

# International Court of Justice

Case Concerning Questions of  
Interpretation and Application of the  
1971 Montreal Convention Arising from  
the Aerial Incident at Lockerbie  
(Libyan Arab Jamahiriya v. United Kingdom)

*Preliminary Objections of the  
United Kingdom*

JUNE, 1995



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## INTRODUCTION

On 20 December 1993 the Libyan Arab Jamahiriya lodged its Memorial in the *Case Concerning Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United Kingdom)*. The following is an outline of the United Kingdom's Preliminary Objections to the Court's jurisdiction, and to the receivability of Libyan claims, in this case.

1. The only possible basis of jurisdiction between the United Kingdom and Libya is that provided for under Article 14(1) of the Montreal Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, 1971 ("the Montreal Convention").<sup>1</sup> Libya contends for no alternative basis of jurisdiction. It will be demonstrated, however, that for the most part the claims made by Libya against the United Kingdom do not relate to matters falling within the jurisdictional provisions of Article 14(1).

2. In respect of certain other alleged rights under the Montreal Convention upon which Libya seeks a declaration from the Court, no legal dispute exists between the United Kingdom and Libya.

3. In so far as there might remain any dispute between the United Kingdom and Libya in respect of which Article 14(1) might provide for the jurisdiction of the Court, United Nations Security Council resolutions 748 and 883 have determined the actions which Libya is required to take. These resolutions are binding upon all Members of the United Nations by virtue of Article 25 of the United Nations Charter and take precedence over other treaty rights and obligations by virtue of Article 103.

4. Libya's primary argument is that these resolutions do not, in fact, impinge upon its rights under the Montreal Convention and do not require Libya to surrender the accused, so that the steps which the United Kingdom has taken to secure their surrender are contrary to Libya's Montreal Convention rights. The United Kingdom will demonstrate that this is incorrect. Libya argues in the alternative that the resolutions are inconsistent with its

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<sup>1</sup> 974 UNTS 177 (Annex 1).

rights under the Montreal Convention. But even if this were so, no claim can lie against the United Kingdom, the resolutions being legally determinative.

5. Libya has sought to construct a legal dispute with the United Kingdom. In reality the issues raised by Libya are not in dispute between Libya and the United Kingdom, but rather *between Libya and the Security Council*. As such they are not justiciable before the Court.

6. Accordingly, the United Kingdom respectfully submits, in accordance with Article 79 of the Rules of the Court, that:

- the Court lacks jurisdiction, either because no dispute exists or because the claims advanced by Libya do not fall for consideration under Article 14(1) of the Montreal Convention, or both,  
  
and/or
- the effect of Security Council resolutions 748 and 883 is to render the Libyan claims inadmissible.

7. The United Kingdom reserves its rights with respect to any other issue or matter which may arise at this preliminary stage or otherwise.

8. The grounds for the submission are set out in detail in Parts 3 and 4 below. The context of the case is set out in Part 2. Part 1 consists of a brief summary of the case.



## PART 1

### SUMMARY OF THE CASE

1.1 The destruction of flight PA103 over Lockerbie in Scotland happened on 21 December 1988. Within a week it had been established that the aircraft had been destroyed by plastic explosive. The act was condemned by the members of the Security Council of the United Nations in a statement issued on 30 December 1988 by the President of the Council.<sup>2</sup> Following an initiative by Czechoslovakia and the United Kingdom, on 14 June 1989 the Security Council adopted resolution 635<sup>3</sup> calling upon all States to cooperate in devising and implementing measures to prevent all acts of terrorism, including those involving plastic explosives.

1.2 The criminal investigation leading to the issue of warrants lasted almost three years. It has been one of the largest ever mounted. It has produced corroborated evidence against two Libyan nationals, Abdelbaset Ali Mohamed Al Megrahi and Al Amin Khalifa Fhimah, acting in furtherance of the purposes of the Libyan intelligence services. On 13 November 1991 a warrant<sup>4</sup> was issued by a Scottish court for their arrest on charges of conspiracy, murder and contravention of the Aviation Security Act 1982.

1.3 On 14 November 1991 copies of the charges and warrant,<sup>5</sup> and a detailed Statement of Facts,<sup>6</sup> were transmitted to Libya with a formal demand for the surrender of the two accused for trial in Scotland. The same day Libya issued a press release denying any knowledge of the crime. A few days later it was stated by Libya that a Libyan judge had been appointed to inquire into the accusations.<sup>7</sup>

1.4 No satisfactory response to the demand for surrender having been received from Libya, on 27 November 1991 the United Kingdom and the United States jointly issued a public declaration that Libya must surrender the

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2 Annex 38.

3 Annex 40.

4 Annex 17.

5 *Ibid.*

6 Annex 16.

7 S/23416 (Annex 47).

accused for trial and accept responsibility for the actions of Libyan officials; disclose all it knows of the crime and allow full access to evidence; and pay appropriate compensation.<sup>8</sup> The same day a similar declaration was made by France in respect of the sabotage of UTA flight 772,<sup>9</sup> and the three Governments issued a joint statement requiring Libya promptly to commit itself to cease all forms of terrorist activities.<sup>10</sup>

**1.5** In view of Libya's long record of involvement in terrorism, the concern expressed about international terrorism over many years by the Security Council and General Assembly of the United Nations, and the failure of Libya to make an effective reply to the demands, the three Governments caused details of the charges and the demands to be circulated on 31 December 1991 as documents of the United Nations General Assembly and Security Council.

**1.6** Beginning on 2 January 1992 the three Governments made demarches in the capitals of all other members of the Security Council, seeking their support for a call by the Security Council for Libya to comply with the demands. By 7 January the representatives of the three Governments had discussed at the United Nations in New York with all other members of the Security Council possible action by the Security Council. On 10 January a draft resolution, prepared after discussion between the five permanent members of the Security Council, was circulated informally to all members of the Council.

**1.7** The following day, in a letter to the International Civil Aviation Organisation (ICAO), Libya invoked the Montreal Convention for the first time.<sup>11</sup>

**1.8** On 14 January a revised draft resolution was circulated informally to all members of the Security Council. On 18 January Libya made a request that the United Kingdom submit a dispute between itself and Libya for arbitration under Article 14 of the Montreal Convention.<sup>12</sup>

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<sup>8</sup> Annex 7.

<sup>9</sup> Annex 5.

<sup>10</sup> Annex 8.

<sup>11</sup> Libyan Annex 75.

<sup>12</sup> Annex 9.

1.9 Three days later, on 21 January 1992, the Security Council adopted resolution 731. This condemned the destruction of flights PA 103 and UTA 772; strongly deplored the fact that Libya had not yet responded effectively to the requests of the three Governments to cooperate fully in establishing responsibility for the terrorist acts against the two flights; urged Libya immediately to provide a full and effective response to the requests, so as to contribute to the elimination of international terrorism; and requested the Secretary-General of the United Nations to seek the cooperation of the Libyan Government to provide such a response.

1.10 At the time of adoption of the resolution,<sup>13</sup> the United Kingdom made clear its view that the Security Council was not dealing with a dispute under the Montreal Convention, as Libya had suggested, but with the proper reaction of the international community to the situation arising from Libya's failure to respond effectively to the most serious accusations of State involvement in acts of terrorism.

1.11 The Secretary-General appointed a representative to hold consultations with Libya regarding implementation of the resolution. The Secretary-General reported to the Security Council on 11 February 1992 and 3 March 1992 that Libya had not yet complied with resolution 731.<sup>14</sup>

1.12 On 3 March 1992 Libya made its Application to the Court in the present case. It asked the Court to adjudge and declare:

- "(a) that Libya has fully complied with all of its obligations under the Montreal Convention;
- (b) that the United Kingdom has breached, and is continuing to breach, its legal obligations to Libya under Articles 5(2), 5(3), 7, 8(2) and 11 of the Montreal Convention; and
- (c) that the United Kingdom is under a legal obligation immediately to cease and desist from such breaches and from the use of any and all force or threats against Libya, including the threat of force against Libya, and from all violations of the sovereignty, territorial integrity, and the political independence of Libya."

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<sup>13</sup> See paragraph 2.70 below.

<sup>14</sup> Annexes 13 and 14.

**1.13** On the same day Libya filed a request to the Court for the indication of provisional measures of protection. Libya claimed that the United Kingdom was actively seeking to by-pass the provisions of the Montreal Convention by threatening various actions, including seeking sanctions against Libya and refusing to rule out the use of armed force to compel it, in contravention of the Convention, to surrender the accused. Libya asked the Court:

- "(a) to enjoin the United Kingdom from taking any action against Libya calculated to coerce or compel Libya to surrender the accused individuals to any jurisdiction outside of Libya; and
- (b) to ensure that no steps were taken that would prejudice in any way the rights of Libya with respect to the legal proceedings that are the subject of Libya's Application."

The Court held oral hearings on the Libyan request on 26, 27 and 28 March 1992.

**1.14** The Court had before it the detailed Statement of Facts which had been made available to Libya at the time the United Kingdom first called upon Libya to surrender the two accused<sup>15</sup>. Then, as now, the United Kingdom was scrupulous to avoid making any public statement or disclosure of evidence which might prejudice the chances of a fair trial of the two accused, the objective of the United Kingdom throughout being to ensure that a fair trial takes place in Scotland or the United States.

**1.15** Meanwhile, discussions had been held since 17 March 1992 among the members of the Security Council regarding a draft further resolution which would be sponsored by France, the United Kingdom and the United States. This was adopted on 31 March 1992, as resolution 748.<sup>16</sup>

**1.16** In the resolution the Security Council determined that the failure by Libya to demonstrate by concrete actions its renunciation of terrorism, and in particular its continued failure to respond fully and effectively to the requests in resolution 731, constituted a threat to international peace and security. Acting under Chapter VII of the United Nations Charter, the Security Council decided that Libya must comply without any further delay with the requests

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<sup>15</sup> Annex 16. See paragraph 1.3 above.

<sup>16</sup> Annex 3.

of the three Governments; commit itself definitively to cease all forms of terrorist action and assistance to terrorist groups; and, by concrete actions, demonstrate its renunciation of terrorism. The resolution also imposed various economic and other sanctions on Libya until it complied.

1.17 On 4 April 1992 the Court invited the Parties to make observations on the possible implications of resolution 748 for the proceedings before the Court. In its observations Libya contended *inter alia* that:

- inasmuch as by deciding, in effect, that Libya must surrender its nationals to the United Kingdom, the Security Council infringed or threatened to infringe the enjoyment and the exercise of the rights conferred on Libya by the Montreal Convention;
- the United Kingdom should so act as not to infringe those rights, for example, by seeking a suspension of the relevant part of resolution 748;
- the decision of the Security Council was contrary to international law; and
- the Security Council had employed its power to characterize the situation for purposes of Chapter VII simply as a pretext to avoid applying the Montreal Convention.

1.18 The Court gave its decision on the Libyan request for provisional measures on 14 April 1992.<sup>17</sup> It considered that the obligations of Libya and the United Kingdom, under Article 25 of the United Nations Charter, to carry out the decisions of the Security Council *prima facie* extended to the decision in resolution 748, and that, in accordance with Article 103 of the Charter, the obligations of the Parties in that respect prevailed over their obligations under any other international agreement, including the Montreal Convention. It also held that, whereas the Court was not at that stage called upon to determine definitively the legal effect of resolution 748, whatever the situation previous to its adoption the rights claimed by Libya under the Montreal Convention could not now be regarded as appropriate for protection by the indication of

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<sup>17</sup> ICJ Reports, 1992, p.3.

provisional measures; and that an indication of the measures requested by Libya would be likely to impair the rights which appeared *prima facie* to be enjoyed by the United Kingdom by virtue of resolution 748. The Court, by 11 votes to 5, thus found that the circumstances of the case were not such as to require the exercise of its power under Article 41 of the Statute of the Court to indicate provisional measures.

**1.19** On 19 June 1992 the Court ordered Libya to lodge its Memorial by 20 December 1993 and the United Kingdom to lodge a Counter-Memorial by 20 June 1995. The Libyan Memorial was duly lodged on 20 December 1993.

**1.20** In the some 19 months following the adoption of resolution 748 Libya did not surrender the two accused for trial, notwithstanding continuing efforts by the Secretary-General of the United Nations to secure full implementation of the resolution. Instead Libya sought to distract attention by various means, including proposals for a trial at The Hague before a "Scottish" court. At the same time Libya continued to assert (including in its Memorial) that it was not obliged to, and could not, extradite its own nationals, although it has also on occasion said that it has not ruled out the possibility of changing the law.<sup>18</sup> Colonel Qadhafi did, however, admit Libya's past involvement with a terrorist organisation, the Provisional IRA; and certain information about that involvement has since been supplied by Libya to the United Kingdom.

**1.21** In view of Libya's failure to comply fully with the demands of resolution 748, on 11 November 1993 the Security Council adopted resolution 883.<sup>19</sup> The resolution extended the scope of the sanctions against Libya, but expressed the Security Council's readiness to review the sanctions with a view to suspending them immediately if Libya ensured the appearance of the accused for trial before the appropriate United Kingdom or United States court.

**1.22** Since the adoption of resolution 883, Libya has continued to prevaricate. The sanctions regime is reviewed by the Security Council every 120 days, but because Libya has not complied with the requirements of the Security Council the sanctions remain in force.<sup>20</sup>

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<sup>18</sup> The relevant documents are discussed in Part 2, below.

<sup>19</sup> Annex 4.

<sup>20</sup> See, most recently, the Presidential Statement of 30 March 1995; S/PRST/1995/14 (Annex 83).

## PART 2

### THE CONTEXT OF THE CASE

2.1 This Part consists of an account of:

- The background to the case
  - the history of the United Nations concern with terrorism;
  - the record of Libyan involvement in terrorism;
- The facts of the case
  - the destruction of flight PA 103 and the criminal investigation;
  - a summary of the facts disclosed by the criminal investigation;
  - criminal proceedings in Scotland;
  - the diplomatic action to obtain surrender of the accused;
  - the United Nations response.

#### I The Background to the Case

##### History of the United Nations concern with terrorism

2.2 The issue of terrorism has long been a concern of the United Nations. The history of its concern has been described by Judge Guillaume in his lectures at the Hague Academy of International Law, *Terrorisme et Droit*<sup>21</sup>.

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21 *Recueil des cours*, Vol. 215, 1989, pp.287-416.

## (1) The Security Council

2.3 In 1970, the Security Council adopted resolution 286 on the subject of hijacking and other interference in international civil aviation.<sup>22</sup> The resolution expressed grave concern at the threat to innocent civilian lives and called on all States to take all possible legal steps to prevent any interference with international civil aviation. On 9 October 1985 the Security Council issued a statement deploring the killing of Leon Klinghoffer during the hijacking of the *Achille Lauro*, and condemning hijacking and other forms of terrorism.<sup>23</sup> Following the hijacking of an Egyptian aircraft in December 1985, resolution 579 condemned all acts of hostage-taking and abduction. In the same month the Security Council issued a statement condemning the attacks on Rome and Vienna airports.<sup>24</sup> Increasing concern about terrorism, especially the spate of kidnappings in Beirut in 1985 and 1986, led the Security Council to issue a further statement on 28 January 1987 condemning in particular hostage-taking.<sup>25</sup>

2.4 On 30 December 1988 the President of the Security Council issued a statement on behalf of the members of the Council strongly condemning the destruction of PA 103 and calling on all States to assist in the apprehension and prosecution of those responsible for the crime.<sup>26</sup>

2.5 The Lockerbie bombing also led the Security Council to adopt resolution 635 (1989), which condemned all acts of unlawful interference against the security of civil aviation and called on all States to cooperate in measures to prevent acts of terrorism, including those involving plastic explosives, and urged the International Civil Aviation Organisation to intensify its work on devising an international regime for the marking of plastic or sheet explosives for the purpose of detection.<sup>27</sup> As a result, a Convention on the Marking of Plastic Explosives for the Purpose of Detection was adopted at Montreal on 1 March 1991.<sup>28</sup>

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22 Annex 24.

23 S/17554 (Annex 31).

24 S/17702 (Annex 32).

25 S/18641 (Annex 35).

26 SC/5057 (Annex 38).

27 Annex 40. By 28 December 1988 it had already been established that the aircraft had probably been destroyed by plastic explosive: see paragraph 2.33 below.

28 30 ILM 726 (1991).



2.6 On 31 January 1992, ten days after the adoption of resolution 731,<sup>29</sup> the President of the Security Council made a statement on behalf of the members of the Council at the conclusion of the meeting held at the level of Heads of State and Government, in connection with the item entitled "The responsibility of the Security Council in the maintenance of international peace and security". The statement included the following passage:

"The members of the Council express their deep concern over acts of international terrorism and emphasize the need for the international community to deal effectively with all such acts."<sup>30</sup>

2.7 This concern was reiterated on 29 July 1994 when the President of the Security Council made a statement to the media on behalf of the Council strongly condemning recent terrorist attacks in Buenos Aires and London, and stressing the need for "full and effective measures to prevent, combat and eliminate all forms of terrorism, which affect the international community as a whole."<sup>31</sup>

## **(2) The General Assembly and Specialized Agencies**

2.8 Terrorism has also been a concern of the General Assembly and the Specialized Agencies. In resolution 2551 (XXIV)<sup>32</sup> of 1969 the General Assembly expressed deep concern at hijacking of aircraft and urged full support for the efforts of the International Civil Aviation Organization (ICAO) in seeking measures to deal with it.

2.9 In resolution 2645 (XXV)<sup>33</sup> adopted in 1970, the General Assembly condemned, without any exception whatsoever, all acts of aerial hijacking or other interference with civil air travel, and repeated its support for the efforts of ICAO.

2.10 From an early stage the United Nations General Assembly was conscious also of the problem of State involvement in acts of terrorism. The Declaration on Principles of International Law concerning Friendly Relations

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29 See paragraph 2.68 below.

30 S/23500 (Annex 49).

31 S/PRST/1994/40 (Annex 76).

32 Annex 21.

33 Annex 23.

and Cooperation among States in accordance with the Charter of the United Nations (the Friendly Relations Declaration), adopted by the General Assembly of the United Nations on 24 October 1970,<sup>34</sup> dealt with the problem of terrorism in the context of the principle of the non-use of force:

"Every State has the duty to refrain from organizing, instigating, assisting or participating in acts of civil strife or terrorist acts in another State or acquiescing in organized activities within its territory directed towards the commission of such acts, when the acts referred to in the present paragraph involve a threat or use of force."

**2.11** In 1972, following the attack by the terrorist organization Black September at the Munich Olympic Games, the General Assembly, on the initiative of the Secretary-General of the United Nations, inscribed an item on terrorism on its agenda. Under the item the General Assembly adopted that year resolution 3034 (XXVII),<sup>35</sup> which recalled the Friendly Relations Declaration and expressed deep concern over the increasing acts of violence which endangered or took innocent human lives or jeopardized fundamental freedoms. The resolution was followed in succeeding years by nine further resolutions under the same agenda item.<sup>36</sup>

**2.12** In an 11th resolution under the same item, adopted without a vote on 9 December 1994, the General Assembly approved a Declaration on Measures to Eliminate International Terrorism.<sup>37</sup> In the preamble to the Declaration, the General Assembly expressed its conviction:

"that the suppression of acts of international terrorism, including those in which States are directly or indirectly involved, is an essential element for the maintenance of international peace and security".

**2.13** During the years preceding the adoption of this Declaration a continuing debate as to the causes of terrorism had been given priority over the taking of further effective action by the General Assembly. But during that period ICAO had been taking active steps within its own sphere to deal with international terrorism. Under its auspices two conventions to deal with the

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<sup>34</sup> Resolution 2625 (XXV) (Annex 22).

<sup>35</sup> Annex 25.

<sup>36</sup> 31/102 (15/12/76); 32/147 (16/12/77); 34/145 (17/12/79); 36/109 (10/12/81); 38/130 (19/12/83); 40/61 (9/12/85); 42/159 (7/12/87); 44/29 (4/12/89); 46/51 (9/12/91).

<sup>37</sup> A/49/760 (Annex 81).

threat posed by terrorism to the safety of civil aviation were adopted: the Hague Convention on the Suppression of Unlawful Seizure of Aircraft of 1970<sup>38</sup> and the Montreal Convention on the Suppression of Unlawful Acts against the Safety of Civil Aviation of 1971.<sup>39</sup> In 1977 ICAO adopted Annex 17 to the International Convention on Civil Aviation of 1944 prescribing the International Standards and Recommended Practices for the safeguarding of international civil aviation against acts of unlawful interference.

**2.14** Following the hijacking of the liner *Achille Lauro* in 1985, there was adopted in 1988, under the auspices of the International Maritime Organisation, the International Convention on the Suppression of Unlawful Acts against the Safety of Maritime Navigation and a Protocol on the Suppression of Unlawful Acts against the Safety of Fixed Platforms located on the Continental Shelf.<sup>40</sup>

### **Record of Libyan involvement in terrorism**

**2.15** There is a marked contrast between Libya's conduct and the standard required by the United Nations. Since 1980, Libya has conducted, assisted or instigated a number of terrorist incidents in various countries.<sup>41</sup> On 8 February 1980 Libyan Revolutionary Committees announced a campaign against Libyan dissidents abroad. On 12 June 1980, the day he was recognised by the British Government as Head of the Libyan People's Bureau in London (i.e. Head of the Libyan diplomatic mission), Musa Kusa publicly voiced his approval of a decision by Libyan revolutionary committees to kill two Libyan dissidents, who were at the time in the United Kingdom. The next day he was told to leave. Three other Libyans had to be expelled for the same reason.<sup>42</sup> In 1983 Musa Kusa became head of the "Mathaba" ("The International Centre for Resistance to Imperialism, Zionism, Racism, Reaction and Fascism"). In 1990 he was appointed Deputy Foreign Minister. He is currently Head of the External Security and Intelligence Organisation of Libya (ESO).<sup>43</sup>

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38 860 UNTS 105.

39 Annex 1.

40 27 ILM 672 (1988).

41 House of Commons Debates, 24 April 1986, cols 209-211 (Annex 34).

42 House of Commons Debates, 1 May 1984, col 209 (Annex 29).

43 The Arabic name of the organisation is *Amn Al-Jamahiriya*, which has been described by JANA (the Libya News Agency) as "the external security organisation" (Annex 60). It is sometimes referred to in English as the "Jamahiriya Security Organisation" (JSO).

**2.16** In November 1980 two children of a Libyan dissident were poisoned in Portsmouth in England. When four Libyan nationals were convicted and imprisoned for this crime, Libya expelled three British diplomats and an attempt was made to burn down the British Embassy in Tripoli.<sup>44</sup>

**2.17** On 17 April 1984 a woman police officer, Yvonne Fletcher, was murdered in St James's Square in London, the murder being carried out by shots fired from the premises of the Libyan diplomatic mission. Libya refused to cooperate in a criminal investigation, but as a result of their inquiries the Metropolitan Police were of the view that the murder was committed by one of two people in the mission. Libya refused to allow the mission to be searched and proposed that a Libyan commission of enquiry should come to the United Kingdom, and that any Libyan who might be found to be implicated should be put on trial in Libya. In view of the inadequate response to this grave incident diplomatic relations were broken off on 22 April 1984.<sup>45</sup> In 1991 the United Kingdom Police Dependents Trust received a cheque for £250,000 from the Libyan Police Syndicate in connection with the murder of WPC Fletcher.<sup>46</sup> The Trust declined to accept it.

**2.18** The conditions which the United Kingdom would require to be satisfied before diplomatic relations could be resumed have been put to Libya several times, and include:

- acceptance of responsibility for the actions of Libyan officials;
- an apology;
- compensation to WPC Fletcher's family.<sup>47</sup>

**2.19** On 17 November 1984, the Associated Press reported official Libyan claims that they had assassinated Mr Abdel-Hamid Bakoush, a Libyan dissident and former Libyan Prime Minister who had lived in Cairo since 1977, following which the Egyptian authorities then produced Mr Bakoush, saying

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44 House of Commons Debates, 1 May 1984, col 209 (Annex 29).

45 House of Commons Debates, 25 April 1984, cols 739-752 (Annex 27) and 1 May 1984, cols 195-208 (Annex 28).

46 Annex 42.

47 Letter of 1 April 1992 from the Secretary of State for Foreign and Commonwealth Affairs to Mr R Muir (Annex 50).

they had tricked the Libyans into believing that their assassination team had succeeded in killing him.<sup>48</sup>

**2.20** On 3 March 1986, the General Peoples Congress (the Libyan parliament) called for the creation of "suicide commandos", whose task would be, *inter alia*, to "strike at American and Zionist interests everywhere".<sup>49</sup>

**2.21** On 19 September 1989 UTA flight 772 was sabotaged in flight causing the loss of 171 lives. The French judicial inquiry into the crime has implicated several Libyan nationals.<sup>50</sup>

**2.22** There has been publicly expressed and active support by Libya for the Provisional IRA, a body responsible for repeated terrorist attacks in the United Kingdom and elsewhere up until August 1994. The practical support given by Libya included supplying and shipping arms and explosives for the use of the Provisional IRA in their acts of terrorism. In March 1973 the Irish authorities boarded the Cypriot-registered coaster *Claudia* which was found to be carrying a cargo of five tons of arms and explosives. These had been supplied by Libya and were destined for the Provisional IRA, a known member of which was on board the vessel.<sup>51</sup> In October 1987 the ship *Eksund* was intercepted by French customs officers in the Bay of Biscay carrying a quantity of weapons and explosives supplied by Libya and destined for the Provisional IRA.<sup>52</sup>

**2.23** On 17 June 1991, in a speech to the Libyan parliament, Colonel Qadhafi said that the cause of the IRA was just:

"we support it, terrorism or no terrorism".<sup>53</sup>

**2.24** More recent Libyan actions have confirmed Libya's links with terrorist groups during those years. Following the adoption of Security Council resolution 748 in March 1992, the Libyan Peoples Committee for Foreign Liaison and International Cooperation (the Libyan Foreign Ministry) issued on 14 May 1992 a communiqué, the first point of which was that Libya

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48 Annex 30.

49 Annexes 33 and 36.

50 S/23306 (Annex 5).

51 House of Commons Debates, 16 April 1973, col 43 (Annex 26).

52 House of Commons Debates, 18 November 1987, col 595 (Annex 37).

53 Annex 41.

"severs relations with all groups and organisations involved in international terrorism of any kind".<sup>54</sup>

**2.25** The same day a letter from the Libyan Foreign Minister, Mr Bishari, was transmitted to the Secretary-General of the United Nations.<sup>55</sup> The letter repeated the terms of the communiqué. In particular, it said that Libya would supply information concerning its links with the Provisional IRA, including details of financial assistance, provision of weapons, training of personnel and contact points. It proposed a meeting between representatives of the British and Libyan Governments for this purpose. Such meetings were held in Geneva and Cairo on 9 June 1992, 13 August 1992, 28 November 1992, 31 July 1993, 24 August 1993 and 23 January 1995. At the meetings the Libyan representatives provided information about Libya's relationships with the Provisional IRA, but the information supplied does not yet amount to a full disclosure of the nature and extent of that relationship.<sup>56</sup>

**2.26** Mr Bishari's letter of 14 May 1992 also said that Libya no longer had any link with the terrorists Abu Musa or Abu Nidal, the latter apparently having been permitted to establish his headquarters in Libya in 1987. During the summer of 1992 Libya closed or dismantled many of the camps previously used to train terrorists.<sup>57</sup>

**2.27** On 2 April 1992 (two days after the adoption of Resolution 748)<sup>58</sup> the Secretary-General of the United Nations protested to the Libyan Permanent Representative about the attacks that day against the Venezuelan Embassy in Tripoli. Venezuela was at the time a member of the Security Council and had voted for Resolution 748.<sup>59</sup> The same day the President of the Security Council made the following statement on behalf of the Council:

"The Security Council strongly condemns the violent attacks on and destruction of the premises of the Embassy of Venezuela in Tripoli that took place today. The fact that these intolerable and extremely grave events have been directed not only against the Government of Venezuela but also against and in

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54 Annex 55.

55 Annex 56.

56 House of Commons Debates, 18 June 1992, cols 1038-40 (Annex 57) and 1 February 1995 col 1062 (Annex 80).

57 House of Commons Debates, 20 November 1992, cols 432-3 (Annex 61).

58 See paragraphs 2.78 to 2.82 below.

59 UN Press Release SG/1925 (Annex 51).

reaction to Security Council resolution 748 (1992) underlines the seriousness of the situation.

The Council demands that the Government of the Libyan Arab Jamahiriya take all necessary measures to honour its international legal obligations to ensure the security of the personnel and to protect the property of the Embassy of Venezuela and of all other diplomatic and consular premises or personnel present in the Libyan Arab Jamahiriya, including those of the United Nations and related organizations, from acts of violence and terrorism.

The Council further demands that the Libyan Arab Jamahiriya pay to the Government of Venezuela immediate and full compensation for the damage caused.

Any suggestion that those acts of violence were not directed against the Government of Venezuela but against and in reaction to resolution 748 (1992) is extremely serious and totally unacceptable."<sup>60</sup>

## **II The Facts of the Case**

### **The destruction of PA 103 and the criminal investigation**

**2.28** On 21 December 1988 a Boeing 747 aircraft of Pan American Airways exploded in flight over the town of Lockerbie in southern Scotland. The aircraft crashed, killing all 259 passengers and crew and eleven residents of Lockerbie. The victims included nationals of twenty-one countries in Europe, the Americas, Africa and Asia. Nineteen of the victims were children.

**2.29** An international investigation was begun immediately and was based at Lockerbie under the command of the Chief Constable of Dumfries and Galloway Constabulary, the Scottish police force whose region includes Lockerbie. They were assisted by police officers from a number of British police forces, and worked in co-operation with agents of the United States Federal Bureau of Investigation.

**2.30** Investigation of sudden and unexplained deaths in Scotland, whether caused by a criminal act or otherwise, is the responsibility of the Procurator

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<sup>60</sup> S/PV.3064 (Annex 52). Libya acknowledged its responsibility for the destruction of the Venezuelan Embassy and paid compensation to the Government of Venezuela.

Fiscal, who is the public prosecutor acting within a particular geographical district. The Procurator Fiscal is the local representative of the Lord Advocate, who is the chief public prosecutor for Scotland. The Procurator Fiscal whose district includes Lockerbie is the Procurator Fiscal for Dumfries. In view of the magnitude of the disaster at Lockerbie the then Procurator Fiscal established a temporary office in Lockerbie and remained based there until February 1992. A description of Scottish criminal procedure and investigative procedures so far as is relevant to the Lockerbie case is contained in the *Summary of Scottish Criminal Procedure in Murder Cases*.<sup>61</sup>

**2.31** The investigation of particular criminal offences, decisions whether to prosecute and the conduct of prosecutions in Scotland are wholly free from any political control. The independence from Government of the Lord Advocate in his role as public prosecutor has been long recognised. It was put thus in 1928:

"In this department of his office the Lord Advocate exercises directly the executive authority of the Sovereign, and he is not answerable to, or bound to take instructions from, any other Minister of the Crown."<sup>62</sup>

In 1959 the then Prime Minister said in the House of Commons:

"It is an established principle of Government in this country and a tradition long supported by all political parties, that the decision as to whether any citizen should be prosecuted, or whether any prosecution should be discontinued, should be a matter .... for the prosecuting authorities to decide on the merits of the case without political or other pressure.

It would be a most dangerous deviation from this sound principle if a prosecution were to be instituted or abandoned as a result of political pressure or popular clamour."<sup>63</sup>

**2.32** The Secretary of State for Foreign and Commonwealth Affairs ("the Foreign Secretary"), Mr Douglas Hurd, said in the House of Commons on 1 February 1995 in response to points made during a debate by an opposition Member of Parliament, Mr Tam Dalyell:

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<sup>61</sup> Annex 18.

<sup>62</sup> *Encyclopaedia of the Laws of Scotland*, 1928, Vol V, paragraph 483.

<sup>63</sup> House of Commons Debates, 16 February 1959, col 31 (Annex 20).



"I must stress the total independence from Government of the investigation of the Lord Advocate in his responsibility for criminal prosecutions. Neither he nor his predecessor would have brooked any attempt to influence them in exercising their independent judgment. It is not the job of Ministers or the Foreign Office to decide who should be prosecuted for a crime. It is not the job of Ministers or the Foreign Office to pronounce opinions as to who is guilty. There is no place in the matter for diplomatic or political considerations, and we have not at any time allowed such considerations any place in our actions.

Neither the Foreign Office nor any agency for which I am responsible has attempted to steer the Lockerbie investigation or to shield any individual or state who may have been responsible. There is no hidden political influence behind the investigation, and there has been no censorship by the Foreign Office. All significant information relevant to Lockerbie obtained by the intelligence agencies – or anyone else, to my knowledge – is invariably and as a matter of course provided to those who are responsible for the investigation. It is for the prosecuting authorities and, ultimately, we hope, for the courts, not the Government, to weigh the evidence; so when the hon. Gentleman asks whether I am at ease with that, or whether I am satisfied with that, those are not questions for me. It is not for me to weigh or ponder the evidence or to allow those under my control to do so."<sup>64</sup>

2.33 Wreckage from the aircraft was scattered over an area of 2190 square kilometres. But by 28 December 1988 it had been established by scientific examination of wreckage that the destruction of the aircraft had been caused by a detonating high explosive consistent with the use of a high performance plastic explosive and that the disaster was, accordingly, the result of a criminal act.<sup>65</sup> It was thereafter the responsibility of the Procurator Fiscal to direct further investigation in order to establish more fully the circumstances of the deaths and evidence of criminal responsibility. It was the duty of the police to carry out enquiries on his behalf and to report to him. It was the duty of the Lord Advocate to determine whether a public inquiry under the Fatal Accidents and Sudden Deaths Inquiry (Scotland) Act 1976 should be held

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<sup>64</sup> House of Commons Debates, 1 February 1995, cols 1058–9 (Annex 80).

<sup>65</sup> Statement of the Air Accidents Investigation Branch of the Department of Transport of the United Kingdom (Annex 39).

pending the completion of the criminal investigation<sup>66</sup> and, in due course, whether there was sufficient evidence to merit criminal proceedings against named persons. The Lockerbie disaster investigation, as one of particular importance and complexity, proceeded subject to the general direction and overall control of the Lord Advocate.

**2.34** The wide-ranging criminal investigation spread far beyond Lockerbie, and indeed far beyond Scotland and the rest of the United Kingdom, to reach 70 countries. Judicial, prosecuting and investigating agencies from many countries co-operated in an investigation which was of an unprecedented scale. In the course of it over 4,000 items were retained for examination or as evidence. Investigative decisions were taken by the Chief Constable, the Procurator Fiscal and the Lord Advocate, acting in the exercise of their duties independently of any Government or other outside pressure, and subject to no constraints other than compliance with proper legal procedures.

**2.35** The conclusions of the investigation are contained in the annexed Statement of Facts, which was before this Court during the hearing in March 1992 of the request by Libya for the indication of provisional measures.<sup>67</sup> The United Kingdom cannot properly make public further details of the evidence while criminal proceedings are pending, as to do so might prejudice the fair trial of the case before a judge and jury, which is the proper forum before which criminal evidence should be presented and tested. Because of the prohibition on the Crown publishing evidence while a criminal trial is pending, the then Lord Advocate, when announcing the charges against the two accused on 14 November 1991, said that he:

"cannot and will not comment on the evidence on which these charges are based."<sup>68</sup>

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<sup>66</sup> Such a public inquiry was held at Dumfries between 1 October 1990 and 13 February 1991, presided over by a senior Judge, Sheriff Principal John Mowat QC, who heard evidence over 55 days and issued a Determination of his findings on 18 March 1991. The inquiry was concerned with the circumstances of the deaths and not with criminal responsibility for the deaths.

<sup>67</sup> Annex 16 (United Kingdom Document No.2 in the hearings of March 1992).

<sup>68</sup> S/23307, at p.6 (Annex 6). See also the statements by the Parliamentary Under-Secretary of State for Scotland, Lord James Douglas-Hamilton, House of Commons Debates, 13 December 1994 cols 45-48 (Annex 79) and the Summary of Scottish Criminal Procedure in Murder Cases, paragraph 19 (Annex 18).

## Summary of the facts disclosed by the criminal investigation

2.36 In the initial stages the investigators had no specific reason to suppose Libyan complicity in the crime, nor had they any reason to suspect that the suitcase which had contained the improvised explosive device<sup>69</sup> had been loaded onto an aircraft in Malta. Flight PA103 had commenced at Frankfurt am Main in Germany on a Boeing 727 passenger aircraft, from which 49 passengers had transferred to the Boeing 747 aircraft at London Heathrow airport, joining a further 194 passengers there. Baggage had been transferred from the Boeing 727 aircraft to the Boeing 747 aircraft at London Heathrow. Other baggage had been transferred to the Boeing 727 aircraft at Frankfurt am Main and further baggage was transferred, in due course, from other aircraft to the Boeing 747 aircraft at London Heathrow. The initial investigation was naturally directed to the possibility of the baggage containing the improvised explosive device having been loaded at London Heathrow or Frankfurt am Main airports. Careful scientific investigation established the identity of the suitcase which had contained the improvised explosive device and the location of the suitcase within a particular baggage container. The location of the suitcase meant that it could not have been loaded onto an aircraft for the first time at London Heathrow or transferred onto PA103 from another flight at that airport, but could only have been transferred directly from the Boeing 727 aircraft which came from Frankfurt am Main on the first leg of flight PA103.<sup>70</sup>

2.37 Careful investigation was made into the possibilities of the suitcase having been loaded onto an aircraft for the first time at Frankfurt am Main, or having been transferred onto the Boeing 727 aircraft there from another aircraft. Extensive investigation was carried out in the Federal Republic of Germany and, in consequence of that investigation, in a number of other countries.

2.38 Meanwhile, scientific examination of explosive-damaged items was successful in establishing that a number of items of clothing had been in the suitcase containing the improvised explosive device. Those items and other damaged contents of the suitcase were traced back to a particular shop in

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<sup>69</sup> The term "improvised explosive device" is used to describe a bomb which has not been manufactured or assembled commercially or by any established ordnance manufacturer.

<sup>70</sup> Statement of Facts, paragraph 3 (Annex 16).

Malta.<sup>71</sup> Investigation of the movement of flights and baggage at Frankfurt am Main indicated that a single piece of luggage had arrived at that airport on 21 December 1988 from Air Malta Flight KM 180 and was thereafter transferred to the Boeing 727 Aircraft of flight PA103, where it appears to have been carried as unaccompanied luggage. While no direct documentary evidence has been produced from Malta to show that the suitcase was loaded there,<sup>72</sup> the evidence available from Frankfurt am Main, and the circumstances as described in the Statement of Facts, demonstrate that the suitcase containing the improvised explosive device was loaded in Malta.<sup>73</sup>

**2.39** It was the identification of the timing device which detonated the improvised explosive device as having been one of a small number manufactured and supplied by the Swiss company, MEBO AG, for and to the order of Libyan intelligence officials which led to the investigators establishing evidence of Libyan complicity in the crime.<sup>74</sup>

**2.40** The Statement of Facts describes the alleged involvement of Abdelbaset Ali Mohmed Al Megrahi and Al Amin Khalifa Fhimah with the External Security and Intelligence Organisation of Libya (ESO),<sup>75</sup> and the alleged involvement of other ESO officials (Izz Al Din Al Hinshiri, Said Mohammed Abdallah Rashid, Abdallah Senussi, Badri Hasan and Nasser Ali Ashur) in procuring and testing timers manufactured by MEBO AG.<sup>76</sup> The ESO had at that time responsibility for acquiring intelligence concerning Libyan nationals who were perceived to threaten the regime, and also for the conduct of terrorist operations. In October 1992 the ESO was incorporated into the Justice and Public Security Secretariat.<sup>77</sup>

**2.41** Abdallah Senussi was a member of the six-man committee which controlled the ESO and was head of the Information Directorate of the ESO in 1985, holding the titles of Director of Information and Head of Special Operations. He had overall control of the Centre for Strategic Studies of which Abdelbaset Ali Mohmed Al Megrahi was appointed Director on 1 January 1987, and had control over or access to training camps. In October 1988

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71 Statement of Facts, paragraph 11 (Annex 16).

72 Libyan Memorial, paragraph 2.13.

73 Statement of Facts, especially paragraphs 4, 10, 17, 19 and 21 (Annex 16).

74 *Ibid.*, especially paragraphs 5 to 9, 12 to 15 (Annex 16).

75 *Ibid.*, paragraphs 8 and 10 (Annex 16); see also footnote 43 above.

76 *Ibid.*, paragraphs 5, 6 and 12 to 15 (Annex 16).

77 Annex 60.

Senussi was appointed Director of Operations Administration and remained so as at 21 December 1988.

**2.42** Hinshiri and Rashid were in 1985 members of the controlling committee of the ESO. Hinshiri was head of Central Security Administration in the Directorate of General Security. In early 1986 an Operations Administration was established within the ESO with Rashid as its head. In January 1987 Rashid was transferred to an electronics company. In 1988 Hinshiri was transferred to the General People's Committee for Justice. In March 1989 he was appointed Minister for Justice. Between October 1991 and November 1992 he was Minister for Communications and Transport, and resumed that post in January 1994.

### **Criminal Proceedings in Scotland**

**2.43** Under the law of Scotland, no person may be convicted of a crime on the evidence of only one witness or on evidence from only one source. The essential facts in any criminal case must be proved by the prosecutor beyond reasonable doubt by corroborated evidence. The Lord Advocate was, by 13 November 1991, satisfied on the basis of the reports of the Procurator Fiscal and the Chief Constable that there was a case which could be established by corroborated evidence against two Libyans, Abdelbaset Ali Mohamed Al Megrahi and Al Amin Khalifa Fhimah, acting in furtherance of the purposes of the Libyan intelligence services, as specified in the Statement of Facts.

**2.44** The Lord Advocate came to his conclusion that there was sufficient evidence only on the basis of a comprehensive investigation, independent of any Government influence, and on the basis of available evidence. It was only in consequence of the meticulous scientific examination of items of wreckage and the contents of the aircraft, themselves recovered by extensive and painstaking searches over an enormous area, that the lines of investigation opened up. The Lord Advocate has seen no evidence which would warrant reconsideration of the charges which have been made, and remains of the opinion that the evidence should properly be tested before the criminal courts having jurisdiction in Scotland or the United States.

**2.45** The possible involvement of nationals of a number of countries was very closely investigated. Despite the unprecedented scale of the

investigation, the available evidence does not support charges against the nationals of any country besides Libya.

**2.46** It was known that the two persons charged were not to be found in United Kingdom jurisdiction, but they were believed to be resident in Libya. Accordingly, the Lord Advocate instructed the Procurator Fiscal to apply to the Sheriff at Dumfries, being the Judge having jurisdiction in such matters, to grant a warrant for the arrest of Abdelbaset Ali Mohamed Al Megrahi and Al Amin Khalifa Fhimah on a charge of conspiracy, or alternatively murder, or alternatively contravention of Section 2(1) and (5) of the Aviation Security Act 1982,<sup>78</sup> and the warrant was granted on 13 November 1991.<sup>79</sup> A statement of the legal basis for these offences is annexed.<sup>80</sup>

**2.47** On 14 November 1991, the Lord Advocate announced publicly that the warrant had been granted and made the terms of the charges known.<sup>81</sup> Simultaneously, the Acting Attorney General of the United States of America announced the issue of warrants there against the same two accused, following the handing down of an indictment by a Grand Jury.

**2.48** On the same day, copies of the Scottish charges and warrant, together with the Statement of Facts, were supplied to Libya through its Permanent Representative to the United Nations in New York, and through the Italian Government, that Government being the one protecting British interests in the absence of diplomatic relations between the United Kingdom and Libya. The covering note from the Foreign Secretary to the Italian Ambassador said that the handing over of the documents constituted the demand to Libya for surrender of the two accused. That demand was reiterated in the House of Commons by the Foreign Secretary the same day.<sup>82</sup>

**2.49** The evidence obtained by the criminal investigation implicating Libyan officials would have made a trial in Libya out of the question even if Libya were an alternative jurisdiction to Scotland.<sup>83</sup>

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78 Annex 19, at paragraph 4.

79 Annex 17.

80 Annex 19.

81 Annex 6, at page 3.

82 *Ibid.*, at page 7.

83 Further considerations were the serious doubts about the independence of the Libyan judicial system in view of the connections between members of that system and Libyan intelligence services (paragraphs 2.40 to 2.42 above), and Libya's past record of allowing officials involved

**2.50** Libya has been given assurances about the fair trial of the accused in Scotland, most particularly in September 1993 when Libya raised a number of questions regarding criminal procedure in Scotland and sought assurances that the accused would receive a fair trial. Those questions were answered and the assurances were given. Libya has confirmed that the assurances were satisfactory.<sup>84</sup>

**2.51** The Libyan Memorial<sup>85</sup> complains that the United Kingdom has always refused to provide Libya with the slightest proof (*la moindre preuve*) of the allegations against the two accused. The Statement of Facts is however a detailed summary of the case against the two accused and has been with Libya since 14 November 1991.

### **Diplomatic action to obtain surrender of the accused**

**2.52** On 14 November 1991, the day the United Kingdom made its demand that Libya surrender the two accused,<sup>86</sup> the Permanent Mission of Libya to the United Nations in New York issued a press release unequivocally denying any and all association with and knowledge of the Lockerbie incident.<sup>87</sup> This denial was repeated by Libya in a letter to the President of the Security Council of 15 November 1991, which also criticised the United Kingdom for not contacting the Libyan judiciary to seek clarification and verification of the accusations.<sup>88</sup> The denial was reiterated in a letter to the Secretary-General of the United Nations of 17 November 1991.<sup>89</sup> In a letter of 20 November 1991 to the Secretary-General of the United Nations, the Libyan Foreign Minister said that Libya had appointed a judge to inquire into the accusations.<sup>90</sup>

**2.53** No satisfactory response having been received from Libya to the demand for surrender of the two accused, on 27 November 1991 the Government of the United Kingdom issued jointly with the Government of the United States a declaration stating that the Government of Libya must:

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in terrorism to go unpunished (paragraphs 2.15 to 2.27 above).

84 See paragraphs 2.89 and 2.90 below.

85 Libyan Memorial paragraph 2.13.

86 Paragraph 2.48 above.

87 Libyan Annex 12.

88 S/23221, (Annex 43).

89 S/23226, (Annex 44).

90 S/23416 (Annex 47).

"- surrender for trial all those charged with the crime; and accept responsibility for the actions of Libyan officials;

- disclose all it knows of the crime, including the names of all those responsible, and allow for full access to all witnesses, documents and other material evidence, including all the remaining timers;

- pay appropriate compensation."<sup>91</sup>

The statement expressed the expectation that Libya would comply promptly and in full. In response Libya released a press statement describing the joint statement as "yet another orchestrated crusade against Libya" and suggesting that the facts be studied by an impartial committee or by this Court.<sup>92</sup>

**2.54** As regards the demand for compensation, in a letter of 14 May 1992 to the Secretary-General of the United Nations, Libya undertook to pay appropriate compensation if its responsibility were established.<sup>93</sup>

**2.55** With regard to the question of how the demands were compatible with the presumption of innocence, the United Kingdom Permanent Representative said in the Security Council, following the adoption of resolution 731 on 21 January 1992, that:

"We are not asserting the guilt of these men before they are tried, but we do say that there is serious evidence against them which they must face in court."<sup>94</sup>

At the oral hearing on the Libyan request for the indication of provisional measures on 26 March 1992, Counsel for the United Kingdom<sup>95</sup> said:

"I pause to observe that it was a recurring theme of the speeches made on behalf of the Applicant this morning that by asking for the accused to be handed over the United Kingdom was somehow violating the principle that their innocence was to be presumed until they had been found guilty. It is certainly true that my colleague the Lord Advocate has sufficient

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<sup>91</sup> S/23308 (Annex 7).

<sup>92</sup> Libyan Document 42.

<sup>93</sup> S/23918 (Annex 56).

<sup>94</sup> S/PV.3033 at p103, (Annex 10).

<sup>95</sup> Mr Rodger, then Solicitor-General for Scotland, now the Lord Advocate.



evidence to justify charging these two men but if they are handed over for trial in Scotland their guilt or innocence will be determined not by the Lord Advocate, nor by the Government of the United Kingdom, but by a jury of 15 ordinary men and women."<sup>96</sup>

**2.56** On 20 December 1991 France issued a communiqué which said that the judicial inquiry into the attack on UTA flight 772 on 19 September 1989 causing 171 deaths had implicated several Libyan nationals. The communiqué called on Libya to produce all material evidence in its possession; to facilitate access to all documents that might be useful in inquiring into the attack; and to authorise the responsible Libyan officials to respond to any request made by the French examining magistrate.<sup>97</sup>

**2.57** On 27 November 1991 the three Governments also issued jointly a declaration in which they required Libya promptly to commit itself to cease all forms of terrorist activities.<sup>98</sup>

**2.58** During the two months following the original demand of 14 November 1991 for surrender of the two accused, no effective reply was received from Libya. Libya had sent four letters to the Secretary-General of the United Nations.<sup>99</sup> These did not acknowledge that Libya had been involved in terrorism, nor agree to make the two accused available for trial, nor agree to meet the other specific demands in the joint declaration of 27 November 1991.

**2.59** The reaction of Libya to the results of the criminal investigation, and to the demands for surrender of the two accused, was seen by the United Kingdom in the context of Libya's record of involvement in terrorism. Therefore, when Libya failed to respond appropriately to the demands made upon it by the three Governments, the United Kingdom thought it right to take the matter to the United Nations, particularly in view of the frequently expressed concern of the United Nations about terrorism and its effect on international peace and security. The United Kingdom, as the State in whose territory the crime had been committed and which had carried out the criminal

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<sup>96</sup> CR 92/3, p 21.

<sup>97</sup> S/23306 (Annex 5).

<sup>98</sup> S/23309 (Annex 8).

<sup>99</sup> S/23226 (Annex 44); S/23396 (Annex 46); S/23416 (Annex 47) and S/23436 (Annex 48).

investigation, would have been justified in referring the matter to the United Nations at an earlier date. However, the United Kingdom considered that it was appropriate that it should first seek the cooperation of the Government of the State in which the two accused were resident, even though the evidence indicated that authorities of that State were implicated in the crime. Only when it became clear that Libya would not cooperate in this regard did the United Kingdom decide to take the matter to the United Nations.

**2.60** On 31 December 1991, the text of the Lord Advocate's announcement of 14 November 1991 about the investigation, and the statement of the Foreign Secretary made the same day,<sup>100</sup> were circulated as General Assembly and Security Council documents.<sup>101</sup> The same day the French communiqué of 20 December 1991 calling on Libya to cooperate with French justice with regard to the attack on UTA flight 772, the joint declaration of the United Kingdom and United States of 27 November 1991, and the tripartite declaration of the United Kingdom, France and United States on terrorism of 27 November 1991, were also circulated as General Assembly and Security Council documents.<sup>102</sup>

**2.61** From 2 January 1992 onwards, France, the United Kingdom and the United States made démarches to a number of States, including all the then members of the Security Council. These sought support for the proposal that the Security Council should call on Libya to comply with the demands of the three Governments. In addition, by 7 January, the Permanent Representatives of the three Governments at the United Nations in New York had discussed possible action by the Security Council with the representatives of all the other Council members.

**2.62** On 7 January, the Libyan Foreign Minister requested that a Special Session of the General Assembly of the United Nations be convened to discuss international terrorism.<sup>103</sup> Since a majority of the Members of the United Nations did not concur in the request, the proposal lapsed.

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<sup>100</sup> Paragraphs 2.47 and 2.48 above.

<sup>101</sup> A/46/826 and S/23307 (Annex 6).

<sup>102</sup> A/46/825 and S/23306 (Annex 5); A/46/827 and S/23308 (Annex 7); A/46/828 and S/23309 (Annex 8).

<sup>103</sup> A/46/840 and A/46/840 Corr.1 (Annex 45).

2.63 On 8 January, in a letter to the Secretary-General of the United Nations, the Libyan Foreign Minister denied that the Security Council had competence under the Charter of the United Nations to deal with the matter, and invoked Article 33 of the Charter.<sup>104</sup>

2.64 On 10 January, a draft resolution supporting the demands made of Libya by the three Governments, and prepared after discussion between the five permanent members of the Security Council, was circulated informally in New York to all members of the Council.

2.65 The next day, 11 January, Libya sent a letter to the International Civil Aviation Organisation<sup>105</sup> mentioning the Montreal Convention for the first time. An earlier Libyan communication to ICAO of 30 December 1991 had made no mention of the Convention.<sup>106</sup>

2.66 On 14 January, a revision of the draft resolution was circulated informally to all members of the Security Council.

2.67 On 18 January, while the draft resolution was still under consideration, and shortly before the debate on it in the Security Council, Libya sent the United Kingdom a letter requesting that a dispute be submitted for arbitration under Article 14(1) of the Montreal Convention.<sup>107</sup>

#### **The United Nations response**

2.68 Three days later, on 21 January 1992, the Security Council unanimously adopted resolution 731<sup>108</sup> in which it reaffirmed its earlier resolutions on terrorist threats to international aviation, and expressed its deep concern:

"over the results of investigations, which implicate officials of the Libyan Government and which are contained in Security Council documents",

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104 S/23396 (Annex 46).

105 Libyan Memorial, paragraph 2.15 (Libyan Annex 75).

106 Libyan Annex 66.

107 S/23441 (Annex 9).

108 Annex 2.

and its determination to eliminate international terrorism. The operative paragraphs condemned the destruction of PA 103 and UTA 772, and strongly deplored the fact that the Libyan Government had not yet responded effectively to the requests of the three Governments in connection with the legal procedures related to the attacks carried out against the two flights.<sup>109</sup> The Security Council urged the Libyan Government to provide "a full and effective response" to the requests of the three Governments "so as to contribute to the elimination of international terrorism". The Council also requested the Secretary-General to seek the cooperation of the Libyan Government to provide a full and effective response to those requests.

**2.69** Speaking in the Security Council on 21 January 1992, following the adoption of the resolution, the United Kingdom Permanent Representative, Sir David Hannay, emphasized that it was the clear indication of Libyan Government involvement in the crime which led the British Government, together with those of France and the United States, to bring before the Council Libya's failure to comply with the requests that the accused be made available for trial in Scotland or in the United States and to cooperate with the French judicial authorities.<sup>110</sup> It was this exceptional circumstance of alleged Libyan Government involvement which made it particularly appropriate for the Council to adopt a resolution urging Libya to comply with those requests.

**2.70** The Libyan letter of 18 January 1992, containing a request for arbitration under Article 14 of the Montreal Convention,<sup>111</sup> had been circulated as a Security Council document and drawn to the attention of the Security Council by the Libyan Permanent Representative. Sir David Hannay said that this letter:

"... is not relevant to the issue before the Council. The Council is not, in the words of article 14 of the Montreal Convention, dealing with a dispute between two or more Contracting Parties concerning the interpretation or application of the Montreal Convention. What we are concerned with here is the proper reaction of the international community to the situation arising from Libya's failure, thus far, to

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109 A reference to the demands of the three Governments referred to in paragraphs 2.53, 2.56 and 2.57 above.

110 S/PV.3033 pp102-106 (Annex 10).

111 Paragraph 2.67 above.

respond effectively to the most serious accusations of State involvement in acts of terrorism."<sup>112</sup>

2.71 Speaking after the adoption of the resolution, the Representative of the Russian Federation accepted explicitly that the demand for surrender of the two accused for trial in Scotland or the United States was reasonable:

"It is important, in accordance with universally acknowledged legal norms, that the judicial organs of those countries to which the downed aircraft belonged and over whose territory the crime was committed should be allowed to deal with this case."<sup>113</sup>

2.72 The need for the Security Council to take action to deal with a threat to international peace and security was recognised. The Representative of Hungary said:

"The attacks on Pan Am and UTA aircraft are acts that obviously threaten international peace and security. As a result, we feel that it is entirely justified and highly appropriate for the Security Council, the United Nations body entrusted with the primary responsibility for the maintenance of international peace and security, to consider these terrorist manifestations.

....

Hungary believes that the question of eradicating international terrorism has a legitimate place among the concerns of the Security Council, which, on the basis of its mandate under the Charter, is obliged to follow closely any event that might endanger international peace and security. In this connection the Council is in duty bound to exercise vigilance and to remain seized of specific acts of terrorism that threaten or destroy innocent lives. For verbal expressions of faith are no longer enough; the time has come for concrete actions."<sup>114</sup>

The Representative of Austria said:

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112 Annex 10 at p.104.

113 *Ibid.*, at p.88.

114 *Ibid.*, at pp.91-2.

"The resolution adopted by the Security Council today is an important step in this concerted action against the scourge of international terrorism."<sup>115</sup>

2.73 Even where a member of the Council expressed some misgivings, the need to deal with cases where a State is implicated in terrorism was recognised. The Representative of Venezuela said:

"The countries that sponsored this resolution ... worked with a group of non-aligned countries represented in the Council and made the clear declaration that this resolution is exceptional by its nature and cannot be considered in any way as a precedent but is intended only for those cases in which States are involved in acts of terrorism."<sup>116</sup>

2.74 Following the adoption of resolution 731, the Secretary General's representative, pursuant to paragraph 4 of the resolution, undertook consultations with the Libyan authorities. The Secretary-General reported on those consultations on 11 February 1992 and 3 March 1992.<sup>117</sup> Neither the results of those consultations, nor any subsequent actions of the Libyan authorities, evidenced any intention by Libya to comply with the terms of resolution 731.

2.75 On the day the second report was published, 3 March 1992, Libya filed its Application in the present case together with a request for the indication of provisional measures.

2.76 By that stage the subject of Libya's response to the result of the criminal investigation of the sabotage of PA103 had been under consideration in the Security Council for some 15 weeks. The crime itself had been condemned by the members of the Security Council when it occurred in December 1988, and had been the impetus for Security Council resolution 635 (1989), which in turn had resulted in the adoption in 1991 of the Convention on the Marking of Plastic Explosives for the Purpose of Detection.<sup>118</sup> Furthermore, the Security Council had already on 21 January 1992, in resolution 731, unanimously deplored the fact that Libya had not yet responded effectively to the requests of the three Governments, and urged it

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115 Annex 10 at p.92.

116 *Ibid.*, at p.101.

117 S/23574 (Annex 13) and S/23672 (Annex 14).

118 See paragraph 2.5 above.

to provide a full and effective response, and that meanwhile the Security Council would remain seized of the matter.

**2.77** The three Governments accordingly began discussions with other members of the Security Council on 9 March 1992 about measures directed to ensuring compliance by Libya with resolution 731. On 17 March 1992 the three Governments circulated informally to the other members of the Security Council a draft of what was eventually to become resolution 748.

**2.78** While the Court held oral hearings on Libya's request on 26, 27 and 28 March 1992, consultations among members of the Security Council regarding the draft resolution continued. They resulted in the adoption by the Security Council on 31 March 1992 of resolution 748<sup>119</sup> by 10 votes (Austria, Belgium, Ecuador, France, Hungary, Japan, Russian Federation, United Kingdom, United States, Venezuela) to none. Five members abstained (Cape Verde, China, India, Morocco, Zimbabwe).

**2.79** In the preamble to the resolution the Security Council expressed its deep concern that Libya had not provided a full and effective response to the requests in resolution 731, and its conviction that the suppression of acts of international terrorism, including those in which States are directly or indirectly involved, is essential for the maintenance of international peace and security. The preamble recalled the statement issued on 31 January 1992, on the occasion of the meeting of the Security Council at the level of Heads of State and Government.<sup>120</sup> The preamble also re-affirmed that, in accordance with the principle in Article 2, paragraph 4, of the Charter of the United Nations, every State has a duty to refrain from organising, instigating, assisting or participating in terrorist acts in another State or acquiescing in organised activities within its territory directed towards the commission of such acts, when such acts involve a threat or use of force.

**2.80** The preamble then made a formal determination that the failure by Libya to demonstrate by concrete action its renunciation of terrorism, and in particular its continued failure to respond fully and effectively to the requests in resolution 731, constituted a threat to international peace and security. The

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119 Annex 3.

120 Paragraph 2.6 above.

final paragraph of the preamble stated that the Council was acting under Chapter VII of the Charter of the United Nations.

**2.81** Operative paragraph 1 of the resolution decided that

"the Libyan Government must now comply without any further delay with paragraph 3 of resolution 731 (1992) regarding the requests in documents S/23306, S/23308 and S/23309".

These documents contained, respectively, the French communiqué calling on Libya to cooperate with French justice with regard to the attack on UTA flight 772; the joint declaration by the United Kingdom and the United States demanding the surrender of the two accused of the sabotage of PA 103; and the tripartite declaration calling on Libya to prove by concrete actions its renunciation of terrorism.<sup>121</sup> In operative paragraph 2 the Council decided that:

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

**2.82** The resolution then prescribed a number of measures to be applied by all Members of the United Nations to Libya until the Security Council decides that Libya has complied with operative paragraphs 1 and 2. The measures included a prohibition on flights to and from Libya; prohibitions on the export of arms to Libya; reductions in the number and level of staff at Libyan diplomatic missions and consular posts; and denial of entry to, or expulsion of, Libyan nationals who have been denied entry, or expelled from, other States because of their involvement in terrorist activists.

**2.83** Speaking after adoption of the resolution the United Kingdom Permanent Representative said:

"One of Libya's suggestions in recent days has been that compliance with the requests in resolution 731 (1992) should await the outcome of the proceedings instituted by Libya in the International Court of Justice. As the United Kingdom Representative stated

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<sup>121</sup> Annexes 5, 7 and 8 and paragraphs 2.53, 2.56 and 2.57 above.



to the Court, we believe that Libya's application, while purporting to enjoin action by the United Kingdom against Libya, is in fact directed at interfering with the exercise by the Security Council of its rightful functions and prerogatives under the United Nations Charter. We consider the Security Council is fully entitled to concern itself with issues of terrorism and the measures needed to address acts of terrorism in any particular case or to prevent it in the future. Any other view would undermine the primary responsibility for the maintenance of international peace and security conferred on the Council by Article 24 of the Charter. It would thus seriously weaken the Council's ability to maintain peace and security in future circumstances which are unforeseen and unforeseeable."<sup>122</sup>

2.84 On 21 April 1992 France informed the Secretary-General of the United Nations that, according to the French judge investigating the sabotage of UTA flight 772, the Libyan authorities were not cooperating with him, as required by resolutions 731 and 748.<sup>123</sup> The Libyan response was uninformative<sup>124</sup>. On 2 December 1993, the French Minister of Foreign Affairs wrote to the Libyan Foreign Minister repeating the hope that Libya would

"give its entire cooperation to the French Judiciary in full respect of the relevant Security Council resolutions".<sup>125</sup>

2.85 In the 19 months between the adoption of resolution 748 on 31 March 1992, and the adoption of resolution 883 on 11 November 1993, Libya sent numerous communications to the United Nations in which it claimed that it was complying with resolution 731, and that resolution 748 was therefore unjustified.<sup>126</sup>

2.86 Even though Libya maintained that its law *prevented* the two accused being extradited,<sup>127</sup> certain of the Libyan communications suggested

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<sup>122</sup> S/PV. 3063 at pp.68 and 69 (Annex 11).

<sup>123</sup> S/23828 (Annex 53).

<sup>124</sup> S/23891 (Annex 54).

<sup>125</sup> S/26837 (Annex 73).

<sup>126</sup> See, eg, S/24209 (Annex 58); S/24428 (Annex 59); S/24961 and S/24961/Add.1 (Annex 63); S/26139 (Annex 64); S/26313 (Annex 66); S/26500 (Annex 67); S/26523 (Annex 69); S/26629 (Annex 71).

<sup>127</sup> Libyan Memorial paragraph 2.7. The United Kingdom has never sought extradition of the two accused under the Montreal Convention, but surrender under general international law.

alternative ways in which the two accused could be tried outside Libya, provided the trial was not held in Scotland or the United States.<sup>128</sup>

**2.87** On 30 June 1992 Libya said it would not object to the conduct of the investigation and the trial through a seven-member committee established by the League of Arab States or through the United Nations before a just and impartial court to be agreed on.<sup>129</sup> On 8 December 1992 Libya repeated this proposal, adding that it had no objection to the two accused appearing voluntarily before a British or US court.<sup>130</sup>

**2.88** On 17 August 1993, Libya acknowledged that it was necessary for the two accused to be brought to trial and that it was prepared to discuss the venue where the trial must be held if it were to be just and fair.<sup>131</sup>

**2.89** On 14 September 1993, the Secretary-General of the United Nations received a list of detailed questions raised by the Libyan Foreign Minister about the procedure which would be followed in relation to a criminal trial of the two accused in Scotland or the United States.<sup>132</sup> The Secretary-General replied with answers to the questions based on material provided by the United Kingdom and the United States.<sup>133</sup>

**2.90** On 29 September 1993 and 1 October 1993 Libya said that it was satisfied by the replies to the questions and was no longer opposed to the accused going on trial and was "encouraging the two suspects to appear

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<sup>128</sup> Libya has not been consistent in this regard. At the oral hearing on the Libyan request for an indication of provisional measures, the Agent for Libya, Mr Al Fatouri, stated:

"The Libyan Government has not ruled out the possibility of amending its national law in order to remove the internal obstacle created by its prohibition of extraditing its nationals." (CR92/2 p.20 (original); pp.14 and 15 (Translation provided by the Registry)).

Furthermore, Libya, in a letter to the United Nations Secretary-General of 14 May 1992, said that:

"the competent authorities in Libya have not rejected the principle of surrendering the two individuals under suspicion." (S/23918, Annex 56).

Yet in a letter of 11 September 1993 to the Secretary-General, Libya stated that it refused to compel the two accused to "extradite themselves" and that in the absence of an extradition agreement Libya was unable to compel them to do so (S/26500, Annex 67, p.9, paragraphs 8 and 9).

<sup>129</sup> S/24209 (Annex 58).

<sup>130</sup> S/24961 (Annex 63).

<sup>131</sup> S/26313 (Annex 66).

<sup>132</sup> S/26500 (Annex 67).

<sup>133</sup> The Secretary-General's reply has not been published. Material provided to the Secretary-General by the United Kingdom in September 1993 is contained in Annex 68.

before the Scottish courts".<sup>134</sup> This was repeated in further Libyan communications of 26 October 1993<sup>135</sup> and 27 March 1995.<sup>136</sup>

**2.91** Libya's assertions that it was complying with resolution 731<sup>137</sup> were baseless. None of the Libyan proposals for alternative trials met the requirements of the Security Council resolutions. In particular, Libya did not agree to surrender the two accused for trial in Scotland or the United States.

**2.92** On 27 November 1992, one year after France, the United Kingdom and the United States had presented their original demands to Libya, their three Governments issued a joint declaration and circulated it as a United Nations document. The declaration included the following passage:

"On this anniversary, the three States strongly reaffirm their single objective with respect to Libya: prompt, complete and unequivocal compliance with the terms of United Nations Security Council resolutions 731 and 748. Justice for all 441 victims of the Pan Am 103 and UTA 772 bombings, and international peace and security, which is threatened by Libya's support of terrorism, require no less.

Accordingly, the United States, France and the United Kingdom are determined to intensify their efforts, in close cooperation with the United Nations Secretary-General, to make the sanctions adopted by the United Nations Security Council in March yet more effective. They call upon the Government of Libya to end its defiance of the international community."<sup>138</sup>

**2.93** On 13 August 1993 the three Governments made a further joint declaration, which was circulated as a UN document. This pointed to the fact that Libya had failed to comply with the demands in resolution 731 and 748, even though by then some 16 months had passed since the Security Council had imposed sanctions on it.<sup>139</sup>

**2.94** That Libya had not complied with the requirements laid upon it by the resolutions has been recognised by the Security Council. Resolution 748

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134 S/26523 (Annex 69).

135 S/26629 (Annex 71).

136 S/1995/226 (Annex 82).

137 Paragraph 2.85 above.

138 A/47/758 and S/24913 (Annex 62).

139 A/48/314 and S/26304 (Annex 65).

requires the sanctions against Libya to be reviewed every 120 days. After each of the (so far nine) reviews the President has issued a statement on behalf of the members of the Council that there was no agreement that the necessary conditions existed for modification of the sanctions.<sup>140</sup>

**2.95** On 11 November 1993 resolution 883 was adopted by 11 votes (Brazil, Cape Verde, France, Hungary, Japan, New Zealand, Russian Federation, Spain, United Kingdom, United States, Venezuela) to none. Four members abstained (China, Djibouti, Morocco, Pakistan).<sup>141</sup> The resolution extended the scope of the sanctions on Libya, including a partial freeze on Libyan public assets, and tightened existing measures.

**2.96** The preamble to the resolution took note of letters to the Secretary-General of 29 September and 1 October 1993 from the Libyan Foreign Minister,<sup>142</sup> and his speech in the general debate at the 48th Session of the General Assembly<sup>143</sup> in which he had stated Libya's intention to "encourage" those charged with the sabotage of Pan Am 103 to appear for trial in Scotland, and its willingness to cooperate with the competent French authorities in the case of the sabotage of UTA 772.

**2.97** In view of these statements, operative paragraph 16 of the resolution expresses the Security Council's readiness to review the sanctions with a view to suspending them immediately if the Secretary-General reports to the Council that

"the Libyan Government has ensured the appearance of those charged with the bombing of Pan Am 103 for trial before the appropriate United Kingdom or United States court"

with a view to lifting them immediately

"when Libya complies fully with the requests and decisions in resolutions 731 (1992) and 748 (1992)".

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<sup>140</sup> The most recent statement was made on 30 March 1995 (S/PRST/1995/14; Annex 83). The other statements – S/24424, S/24925, S/25554, S/26303, S/26861, S/PRST/1994/18, S/PRST/1994/41, S/PRST/1994/76 – are in the same terms and have not been annexed.

<sup>141</sup> Annex 4.

<sup>142</sup> S/26523 (Annex 69).

<sup>143</sup> A/48/PV20 (Annex 70).

No such report has been received from the Secretary-General. The sanctions remain in force.

**2.98** After adoption of resolution 883, the Permanent Representative of the United Kingdom said:

"The objectives of the sponsors remain strictly limited. They are to secure justice for the victims of Pan Am 103 and UTA 772 and to ensure that such atrocities do not happen again. Central to these objectives is that the two men accused of the Lockerbie bombing should stand trial in Scotland or the United States and that the demands of French justice regarding the UTA case be met.

My Prime Minister and Foreign Secretary have repeatedly given assurances that if the two Lockerbie suspects went to Scotland they would receive a fair trial, with the full protection afforded by Scottish legal procedures. I now reiterate those assurances. My Ministers have also made it clear that we are pursuing no hidden agenda. Our agenda is set out in Security Council resolutions 731 (1992), 748 (1992) and the present resolution – no more and no less."<sup>144</sup>

**2.99** A statement issued by the Libyan Foreign Ministry on the day resolution 883 was adopted expressed its "displeasure" that the Security Council had

"once again yielded to the pressures and manoeuvres of the United States of America, the United Kingdom and France"

and referred again to the many initiatives and proposals made by Libya, and repeated that Libya had no objection to the two accused appearing before a Scottish court and was prepared to urge them to do so.<sup>145</sup>

**2.100** On 8 December 1993, Libya referred to a proposal by Tunisia, made after consultation with it, that the two accused be interrogated and tried in France; and referred again to an earlier proposal for a "Scottish trial" in a third country or at the seat of the International Court of Justice at The Hague.<sup>146</sup>

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<sup>144</sup> S/PV/3312 p.45 (Annex 12).

<sup>145</sup> S/26760 (Annex 72).

<sup>146</sup> S/26859 (Annex 74).

**2.101** On 26 July 1994 Libya repeated this latter proposal, and an alternative: if the accused were not tried in Libya they could be tried in another Arab country<sup>147</sup>.

**2.102** Addressing the General Assembly of the United Nations on 7 October 1994, the Libyan Foreign Minister referred to earlier Libyan proposals, and criticised France, the United Kingdom and the United States for (as he put it) pushing mandatory resolutions arbitrarily through the Security Council even though Libya had not threatened anybody and had never acted in a manner that jeopardised international peace and security<sup>148</sup>.

**2.103** On 5 August 1994, over two and a half years after the adoption of resolutions 731 and 748, the Governments of France, the United Kingdom and the United States issued another declaration calling once again on Libya to fulfil its obligations.<sup>149</sup> On 31 March 1995 the Governments issued a further declaration, as follows:

"France, the United Kingdom of Great Britain and Northern Ireland and the United States of America reaffirm their joint declaration of 5 August 1994 (S/1994/938) and their common determination to bring to justice those responsible for the bombings of flights Pan Am 103 and UTA 772.

The three States regret that the Libyan Arab Jamahiriya has still not satisfied the French judicial authorities with respect to the bombing of UTA 772.

They are committed to full and comprehensive enforcement of the sanctions imposed on Libya.

They also reaffirm that the Libyan Arab Jamahiriya must commit itself definitively to ceasing all forms of terrorist activity and all assistance to terrorist groups and demonstrate, by concrete actions, its renunciation of terrorism.

They reiterate that, in accordance with the Security Council resolutions, the Government of Libya must ensure the appearance of the two Lockerbie suspects in the United Kingdom or United States, where they will receive a fair trial. The three States reaffirm that alternative proposals for trial in The Hague or

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147 S/1994/900 (Annex 75).

148 A/49/PV23, pp.10-12 (Annex 78).

149 S/1994/938 (Annex 77).

elsewhere do not meet the Security Council requirements and are therefore unacceptable."<sup>150</sup>

### III Conclusions

2.104 From the facts recorded in this Part, and the course of the proceedings recounted in Part I, one can draw the following conclusions:

- The Security Council and General Assembly of the United Nations have for many years been concerned at the effect of terrorism on the maintenance of international peace and security, and resolutions 731, 748 and 883 are part of the Security Council's action against international terrorism.
- Libya has a long record of involvement in terrorism.
- The charges of murder laid against two Libyan nationals were the result of a lengthy and meticulous independent criminal investigation, which followed the normal procedures under Scottish law for the investigation of murder.
- The investigation produced evidence that the two accused caused the planting of an explosive device on flight PA103 and that they were officers of, and were acting on behalf, of the Libyan intelligence services.
- Despite a detailed Statement of Facts being supplied to Libya when the original demand for surrender of the two accused was made, at no time has Libya cooperated in any way with the Scottish prosecuting authorities.
- Libya invoked the Montreal Convention only in an attempt to prevent adoption of resolution 731.
- Similarly, Libya made its Application to this Court, and its request for an indication of provisional measures, in an attempt to restrain the United Kingdom and the United States from

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<sup>150</sup> S/1995/247 (Annex 84).

seeking a mandatory resolution in support of the demands of the three Governments.

- Despite the requirements of the Security Council in resolutions 748 and 883, Libya has given no indication that it is willing to comply with them, and because of this the sanctions against it remain in force following nine reviews.
- Libya has publicly expressed its satisfaction with Scottish criminal procedure.
- Libya has been inconsistent in arguing that it is debarred by its law from extraditing its nationals, yet saying that it has not ruled out changing its law or surrendering the two accused, and would agree to the two accused being tried outside Libya, but not in Scotland or the United States. At various times Libya has suggested:
  - trial before a "Scottish" court at The Hague or in another third country;
  - trial before a specially constituted international body;
  - trial through the auspices of the Arab League;
  - trial at a place to be agreed;
  - trial in a third country;
  - trial in an Arab country;
  - trial in France.
- Libya continues to defy the international community, as represented by the Security Council, and persists with the present proceedings in order to divert attention from its failure to comply with the mandatory resolutions of the Security Council.



#### **IV The Submission of Factual Material to the Court**

**2.105** As has been shown, the factual context of this case is highly complex. It follows from the largest criminal investigation ever conducted by the Scottish authorities, extending over several countries. For the purpose of these Objections, it is necessary only to describe these matters in outline. They would, however, be directly pertinent to any future consideration of the merits in this case. Should the case proceed to the merits, it may be necessary for the Court to address complex issues of fact in the context of how the Montreal Convention should be interpreted and applied.

**2.106** Any handling of the evidential material necessarily involved at the stage of oral argument and thereafter would, it is respectfully submitted, have to be subject to scrupulous safeguards to avoid prejudicing a fair criminal trial of the accused subsequently, which both parties to the present proceedings have committed themselves to ensuring.

**2.107** The United Kingdom submits, however, that for the reasons of law advanced in these pleadings, this case should be disposed of at the preliminary phase, thus making it unnecessary to proceed to the merits.

## PART 3

### JURISDICTION OF THE COURT

#### I The Basis for the Jurisdiction of the Court

**(1) The only basis for the jurisdiction of the Court is Article 14(1) of the Montreal Convention**

3.1 The basis which Libya has advanced for the jurisdiction of the Court in this case is Article 14(1) of the Montreal Convention, which provides that:

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

3.2 Article 14(1) lays down a series of requirements which must be met before that provision can confer jurisdiction upon the Court:-

- (1) there must be a dispute between the parties concerning the interpretation or application of the Montreal Convention;
- (2) the dispute must be one which cannot be settled by negotiation;
- (3) one of the parties must have requested that the dispute be submitted to arbitration; and
- (4) only if the parties have been unable, within six months from the date of the request, to agree upon the organization of the arbitration may the dispute then be referred, by either of the parties, to the Court.<sup>151</sup>

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<sup>151</sup> See also Libyan Memorial, paragraph 3.13.

3.3 At the provisional measures stage, the United Kingdom submitted that Libya had not shown the necessary *prima facie* jurisdiction.<sup>152</sup> The United Kingdom maintained that Libya had failed adequately to define a dispute between itself and the United Kingdom concerning the interpretation or application of the Montreal Convention; had not shown that any such dispute could not be settled by negotiation; and had not made a proper request for arbitration. In addition, the United Kingdom pointed out that only six weeks, rather than six months, had elapsed between the date of the letter of 18 January 1992, which Libya claimed constituted its request for arbitration,<sup>153</sup> and the Libyan Application to the Court on 3 March 1992, so that the time requirement set by Article 14(1) had not been met.

3.4 The United Kingdom does not wish, at the present stage of the proceedings, to contest the jurisdiction of the Court on all of the same grounds, but rather to make a related, but fundamental, point about the Court's jurisdiction. The only basis for jurisdiction advanced by Libya, and thus the only basis for jurisdiction which can exist in this case, is Article 14(1) of the Montreal Convention. That provision confers jurisdiction only in respect of disputes concerning the interpretation or application of the Montreal Convention. Libya must, therefore, show first that there exists a legal dispute between itself and the United Kingdom and, secondly, that that dispute falls to be resolved by reference to the jurisdiction provided in Article 14(1).

**(2) Libya is required to identify the dispute between itself and the United Kingdom**

3.5 It is for Libya to identify the dispute between itself and the United Kingdom. The law and practice of judicial settlement require an applicant to demonstrate to the tribunal not only that the parties are in dispute but also what constitutes the dispute. This requirement is logically derived, in the first place, from the nature of the judicial function, which, as the Court has frequently pointed out, makes it a pre-requisite of the receivability of a claim that there should be a dispute, in the legal sense, between the parties (see, e.g., the *Northern Cameroons* case,<sup>154</sup> and the Separate Opinion of Judge Sir Gerald

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<sup>152</sup> See the argument of the Solicitor-General for Scotland, CR 92/3, pp.33-40.

<sup>153</sup> S/23441 (Annex 9).

<sup>154</sup> *ICJ Reports*, 1963, p.3 at pp.33-34.

Fitzmaurice,<sup>155</sup> and the *Nuclear Tests* case<sup>156</sup> ). The requirement that an applicant identify and define the dispute which gives rise to its claim is derived also from the need to satisfy the terms of the jurisdictional clause which founds the competence of the tribunal in the particular case. In addition, the requirement is necessary in order to justify the relief which the applicant seeks from the tribunal. A respondent cannot be expected to meet a case against it, either at the jurisdiction stage or on the merits, unless it knows what is the case it has to meet. For a tribunal to hold otherwise would be to reverse the logical sequence and impose upon the respondent the responsibility of showing the non-existence of a dispute.

3.6 As Libya accepts,<sup>157</sup> the mere fact that a State submits an application to the Court does not, in itself, establish the existence of a dispute between that State and the respondent. The present Court and its predecessor have made clear that "whether there exists a dispute is a matter for objective determination" (advisory opinion on the *Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947*,<sup>158</sup> see also the advisory opinion on the *Interpretation of Peace Treaties*<sup>159</sup> and the *Mavrommatis Palestine Concessions* case<sup>160</sup> ). It is common ground between the Parties that the classic definition of a dispute is that contained in the *Mavrommatis Palestine Concessions* case, namely "a disagreement on a point of law or fact, a conflict of legal views or of interests".<sup>161</sup> That definition plainly requires Libya to specify the precise *point* of law or fact on which a disagreement is alleged to exist.

3.7 It is clear that many governments have differences of view or of interests with one another without entering into a formal state of dispute in the legal sense. Thus, as the Court held in its decision of 21 December 1962 in the *South West Africa* cases, in a passage quoted in part in the Libyan Memorial,<sup>162</sup> but which it is useful to set out in full:

"In other words it is not sufficient for one party to a contentious case to assert that a dispute exists with the

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155 *ICJ Reports*, 1963 at p.105.

156 *ICJ Reports*, 1974, p.253 at p.260.

157 Libyan Memorial, paragraph 3.18.

158 *ICJ Reports*, 1988, p.12 at p.27.

159 *ICJ Reports*, 1950, p.65 at p.74.

160 *PCIJ Reports*, Series A, No. 2, at p.11.

161 Quoted in the Libyan Memorial at paragraph 3.18.

162 Libyan Memorial, paragraph 3.18.

other party. A mere assertion is not sufficient to prove the existence of a dispute any more than a mere denial of the existence of a dispute proves its non-existence. Nor is it adequate to show that the interests of the two parties to such a case are in conflict. It must be shown that the claim of one party is positively opposed by the other."<sup>163</sup>

There is therefore a critical distinction between a general conflict of interests between the parties and a clearly defined claim which relates to the subject-matter of the application and which is positively opposed. Only the latter will constitute a dispute.

**3.8** The United Kingdom has had some difficulty in discerning from the Application and the Memorial exactly what Libya considers to be the dispute between itself and the United Kingdom. As will be shown below, however, none of the claims advanced by Libya discloses the existence of a dispute – in the legal sense of the term – which falls within the jurisdiction of the Court under Article 14(1) of the Montreal Convention.

**(3) The Court's jurisdiction is limited to claims regarding disputes falling within Article 14(1) of the Montreal Convention**

**3.9** Libya must identify the dispute and also show that it concerns the interpretation or application of the Montreal Convention, for otherwise Article 14(1) will not confer jurisdiction. For that purpose, Libya must demonstrate either that the United Kingdom has acted unlawfully towards Libya in respect of its rights and obligations under the Montreal Convention, or that any alleged difference between the two States as to the meaning of the Convention really exists and is relevant to the precise legal relations between them.

**3.10** Moreover, even if such a dispute is shown to exist, the Court will have jurisdiction only in respect of that dispute and not in respect of any other dispute or difference which, even should it arise from the same facts, would not itself concern the interpretation or application of the Montreal Convention. The Court has made clear, in its two Orders in the *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide*,<sup>164</sup> that where a claimant State founds the jurisdiction of the Court in

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<sup>163</sup> ICJ Reports, 1962, p.319, at p.328.

<sup>164</sup> ICJ Reports, 1993, pp.3 and 325.

respect of a dispute on a provision in a multilateral convention the Court has jurisdiction to grant relief only in respect of matters which come within the terms of that provision. In its first Order in that case, the Court held that, since the only basis on which jurisdiction had been established *prima facie* was Article IX of the Genocide Convention,

"the Court...ought not to indicate measures for the protection of any disputed rights other than those which might ultimately form the basis of a judgment in the exercise of that jurisdiction." <sup>165</sup>

The Court, therefore, rejected requests for the indication of provisional measures which, it held, were concerned exclusively with the protection of rights claimed by the applicant State falling outside the scope of the Genocide Convention. <sup>166</sup> As Judge *ad hoc* Lauterpacht put it, in his Separate Opinion on the further requests for the indication of provisional measures:

"The Court can only act in a case if the parties, both applicant and respondent, have conferred jurisdiction upon it by some voluntary act of consent. ... Whatever form the consent may take, the range of matters that the Court can then deal with is limited to the matters covered by that consent." <sup>167</sup>

In the present case, the only "voluntary act of consent" invoked by the applicant is contained in Article 14(1) of the Montreal Convention. The jurisdiction of the Court therefore extends only to the matters covered by that provision and (subject only to what is said below) does not include the interpretation or application of other international agreements or of customary international law. As the Permanent Court of International Justice said in the *Mavrommatis Palestine Concessions* case, when referring to a provision which conferred jurisdiction in respect of disputes relating to "the interpretation or the application of the provisions of the Mandate":

"The dispute may be of any nature; the language of the article in this respect is as comprehensive as possible ... but in every case it must relate to the interpretation or application of the provisions of the Mandate." <sup>168</sup>

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<sup>165</sup> *Ibid.*, 1993, p.3, at p.19.

<sup>166</sup> See, in particular, the second order, *ICJ Reports*, 1993, p.325, at p.344.

<sup>167</sup> *Ibid.*, 1993, p.325 at p.412.

<sup>168</sup> *PCIJ Reports*, Series A, No. 2 (1924), p.15.

3.11 There can therefore be no jurisdiction in respect of alleged violations by the United Kingdom of Libya's rights under general international law, including its rights under the United Nations Charter. Nor does jurisdiction exist regarding the alleged failure of the United Kingdom to establish a dispute resolution mechanism. Neither allegation falls within the scope of Article 14 of the Montreal Convention.

3.12 With regard to Security Council resolutions 748 and 883, the position is more complex. If those resolutions have created obligations for Libya which prevail over any rights which Libya claims to have under the Montreal Convention, the United Kingdom, as the respondent in this case, must be able to rely upon the inherent jurisdiction of the Court to establish this and to determine the legal consequences. Where the Court has jurisdiction to resolve a dispute concerning the interpretation or application of a treaty, that jurisdiction must encompass the competence to declare inadmissible the claims made in relation thereto because of an overriding normative obligation. The Court therefore has jurisdiction, as set out in Part 4 of these Preliminary Objections, to rule upon whether the effect of the Security Council resolutions is that the obligations which they impose have priority over any rights or obligations flowing from the Montreal Convention. Article 14(1) of the Montreal Convention does not, however, confer jurisdiction otherwise to rule upon questions of the application or propriety of Security Council resolutions.

3.13 It is therefore necessary to examine, first, what Libya contends is the dispute and, secondly, whether Libya's claims constitute a dispute in the sense in which that term is used in the jurisprudence of the Court, and whether that dispute falls within the terms of Article 14(1) of the Montreal Convention.

## **II The Dispute which Libya claims to Exist**

### **(1) Libya's definition of the dispute in the Application and the Memorial**

3.14 It is not clear from the Application or the Memorial in what way the United Kingdom is alleged to be in breach of its obligations to Libya under the Montreal Convention; or, to put it another way, what the United Kingdom should or should not have done under the Convention. According to the Application, there is a dispute regarding two issues: (1) whether the Montreal Convention is applicable and (2) whether the United Kingdom is in violation of

the duty of co-operation laid down in Article 11 of the Montreal Convention.<sup>169</sup> In the oral hearings before the Court at the provisional measures phase, counsel for Libya refined the dispute and stated it in these terms:

"In the present case, the dispute between the Parties essentially concerns Libya's right, in application of the Montreal Convention, to try the two suspects before Libyan judges and, secondarily, the duty of the two respondent governments to co-operate under the terms of that Convention."<sup>170</sup>

and he continued:

"I would add that this is the only genuine serious dispute remaining between the Parties."<sup>171</sup>

Subsequently, in his reply on Saturday 28 March 1992, counsel for Libya stated that:

"... essentially, there are two quite specific disputes, namely, determining the competent judge on the one hand and co-operation with the Libyan judges on the other."<sup>172</sup>

This definition of the dispute is repeated in the Libyan Memorial.<sup>173</sup>

**3.15** To determine whether there is a dispute falling within Article 14(1) of the Montreal Convention it is necessary however, to go further and examine what it is that Libya alleges the United Kingdom has done or has omitted to do in violation of what Libya claims to be its rights under the Montreal Convention.

**3.16** In Section III of the Application, Libya makes the following claims:

- (a) that the Montreal Convention is the only relevant convention in force between itself and the United Kingdom and that the United Kingdom is bound to adhere to its provisions;<sup>174</sup>

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169 Application, Section II.

170 CR 92/2, p.47; Professor Salmon (Translation provided by the Registry).

171 *Ibid.*, p.48.

172 CR 92/5, p.25; Professor Salmon (Translation provided by the Registry).

173 Libyan Memorial, paragraph 3.15.

174 Application, Section III (a).



- (b) that the United Kingdom is violating Libya's rights, or preventing Libya from fulfilling its obligations, under Articles 5(2), 5(3), 7 and 8(2) of the Montreal Convention;<sup>175</sup>
- (c) that the United Kingdom is in breach of its duty of co-operation under Article 11 of the Montreal Convention;<sup>176</sup> and
- (d) that the United Kingdom is bound by its obligations under the Montreal Convention, which require it to act "in accordance with the Convention and only in accordance with the Convention".<sup>177</sup>

3.17 The Libyan Application then asks the Court to adjudge and declare:—

- "(a) that Libya has fully complied with all of its obligations under the Montreal Convention;
- (b) that the United Kingdom has breached, and is continuing to breach, its legal obligations to Libya under Articles 5(2), 5(3), 7, 8(2) and 11 of the Montreal Convention; and
- (c) that the United Kingdom is under a legal obligation immediately to cease and desist from such breaches and from the use of any and all force or threats against Libya, including the threat of force against Libya, and from all violations of the sovereignty, territorial integrity and political independence of Libya."<sup>178</sup>

3.18 In the submissions contained in its Memorial, Libya states its case in somewhat different terms, asking the Court to adjudge and declare:—

- "(a) que la convention de Montréal s'applique au présent litige;
- (b) que la Libye a pleinement satisfait à toutes ses obligations au regard de la convention de Montréal et est fondée à exercer la compétence pénale prévue par cette convention;

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175 *Ibid.*, Section III (b) to (e).

176 *Ibid.*, Section III (f).

177 *Ibid.*, Section III (g).

178 *Ibid.*, Section IV.

(c) que le Royaume-Uni a violé, et continue de violer, ses obligations juridiques envers la Libye stipulées à l'art. 5§§2-3, à l'art. 7, à l'art. 8§3 et à l'art. 11 de la convention de Montréal;

(d) que le Royaume-Uni est juridiquement tenu de respecter le droit de la Libye à ce que cette convention ne soit pas écartée par des moyens qui seraient au demeurant en contradiction avec les principes de la Charte des Nations Unies et du droit international général de caractère impératif qui prohibent l'utilisation de la force et la violation de la souveraineté, de l'intégrité territoriale, de l'égalité souveraine des Etats et de leur indépendance politique." 179

3.19 The claims on which these submissions are founded are set out in greater detail in Part III of the Memorial, analysis of which reveals that Libya has been far from consistent in the way in which it puts its case. Nevertheless, it is possible to summarize what Libya regards as the essential elements of the dispute which it seeks to place before the Court, as follows:

- (1) The Montreal Convention is applicable to these proceedings;
- (2) Libya has complied with its obligations under the Montreal Convention and is entitled to exercise the jurisdiction provided by the Convention;
- (3) The United Kingdom is required to act in accordance with the Montreal Convention and only the Convention;
- (4) The United Kingdom is in breach of Articles 5(2-3), 7, 8(2) or 8(3) and 11 of the Montreal Convention;
- (5) The United Kingdom, by allegedly issuing threats of force against Libya, by "applying pressure" to Libya and by declining to establish a mechanism for the resolution of the dispute with Libya, is in breach of its obligations under the United Nations Charter and general international law; and

- (6) The application of sanctions to Libya is unfair and discriminatory and, on Libya's second argument regarding Security Council resolutions 731, 748 and 883, the Security Council has acted unlawfully.

Whether, and if so to what extent, these claims reveal a dispute which is within the jurisdiction of the Court under Article 14(1) of the Montreal Convention will now be considered.

### III Analysis of the claims in the Libyan Memorial

**(a) Libya's claim that the Montreal Convention is applicable to these proceedings**

**3.20** Libya's first submission, that the Montreal Convention "s'applique au présent litige" (is applicable to the present proceedings)<sup>180</sup> involves circular reasoning. The Court cannot determine whether or not it has jurisdiction to rule upon this submission until it has first decided what these proceedings involve and, in particular, what is the dispute with which these proceedings are concerned and whether it falls within the scope of Article 14(1) of the Montreal Convention. That is why the United Kingdom submits that it is necessary to analyse in detail each of the claims advanced by Libya in order better to ascertain the nature of the dispute to which, as Libya claims, the Montreal Convention is applicable.

**(b) Libya's claim that it has complied with its obligations under the Montreal Convention and is entitled to exercise the jurisdiction provided by the Convention**

**3.21** Libya's second request is that the Court declare that it has complied with its obligations under the Montreal Convention and is entitled to exercise the jurisdiction provided by that Convention.<sup>181</sup> The United Kingdom notes that the way in which this claim is framed suggests that Libya is asserting that it is entitled to exercise jurisdiction because it has complied with its obligations under the Montreal Convention, thus implying that had it not complied with those obligations, it would have no such entitlement. There is, however, no

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<sup>180</sup> Libyan Memorial, paragraph 8.1 (a).

<sup>181</sup> *Ibid.*, paragraph 8.1 (b).

dispute (in the sense set out in paragraph 3.7, above) before the Court regarding the submission that Libya has complied with its Montreal Convention obligations. It is Libya, not the United Kingdom, which has brought this case before the Court and which has been making accusations of breaches of the Montreal Convention. An assertion by a State that it is acting in accordance with a treaty does not create a dispute regarding the interpretation or application of that treaty between that State and another party to the treaty unless that other party has, prior to the seisin of the Court, made a claim under the treaty that the first State is acting unlawfully. On this part of its claim, therefore, Libya has failed to demonstrate the existence of a dispute between itself and the United Kingdom which falls within Article 14(1) of the Montreal Convention. Insofar as the entitlement to exercise jurisdiction is advanced by Libya as a separate, substantive claim, the United Kingdom has at no stage made any pronouncement regarding that claim. Even were there a dispute over a Libyan claim to be entitled to exercise jurisdiction in priority to other States, which might be said to raise an issue within the jurisdiction of the Court, it will be demonstrated in Part 4 below, that any such entitlement would necessarily be set aside by the provisions of Security Council resolutions 748 and 833.

**(c) Libya's claim that the United Kingdom is required to act in accordance with the Montreal Convention and only the Convention**

**3.22** Libya's claim that the United Kingdom is required to act in accordance with the Montreal Convention and *only* in accordance with the Convention<sup>182</sup> cannot be determined by reference to the Convention alone, since it necessarily involves the consideration of other rules of international law. The critical part of this claim is the argument that it is only the Montreal Convention which prescribes how the United Kingdom must act in its relations with Libya. That argument, however, ignores Security Council resolutions 748 and 883, which, having been adopted under Chapter VII of the United Nations Charter, impose legal obligations upon all Members of the United Nations, including Libya and the United Kingdom. The relationship between those obligations and the rights and obligations arising from the Montreal Convention turns on the effects of Article 103 of the Charter, the implications of which are addressed in Part 4 below.

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<sup>182</sup> Application, Section III (g).

(d) **Libya's claim that the United Kingdom is in breach of Articles 5(2-3), 7, 8(2) or 8(3) and 11 of the Montreal Convention**

3.23 In Part III of its Memorial Libya maintains that the following provisions of the Montreal Convention have been violated by the United Kingdom:

- (i) *Article 5(2), which requires each Contracting State to take such measures as may be necessary to "establish" its jurisdiction over certain of the offences mentioned in Article 1, in the case where the alleged offender is present in its territory and it does not extradite him pursuant to Article 8. Libya maintains that this provision requires it to exercise its jurisdiction in respect of the two accused, and that other States have a duty to respect Libya's duty to exercise its jurisdiction and not to hinder it in the discharge of that obligation.*<sup>183</sup>
- (ii) *Article 5(3), which provides that the Convention "does not exclude any criminal jurisdiction exercised in accordance with national law." The provision of the Libyan penal code on which Libya bases its jurisdiction over the two accused was already in force when Libya became party to the Montreal Convention<sup>184</sup> and Libya maintains that Article 5(3) confers upon it a right to exercise jurisdiction under this provision of the penal code.*<sup>185</sup>
- (iii) *Article 7, which requires that if a Contracting State, on whose territory an alleged offender is found, does not extradite him, then it must submit the case to its competent authorities for the purpose of prosecution. Libya maintains that this provision gives it a right to choose between extradition and prosecution. It then alleges that the United Kingdom is violating that right by maintaining its demand that Libya surrender the two Lockerbie suspects and allegedly attempting to coerce Libya into complying with that demand.*<sup>186</sup>

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183 Libyan Memorial, paragraphs 3.5 and 4.6 to 4.12.

184 *Ibid.*, paragraph 2.7.

185 *Ibid.*, paragraphs 3.5 and 4.13.

186 *Ibid.*, paragraphs 3.7 and 4.32 to 4.43.

- (iv) *Article 8 of the Convention, which deals with extradition, although Libya seems uncertain whether it wishes to rely upon Article 8(2) or Article 8(3) or both.*<sup>187</sup> In its Application Libya accused the United Kingdom of violating Article 8(2) by allegedly attempting to coerce Libya into extraditing the two accused when Libyan law, as the law of the "requested State", prohibits the extradition by Libya of its citizens.<sup>188</sup> Counsel for Libya during the oral hearings at the provisional measures phase also referred to Libya's rights under Article 8(2),<sup>189</sup> although, rather confusingly, he also stated, at one point, that Article 8(2) created "a discretionary right not applicable here."<sup>190</sup> References to the duty to observe Article 8(2) also appear in the Memorial at paragraphs 3.3 and 3.8. Later in the Memorial, however, Libya admits that Article 8(2) does not apply to the present case, because it concerns only those States which make extradition conditional on the existence of an extradition treaty, which Libya does not.<sup>191</sup> Instead, the Memorial then makes an allegation that the United Kingdom is violating its obligations towards Libya under Article 8(3) which, Libya maintains, does not require Libya to extradite the suspects in violation of Libyan law.<sup>192</sup>
- (v) *Article 11, which provides for a duty of co-operation between States party to the Convention.* The allegation that the United Kingdom is in breach of Article 11, is based on the premise that once Libya had commenced a judicial investigation of its own, the United Kingdom was under an obligation to hand over to

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187 The relevant parts of Article 8 read as follows:

"2. If a Contracting State which makes extradition conditional on the existence of a treaty receives a request for extradition from another Contracting State with which it has no extradition treaty, it may at its option consider this Convention as the legal basis for extradition in respect of the offences. Extradition shall be subject to the other conditions provided by the law of the requested State.

3. Contracting States which do not make extradition conditional on the existence of a treaty shall recognize the offences as extraditable offences between themselves subject to the conditions provided by the law of the requested State."

188 Application, Section III (e) and Section IV (b).

189 CR 92/2, pp.57 and 59; CR 92/5, p.36 (Professor Salmon) (Translation provided by the Registry).

190 *Ibid.*, p.56.

191 Libyan Memorial, paragraph 4.21.

192 *Ibid.*, paragraph 4.31 and paragraph 8.1 (c).

the Libyan authorities all the evidence in its possession regarding the crime in the exercise of a duty to afford "the greatest measure of assistance" under Article 11(1).<sup>193</sup>

- (vi) *Article 6, which requires a Contracting State in whose territory an alleged offender is found to take him into custody and to make a preliminary enquiry.* At paragraph 3.6 of the Memorial, Libya alleges that

"par leurs actions et leurs menaces, le Royaume-Uni et les Etats-Unis, tentent d'empêcher la Libye d'exercer les facultés qui lui confère cette disposition de la convention de Montréal."

This allegation is not, however, repeated in the submissions made by Libya. Nor does it feature in the Application. Article 6 is not, therefore, further considered in these Preliminary Objections.

**3.24** It is not always clear in what respect Libya maintains that there is a dispute with the United Kingdom regarding these articles of the Convention. In the case of Article 8, for example, Libya's argument really amounts only to a contention that Article 8 does not impose a duty on Libya to extradite its own nationals.<sup>194</sup> There is no dispute between the United Kingdom and Libya on that point, since the United Kingdom has not sought extradition under Article 8 of the Convention in the present case. Libya's uncertainty over whether to rely on Article 8(2) – which it now concedes has nothing to do with the case before the Court – or Article 8(3), is indicative of the difficulty which it has in formulating a dispute between itself and the United Kingdom regarding the interpretation or application of this Article. In fact, neither Article 8(2) nor Article 8(3) has any relevance to the case.

**3.25** Nor has Libya succeeded in formulating an identifiable dispute (in the sense considered in paragraph 3.7 above) between itself and the United Kingdom regarding the interpretation or application of Articles 5(2), 5(3) or 7. The United Kingdom has not, in the present proceedings, accused Libya of

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<sup>193</sup> Libyan Memorial, paragraphs 3.9 and 4.44 to 4.46. The details of this alleged failure to cooperate are set out at paragraph 2.13 above.

<sup>194</sup> Libyan Memorial, paragraph 4.31.

failing to fulfil its obligations under these provisions of the Montreal Convention. Nor do these provisions impose obligations on the United Kingdom to act, or to refrain from acting, in any particular way with regard to the two accused.

**3.26** What Libya alleges, however, is that by its general conduct the United Kingdom has sought to frustrate Libya's exercise of its "rights" under these provisions and is thus in breach of them. To see whether there is, in reality, a dispute between the two States regarding the interpretation or application of these provisions, it is necessary to examine the nature of this allegation in more detail.

**3.27** As set out in Part 2 above, when the careful police investigation and scientific analysis of the evidence which followed the destruction of Flight PA103 implicated Abdelbaset Ali Mohmed al Megrahi and Al Amin Khalifah Fhimah in the bombing, the United Kingdom issued a statement calling upon Libya to surrender them for trial. The United Kingdom has persisted in this demand ever since November 1991. The United Kingdom has at no point, however, argued that Libya had an obligation to extradite the two accused based on any of the specific provisions of the Montreal Convention to which Libya refers. Moreover, the making of that demand cannot, in itself, constitute a violation of any rights that Libya might possess under the Montreal Convention. Even if Libya had a "right" under those provisions of the Montreal Convention to try the accused, the mere demand for their surrender to the United Kingdom cannot affect that "right" and cannot, therefore, amount to a breach of a corresponding "obligation" on the part of the United Kingdom. None of the provisions of the Convention referred to by Libya expressly or impliedly prohibits a State party from calling for the surrender of a suspect outside the framework of the Convention.

**3.28** In reality, as Judge Oda pointed out at the provisional measures phase, the Libyan complaint relates not to the request itself but to the means by which the United Kingdom has sought to reinforce that request.<sup>195</sup> Libya regularly characterizes those means as "coercive" or as involving "threats" against Libya.<sup>196</sup> In part, Libya's case here is based upon allegations that the United Kingdom has threatened to use force against Libya. The jurisdictional aspects

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<sup>195</sup> *ICJ Reports*, 1992, p.114 at p.130-131.

<sup>196</sup> See, e.g., Libyan Memorial, paragraphs 3.5, 3.11 and 8.1 (d).



of these allegations – allegations which are wholly without foundation – are considered below.<sup>197</sup> Leaving these aspects of Libya's allegations aside, however, the only means which the United Kingdom has employed to reinforce its demands, other than the normal political acts of making representations and attempting to persuade other States to lend their support to those representations, were, first, joining other States in proposing to the Security Council that it adopt under Chapter VII of the United Nations Charter a resolution (subsequently adopted as resolution 748) requiring Libya to comply with paragraph 3 of Security Council resolution 731 regarding the requests of the United Kingdom and the United States referred to therein, and, secondly, enforcing against Libya the economic sanctions which were then imposed by the Security Council in resolution 748, and subsequently tightened by resolution 883.

**3.29** So far as the conduct of the United Kingdom in proposing action to the Security Council is concerned, the action of an individual State (whether a member of the Security Council or not) in referring a situation to the Council or making proposals for action by the Council cannot be made a matter of complaint to the Court. No prohibition on bringing a matter before the Security Council or on proposing a particular course of action by the Council can be found in the Montreal Convention, nor can one be implied.

**3.30** Once a situation has been duly referred to the Security Council, the subsequent handling of the item in the Council becomes the responsibility of the Council itself as a collective body, and ceases to be that of the members for the time being of the Council in their national capacities. This is so notwithstanding the fact that particular actions (e.g. draft resolutions) may be put forward on the initiative of individual members of the Council, since a proposal, once taken up, passes out of the hands of the originator(s) and becomes a matter for collective decision by the Council in the exercise of its powers under the Charter. It follows that proceedings in the Council and decisions taken by the Council cannot give rise to a cause of action against an individual State, whatever may have been the role of that State in the proceedings of the Council.

**3.31** Nothing which the United Kingdom has done with regard to the enforcement of sanctions against Libya in accordance with resolutions 748, and

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<sup>197</sup> Paragraphs 3.33 to 3.39.

latterly 883, gives rise to a dispute between Libya and the United Kingdom regarding the interpretation or application of the Montreal Convention. Insofar as there is a dispute at all regarding the application of sanctions, it is a dispute between Libya and the Security Council of the United Nations, which, of course, is not, and cannot be, a party to these proceedings. The United Kingdom cannot bear legal responsibility for the actions of the Council.

**3.32** Libya's allegations that the United Kingdom has violated specific provisions of the Montreal Convention do not disclose a dispute between Libya and the United Kingdom which falls within the scope of Article 14(1) of the Montreal Convention, except, perhaps, in the case of Libya's allegations regarding Article 11(1) of the Convention.<sup>198</sup> The United Kingdom will, however, contend, in Part 4 below, that, because of the effect of Security Council resolutions 748 and 883, there is no issue regarding the application of Article 11(1) which could require a determination on the merits.<sup>199</sup>

**(e) Libya's claim that the United Kingdom, by allegedly issuing threats of force against Libya, by "applying pressure" to Libya and by declining to establish a mechanism for the resolution of the dispute with Libya, is in breach of its obligations under the United Nations Charter and general international law**

**3.33** Libya also accuses the United Kingdom of violating Libya's rights under the United Nations Charter and the rules of general international law. Such an allegation is first made in the Application, where Libya argues that

"the United Kingdom is under a legal obligation immediately to cease and desist from such breaches and from the use of any and all force or threats against Libya, including the threat of force against Libya, and from all violations of the sovereignty, territorial integrity and political independence of Libya."<sup>200</sup>

**3.34** That allegations of breaches of rules of international law outside the Montreal Convention form an essential part of Libya's case is also clear from the Memorial. Thus, in that part of its Memorial which is entitled

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<sup>198</sup> With respect to Article 11(1), Libya maintains that the United Kingdom has failed to co-operate with the Libyan authorities in the manner which it argues is required by that provision.

<sup>199</sup> Should this case proceed to trial on the merits, however, the United Kingdom will deny that it has violated Article 11(1) of the Convention

<sup>200</sup> Application, Section IV (c).

"Considérations Générales", Libya sets out certain considerations which it describes as forming "the basis of its application". Libya here states that:

"La Libye a saisi la principale juridiction pour les conflits régis par le droit international public, en vue de protéger ses droits comme membre d'une communauté d'Etats égaux en droit.

"La Libye a fait l'objet de demandes, soutenues par des mesures de contraintes, qui pourraient impliquer la livraison de ressortissants libyens en contravention des règles pertinentes du droit international général relatives à l'extradition, des dispositions d'une convention internationale multilatérale majeure, des droits des deux accusés qui, comme tels, bénéficient des standards généralement acceptés en matière de droit de l'homme, et des dispositions de la loi libyenne, conformes à la convention de Montréal, qui ne permettent pas l'extradition des nationaux."<sup>201</sup>

Although this passage refers to the Montreal Convention ("une convention internationale multilatérale majeure"), it is clear that Libya's complaints range far beyond that Convention and Libya expressly argues that its rights under general international law have been violated.<sup>202</sup>

**3.35** The United Kingdom rejects any suggestion that it has used, or threatened to use, force against Libya or that it has in any way violated Libya's sovereignty, territorial integrity or political independence, or the principle of the equal sovereignty of States. When Libya first made this allegation on filing its Application in March 1992, it maintained that there was an imminent danger that force would be used against it, and that it was because of that danger that its request for the indication of provisional measures of protection satisfied the requirement of urgency. In reality, however, there was never any substance in this allegation. It is revealing, therefore, that Libya persisted in these allegations when it filed its Memorial in December 1993, even though it could not point to a single instance of the United Kingdom threatening, let alone using, force against Libya during the intervening twenty-one months. The truth is that the United Kingdom's actions during this period were limited to diplomatic activity in co-operation with other States and the Secretary-General in order to bring about compliance with the Security Council resolutions and enforcement of the sanctions which had been imposed by the Security Council.

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<sup>201</sup> Libyan Memorial, paragraph 7.2.

<sup>202</sup> See also Libyan Memorial, paragraph 3.11.

Libya's persistence in its unfounded allegations regarding the threat of force is thus an indication of its desperation in trying to formulate a claim against the United Kingdom.

**3.36** The important point in the present stage of the proceedings, however, is that the rights on which Libya relies in its allegations regarding the threat of force are derived, not from the Montreal Convention, but from general international law and, in particular, from the United Nations Charter. The lack of the necessary connection between this allegation and Article 14(1) of the Montreal Convention was disclosed by counsel for Libya in the course of his submissions during the oral hearings at the provisional measures phase, when he accused the United Kingdom of

"a breach of the rules of imperative general law of public international scope ... to which the Court may spontaneously address itself within the general framework of its mission."<sup>203</sup>

The reality is that the Court has no jurisdiction in respect of these allegations, because they fall wholly outside the only basis for jurisdiction which has been advanced in the Libyan Application and Memorial.

**3.37** The same is true of the Libyan argument that the United Kingdom has violated an obligation regarding the peaceful settlement of disputes. Although this argument does not feature in the Application or the submissions at the end of the Memorial, the Libyan Memorial contains repeated suggestions that the United Kingdom is in breach of its obligations regarding peaceful settlement of disputes.<sup>204</sup> There appear to be two separate strands to this allegation. First, Libya appears to be accusing the United Kingdom of violating a general obligation, derived from Article 33 of the United Nations Charter, to settle disputes by peaceful means.<sup>205</sup> Secondly, Libya asserts that the United Kingdom is in breach of an obligation, which according to Libya arises under the terms of Security Council resolutions 731 and 748, to establish a dispute resolution mechanism.<sup>206</sup>

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<sup>203</sup> CR 92/2, p.59; Professor Salmon (Translation provided by the Registry).

<sup>204</sup> Libyan Memorial, paragraphs 2.15 (quoting Libyan letter of 18 January 1992, S/23441; Annex 9), 3.14, 6.5, 6.11-14, 6.22, 6.35 and 6.42.

<sup>205</sup> See, e.g., Libyan Memorial, paragraphs 2.15 and 3.14.

<sup>206</sup> See, e.g., Libyan Memorial, paragraph 6.35.

3.38 The United Kingdom denies that it has violated its obligations regarding peaceful settlement of disputes. The Libyan allegations, however, fall outside the scope of Article 14(1) of the Montreal Convention. If there is a dispute regarding the interpretation or application of the Montreal Convention, there is a duty to settle that dispute peacefully. But Article 14 of the Convention is a procedural provision which comes into play only once there is a dispute about the Montreal Convention. Any wider obligation to settle disputes by peaceful means comes not from the Montreal Convention but from Articles 2(3) and 33 of the United Nations Charter.

3.39 The more specific Libyan allegation is that Security Council resolutions 731 and 748 required the United Kingdom to establish a dispute resolution mechanism, which Libya alleges the United Kingdom has failed to do. The Libyan argument is based on paragraphs 3 and 4 of resolution 731 and paragraph 1 of resolution 748, together with that resolution's reference to resolution 731. The United Kingdom denies that it is in breach of any of its obligations under these resolutions. Once again, however, if there is a dispute (in the legal sense of that term) between the United Kingdom and Libya on this point, it is a dispute concerning the interpretation and application of the Security Council resolutions and not about the Montreal Convention, and does not, therefore, come within the Court's jurisdiction under Article 14(1) of the Montreal Convention.

**(f) Libya's claim that the application of sanctions is unfair and discriminatory and that in respect of Security Council resolutions 731, 748 and 883 the Security Council has acted unlawfully**

3.40 Finally, Libya makes a number of claims regarding the conduct of the Security Council, with particular regard to the adoption of resolutions 731, 748 and 883. These allegations are summarized in the following passage from the section of the Memorial entitled "Considérations Générales":

"Le traitement grossièrement inégal réservé à la Libye sous la pression des Etats-Unis et du Royaume-Uni par le Conseil de sécurité résulte d'une démarche qui présume la responsabilité d'un Etat basée sur de simples affirmations des Etats défendeurs. Il s'agit non seulement d'un déni de justice, mais aussi d'une mesure manifestement discriminatoire. Ici on condamne et on sanctionne sans preuve un Etat, alors qu'ailleurs on

s'abstient de condamner et de sanctionner bien que les preuves soient patentes."<sup>207</sup>

This theme is echoed in several other places in the Memorial, where Libya accuses the United Kingdom of misusing power through the institutional pressure of the United Nations Security Council<sup>208</sup> and complains of the effects of the sanctions imposed by Security Council resolutions 748 and 883.<sup>209</sup>

**3.41** With regard to the effect of the Security Council resolutions, Libya raises two alternative arguments. Libya's first argument is that resolutions 731, 748 and 883, properly interpreted, do not purport to require Libya to surrender the two accused for trial in Scotland or the United States and do not require Libya to give up its rights under the Montreal Convention.<sup>210</sup> According to this argument, Libya is required only to agree with the United Kingdom and the United States on the establishment of a mechanism which will make it possible to try the accused. Libya maintains that it has complied with all the requirements of the resolutions which are capable of affecting the outcome of the present proceedings; and that the imposition and maintenance of sanctions is unfair and discriminatory. On this argument, however, if there is a dispute then

- (a) it is a dispute regarding the interpretation and application of Security Council resolutions 731, 748 and 883, not a dispute regarding the interpretation or application of the Montreal Convention; and
- (b) it is a dispute between Libya and the Security Council or the United Nations, and not between Libya and any given member of the Security Council.

**3.42** In the alternative, Libya maintains that if, contrary to its first argument, Security Council resolutions 731, 748 and 883 are interpreted as requiring Libya to surrender the two accused for trial in Scotland or the United States, then those resolutions are contrary to the Montreal Convention, the United Nations Charter and fundamental principles of general international law

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207 Libyan Memorial, paragraph 7.4.

208 *Ibid.*, paragraph 3.11.

209 *Ibid.*, paragraph 2.39.

210 *Ibid.*, Part Four, Chapters I and II.

and are therefore *ultra vires* the Council and not opposable to Libya.<sup>211</sup> The implications of this argument for the receivability of this case are considered in detail in Part 4 below.

**3.43** Although the Court necessarily has to consider resolutions 748 and 883 in these proceedings as part of the *compétence de la compétence*, that does not alter the fact that Article 14(1) of the Montreal Convention remains the sole basis for the jurisdiction of the Court. It follows that the Court has jurisdiction to consider and apply these resolutions only in so far as they are capable of having legal effects upon a dispute regarding the interpretation or application of the Montreal Convention. The question is not whether the Court has jurisdiction *in abstracto* to review Security Council resolutions, but whether, and, if so, to what extent, it has competence to review these resolutions in the context of proceedings in which jurisdiction is based exclusively upon Article 14(1) of the Montreal Convention – which confers jurisdiction only in respect of disputes concerning the interpretation and application of the Montreal Convention.

**3.44** On that basis, it is submitted that the Court has no jurisdiction under Article 14(1) of the Montreal Convention to determine whether the Security Council resolutions were "fair" or whether, as Libya has alleged, Libya was treated more harshly by the Security Council than other States in comparable situations.<sup>212</sup> Irrespective of whether it would ever be appropriate for the Court to determine such a question, such a question goes far beyond a dispute regarding the interpretation or application of the Montreal Convention, and would require the Court to rule upon the relative merits of the Council's handling of a wide range of different situations which the Council has determined constitute a threat to international peace and security.

**3.45** Nor, for different reasons which are explained in Part 4 below, does the Court have jurisdiction in the present case to determine whether resolutions 748 and 883 should have been adopted under Chapter VII of the United Nations Charter.<sup>213</sup>

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211 *Ibid.*, Part Four, Chapters III and IV.

212 *Ibid.*, paragraph 7.4.

213 See paragraphs 4.30 to 4.42 below; c.f. Libyan Memorial, paragraphs 6.108 et seq

### III Conclusions

3.46 Accordingly, the United Kingdom submits that the only matter in respect of which there might possibly have been jurisdiction under Article 14(1) of the Montreal Convention, is that relating to the interpretation and application of Article 11(1) of that Convention. However, for the reasons set out in Part 4 below, the rights and obligations of the Parties are determined by the relevant Security Council resolutions. If there is any conflict between those decisions of the Security Council and the rights and obligations under Article 11(1) of the Montreal Convention, the decisions of the Security Council prevail.



## PART 4

### THE SECURITY COUNCIL RESOLUTIONS ARE DETERMINATIVE OF ANY DISPUTE OVER WHICH THE COURT MIGHT HAVE JURISDICTION

4.1 In Part 3 the United Kingdom has identified the subject matter of any dispute in respect of which jurisdiction might conceivably exist under Article 14(1) of the Montreal Convention.

4.2 In this Part the United Kingdom will show that the Security Council has adopted resolutions which are determinative of the matters contained therein, which are binding on all Members of the United Nations under Article 25 of the United Nations Charter, and which have priority over any conflicting rights or obligations of Libya or the United Kingdom under the Montreal Convention.

4.3 Libya in its Memorial seeks to minimize the legal relevance of Security Council resolutions 731, 748 and 883;<sup>214</sup> indeed, large parts of its argument are really a complaint against the Security Council for adopting the resolutions. Libya seeks to avoid the legal consequences of the resolutions by denying that they generate legal obligations; by denying that they require Libya to surrender the two accused for trial in Scotland or the United States; and by contending that if they do so require, they should be found by this Court to be unlawful.

4.4 The comparison of the resolutions with the provisions of the Montreal Convention may need to be addressed by the Court should this case proceed to the merits.<sup>215</sup>

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<sup>214</sup> Annexes 2, 3 and 4 respectively.

<sup>215</sup> This is what the United Kingdom has understood when the Court stated in its Order of 14 April 1992 that it was "not at this stage called upon to determine definitively the legal effect of Security Council resolution 748 (1992)" *ICJ Reports* 1992 p.3 at p.15 (paragraph 40). To interpret the resolutions is, of course, a judicial task entirely different from deciding whether a threat to international peace and security existed or whether the requirements made by the Council were appropriate or whether the Council was right to regard them as not having been met by Libya.

4.5 But in order to show that the Security Council resolutions do, by virtue of their content and the operation of Articles 25 and 103, have priority over any rights or obligations under the Montreal Convention in respect of which Libya might claim the Court has jurisdiction, it is necessary now to examine the resolutions and their legal consequences. It will be demonstrated that even were there to be any dispute over which the Court had jurisdiction under Article 14 of the Montreal Convention, it could not and should not exercise jurisdiction in the particular circumstances. The claim of Libya is thus inadmissible.

4.6 It is for these purposes, to demonstrate inadmissibility, that the United Kingdom now shows what is required by the resolutions, their binding nature, their lawfulness, and the legal consequences for receivability that flow from Articles 25 and 103.

**I The resolutions require the surrender of the accused for trial in Scotland or the United States**

4.7 In its Memorial Libya contends that the resolutions do not require the surrender of the accused, because:

(i) *It is said that resolution 731 makes reference to "the Charter of the United Nations and relevant principles of international law", and thus precludes surrender.*<sup>216</sup> It is apparent that this response begs the question. It is exactly by reference to the normal principles of jurisdiction that the criminal proceedings are appropriately to be brought in Scotland or the United States. And there is nothing *a priori* contrary to international law in the Security Council supporting a request that a person be surrendered for that purpose.<sup>217</sup>

(ii) *It is said that surrender was not intended by the resolutions "inasmuch as a fair trial cannot be guaranteed" in*

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<sup>216</sup> Libyan Memorial, paragraph 6.10.

<sup>217</sup> Questions relating to the international law of extradition of nationals (a different, but proximate, point of law) have not so far been addressed in argument by the Parties to this case. No legal argument on this point was before the Court in the phase of this case concerning the request for the indication of provisional measures.

Scotland.<sup>218</sup> Not only is a fair trial ensured within the Scottish legal system,<sup>219</sup> both generally and in respect of the accused;<sup>220</sup> but the Security Council simply did not share Libya's view. That follows from the reiterated requirement, through all of the resolutions, that Libya respond fully and effectively to the requests made by the United Kingdom contained in S/23309.<sup>221</sup>

- (iii) *It is said that because the requests are "to cooperate fully in establishing responsibility" and this "obviously does not mean surrendering the suspects to the United States or the United Kingdom".*<sup>222</sup> However, the guilt or otherwise of the accused will be established by a fair trial in Scotland; and the broader responsibility for their acts is also to be accepted, which equally requires the cooperation of Libya. Libya's duty to cooperate in establishing responsibility in no way requires one to read the resolutions as having eliminated the requirement to surrender for trial the accused, so that their guilt or otherwise may be determined in a court of law.
- (iv) *It is said that as Libya was required to give "a full and effective response", which "is not the same as saying that Libya must "comply with those requests",*<sup>223</sup> *"... the Council is allowing Libya to offer counter proposals".*<sup>224</sup> On this matter the argument is entirely artificial, since a "full and effective response" to the requests of the United Kingdom clearly requires surrender of the accused – and more besides. The response was to cover all the elements ("full"), and it was to be unequivocal; it was to allow for trial, and to guarantee a renunciation of terrorism ("effective"). Moreover, as will be shown below,<sup>225</sup> it was exactly the failure of Libya to surrender the accused, and its prevarication with "counter

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218 Libyan Memorial, paragraph 6.10 (translation by the United Kingdom).

219 Libya itself has accepted this: see S/PV.3312, p.14 (Annex 12) and S/26523 (Annex 69).

220 See paragraphs 2.30 to 2.35, and paragraph 2.43, above.

221 Annex 8.

222 Libyan Memorial, paragraph 6.11 (translation by the United Kingdom).

223 *Ibid.*, paragraph 6.12 (translation by the United Kingdom).

224 *Ibid.*, paragraph 6.12 (translation by the United Kingdom).

225 Paragraphs 4.48 to 4.53.

proposals", that caused the Security Council to determine that Libya's continued failure to respond fully and effectively to the requests of the United Kingdom constituted a threat to international peace and security, and that it was necessary to adopt measures.

- (v) *It is said that because the Secretary-General was asked to assist in seeking the cooperation of Libya in providing the full and effective response to the requests, that also means that Libya does not have to comply with the requests but has "room to manoeuvre":*

"En assumant cette tâche, le Secrétaire général des Nations Unies a lui-même interprété la résolution 731 comme laissant une marge de manœuvre par rapport aux demandes anglo-américaines et françaises. Dans sa lettre du 23 janvier 1992 au Colonel Kadhafi, le Secrétaire général dit en effet

"(... )I took the initiative for sending a special envoy ... to discuss several points and *presenting certain ideas* as well as *knowing your views and proposals regarding the manner of implementing* the said Resolution."<sup>226</sup>

The United Kingdom merely observes that the Secretary General was given a role within, and not beyond, the requirements of the resolutions, and has in his various reports<sup>227</sup> clearly interpreted his role as providing a modality for the compliance by Libya with the requests of the United Kingdom for the surrender of the accused. He has never at any stage engaged in negotiations for other purposes or in "counter proposals".

- (vi) *It is said that resolution 731 "dissociates the demands of the Security Council from the US-British requests", because it did not repeat them in terms. This is further said to be supported by the fact that resolution 748, in operative*

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<sup>226</sup> Libyan Memorial, paragraph 6.14 (emphasis in the Memorial).

<sup>227</sup> S/23574 of 11 February 1992 (Annex 13), S/23672 of 3 March 1991 (Annex 14) and S/23992 of 22 May 1992 (Annex 15).

*paragraph 2, specified in terms the requirement that Libya must cease all terrorist activity and support for terrorist groups, but chose not to specify in terms the requirement of surrender of the accused.* In the argument of Libya this "implies" dissociation between the demands of the Council and the requests cited as a reference.<sup>228</sup> This argument is totally without merit. All the resolutions contain clearly repeated calls for compliance with the requests of the United Kingdom, the United States and France in their totality. This was expressed in resolution 731 in operative paragraph 3, where the term "those requests" refers to all the elements, including of course the surrender of the accused. In resolution 748 the matter is made clear in operative paragraph 1, with its reference to operative paragraph 3 of resolution 731 and "the requests" – not some of them – contained in documents S/23306, S/23308 and S/23309.<sup>229</sup> And in resolution 883 the reference to "the requests" in the seventh preambular paragraph, and to compliance with resolutions 731 and 748 in operative paragraph 1, also make clear that the Security Council was fully committed to, and demanding, the surrender of the accused.

4.8 The content of the resolutions, and its relevance for the admissibility of Libya's claims, is apparent. The resolutions followed upon the scientific investigation implicating the accused; a demand by the United Kingdom for their surrender for trial;<sup>230</sup> the issue of the joint declaration of 27 November 1991 with the United States requiring, inter alia, the surrender of those charged with the crime;<sup>231</sup> the issue of a joint declaration of the same date with France and the United States requiring Libya to commit itself to cease all forms of terrorist activity;<sup>232</sup> and the communication of the matter to the Security Council on 31 December 1991.<sup>233</sup> The resolutions reflect these elements in their terms.

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228 Libyan Memorial, paragraph 6.23.

229 Annexes 5, 7 and 8.

230 Annex 6.

231 Annex 7.

232 Annex 8.

233 See above, paragraphs 2.52 to 2.103.

**4.9** Resolution 731 recalled that on 30 December 1988 the President of the Security Council had called on all States to assist in the apprehension and prosecution of those responsible for the destruction of flight PA103. The resolution found that the investigation implicated officials of the Libyan government; and it referred in that context to, *inter alia*, the requests addressed to the Government of Libya by the United Kingdom contained in S/23309. And, in operative paragraph 2 it strongly deplored that the Libyan Government

"had not yet responded effectively to the above requests to cooperate fully in establishing responsibility".

"The above requests" clearly required that responsibility be established through surrender to criminal prosecution in Scotland or the United States; and through cooperation generally. Operative paragraph 3 urged Libya

"immediately to provide a full and effective response to those requests".

**4.10** Resolution 748, in operative paragraph 1, decided that Libya must comply without further delay "with paragraph 3 of resolution 731 (1992) regarding the requests contained in documents S/23306,<sup>234</sup> S/23308<sup>235</sup> and S/23309".<sup>236</sup> These requests manifestly included, as their central element, the surrender of the accused for trial.

**4.11** Resolution 883, in operative paragraph 1,

"demands once again that the Libyan Government comply without any further delay with resolutions 731 (1992) and 748 (1992)".

These resolutions, as has been shown, require compliance with the requests of the the United Kingdom contained in S/23309, which include the request for surrender for trial of the accused. That the resolutions require their surrender for trial is further demonstrated by operative paragraph 16 of resolution 883, in which the Council:

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<sup>234</sup> Annex 5.

<sup>235</sup> Annex 7.

<sup>236</sup> Annex 8.

*"Expresses its readiness to review the measures set forth above and in resolution 748 (1992) with a view to suspending them immediately if the Secretary-General reports to the Council that the Libyan Government has ensured the appearance of those charged with the bombing of Pan Am 103 for trial before the appropriate United Kingdom or United States court and has satisfied the French judicial authorities with respect to the bombing of UTA 772, and with a view to lifting them immediately when Libya complies fully with the requests and decisions in resolutions 731 (1992) and 748 (1992)..."*

4.12 The wording of these resolutions, the internal cross-referencing, and indeed the very necessity for a series of resolutions to be passed, all testify to the fact that they required, and were understood by all to require, the surrender of the accused. Further, they were understood in this sense by Libya. At no time did it suggest either to the Security Council<sup>237</sup> or the Secretary General that it understood the resolutions in the sense now advanced in its Memorial. And its observations to the Court during the provisional measures stage concerning the impact of resolution 748 also confirm that it understood the resolution to require the surrender of the accused.<sup>238</sup> This is further confirmed by Libya's various proposals for surrender of the accused for trial outside Libya.<sup>239</sup>

## **II The Security Council's demands for compliance with the requests for surrender are binding**

4.13 Whatever the precise legal effect of resolution 731, it is absolutely clear that resolutions 748 and 883 are binding resolutions. They give rise to obligations of Member States of the United Nations by virtue of Article 25, and by virtue of Article 103 they prevail over obligations under any other international agreement. Resolution 748 determined that

*"the failure by the Libyan Government to demonstrate by concrete actions its renunciation of terrorism and in particular its continued failure to respond fully and effectively to the requests in resolution 731 (1992)*

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<sup>237</sup> To the contrary, see the statement of the Permanent Representative of Libya in the Security Council debate which preceded the adoption of Resolution 883: S/PV.3312, p.24 (Annex 12).

<sup>238</sup> Observations of Libya on the request for interim measures of protection with regard to Security Council resolution 748 (7 April 1992), paragraph 2. Also see paragraphs 2.85 and 2.86 above.

<sup>239</sup> See the summary of the proposals in paragraph 2.104.

constitute a threat to international peace and security."

The Council's decision in operative paragraph 1 of that resolution, that Libya must comply with the requests of the three Governments, was stated in terms to have been taken under Chapter VII of the Charter.

**4.14** Resolution 883 reiterated this, adding to the elements that constituted the threat to international peace and security. The Council now found a threat to international peace and security by virtue of the failure to respond fully and effectively both to the requests of the Governments *and* to the decisions relating thereto contained in resolutions 731 and 748. Again, the demand for compliance contained in operative paragraph 1 of resolution 883 was expressed as being made under Chapter VII. To impose measures binding on all Members of the United Nations under Chapter VII in support of demands on Libya which were not themselves binding, would have been futile and illogical.

### **III The Security Council resolutions are determinative of any dispute over which the Court might have jurisdiction**

**4.15** The United Kingdom reiterates the views it expressed in oral submissions at the interim measures phase of this case – namely, that the United Nations institutional system envisages the different organs working alongside each other mutually to reinforce the attainment of the purposes and objectives of the United Nations. There is not within the Charter a hierarchical relationship between the principal organs. But coherence, political effectiveness and legality are all provided for through the diverse allocation of competences among the various organs, and, concomitantly, through "limitations on their activities ... *ratione materiae*".<sup>240</sup>

**4.16** To say that the Court deals only with legal matters, and the Security Council only with political matters, is to oversimplify. As the Court itself has said many times, judicial decision-making necessarily has a political impact. And the fact that there is a political dimension to a case does not constrain the Court from adjudicating or giving an advisory opinion, so long as there is a legal question for the Court to answer (*United States Diplomatic and*

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<sup>240</sup> Rosenne, *The Law and Practice of the International Court*, 2nd rev.ed., at p.70.



*Consular Staff in Tehran*;<sup>241</sup> *Military and Paramilitary Activities in and Against Nicaragua (Jurisdiction)*;<sup>242</sup> *Conditions of Admission of a State to Membership in the United Nations*;<sup>243</sup> *Certain Expenses of the United Nations*;<sup>244</sup> *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt*.<sup>245</sup> The Security Council has, over the years, in the exercise of its primary responsibility for the maintenance of international peace and security, made determinations of relevance to the legal sphere. It has determined whether maritime rights of visit and search are available when an armistice is in place (Security Council resolution 95 (1951)). It has pronounced upon the illegality of military invasions, such as Iraq's invasion of Kuwait (Security Council resolutions 660 (1990) and 662 (1991)), and military occupations, including Israel's occupation of Arab territories (see e.g., Security Council resolutions 252 (1968), 298 (1971) and 478 (1980) on the status of Jerusalem and 497 (1981) on the status of the Golan Heights). The resolutions of the Security Council are full of examples of references to the requirements of international law. This is because, in the exercise of its competence *ratione materiae*, the Security Council must interpret facts to see if there have been threats to international peace and security or violations of the Charter. These tasks necessarily often entail appreciations of the substance of international law – international law being invoked by one party to support its entitlement to act, and by the other party to decry the action concerned. The Security Council has to take a view. Each organ has its own competences, but in terms of subject matter they are not hermetically sealed or absolutely rigid. This is no more than is to be expected, because the competences of international organisations are not divided up by reference to legislative, executive and judicial powers. Thus the principle of separation of powers cannot be fully applied. As Judge Lachs put it in his separate opinion in the Provisional Measures phase of this case:

"The framers of the Charter, in providing for the existence of several main organs, did not effect a complete separation of powers, nor indeed is one to suppose that such was their aim."<sup>246</sup>

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241 *ICJ Reports*, 1980, p.3 at pp.19–20.

242 *ICJ Reports*, 1984, p.392 at p.435.

243 *ICJ Reports*, 1947–48, p.57 at p.61.

244 *ICJ Reports*, 1962, p.151 at p.155.

245 *ICJ Reports*, 1980, p.73 at p.87.

246 *ICJ Reports*, 1992, p.3 at p.26.

**4.17** There are no provisions in the Charter for States to whom resolutions of the Security Council are addressed to seek judicial review. It is clear from the *travaux préparatoires* that this possibility was deliberately rejected. The reasons are instructive. The Soviet Union believed that it would weaken the Security Council too much.<sup>247</sup> The United States pointed to the obligation of the Council to secure only the objectives of the Charter.<sup>248</sup> France believed that such a review would unacceptably disperse the responsibilities allocated under the Charter.<sup>249</sup> And the United Kingdom emphasised that the delays this would entail would operate to the advantage of aggressor States.<sup>250</sup>

**4.18** A later proposal, for a Committee on Legal Problems to be established as an interpretative organ for certain parts of the Charter, was also rejected. The clear view was that the Charter requirements themselves, the ability of the major organs to request advisory opinions, and the entitlement of States to resolve their disputes before the Court, provided sufficient guarantees of protection of sovereign rights by reference to international law.<sup>251</sup> It is thus clear that, in contentious litigation, judicial scrutiny of a resolution can only be incidental to the determination of the issue to be resolved.

**4.19** By contrast, in an advisory opinion a resolution may necessarily assume a more central place in the Court's scrutiny. Certain organs of the United Nations or specialized agencies may, through a request for an advisory opinion, themselves seek advice as to what course of action they may legally take in the execution of their tasks. This may entail the scrutiny of a resolution or resolutions already adopted as a necessary component element in providing such legal advice. The *Expenses Case* and the *Namibia Case* afford examples.

**4.20** Not all domestic systems have developed the practice of judicial review. There are a variety of institutional mechanisms for guaranteeing the rule of law. But in any event, analogies with domestic practice are inapposite. The relationship between the Security Council and the Court is to be determined by reference to the Charter, and not by analogy with selected domestic law systems. The Security Council has the primary responsibility

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247 United Nations Conference on International Organization Documents (UNCIO) Vol.12, Doc. 433 (III/2/15) p.47 at p.49.

248 *Ibid.*

249 *Ibid.*, at p.50.

250 UNCIO Vol.12, Doc. 498 (III/2/19), p.65 at pp.65-66.

251 UNCIO, Vol.13: Doc. 843 (IV/2/37), p.645 and Doc. 933 (IV/2/42(2)), pp.709-710.

under the Charter for the maintenance of international peace and security; it is not merely exercising the equivalent of executive discretion.

4.21 Nothing in Chapter XIV of the Charter suggests a generalized power of the Court to review decisions of political organs. Nor is such a power mentioned in the Statute of the Court. And there has, of course, never been a general power of judicial review whereby the Court, of its own volition or at the instigation of an addressee of a Security Council resolution, has decided either to "quash" a resolution or to remit it for revision. Neither the United States model of judicial review (*Marbury v. Madison*<sup>252</sup>), nor the United Kingdom model of judicial review (*Associated Provincial Picture Houses Limited v. Wednesbury Corporation*<sup>253</sup>), has been followed under the Charter.<sup>254</sup>

4.22 The question that here arises is whether that judicial review function can nonetheless be engaged in by the Court through a State to whom a resolution is addressed bringing an action against certain members of the Security Council who promoted that resolution. It is not clear whether the members who initiated discussion of the resolution relevant to this case are said to have acted unlawfully; or whether they, and others in the Security Council (though no action is brought against *them*) are said to have acted unlawfully by voting for the resolution. But, in any event, the suggestion by Libya is that these questions are to be answered by having the fairness and necessity of the resolution judicially reviewed.

4.23 The United Kingdom does not take the view that because a certain matter has been before the Security Council, and resolutions have been adopted thereon, the Court has no interest or role. That would reflect the "hermetically sealed" view of allocation of competences, and the jurisprudence of the Court clearly rejects that view: *United States Diplomatic and Consular Staff in Tehran*;<sup>255</sup> *Military and Paramilitary Activities in and against Nicaragua* (*Nicaragua v. United States of America*) *Provisional*

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252 5 US (1 Cranch) 137 (1803).

253 [1948] 1 KB 223.

254 *Marbury v. Madison* holds that the courts lack the power to enforce a law that violates the Constitution; and that it is for the courts - and ultimately the Supreme Court - to determine the constitutionality of a law. The *Wednesbury* case holds that an executive decision or exercise of discretion may be challenged on the ground that it was so unreasonable that no reasonable man could have made the same decision or exercised the same discretion.

255 *ICJ Reports*, 1980, p.3 at p.21-22, paragraph 40.

Measures;<sup>256</sup> *Jurisdiction and Admissibility*.<sup>257</sup> See also *Case Concerning Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie, Provisional Measures*, Order of 14 April 1992, Separate Opinion of Judge Shahabuddeen.<sup>258</sup>

**4.24** The Court has itself, in terms, declined the suggestion that it holds generalised powers of judicial review. In the *Expenses Case* the Court observed that:

"In the legal system of states, there is often some procedure for determining the validity of even a legislative or governmental act; but no analogous procedure is to be found in the structure of the United Nations. Proposals made during the drafting of the Charter to place the ultimate authority to interpret the Charter in the International Court of Justice were not accepted..." (*Certain Expenses of the United Nations (Article 17, paragraph 2 of the Charter)*).<sup>259</sup>

And in the *Namibia Case* the Court observed:

"Undoubtedly, the Court does not possess powers of judicial review or appeal in respect of the decisions taken by the United Nations organs concerned."<sup>260</sup>

**4.25** The key elements may be summarised thus:

- (1) the relationship between the main organs of the United Nations is not hierarchical;
- (2) the functions are characterized by a delimitation *ratione materiae*;
- (3) at the same time, there is a certain functional overlapping of competences.

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256 *ICJ Reports*, 1984, p.169 at pp.185-186.

257 *ICJ Reports*, 1984, p.392 at pp.433-6.

258 *ICJ Reports*, 1992, p.3 at p.29.

259 *ICJ Reports*, 1962, p.151 at p.168.

260 *ICJ Reports*, 1971, p.16 at p.45.

These legal and institutional realities were trenchantly summarized by Judge Lachs in his Separate Opinion in the present case when he stated:

"One may therefore legitimately suppose that the intention of the founders was not to encourage a blinkered parallelism of functions but a fruitful interaction."<sup>261</sup>

4.26 The search must therefore be to identify a relationship between the Court and Security Council that reflects, on the one hand, an absence of generalized judicial review, and, on the other hand, the need for a "fruitful interaction" in overlapping competences. The United Kingdom believes that both some past practice of the Court in other cases, and the *dicta* of certain judges in the earlier phase of the present case, are to be understood in this light. Judge Shahabuddeen asked whether, in relation to the operation of Article 103

"there are any limitations on the power of the Council to characterize a situation as one justifying the making of a decision entailing such consequences. Are there any limits to the Council's power 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?"<sup>262</sup>

4.27. The United Kingdom believes the answers to these questions to lie in following the injunction of Judge Lachs in the earlier phase of the present case that

"the two main organs with specific powers of binding decision act in harmony – though not, of course, in concert – and that each should perform its functions with respect to a situation or dispute, different aspects of which appear on the agenda of each, without prejudicing the exercise of the other's powers."<sup>263</sup>

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261 Order of 14 April 1992, *ICJ Reports*, 1992, p.3 at p.26.

262 *Ibid.*, at p.32.

263 *Ibid.*, at p.27.

**4.28** The starting point must therefore be to identify what is essential to the exercise of the powers of the Court; and what is essential to the powers of the Security Council. The Court is the principal judicial organ of the United Nations (Article 92). It is for the Court to concern itself with issues of legality in relation to Security Council resolutions, insofar as those are germane to the disposal of litigation brought before it. But it is for the Security Council to exercise the political judgments allocated to it under the Charter. This leads inescapably to the conclusion that the Court is concerned with constitutional legality (that is, compliance with the Charter requirements of formal validity), and the Security Council with the exercise of political judgment. When scrutinizing resolutions the Court will eschew all matters relating to political judgment.

**4.29** The Court is also an autonomous judicial organ with the function, under Article 38 of the Statute, of applying international law to those disputes between states which are brought before it. But the legality of actions by other United Nations organs cannot be assessed by reliance on Article 38 of the Statute, but rather by an appreciation of the law of the Charter. And the Charter itself envisages, in Article 103, that the proper exercise of competences by the Security Council under Chapter VII and Article 25 may lead to a clash with other rights and obligations of Members. Libya has not at this stage established the rights it claims under the Montreal Convention – that would be for the merits, if that stage is ever reached. But even were those rights established, the obligations under the Charter prevail. Accordingly, it can never be the case that the Security Council has acted unlawfully simply because it has passed a resolution the effect of which may be to impinge on rights a Member alleges it holds.<sup>264</sup> The illegality which is relevant to the role of the Court as the principal judicial organ of the United Nations relates to fundamental illegalities of procedure and form under the Charter.<sup>265</sup>

#### **IV Discretions reserved to the Security Council alone**

**4.30** The Security Council is given primary responsibility for the maintenance of international peace and security (Article 24(1)). Paragraph 1 of Article 24 also provides that in carrying out its responsibilities the Security Council acts on behalf of the membership of the United Nations – that is to

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<sup>264</sup> cf. Libyan Memorial, paragraphs 6.76–6.82.

<sup>265</sup> See further below, paragraphs 4.54 to 4.61.

say, not just on behalf of the Security Council members. The composition of the Security Council, under Article 23 of the Charter, is arrived at in such a way as to ensure that the organ is representative of the UN membership as a whole. The presence on the Security Council of non-permanent members, who are entirely capable of voting negatively or abstaining if they choose, and by such means preventing the adoption of a resolution by the majority specified in Article 27(3), provides a further link to the membership as a whole. The permanent members cannot impose a resolution; they can only "veto" a resolution that would otherwise be adopted. That is the essential mechanism, not only when the Security Council permanent members are in political conflict (as was often the case during the Cold War), but also when they agree (as was envisaged in the Charter and as has more recently been the case). The fact that Security Council members are more frequently today in agreement, neither removes the provision in Article 24(1) that the Council operates on behalf of the membership of the UN, nor does it invite the Court to replace the discretion exercised by the Council with its own perceptions.

**4.31** The essential competences relating to international peace and security reserved to the Security Council and relevant to this case are the following:

- i) to determine the existence of any threat to the peace, breach of the peace, or act of aggression;
- ii) to select the measures appropriate for responding to situations that may disturb relations between states or potentially threaten international peace and security;
- iii) to decide if the demands it has put in a resolution have in fact been met and, by virtue of Article 41, to decide what measures not involving the use of armed force are to be employed to give effect to its decisions.

**4.32** Each of these essential competences will now be examined in relation to the facts of this case.

**(1) The Security Council alone is entitled to determine under Article 39 of the Charter the existence of a threat to international peace and security**

**4.33** Security Council resolution 748 (1992) resolved that

"the failure by the Libyan Government to demonstrate by concrete actions its renunciation of terrorism and in particular its continued failure to respond fully and effectively to the requests in resolution 731 (1992) constitute a threat to international peace and security".

It went on to state that it was "Acting under Chapter VII of the Charter" in deciding upon various measures. The same terms were used in Security Council resolution 883 (1993). The Security Council was uniquely entitled to make these determinations under Article 39.

**4.34** The existence or otherwise of a general power to review Security Council decisions, and the legal consequences of any such review, has been the subject of extensive recent debate. The specific function of making determinations under Article 39 is a matter for the Security Council alone, and not subject to any review. This view was clearly put by Judge Weeramantry in his dissenting opinion in the Order of 14 April 1992:

"[T]he determination under Article 39 of the existence of any threat to the peace, breach of the peace or act of aggression, is one entirely within the discretion of the Council. It would appear that the Council and no other is the judge of the existence of the state of affairs which brings Chapter VII into operation... Once [an Article 39 decision is] taken, the door is opened to the various decisions the Council may make under that Chapter."<sup>266</sup>

**4.35** The determination of a threat to the peace is necessarily an act of political judgement. There is no "correct legal" answer to whether international peace and security is threatened by a particular set of circumstances. Because the Security Council's assessment under Article 39 is necessarily an act of discretion, if a finding of the Security Council were to be brought into question, that review itself would necessarily entail an act of political

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<sup>266</sup> *ICJ Reports*, 1992, at p.3 at p.66.



judgement. It could not be a judicial act, as there are no legal criteria by which the existence of a "threat to the peace" is to be judicially determined, or the Security Council's own assessment thereof could be found to be legally incorrect. The Court is indeed the "guardian of legality" – but the determination of a threat to international peace and security is not a matter of law but of political appreciation. Not only is there no yardstick for appropriate review on grounds of legality; but review by the Court would itself necessarily be an alternative act of political appreciation.

**4.36** Challenges by Members to an Article 39 determination by the Security Council have not been accepted, because it is the Security Council that is given the sole competence to make the assessment. The decision that it makes is then immediately effective and is not open to challenge by any Member. Exactly because, as Judge Weeramantry pointed out, an Article 39 finding is the condition precedent to action to maintain and restore international peace, the Security Council's intended role under Chapter VII would be rendered impossible if the Article 39 determination could itself be the subject matter of litigation brought by one party to a dispute before the Security Council against another. The intention of Chapter VII would be blocked. Moreover, the Security Council would be unable to fulfil its primary responsibility for the maintenance of international peace and security, as conferred on it by Article 24(1).

**4.37** Further, if the matter simply came before the Court for review as an incidental factor in an interstate dispute,<sup>267</sup> perhaps months or years after the adoption of the resolution, any review of an Article 39 determination would be incompatible with the concept of stability and finality in the UN legal order. Members have to be able to rely on Article 39 determinations that have been the basis of UN resolutions binding on the membership, and which have provided the legal ground for various kinds of subsequent action.

**4.38** Determinations made by the Security Council under Article 39 do not become subject to review because of the allegation that the determination was only made in order that certain action could then be taken: cf. Libya in its Memorial at paragraphs 6.112–6.121. Several observations may be made. *First*,

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<sup>267</sup> In the present case, of course, the matter is not "incidental" to an inter-state dispute - it is central to the issues brought before the Court by Libya. Libya, while describing the dispute with the United Kingdom in a variety of ways, places the alleged unlawfulness of the resolutions, and absence of a "real" threat to international peace and security, as the centrepiece of its complaints.

while those persons cited by Libya may hold the view that there is no threat to international peace and security, the Security Council has taken a different view – and it is the Security Council that is given competence under the Charter to make this determination. *Second*, the threat perceived by the Security Council was not – contrary to what is asserted by Libya<sup>268</sup> – the outrage of December 21, 1988 alone; it was the refusal of Libya, with its long history of involvement in terrorism, to cooperate fully, from January 1992 was (to this day), in the fight against terrorism. *Third*, the history of the United Nations is replete with examples of determinations under Article 39 being made in order for the Council to be able to proceed to take action under Chapter VII. *Fourth*, it is impossible for the Court to decide, after the adoption of a resolution, that an Article 39 finding was made only in order to assume Article 41 powers. This requires the Court to act as a psychologist as to the perceptions and motives of members of the Security Council.

**4.39** The circumstances in which a determination by the Security Council could be challenged could not be foreseen. It would be a challenge potentially open to States of all political persuasions, in support of all sorts of objectives. Thus when Rhodesia's minority government unilaterally declared independence from the United Kingdom, both Portugal and South Africa challenged the Security Council's decision that this constituted a threat to international peace and security – a finding that was essential to "opening the door" to enforcement action by the Security Council.<sup>269</sup> Although in the view of Portugal and South Africa a threat to international peace and security did not "objectively exist", the Security Council, in making its determination, was correctly treated as having exercised a political judgement that was not subject to challenge.

**4.40** There are other reasons why the Security Council alone may decide if there exists a threat to international peace and security. Further examples that could be cited are the findings in respect of Somalia,<sup>270</sup> Haiti<sup>271</sup> and Rwanda.<sup>272</sup> Certain critics have suggested that no threat to international peace and security "objectively" existed in those cases, and that the Security

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<sup>268</sup> Libyan Memorial, paragraph 6.120.

<sup>269</sup> See Security Council resolution 221 (1966) paragraph 1, SCOR 21st session; Security Council resolution 232 (1966), paragraph 1, SCOR 21st session.

<sup>270</sup> Security Council resolution 794 (1992).

<sup>271</sup> Security Council resolution 841 (1993).

<sup>272</sup> Security Council resolution 955 (1994).

Council was seeking a necessary basis to sustain a decision to order action under Chapter VII. Whatever the perceptions, these findings are not subject to review by the Court. Lockerbie is surely an *a fortiori* case, because the Security Council had for many years been concerned with terrorism, and had long viewed its manifestations as a threat to international peace and security.

4.41 The Court has clearly indicated that it is not prepared to go behind decisions of United Nations organs acting within their competence:

"Whatever the motivation of the General Assembly in reaching the conclusions contained in those paragraphs, whether or not it was acting wholly on the political plane and without the Court finding it necessary to consider here whether or not the General Assembly based its decision on a correct interpretation of the Trusteeship Agreement, there is no doubt... that the resolution had definitive legal effect." (*Northern Cameroons Case*).<sup>273</sup>

Further:

"It must be assumed that the General Assembly was mindful of the general interest when, acting within its competence, it decided on the termination of the Trust."<sup>274</sup>

4.42 There are Article 39 determinations in resolutions 748 and 883. These reflected the Security Council's view that Libya's failure in concrete terms to renounce terrorism does, in the light of all the relevant history, constitute a continuing threat to international peace and security. It is within the full discretion of the Security Council to decide that a failure to respond to demands in a resolution which is not adopted under Chapter VII (such as Security Council resolution 731) can constitute such a threat. This is not to suggest that every failure to respond to a call from the Security Council will necessarily merit a determination under Article 39 – it is for the Security Council to decide in the light of all the circumstances and information at its disposal.

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<sup>273</sup> *ICJ Reports*, 1963 p.15 at p.32.

<sup>274</sup> *Ibid.* p.36.

**(2) The Security Council alone is entitled to decide what measures should be adopted pursuant to an Article 39 determination**

**4.43** That the entitlement to decide upon measures is a necessary corollary of the right to determine the existence of a threat to international peace and security, was acknowledged by *ad hoc* Judge Lauterpacht in the *Application of the Genocide Convention, Further Requests for the Indication of Provisional Measures Case*. He there said that any power of judicial scrutiny by the Court

"... does not embrace any right of the Court to substitute its discretion for that of the Security Council in determining the existence of a threat to the peace, a breach of the peace or an act of aggression, or the political steps to be taken following such a determination."<sup>275</sup>

**4.44** The political steps decided upon by the Security Council in resolution 748 were those enumerated in paragraphs 4 to 7. It has decided, in accordance with Article 41 of the Charter, upon measures not involving the use of armed force to give effect to its decisions. They cover aviation sanctions, prohibition on arms and related training, and reduction of Libyan diplomatic representation. Resolution 883 decided upon the steps in paragraphs 3 to 7, directed at the freezing of certain funds, and further aviation sanctions.

**4.45** Libya devotes several pages of its Memorial to asserting that the measures adopted were "contrary to the principles of justice and international law",<sup>276</sup> without ever saying why. In any event, it is clearly for the Security Council to decide what measures it thinks appropriate. That is exactly what is provided for in Article 41 of the Charter. The measures selected were, in fact, restrained and carefully fashioned. But in any event measures adopted within the political discretion of the Security Council may not be reviewed by the Court or replaced by measures of its own selection, and thus cannot form the subject matter of any dispute before the Court.

**4.46** As has been explained above,<sup>277</sup> the Security Council was faced with three sets of factors. The first was a longstanding concern with international

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<sup>275</sup> *ICJ Reports*, 1993, p.325 at p.439.

<sup>276</sup> Libyan Memorial, paragraphs 6.76 to 6.79.

<sup>277</sup> Paragraphs 2.2 to 2.67.

terrorism, which had already been the subject of various resolutions.<sup>278</sup> The second was the results of the painstaking scientific analysis and police investigations after the destruction of flight PA103 on 21 December 1988. These produced evidence that Abdelbaset Ali Mohamed Al Megrahi and Al Amin Khalifa Fhimah caused the placing of the explosive device on Pan Am 103, and that they were officers of and acting on behalf of the Libyan intelligence services. And, finally, the Security Council was made aware that the United Kingdom, along with the United States, had asked for the surrender of the accused for trial in Scotland or the United States. When it was clear that no satisfactory cooperation was forthcoming, the United Kingdom and the United States issued a declaration containing specific demands.<sup>279</sup> At the same time a similar declaration was made by France in respect of the bombing of the UTA Flight 772.<sup>280</sup> All three Governments issued a further statement simultaneously, in which they required that Libya promptly commit itself to cease all forms of terrorist activity.<sup>281</sup> No adequate response being forthcoming, the United Kingdom, France and the United States took the matter to the United Nations.

**4.47** It is within the discretion of the Security Council to decide that this convergence of events represented a matter properly to be placed upon its agenda. It is further within the appreciation of the Security Council to decide that the combating of international terrorism required both a renunciation of terrorism by Libya, and cooperation in bringing the accused to trial in either Scotland or in the United States. Article 24(1) makes clear that the Security Council was given specific power and discretions under Chapters VI and VII which it could exercise. It was in the exercise of these discretionary competences that the Security Council did not accept the argument that either Libyan involvement in terrorism generally, or the PA103 outrage specifically, could be handled as if it were a question of legal rights and obligations under the Montreal Convention. Notwithstanding Libya's claims to the contrary,<sup>282</sup> the Security Council was perfectly entitled – and subject to no review in this entitlement – to classify the problem as one relating to the maintenance of international peace and security and thus requiring certain responses, rather than to classify the problem as one of protecting alleged legal rights of Libya.

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<sup>278</sup> See paragraphs 2.3 to 2.7, above.

<sup>279</sup> Annex 7.

<sup>280</sup> Annex 5.

<sup>281</sup> Annex 8.

<sup>282</sup> Libyan Memorial, paragraphs 6.108 to 6.136.

**(3) The Security Council alone is entitled to decide if the terms of its resolutions under Chapter VII have been met**

**4.48** Libya's Memorial complains at length that it has fully met the demands of the Security Council in Resolutions 731 and 748.<sup>283</sup> These complaints entail both a very remarkable interpretation by Libya as to what was required by the resolutions, which has been addressed above;<sup>284</sup> and an insistence that the requirements had been met and that the Security Council was "wrong" in proceeding from Resolution 731 to Resolution 748.

**4.49** It is a matter for the Security Council to determine whether demands contained in its Chapter VII resolutions have in fact been met. It is apparent that the organ which is given the authority to order sanctions in order to secure compliance with its demands has, by necessary implication, the authority to determine whether those demands have been met. Thus the Security Council decided that it was for itself alone to determine if sanctions against Rhodesia should be lifted in 1979;<sup>285</sup> it is for the Security Council to resolve whether Iraq has met all the requirements laid down in resolution 687 (1991) as a condition for the lifting of sanctions; and it is for the Security Council to appraise Libya's conduct in the light of the requirements of its resolutions. Libya is wrong in law in assuming that the Court can be used as an appeal court from the political assessments made by the Security Council.

**4.50** Resolution 748 was adopted by 10 votes in favour (Austria, Belgium, Ecuador, France, Hungary, Japan, Russian Federation, United Kingdom, United States, Venezuela), none against, and 5 abstentions (Cape Verde, China, India, Morocco and Zimbabwe). It is clear that each of the States voting in favour of the resolution, exercised its own sovereign judgment that Resolution 731 had not been complied with: see the comments of Japan:

"... it was foreseen that the Security Council would be compelled to take further measures if Libya did not comply with it. Unfortunately the subsequent developments in the situation call for the Council's adoption of a new resolution."<sup>286</sup>

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283 Libyan Memorial, paragraphs 6.36 to 6.41.

284 See paragraphs 4.7 to 4.12, above.

285 Security Council resolution 460 (1979).

286 S/PV.3063, p.75 (Annex 11).

Hungary stated:

"...we are compelled to note that, although over two months have passed since the adoption of Security Council resolution 731 (1992), Libya has yet to comply with its provisions. This is all the more regrettable since the United Nations Secretary-General, the League of Arab States and other countries have spared no effort to promote and facilitate the implementation of that resolution. All of this casts doubt on the value of statements expressing readiness to cooperate with the Security Council ... Bearing in mind the vital significance of the subject before us today ... Hungary has felt and continues to feel that the Security Council must take further measures to ensure compliance with its own resolutions."<sup>287</sup>

Austria stated:

"Terrorism is a most dangerous threat to international peace and security. That is why it is appropriate for the Security Council to deal firmly with the matter ...

...

[The sanctions under resolution 748] are not punishment; they are introduced in order to make a certain member of the international community comply with its obligations under the Charter of the United Nations."<sup>288</sup>

The Russian Federation stated:

"... international terrorism ... poses an overt threat to our common security ...

...

... the Russian Federation, together with many other states, has been trying for two months now to convince the Libyan authorities to heed the will of the international community. Unfortunately, these efforts, including the good offices of the Secretary-General of the United Nations, have not produced the desired results."<sup>289</sup>

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287 *Ibid.*, p.76.

288 *Ibid.*, pp.77-78.

289 *Ibid.*, pp.79-80.

Belgium noted that even the new resolution had been subject to a two week delay, in the hope of securing a Libyan response.<sup>290</sup> Venezuela made

"one more appeal to the Government of Libya ... that Libya fulfil the provisions of resolution 731 (1992) before the 15 April 1992 deadline provided for in this latest resolution".<sup>291</sup>

**4.51** No state, including any of those abstaining, supported Libya's contention, which it now deploys before the Court, that it *had* complied with Resolution 731.

**4.52** In Resolution 883 eleven states now voted in favour (Cape Verde having moved from an abstention), none against, and four states (China, Djibouti, Morocco and Pakistan) abstained. By that time some twenty months had elapsed since the Security Council issued its requests in resolution 731. The French Representative felt obliged to observe that

"the Libyan Government has sought literally to take advantage of our Council... Libya may still hope to have it believed that it is prepared to do what the Security Council expects of it, but no one can be duped any longer."<sup>292</sup>

Spain and Brazil clearly thought the requirements yet had to be met. Hungary spoke of "delaying tactics and unkept promises and the growing gap between verbal statements and concrete actions".<sup>293</sup> China, while still placing its hope on a "certain flexibility" on the Libyan part, did not suggest that the requirements of the earlier resolutions had been met. Pakistan, explaining its abstention, said that "we have not lost hope and feel that these endeavours should continue".<sup>294</sup> It did not contend that the new resolution should not be passed because Libya had met the Security Council's demands. Nor did Djibouti.

**4.53** Not one single member of the Security Council, the composition of which altered between the adoption of resolutions 748 and 883, and in which the representatives of the non-permanent members were fully involved,

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<sup>290</sup> *Ibid.*, p.82.

<sup>291</sup> S/PV.3063, p.84 (Annex 11).

<sup>292</sup> S/PV.3312, p.43 (Annex 12).

<sup>293</sup> *Ibid.*, p.59.

<sup>294</sup> *Ibid.*, pp.53 and 64.



accepted that Libya had met the conditions stipulated by Security Council to meet the threat of international terrorism. Every member was aware of every proposal, statement and suggestion of Libya. It was for the Council, and the Council alone, to make this appreciation. It is not a matter for the Court, even in the unlikely event that it wished to replace this unanimous judgment with its own.

## V The relationship between the Court and the Security Council in respect of decisions of the Security Council

4.54 Judge Lachs stated:

"While the Court has the vocation of applying international law as a universal law, operating both within and outside the United Nations, it is bound to respect, as part of that law, the binding decisions of the Security Council."<sup>295</sup>

4.55 That role – respect for binding decisions of the Security Council as part of the vocation of applying international law within the United Nations – may entail certain functions of a properly judicial character for the Court. It may not be entirely clear what the Security Council has decided: in an appropriate case the Court may have to interpret the meaning of particular resolutions and clarify the obligations to which they give rise. Again, an issue may arise as to whether a particular resolution is binding.

4.56 In the present case, the Court may interpret Security Council resolutions 731, 748 and 883 as part of its *compétence de la compétence*<sup>296</sup> – though the need for Libya to show relevant jurisdiction over a dispute within Article 14 of the Montreal Convention precludes the Court in this case from exercising a more general competence to interpret the resolutions. And here the Court can readily determine that it has before it "binding decisions", it being entirely clear that Security Council resolutions 748 and 883 were adopted under Chapter VII of the Charter and expressed in mandatory terms.

4.57 An issue could legitimately arise as to whether a resolution is within the competence *ratione materiae* of a particular organ of the United Nations. Normally this would happen as a result of concern on the part of the UN organ

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<sup>295</sup> Order of 14 April 1992, *ICJ Reports*, 1992, p.3 at p.26.

<sup>296</sup> See paragraphs 3.40 to 3.45 above.

itself as to the nature or limits of its competence, in which case that organ might request an advisory opinion. The Court has shown that a strong presumption of legality operates. In its *Opinion on Certain Expenses of the United Nations (Article 17, paragraph 2 of the Charter)*<sup>297</sup> it made reference to whether the disputed actions of the Security Council and the General Assembly in regard to the establishment of ONUC and UNEF might have

"been initiated or carried out in a manner not in conformity with the division of functions among the several organs which the Charter prescribes...[i]f the action was taken by the wrong organ, [if] it was irregular as a matter of that internal structure."

**4.58** The Court referred to a "presumption that such action is not *ultra vires* the Organization" and was careful to say that, even had a UN organ acted *ultra vires*, the United Nations might still be bound to third parties.<sup>298</sup> It is striking that the Court thought the matter of *ultra vires* was to be tested, not by making its own judgement as to how the problems of Congo and Suez should have been addressed by the Security Council and the General Assembly, but by examining whether decisions had been made within the competence of the relevant UN organs.<sup>299</sup>

**4.59** It is not so obvious how an issue of competence *ratione materiae* could legitimately arise in contentious proceedings between Members of the United Nations, but in any event, no issue of competence *ratione materiae* arises in this case. Both the Security Council and the General Assembly may properly debate and pass resolutions on issues relating to international terrorism and both have done so on many occasions.<sup>300</sup> And a decision that certain matters related to international terrorism constitute a threat to international peace and security, and require measures to be taken under Chapter VII of the Charter, is for the Security Council alone. Nor is it the case, for reasons that have been examined above,<sup>301</sup> that, because Libya claimed

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297 *ICJ Reports*, 1962, at p.168.

298 *Ibid.*, p.168.

299 *Ibid.*, p.168.

300 See paragraphs 2.2 to 2.14, above.

301 Paragraphs 4.15 and 4.29.

that there was a legal dimension to the matter, it could be discussed by the Court alone. No issue arises here.<sup>302</sup>

**4.60** To respect a binding decision of the Security Council as part of its vocation of applying international law, the Court may need to satisfy itself that that decision has been adopted by the required voting majorities. The Court has already in the *Namibia* case<sup>303</sup> addressed arguments of a State that a particular voting practice of the Security Council was unlawful, thus rendering invalid resolutions adopted thereby. The Court there affirmed the Security Council's longstanding practice that abstention constituted a "concurring vote" for the purposes of Article 27(3). It is of interest that certain judges in the *Expenses* case emphasised that compliance with the voting majority was an important element of the strong presumption of validity that operates in respect of United Nations resolutions: see, for example, the comments of Judge Sir Gerald Fitzmaurice.<sup>304</sup> This was also the view of Judge Morelli, who observed that the legal status of a resolution was not open to challenge unless it failed to satisfy an essential requirement – that is, unless it manifested an essential defect, such as being based on an insufficient voting majority.<sup>305</sup> He indeed went so far as to say that whether the "reasons" on which a resolution was based were "correct or not", "[i]t must be supposed that the Charter confers finality on the Assembly's resolution".<sup>306</sup> Any principle of finality operating in favour of an Assembly resolution that complies with formal validity, *a fortiori* must apply to Security Council resolutions adopted under Chapters VI and VII.

**4.61** But, even if considerations relating to sufficiency of voting majorities could arise, they do not do so in this case. Security Council resolutions 731, 748 and 884 were all adopted by the appropriate majorities. The United Kingdom submits that none of the circumstances in which the Court might be called upon to assess whether it indeed has before it a "binding decision" of the Security Council arise in this case. Security Council resolutions 748 and 883 are binding decisions of the Security Council, which therefore fall to be

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302 In the Security Council debate the Libyan representative insisted that Article 36(3) of the Charter meant that only the Court could deal with these matters: "the Security Council is a forum that is not competent to consider the question"; "this is a purely legal question"; S/PV.3033, pp.14-15 (Annex 10).

303 *ICJ Reports*, 1971, p.3 at paragraphs 23–26.

304 *ICJ Reports*, 1962, p.151 at pp.204–5.

305 *Ibid.*, p.223.

306 *Ibid.*, p.224.

respected by the Court as part of its judicial function of applying international law within the United Nations.

## VI Article 103 and Security Council Resolutions 748 and 883

4.62 In its Order of 14 April 1992, in response to Libya's request for the indication of provisional measures the Court referred to the fact that both Libya and the United Kingdom are obliged to accept and carry out the decisions of the Security Council in accordance with Article 25 of the Charter; that *prima facie* this obligation extends to the decision in resolution 748 (1992); and that by virtue of Article 103 the obligations of the parties prevailed over their obligations under any other international agreement, including the Montreal Convention.<sup>307</sup>

4.63 The Court thus affirmed that Article 103 (whose French text speaks of "obligations ... en vertu de la présente charte") provides not only that obligations derived directly from provisions of the Charter prevail over other obligations, but also that those decisions of the Security Council which are binding under Article 25 of the Charter have that effect. Judge Shahabuddeen, who took the view at the interim measures phase that "the validity" of resolution 748 (1992) was to be presumed, concluded that by virtue of Article 103 of the Charter, "that obligation prevails over any conflicting treaty obligation which Libya may have".<sup>308</sup> Judges Bedjaoui, Weeramantry and Ajibola, while dissenting on the Court's refusal to indicate provisional measures, emphasised the importance of Article 103 in relation to decisions adopted under Article 25. Judge Bedjaoui agreed with the majority that resolution 748 at that phase "benefits from a presumption of validity".<sup>309</sup> He concluded that while Article 103 would accordingly deprive any provisional measures of useful effect, such orders could nonetheless be given. Judge Weeramantry expressly agreed with the majority that at that phase

"resolution 748 (1992) must be treated as binding on Libya as on all countries in terms of Article 25 of the United Nations Charter and that, in terms of Article 103, the obligations it lays down prevail over the obligations flowing from any other international agreement. In specific terms, this means that Libya is,

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307 *ICJ Reports*, 1992, p.3 at p.15.

308 *Ibid.*, p.28.

309 *Ibid.*, p.46.

*prima facie*, bound by the provisions of that resolution even if they should conflict with the rights Libya claims under the Montreal Convention".<sup>310</sup>

Judge Ajibola took essentially the same view.<sup>311</sup> Where all three departed from the majority view was in believing that provisional measures *proprio motu* could be issued which would not conflict with resolution 748 (1992), or with the operation of Article 103.

**4.64** Thus all members of the Court were of the view, when dealing with the request for the indication of provisional measures, that Article 103 would operate to ensure that the obligations arising under resolution 748 would prevail over any other obligations and rights held by parties under the Montreal Convention.

**4.65** Since that time, resolution 748 has been followed by resolution 883, and the appropriateness of the indicating of interim measures is no longer in issue. The United Kingdom has shown that these resolutions were both exercises of discretion within the sole competence of the Security Council, and adopted *intra vires* and by the required voting majority. Accordingly, they are valid decisions binding upon Libya (and all United Nations Members) under Article 25 of the Charter; and Article 103 has its normal consequence in relation thereto.

**4.66** It necessarily follows that even if Libya had the rights and obligations it claims under the Montreal Convention (which the United Kingdom does not accept), the resolutions would have determinative effect and prevail over other conflicting obligations. No issue on the merits regarding the Montreal Convention can therefore arise for the consideration of the Court, and Libya's claims in relation thereto are inadmissible.

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<sup>310</sup> *Ibid.*, p.67.

<sup>311</sup> *Ibid.*, p.88.

## CONCLUDING SUBMISSIONS

For the reasons advanced, the United Kingdom requests the Court to adjudge and declare that:

it lacks jurisdiction over the claims brought against the United Kingdom by the Libyan Arab Jamahiriya

and/or

the claims brought against the United Kingdom by the Libyan Arab Jamahiriya are inadmissible.

16 June 1995

Franklin D Berman

Agent of the United Kingdom  
of Great Britain  
and Northern Ireland

## LIST OF ANNEXES

Volume I of the annexes contains a set of basic documents. Documents in Volumes II and III are set out in chronological order. Where material has been circulated as a United Nations document, the date cited is that of the United Nations document itself.

### BASIC DOCUMENTS

| <u>Annex<br/>Number</u> | <u>Title and Reference</u>   |
|-------------------------|--|
|                         | <b>Convention</b>  |
| 1                       | Convention for the Suppression of Unlawful Acts against the Safety of Civilian Aircraft, Montreal, 23 September 1971 (the Montreal Convention), 974 United Nations Treaty Series 177.  |
|                         | <b>UN Security Council Resolutions</b>   |
| 2                       | Security Council Document S/RES/731 (1992), 21 January 1992: Security Council resolution 731 (1992).   |
| 3                       | Security Council Document S/RES/748 (1992), 31 March 1992: Security Council resolution 748 (1992).   |
| 4                       | Security Council Document S/RES/883 (1993), 11 November 1993: Security Council resolution 883 (1993).  |
|                         | <b>Letters Circulated as UN Documents</b>  |
| 5                       | General Assembly Document A/46/825 and Security Council Document S/23306, 31 December 1991: Letter from the French Permanent Representative to the United Nations Secretary-General.   |
| 6                       | General Assembly Document A/46/826 and Security Council Document S/23307, 31 December 1991: Letter from the United Kingdom Permanent Representative to the United Nations Secretary-General.                                       |
| 7                       | General Assembly Document A/46/827 and Security Council Document S/23308, 31 December 1991: Letter from the United States Permanent Representative to the United Nations Secretary-General.  |
| 8                       | General Assembly Document A/46/828 and Security Council Document S/23309, 31 December 1991: Letter from the Permanent Representatives of France, the United Kingdom and the United States to the United Nations Secretary-General. |

Annex  
Number

Title and Reference

- 9 Security Council Document S/23441, 18 January 1992: Letter from the Libyan Permanent Representative to the President of the Security Council.

**UN Security Council Debates**

- 10 Security Council Document S/PV.3033, 21 January 1992: Provisional Verbatim record of the 3,033rd meeting of the Security Council.
- 11 Security Council Document S/PV.3063, 31 March 1992: Provisional Verbatim record of the 3,063rd meeting of the Security Council.
- 12 Security Council Document S/PV.3312, 11 November 1993: Provisional Verbatim record of the 3,312th meeting of the Security Council.

**Reports of the UN Secretary-General**

- 13 Security Council Document S/23574, 11 February 1992: Report by the Secretary-General pursuant to paragraph 4 of Security Council resolution 731 (1992).
- 14 Security Council Document S/23672, 3 March 1992: Further report by the Secretary-General pursuant to paragraph 4 of Security Council resolution 731 (1992).
- 15 Security Council Document S/23992, 22 May 1992: Report of the Secretary-General pursuant to paragraph 8 of Security Council resolution 748 (1992).

**Scottish Criminal Proceedings**

- 16 Statement of Facts by the Lord Advocate of Scotland in the case of Abdelbaset Ali Mohamed Al Megrahi and Al Amin Khalifa Fhimah, Edinburgh, 13 November 1991.
- 17 Petition of the Procurator Fiscal of Dumfries and Galloway charging Abdelbaset Ali Mohamed Al Megrahi and Al Amin Khalifa Fhimah, 13 November 1991.
- 18 Summary of Scottish Criminal Procedure in Murder Cases, May 1995.
- 19 Statement of Legal Provision concerning Offences under Scots Law, May 1995.



## CHRONOLOGICAL LIST OF DOCUMENTS

(Documents included in Volume I are marked with an asterisk)

| <u>Annex<br/>Number</u> | <u>Title and Reference</u>  |
|-------------------------|---|
| <b>1959</b>             |   |
| 20                      | House of Commons Debates, 16 February 1959, columns 31 to 34.   |
| <b>1969</b>             |   |
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