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James A. R. Nafziger

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# POLITICAL DISPUTE RESOLUTION BY THE WORLD COURT, WITH REFERENCE TO UNITED STATES COURTS

JAMES A.R. NAFZIGER\*

Nobody seems to argue that the political branches of the United States government should refrain from taking any action that might embarrass the courts in their administration of justice. Yet the political question doctrine that counsels judicial abstention in international cases routinely embarrasses our constitutional system in the quixotic interest of keeping its powers meticulously separated.<sup>1</sup> Perhaps we should take a cue from the Dalai Lama: "Always keep in mind," he pronounced on arriving in Taiwan recently, "that any activities of mine should not bring any embarrassment to anybody."<sup>2</sup> If only a simple disclaimer of this sort would relieve the courts of their fear of doing something embarrassing to the political branches of the government! After all, how is it possible to embarrass the very branches of government that produced the Helms-Burton legislation?<sup>3</sup>

The political question doctrine ultimately relies on principles of democracy. Those principles provide a justification, though a deceptively simple one, for courts to shun rulings on international issues that might complicate the essentially political conduct of foreign relations. That is the theory. In reality, however, the doctrine may be understood to be a technique of judicial management; a means of weeding out controversial cases. The courts understandably seek refuge in the separation of powers as they face more complicated disputes with fewer resources. Better yet, why not a *divorce* of powers rather than a mere

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\* Thomas B. Stoel Professor of Law, Willamette University College of Law. This article is based on the author's remarks at a conference on "The Celebration of 50 Years of the International Court of Justice" held at the University of Denver College of Law, April 18, 1997.

1. The classic statement of this doctrine, rooted in the separation of constitutional powers, is found in *Baker v. Carr*, 369 U.S. 186 (1962).

2. Seth Faison, *Dalai Lama in Taiwan to China's Dismay*, N.Y. TIMES, Mar. 23, 1997, at 4.

3. The controversial Helms-Burton legislation signed into law by President Clinton extends extraterritorial jurisdiction to apply sanctions against "traffickers" in property of United States nationals that was confiscated by the Cuban government of Fidel Castro and excludes such "traffickers" from admission into U.S. territory. Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996, 22 U.S.C.S. § 6021 (Law. Co-op. Supp. 1997).

separation? The problem, of course, is that the political branches are uncertain whether they want to gain full custody over transnational dispute resolution, leaving the courts with only occasional visiting rights.

A related issue involves the choice of international law as a rule of decision. Although the Supreme Court has confirmed that "[i]nternational law is part of our law,"<sup>4</sup> debate continues on the meaning of that statement. For example, one recent argument for what its authors candidly call "political branch hegemony"<sup>5</sup> would require specific Congressional authorization for the courts to apply customary international law as federal law. The philosophical premise for such a surprising interpretation of the Constitution seems to be that legislative intervention generally enhances democratic values. Let the people speak! Public choice theory has, however, challenged pat assumptions about a close identification between the legislative process and the fulfillment of democratic values.<sup>6</sup> Technically, the political hegemony argument is based on an expansive reading of the *Erie* doctrine<sup>7</sup> and a narrow reading of other Supreme Court law, rather than on separation-of-powers doctrine. Its correlation with political question etiquette is nevertheless evident.

## I. THE POLITICAL COMPLEXION OF "LEGAL DISPUTES" BEFORE THE WORLD COURT

### A. A Functional Approach

The World Court's<sup>8</sup> sharply contrasting model of adjudication recognizes that virtually every claim before it is bound to have political

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4. *Paquete Habana*, 175 U.S. 677, 700 (1900). See generally Jordan Paust, *INTERNATIONAL LAW AS LAW OF THE UNITED STATES* 6-8 (1996).

5. See Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 816, 861, 871 (1997).

6. See Daniel A. Farber & Philip P. Frickey, *The Jurisprudence of Public Choice*, 65 TEX. L. REV. 873 (1987); Philip P. Frickey, *Legislative Processes and Products*, 46 J. LEGAL EDUC. 469 (1996); Edward L. Rubin, *Public Choice and Legal Scholarship*, 46 J. LEGAL EDUC. 490 (1996).

7. *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938) (interpreting the Federal Rules of Decision Act, 28 U.S.C. 1652 (1994), requiring a federal court hearing a case on the basis of diversity of citizenship to apply the substantive law of the state in which the court is sitting). On *Erie* and the relationship between state courts and international law, see James A.R. Nafziger, *State Law in International Cases*, 84 PROC. AM. SOC'Y INT'L L. 333 (1990); James A.R. Nafziger, *Resolving International Conflict of Laws by Federal and State Law*, 2 PACE Y.B. INT'L L. 67 (1990).

8. The generic term "World Court" is used to refer to the current International Court of Justice and its predecessor tribunal during the League of Nations period, the Permanent Court of International Justice.

implications.<sup>9</sup> Indeed, the Court is at its best when it is resolving political disputes. For example, the first phase of the *Lockerbie*<sup>10</sup> case confirmed the Court's customary presumption of justiciability despite the highly charged political context in which the case arose. A legal dispute, as that term appears in Article 36(3) of the United Nations Charter,<sup>11</sup> is therefore defined not by the nature of the dispute, but by the process for best resolving particular issues. The political-legal distinction, to the extent it exists at all, is therefore functional, not philosophical or hierarchical.<sup>12</sup> The Court has therefore refrained from characterizing a particular dispute as essentially "political" or "legal." It acknowledges that to do so might be a preface to inaction.

The United Nations Charter itself contemplates a concurrent jurisdiction between an active Court and the so-called political organs.<sup>13</sup> The Charter thereby reinforces a functional distinction between the respective roles of the Court and the political organs in pursuing a common purpose of peacefully settling disputes.<sup>14</sup> The Security Council serves as a source of decisions and norms, as well as the chosen instrument for enforcement of the Court's decisions.<sup>15</sup> The question is really how best

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9. Edward Gordon, *Discretion to Decline to Exercise Jurisdiction*, 81 AM. J. INT'L L. 129, 133 (1987).

10. Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libya v. U.K; Libya v. U.S.), 1992 I.C.J. 3 (Provisional Measures Orders of Apr. 14) [hereinafter *Lockerbie*]. For an excellent discussion of these points, see Vera Gowlland-Debbas, *The Relationship between the International Court of Justice and the Security Council in the Light of the Lockerbie Case*, 88 AM. J. INT'L L. 643 (1994).

11. In demarcating the Security Council's powers, Article 36 para. 3 states that "legal disputes should as a general rule be referred by the parties to the International Court of Justice." U.N. CHARTER art. 36(3). On the non-technical, generic character of references to the term "disputes" in the Charter and Statute of the Court, see Edward Gordon, "Legal Disputes" Under Article 36(2) of the Statute, in THE INTERNATIONAL COURT OF JUSTICE AT A CROSSROADS 183 (L.F. Damrosch ed. 1987).

12. See, e.g., Rosalyn Higgins, *Policy Considerations and the International Judicial Process*, 17 INT. & COMP. L.Q. 58, 61, 74 (1968) ("A dispute is a legal dispute if it is to be settled by the application of legal norms, that is to say, by the application of existing law.") (quoting HANS KELSEN, PRINCIPLES OF INTERNATIONAL LAW 526 (R.W. Tucker, 2d. rev. ed. 1966)).

13. Art. 35(1) enables any member to bring to the attention of the Security Council or General Assembly any dispute or situation which might lead to international friction or give rise to a dispute. U.N. CHARTER art. 35 para. 1. Article 96 enables United Nations organs and specialized agencies to request advisory opinions from the World Court on any legal question. *Id.* at art. 96. Concurrently, the Statute of the Court establishes the jurisdiction of the Court over all cases that parties refer to it, and to all matters that the Charter and international agreements specially provide. I.C.J. Statute, art. 36(1).

14. It is therefore "impossible to say that the World Court should not hear cases merely because the Council is involved." José Alvarez, *Judging the Security Council*, 90 AM. J. INT'L L. 1, 17 (1996).

15. U.N. Charter art. 94 para. 2 provides that,  
[i]f any party to a case fails to perform the obligations incumbent upon  
it under a judgment rendered by the Court, the other party may have

to allocate the powers of coordinate organs to avoid further tensions resulting from a dispute. As Wilfred Jenks observed in the very year of the *Sabbatino*<sup>16</sup> decision:

[T]here will now be a wide measure of agreement (1) that there are no technical limitations to the possibility of determining judicially every international controversy but (2) that this is not the heart of the matter, the essence of the problem being that a judicial determination on the basis of the existing law may aggravate rather than eliminate the difficulty.<sup>17</sup>

Despite this risk, the Court's review of political action by the Security Council is likely to enlarge as the Council produces more legal norms for the Court to interpret and apply.

The Court's expanded docket since the end of the Cold War may or may not reflect a durable trend in the peaceful settlement of disputes. Similar surges in the Court's agenda immediately following the two World Wars should make us cautious about reading too much into the trend. Of particular significance is the greater use of the Court to resolve or help resolve serious political disputes. Although it is difficult to be optimistic about the Court's centrality in international dispute resolution, it does seem that states are more inclined today to view adjudication as a worthwhile step in the political process and to conceptualize important issues in legal terms.<sup>18</sup>

The end of the Cold War eliminated a powerful incentive for states to pursue adjudication cynically as a tool to shame each other. Today their motivation is more likely to be either an honest commitment to the judicial settlement of a dispute or a use of adjudication to leverage a settlement by alternative dispute resolution. The *Great Belt*,<sup>19</sup> *Nauru*<sup>20</sup>

recourse to the Security Council, which may, if it deems necessary, make recommendations or decide measures to be taken to give effect to the judgment.

U.N. CHARTER art. 94, para.2.

16. *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964). The Supreme Court stated that the act of state doctrine is a rule of federal common law that operates "[i]n ordering our relationships with other members of the international community." *Id.* at 425. Therefore, the court held that the Judicial Branch would not examine the validity of a Cuban act expropriating property "[i]n the absence of a treaty or other unambiguous agreement regarding controlling legal principles, even if the complaint alleges that the taking violates customary international law." *Id.* at 428. The exact meaning of the phrase "other unambiguous agreement" is unclear, but may be reasonably interpreted to refer to international custom and general principles of international law.

17. C. WILFRED JENKS, *THE PROSPECTS OF INTERNATIONAL ADJUDICATION* 16 (1964).

18. These points are convincingly developed in Gary L. Scott, et al., *Recent Activity Before the International Court of Justice*, 3 *ILSA J. INT'L & COMP. L.* 1 (1996).

19. *Passage Through the Great Belt (Fin. v. Den.)*, 1992 I.C.J. 348 (Sept. 10).

20. *Certain Phosphate Lands in Nauru (Nauru v. Austl.)*, 1992 I.C.J. 240 (Preliminary Objections Order of June 26) [hereinafter *Nauru*]. The terms of settlement of the

and *Persian Gulf Aerial Incident*<sup>21</sup> cases illustrate the leveraging strategy.

### B. *The Nuclear Weapons Case*

*Nuclear Weapons*<sup>22</sup> fits the paradigm of political dispute resolution by the Court. The Court confirmed that "[t]he fact that this question also has political aspects, as, in the nature of things, is the case with so many questions which arise in international life, does not suffice to deprive it of its character as a 'legal question' . . ." <sup>23</sup> Several states, arguing against the Court's competence to hear the dispute, had claimed that neither the World Health Organization ("WHO") nor the General Assembly were authorized to request an advisory opinion because neither was itself competent to address the legality of nuclear weapons in the first instance and both institutions had been politically motivated in making their requests. Although the Court denied the WHO request, it observed in both cases that "[t]he political nature of the motives which may be said to have inspired the request and the political implications that the opinion given might have are of no relevance in the establishment of its jurisdiction to give such an opinion."<sup>24</sup> Other recent decisions to the same effect include *Aegean Sea Continental Shelf*,<sup>25</sup> *Hostages*,<sup>26</sup> *Nicaragua*,<sup>27</sup> and *Lockerbie*.<sup>28</sup>

The Court's advisory opinion in *Nuclear Weapons* is a mixture of judicial activism and restraint.<sup>29</sup> On one hand, the Court agreed to re-

dispute are summarized at 32 I.L.M. 1471 (1993).

21. Concerning the Aerial Incident of 3 July 1988 (Iran v. U.S.), 1996 I.C.J. 9 (Feb. 22).

22. Legality of the Threat or Use of Nuclear Weapons, July 8, 1996, 35 I.L.M. 809 [hereinafter *Nuclear Weapons*]. The Court agreed to issue an advisory opinion to the General Assembly; however, on the same day, the Court denied a request by the World Health Organization (WHO) for a similar advisory opinion. Legality of the Use by a State of Nuclear Weapons in Armed Conflict, 1996 I.C.J. (July 8) [hereinafter *WHO Request*].

23. *Nuclear Weapons*, *supra* note 22, para. 13; *WHO Request*, *supra* note 22, para. 16.

24. *Id.*

25. *Aegean Sea Continental Shelf (Greece v. Turk.)*, 1976 I.C.J. 3 (Interim Protection Order of Sept. 11) [hereinafter *Aegean Sea Continental Shelf*].

26. *United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran)*, 1980 I.C.J. 3 (May 24) [hereinafter *Hostages*].

27. *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.)*, 1984 I.C.J. 392 (Jurisdiction and Admissibility Order of Nov. 26) [hereinafter *Nicaragua*].

28. Gordon, *supra* note 9.

29. See THOMAS J. BODIE, *POLITICS AND THE EMERGENCE OF AN ACTIVIST INTERNATIONAL COURT OF JUSTICE* (1995) (analyzes justiciability in international litigation, concluding that after 1966 the World Court became more activist). This article draws upon the author's review of the book. James A.R. Nafziger, Book Review, 21 *LEGAL STUD. F.* 129 (1997).

view the General Assembly's request for an advisory opinion on whether international law permits the threat or use of nuclear weapons.<sup>30</sup> On the other hand, the Court refused to review the similar request by the WHO that emphasized the detrimental health and environmental effects of a nuclear explosion.<sup>31</sup>

The Court's *dispositif* in *Nuclear Weapons* reflects the same mixture of activism and restraint. The Court first decided that international law neither authorizes nor prohibits the use or threat of nuclear weapons, although such activity would at least have to conform to the requirements of the United Nations Charter and international humanitarian law.<sup>32</sup> By a 7-7 vote, however, the Court found itself unable to "[c]onclude definitively whether the threat or use of nuclear weapons would be lawful in an extreme circumstance of self-defence, in which the very survival of a State would be at stake."<sup>33</sup> The Court thereby left unresolved the issue of whether self-defense, in extreme circumstances, could ever be permitted to trump the prohibitions, under international humanitarian law, against the threat or use of nuclear weapons.

The Court unanimously concluded that an effective international solution to the problem of nuclear weapons should be left to the *political* process of nuclear disarmament.<sup>34</sup> This should not be interpreted as an international version of the political question doctrine. Instead, the Court's encouragement of disarmament negotiations represented its customary deference to the political process for implementation of its decisions, doubtlessly strengthened by the political stakes involved in the *Nuclear Weapons* case.

More importantly, this kind of a diplomatic denouement reflects and yet transcends the simple wisdom first articulated in *Haya de la Torre*<sup>35</sup>; that the details for carrying out the Court's judgments are to be entrusted to politics and political institutions.<sup>36</sup> The political-legal distinction is clearly functional.

As Judge Schwebel so boldly began his dissenting opinion with an

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30. *Nuclear Weapons*, *supra* note 22, at para. 105.

31. WHO Request, *supra* note 22, at para. 22.

32. *Id.* at paras. 63, 65-67, 86, 89.

33. *Id.* at para. 105(2)E.

34. *Id.* at paras. 99-100. The political exit on the issue of disarmament is reasonable, for "[i]t [would be] unrealistic to expect the International Court of Justice to solve this immense problem by means of an advisory opinion in reply to a vigorously contested request that consisted of a mere fifteen words. Its final resolution will more likely be brought about by political compromise." Peter H. Bekker, *International Decision: Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion*, 91 AM. J. INT'L L. 126, 132-33 (1997).

35. *Haya de la Torre (Colom. v. Peru)* 1951 I.C.J. 71 (June 13) [hereinafter *Haya de la Torre*].

36. See J.G. MERRILLS, *INTERNATIONAL DISPUTE SETTLEMENT* 151 (2d ed. 1991).

emphasis<sup>37</sup> a half century of reliance by the global community on nuclear deterrence, “[m]ore than any case in the history of this Court, this proceeding presents a titanic tension between State practice and legal principle.”<sup>38</sup> A definition of state practice and hence international custom is, however, complicated. The expectations of the nuclear powers must be viewed in the light of the growing antinuclear consensus of the global community in recent years.<sup>39</sup> In any event, the interests of both nuclear and non-nuclear states will have to be expressed fully in the political give-and-take of disarmament. An ongoing political tradeoff between nuclear and non-nuclear states is, after all, the premise<sup>40</sup> of the entire non-proliferation regime.

### C. *A Balance Between Judicial Activism and Restraint*

The *Nuclear Weapons* decision was not so much a product of judicial activism, as it was an example of the Court’s characteristic respect for its special role in the United Nations regime of conflict management. The Court’s recent record reflects a mixture of activism and restraint. The Court has broadly construed its jurisdiction in *Nauru*<sup>41</sup> and *Qatar-Bahrain*;<sup>42</sup> however, in *East Timor*,<sup>43</sup> the Court refused to allow what it found to be the *erga omnes* character of a right to self-determination to overcome a narrow reading of its jurisdiction. Thus, the Court refused to hear Portugal’s claim protesting an agreement between Australia and Indonesia on delimitation of waters around East Timor. Also, *East Timor*’s narrow construction of the necessary party rule in *Monetary Gold*<sup>44</sup> further challenges any assumption that the Court is bent on progressive change. To the contrary, the Court’s timorous decision recalls all too ironically the very name of the disputed territory. Similarly, the Court’s refusal, however reasonable or appropriate, to explore the environmental implications of underground nuclear testing in *Nuclear Tests*

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37. *Haya de la Torre*, *supra* note 35 (Schwebel, dissenting).

38. *Id.* at 836.

39. See Richard A. Falk, *Nuclear Weapons, International Law and the World Court: A Historic Encounter*, 91 AM. J. INT’L L. 64 (1997) (noting an antinuclear consensus among United Nations members).

40. Each of the Parties to the Treaty undertakes to pursue negotiations in good faith on effective measures relating to cessation of the nuclear arms race at an early date and to nuclear disarmament, and on a treaty on general and complete disarmament under strict and effective international control. Treaty on the Non-Proliferation of Nuclear Weapons, art. 6, July 1, 1968, 21 U.S.T. 483, 729 U.N.T.S. 161.

41. See *Nauru*, *supra* note 20.

42. Case Concerning Maritime Delimitation and Territorial Questions Between Qatar and Bahrain (*Qatar v. Bahrain*), 1995 I.C.J. 6 (Feb. 15) [hereinafter *Qatar-Bahrain*].

43. Case Concerning East Timor (*Port. v. Austl.*), 1995 I.C.J. 90 (June 30) [hereinafter *East Timor*].

44. Case of the Monetary Gold Removed from Rome in 1943, 1954 I.C.J. 19 (June 15) [hereinafter *Monetary Gold*].



*II*<sup>45</sup> cannot be counted as a blow for activism. In that respect, the *Nuclear Weapons* opinion adopts a more progressive approach by addressing the role of environmental considerations in the law governing military action. Both *Nuclear Tests II* and *Nuclear Weapons* reflect the Court's inability to draw precise conclusions from the law that the opinions establish.

In *Nuclear Weapons*, the Court's restraint produced a *non liquet*, but that is not the same as an abdication of judicial responsibility. Legal indeterminacy does not in itself require judicial abstention. For example, the numerous maritime boundary disputes attest to the Court's willingness to adjudicate in the face of indeterminacy,<sup>46</sup> even in contentious proceedings. This seems even more appropriate in advisory cases. As Judge Vereschchetin noted, procedures in advisory proceedings, unlike contentious proceedings, do not presuppose a seamless web of legal authority. In his words:

Even had the Court been asked to fill the gaps, it would have had to refuse to assume the burden of law-creation, which in general should not be the function of the Court. In advisory procedure, where the Court finds a lacuna in the law or finds the law to be imperfect, it ought merely to state this without trying to fill the lacuna or improve the law by way of judicial legislation. . . .

In my view, the case in hand presents a good example of an instance where the absolute clarity of the Opinion would be "deceptive" and where on the other hand, its partial "apparent indecision" may prove useful "as a guide to action".<sup>47</sup>

The *non-liquet* issue highlights the foundations of a political-legal distinction that the Court has consistently rejected. A venerable academic doctrine derived from the writings of Vattel and eventually couched in terms of justiciability would have confined the definition of international legal disputes to those that are capable of resolution by applying international law and those that do not affect the vital inter-

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45. Request for an Examination of the Situation in Accordance with Paragraph 63 of the Court's Judgment of 20 December 1974 in the *Nuclear Tests (N.Z. v. Fr.)*, 1995 I.C.J. 288 (Sept. 22) [hereinafter *Nuclear Tests II*].

46. See Alvarez, *supra* note 14, at 17.

47. *Nuclear Weapons*, *supra* note 22, at 833 (separate opinion of Judge Vereschchetin). In Judge Vereschchetin's words,

The Court cannot be blamed for indecisiveness or evasiveness where the law, upon which it is called to pronounce, is itself inconclusive. Even less warranted would be any allegation of the Court's indecisiveness or evasiveness in this particular Opinion, which gives an unequivocal, albeit non-exhaustive, answer to the question put to the Court.

*Id.*

ests of states.<sup>48</sup> By contrast, other disputes are “political.”

The Court’s denial of standing to Ethiopia and Liberia in its infamous *South West Africa Phase Two*<sup>49</sup> decision was said to be a case in point. Generally, the World Court has rejected the venerable doctrine to determine its competence.<sup>50</sup> “[T]he distinction between legal and political disputes . . . has no validity as an abstract proposition of law, despite its real importance as a matter of practical politics.”<sup>51</sup> Non-justiciability has generally been a matter of propriety rather than an acknowledgment that the Court lacks jurisdiction to hear a particular dispute.<sup>52</sup> A salient exception from the Court’s first decade was the *Free Zones* case,<sup>53</sup> in which the Court refused to address economic issues left unresolved by agreement between France and Switzerland.

In *Hostages*,<sup>54</sup> the Court clearly emphasized its paramount role in the peaceful resolution of international disputes, even though the legal dispute over Iran’s continued detention of American diplomatic staff members was only one aspect of a larger, essentially political dispute between the two countries.<sup>55</sup> In *Nicaragua*,<sup>56</sup> the concurrent Contadora process for restoring peace to Central America provided no basis for suspending or discontinuing the Court’s examination of some of the same issues. The choice of one method of dispute resolution does not exclude all others.<sup>57</sup> Although to some extent international Arbitral bodies have followed the same rule, as in the *Air Services Award*<sup>58</sup> case between the United States and France, their competence ordinarily has been more strictly confined to technical, so-called “justiciable” or “legal”

48. BODIE, *supra* note 29, at 7.

49. *South West Africa (Eth. v. S. Afr.; Liber. v. S. Afr.)*, 1966 I.C.J. 6 (Second Phase, Judgment of July 18) [hereinafter *South West Africa Phase Two*].

50. I.C.J. Statute, art. 36.

51. SHABTAI ROSENNE, *THE LAW AND PRACTICE OF THE INTERNATIONAL COURT* 94 (1965).

52. Gowlland-Debbas, *supra* note 10, at 652.

53. *Free Zones of Upper Savoy and the District of Gex*, 1929 P.C.I.J. (ser. A) No. 22 [hereinafter *Free Zones*].

54. *See Hostages*, *supra* note 26.

55. [L]egal 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 [before] 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.

*Id.* at 20.

56. *See Nicaragua*, *supra* note 27.

57. The Charter does not adopt this principle (*una via selecta, non datur recursus ad alteram*). SHABTAI ROSENNE, *THE WORLD COURT: WHAT IT IS AND HOW IT WORKS* 238 (4th rev. ed. 1989).

58. *Air Services Arbitral Award (U.S. v. Fr.)*, 18 R.I.A.A. 417 (1978) [hereinafter *Air Services Award*].

issues.<sup>59</sup>

It is tempting to link the political-legal distinction, to the extent it is influential, with principles of domestic jurisdiction, in other words, the reserved domain of states. Accordingly, characterization of an issue as "political" would be tantamount to recognizing a state claim of exclusive "domestic jurisdiction" over it. The World Court has generally ignored this invitation to sloth. Instead, its famous dictum in *Tunis-Morocco Nationality Decrees* became the benchmark of a more dynamic survey of the reserved domain: "Whether a certain matter is or is not solely within the jurisdiction of a State is an essentially relative question; it depends on the development of international relations."<sup>60</sup>

## II. COOPERATIVE ALLOCATION OF FUNCTIONS BETWEEN THE COURT AND THE POLITICAL ORGANS

Despite the Court's record of political dispute resolution, its competence is limited to "*legal disputes*"<sup>61</sup> (italics added). Its rejection of an all-or-nothing doctrine of abstention from political issues does not imply unlimited powers of judicial review. An appropriate formula for allocating functions between the Court and the political organs remains elusive. During the Cold War, the Court and the Security Council overcame the latent constitutional and jurisdictional conflicts between them by practicing cooperation out of necessity.<sup>62</sup>

The end of the Cold War and the expansion of the Court's docket has exacerbated the latent conflicts between the Court and the Security Council. Although one organ is labeled "political," and the other "judicial," both organs must concurrently act to protect international peace and security. *Lockerbie* confirmed that "[b]oth organs can . . . perform their separate but complementary functions with respect to the same effects,"<sup>63</sup> but the boundaries are uncertain in a political-legal dispute where the Court is called upon to evaluate the merits of Security Council action. Judge Shahabudeen's exasperation rings in our ears:

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

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59. See BODIE, *supra* note 29, at 21; MANLEY O. HUDSON, INTERNATIONAL TRIBUNALS PAST AND FUTURE 241 (1944).

60. Nationality Decrees Issued in Tunis and Morocco, 1923 P.C.I.J. (ser. B) No. 4, at 24.

61. See *supra* note 10.

62. See W. Michael Reisman, *The Constitutional Crisis in the United Nations*, 87 AM. J. INT'L L. 83, 84 (1993).

63. *Lockerbie*, *supra* note 10, at 22, 141.

any limits, what are those limits and what body, if other than the Security Council, is competent to say what those limits are?<sup>64</sup>

Because the United Nations is not a system of checks and balances, its organs have the capacity to coordinate a mutually satisfactory allocation of powers. The Court and the political organs should therefore seek to coordinate their spheres of authority. Instead of awaiting a judicial formula to allocate powers, the World Court and the political organs of the United Nations should work together to develop different standards of review depending on the posture and type of issue presented to the Court.

Levels of scrutiny applied by domestic courts might be instructive.<sup>65</sup> For example, an abuse-of-discretion standard might be more appropriate to the highly sensitive issues in contentious cases involving Security Council actions under Chapter VII. On the other hand, advisory opinions on General Assembly resolutions might warrant a less deferential standard of review.

Questions occasionally arise about the proper exercise of executive or administrative discretion. Domestic practice might be helpful in defining standards for reviewing the Secretary General's discretionary powers, as well as the U.N. family's administrative decisions. For example, the *Chevron* standard<sup>66</sup> requires United States courts to accept an agency's reasonable interpretation of the law if the agency is the chosen instrument of implementation. To avoid indeterminacy in the law, a court must ascertain whether there has been a clear legislative pronouncement on the precise question at issue. If so, it is binding and the agency's views are irrelevant. If, however, the legislative intent cannot be easily discerned, *Chevron* counsels a judicial deference to a reasonable or permissible resolution by the agency of legislative uncertainty or ambiguity.<sup>67</sup> Such an approach to judicial review would emphasize a functional rather than purely formal allocation of powers within the United Nations and its specialized agencies.

### III. CONCLUSION

The image of the International Court of Justice as a sort of lemonade stand dispensing occasional decisions to sovereign passersby is no longer apt. Of course, the Court's docket of a dozen or so cases would certainly be the envy of a county court. Nevertheless, even having more than one or two cases before it indicates the Court's expanded role

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64. *Id.* (separate opinion of Judge Shahabudeen).

65. See Alvarez, *supra* note 14, at 26.

66. *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

67. See, e.g., Maureen B. Callahan, *Judicial Review of Agency Legal Determinations in Asylum Cases*, 28 WILLAMETTE L. REV. 773, 781 (1992).

during the past decade in resolving significant disputes. To be sure, several of the cases have covered the same waterfront of maritime delimitation. A more ambitious agenda is apparent, however. The *Nuclear Weapons*, *Bosnia* and *Lockerbie* cases, in particular, have touched the sensitive nerves of legal indeterminacy, powers of judicial review and functional parallelism among United Nations organs.

The political question etiquette that has handicapped judicial decision-making in the United States has no place in the global system. It operates, and poorly at that, only in a system of checks and balances, similar to that of *Marbury v. Madison*.<sup>68</sup> Even then, bully legislation such as the Helms-Burton Act directed against Cuba strains the separation-of-powers rationale of the doctrine in transnational dispute resolution.

Though the World Court is free of both Vattel and Fidel, it needs to clarify an appropriate allocation of powers between organs with concurrent jurisdiction. It can do so without sacrificing its judicial independence by working with the Security Council and perhaps the General Assembly to define appropriate standards of review. The experience of national courts, including those of the United States, will be instructive. We have much to learn from each other in the global family of institutions, and it is in everyone's interest to avoid a troubled marriage between the principal partners within the United Nations family.

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68. 5 U.S. (1 Cranch) 137 (1803). *But see* Michael J. Glennon, *Protecting the Court's Institutional Interests: Why Not the Marbury Approach?*, 81 AM. J. INT'L L. 121 (1987) (suggesting that the Court in the *Nicaragua* case should have considered *Marbury* as a model for confirming its powers of review while refusing to exercise its jurisdiction over the sensitive issues in the case).