

NOTES AND COMMENTS

THE CONSTITUTIONAL CRISIS IN THE UNITED NATIONS

The United Nations is in the midst of an unusual constitutional crisis. It was not caused by the Organization's historic ineffectiveness but, rather, by new expectations that parts of the Organization might be evolving into something far more effective and powerful than anticipated. Yet, curiously, the crisis is not due to any widespread dissatisfaction with the substance of the decisions that have signaled the emergence of this different United Nations. Until January 21, 1992, when the Security Council directed its attention to Libya, the major new decisions pertained to Iraq and the detritus of its aggression against Kuwait. These decisions had benefited from the consensus that they were well within the province of international law and the United Nations.

The crisis that is taking shape grows out of a vague disquiet about the longer-term implications of these constitutional trends for what, in 1945, were called, in a triumph of euphemism and oxymoron, the "smaller powers." This issue is critical now because, though the world of big and small and strong and weak states reflected in the United Nations Charter persists, the sharp asymmetries of 1945 have given way to complex international interdependencies. In this new world order, constitutional arrangements about the maintenance of peace and security, if they are to be effective, require more and more cooperation between large and small states.

I.

Its rhetoric of state equality notwithstanding, the United Nations Charter confirms and endorses a highly differentiated international society. Critical political powers are reserved to five of the strongest states by giving them a dominant role in the Security Council, which is charged with the maintenance of international peace and security and accorded the competence, in chapter VII of the Charter, to bind all the other members on the occurrence of rather vague contingencies that they themselves are authorized to determine.¹ The most apparent constitutional limitation is the veto, assigned to each of the same five strongest states.

But the Charter, as is wont with constitutions, has evolved since its inception in 1945. Practice within the UN system gradually led to the development of various constitutional controls over Security Council activity. In particular, although the Charter does not incorporate a constitutional theory of checks and balances be-

¹ UN CHARTER Art. 39. The relative power originally assigned to smaller states in the Charter system continues to be a point of scholarly controversy. Judgments here often depend on baselines. Goodrich, Hambro and Simon, for example, observe:

While it may be argued that concessions by the major powers were more apparent than real, it would seem to be a justified conclusion, particularly in the light of the subsequent development of the Charter, that the smaller powers did succeed in introducing important changes in the Dumbarton Oaks Proposals, even as modified by the amendments proposed by the Sponsoring Governments themselves.

LELAND M. GOODRICH, EDVARD HAMBRO & ANNE P. SIMONS, *THE CHARTER OF THE UNITED NATIONS* 8 (3d rev. ed. 1969).

tween separate branches, the reciprocal operation of the veto during the Cold War and the resultant paralysis of the Security Council created a system that was its functional equivalent. The effect of this paralysis in particular cases was often tragic; the resulting system, however, at least from the standpoint of elites from many smaller states, was apparently acceptable. If nothing else, it created a space for them, an area of relatively free operation.

During the Cold War, while the Council was frequently blocked, the General Assembly grew with the admission of many newly independent states. Many of them became increasingly restive about the Assembly's limited powers. Shortly after the Korean War erupted, then U.S. Secretary of State Dean Acheson, who wished to use the United Nations as an instrument of policy but was frustrated by the Soviet veto, encouraged the Assembly² to discover, with the International Court's later benediction,³ that the choice of the word "primary" for Security Council responsibilities under the Charter meant that hidden somewhere was a "secondary" responsibility, vested in the Assembly itself.

In 1963, in response to the ongoing pressure from the newly enlarged Assembly, a more meaningful constitutional reform was put in place: four nonpermanent seats were added to the six already on the Security Council.⁴ In theory, this expansion gave the "nonaligned" states a veto power over the Permanent Five (P-5). A significant potential check on the power of the P-5 was thus set in place.

Throughout this period, the International Court, like the General Assembly, tried to extend its range of activity, even into the area of peace and security. There is, of course, a potential for conflict between Court and Council if each tries to cook the same broth. But as long as the Council remained paralyzed, obviously no explicit conflict came between them. If anything, the Council's paralysis served as a justification for judicial activism.⁵ Moreover, even when Council and Court were simultaneously seized of a dispute, the latent constitutional and jurisdictional conflicts receded if, as sometimes occurred, both organs were asked by the same parties to do substantially the same things. Here the issue was not conflict but cooperation.

In certain historic periods, the United States Supreme Court, in the course of performing its function of constitutional control, has tried to protect and even

² *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 Y.B. 193. In *Uniting for Peace*, the General Assembly decided that if the Security Council was unable to exercise its primary responsibility for the maintenance of international peace and security when there appeared to be a threat to the peace, breach of the peace or act of aggression, the Assembly would take up the matter immediately with a view to making recommendations to its members for collective security, including the possible use of armed force.

From an international constitutional standpoint, *Uniting for Peace* was an imperfect initiative, for though it could overcome the paralyzing effect of a veto, it surrendered the self-protection of the Organization assured by the veto. Were *Uniting for Peace* applied, it could actively contrapose the Organization and one of the great powers. In the Suez crisis, the Assembly, using *Uniting for Peace*, did oppose two of the Permanent Five, France and the United Kingdom, but the impression of Assembly dominance over the Security Council here is, of course, completely illusory. The effective powers in the Security Council, the United States and the Soviet Union, were joined in opposition to France and the United Kingdom and used the Assembly or, if one prefers, enabled it, by their support, to employ *Uniting for Peace* in ways that otherwise could not have been used. For discussion of the implications of a real conflict, see text at notes 42-43 *infra*.

³ 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*].

⁴ GA Res. 1991 A (XVIII), UN GAOR, 18th Sess., Supp. No. 15, at 21, UN Doc. A/5515 (1963).

⁵ See *Military and Paramilitary Activities in and against Nicaragua* (Nicar. v. U.S.), *Jurisdiction and Admissibility*, 1984 ICJ REP. 392, 433, para. 93 (Nov. 26) [hereinafter *Nicaragua Jurisdiction*].

enhance the rights of the weakest members of society. In the 1970s, as the opportunity presented itself, the International Court began to develop a comparable function. Beginning with the *Nuclear Tests* cases,⁶ continuing through *Nicaragua*,⁷ and, most recently, in the jurisdictional phase of *Nauru*,⁸ the Court indicated that it was prepared to depart from the classical and strictly consensual basis for its operations and assert its jurisdiction over disputes on the basis of what would previously have been considered weak or even questionable grounds. Common to these cases was a gross disparity in the power positions of the states parties, with the weaker party requesting judicial intervention.

By this time, a generation of political leaders from the smaller states in the General Assembly had grown up operating in this changing environment. As a result, the membership of a much larger General Assembly came to feel itself entitled to far greater competence than the subordinate role to which the Assembly is consigned by the 1945 Charter. Some states aspired, individually, to admission to the most exclusive club in the world; others (of which Qaddafi Libya was a leader), to limit or abolish the veto entirely. None of these initiatives proved successful, but at the time there was little chagrin because the functional checks that had evolved worked and, in any case, the Council itself was so often ineffective.

Now, however, the Cold War has ended and, suddenly, the Council, by national or international governmental standards, seems remarkably effective, as was most recently demonstrated by the expulsion of an aggressor and the liberation of Kuwait. That was a campaign all could applaud because it responded to the sort of international delinquency that, writ large, may threaten every small state. But the expulsion was followed by deployment of the military, economic and diplomatic means at the Council's disposal, with the manifest objective of forcing a leader from power and changing a government. Using the powers of the United Nations to change a national government that two or three of the permanent members dislike is quite different from expelling an aggressor. The UN branch of Saddam Hussein's fan club may be small and shrinking, but actions like these may have precedential dimensions. The permanent members also, in effect, ordered the demarcation of a boundary,⁹ a dramatic new policy that makes many political elites elsewhere uneasy. Moreover, the permanent members undertook to sequester the natural resource wealth of a state without its agreement and to require it to pay a potentially large amount of damages, whose quantum and beneficiaries will be determined, in the ultimate instance, by the Council.¹⁰ Thus, with the end of the Cold War, the Council not only has revived atrophied functions, but also has undertaken activities that, arguably, may not have been contemplated at its inception.

Magnifying the disquiet is the fact that, as the Council has become more effective and powerful, it has become more secretive. Like a parliamentary matryoshka (doll), it now contains ever-smaller "mini-Councils," each meeting behind closed doors without keeping records, and each taking decisions secretly. Before the

⁶ *Nuclear Tests (Austl. v. Fr.; NZ v. Fr.)*, 1974 ICJ REP. 253, 457 (Dec. 20).

⁷ *Nicaragua Jurisdiction*, 1984 ICJ REP. 392.

⁸ *Certain Phosphate Lands in Nauru (Nauru v. Austl.)*, Preliminary Objections, 1992 ICJ REP. 240 (June 26).

⁹ See UN Doc. S/22412 (1991); see also SC Res. 687 (Apr. 3, 1991), reprinted in 30 ILM 847 (1991).

¹⁰ See SC Res. 692 (May 20, 1991), reprinted in 30 ILM 864 (1991); see also UN Doc. S/23608 (1992).

plenary Council meets in "consultation," in a special room assigned to it near the Security Council, the P-5 have met in "consultation" in a special room now assigned to them outside the Security Council; and before they meet, the P-3, composed of the United States, the United Kingdom and France, have met in "consultation" in one of their missions in New York. All of these meetings take place *in camera* and no common minutes are kept.¹¹ After the fifteen members of the Council have consulted and reached their decision, they adjourn to the Council's chamber, where they go through the formal motions of voting and announcing their decision. Decisions that appear to go further than at any time in the history of the United Nations are now ultimately being taken, it seems, by a small group of states separately meeting in secret.

As long as the target was Iraq and the context the continuing UN response to its aggression against Kuwait, the Council's activities, if innovative, were undertaken within a framework clearly contemplated by the Charter. To characterize the government of Saddam Hussein and his outsized arsenal of chemical, biological and soon nuclear weapons as a threat to the peace hardly seemed excessive. Even removing clouds from critical boundaries in the wake of an aggression might be fit into chapter VII. But in its Resolution 731, on January 21, 1992, the Council shifted its attention to Libya and its alleged export of state terrorism, using language redolent of Charter Article 39, which provides the Council with the contingent authority to issue decisions binding on all member states of the United Nations. Were the P-3 of the Security Council proclaiming, in fact, a "new world order" in which they constituted, in the vivid expression of Professor René-Jean Dupuy, "a world directorate"¹² for *anything* they determined to be a "threat to the peace"? Libya insisted that they were, and that their doing so violated its rights under the Charter and conventional international law. Libya brought the matter to the International Court of Justice.

II.

Libya's suit in the International Court against the United States and the United Kingdom¹³ for alleged violations of its rights under the 1971 Montreal Convention¹⁴ was widely viewed as the cynical ruse of a government implicated in state terrorism to evade condemnation and sanction by the Security Council. But claimants, no matter how ignoble, sometimes raise important issues. In dealing with Libya's request for interim measures and the jurisdictional boundary between the International Court and the Security Council, the Court collided with world constitutional issues that had been taking shape over the previous five years.

In Resolution 731 (1992),¹⁵ the Council had asked Libya, in effect, to surrender for trial two Libyan officials who had been indicted in the United States and

¹¹ For description, see Anthony Aust, *The Procedure and Practice of the Security Council Today* (unpublished manuscript, on file with present author).

¹² Statement at the Hague Academy (July 21, 1992).

¹³ The suit was initiated on March 3, 1992. The Court's two decisions on the request for interim measures, one regarding the United States and one regarding the United Kingdom, were delivered on April 14, 1992. Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libya v. UK; Libya v. U.S.), Provisional Measures, 1992 ICJ REP. 3, 114 (Orders of Apr. 14) [hereinafter *Lockerbie*]. The Orders are nearly the same.

¹⁴ Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, Sept. 23, 1971, 24 UST 564, 974 UNTS 177 [hereinafter *Montreal Convention*].

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

Scotland for causing the destruction of an American civilian airliner over Lockerbie, Scotland. Relying on the Montreal Convention, to which all the relevant states are party, Libya insisted on its treaty and customary right *aut dedere aut judicare* and indicated that it would try the officials itself if its investigating magistrate—who, it averred, had begun to review the evidence—found sufficient grounds. As the Libyan Government purported to see it, three permanent members of the Council—the United States, the United Kingdom and France—were exploiting their powers under the Charter to deprive Libya of its rights under conventional and customary international law. Because the Montreal Convention incorporates the International Court's jurisdiction,¹⁶ Libya asked the Court to stop them. Though the Court's decision responds to a request for interim measures and could be reconsidered at a hypothetical merits phase, the majority, concurring and dissenting opinions provide a remarkable window on the Court's thinking about a critical constitutional problem.

The nominal issue in *Lockerbie* was thus the sequencing, as between Council and Court, of the exercise of jurisdiction in part held concurrently by both of them. This is not an unusual phenomenon in advanced legal systems where different organs with different competences are created over time and often find themselves seized of all or different parts of the same dispute. The solution lies in the development of various codes for allocating and sequencing competences.¹⁷ Behind this nominal issue, however, lay a more difficult constitutional question that fused an apparently technical interpretation of the Charter about the boundary between the competences of Council and Court with an increasingly acute struggle over the most fundamental allocations of power in the United Nations system.

The nominal constitutional issue in *Lockerbie* is easily resolved. When the Security Council makes a decision under chapter VII of the Charter that concerns a state and the decision is inconsistent with some other treaty-based right claimed by that state, the Council decision prevails.¹⁸ The interim measures decision in *Lockerbie* thus reached the right legal conclusion on this point. Unfortunately, the Court seems to have reached its decision on the basis of unsound constitutional policy reasoning, which may prove to be troublesome in subsequent cases.

In *Lockerbie* the Council action that proved determinative, Resolution 748,¹⁹ only came several days after cloture of the proceedings in the Court. As a result, the focus of the parties' arguments before the Court had perforce been Resolution 731, which was cast in recommendatory language. (Indeed, it was not clear from the terms of Resolution 731 whether it had been adopted pursuant to chapter VI, or as a nonbinding recommendation under Article 39 of chapter VII.) The structure of the majority opinion, as well as several of the declarations and separate opinions, suggests that more than a few of the judges believed that Resolution 731, by itself, would not have preempted the rights Libya had claimed under the Montreal Convention.

¹⁶ Montreal Convention, *supra* note 14, Art. 14.

¹⁷ In modern international law, the rapid proliferation of institutions has already begun to generate an incipient doctrine of *lis alibi pendens* to deal with such conflicts. See, e.g., American Convention on Human Rights, Nov. 22, 1969, Art. 46(1)(c), OEA/Ser.K/XVI.1.1, doc. 70, rev.1, corr.1 (1970), reprinted in 1 THE INTER-AMERICAN SYSTEM, pt. II at 51 (F. V. García-Amador ed., 1983).

¹⁸ *Lockerbie*, 1992 ICJ REP. at 126, para. 39. The Court said that Charter Article 25 extends "*prima facie*" to Resolution 748. Judge Bedjaoui, dissenting, *id.* at 157, reached the same conclusion, on the ground that rights meriting protection had been "abolished" by a resolution of the Security Council. (The English translation curiously escalates Judge Bedjaoui's "abolished" to "annihilated.")

¹⁹ SC Res. 748 (Mar. 31, 1992), reprinted in 31 ILM 750 (1992).

Perhaps the defendants, the United States and the United Kingdom, had sensed this judicial inclination during the proceedings. In pleadings, the Court was reminded that the Council was still seized of the matter and might be moving toward an explicit chapter VII decision. Whatever the reason, after oral argument in the Peace Palace had ended, but before judgment was rendered, the Security Council issued Resolution 748. This time, the Council used very precise language. The new resolution said *expressis verbis* that it was a decision being taken under chapter VII of the Charter and that "the Libyan Government must now comply without any further delay with paragraph 3 of Resolution 731."

The effect on the Court of this new resolution was immediate and dispositive. Every judge who joined the majority (and, indeed, some of the dissenters) relied on Resolution 748 and not on 731. The Court said: "whatever the situation previous to the adoption of that 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."²⁰ By relying exclusively on Resolution 748, the Court tended to confirm, after the fact, the fears of the defendants that the judges might well view Resolution 731 by itself as insufficient to trump the Montreal Convention.²¹

In the most basic terms, the Court's legal reason for the supremacy of Resolution 748 over rights based on the Montreal Convention or on customary international law was that (1) Council "decisions" taken under the authority of chapter VII are accepted in advance as obligations by member states by virtue of Charter Article 25; and (2) obligations under the Charter prevail over obligations under any other international agreement by virtue of Charter Article 103. It is not, as one separate opinion was at pains to point out,²² so much that the Court is shouldered aside by a chapter VII decision, as that the applicant state loses whatever conventional or customary legal basis it may have had for making its application before the chapter VII decision. Superficially, this line of reasoning seems to preserve the dignity and organic equality of the Court vis-à-vis the Council. Implicit in this reasoning, however, is the notion that Resolution 731 would not have prevailed over treaty-based Court jurisdiction.

This notion is extremely problematic in light of the constitutional policy that animates the law in this area. The Council was assigned the primary responsibility for the maintenance of international peace and security, conditions that are, by their nature, basic and prerequisite to the achievement of all the other legal goals of the Charter. When the Council is involved in discharging that primary responsibility, states may not oppose to it inconsistent treaty or customary-based rights. If they could, the Council's function might be checked in some cases and the UN scheme for the maintenance of international peace and security could fail.

The Council is a political organ, operating in a political context that may sometimes limit its resources or, as a practical matter, restrict the way they may be used. In exercising its powers for the maintenance of peace and security, the Council may find it convenient in some cases to bargain or deal with a state by couching its wishes in recommendatory rather than binding terms. "Softer" language may allow that government to save face while accommodating the Council, or may allow the Council to adjust its own position as the Secretary-General and

²⁰ 1992 ICJ REP. at 126-27, para. 43.

²¹ Indeed, Judge Bedjaoui would not even have admitted Resolution 748, since it was passed after cloture of proceedings. *Id.* at 151.

²² 1992 ICJ REP. at 140 (Shahabuddeen, J., sep. op.).

his agents shuttle back and forth and the political situation evolves.²³ For this purpose, the variegated language of Article 39 gives the Council and its agents a range of options or strategic devices. But if the rules of the game allow the target state, at its option, to trump the Council by initiating an action in another organ on the basis of treaty or customary law, so long as an explicit chapter VII decision has not been taken, the Council must “escalate” immediately to the “decision” level of chapter VII. This option deprives the Council of a supple and adaptable strategy. In some cases, the relative rigidity of response might even aggravate the situation.

Constitutions, as Holmes said, are not suicide pacts. They must be minimally effective. If one approaches *Lockerbie* from the standpoint of the effective and economic operation of the Council, Resolution 731 should be viewed, at least *in posse*, as normatively strong enough to override other treaty or customary rights even though couched in recommendatory language. Whether a resolution like 731 would be judicially construed as having chapter VII, rather than chapter VI, consequences requires a searching assessment by the Court of the Council’s intentions in the context of each case, rather than some a priori conception of the bounds of a “threat to the peace.” That is an interpretive task. It may not always be easy, but it was not particularly difficult in the case of *Lockerbie*. The wording of Resolution 731 had been carefully scored with themes and phrases from chapter VII.²⁴ The belated and nervous appearance of Resolution 748 and its incorporation *eo nomine* of Resolution 731 merely served to make explicit the latter’s implicit chapter VII undertones.²⁵

If the Court had been sensitive to this constitutional policy dimension, its interim measures decision could have indicated that when the Council is factually in a chapter VII mode, even recommendations may have the effect of overriding treaty or custom-based rights. The question would then have concerned the methodology of judicial appreciation of the intentions of the Council, as reasonably understood by it and the targeted state, in the context of the case. To have done so, however, would have led the Court to make a judgment that, *inter alia*, would have confirmed one aspect of the expansion of the Council’s powers.

To avoid endorsing that expansion, the Court in *Lockerbie* took the opposite tack and relied exclusively on Resolution 748. In so doing, it minimized the normative force of Resolution 731, not on the basis of its wording but, rather, on the basis of its assumed provenance—chapter VI of the Charter. The Court may have thought that this was a remonstrance to the Council and an insistence on strict fidelity to the Charter. In fact, it hinders the Council in discharging its primary Charter responsibility, with the unfortunate result that the Council will find it harder to use the full range of nuanced and nuancing devices available to it for achieving its primary mission. In the future, the Council will be obliged to go

²³ This seems to have been the Secretary-General’s objective and impression. In his report to the Security Council of March 3, 1992, he concluded: “From the foregoing, it will be seen that while resolution 731 (1992) has not been complied with, there has been a certain evolution in the position of the Libyan authorities The Security Council may wish to consider this in deciding on its future course.” UN Doc. S/23672, at 3, para. 6 (1992).

²⁴ For example, compare the wording of paragraphs 1 and 2 of the *consideranda* of Resolution 731, *supra* note 15, and its operative paragraph 3 with Articles 39 and 40 of the UN Charter. But see Christian Tomuschat, *The Lockerbie Case before the International Court of Justice*, REV. INT’L COMM’N JURISTS, June 1992, at 38, for a different interpretation.

²⁵ The operative paragraph of Resolution 748 ordered compliance with the third operative paragraph of Resolution 731.

directly to a chapter VII decision if it fears that the delinquent state may “jump the arena” and try to rely on other preexisting, but now inconsistent, rights it believes will be cognizable in the Court.

III.

If the *Lockerbie* decision threatens to impede the Council, it also threatens to impede the Court. The majority opinion and some of the dissents rest ultimately on a per se and formal criterion: the existence of a Security Council decision under chapter VII. In the theory of the majority, such a decision preempts, at least for the duration of its operation, potential judicial jurisdiction based on another instrument. A cognate species of formalism was invoked, *mutatis mutandis*, in the *Nicaragua* case²⁶ to reject the United States claim of an international “political question” doctrine, in contrast to the more supple approach taken by the Court to support jurisdiction in the *Hostages* case.²⁷

As international constitutional law, such a formalistic approach is unsatisfactory, for it precludes, in blanket fashion, the exercise of judicial jurisdiction *whenever* and *simply because* the Council is in a chapter VII decision mode. A few dissenting judges observed that a complex dispute may have elements that are justiciable and separable, so that some aspects might be in the Council, and others in the Court, without fear of contradictory decisions or reciprocal let or hindrance.²⁸

That was not the case in *Lockerbie*. There Libya’s application and, in particular, the request for the indication of interim measures were not intended to assign severable aspects of the same dispute to different organs. Quite the contrary. They were manifestly designed to preempt the Council and force a shift of the dispute from Turtle Bay, where an outcome adverse to the Qaddafi government was certain, to The Hague, where, it was hoped, the dispute would be redefined so as to secure a more favorable outcome for Libya. Under the circumstances of the case, it was constitutionally proper, indeed mandatory, for the Court to defer to the Council.²⁹

The problem, therefore, is not the Court’s concrete decision. Rather, it lies in the Court’s reasoning and the implications of that reasoning for the future.

There may be disputes, like the *Hostages* case, in which the Court could take jurisdiction of the justiciable aspects without interfering with the Council. The

²⁶ *Nicaragua Jurisdiction*, 1984 ICJ REP. at 433–34, paras. 93–94 (rejecting U.S. argument that complaints involving use of force can only be resolved by Security Council action); *Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.)*, Merits, 1986 ICJ REP. 14, 26, para. 32 (June 27) [hereinafter *Nicaragua Merits*].

²⁷ *United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran)*, 1980 ICJ REP. 3, 21, para. 40 (May 24). There, the Security Council’s manifest acquiescence, indeed express satisfaction, in the Court’s assuming jurisdiction over certain elements of the dispute was a key factor in confirming that jurisdiction despite the fact that the Security Council was “actively seized of the matter.” *Id.* at 21. The reliance on this ground in *Nicaragua* seemed less plausible, on the facts of that case.

²⁸ *See, e.g.*, Declaration of Judge Ni, 1992 ICJ REP. at 132.

²⁹ This was, indeed, a case in which anything else the Court might have done, whatever its intention, would probably have undermined the program the Security Council had undertaken. Thus, proposals in separate dissenting opinions by Judges Ajibola, Bedjaoui and Weeramantry for *other* provisional measures, issued *ex proprio motu*, which, purportedly, would not have impeded the Council’s actions, would have been constitutionally inappropriate and were properly ignored by the majority. The proposals of Judge *ad hoc* El-Koshiery would have displaced parts of the program that the Council had adopted.

formalistic, per se approach taken by the majority and some of the dissenters in *Lockerbie* freed the Court from having to develop a judicial theory for dealing with these more challenging cases. While some dissenters rejected the per se and formalistic approach, none devised a plausible alternative or a coherent test to determine severability of future Council resolutions.³⁰ Thus, while a formalistic, per se approach may have eased the composition of a majority in *Lockerbie*, it cuts the Court out of other cases where it may well wish to operate.

It is also regrettable that the Court did not approach the matter differently with regard to Resolution 731. The Court could have insisted, in its own assigned sphere, on its equality with the Council, while affirming its inherent prudential competence to defer, and even to decline, the exercise of otherwise well-founded jurisdiction when, in its view, the larger purposes of the United Nations required it.³¹ The result would have been the right decision in *Lockerbie*, a potential enhancement of its own jurisdiction in future cases, and a precedent with which the Council could easily have lived.³²

IV.

Lockerbie is such an important constitutional case precisely because it coincides with the remarkable revival of the Security Council and the breakdown of the functional checks that had operated during the Cold War, and because, in this new context, it was precipitated by an expansion and a rather innovative use of the Charter's trigger concept of "threat to the peace." The constitutional dimensions of the case must surely have been apparent to the Court, if for no other reason than that the effective and dramatically expanded power of the Security Council was now encroaching upon the Court's sphere of activity, in particular, through Resolution 748, which choked off judicial jurisdiction in this phase of the case and, at that, did it *after* cloture of proceedings—establishing, as well, the more general principle that chapter VII decisions can trump otherwise valid judicial jurisdiction.³³ It should be no surprise, then, that some judges were moved to

³⁰ Judge Bedjaoui relied on the alleged distinction between disputes of a "political" and a "legal" nature. 1992 ICJ REP. at 143–44. See also the dissenting opinion of Judge Weeramantry, 1991 ICJ REP. at 165–67.

³¹ See, in this regard, the thoughtful view of Judge Lachs in his separate opinion, 1991 ICJ REP. at 138. Consider also the Court's earlier ruminations on the nature of the international judicial process in Northern Cameroons (Cameroon v. UK), Preliminary Objections, 1963 ICJ REP. 15, 38 (Dec. 2).

³² Such doctrines of prudential deference to political branches can be found in various well-developed constitutional systems, for example, in the U.S. Supreme Court's "act of state" and "political question" doctrines. See, e.g., *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964) (act of state); and *Baker v. Carr*, 369 U.S. 186 (1962) (political question); but see Louis Henkin, *Is There a "Political Question" Doctrine?*, 85 YALE L.J. 597 (1976).

³³ Professor Franck, in a characteristically thoughtful and eloquent comment in this *Journal*, contends that *Lockerbie's* ratio is that Charter Article 103 only trumps Libya's rights for purposes of interim measures. Thomas M. Franck, *The "Powers of Appreciation": Who Is the Ultimate Guardian of UN Legality?*, 86 AJIL 519, 521 (1992). While, depending on its terms, the termination of a particular chapter VII decision could lead to a revival of the rights that had been, as it were, "suspended" by it, I find it difficult to see how one can contest, under the terms of the Charter, or *Lockerbie*, that Articles 25 and 103 always trump rights arising from other agreements. Professor Franck, relying on Judge Oda's declaration, suggests that the synergy of Articles 25 and 103 would not trump "sovereign rights under general international law." *Id.* at 522. The idea that there is a body of general international law that hovers, like a "brooding omnipresence," over and limits the Charter and the organs that apply it is quite interesting. It was argued, of course, by the United States in *Nicaragua* but was rejected by the Court. *Nicaragua Merits*, 1986 ICJ REP. 14.

consider the possibility of some form of constitutional controls over Security Council actions. Specifically, several judges in *Lockerbie* indicated, some more tentatively than others, that, under certain circumstances, a decision by the Security Council might be viewed as invalid by the Court.³⁴ These opinions raise a fundamental question: does the Charter give the Court competence to review chapter VII actions by the Council?

Legal language carries, virtually *in ossibus*, the idea of legal restraints. Though the Charter charges and endows the Security Council with primary responsibility for the maintenance of international peace and security, is it free, in the performance of this vital task, from *all* legal restraint? Kelsen, surely the closest and most perceptive reader of the Charter, remarked that "the Security Council is not bound strictly to comply with existing law."³⁵ But the Council is, itself, a creature of a treaty. The juridical mind inclines to assume that, as such, the Council simply could not be discharged, when fulfilling its mandate, from the application of some principles of international law or compliance with some of the terms of the United Nations Charter. But that hypothesis is untestable without some agent for implementation. The practical questions, then, are: who will review Security Council actions and who will determine the content, if any, of the arguably limiting legal principles?

From the very beginning of the Organization, the advisory opinion mode of the Court has had the potential for "judicial review" of questions of this type. Some of the questions presented to the Court in its advisory mode were provoked by the claim that a political organ had acted *ultra vires* the Charter. Such claims necessarily involved an appraisal under the Charter of the lawfulness of the action complained of and whether it was *ultra vires*.

When political organs ask the Court for its opinion on the lawfulness of actions already taken, as happened, for example, in *Certain Expenses*³⁶ or, at least in part, in *Namibia*,³⁷ some of those voting to submit the question believe the action was unlawful; all of those voting have assumed, and presumably have discounted the possibility, that an opinion to that effect might issue. While those states that would be prejudiced by such an opinion may be consoled by its "advisory" and "non-binding" character, they would be recklessly wrong if they assumed that, for this reason alone, such an opinion would be devoid of political and even legal force. A statement of the law, rendered according to due process by a court obliged to decide according to law, cannot help but say something authoritative about the law.

In no opinion to date has the Court held an action by a major political organ to be *ultra vires*. But one can find in the advisory jurisdiction of the International Court analogues to *Marbury v. Madison*.³⁸ Like its American counterpart, the Court was able to assert its right to pass on the legality of legislative decision

³⁴ See, e.g., Judge Oda's declaration: "a decision of the Security Council, properly taken in the exercise of its competence, cannot be summarily reopened." 1992 ICJ REP. at 129; Judge Lachs, 1992 ICJ REP. at 138; Judge Shahabuddeen, 1992 ICJ REP. at 142.

³⁵ HANS KELSEN, *THE LAW OF THE UNITED NATIONS: A CRITICAL ANALYSIS OF ITS FUNDAMENTAL POWERS* 275 (1950).

³⁶ *Certain expenses*, 1962 ICJ REP. 151.

³⁷ *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 (Advisory Opinion of June 21).

³⁸ 5 U.S. (1 Cranch) 137 (1803).

making without, in the particular case, bringing itself into direct conflict with the political branches. Like *Marbury*, such international decisions may serve as a fundamental precedent for establishing the legitimacy of the International Court's general judicial review.

Finding criteria to be applied in such a review that might limit the Security Council in its peace and security functions is another matter. Insofar as there are substantive controls available to the Court, they must be found in the Charter itself. It is not easy. Chapter VII is, to use Professor Hart's nice expression, "open-textured";³⁹ a "threat to the peace" is, and was obviously designed to be, subjectively determined. Moreover, there are compelling systemic reasons for this assignment of broad discretion. Under Charter Article 27(3) in chapter V, a member of the Council, whether or not permanent, that is a party to a dispute before the Council may not vote on resolutions taken under chapter VI. While the *nemo iudex* principle underlying this prohibition expresses a fundamental principle in municipal law, it is not certain that it has been carried over into general international law. In any case, the prohibition is largely cosmetic in the Charter system. Resolutions under chapter VI are recommendatory. The real power of the Council rests in chapter VII. The *nemo iudex* prohibition in Article 27(3) does not affect decisions taken there. Moreover, since Article 39 permits the Council, when exercising chapter VII powers, to make either recommendations or decisions as it sees fit, the permanent members of the Council can evade Article 27(3) by operating under chapter VII or, as was the case with Resolution 731, by simply not indicating whether the resolution in question is being adopted under chapter VI or chapter VII.

Are there substantive limitations elsewhere in the Charter on actions taken by the Security Council when it is operating under chapter VII? The synergy of Articles 25 and 103, as we have seen, trumps all contrary non-Charter legal obligations. Article 24(2) enjoins the Security Council, in discharging its duties, to "act in accordance with the Purposes and Principles of the United Nations." Chapter I of the Charter is entitled "Purposes and Principles." Article 1(1) provides that the purposes of the United Nations are, among others, "to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes." Article 2 enjoins the Organization and its members to follow certain principles that could act as limitations. Only two of the seven paragraphs are addressed specifically to the Organization and both of them expand rather than limit the powers of the Security Council. Paragraph 6 enjoins the Organization to require nonmembers of the United Nations to act in accordance with its principles "so far as may be necessary for the maintenance of international peace and security." Paragraph 7, while nodding to "domestic jurisdiction," explicitly waives this limitation for enforcement measures under chapter VII. As for the term "threat to the peace," it has proved to be quite elastic in the hands of the Council.

Some contemporary jurists, inspired by Professor Jacques Derrida, could certainly deconstruct "implied" restraints from the Charter, but in that genre of interpretation, modality is message. The results often say far more about the interpreter's yearnings and interpretive creativity than about the intentions of the drafters or the contemporary expectations of the relevant parties or the community. Hard substantive and procedural standards for review of chapter VII actions

³⁹ H. L. A. HART, *THE CONCEPT OF LAW* 120 (1961).

are difficult to pinpoint in the Charter. Their very absence, in a context where so much power is assigned to the Council, is telling. A judicial review function, viewed in the formal Charter regime, seems somewhat difficult.

This is all very discouraging for the incurable judicial romantics who look to courts as a type of *deus ex machina*, ready to descend, upon the mere utterance of some juridical incantations that summon forth mysterious powers inherent in the law, to bring order and justice to the most untidy, even violent political situations. Many judicial romantics subconsciously transpose some of the powerful emotive affects of the symbol "courts" in municipal systems, where they have been significant struts of public order, to radically different environments. This transfer can be disappointing and even dangerous. A court, by itself, is only a college of people. Its powers in any setting derive from a political process, of which it is a part, and which enfranchises it.

In a statement redolent of such judicial romanticism, Judge Lachs remarked in *Lockerbie* that "the Court is the guardian of legality for the international community as a whole, both within and without the United Nations."⁴⁰ A potential "protective" role envisioned by Judge Lachs for the Court, as the custodian of some sort of Charter "legality," would have important international constitutional implications. But the Charter, as we have seen, seems not to have incorporated such a role for the Court and the example of *Lockerbie* is not inspiring. Here, the Court, as a whole, reached the right decision, but made no contribution to international constitutional law or to its own future role in it. Though the Court deferred to the Council, the majority judgment manifests no understanding of the special role requirements of the Council in discharging those functions that are the most important in the entire Charter. Nor, for that matter, was the Court solicitous of its own complementary role.

Some individual opinions attacked the constitutional issues more directly, but the judges who expressed themselves separately, whether in concurrence or dissent, seem to have done little more than position themselves symbolically as being in favor of limited constitutionalism. The mood of oddly passive judicial detachment was best captured by Judge Shahabuddeen in his separate opinion:

Are there any limits to the Council's powers of appreciation? In the equilibrium of forces underpinning the structure of the United Nations within the evolving international order, is there any conceivable point beyond which a legal issue may properly arise as to the competence of the Security Council to produce such overriding results? If there are any limits, what are those limits and what body, if other than the Security Council, is competent to say what those limits are?

If the answers to these delicate and complex questions are all in the negative, the position is potentially curious. It would not, on that account, be necessarily unsustainable in law; and how far the Court can enter the field is another matter.⁴¹

These carefully crafted and tantalizing questions will surely reinforce demands in the Assembly for increased power and enhanced controls, and even generate new ones, but they do not clarify the special features of the international political system or specify what kind of policy issues must be considered when fashioning legal institutions or appraising their performance in the world constitutive process. Judge Shahabuddeen concluded his recital of provocative questions by remarking that they were important but could not be examined now.

⁴⁰ 1992 ICJ REP. at 138.

⁴¹ 1992 ICJ REP. at 142.

V.

Underlying the relation between Court and Council was the real problem with which the Court grappled in *Lockerbie*, if only through a glass darkly. It concerned the relation, in the post-Cold War period, between the five permanent members of the Council (and more restricted constellations within their ranks) and the rest of the United Nations membership. Specifically, will the United Nations reemerge now as conceived in 1945, as essentially an oligarchy of the victors of the Second World War who, when they agree, can decide on and enforce their vision of world order? Or will there be some system of controls, some restraints or checks and balances of the sort that are deemed crucial in modern constitutional theory, indeed, in the very notion of the municipal *Rechtstaat*?

As noted before, the design of the United Nations did not incorporate these sorts of checks and balances. As a victors' creation, the only real control was the veto assigned to the permanent members of the Council. The amendment of 1963 that expanded the Council's membership had the potential for creating an effective "nonaligned" veto, which would have countered and repaired this apparent oligarchical and arguably atavistic feature. The enfranchised General Assembly's decision to increase the number of seats in the Security Council as an additional control strategy is telling. The Assembly did not establish a normative framework and assign its implementation to the Court. It acknowledged, by implication, the fluidity and discretion necessary for determinations of "threats to the peace" and assigned itself a *liberum veto* akin to the one the Charter had created for the permanent members of the Council. In effect, it endorsed the Charter system. But it endorsed it in a historical period in which (as we saw) other functional constitutional controls operated.

With the end of the Cold War, those controls no longer operate. *Lockerbie* was decided against the background of these developments. Even states with scant sympathy for Qaddafi Libya are disquieted. The leadership of these states may feel that some, if not all, of these Council initiatives are right in this case and, as I believe, that in the circumstances of Libya's actions, they are proper decisions for the organized international community to take. What appears to concern them is not disagreements about political values but the precedential weight of the *manner* in which these decisions are being taken. The elites of many of the smaller states that are discomfited are committed to the political values associated with the United States that triumphed in the Cold War. Yet, as they come to appreciate the implications of this new world order, they and the leaders of other smaller states, like members of any weaker stratum in a political system, have begun to discover that in an increasingly organized, but still asymmetrical, world political system, it is safer to depend on the structural restraints of a constitution than on the good will and shifting interests of the Prince. In short, they have begun to appreciate the need for a better approximation of a modern constitution.

This desideratum runs like a leitmotif throughout *Lockerbie*. It is played and replayed in the majority, separate and dissenting opinions. The fact that the search by the majority and dissenting judges for constitutional restraints proved fruitless accounts, I submit, for the rather gloomy tone of the Orders. The gloom does not arise from sympathy with Qaddafi Libya. Every member of the Court was surely repelled by the cold-blooded destruction of the civil aircraft and its passengers and, one would surmise, many on the Court accepted that only strong action by the Security Council could curb a government run by people capable of ordering and financing such massacres. But the implication of the *Lockerbie* deci-

sion is that, now more than ever, there is a need for a robust world constitutive process, even as the Court was marginalizing its own potential to help shape it.

VI.

A constitution is a continuing process, not a single event. The next decade will surely witness an international constitutional struggle on many fronts, as the governments of the majority of small states seek some checks and balances on unrestrained Security Council action, just as they sought to impose them, without significant success, in San Francisco in the spring of 1945. Indeed, some ideas for addressing the situation can already be detected in the wings.

One view implies that a potential restraint exists in the present Council, inasmuch as the interests of the smaller states are already de facto represented there by one or more of the permanent members. Unfortunately, there is little evidence to suggest that this is actually the case. For example, while China may wish to be viewed as the protector of the disenfranchised, the fact that, in the critical cases to date, it has held out only until some special interest of its own was satisfied by one of the other permanent members has not gone unnoticed by the membership of the General Assembly.

A second recipe for limitation draws its inspiration from the expansion of the Security Council's membership in 1963. Four nonpermanent seats were added then, creating, as we saw, a potential "nonaligned state" veto if the nonpermanent members voted as a bloc. In fact, that has not happened and, as a result, the real power system in the Council has not been affected. A further expansion of the Council would be unlikely to satisfy those agitating for change, yet it would make the Council more unwieldy and less efficient in the performance of its primary task.

A third avenue involves increasing the number of permanent members. The addition to the Council of the resurgent great powers of the prewar era, Germany and Japan, would hardly assuage Assembly concerns. Germany and Japan may have already acquired some de facto Council influence insofar as the industrialized Group of Seven overlaps with the Permanent Five; that development underlines the community of interest of this powerful group. Leading developing countries, like India and Brazil, might propose themselves as new "Third World" permanent members of the Council. There is little assurance that, if they or others were elevated as representatives of this constituency, they would perform that mandate. The reason for their selection and elevation would be that they were, in fact, great powers, with corresponding interests and loyalties.

Whatever strategy it settles upon, will the Assembly majority succeed in winning some meaningful constitutional checks? Like all constitutional issues, the ones converging in the *Lockerbie* case turn ultimately not only on policy and values, but also on raw power. The General Assembly has less power now than its members enjoyed one or two decades ago. Many of the variables in international and domestic politics are unstable and things could change quickly. Until they do, however, the realization of constitutional innovations through political action in the Assembly is unlikely.

VII.

Perched atop the new structure of world politics, the United States seems to be the winner, the major beneficiary of the revival of the authentic Charter dynamic.

The Security Council is finally working as planned. Within the Council, the P-5 meet privately to coordinate policy and, within the P-5, the P-3 meet privately to coordinate policy. There is no question about the identity of P-1.

A recent planning document of the Department of Defense, which was leaked in Washington, suggests that some U.S. officials are now tempted to use this new configuration to "go it alone," clarifying and implementing the common interest as the United States thinks best.⁴² It is not the genre of which this exercise was a part, as such, or the fact that it includes some scenarios projecting that the United States might have to operate alone, that causes concern. Unquestionably, responsible U.S. officials must plan carefully and elaborately for security; among the scenarios that will be designed must be some contemplating unilateral action. But, as reported, this particular exercise manifests a strange, almost autistic perceptual block: a world in which, in the crunch, only one state exists—P-1.

Officials prone to this ailment will quickly discover their mistake. Indeed, the United States may be the most powerful state now, but its power, as U.S. trade negotiators can attest, is more on the order of "fate control" than "behavior control." It is nice to have power, but securing cooperative behavior still requires the skilled use of diplomacy. That, inevitably, includes concessions. When the targeted behavior is that of many similarly situated states, some of these concessions will best be made collectively and on the constitutive level.

There is, in short, still a world out there. The United States, for all its formidable power, is still, perforce, a player in the world constitutive process. The key question concerns the role and posture it will adopt. I believe that the United States, at this critical moment, should accept the responsibility of leadership. It should initiate the adaptation of the international constitution to contemporary needs and conditions, as it did once before.⁴³ It is hard to yield power; hard, for some, even to share it. In the constitutional struggle to come, some U.S. officials may be tempted to view those who challenge American efforts to use power in pursuit of peace as impertinent, ungrateful, even hostile. That would be unfortunate, for, if anything, the coming struggle for international constitutional guarantees in a new world order represents a triumph of historic American political values.

VIII.

But what are the possibilities for constitutional changes that integrate the need for responsible and effective maintenance of international peace and security with demands for power sharing and controls? It will surely be impossible to satisfy all the demands of the members of the Assembly. Security, in the final analysis, is not a verbal exercise but the exercise of power in defense of public order. Without power, security is a word. The design of a realistic international security system cannot ignore how power is actually distributed. This unyielding aspect of international political reality accounts, in international law, for the congruence of control and authority in the form of permanent membership in the Council, as well as

⁴² *Pentagon Imagines New Enemies to Fight in Post-Cold-War Era*, N.Y. TIMES, Feb. 17, 1992, at A1, A8; *War in 1990's: New Doubts*, *id.*, Feb. 18, 1992, at A1, A12. The planning document was not released by the *Times*. Others who claim to be familiar with it have stated that it was misrepresented. See Francis Fukuyama, *The Beginning of Foreign Policy*, NEW REPUBLIC, Aug. 17, 1992, at 24, 24-25, 28, 30, 32.

⁴³ See text at and note 2 *supra*.

for the episodically lawful, if constitutionally anomalous, practice of the unilateral use of force. The intellectual task will be to see to what extent responsible participation and constitutional control can be made compatible with effective security.

The evolution of the Charter regime seems well adapted, for the foreseeable future, to the effective power process in world politics and the minimum survival needs of the United Nations itself. The structure of the Security Council, with a limited number of permanent memberships that are roughly congruent with the actual distribution of power in the larger political system, meets the reality principle in the following critical ways:

- First, at a minimum, when the core Council membership agrees on something, it is not a verbal exercise. The Council can perform.
- Second, when the core Council membership does not agree, the Organization cannot act. The veto permits its holder (or holders) to stop the Organization from operating if it feels the proposed action would conflict with one of its own vital interests. Thus, the Organization cannot directly confront one of the major power centers or, in more general terms, the effective power process. Recognition of this condition seems necessary for, in a confrontation, the Organization would be the casualty.
- Third, the potential for a functional veto by the nonpermanent membership permits the members of the General Assembly to block UN action when they feel their vital interests would be compromised. If seven nonpermanent members vote against a proposal, the Council cannot pass it, no matter how united and passionate the Permanent Five may be.
- Fourth, the residual and contingent right of unilateral action, subject to appraisal in substantive terms by the international community as a whole, permits individual states to act when the Organization is blocked, and thus to perform whatever systemic functions are required.

What is missing from this system is the opportunity for the Assembly to be apprised of prospective Council operations under chapter VII, so that it could determine whether they might conflict with its members' collective vital interests. This missing element is even more sorely felt now that the Council has taken to the generalized practice of deliberation *in camera*. Yet in many cases closed deliberations may be justified.

The problem here is not a primary structural defect but the absence of an appropriate informational loop from Council to Assembly. The Charter envisaged such a loop. Article 12(2) provides:

The Secretary-General, with the consent of the Security Council, shall notify the General Assembly at each session of any matters relative to the maintenance of international peace and security which are being dealt with by the Security Council and shall similarly notify the General Assembly, or the Members of the United Nations if the General Assembly is not in session, immediately the Security Council ceases to deal with such matters.

With the Council's expanding agenda, this structure, even were it working, is not sufficient. The absence of an effective loop may have been lamentable in the past, but it was not systemically significant as long as the Assembly was relatively powerless or the Council was blocked. But the revival of the Council and the growth of interdependence between larger and smaller states have made the acquiescence, if not the active support, of the Assembly's membership more important to fulfilling the peace maintenance function of the Security Council.

To deal with this problem, the United States should initiate a proposal in the Security Council for the formation of a "Chapter VII Consultation Committee" of the General Assembly. It should be composed of twenty-one members of the Assembly, representing a range of regions and interests, to be selected annually by the Assembly. A protocol would be established, by which the Security Council would immediately notify the committee whenever it planned to move into a chapter VII decision mode. The President of the Council and the Secretary-General would promptly meet with the committee to share the Council's information and views and solicit the committee's views, which would be reported to the Council. Throughout the crisis, the Council and committee would remain in contact in this fashion. As a result, the Council would always be apprised of representative Assembly views and the Assembly, for its part, would have the full benefit of the Council's perspective.

Consultation is a term of art in international law. It does not import a veto power for the party consulted, but, when practiced in good faith, it amounts to more than mere notification.⁴⁴ Procedurally, this proposal incorporates a representative and authoritative at-large group of the Assembly into the thinking and planning of the Council in its chapter VII mode. Substantively, it informs the Council of Assembly views and facilitates their incorporation. Insofar as the Assembly still strongly opposes the Council's direction even after consultation, it can consolidate its view and operate through the Council's nonpermanent membership.

To be sure, there are ten nonpermanent members already on the Council that are elected from the Assembly for two-year terms. But their function is not so much liaison as participation. No one on the Council is expressly charged with maintaining an open line to the Assembly, nor is anyone in the Assembly designated as the receiver and relayer of such information from the Council. The Consultation Committee would invest decisions of the Council with the imprimatur of the world community, and the expansion of chapter VII competence would be viewed as a democratic constitutional development and not the reinforcement of a world directorate.

IX.

The implosion of many single-party states in the last half decade and efforts to construct viable democracies out of their political and economic ruins have focused renewed attention on the indispensable role of a constitutional document, a basic agreement between all political factions and the rank-and-file on the fundamental institutions of decision making, their objectives, their methods of operation and the limitations to which they will be subjected. Constitution building cannot be conceived of narrowly or in some pure legalistic fashion. Beautifully crafted and wonderfully sonorous documents may be inspiring, but if they do not work, they are worthless. Constitutions that work have taken account of popular aspiration, indigenous political culture, internal and external threats to order, the resources available and the distribution of effective power. No two constitutional documents are the same. Each is the outcome of a unique and continuing constitutive process. Each must be designed to deal with the unique circumstances in which it will operate; within that framework, each must create structures and

⁴⁴ See *Lake Lanoux (Spain v. Fr.)*, 12 R.I.A.A. 281 (1957).

processes that maintain minimum order and approximate popular aspirations to the extent possible.

The end of the Cold War has once again moved constitutional law to the forefront, not simply in domestic contexts but on a planetary scale as well.⁴⁵ The United Nations Charter is only a part of this ongoing world constitutive process, but a full understanding of what the Charter has been able to achieve and what it is capable of achieving in the future requires clarification of critical international policies and the invention and appraisal of alternatives.

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The *American Journal of International Law* welcomes short communications from its readers. It reserves the right to determine which letters should be published and to edit any letters printed. Letters should conform to the same format requirements as other manuscripts.

TO THE EDITOR IN CHIEF:

In her argument generally supporting the Supreme Court's decision in *Alvarez-Machain* (*Agora*, 86 AJIL 736 (1992)), Professor Malvina Halberstam quotes and cites prominently both me and the *Restatement (Third) of the Foreign Relations Law of the United States* (1987). She has quoted and cited correctly, but incompletely.

First. Professor Halberstam quotes me as saying:

To date, however, international law is wedded to the principle *male captus bene detentus*: a person arrested in violation of international law, for example by kidnapping from the territory of another State without that State's consent, . . . may nonetheless be brought to trial and the arresting State does not thereby commit an additional violation. (86 AJIL at 738)

She might have quoted also the sentences that follow: "That principle, antedating the age of human rights, encourages invasions of foreign territory and gross violation of human rights. It cries for re-examination and rejection."

In fact, the law relevant to *Alvarez-Machain* is not today what Professor Halberstam suggests. In my opinion, *male captus, bene detentus* is not the law when the state whose territory is violated protests the abduction and demands the victim's return.

That was the lesson in international law taught by the *Eichmann* case. It was generally accepted that if Argentina had insisted on Eichmann's return, Israel would have compounded its violation of Argentine territory by failing to return him. Fortunately, Argentina was persuaded to accept an apology from the Government of Israel and not to request Eichmann's return.

Professor Halberstam might have quoted also section 432, comment *c* of the *Restatement*. It states:

⁴⁵ Myres S. McDougal, Harold Lasswell & W. Michael Reisman, *The World Constitutive Process of Authoritative Decision*, 19 J. LEGAL EDUC. 253 (1967), reprinted in MYRES S. MCDUGAL & W. MICHAEL REISMAN, *ESSAYS IN INTERNATIONAL LAW* 191 (1981).

* Of the Board of Editors. The author benefited from comments on earlier drafts by Mahnoush Arsanjani, Myres S. McDougal, Andrew Willard, Philip Bobbitt and Andrew Cappel.