect of the Court's decision, then, would only make a difference if for some reason the next aggrieved party does not or cannot bring suit in the World Court. This prospect becomes less and less probable, however, as more treaties provide for referral of disputes to the Court, more states accede to the compulsory jurisdiction of the Court, and more litigants obtain jurisdiction through special agreement.²³⁸ As a practical matter, limiting the formal effects of a constitutional decision might have relatively little consequence. In the international arena, in other words, "Jeffersonian" judicial review might begin to resemble "limited judicial supremacy."

One common argument against the "Jeffersonian" model of "concurrent review" is that it lacks finality.²³⁹ For the international system, however, this may not be a liability.²⁴⁰ International law is notoriously decentralized anyway.²⁴¹ It has never treated "finality" as an important goal; in a community of sovereign states, dissent and deviation is inevitable. Most rules of international law have not moved "vertically"

238. For example, the treaty at issue in *Libya v. United States*, the Montreal Convention, provided for referral to the World Court. See *supra* note 140. In addition, the trend in recent years has been for a greater number of states to accede to the compulsory jurisdiction of the Court. See CARTER & TRIMBLE, *supra* note 179, at 307 (noting that six more states have accepted the Court's compulsory jurisdiction in the past five years and that more are considering doing so). The Statute of the Court, moreover, provides for jurisdiction by special agreement, which creates the possibility that two states might agree to submit a "dispute" to the Court to test the validity of an act of a U.N. organ. See Statute of the International Court of Justice, June 26, 1945, art. 36, para. 1, 59 Stat. 1055, 1060, 3 Bevens 1179, 1186.

239. See Engdahl, *supra* note 228, at 321-22 (describing this view).

240. Professor Engdahl argues that a Jeffersonian model would better serve the U.S. Constitution, as well. In his view, the Republic benefits when constitutional debate is not cut off suddenly, but instead is allowed to percolate in different branches of government. See generally *id.* at 333-39.

241. Extradition, for example, is not governed by a single multilateral convention, but by a huge web of interlocking bilateral extradition treaties. See 2 M. CHERIF BASSIOUNI, INTERNATIONAL CRIMINAL LAW: PROCEDURE 407 (1986) (noting that the United States relies on bilateral extradition treaties).

from the Security Council (or the World Court) down to individual states; instead, they have developed "horizontally" from treaties and state practice. The process has never encouraged "finality." True, the international legal system has become more centered around the Security Council in the past two years, but World Court review will not appreciably impede this process since in the vast majority of cases the Court will surely sustain the Council's activity. In those rare instances in which the Court does rebuff the Council, it will be able to issue judgments that are final in the particular case and highly persuasive in future cases. The Court will also be able to strengthen its precedents by reaffirming them. As Jefferson himself put it, "uniform decisions . . . so strengthen a construction as to render highly irresponsible a departure from it."²⁴² If the Court persists, in other words, its judgments eventually will be seen as "final."

In sum, a "Jeffersonian" model of judicial review would comport with the history of the Charter and with the rule that Court decisions bind only the parties to a case. A doctrine of judicial supremacy finds less support in the text and negotiating history of the relevant U.N. instruments. As a political matter, moreover, a doctrine of judicial supremacy is more likely to provoke controversy among the permanent members of the Security Council, most of whom are probably satisfied with the traditional balance between a strong Council and a weak Court. It may well be that any form of judicial review—Jeffersonian or otherwise—will generate political opposition if announced more openly than in *Libya v. United States*. The conclusion of this Article examines some of these political considerations.

V. CONCLUSION

A system of limited judicial review could have significant advantages. Such a regime would often serve to validate the acts of other organs,²⁴³ as has been the case in all three major World Court opinions to date. It might, over time, enhance the Court's prestige enough that Court opinions serve the same "expressive" function as some U.S. Supreme Court opinions,²⁴⁴ though it is admittedly unlikely that the World Court will ever have much influence on any nation's popular culture. It might, moreover, provide non-binding "cues" to other organs of the United Nations, helping to harmonize differences among them or at least to induce restraint. Obviously, however, the most important aspect of judicial review—"Jeffersonian" or otherwise—is

242. 3 ALBERT J. BEVERIDGE, *THE LIFE OF JOHN MARSHALL* 605–06 (1919).

243. See BLACK, *supra* note 29, at 223 (arguing that judicial review can serve an important "legitimizing" function).

244. See BOBBITT, *supra* note 177, at 218–19 (describing the "expressive" function).

that it might, on rare occasion, "check" a rogue Security Council. The desirability of this "checking" function is a potentially explosive political issue.²⁴⁵

Many states are willing to tolerate such a "checking" function in their internal constitutional systems—to concede that the judiciary can sometimes say "no" to the executive or the legislature. Many of those same states, however, are probably much less anxious to concede that the international judiciary can sometimes say "no" to the international legislature. In particular, a "checking" function may seem unnecessary to the Western powers, who are well-represented on the Council. The United States, France, Britain and perhaps Russia have no more interest in expanding the power of the Court than they do in diluting their own power in the Council.

In the eyes of the developing countries, however, the Council looks increasingly monolithic. Four of the five permanent Security Council members are now "Western" or at least "pro-Western" democracies, if one counts Russia. Even industrialized states like Germany and Japan—excluded from the Council as aggressors in World War II—must wonder why they have no permanent seat while Britain and France do. To the developing countries, the composition of the Council creates the possibility that the Council will overstep its boundaries, as some believe has already happened in Iraq and in Libya.²⁴⁶ It is true that the developing countries still have a reluctant spokesperson on the Security Council, the People's Republic of China. China has quietly abstained on many of the Council's most momentous decisions,²⁴⁷ and it is doubtless prepared to use its veto in what it views as extreme cases. But the developing countries are surely uneasy about relying on China to represent them in the Council, for it is possible that the United States and other Western powers will continue to attempt to "constructively engage" China.²⁴⁸ For these reasons, an expanded role for the World Court is probably much more appealing to developing countries than to Security Council members.

245. In the context of its time, by contrast, *Marbury v. Madison* "represented no novel seizure of power," since the framers generally assumed the federal courts would have such power anyway. *TRIBE*, *supra* note 29, at 25–26.

246. See *United Nations: Growing Concerns Over Role of Security Council*, *supra* note 6, at 1; cf. *Franck*, *supra* note 143, at 523 (noting that many states "with little or no voice" in the Council "are probably somewhat surprised to find that it may order them to take major steps that they consider contrary to their national interest and that, moreover, are incongruent with expectations created by multilateral treaties to which they are parties").

247. See, e.g., S.C. Res. 678, *supra* note 1, at 27 (authorizing use of force against Iraq) (China abstaining); S.C. Res. 770, *supra* note 4 (authorizing use of force for humanitarian relief in Bosnia and Herzegovina) (China abstaining).

248. Cf. James A. Baker, III, *America in Asia*, 70 *FOREIGN AFFAIRS* 1, 15–16 (Winter 1991/92) (defending the Bush Administration's efforts to draw China into the global economic and political system).

Whatever the merits of the political debate, the Court has done well to avoid inflaming it. Unlike *Marbury v. Madison*, which was handed down in a legal culture already receptive to judicial review, *Libya v. United States* was handed down at a time of uneasy transition in the global community. The Court was therefore prudent to issue a cautious majority opinion, one that does not have the ring of John Marshall about it. Nonetheless, the concurring and dissenting opinions in *Libya v. United States* may eventually be remembered as the international *Marbury v. Madison*. Here, for the first time, a significant portion of the World Court endorsed judicial review in a contentious case. If the Court can consolidate its gains—by forthrightly announcing a power of limited judicial review in an appropriate contentious case—it may keep pace with the Security Council, whose power and prestige only seem to grow. Otherwise the Court may become more marginal than ever.

