CENTRO STUDI STRATEGICI CARLO DE CRISTOFORIS

The UN Security Council in the Lockerbie Case

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2012

CESTUDEC

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I. Introduction: The UN in a Crisis since its Inception

Since its inception, the United Nations (UN) has reportedly been in a constant crisis. Ever since 1946, when *The New York Times* posed the dramatic question: 'Is the UNO going to break on the rocks of Iran?', the Organization has been faced with numerous constitutional challenges and crises in an institutional history of over 60 years.[1] Most notably, the UN dealt with the peacekeeping constitutional and financial crises of the 1960s[2], accompanied by the death of Secretary General Dag Hammarskjöld[3]. Soviet proposal for Troika (which would have led to the end of the Secretariat) and Soviet walkout (which brought to a halt en entire session of the General Assembly) were later followed by the crisis of multilateralism, with the US threatening to withdraw from many UN agencies and refusing to pay its UN dues.[4] In 1988, the General Assembly session was displaced to Geneva as the United States refused to grant visa to Yasser Arafat; and later, with the end of the Cold War, the UN faced the Iraq crisis 'smear campaign', 'unbridled unilateralism' and 'onslaught' by the Bush Administration and US representative John Bolton.[5] Nevertheless, as Prof. Gowlland-Debbas claims, all these discussions have underestimated the 'remarkable resilience of the Organization and its constituent instrument'[6].

The present article examines the *Lockerbie*[7] case through the legal lens of the United Nations constitutive instrument – the Charter, and raises the issues related to the vigorous 'constitutional crisis' debates since 1992, which have accompanied the case. This work aims at deconstructing the legal discourse surrounding the 1992 and 1998 phases of the case, and more specifically, the statement that in *Lockerbie* the ICJ was

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[1] Vera Gowlland-Debbas, "Collective Security Revisited in Light of the Flurry over UN Reform: An International Law Perspective", in Vincent Chetail (ed.), *Conflict, securite et cooperation/Conflict, Security and Cooperation. Liber Amicorum Victor. Yves Ghebali*, p.251

[2] *See* Nathaniel Nathanson, "Constitutional Crisis at the United Nations: The Price of Peacekeeping", 32 The University of Chicago Law Review (Summer, 1965)

[3] Gowlland-Debbas, *supra note* 1

[4] *Ibid.*

[5] *Ibid.*

[6] *Ibid.*

[7] Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libya v United Kingdom; Libya v. United States), Provisional Measures, 1992 ICJ Rep. 3, 114 (Orders of Apr. 14) [hereinafter Lockerbie Provisional Measures]; Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libya v United Kingdom) Judgment, ICJ Rep. 1998, 9; (Libya v. United States), ICJ Rep. 1998, 115 [hereinafter Lockerbie]

avoiding a constitutional crisis.[8] It is argued here that the problem has been incorrectly framed as a constitutional crisis. Secondly, the Court cannot be characterized as 'avoiding', either.

The article proceeds as follows: Section II outlines the dispute, the two decisions of the Court, the relevant Security Council resolutions and the two organs' competences under the UN Charter. Section III raises the central constitutional questions, which are tackled in Section IV. Section V concludes on the relationship between the International Court of Justice and the Security Council, with a view towards the future of the UN.

II. Lockerbie: Dispute, Resolutions and Decisions

The *Lockerbie* case contains two judgments – the 1992 provisional measures stage and the 1998 preliminary objections phase, each of which shall be dealt with in turn. It should be noted that it took over 6 years for the ICJ to proceed to the merits stage. Even by ICJ standards, this is a lengthy period. This could only emphasize the politically sensitive and legally complex issues, which such decision affects, and more specifically, among others, the constitutional relationship between the Court and the Council within the framework of the UN Charter.

A. The Dispute and the 1992 Decision on Provisional Measures

The dispute between Libya, and the United States and the United Kingdom, arose from the destruction of the American airliner (Pan Am Flight 103) over Lockerbie, Scotland on 21 December, 1988.[9] On 14 November, 1991, two Libyan nationals were indicted in the United States District Court for the District of Columbia for 'causing a bomb to be placed aboard…, which bomb had exploded causing the aeroplane to crash'[10].

[8] S*ee* Michael Reisman, , *"The Constitutional Crisis in the United Nations"*, 87 *AJIL* (1993), pp.83-100; Paul de Waart, *"The UN System at a Crossroads: People's Center or Big Brothers' Small Club?"*, Towards More Effective Supervision by International Organizations, 49 (Niels Blocker and Sam Muller eds. (1994)
[9] Lockerbie Provisional Measures, 1992 ICJ Rep.
[10] Lockerbie Provisional Measures, 1992 ICJ Rep.

In a joint declaration on 27 November 1991[11] cited by the Court, the United States and the United Kingdom urged the Government of Libya to 'surrender for trial those charged with the crime and accept responsibility for the actions of Libyan officials; disclose all it knows of this crime, including the names of all those responsible, and allow full access to all witnesses, documents and other material evidence, including all the remaining timers; and pay appropriate compensation.'[12] France also joined[13] the US and the UK in a trilateral declaration[14] at the Security Council. Affirming the above mentioned requests, the UN Security Council on 21 January, 1992, passed Resolution 731 (1992) [15] asking Libya *inter alia* to surrender for trial the two Libyan nationals who had been indicted in the US:

'*Deeply concerned* over results of investigations which implicate officials of the Libyan Government and which are contained in Security Council documents that include requests addressed to the Libyan authorities by France, the United Kingdom of Great Britain and Northern Ireland and the United States of America in connection with the legal procedures related to the attacks carried out against Pan Am flight and UTA flight 772 …

2. *Strongly deplores* the fact that the Libyan Government has not yet responded effectively to the above request to cooperate fully in establishing responsibility for the terrorist acts …;

3. *Urges* the Libyan government immediately to provide a full and effective response to those requests [inter alia, to surrender the two suspects, disclose information, cooperate in investigation and pay compensation[16]] so as to contribute to the elimination of international terrorism;…'[17]

In response, on 3 March 1992 Libya instituted proceedings at the International Court of Justice against the United States in respect of a 'dispute between Libya and the United States over the interpretation of application of the Montreal Convention of 23

[11] Joint US-UK Declaration (Nov. 27, 1991): Statement issued by the British Government, UN Doc. A/46/826-S/23307, Annex III (1991); Statement issued by the Government of the United States, UN Doc. A/46/827-S/23308, annex (1991)

[12] Joint US-UK Declaration, *supra note* 13

[13] Separately, France accused Libya of responsibility for the downing of French UTA Flight 722 over Chad in 1989, and called for Libya to cooperate in the French criminal investigation. *Communiqué from the Presidency of the French Republic and the Ministry of Foreign Affairs* (Dec. 20, 1991), Un Doc. A/46/825 – S/23309, annex (calling upon Libya to produce evidence and documents, facilitate interviews with witnesses, and authorize its officials to respond to requests from the French examining magistrate). *See* also Schwartz, Jonathan, *"Dealing with a 'Rogue State': The Libya Precedent "*, 101 *AJIL* (2007), p. 556

[14] Declaration of the United States, France and Great Britain on Terrorism (Dec. 20, 1991), UN Doc. A/46/828-S/23309, annex (1991)

[15] SC Res. 731 (Jan. 21, 1992), reprinted in 31 ILM 732 (1992)

[16] See requests by France, US and UK, S/23306, S/23307, S/23308, S/23309, S/23317

[17] SC Res. 731 (Jan. 21, 1992), reprinted in 31 ILM 732 (1992)

Sept. 1971'.[18] Libya made three claims requesting the Court to adjudicate and declare: 'that Libya has fully complied with its obligations under the Montreal Convention; that the United States has breached and continuing to breach its legal obligations to Libya under Art. 5, 7, 8, 11 and 14 of the Montreal Convention; that the United States is under a legal obligation immediately to cease and desist from such breaches and the use of any and all force or threats against Libya, including the threat of force against Libya, and from all violations of the sovereignty, territorial integrity, and the political independence of Libya.'[19] Libya also requested the Court to indicate provisional measures[20] to 'enjoin the United States from taking any action against Libya calculated to coerce or to compel Libya to surrender the accused individuals to any jurisdiction outside of Libya; and to ensure that no steps are taken that would prejudice in any way the rights of Libya with respect to the legal proceedings that are the subject of Libya's application'.[21] Libya insisted on its treaty rights under the Montreal Convention[22] to prosecute or extradite its own nationals, claiming it had already instituted legal proceedings against the two individuals.[23]

Three days after the close of hearings, on 31 March 1992, the Security Council adopted Resolution 748 (1992) instituting sanctions against Libya:

'Acting under Chapter VII of the Charter of the United Nations,

1. Decides that the Libyan Government must now comply without any further delay with paragraph 3 of resolution 731 (1992) regarding the requests contained in documents S/23306, S/23308 and S/23309 [French, British and US requests [24]];

[18] Lockerbie Provisional Measures, 1992 ICJ Rep. at 118-119
[19] Ibid.
[20] Under Art. 41 of the ICJ Statute, while a judgment is pending, the Court has the power to indicate provisional measures 'if it considers that circumstances so require … to preserve the respective rights of either parties'. As the Court stated in *Electricity Co. of Sofia and Bulgaria* (Interim Protection), 'the parties to a case must abstain from any measure capable of exercising a prejudicial effect in regard to the execution of the decision to be given, and in general, not allow any step of any kind to be taken which might aggravate or extend the dispute'. 1939 PCIJ (ser.A/B) No. 79 at 199 (Order of Dec. 5)
[21] Lockerbie Provisional Measures, 1992 ICJ Rep. at 118-119
[22] Convention for Suppression of Unlawful Acts against the safety of civil aviation, Sept., 23, 1971, 24 UST 564, 974 UNTS 177 [hereinafter Montreal Convention]
[23] It has been argued that Libya also claimed rights under the customary law principle a*ut dedere aut judicare. See* Reisman, *supra note* 8. This statement, however, can be objected against since Libya did not refer to customary law rights in the 1992 proceedings before the Court (See Schwartz, Jonathan, *"Dealing with a 'Rogue State': The Libya Precedent "*, 101 *AJIL* (2007), pp.557) The better view is that Libyan claims arose only from rights claimed under the Montreal Convention.
[24] S*upra note* 13, 15, 16

2. Decides that the Libyan Government must commit itself definitely to cease all forms of terrorist action and all assistance to terrorist groups and that it must promptly, by concrete actions, demonstrate its renunciation of terrorism;

3. Decides that on 15 April 1992 all States shall adopt the measures set out below, which shall apply until the Security Council decides that the Libyan Government has complied with paragraphs 1 and 2 above:

…

7. Calls upon all States, including States not Members of the United Nations, and all international organizations, to act strictly in accordance with the provisions of the present resolution, notwithstanding the existence of any rights or obligations conferred or imposed by any international agreement or any contract entered into or any license or permit granted before 15 April 1992;… '[25]

After considering SC Res. 748 (1992), in an Order issued on 14 April, 1992, the Court found, by 11 votes to 5, that 'the circumstances of the case were not such as to require the exercise of its power under Art. 41 of the Statute to indicate provisional measures'[26]. In a very cautious and carefully formulated decision the ICJ also stated that it 'cannot make definitive findings either of fact or law on the issues relating to the merits, and the right of the Parties to contest such issues at the stage of the merits must remain unaffected by the Court's decision'[27]. Nevertheless, in its decision the Court stressed that 'both Libya and the United States, as Members of the United Nations, are obliged to accept and carry out the decisions of the Security Council in accordance with Art. 25 of the Charter, and ... [that] at the stage of proceedings on provisional measures, considers that *prima facie* obligation extend to the decision contained in resolution 748 (1992)'[28].

Especially pertinent to the constitutional questions to be dealt with in the present paper is the Court's assertion that in accordance with Article 103 of the Charter, the obligations of the Parties in that respect prevail over their obligations under any other international agreement, including the Montreal Convention[29]. The Court considered that it is 'not at this stage called upon to determine definitively the legal effects of Security Council resolution 748 (1992)', and 'whatever the situation previous to the adoption of that resolution, the rights claimed by Libya under the Montreal Convention cannot not be

[25] SC Res. 748
[26] Lockerbie Provisional Measures, 1992 ICJ Rep.
[27] *Ibid.*
[28] *Ibid.*
[29] *Ibid.*

regarded as appropriate for protection by the indication of provisional measures'[30] because the indication of such measures 'would be likely to impair the rights which appear to be prima facie enjoyed by the United States by virtue of … resolution 748…'[31]. The Court concluded that at this stage it is not called upon to decide any of the other questions raised, including the question of jurisdiction to entertain the merits, and that the questions are in no way prejudged by this decision, leaving the rights of the parties unaffected.

In 1933 the Security Council passed a third resolution – Resolution 883 (1993)[32], affirming its previous resolutions 731 (1992) and 748 (1992), and extending the sanctions regime applied against Libya. With regard to the requests including the surrender of the two Libyan nationals and cooperation in investigations, the Security Council:

'Determining in this context, that the continued failure by the Libyan Government to demonstrate by concrete actions its renunciation of terrorism, and in particular its continued failure to respond fully and effectively to the requests and decisions in resolutions 731 (1992) and 748 (1992), constitute *a threat to international peace and security* (emphasis added),

…

Acting under Chapter VII of the Charter,

1. Demands once again that the Libyan Government comply without any further delay with resolutions 731 (1992) and 748 (1992) …'[33]

B. The 1998 Preliminary Objections

After the dismissal of Libya's request for provisional measures, Libya filed a memorial on the merits requesting the Court to declare that the Montreal Convention is applicable to the dispute; that Libya has fully complied with its obligations under the Montreal Convention and is justified in its exercise of criminal jurisdiction over the

[30] *Ibid.* Under Art. 41 of the ICJ Statute, while a judgment is pending, the Court has the power to indicate provisional measures 'if it considers that circumstances so require … to preserve the respective rights of either parties'. As the Court stated in *Electricity Co. of Sofia and Bulgaria* (Interim Protection), 'the parties to a case must abstain from any measure capable of exercising a prejudicial effect in regard to the execution of the decision to be given, and in general, not allow any step of any kind to be taken which might aggravate or extend the dispute'. 1939 PCIJ (ser.A/B) No. 79 at 199 (Order of Dec. 5)

[31] Lockerbie Provisional Measures, 1992 ICJ Rep. at

[32] SC Res. 883, Nov. 11, 1993, reprinted in 31 ILM 1192 (1993)

[33] *Ibid.*

suspects; that the US has breached and continuing to breach its obligations under the Convention[34] (see p. 6).

Libya argued that the

'… the United States is under a legal obligation to respect Libya's right not to have the Convention set aside by means which would in any case be at variance with the principles of the United Nations Charter and with the mandatory rules of general international law prohibiting the use of force and the violation of sovereignty, territorial integrity, sovereign equality and political independence of States.'[35]

At this point the US filed preliminary objections pertaining to the jurisdiction of the Court and admissibility of the claim. In its judgment the Court examined the questions of existence of a legal dispute between the parties, jurisdiction over the dispute, the objection to admissibility of Libyan application, effects of SC resolutions 748 and 883 on the claim of inadmissibility, the US objection that Libyan claims are without object and the question of objections being of 'exclusively preliminary character'[36].

In a vote of thirteen to two, the Court rejected US objection to jurisdiction on the basis of alleged absence of a legal dispute. By a vote of thirteen to two, the Court found that it had jurisdiction on basis of Art. 14.1 of the Montreal Convention, to hear the disputes between Libya and the US as to the interpretation and application of the Convention. By twelve to three, the Court rejected US objection to admissibility of claim derived from Resolutions 748 (1992) and 883 (1993). It ruled that Libya's application as of 3 March 1992 is admissible, as the date 3 March 1992 on which Libya filed the application, was 'in fact the only relevant date for determining the admissibility'[37]. 'The resolutions [748 and 883] cannot be taken into consideration in regard to admissibility since they were adopted at a later date'; …[and] 'the Court can usefully rule on interpretation and application of [the Convention] … independently of the legal effects of [the resolutions]'[38]. SC resolution 731 (1992) adopted before the filing the Court did not consider a legal impediment, concluding that the resolution was a mere recommendation without binding effect.

Finally, the Court rejected US preliminary objection that Libya's claims became moot because resolutions 748 and 883 rendered them without an object. In the

[34] Lockerbie, 1998 ICJ Rep.
[35] Lockerbie, 1998 ICJ Rep.
[36] *Ibid.*
[37] *Ibid.*
[38] *Ibid.*

circumstance of the case, the Court found that such objection does not have 'an exclusively preliminary character'[39]. To decide on the effects of the resolutions would have meant that the Court had to consider the merits of the case, which it was not called upon to do at this stage.

C. The Court's and Council's Competence under the UN Charter

In *Lockerbie*, Judge Weeramanty stated: 'as with the great branches of government within a domestic jurisdiction such as the executive and the judiciary, they perform their mission for the common benefit of the greater system of which they are a part. In the United Nations system, the sphere of each of these bodies is laid down in the Charter, as within a domestic jurisdiction it may be laid down in a constitution.'[40]

Article 7 paragraph 1 of the Charter establishes the 'principal organs of the United Nations', among which 'a Security Council' and 'an International Court of Justice'.[41]The UN Charter, therefore, should be the starting point for the examination of the Court's and Council's competences within the UN system.

1. The Council The Security Council's competences pertaining to *Lockerbie* shall be outlined as a foundation of the debate to follow. Under the Charter, Article 24 paragraph 1 establishes that '[i]in order to ensure prompt and effective action by the United Nations, its Members confer on the Security Council *primary responsibility for the maintenance of international peace and security*, and agree in carrying out its duties under this responsibility the Security Council acts on their behalf.'[42] (emphasis added) This article raises questions as to the primacy of the Council over any other organ in the UN system.

Among other powers, under Chapter VII Article 39 the Council has the power to determine threats to peace: 'The Security Council shall determine the existence of any threat to the peace, breach to the peace, or acts of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.'[43] The determination by

[39] Lockerbie, 1998 ICJ Rep.
[40] Lockerbie, 1998 ICJ Rep. at 165 (Weeramanty, J. dissenting opinion)
[41] Art. 7 para. 1, Charter of the United Nations, San Francisco, 26 June, 1945
[42] Art. 24 para 1, Charter of the United Nations, San Francisco, 26 June, 1945
[43] Art. 39, Charter of the United Nations, San Francisco, 26 June, 1945

the Council that the refusal to extradite, the refusal to pay compensation and the refusal to cooperate in the criminal investigations on the part of Libya amounted to threat to international peace, proved central in the case. Under Art. 41 the Council 'may decide what measures not involving the use of armed force are to be employed to give effect to its decisions.'[44] This, as has been argued[45], was the basis for Security Council resolutions 748 (1992) and 833 (1993), which provided for a set of coercive commercial and diplomatic measure against Libya and created obligations for all UN members.

Pursuant to Art. 25, '[t]he Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter.'[46] With regard to potential conflict with obligations under Art. 25 of the Charter, including those arising from Security Council resolutions under Chapter VII, Art. 103 states that '[i]n the event of conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail'[47]. The legal effect of the combination of Art. 25 and Art. 103 was the central issue in the 1992 Court's decision resulting in dismissal of provisional measures request by Libya.

Although possessing broad powers, the Security Council is not unlimited in its actions. Pursuant to Art. 24.2, '[i]n discharging these duties the Security Council *shall act in accordance with the Purposes and Principles of the United Nations*. These specific powers granted to the Security Council for the discharge of these duties are laid down in Chapters VI, VII, VIII and XII.'[48] (emphasis added) This article places constitutional restraints upon the Council. The Purposes and Principles of the United Nations limiting the exercise of power by the Council are listed in Articles 1 and 2 of the Charter. Under Art. 1.1 the Purposes of the United Nations are '[t]o maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the

[44] Art. 41, Charter of the United Nations, San Francisco, 26 June, 1945. The measures stated in the article, however, are not an exhaustive list. In *Tadic* the ICTY concluded that: 'It is evident that the measures set out in Article 41 are merely illustrative examples which obviously do not exclude other measures.' *The Prosecutor v. Tadic*, Case No. IT-94-1-A and IT-94-1-Abis
[45] Gowlland-Debbas, *supra note* 1, p. 643
[46] Art. 25, Charter of the United Nations, San Francisco, 26 June, 1945
[47] Art. 103, Charter of the United Nations, San Francisco, 26 June, 1945
[48] Art. 24 para. 2, Charter of the United Nations, San Francisco, 26 June, 1945

principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of peace'[49]. It should be noted that 'conformity with international law' is part of the Purposes.

Under Article 2 the Principles of the Organization are *inter alia* 'sovereign equality of all its Members'[50], settling of 'international disputes by peaceful means'[51], and refraining from 'the threat or use of force against the territorial integrity or political independence of any State'[52]. Articles 1 and 2 can serve as the constitutional criteria against which the Court might review Council's actions.

2. The Court With regard to the competence of the Court under the Charter, pursuant to Article 92, '[t]he International Court of Justice shall be the *principal judicial organ of the United Nations*. It shall function in accordance with the annexed Statute, which is based upon the Statute of the Permanent Court of International Justice and forms and integral part of the present Charter'[53]. (emphasis added) Related to Art. 24 of the Charter pointing to the Council's primary responsibility for the maintenance of international peace, it seems that the Charter also uses language of primacy with regard to the Court's functions as a judicial organ.

Apart from being the principal judicial organ of the UN, under Art. 38 of its Statute the Court also has an autonomous function, of applying international law, separate from UN constitutional issues.[54] According to Art. 36.1 of the ICJ Statute, the Court has jurisdiction over 'all cases which the parties refer to it and all matters specially provided for in the Charter of the United Nations or in treaties and conventions in force'[55]. This proves central to the possibility of incidental judicial review by the Court in a contentious case. The following sections consider closely the relationship between the Court's and the Council's competences.

[49] Art. 1 para. 1, Charter of the United Nations, San Francisco, 26 June, 1945
[50] Art. 2 para. 1, Charter of the United Nations, San Francisco, 26 June, 1945
[51] Art. 7 para. 3, Charter of the United Nations, San Francisco, 26 June, 1945
[52] Art. 2 para. 4, Charter of the United Nations, San Francisco, 26 June, 1945
[53] Art. 92, Charter of the United Nations, San Francisco, 26 June, 1945
[54] Gowlland-Debbas, *supra note* 1, p.643
[55] Art. 36 para. 1 ICJ Statute

III. Avoiding a Constitutional Crisis? Legal Issues Raised

In the opening sentence of his article entitled 'Constitutional Crisis in the United Nations' Michael Reisman declares that '[t]he United Nations is in the midst of an unusual constitutional crisis'[56]. As a starting point for the purposes of the present paper, it is necessary to define 'constitutionalism' and 'constitutionalist crisis'.

Constitutionalism in international law has developed in two main strands. One strand focuses on the international legal order at large; the other strand focuses on constitutionalism within specific international organizations.[57] For the present purposes, constitutionalism will be seen in light of the latter approach with focus on the constitutionalist system within the United Nations and the relationship between the two organs – the Council and the Court. Constitutionalism means limits and restraints on these organs' powers.

Constitutional crisis usually refers to 1) the disruption of the process of governance, 2) a question that cannot be resolved within the constitutive document, causing the disruption, or 3) the abrogation of the constitutive document by one organ or branch of power. All three meanings emerge in the literature on *Lockerbie* and as such, shall be considered as encompassing the term 'constitutional crisis'. The crisis in the UN system arises from the following sequence: The Security Council has the primary responsibility for maintenance of international peace. In the same time the Court's competence for judicial review exercise is problematic, as the Charter is silent on the question of judicial review. Even if the Court invalidated a Council's decision, the Council might nevertheless decide to proceed and ignore the judgment, which would lead to the constitutional crisis extreme point. This is why it has been suggested that in *Lockerbie* the Court refrained from judicial review exercise and stepped down in order to avoid a constitutional crisis.

Realists as Reisman and Gill, have concluded that the Court should refrain from interference in the Council's actions, not necessarily expressing regret for a lack of vigor by the Court in *Lockerbie provisional measures*.[58] As Reisman submits, in Lockerbie, the

[56] Reisman, *supra note* 8, p.83
[57] Jan Klabbers, '*Contending Approaches to International Organizations: Between Functionalism and Constitutionalism'*, p. 13, unpublished paper, on file with the author
[58] Reisman, *supra note* 8, p.83, 84, 95; Terry Gill, 1993 Joint Conference, p.284

'Court deferred to the Council' and 'reached the right decision'. [59] On the other hand, among the greatest critiques of the Court in that case is de Waart, who argues that the Court missed an important opportunity, with the possibility for judicial review in the UN system now having been closed.[60] Both interpretations seem to underline the fact that the Court refrained from acting in order to avoid a constitutional crisis.

The present paper deconstructs the above stated interpretation. It will be argued that the problem has been incorrectly framed as a constitutional crisis. Further, the relationship between judicial review and constitutionalism, and the relationship between the Court and the Council, shall be examined. Secondly, it will be argued that in *Lockerbie* the Court cannot be characterized as 'avoiding' the issue. Various judicial review modes shall be examined in order to paint the nuanced picture of what judicial review in the UN system could take the shape of.

A list of questions emerges in the constitutional discussions with regard to judicial review by the Court: Is judicial review and checks and balances a necessary requirement for a constitutionalist system? Is the explicit mention of such mechanisms in the constitutive instrument a necessary requirement? Can competence be implied? Does the Court have jurisdiction over SC acts? Is judicial review a clear all-or-nothing process, whereby a judicial organ pronounces the acts of the executive null and void? Is judicial review concerned only with invalidating acts *per se*, or could it be about outlining constitutional limits and competences through other means at the disposal of the Court, or to use Jose Alvarez's phrase, 'would we recognize judicial review when we see it' [61]? Is judicial review a one-time paradigmatic unique event, which salience emerged only with *Lockerbie*, or could we perhaps trace it back in the Court's jurisprudence? Could affirming acts of the executive also be seen as a form of judicial review? What would be the effects of such invalidation/affirmation? What is the relationship between the Court and the Council under the Charter, and in the context of the Charter's evolution? Is there a clear division between political and judicial functions, and political and legal disputes? What is the relationship between Security Council resolutions (binding and non-binding)

[59] Ibid. Reisman, supra note 8, p. 94
[60] Paul de Waart, "The UN System at a Crossroads: People's Center or Big Brothers' Small Club?", Towards More Effective Supervision by International Organizations, 49 (Niels Blocker and Sam Muller eds. (1994), pp.61-64
[61] Jose Alvarez, "Judging the Security Council", 90 *AJIL* (1996), p. 30

and international law, which the Court is entitled to apply? How is this relationship likely to develop in future?

These questions are tackled against the background of the two central propositions maintaining that the issues raised in *Lockerbie* are a) not a question of a constitutional crisis and b) not a question of avoidance on the part of the Court.

IV. (Not) Avoiding a Constitutional Crisis

A. The relationship between judicial review and constitutionalism

In the discussions surrounding *Lockerbie*, the most frequently cited case is the US constitutional case *Marbury vs Madison*[62].[63] In it the US Supreme Court declared acts by the executive unconstitutional. On that basis, notions of constitutional checks and balances and judicial review powers are imported as an analogy into discussions of constitutionalism in the UN system. Such 'measure' of constitutionality should be more closely examined.

The central role of the Security Council in the UN system does not allow us to speak of strict separation of powers in the organization[64]. That was affirmed by Judge Weeramanty in *Lockerbie* [65]. Nonetheless, the Charter assigns different limited powers and tasks to different organs.[66] In any event, separation of powers in itself cannot be considered as an essential constitutional feature, the European parliamentary constitutional systems being only one among many exceptions. [67] Checks and balances and judicial review powers are not articulated in most European constitutions[68]. In some systems, such as the Netherlands, separation of powers with regard to securing the constitutional principles laid down, does not exist, as the legislature exercises self-

[62] 5 US (1 Cranch) 137 (1803)
[63] *See* Thomas Frank, *"The 'Powers of Appreciation': Who is the Ultimate Guardian of UN Legality?"*, 86 *AJIL* (1992), pp.519, Scott Bortz, *"Avoiding Collision of Competence: The Relationship between the Secuirty Council and the International Court of Justice"*, 2 Fla St. U. J. Int'l L. & Pol. 352 (1993); Alvarez, *supra note* 61
[64] Bardo Fassbender, *"The United Nations Charter as Constitution of the International Community"*, 36 *Columbia Journal of Transnational Law*, (1998), p. 574
[65] Lockerbie, 1998 ICJ Rep. at 55 (Weeramanty, J. dissenting opinion)
[66] Fassbender, *supra note* 64
[67] Fassbender, *supra note* 64
[68] For an extensive research of European constitutional systems *see* Constance Grewe and Helene Fabri, Droit constitutionnels europeens (1995), pp. 366-83

restrain. The presumption is that when a law passes, constitutionality has already been considered and reviewed, and that law would necessarily be in conformity with the Constitution.[69]

Lack of judicial review does not lead to lack of constitutionalism, therefore. Judicial review is not mentioned as a criterion in the authoritative literature on the UN Charter as the constitution of the international community.[70] Review power by the judicial branch is not a necessary constitutional requirement, as affirmed by Judge Schwebel in *Lockerbie* [71] Lack of judicial review does not lead to a crisis in constitutionalism. The question whether the Court has the power to review acts of the Security Council, cannot be characterized as a constitutional crisis because, existing or not, the power or lack of such power is not a threat to the constitutionalist nature of the system. In any event, this cannot preclude judicial review from evolving. The question whether judicial review might exist under the Charter is a constitutional one, which is nevertheless a separate issue from judicial review as a precondition for constitutionality.

B. The Evolution of the Court's Competence

The Charter's *travaux preparatoires* reflecting the history of negotiations at San Francisco and Dumbarton Oaks, reveal that inclusion of judicial review by the Court was discussed by way of a Belgian proposal for amendment. The suggestion was struck down.[72] Belgian proposal for creation of a committee that would consider disputes over the interpretation of the Charter was also rejected.[73]

It should be acknowledged, however, that the Court has made a very limited use of interpretations of the Charter, according to the drafters' intentions. In its jurisprudence, the Court has favored a teleological interpretation of the Charter as a living instrument. In *Reparations for Injuries*, *Certain expenses*, *Namibia* and *Western Sahara*[74] the Court

[69] For a suggested Security Council's self-restraint model *see* Farral, Jeremy, United Nations Sanctions and the Rule of Law, Cambridge (2007)
[70] Pierre-Marie Depuy, "The Constitutional Dimension of the Charter of the United Nations", 1 *Max Planck Yearbook of UN Law* (1997); Bardo Fassbender, *supra note* 64
[71] Lockerbie, 1998 ICJ Rep. at 165 (Scwebel, J. dissenting opinion)
[72] Doc. 664, IV/2/33, 13 UNCIO Docs. 633 (1945)
[73] Doc. 2 G/7 (k) (1) 3 *ibid* at 335-36. For an extensive discussion see *Lockerbie*, 1998 ICJ Rep. at 168 (Schwebel, J. dissenting opinion). *See* also Watson, Geoffrey, '*Constitutionalism, Judicial Review and the World Court'*, 34 Harvard International Law Journal, 8-14 (1993)
[74] Reparations for Injuries suffered in the Service of the United Nations, 1949 ICJ Rep. 174 (Advisory Opinion of Apr. 11); Certain Expenses; Namibia, Western Sahara, 1975 ICJ Rep. 12 (Advisory Opinion of oct. 16

relied on the doctrine of implied powers and functional necessity, whereby powers are construed in conformity with the purposes of the Organization and according to functional necessity. Powers can be implied. To draw a parallel, in European constitutions at the domestic level, as well as at the EU level[75], judicial review has evolved without an explicit constitutional warrant[76].

A number of authors submit that some form of judicial review by the Court is possible[77]; 'few would dispute that the Court may exercise some form of judicial control when the question is posed incidentally before it'[78]. Lack of explicit mention in the Charter cannot lead to a constitutional crisis. Doctrines on the relationship between UN organs evolve, the way the competence of the General Assembly and the Council, and their mutual relationship[79], has evolved under the Charter. If the situation presented in *Lockerbie* is a unique constitutional crisis, then almost any question related to the Organization's functioning and competence today can be characterized as a constitutional crisis. The question, therefore, is not one of deficiency in law, where the answer cannot be found within the instrument. Adjudicative bodies have the skill to produce a coherent legal reasoning even when the answer would not be obvious or easy to reach. Judicial review takes many faces. The answer as to whether judicial review powers are to be exercised by the Court is to be found within the evolution of the Charter, which includes *inter alia* the Court's jurisprudence on the interpretation of the Charter with this respect. The Court has 'asserted its competence both to interpret United Nations resolutions in the light of the Charter and to make pronouncements on the legality and validity of United Nations resolutions with respect to their conformity with the constituent instrument[80].

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[75] For a study of judicial review in the European Union system *see* Joseph Weiler, *"Eurocracy and Distrust: Some Questions concerning the Role of the European Court of Justice in the Protection of Fundamental Human Rights within the Legal Order of the European Communities*", 61 Washington Law Review 1103 (1986), *see* also Paul Dubinksy, *"The Essential Functions of Federal Courts: The European Union and the United States Compared"*, 42 American Journal of Comparative Law 295 (1994), p. 340-46

[76] Allan Brewer-Carias, Judicial Review in Comparative Law (1989), and Kenneth Holland, Judicial Activism in Comparative Perspective (ed.) (1991); on how judicial review has evolved without an explicit constitutional warrant

[77] Mohammed Bedjaoui, The New World Order and the Security Council: Testing the Legality of Its Acts (1994); Alvarez, *supra note* 61; Frank, supra note 64; Jan Klabbers, *"Straddling Law and Politics: Judicial Review in International Law"*, in R. St. J. McDonald & D.M. Johnson (eds.), *Towards World Constitutionalism*, (2005); Leo Gross, *"The International Court of Justice and the United Nations"*, 120 RCADI 313, 327 (1967 I); Mattias Herdegen, *"The Constitutionalisation of the UN Security System*", 135 *Vand. J. Transnational Law* (1994);

[78] Gowlland-Debbas, *supra note* 1, p.665

[79] *See* Cerain Expenses, supra note 45

[80] Gowlland-Debass, supra note, 1 p. 665

The Court could exercise judicial control to some extent only in incidental cases, and indirectly, as it lacks jurisdiction over the Council, the Council not being a party to the ICJ Statute. A Court's decision in a contentious case or an advisory opinion, although having far reaching impact on legitimacy, would not have a direct legally binding effect.

C. The Question of Invalidation

Apart from problems of jurisdiction and legally binding effects, the possibility for judicial review is also undermined by the unclear effects of invalidation (which is arguably the purpose of judicial review). With respect to the doctrine of *ultra vires* and the distinction between procedural illegality and substantial illegality, only in the latter case the validity of an act would be in question.[81] The legal effects of invalidation, however, remain unclear in law and doctrine. Questions such as whether the act invalidated would be void with retroactive effect, or void from the time of the decision, cannot be answered, as the law has scarcely developed concerning the consequences of determination of illegal actions by international organizations.[82] Even in contentious cases, the legal effects are 'unpredictable and case specific'[83]. The effect of pronouncing an act *ultra vires* could be nullification *ab intio* – the conclusion that the act is null and void. Alternatively or in a complementary fashion, invalidation could entail the conclusion that there is no legal force as a basis for further action[84].

Another option is ruling only on the *application* [85]of the act. The latter suggestion works under the assumption that it is not advisable for the Court to 'unpack' Security Council resolutions in order to examine how they were reached at. Instead, the Court could examine whether the *application* is being carried out in accordance with the Purpose and Principles of the Charter, or general international law, and particularly *jus cogens* peremptory norms. Invalidation can assume 'shades of gray'. The test for whether

[81] The doctrine of *ultra vires* in Certain Expenses, 1962, ICJ Rep.; *see* also Gowlland-Debbas, *supra note* 1, p.672 quoting Ebere Osieke, *'The Legal Validity of Ultra Vires Decisions of International Organizations'*, 77 AJIL 239 (1983)
[82] Elihu Lauterpracht, The Function of Law in the International Community (1933), pp.4-7
[83] Alvarez, *supra note* 61, p.5
[84] Elihu Lauterpracht, *"The Legal Effects of Illegal Acts of International Organizations"*, Cambridge Essays in International Law. Essays in Honor of Lord McNair, 88,89 (1965), p. 109
[85] S*ee* Klabbers, *supra note* 77, p.830; Alvarez, Jose, *"The Security Council's War on Terrorism: Problems and Policy Options"*, in Erica de Wet & Andre Nollkaemper (eds.), Review of the Security Council by Member States (2003)

judicial review has occurred, therefore, cannot simply be the presence or absence of an unequivocal null-and-void type of decision by the Court.[86] This is especially true in the context of lack of consensus and clarity over the effects of invalidation.

D. The functional relationship between the Court and the Council

The possibility for a judicial review by the Court naturally leads to questions about the functional relationship between the two UN organs. As Prof. Gowlland-Debass argues, *Lockerbie* is not the first dispute dealt with simultaneously by the Court and the Council, the previous cases being *Aegean Sea Continual Shelf* [87], *Hostages*[88] and *Nicaragua* [89]. However, while with the previous cases it was the same state alleging a breach of international obligations that sought support from the Court and the Council, *Lockerbie* created a potential for conflict between the two organs exactly because they were seized by different parties to the dispute.[90]

1. The legal/political dichotomy The question raised here relates to the traditional doctrine of legal/political dichotomy, justiciable and non-justiciable disputes, asserting that some disputes are not appropriate for adjudication and should be dealt with through political methods.[91] Justiciable disputes can be seen as disputes by states that are capable of resolution by the application of existing international rules (*non liquet*), or as legal disputes that do not affect the vital interests of states.[92] It has been suggested that the Court exercises judicial functions with regard to that type of disputes, whereas Security Council actions are political in nature. The organs, therefore, have separate and complementary functions, as stated by the Court in *Nicaragua*, the relationship being one

[86] According to Alvarez, in fact, null and void declaration by the Court with regard to Council's actions can never be expected. Alvarez, supra note 61, p.5
[87] Aegean Sea Continental Shelf (Greece v Turkey), Interim Protection, 1976 ICJ Rep. 3 (Order of Sept.11)
[88] United States Diplomatic and Consular Staff in Tehran (United States v. Iran), 1980 ICJ Rep. 3 (May 24) [hereinafter Hostages]
[89] Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States), Provisional measures, 1984 ICJ Rep. 169 (Order of May 10) [hereinafter Nicaragua Provisional Measures]; Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States), Jurisdiction and Admissibility, 1984 ICJ Rep. 392 (November 26) [hereinafter Nicaragua]
[90] Gowlland-Debass, supra note 1, p.644
[91] *Ibid.* p. 649, citing Lauterpracht, The Function of Law in the International Community 4-7 (1933) and Vattel, Emmerich, Le Droit des Gens, bk. II, ch xviii (Carnegie, ed. Charles Fenwick trans., 1916) (1758)
[92] *Ibid.* p. 649

of coordination and cooperation, not one of competition, characterized by no hierarchy between the two organs.[93] The Council can certainly refer disputes to the Court. Although Art. 36. 3 of the Charter states that 'legal disputes as a general rule be referred by the parties to the International Court of Justice'[94], the Security Council has made use of this provision only once in the *Corfu Channel* [95] case.[96]

With relation to settlement of disputes that endanger international peace, in *Hostages* the Court declared: 'It is for the Court, the principal organ of the United Nations, to resolve any legal question that may be at issue between the parties to a dispute; and the resolution of such legal questions by the Court may be an important, sometimes decisive, factor in promoting the peaceful settlement of the dispute.' [97] Further, in *Hostages* the ICJ concluded that: 'legal disputes between sovereign states by their very nature are likely to occur in political contexts, and often form only one element in a wider and long-standing political dispute between the states concerned. Yet never has the view been put forward that, because a legal dispute submitted to the Court is only one aspect of a political dispute, the Court should decline to resolve for the parties the legal questions at issue between them.'[98]

That is also supported by the statement in *Nicaragua* that 'the Court has never shied away from a case brought before it merely because it had political implications'[99] . The primary responsibility of the Council for the maintenance of international peace has not been seen as absolute. In *Certain Expenses,* in harmony with the reasoning of Uniting for Peace GA resolution 377[100], the Court concluded that 'primary' does not mean exclusive responsibility. [101] Referring to the previous decision of the Court in *Hostages*, Judge Ni stated in *Lockerbie* that the passing of resolutions by the Council does not prevent the Court from exercising its jurisdiction over the dispute.[102] Indeed, this was the position argued by the US as well in *Hostages*:

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[93] Gowlland-Debass, *supra note* 1, p.648, citing Judge Ni Declaration, 1992 ICJ at 22, 134; and Nicaragua Jurisdiction, 1984 ICJ Rep. at 27, 434-35; for an opposing view *see* Alvarez, Jose, *supra note* 61, p. 3
[94] Art. 36.3 Charter of the United Nations, San Francisco, 26 June, 1945
[95] Corfu Channel case (Preliminary Objections), 1948 ICJ Rep. 15,17 (March 25)
[96] Gowlland-Debass, *supra note* 1, p.650
[97] Hostages, 1980, ICJ Rep. at 20
[98] Ibid.
[99] Nicaragua Jurisdiction, 1984 ICJ Rep. at 435
[100] Uniting for Peace, GA Res. 377 (V) UN GAOR, 5th Sess. Supp.No.20, at 10, UN Doc A/1775 (1950) reprinted in 1950 UN YB 193
[101] Certain Expenses of the United Nations (Article 17, paragraph 2 of the Charter), 1962 ICJ Rep. 151, 163 (Advisory Opinion of July 20) [hereinafter Certain Expenses];
[102] Lockerbie, 1992, ICH Rep. at 20-21, 132-3 (quoted in Gowlland-Debass, supra note 1,p. 656)

'There is absolutely nothing in the United Nations Charter or in this Court's Statute to suggest that action by the Security Council excludes action by the Court, even if the two actions might in some respects be parallel.'[103]

By virtue of estoppel, this statement should be considered in light of *Lockerbie*, as well.

2. Functional Overlap Furthermore, the traditional legal/political dichotomy overlooks a certain functional overlap, or 'functional parallelism'[104], between the Council and the Court. Notably, in *Lockerbie* both the Council and the Court were to be 'involved in questions relating to state responsibility'[105]. As Gowlland-Debass argues, the Security Council in its enforcement functions enters the legal ambit of determination of state responsibility.[106] There is no longer two different methods – legal and political, but rather two methods *both* within the legal framework, one relying on judicial settlement of dispute, and the other – on institutionalized countermeasures or sanctions, with the distinction that the former is open to a challenge by an adjudicator, while the later is a matter of determination by the Council under Art. 39.[107] Although the Council is involved in making a legal determination, the process and method through which it derives at the characterization is not judicial, which has raised many questions with regard to incompleteness of evidence in the case of Libya.

With regard to the Council's broad discretionary powers, including the powers under Art. 39 of determination and legal characterization, in *Namibia* Judge Fitzmaurice stated that UN members are not unlimited and that they may not abuse their discretionary power[108]. This is relevant to the Council and its Members in light of the fact that in *Lockerbie* the Council determined the situation as threat to the peace three years after the event.[109] In what ways then could the Court act as a check on abuse of power?

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[103] Hostages, 1980 ICJ Pleading, 25,29
[104] Alvarez, supra note 61, p.3
[105] Gowlland-Debass, supra note 1, p.659
[106] Gowlland-Debbas, Vera, "Security Council Enforcement Action and Issues of State Responsibility", 43 *The International and Comparative Law Quarterly*, (1994). On the same topic s*ee* also Gowlland-Debass, Collective Responses to Illegal Acts in International Law. United Nations Actions in the Question of Southern Rhodesia (1990).
[107] Gowlland-Debass, supra note 1, p. 661
[108] Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), 1971 ICJ Rep. 16, 293-94, 340 (Advisory Opnion 0f June 2 [hereinafter Namibia]
[109] 1992 ICJ Rep. at 14, 126

E. Variety of Review Modes

Comparative study of judicial review in domestic systems reveals an enormous variety in procedure and approach, the continuum stretching from activist and teleological to literalism and original intent.[110] As Alvarez submits, it is unlikely that the Court will find that a Council decision already taken is null and void.[111] This is why absence of such declaration in *Lockerbie* cannot lead to the conclusion that the Court abdicated or deferred to the Council. Indeed, to assume such standard would be placing an unrealistically high expectation upon the Court in light of multiple problems with unclear competence and jurisdiction, unclear invalidation effects, and functional overlap in a system such as the UN.

However, there is an array of options for review of legality, falling short of declaring acts null and void. Frank departs from the notion that judicial review is an all-or-nothing process, submitting that there could be a middle path between no review and a full-fledged judicial review, ascertaining that the Court has left its mark with *Lockerbie*.[112]

Another approach to judicial review could be that the Court employs the assumption that there is no 'manifest intent' by the Council's members to violate the Charter, building on the analogy of *US v PLO*[113].

Alvarez suggests that an 'expressive mode' of review could exist, the Court guiding behavior and directing other organs by giving them 'cues'.[114] The court could also find, for example, that a particular Council decision *as applied* to the parties in the circumstances at issue would be illegal.[115]

The various interpretations of *Lockerbie* 1992 decision stretched from one side of the spectrum to the other: from statements that the Court simply affirmed the superiority of the Council[116], to interpretations of the decision as a revolutionary step in the direction of a full-scale judicial review[117]. That can only show that judicial review does not have

[110] Alvarez, supra note 61, p.25
[111] Ibid, p.5
[112] Frank, supra note 63, p. 523
[113] United States v Palestine Liberation Organization, 995 F.Supp. 1468-71 (SDNY 1988)
[114] Alvarez, supra note 61, p.29
[115] Ibid, p.5
[116] Ibid, p. 33
[117] Frank, supra note 63, p. 523

one single meaning, its extreme version not necessarily being the most suitable mode against which the Court's decisions should be compared.

F. The *Lockerbie* decision revisited

Finally, the Lockerbie decision shall be reexamined in light of the propositions put forward. Lockerbie cannot be seen as an abdication and stepping down by the Court. With regard to the provisional measures stage, the Court decided that SC resolution 748 precluded only indication of provisional measures.[118] The Court did not dismiss the case. It did not step down from adjudication: it stated that it cannot institute provisional measures, not that it cannot adjudicate. This becomes clear from the statement at the provisional measures stage that the Court 'cannot make definitive findings either of fact or law on the issues relating to the merits, and the right of the Parties to contest such issues at the stage of the merits must remain unaffected by the Court's decision'[119]. Indeed, the Court was not deterred in any way from proceeding to the merits and preliminary objections stage. As Judge Ajibola stated in his dissenting opinion, in some way affirming the political legal dichotomy: '[t]he Montreal Convention, on which Libya's Application is based squarely presents the Court with issues of rights and disputes under international law, involving, in particular, extradition, while the Security Council is dealing with the issue of the surrender of two suspects and the problem of international terrorism as it effects international peace and the security of nations – i.e. matters of political nature.'[120]

Furthermore, the Court underlined that the rights and obligations arising out of Res. 748 are prima facie and '*appear* to be prima facie enjoyed (emphasis added)'[121], which does not preclude the Court from considering more closely their effect, as it stated that 'the decisions given in these proceedings in no way prejudge'[122] any of the other questions raised. The Court could not review the legal effects of Res. 748 at this point, as it concluded that at this stage it cannot determine questions related to merits.[123] The decision was a postponement not an abdication because procedurally the Court was not entitled to pronounce on anything except provisional measures pursuant to Art. 46 of the

[118] *See* Frank, supra note 63, p. 522
[119] Lockerbie, 1992 ICJ Rep. at 34, 144
[120] Ibid.
[121] Ibid
[122] Ibid
[123] Ibid

Statute. Many accused the Court from shying away. However, to pronounce on the validity and legality of the resolutions at this point would have been intemperate.

In fact, the Court's 98 decision could seem surprising to many of the Court's critiques. By refusing to dismiss the case, it became clear that the Court would not defer to the Council. One could only speculate what would have been the final judgment had the case between the two parties not been settled in 2003.[124] At the preliminary objections stage, the Court did not rule out the possibility of examining the Council's resolutions once it proceeded to merits. It reiterated a number of times that the preliminary objection phase is not the time to consider issues such as validity of the resolution, which is arguably a substantial, rather than procedural, matter.

With regard to the political/legal dichotomy, in *Lockerbie* Libya argued that a legal dispute existed, while the US and the UK rejected the existence of such legal dispute at both phases of the case. The Court in its 1998 judgment accepted Libya's reasoning and determined that a dispute about the applicable legal regime does exist. It seems that the Court ruled in conformity with the rationale of its previous decisions in *Hostages* and *Nicaragua,* rejecting the legal/political dichotomy. Judge Lach stated that the Court should not be seen as 'abdicating'[125]. Judge Schahabudeen also stated in a separate opinion: 'This [the dismissal of request for provisional measures] results not from any collision between the competence of the Security Council and that of the Court, but from a collision between the obligations of Libya under the decision of the Security Council and any obligations, which it may have under the Montreal Convention. The Charter says that the former prevail.'[126]

With regard to hierarchy between the two organs, it has been argued that in matters of international peace, the Council has exclusive competence by virtue of Art. 39 and the Court should defer to the Council. Such arguments have been rejected in the Court's jurisprudence[127], as shown above. The Court did not follow such reasoning in *Lockerbie,* as well. Concerning admissibility of claim at the 1998 preliminary objections stage, the Court determined the relevant date as the date of the application's filing, concluding that SC resolutions 748 and 883 could not prejudice admissibility of claim, as

[124] For a discussion of the 'other' Lockerbie case where the two individuals were tried in the Netherlands, *see* Anthony Aust, *"Lockerbie: The Other Case"*, 49 *The International and Comparative Law Quarterly*, (2000)
[125] 1992 ICJ Rep. at 27, 139 (Judge Lach, separate opinion)
[126] 1992 ICJ Rep. at 29,141 (Judge Schahabudeen, separate opinion)
[127] Gowlland-Debass, supra note 1 p. 655

they followed in time the filing of application by Libya. The Court, therefore, cannot be portrayed as avoiding or deferring to the Council. Most importantly, the judgment concerning 'exclusively preliminary objection' sent an important signal. The Court decided to view the resolutions as belonging to the merits. All of the above show that the Court would not treat SC resolutions as having absolute sweeping effect. Instead, it followed the proper judicial procedures.

V. Conclusions.

The Council's Accountability: *Lockerbie* and Beyond

Finally, in light of the evolution of the UN Charter, I shall discuss the limitations to the intentions-of-the-drafters interpretative method serving as an impediment to judicial review by the Court. The evolution of the Security Council powers under Chapter VII has allowed the Council to characterize as a threat to international peace the situation in *Lockerbie* in which one state is unwilling to surrender two of its nationals, who have allegedly committed a crime, for criminal prosecution in another state. One must remember that at the San Francisco and Dumbarton Oaks negotiations of the Charter, the vision of criminal prosecution is still state-centric. The drafters probably did not intend to endow the Council with the far reaching competence to deal with criminal prosecution of individuals. Yet, most recently the Council has been involved in matters of individual criminal responsibility and punitive measures, by establishing the ICTY, ICTR and instituting sanctions targeting individuals. It could be argued that the Council has intentionally been endowed with far reaching powers and discretion to determine threats to international peace, pursuant to Art. 39. However, no matter how elastic Art. 39 may seem, in light of the 'intentions of the drafters' such acts on the part of the Council are 'not evolutionary but revolutionary'[128], to use the words of Judge Schwebel, denying the Court's potential for judicial review.

The powers of the Council today look very different from the letter of the Charter, as well as from the intentions of the drafters. If the evolution of the UN Charter allows this for the Council, then it follows that ICJ's competence should not be exclusively

[128] *Lockerbie*, 1998 ICJ Rep. at 168 (Schwebel, J. dissenting opinion)

limited to the intentions of the drafters test, either. There is no reason why, as a UN organ, only the Court's competences should be held to the 'intentions of the drafters' test, but not the Council's.

With the Security Council's functions expanding, there is also a growing distrust among the international community[129]. The Council has been widely criticized for human rights violations in the context of sanctions imposition and the counter-terrorism measures against individuals since 2001. Those issues present a more critical constitutional question than *Lockerbie* because at stake are values of normative hierarchy (i.e. human rights), which constitutions must protect. In *Lockerbie,* the effect of Art.103 is straightforward, the conflict arising out of obligations under the Charter and a treaty. A more complex case is one, which involves customary law, which does not necessarily fall within the wording of Art. 103 (stating that Charter obligations prevail with regard to *international agreements,* without a mention of customary law).

The *Bosnia* case of 1998 brought to the fore also the question of conflicting obligations under the Charter and *jus cogens*. In the words of Judge Lauterpracht in the *Bosnia*[130]case: 'the prohibition of genocide, unlike the matters covered by the Montreal Convention in the Lockerbie case in which the terms of Article 103 could be directly applied, has generally been accepted as having the status not of an ordinary rule of international law but of jus cogens … The relief which Article 103 of the Charter may give the Security Council in case of conflict between its decisions and an operative treaty obligation cannot – as a matter of simple hierarchy norm – extend to a conflict between a Security Council resolution and jus cogens.'[131]

Obligations for states under Art. 103 only lawfully arise if they are in accordance with the constitutional law of the international community, including its peremptory norms. It is only decisions consistent with *jus cogens* that can create obligations under Art. 103.[132] Nullity *ab intio* would be the result of any decision in conflict with a

[129] Adam Roberts and Benedict Kingsbury, Presiding over a divided world: Changing UN Roles, 1945-1993, International Peace Academy, Occasional Paper Series (1994)
[130] Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Yugoslavia (Serbia and Montenegro)), 1993 ICJ Rep., 407
[131] Ibid p. 440, para. 100 (13 Sept.) (Lauterpracht, j., sep. op.)
[132] *Lockerbie*, 1992 ICJ 64, 174 (Weeramantry, J. Dissenting opinion) ,'The powers of the Council are subject to Art. 1 and 2, and in particular, to the guarantees they provide of conformity with international law', *Lockerbie*, 1992 ICJ 101-2, 206-07, para 23 (El-Kosheri, J. Dissenting opinion) 'The meaning of Art. 25 is that the Members are obliged to carry out only those decisions which the Security Council has taken in accordance with the Charter', quoting Kelsen, Hans, The Law of the United Nations 110 (1950), p.95 , *See* also, Gowland-Debass, supra note 1, p. 667, *see* also Fassbender, supra note 64, *See* also Schachter,

peremptory norm.[133] In contrast to *Lockerbie*, those issues are the true constitutional issues, which are unfortunately beyond the scope of the present paper.

With the Council increasingly involved in law-making[134], moving from targeting of specific state addressees (as Libya in *Lockerbie*) to a more open-ended and undefined list of addressees (as individuals in counter-terrorism measures), it becomes more likely that the Council's resolutions could come into conflict with other sources of international law, which the ICJ must apply. The probability for incidental review by the Court, therefore, grows proportionally with the various, expanding and evolving powers of the Council. Judicial review should not be ruled out as a possibility. Perhaps the best indication for this future possibility is the Court's willingness to proceed to the merits of *Lockerbie* after rejecting the United States' objections on admissibility, application without an object, and jurisdiction. As the *Tadic* appeals chamber decision shows, one should also be aware of, and tuned to other international tribunals, as well, and their potential in reviewing Council's actions.[135]

In conclusion, Judge Onyeama's statement in *Namibia* should be recalled: 'In exercising its functions the Court is wholly independent of the other organs of the United Nations and is in no way obliged or concerned to render a judgment or opinion which would be "politically acceptable'. Its function is, in the words of Article 38 of the Statute, "to decide in accordance with international law".[136]

The Court is the 'guardian of legality for the international community as a whole, both within and without the United Nations'[137], as stated by Judge Lach in *Lockerbie*. With the Council's functions expanding, the need for that role of the Court is ever more present.

Oscar, *"The UN Legal Order: An Overview"*, 1 United Nations Legal Order 1, 13, Oscar Schacter and Christopher C. Joyner eds. (1995)

[133] Gowlland-Debass, supra note 1, p.673

[134] *See* Stefan Talmon, *,The Security Council as World Legislature'*, 99 AJIL (2005)

[135] *The Prosecutor v. Tadic*, Case No. IT-94-1-A and IT-94-1-Abis, The Appeals Chambers affirmed the power of the Council to create a criminal tribunal under Art. 41 of the Charter and concluded that it has jurisdiction on the basis of the principle *competence de la competence*, for a discussion *see* Warbrick, Collin, and Rowe, Peter, 'The International Criminal Tribunal for Yugoslavia: The Decision of the Appeals Chamber', 45 *The International and Comparative Law Quarterly*, (1996), pp. 691-94

[136] Namibia, 1971, ICJ Rep. at 143

[137] Lockerbie, 1992 Rep. at 138 (Lach, J., separate opinion)

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