

COUR INTERNATIONALE DE JUSTICE
RECUEIL DES ARRÊTS,
AVIS CONSULTATIFS ET ORDONNANCES

AFFAIRE RELATIVE À DES QUESTIONS
D'INTERPRÉTATION ET D'APPLICATION
DE LA CONVENTION DE MONTRÉAL DE 1971
RÉSULTANT DE L'INCIDENT AÉRIEN
DE LOCKERBIE

(JAMAHIRIYA ARABE LIBYENNE c. ÉTATS-UNIS
D'AMÉRIQUE)

EXCEPTIONS PRÉLIMINAIRES

ARRÊT DU 27 FÉVRIER 1998

1998

INTERNATIONAL COURT OF JUSTICE
REPORTS OF JUDGMENTS,
ADVISORY OPINIONS AND ORDERS

CASE CONCERNING QUESTIONS OF
INTERPRETATION AND APPLICATION OF
THE 1971 MONTREAL CONVENTION ARISING
FROM THE AERIAL INCIDENT
AT LOCKERBIE

(LIBYAN ARAB JAMAHIRIYA v. UNITED STATES
OF AMERICA)

PRELIMINARY OBJECTIONS

JUDGMENT OF 27 FEBRUARY 1998

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PRELIMINARY OBJECTIONS

Objection to jurisdiction — Montreal Convention of 23 September 1971 — Treaty in force between the Parties — Article 14, paragraph 1, of the Convention.

Grounds for lack of jurisdiction invoked in the provisional measures phase — Arguments repeated in passing in the present phase of the proceedings — Negotiations — Request for arbitration — Six-month period before the Court can be seised.

Contention that no legal dispute exists concerning the interpretation and application of the Montreal Convention — Dispute of a general nature as to the legal régime applicable to the destruction of the Pan Am aircraft over Lockerbie — Specific disputes concerning the interpretation and application of Article 7 of the Convention, read in conjunction with Articles 1, 5, 6 and 8, and the interpretation and application of Article 11 of the Convention.

Contention that it is not for the Court to decide on the lawfulness of actions instituted by the Respondent to secure the surrender of the two alleged offenders — Jurisdiction of the Court to decide on the lawfulness of those actions in so far as they would be at variance with the provisions of the Montreal Convention.

Security Council resolutions 748 (1992) and 883 (1993) — Adoption after

filing of the Application — Jurisdiction to be determined at the date of filing of the Application.

Objection to admissibility — Contention that the dispute between the Parties is governed by Security Council resolutions 748 (1992) and 883 (1993) and not the Montreal Convention — Admissibility to be determined at the date of filing of the Application — Adoption of the resolutions after the filing of the Application.

Objection that there is no ground for proceeding to judgment on the merits — Contention that the Applicant's claims have become moot because Security Council resolutions 748 (1992) and 883 (1993) have rendered them without object — Article 79, paragraph 1, of the Rules of Court — "Preliminary" Objection — Formal conditions for presentation — Article 79, paragraph 7, of the Rules of Court — 1972 Revision — Objection which is "not exclusively" preliminary containing "both preliminary aspects and other aspects relating to the merits" — Rights on the merits constituting the very subject-matter of a decision on the objection.

Request submitted in the alternative that the Court should "resolve the case in substance now" — By raising preliminary objections, the Respondent has made a procedural choice the effect of which, according to the express terms of Article 79, paragraph 3, is to suspend the proceedings on the merits.

Fixing of time-limits for the further proceedings.

JUDGMENT

Present: Vice-President WEERAMANTRY, Acting President; President SCHWEBEL; Judges ODA, BEDJAOU, GUILLAUME, RANJEVA, HERCZEGH, SHI, FLEISCHHAUER, KOROMA, VERESHCHETIN, PARRA-ARANGUREN, KOOLJMAN, REZEK; Judge ad hoc EL-KOSHERI; Registrar VALENCIA-OSPINA.

In the case concerning questions of interpretation and application of the 1971 Montreal Convention arising from the aerial incident at Lockerbie,

between

the Great Socialist People's Libyan Arab Jamahiriya,
represented by

H.E. Mr. Hamed Ahmed Elhouderi, Ambassador, Secretary of the People's Office of the Great Socialist People's Libyan Arab Jamahiriya to the Netherlands,

as Agent;

Mr. Mohamed A. Aljady,
Mr. Abdulhamid Raeid,

as Counsel;

Mr. Abdelrazeg El-Murtadi Suleiman, Professor of Public International Law, Faculty of Law, University of Benghazi,

Mr. Ian Brownlie, C.B.E., Q.C., F.B.A., Chichele Professor of Public International Law, University of Oxford,

Mr. Jean Salmon, Professor of Law emeritus, Université libre de Bruxelles,
Mr. Eric Suy, Professor of International Law, Catholic University of Louvain (K.U. Leuven),

Mr. Eric David, Professor of Law, Université libre de Bruxelles,
as Counsel and Advocates;

Mr. Nicolas Angelet, Principal Assistant, Faculty of Law, Catholic University of Louvain (K.U. Leuven),

Mrs. Barbara Delcourt, Assistant, Faculty of Social, Political and Economic Sciences, Université libre de Bruxelles; Research Fellow, Centre of International Law and Institute of European Studies, Université libre de Bruxelles,

Mr. Mohamed Awad,
as Advisers.

and

the United States of America,
represented by

Mr. David R. Andrews, Legal Adviser, United States Department of State,
as Agent;

Mr. Michael J. Matheson, Principal Deputy Legal Adviser, United States Department of State,
as Co-Agent;

Mr. John R. Crook, Assistant Legal Adviser, United States Department of State,

Mr. Sean D. Murphy, Counsellor for Legal Affairs, United States Embassy, The Hague,

Mr. Oscar Schachter, Professor at the Columbia University School of Law,

Ms Elisabeth Zoller, Professor at the University of Paris II,
as Counsel and Advocates;

Mr. John J. Kim, Office of the Legal Adviser, United States Department of State,

Mr. Brian Murtagh, United States Department of Justice,
as Counsel.

THE COURT,

composed as above,
after deliberation,

delivers the following Judgment:

1. On 3 March 1992, the Government of the Great Socialist People's Libyan Arab Jamahiriya (hereinafter called "Libya") filed in the Registry of the Court an Application instituting proceedings against the Government of the United States of America (hereinafter called "the United States") in respect of a "dispute . . . between Libya and the United States over the interpretation or application of the Montreal Convention" of 23 September 1971 for the Sup-

pression of Unlawful Acts against the Safety of Civil Aviation (hereinafter called "the Montreal Convention"). The Application referred to the destruction, on 21 December 1988, over Lockerbie (Scotland), of the aircraft on Pan Am flight 103, and to charges brought by a Grand Jury of the United States in November 1991 against two Libyan nationals suspected of having caused a bomb to be placed aboard the aircraft, which bomb had exploded causing the aeroplane to crash. The Application invoked as the basis for jurisdiction Article 14, paragraph 1, of the Montreal Convention.

2. Pursuant to Article 40, paragraph 2, of the Statute, the Application was immediately communicated to the Government of the United States by the Registrar; pursuant to paragraph 3 of that Article, all States entitled to appear before the Court were notified of the Application.

3. Pursuant to Article 69, paragraph 3, of the Rules of Court, the Registrar addressed to the Secretary General of the International Civil Aviation Organization the notification provided for in Article 34, paragraph 3, of the Statute.

Pursuant to Article 43 of the Rules of Court, the Registrar also addressed the notification provided for in Article 63, paragraph 1, of the Statute to all those States which, on the basis of information obtained from the depositary Governments, appeared to be parties to the Montreal Convention.

4. Since the Court included upon the Bench no judge of Libyan nationality, Libya exercised its right under Article 31, paragraph 2, of the Statute to choose a judge *ad hoc* to sit in the case: it chose Mr. Ahmed Sadek El-Kosheri to do so.

5. On 3 March 1992, immediately after the filing of its Application, Libya submitted a request for the indication of provisional measures under Article 41 of the Statute.

By an Order dated 14 April 1992, the Court, after hearing the Parties, found that the circumstances of the case were not such as to require the exercise of its power to indicate provisional measures.

6. By an order of 19 June 1992, the Court, having regard to the requests of the Parties, fixed 20 December 1993 as the time-limit for the filing by Libya of a Memorial and 20 June 1995 as the time-limit for the filing by the United States of a Counter-Memorial.

Libya duly filed its Memorial within the prescribed time-limit.

7. Within the time-limit fixed for the filing of its Counter-Memorial, the United States filed Preliminary Objections to the jurisdiction of the Court and the admissibility of the Application.

Accordingly, by an Order of 22 September 1995, the Court, noting that by virtue of Article 79, paragraph 3, of the Rules of Court the proceedings on the merits were suspended, fixed 22 December 1995 as the time-limit within which Libya might present a written statement of its observations and submissions on the preliminary objections.

Libya filed such a statement within the time-limit so fixed, and the case became ready for hearing in respect of the preliminary objections.

8. By a letter dated 19 February 1996, the Registrar, pursuant to Article 34, paragraph 3, of the Statute, communicated copies of the written pleadings to the Secretary General of the International Civil Aviation Organization and, referring to Article 69, paragraph 2, of the Rules of Court, specified that, if the Organization wished to present written observations to the Court they should be limited, at that stage, to questions of jurisdiction and admissibility.

By a letter of 26 June 1996, the Secretary General of the International Civil

Aviation Organization informed the Court that the Organization “ha[d] no observations to make for the moment” but wished to remain informed about the progress of the case, in order to be able to determine whether it would be appropriate to submit observations later.

9. The President of the Court, being a national of one of the Parties to the case, was unable, by virtue of Article 32, paragraph 1, of the Rules of Court, to exercise the functions of the presidency in respect of the present case. It therefore fell to the Vice-President, in accordance with Article 13, paragraph 1, of the Rules of Court, to exercise the functions of the presidency in the case.

10. In accordance with Article 53, paragraph 2, of its Rules, the Court decided to make accessible to the public, on the opening of the oral proceedings, the Preliminary Objections of the United States and the written statement containing the observations and submissions of Libya on the objections, as well as the documents annexed to those pleadings.

11. Public sittings were held between 13 and 22 October 1997, at which the Court heard the oral arguments and replies of:

- | | |
|-------------------------------|---|
| <i>For the United States:</i> | Mr. David Andrews,
Mr. Sean D. Murphy,
Mr. John R. Crook,
Mr. Oscar Schachter,
Ms Elisabeth Zoller,
Mr. Michael J. Matheson. |
| <i>For Libya:</i> | H.E. Mr. Hamed Ahmed Elhouderi,
Mr. Abdelrazeg El-Murtadi Suleiman,
Mr. Jean Salmon,
Mr. Eric David,
Mr. Eric Suy,
Mr. Ian Brownlie. |

At the hearings, Members of the Court put questions to the Parties, who answered in writing after the close of the oral proceedings.

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12. In the Application, the following requests were made by Libya:

“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 States 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 States 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.”

13. In the written proceedings, the following submissions were presented by the Parties:

On behalf of the Government of Libya,

in the Memorial:

“For these reasons, while reserving the right to supplement and amend these submissions as appropriate in the course of further proceedings, Libya requests the Court to adjudge and declare as follows:

- (a) that the Montreal Convention is applicable to this dispute;
- (b) that Libya has fully complied with all of its obligations under the Montreal Convention and is justified in exercising the criminal jurisdiction provided for by that Convention;
- (c) that the United States has breached, and is continuing to breach, its legal obligations to Libya under Article 5, paragraphs 2 and 3, Article 7, Article 8, paragraph 3, and Article 11 of the Montreal Convention;
- (d) that the United States is under a legal obligation to respect Libya’s right not to have the 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.”

On behalf of the Government of the United States,

in the Preliminary Objections:

“The United States of America requests that the Court uphold the objections of the United States to the jurisdiction of the Court and decline to entertain the case.”

On behalf of the Government of Libya,

in the written statement of its observations and submissions on the preliminary objections:

“For these reasons, and reserving the right to complement or modify the present submissions in the course of the proceedings if necessary, Libya requests the Court to adjudge and declare:

- that the preliminary objections raised by the United States must be rejected and that, as a consequence:
 - (a) the Court has jurisdiction to entertain the Application of Libya,
 - (b) that the Application is admissible;
- that the Court should proceed to the merits.”

14. In the oral proceedings, the following submissions were presented by the Parties:

On behalf of the Government of the United States,

at the hearing on 20 October 1997:

“The United States of America requests that the Court uphold the objections of the United States to the jurisdiction of the Court and decline to entertain the case concerning *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United States of America)*.”

On behalf of the Government of Libya:
at the hearing on 22 October 1997:

“The Libyan Arab Jamahiriya requests the Court to adjudge and declare:

- that the preliminary objections raised by . . . the United States must be rejected and that, as a consequence:
 - (a) the Court has jurisdiction to entertain the Application of Libya,
 - (b) that the Application is admissible;
- that the Court should proceed to the merits.”

* * *

15. In its most recent arguments in the present case, the United States raised three objections: the first to the Court’s jurisdiction, the second to the admissibility of the Application and the third alleging that the Libyan claims had become moot as having been rendered without object. For the United States, each of these objections is “genuinely preliminary in character”. The United States contended moreover, in the alternative, that, should the Court nonetheless hold that it had jurisdiction and decide to exercise that jurisdiction, it could and should “resolve the case in substance now” by deciding, as a preliminary matter, that the relief sought by Libya is precluded.

* * *

16. The Court will first consider the objection raised by the United States to its jurisdiction.

17. Libya submits that the Court has jurisdiction on the basis of Article 14, paragraph 1, of the Montreal Convention, which provides that:

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

18. The Parties agree that the Montreal Convention is in force between them and that it was already in force both at the time of the destruction of the Pan Am aircraft over Lockerbie, on 21 December 1988, and at the time of filing of the Application, on 3 March 1992. However, the Respondent contests the jurisdiction of the Court because, in its submission, all the requisites laid down in Article 14, paragraph 1, of the Montreal Convention have not been complied with in the present case.

* *

19. The United States contests the jurisdiction of the Court mainly on the basis of Libya's failure to show, firstly, that there exists a legal dispute between the Parties, and, secondly, that such dispute, if any, concerns the interpretation or application of the Montreal Convention and falls as a result within the terms of Article 14, paragraph 1, of that Convention.

However, at the hearings, the United States also made reference, in passing, to the arguments it had advanced, in the provisional measures phase of the proceedings, as to whether the dispute that, in the opinion of Libya, exists between the Parties could be settled by negotiation, whether Libya had made a proper request for arbitration and whether it had respected the six-month period required by Article 14, paragraph 1, of the Convention.

20. The Court observes that in the present case, the Respondent has always maintained that the destruction of the Pan Am aircraft over Lockerbie did not give rise to any dispute between the Parties regarding the interpretation or application of the Montreal Convention and that, for that reason, in the Respondent's view, there was nothing to be settled by negotiation under the Convention; the Court notes that the arbitration proposal contained in the letter sent on 18 January 1992 by the Libyan Secretary of the People's Committee for Foreign Liaison and International Co-operation to the Secretary of State of the United States met with no answer; and it notes, in particular, that the Respondent clearly expressed its intention not to accept arbitration — in whatever form — when presenting and strongly supporting resolution 731 (1992) adopted by the Security Council three days later, on 21 January 1992.

Consequently, in the opinion of the Court the alleged dispute between the Parties could not be settled by negotiation or submitted to arbitration under the Montreal Convention, and the refusal of the Respondent to enter into arbitration to resolve that dispute absolved Libya from any obligation under Article 14, paragraph 1, of the Convention to observe a six-month period starting from the request for arbitration, before seising the Court.

* *

21. As recalled by the Parties, the Permanent Court of International Justice stated in 1924 that "A dispute is a disagreement on a point of law or fact, a conflict of legal views or of interests between two persons" (*Mavrommatis Palestine Concessions*, 1924, P.C.I.J., Series A, No. 2, p. 11). The present Court for its part, in its Judgment of 30 June 1995 in the case concerning *East Timor (Portugal v. Australia)* emphasized the following:

"In order to establish the existence of a dispute, 'It must be shown that the claim of one party is positively opposed by the other' (*South West Africa, Preliminary Objections, Judgment, I.C.J. Reports 1962*,

p. 328); and further, 'Whether there exists an international dispute is a matter for objective determination' (*Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase, Advisory Opinion, I.C.J. Reports 1950*, p. 74)." (*I.C.J. Reports 1995*, p. 100.)

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22. In its Application and Memorial, Libya maintained that the Montreal Convention was the only instrument applicable to the destruction of the Pan Am aircraft over Lockerbie, for the following reasons:

- (a) the Respondent and Libya are bound by the Montreal Convention which is in force between the Parties;
- (b) the Montreal Convention is specifically aimed at preventing that type of action (third paragraph of the Preamble);
- (c) the actions ascribed to the Libyan nationals are covered by Article 1 of the Montreal Convention;
- (d) "the system of the Montreal Convention, as compared to the system of the Charter, is both a *lex posterior* and a *lex specialis*; consequently, for matters covered by that Convention, it must *a priori* take precedence over the systems for which the Charter provides"; and
- (e) there is no other convention concerning international criminal law in force which is applicable to these issues in the relations between Libya and the United States.

23. The United States does not deny that, as such, the facts of the case could fall within the terms of the Montreal Convention. However, it emphasizes that, in the present case, from the time Libya invoked the Montreal Convention, the United States has claimed that it was not relevant because it was not a question of "bilateral differences" but one of "a threat to international peace and security resulting from State-sponsored terrorism".

24. Consequently, the Parties differ on the question whether the destruction of the Pan Am aircraft over Lockerbie is governed by the Montreal Convention. A dispute thus exists between the Parties as to the legal régime applicable to this event. Such a dispute, in the view of the Court, concerns the interpretation and application of the Montreal Convention, and, in accordance with Article 14, paragraph 1, of the Convention, falls to be decided by the Court.

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25. Furthermore, in its Application and Memorial, Libya stressed the following six points, in particular in support of the submissions set forth, respectively, in paragraph 12 (subparagraphs (a) and (b)) and paragraph 13 (subparagraphs (b) and (c)), above:

- (a) the actions which brought about the destruction of the Pan Am aircraft over Lockerbie constitute one of the offences covered by Article 1 of the Montreal Convention and therefore the Montreal Convention must be applied to those facts;
- (b) Libya has complied with the obligation imposed by Article 5, paragraph 2, of the Montreal Convention of establishing its jurisdiction over the alleged offenders in the destruction of the aircraft, and it has the right to exercise the jurisdiction so established;
- (c) Libya has exercised its jurisdiction over the two alleged offenders on the basis of its Penal Code, and the Respondent should not interfere with the exercise of that jurisdiction;
- (d) Libya has exercised the rights conferred by Article 6 of the Montreal Convention by taking all necessary measures to ensure the presence of the two alleged offenders, making preliminary enquiries, notifying the States concerned and indicating that it intended to exercise jurisdiction, but according to Libya the Respondent, by its actions and threats, is attempting, according to Libya, to prevent the application of the Convention;
- (e) Libya having decided not to extradite the two alleged offenders, Article 7 of the Montreal Convention gives it the right to submit them to its competent authorities for the purpose of prosecution in accordance with Libyan law; and
- (f) on the basis of Article 8, paragraph 3, of the Montreal Convention, it has the right not to extradite the two alleged offenders because they are Libyan nationals and the Libyan Constitution does not permit their extradition.

26. The Respondent disputes that the Montreal Convention confers on Libya the rights it claims to enjoy. It contends, moreover, that none of the provisions referred to by Libya imposes obligations on the United States. Finally, it recalls that it never itself invoked the Montreal Convention, and observes that nothing in that Convention prevented it from requesting the surrender of the two alleged offenders outside the framework of the Convention.

27. Article 1 of the Montreal Convention provides as follows:

“1. Any person commits an offence if he unlawfully and intentionally:

- (a) performs an act of violence against a person on board an aircraft in flight if that act is likely to endanger the safety of that aircraft; or
- (b) destroys an aircraft in service or causes damage to such an aircraft which renders it incapable of flight or which is likely to endanger its safety in flight; or
- (c) places or causes to be placed on an aircraft in service, by any means whatsoever, a device or substance which is likely to destroy that aircraft, or to cause damage to it which renders it

incapable of flight, or to cause damage to it which is likely to endanger its safety in flight; or

- (d) destroys or damages air navigation facilities or interferes with their operation, if any such act is likely to endanger the safety of aircraft in flight; or
- (e) communicates information which he knows to be false, thereby endangering the safety of an aircraft in flight.

2. Any person also commits an offence if he:

- (a) attempts to commit any of the offences mentioned in paragraph 1 of this Article; or
- (b) is an accomplice of a person who commits or attempts to commit any such offence.”

Article 5 provides:

“1. Each Contracting State shall take such measures as may be necessary to establish its jurisdiction over the offences in the following cases:

- (a) when the offence is committed in the territory of that State;
- (b) when the offence is committed against or on board an aircraft registered in that State;
- (c) when the aircraft on board which the offence is committed lands in its territory with the alleged offender still on board;
- (d) when the offence is committed against or on board an aircraft leased without crew to a lessee who has his principal place of business or, if the lessee has no such place of business, his permanent residence, in that State.

2. Each Contracting State shall likewise take such measures as may be necessary to establish its jurisdiction over the offences mentioned in Article 1, paragraph 1 (a), (b) and (c), and in Article 1, paragraph 2, in so far as that paragraph relates to those offences, in the case where the alleged offender is present in its territory and it does not extradite him pursuant to Article 8 to any of the States mentioned in paragraph 1 of this Article.

3. This Convention does not exclude any criminal jurisdiction exercised in accordance with national law.”

Article 6, for its part, states:

“1. Upon being satisfied that the circumstances so warrant, any Contracting State in the territory of which the offender or the alleged offender is present, shall take him into custody or take other measures to ensure his presence. The custody and other measures shall be as provided in the law of that State but may only be continued for such time as is necessary to enable any criminal or extradition proceedings to be instituted.

2. Such State shall immediately make a preliminary enquiry into the facts.

3. Any person in custody pursuant to paragraph 1 of this Article shall be assisted in communicating immediately with the nearest appropriate representative of the State of which he is a national.

4. When a State, pursuant to this Article, has taken a person into custody, it shall immediately notify the States mentioned in Article 5, paragraph 1, the State of nationality of the detained person and, if it considers it advisable, any other interested State of the fact that such person is in custody and of the circumstances which warrant his detention. The State which makes the preliminary enquiry contemplated in paragraph 2 of this Article shall promptly report its findings to the said States and shall indicate whether it intends to exercise jurisdiction."

Article 7 is worded in the following terms:

"The Contracting State in the territory of which the alleged offender is found shall, if it does not extradite him, be obliged, without exception whatsoever and whether or not the offence was committed in its territory, to submit the case to its competent authorities for the purpose of prosecution. Those authorities shall take their decision in the same manner as in the case of any ordinary offence of a serious nature under the law of that State."

Finally, in the words of Article 8:

"1. The offences shall be deemed to be included as extraditable offences in any extradition treaty existing between Contracting States. Contracting States undertake to include the offences as extraditable offences in every extradition treaty to be concluded between them.

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

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

4. Each of the offences shall be treated, for the purpose of extradition between Contracting States, as if it had been committed not only in the place in which it occurred but also in the territories of the States required to establish their jurisdiction in accordance with Article 5, paragraph 1 (b), (c) and (d)."

28. In view of the positions put forward by the Parties, the Court finds that there exists between them not only a dispute of a general nature, as defined in paragraph 24 above, but also a specific dispute which concerns the interpretation and application of Article 7 — read in conjunction with Article 1, Article 5, Article 6 and Article 8 — of the Montreal Convention, and which, in accordance with Article 14, paragraph 1, of the Convention, falls to be decided by the Court.

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29. Moreover, Libya maintained in its Application and Memorial that, once it had commenced its judicial investigation of the two alleged offenders, the Respondent was, according to Article 11, paragraph 1, of the Montreal Convention, under an obligation to hand over to the Libyan authorities all the evidence in its possession regarding the offence. In Libya's opinion, this obligation was not duly complied with, because the United States "has supplied *no* information".

30. In this regard, the United States acknowledges that "Article 11 is the only provision, among those listed in Libya's complaint, that arguably addresses any obligation of any State other than Libya". However, it claims that "the obligation expressed in Article 11 is very general in nature" and that it had "satisfied [this] general obligation". It states in this connection that "on 21 November 1991, the United States transmitted to Libya through the authorities of the Government of Belgium copies of the grand jury indictment of the two Libyans". It also maintains that "Article 11 preserves the right of the United States, under United States law, to refuse to disclose additional details regarding the investigation, such as evidence derived from confidential sources". The United States, in addition, makes the following observation:

"As a practical matter, it is difficult to see how the Court can define specific forms of additional assistance that must be provided under Article 11. For the Court to try to inject into Article 11 specificity as to the level of assistance that is required — such as the provision of witness statements or other information — would simply be unworkable and could inhibit co-operation in an area that the drafters of the Montreal Convention deliberately did not seek to regulate."

31. Article 11 of the Montreal Convention is worded as follows:

"1. Contracting States shall afford one another the greatest measure of assistance in connection with criminal proceedings brought in respect of the offences. The law of the State requested shall apply in all cases.

2. The provisions of paragraph 1 of this Article shall not affect

obligations under any other treaty, bilateral or multilateral, which governs or will govern, in whole or in part, mutual assistance in criminal matters.”

32. Having taken account of the positions of the Parties as to the duties imposed by Article 11 of the Montreal Convention, the Court concludes that there equally exists between them a dispute which concerns the interpretation and application of that provision, and which, in accordance with Article 14, paragraph 1, of the Convention, falls to be decided by the Court.

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33. Libya, in the latest version of its submissions, finally asks the Court to find that

“the United States 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”.

34. The United States maintains that it is not for the Court, on the basis of Article 14, paragraph 1, of the Montreal Convention, to decide on the lawfulness of actions which are in any event in conformity with international law, and which were instituted by the Respondent to secure the surrender of the two alleged offenders. It concludes from this that the Court lacks jurisdiction to hear the submissions presented on this point by Libya.

35. The Court cannot uphold the line of argument thus formulated. Indeed, it is for the Court to decide, on the basis of Article 14, paragraph 1, of the Montreal Convention, on the lawfulness of the actions criticized by Libya, in so far as those actions would be contrary to the provisions of the Montreal Convention.

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36. In the present case, the United States has contended, however, that even if the Montreal Convention did confer on Libya the rights it claims, those rights could not be exercised in this case because they were superseded by Security Council resolutions 748 (1992) and 883 (1993) which, by virtue of Articles 25 and 103 of the United Nations Charter, have priority over all rights and obligations arising out of the Montreal Convention. The Respondent has also argued that, because of the adoption of those resolutions, the only dispute which existed from that point on was between Libya and the Security Council; this, clearly, would not be a dis-

pute falling within the terms of Article 14, paragraph 1, of the Montreal Convention and thus not one which the Court could entertain.

37. The Court cannot uphold this line of argument. Security Council resolutions 748 (1992) and 883 (1993) were in fact adopted after the filing of the Application on 3 March 1992. In accordance with its established jurisprudence, if the Court had jurisdiction on that date, it continues to do so; the subsequent coming into existence of the above-mentioned resolutions cannot affect its jurisdiction once established (cf. *Nottebohm, Preliminary Objection, Judgment, I.C.J. Reports 1953*, p. 122; *Right of Passage over Indian Territory, Preliminary Objections, Judgment, I.C.J. Reports 1957*, p. 142).

* *

38. In the light of the foregoing, the Court concludes that the objection to jurisdiction raised by the United States on the basis of the alleged absence of a dispute between the Parties concerning the interpretation or application of the Montreal Convention must be rejected, and that the Court has jurisdiction to hear the disputes between Libya and the United States as to the interpretation or application of the provisions of that Convention.

* * *

39. The Court will now turn to consider the objection of the United States according to which the Libyan Application is not admissible.

40. The United States emphasizes that the measures which Libya opposes are those taken by the Security Council under resolutions 731 (1992), 748 (1992) and 883 (1993):

- (a) determining that Libya's failure to respond fully and effectively to the requests that Libya surrender the two accused for trial in the United States or the United Kingdom constitutes a threat to international peace and security;
- (b) deciding that the Government of Libya must comply with those requests; and
- (c) imposing economic sanctions and other measures to compel Libya to comply with those requests.

According to the United States, by seising the Court, Libya was endeavouring to "undo the Council's actions". The United States argues that, even if Libya could make valid claims under the Montreal Convention, these are "superseded" by the relevant decisions of the Security Council under Chapter VII of the Charter, which impose different obligations. The said decisions thus establish the rules governing the dispute between Libya and the United States. Those rules — and not the Montreal Convention — define the obligations of the Parties; and the

claims of Libya based on the Convention are therefore inadmissible. The United States further contends that if the Court should see fit to

“assert [its] jurisdiction to examine on the merits, by way of objection, the validity of Security Council resolutions 731 (1992), 748 (1992) and 883 (1993), the Libyan Application should nonetheless be dismissed at the preliminary objections stage because it is not admissible”.

41. For its part, Libya argues that it is clear from the actual terms of resolutions 731 (1992), 748 (1992) and 883 (1993) that the Security Council has never required it to surrender its nationals to the United States or the United Kingdom; it stated at the hearing that this remained “Libya’s principal argument”. It added that the Court must interpret those resolutions “in accordance with the Charter, which determined their validity”, and that the Charter prohibited the Council from requiring Libya to hand over its nationals to the United States or the United Kingdom. Libya concludes that its Application is admissible “as the Court can usefully rule on the interpretation and application of the Montreal Convention . . . independently of the legal effects of resolutions 748 (1992) and 883 (1993)”.

Libya also observes that the arguments of the United States based on the provisions of the Charter raise problems which do not possess an exclusively preliminary character, but appertain to the merits of the dispute. It argues, in particular, that the question of the effect of the Security Council resolutions is not of an exclusively preliminary character, inasmuch as the resolutions under consideration are relied upon by the United States in order to overcome the application of the Montreal Convention, and since Libya is justified in disputing that these resolutions are opposable to it.

42. Libya furthermore draws the Court’s attention to the principle that “[t]he critical date for determining the admissibility of an application is the date on which it is filed” (*Border and Transborder Armed Actions (Nicaragua v. Honduras)*, *Jurisdiction and Admissibility*, *I.C.J. Reports 1988*, p. 95, para. 66). It points out in this connection that its Application was filed on 3 March 1992; that Security Council resolutions 748 (1992) and 883 (1993) were adopted on 31 March 1992 and 11 November 1993, respectively; and that resolution 731 (1992) of 21 January 1992 was not adopted under Chapter VII of the United Nations Charter and was only a mere recommendation. Consequently, Libya argues, its Application is admissible in any event.

43. In the view of the Court, this last submission of Libya must be upheld. The date, 3 March 1992, on which Libya filed its Application, is in fact the only relevant date for determining the admissibility of the Application. Security Council resolutions 748 (1992) and 883 (1993) cannot be taken into consideration in this regard, since they were adopted at

a later date. As to Security Council resolution 731 (1992), adopted before the filing of the Application, it could not form a legal impediment to the admissibility of the latter because it was a mere recommendation without binding effect, as was recognized moreover by the United States. Consequently, Libya's Application cannot be held inadmissible on these grounds.

44. In the light of the foregoing, the Court concludes that the objection to admissibility derived by the United States from Security Council resolutions 748 (1992) and 883 (1993) must be rejected, and that Libya's Application is admissible.

* * *

45. The Court will now consider the third objection raised by the United States. According to that objection, Libya's claims have become moot because Security Council resolutions 748 (1992) and 883 (1993) have rendered them without object; any judgment which the Court might deliver on the said claims would thenceforth be devoid of practical purpose.

The Court has already acknowledged, on several occasions in the past, that events subsequent to the filing of an application may "render an application without object" (*Border and Transborder Armed Actions (Nicaragua v. Honduras)*, *Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1988*, p. 95, para. 66) and "therefore the Court is not called upon to give a decision thereon" (*Nuclear Tests (Australia v. France)*, *Judgment, I.C.J. Reports 1974*, p. 272, para. 62) (cf. *Northern Cameroons, Judgment, I.C.J. Reports 1963*, p. 38).

Thus formulated, the Respondent's objection is that there is no ground for proceeding to judgment on the merits, which objection must be examined within the framework of this jurisprudence.

46. The Court must satisfy itself that such an objection does indeed fall within the provisions of Article 79 of the Rules, relied upon by the Respondent. In paragraph 1, this Article refers to "Any objection . . . to the jurisdiction of the Court or to the admissibility of the application, or *other objection*" (emphasis added); its field of application *ratione materiae* is thus not limited solely to objections regarding jurisdiction and admissibility. However, if it is to be covered by Article 79, an objection must also possess a "preliminary" character. Paragraph 1 of Article 79 of the Rules of Court characterizes as "preliminary" an objection "the decision upon which is requested before any further proceedings". There can be no doubt that the objection envisaged here formally meets this condition. The Court would also recall that, in this instance, the Respondent is advancing the argument that the decisions of the Security Council could not form the subject of any contentious proceedings before the Court, since they allegedly determine the rights which the Applicant claims to derive from a treaty text, or at least that they directly affect those rights; and that the Respondent thus aims to preclude at the outset any consid-

eration by the Court of the claims submitted by the Applicant and immediately terminate the proceedings brought by it. In so far as the purpose of the objection raised by the United States that there is no ground for proceeding to judgment on the merits is, effectively, to prevent, *in limine*, any consideration of the case on the merits, so that its “effect [would] be, if the objection is upheld, to interrupt further proceedings in the case”, and “it [would] therefore be appropriate for the Court to deal with [it] before enquiring into the merits” (*Panevezys-Saldutiskis Railway, Judgment, 1939, P.C.I.J., Series A/B, No. 76, p. 16*), this objection possesses a preliminary character and does indeed fall within the provisions of Article 79 of the Rules of Court.

Moreover it is incontrovertible that the objection concerned was submitted in writing within the time-limit fixed for the filing of the Counter-Memorial, and was thus submitted in accordance with the formal conditions laid down in Article 79.

47. Libya does not dispute any of these points. It does not contend that the objection thus derived by the United States from Security Council resolutions 748 (1992) and 883 (1993) is an objection on the merits, which does not fall within the provisions of Article 79 of the Rules of Court; nor does it claim that the objection was not properly submitted. What Libya contends is that this objection — like the objection of inadmissibility raised by the United States, and for the same reasons (see paragraph 41 above) — falls within the category of those which Article 79, paragraph 7, of the Rules of Court characterizes as objections “not possess[ing], in the circumstances of the case, an exclusively preliminary character”.

On the contrary, the United States considers that the objection concerned possesses an “exclusively preliminary character” within the meaning of that provision. It contends, in particular, in support of this argument, that this objection does not require “the resolution of disputed facts or the consideration of evidence”.

Thus it is solely on the question of the “exclusively” or “non-exclusively” preliminary character of the objection under consideration that the Parties are divided and on which the Court must now make a determination.

48. The present wording of Article 79, paragraph 7, of the Rules of Court was adopted by the Court in 1972. The Court has had occasion to examine its precise scope and significance in the Judgments it delivered in the case concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, on 26 November 1984 (*Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984, pp. 425-426*) and on 26 June 1986 (*Merits, Judgment, I.C.J. Reports 1986, pp. 29-31*), respectively. As the Court pointed out in the second of those Judgments,

“Under the Rules of Court dating back to 1936 (which on this point reflected still earlier practice), the Court had the power to join

an objection to the merits ‘whenever the interests of the good administration of justice require it’ (*Panevezys-Saldutiskis Railway, P.C.I.J., Series A/B, No. 75, p. 56*), and in particular where the Court, if it were to decide on the objection, ‘would run the risk of adjudicating on questions which appertain to the merits of the case or of prejudging their solution’ (*ibid.*)” (*I.C.J. Reports 1986, pp. 29-30, para. 39.*)

However, the exercise of that power carried a risk,

“namely that the Court would ultimately decide the case on the preliminary objection, after requiring the parties to fully plead the merits — and this did in fact occur (*Barcelona Traction, Light and Power Company, Limited, Second Phase, I.C.J. Reports 1970, p. 3*). The result was regarded in some quarters as an unnecessary prolongation of an expensive and time-consuming procedure.” (*Ibid.*, p. 30, para. 39.)

The Court was then faced with the following choice:

“to revise the Rules so as to exclude . . . the possibility of joinder to the merits, so that every objection would have to be resolved at the preliminary stage, or to seek a solution which would be more flexible” (*ibid.*, p. 30, para. 40).

The solution adopted in 1972 was ultimately not to exclude the power to examine a preliminary objection in the merits phase, but to limit the exercise of that power, by laying down the conditions more strictly. The Court concluded, in relation to the new provision thus adopted:

“It thus presents one clear advantage: that it qualifies certain objections as preliminary, making it quite clear that when they are exclusively of that character they will have to be decided upon immediately, but if they are not, especially when the character of the objections is not exclusively preliminary because they contain both preliminary aspects and other aspects relating to the merits, they will have to be dealt with at the stage of the merits. This approach also tends to discourage the unnecessary prolongation of proceedings at the jurisdictional stage.” (*Ibid.*, p. 31, para. 41.)

49. The Court must therefore ascertain whether, in the present case, the United States objection considered here contains “both preliminary aspects and other aspects relating to the merits” or not.

That objection relates to many aspects of the dispute. By maintaining that Security Council resolutions 748 (1992) and 883 (1993) have rendered the Libyan claims without object, the United States seeks to obtain from the Court a decision not to proceed to judgment on the merits, which would immediately terminate the proceedings. However, by requesting such a decision, the United States is requesting, in reality, at least two others which the decision not to proceed to judgment on the

merits would necessarily postulate: on the one hand a decision establishing that the rights claimed by Libya under the Montreal Convention are incompatible with its obligations under the Security Council resolutions; and, on the other hand, a decision that those obligations prevail over those rights by virtue of Articles 25 and 103 of the Charter.

The Court therefore has no doubt that Libya's rights on the merits would not only be affected by a decision not to proceed to judgment on the merits, at this stage in the proceedings, but would constitute, in many respects, the very subject-matter of that decision. The objection raised by the United States on that point has the character of a defence on the merits. In the view of the Court, this objection does much more than "touch[ing] upon subjects belonging to the merits of the case" (*Certain German Interests in Polish Upper Silesia, Jurisdiction, Judgment No. 6, 1925, P.C.I.J., Series A, No. 6, p. 15*); it is "inextricably interwoven" with the merits (*Barcelona Traction, Light and Power Company, Limited, Preliminary Objections, Judgment, I.C.J. Reports 1964, p. 46*).

The Court notes furthermore that the United States itself broached many substantive problems in its written and oral pleadings in this phase, and pointed out that those problems had been the subject of exhaustive exchanges before the Court; the United States Government thus implicitly acknowledged that the objection raised and the merits of the case were "closely interconnected" (*Barcelona Traction, Light and Power Company, Limited, Preliminary Objections, Judgment, I.C.J. Reports 1964, p. 46*, and the reference to *Pajzs, Csáky, Esterházy, P.C.I.J., Series A/B, No. 66, p. 9*).

If the Court were to rule on that objection, it would therefore inevitably be ruling on the merits; in relying on the provisions of Article 79 of the Rules of Court, the Respondent has set in motion a procedure the precise aim of which is to prevent the Court from so doing.

The Court concludes from the foregoing that the objection of the United States according to which the Libyan claims have become moot as having been rendered without object does not have "an exclusively preliminary character" within the meaning of that Article.

50. Having established its jurisdiction and concluded that the Application is admissible, the Court will be able to consider this objection when it reaches the merits of the case.

* * *

51. Lastly, the United States requested the Court, in the alternative, in the event that, notwithstanding the United States' objections, it should declare that it has jurisdiction and deem the Application admissible, to "resolve the case in substance now" by deciding, as a preliminary matter, that the relief sought by Libya is precluded.

As the Court has already indicated, it is the Respondent which sought to rely, in this case, on the provisions of Article 79 of the Rules. By raising preliminary objections, it has made a procedural choice the effect of

which, according to the express terms of Article 79, paragraph 3, is to suspend the proceedings on the merits. The Court cannot therefore uphold the claim of the United States.

* * *

52. In accordance with Article 79, paragraph 7, of the Rules of Court, time-limits for the further proceedings shall be fixed subsequently by the Court.

* * *

53. For these reasons,

THE COURT,

(1) (a) By thirteen votes to two,

Rejects the objection to jurisdiction raised by the United States on the basis of the alleged absence of a dispute between the Parties concerning the interpretation or application of the Montreal Convention of 23 September 1971;

IN FAVOUR: *Vice-President Weeramantry, Acting President; Judges Bedjaoui, Guillaume, Ranjeva, Herczegh, Shi, Fleischhauer, Koroma, Vereshchetin, Parra-Aranguren, Kooijmans, Rezek; Judge ad hoc El-Kosheri;*

AGAINST: *President Schwebel; Judge Oda;*

(b) By thirteen votes to two,

Finds that it has jurisdiction, on the basis of Article 14, paragraph 1, of the Montreal Convention of 23 September 1971, to hear the disputes between Libya and the United States as to the interpretation or application of the provisions of that Convention;

IN FAVOUR: *Vice-President Weeramantry, Acting President; Judges Bedjaoui, Guillaume, Ranjeva, Herczegh, Shi, Fleischhauer, Koroma, Vereshchetin, Parra-Aranguren, Kooijmans, Rezek; Judge ad hoc El-Kosheri;*

AGAINST: *President Schwebel; Judge Oda;*

(2) (a) By twelve votes to three,

Rejects the objection to admissibility derived by the United States from Security Council resolutions 748 (1992) and 883 (1993);

IN FAVOUR: *Vice-President Weeramantry, Acting President; Judges Bedjaoui, Guillaume, Ranjeva, Shi, Fleischhauer, Koroma, Vereshchetin, Parra-Aranguren, Kooijmans, Rezek; Judge ad hoc El-Kosheri;*

AGAINST: *President Schwebel; Judges Oda, Herczegh;*

(b) By twelve votes to three,

Finds that the Application filed by Libya on 3 March 1992 is admissible;

IN FAVOUR: *Vice-President* Weeramantry, *Acting President*; *Judges* Bedjaoui, Guillaume, Ranjeva, Shi, Fleischhauer, Koroma, Vereshchetin, Parra-Aranguren, Kooijmans, Rezek; *Judge ad hoc* El-Kosheri;

AGAINST: *President* Schwebel; *Judges* Oda, Herczegh;

(3) By ten votes to five,

Declares that the objection raised by the United States according to which the claims of Libya became moot because Security Council resolutions 748 (1992) and 883 (1993) rendered them without object, does not, in the circumstances of the case, have an exclusively preliminary character.

IN FAVOUR: *Vice-President* Weeramantry, *Acting President*; *Judges* Bedjaoui, Ranjeva, Shi, Koroma, Vereshchetin, Parra-Aranguren, Kooijmans, Rezek; *Judge ad hoc* El-Kosheri;

AGAINST: *President* Schwebel; *Judges* Oda, Guillaume, Herczegh, Fleischhauer.

Done in French and in English, the French text being authoritative, at the Peace Palace, The Hague, this twenty-seventh day of February, one thousand nine hundred and ninety-eight, in three copies, one of which will be placed in the archives of the Court and the others transmitted to the Government of the Great Socialist People's Libyan Arab Jamahiriya and the Government of the United States of America, respectively.

(*Signed*) Christopher G. WEERAMANTRY,
Vice-President.

(*Signed*) Eduardo VALENCIA-OSPINA,
Registrar.

Judges BEDJAOUI, RANJEVA and KOROMA append a joint declaration to the Judgment of the Court; Judges GUILLAUME and FLEISCHHAUER append a joint declaration to the Judgment of the Court; Judge HERCZEGH appends a declaration to the Judgment of the Court.

Judges KOOIJMANS and REZEK append separate opinions to the Judgment of the Court.

President SCHWEBEL and Judge ODA append dissenting opinions to the Judgment of the Court.

(Initialed) C.G.W.

(Initialed) E.V.O.
