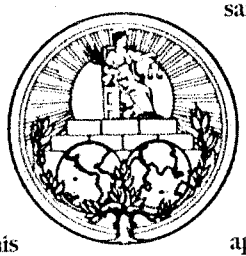
# The United Nations and Judicial Review

## Marbury v. Madison Revival

*Petra Lustigová*

### Judicial Review – Hot Issue Again



The US Supreme Court decision in *Marbury v. Madison*, regarding the power of judicial review *vis-à-vis* political organs, is deeply rooted in the history of constitutionalism as one of its most fundamental and widely-recognized principles. Recently, this almost two-century-old doctrine has been experiencing something of a 'grand revival', this time with regard to international law, and an International Court of Justice (ICJ) case concerning interim measures brought by Libya against the United States and the United Kingdom, popularly known as the *Lockerbie Case*.[1]

### The UN Security Council versus the ICJ

The case began with a joint request from the United States and the United Kingdom asking Libya to surrender for trial two Libyan suspects accused of bombing Pan Am Flight 103 over the Scottish town of Lockerbie in December 1988. At the same time, the US also initiated **UN Security Council Resolution 731,**[2] which reiterated this demand. Libya, however, refused to surrender its own nationals on the grounds that the US and the UK violated the 1971 **Montreal Convention,**[3] and filed two ICJ counter-suits seeking protection from unilateral action against Libya for refusing to extradite the accused bombers. Shortly after oral hearings had commenced on the Libyan request, but before the Court reached a decision, the UN Security Council passed **Resolution 748,**[4] imposing universal mandatory commercial and diplomatic sanctions against Libya for not complying with **Resolution 731**.

The ICJ then found itself in the position of having to determine whether it would review the legality of a Security Council decision. According to Alvarez, the ICJ faced "a decision like the one the US Supreme Court confronted in 1803 in *Marbury v. Madison;*... ICJ judges need to decide whether to 'cross the Rubicon' and assume the power, without express constitutional warrant, to render the decision of a coordinate political organ null and void."[5]

The Court, however, decided not to take that leap and, instead, opted for a narrow ruling that was limited to determining that **UN Charter** obligations prevailed over those of the 1971 **Montreal Convention** (referring to Arts. 25 and 103 of the **UN Charter**). With regard to interim relief, the Court refused to make any statement as to the legality of SC **Resolution 748** being *ultra vires*, despite Libya's claim that "there was reason to believe that the Security Council might have exceeded its Charter-delegated powers by imposing sanctions."[6] The fact that the ICJ upheld the validity of **Resolution 748** imposed an obligation UN member states "to accept and carry out the decisions of the Security Council" according to Art. 25.[7] Moreover, "Art. 103[8] of the **Charter** 'trumps' any rights Libya might have under the **Montreal Convention** and thus frees the Security Council to apply sanctions as a suitable remedy in exercise of its powers under chapter VII."[9]

### The Security Council out of Control

Because of the particular structure of the UN system[10] there is no control mechanism regarding the decisions of the Security Council relating to the determination under Art. 39[11] as to whether or not a particular situation constitutes a "threat to the peace." Consequently, this broad discretionary power, which is very political in nature, falls exclusively within the jurisdiction of the Security Council and may not be exercised or overruled by any other entity. The Security Council decisions regarding an Art. 39 determination are final and not subject to review, not even by the ICJ.[12]

While legal systems of individual states often include procedures for determining the validity of legislative and governmental acts, no analogous procedure exists within the structure of the United Nations.[13] The ICJ does not serve as a general constitutional court of the UN system and lacks "powers of judicial review in the sense of being able to quash definitively the decisions of political organs of the United Nations."[14]

The legality of a Security Council decision depends largely on legitimate recognition by those who are called upon to implement the decision,[15] which means that, although the UN members agreed, by virtue of Art. 25 to respect the Council decisions, they "cannot be forced to execute actively these resolutions. No system exists to compel the members to cooperate as is the case with national governments."[16]

Currently, the Security Council appears to be dominated by a single permanent member and its actions "seem to be more a reflection of the interests of a few major powers than an overwhelming desire to maintain international peace and security."[17] Because of this, it is especially important that the ICJ not only clearly expresses itself on the admissibility of judicial review over the Security Council, but also sets some legal limits on the Council's decisions and assumes more fully the role of 'guardian' of UN legality "thus to encourage the Security Council not to stray so far that it loses legitimacy."[18]

### The ICJ Stepping out of Its Shadow?

Irrespective as to whether or not one believes that the *Lockerbie* and *Marbury* cases are comparable, the ICJ undeniably had a chance to step out of its shadow and follow the example of the US Supreme Court. Had the ICJ dared, it could have assumed jurisdiction over a political organ for the benefit of the entire international community and set a precedent to modify the UN system. It would not have been the first time a detour was taken from the UN Charter, as proved by the organisation's ongoing peacekeeping missions.[19] We can only guess why the ICJ didn't stand up to this legal challenge. Perhaps the newly-energized Security Council and the UN's collective security scheme are still too fragile to challenge.

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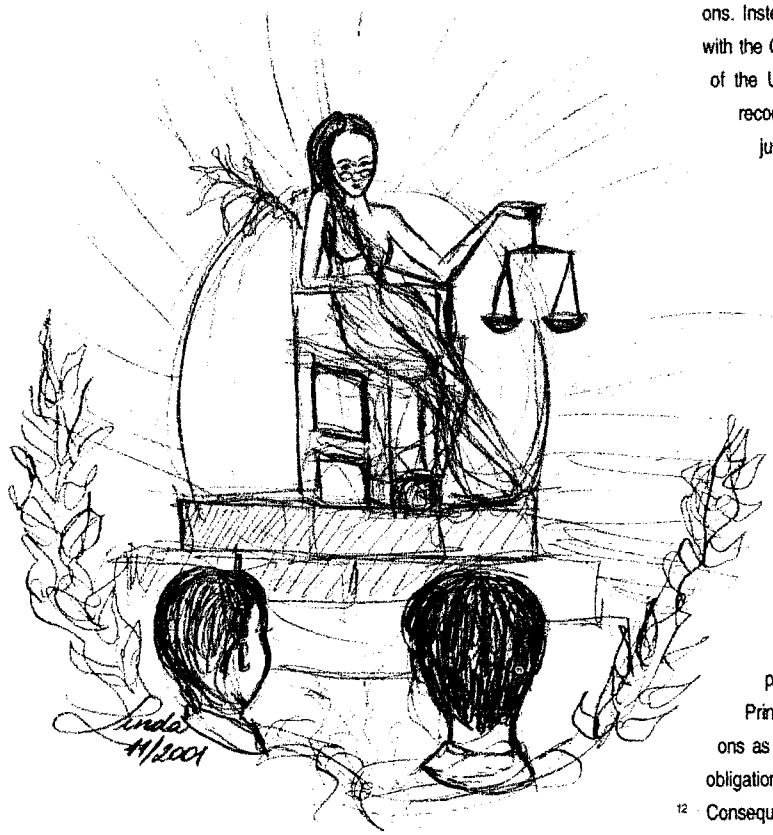
1 Question of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (*Libya v. US* and *Libya v. UK*, Provisional Measures, Order of April 14, 1992). Some scholars see another parallel in *Bosnia Case* (Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosnia & Herzegovina v. Yugoslavia*, Provisional Measures, Order of Sept. 13, 1993). This case also contains a request for provisional measures relating to arms embargo upon the whole territory of the former Yugoslavia. E.g., Dapo Akande, The International Court of Justice and the Security Council: Is There Room for Judicial Control of Decisions of the Political Organs of the United Nations?, 46 INTERNATIONAL AND COMPARATIVE LAW QUARTERLY, April 1997; Jose E. Alvarez, Judging the Security Council, 90 AJIL, 1996.




*"So, what do you have for us Mr. Marbury and Mr. Madison?"*

2 UN Doc. SC/Res/731 (Jan. 21, 1992). The resolution exhorts Libya to provide a full and effective response to the US and UK requests.

3 Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (1971).

4 UN Doc. SC/RES/748 (Mar. 31, 1992). The Security Council explicitly invoked Chapter VII of the UN Charter - specifically coercive measures under Art. 41. Determination of a threat to international peace and security under Art. 39, which was necessary before invoking Chapter VII, was based on Libya's failure to respond to the extradition requests and on its failure to demonstrate 'by concrete actions' its renunciation of terrorism. See, e.g., Anthony Aust, Lockerbie: the Other Case, 49 INTERNATIONAL AND COMPARATIVE LAW QUARTERLY, April 2000, p. 278. Gowland-Debbas comments ironically that this determination of a threat to international peace took place three years after the bombing. Vera Gowland-Debbas, The Relationship between the International Court of Justice and the Security Council in the Light of the Lockerbie Case, 88 AJIL, 1994, p. 663.

5 Alvarez, supra note 1, p. 3. Both [cases also] raise the specter of political actors exercising powers *mala fide* and *ultra vires* and what courts are to do about them. Thomas M. Franck, The "Powers of Appreciation": Who Is the Ultimate Guardian of the UN Legality?, 86 AJIL, 1992, p. 520.

6 Franck, id. p. 520.

7 Art. 25 UN Charter: The Member States agree to accept and carry out the decisions of the Security Council in accordance with the present Charter.

8 Art. 103 states that obligations of member states under the Charter prevail over obligations undertaken pursuant other international agreements.

9 Franck, supra note 5, p. 521.

10 Firstly, although the UN Charter is often compared to a 'world constitution', it lacks a system of checks and balances that is built into most national constitutions. Instead, the UN was formed as a hierarchical collective security scheme with the Council at its apex. Alvarez, supra note 1, p. 2. According to Art. 94(2) of the UN Charter (the Security Council may, if it deems necessary, make recommendations or decide upon measures to be taken to give effect to the judgment), the ICJ relies on the Security Council for enforcement of its decisions. Additionally, the ICJ and the Security Council are institutionally equal to one another. Neither is in a position of hierarchical superiority or subordination nor is either bestowed, by the UN Charter, powers of review over the other.

11 Nowhere in the Charter or the ICJ Statute is the Court given any power of general judicial review which would authorize it to pass judgment on questions of Art. 39 determination. See, e.g., T. D. Gill, Legal and Some Political Limitations on the Power of the UN Security Council to Exercise its Enforcement Powers under Chapter VII of the Charter, 26 NYIL, 1995, p. 117. Judge Weeramantry also stated in his Dissenting Opinion in *Lockerbie:* the determination under Article 39 . . . is one entirely with the discretion of the Council. [T]he Council and no other is the judge of the existence of the state of affairs which brings Chapter VII into operation. *Lockerbie Case*, supra note 1. However, some argue that this power is not unlimited, but must remain within the Purposes and Principles of the Charter as enacted in Art. 24(2). There are other limitations as well, including general international law, *ius cogens* and human rights obligations.

12 Consequentially, the ICJ's ruling on the validity of Security Council resolutions in contentious cases is binding only *inter partes*. Advisory opinions are non-binding and are only 'advisory' nature. And according to Art. 96(1) only the General

Assembly and the Security Council are empowered to request them; UN member states are not competent to request advisory opinions.

[13] Proposals made during the drafting of the Charter which would have placed the ultimate authority to interpret the Charter in the ICJ were not accepted. Vera Gowland-Debbas, supra note 4, p. 664, n. 113 (Certain Expenses, 1962 ICJ REP. at 168).

[14] Akande, supra note 1, p. 330.

[15] Sanctions against Libya, for example, were not viewed by many states to be legitimate and, therefore, compliance was low.

[16] Karl Dochring, Unlawful Resolutions of the Security Council and their Legal Consequences, 1 MAX PLANCK YEARBOOK OF UNITED NATIONS LAW, 1997, p. 97.

[17] Max Hilaire, Role of the United Nations in the Post Cold War Era, 78 REVUE DE DROIT INTERNATIONAL (THE INTERNATIONAL LAW REVIEW), 2000, p. 128. This persistent perception is currently reinforced by the prominent position of the United States, within and outside the Security Council. Pierre-Marie Dupuy, The Constitutional Dimension of the Charter of the United Nations Revisited, 1 MAX PLANCK YEARBOOK OF UNITED NATIONS LAW, 1997, p. 29, n. 85.

[18] John Quigley, The United Nations Security Council: Promethean Protector or Helpless Hostage?, 35 TEXAS INTERNATIONAL LAW JOURNAL, 2000, p. 171.

[19] Former UN Secretary General Dag Hammarskold joked that peacekeeping fits into 'Chapter Six and a Half' of the UN Charter.

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# Justice or Russian Roulette?

## Death Penalty in the U.S. - Past and Present


*Jaroslav Šuchman*


### A Historical Struggle

The death penalty is under public scrutiny again in the U.S. Furthermore, the pressure on the death penalty has gone beyond the growing abolitionist movement. Science has impacted on the debate. Recently in a substantial number of cases, DNA tests have led to the exoneration of death row inmates. This in turn led Illinois Governor George Ryan to impose a statewide moratorium on executions in January 2000. Moreover, several new studies have raised the issue of racial bias in sentencing. There has been legislation seeking to tackle these problems including Senator Leahy's **Innocence Protection Act of 2000.**

The controversy over capital punishment is of long standing. The law of capital punishment in America goes back to colonial times. The first recorded execution was in 1608 at Jamestown Colony of Virginia. Ever since, there has been a struggle between the supporters of the death penalty, including organisations such as the Washington Legal Foundation, and the abolitionist movement, including, for instance, the Illinois Coalition Against the Death Penalty. The number of executions in the U.S. was at its historic peak in the 1930s with an average of 167 people put to death each year. In 1966 the public support for capital punishment sank to an all-time low of 62%. In the following years there were several challenges to its constitutionality. Most were brought either under the **Eighth Amendment** to the **U.S. Constitution** which prohibits cruel and unusual punishment or under the **Fourteenth** which stipulates the right to the equal protection of the law.

### First Constitutional Challenges

As early as 1958 the case of *Trop v. Dulles* was brought in the U.S. Supreme Court which, though it did not directly concern the death penalty, suggested a modern interpretati-