

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 STATES OF AMERICA)

---

PRELIMINARY OBJECTIONS

SUBMITTED BY

THE UNITED STATES OF AMERICA

20 JUNE 1995

## TABLE OF CONTENTS

INTRODUCTION AND SUMMARY .....	1
PART I STATEMENT OF FACTS .....	4
Chapter I Two Libyan Nationals Were Indicted by a Federal Grand Jury in the United States Following an International Investigation into the Bombing of Pan Am 103 .....	5
<u>Section 1. The Bombing of Pan Am 103 and the Ensuing International     Investigation</u> .....	5
<u>Section 2. The Grand Jury Indictment in the United States</u> .....	6
A. <u>The Grand Jury Process in the United States</u> .....	7
B. <u>The Grand Jury Charges Against the Two Libyans</u> .....	10
Chapter II The UN Security Council Has Acted Repeatedly and Decisively to Condemn The Bombing of Pan Am 103 and to Require Libya to Surrender for Trial in the United Kingdom or the United States the Two Libyan Nationals Accused of Committing the Crime .....	18
<u>Section 1. Events leading to Security Council Resolution 731</u> .....	19
A. <u>The Demands of the United States, the United         Kingdom and France</u> .....	19
B. <u>Libya's Responses to the United States, the United         Kingdom and France</u> .....	22
<u>Section 2. Security Council Resolution 731 of 21 January 1992</u> .....	24
<u>Section 3. Libya's Application to this Court and its Request for     Provisional Measures (3 March 1992)</u> .....	29
<u>Section 4. Security Council Resolution 748 of 31 March 1992</u> .....	31
<u>Section 5. Security Council Resolution 883 of 11 November 1993</u> .....	39
A. <u>Events Leading to Security Council Resolution 883</u> .....	39
B. <u>Security Council Resolution 883</u> .....	41

Chapter III	<b>The Security Council's Condemnation of the Bombing of Pan Am 103 and Its Other Actions in this Case are Consistent with its Longstanding Commitment to Maintain International Peace and Security by Condemning and Acting Against International Terrorism</b>	49
Chapter IV	<b>Libya Continues to Refuse to Comply with the Security Council's Requirement that it Surrender for Trial the Libyan Fugitives Accused of Bombing Pan Am 103</b>	52
PART II	<b>THE OBJECTIONS OF THE UNITED STATES TO THE LIBYAN APPLICATION COME WITHIN THE SCOPE OF ARTICLE 79</b>	55
Chapter I	<b>Article 79 Covers a Broad Range of Objections</b>	56
Chapter II	<b>The Court Can Dispose of these Objections at this Stage even if an Objection Raises Issues that Might Touch upon the Merits of the Case</b>	60
PART III	<b>THE MONTREAL CONVENTION PROVIDES NO BASIS FOR JURISDICTION</b>	64
Chapter I	<b>The Montreal Convention Provides the Sole Alleged Basis for Jurisdiction Over These Proceedings</b>	66
Chapter II	<b>Libya's Application Does Not Set Out a Dispute Between the Parties Over the Interpretation or Application of the Convention</b>	68
Chapter III	<b>Libya's Dispute is not with the United States, but with the Security Council</b>	76
	<u>Section 1. The Proceedings on Libya's Request for Provisional Measures Demonstrate that this Action is about Libya's Dispute with the Security Council - Not the United States</u>	79
	<u>Section 2. Libya's Memorial Demonstrates that this Action Concerns Libya's Dispute with the Security Council</u>	80
	<u>A. Security Council Resolution 731</u>	81
	<u>B. Reports of the Secretary-General Pursuant to Security Council Resolution 731</u>	85

	<u>C. Security Council Resolution 748</u> . . . . .	86
	<u>D. Security Council Resolution 883</u> . . . . .	87
<b>PART IV</b>	<b>EVEN IF THE COURT HAS JURISDICTION, IT SHOULD DECLINE TO EXERCISE JURISDICTION IN THESE PROCEEDINGS</b> . . . . .	90
<b>Chapter I</b>	<b>A Decision by the Court to Accept Jurisdiction in these Proceedings is Incompatible with the Functions of the Court</b> . . . . .	92
	<u>Section 1. Any Judgment that the Court Might Render Would Be Without Practical Effect and Would Embroil the Court in a Political Dispute</u> . . . . .	93
	<u>Section 2. The Court Should Decline to Exercise Jurisdiction in this Proceeding to Avoid Undermining the Ability of the Security Council to Maintain and Restore International Peace and Security</u> . . . . .	95
<b>Chapter II</b>	<b>The Security Council has Full Authority to Require Libya to Surrender the Two Accused Persons</b> . . . . .	101
	<u>Section 1. The Actions of the Security Council are Fully Consonant with Principles of Justice and International Law</u> . . . . .	102
	<u>Section 2. The Actions of the Security Council do not Violate Article 2(7) of the Charter</u> . . . . .	106
	<u>Section 3. The Security Council has Acted within its Authority</u> . . . . .	108
<b>PART V</b>	<b>EVEN IF THE COURT EXERCISES JURISDICTION, IT SHOULD DECIDE, AS A PRELIMINARY MATTER, THAT THE DECISIONS OF THE SECURITY COUNCIL PRECLUDE THE RELIEF SOUGHT BY LIBYA</b> . . . . .	112
	<b>CONCLUSION</b> . . . . .	115
	<b>SUBMISSION</b> . . . . .	116

## INTRODUCTION AND SUMMARY

1. On 3 March 1992, the Government of Libya filed an Application with the Court instituting the present proceedings against the United States in respect of what Libya maintains is a dispute between Libya and the United States over the interpretation and application of the Montreal Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation (hereinafter Montreal Convention or Convention) concerning the bombing of Pan Am Flight 103 over Lockerbie in Scotland on 21 December 1988. The United States submits the following Preliminary Objections to the Court's entertaining the Application filed by Libya.

2. In its Application, the Government of Libya seeks relief from this Court solely on the basis of the Montreal Convention. Specifically, Libya requests the Court to adjudge and declare that: 1) Libya has fully complied with all of its obligations under the Montreal Convention; 2) the United States has breached, and is continuing to breach, its obligations to Libya under several articles of the Convention; and 3) the United States is under a legal obligation immediately to cease and desist from such alleged breaches and from the use of any and all force or threats against Libya.

3. In this case, Libya is invoking, under Article 36(1) of the Statute of the Court, the basis of jurisdiction provided for in Article 14(1) of the Montreal Convention. This provision confers on the Court jurisdiction only to decide disputes relating to the interpretation and application of the Convention. Article 14(1) does not provide any basis for consideration by the Court of claims relating to other sources of law, such as the United Nations Charter or general principles of international law.

4. The United States contends that there is no dispute between the United States and Libya under the Montreal Convention. The actual dispute in this matter is between Libya and the Security Council concerning decisions of the Security Council requiring that Libya surrender two accused Libyan nationals for trial in the United States or the United Kingdom and the imposition by the Security Council of economic sanctions and other measures to compel Libya to comply with those demands. The United States has never made a claim upon which a dispute between the parties under the Montreal Convention could be found to exist and maintains that there is not a sufficient connection between the dispute set out in Libya's Application and the Montreal Convention to provide jurisdiction under the Convention for the Court to entertain these proceedings.

5. The United States also maintains that, even if the Court were to conclude that it had jurisdiction over these proceedings, the Court nonetheless should decline to exercise jurisdiction in this instance because any judgment by the Court with regard to the rights and duties of the parties under the Montreal Convention could have no practical consequences in light of the decisions of the Security Council. In addition, the Court cannot render a judgment addressing Libya's objections to the Security Council's demands without exceeding its jurisdiction pursuant to the Montreal Convention. Such a judgment also risks, in the context of a decision by the Security Council under Article 39 of the Charter, involving the Court in a dispute that can only be properly decided by the Security Council. Moreover, any judgment by the Court that addresses Libya's objections to the Security Council's demands would undermine the ability of the Security Council to perform its functions under the Charter for the maintenance and restoration of international peace and security. In effect,

Libya is seeking by these proceedings to persuade the Court to overrule decisions of the Security Council taken under Chapter VII of the United Nations Charter.

6. Further, even if the Court were to exercise jurisdiction in this instance, it should decide, as a preliminary matter, that the decisions of the Security Council preclude the relief sought by Libya, whatever the merits of its arguments concerning the Montreal Convention. As a result of Article 103 of the Charter, the obligations of Libya and other states under the Security Council's decisions take precedence over any inconsistent obligations and accordingly render it unnecessary to consider Libya's assertions under the Montreal Convention.

7. The United States, therefore, requests that the Court first address these preliminary objections in accordance with Article 79 of the Rules of the Court. A favorable ruling on these objections now would avoid having the Court unnecessarily address through a difficult and lengthy process numerous complicated factual and legal issues in a situation where no practical relief can be granted.

8. The United States reserves its right to object to any other issue of the Court's jurisdiction over, or the admissibility of, Libya's claims that arise in the course of these proceedings and all its other rights under the Statute and the Rules of Court.

**PART I**  
**STATEMENT OF FACTS**

1.01 Part I of this Memorial sets forth the facts relating to and underlying Libya's Application to the Court. Chapter 1 discusses the bombing of Pan American World Airways Flight 103 ("Pan Am 103") on 21 December 1988, and the indictment of two Libyan nationals for this crime on 14 November 1991 by a federal grand jury in the United States. Chapter 2 discusses the actions and decisions of the Security Council in connection with the bombing of Pan Am 103, including the imposition of sanctions on Libya for failure to comply with the Security Council's requirement that the two indicted Libyans be surrendered for trial in the United Kingdom or the United States. Chapter 3 explains that the Security Council's condemnation of the bombing of Pan Am 103 and its other actions in this case are consistent with its longstanding commitment to maintain international peace and security by condemning and acting against international terrorism. Chapter 4 addresses Libya's continuing refusal to comply with the Security Council's requirements.



## Chapter I

### **Two Libyan Nationals Were Indicted by a Federal Grand Jury in the United States Following an International Investigation into the Bombing of Pan Am 103**

#### Section 1. The Bombing of Pan Am 103 and the Ensuing International Investigation

1.02 On 21 December 1988, a United States registered aircraft flying as Pan American World Airways Flight 103, bound from Heathrow Airport in London, England, to New York's John F. Kennedy Airport in the United States, exploded over Lockerbie, Scotland. Two-hundred and seventy people were killed: 11 residents of the Scottish town of Lockerbie, and 259 passengers and crew, including 189 United States and at least 29 United Kingdom nationals. The aircraft also carried citizens of Argentina, Belgium, Bolivia, Canada, France, Germany, Hungary, India, Ireland, Israel, Italy, Jamaica, Japan, the Philippines, South Africa, Spain, Sweden, Switzerland, and Trinidad. The victims included children, students, families, business persons and government officials. The United Nations itself lost a most distinguished official in the bombing, Mr. Bernt Carlsson, the Commissioner for Namibia.<sup>1</sup>

1.03 Immediately following the bombing, a large and thorough international criminal investigation was launched, involving hundreds of investigators and the cooperation of more than 25 States. On December 30, 1988, the President of the Security Council issued a statement on behalf of the members of the Council strongly condemning the destruction of

---

<sup>1</sup> A complete list of the individuals killed on the flight is attached to Letter dated 23 December 1991 from the Acting Permanent Representative of the United States of America to the United Nations addressed to the Secretary-General, 23 December 1991, UN Doc. A/46/831-S/23317, Exhibit 1, pp. 10-15.

Pan Am 103 and calling on all States to assist in the apprehension and prosecution of those responsible for this criminal act.<sup>2</sup>

1.04 The bombing of the aircraft was a singularly horrible act of violence. Law enforcement authorities of the United States and the United Kingdom immediately dedicated tremendous resources to the investigation. Each nation had a great and compelling interest in identifying those responsible for the bombing: As noted above, the vast majority of the individuals killed in the bombing were nationals of the United States or the United Kingdom. In addition, the aircraft was U.S.-registered and owned and operated by Pan American World Airways, Inc., a U.S. corporation. It was destroyed over British territory, killing British citizens in the air and on the ground and destroying numerous homes in the town of Lockerbie.

## Section 2. The Grand Jury Indictment in the United States

1.05 The international investigation proceeded vigorously for the next three years. By 1991 law enforcement authorities in the United States and the United Kingdom had amassed evidence to justify application to their judicial systems for indictments and warrants for the arrest of two Libyan nationals, Abdel Basset Al-Megrahi ("Abdel Basset"), a senior Libyan Government intelligence official, and Lamem Khalifa Fhimah ("Lamen Fhimah"), the former manager of the Libyan Arab Airlines office in Malta. Section A below describes the grand jury process in the United States and thereby puts the indictment into its legal context.

---

<sup>2</sup> United Nations Press Release: Security Council Condemns Destruction of Pan Am Flight 103, 30 December 1988, UN Doc. SC/5057, Exhibit 2.

Section B then outlines the findings and conclusions of the federal grand jury regarding the bombing of Pan Am 103 and the alleged culpability of the two Libyan defendants.

A. The Grand Jury Process in the United States

1.06 The grand jury process used in the federal courts of the United States is principally governed by Sections 1861 through 1869 of Title 28 of the United States Code, and Rules 6 through 9 of the Federal Rules of Criminal Procedure.<sup>3</sup> As described in detail in these laws and Rules, federal grand juries in the United States operate as follows:

- A federal grand jury consists of at least 16, but no more than 23, United States citizens who are at least 18 years of age, and who have lived for a period of one year within the judicial district where they are asked to serve. They may not have been convicted of felonies or be the subjects of felony proceedings at the time they are asked to sit. Jurors are selected at random from a cross section of their community, and are not selected by the prosecution.

- No citizen may be excluded from service on a grand jury on account of race, color, religion, sex, national origin or economic status. Each United States district court is required by law to devise and place into operation a written plan for random selection of grand jurors that shall be designed to achieve these objectives.<sup>4</sup>

---

<sup>3</sup> United States Code, Title 28, § 1861-1869, Exhibit 3; Federal Rules of Criminal Procedure, Rules 6-9, Exhibit 4.

<sup>4</sup> Jury Selection Plan for the United States District Court for the District of Columbia, as amended through 9 September 1993, Exhibit 5.

- The identity of citizens who serve as grand jurors is kept strictly secret. The grand jury's deliberations are supervised by a United States District Judge, whose activities while in office are independent of the political process and who is appointed to the bench for life. The supervising United States District Judge selects one of the members of the grand jury to serve as the grand jury's foreperson. The foreperson has the sole power to swear witnesses and sign indictments on behalf of the grand jury.

- The federal grand jury conducts its proceedings in secret. While the grand jury is deliberating and voting on indictments, only the grand jurors may be present. Attorneys for the government may attend other grand jury proceedings, including the presentation of witnesses. Grand jurors may question witnesses and the prosecutors.

- The principal function of the federal grand jury is to decide whether to approve an indictment relating to felony crime which is believed to have been committed. To make that decision, the grand jury must determine from the evidence presented whether a crime has been committed and if there is probable cause to return an indictment charging one or more individuals with the commission of the crime. In most cases, federal grand juries consider evidence prepared and presented by prosecuting attorneys, but do not themselves investigate crimes.

- The prosecutors responsible for a case brought to the grand jury typically advise the grand jury about relevant law and prepare a proposed indictment for the grand jury to consider. The grand jury is under no obligation to return the indictment prepared by the prosecutors, and may choose to return an indictment for only some of

the charges suggested, or not to return an indictment at all. The grand jury's "veto" power over indictments stems from a requirement in the United States Constitution that indictments for major federal crimes may only be brought by a federal grand jury, and not by U.S. prosecutors acting alone.

- A grand jury's indictment is not a conclusive finding of guilt of the accused. It constitutes a finding of probable cause to believe that a crime was committed and that the individuals indicted for the crime have been determined to be the persons likely to have committed the crime. For conviction, an indictment must be followed by a full and public criminal trial, at which defendants are entitled to be represented by the attorney of their choice, or to have an attorney appointed for them by the court. Their guilt is judged by a second jury, known as a "petit jury," which consists of twelve citizens chosen at random from the community at large.

- To obtain a conviction, the United States Government must prove to the petit jury beyond a reasonable doubt in a public trial that the defendant indicted by the grand jury committed the crimes alleged in the indictment. Any decision of guilt must be reached unanimously by the twelve members of the petit jury. Thus, if a single juror is uncertain about the guilt of a defendant or believes that the government has not met its burden of proving guilt beyond a reasonable doubt, that defendant may not be found guilty.

- Defendants are entitled to a wide range of protections in criminal trials in the United States, including the right to challenge potential jurors peremptorily or for cause; the right to examine and challenge physical evidence presented by the

prosecutors and to cross-examine witnesses who testify for the government; the right to present evidence and to call witnesses for the defense; the right to testify or to remain silent, with no legal inferences being drawn from the decision not to testify; the right to address the jury directly or through legal counsel; and the right to appeal to an appellate court, also consisting of life-tenured federal judges, with broad power to review all aspects of the criminal trial for legal errors.<sup>5</sup>

#### B. The Grand Jury Charges Against the Two Libyans

1.07 On 14 November 1991, a grand jury of the United States District Court for the District of Columbia in Washington, D.C., handed down an indictment against Abdel Basset and Lamén Fhimah. The indictment charged them with the federal crimes of engaging in a criminal conspiracy, the goals of which included the destruction of Pan Am 103 and the murder of those aboard; wilfully and unlawfully causing a destructive device and substance to be placed in and upon a civil aircraft of the United States used, operated and employed in overseas and foreign air commerce; wilfully and unlawfully damaging and destroying, by means of an explosive device, a civil aircraft of the United States used, operated, and employed in overseas and foreign air commerce; maliciously damaging and destroying by means of an explosive property used in or affecting interstate or foreign commerce, causing

---

<sup>5</sup> For the benefit of the Court and the Parties to this proceeding, the U.S. Department of Justice has prepared a memorandum providing additional detail concerning the criminal process in the federal courts of the United States, including the protections afforded to defendants under the United States federal system. United States Department of Justice, Summary of Criminal Procedure in Federal Criminal Cases in the United States, 31 May 1995, Exhibit 6.

the deaths of 270 persons; and murdering 189 United States nationals outside the United States.<sup>6</sup> Details of the charges against Abdel Basset and Lamem Fhimah are contained in the grand jury's indictment.<sup>7</sup>

1.08 The crucial facts alleged by the grand jury and set forth in detail in the indictment may be summarized as follows:

- Both defendants were employed by the external section of the Jamahiriya Security Organization (the "JSO"), the Libyan Government's intelligence service. Abdel Basset was employed by the JSO in various positions including as the Chief of the JSO's Airline Security Section, Operations Division, and as such was familiar with international airline security procedures. Lamem Fhimah was employed by the JSO in various positions, including at various times as the Station Manager and representative for Libyan Arab Airlines at Luqa Airport, Malta. Lamem Fhimah had access to Air Malta luggage tags and the Air Malta facilities used to board passengers and baggage for LAA flights from Luqa Airport, Malta to cities in Germany and elsewhere.

- Pan Am 103 was destroyed as the result of an explosive device in its forward cargo hold.

- The explosive device was placed on the aircraft in furtherance of a conspiracy by the Libyan defendants and their co-conspirators to destroy an American aircraft by means of an explosive device and to kill passengers on board the aircraft.

---

<sup>6</sup> See United States Code, Title 18, §§ 32, 844, 2332 (previously codified as 2331) and 371, Exhibit 7.

<sup>7</sup> The grand jury's indictment is set forth in its entirety in the Annex to Exhibit 1.

- The defendants and co-conspirators are criminally responsible for the destruction of the aircraft and the murder of all on board and of eleven people on the ground in Lockerbie, Scotland.

- The defendants and co-conspirators utilized the resources and facilities of the nation of Libya, including the JSO, to carry out their scheme to destroy the aircraft and kill those on board. To accomplish the sabotage of Pan Am 103, the defendants and co-conspirators did the following:

- constructed and caused to be constructed an improvised explosive device consisting of plastic explosives containing the substances RDX and PETN, and an MST-13 prototype digital electronic timer, capable of initiating an explosion at a predetermined future time, which had been manufactured for and delivered to the Libyan JSO by the Swiss firm of Meister et Bollier during the period of 1985 to 1986 at the request of senior Libyan Government officials.
- caused the improvised explosive device to be concealed inside a portable radio cassette player.
- caused the radio cassette player to be placed inside a brown colored Samsonite Silhouette 4000 range suitcase.
- caused the suitcase to be packed with clothing, purchased in Malta, to provide the appearance of a normal travel bag.
- caused the suitcase, with the armed device concealed within it, to be placed in the stream of international airline passenger luggage at Luqa Airport in Malta.
- utilized false identities to enter Malta and other nations within which the conspiracy was carried out.
- utilized their knowledge and access gained as a result of their employment with Libyan Arab Airlines to circumvent and evade Maltese customs and airline security at Luqa Airport and elsewhere; and improperly obtained and utilized the Air Malta baggage tags to



cause the interline transfer of the suitcase, containing the explosive device, to other aircraft.

-- caused the suitcase containing the explosive device to be placed into the baggage compartment of Air Malta Flight KM-180 at Luqa Airport, Malta; caused the same suitcase to be transferred from Air Malta Flight KM-180 to Pan American World Airways Flight 103A in Frankfurt, Germany; caused the same suitcase to be further transferred to Pan Am 103 at Heathrow Airport, London; caused the detonation of the explosive device during Pan Am 103's journey to the United States; and caused the destruction of Pan Am 103 and the death of 270 people on the aircraft and on the ground.

1.09 The indictment further alleges that numerous specific overt acts were committed by Abdel Basset and Lamen Fhimah in Libya, Switzerland, Malta, Germany, the United Kingdom, and elsewhere, in connection with the bombing of Pan Am 103. The following are the specific allegations of overt acts, quoted verbatim from paragraph 39 of the indictment:

#### "OVERT ACTS

"39. In order to further the conspiracy and to achieve its objectives, the following overt acts, among others, were committed in Libya, Switzerland, Malta, Germany, the United Kingdom, and elsewhere:

"(a) In or about the summer of 1988, LAMEN FHIMAH stored a quantity of plastic explosive in his office at the Libyan Arab Airlines Station, Luqa Airport, Malta.

"(b) In or about the fall of 1988, ABDEL BASSET flew from Tripoli, Libya, to Luqa Airport, Malta, on Libyan Arab Airlines.

"(c) On or about 7 December 1988, ABDEL BASSET travelled from Libya to Malta.

"(d) On or about 7 December 1988, ABDEL BASSET registered at the Holiday Inn, Sliema, Malta, using the name "ABDEL BASET A. MOHMED", a "FLIGHT DISPATCHER" (sic) for Libyan Arab Airlines.

"(e) On or about 7 December 1988, in Sliema, Malta, ABDEL BASSET purchased items of clothing from Mary's House, a retail store located approximately 300 yards from the hotel in which ABDEL BASSET was staying.

"(f) On or about 9 December 1988, ABDEL BASSET travelled from Malta to Zurich, Switzerland.

"(g) On or about 15 December 1988, LAMEN FHIMAH made the following entries in his diary: "Abdel Basset is coming from Zurich with Salvu..." and "take taggs (sic) from Air Malta."

"(h) On or about 15 December 1988, LAMEN FHIMAH made an additional entry in the "Notes" section of his diary: "bring the tags from the Airport (ABDEL BASSET-ABDUL SALAM)."

"(i) On or about 15 December 1988, LAMEN FHIMAH made an additional entry in his diary by writing letters "OK" adjacent to the notation: "ABDEL BASSET is coming from Zurich with Salvu ... take taggs (sic) from Air Malta."

"(j) On or about 17 December 1988, ABDEL BASSET travelled from Zurich, Switzerland, to Luqa Airport, Malta, and then on to Tripoli, Libya.

"(k) On or about 18 December 1988, LAMEN FHIMAH travelled from Malta to Libya for a meeting with ABDEL BASSET.

"(l) On or about 20 December 1988, ABDEL BASSET travelled from Libya to Luqa Airport, Malta, utilizing the false identity of "AHMED KHALIFA ABDUSAMAD".

"(m) On or about 20 December 1988, LAMEN FHIMAH travelled from Tripoli, Libya, to Luqa Airport, Malta, on the same flight as ABDEL BASSET.

"(n) On or about 20 December 1988, the Defendants and co-conspirators brought a large, brown hard-sided Samsonite suitcase into Malta.

"(o) On or about 20 December 1988, ABDEL BASSET had a meeting with LAMEN FHIMAH in Malta.

"(p) On or about 20 December 1988, ABDEL BASSET registered at the Holiday Inn, Sliema, Malta, under the false name "AHMED KHALIFA ABDUSAMAD".

"(q) On 21 December 1988, at approximately 7.11 a.m., CET, ABDEL BASSET' placed a telephone call to LAMEN FHIMAH from the Holiday Inn, Sliema, Malta.

"(r) On 21 December 1988, ABDEL BASSET, travelling under an assumed name, departed Luqa Airport, Malta, on LAA Flight LN 147 to Tripoli, Libya.

"(s) On 21 December 1988, between 0815 and 0915 hours, CET, the Defendants and co-conspirators unknown to the Grand Jury, caused a brown, hard-sided Samsonite suitcase containing an explosive device incorporating an MST-13 timer, previously manufactured for the JSO, to be introduced as part of the interline baggage in Air Malta Flight KM-180 to Frankfurt, Germany.

"(t) On 21 December 1988, the Defendants and co-conspirators unknown to the Grand Jury, destroyed aircraft N739PA [Pan Am 103] as charged in Count Three of this Indictment, the allegations of which are hereby re-alleged and incorporated by reference.

"(u) On 21 December 1988, the Defendants and co-conspirators unknown to the Grand Jury, by means of fire and explosives destroyed aircraft N739PA, and as a direct result thereof caused the death of two hundred seventy persons as set forth in Counts Two and Three, the allegations of which are hereby re-alleged and incorporated by reference.

"(v) On 21 December 1988, the Defendants and co-conspirators unknown to the Grand Jury, by means of fire and explosives destroyed aircraft N739PA, and as a direct result thereof, did murder one hundred eighty-nine nationals of the United States, as set forth in Counts Five through One Hundred Ninety-Three, the allegations of which are hereby re-alleged and incorporated by reference."<sup>8</sup>

---

<sup>8</sup> Exhibit 1, pp. 7-9.

1.10 The grand jury's indictment thus directly links the two Libyan nationals, acting as officials of the JSO, to the suitcase containing the bomb and its insertion into the baggage system leading to Pan Am 103. On the basis of the evidence known to it, the grand jury also linked defendant Abdel Basset to the Swiss company, Meister et Bollier, that manufactured for the Libyan Government the sophisticated electronic timers used in the Pan Am 103 bombing and found in the plane's wreckage. Substantially identical factual and legal conclusions were reached by the Procurator Fiscal for Dumfries, Scotland, who applied for, obtained, and issued a Petition Warrant for Abdel Basset and Lamem Fhimah on 14 November 1991, following the investigation by Scottish authorities into the tragedy at Lockerbie.<sup>9</sup>

---

<sup>9</sup> See Letter dated 20 December 1991 from the Permanent Representative of the United Kingdom to the United Nations addressed to the Secretary-General, 31 December 1991, UN Doc. A/46/826-S/23307, Exhibit 8, p. 3.

## Chapter II

### **The UN Security Council Has Acted Repeatedly and Decisively to Condemn The Bombing of Pan Am 103 and to Require Libya to Surrender for Trial in the United Kingdom or the United States the Two Libyan Nationals Accused of Committing the Crime**

1.11 Security Council involvement in the Pan Am 103 bombing began almost immediately after the crime occurred. On 30 December 1988, the President of the Security Council issued a statement on behalf of the members of the Council strongly condemning the destruction of Pan Am 103 and calling on all States to assist in the apprehension and prosecution of those responsible for this criminal act.<sup>10</sup>

1.12 Security Council involvement intensified when, on 14 November 1991, the international investigation into the bombing led to the grand jury indictment in the United States and the issuance of a Petition Warrant by the Procurator Fiscal for Dumfries, Scotland, against the two Libyans. During the next two years, the Security Council adopted three major resolutions calling on Libya to surrender to the United States or the United Kingdom the two Libyan officials accused of murdering the 270 victims of Pan Am 103. The latter two of these Resolutions, 748 and 883, were decisions under Chapter VII of the UN Charter, requiring Libyan compliance with the demands of the United States and the United Kingdom to surrender for trial the Libyans implicated in the conspiracy and murder. As noted below, Libya has defied the Security Council and has refused to produce its nationals for trial. The Security Council has repeatedly reviewed Libya's failure to comply

---

<sup>10</sup> Exhibit 2.

with the sanctions and has decided each time to keep them in place to compel Libya to comply.

1.13 The following detailed chronology will review for the Court the key actions taken by the Security Council from November 1991 to the present and the events which preceded and triggered the Security Council's actions.

#### Section 1. Events leading to Security Council Resolution 731

##### A. The Demands of the United States, the United Kingdom and France

1.14 On 21 November 1991, the United States transmitted to Libya through authorities of the Government of Belgium, which represents United States interests in Libya, copies of the grand jury indictment of the two Libyan officials. Along with that indictment, the United States transmitted a note which demanded that the Government of Libya surrender the two Libyans to the United States in order to stand trial. The United Kingdom similarly transmitted the arrest warrant and the statement made by the Lord Advocate of Scotland outlining the case against the two Libyan officials. Thereafter, the British Government sought unsuccessfully to persuade the Libyan Government to make available the two accused for trial in Scotland. On 27 November 1991, the Governments of the United States and the United Kingdom both issued declarations stating:

"The British and American Governments today declare that the Government of Libya must:

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

- disclose all it knows of this crime, including the names of all those responsible, and allow full access to all witnesses, documents and other material evidence, including all the remaining timers;
- pay appropriate compensation."<sup>11</sup>

1.15 France, for its part, called upon Libya on 20 December 1991 to produce all the material evidence in its possession and to facilitate access to all documents that might be useful in France's judicial inquiry into the 19 September 1989, bombing of Union de Transports Aériens Flight 772 (hereinafter UTA 772), and to authorize the responsible Libyan officials to respond to any request made by the examining magistrate responsible for judicial information.<sup>12</sup> The complete text of the French Communiqué on this subject is as follows:

**"COMMUNIQUÉ FROM THE PRESIDENT OF THE FRENCH REPUBLIC  
AND THE MINISTRY OF FOREIGN AFFAIRS**

"The judicial inquiry conducted with regard to the attack on the UTA DC-10, which resulted in 171 deaths on 19 September 1989 places a heavy presumption of guilt for this odious crime on several Libyan nationals.

"Accordingly, following the summoning of the Ambassador of Libya to France by the Minister of State, Minister for Foreign Affairs, the French Government reiterates its demand that the Libyan authorities cooperate immediately, effectively

---

<sup>11</sup> These declarations were included in two submissions dated 20 December 1991 to the Secretary-General; they differ only in the British insertion of "complete" before "responsibility." See Exhibit 8, p. 9; Letter dated 20 December 1991 from the Permanent Representative of the United States of America to the United Nations addressed to the Secretary-General, 31 December 1991, UN Doc. A/46/827-S/23308, Exhibit 9, p. 2.

<sup>12</sup> UTA 772 was destroyed by a bomb over Niger on September 19, 1989. The flight was en route from Chad to France and was carrying 171 passengers and crew. There were no survivors. Among the dead were seven Americans, including the wife of the United States Ambassador to Chad.



and by all possible means with French justice in order to help to establish responsibility for this terrorist act.

"To that end, France calls upon Libya:

- To produce all the material evidence in its possession and to facilitate access to all documents that might be useful for establishing the truth.
- To facilitate the necessary meetings, inter alia, for the assembly of witnesses.
- To authorize the responsible Libyan officials to respond to any request made by the examining magistrate responsible for judicial information."<sup>13</sup>

1.16 On 20 December 1991, the British, French, and U.S. Governments issued a joint declaration, the complete text of which follows:

**"DECLARATION OF THE UNITED STATES OF AMERICA, FRANCE  
AND GREAT BRITAIN ON TERRORISM**

"The three States reaffirm their complete condemnation of terrorism in all its forms and denounce any complicity of States in terrorist acts. The three States reaffirm their commitment to put an end to terrorism.

"They consider that the responsibility of States begins whenever they take part directly in terrorist actions, or indirectly through harbouring, training, providing facilities, arming or providing financial support, or any form of protection, and that they are responsible for their actions before the individual States and the United Nations.

"In this connection, following the investigation carried out into the bombings of Pan Am 103 and UTA 772 the three States have presented specific demands to the Libyan authorities related to the judicial procedures that are under way. They require that Libya comply with all these demands, and, in addition, that Libya commit itself

---

<sup>13</sup> The French Communiqué was also submitted to the Secretary General in the Letter dated 20 December 1991 from the Permanent Representative of France to the United Nations addressed to the Secretary-General, 31 December 1991, UN Doc. A/46/825-S/23306, Exhibit 10, p. 2.

concretely and definitively to cease all forms of terrorist actions and all assistance to terrorist groups. Libya must promptly, by concrete actions, prove its renunciation of terrorism."<sup>14</sup>

B. Libya's Responses to the United States, the United Kingdom and France

1.17 Libya responded to the charges brought by the law enforcement authorities in the United States and the United Kingdom, and to the demands of the United States, the United Kingdom, and France, in five letters it sent to the UN Secretary-General between 17 November 1991, and 18 January 1992:

- In its letter of 17 November 1991, Libya categorically denied that it had any involvement with the Pan Am 103 bombing or that the Libyan authorities had any knowledge of its perpetrators.<sup>15</sup>

- In its letter of 20 November 1991, Libya asserted that it had appointed a judge to inquire into the accusations made, and that it had requested the United States and United Kingdom to nominate lawyers to monitor the fairness and propriety of the inquiry.<sup>16</sup>

---

<sup>14</sup> Letter dated 20 December 1991 from the Permanent Representatives of France, the United Kingdom and the United States of America to the United Nations addressed to the Secretary-General, 31 December 1991, UN Doc. A/46/828-S/23309, Exhibit 11, p. 3.

<sup>15</sup> Letter dated 17 November 1991 from the Permanent Representative of the Libyan Arab Jamahiriya to the United Nations addressed to the Secretary-General, 20 November 1991, UN Doc. A/46/660-S/23226, Exhibit 12, p. 2.

<sup>16</sup> Letter dated 20 November 1991 from the Permanent Representative of the Libyan Arab Jamahiriya to the United Nations addressed to the Secretary-General, 13 January 1992, UN Doc. A/46/844-S/23416, Exhibit 13, p. 5.

- In its letter of 8 January 1992, Libya stated that the two judges appointed to conduct the inquiry had communicated with the competent judicial authorities of the United States, the United Kingdom, and France, which had refused to respond to the judges' requests for the records of the investigation.<sup>17</sup>

- In its letter of 17 January 1992, Libya transmitted a copy of the resolution adopted by the Council of the Arab League, *inter alia*, urging the Security Council to resolve the conflict by negotiation, mediation and judicial settlement in accordance with Article 33 of Chapter VI of the U.N. Charter.<sup>18</sup>

- Finally, in its letter of 18 January 1992, Libya stated that its examining magistrate had instituted judicial procedures to ascertain the presence of the two suspects, had initiated a preliminary inquiry, and had issued an order for the two suspects to be taken into custody on a tentative basis. The letter indicated that Libyan judicial authorities had unsuccessfully sought the assistance of law enforcement authorities of the United States and France in Libya's investigation. It also urged the United States and the United Kingdom to agree promptly to arbitration in accordance

---

<sup>17</sup> Letter dated 8 January 1992 from the Permanent Representative of the Libyan Arab Jamahiriya to the United Nations addressed to the Secretary-General, 9 January 1992, UN Doc. A/46/841-S/23396, Exhibit 14, p. 2.

<sup>18</sup> Letter dated 17 January 1992 from the Permanent Representative of the Libyan Arab Jamahiriya to the United Nations addressed to the President of the Security Council, 17 January 1992, UN Doc. S/23436, Exhibit 15.

with Article 14(1) of the Montreal Convention for the Suppression of Unlawful Acts Against the Safety of International Civil Aviation (the Montreal Convention).<sup>19</sup>

Section 2. Security Council Resolution 731 of 21 January 1992

1.18 In early 1992, as it became clear that Libya was not making an effective response to the United States' and United Kingdom's demands to make the accused available for trial, the United States, the United Kingdom, and France decided to seek Security Council action. The three States circulated drafts of a possible resolution to other members of the Security Council in early and mid January 1992. As noted above, on 18 January 1992, Libya proposed arbitration under the Montreal Convention.

1.19 On 21 January 1992, the Security Council unanimously adopted Resolution 731,<sup>20</sup> which strongly deplored the fact that Libya had not responded effectively to the requests of the United States, United Kingdom, and France for cooperation. These requests included -- in addition to requests that Libya make compensation, renounce terrorism, and reveal all it knows of the crimes -- specific United States and United Kingdom requests for Libya to surrender for trial the two JSO officials who had been indicted in the United States and charged in the United Kingdom. As reflected below, the Security Council urged Libya in paragraph 3 of the resolution to provide a "full and effective response to those requests so

---

<sup>19</sup> Letter dated 18 January 1992 from the Permanent Representative of the Libyan Arab Jamahiriya to the United Nations addressed to the President of the Security Council, 18 January 1992, UN Security Council Doc. S/23441, Exhibit 16, pp. 2-3. The Montreal Convention, 974 U.N.T.S. pp. 178-91, appears as Exhibit 17.

<sup>20</sup> Resolution 731, United Nations Security Council 3033rd meeting, 21 January 1992, UN Doc. S/RES/731, Exhibit 18.

as to contribute to the elimination of international terrorism." The full text of Resolution 731 follows:

"The Security Council,

"Deeply disturbed by the world-wide persistence of acts of international terrorism in all its forms, including those in which States are directly or indirectly involved, which endanger or take innocent lives, have a deleterious effect on international relations and jeopardize the security of States,

"Deeply concerned by all illegal activities directed against international civil aviation, and affirming the right of all States, in accordance with the Charter of the United Nations and relevant principles of international law, to protect their nationals from acts of international terrorism that constitute threats to international peace and security,

"Reaffirming its resolution 286 (1970) of 9 September 1970, in which it called on States to take all possible legal steps to prevent any interference with international civil air travel,

"Reaffirming also its resolution 635 (1989) of 14 June 1989, in which it condemned all acts of unlawful interference against the security of civil aviation and called upon all States to cooperate in devising and implementing measures to prevent all acts of terrorism, including those involving explosives,

"Recalling the statement made on 30 December 1988 by the President of the Security Council on behalf of the members of the Council strongly condemning the destruction of Pan Am flight 103 and calling on all States to assist in the apprehension and prosecution of those responsible for this criminal act,

"Deeply concerned over the results of investigations, which implicate officials of the Libyan Government and which are contained in Security Council documents that include the 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 transport aérens flight 772 [citations to the requests of the United States, United Kingdom and France omitted herein];

"Determined to eliminate international terrorism,

"1. Condemns the destruction of Pan American flight 103 and Union de transports aérens flight 772 and the resultant loss of hundreds of lives;

"2. Strongly deplores the fact that the Libyan Government has not yet responded effectively to the above requests to cooperate fully in establishing responsibility for the terrorist acts referred to above against Pan American flight 103 and Union de transports aérens flight 772;

"3. Urges the Libyan Government immediately to provide a full and effective response to those requests so as to contribute to the elimination of international terrorism;

"4. Requests the Secretary-General to seek the cooperation of the Libyan Government to provide a full and effective response to those requests;

"5. Urges all States individually and collectively to encourage the Libyan Government to respond fully and effectively to those requests;

"6. Decides to remain seized of the matter."

1.20 The Representative of the United Kingdom, in explaining his vote in favor of Resolution 731, stated: "It has been suggested the men might be tried in Libya. But in the particular circumstances there can be no confidence in the impartiality of the Libyan courts. ... We are not setting a broad precedent. We are dealing only with terrorism in which there is State involvement. In the circumstances of this case it must be clear to all that the State which is itself implicated in the acts of terrorism cannot try its own officials."<sup>21</sup>

1.21 Ambassador Thomas Pickering, the United States Representative, similarly stated: "The Council was faced in this case with clear implications of Government involvement in terrorism as well as with the absence of an independent judiciary in the implicated State."<sup>22</sup>

---

<sup>21</sup> Provisional Verbatim Record, United Nations Security Council, 3033rd meeting, 21 January 1992, UN Doc. S/PV.3033, Exhibit 19, pp. 105-06.

<sup>22</sup> Ibid, p. 80.

1.22 During consideration of the draft of what became Resolution 731, representatives from various other members of the Security Council also condemned Libya's actions and called on Libya to comply with the requests of the Security Council. The following are verbatim excerpts of comments made by various representatives:

Belgium: "Those are extremely serious indications of the responsibility of Libyan officials in the destruction of these two aircraft in flight and the death of all their passengers. It is Libya's responsibility to cooperate fully with the legal authorities of the States directly concerned in these two attacks, so that responsibility can be determined once and for all."<sup>23</sup>

Canada: "Canada is entirely committed to putting an end to all forms of international terrorism. The international community has been for too long the victim of the type of terrorism in which States have been involved directly or indirectly . . . Canada believes that attacks against civilian targets are abhorrent threats to international peace and security, and they must be addressed by the international community as a whole.

"Moreover, the concern of the Security Council in respect of matters of international terrorism is not new. In 1989 my delegation was pleased to be involved in the process that led to the adoption by the Security Council of resolution 635 (1989), which condemned all acts of unlawful interference against the security of civil aviation. The Council now has the opportunity to build upon its involvement and to make a constructive contribution to bringing such criminal acts to an end.

"In bilateral contacts, Canada has already underlined the seriousness with which it regards the matter. We have urged Libya to cooperate fully with the British, French and United States Governments in respect of the matter. In the absence of a satisfactory Libyan response to the various bilateral démarches made to it and, given the non-acceptance to date by Libya of its responsibilities in these two tragedies, the Government of Canada considers that the draft resolution submitted to the Security Council represents the best course of action for the international community."<sup>24</sup>

---

<sup>23</sup> Ibid, p. 83. (translation)

<sup>24</sup> Ibid, pp. 47-48.

Hungary: "Hungary expresses its deep concern at terrorist acts in which States are implicated directly or indirectly. Each and every member of the international community is in duty bound to cooperate fully and appropriately to bring the facts to light and to establish responsibility unequivocally."<sup>25</sup>

India: "Governments have sometimes for short-term gains been lenient with terrorists. ... My delegation believes, therefore, that determined Security Council action should send out the message that terrorists, and international terrorists even more, will not find safe haven anywhere but will be flushed out and punished for their misdeeds."<sup>26</sup>

Italy: "[M]y country has favoured the involvement of the United Nations in connection with the need to identify and to prosecute those responsible for the terrorist acts conducted against the Pan Am and UTA flights that are the subject of the Council's deliberations today.

In this context, the Italian Government wishes to express appreciation for the raft resolution that is about to be adopted by the Security Council. It fervently hopes that the Libyan authorities will promptly and effectively comply with the draft resolution's provisions."<sup>27</sup>

1.23 During debate on Resolution 731, the Representative of Libya said the British charges and U.S. indictments were baseless and questioned the authority of the Security Council to act on this matter: "There can be no doubt that this is a purely legal question. Neither can there be any doubt that therefore the Security Council is a forum that is not competent to consider the question."<sup>28</sup>

1.24 In sum, at the time the Security Council acted, it had before it, through Libya's series of written submissions and its statements during debate, Libya's claims that: Libya

---

<sup>25</sup> Ibid, p. 91. (translation)

<sup>26</sup> Ibid, p. 95.

<sup>27</sup> Ibid, p. 46.

<sup>28</sup> Ibid, pp. 14-15. (translation)



should prosecute the individuals; Libya could not extradite the individuals; the United States had not cooperated with Libya's investigation; and the matter should be handled pursuant to the Montreal Convention and be referred either to arbitration or to the International Court of Justice. Despite these arguments, and over Libya's vigorous objections, the Council unanimously adopted Resolution 731.

Section 3. Libya's Application to this Court and its Request for Provisional Measures (3 March 1992)

1.25 On 3 March 1992, just five weeks after Resolution 731 was passed, Libya instituted proceedings at this Court to attempt to impede the United States and the United Kingdom from pursuing further action against Libya. As it had done before the Security Council, Libya claimed there existed a dispute between Libya and the United States and Libya and the United Kingdom over the interpretation or application of the Montreal Convention, a dispute which Libya claimed arose from the bombing of Pan Am 103 on 21 December 1988.

1.26 Since the Court already has before it Libya's Application against the United States and the proceedings that took place in March 1992 in connection with Libya's request for provisional measures, United States will only summarize Libya's arguments briefly here for convenient reference. Libya claims that:

- the Montreal Convention is the only appropriate convention in force between the parties dealing with such offenses, and that the U.S. is bound by its legal obligations under the Convention which require it to act in accordance with the Convention, and only the Convention, with respect to the matter involving Pan Am 103 and the accused;

- the United States has breached and is continuing to breach the Convention in certain respects;
- Libya has taken measures to establish its jurisdiction over the offenses charged, to ensure the presence of the accused in Libya in order to enable criminal proceedings to be instituted, and to submit the case to its competent authorities for the purpose of prosecution, pursuant to the Convention;
- Libya has not extradited the accused, there being no extradition treaty with the United States, and Libyan law prohibits extradition of Libyan nationals;
- the United States has shown that it is not interested in proceeding within the framework of the Convention but is intent on compelling the surrender to it of the accused, in violation of the Convention; and
- by its actions and threats, the United States seeks, in violation of the Convention, to prevent Libya from exercising the right conferred on it by the Convention to exercise its criminal jurisdiction to deal with the matter in accordance with its national law.

1.27 In its Application, Libya asked the Court to adjudge and declare that: Libya has fully complied with all of its obligations under the Convention; the United States has breached and is continuing to breach its legal obligations to Libya under Article 5(2), 5(3), 7, 8(2) and 11 of the Convention; and 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.

1.28 Along with its Application, Libya filed an urgent request that the Court indicate provisional measures to preserve Libya's rights. In requesting provisional measures, Libya alleged that the United States was actively seeking to by-pass the provisions of the Convention by threatening actions against Libya in order to compel Libya, in violation of the Convention, to surrender its two accused nationals. Libya also alleged that the United States had indicated that it might seek or impose economic, air and other sanctions against Libya if Libya did not comply with the demands of the United States. Libya specifically requested

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

1.29 On 14 April 1992, this Court firmly rejected Libya's request, citing, inter alia, the decisions of the Security Council, which directed Libya to comply with the requests of the United States or the United Kingdom to render the accused to one of those two countries for trial. Among other things, the Court determined that both Libya and the United States, as Members of the United Nations, are obliged to accept and carry out the decisions of the Security Council in accordance with Article 25 of the UN Charter; that in accordance with Article 103 of the Charter, the obligations of the Parties in that respect prevail over their obligations under any other international agreement, including the Montreal Convention; and that an indication of measures requested by Libya would be likely to impair the rights which appear prima facie to be enjoyed by the United States by virtue of Security Council Resolution 748 discussed below.

#### Section 4. Security Council Resolution 748 of 31 March 1992

1.30 As noted above, Resolution 731 requested the UN Secretary-General to seek the cooperation of the Libyan Government to provide a full and effective response to the United States, United Kingdom and French requests. The Secretary-General filed two reports on his efforts to obtain such cooperation. In the first report of 11 February 1992, the Secretary-General stated that Libya had indicated a readiness to cooperate fully with the Security

Council and had invited the Secretary-General to create a mechanism for the implementation of resolution 731.<sup>29</sup> In his second report of March 3, 1992, however, the Secretary-General reported less cooperative comments by Libyan officials on the possibility of handing over the Libyan defendants.<sup>30</sup>

1.31 Faced with continued Libyan non-compliance with the requests of the Security Council, the United States, the United Kingdom, and France consulted with other members of the Council about a second, stronger Council resolution that would direct Libya to respond. Resolution 731, described above, was adopted under Chapter VI of the UN Charter, pursuant to which the Security Council may seek or request action of member states. Because it had become apparent by March 1992 that Libya was not inclined to cooperate voluntarily with the Security Council, the members of the Security Council determined to seek action under Chapter VII, pursuant to which Libya would be legally required, among other things, to comply with the requests of the United States and the United Kingdom to surrender the two individuals who had been indicted in the United States and charged in the United Kingdom. Similarly, under Article 48 of the Charter, Member States of the United Nations would be obliged to comply with any sanctions imposed against Libya under Chapter VII until Libya complied with those requirements.

---

<sup>29</sup> Report by the Secretary-General Pursuant to Paragraph 4 of Security Council Resolution 731, 11 February 1992, UN Doc. S/23574, Exhibit 20.

<sup>30</sup> Further Report by the Secretary-General Pursuant to Paragraph 4 of Security Council Resolution 731, 3 March 1992, UN Doc. S/23672, Exhibit 21.

1.32 On 31 March 1992, the Council thus considered a draft resolution under Chapter VII of the UN Charter.<sup>31</sup> The key elements of the draft, and particularly Libya's arguments during debate, are set forth below to emphasize the fact that Libya made to the Security Council fundamentally the same arguments it is now making to this Court. The draft resolution, which was co-sponsored by the United Kingdom, the United States and France, stated that the Council would take the following steps:

- once again express deep concern that the Libyan Government still had not provided a full and effective response to the requests of the United States, United Kingdom and France endorsed by Resolution 731;
- determine that the failure by the Libyan Government to demonstrate by concrete actions its renunciation of terrorism and in particular its continued failure to respond fully and effectively to the requests in Resolution 731 constituted a threat to international peace and security;
- decide, under Chapter VII of the Charter, that the Libyan Government must comply without further delay with the requests of the United States, United Kingdom and France;
- decide, under Chapter VII, to impose mandatory economic sanctions on the Government of Libya, including a civil air embargo and an arms embargo.

1.33 Libya's representative argued that the Security Council should not adopt such a resolution because:

- the Council was being asked to decide without having before it any evaluation of the evidence by a neutral and objective forum;
- Libya had taken steps under the Montreal Convention to assume jurisdiction over the matter, take custody of the accused, conduct an investigation of the charges, and seek the cooperation of the United States and the United Kingdom in the investigation, as provided under the Montreal Convention;

---

<sup>31</sup> The statements of Libya and of the three States which sponsored Resolution 748, along with various other members of the Security Council, are set forth in Provisional Verbatim Record, United Nations Security Council, 3063rd meeting, 31 March 1992, UN Doc. S/PV.3063, Exhibit 22.

- Libya had indicated that it would welcome a neutral investigating committee or putting the matter before the International Court of Justice, and presented a number of proposals to that end;
- Libya had indicated its willingness to turn the accused over to some neutral body for investigation and trial;
- the United States and the United Kingdom continue to request extradition in violation of judicial procedure and established conventions and norms;
- Resolution 731 was based upon incomplete investigations, and was without justification;
- adoption of Resolution 731 did not take into account the correct implementation of Article 27(3) of the Charter which bars Members of the Council that are party to a legal dispute from participating in Council consideration of that dispute;
- there is no need to take the action being considered only two months after the adoption of Resolution 731;
- Libya had submitted the matter to the International Court of Justice under Article 14 of the Montreal Convention and questioned why it is claimed that this incident does not come under the jurisdiction of the Court;
- States should await the opinion of this Court on the question;
- the proposed action did not relate to threats to the peace, but related to a legal dispute concerning who should investigate the accused and who should put them on trial.<sup>32</sup>

1.34 Resolution 748 was adopted by a vote of 10 in favor (Austria, Belgium, Ecuador, France, Hungary, Japan, Russian Federation, the United Kingdom, the United States and Venezuela), none opposed, and five abstentions (Cape Verde, China, India, Morocco, and Zimbabwe)<sup>33</sup>. During debate on the measure, Security Council members observed that Libya's continued non-compliance with Resolution 731 had led them to support the stricter, mandatory

---

<sup>32</sup> *Ibid*, pp. 3-22.

<sup>33</sup> Resolution 748, United Nations Security Council, 3063rd meeting, 31 March 1992, UN Doc. S/RES/748, Exhibit 23.

measures of Resolution 748. The following are verbatim excerpts of comments made by various representatives:

Ecuador: "Unfortunately, neither resolution 731, nor the statement of the Heads of State and Government adopted on 31 January, nor the diligent steps taken by the Secretary-General in implementation of paragraph 4 of that resolution, nor the tireless efforts of the members of the Non-Aligned Movement have thus far prompted Libya to comply with the requests made to it in resolution 731 (1992)."<sup>34</sup>

France: "In the absence of any response from the Tripoli Government, the course chosen by the three countries has been that based on the rule of law, namely, the Security Council.... The repeated efforts of the Secretary-General, of the League of Arab States and of Libya's neighbors have been met with delaying tactics. In order not to reverse itself, the Security Council was therefore forced to adopt new measures to bring Libya to face up to its responsibilities. It has just done so by adopting resolution 748 (1992), of which France is a sponsor."<sup>35</sup>

Japan: "At the time resolution 731 (1992) was adopted on 21 January it was foreseen that the Security Council would be compelled to take further measures if Libya did not comply with it. Unfortunately, the subsequent developments in the situation call for the Council's adoption of a new resolution."<sup>36</sup>

Hungary: "Today, as we consider for the second time the fate of these Pan Am and UTA flights, we are compelled to note that, although over two months have passed since the adoption of Security Council resolution 731 (1992), Libya has yet to comply with its provisions . . . Bearing in mind the vital significance of the subject before us today, as well as the credibility and authority of the United Nations, Hungary has felt and continues to feel that the Security Council must take further measures to ensure compliance with its own resolutions."<sup>37</sup>

---

<sup>34</sup> Exhibit 22, p. 48. (translation)

<sup>35</sup> Ibid, pp.73-74. (translation)

<sup>36</sup> Ibid, p. 75.

<sup>37</sup> Ibid, p. 76. (translation)

Austria: "Regrettably, Libya has still not implemented its obligations under [Resolution 731]. Hence, we voted in favour of resolution 748 (1992)."<sup>38</sup>

1.35 Resolution 748 imposed sanctions on Libya including a ban on all air traffic into and out of Libya; a ban on the operations of Libyan Airlines offices worldwide; a ban on provision of aircraft and related services and parts to Libya; a ban on all arms supplies and related material of all types and licensing arrangements for arms to Libya; withdrawal of military advisers, specialists, and technicians from Libya; a requirement that States significantly reduce the number and level of staff at Libyan diplomatic missions and consular posts; and the requirement that States take steps to deny entry or expel Libyan nationals who have been involved in terrorist activities.

1.36 Key sections of Resolution 748 are as follows:<sup>39</sup>

"The Security Council

...

"Deeply concerned that the Libyan Government has still not provided a full and effective response to the requests in its resolution 731 (1992) of 21 January 1992,

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

"Recalling that, in the statement issued on 31 January 1992 on the occasion of the meeting of the Security Council at the level of heads of State and Government, the members of the Council expressed their deep concern over acts of international terrorism, and emphasized the need for the international community to deal effectively with all such acts,

---

<sup>38</sup> Ibid, p. 78.

<sup>39</sup> The full text of Resolution 748 appears as Exhibit 23.



"Reaffirming that, in accordance with the principle in Article 2, paragraph 4, of the Charter of the United Nations, every State has the duty to refrain from organizing, instigating, assisting or participating in terrorist acts in another State or acquiescing in organized activities within its territory directed towards the commission of such acts, when such acts involve a threat or use of force,

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

"Determined to eliminate international terrorism,

"Recalling the right of States, under Article 50 of the Charter, to consult with the Security Council where they find themselves confronted with special economic problems arising from the carrying out of preventive or enforcement measures,

"Acting under Chapter VII of the Charter,

"1. Decides that the Libyan Government must now comply without any further delay with paragraph 3 of resolution 731 (1992) regarding the requests contained in documents S/23306, S/23308 and S/23309 [the requests by the United States, the United Kingdom and France mentioned above],

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

"3. Decides that, on 15 April 1992 all States shall adopt the measures set out below, which shall apply until the Security Council decides that the Libyan Government has complied with paragraphs 1 and 2 above,

"4. Decides also that all States shall:

"(a) Deny permission to any aircraft to take off from, land in or overfly their territory if it is destined to land in or has taken off from the territory of Libya, unless the particular flight has been approved on grounds of significant humanitarian need by the Committee established by paragraph 9 below;

"(b) Prohibit, by their nationals or from their territory, the supply of any aircraft or aircraft components to Libya, the provision of engineering and maintenance servicing of Libyan aircraft or aircraft components, the certification of airworthiness for Libyan aircraft, the payment of new claims against existing insurance contracts and the provision of new direct insurance for Libyan aircraft;

"5. Decides further that all States shall:

"(a) Prohibit any provision to Libya by their nationals or from their territory of arms and related material of all types, including the sale or transfer of weapons and ammunition, military vehicles and equipment, paramilitary police equipment and spare parts for the aforementioned, as well as the provision of any types of equipment, supplies and grants of licensing arrangements, for the manufacture or maintenance of the aforementioned;

"(b) Prohibit any provision to Libya by their nationals or from their territory of technical advice, assistance or training related to the provision, manufacture, maintenance, or use of the items in (a) above;

"(c) Withdraw any of their officials or agents present in Libya to advise the Libyan authorities on military matters;

"6. Decides that all States shall:

"(a) Significantly reduce the number and level of the staff at Libyan diplomatic missions and consular posts and restrict or control the movement within their territory of all such staff who remain; in the case of Libya's missions to international organizations, the host State may, as it deems necessary, consult with the organization concerned on the measures required to implement this subparagraph;

"(b) Prevent the operation of all Libyan Arab Airline Offices;

"(c) Take all appropriate steps to deny entry to or expel Libyan nationals who have been denied entry to or expelled from other States because of their involvement in terrorist activities.

"7. Calls upon all States, including States not members of the United Nations, and all international organizations, to act strictly in compliance with the provisions of the present resolution, notwithstanding the existence of any rights or obligations conferred or imposed by any international agreement or any contract entered into or any license or permit granted prior to 15 April 1992;

. . . .

"13. Decides the Security Council shall, every 120 days or sooner should the situation so require, review the measures imposed by paragraphs 3 to 7 above in the light of the compliance by the Libyan Government with paragraphs 1 and 2 above taking into account, as appropriate, any reports provided by the Secretary-General on his role as set out in paragraph 4 of resolution 731 (1992);

"14. Decides to remain seized of the matter."

1.37 Other sections of resolution 748 not quoted above seek reports from Member States on their compliance with the sanctions established in the resolution and establish a special Security Council committee to examine the reports of States on compliance and to make additional recommendations to enhance the effectiveness of the sanctions against Libya.

Section 5. Security Council Resolution 883 of 11 November 1993

A. Events Leading to Security Council Resolution 883

1.38 In the months following the passage of Resolution 748, the Committee established by that resolution reviewed and supervised implementation of the sanctions against Libya. The United States and other members of the United Nations implemented the sanctions regime and continued to call on Libya to comply with the requirements of Resolutions 731 and 748. Notwithstanding the sanctions and the demands of the international community, Libya continued to refuse to comply with the requirements of the Security Council resolutions and surrender for trial the two individuals accused of bombing Pan Am 103.

1.39 From August 1992 through August 1993, the Security Council repeatedly reviewed Libyan compliance with sanctions, as called for in resolution 748, and found that Libya remained in defiance of the will of the international community.<sup>40</sup> Members of the Security Council

---

<sup>40</sup> See Note by the President of the Security Council, 12 August 1992, UN Doc. S/24424, Exhibit 24; Note by the President of the Security Council, 9 December 1992, UN Doc. S/24925, Exhibit 25; Note by the President of the Security Council, 8 April 1993, UN Doc. S/25554, Exhibit 26; Note by the President of the Security Council, 13 August 1993, UN Doc. S/26303, Exhibit 27.

therefore began to consider whether additional sanctions, including sanctions affecting Libya's oil revenues, might force Libyan to comply with the Security Council's requirements.

1.40 On 13 August 1993, the Governments of France, the United Kingdom and the United States issued a Declaration on Libyan terrorism which stated in part:

"The United States, the United Kingdom and France have observed with diminishing patience that the envoys of the Secretary-General of the United Nations to Tripoli repeatedly come back empty-handed, without indications of compliance although with many assurances of Libya's cooperation. We have waited the four months requested by the Secretary-General of the League of Arab States, who wished to serve as an intermediary between the international community and the Libyans. We have repeatedly rejected Libyan efforts to distract the international community from its lack of compliance with empty offers to surrender the Lockerbie suspects and to comply with the requirements of French justice and to prove their partial compliance with the Security Council's demands.

"However, our three Governments, in the interests of giving Libya one last chance, have asked the Secretary-General of the United Nations to look into the matter and take the necessary steps to achieve the full implementation by the Libyan Government of Resolution 731 (1992) within 40 to 45 days.

"If, by October first, the Libyan Government has failed to comply with resolutions 731 (1992) and 748 (1992), including the transfer to United States or United Kingdom jurisdiction of the Lockerbie suspects and compliance with the requests of French justice on UTA flight 772, we will table a resolution strengthening the sanctions in key oil-related financial and technological areas.

"Once more, our three Governments reiterate that they have no hidden agenda and that, on the contrary, upon full implementation by Libya of Security Council resolutions 731 (1992) and 748 (1992), the conditions would be met for the lifting of sanctions by the Security Council."<sup>41</sup>

1.41 Approximately five weeks after this Declaration, under cover of a letter dated 11 September 1993, Libya sent the Secretary-General a memorandum raising a series of nineteen

---

<sup>41</sup> Letter dated 13 August 1993 from the Representatives of France, the United Kingdom and the United States of America to the United Nations addressed to the Secretary-General, 13 August 1993, UN Doc. A/48/314-S/26304, Exhibit 28.

questions regarding trial in the United Kingdom or the United States of the two Libyans sought for trial.<sup>42</sup> The United States and United Kingdom replied quickly to Libya's questions.<sup>43</sup> Based on these replies, the Secretary-General's responsive letter to Libya provided detailed answers shortly thereafter, on 24 September 1993, in which the Libyan Government was assured, inter alia, that its nationals would be afforded a fair trial in either forum.<sup>44</sup> In a letter dated 1 October 1993, Libya acknowledged that the replies to its memorandum were "adequate and acceptable."<sup>45</sup> Yet Libya continued to fail to comply with the Security Council's requirement to surrender the two suspects for trial.

#### B. Security Council Resolution 883

1.42 In light of the Libyan Government's continued failure to cooperate, the members of the Security Council began to consider whether the sanctions regime imposed in Resolution

---

<sup>42</sup> Letter dated 22 September 1993 from the Permanent Representative of the Libyan Arab Jamahiriya addressed to the Secretary-General, 28 September 1993, UN Doc. S/26500, Exhibit 29.

<sup>43</sup> The answers to Libya's questions, which were supplied by the United States to the United Nations through the U.S. Mission to the United Nations in New York, are set forth in a cable sent from the U.S. Department of State on 22 September 1993 to the U.S. Mission to the United Nations, Exhibit 30. While this cable was originally classified by the United States, it has been declassified in relevant part for use in this proceeding, and the classification markings and other information not communicated to the United Nations have been redacted from the document.

<sup>44</sup> The Secretary-General's responsive letter to His Excellency Mr. Omar Al-Muntasser, Secretary of the General People's Committee of the People's Bureau for Foreign Liaison and International Cooperation of the Great Socialist People's Libyan Arab Jamahiriya, has not been published as a United Nations document.

<sup>45</sup> Letter dated 1 October 1993 from the Permanent Representative of the Libyan Arab Jamahiriya to the United Nations addressed to the Secretary-General, 1 October 1993, UN Doc. S/26523, Exhibit 31, p. 3.

748 should be expanded to include sanctions on Libyan oil revenue. Ultimately, on 11 November 1993, the Security Council imposed additional sanctions, in Resolution 883.<sup>46</sup> Key elements of this resolution, which went into effect on December 1, 1993, included a limited assets freeze, an embargo on aircraft or aircraft components, and language closing certain gaps in the civil aviation sanctions which had been put into place by Resolution 748.

1.43 In Resolution 883, like Resolution 748, the Security Council acted pursuant to Chapter VII of the Charter. The Resolution provides in part:

"The Security Council,

"Reaffirming its resolutions 731 (1992) of 21 January 1992 and 748 (1992) of 31 March 1992,

"Deeply concerned that after more than twenty months the Libyan Government has not fully complied with these resolutions,

"Determined to eliminate international terrorism,

"Convinced that those responsible for acts of international terrorism must be brought to justice,

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

"Determining, in this context, that the continued failure by the Libyan Government to demonstrate by concrete actions its renunciation of terrorism, and in particular its continued failure to respond fully and effectively to the requests and decisions in resolutions 731 (1992) and 748 (1992), constitute a threat to international peace and security,

"Taking note of the letters to the Secretary-General dated 29 September and 1 October 1993 from the Secretary of the General People's Committee for Foreign Liaison and International Cooperation of Libya (S/26523) and his speech in the General Debate at the

---

<sup>46</sup> Resolution 883, United Nations Security Council, 3312th meeting, 11 November 1993, UN Doc. S/RES/883, Exhibit 32.

forty-eighth session of the General Assembly (A/48/PV.20) in which Libya stated its intention to encourage those charged with the bombing of Pan Am 103 to appear for trial in Scotland and its willingness to cooperate with the competent French authorities in the case of the bombing of UTA 772,

...

"Acting under Chapter VII of the Charter,

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

"2. Decides, in order to secure compliance by the Libyan Government with the decisions of the Council, to take the following measures, which shall come into force at 00.01 EST on 1 December 1993 unless the Secretary-General has reported to the Council in the terms set out in paragraph 16 below;

"3. Decides that all States in which there are funds or other financial resources (including funds derived or generated from property) owned or controlled, directly or indirectly, by:

"(a) the Government or public authorities of Libya, or

"(b) any Libyan undertaking,

"shall freeze such funds and financial resources and ensure that neither they nor any other funds and financial resources are made available, by their nationals or by any persons within their territory, directly or indirectly, to or for the benefit of the Government or public authorities of Libya or any Libyan undertaking, which for the purposes of this paragraph, means any commercial, industrial or public utility undertaking which is owned or controlled, directly or indirectly, by

"(i) the Government or public authorities of Libya,

"(ii) any entity, wherever located or organized, owned or controlled by (i), or

"(iii) any person identified by States as acting on behalf of (i) or (ii) for the purposes of this resolution;

"4. Further decides that the measures imposed by paragraph 3 above do not apply to funds or other financial resources derived from the sale or supply of any petroleum products, including natural gas and natural gas products, or agricultural products or commodities, originating in Libya and exported therefrom after the time specified in

paragraph 2 above, provided that any such funds are paid into separate back accounts exclusively for these funds;

"5. Decides that all States shall prohibit any provision to Libya by their nationals or from their territory of the items listed in the annex to this resolution, as well as the provision of any types of equipment, supplies and grants of licensing arrangements for the manufacture or maintenance of such items;

"6. Further decides that, in order to make fully effective the provisions of resolution 748 (1992), all States shall:

"(a) require the immediate and complete closure of all Libyan Arab Airlines offices within their territories;

"(b) prohibit any commercial transactions with Libyan Arab Airlines by their nationals or from their territory, including the honouring or endorsement of any tickets or other documents issued by the airline;

"(c) prohibit, by their nationals or from their territory, the entering into or renewal of arrangements for:

"(i) the making available, for operation within Libya, of any aircraft or aircraft components, or

"(ii) the provision of engineering or maintenance servicing of any aircraft or aircraft components within Libya;

"(d) prohibit, by their nationals or from their territory, the supply of any materials destined for the construction, improvement or maintenance of Libyan civilian or military airfields and associated facilities and equipment, or of any engineering or other services or components destined for the maintenance of any Libyan civil or military airfields or associated facilities and equipment, except emergency equipment and equipment and services directly related to civilian air traffic control;

"(e) prohibit, by their nationals or from their territory, any provision of advice, assistance, or training to Libyan pilots, flight engineers, or aircraft and ground maintenance personnel associated with the operation of aircraft and airfields within Libya;

"(f) prohibit, by their nationals or from their territory, any renewal of any direct insurance for Libyan aircraft;

"7. Confirms that the decision taken in resolution 748 (1992) that all States shall significantly reduce the level of the staff at Libyan diplomatic missions and consular



posts includes all missions and posts established since that decision or after the coming into force of this resolution;

...

"9. Instructs the Committee established by resolution 748 (1992) to draw up expeditiously guidelines for the implementation of paragraphs 3 to 7 of this resolution, and to amend and supplement, as appropriate, the guidelines for the implementation of resolution 748 (1992), especially its paragraph 5(a);

...

"12. Calls upon all States, including States not members of the United Nations, and all international organizations, to act strictly in accordance with the provisions of the present resolution, notwithstanding the existence or any rights or obligations conferred or imposed by any international agreement or any contract entered into or any license or permit granted prior to the effective time of this resolution;

...

"16. 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 such 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;

"17. Decides to remain seized of these measures."

1.44 Libya objected to the adoption of Resolution 883 on the same general grounds that it invoked in objecting to the adoption of resolutions 731 and 748. These arguments include, inter alia, the following:

- Libya has fully complied with Resolution 731, except in regard to the demand made by the United States and United Kingdom to surrender the two suspects;

- notwithstanding its submission of this matter to the International Court of Justice, Libya spared no effort in seeking a peaceful solution of the dispute making specific proposals involving the use of the International Court of Justice or the United Nations;

- Libya has declared its readiness to enter into negotiations under the supervision of the UN Secretary-General with the countries concerned in regard to holding trial in a neutral country.<sup>47</sup>

1.45 Resolution 883 was adopted by a vote of eleven in favor (Brazil, Cape Verde, France, Hungary, Japan, New Zealand, Russian Federation, Spain, United Kingdom, United States, Venezuela), none opposed and four abstentions (China, Djibouti, Morocco, Pakistan).

The following are verbatim excerpts from the statements made by various representatives:

Brazil: "It is our view that all resolutions of the Security Council must be complied with. Resolutions 731 (1992) and 748 (1992) - both adopted at a time when Brazil was not a member of the Security Council - are no different. The fact that the resolutions deal with a uniquely serious and complex case of international terrorism makes it all the more important and urgent for this Council to enforce compliance with its previous decisions in this matter. The resolution now adopted is directly linked to those previous decisions, whose implementation it is intended to promote.

"It is also our view that the strong measures of sanction that this Council is empowered to impose under Chapter VII of the Charter constitute a last resort, to be used only in exceptionally grave circumstances that involve a clear and direct threat to international peace and security. It was thus only after carefully pondering the extremely serious nature of the case before us, as well as the negative consequences that would ensue should the Council be unable to act, that we decided to cast a positive vote on this resolution."<sup>48</sup>

Spain: "Despite the determined efforts of the Secretary General . . . we must note that Libya has not fully complied with the demands set forth in Security Council resolutions 731 (1992) and 748 (1992).

---

<sup>47</sup> Provisional Verbatim Record, United Nations Security Council, 3312th meeting, 11 November 1993, UN Doc. S/PV.3312, Exhibit 33, pp. 3-26.

<sup>48</sup> Ibid, pp. 47-48.

"In those circumstances, the adoption of a new resolution was inevitable. First it is necessary to ensure respect for the obligation imposed by the United Nations Charter on all Member States to comply with decisions of the Security Council. Secondly, the events that led to resolutions 731 (1992) and 748 (1992) are particularly serious. The attacks against commercial flights of Pan Am and UTA are horrendous crimes, which caused numerous innocent victims, and their presumed perpetrators must be brought to justice."<sup>49</sup>

Hungary: "We regret that, because of delaying tactics and unkept promises and the growing gap between verbal statements and concrete actions, this item is still on the Council's agenda. We regret that for the third time the Council has had to meet to review the situation. The reason for this is Libya's failure, despite persistent efforts by the Secretary-General, the countries members of the Arab League, and other States concerned, to comply with Security Council resolutions 731 (1992) and 748 (1992), adopted, respectively, in January and March last year.

"It is clear that the Council had no choice but to adopt new measures to ensure respect for its two earlier resolutions. At the same time, as in other similar cases, we cannot conceal our regret that we have had to have recourse to Chapter VII of the Charter to tighten the sanctions imposed on a Member State of the Organization, particularly since that State is a country with which Hungary has long had mutually advantageous economic cooperation."<sup>50</sup>

Venezuela: "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>51</sup>

Japan: "Japan, which is strongly opposed to terrorism in all its forms, has appealed repeatedly to the Libyan Government to comply with Security Council resolutions 731 (1992) and 748 (1992). It is indeed regrettable that, despite such endeavours, 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>49</sup> Ibid, p. 56. (translation)

<sup>50</sup> Ibid, pp. 59-60.

<sup>51</sup> Ibid, p. 62. (translation)

"Last year, at the time that resolutions 731 (1992) and 748 (1992) were adopted, it was understood that the Security Council would be compelled to take further measures if Libya did not comply with them. Now, unfortunately, the Council has had no choice but to adopt further measures to gain Libya's compliance.

"Japan urges the Libyan Government to comply fully with the relevant Security Council resolutions without further delay. It is in the hope of gaining this compliance that my delegation supported the adoption of this new resolution. In the meantime, Japan remains committed to efforts to find a solution to this difficult situation and, indeed, to eliminate all forms of international terrorism."<sup>52</sup>

1.46 Among other things, it should be noted that Resolution 883 states specifically that the sanctions imposed therein will be suspended immediately if "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 courts and has satisfied the French judicial authorities with respect to the bombing of UTA." The Security Council thus made very clear to Libya that the appearance for trial in the United Kingdom or the United States of the two suspects was of the highest importance to the Council and was a key condition for the lifting of sanctions. Nonetheless, Libya has refused to surrender the suspects.

---

<sup>52</sup> Ibid, p. 63.

### Chapter III

#### **The Security Council's Condemnation of the Bombing of Pan Am 103 and Its Other Actions in this Case are Consistent with its Longstanding Commitment to Maintain International Peace and Security by Condemning and Acting Against International Terrorism**

1.47 The actions of the Security Council in this case were taken to further its longstanding commitment to maintain international peace and security by addressing the scourge of international terrorism. It has demonstrated this commitment repeatedly in the last twenty-five years, *e.g.*, as it has addressed hostage-taking, aircraft hijacking, other terrorist interference with international civil aviation, and more generally, all acts of international terrorism.<sup>53</sup> On 31 January 1992, at a Security Council summit in New York at which the members of the Council were represented by their heads of State or Government,

---

<sup>53</sup> See, *e.g.*, Resolution 286, United Nations Security Council, 1552nd meeting, 9 September 1970, Exhibit 34 (expressing grave concern at the threat to innocent civilian lives from the hijacking of aircraft and any other interference in international travel and calling on States "to take all possible legal means to prevent" further hijackings or any other interference with international civil air travel); Note by the President of the Security Council, 9 October 1985, UN Doc. S/17554, Exhibit 35 (deploring the reported death of a passenger on the cruise ship Achille Lauro and condemning "terrorism in all its forms whenever and by whomever committed"); Resolution 579, United Nations Security Council, 2637th meeting, 18 December 1985, Exhibit 36 (recalling the Security Council President's 9 October 1985 condemnation of all acts of terrorism and condemning "unequivocally all acts of hostage taking and abduction"); Resolution 635, United Nations Security Council, 2869th meeting, 14 June 1989, Exhibit 37 (condemning "all acts of unlawful interference against the security of civil aviation" and urging the International Civil Aviation Organization "to intensify its work aimed at preventing all acts of terrorism against international civil aviation and in particular its work on devising an international régime for the marking of plastic on sheet explosives for the purpose of detection"); Resolution 687, United Nations Security Council 2981st meeting, 3 April 1991, Exhibit 38 ("Deploring threats made by Iraq during the recent conflict to make use of terrorism against targets outside Iraq and the taking of hostages by Iraq").

the Security Council analyzed its responsibilities under the Charter for "the maintenance of international peace and security" and reiterated that international terrorism was one of those responsibilities. The following are excerpts of the comprehensive statement regarding the responsibilities of the Security Council made by the Council's President on behalf of the members of the Council:

"The Security Council met at the Headquarters of the United Nations in New York on 31 January 1992, for the first time at the level of Heads of State and Government. The members of the Council considered, within the framework of the commitment to the United Nations Charter, 'The responsibility of the Security Council in the maintenance of international peace and security.'

"The members of the Security Council consider that their meeting is a timely recognition of the fact that there are new favourable international circumstances under which the Security Council has begun to fulfil more effectively its primary responsibility for the maintenance of international peace and security.

...

"Commitment to Collective Security

...

"The members of the Council express their deep concern over acts of international terrorism and emphasize the need for the international community to deal effectively with all such acts."<sup>54</sup>

1.48 Citing this Security Council decision, the President of the Council on 29 July 1994 strongly condemned the recent terrorist attacks in Buenos Aires and London and stated on behalf of the Council:

"The members of the Security Council demand an immediate end to all such terrorist attacks. They stress the need to strengthen international cooperation in order

---

<sup>54</sup> Note by the President of the Security Council, 31 January 1992, UN Doc. S/23500, Exhibit 39, pp. 1-3.

to take full and effective measures to prevent, combat and eliminate all forms of terrorism, which affect the international community as a whole."<sup>55</sup>

1.49 The Security Council's adoption of Resolutions 731, 748 and 883 was thus squarely within its responsibility and mandate to maintain international peace and security.<sup>56</sup>

---

<sup>55</sup> Statement by the President of the Security Council, 29 July 1994, UN Doc. S/PRST/1994/40, Exhibit 40.

<sup>56</sup> The UN General Assembly has similarly condemned international terrorism and interference with international civil aviation. See, e.g., Declaration of Principles of International Law Concerning Friendly Relations and Co-Operation of States in Accordance with the Charter of the United Nations, Resolution 2625 (XXV), Annex, United Nations General Assembly, 25th session, 1883rd meeting, 24 October 1970, Exhibit 41 ("Every state has the duty to refrain from organizing, instigating, assisting or participating in acts of civil strife or terrorist acts in another State or acquiescing in organized activities within its territory directed toward the commission of such acts, when the acts referred to in the present paragraph involve a threat or use of force"); Aerial Hijacking or Interference with Civil Air Travel, Resolution 2645 (XXV), United Nations General Assembly, 25th session, 1914th meeting, 25 November 1970, Exhibit 42 (General Assembly "[c]ondemns, without exception whatsoever, all acts of aerial hijacking or other interference with civil air travel"); Measures to Eliminate International Terrorism, Resolution 49/60, United Nations General Assembly, 49th session, 84th plenary meeting, 9 December 1994, Exhibit 43 ("The States Members of the United Nations solemnly reaffirm their unequivocal condemnation of all acts, methods and practices of terrorism, as criminal and unjustifiable, whenever and by whomever committed, including those which jeopardize the friendly relations among States and peoples and threaten the territorial integrity and security of States").

## Chapter IV

### Libya Continues to Refuse to Comply with the Security Council's Requirement that it Surrender for Trial the Libyan Fugitives Accused of Bombing Pan Am 103

1.50 Notwithstanding the repeated demands of the Security Council to surrender the two individuals charged with the bombing of Pan Am 103 for trial in the United States or the United Kingdom, Libya continues to defy the international community. The sanctions regime imposed under Chapter VII by resolutions 748 and 883 continues in force, with the oversight of the special monitoring committee established by the Security Council. The sanctions have been reviewed every 120 days since April 1992, and the Security Council has repeatedly left the sanctions in place.<sup>57</sup>

1.51 During this period, Libya has from time to time suggested that notwithstanding the explicit requirements of the Security Council, it might offer its nationals for trial in The Hague or some other location.<sup>58</sup> As recently as 30 March 1995, however, in connection

---

<sup>57</sup> See Exhibits 24-27; Note by the President of the Security Council, 10 December 1993, UN Doc. S/26861, Exhibit 44; Note by the President of the Security Council, 12 April 1994, UN Doc. S/PRST/1994/18, Exhibit 45; Note by the President of the Security Council, 5 August 1994, UN Doc. S/PRST/1994/41, Exhibit 46; Note by the President of the Security Council, 30 November 1994, UN Doc. S/PRST/1994/76, Exhibit 47; Note by the President of the Security Council, 30 March 1995, UN Doc. S/PRST/1994/14, Exhibit 48.

<sup>58</sup> See, e.g., Exhibit 33, pp. 10, 25; see also Letter dated 28 July 1994 from the Secretary-General Addressed to the President of the Security Council, 29 July 1994, UN Doc. S/1994/900, Exhibit 49 (attaching a letter from the Secretary of the General People's Committee for Foreign Liaison and International Cooperation of the Socialist People's Libyan Arab Jamahiriya addressed to the Secretary-General of 29 July 1994, which suggested that the trial might be held in "any Arab country" or in The Hague or "any United Nations premises on the European continent"); Letter dated 9 December 1993 from the Chargé D'Affaires A.I. of the Permanent Mission of the Libyan Arab Jamahiriya to the United Nations addressed to the Secretary-General, 10 December 1993, UN Doc. S/26859, Exhibit (continued...)



with the most recent continuation of the sanctions, the President of the Security Council affirmed, after full discussion among Security Council members, that "after hearing all the opinions expressed in the course of the consultations there was no agreement that the necessary conditions existed for modification of the measures of sanctions established in paragraphs 3 to 7 of Resolution 748."<sup>59</sup>

---

<sup>58</sup>(...continued)

50 (noting options including France, "a third country," or "at the headquarters of the International Court of Justice in The Hague").

<sup>59</sup> See Exhibit 48. In connection with the most recent continuation of sanctions, the United States, the United Kingdom and France issued another joint declaration regarding the Security Council's requirement that the accused be brought to trial in the United Kingdom or the United States:

**DECLARATION DATED 30 MARCH 1995 BY THE GOVERNMENTS OF FRANCE, THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND AND THE UNITED STATES OF AMERICA ON THE OCCASION OF THE NINTH REVIEW OF SANCTIONS IMPOSED ON THE LIBYAN ARAB JAMAHIRIYA BY THE SECURITY COUNCIL IN ITS RESOLUTION 748 (1992) OF 31 MARCH 1992**

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

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

They are committed to full and comprehensive enforcement of the sanctions imposed on the Libyan Arab Jamahiriya.

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

They reiterate that, in accordance with the Security Council resolutions, the Government of the Libyan Arab Jamahiriya must ensure the appearance of the two  
(continued...)

1.52 Thus, the Council remains fully seized of this matter, and will continue to review Libyan compliance every 120 days pursuant to Resolutions 748 and 883. The demands for the surrender of the two Libyan agents do not come from the law enforcement authorities or Governments of the United States and the United Kingdom alone. They come from the international community, speaking through the Chapter VII authority of the Security Council.

---

<sup>59</sup>(...continued)

Lockerbie suspects in the United Kingdom or United States, where they will receive a fair trial. The three States reaffirm that alternative proposals for trial in The Hague or elsewhere do not meet the Security Council requirements and are therefore unacceptable.

Letter dated 30 March 1995 from the Permanent Representatives of France, the United Kingdom of Great Britain and Northern Ireland and the United States of America to the United Nations addressed to the Secretary-General, 30 March 1995, UN Doc. A/50/128-S/1995/247, Exhibit 51. The three States had issued a Declaration to the same general effect on 5 August 1994. See Letter dated 5 August 1994 from the Representatives of France, the United Kingdom of Great Britain and Northern Ireland and the United States of America to the United Nations addressed to the Secretary-General, 8 August 1994, UN Doc. A/49/299-S/1994/938, Exhibit 59.

## PART II

### THE OBJECTIONS OF THE UNITED STATES TO THE LIBYAN APPLICATION COME WITHIN THE SCOPE OF ARTICLE 79

2.01 On the basis of Article 79 of the Rules of Court, the United States requests that the Court first address its preliminary objections, which are the kind of objections that can and should be disposed of under Article 79,<sup>60</sup> before any further proceedings in this case.

2.02 The objections of the United States raise the fundamental issue of the absence of consent by the United States to these proceedings because Libya fails to show a sufficient connection between its claims and the Montreal Convention. The objections also raise the fundamental issue of the Court's judicial function in relation to the responsibilities of the other principal organs of the United Nations under the Charter for maintaining and restoring international peace and security. In the view of the United States, the facts as described in documents of the United Nations Security Council, including the documents submitted to the Council by the three sponsors of Security Council Resolutions 731, 748 and 883, by Libya and by other states, as well as the determinations of the Council, are sufficient for the purpose of these preliminary proceedings.

---

<sup>60</sup> Article 79 of the Rules of the Court provides in part:

"1. Any objection by the respondent to the jurisdiction of the Court or to the admissibility of the application, or other objection the decision upon which is requested before any further proceedings on the merits, shall be made in writing within the time-limit fixed for the delivery of the Counter-Memorial. ....

"6. In order to enable the Court to determine its jurisdiction at the preliminary stage of the proceedings, the Court, whenever necessary, may request the parties to argue all questions of law and fact, and to adduce all evidence, which bear on the issue."

## Chapter I

### Article 79 Covers a Broad Range of Objections

2.03 Article 79 authorizes not only objections to the jurisdiction of the Court and the admissibility of the application but also "any other objection the decision upon which is requested before further proceedings on the merits." The United States is requesting a decision on its objections before there are any further proceedings in this case.

2.04 The only basis for jurisdiction that Libya has invoked in its Application is Article 14 of the Montreal Convention.<sup>61</sup> This was noted by the Court in its Order of 14 April 1992<sup>62</sup> and is emphasized by Libya in its Memorial.<sup>63</sup> The United States will demonstrate that Article 14 of the Convention does not confer on the Court jurisdiction to decide the dispute that is the subject of this proceeding.

2.05 In accordance with Article 36(1) of the Statute, the jurisdiction of the Court rests on the consent of the States concerned.<sup>64</sup> In this case, only the Montreal Convention is

---

<sup>61</sup> Libyan Application, p. 8.

<sup>62</sup> Case Concerning Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident At Lockerbie (Libya v. United States), I.C.J. Reports 1992, p. 114 at 121 (hereinafter "Order on Provisional Measures").

<sup>63</sup> Libyan Memorial, paras. 2.17 and 3.12.

<sup>64</sup> See Anglo-Iranian Oil Co. (United Kingdom v. Iran), Judgment, I.C.J. Reports 1952, p. 93, at p. 103; Ambatielos (Greece v. United Kingdom), Preliminary Objections, Judgment, I.C.J. Reports 1952, p. 28, at p. 38; Interpretation of the Peace Treaties with Bulgaria, Hungary and Romania, First Phase, Advisory Opinion, I.C.J. Reports 1950, p. 65, at p. 71. As the Court said in the Peace Treaties case: "The consent of States, parties to a dispute, is the basis of the Court's jurisdiction in contentious cases." Ibid. In Border and Transborder Armed Action (Nicaragua v. Honduras), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1988, p. 69, at p. 76, the Court affirmed the essential nature of its responsibility to establish the consent of the parties to confer jurisdiction upon the Court.

proffered to show that consent. A State cannot be presumed to have consented to jurisdiction simply on the basis of a mere assertion by another State that a particular dispute arises under one of those conventions. As the Court expressly held in Ambatielos, "[i]t is not enough for the claimant government to establish a remote connection between the facts of the claim" and the treaty upon which jurisdiction was founded.<sup>65</sup> The claimant government must establish a sufficient connection between the treaty and the claims submitted to the Court.<sup>66</sup> As the facts

---

<sup>65</sup> Ambatielos (Greece v. United Kingdom), Merits, Judgment, I.C.J. Reports 1953, p. 10, at p. 18. In that case, the question was whether the Court had jurisdiction under a 1926 Treaty of Commerce and Navigation between the United Kingdom and Greece to decide whether the United Kingdom was under an obligation to submit to arbitration a dispute between the two governments as to the validity of the Ambatielos claim in so far as the claim was based on an 1886 Treaty of Commerce and Navigation between the parties. The Court rejected the contention by the United Kingdom that before the Court could decide upon arbitration it was necessary for the Court to determine whether the claim was actually or genuinely based upon the 1886 Treaty, holding that to do so would be to substitute the Court impermissibly for the special commission of arbitration established under the 1886 Treaty. Ibid., pp. 16-17. In the unique circumstances of that case, the Court concluded that it must determine whether the arguments were "sufficiently plausible" to establish a connection between the claim and the 1886 Treaty. Ibid., p. 18. Before concluding that it had the jurisdiction to refer the dispute to the special commission, the Court analyzed the particular claim to determine if it came within the scope of the 1886 Treaty. Ibid., pp. 16, 18. A few years later, in a case involving a contract dispute between UNESCO and four former employees, the Court was asked to address a similar question of interpretation regarding the relationship of the contract claims to the provisions of the Statute of the Administrative Tribunal of the International Labour Organization. In that case, the Court concluded: "[i]t is necessary that the complaint should indicate some genuine relationship between the complaint and the provisions invoked" and characterized the issue as "whether the terms and the provisions invoked appear to have a substantial and not merely an artificial connexion with the refusal to renew the contracts." Judgments of the Administrative Tribunal of the ILO upon Complaints Made against UNESCO, Advisory Opinion, I.C.J. Reports 1956, p. 77, at p. 89.

<sup>66</sup> Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States), Preliminary Objections, Judgment, I.C.J. Reports 1984, p. 392, at pp. 427-29. In that case, the United States objected that a treaty of Friendship, Commerce and Navigation relied upon by Nicaragua to establish jurisdiction in those proceedings was irrelevant to the subject matter of Nicaragua's claims before the Court and, therefore, provided no basis for

(continued...)

set out in Libya's Application and amplified in its Memorial demonstrate, the dispute that is the subject of these proceedings does not arise under the Montreal Convention and has no reasonable connection with that Convention.

2.06 Moreover, it is the contention of the United States that, even if the Court were to find that there had been a dispute under the Montreal Convention, the Court nonetheless should decline to exercise jurisdiction since no purpose would now be served by such exercise in view of the subsequent decisions of the Security Council. It is well established that even where the Court may have jurisdiction over an Application, circumstances may exist where the Court may decline to exercise such jurisdiction.<sup>67</sup> As the Court said in the Northern Cameroons case:

"[T]he seising of the Court is one thing, the administration of justice is another.' It is the act of the Applicant which seises the Court but even if the Court, when seised, finds that it has jurisdiction, the Court is not compelled in every case to exercise that jurisdiction. There are inherent limitations on the exercise of the judicial function which the Court, as a court of justice, can never ignore. There may thus be an incompatibility between the desires of an applicant, or, indeed, of both parties to a case, on the one hand, and on the other hand the duty of the Court to maintain its judicial character."<sup>68</sup>

---

<sup>66</sup>(...continued)

such jurisdiction. Although the Court concluded that the treaty provided a basis for jurisdiction, it did so on the basis of an analysis of Nicaragua's claims in light of the circumstances in which Nicaragua brought its Application to the Court and the facts asserted by Nicaragua. A similar analysis of Libya's claims in light of the circumstances in which Libya brought its Application to the Court and the facts asserted by Libya establish that the Montreal Convention does not support a finding of jurisdiction in these proceedings.

<sup>67</sup> Case Concerning Northern Cameroons (Cameroon v. United Kingdom) Preliminary Objections, Judgment, I.C.J. Reports 1963, p. 15 at p. 29 (citing the Nottebohm case (Liechtenstein v. Guatemala), Preliminary Objections, I.C.J. Reports 1953, p. 111 at p. 122).

<sup>68</sup> Ibid.

While the Court must take into account certain facts to determine whether the jurisdiction pled is one which the Court's judicial function permits it to exercise,<sup>69</sup> it is well established that the Court may reach a decision on this question at the preliminary objection stage.<sup>70</sup>

2.07 Finally, it is the contention of the United States that the Court, in the exercise of its judicial functions, should decline jurisdiction over challenges by Libya to the authority of the Security Council in the exercise of its functions under Chapter VII of the Charter to make decisions relating to the maintenance and restoration of international peace and security. Both the Security Council and the Court are principal organs of the United Nations. The Court has consistently acted to sustain the actions of the Security Council in the performance of its political functions for the maintenance and restoration of international peace and security.<sup>71</sup> In the absence of a formal request by the Security Council, the Court would not have the authority generally to review the actions of the Security Council in the performance of its functions under the Charter for the maintenance or restoration of international peace and security. On the other hand, the Court has the authority to interpret the meaning of particular provisions of Security Council resolutions in order to clarify the binding legal obligations to which they give rise for Libya and other states under the Charter.

---

<sup>69</sup> Ibid, p. 30.

<sup>70</sup> Ibid, p. 38.

<sup>71</sup> See paras. 4.03-4.19, below.

## Chapter II

### **The Court Can Dispose of these Objections at this Stage even if an Objection Raises Issues that Might Touch upon the Merits of the Case**

2.08 Paragraph 6 of Article 79 of the Rules of the Court authorizes the Court to address all legal and factual questions that bear on the issue of a preliminary objection, even to the extent of adducing evidence on such questions, in order to dispose of that objection. The history of that provision demonstrates that its essential purpose is to encourage the Court to dispose of cases at the preliminary objection stage -- even where to do so may touch upon the merits of the proceeding.<sup>72</sup>

2.09 In the early 1970s, in connection with the consideration of proposals to enhance the effectiveness of the Court, representatives in the Sixth Committee of the General Assembly criticized the previous practice of the Court in joining preliminary objections with the merits. The debates in the Sixth Committee were summarized in 1970 in the analytical report of the Committee to the General Assembly as follows:

"In particular, the view was expressed that it would be useful for the Court to decide expeditiously on all questions relating to jurisdiction and other preliminary issues which might be raised by the parties. The practice of reserving decisions on such questions pending consideration of the merits of the case had many drawbacks and had been sharply criticized in connexion with the South West Africa cases and the Barcelona Traction case".<sup>73</sup>

---

<sup>72</sup> Case Concerning Certain Phosphate Lands in Nauru (Nauru v. Australia) Preliminary Objections, I.C.J. Reports 1992, p. 240 at p. 271-273 (separate opinion of Judge Shahabudeen).

<sup>73</sup> Review of the Role of the International Court of Justice, Report of the Sixth Committee, 11 December 1970, UN Doc. A/8238, Exhibit 52, p. 19.



This was repeated the next year and was summarized as follows in the 1971 report of the Committee:

"Mention was also made of a suggestion that the Court should be encouraged to take a decision on preliminary objections as quickly as possible and to refrain from joining them to the merits unless it was strictly essential."<sup>74</sup>

2.10 In 1972, the Rules of Court were revised to encourage decisions on questions of jurisdiction and admissibility prior to the merits phase. Previously, the Rules expressly authorized the Court to join the objection to the merits. Paragraph 5 of Article 62 of the 1946 Rules had provided:

"After hearing the parties the Court shall give its decision on the objection or shall join the objection to the merits."

In 1972, the Rules relating to preliminary objections were revised to eliminate this express authorization and provide instead a rule intended to facilitate the disposition of such objections prior to consideration of the merits, even if this required addressing questions of law or fact that may touch upon the merits. The Court added a new provision in paragraph 6 that provides:

"In order to enable the Court to determine its jurisdiction at the preliminary stage of the proceedings, the Court, whenever necessary, may request the parties to argue all questions of law and fact, and to adduce all evidence, which bear on the issue."

As a previous President of the Court and member of the Committee that prepared the 1972 revision of the Rules has stated:

---

<sup>74</sup> Review of the Role of the International Court of Justice, Report of the Sixth Committee, 10 December 1971, UN General Assembly Doc. A/8568, Exhibit 53, p. 21.

"The Rule [adopted in 1972] lays down that the Court *must* resolve the question of jurisdiction before entering upon the merits of the case."<sup>75</sup>

2.11 Paragraph 7 of Article 67 of the 1972 Rules, which corresponds to paragraph 7 of Article 79 of the current Rules, provides:

"After hearing the parties, the Court shall give its decision in the form of a judgment, by which it shall either uphold the objection, reject it, or declare that the objection does not possess, in the circumstances of the case, an exclusively preliminary character. If the Court rejects the objection or declares that it does not possess an exclusively preliminary character, it shall fix time limits for further proceedings."

2.12 These revisions have been recognized as introducing one of the most important amendments to the Rules.<sup>76</sup>

2.13 Prior to these revisions, the Court had felt compelled to join the issue of jurisdiction to the merits where determination of a preliminary objection required consideration of questions of fact or law that may bear a close relationship to some of the issues on the merits of the case. As recognized by the Member of the Court who was the chairman of the Court's committee that proposed these revisions and was one of their principal architects, paragraph 6 is intended to provide a different solution to such difficulties:

"In the presence of such an objection, the Court, instead of bringing in the whole of the merits by means of a joinder, would, according to paragraph 6, request the parties

---

<sup>75</sup> M. Lachs, "The Revised Procedure of the International Court of Justice" in Essays on the Development of the International Legal Order p. 21, at p. 31 (F. Kalshoven et al. eds. 1980), Exhibit 54 (emphasis in original).

<sup>76</sup> E. Jiménez de Aréchaga, "The Amendments to the Rules of Procedure of the International Court of Justice," 67 American Journal of International Law, p. 1, at p. 11 (1973), Exhibit 55; G. Guyomar, Commentaire du Règlement de la Cour Internationale de Justice: Interprétation et Pratique, p.371 (1972), Exhibit 56.

to argue at the preliminary stage those questions, even those touching upon the merits, which bear on the jurisdictional issue. Thus, there would no longer be justification for leaving in suspense or for postponing a decision on the question of the Court's own jurisdiction."<sup>77</sup>

Similarly, Professor Guyomar concluded:

"L'alinéa 6 reconnaît à la Cour le droit d'inviter les Parties à débattre tout point de fait ou de droit, et à produire tout moyen de preuve ayant trait à la question de la compétence de la Cour, ceci afin de permettre à cette dernière de se prononcer sur ce point au stade préliminaire de la procédure. L'accent semble donc mis sur la nécessité de statuer sur la compétence avant d'entamer l'examen de l'affaire au fond : c'est là un élément nouveau et vraisemblablement très important."<sup>78</sup>

---

<sup>77</sup> E. Jiménez de Aréchaga, *op. cit.* note 76, p. 13.

<sup>78</sup> G. Guyomar, *op. cit.* note 76, p. 371 ("Paragraph 6 acknowledges the Court's right to invite the Parties to debate any point of fact or law and to produce any evidence relating to the issue of the Court's jurisdiction, in order to allow the Court to rule on this point in the preliminary stage of the procedure. In this way, the emphasis appears to be placed on the need to rule on the matter of jurisdiction prior to undertaking an examination of the case on its merits. This is a new and seemingly very important element.") (emphasis added.)

### PART III

#### THE MONTREAL CONVENTION PROVIDES NO BASIS FOR JURISDICTION

3.01 The only claimed basis of jurisdiction in these proceedings is the Montreal Convention. There is, however, no dispute between the parties regarding the interpretation or application of that Convention. In reality, the dispute is between Libya and the Security Council regarding the requirement under Resolutions 748 and 883 for Libya to surrender for trial in the United States or the United Kingdom the two Libyan nationals accused of involvement in the bombing of Pan Am 103. Disputes regarding the implementation of Security Council resolutions are not disputes relating to the interpretation or application of the Montreal Convention and do not come within the jurisdiction of the Court under that Convention.

3.02 As Libya has recognized in both its Application and Memorial, in order for the Court to have jurisdiction in this case, the subject of the dispute which the Court is asked to address must relate to the interpretation or application of the Montreal Convention.<sup>79</sup> The subject of the dispute placed before the Court by these proceedings, however, does not relate to the interpretation or application of that Convention. It concerns Libya's objections to actions of the Security Council concluding that the results of certain investigations clearly implicate officials of the Libyan Government in the bombing of Pan Am 103;<sup>80</sup> determining that the failure of Libya to demonstrate its renunciation of terrorism and in particular its

---

<sup>79</sup> Libyan Application, p. 8; Libyan Memorial, para 3.12.

<sup>80</sup> Security Council Resolution 731, Exhibit 18, preambular para. 6.

continued failure fully and effectively to respond to the requests of the United States and the United Kingdom that Libya surrender the accused Libyan nationals for trial constitute a threat to international peace and security;<sup>81</sup> deciding that the Libyan Government must comply without further delay with those requests;<sup>82</sup> and imposing sanctions on Libya pending compliance with these requests.<sup>83</sup> Libya's dispute therefore, is clearly not with the United States but with the United Nations Security Council.

---

<sup>81</sup> Security Council Resolution 748, Exhibit 23, preambular para. 7; Security Council Resolution 883, Exhibit 32, preambular paras. 2, 6.

<sup>82</sup> Security Council Resolution 748, Exhibit 23, para. 1; Security Council Resolution 883, Exhibit 32, para. 1.

<sup>83</sup> Security Council Resolution 748, Exhibit 23, paras. 3-7; Security Council Resolution 883, Exhibit 30, paras. 3-7.

## Chapter I

### The Montreal Convention Provides the Sole Alleged Basis for Jurisdiction Over These Proceedings

3.03 Article 14 of the Montreal Convention is the sole basis upon which Libya relies in its Application<sup>84</sup> and Memorial<sup>85</sup> for the jurisdiction of the Court over these proceedings.

3.04 Article 14(1) provides:

"Any dispute between two or more Contracting States concerning the interpretation or application of this Convention which cannot be settled through negotiation, shall, at the request of one of them, be submitted to arbitration. If within six months from the date of the request of 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."

Article 14 confers jurisdiction only in respect of disputes concerning the interpretation or application of the Montreal Convention. Consequently, the Court does not have jurisdiction in these proceedings in respect of any alleged violation by the United States of any rights Libya may have under any other source of law, including the Charter of the United Nations or general principles of international law. As the Permanent Court of International Justice said in the Mavrommatis Palestine Concessions case: "[t]he dispute may be of any nature; the language of [Article 26 of the Mandate for Palestine] in this respect is as comprehensive

---

<sup>84</sup> Libyan Application, pp. 7-8.

<sup>85</sup> Libyan Memorial, para. 3.12.

as possible..., but in every case it must relate to an interpretation or application of the Mandate."<sup>86</sup>

3.05 Article 14 of the Montreal Convention establishes a series of requirements which must be met to establish the jurisdiction of the Court. First and foremost among these requirements is that there must be a dispute between the parties concerning the interpretation or application of the Montreal Convention. In the view of the United States, the claims made by Libya in its Application and Memorial that the United States has violated the Montreal Convention do not relate to any dispute between the Parties under that Convention.<sup>87</sup> They relate to Libya's complaints against the actions of the Security Council in requiring Libya to surrender the two accused Libyan nationals for trial in the United States or the United Kingdom and in imposing sanctions on Libya pending compliance with that requirement.

---

<sup>86</sup> Mavrommatis Palestine Concessions (Greece v. Great Britain), P.C.I.J. Reports 1924, Series A, No. 2, p. 15-16. In that case, jurisdiction was asserted under Article 26 of the Mandate for Palestine, which provided that non-negotiable disputes arising between the parties "relating to the interpretation or application of the provisions of the Mandate" shall be submitted to the Permanent Court. To that end, the Permanent Court held that the dispute between the parties must relate to the Mandate in order for its exercise of jurisdiction to be valid. Ibid, p. 16.

<sup>87</sup> The United States demonstrated at the provisional measures stage that Libya failed to establish a prima facie basis for jurisdiction under the Montreal Convention. Order on Provisional Measures, p. 126. The United States submitted that, Libya's assertions to the contrary notwithstanding, there was no dispute between the United States and Libya involving the interpretation or application of the Convention. The United States also argued that the purpose of Libya's action was not to resolve any dispute under the Montreal Convention but to prevent action directed at Libya in the Security Council.

## Chapter II

### **Libya's Application Does Not Set Out a Dispute Between the Parties Over the Interpretation or Application of the Convention**

3.06 Libya has set out in its Application and amplified in its Memorial the alleged subject of the dispute.<sup>88</sup> Libya's claim that the dispute concerns an interpretation or application of the Montreal Convention rests on the premise that the Security Council's demands that Libya surrender the two Libyan nationals accused of participating in the bombing of Pan Am 103 involve an interpretation or application of the Montreal Convention. In fact, this is not true. The Security Council acted under the Charter of the United Nations.

3.07 While the Montreal Convention is in force between the Parties to that Convention, it does not follow, as Libya suggests, that the dispute that is the subject of this proceeding relates to that Convention and that, therefore, the United States is "bound, in the matters pertaining to this subject, to adhere to the provisions" of the Convention.<sup>89</sup> The United States has never made claims concerning Libya's rights or obligations under the Montreal Convention upon which a dispute between the parties under the Convention could be based.

3.08 Libya asserts 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

---

<sup>88</sup> Libyan Application, pp. 8-10; Libyan Memorial, paras. 3.2-3.11.

<sup>89</sup> Libyan Memorial, para. 3.2 (translation). In so concluding, Libya argued that "the Montreal Convention is the only relevant convention between the Parties that deals with the offenses" involved in the bombing of Pan Am 103. *Ibid.* (translation)



Convention. Article 5(2) requires each contracting state to take such measures as may be necessary to "establish" its jurisdiction over certain offenses mentioned in the Convention in the case where the alleged offender is present in its territory and where it does not extradite the person pursuant to Article 8. Article 5(3) provides that the Convention does not exclude any criminal jurisdiction exercised in accordance with national law. Article 7 requires a contracting state on whose territory an alleged offender is found and which does not extradite him to submit the case to its competent authorities for the purpose of prosecution. Article 8 contains provisions relating to extradition in relation to offenses under the Convention. Article 11 requires contracting states to assist other contracting states in conducting investigations relating to offenses under Article 1 of the Convention.

3.09 It is Libya's contention that the United States has sought to frustrate the Libyan Government's rights under the above provisions by seeking the surrender of the two accused Libyan agents. However, Articles 5(2), 5(3), 7 and 8(2) of that Montreal Convention do not impose any affirmative obligation on the United States or any other state to perform any act or refrain from any act with respect to these two individuals. Article 11 is the only provision, among those listed in Libya's complaint, that arguably addresses any obligation of any State other than Libya.

3.10 Article 11 requires contracting states to assist other contracting states commencing an investigation of an offence under the Convention. However, whatever right Libya may have asserted under that Article (or under other articles in the Montreal Convention) for refusing to surrender the two accused for trial was superseded by the decision of the Security Council under Chapter VII in Resolutions 748 and 883. Specifically,

the decision of the Council that the two suspects be surrendered for trial to the United States or the United Kingdom obviously supersedes any obligation to cooperate with continued investigations and proceedings in Libya. To the extent that there is any conflict between rights allegedly created under the Montreal Convention and the obligations arising under the United Nations Charter from the adoption by the Security Council of Resolutions 748 and 883, the obligations arising under the United Nations Charter prevail by virtue of Articles 25 and 103 of the United Nations Charter.

3.11 Libya asserts that the United States and the United Kingdom did not give any basis for the requests that the suspects be surrendered to them.<sup>90</sup> Whatever the situation with regard to the original requests of the United States and the United Kingdom, since the adoption of Resolution 731, both of those States and the Security Council have been clear that the basis for requiring the surrender of the suspects is the resolutions of the Security Council.

3.12- Since 14 November 1991, when a U.S. federal grand jury returned an indictment against Abdel Basset and Lamem Fhimah, the United States has been requesting that Libya surrender the two accused for trial in the United States or the United Kingdom.

---

<sup>90</sup> Ibid, para. 3.20. It is important to note that Libya has acknowledged that the United States and the United Kingdom have never sought extradition of the accused under the provisions of the Montreal Convention or any other extradition agreement. Rather, as noted by Libya, they have requested that Libya "surrender" or otherwise deliver the accused for trial in the United States or the United Kingdom. Ibid, para. 3.7.

The United States has never invoked the Montreal Convention or argued that Libya is obligated to extradite these two individuals under the terms of the Montreal Convention.<sup>91</sup>

3.13 As Libya has acknowledged, the United States and the United Kingdom have sought to obtain the surrender of the accused by recourse to the Security Council after Libya refused to surrender them voluntarily.<sup>92</sup> In fact, the Security Council never accepted Libya's repeated assertions that jurisdiction over the accused should be treated as a legal dispute between Libya and the United States under the Montreal Convention.<sup>93</sup>

3.14 Libya's complaint is not based upon the request for the surrender of the two accused Libyan agents, but upon the means through which the United States has sought to advance this request. Libya has accused the United States of "coercive" methods involving "threats" against Libya. However, even if this were relevant to the issue of the Court's jurisdiction over a claim asserted under the Montreal Convention, the United States categorically denies any suggestion that it used or threatened to use force or in any way violated the territorial integrity or political independence of Libya in seeking the surrender of the two accused Libyan agents. The only steps the United States has taken to further its request for the surrender of the two accused, aside from the normal political actions of

---

<sup>91</sup> Moreover, the making of such requests to Libya does not constitute a violation of any rights that Libya might possess under the Montreal Convention. Even if the Libyan Government could claim a "right" to try the two accused in Libya, the simple request or demand for their surrender does not in any way affect that "right" and therefore does not entail the breach of any corresponding "obligation" on the part of the United States. See Order on Provisional Measures, p. 114, at pp. 136-37 (joint declaration of Judges Evensen, Tarassov, Guillaume, and Aguilar Mawdsley).

<sup>92</sup> Libyan Memorial, para. 2.16.

<sup>93</sup> Libyan Memorial, para. 3.14.

making representations and seeking support from other countries, have been to join other States in adopting resolutions in the United Nations Security Council.

3.15 The action of an independent State in referring a situation to the Security Council cannot legitimately become the subject of a complaint before this Court. The work of the Security Council is the responsibility of the Council as a collective body, and the actions it takes are not the actions of its individual members in their national capacities. Thus, proceedings in and decisions taken by the Security Council cannot give rise to a cause of action against an individual State, regardless of the role it played in the work of the Council.

3.16 Moreover, there is nothing in the Montreal Convention prohibiting parties from submitting issues for the consideration of the Security Council, and nothing in the actions of the United States as a member of the Security Council gives rise to a dispute over the interpretation or application of the Montreal Convention. Any dispute that Libya may have over the adoption of Resolutions 731, 748 or 883 would be with the Security Council, not with the United States, and the Security Council is not and cannot become a party to these proceedings.

3.17 Prior to the adoption of Resolution 731, Libya argued in the Security Council that jurisdiction over the accused raised a legal dispute relating to the interpretation or application of the Montreal Convention which should be addressed either in arbitration or by the Court.<sup>94</sup> During the debate in the Council on Resolution 731, the United States and the

---

<sup>94</sup> See Exhibit 16, pp. 2-3; Exhibit 19, pp. 13-15.

United Kingdom denied this allegation, both maintaining that what was at issue was a threat to international peace and security resulting from state-sponsored terrorism.<sup>95</sup>

3.18 As Libya suggests,<sup>96</sup> the Members of the Security Council clearly understood that France, the United Kingdom and the United States intended the requests for surrender of the two accused Libyans called for by Resolution 731 to be based on the authority of the Security Council under the United Nations Charter to address threats to international peace and security rather than under any provision of the Montreal Convention. Thus, the Security Council, in unanimously adopting Resolution 731, did not accept Libya's contentions that the matter before the Council constituted a dispute between it and the sponsors of Resolution 731 and that it was inappropriate for the Council to deal with the matter.<sup>97</sup> Indeed, virtually every member of the Council expressed its delegation's understanding that Resolution 731 addressed the problem of combatting international terrorism.<sup>98</sup> Typical of the statements is

---

<sup>95</sup> Exhibit 19, pp. 80, 104-105.

<sup>96</sup> Libyan Memorial, paras. 3.22, 3.24.

<sup>97</sup> Nor did the Security Council accept Libya's argument that the United States and the United Kingdom were barred from participating in the Council's debate on this matter under Article 27(3) of the Charter since they were parties to that "dispute". Exhibit 19, pp. 24-25. Article 27(3) provides that "Decisions of the Security Council on all other matters shall be made by an affirmative vote of nine members including the concurring votes of the permanent members; provided that, in decisions under Chapter VI ... a party to a dispute shall abstain from voting." The United States and the United Kingdom insisted that the matter before the Court related to a situation that threatened international peace and security and participated in the Council's debate without objection from other Members of the Council.

<sup>98</sup> Exhibit 19, pp. 57 (Morocco), 70-71 (Zimbabwe), 72-73 (Ecuador), 76 (Cape Verde), 84 (China), 87 (Russia), 89-91 (Hungary), 92-93 (Austria), 94 (India), 97 (Japan), and 98 (Venezuela). Comparable statements were made by members of the Council in connection with the adoption of Resolution 748, U. N. Doc. S/PV 3063, Exhibit 21, pp. 46 (Cape  
(continued...)

that of the Permanent Representative of India: "I should stress here that the Council is specifically addressing the question of international terrorism."<sup>99</sup>

3.19 Thus, in resolution 731, the Security Council expressed its deep concern over both the worldwide persistence of acts of international terrorism in all its forms including those in which States are directly or indirectly involved, and over all illegal activities directed against international civil aviation. It expressed its determination to eliminate international terrorism and urged the Libyan Government immediately to provide a full and effective response to the requests of the United States and the United Kingdom "so as to contribute to the elimination of international terrorism."<sup>100</sup>

3.20 Libya repeated its arguments relating to the Montreal Convention before the Security Council during consideration of Resolutions 748<sup>101</sup> and 883.<sup>102</sup> On neither occasion did the Security Council accept Libya's arguments. Each time, the Security Council demanded that Libya surrender the accused for trial in the United States or the United Kingdom.<sup>103</sup>

---

<sup>98</sup>(...continued)

Verde), 47 (Ecuador), 51, 59 (Zimbabwe), 56 (India), 61 (Morocco), 74 (Japan), 76 (Hungary), 78 (Austria), 79-80 (Russia), 81 (Belgium), and 82 (Venezuela).

<sup>99</sup> Exhibit 19, P. 94.

<sup>100</sup> Exhibit 18, preambular paras. 1, 2, 6; para. 3.

<sup>101</sup> Exhibit 22, p. 13.

<sup>102</sup> Exhibit 33, pp. 4-7.

<sup>103</sup> Security Council Resolution 748, Exhibit 23, para.1; Security Council Resolution 883, Exhibit 32, para. 1.

3.21 The United States has never invoked the Montreal Convention in its efforts to obtain the surrender of the two Libyan nationals accused of participating in the bombing of Pan Am 103. Moreover, assuming arguendo that the Montreal Convention could be construed to provide Libya a right to refuse to surrender the two accused Libyans, such a right could no longer be asserted following the adoption of resolution 748. Resolutions 748 and 883 establish a legal obligation for Libya which is entirely independent of, and which supercedes, any related rights of Libya under the Montreal Convention. If Libya objects to the obligation to surrender the two accused persons, its objections must be directed solely to the Security Council and not to this Court.

### Chapter III

#### Libya's Dispute is not with the United States, but with the Security Council

3.22 The subject of this proceeding is a dispute over whether Libya is required to surrender the two Libyan nationals accused of involvement in the bombing of Pan Am 103 for trial in the United States or the United Kingdom. This dispute does not relate to the Montreal Convention. It relates to Libya's obligations to comply with the decisions of the Security Council. Libya does not assert that the Court possesses jurisdiction to entertain a dispute between Libya and the Security Council. Neither the Charter nor the Statute of the Court provides such jurisdiction. For that reason, the Court ought not allow Libya to abuse the Court's jurisdiction to entertain disputes that do not arise under the Montreal Convention.

3.23 While Libya might have chosen to argue that it was not obligated to comply with Resolution 731, which exhorted Libya to provide a full and effective response to the requests of the United States and the United Kingdom,<sup>104</sup> Libya must comply with Resolutions 748 and 883. Those resolutions specifically demanded that Libya comply with the requests of the United States and the United Kingdom for the surrender of the two Libyans, and stated that the Security Council was acting under Chapter VII of the Charter. They are binding on every Member of the United Nations, including Libya and the three sponsors of the resolutions.

3.24 The resolutions require Libya to surrender the two suspects, irrespective of any rights Libya might claim under the Montreal Convention, and they impose economic

---

<sup>104</sup> Exhibit 18, para. 3.



sanctions on Libya in order to compel it to comply with that requirement. Whatever might have been the precise standing of Resolution 731 previously, Resolution 748 made clear that Libya was now legally obliged to provide a full and effective response to the initial requests of the three governments.

3.25 Pursuant to Article 24 of the Charter, Member States, including Libya, conferred on the Security Council the primary responsibility of maintaining and restoring international peace and security and agreed that in carrying out its duties under this responsibility, the Council acts on their behalf.<sup>105</sup> Article 39 of the Charter provides that the Council shall determine the existence of any threat to the peace and make recommendations or decide what measures shall be taken to maintain or restore international peace and security.<sup>106</sup> Under Article 25, Libya, as a Member of the United Nations, is bound to carry out the decisions of the Security Council.<sup>107</sup> Moreover, in accordance with Article 103 of

---

<sup>105</sup> Article 24(1) of the Charter provides:

"In order to ensure prompt and effective action by the United Nations, its Members confer on the Security Council primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf."

<sup>106</sup> Article 39 of the Charter provides:

"The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security."

<sup>107</sup> Article 25 of the Charter provides:

"The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter." See Order on Provisional Measures, p. 126; Legal Consequences for States of the Continued

(continued...)

the Charter,<sup>108</sup> the obligation of States to accept and carry out decisions of the Security Council under Article 25 prevail over the obligations of such States under any other international agreement, including the Montreal Convention.<sup>109</sup> Libya is required to surrender the two accused for trial in the United States or United Kingdom, and other states are required to implement the sanctions imposed on Libya under those resolutions.

3.26 Libya has made it abundantly clear by its actions both before the Security Council and this Court that the relief it seeks is directed at the Security Council - not at the United States or the United Kingdom. Libya objects to the requirement that it surrender the

---

<sup>107</sup>(...continued)

Presence of South Africa in Namibia (South West Africa), Advisory Opinion, I.C.J. Reports 1971, p. 16 at pp. 52-53.

Further, Article 48 of the Charter provides:

"1. The action required to carry out the decisions of the Security Council for the maintenance of international peace and security shall be taken by all the Members of the United Nations or by some of them, as the Security Council may determine.

"2. Such decisions shall be carried out by the Members of the United Nations directly and through their action in the appropriate international agencies of which they are members."

<sup>108</sup> Article 103 of the Charter provides:

"In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail."

<sup>109</sup> See Order on Provisional Measures, p. 126 ("Whereas both Libya and the United States, as Members of the United Nations, are obliged to accept and carry out the decisions of the Security Council in accordance with Article 25 of the Charter; whereas the Court, which is at the stage of proceedings on provisional measures, considers that prima facie this obligation extends to the decision contained in resolution 748 (1992); and whereas, in accordance with Article 103 of the Charter, the obligations of the Parties in that respect prevail over their obligations under any other international agreement, including the Montreal Convention ... .")

two accused to the United States or the United Kingdom for trial and to the measures imposed by the Council in order to compel Libya to comply with that requirement. It has submitted numerous letters and made repeated statements to the Security Council urging the Council to refrain from adopting Resolutions 731, 748 and 883.

Section 1. The Proceedings on Libya's Request for Provisional Measures Demonstrate that this Action is about Libya's Dispute with the Security Council - Not the United States

3.27 Libya stated during the oral proceedings on its request for provisional measures that the relief that it was seeking was to prevent the Council from imposing sanctions to compel Libya to surrender the two suspects. As Counsel for Libya said:

"In our request for provisional measures we have asked the Court to hold that the Respondents should refrain from taking any action that could irreparably impair Libya's right to have its nationals prosecuted by its own judicial organs. The attempt made by the Respondents to bring this conflict within the ambit of Chapter VII of the Charter and to take steps within the Security Council with a view to the taking of collective action against Libya is such as to jeopardize the rights of Libya. Without denying the Security Council's right to deal with this matter within the framework of Chapter VI, Libya requests the Court to order the Respondents to refrain from taking any initiative within the Security Council for the purpose of impairing the right to exercise jurisdiction that Libya asks the Court to recognize."<sup>110</sup>

As the Court noted, in its order rejecting Libya's request for an indication of provisional measures, Libya sought provisional measures "in order to cause the United States to abstain from any action capable of having a prejudicial effect on the Court's decision in the case, and more specifically to refrain from taking any initiative within the Security Council for the

---

<sup>110</sup> Case Concerning Questions of Interpretation and Application of the 1971 Montreal Convention Arising from Aerial Incident at Lockerbie (Libya v. United States), Provisional Measures, Oral Argument, CR 92/2, 26 March 1992, p. 72. (translation)

purpose of impairing that right to exercise jurisdiction, which Libya asks the Court to recognize ... ."<sup>111</sup>

3.28 While the specific requests for relief were cast in terms of the actions of the United States and the United Kingdom, the action that Libya sought to prevent was a decision by the Security Council requiring Libya to surrender the two accused and imposing sanctions and other measures to compel such action by Libya. Of course, it was not within the power of the United States or the United Kingdom to create such a requirement on Libya or to impose such sanctions under the Charter. Only the Council could make such a decision.<sup>112</sup>

Section 2. Libya's Memorial Demonstrates that this Action Concerns Libya's Dispute with the Security Council

3.29 Any doubt that Libya's dispute is with the Security Council and not the United States or the United Kingdom is removed by Libya's Memorial. Nearly one-half of Libya's lengthy Memorial is devoted to contesting Security Council actions.<sup>113</sup> In this respect, Libya contends that the resolutions do not by their terms ask that Libya surrender the two

---

<sup>111</sup> Order on Provisional Measures, p. 124.

<sup>112</sup> Moreover, any effort by a state to control the actions of Members of the Security Council in regard to the exercise by the Council of its responsibility to maintain or restore international peace and security violates those provisions of the Charter that delegate to members of the Council this important responsibility. Article 28(1) makes clear that each Member of the Council shall be able to perform these functions continuously.

<sup>113</sup> See, e.g., paras. 2.16-2.38, 6.1-6.141, 7.4.

suspects.<sup>114</sup> Libya relies in this respect on arguments that by the use of the term "requests," the Security Council expressed an intention to exclude from the reach of its resolutions the "demands" of the sponsoring states that the two accused Libyan nationals be surrendered for trial. Libya also relies upon the statements by some Members of the Council expressing a hope that the crisis could be resolved through negotiation or diplomacy.<sup>115</sup> Libya's contentions to the contrary notwithstanding, the members of the Security Council understood that the "requests" to which resolution 731 referred include the "demands" of the three sponsors of the resolutions that Libya surrender the two accused Libyan nationals for trial in the United States or the United Kingdom.

3.30 Libya contends that in referring to the "requests" contained in those documents without mentioning the "demands" of the three sponsoring states, the Council intended to "distance itself" from those demands; that the Council by such reference intended no more than "a reference to the bilateral relations between these states."<sup>116</sup> This construction flies in the face of the terms of resolution 731 and the consideration of the matter in the Council.

#### A. Security Council Resolution 731

3.31 Resolution 731 urges Libya to provide a full and effective response to the requests addressed to the Libyan authorities by France, the United Kingdom and the United

---

<sup>114</sup> Libya argues that the resolutions cannot, as a legal matter, be construed to require Libya to surrender the two suspects, since such a decision by the Council would, in Libya's view, violate the United Nations Charter and principles of international law. See, e.g., Libyan Memorial, paras. 2.17, 2.31, 2.42, 6.1, 6.44-6.141. See also paras. 4.01-4.38, below.

<sup>115</sup> See Libyan Memorial, para. 6.16.

<sup>116</sup> Libyan Memorial, paras. 6.11. (translation) (emphasis in original)

States.<sup>117</sup> Those documents contain demands that Libya surrender the two suspects for trial in the United States or the United Kingdom. For example, the three states asserted:

"The three States reaffirm their complete condemnation of terrorism in all its forms and denounce any complicity of States in terrorism acts. The three States reaffirm their commitment to put an end to terrorism.

. . . .

"In this connection, following the investigation carried out into the bombings of Pan Am 103 and UTA 772 the three States have presented specific demands to the Libyan authorities related to the judicial procedures that are under way. They require that Libya comply with all these demands, and, in addition, that Libya commit itself concretely and definitively to cease all forms of terrorist action and all assistance to terrorist groups. Libya must promptly, by concrete actions, prove its renunciation of terrorism."<sup>118</sup>

Moreover, the United States and United Kingdom jointly declared:

"The British and American Governments today declare that the Government of Libya must:

- surrender for trial all those charged with the crime; and accept responsibility for the actions of Libyan officials;
- disclose all it knows of this crime, including the names of all those responsible, and allow full access to all witnesses, documents and other material evidence, including all the remaining timers;
- pay appropriate compensation."<sup>119</sup>

3.32 The sponsors of Resolution 731 also made clear in their statements in connection with the adoption of the resolution that its requests to Libya included specifically

---

<sup>117</sup> See Exhibits 8-11.

<sup>118</sup> Exhibit 11, p. 3.

<sup>119</sup> Exhibit 9, p. 2; Exhibit 8, p. 9. The joint declaration differed only in the British insertion of "complete" before "responsibility."

the "demands" to surrender the two suspects for trial contained in the documents that they submitted to the Council. The Permanent Representative of the United States, Mr. Pickering, described what was intended by references to the "requests" that are the subject of Resolution 731:

"The resolution just adopted responds to a special situation that has been brought before this Council. It makes a straightforward request of Libya: that it cooperate fully in turning over its officials who have been indicted or implicated in these bombings and that it take concrete actions to conduct itself in as a law-abiding State. ... The resolution provides that the people accused be simply and directly turned over to the judicial authorities of the two Governments which are competent under international law to try them."<sup>120</sup>

Making clear that use of the term "requests" was not intended or understood to "distance" the Council from the "demands" set out in the documents submitted to the Council by the three sponsors, Mr. Pickering added:

"Until now, Libya has refused to respond to those requests and has sought to evade its responsibilities and to procrastinate."<sup>121</sup>

Similarly, Sir David Hannay, the Permanent Representative of the United Kingdom referred to the "demands" of the three sponsoring parties in terms of "requests" to Libya.<sup>122</sup>

3.33 So too with the statement of the Deputy Permanent Representative of France, Mr. Rochereau de le Sablière:

"In these circumstances, France hopes that the unanimous reaction of the international community, expressed by the Security Council in its resolution 731 (1992) ... will induce the Libyan authorities to respond very quickly to the requests of the judicial

---

<sup>120</sup> Exhibit 19, p. 79. (Emphasis added.)

<sup>121</sup> Ibid.

<sup>122</sup> Ibid., pp. 102-103.

authorities conducting the investigation into the heinous attacks committed against UTA flight 772 and Pan Am flight 103 ... ."<sup>123</sup>

3.34 Moreover, the discussion that occurred in the Council in regard to Resolution 731 makes no sense if the term "requests" is construed so as to exclude the "demands" set out in documents that the three sponsoring states submitted to the Security Council. Thus, Libya objected to the proposed resolution because it contravened what Libya viewed as its rights under the Montreal Convention and general principles of international law to refuse to surrender the two accused.<sup>124</sup> In addition, some Members of the Council expressed concern that the resolution not be viewed as a general precedent because of the implications that such a precedent might have for the law governing extradition of nationals.<sup>125</sup> In fact, the sponsoring states worked with these states to ensure that the proposed resolution would not establish such a precedent. As the Permanent Representative of Venezuela stated:

"The countries that sponsored this resolution - the United States, France and the United Kingdom - worked with the group of non-aligned countries represented in the Council and made the clear declaration that this resolution is exceptional by its nature and cannot be considered in any way as a precedent but is only for those cases in which states are involved in acts of terrorism."<sup>126</sup>

A resolution that was understood to exclude the "demands" of the sponsoring states for the surrender of the two suspected Libyan nationals would not have provoked such concerns.

3.35 Finally, Libya suggests that statements by some members of the Security Council during the discussion relating to the peaceful resolution of disputes, including

---

<sup>123</sup> *Ibid*, p. 82. (translation) (Emphasis added.)

<sup>124</sup> *Ibid*, p. 104.

<sup>125</sup> Exhibit 19, pp. 58 (Morocco), 77 (Cape Verde), 96 (India), and 101 (Venezuela).

<sup>126</sup> *Ibid*, p. 101.



reference to arbitration under Article 14 of the Montreal Convention and the role set out for the Secretary-General under the resolution, confirm Libya's view that there was no intention on the part of the Council to address the demands of the three sponsoring states that the two accused be surrendered for trial. These members, however, were simply expressing the hope that this crisis would be resolved through negotiation or diplomacy, assisted by the Secretary-General pursuant to the role assigned him under the resolution.<sup>127</sup>

3.36 Thus, Resolution 731 requested the Secretary-General to "seek the cooperation of Libya to provide a full and effective response to the requests" of the United States and the United Kingdom. The reports of the Secretary-General pursuant to the resolution indicate that the "requests" to Libya to which that resolution refers were understood to include the "demands" of the three sponsoring states that Libya surrender the two suspects for trial.

B. Reports of the Secretary-General Pursuant to Security Council Resolution 731

3.37 The Secretary-General submitted two reports on his efforts, both of which addressed the requirement that Libya surrender the two suspects. In his second report, the Secretary-General outlined the points that the three sponsoring states requested him to convey to Libyan authorities which included:

"(d) The three Governments have no objection to the hand-over of the suspects and the information requested taking place through the Secretary-General of the United Nations in accordance with ... resolution 731 (1992)."<sup>128</sup>

---

<sup>127</sup> *Ibid*, pp. 57 (Yemen), 59-60 (Morocco), 71 (Zimbabwe), 77 (Cape Verde), 86 (China), 96-97 (India), and 102 (Venezuela).

<sup>128</sup> Exhibit 21, p.2.

The report also outlined the response made by Libya to the points conveyed by the Secretary-General on behalf of the three sponsoring states. Those points refer to contradictory comments of Libyan officials on the possibility of handing over the two suspects. The Secretary General concluded:

"From the foregoing, it will be seen that while 731 has not yet been complied with, there has been certain evolution in this position of the Libyan authorities ... ." <sup>129</sup>

3.38 Any doubt that the Council intended by its reference to the "requests" to Libya to include the demands of the three sponsoring states to surrender the two suspects for trial was laid to rest by Resolutions 748 and 883.

#### C. Security Council Resolution 748

3.39 It was in response to Libya's failure to comply with those requests that the Council imposed sanctions on Libya in Resolution 748 with a view to compelling Libya to comply. As the Permanent Representative of the United States stated in connection with the adoption of Resolution 748:

"We have called upon Libya to comply with the four requests included in resolution 731 (1992): turn over the two suspects in the bombing of Pan Am 103 for trial in either the United States or the United Kingdom and meet the demands of French justice ... ."

"Over two months ago this Council, acting on behalf of the international community, unanimously urged the Libyan Government to provide a full and effective response to the four demands. This resolution also makes clear the Council's decision that Libya should comply with these demands. As we sadly know, all efforts by the Secretary-General, the League of Arab States and indeed many others to bring about

---

<sup>129</sup> Ibid, para. 6. In Resolution 748, the Council continued the role of the Secretary-General and also decided to review the measures imposed on Libya at least every 120 days in light of the compliance by the Libyan Government with the demands of the Council and any reports by the Secretary-General on his efforts to obtain such compliance. Security Council Resolution 748, Exhibit 23.

Libya's compliance have been blocked by Libya's continuing refusal to cooperate with the specific requests made in resolution 731 (1992).<sup>130</sup>

3.40 The Council specifically made a determination that the failure of the Libyan Government to demonstrate its renunciation of terrorism and in particular its continued failure to respond fully and effectively to the requests in resolution 731 constituted a threat to international peace and security.<sup>131</sup> Having made such a determination, the Council, acting under Chapter VII of the Charter, decided that the Libyan Government must comply with the requests,<sup>132</sup> spelling out in the process that the requests to which it referred are those described in Security Council documents.<sup>133</sup>

#### D. Security Council Resolution 883

3.41 Finally, Resolution 883 states even more definitively the intention of the Council in Resolutions 731 and 748 to require Libya to surrender the two suspects. In that resolution, the Council affirmed Resolutions 731 and 748; expressed its deep concern that Libya has not fully complied with these resolutions; demanded "once again" that Libya comply with the resolutions; and decided to impose additional economic sanctions to compel Libyan compliance. Indeed, Libya in arguing that the Council should not impose sanctions suggested that it also understood that Resolution 731 referred to the demands of the three states to surrender the suspects for trial in the United States or the United Kingdom. Thus, the Permanent Representative of Libya stated:

---

<sup>130</sup> Exhibit 22, p. 66.

<sup>131</sup> Security Council Resolution 748, Exhibit 23, preambular para. 7.

<sup>132</sup> Security Council Resolution 748, Exhibit 23, paras. 1, 13.

<sup>133</sup> Exhibits 9, 10 and 11.

"However, the truth of the matter is that the Libyan Jamahiriya has fully responded to Security Council resolution 731 (1992). The only point that remains outstanding is the problem that arose from the demand by the United States of America and the United Kingdom that the two alleged suspects be extradited. This is a problem that remains unsolved because of a legal wrangle over which country has the competence in law to try the two persons accused of involvement in the bombing of Pan Am flight 103 over Lockerbie, Scotland."<sup>134</sup>

The Council also expressed its readiness to review the economic sanctions with a view to suspending them immediately if the Secretary-General reported to the Council that the Libyan Government had ensured the appearance of the two suspects for trial in the United States or the United Kingdom.<sup>135</sup> As the Deputy Permanent Representative of France said in connection with the adoption of Resolution 883:

"The three sponsors of the resolution have been accused of having a hidden agenda against the Libyan regime. The text of the resolution that our Council has just adopted shows that that is not so, and it paves the way for a speedy solution. If the Libyan Government cooperates effectively with my country's judicial authorities in the UTA 772 case, and if it hands over to the competent courts the two suspects in

---

<sup>134</sup> Exhibit 33, p. 4.

<sup>135</sup> Exhibit 32, para. 16 provides:

"The Security Council,

. . . .

"16. 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 such 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; . . . ."

the attack on Pan Am 103, the Council will immediately be able to adopt a resolution suspending the implementation of all the sanctions."<sup>136</sup>

This provision, which serves to encourage Libya to surrender the two suspects, emphasizes the understanding of the Members of the Council that Libya is required under the resolutions to take such action. Since the adoption of Resolution 883, the Security Council on four occasions has reviewed Libyan compliance with the requirements imposed by the Council in Resolution 748. The sanctions have remained unaltered and continue in effect.

---

<sup>136</sup> Exhibit 33, p. 44.

## PART IV

### EVEN IF THE COURT HAS JURISDICTION, IT SHOULD DECLINE TO EXERCISE JURISDICTION IN THESE PROCEEDINGS

4.01 Even if the Court were to conclude that Libya's Application established in some respect a dispute relating to the interpretation or application of the Montreal Convention and that the requirements of Article 14 of the Montreal Convention had been met, the Court nonetheless, should decline to exercise jurisdiction in these proceedings. The actions to which Libya objects are the actions of the Security Council in Resolutions 731, 748 and 883, 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, deciding that the Government of Libya must comply with those requests, and imposing economic sanctions and other measures to compel Libya to comply with those requests.<sup>137</sup> The relief sought by Libya invites the Court to challenge the binding decisions of the Council; otherwise, the request for relief is meaningless and academic.

4.02 Libya argues that even if the resolutions by their terms purport to impose a requirement to surrender the two accused, those resolutions could not prejudice Libya's rights under the Charter and international law.<sup>138</sup> In effect, Libya seeks to have the Court review the actions of the Security Council in adopting the resolutions in light of the

---

<sup>137</sup> See paras. 3.29-3.41, above.

<sup>138</sup> Libyan Memorial, paras. 6.44-6.136.

provisions of the Charter. Such a review in these contentious proceedings, where the sole alleged basis of jurisdiction is the Montreal Convention, would be incompatible with the function of the Court under the Charter. For this reason, the United States does not believe that the Court should conduct such a review, even though the United States is confident that the Council had full authority for its actions.

## Chapter I

### **A Decision by the Court to Accept Jurisdiction in these Proceedings is Incompatible with the Functions of the Court**

4.03 The actions to which Libya objects in these proceedings are decisions of the Security Council taken in the fulfillment of its duties under Chapter VII of the Charter with respect to threats to international peace and security. As a result, any judgment by the Court in regard to the rights and obligations of the Parties under the Montreal Convention cannot have any practical consequences for Libya.

4.04 It is difficult to conceive how the Court could address Libya's claims on the merits of Libya's Application by an interpretation or application of the Montreal Convention. To grant Libya relief, the Court necessarily would involve itself in a review of the authority of the Security Council to make the decisions contained in Resolutions 748 and 883. That question is, however, far beyond an "interpretation or application of the Montreal Convention," the only subject matter over which the Court's jurisdiction allegedly extends in this matter. Moreover, any judgment by the Court in regard to these matters can only serve a political purpose that would be inconsistent with the judicial character and functions of the Court.



Section 1. Any Judgment that the Court Might Render Would Be Without Practical Effect and Would Embroil the Court in a Political Dispute.

4.05 Any decision of the Court in these proceedings could have no binding force except as between the Parties and in respect of this particular case.<sup>139</sup> But it is not the United States (or the United Kingdom) that requires Libya to surrender the two accused, or that can lift the economic sanctions and other measures imposed on Libya by Resolutions 748 and 883 to compel such a surrender. It is only the Security Council which can do so.

4.06 Of course, Libya is free to request and the Court has authority to issue declaratory relief. However, any declaratory relief that the Court could provide in these proceedings would not be consistent with the judicial function of the Court. As the Court said in the Northern Cameroons case:

"That the Court may, in an appropriate case, make a declaratory judgment, is indisputable. The Court has, however, already indicated that even if, when seised of an Application, the Court finds that it has jurisdiction, it is not obliged to exercise it in all cases. If the Court is satisfied, whatever the nature of the relief claimed, that to adjudicate on the merits of an application would be inconsistent with its judicial function, it should refuse to do so."<sup>140</sup>

4.07 If the declaratory relief Libya seeks is limited to the interpretation and application of the Montreal Convention and ignores the effect of Resolutions 748 and 883 on the rights and obligations of the Parties, the Court's decision can only be of academic interest and, therefore, would not be appropriate to the Court's judicial function.<sup>141</sup>

---

<sup>139</sup> Article 59 of the Statute of the International Court of Justice provides: "The decision of the Court has no binding force except between the parties and in respect of that particular case."

<sup>140</sup> Case Concerning The Northern Cameroons (Cameroon v. United Kingdom) Preliminary Objections, Judgment, I.C.J. Reports 1963, p. 14 at p. 37.

<sup>141</sup> See ibid, p.35.

4.08 If the declaratory relief Libya seeks addresses the legality of Security Council actions, it would go beyond an interpretation or application of the Montreal Convention and would involve an interpretation and application of the Charter. For the Security Council, which is not a party to the proceeding, the effect of the Court's pronouncement would not be binding. The judgment, therefore, could not have any practical effect on the obligations of Libya under Chapter VII of the United Nations Charter and under Security Council Resolutions 748 and 883 to surrender the two accused persons.

4.09 It is clear that Libya, nonetheless, seeks such an opinion to further its political efforts to reverse Resolutions 748 and 883. Accepting jurisdiction in these contentious proceedings for that purpose risks moving the Court beyond its judicial function and onto the political plane. As the Court has stated:

"It may be also agreed ... that after a judgment is rendered, the use which the successful party makes of the judgment is a matter which lies on the political and not on the judicial plane. But it is not the function of a court merely to provide a basis for political action if no question of actual legal rights is involved."<sup>142</sup>

Consequently, accepting jurisdiction in these proceedings is incompatible with the judicial character of the Court.

---

<sup>142</sup> *Ibid*, p. 37.

Section 2. The Court Should Decline to Exercise Jurisdiction in this Proceeding to Avoid Undermining the Ability of the Security Council to Maintain and Restore International Peace and Security.

4.10 A decision by the Court to exercise jurisdiction in these proceedings for the purpose of providing Libya with the opportunity to challenge decisions of the Security Council made under Chapter VII of the Charter would be contrary to the Court's consistent practice of supporting the Security Council in the exercise of its primary responsibility under the Charter for maintaining and restoring international peace and security.

4.11 The Court has only twice specifically addressed the question of its authority to review the actions of the other principal organs of the United Nations. In both instances, the Court was acting in response to a request for an advisory opinion from another principal organ seeking the Court's views before deciding upon what action that organ would take in a specific situation. In each instance, the Court held that it does not possess the general power to review the actions of other principal United Nations organs.

4.12 In the Expenses case, the General Assembly requested the Court to give an advisory opinion on the question of whether the expenditures authorized by the General Assembly in regard to peacekeeping operations in the Congo and the Middle East constituted expenses of the United Nations Organization within the meaning of Article 17 of the Charter. In those proceedings, a question arose as to the jurisdiction of the Court to review the authority of the United Nations General Assembly to initiate such operations. The Court concluded, based upon the debates in the General Assembly, that the General Assembly

"took it for granted that the Court" would consider such questions.<sup>143</sup> In arriving at that conclusion, the Court said that:

"It is not to be assumed that the General Assembly would thus seek to fetter or hamper the Court in the discharge of its judicial functions."<sup>144</sup>

However, in addressing these issues, the Court more generally concluded:

"In the legal systems of States, there is often some procedure for determining the validity of even a legislative or governmental act, but no analogous procedure is to be found in the structure of the United Nations. Proposals made during the drafting of the Charter to place ultimate authority to interpret the Charter in the International Court of Justice were not accepted; the opinion which the Court is in course of rendering is an advisory opinion."<sup>145</sup>

4.13 The Court reiterated these views in the advisory opinion it rendered in Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa). In that case, the Security Council requested the Court to render an advisory opinion on the legal consequences for states of the actions of the United Nations in regard to Southwest Africa.<sup>146</sup>

4.14 As the Court noted:

"The request is put forward by a United Nations organ with reference to its own decisions and it seeks legal advice from the Court on the consequences and implications of these decisions."<sup>147</sup>

---

<sup>143</sup> Certain Expenses of the United Nations, Advisory Opinion, I.C.J. Reports 1962, p. 151 at p. 157.

<sup>144</sup> Ibid.

<sup>145</sup> Ibid, p. 168. (Emphasis in original.)

<sup>146</sup> Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa), I.C.J. Reports 1971, p. 16 at pp. 17-18.

<sup>147</sup> Ibid, p. 24.

Thus, the Court was expressly asked by the Security Council to comment on resolutions adopted by the Council in the exercise of "what it deemed to be its primary responsibility, the maintenance of peace and security."<sup>148</sup>

4.15 In that case, it was argued that the Court should not assume powers of judicial review over the actions taken by other principal organs of the United Nations without a specific request to that effect, and that there had been no specific request. The Court stated that:

"Undoubtedly, the Court does not possess powers of judicial review or appeal in respect of the decisions taken by the United Nations organs concerned ... However, in the exercise of its judicial function and since objections have been advanced the Court, in the course of its reasoning, will consider these objections before determining any legal consequences arising from those resolutions."<sup>149</sup>

The Court's decision to consider objections was taken within the context of the request by the Security Council for an advisory opinion which neither limited the manner in which the Court could respond to that request nor impugned statements of other states that the request was broad enough to encompass any questions reasonably arising in connection with the request.

4.16 A decision by the Court to exercise jurisdiction in the present proceedings would be inconsistent with the Court's long established practice in contentious cases to give full backing to the efforts of the Council to maintain or restore international peace and security and not to interfere with the consequences of the Security Council's decision that a particular situation constitutes a threat to such peace and security. While the Court has

---

<sup>148</sup> Ibid, pp. 51-52.

<sup>149</sup> Ibid, p. 45.

decided that it and the Security Council may properly exercise their respective functions with regard to the same international dispute or situation,<sup>150</sup> the Court has never exercised its independent authority to undermine or in any way impinge upon or frustrate the decisions of the Security Council in dealing with threats to international peace and security. This is exactly what Libya is calling upon the Court to do since no other result can provide Libya with the relief it is seeking.

4.17 Under Chapter VII of the Charter, the Security Council alone has the authority to determine that a situation involves a threat to international peace and security and to make legally binding decisions regarding the measures to be taken in response to such threats. Such determinations and decisions necessarily require a political judgment based on an assessment of the likely consequences of the continuation of a particular situation. A decision by the Court to accept Libya's invitation to reopen the Council's decisions, using contentious proceedings instituted under the Montreal Convention, would invite such challenges to the actions of the Council in other cases and would introduce uncertainty in the exercise of the Council's fundamental responsibility for maintaining and restoring international peace and security. It would bring into question the finality and authority of every action of the Security Council under Chapter VII, and thus provide a basis for challenging, on a protracted basis, efforts of the international community to restore or maintain international peace and security.

---

<sup>150</sup> Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States), Preliminary Objections, Judgment, I.C.J. Reports 1984, pp. 435-36; Case Concerning United States Diplomatic and Consular Staff in Tehran (United States v. Iran), Judgment, I.C.J. Reports 1980, pp. 21-22; Aegean Sea Continental Shelf Case (Greece v. Turkey), Interim Measures, I.C.J. Reports 1976, p. 27.

4.18 The Court has consistently resisted all efforts to take actions that could weaken the ability of the Security Council to perform this vital task on behalf of the international community, and should continue to do so in these proceedings. Thus, even if the Court had jurisdiction under the Montreal Convention, in the circumstances of this case, it may and should decline to exercise that jurisdiction. As Professor Rosenne has written, the Court, in its capacity as a principal organ of the United Nations:

"must cooperate in the attainment of the aims of the Organization and strive to give effect to the decisions of the other principal organs, and not achieve results which would render them nugatory."<sup>151</sup>

Another scholar has commented:

"Even though the situation can involve many interesting justiciable issues, adjudication by the Court, pending proceedings in the Council, could unnecessarily complicate and aggravate the situation. Accordingly, in such a situation, instead of promoting the peaceful settlement of disputes the Court could endanger the maintenance of international peace and security, the very backbone of the organization."<sup>152</sup>

In each case where a like issue had been brought to the Court, it acted to support the Security Council.<sup>153</sup> As described by Judge Tarazi in the Aegean Sea case:

"For if it is true and certain that the Court is an independent and judicial organ ... it is no less true that it is an integral part of the United Nations ....

"That being so, the present Court, while maintaining its independence, should not fail to take into consideration this basic truth, namely that it is an integral part of the

---

<sup>151</sup> S. Rosenne, The Law and Practice of the International Court, p. 70 (1985), Exhibit 60.

<sup>152</sup> T. Elsen, Litispence Between the International Court of Justice and the Security Council, p. 69 (1986), Exhibit 61.

<sup>153</sup> Case Concerning United States Diplomatic and Consular Staff in Tehran (United States v. Iran), Judgment, I.C.J. Reports 1980, pp. 20-21; Aegean Sea Continental Shelf Case (Greece v. Turkey), Judgment, I.C.J. Reports 1978, p. 3.

United Nations. The Charter, whose genesis marked a new stage in the course of history, features some essential differences in comparison with the provisions of its predecessor, the Covenant of the League of Nations. Those differences were due to the new situation which States and peoples had to face on account of the consequences of the Second World War and of the developments which preceded or triggered its outbreak.

"There is no necessity here to consider these differences in detail. One may content oneself with the affirmation that, by virtue of the Charter, the Security Council bears an essential responsibility for the maintenance of peace and security. The Court, if circumstances so require, ought to collaborate in the accomplishment of this fundamental mission."<sup>154</sup>

4.19 Because jurisdiction in this proceeding is based solely on the Montreal Convention, the Court can avoid entering into Libya's dispute with the Security Council and avoid the risks that such action by the Court could have on the ability of the Council to maintain or restore international peace and security. Any decision by the Court to allow Libya to challenge in these proceedings the authority of the Security Council to adopt Resolutions 731, 748 and 883 would encourage states against which the Security Council proposes to take or has taken action under Chapter VII to initiate proceedings against a member of the Council under any treaty on even the most attenuated of jurisdictional bases in the hope of frustrating such action. Such a decision would seriously weaken the Council's ability to maintain peace and security in future circumstances which are unforeseen and unforeseeable.<sup>155</sup> The Court, as a co-relative principal UN organ with the Security Council, should decline to accept jurisdiction in this matter.

---

<sup>154</sup> Agean Sea Continental Shelf Case (Greece v. Turkey), Interim Measures, I.C.J. Reports 1976, p. 3 at p. 33.

<sup>155</sup> See statement of the Permanent Representative of the United Kingdom during the debate in the Council relating to the adoption of Resolution 748, Exhibit 22, pp. 68-69.



## Chapter II

### **The Security Council has Full Authority to Require Libya to Surrender the Two Accused Persons**

4.20 In its Memorial, Libya challenges the authority of the Security Council to make the determinations and decisions contained in Resolutions 731, 748 and 883, arguing that the resolutions violate Articles 1(1) and 2(7) of the Charter and that recourse to Chapter VII constitutes a misuse of the power of the Council. For the reasons discussed above, the Court should decline to undertake such a review. Nonetheless, the United States does not wish to leave Libya's contentions unanswered and provides the following information for the record.

4.21 Libya's arguments ignore the mandate of the Security Council under the Charter to act, on behalf of all Members of the United Nations, effectively to exercise its responsibility for maintaining and restoring international peace and security.<sup>156</sup> In Resolution 731, based on its commitment "to eliminate international terrorism,"<sup>157</sup> the Security Council urged the Libyan Government immediately to provide a full and effective response to the requests of the United States and the United Kingdom to surrender the two accused for trial.<sup>158</sup> In Resolution 748, based on its determination that the Libya's failure to demonstrate by concrete action its renunciation of terrorism and particularly its continued failure to respond fully and effectively to the requests constitute a "threat to international

---

<sup>156</sup> United Nations Charter, Article 24.

<sup>157</sup> Security Council Resolution 731, Exhibit 18, preambular para. 7.

<sup>158</sup> Ibid, para. 3.

peace and security,"<sup>159</sup> the Security Council decided under Chapter VII of the Charter that Libya must comply without any further delay with those requests.<sup>160</sup> In Resolution 883, the Council, expressing its determination to eliminate international terrorism and acting once again under Chapter VII of the Charter, demanded that Libya comply without any further delay with the terms of Resolutions 731 and 748 and imposed additional sanctions on Libya in an effort to obtain such compliance. The determinations of threat to international peace and security by the only body expressly authorized and, indeed, directed under the Charter to make such determinations,<sup>161</sup> provides the legal basis under the Charter for the Council to make a decision under Chapter VII that requires Libya to surrender the two suspects for trial in the United States or the United Kingdom, notwithstanding Article 2(7).

Section 1. The Actions of the Security Council are Fully Consonant with Principles of Justice and International Law

4.22 Libya argues that the Security Council Resolutions violate Article 1(1) because they ignore the requirement that any effort to bring about an adjustment or settlement of an international dispute or situation be in conformity with principles of justice and international law. More specifically, Libya argues that the resolutions violate principles of justice and international law because they ignore what Libya perceives is its right under the Montreal Convention and general principles of international law to exercise jurisdiction over the two

---

<sup>159</sup> Security Council Resolution 748, Exhibit 22, preambular para. 7.

<sup>160</sup> Ibid, para. 1.

<sup>161</sup> United Nations Charter, Article 39.

accused.<sup>162</sup> Libya also argues that any requirement to surrender the two accused to the United States or the United Kingdom for trial would infringe Article 1(1) by violating the right of the accused to a fair trial<sup>163</sup> and the presumption of innocence to which they are entitled under international law.<sup>164</sup> The simple response to these arguments is that they do not address enforcement action by the Security Council under Chapter VII.

4.23 As Libya acknowledges:

"It is true that under the terms of Article 1(1), compliance with the principles of justice and international law is a requirement only for the adjustment or settlement of situations or disputes; it does not apply to the "collective measures for the prevention and removal of threats to the peace" mentioned in the first part of the article."<sup>165</sup>

Libya proposes to ignore the distinctions between actions of the Council under Chapter VI, dealing with the "Peaceful Settlement of Disputes" between states, and Chapter VII, dealing with "Action with Respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression."<sup>166</sup> By ignoring this distinction, Libya ignores the significance of Chapter VII of the Charter.

---

<sup>162</sup> Libyan Memorial, paras. 6.64-6.83. Article 1 of the United Nations Charter provides:

"The Purposes of the United Nations are: (1) To maintain international peace and security, and to that end; to take effective collective measures for the prevention and removal of threats to peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace...."

<sup>163</sup> Libyan Memorial, paras. 6.78-6.79.

<sup>164</sup> Ibid, paras. 6.82.

<sup>165</sup> Ibid, para. 6.71.

<sup>166</sup> Ibid, paras. 6.70-6.75, 6.83.

4.24 Libya consistently maintained before the Council that the question of jurisdiction to try the two accused relates to a legal dispute between Libya and the United States (and the United Kingdom) in relation to the interpretation and application of the Montreal Convention and that the Council, therefore, should refrain from taking action under Chapter VII seeking to compel the surrender of the two accused pending negotiation, arbitration and, finally, action by this Court in these proceedings. The Council has repeatedly declined to accept those arguments and has acted to compel Libya to surrender the two accused. As Libya acknowledges, the Council acted under Chapter VII to determine that Libya's continued refusal to comply with the requests of the United States and the United Kingdom constituted a threat to international peace and security.

4.25 Despite failing in its efforts to persuade the Council to treat this matter simply as a dispute under Chapter VI, Libya, nonetheless, seeks to have the Court apply the requirements of Chapter VI to actions taken by the Council under Chapter VII. Such action would require the Court to ignore the fundamental distinctions contained in the Charter relating to the authority of the Council. As Libya admits, the actions of the Council under Chapter VI are recommendatory. The situation is different under Chapter VII. Not only have the Council's decisions under Chapter VII resulted in binding legal obligations for member states; they have also resulted in obligations that supersede existing conflicting obligations of those states under other agreements, such as the Montreal Convention.

4.26 Thus, Article 103 expressly provides that in the event of any conflict between the obligations of member states under the Charter and their obligations under "any other

international agreement," their obligations under the Charter shall prevail.<sup>167</sup> Whatever the situation of the Parties under the Montreal Convention prior to the adoption of Resolution 748, after the adoption of that resolution their Charter obligations under the decisions of the Council prevail.<sup>168</sup>

4.27 To the extent that principles of justice could be said to encompass a requirement to respect existing agreements, Article 103 demonstrates that the Security Council was not to be restrained by such principles in making decisions under Chapter VII. Nor should such principles be so narrowly construed. The principles are sufficiently flexible to encompass actions taken by the Council to restore and maintain international peace and security, which is the first and primary purpose of the United Nations.

4.28 The Security Council did not accept Libya's claims that surrender of the two suspects for trial would violate their rights to a fair trial or a presumption of their innocence based upon principles of justice and international law. A trial in the United Kingdom or United States would encompass the highest standard of justice and fairness including strict adherence to the presumption of innocence. Based upon information supplied by the United Kingdom and the United States, the Secretary-General responded in detail in 1993 to questions posed by the Libyan Government regarding the procedures to be followed at trial and the protections that would be guaranteed to the two defendants. These protections include the right to challenge potential jurors peremptorily or for cause, the right to examine and challenge physical evidence, the right to cross-examine government witnesses, and the

---

<sup>167</sup> See Part III, above.

<sup>168</sup> Order on Provisional Measures, p. 126.

right to testify or remain silent. Moreover, defendants also have the right to appeal the trial court's verdict to an appellate court where judges can review the trial proceedings in order to determine whether the trial court properly observed the defendant's rights. The Libyan Government found the Secretary-General's response to be "adequate and acceptable."<sup>169</sup>

4.29 In any event, the decision to require the surrender of these two individuals was made by the Council in the exercise of its duties under the Charter for the maintenance of international peace and security. Any complaint that Libya may have against the Security Council should be taken up with the Security Council and not with the United States (and the United Kingdom) by reference to the Montreal Convention.

Section 2. The Actions of the Security Council do not Violate Article 2(7) of the Charter

4.30 Libya argues that in requiring it to surrender the two accused, the Council has acted contrary to the principle contained in Article 2(7) of the Charter against intervention in matters which are essentially within the domestic jurisdiction of a state.<sup>170</sup> Once again, there is a simple response to Libya's objection. In fact, the principle against such intervention is subject to an exception. Article 2(7) provides:

"Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII."

(Emphasis added.) And, as Libya acknowledges:

2.

---

<sup>169</sup> Exhibit 31, Annex, p. 2.

<sup>170</sup> Libyan Memorial, paras. 6.85-6.98.

"There can be no doubt, then, that when a threat to peace arises, Article 2(7) cannot prevent the Council from handling the matter."<sup>171</sup>

4.31 Libya argues that a state's jurisdiction over its nationals for purposes of prosecuting criminal cases and, particularly, the right of a state to refuse extradition, is a matter which is essentially within the domestic jurisdiction of a state.<sup>172</sup> This argument ignores the interests which the international community has in the prosecution of individuals whose actions threaten international peace and security, and the determination by the Security Council that Libya's continued failure to renounce terrorism and in particular to fully and effectively respond to the requests of the United States (and the United Kingdom) to surrender the two suspects constitute such a threat. The Council, in fact, has taken vigorous action with regard to addressing the criminal behavior of individuals, most recently with the establishment under Chapter VII of special tribunals to investigate and prosecute war crimes in the former Yugoslavia and Rwanda.<sup>173</sup> The resolutions setting up these tribunals require states to turn over individuals for trial.<sup>174</sup> No exception is provided or intended for a member state's own nationals.

---

<sup>171</sup> *Ibid*, para. 6.88. (translation)

<sup>172</sup> *Ibid*, paras. 6.91-6.98.

<sup>173</sup> Resolution 827, United Nations Security Council, 3217th meeting, 25 May 1993, UN Doc. S/RES/827, Exhibit 57; Resolution 955, United Nations Security Council, 3453rd meeting, 8 November 1994, UN Doc. S/RES/955, Exhibit 58.

<sup>174</sup> Exhibit 57, para. 4 (deciding that all States shall cooperate with requests for assistance from the International Tribunal for the Former Yugoslavia, which might include requests for the surrender or transfer of the accused to the International Tribunal); Exhibit 58, para. 2 (same decision, applicable to the International Tribunal for Rwanda). See, e.g., *ibid*, p. 14, Rule 28(2) ("States shall comply without undue delay with any request for assistance or an order issued by a Trial Chamber, including, but not limited to ... (e) [t]he surrender or the transfer of the accused to the International Tribunal for Rwanda").

### Section 3. The Security Council has Acted within its Authority

4.32 Libya challenges the authority of the Council to make the determination that Libyan actions constitute a threat to peace, arguing that making such a determination was a misuse of the power of the Council. Libya rests these arguments on its view of Resolutions 731 and 748 that the Council was not responding to any threat to international peace and security, but was simply making the determination to invest itself with the authority to make the decision to require Libya to surrender the two accused.<sup>175</sup> Once again, Libya made these same arguments to the Council and the Council refused to accept them.

4.33 The Security Council obviously had a strong basis upon which to conclude that Libya's actions constituted a threat to international peace and security, thereby justifying its decisions under Chapter VII of the United Nations Charter. The Governments of three Members of the Security Council have repeatedly sought Libya's full cooperation in their investigation of the terrorist destruction of Pan Am 103 and UTA 772 without success. With respect to Pan Am 103, two Libyan nationals were formally accused by a federal grand jury in the United States and by the Procurator Fiscal for Dumfries and Galloway, Scotland, of having sabotaged Pan Am 103, murdering 270 individuals. The Governments of the United States and the United Kingdom requested the Government of Libya to surrender the two individuals for trial to face the charges made against them. The two governments also provided the Security Council with copies of the court papers which provided the details of the accusations against the two Libyan agents, which included numerous charges implicating

---

<sup>175</sup> Libyan Memorial, paras. 6.108-6.129. Libya also challenges the actions of the Council on the grounds of "proportionality." *Ibid*, paras. 6.103-6.104. (translation)



the Libyan Government, including accusations that the Libyan JSO had purchased the timers used in the Pan Am 103 bombing; that the two accused Libyan agents were officers and operatives of the JSO and were utilizing the resources and facilities of the nation of Libya; that one of the Libyan agents had purchased the clothing used in the suitcase carrying the bomb; and that the two Libyan agents and their co-conspirators caused that suitcase to be introduced as baggage on Pan Am 103, causing the destruction of the plane as it flew over Lockerbie, Scotland.

4.34 After receiving these formal accusations and reviewing the declarations and requests of the United Kingdom, United States and France that Libya surrender the two accused for trial, the Security Council in Resolution 731 expressed concern over the fact that the investigation implicated officials of the Libyan Government,<sup>176</sup> strongly deplored Libya's failure to respond effectively to those requests<sup>177</sup> and urged 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>178</sup> In so doing, the Security Council indicated that it was deeply disturbed by "the world-wide persistence of acts of international terrorism in all its forms, including those in which States are directly or indirectly involved,"<sup>179</sup> and was deeply concerned by "all illegal activities directed against international civil aviation."<sup>180</sup> As

---

<sup>176</sup> Exhibit 18, preambular para. 6.

<sup>177</sup> Ibid, para. 2.

<sup>178</sup> Ibid, para. 3.

<sup>179</sup> Ibid, preambular para. 1.

<sup>180</sup> Ibid, preambular para. 2.

noted above, the Security Council has repeatedly deplored and condemned international terrorism, finding that it constitutes a threat to international peace and security. When Libya did not comply with the requests of other members of the United Nations and with the Security Council's resolution, the Security Council was justified in finding subsequently in Resolution 748 that Libya's actions constituted a threat to international peace and security.

4.35 In Resolution 748, the Security Council expressed its conviction that the suppression of international acts of terrorism in all its forms was essential for the maintenance of international peace and security<sup>181</sup> and emphasized the need for the international community to deal effectively with all such acts.<sup>182</sup> The Council also reaffirmed the obligation of all States under Article 2(4) of the Charter to refrain from organizing, instigating, assisting, or participating in terrorist acts in another State<sup>183</sup> and expressed its concern that the Libyan Government had yet to provide a full and effective response to the requests put forward in Resolution 731.<sup>184</sup>

4.36 Finally, in Resolution 883, the Council once again presented the considerations forming the basis for its determination. The Council reiterated its concerns over the safety of international civil aviation,<sup>185</sup> the persistence of acts of international terrorism<sup>186</sup> and the

---

<sup>181</sup> Exhibit 23, preambular para. 4.

<sup>182</sup> Ibid, preambular para. 5.

<sup>183</sup> Ibid, preambular para. 6.

<sup>184</sup> Ibid, preambular para. 3.

<sup>185</sup> Exhibit 32, preambular paragraph 3.

<sup>186</sup> Ibid, preambular para. 2.

investigations which implicated Libyan Government officials in the bombing of Pan Am 103,<sup>187</sup> and it reaffirmed its condemnation of all acts of unlawful interference against the security of international civil aviation.<sup>188</sup>

4.37 The Security Council was justified in making the determination under Chapter VII of the United Nations Charter that such a situation constitutes a threat to the peace and security and in requiring Libya to take actions (such as the surrender of the persons responsible) that might avert further threats to the peace. The authority to take those actions is committed exclusively to the Security Council by the Charter.

4.38 In the end, Libya is left with the fact that the Council made its determination and acted upon it. That is what the Charter requires in order for the decision of the Council to be binding on Libya. Libya's dispute is with the Council over the implementation of Resolutions 748 and 883 not with the United States under the Montreal Convention.

---

<sup>187</sup> Ibid, preambula: para. 6.

<sup>188</sup> Ibid, preambular para. 4.

## PART V

### **EVEN IF THE COURT EXERCISES JURISDICTION, IT SHOULD DECIDE, AS A PRELIMINARY MATTER, THAT THE DECISIONS OF THE SECURITY COUNCIL PRECLUDE THE RELIEF SOUGHT BY LIBYA**

5.01 Even if the Court decides that it has jurisdiction over the Libyan complaint and that it should not decline to exercise that jurisdiction, it should decide, as a preliminary matter, that the decisions of the Security Council preclude the relief sought by Libya, whatever the merits of the Libyan arguments concerning the Montreal Convention.

5.02 The preceding Parts of this submission establish that Libya is required under Resolutions 731, 748 and 883, to surrender the accused persons for trial in the United States or the United Kingdom, and that this requirement takes precedence over any contrary obligations of the parties flowing from the Montreal Convention. This conclusion is clear from the face of these instruments and requires no inquiry by the Court into the numerous and very complicated factual and legal issues that would need to be addressed were the Court to proceed to a review of the merits of Libya's arguments concerning the Montreal Convention.

5.03 Such a difficult and lengthy process would, moreover, be wholly without purpose if in the end the Court concludes that Libya must comply with the Council's decisions and surrender the two accused persons for trial in the United States or the United Kingdom. The United States and the United Kingdom have, on the basis of the Security Council's decisions, insisted on the surrender of the accused and have refused to cooperate with Libya's supposed attempts to investigate and prosecute the matter elsewhere. Whatever

obligation to cooperate with Libya may have existed under Article 11 of the Montreal Convention, such obligation has been superseded by the demands of the Security Council that Libya surrender the two individuals to the United States or the United Kingdom.<sup>189</sup> This is particularly the case where the demands of the Security Council are based upon its concern that the evidence implicates the Libyan Government in the crimes and where the Security Council has also required that Libya cooperate with the United States and the United Kingdom in the prosecution by those states of the two individuals.<sup>190</sup>

5.04 Under these circumstances, Libya's demand for a declaration by the Court as to rights and obligations of the parties under the Montreal Convention flies in the face of common sense, judicial economy, and the Rules of Court. It is clearly within the power of the Court to avoid unnecessary examination of immaterial and more difficult legal and factual issues. Indeed, it was exactly for that purpose that the Rules of the Court were revised in 1972. The previous practice of the Court in joining preliminary objections to the merits, for example in the Southwest Africa cases and the Barcelona Traction case, was severely criticized.<sup>191</sup>

5.05 In response to such criticism, the Rules of Court were revised in 1972 to encourage decisions on preliminary objections prior to the merits phase by authorizing the

---

<sup>189</sup> Exhibit 23, para. 1.

<sup>190</sup> Resolution 748 required Libya to comply with paragraph 3 of Resolution 731 regarding the requests to Libya set out in specific correspondence with Libya. Security Council Resolution 748, Exhibit 23, para. 1. Those requests include the request that Libya "disclose all its knows of this crime, including the names of all those responsible, and allow full access to all witness, documents, and other material evidence, including all the remaining timers." Security Council Resolution 731, Exhibit 18, para. 3; Exhibit 9, Annex.

<sup>191</sup> See paras. 2.01-2.13 above.

Court to address all legal and factual questions that bear on the issue of a preliminary objection, even to the extent of adducing evidence on such questions, in order to dispose of that objection. Under Article 79 of the Rules of Court, the Court may hear a preliminary objection "to the jurisdiction of the court or to the admissibility of the application, or other objection the decision upon which is requested before any further proceedings on the merits . . . ." The objection that the relief sought by Libya is inconsistent with the mandatory decisions if the Security Council clearly falls within the ambit of Article 79.

5.06 Accordingly, if the case can be disposed of (as the United States submits) on the basis of preliminary objections as provided under Article 79, it is incumbent on the Court to do so. The United States therefore requests the Court, if it determines to exercise jurisdiction in this case, to decide as a preliminary matter that the decisions of the Security Council preclude and render irrelevant any relief sought by Libya pursuant to the Montreal Convention.

## CONCLUSION

Libya's arguments notwithstanding, two things remain clear: Resolutions 748 and 883 by their terms require Libya to surrender the two accused and impose economic sanctions and other measures on Libya to compel compliance with that requirement; and the relief Libya is requesting is relief from the operation of those resolutions. Having failed to convince the Council to refrain from adopting the resolutions, Libya now seeks to obtain relief by this proceeding against the United States and the United Kingdom purportedly under the Montreal Convention. This the Court should not permit. Libya's dispute is not with the United States or the United Kingdom in relation to the interpretation or application of the Montreal Convention but is with the Security Council in regard to Resolutions 748 and 883.

**SUBMISSION**

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.

20 June 1995



---

Conrad K. Harper  
Agent of the United States  
of America



**EXHIBITS TO THE MEMORIAL OF THE  
UNITED STATES OF AMERICA**

- Exhibit 1. Letter dated 23 December 1991 from the Acting Permanent Representative of the United States of America to the United Nations addressed to the Secretary-General (United Nations Document A/46/83-S/23317).
- Exhibit 2. United Nations Press Release: Security Council Condemns Destruction of Pan Am Flight 103 (United Nations Document SC/5057; 30 December 1988).
- Exhibit 3. United States Code, Title 28, Sections 1861 through 1869.
- Exhibit 4. United States Federal Rules of Criminal Procedure, Rules 6 through 9.
- Exhibit 5. Jury Selection Plan for the United States District Court for the District of Columbia (as amended through 9 September 1993).
- Exhibit 6. U.S. Department of Justice Memorandum: Summary of Criminal Procedure in Federal Criminal Cases in the United States.
- Exhibit 7. United States Code, Title 18, Section 32  
(Destruction of aircraft or aircraft facilities).
- United States Code, Title 18, Section 844 (Malicious destruction of property used in or affecting interstate or foreign commerce, causing deaths).
- United States Code, Title 18, Section 2332  
(Terrorist murders of United States nationals outside the United States; this section was codified as United States Code, Title 18, Section 2331 until October 29, 1992).
- United States Code, Title 18, Section 371  
(Conspiracy to commit criminal offense).
- Exhibit 8. Letter dated 20 December 1991 from the Permanent Representative of the United Kingdom of Great Britain and Northern Ireland to the United Nations addressed to the Secretary-General (United Nations Document A/46/826-S/23307; 31 December 1991).

- Exhibit 9. Letter dated 20 December 1991 from the Permanent Representative of the United States of America to the United Nations addressed to the Secretary-General (United Nations Document A/46/827-S/23308; 31 December 1991).
- Exhibit 10. Letter dated 20 December 1991 from the Permanent Representative of France to the United Nations addressed to the Secretary-General (A/46/825-S/23306; 31 December 1991).
- Exhibit 11. Letter dated 20 December 1991 from the Permanent Representatives of France, the United Kingdom of Great Britain and Northern Ireland and the United States of America to the United Nations addressed to the Secretary-General (United Nations Document A/46/828-S/23309; 31 December 1991).
- Exhibit 12. Letter dated 17 November 1991 from the Permanent Representative of the Libyan Arab Jamahiriya to the United Nations addressed to the Secretary-General (United Nations Document A/46/660-S/23226; 20 November 1991).
- Exhibit 13. Letter dated 20 November 1991 from the Permanent Representative of the Libyan Arab Jamahiriya to the United Nations addressed to the Secretary-General (United Nations Document A/46/844-S/23416; 13 January 1992).
- Exhibit 14. Letter dated 8 January 1992 from the Permanent Representative of the Libyan Arab Jamahiriya to the United Nations addressed to the Secretary-General (United Nations Document A/46/841-S/23396; 9 January 1992).
- Exhibit 15. Letter dated 17 January 1992 from the Permanent Representative of the Libyan Arab Jamahiriya to the United Nations addressed to the President of the Security Council (United Nations Document S/23436; 17 January 1992).
- Exhibit 16. Letter dated 18 January 1992 from the Permanent Representative of the Libyan Arab Jamahiriya to the United Nations addressed to the President of the Security Council (United Nations Document S/23441; 18 January 1992).
- Exhibit 17. Convention for the Suppression of Unlawful Acts Against the Safety of International Civil Aviation, done at Montreal on 23 September 1971.

- Exhibit 18. Resolution 731, United Nations Security Council, 3033rd meeting, 21 January 1992 (United Nations Document S/RES/731).
- Exhibit 19. Provisional Verbatim Record of the Three Thousand and Thirty Third Meeting of the Security Council (United Nations Document S/PV.3033; 21 January 1992).
- Exhibit 20. Report by the Secretary-General Pursuant to Paragraph 4 of Security Council Resolution 731 (United Nations Document S/23574; 11 February 1992).
- Exhibit 21. Further Report by the Secretary-General Pursuant to Paragraph 4 of Security Council Resolution 731 (United Nations Document S/23672; 3 March 1992).
- Exhibit 22. Provisional Verbatim Record of the Three Thousand and Sixty-Third Meeting of the Security Council (United Nations Document S/PV.3063; 31 March 1992).
- Exhibit 23. Resolution 748, United Nations Security Council, 3063rd meeting, 31 March 1992, (United Nations Document S/RES/748).
- Exhibit 24. Note by the President of the Security Council (United Nations Document S/24424; 12 August 1992).
- Exhibit 25. Note by the President of the Security Council (United Nations Document S/24925; 9 December 1992).
- Exhibit 26. Note by the President of the Security Council (United Nations Document S/25554; 8 April 1993).
- Exhibit 27. Note by the President of the Security Council (United Nations Document S/26303; 13 August 1993).
- Exhibit 28. Letter dated 13 August 1993 from the representatives of France, the United Kingdom of Great Britain and Northern Ireland and the United States of America to the United Nations addressed to the Secretary-General (United Nations Document A/48/314-S/26304; 13 August 1993).
- Exhibit 29. Letter dated 22 September 1993 from the Permanent Representative of the Libyan Arab Jamahiriya to the United Nations Addressed to the Secretary-General (United Nations Document S/26500; 28 September 1993).

- Exhibit 30. United States cable dated 22 September 1993 from Washington, D.C. to United States Mission to the United Nations, New York.
- Exhibit 31. Letter dated 1 October 1993 from the Permanent Representative of the Libyan Arab Jamahiriya to the United Nations addressed to the Secretary-General (United Nations Document S/26523; 1 October 1993).
- Exhibit 32. Resolution 883, United Nations Security Council 3312th meeting, 11 November 1993, (United Nations Document S/RES/883).
- Exhibit 33. Provisional Verbatim Record of the Three Thousand Three Hundred and Twelfth Meeting of the Security Council (United Nations Document S/PV.3312; 11 November 1993).
- Exhibit 34. Resolution 286, United Nations Security Council, 1552nd meeting, 9 September 1970.
- Exhibit 35. Note by the President of the Security Council, (United Nations Document S/17554; 9 October 1985).
- Exhibit 36. Resolution 579, United Nations Security Council, 2637th meeting, 18 December 1985.
- Exhibit 37. Resolution 635, United Nations Security Council, 2869th meeting, 14 June 1989.
- Exhibit 38. Resolution 687, United Nations Security Council, 2981st meeting, 3 April 1991.
- Exhibit 39. Note by the President of the Security Council (United Nations Document S/23500; 31 January 1992).
- Exhibit 40. Statement by the President of the Security Council (United Nations Document S/PRST/1994/40; 29 July 1994).
- Exhibit 41. Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations, Resolution 2625 (XXV), United Nations General Assembly, 1883rd Plenary Meeting, 24 October 1970.
- Exhibit 42. Aerial Hijacking or Interference with Civil Air Travel, Resolution 2645 (XXV), United Nations General Assembly, 1914th Plenary Meeting, 25 November 1970.

- Exhibit 43. Measures to Eliminate International Terrorism, Resolution 49/60, United Nations General Assembly, 84th Plenary Meeting, 9 December 1994 (United Nations Document A/RES/49/60; 17 February 1995).
- Exhibit 44. Note by the President of the Security Council (United Nations Document S/26861; 10 December 1993).
- Exhibit 45. Note by the President of the Security Council (United Nations Document S/PRST/1994/18; 12 April 1994).
- Exhibit 46. Note by the President of the Security Council (United Nations Document S/PRST/1994/41; 5 August 1994).
- Exhibit 47. Note by the President of the Security Council (United Nations Document S/PRST/1994/76; 30 November 1994).
- Exhibit 48. Note by the President of the Security Council (United Nations Document S/PRST/1995/14; 30 March 1995).
- Exhibit 49. Letter dated 28 July 1994 from the Secretary-General addressed to the President of the Security Council (United Nations Document S/1994/900; 29 July 1994).
- Exhibit 50. Letter dated 9 December 1993 from the Chargé D'Affaires A.I. of the Permanent Mission of the Libyan Arab Jamahiriya to the United Nations addressed to the Secretary-General (United Nations Document S/26859; 10 December 1993).
- Exhibit 51. Letter dated 30 March 1995 from the Permanent Representatives of France, the United Kingdom of Great Britain and Northern Ireland and the United States of America to the United Nations addressed to the Secretary-General. (United Nations Document A/50/128-S/1995/247; 30 March 1995).
- Exhibit 52. Review of the Role of the International Court of Justice, Report of the Sixth Committee (United Nations Document A/8238; 11 December 1970).
- Exhibit 53. Review of the Role of the International Court of Justice, Report of the Sixth Committee (United Nations Document A/8568; 10 December 1971).

- Exhibit 54. M. Lachs, "The Revised Procedure of the International Court of Justice" in Essays on the Development of The International Legal Order, pp. 21, 31 (1980).
- Exhibit 55. E. Jiménez de Aréchaga, "The Amendments to the Rules of Procedure of the International Court of Justice," 67 American Journal of International Law, pp. 1, 11, and 13 (1973).
- Exhibit 56. G. Guyomar, Commentaire du Règlement de la Cour Internationale de Justice: Interprétation et Pratique, p. 371 (1972).
- Exhibit 57. Resolution 827, United Nations Security Council, 3217th meeting, 25 May 1993 (United Nations Document S/RES/827).
- Exhibit 58. Resolution 955, United Nations Security Council, 3453rd meeting, 8 November 1994 (United Nations Document S/RES/955).
- Exhibit 59. Letter dated 5 August 1994 from the representatives of France, the United Kingdom of Great Britain and Northern Ireland and the United States of America to the United Nations addressed to the Secretary-General (United Nations Document A/49/299-S/1994/938; 8 August 1994).
- Exhibit 60. S. Rosenne, The Law and Practice of the International Court, p. 70 (1985).
- Exhibit 61. T. Elsen, Litispence Between the International Court of Justice and the Security Council, p. 59 (1986)

