

# 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)

*Rejoinder of the United Kingdom*

AUGUST, 2001



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## PART I

### THE PRESENT STATE OF THE PROCEEDINGS

1.1 The present proceedings were commenced on 3 March 1992, when Libya filed its Application with the Court. In view of the length of time which has elapsed and the developments in the case since that date, it is useful to recall how Libya put its case then and what relief it sought. Libya summarised its case as follows –

#### **“III. The claims of Libya**

In submitting this dispute to the Court, Libya claims as follows:

- (a) The Montreal Convention is the only appropriate convention in force between the Parties dealing with the offences listed in Article 1 [of the Montreal Convention]. Consequently, the United Kingdom is bound to adhere to the provisions of the Montreal Convention relating to the incident.
- (b) Pursuant to Article 5 (2) of the Montreal Convention, Libya is entitled to take such measures as may be necessary to establish its jurisdiction over the offences listed [in Article 1 of the Montreal Convention] in cases where, as is the situation here, the alleged offender is present in its territory and is not extradited pursuant to Article 8 of the Convention. By its actions and threats against Libya, the United Kingdom, in violation of Article 5 (2) of the Convention, is attempting to preclude Libya from establishing its legitimate jurisdiction over the matter.
- (c) Pursuant to Article 5 (3) of the Convention, Libya is entitled to exercise criminal jurisdiction over the matter in accordance with its national law. By its actions and threats, the United Kingdom is attempting to preclude Libya from exercising that right in violation of the Convention.
- (d) Under Article 7 of the Convention, Libya is obliged to submit the case to its competent authorities for the purpose of prosecution — a step that Libya has taken. By its efforts to force Libya to surrender the accused, the United Kingdom is attempting to prevent Libya from fulfilling its obligations in this respect in violation of the Convention.
- (e) Under Article 8 (2) of the Convention, extradition is made subject to the laws of the State from which extradition is requested. Under Article 493 (A) of the Libyan Code of Criminal Procedures, Libyan law prohibits the extradition of its nationals. It follows therefore, that there is no basis in either Libyan law or

under the Montreal Convention for the extradition of the accused from the territory of Libya, and the United Kingdom's efforts to the contrary constitute a violation of this provision of the Montreal Convention.

(f) Under Article 11 (1) of the Convention, the United Kingdom is under an obligation to afford Libya, as a Contracting State, with the greatest measure of assistance in connection with criminal proceedings brought by Libya in respect of the offences listed in Article 1. By failing to provide such assistance, the United Kingdom has breached its obligations under the Montreal Convention.

(g) The United Kingdom is bound by its legal obligations under the Montreal Convention, which obligations require it to act in accordance with the Convention, and only in accordance with the Convention, with respect to the matter involving flight PA 103 and the accused. Whereas Libya submits that it has fully complied with its own obligations under the Convention, the United Kingdom has breached, and is continuing to breach, those obligations.”

1.2 Libya then requested the following relief –

**“IV. Judgment requested**

Accordingly, while reserving the right to supplement and amend this submission as appropriate in the course of further proceedings, Libya requests the Court to adjudge and declare as follows:

- (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.”

1.3 These allegations were made in circumstances where the two men accused of the destruction of Pan Am Flight 103 over Lockerbie on 21 December 1988 (Abdelbaset Ali Mohamed Al Megrahi and Al Amin Khalifa Fhimah) were the subject of arrest warrants in Scotland but were present in Libya, which refused to surrender them for trial. Libya persisted in this refusal notwithstanding that the United Nations Security Council later

adopted two resolutions, resolution 748 (1992) of 31 March 1992<sup>1</sup> and resolution 883 (1993) of 11 November 1993,<sup>2</sup> which, *inter alia*, required Libya to surrender the two accused. In its Memorial of December 1993, Libya essentially maintained the claims set out in its Application.<sup>3</sup>

1.4 The essence of Libya's claim, therefore, was that the United Kingdom was committing a continuing violation of the Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, 1971 ("the Montreal Convention")<sup>4</sup> and Libya was asking the Court to make a ruling on how the Convention was to be applied with regard to the trial of the two accused. In responding to that claim, the United Kingdom was constrained by the need not to make any disclosure regarding the evidence against the two accused which might prejudice the chances of their receiving a fair trial in accordance with the requirements of the Security Council resolutions.

1.5 In its Judgment of 27 February 1998,<sup>5</sup> the Court held that it had jurisdiction in the case to the extent that the proceedings fell within the scope of Article 14(1) of the Montreal Convention. The Court joined to the merits a United Kingdom submission that resolutions 748 (1992) and 883 (1993) had rendered Libya's claims without object.

1.6 Since the Judgment of 27 February 1998, the factual framework of the proceedings has undergone a transformation. On 27 August 1998 the United Nations

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<sup>1</sup> United Kingdom Annex 3. (The United Kingdom Annexes deposited at the various stages of the proceedings are numbered consecutively. Annexes 1 to 84 appear in Volumes I to III, which were deposited with the United Kingdom Preliminary Objections in June 1995; Annexes 85 to 121 appear in Volumes IV and V, which were deposited with the United Kingdom Counter-Memorial in March 1999; Annexes 122 to 125 appear in the Supplement to the Counter-Memorial, which was deposited in May 1999. Annexes 126 to 129 appear in Volume VI, which accompanies the present Rejoinder.)

<sup>2</sup> United Kingdom Annex 4.

<sup>3</sup> Libyan Memorial, para. 8.1. One difference is that Libya now relies on Article 8(3) not Article 8(2) of the Montreal Convention.

<sup>4</sup> United Kingdom Annex 1.

<sup>5</sup> Case concerning *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libya v. United Kingdom)* (Preliminary Objections), ICJ Reports 1998, p. 9 (hereinafter "*Preliminary Objections Judgment*").

Security Council adopted resolution 1192 (1998),<sup>6</sup> which called upon the United Kingdom and the Netherlands to take the necessary steps to enable a Scottish Court to sit in the Netherlands to try the two accused and required that Libya ensure their appearance before that Court.

1.7 The two accused were finally surrendered for trial on 5 April 1999 when they were delivered to the Netherlands. The two accused waived their right to contest extradition and were delivered into the custody of the Scottish Court. On 31 January 2001 the Scottish Court convicted Abdelbaset Ali Mohamed Al Megrahi of the murder of the 259 people on board Pan Am Flight 103 and 11 residents of Lockerbie. The Court acquitted Al Amin Khalifa Fhimah.<sup>7</sup> At the time this Rejoinder was sent for printing, Abdelbaset Ali Mohamed Al Megrahi's appeal against his conviction was pending before the Scottish Criminal Appeal Court, which sits as part of the High Court of Justiciary.<sup>8</sup>

1.8 In view of these developments, the United Kingdom is surprised that Libya persists with this case. Since the two accused have now been tried by the Scottish Court in accordance with the requirements of the Security Council and with the full agreement of Libya, the proceedings are plainly without object (quite apart from the United Kingdom's submission, set out in its Counter-Memorial, regarding the effects of resolutions 748 (1992) and 883 (1993)). The relief which Libya sought in its Application and Memorial is now irrelevant.

1.9 Libya has, however, chosen to continue with the proceedings and has attempted in its Reply to refashion its claim as one for past violations of the Montreal Convention allegedly committed during a period which Libya does not adequately define but which must have come to an end, at the latest, with the adoption of resolution 1192 (1998) on 27 August 1998. It also claims damages in respect of those violations. The damages claim

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<sup>6</sup> United Kingdom Annex 87.

<sup>7</sup> The verdict of the court appears at Annex 128.

<sup>8</sup> Although the Criminal Appeal Court and the trial court are both parts of the High Court of Justiciary, they operate as entirely separate tribunals and the appeal is not a retrial. Under the Criminal Procedure (Scotland) Act 1995, section 106(3), the sole ground of appeal is that there has been a miscarriage of justice.



is entirely new. Although Libya included in its Application and Memorial what has become the standard reservation of a right to "supplement and amend", it gave no hint in its earlier pleadings of the possibility of a claim for damages. Nor does it now give any indication of what it maintains are the losses in respect of which it claims damages. That question, it seems, is to be reserved for yet another round of proceedings in a case which has already lasted for nearly ten years.

1.10 The arguments of the Parties have been fully set out in the written pleadings and in the oral proceedings of 1992 and 1997. In responding to the Libyan Reply, the United Kingdom will not repeat arguments already set out in its Preliminary Objections and Counter-Memorial but, in accordance with Article 49(3) of the Rules of Court, will concentrate upon bringing out the issues which still divide the Parties. While the effect of developments since the Court gave its Judgment on the Preliminary Objections in 1998 has been to narrow the issues between the Parties, the United Kingdom notes, with regret, that in its latest pleading Libya has sought to introduce wholly new issues in an attempt to broaden the scope of the case.

1.11 The following questions of law appear now to be in issue between Libya and the United Kingdom –

- (1) the effect of the Court's 1998 Judgment in limiting the issues over which the Court has jurisdiction;
- (2) whether events have rendered the Libyan Application without object and, in this connection, whether Libya is entitled to refashion its claim and add a claim for damages;
- (3) the significance for the application of the Montreal Convention of the fact that Libya was implicated in the destruction of Pan Am Flight 103;
- (4) whether the United Kingdom violated Article 7 of the Montreal Convention, read together with Articles 1, 5, 6 and 8(3), by taking the matter to the Security Council and implementing the decisions of the Council, or otherwise;

- (5) whether the United Kingdom violated Article 11 of the Montreal Convention;
- (6) the interpretation of Security Council resolutions 731 (1992),<sup>9</sup> 748 (1992), 883 (1993) and 1192 (1998);
- (7) the effect of those resolutions upon the rights and obligations of Libya and the United Kingdom;
- (8) whether the Court has jurisdiction in respect of Libya's allegations that the United Kingdom unlawfully threatened to use force against Libya and, if so, whether there is any substance in those allegations;
- (9) whether Libya is entitled to any part of the relief which it now claims.

In addition, the Parties are divided in respect of a number of questions of fact.

**1.12** The United Kingdom Rejoinder will deal with these issues in the following way –

*Part 2* will review developments in the case since the filing of the United Kingdom Counter-Memorial in March 1999 and will consider certain issues of fact;

*Part 3* will consider the effect of the Court's 1998 Judgment and whether Libya can now add an entirely new claim for damages;

*Part 4* will consider the Montreal Convention issues which divide the Parties;

*Part 5* will examine the interpretation and effect of the Security Council resolutions;

*Part 6* will discuss Libya's allegations that the United Kingdom threatened to use force;

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<sup>9</sup> United Kingdom Annex 2.

*Part 7* will set out the United Kingdom's conclusions and submissions.

**1.13** For reasons of its own, Libya has chosen to deposit a single Reply in respect both of the present case and the parallel case between Libya and the United States of America. The United Kingdom regrets this decision by Libya, since the two cases are separate and Libya had filed separate Observations on the Preliminary Objections raised in them. The use of a single pleading unnecessarily complicates matters as there are a number of issues which arise only in respect of one or other of the two cases. The United Kingdom will not address those parts of the Reply which are relevant only to Libya's case against the United States of America.<sup>10</sup>

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<sup>10</sup> For example, the United Kingdom will not discuss the allegations at paras. 1.42 to 1.45 of the Reply which concern unilateral US measures against Libya.

## PART 2

### ISSUES OF FACT

2.1 This Part of the Rejoinder will begin by considering the two major developments since the filing of the United Kingdom Counter-Memorial – the implementation of Security Council resolution 1192 (1998) and the trial and verdict which ensued. The Rejoinder will then identify and briefly address the principal issues of fact which continue to divide the Parties.

#### *A: Developments since the 1998 Judgment*

##### *(1) The implementation of resolution 1192 (1998)*

2.2 The circumstances which led to the adoption of Security Council resolution 1192 (1998)<sup>11</sup> have already been discussed by the United Kingdom in its Counter-Memorial<sup>12</sup> and will not be repeated here. The account of the implementation of that resolution was, however, incomplete, because it was not until after the Counter-Memorial was sent for printing in March 1999 that Libya finally announced that it would ensure the appearance of the two accused before the Scottish Court sitting in the Netherlands.<sup>13</sup> The United Kingdom decided not to seek a further extension of the deadline for filing the Counter-Memorial.<sup>14</sup> The timetable for printing the Counter-Memorial meant that it was possible, therefore, only to add a brief paragraph noting the Libyan statement.<sup>15</sup> The Counter-Memorial was, however, accompanied by a letter from the Agent of the United Kingdom

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<sup>11</sup> United Kingdom Annex 87.

<sup>12</sup> United Kingdom Counter-Memorial, Part 5.

<sup>13</sup> See UN Document S/1999/311, letter of 23 March 1999 from the Secretary-General to the President of the Security Council attaching a letter from the Secretary of the General People's Committee of the People's Bureau for Foreign Liaison and International Co-operation of the Libyan Government dated 19 March 1999; United Kingdom Annex 122.

<sup>14</sup> An extension from 31 December 1998 to 31 March 1999 had already been granted by Judge Oda, as Senior Judge, in December 1998.

<sup>15</sup> United Kingdom Counter-Memorial, para. 5.16.

explaining the circumstances and notifying the Court that the United Kingdom would file a brief Supplement to the Counter-Memorial to inform the Court of developments in the implementation of resolution 1192 (1998).<sup>16</sup> The United Kingdom filed that Supplement on 7 May 1999, confirming that the two accused had been transferred into the custody of the Scottish Court at Camp Zeist on 5 April 1999.<sup>17</sup>

2.3 The arrangements for a trial before the specially constituted Scottish Court in the Netherlands were made under an Agreement between the Netherlands and the United Kingdom<sup>18</sup> and United Kingdom delegated legislation.<sup>19</sup> That legislation provided for the High Court of Justiciary to conduct a trial of the two accused in the Netherlands under Scottish criminal law and procedure. Scottish law provides for an adversarial form of trial in which the responsibility for calling witnesses and adducing other evidence rests on the prosecution and defence counsel, not the court. The burden of proof is on the prosecution, which is required to prove beyond reasonable doubt the ingredients of the offence charged. No person may be convicted on the evidence of only one witness or evidence from only one source and essential facts must be established by corroborated evidence, that is evidence from at least two independent sources.<sup>20</sup> The United Kingdom legislation provided that the Scottish Court which would sit in the Netherlands would be subject to and would apply all of the normal rules of Scottish criminal law and criminal procedure,<sup>21</sup> the only difference from proceedings in Scotland itself being that the Court

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<sup>16</sup> Certain comments in the Libyan Reply (e.g. para. 1.35) suggest that Libya's counsel may not have seen this letter. The Libyan letter of 19 March 1999, note 13 above, was attached to the letter from the Agent of the United Kingdom.

<sup>17</sup> United Kingdom Counter-Memorial Supplement, para. 5.

<sup>18</sup> United Kingdom Annex 90.

<sup>19</sup> The High Court of Justiciary (Proceedings in the Netherlands) (United Nations) Order 1998, Statutory Instrument 1998 No. 2251: United Kingdom Annex 89.

<sup>20</sup> Summary of Scottish Criminal Procedure: United Kingdom Annex 126. See also the Summary of Scottish Criminal Procedure in Murder Cases: United Kingdom Annex 18.

<sup>21</sup> United Kingdom Annex 89, Article 3.

would sit as a bench of three judges without a jury, instead of the normal arrangement of a single judge with a jury of fifteen.<sup>22</sup>

2.4 These provisions were made against the background of a number of other developments in the case. First, in September 1993 Libya had sent the United Nations Secretary-General a list of questions relating to Scottish criminal procedure and guarantees for the accused in a criminal trial.<sup>23</sup> The United Kingdom supplied the Secretary-General with detailed answers to those questions which formed the basis of his reply to Libya.<sup>24</sup> Libya responded by saying that it was satisfied by the replies to its questions.<sup>25</sup>

2.5 Secondly, in 1997, at the invitation of the United Kingdom Government, the Secretary-General appointed the former Chief Justice of Zimbabwe, Dr Dumbutshena, and Professor Schermers, of Leiden University, as United Nations representatives for the purpose of a visit to Scotland to study the Scottish criminal justice system and report on whether the accused would receive a fair trial in a Scottish court. Their conclusions were as follows –

“Based on the foregoing, we conclude that the accused would receive a fair trial under the Scottish judicial system. Their rights during the pre-trial, trial and post-trial proceedings would be protected in accordance with international standards. The presence of United Nations and other observers can be fully and easily accommodated. A trial by jury would not prejudice the accused’s right to a free trial. If, however, the accused could reasonably establish that their right to a free trial would be prejudiced by a jury trial, we suggest that the idea of dispensing with the jury be pursued with the Government of the United Kingdom.”<sup>26</sup>

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<sup>22</sup> United Kingdom Annex 89, Article 5.

<sup>23</sup> UN Doc. S/26500: United Kingdom Annex 67.

<sup>24</sup> The material supplied by the United Kingdom appears at United Kingdom Annex 68.

<sup>25</sup> United Kingdom Annexes 69, 71 and 82.

<sup>26</sup> UN Doc. S/1997/991, p.15: United Kingdom Annex 85.

Libya received a copy of this report and its representative stated in the Security Council on 20 March 1998 that the Libyan Government had no criticism of Scottish law or the Scottish judiciary.<sup>27</sup>

2.6 The accused arrived in the Netherlands on 5 April 1999 and were arrested by the Dutch authorities. They waived their right to contest extradition and were extradited in accordance with Netherlands law and transferred to the custody of Scottish police officers at Camp Zeist on the same day. On 6 April 1999 the accused made their first appearance in court before the Sheriff Principal of South Strathclyde, sitting at Camp Zeist, who committed them for trial and remanded them in custody.

2.7 Under Scottish criminal procedure the trial would normally have commenced not later than August 1999.<sup>28</sup> However, the defence sought further time to prepare their case and the Scottish Court granted them two extensions to the ordinary time-limits. An application by the prosecution for an extension of time to prepare was denied.

2.8 The charges against the two accused were set out in the Indictment. In Scottish criminal procedure, the Indictment is the document which sets out the charges for the trial. It is prepared by the prosecution after the accused has been committed for trial by the Sheriff and in the light of a confidential report to Crown Counsel on all the investigations which have been carried out by the Procurator Fiscal and the police. Accordingly, the Indictment will normally be different from the Petition (on which the arrest warrant is based), especially in the detailed specification of the charges. In the present case, both the Petition and the Indictment alleged the same offences (murder, conspiracy to murder, and offences against section 2 of the Aviation Security Act 1982)

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<sup>27</sup> UN Doc. S/PV.3864, p. 9: United Kingdom Annex 118.

<sup>28</sup> Summary of Scottish Criminal Procedure: United Kingdom Annex 126.

but the detailed specification of these charges in the Indictment differed from that in the Petition.<sup>29</sup> The trial commenced on 3 May 2000.

2.9 Paragraph 4 of Security Council resolution 1192 (1998) required “that the Libyan Government shall ensure that any evidence or witnesses in Libya are, upon the request of the court, promptly made available at the court in the Netherlands for the purpose of trial.”<sup>30</sup> On 8 July 1999 a Letter of Request addressed to the Libyan Government and issued by the High Court, together with a translation into Arabic, was handed to the Libyan Foreign Liaison Bureau in Tripoli. The Letter of Request sought the co-operation of the Libyan authorities with regard to the production of certain evidence and requested permission for Scottish police officers to visit Libya in connection with this evidence. According to the Foreign Liaison Bureau, the Letter of Request and translation were passed on to the Libyan judicial authorities on 29 July 1999. At the end of September 1999 the Libyan authorities gave permission for Scottish police officers to visit Libya and that visit took place between 18 October and 4 November 1999. On 10 February 2000 the Arabic text of a Protocol of execution of request, containing certain evidence, was received by the Crown Office in Scotland. An official English translation was received by the Crown Office on 24 March 2000.

(2) *The trial and judgment*

2.10 The principal charge against each of the accused was that of murder of the 259 people on board Pan Am Flight 103 and eleven residents of Lockerbie. The Scottish Court heard evidence from 230 witnesses over a period of 77 days. There were a further

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<sup>29</sup> The Petition appears as United Kingdom Annex 17. The Indictment, in its final form, appears as United Kingdom Annex 127. In accordance with normal Scottish criminal procedure, the original Indictment was amended during the trial when the Prosecution elected to withdraw those charges other than murder (see below, para. 2.10, and Annex 126, para. 12) and again at the conclusion of the trial in order to reflect the verdict of the Court. Since the changes in the Indictment do not affect the matters presently under consideration, the United Kingdom has attached only the Indictment in its final form. The United Kingdom will, of course, provide copies of the earlier versions of the Indictment should the Court wish.

<sup>30</sup> United Kingdom Annex 87.



seven days of closing arguments from prosecution and defence counsel. The Court gave its verdict on 31 January 2001.

2.11 The Court unanimously found the first accused, Abdelbaset Ali Mohamed Al Megrahi, guilty of murder. The second accused, Al Amin Khalifa Fhimah, was acquitted. The Court set out the reasons for its verdict in an Opinion published on 31 January 2001.<sup>31</sup> The Indictment, as it stood following the verdict of the Court, stated that the first accused was a member of the Libyan Intelligence Services (“the JSO”) - specifically, the Head of Security of Libyan Arab Airlines and later the Director of the Centre for Strategic Studies in Tripoli - that he had, while acting in concert with others, formed a criminal purpose to destroy a civil passenger aircraft and murder those on board in furtherance of the purposes of the Libyan Intelligence Services and that, in execution of that plan, he had murdered the 259 passengers and crew on board Pan Am Flight 103 and 11 persons on the ground. The Court found that the evidence demonstrated, beyond reasonable doubt, that these allegations were true.

2.12 It is not necessary, for present purposes, to discuss in detail the findings of the Court (which are set out in full in the Opinion). It is sufficient simply to draw attention to two passages, the first summarising the Court’s conclusions on the evidence, the second addressing the guilt of the first accused.

2.13 As regards the evidence before it, the Court held that –

“The clear inference which we draw from this evidence is that the conception, planning and execution of the plot which led to the planting of the explosive device was of Libyan origin. While no doubt organisations such as the PFLP-GC and the PPSF were also engaged in terrorist activities during the same period, we are satisfied that there was no evidence from which we could infer that they were involved in this particular act of terrorism, and the evidence relating to their activities does not create a reasonable doubt in our minds about the Libyan origin of this crime.”<sup>32</sup>

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<sup>31</sup> *Her Majesty’s Advocate v. Abdelbaset Ali Mohamed Al Megrahi and Al Amin Khalifa Fhimah*, Case No.1475/99: United Kingdom Annex 128 (which includes the Opinion and the transcript of the verdict of the Court).

<sup>32</sup> United Kingdom Annex 128, para. 82.

2.14 With regard to the first accused, the Court found that “he was a member of the JSO, occupying posts of fairly high rank”<sup>33</sup> and concluded that –

“... having considered the whole evidence in the case, including the uncertainties and qualifications, and the submissions of counsel, we are satisfied that the evidence as to the purchase of clothing in Malta, the presence of that clothing in the primary suitcase, the transmission of an item of baggage from Malta to London, the identification of the first accused (albeit not absolute), his movements under a false name at or around the material time, and the other background circumstances such as his association with Mr Bollier and with members of the JSO or Libyan military who purchased MST-13 timers, does fit together to form a real and convincing pattern. There is nothing in the evidence which leaves us with any reasonable doubt as to the guilt of the first accused, and accordingly we find him guilty of the remaining charge in the Indictment as amended.”<sup>34</sup>

2.15 Mr Al Megrahi is appealing against his conviction. At the time of filing this Rejoinder, no date had yet been fixed for the hearing of the appeal. The United Kingdom will provide a copy of the decision on the appeal as soon as it is available, together with any observations thereon which may be of assistance to the Court.

*B: Issues of fact in contention*

2.16 The Libyan Reply makes a number of assertions of fact with which the United Kingdom disagrees. Since nothing turns on many of these, the United Kingdom will not take up the Court’s time by replying to each of them. Two issues are, however, of some significance and require brief comment.

2.17 First, the Reply states that the United Kingdom has falsely accused Libya of complicity in the Lockerbie bombing without any evidence and before the question of responsibility for the bombing had been determined at a trial.<sup>35</sup> Libya’s approach is

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<sup>33</sup> United Kingdom Annex 128, para. 88.

<sup>34</sup> United Kingdom Annex 128, para. 89.

<sup>35</sup> Libyan Reply, paras. 1.37 et seq. and 2.11.

based upon a misrepresentation of what the United Kingdom has said. The United Kingdom has made the point on several occasions that the Montreal Convention does not give a State the right to insist upon trying persons accused of a Convention offence when that State is itself *implicated* in the offence. The use of the word “implicated” means that there were good grounds on the evidence available to suspect the involvement of Libya. Of its nature this is not an accusation which can, or should, first be proved at trial; it is a fact which is relevant to where a trial should take place.<sup>36</sup>

2.18 That was understood by the Security Council. In the preamble to resolution 731 (1992),<sup>37</sup> the Council expressed itself –

“Deeply concerned over the results of investigations, which implicate officials of the Libyan Government and which are contained in Security Council documents that include requests addressed to the Libyan authorities by France, the United Kingdom of Great Britain and Northern Ireland and the United States of America in connection with the legal procedures related to the attacks carried out against Pan American Flight 103 and Union de transports aériens flight 772.”

The results of the investigations were clear in, for example, the Statement of Facts produced by the Lord Advocate and given to Libya on 14 November 1991<sup>38</sup> and the Petition of the Procurator Fiscal setting out the charges against the two accused, which expressly charged them with having acted as agents of the Libyan Government and in order to further the purposes of the Libyan Intelligence Services.<sup>39</sup> The details of the evidence on which these accusations rested could not be made known before the trial of the two accused for fear of prejudicing that trial. However, even on the material which was made public before the trial, it is clear that there were good grounds for suspecting that Libya had been involved in the attack.

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<sup>36</sup> United Kingdom Counter-Memorial, paras. 3.104 to 3.121.

<sup>37</sup> United Kingdom Annex 2.

<sup>38</sup> United Kingdom Annex 16.

<sup>39</sup> United Kingdom Annex 17.

**2.19** Although the appeal is still pending, the outcome of the trial confirms those concerns and indicates the evidence on which they are based. The Court found, after a lengthy trial and to a very high standard of proof, that –

- (1) The conception, planning and execution of the plot to destroy Pan Am Flight 103 and murder those on board was of Libyan origin;
- (2) Abdelbaset Ali Mohmed Al Megrahi was a member of the Libyan Intelligence Services occupying posts of fairly high rank; and
- (3) Abdelbaset Ali Mohmed Al Megrahi was responsible for the destruction of the aircraft and the deaths of 270 people.

In the light of these findings, Libya's protestations that there was no basis for suggesting that it might have been responsible for the Lockerbie bombing have a distinctly hollow ring.

**2.20** Secondly, the Reply accuses the United Kingdom of seeking to "demonise" Libya by falsely accusing Libya of links with terrorist organisations and acts. Yet the accusations made by the United Kingdom were based on what Libya's highest officials have themselves said. The record is plain. To take just one example: in its Preliminary Objections, the United Kingdom quoted a statement by Colonel Gadhafi about Libyan relations with the Provisional IRA in which he said, "we support it, terrorism or no terrorism".<sup>40</sup> Libya subsequently admitted links with the Provisional IRA and other groups engaged in terrorist activity which it claimed to have severed.<sup>41</sup> Libya does not (and cannot) deny any of this record and is reduced instead to accusing the United Kingdom of confusing terrorist organisations with national liberation movements when

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<sup>40</sup> United Kingdom Annex 41.

<sup>41</sup> United Kingdom Annexes 55 and 63.

Libya had itself acknowledged that the organisation in question had engaged in terrorist activities.<sup>42</sup>

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<sup>42</sup> Similarly, Libya has itself accepted general responsibility for the killing, in 1984, of WPC Yvonne Fletcher (described in United Kingdom Preliminary Objections, para. 2.17): United Kingdom Annex 129.

## PART 3

### THE SCOPE OF THE PRESENT PROCEEDINGS

#### *A: The effect of the 1998 Judgment*

3.1 The 1998 Judgment of this Court defined the scope of the issues over which the Court has jurisdiction. The United Kingdom had thought that the effect of the 1998 Judgment was not in contention between the Parties.<sup>43</sup> It is now apparent from the Libyan Reply that this is not the case. There are three significant differences between the Parties over the effect of the Judgment.

#### *(1) The Libyan claim regarding alleged threats to use force*

3.2 First, Libya has persisted with its claim against the United Kingdom for allegedly threatening to use force contrary to the Charter of the United Nations and the principles of customary international law.<sup>44</sup> Indeed, Libya now seeks to give this part of its claims greater prominence. The Libyan Memorial described this claim in the following terms –

“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.”<sup>45</sup>

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<sup>43</sup> United Kingdom Counter-Memorial, paras. 1.17 to 1.21.

<sup>44</sup> Reply, paras. 4.3 to 4.17.

<sup>45</sup> Libyan Memorial, para. 8.1(d). “The United Kingdom is under a legal obligation to respect Libya’s right not to have the [Montreal] Convention set aside by means which would in any case be at variance with the principles of the United Nations Charter and with the mandatory rules of general international law prohibiting the use of force and the violation of the sovereignty, territorial integrity, sovereign equality and political independence of States.” (Translation by the Court).

3.3 In its 1998 Judgment, the Court held that Libya's claim regarding the alleged actions of the United Kingdom came within the jurisdiction of the Court only "in so far as those actions would be at variance with the provisions of the Montreal Convention."<sup>46</sup> It is clear, therefore, that allegations of violations of rules of international law other than the provisions of the Montreal Convention are outside the jurisdiction of the Court.

3.4 That is confirmed by the Joint Declaration of Judges Guillaume and Fleischhauer. After quoting paragraph 8.1(d) of the Libyan Memorial, they stated that –

"We recognize that there is a legal dispute between the Parties concerning this point. That dispute, however, falls under Article 14, paragraph 1, of the Montreal Convention and therefore within the jurisdiction of the Court only if, and in so far as, it concerns the interpretation and application of one or more of the provisions of the Convention. The dispute does not fall under Article 14, paragraph 1, and the jurisdiction of the Court if it concerns the interpretation and application of Article 2, paragraph 4, of the Charter of the United Nations."<sup>47</sup>

Similarly, Judge Kooijmans, in his Separate Opinion, remarked that –

"The Court's jurisdiction in my view is confined to the issues just mentioned which are covered by the terms of Article 14, paragraph 1 of the Montreal Convention, viz., the issues of applicability and compliance or non-compliance. In particular, the ways and means by which this non-compliance is practised and the question whether these ways and means are at variance with the Charter of the United Nations and with mandatory rules of general international law do not come within the Court's jurisdiction as consensually agreed upon in Article 14, paragraph 1, of the Convention."<sup>48</sup>

3.5 As these passages from the opinions of three judges who voted in favour of the relevant part of the Court's Judgment indicate, the effect of the Court's ruling is clear – the Court has jurisdiction to determine whether or not the United Kingdom has violated

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<sup>46</sup> *Preliminary Objections Judgment, ICJ Reports 1998*, p. 9 at para. 36.

<sup>47</sup> *ICJ Reports 1998*, p. 9 at p. 50.

<sup>48</sup> *ICJ Reports 1998*, p. 9 at para. 8.

the Montreal Convention; it does not have jurisdiction to determine whether or not the United Kingdom has violated Article 2(4) of the Charter, or the general international law regarding the use of force. Libya itself, however, describes the alleged threats to use force as conduct which, if proved, would be “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” (“at variance with the principles of the United Nations Charter and with the mandatory rules of general international law prohibiting the use of force”)<sup>49</sup> but not with the Montreal Convention. This part of Libya’s claim, therefore, falls outside the jurisdiction of the Court.

3.6 In an attempt to circumvent the Court’s ruling on this point, Libya now argues (in spite of the clear language of its own Memorial) that its claim is solely for an alleged violation of the Montreal Convention.<sup>50</sup> Yet Libya does not point to any provision of the Montreal Convention which could be described as regulating the threat or use of force between States, a matter which is subject to quite distinct rules of international law derived (as Libya correctly stated in its Memorial) from sources other than the Montreal Convention.

3.7 Instead, Libya relies heavily on the decisions of the Court in the *Fisheries Jurisdiction* cases<sup>51</sup> as authority for the proposition that “la jurisprudence de la Cour montre que des actes constitutifs de recours à la force peuvent entrer dans le cadre d’une demande basée sur une clause compromissoire” (“the Court’s case-law shows that acts constituting the use of force may form the subject of an application based upon a compromissory clause”).<sup>52</sup> The question, however, is not whether claims regarding the threat or use of force can ever fall within the scope of a compromissory clause but

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<sup>49</sup> Libyan Memorial, para. 8(1)(d) (translation by the Court).

<sup>50</sup> Libyan Reply, para. 4.6 et seq..

<sup>51</sup> *United Kingdom v. Iceland (Merits)*, ICJ Reports 1974, p. 3 at p. 21; *Federal Republic of Germany v. Iceland (Merits)*, ICJ Reports 1974, p. 175 at p. 203.

<sup>52</sup> Libyan Reply, para. 4.11 (unofficial translation by the United Kingdom).



whether Libya's claim regarding threats to use force falls within the scope of *this* jurisdictional clause, i.e. Article 14(1) of the Montreal Convention.

3.8 The jurisdictional provisions on which the United Kingdom and Germany relied in the *Fisheries Jurisdiction* cases were markedly different from Article 14(1) of the Montreal Convention. The decisions therefore shed little if any light on the issue in the present case. The jurisdiction of the Court in the *Fisheries Jurisdiction* cases was based upon identical provisions in two Exchanges of Notes of 1961, which provided that, should Iceland further extend its fisheries limits, the Court would have jurisdiction with respect to "a dispute in relation to such extension." While that provision limited the subject-matter over which the Court was granted jurisdiction, it did not specify the source of the rights and obligations which might arise in such a dispute. By contrast, Article 14(1) of the Montreal Convention confers jurisdiction only in respect of disputes concerning a certain subject-matter and arising out of a specific legal source, namely the Convention itself.

3.9 Nor does the recent decision of the Court in the *LaGrand* case suggest a different conclusion.<sup>53</sup> The Court there held that Article I of the Optional Protocol to the Vienna Convention on Consular Relations, 1963, conferred jurisdiction in respect of a claim based on the concept of diplomatic protection, notwithstanding that diplomatic protection is a concept of customary international law, not one derived directly from the Vienna Convention.<sup>54</sup> However, the substantive rule which Germany argued had been violated, and in respect of which it brought its diplomatic protection claim, was contained in the Vienna Convention. The present case is entirely different, as the Montreal Convention contains no rules relating to the threat or use of force.

3.10 It follows that Libya's allegations that the United Kingdom threatened to use force can be brought within the jurisdiction of the Court only in so far as they can be shown to constitute violations of the Montreal Convention. The United Kingdom will, in

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<sup>53</sup> *LaGrand case (Germany v. United States of America)*, judgment of 27 June 2001.

<sup>54</sup> *LaGrand case*, para. 42.

any event, demonstrate in Part 6 of this Rejoinder that there is no substance in Libya's claims that it threatened to use force against Libya.

(2) *The dispute regarding the interpretation and application of the Montreal Convention*

3.11 Libya also maintains in its Reply that the 1998 Judgment "n'a pas réduit l'étendue des questions soulevées dans le mémoire libyen" ("did not reduce the scope of the issues raised in the Libyan Memorial").<sup>55</sup> Libya again misunderstands the Court's decision. In its Memorial, Libya claimed that the United Kingdom was in violation of Articles 5(2), 5(3), 7, 8(3)<sup>56</sup> and 11 of the Convention.<sup>57</sup> The Court found that it had jurisdiction over a dispute in relation to the interpretation and application of Article 7 and a dispute in relation to the interpretation and application of Article 11.<sup>58</sup> Paragraph 29 of the Judgment makes clear that the Court considered that Article 7 had to be "read in conjunction with Articles 1, 5, 6 and 8" but that none of those Articles could form the basis for a separate claim. In other words, in order to make good its case, Libya must prove that the United Kingdom is in violation of Article 7 or Article 11.

(3) *The effect of Security Council resolutions 748 (1992) and 883 (1993)*

3.12 Finally, Libya misrepresents the decision of the Court regarding the possible effect of Security Council resolutions 748 (1992) and 883 (1993). In its Reply Libya claims that the Court held that these resolutions were not retrospective and thus did not affect the situation before 31 March 1992, the date on which resolution 748 (1992) was

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<sup>55</sup> Libyan Reply, para. 2.3 (unofficial translation by the United Kingdom).

<sup>56</sup> The Application relies on Article 8(2). No explanation is given by Libya as to why it altered the provision on which it relies.

<sup>57</sup> Libyan Memorial, para. 8.1(c).

<sup>58</sup> *Preliminary Objections Judgment, ICJ Reports 1998*, p. 9 at paras. 29 and 33.

adopted.<sup>59</sup> In fact, the Court's decision regarding the temporal effect of the resolutions was significantly more limited than is claimed.

3.13 In rejecting the United Kingdom claim that the two resolutions meant that the Court lacked jurisdiction and/or rendered the Libyan Application inadmissible, the Court held that the questions of jurisdiction and the admissibility of an application have to be determined as at the date on which the application is filed. If at that date the Court has jurisdiction and the application is admissible, subsequent events will not deprive the Court of that jurisdiction or render the application inadmissible.<sup>60</sup> Those were the only rulings which the Court made regarding the possible temporal effect of the resolutions.

3.14 The Court specifically reserved to the merits phase any decision on whether resolutions 748 (1992) and 883 (1993) rendered the Libyan claim without object. In this regard, the Court recognised that "events subsequent to the filing of an application may 'render the application without object'".<sup>61</sup> The Court set no temporal limit on the potential effects of the resolutions on this point and thus left open the question whether the resolutions rendered the entire application without object. The decision does not, therefore, exclude the possibility that resolutions 748 (1992) and 883 (1993) render the Libyan Application without object even in so far as the Application relates to acts which are said to have occurred before 31 March 1992.

3.15 Nor does the Court exclude the possibility that the two resolutions might afford a substantive defence to Libya's claims even with regard to acts said to have occurred before 31 March 1992. The Judgment is quite simply silent on this point.

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<sup>59</sup> See, in particular, Libyan Reply, para. 1.4.

<sup>60</sup> *Preliminary Objections Judgment, ICJ Reports 1998*, p. 9 at paras. 38-39 and 44-45.

<sup>61</sup> *Preliminary Objections Judgment, ICJ Reports 1998*, p. 9 at para. 46.

*B: The Application is now without object*

(1) *The effect of recent developments on Libya's Application*

3.16 The operative part of Libya's Application instituting proceedings requests the Court to adjudge and declare "that the United Kingdom has breached, and is continuing to breach, its legal obligations to Libya" under various stated provisions of the Montreal Convention.<sup>62</sup> It is clear from the Libyan Reply that Libya no longer maintains the allegation of a continuing breach of the Montreal Convention by the United Kingdom – stating, indeed, that "les actes illicites ont désormais cessé" ("the illegal acts have now ended").<sup>63</sup> The question that then arises is whether the dispute between the Parties of which the Court was seised pursuant to the Libyan Application has been denuded of all practical substance. In other words, in the light of the Camp Zeist arrangements and the trial, has the case, as defined by the Libyan Application, become one of abstract adjudication of claims of only historical significance? If so, considerations of principle, and the authorities on this issue,<sup>64</sup> suggest that the Court, in the exercise of its inherent judicial function, should decline to proceed to judgment on the matter.

3.17 In the United Kingdom's view, that is indeed the position. Reference to the claims advanced by Libya, both in its Application instituting proceedings and in its Memorial, make it plain that a judgment on the matters with which the Court is seised would be entirely academic. At the core of the case is Libya's claim that, under Article 7 of the Montreal Convention, "Libya is obliged to submit the case to its competent authorities for purposes of prosecution" and that "the United Kingdom is attempting to prevent Libya from fulfilling its obligations in this respect in violation of the Convention".<sup>65</sup> Libya also claims that under Article 11(1) of the Montreal Convention,

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<sup>62</sup> Application, at p.10, Section IV, para. (b), quoted at para. 1.2, above.

<sup>63</sup> Libyan Reply, at para. 1.30 (unofficial translation by the United Kingdom).

<sup>64</sup> The Court recognized in its *Preliminary Objections Judgment* that "events subsequent to the filing of an application may 'render the application without object'" (*ICJ Reports 1998*, p. 9 at para. 46).

<sup>65</sup> Application, at p.10, Section III, para. (d).

“the United Kingdom is under an obligation to afford Libya ... the greatest measure of assistance in connection with criminal proceedings brought by Libya in respect of the offences”.<sup>66</sup> As with these principal claims, Libya’s remaining claims are equally focussed on securing a ruling from the Court on what Libya contends are its rights and the United Kingdom’s obligations under the Montreal Convention in respect of the Lockerbie accused.

3.18 Indeed, at the oral hearings on the United Kingdom’s Preliminary Objections, the Agent of Libya expressly stated that Libya’s object in bringing the case was to obtain from the Court a ruling which would remind the Parties of their respective rights and obligations. In his opening speech, he told the Court that “nous avons espéré que notre requête serait comprise dans son sens constructif et qu’il n’y avait rien de déraisonnable à demander que, par une décision, la Cour rappelle à chacun ses droits et ses obligations.”<sup>67</sup>

3.19 It is plain, therefore, that the Camp Zeist arrangements and the transfer by Libya of the accused into the custody of the Scottish authorities for purposes of trial render the Libyan claims without object. There is now no question of Libya exercising jurisdiction over the accused pursuant to Article 7 of the Montreal Convention. The claim that the United Kingdom is obliged to afford Libya the greatest measure of assistance in respect of such proceedings has also become entirely hypothetical. The same is true of the remaining Libyan claims.

3.20 In the *Northern Cameroons* case, the Court declined to proceed to judgment on grounds that circumstances had arisen since the filing of the Application that rendered any adjudication “devoid of purpose”.<sup>68</sup> In the *Nuclear Tests* cases, the Court observed that “[i]t does not enter into the adjudicatory functions of the Court to deal with issues *in*

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<sup>66</sup> Application, at p.10, Section III, para. (f).

<sup>67</sup> “[...] [W]e had hoped that our application would be understood as a constructive measure and that there was nothing unreasonable in the request that, by a decision the Court remind each of their rights and obligations” (CR 97/20, p. 9; para. 1.03 (Mr El-Houderi) (translation by the Court)).

<sup>68</sup> Case concerning *the Northern Cameroons (Cameroon v. United Kingdom)*, Preliminary Objections, ICJ Reports 1963, p. 15 at p. 38.

*abstracto*".<sup>69</sup> While the circumstances of these cases are not exactly identical with those of the present case, the proposition that it is not within the adjudicatory function of the Court to render what in effect would be an advisory opinion in the course of contentious proceedings is nevertheless compelling. Indeed, the present case calls out for the application of that principle to a greater extent than did the *Nuclear Tests* cases. In the *Nuclear Tests* cases, the Court held that the applications by Australia and New Zealand had become moot because France had given an undertaking not to conduct further atmospheric nuclear tests. In the present case, it is events which have already occurred, namely the conclusion of the Camp Zeist arrangements and, as Libya has put it, "the voluntary appearance of the suspects before a Scottish court in the Netherlands", which render further proceedings on the Libyan Application without object, rather than any undertaking as to future conduct.<sup>70</sup> That such events would render the Libyan Application without object was recognized as early as 1992 by Judge *ad hoc* El-Kosheri, who said that –

"In a nutshell, once a forced surrender takes place, the present case related to the interpretation and application of the Montreal Convention will become meaningless, since there will be no more legal issue to be adjudicated."<sup>71</sup>

That is, of course, equally true of a voluntary surrender.

(2) *Libya's attempt to refashion its claim*

3.21 Recognising that the developments since the 1998 Judgment make it difficult to resist the conclusion that the Application is now without object, Libya has sought in the Reply to refashion its claim. Prior to the filing of the Libyan Reply, Libya had made no mention of a claim for damages. On the contrary, its pleadings, both written and oral,

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<sup>69</sup> *Nuclear Tests (Australia v. France)*, ICJ Reports 1974, p. 253 at p. 271, para. 59; *Nuclear Tests (New Zealand v. France)*, ICJ Reports 1974, p. 457 at p. 477, para. 61.

<sup>70</sup> Libyan Reply, at para. 1.15.

<sup>71</sup> Case concerning *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libya v. United Kingdom) (Provisional Measures)*, ICJ Reports 1992, p. 3 (hereinafter "*Provisional Measures Order*"); dissenting Opinion of Judge *ad hoc* El-Kosheri at p. 110, para. 56.

suggested that the object of its Application was far removed from such a claim.<sup>72</sup> Now, however, the Court is told that it is because of the need to found a subsequent claim for damages that establishment by the Court of Libya's rights and the United Kingdom's alleged violations of the Convention is necessary. Moreover, Libya assures the Court that it is this factor which distinguishes the present case from the *Northern Cameroons*<sup>73</sup> and *Nuclear Tests*<sup>74</sup> cases –

“Une constatation par la Cour des droits de la Libye et des violations corrélatives de la convention de Montréal par les défendeurs est nécessaire pour fonder une réclamation ultérieure en réparation. C'est ce qui distingue la présente espèce des affaires du *Cameroun septentrional* et des *Essais nucléaires*.”<sup>75</sup>

**3.22** Libya is not entitled, at this late stage of the proceedings, to add an entirely new claim. As the Court has recently stated –

“Paragraph 1 of Article 40 of the Statute of the Court requires moreover that the ‘subject of the dispute’ be indicated in the Application; and, for its part, paragraph 2 of Article 38 of the Rules of Court requires ‘the precise nature of the claim’ to be specified in the Application. In a number of instances in the past the Court has had occasion to refer to these provisions. It has characterized them as ‘essential from the point of view of legal security and the good administration of justice’ and, on this basis, has held inadmissible new claims, formulated during the course of proceedings, which, if they had been entertained, would have transformed the subject of the dispute originally brought before it under the terms of the Application (*Certain Phosphate Lands in Nauru (Nauru v. Australia)*, *Preliminary Objections, Judgment, I.C.J. Reports 1992*, pp. 266-267; see also *Prince von Pless Administration, Order of 4 February 1933, P.C.I.J., Series A/B, No. 52*, p. 14 and *Société Commerciale de Belgique, Judgment, 1939, P.C.I.J., Series A/B, No. 78*, p. 173).”<sup>76</sup>

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<sup>72</sup> See, e.g., the statement by the Libyan Agent at the 1997 hearings: para. 3.18, above.

<sup>73</sup> *ICJ Reports 1963*, p. 15 at pp. 37-8.

<sup>74</sup> *ICJ Reports 1974*, p. 253 at pp. 269-272 (*Australia v. France*) and p. 457 at pp. 475-77 (*New Zealand v. France*).

<sup>75</sup> “Establishment by the Court of Libya's rights and the corresponding violations the Montreal Convention by the Respondents is needed in order to found a subsequent claim for damages. This is what distinguishes the present case from the *Northern Cameroons* and *Nuclear Tests* cases” (Libyan Reply, para. 1.31; unofficial translation by the United Kingdom).

<sup>76</sup> *Fisheries Jurisdiction (Spain v. Canada)*, *ICJ Reports 1998*, p. 432 at para. 29.

3.23 The decisions there cited concerned attempts to introduce new claims in the Memorial of the Applicant State. The principle applies with even greater force to an attempt to introduce a new claim in the Reply. The Memorial is supposed to constitute a comprehensive statement of the claim. The purpose of the Reply and the Rejoinder, which are in any event not automatic pleadings but ones which require the authorisation of the Court, is to bring out the issues that still divide the Parties, not to introduce new issues between them.<sup>77</sup> Moreover, if an Applicant were permitted to introduce a new claim after the filing of its Memorial, there would be a fundamental departure from the principle of equality of arms, because the Rules of Court require a Respondent to lodge any counter-claim when it deposits its Counter-Memorial.<sup>78</sup>

3.24 A claim for damages in respect of alleged past violations of the Montreal Convention is radically different from a claim for declaratory relief in respect of what are said to be continuing violations of the Convention; and obtaining reparation is a wholly different purpose for the proceedings from that hitherto advanced. While Libya cannot have been expected to foresee all of the developments in the case, if it has indeed suffered "dommages matériels et moraux,"<sup>79</sup> then they are not something novel which has only occurred in the period since 1993 and there is no reason why Libya could not have claimed reparation in its Application or, at the latest, in its Memorial. Libya cannot now be allowed to add a claim for damages after the deadline for filing a counter-claim has passed and seven years after it filed its Memorial.

3.25 Two further considerations are relevant here. First, Libya gives no indication whatever of what are the damages which it claims to have suffered. The bald assertion, in paragraph 1.30 of the Reply, that there has been such damage is nowhere supported by any evidence as to its nature, cause or extent. Quite simply, the United Kingdom is given no idea of the claim that it might have to meet. The claim could not relate to the effect of the sanctions imposed by resolutions 748 (1992) and 883 (1993), because any damage

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<sup>77</sup> Rules of Court, Article 49(3).

<sup>78</sup> Rules of Court, Article 80(2).

<sup>79</sup> Libyan Reply, para. 1.30.



caused by sanctions imposed by the United Nations Security Council could not be the responsibility of a single Member State. Libya has nowhere referred to any other damages which it might have sustained.

3.26 Secondly, Libya appears to have added this last minute claim for reparation in order to give the proceedings a *raison d'être*. Libya recognizes, at paragraphs 1.30 to 1.31 of its Reply, that developments since the 1998 Judgment of the Court have removed the original purpose of the proceedings. In an attempt to stave off a decision, based on the principle identified in *Northern Cameroons* and *Nuclear Tests*, that the proceedings are now without object, Libya seeks to add this new claim for damages in order to breathe life back into them. Libya's Reply admits, in effect, that without the claim for damages which it seeks to add the case would not be distinguishable from *Northern Cameroons* and *Nuclear Tests* and would therefore have to be dismissed. That is all the more reason for the Court to rule the attempt to add the new claim inadmissible. It would be contrary to principle, to authority and to the orderly management of the Court's docket for a litigant to be allowed to use the Reply to refashion its claim so as to rescue it from the effects of a clearly established rule of law.

## PART 4

### THE INTERPRETATION AND APPLICATION OF THE MONTREAL CONVENTION

4.1 On 27 August 1998, the United Nations Security Council adopted resolution 1192 (1998) calling upon the United Kingdom and the Netherlands to take such steps as are necessary to implement an initiative put before it “for the trial of the two persons charged with the bombing of Pam Am flight 103 (‘the two accused’) before a Scottish Court sitting in the Netherlands”.<sup>80</sup> Pursuant to the terms of this resolution, the United Kingdom and the Netherlands concluded the arrangements necessary for such a trial at Camp Zeist in the Netherlands.

4.2 In its Reply, Libya contends that the transfer of the two accused for trial before the Scottish Court at Camp Zeist “apparaissant comme une manière d’appliquer la convention de Montréal” (“appears to be a way of applying the Montreal Convention”) insofar as it was “une interprétation raisonnable de la convention afin d’assurer la comparution des suspects devant un tribunal pénal” (“a reasonable interpretation of the Convention in order to ensure that the suspects appear before a criminal court”).<sup>81</sup> The United Kingdom takes a different view. The arrangements concluded between the United Kingdom and the Netherlands for the establishment of the Scottish Court at Camp Zeist, and the subsequent trial of the two accused pursuant to these arrangements, must be seen in the context of Security Council resolution 1192 (1998). While not inconsistent with the terms of the Montreal Convention, the Camp Zeist arrangements established a *sui generis* mechanism in fulfilment of the decision of the Security Council, rather than in implementation of a specific provision of the Montreal Convention. The difference in the appreciation of the Parties on this point is not, however, material for purposes of the interpretation and application of the substantive provisions of the Convention.

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<sup>80</sup> United Kingdom Annex 87, at paragraphs 2 and 3.

<sup>81</sup> Libyan Reply, paras. 2.2 and 1.29 respectively (unofficial translation by the United Kingdom).

*A: The Significance of Libya being Implicated in the Lockerbie Bombing*

4.3 It has been the United Kingdom's position throughout that the fact that Libya was implicated in the Lockerbie bombing has consequences for the application of the Montreal Convention. That was the case even before the decision of the Scottish Court in the criminal trial. The outcome of the trial confirms that position. Whatever the outcome of the appeal in the criminal case, and whatever nuance of interpretation Libya may be able to bring to bear on the allegation of its complicity in the bombing, the unanimous findings of a panel of three senior judges in the course of a criminal trial with a high threshold of proof confirms that the United Kingdom was acting neither capriciously nor in bad faith in referring the matter of the bombing to the United Nations Security Council, and in refusing to accept Libya's claim to be an appropriate forum for the trial of the two accused.

4.4 While disputing the existence of such evidence, Libya, in its Reply, implicitly acknowledges that if there were evidence of Libyan complicity in the bombing of Pan Am Flight 103, that would support both the United Kingdom's interpretation of the Montreal Convention and its reference of the matter to the United Nations Security Council. Thus, dismissing peremptorily the United Kingdom's argument that Libya, as a State implicated in a Convention offence, cannot rely on the Montreal Convention to found rights under Articles 7 and 11 of that Convention, Libya observed as follows –

“... cet argument ne mérite pas de réponse très longue dès lors qu'il n'est nullement démontré que la Libye est en quoi que ce soit impliquée dans la tragédie de Lockerbie. Le Royaume-Uni reconnaît d'ailleurs ce fait mais n'en poursuit pas moins une démonstration qui ne tient que *si l'on accepte pour prémisse que la Libye est à l'origine de l'incident de Lockerbie ...*”<sup>82</sup>

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<sup>82</sup> “... this argument does not merit a very long response since it has by no means been demonstrated that Libya is in any way implicated in the Lockerbie tragedy. The United Kingdom acknowledges this fact, moreover, but nonetheless seeks to demonstrate it in a way which holds good *only if one accepts as the initial premise that Libya was behind the Lockerbie incident ...*” Libyan Reply, para. 2.11 (unofficial translation by the United Kingdom; emphasis added).

4.5 This statement effectively concedes that, if it could be shown that Libya was implicated in the Lockerbie bombing, the Montreal Convention could not be construed so as to found the rights that Libya claims under the Convention.

4.6 Libya makes a similar concession in respect of the United Kingdom's argument on Article 7 of the Montreal Convention that, even if Article 7 is capable of conferring a right as claimed by Libya, Libya, as a State which is implicated in the very offence which is in issue, cannot possess such a right.<sup>83</sup> Addressing this contention, Libya observes as follows –

“L'argument est identique à celui déjà évoqué plus haut, à savoir que rien n'empêcherait les États parties à la convention de Montréal de s'efforcer d'arrêter les auteurs de faits visés par celle-ci en se fondant sur un autre instrument que la convention (*supra* § 2.8). La réponse à cet argument se trouve ici aussi dans les principes de l'application de bonne foi des traités, de l'interdiction de l'abus de droit, de la *lex specialis* et de l'*electa una via* (*supra* §§ 2.9/10). *L'argument ne serait acceptable que s'il était dûment prouvé que la Libye avait été impliquée dans l'incident de Lockerbie, preuve qui, faut-il le répéter encore et encore, n'a toujours pas été rapportée.*”<sup>84</sup>

4.7 Here too, Libya appears to accept that, in so far as Libyan complicity in the bombing can be shown, the United Kingdom's interpretation of Article 7 of the Montreal Convention would have substance.

4.8 Libya also acknowledges the force of this United Kingdom argument in respect of the interpretation and application of Article 11 of the Montreal Convention. Addressing the United Kingdom's argument that, given the allegation of Libyan involvement in the acts in question and the commencement of criminal proceedings against the two accused

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<sup>83</sup> United Kingdom Counter-Memorial, para. 3.51.

<sup>84</sup> “The argument is the same as that already set out above, namely that there is nothing to bar States parties to the Montreal Convention from seeking to arrest offenders under the Convention on the basis of an instrument other than the Convention (paragraph 2.8 above). The response to that argument is also to be found in the principles of the performance of treaties in good faith and the prohibition on the unfair use of the law, of *lex specialis* and of *electa una via* (paragraphs 2.9/10 above). *The argument would only be acceptable if it were duly proved that Libya had been implicated in the Lockerbie incident, proof which, it must be said again and again, has not been provided.*” Libyan Reply, para. 2.21 (unofficial translation by the United Kingdom; emphasis added).

in Scotland, the United Kingdom was entitled to refuse assistance to Libya,<sup>85</sup> Libya observes as follows –

“Ce type d’argument est fondé sur la présomption récurrente que la Libye est responsable de l’incident de Lockerbie. Sans preuve, l’argument n’est qu’un slogan sans valeur juridique (cf. *supra* § 2.11).”<sup>86</sup>

4.9 As these statements by Libya demonstrate, there is a compelling logic to the argument that the Montreal Convention cannot be relied upon by a State implicated in a Convention offence to found a right to try the accused in its own courts and to require the greatest measure of assistance from other States in doing so. As the United Kingdom observed in its Counter-Memorial, for the Court to hold that, in the circumstances of this case, the Montreal Convention confers upon Libya the right to insist on a trial of the two accused in its own courts, would be to create a loophole in the Convention of the greatest magnitude.<sup>87</sup> This assessment applies equally in respect of Libya’s claim to the greatest measure of assistance from the United Kingdom in respect of such criminal proceedings.

4.10 Libya’s sole argument in respect of these contentions is that Libyan complicity in the Lockerbie bombing had not been proved. Beyond this, the substance of the United Kingdom’s arguments is not addressed. While the trial of the two accused did not directly address the question of Libyan responsibility for the bombing as a matter of international law, and without prejudice to the outcome of Mr Al Megrahi’s appeal against conviction, the findings of the Scottish Court confirm, at the very least, that there were good grounds for the United Kingdom to suspect that Libya was involved in the bombing. Moreover, in its Application instituting proceedings, Libya requested the Court to adjudge and declare *inter alia* that it had fully complied with its obligations under the

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<sup>85</sup> United Kingdom Counter-Memorial, para. 3.85.

<sup>86</sup> “An argument of this type is based on the recurring presumption that Libya is responsible for the Lockerbie incident. Without proof, the argument is just a slogan without any legal value (see paragraph 2.11 above).” Libyan Reply, para. 2.37 (unofficial translation by the United Kingdom).

<sup>87</sup> United Kingdom Counter-Memorial, para. 3.106.

Montreal Convention.<sup>88</sup> Libya expanded upon this request in its Memorial, asking the Court to adjudge and declare –

“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.”<sup>89</sup>

4.11 The formulation of this submission has changed in Libya’s Reply. Libya now requests the Court to adjudge and declare simply that “la Libye a pleinement rempli ses obligations au regard de la convention de Montréal”.<sup>90</sup>

4.12 As the United Kingdom observed in its Counter-Memorial, this case is not about Libya’s claim to rights in the abstract.<sup>91</sup> It is a contentious case brought by Libya against the United Kingdom alleging a breach of the Montreal Convention by the United Kingdom. It is not a case initiated by the United Kingdom against Libya concerning allegations of violation of the Montreal Convention by Libya. It would not therefore be appropriate for the Court to declare in some generalised form that Libya has complied fully with all of its obligations under the Convention. Nor, it may be added, would the Court be in a position to come to such a conclusion on the basis of the material presented as part of the record in this case.

4.13 This appreciation is particularly important in the light of the finding of the Scottish Court that the first accused, Mr Al Megrahi, convicted of murder on account of the bombing, was a member of the Libyan Jamahiriya Security Organisation (“JSO”), occupying posts of fairly high rank.<sup>92</sup> As the United Kingdom observed in its Counter-

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<sup>88</sup> Application, 3 March 1992, p.10, Section IV.

<sup>89</sup> “... that Libya has fully complied with all of its obligations under the Montreal Convention and is justified in exercising criminal jurisdiction provided for by that Convention.” Libyan Memorial, para. 8.1(b) ( translation by the Court).

<sup>90</sup> “... that Libya has fully complied with its obligations under the Montreal Convention”. Libyan Reply, Submissions, para. I(d) (unofficial translation by the United Kingdom).

<sup>91</sup> United Kingdom Counter-Memorial, para. 3.4.

<sup>92</sup> *Her Majesty’s Advocate v. Abdelbaset Ali Mohamed Al Megrahi and Al Amin Khalifa Fhimah*, Case No.1475/99, Opinion of the Court, 31 January 2001, para. 88: United Kingdom Annex 128.

Memorial, the principal objective of the Montreal Convention is to prevent and deter unlawful attacks against civil aviation.<sup>93</sup> The scope of the Convention is broadly cast, both *ratione personae* and *ratione materiae*. Contracting States are enjoined to take all practicable measures for the purpose of preventing the offences mentioned in Article 1 of the Convention. Implicit in the obligation to prevent the offences mentioned in Article 1, as well as in the text and scheme of the Convention more generally, is an obligation not to commit the offences in question. While the present case is not about Libya's responsibility under the Montreal Convention for the acts of its high ranking security official, it is certainly not a case in which some generalised declaration by the Court of Libyan compliance with all of its obligations under the Montreal Convention would be appropriate.

*B: The Issues of Substance concerning the Interpretation and Application of the Montreal Convention that still Divide the Parties*

4.14 Turning to the issues of substance concerning the interpretation and application of the Montreal Convention that still divide the Parties, it may assist the Court to set out in summary form the essence of the position of the Parties for purposes of determining where the differences between them lie.

4.15 As the United Kingdom noted in its Counter-Memorial,<sup>94</sup> the Court held, in its *Preliminary Objections Judgment* of 27 February 1998, that it had jurisdiction in respect of the following disputes between the Parties:

- (a) the applicability of the Montreal Convention between the Parties in the circumstances of the present case;<sup>95</sup>
- (b) the interpretation and application of Article 7 of the Montreal Convention, read in conjunction with Articles 1, 5, 6 and 8 of the Convention;<sup>96</sup>

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<sup>93</sup> United Kingdom Counter-Memorial, paras. 3.12 and 3.25 to 3.33.

<sup>94</sup> United Kingdom Counter-Memorial, para. 1.17.

<sup>95</sup> *Preliminary Objections Judgment*, ICJ Reports 1998, p. 9 at para. 25.

<sup>96</sup> *Preliminary Objections Judgment*, ICJ Reports 1998, p. 9 at para. 29.

(c) the interpretation and application of Article 11 of the Montreal Convention;<sup>97</sup> and

(d) the question of whether the actions of the United Kingdom criticised by Libya are at variance with the provisions of the Montreal Convention.<sup>98</sup>

4.16 Insofar as the last of these elements concerns the Libyan allegation against the United Kingdom of the threat of force, it is addressed separately below. That apart, within the scheme of these heads of jurisdiction, the United Kingdom's position can be summarised as follows:

(a) the Montreal Convention is applicable in circumstances in which a Contracting State is implicated in the commission of an act to which Article 1 of the Convention refers. The Montreal Convention is therefore applicable in the circumstances of the present case;<sup>99</sup>

(b) the Montreal Convention is, however, only one part of the wider panoply of international law that may be applicable to incidents that come within the scope of the Convention. Other international agreements and rules of customary international law may also be relevant. Within this scheme, the United Nations Charter occupies a position of special importance;<sup>100</sup>

(c) while the Montreal Convention is applicable in circumstances in which a Contracting State is implicated in the commission of a Convention offence, a State so implicated cannot rely on the Convention in order to found a right to try those accused of committing the offence in its own courts or to require that other

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<sup>97</sup> *Preliminary Objections Judgment, ICJ Reports*, p. 9 at para. 33.

<sup>98</sup> *Preliminary Objections Judgment, ICJ Reports*, p. 9 at para. 36.

<sup>99</sup> United Kingdom Counter-Memorial, para. 3.1.

<sup>100</sup> United Kingdom Counter-Memorial, para. 3.44.



Contracting States afford it the greatest measure of assistance in respect of such a proposed prosecution;<sup>101</sup>

(d) separately, and in the alternative, Article 7 of the Montreal Convention does not confer a *right* upon a State having custody of the accused to submit the case to its own competent authorities for the purposes of prosecution; it imposes an *obligation* upon it to do so in circumstances in which it does not extradite the accused;<sup>102</sup>

(e) even if, however, Article 7 did create a right upon which Libya was entitled to rely, none of the actions of the United Kingdom of which Libya complains constitutes a breach of any obligation of the United Kingdom under the Convention;<sup>103</sup>

(f) in respect of Article 11 of the Montreal Convention, even if this did create a right upon which Libya was entitled to rely, it would only have given rise to an obligation on the part of the United Kingdom once it was clear that jurisdiction was properly to be exercised by Libya. In other words, Article 11 is not a self-standing obligation that operates in the abstract simply requiring a State to hand over its docket on a case notwithstanding a dispute as to the exercise of jurisdiction in the case in question;<sup>104</sup>

(g) in any event, paragraph 2 of Article 11 permitted the United Kingdom to refuse assistance to Libya in this case given the allegation of Libyan involvement in the acts in question and the fact that criminal proceedings had already been initiated against the two accused in Scotland.<sup>105</sup>

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<sup>101</sup> United Kingdom Counter-Memorial, paras. 3.2, 3.9, 3.51, 3.85, 3.104 – 3.121.

<sup>102</sup> United Kingdom Counter-Memorial, paras. 3.49 – 3.50.

<sup>103</sup> United Kingdom Counter-Memorial, paras. 3.52 – 3.61.

<sup>104</sup> United Kingdom Counter-Memorial, paras. 3.84, 3.86 – 3.91.

<sup>105</sup> United Kingdom Counter-Memorial, paras. 3.85, 3.92 – 3.103.

4.17 In respect of these contentions of the United Kingdom, Libya's position can be summarised as follows –

(a) there is no dispute between the Parties that the Montreal Convention applies in circumstances in which a Contracting State is implicated in the commission of a Convention offence. The Parties agree, therefore, that the Montreal Convention is applicable in the circumstances of the present case;

(b) Libya, however, disputes that the Montreal Convention is part of the broader framework of international law which may be applicable to incidents that come within the scope of the Convention. In Libya's view, the Montreal Convention is both *lex specialis* and an *electa via* in respect of offences coming within its scope and it should be applied as such in good faith to the exclusion of the United Nations Charter and appeal to the Security Council.<sup>106</sup>

Libya's position on this matter appears, however, to be subject to an important caveat insofar as it seems to concede that reliance on the United Nations Charter would not be an abuse of right where there was good reason for doing so. This is apparent from Libya's assessment that "[I]a convention [de Montréal] apparaissant alors tant comme une *lex specialis* que comme une *electa via* par rapport à la Charte des N.U. qu'invoquent les défendeurs, ceux-ci commettaient un abus de droit en 'court-circuitant' l'application normale de la convention *sans raison décisive*."<sup>107</sup> This statement of course invites the response that the United Kingdom referred the matter to the Security Council with very good reason. It was in possession of evidence which gave good grounds for suspecting that Libya was involved in the bombing of Pan Am Flight 103;

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<sup>106</sup> Libyan Reply, para. 2.10.

<sup>107</sup> "As the [Montreal] Convention appeared to be both a *lex specialis* and an *electa via* in relation to the United Nations Charter relied on by the Respondents, the latter were guilty of unfair use of the law by 'short-circuiting' normal application of the Convention *without good reason*." Libyan Reply, para. 2.10 (unofficial translation by the United Kingdom; emphasis added).

(c) as regards the United Kingdom's contention that, as Libya was implicated in the bombing, it was not entitled to rely on the Montreal Convention in order to found a right to try the accused in its own courts, nor to require United Kingdom assistance in respect of such a proposed prosecution, Libya rejects the point peremptorily without any substantive analysis.<sup>108</sup> The reason for this approach is, however, revealing since, as has already been noted,<sup>109</sup> Libya appears not to dispute the basic proposition of law but only that "il n'est nullement démontré que la Libye est en quoi que ce soit impliquée dans la tragédie de Lockerbie."<sup>110</sup> However, the proposition that Libya could not rely on the Convention would, it appears from Libya's Reply, hold good if one "accepte pour prémisse que la Libye est à l'origine de l'incident de Lockerbie".<sup>111</sup> This acknowledgement is repeated subsequently, notably in response to the proposition that Article 7 of the Montreal Convention did not preclude reference of the matter to the Security Council, where Libya stated "[l]'argument ne serait acceptable que s'il était dûment prouvé que la Libye avait été impliquée dans l'incident de Lockerbie".<sup>112</sup>

Needless to say, the United Kingdom contends that, from the outset (namely, 13 November 1991 when the Statement of Facts and the Petition charging the two accused with the Lockerbie bombing were issued<sup>113</sup>) there were good grounds to suspect Libya of complicity in the bombing. The findings of the Scottish Court highlighted above in respect of the conviction of the first accused confirm this;

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<sup>108</sup> Libyan Reply, para. 2.11.

<sup>109</sup> See para. 4.5, above.

<sup>110</sup> "... it has by no means been demonstrated that Libya is in any way implicated in the Lockerbie tragedy." Libyan Reply, para. 2.11 (unofficial translation by the United Kingdom).

<sup>111</sup> "... accepts as the initial premise that Libya was behind the Lockerbie incident". Libyan Reply, para. 2.11 (unofficial translation by the United Kingdom).

<sup>112</sup> "[t]he argument would only be acceptable if it were duly proved that Libya had been implicated in the Lockerbie incident". Libyan Reply, para. 2.21 (unofficial translation by the United Kingdom).

<sup>113</sup> United Kingdom Annexes 16 and 17 respectively.

(d) as regards the United Kingdom's contention that Article 7 of the Montreal Convention does not confer a *right* upon a State to prosecute the accused but rather imposes upon it an *obligation* to do so in circumstances in which it does not extradite the accused, Libya broadly repeats its earlier arguments contending *inter alia* that Article 7 embodies a right that Libya should not be hindered in the performance of its duty;<sup>114</sup>

(e) Libya further contends, although without detailed elaboration in its Reply, that the actions of the United Kingdom violated what Libya asserts is its right under Article 7;<sup>115</sup>

(f) as regards the United Kingdom's contention that Article 11 of the Montreal Convention could only have given rise to an obligation on the part of the United Kingdom once it was clear that jurisdiction was properly to be exercised by Libya, Libya rejects the argument, although in doing so it mischaracterises the argument in a way that suggests that the relevant point was not fully understood;<sup>116</sup>

(g) finally, as regards the United Kingdom's reliance on Article 11(2) and the relevant Scottish law to permit it to refuse assistance to Libya in this case, Libya rejects the argument on the ground that the obligation in Article 11(1) should be performed in good faith.<sup>117</sup> Libya appears, however, to acknowledge that proof of complicity in the bombing would materially alter this appreciation.<sup>118</sup>

**4.18** As this summary of the position of the Parties shows, but for one element, there is a wide and seemingly unbridgeable gulf between them. The one element of possible agreement between the Parties appears to be that evidence of the involvement of a

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<sup>114</sup> Libyan Reply, para. 2.18.

<sup>115</sup> Libyan Reply, para. 2.18.

<sup>116</sup> Libyan Reply, paras. 2.31 – 2.32.

<sup>117</sup> Libyan Reply, paras. 2.37 – 2.40.

<sup>118</sup> Libyan Reply, para. 2.37.

Contracting State in the commission of a Convention offence would preclude that State from relying on the Convention to found a right to try the accused before its own courts and require the assistance of other States in doing so. As, however, Libya has failed to engage fully on this point, contending simply that no such evidence has been provided, the United Kingdom assumes that, notwithstanding the findings of the Scottish Court, it is highly unlikely that what appears to be agreement on the principle in the abstract will translate into real agreement in the circumstances of this case.

4.19 Of the various elements that still divide the Parties, Libya's allegations against the United Kingdom in respect of Articles 7 and 11 of the Montreal Convention warrant further brief comment.

(1) *The allegation that the United Kingdom violated Libya's rights under Article 7 of the Montreal Convention*

4.20 The allegation that the United Kingdom has violated Libya's right under Article 7 of the Montreal Convention hinges fundamentally on an appreciation that Article 7 does indeed embody a right on which Libya is entitled to rely. Responding to the arguments in the United Kingdom's Counter-Memorial, Libya maintains, first, that in conferring on States a choice of whether to extradite or prosecute, Article 7 in fact confers on States a right to choose between the two obligations. Secondly, Libya maintains that the obligation to prosecute in circumstances in which it chose not to extradite carried with it a right not to be hindered in the performance of that obligation. Thirdly, Libya contends that, read together with Article 8(3) of the Convention, which provides that extradition shall be subject to the conditions provided for by the law of the requested State, Article 7 confers upon States the right to act within the limits of their domestic law.<sup>119</sup>

4.21 To the extent that Article 7 does establish a right on which Libya is entitled to rely, Libya contends that the United Kingdom is in violation of that right insofar as, by seeking to oblige Libya to extradite the suspects, it deprived Libya of the choice inherent

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<sup>119</sup> Libyan Reply, para. 2.18.

in the right.<sup>120</sup> Libya further contends that, in referring the matter to the United Nations Security Council, the United Kingdom acted in violation of the principle of good faith in the performance of treaties and the prohibition on abuse of right.<sup>121</sup>

**4.22** These issues can be addressed briefly. First, the United Kingdom maintains that, even assuming that Article 7 establishes a right as claimed by Libya, Libya is not entitled to rely on the right as claimed, since there is, and has been from the outset, evidence of Libyan involvement in the Lockerbie bombing. A finding by the Court that Libya was indeed entitled to rely on Article 7 to insist on trying the accused in its own courts would fundamentally undermine the object and purpose of the Montreal Convention. As has been observed, there is well-founded evidence of Libyan involvement in the offence. There can be no basis in the Montreal Convention for a State implicated in the commission of a Convention offence to rely on the Convention for the very purpose of defeating the object and purpose of the Convention.

**4.23** Secondly, even assuming that Article 7 establishes a right as claimed by Libya on which Libya is entitled to rely, the United Kingdom maintains that it has done nothing which can be characterised as a violation of that right. This issue is addressed in detail in the United Kingdom's Counter-Memorial and needs no further repetition at this point.<sup>122</sup> Rhetoric apart, Libya has failed to show that any action by the United Kingdom amounts to a violation of any obligation of the United Kingdom under the Montreal Convention.

**4.24** Thirdly, on the question of the submission of the matter to the Security Council, as has already been observed, the United Kingdom contends that the Montreal Convention is part of the framework of international law that may be applicable to all incidents that come within its scope. It does not, and cannot, oust the Charter of the United Nations, or create some closed circuit of law, exclusively relevant to acts that come within the scope of the Convention. The notion that the Montreal Convention (and,

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<sup>120</sup> Libyan Reply, para. 2.18.

<sup>121</sup> Libyan Reply, para. 2.21.

<sup>122</sup> United Kingdom Counter-Memorial, paras. 3.52 – 3.61.

by implication, all of the other numerous bilateral and multilateral treaties on various aspects of international life) constitutes *lex specialis* which therefore prevails over the United Nations Charter is contrary to the scheme of the Charter, the primacy which it gives to the maintenance of international peace and security and the express terms of Article 103. That notion is also contrary to legal principle (and common sense), for its effect would be to allow any two or more States to neutralise the Security Council simply by concluding a treaty of a specialised character between themselves.

4.25 Nor can the act of taking to the Security Council a situation which threatens international peace and security possibly constitute a violation of any multilateral treaty. Indeed, Libya itself appears to recognise this insofar as it seems to concede that reliance on the United Nations Charter may be warranted if there is good reason.<sup>123</sup>

4.26 There is ample evidence of Libyan complicity in the bombing for the United Kingdom to have referred the matter to the Security Council. There is nothing to support the Libyan claim that the United Kingdom acted either in bad faith or abused its right as a Member of the United Nations when it referred the matter to the Security Council.

4.27 Fourthly, the United Kingdom maintains its contention that Article 7 cannot be read as conferring the right as claimed by Libya. This matter is addressed fully in the United Kingdom's Counter-Memorial and needs no further comment here.<sup>124</sup>

(2) *The allegation that the United Kingdom violated Libya's rights under Article 11 of the Montreal Convention*

4.28 The allegation that the United Kingdom violated Libya's rights under Article 11 of the Montreal Convention by failing to afford Libya the greatest measure of assistance in connection with its proposal to try the accused in Libya was addressed in detail in the United Kingdom's Counter-Memorial.<sup>125</sup> The arguments need not be rehearsed here. A number of brief observations are, however, warranted.

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<sup>123</sup> Libyan Reply, para. 2.10.

<sup>124</sup> United Kingdom Counter-Memorial, paras. 3.49 – 3.50.

<sup>125</sup> United Kingdom Counter-Memorial, paras. 3.62 – 3.103.

4.29 First, as with Libya's claim under Article 7, the United Kingdom contends that, given the evidence pointing to Libyan complicity in the bombing, Libya cannot rely on Article 11 to found a right to assistance from the United Kingdom in respect of its proposal to try the accused before its own courts. In the circumstances, a trial of the accused in Libya would have defeated the object and purpose of the Convention. Article 11 cannot be relied upon by Libya to compel the United Kingdom to assist in this endeavour.

4.30 Secondly, the evidence pointing to Libyan complicity in the bombing provided good grounds for the United Kingdom to refuse assistance to Libya in this case, consistently with the terms of paragraph 2 of Article 11, on the basis of the relevant Scottish law on the question of judicial assistance. As was shown in the United Kingdom's Counter-Memorial,<sup>126</sup> the relevant principles permit the Scottish authorities to refuse assistance *inter alia* on political, security or national interest grounds. As was further noted in the Counter-Memorial,<sup>127</sup> where, in accordance with these guidelines, and on the basis of enquiries carried out on his behalf, the Lord Advocate has reason to suspect that the requesting State is itself implicated in the crime in question, he would be failing in his duty to uphold the law if he were to disclose to the authorities of that State material which would otherwise be confidential to the Public Prosecutor. To the extent that the crime in question involved a terrorist act of significant magnitude, with good grounds for suspecting State complicity, security considerations will also be material.

4.31 Libya, in its Reply, fails to address this point in any meaningful way, asserting simply that the United Kingdom's contention "est fondé sur la présomption récurrente que la Libye est responsable de l'incident de Lockerbie."<sup>128</sup> That, indeed, was the thrust of the evidence. The weight of this evidence is now confirmed by the findings of the Scottish Court. This is not a point that Libya can simply brush aside without any argument of substance.

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<sup>126</sup> United Kingdom Counter-Memorial, paras. 3.92 to 3.103.

<sup>127</sup> United Kingdom Counter-Memorial, para. 3.102

<sup>128</sup> "... is based on the recurring presumption that Libya is responsible for the Lockerbie incident." Libyan Reply, para. 2.37 (unofficial translation by the United Kingdom).



4.32 Thirdly, Libya appears to have misunderstood the argument that Article 11 could only have given rise to an obligation on the part of the United Kingdom once it was clear that jurisdiction was properly to be exercised by Libya. In its Reply, Libya asserts that this reasoning –

“revient à dire que la reconnaissance de la violation d’une règle est toujours subordonnée à une première phase procédurale où le juge devrait se prononcer sur l’applicabilité de la règle avant de pouvoir ouvrir une seconde phase où il se prononcerait sur son éventuelle violation.”<sup>129</sup>

This is not, however, the United Kingdom’s case. The argument is plain enough. It is that, in circumstances in which there is a dispute as to the exercise of jurisdiction – given that the Montreal Convention provides no basis for reconciling competing claims to jurisdiction – Article 11 will only operate when the issue of the exercise of jurisdiction is resolved.

4.33 In the present case, assuming for these purposes that Libya was entitled to exercise jurisdiction, both Libya and the United Kingdom could validly claim jurisdiction. In such circumstances, Article 11 cannot be read as requiring the greatest measure of assistance until such time as the issue of which State was to exercise jurisdiction was resolved.

(3) *The temporal dimension of Libya’s claims under the Montreal Convention*

4.34 Distinct from, and in the alternative to, the preceding arguments which go to the interpretation of Articles 7 and 11 of the Montreal Convention, a further aspect of Libya’s claims under the Montreal Convention warrants comment. Addressing resolution 748 (1992) of 31 March 1992, and the subsequent decisions of the Security Council

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“... amounts to saying that recognition of the violation of a rule is always contingent on an initial procedural phase, in which the court must rule on the applicability of a rule before initiating a second phase in which it rules on its possible violation.” Libyan Reply, para. 2.32 (unofficial translation by the United Kingdom).

adopted under Chapter VII of the Charter, Libya contends that, whatever the effect of these decisions, they cannot have retrospective effect.<sup>130</sup> Thus, Libya argues –

“[m]ême si [résolution 748 (1992)] possède les effets juridiques que prétendent les défendeurs, elle ne peut affecter la recevabilité des réclamations libyennes durant la période qui s’étend 3 au 31 mars 1992.”<sup>131</sup>

Libya goes on to contend that the pre- and post-31 March 1992 time-frame is significant as –

- avant le 31 mars 1992, la violation de la convention de Montréal par les défendeurs engage leur responsabilité *indépendamment* de la portée et des effets des résolutions du Conseil de sécurité;
- après le 31 mars 1992, la violation de la convention de la Montréal par les défendeurs continue d’engager leur responsabilité, *au vu* de la portée et des effets qu’il convient d’attribuer aux résolutions du Conseil de sécurité.”<sup>132</sup>

4.35 The inference apparently to be drawn from this analysis – which is not developed elsewhere in Libya’s pleadings concerning the Montreal Convention – is that, even if Libya’s claims fail in respect of the period following the adoption of resolution 748 (1992) on 31 March 1992, in consequence of that resolution, the claims subsist in respect of the period prior to this date.

4.36 The interpretation and effect of the various resolutions of the Security Council on obligations arising under the Montreal Convention are addressed in Part 5 below. It is, however, convenient to make one or two observations at this point concerning the

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<sup>130</sup> Libyan Reply, paras. 0.2 and 1.4.

<sup>131</sup> “Even if [resolution 748 (1992)] does have the legal effects which the Respondents claim, it cannot affect the admissibility of the Libyan claims during the period 3 to 31 March 1992.” Libyan Reply, para. 1.6 (unofficial translation by the United Kingdom).

<sup>132</sup> “– before 31 March 1992 violation of the Montreal Convention by the Respondents renders them responsible *irrespective* of the scope and effects of the Security Council resolutions;

– after 31 March 1992, violation of the Montreal Convention by the Respondents continues to render them responsible, *in view* of the scope and effects which should be attributed to the Security Council resolutions.” Libyan Reply, para. 1.14 (unofficial translation by the United Kingdom).

temporal dimension of Libya's claims insofar as this is relevant to the application of Articles 7 and 11 of the Montreal Convention.

4.37 Distinct from any argument going to the interpretation of Articles 7 and 11 of the Montreal Convention, a consideration of whether the United Kingdom violated Libya's rights under the Convention cannot ignore developments in the Security Council. This is as relevant to the period prior to 31 March 1992 as it is to the period subsequent to that date.

4.38 Following the publication of the charges against the two accused on 14 November 1991, and in the absence of any satisfactory response from Libya to the requests for their surrender, the United Kingdom and the United States raised the matter in the Security Council. By 7 January 1992, the possibility of action by the Council had been discussed informally with the representatives of all the members of the Council. A draft resolution, prepared after discussion between the five permanent members of the Council, calling on Libya to provide a full and effective response *inter alia* to the requests for the surrender of the accused, was circulated informally to all members of the Council on 10 January 1992.<sup>133</sup>

4.39 On 11 January 1992, in correspondence with the International Civil Aviation Organisation, Libya first made reference to the Montreal Convention.<sup>134</sup>

4.40 On 21 January 1992, the Security Council unanimously adopted resolution 731 (1992). In paragraph 2 of that resolution, the Council strongly deplored the fact that Libya had not responded effectively to the requests by the United Kingdom, the United States and France to co-operate fully in establishing responsibility for the terrorist acts against Pan Am Flight 103 and UTA Flight 772. In paragraph 3, the Council "*urge[d]*

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<sup>133</sup> United Kingdom Counter-Memorial, para. 4.15.

<sup>134</sup> United Kingdom Counter-Memorial, para. 4.16.

the Libyan Government immediately to provide a full and effective response to those requests so as to contribute to the elimination of international terrorism”<sup>135</sup>

4.41 While resolution 731 (1992) was not binding under the Charter, it was not without legal effect. Pursuant to paragraph 4 of the resolution, the United Nations Secretary-General undertook consultations with the Libyan authorities. Paragraph 5 of the resolution urged all States to encourage Libya to respond effectively to the requests for co-operation in establishing responsibility *inter alia* for the bombing of Pan Am Flight 103. While Libya was not at this point under a binding obligation to hand over the two accused for trial, the terms of resolution 731 (1992), and of the underlying documents to which it referred, left no doubt that a trial of the two accused in Libya was not acceptable.<sup>136</sup>

4.42 While not binding, the terms of resolution 731 (1992) are material to a consideration of the legality of the actions of the United Kingdom from this point. It cannot be a violation of Article 7 of the Montreal Convention to seek to persuade Libya to do what the Security Council had called upon Libya to do, particularly as the Council had explicitly urged all States to enjoin Libya to respond fully and effectively to the requests for the surrender of the accused. Nor can it be a violation of Article 11 of the Convention for the United Kingdom to decline to supply evidence to Libya for purposes of a trial there when the Council had indicated that the trial should take place elsewhere. The fact that Libya was engaged in talks with the representative of the United Nations Secretary-General between the dates of the adoption of resolution 731 (1992), on 21 January 1992, and of resolution 748 (1992), on 31 March 1992, and that those talks turned on the possibility of a trial outside Libya, reinforces the conclusion that there can have been no breach of Article 11 of the Montreal Convention.

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<sup>135</sup> United Kingdom Counter-Memorial, para. 4.17.

<sup>136</sup> This element is developed further in the United Kingdom's Counter-Memorial, paras. 4.37 – 4.41.

4.43 In the light of this assessment, the United Kingdom contends that Libya's attempt to finesse its claims under the Montreal Convention by distinguishing between the periods before and after the adoption of resolution 748 (1992) cannot have the consequences that Libya claims. Resolution 731 (1992) endorsed the request for the surrender of the accused for trial before a Scottish or United States court. It expressed deep concern over the results of the criminal investigation which had implicated officials of the Libyan Government. It implicitly ruled out a trial of the accused in Libya. Given the doubt as to the application of Articles 7 and 11 of the Montreal Convention in the circumstances of the present case, action by the United Kingdom consistent with the terms of resolution 731 (1992) cannot amount to a violation of these provisions.

## PART 5

### THE INTERPRETATION AND EFFECTS OF SECURITY COUNCIL RESOLUTIONS 731 (1992), 748 (1992), 883 (1993) AND 1192 (1998)

5.1 With regard to the interpretation and effects of the Security Council resolutions, the Libyan Reply largely repeats the arguments already made by Libya to which the United Kingdom has responded in detail in Part 4 of the Counter-Memorial. It is clear that the United Kingdom and Libya remain divided over the interpretation of the resolutions, as well as their effects. The only new material advanced by Libya is its attempt to reconcile the text of resolution 1192 (1998) with the convoluted interpretation it has already offered of the earlier Security Council resolutions.

#### *A: Interpretation of the resolutions*

5.2 Libya repeats its argument that resolutions 731 (1992),<sup>137</sup> 748 (1992)<sup>138</sup> and 883 (1993)<sup>139</sup> did not require it to surrender the two accused for trial before a United Kingdom or United States court but merely to offer a variety of means by which the two accused could be brought to trial somewhere. On this basis, Libya maintains that it had complied with the requirements of the resolutions long before the adoption of resolution 1192 (1998).<sup>140</sup> The United Kingdom has addressed this issue in paragraphs 4.9 to 4.61 of its Counter-Memorial and reaffirms what it said on that occasion. Libya makes little reference to the arguments there advanced.

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<sup>137</sup> United Kingdom Annex 2.

<sup>138</sup> United Kingdom Annex 3.

<sup>139</sup> United Kingdom Annex 4.

<sup>140</sup> United Kingdom Annex 87.

5.3 Setting to one side, for the present, the effect of resolution 1192 (1998) (which is considered at paragraphs 5.13 to 5.15, below), the Libyan interpretation of the resolutions faces, and fails to overcome, numerous problems.

5.4 First, Libya's interpretation cannot be reconciled with the text of the resolutions. In particular, Libya offers no adequate explanation of how its interpretation can be reconciled with paragraph 16 of resolution 883 (1993). In its Reply, Libya quotes only an extract from that paragraph. The full text provided that the Security Council –

“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); and requests the Secretary-General, within 90 days of each suspension, to report to the Council on Libya's compliance with the remaining provisions of its resolutions 731 (1992) and 748 (1992) and, in the case of non-compliance, expresses its resolve to terminate immediately the suspension of these measures.”

5.5 As the United Kingdom explained in its Counter-Memorial,<sup>141</sup> this paragraph makes clear what the Council considered Libya had to do to comply with the decisions of the Council. In particular, contrary to what Libya has argued, the reference back to the “requests ... in resolution 731 (1992)” demonstrates that the Security Council required Libya to comply with those requests and that its compliance was a condition of suspending or lifting the sanctions against Libya.

5.6 In its Reply, Libya seeks to explain paragraph 16 away by repeating its earlier argument that the paragraph merely provides that certain actions on the part of Libya would lead to the automatic lifting of sanctions, but that it did not exclude the possibility of sanctions being lifted in other circumstances.<sup>142</sup> In fact, paragraph 16 does not mention the possibility of sanctions *automatically* being lifted in any circumstances.

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<sup>141</sup> United Kingdom Counter-Memorial, paras. 4.52 to 4.54.

<sup>142</sup> Libyan Reply, para. 3.8.

What it says is that if Libya ensured the appearance of the two accused for trial before the appropriate United Kingdom or United States court and took certain other steps, the Council would *review* the measures. The indication is plain that the Council was ready to review the measures only if Libya took the steps specified in paragraph 16 and, which is more significant, that the decisions of the Council required Libya to take all of these steps.

5.7 Nor is there any force in Libya's argument <sup>143</sup> that the reference, in paragraph 16 of resolution 883 (1993), to Libya having "ensured the appearance" of the accused showed that Libya was not required to surrender them. This argument is the worst kind of semantics. The voluntary appearance of the two accused before the appropriate United Kingdom or United States court would obviously have satisfied the Council's requirement that they stand trial there. That had been clear throughout. What is important for present purposes, however, is that if the two accused did not choose to appear voluntarily, the Council required Libya to surrender them.

5.8 Secondly, Libya's interpretation of the resolutions is incompatible with that of some fifty States which were members of the Council between 1992 and 1998. While Libya maintains that it had complied with the decisions of the Council, those States evidently thought otherwise, for the periodic sanctions reviews brought no initiative from any member of the Council to lift sanctions on the ground that Libya had already complied.

5.9 Thirdly, Libya's interpretation of resolution 748 (1992) is not the interpretation which it placed on that resolution at the time. As pointed out in the Counter-Memorial,<sup>144</sup> Libya then attacked the resolution, both in the Council <sup>145</sup> and in its submissions to the

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<sup>143</sup> Libyan Reply, para. 3.8.

<sup>144</sup> United Kingdom Counter-Memorial, paras. 4.58 to 4.60.

<sup>145</sup> See the Libyan representative's speech to the Security Council, United Kingdom Annex 11, pp. 19-22.



Court <sup>146</sup> on the ground that the Security Council was requiring it to do exactly what it now claims the resolution manifestly did not require. In its Reply, Libya seeks to explain this embarrassing fact away by saying that –

“La première lecture que la Libye a pu faire de la résolution 748 ne peut, à elle seule, en déterminer la portée. C’est seulement l’analyse rigoureuse du texte, des travaux préparatoires, etc., à laquelle a procédé ensuite la Libye qui permet de déterminer cette portée.” <sup>147</sup>

This explanation is wholly unconvincing. Libya’s rigorous analysis of the text and *travaux préparatoires* of resolution 748 (1992), which was adopted on 31 March 1992, did not prevent its representative from criticising what became resolution 883 (1993) in the Security Council debate on 11 November 1993. In the course of his speech the Libyan representative made no mention of Libya’s ingenious interpretation of resolution 748 (1992) even though this would have been an obvious occasion to mention it and even though Libya, having had over a year and a half to study resolution 748 (1992), must have developed this interpretation by then. <sup>148</sup>

5.10 Finally, the passages in the Security Council debates which Libya quotes (more than a little selectively) do not support the interpretation which it now advances of those resolutions. <sup>149</sup> For example, Libya quotes part of the statement made by Brazil at the time of adoption of resolution 883 (1993) but there is no hint in the passage quoted that Brazil shared Libya’s interpretation of the resolution for which it had just voted. On the contrary, Brazil (in a part of its statement which Libya did not quote) referred to the situation under consideration as exceptional and as justifying exceptional measures and said that –

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<sup>146</sup> Letter of 7 April 1992 to the Court, responding to the invitation of the Court to make submissions regarding the effect of resolution 748 (1992).

<sup>147</sup> Libyan Reply, para. 3.7 (unofficial translation by the United Kingdom).

<sup>148</sup> United Kingdom Annex 12, especially p. 23 et seq.. See also the statement at United Kingdom Annex 72, quoted in United Kingdom Counter-Memorial, para. 4.34.

<sup>149</sup> Libyan Reply, para. 3.9.

“... the imposition of sanctions must always be linked to the performance of limited, concrete and very specific acts that are mandatory by decisions of the Security Council. Such acts must be specifically set out by the Council so that the State on which sanctions are imposed may be able to know in advance, and beyond all doubt, that the sanctions will be lifted as soon as those specific requirements are met. This was the view we expressed, in connection with operative paragraph 16 of the resolution, in the consultations undertaken by the sponsors, and it is the view we shall take when it comes to the practical application of that paragraph.”<sup>150</sup>

The reference to paragraph 16 as laying down the specific requirements which Libya had to meet shows that Brazil clearly understood the resolution as requiring that Libya (*inter alia*) ensure the appearance of the two accused before the appropriate United Kingdom or United States court and comply in full with the requests in resolution 731 (1992). Brazil's statement not only lends no support to Libya's interpretation of resolution 883 (1993), it contradicts it.

**5.11** Similarly, the statements of the other Security Council members who spoke in the debate contradict the Libyan interpretation of resolution 883 (1993). Thus, France said that –

“It is almost 20 months since the Security Council requested, in resolutions 731 (1992) and 748 (1992) that [Libya] ... hand over the two suspects in the attack on Pan Am 103...”<sup>151</sup>

Spain stated –

“...the Libyan authorities must comply with the provisions of paragraph 16 of resolution 883 (1993), just adopted, and in particular must do everything necessary to ensure that the two persons charged with the bombing of Pan Am flight 103 do indeed appear before the Scottish courts...”<sup>152</sup>

Venezuela commented that it –

“was heartened when, as noted in the seventh preambular paragraph of resolution 883 (1993), the Government of Libya stated its intention to encourage those charged with the bombing of Pan Am flight 103 to appear for trial and its

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<sup>150</sup> United Kingdom Annex 12, pp. 49-50.

<sup>151</sup> Ibid., p. 42.

<sup>152</sup> Ibid., p. 58.

willingness to cooperate with the French authorities in elucidating the case of the bombing of UTA flight 772.

“Unfortunately, those charged did not appear. This fact, together with the lack of a full and effective response to the requests and decisions contained in Security Council resolutions 731 (1992) and 748 (1992), has led the Council to adopt today’s resolution, which provides for new and more drastic measures. The purpose of these measures is to demonstrate the international community’s firm resolve to punish those guilty of committing acts of terrorism.”<sup>153</sup>

**5.12** It is also noticeable that in the debate on resolution 883 (1993) there is not a single suggestion by a Security Council member that Libya had already complied with the requirements of the earlier resolutions. On the contrary, several States made express reference to Libya’s failure to comply with those resolutions.<sup>154</sup> Not a single State said that it considered that Libya was not required to surrender the two accused for trial before a United Kingdom or United States court.

**5.13** As the United Kingdom explained in Part 5 of its Counter-Memorial, resolution 1192 (1998)<sup>155</sup> confirms the United Kingdom’s interpretation of the earlier Security Council resolutions.<sup>156</sup> Libya’s response to the analysis there set out is to suggest that the fact that the Council, in paragraph 1 of resolution 1192, demanded that Libya comply with resolutions 731 (1992), 748 (1992) and 883 (1993), demonstrated that those resolutions did not require Libya to surrender the two accused for trial before a United Kingdom or United States court. Libya purports to find some support for this interpretation in statements made to the Security Council by the representatives of the

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<sup>153</sup> Ibid., pp. 61-62.

<sup>154</sup> See, e.g., the statements by France (p. 43), referring to the “evident bad faith of the Libyan authorities” and the way in which they had been “systematically evasive”; Spain (p. 56), stating that “Libya has not fully complied with the demands set forth in Security Council resolutions 731 (1992) and 748 (1992)”; Hungary (pp. 59-60) which stated that the reason for the adoption of Resolution 883 (1993) was “Libya’s failure, despite persistent efforts by the Secretary-General, the countries members of the Arab League, and other States concerned, to comply with resolutions 731 (1992) and 748 (1992)”; and Japan (p. 63), which stated that “Libya has failed to comply with the Security Council’s requirements and has continuously tried to avoid its international obligations through equivocation and delay”

<sup>155</sup> United Kingdom Annex 87.

<sup>156</sup> United Kingdom Counter-Memorial, paras. 5.9 to 5.13.

United States of America and Portugal that the provisions of resolution 1192 were based on the earlier decisions of the Council.<sup>157</sup>

5.14 Neither the text nor the *travaux préparatoires* of resolution 1192 (1998) support the Libyan interpretation. It is absolutely correct that resolution 1192 was based upon the earlier decisions of the Council. It did, however, modify those decisions by calling upon the United Kingdom and the Netherlands to make provision for the establishment of a tribunal which would not otherwise have existed, namely the Scottish Court sitting in the Netherlands without a jury, and placed Libya under an obligation to ensure the appearance of the accused before that court. Paragraph 8 of resolution 1192, which provided that the Council –

“Reaffirms that the measures set forth in its resolutions 748 (1992) and 883 (1993) remain in effect and binding on all Member States, and in this context reaffirms the provisions of paragraph 16 of resolution 883 (1993), and decides that the aforementioned measures shall be suspended immediately if the Secretary-General reports to the Council that the two accused have arrived in the Netherlands for the purpose of trial before the court described in paragraph 2 *or have appeared for trial before an appropriate court in the United Kingdom or the United States ...*”<sup>158</sup>

makes clear that the Council considered that its earlier resolutions required Libya to surrender the two accused for trial before a United Kingdom or United States court.

5.15 What Libya wholly fails to address in its comments on resolution 1192 (1998) is the fact that this unanimous decision of the Council expressly and unequivocally finds that Libya had not complied with the decisions of the Council up to that point. The demand in paragraph 1 of the resolution and the warning, in paragraph 9, that further measures might be taken if Libya persisted in its non-compliance cannot be reconciled with Libya’s interpretation of resolution 1192.

5.16 Libya also seeks, in paragraphs 3.29 to 3.32 of its Reply, to bolster its case regarding the interpretation of the four Security Council resolutions by arguing that the

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<sup>157</sup> Libyan Reply, para. 3.13.

<sup>158</sup> United Kingdom Annex 87 (emphasis added).

Court must interpret the resolutions in such a way as to comply with the principles of the United Nations Charter. Libya argues that the resolutions cannot be interpreted as requiring it to surrender the two accused for trial because the Council lacks the power to impose such a requirement. As has already been seen, Libya is advancing an interpretation of the resolutions which cannot be reconciled with their wording, the history of their adoption or the interpretation placed upon them by other States and the subsequent actions of the Security Council. In reality, its invitation to the Court to adopt Libya's "reading" of those resolutions by relying on the principles of the United Nations Charter is an argument that the Council has a general power of judicial review of the validity of resolutions of the Security Council, not an argument of interpretation at all. The United Kingdom has already shown that no such power exists and will not repeat its arguments here.<sup>159</sup>

**5.17** In any event, this Libyan argument is based upon a false premise. Libya's case here rests upon the assumption that the Council lacks the power, when acting under Chapter VII of the Charter, to require a State to act in a way which departs from that State's rights under customary international law or treaty. That is not the case.

**5.18** As the United Kingdom has demonstrated in its Counter-Memorial,<sup>160</sup> Chapter VII of the Charter gives the Security Council broad powers to adopt the measures which it considers necessary to address a threat to the peace, breach of the peace or act of aggression. Those measures may require States to take actions which would normally be contrary to their rights or obligations under other international agreements. Provision for the priority of Charter obligations is made in Article 103 of the Charter. Moreover, the Council has on several occasions imposed requirements which prevail over rights and obligations under other treaties. For example, resolution 820 (1993) expressly provided that the obligation of the Danube States to give effect to the various Council decisions on

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<sup>159</sup> United Kingdom Counter-Memorial, paras. 4.97 to 4.173.

<sup>160</sup> Paras. 4.202 to 4.220.

the former Yugoslavia prevailed over other international agreements on Danube navigation.<sup>161</sup>

5.19 In determining the scope of the powers of the Security Council acting under Chapter VII of the Charter, it is important to have regard to the practice of the Council in the use of its powers. As the United Kingdom has pointed out,<sup>162</sup> the Council has adopted a number of resolutions specifying the place of trial for persons accused of offences listed in international conventions, notwithstanding the provisions of those conventions regarding the principle *aut dedere aut judicare*. Thus, the United Kingdom referred to the resolutions creating the International Criminal Tribunals for Former Yugoslavia<sup>163</sup> and Rwanda,<sup>164</sup> which require States to hand over for trial before those tribunals persons accused of offences under, e.g., the Genocide Convention and the 1949 Geneva Conventions. Libya seeks to explain these resolutions away by saying that they refer to the prosecution before international tribunals of offences under international law.<sup>165</sup> While that is, of course, true, it is not the point. Like the Montreal Convention, the 1949 Geneva Conventions each contain provisions requiring a State either to try persons found on its territory who are accused of grave breaches of those Conventions or, if that State prefers, to hand such persons for trial to another State.<sup>166</sup> On Libya's analysis of the corresponding provisions of the Montreal Convention, the State in whose territory such suspects are found has the right to choose between trial and extradition.

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<sup>161</sup> Resolution 820 (1993), para. 17.

<sup>162</sup> United Kingdom Counter-Memorial, paras. 4.202 to 4.220.

<sup>163</sup> Resolution 827 (1993).

<sup>164</sup> Resolution 955 (1994).

<sup>165</sup> Reply, para. 3.21.

<sup>166</sup> For example, Article 146(2) of the Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War (75 UNTS (1950) 287) provides that –

“Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered the commission of, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts. It may also, if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another High Contracting Party concerned, provided such High Contracting Party has made out a *prima facie* case.”

Yet resolution 827 (1993), for example, overrides that choice and requires each State to surrender suspects for trial before the International Criminal Tribunal, irrespective of the provisions of that State's own legislation. The fact that the trial will take place before an international tribunal, not a national court of another State, and the offence charged is an international crime<sup>167</sup> does not alter the fact that the Security Council has required a State to do something (surrender an accused for trial) when the Convention permitted it to deal with the matter in a different way (by trying the accused itself). If Libya's analysis of the powers of the Council in the present case were correct, the Council had no power to take this action in the case of the two international criminal tribunals.

**5.20** Moreover, the Council has required States to surrender persons for trial in another country notwithstanding the provisions of an international agreement. Libya itself refers<sup>168</sup> to resolution 1267 (1999) on the attacks on United States embassies in Nairobi and Dar-es-Salaam. In that resolution, as Libya accepts, the Security Council –

*“Demands that the Taliban turn over Usama bin Laden without further delay to appropriate authorities in a country where he has been indicted, or to appropriate authorities in a country where he will be returned to such a country, or to appropriate authorities in a country where he will be arrested and effectively brought to justice.”*<sup>169</sup>

Libya attempts to read this resolution as including, as one possible course which might be taken, the trial of Usama bin Laden in Afghanistan itself. Yet the text of the paragraph quoted clearly envisages his surrender to another country, not his trial in Afghanistan.

**5.21** Once it is realised that the powers of the Security Council are not limited in the way suggested by Libya – and the consequences, if they are so limited, would include the invalidity of the resolutions creating the two international criminal tribunals – then it is apparent that Libya's last argument regarding the meaning of resolutions 731 (1992), 748 (1992), 883 (1993) and 1192 (1998) must be dismissed, quite apart from the other reasons for its rejection.

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<sup>167</sup> That description could also be applied to violations of the Montreal Convention.

<sup>168</sup> Reply, para. 3.25.

<sup>169</sup> Resolution 1267 (1999), para. 2.

*B: The effects of the Security Council decisions*

5.22 The United Kingdom considers that it is clearly established, and not seriously contested by Libya, that a valid decision of the Security Council, adopted under Chapter VII of the United Nations Charter, imposes legal obligations which bind those States to whom it is addressed. Moreover, the effect of Article 103 of the Charter is that the obligation to comply with that decision prevails over conflicting obligations arising under any other international agreement.<sup>170</sup> Libya's argument that the Montreal Convention must take priority over the Charter on the ground that it is *lex specialis* and *lex posterior* is incompatible with the clear language of Article 103 as well as the overall structure of the Charter.

5.23 Once it is accepted, therefore, that resolutions 748 (1992), 883 (1993) and 1192 (1998) are valid and binding decisions of the Security Council, it is manifest that the obligation to comply with them prevails over the obligations of both Libya and the United Kingdom under the Montreal Convention in the event of a conflict.

5.24 Libya has argued<sup>171</sup> that, if the resolutions require Libya to surrender the accused for trial, they are contrary to the United Nations Charter and that the Court can declare them invalid. The United Kingdom has replied to that argument in detail in paragraphs 4.62 to 4.221 of its Counter-Memorial. Libya has not raised these issues again in any detail in its Reply and the United Kingdom will not, therefore, repeat the arguments which it has already put before the Court but will confine itself to reaffirming those arguments and responding to the new points raised by the Libyan Reply.

5.25 First, Libya seeks to develop an argument that the powers of the Council under Chapter VII of the Charter cannot be used to settle a dispute which can be settled under Chapter VI.<sup>172</sup> This argument misses the point that Chapter VII is the cornerstone of the

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<sup>170</sup> *Provisional Measures Order, ICJ Reports 1992*, p. 3 at para. 39.

<sup>171</sup> Libyan Memorial, paras. 6.44 et seq.

<sup>172</sup> Libyan Reply, para. 3.19. This section of the Reply is principally addressed to the United States of America, so the United Kingdom will not deal with it in detail.



entire structure of collective security in the Charter. It gives the Council a wide power to take whatever measures the Council considers necessary for the maintenance and restoration of international peace and security. Chapter VI does not limit the powers of the Council under Chapter VII and the scope of Chapter VII is not defined by reference to what is included or excluded from the scope of Chapter VI. Again, the practice of the Security Council over a considerable period of time is instructive in this regard.

**5.26** In exercising its powers under Chapter VII, the Council has frequently taken decisions which require a State to take particular actions in respect of matters over which it is in dispute with another State or States. For example, Security Council resolution 687 (1991), adopted in the aftermath of the Gulf conflict, determined that the boundary between Iraq and Kuwait was that set out in an agreement of 1963 between those States and required them to respect that boundary, notwithstanding that this issue was the subject of a dispute between the two States.<sup>173</sup> Resolution 687 also reaffirmed that Iraq was liable to pay compensation to those who had suffered loss as a direct result of Iraq's invasion of Kuwait and established a mechanism (the United Nations Compensation Commission) by which that liability was to be discharged.<sup>174</sup> Similarly, the various resolutions on the situation in the former Yugoslavia required the States of the region to respect the independence of each of the States which had emerged from the former Yugoslavia within the boundaries which had existed prior to the dissolution of the Socialist Federal Republic of Yugoslavia ("SFRY"), notwithstanding the disputes between those States. The Council also took decisions regarding questions of succession to the former SFRY, a matter which was the subject of several disputes between those States.<sup>175</sup>

**5.27** The possibility that the disputes in question might have been capable of settlement under Chapter VI did not preclude the Council from taking measures in respect of them under Chapter VII when it considered that to do so was necessary in order to deal with a

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<sup>173</sup> Resolution 687 (1991), para. 16.

<sup>174</sup> *Ibid.*, para. 16.

<sup>175</sup> For example, resolutions 757 (1992) and 777 (1992).

threat to peace and security. To hold otherwise would seriously handicap the Council in the discharge of its primary responsibility for the maintenance of international peace and security.

**5.28** Secondly, as explained above, Libya misunderstands the United Kingdom's reference to the resolutions of the Security Council establishing the International Criminal Tribunals for Former Yugoslavia and Rwanda.<sup>176</sup> The United Kingdom referred to those resolutions in its Counter-Memorial<sup>177</sup> for the purpose of demonstrating that the Security Council has on several occasions imposed a requirement that persons accused of particular crimes should be tried before a particular tribunal, even though there are in place multilateral agreements which make different provision for bringing suspects to trial.

**5.29** Thirdly, Libya fails to appreciate the significance of the various resolutions of the Security Council and the General Assembly regarding terrorism which it discusses in paragraphs 3.25 to 3.28 of the Reply. Those resolutions establish both that terrorism is widely regarded as a threat to international peace and security and that Libya's allegation that it was singled out for special treatment is untrue. Some of these resolutions and, in particular, resolution 1267 (1999) which required the Taliban regime in Afghanistan to surrender Usama bin Laden for trial, again show that the Council has imposed requirements relating to criminal trial notwithstanding the provisions of other international agreements. As explained above, the suggestion by Libya that the Taliban could comply with resolution 1267 by prosecuting Usama bin Laden in Afghanistan is fanciful and cannot be reconciled with the text of the resolution.

**5.30** Finally, the Libyan Reply contains a brief section repeating Libya's earlier arguments regarding the powers of the Court with regard to resolutions of the Council.<sup>178</sup> This does not add anything to the arguments in the Libyan Memorial and the United

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<sup>176</sup> Libyan Reply, para. 3.21.

<sup>177</sup> United Kingdom Counter-Memorial, paras. 4.203 to 4.220.

<sup>178</sup> Libyan Reply, paras. 3.29 to 3.32.

Kingdom will merely recall its extensive treatment of this issue in the Counter-Memorial.<sup>179</sup>

5.31 In summary, the United Kingdom submits that the meaning of the Security Council resolutions is clear, notwithstanding Libya's ingenuity in trying to create an interpretation which it admits did not occur to its government at the time those resolutions were adopted. The only natural interpretation of the resolutions and the only one for which there is any support in the practice of the Security Council or the statements of its members is that the Council required Libya, *inter alia*, to ensure that the two accused appeared for trial before a United Kingdom or United States court.

5.32 The effect of the resolutions on the present proceedings is also clear. The requirement that Libya comply with the decisions of the Council prevails over any rights or obligations which it might otherwise have had under the Montreal Convention and thus renders the present proceedings without object.

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<sup>179</sup> United Kingdom Counter-Memorial, paras. 4.100 to 4.173.

## PART 6

### LIBYA'S ALLEGATIONS OF THREATS TO USE FORCE

6.1 Libya has made allegations that the United Kingdom threatened to use force against it during 1991 and 1992 on previous occasions.<sup>180</sup> Those allegations have always been wholly unfounded and always seemed to be rhetoric which was peripheral to the Libyan case. Consequently, at the oral hearings before the Court in 1997, the United Kingdom gave Libya the opportunity to withdraw those allegations.<sup>181</sup> Libya chose not to do so but repeated its allegations and has done so again in Chapter IV of its Reply. The United Kingdom regrets that Libya has chosen to make these baseless and highly offensive allegations but, Libya having done so, the United Kingdom considers that it must respond, although, for the reasons given in Part 3 of this Rejoinder, the United Kingdom considers that these allegations fall outside the jurisdiction of the Court in the present case. Fortunately, that response can be brief, because the Libyan case on this point is manifestly unfounded.

6.2 First, it is necessary to consider what conduct might constitute a threat to use force. Although the concept of a threat is not defined in international law,<sup>182</sup> Brownlie's description of it as "an express or implied promise by a government of a resort to force conditional on acceptance or non-acceptance of certain demands of that government"<sup>183</sup> is widely accepted. Secondly, it must be realised that an allegation that a State has

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<sup>180</sup> Application; Libyan Memorial, paras. 7.1 to 7.5.

<sup>181</sup> CR 97/21, pp. 51-4.

<sup>182</sup> The Court's Advisory Opinion on *Legality of the Threat or Use of Nuclear Weapons* states that whether or not "a signalled intention to use force if certain events occur" constitutes a threat under Article 2(4) of the Charter depends upon various factors, *ICJ Reports 1996*, p. 225 at p. 246, para. 47.

<sup>183</sup> *International Law and the Use of Force by States* (1963), p. 364.

threatened to use force in breach of its international obligations is one of the utmost gravity which has to be based upon solid evidence.<sup>184</sup>

6.3 The material on which Libya relies comes nowhere near the level of solid evidence of the existence of a promise – express or implied – on the part of the United Kingdom Government to use force against Libya. Much of the material quoted by Libya consists of press reports which do not even purport to report statements from the United Kingdom Government. For example, two brief reports by economic correspondents that “fears of military action in the Gulf, or against Libya, drove investors into the dollar, the traditional safe haven”,<sup>185</sup> have no evidential value whatever. Speculation about what the motives of investors might have been does not even begin to constitute evidence that a government has done anything, let alone something as serious as threatening the use of force.

6.4 The only evidence of United Kingdom Government statements or actions which Libya has put before the Court consists of two statements. The first is an answer by a British minister to a Parliamentary question, in which the minister stated –

“I have never made any reference to the use of force. I have said here and elsewhere that we seek to persuade the Government of Libya to comply with our request that the two people should be brought to trial before the courts either of Scotland or the United States. We hope that we shall secure a United Nations resolution underpinning that request. We hope the Government of Libya will comply. Clearly, if they do not, we shall have to consider our next step. I’ve not suggested force. I have ruled nothing in and I rule nothing out.”<sup>186</sup>

This statement does not even begin to amount to “an express or implied promise ...of a resort to force.” It expressly excludes any reference to force at the time. The last sentence, on which Libya relies for its entire argument, does no more than state that, if

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<sup>184</sup> Thus, in the *Case concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, ICJ Reports 1986, p. 14, the Court held that reports of United States military exercises near the Honduras-Nicaragua border were not sufficient to sustain allegations by Nicaragua of a threat to use force.

<sup>185</sup> Libyan Reply, para. 4.24.

<sup>186</sup> Libyan Memorial, Annex 80.

Libya did not comply with the request for surrender of the two accused, the Government would consider what to do next and then contains the scarcely surprising statement that nothing had been ruled out at that time. The second is a statement attributed in a press report to a Foreign and Commonwealth Office official,<sup>187</sup> that “nothing would be being ruled out [sic]”. This statement also made no mention of force and adds nothing to the statement by the minister.

6.5 On that slenderest of foundations Libya rests its entire argument regarding the United Kingdom’s alleged threats of force to Libya. There is nothing else; no suggestion of military preparations or exercises (of the kind found insufficient to constitute a threat in the *Nicaragua* case), of direct statements to Libya, or warnings to third countries to avoid Libyan territory.

6.6 The United Kingdom at no time during the long history of the Lockerbie tragedy threatened, or even contemplated the threat of, force against Libya and it is a matter of record that no military action was taken despite Libya’s prolonged refusal to comply with the United Kingdom’s requests and the requirements of the Security Council. Libya’s arguments to the contrary are wholly unfounded.

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<sup>187</sup> Libyan Memorial, Annex 97.

## Part 7

### CONCLUSIONS AND SUBMISSIONS

7.1 The position of the United Kingdom with regard to the issues between the Parties may therefore be summarised as follows –

- (1) the jurisdiction of the Court in the present case is confined to a dispute between the Parties regarding whether or not the United Kingdom has violated its obligations towards Libya under Articles 7 and/or 11 of the Montreal Convention. It does not extend to allegations by Libya of violations of other rules of international law;<sup>188</sup>
- (2) Events have rendered Libya's Application without object. Libya is not entitled to refashion its claim and, in particular, is not entitled to add a claim for damages at this late stage;<sup>189</sup>
- (3) Libya does not have the rights which she claims under the Montreal Convention;<sup>190</sup>
- (4) The United Kingdom is not violating, and has not violated, its obligations towards Libya under Article 7 of the Montreal Convention;<sup>191</sup>
- (5) The United Kingdom is not violating, and has not violated, its obligations towards Libya under Article 11 of the Montreal Convention;<sup>192</sup>

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<sup>188</sup> United Kingdom Counter-Memorial, paras. 1.17-1.21; Rejoinder, paras. 3.2-3.11.

<sup>189</sup> United Kingdom Counter-Memorial, paras. 4.222 and 5.1-5.16; Supplement to United Kingdom Counter-Memorial; Rejoinder, paras. 3.12-3.26.

<sup>190</sup> United Kingdom Counter-Memorial, paras. 3.1-3.123; Rejoinder, paras. 4.1-4.43.

<sup>191</sup> United Kingdom Counter-Memorial, paras. 3.47-3.61 and 3.122-3.123; Rejoinder, paras. 4.20-4.27.

<sup>192</sup> United Kingdom Counter-Memorial, paras. 3.62-3.103 and 3.122-3.123; Rejoinder, paras. 4.28-4.33.

- (6) Security Council resolutions 731 (1992), 748 (1992), 883 (1993) and 1192 (1998) do not bear the interpretation suggested by Libya in its Memorial and Reply;<sup>193</sup>
- (7) Those resolutions imposed legally binding obligations upon both Libya and the United Kingdom which prevail over any obligations which might have existed under the Montreal Convention. The United Kingdom has acted throughout in accordance with the decisions of the Security Council;<sup>194</sup>
- (8) The Court has no jurisdiction in respect of Libya's allegations regarding the threat of force. In any event, those allegations are wholly unfounded;<sup>195</sup>
- (9) Consequently, Libya is not entitled to any part of the relief which it now claims.

7.2 Accordingly, the United Kingdom respectfully requests the Court –

- (1) to rule that the Libyan Application has been rendered without object; alternatively
- (2) to dismiss the claims of the Libyan Arab Jamahiriya.

1 August 2001

Michael C Wood

Agent of the United Kingdom of  
Great Britain and Northern Ireland

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<sup>193</sup> United Kingdom Counter-Memorial, paras. 4.9-4.61 and 5.1-5.16; Rejoinder, paras. 5.2-5.21.

<sup>194</sup> United Kingdom Counter-Memorial, paras. 4.62-4.96 and 5.1-5.16; Rejoinder, paras. 5.22-5.32.

<sup>195</sup> United Kingdom Counter-Memorial, para. 1.19; Rejoinder, paras. 3.2-3.11 and 6.1-6.6.