

**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)**

REJOINDER

SUBMITTED BY

THE UNITED STATES OF AMERICA

3 AUGUST 2001

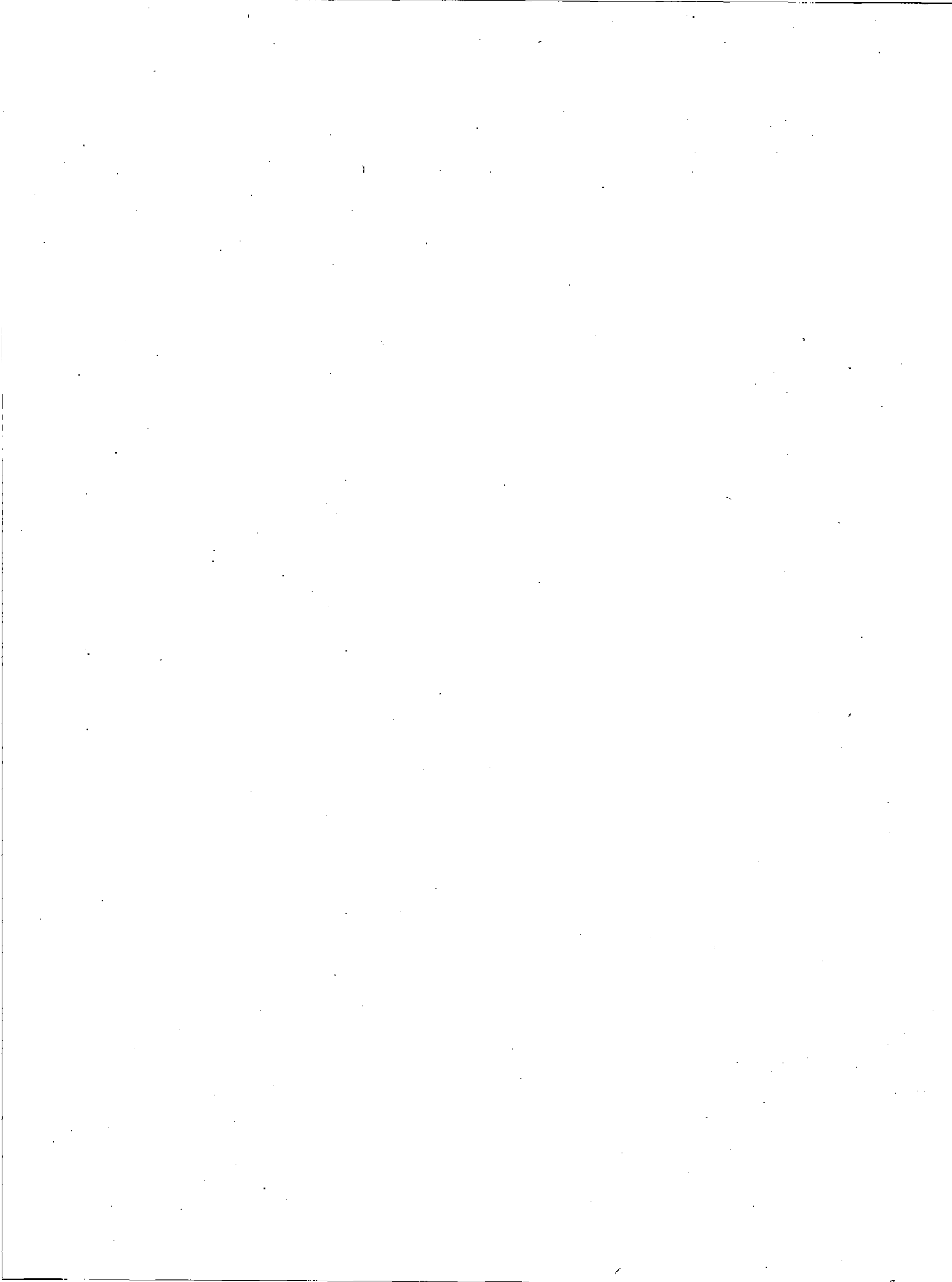
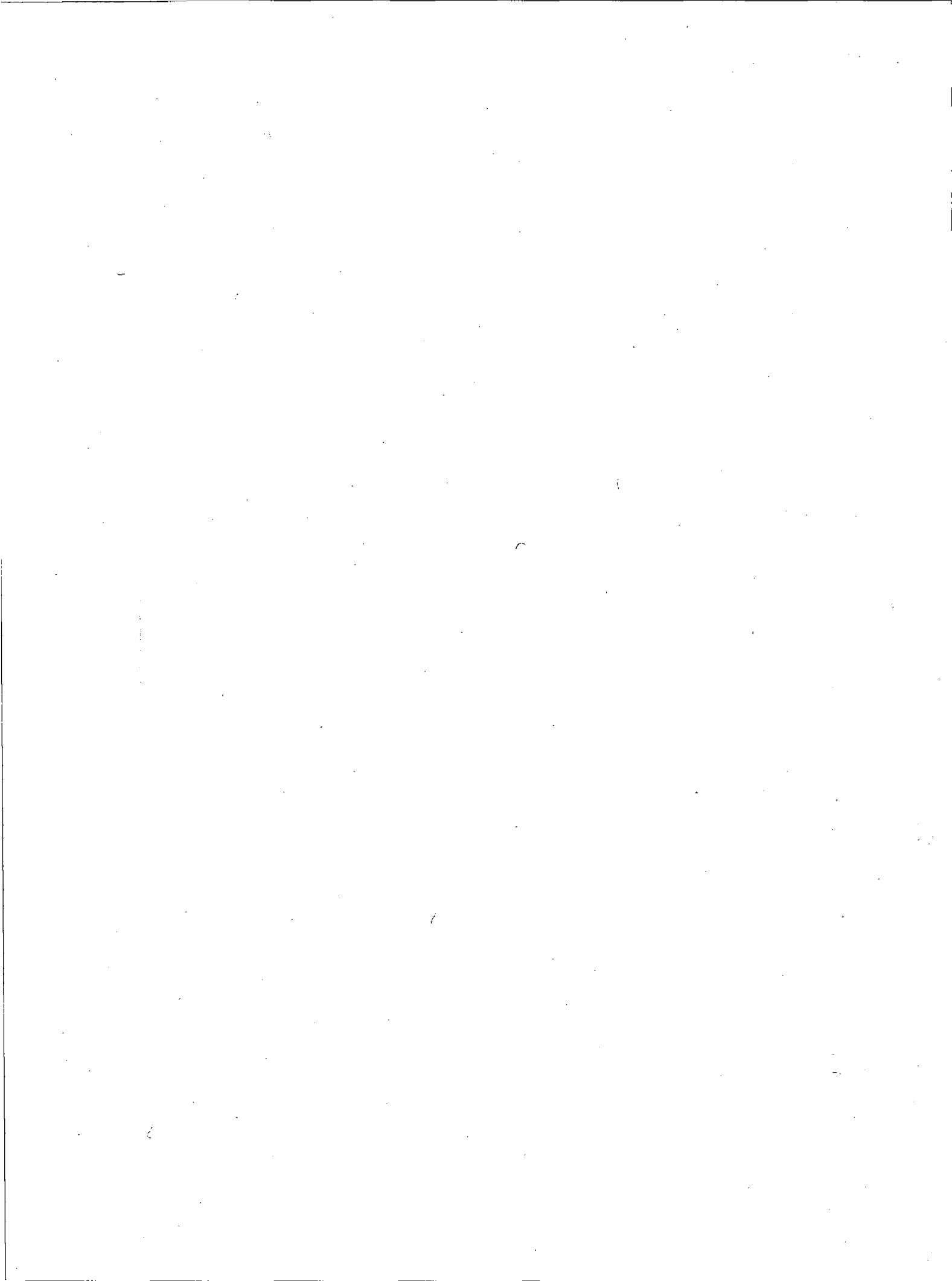


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INTRODUCTION AND OVERVIEW

1. Pursuant to the Court's Order of 6 September 2000, the United States of America submits its Rejoinder in this case.

2. On 29 June 2000, the Government of Libya filed its Reply in this proceeding, reiterating its allegation that the United States violated the Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation done at Montreal on 23 September 1971 ("Montreal Convention") by taking steps to bring two Libyan nationals, accused of having caused the destruction of Pan Am 103, to trial outside Libya. The fundamental weaknesses of Libya's Application remain as they have been throughout this long proceeding: first, the Montreal Convention does not, as a matter of law, impose on Contracting States such as the United States the obligations that Libya asserts that the United States has violated; and, second, even if the Montreal Convention did create such obligations, the Security Council has taken decisions that render those alleged obligations inapplicable to this dispute involving the destruction of Pan Am 103. Many of the assertions made by Libya in its Reply are not new and have been addressed in the United States Counter-Memorial and other pleadings. The United States reaffirms the arguments made in its earlier submissions and, to the extent possible, will not repeat them here.

3. The United States respectfully submits that the Court need not reach the merits of Libya's claims in deciding this case. Libya's recent surrender of the accused for trial in the Netherlands by a Scottish court and the successful conduct and conclusion of that trial have rendered the Application without object. Part I of this Rejoinder will set forth a brief summary of the relevant factual developments. Part II will demonstrate that these

developments have rendered a decision by this Court without object and that, accordingly, the Court is not required to adjudicate the merits of Libya's claim.

4. In Part III, the United States will show that as the dispute has evolved and as Libya has recast its arguments, the link between Libya's complaints and what it says are the obligations of the parties to the Montreal Convention has grown ever more attenuated. Libya now focuses its Montreal Convention arguments on allegations that the United States violated an undefined "spirit of the Convention" or failed to implement in good faith its alleged obligations under the Convention. Moreover, Libya now agrees that the Montreal Convention does not encompass the entire range of legally available solutions regarding trial of the two accused individuals. Indeed, the trial in the Netherlands, which was accepted -- and strongly endorsed -- by Libya as a resolution of this matter, is not an arrangement undertaken pursuant to any provision of the Montreal Convention, but one arrived at through compliance with resolutions of the Security Council. Libya's assertion that the United States acted unlawfully in resorting to the Security Council to take action to address the threat to international peace and security created by Libyan involvement in terrorist activities, including its involvement in the destruction of Pan Am 103, is without merit and should be rejected by the Court.

5. In Part IV, the United States will discuss the relevant resolutions of the Security Council and show that these resolutions required Libya, *inter alia*, to surrender the two accused for trial in courts of the United Kingdom or the United States. It will also show that the obligation of Member States to comply with these resolutions prevails over the rights claimed by Libya under the Montreal Convention. In addition, the United States will demonstrate that the Security Council's exercise of its Chapter VII functions is not subject to

review. Finally, the United States will show that it cannot be held responsible before this Court for its resort to the Security Council or for the effects of Council decisions.

PART I

RECENT FACTUAL DEVELOPMENTS BEARING ON THIS CASE

1.1 The United States previously submitted to the Court detailed information concerning the destruction of Pan Am 103, the subsequent criminal investigation and indictments, and relevant Security Council actions and Libyan responses. We respectfully refer the Court to the United States Counter-Memorial of 31 March 1999 and to the Annex of Factual Background at Counter-Memorial Exhibit 1. Since the filing of the United States Counter-Memorial, there have been significant developments that bear on the issues before the Court. These developments confirm that the United States had a reasonable basis for believing that Libya was implicated in the destruction of Pan Am 103 and that the United States acted properly in the circumstances of this case. They also provide the basis on which the Court may conclude that the Libyan Application has been rendered without object.

1.2 On 5 April 1999, Messrs. Abdelbasset Ali Mohmed Al Megrahi ("Mr. Al Megrahi") and Al Amin Khalifa Fhimah ("Mr. Fhimah") arrived in the Netherlands to stand trial before a Scottish court on charges of having carried out the bombing of Pan Am 103. Libya's surrender of the two accused implemented Security Council Resolution 1192, adopted on 27 August 1998, which endorsed "the initiative for the trial of the two persons charged with the bombing of Pan Am flight 103 before a Scottish court sitting in the Netherlands" and required Libya to ensure the appearance of the suspects for trial¹. The United Kingdom and the United States had proposed this initiative to the Secretary-General

¹ Resolution 1192, United Nations Security Council, 3920th Meeting, 27 August 1998, United Nations Document S/RES/1192, paras. 2 and 4. Exhibit 3 to United States Counter-Memorial.

in a letter of 24 August 1998². By letter dated 19 March 1999, Libya communicated to the Secretary-General its agreement that the two suspects would appear before the Scottish court³. In that letter, Libya thanked the Secretary-General, as well as Mr. Nelson Mandela, President of South Africa, His Majesty King Fahd Bin Abdul-Aziz Al Saud, Custodian of the two Holy Mosques, and His Royal Highness Crown Prince Abdullah Al Saud of the Kingdom of Saudi Arabia, for efforts "to find a just solution to the Lockerbie question"⁴. As called upon in paragraph 5 of Security Council Resolution 1192, the Secretary-General assisted Libya with the safe transfer of the two accused to the Netherlands. Upon the arrival of the two accused in the Netherlands on 5 April 1999, the Secretary-General immediately reported to the Security Council concerning the transfer⁵. On that same day, the Security Council issued a press release, acknowledging that Libya's action had led to the immediate suspension of the sanctions originally ordered in Resolution 748 (1992) of 31 March 1992⁶. The Security Council confirmed the suspension at its 3992nd meeting on 8 April 1999⁷. All

² The Reply of the Government of Libya criticizes the United Kingdom and the United States at length for an alleged attempt to take credit for an initiative that was originally proposed by Libya. See Reply of the Great Socialist People's Libyan Arab Jamahiriya, 29 June 2000 (hereinafter "Libyan Reply"), paras. 1.16-1.27. The 24 August 1998 proposal of the United Kingdom and the United States that a Scottish court be constituted to sit in the Netherlands to conduct the trial of the two suspects was specifically endorsed by the Security Council in Resolution 1192. The United States noted in its Counter-Memorial that Libya too had endorsed a trial by Scottish judges applying Scottish law in a venue outside of Scotland or the United States. See Counter-Memorial Submitted by the United States of America, 31 March 1999 (hereinafter "United States Counter-Memorial"), para. 1.5.

³ The Exhibits in the volume accompanying this Rejoinder are identified throughout as "Rejoinder Exhibit ___." The Libyan letter of 19 March 1999 to the Secretary-General is the attachment to a letter from the Secretary-General to the President of the Security Council dated 19 March 1999, United Nations Document S/1999/311, 23 March 1999. This document is Rejoinder Exhibit 1.

⁴ Idem.

⁵ Letter dated 5 April 1999 from the Secretary-General to the President of the Security Council, United Nations Document S/1999/378, 5 April 1999. Rejoinder Exhibit 2.

⁶ Security Council Press Release, United Nations Document SC/6662, 5 April 1999. Rejoinder Exhibit 3.

⁷ Statement by the President of the Security Council, United Nations Document S/PRST/1999/10, 8 April 1999. Rejoinder Exhibit 4.

United States actions with respect to the appropriate location for the trial of the accused ceased with the surrender of the accused in the Netherlands.

1.3 Upon their arrival in the Netherlands, Messrs. Al Megrahi and Fhimah were taken into custody by Dutch officials and were then transferred to the custody of Scottish officials as specified in the Agreement Between the Government of the Netherlands and the Government of the United Kingdom of Great Britain and Northern Ireland Concerning a Scottish Trial in the Netherlands. The accused were originally charged with conspiracy to murder, alternatively murder, alternatively violations of the Aviation Security Act 1982⁸.

1.4 The trial of Messrs. Al Megrahi and Fhimah began on 3 May 2000 before a three-judge Scottish court sitting at Camp Zeist in the Netherlands. The trial ended with the announcement of a verdict and sentencing on 31 January 2001. Over the course of the trial, the court sat for 77 days and heard evidence, documented in the trial transcript, from 230 witnesses. Near the end of the trial, the charges were amended so that each accused was charged with murder⁹. Under the terms of the amended indictment, Mr. Fhimah was charged with murder as an employee of Libyan Arab Airlines and Mr. Al Megrahi remained charged with murder as a member of the Libyan Intelligence Services¹⁰. Both were charged with acting "in furtherance of the purposes of said Libyan Intelligence Services¹¹".

⁸ Opinion of the Court *in causa* Her Majesty's Advocate v. Abdelbaset Ali Mohmed Al Megrahi and Al Amin Khalifa Fhimah, Case number 1475/99, delivered 31 January 2001 (hereinafter "Opinion"), para. 1. The Opinion is Rejoinder Exhibit 5.

⁹ *Idem*, para. 1.

¹⁰ Final Amended Indictment in the Case of Her Majesty's Advocate v. Abdelbaset Ali Mohmed Al Megrahi and Al Amin Khalifa Fhimah, indicating deletions made by the High Court of Justiciary at Camp Zeist in returning its Verdict on 31 January 2001 (hereinafter "Final Amended Indictment"), para. (2). The Final Amended Indictment is Rejoinder Exhibit 6.

¹¹ *Idem*, para. (2).

1.5 On 31 January 2001, Lord Sutherland, the presiding judge of the Scottish court, delivered the court's verdict and opinion¹². By unanimous decision, the court found Mr. Al Megrahi guilty of murder in the bombing of Pan Am 103 and sentenced him to life imprisonment, with a recommendation that he not be considered for supervised release for a period of twenty years. It acquitted Mr. Fhimah, concluding that the evidence did not prove beyond a reasonable doubt that he was aware that any assistance that he was giving to Mr. Al Megrahi was in connection with a plan to destroy an aircraft by the planting of an explosive device¹³. The court amended the revised indictment to conform to its judicial findings. The final amended indictment¹⁴ constitutes judicial findings of fact as to Mr. Al Megrahi.

1.6 The court convicted Mr. Al Megrahi of committing murder while acting in concert with others and in furtherance of the purposes of the Libyan Intelligence Services (the "Jamah[i]riya Security Organisation" or "JSO")¹⁵. It accepted the evidence that he was a member of the JSO, occupying posts of fairly high rank¹⁶. It further found that Mr. Al Megrahi traveled to Malta for an overnight visit on 20/21 December 1988 using a coded (*i.e.*, false) passport issued in the name of Ahmed Kalifa Abdusamad by the Libyan passport authority¹⁷. The court also concluded that Mr. Al Megrahi, acting with other members of the JSO, ordered and obtained from the Swiss firm MEBO AG the type of explosive device timers used in the bombing of Pan Am 103¹⁸. Based on the whole body of evidence in the

¹² Rejoinder Exhibit 5.

¹³ Opinion, para. 85.

¹⁴ Rejoinder Exhibit 6.

¹⁵ Opinion, para. 89; Final Amended Indictment, para. (2).

¹⁶ Opinion, para. 88.

¹⁷ Opinion, para. 87; Final Amended Indictment, para. (2)(e).

case, the court determined that there was a real and convincing pattern linking Mr. Al Megrahi to the bombing and that there was no reasonable doubt as to his guilt. It also stated its clear inference from the evidence "that the conception, planning and execution of the plot which led to the planting of the explosive device was of Libyan origin¹⁹".

¹⁸ Opinion, para. 88; Final Amended Indictment, para. (2)(b).

¹⁹ Opinion, para. 82.

PART II

A DECISION BY THIS COURT ON THE DISPUTE PRESENTED IN LIBYA'S APPLICATION WOULD BE WITHOUT OBJECT

2.1 The Court's jurisprudence makes clear that once the dispute presented in the Application has been resolved, the Court's judicial function cannot be exercised. Accordingly, as explained below, the resolution of the dispute presented in Libya's Application has obviated the need for the Court to decide the merits of the case.

2.2 Contentious cases require an actual dispute in controversy, not a theoretical one. The result of the process must be a decision having binding force²⁰. The Court emphasized in the Northern Cameroons case that its judgment must be one that can be effectively applied. The Court stated:

If the Court were to proceed and were to hold that the Applicant's contentions were all sound on the merits, it would still be impossible for the Court to render a judgment capable of effective application. . . . The function of the Court is to state the law, but it may pronounce judgment only in connection with concrete cases where there exists at the time of adjudication an actual controversy involving a conflict of legal interests between the parties. The Court's judgment must have some practical consequence in the sense that it can affect existing legal rights or obligations of the parties, thus removing uncertainty from their legal relations²¹.

Indeed, in the Preliminary Objections judgment in this case the Court recognized "that events subsequent to the filing of an application may 'render an application without object'²²".

²⁰ See Shabtai Rosenne, The Law and Practice of the International Court, 1920-1996, Volume II, p. 537 (3d ed. 1997).

²¹ Northern Cameroons, Preliminary Objections, Judgment, I.C.J. Reports 1963, p. 15 at pp. 33-34.

²² Questions of Interpretation and Application of the 1971 Montreal Convention Arising From the Aerial Incident at Lockerbie, (Libyan Arab Jamahiriya v. United States of America), Preliminary Objections, Judgment of 27 February 1998, I.C.J. Reports 1998, p. 115 (hereinafter "Judgment of 27 February 1998") at para. 45 (citing Border and Transborder Armed Actions (Nicaragua v. Honduras), Jurisdiction and Admissibility, Judgment, I.C.J. Reports, 1988, p. 69 at para. 66).

2.3 The dispute between the United States and Libya identified in the Application and elaborated upon in Libya's Memorial involves the question of whether United States efforts to seek the surrender of the accused acted "to prevent Libya from fulfilling its obligations [to try the accused individuals in Libyan courts] in violation of the [Montreal] Convention²³". In its Application, Libya sought certain legal findings as a predicate to its final operative request for relief, which was as follows:

that the United States is under a legal obligation immediately to cease and desist from such breaches [of the Montreal Convention] and from the use of any and all force or threats against Libya, including the threat of force against Libya, and from all violations of the sovereignty, territorial integrity, and the political independence of Libya²⁴.

2.4 In its Memorial, Libya recast the language of its Application and asked the Court to declare that:

les Etats-Unis sont juridiquement tenus de respecter le droit de la Libye à ce que cette convention ne soit pas écartée par des moyens qui seraient au demeurant en contradiction avec les principes de la Charte des Nations Unies et du droit international général de caractère impératif qui prohibent l'utilisation de la force et la violation de la souveraineté, de l'intégrité territoriale, de l'égalité souveraine des Etats et de leur indépendance politique²⁵.

2.5 The fundamental right that Libya claimed in these proceedings was the right "to submit the case to its competent authorities for the purpose of prosecution²⁶". Libya

²³ Application Instituting Proceedings, 3 March 1992 (hereinafter "Libyan Application"), Part III(d).

²⁴ Libyan Application, Part IV(c).

²⁵ Memorial of the Great Socialist People's Libyan Arab Jamahiriya, 20 December 1993 (hereinafter "Libyan Memorial"), para. 8.1(d) ("The United States is legally required to respect Libya's right to ensure that this convention not be circumvented by means that would be contrary to the principles of the United Nations Charter and of general international law that categorically prohibit the use of force and the violation of sovereignty, territorial integrity, equal sovereignty of States, and their political independence."). Throughout this Rejoinder, the United States will provide in the footnotes English translations of French citations from the Libyan Memorial and Reply. These translations were made by the Department of State's Office of Language Services, Translating Division.

²⁶ Libyan Application, Part III(d).

has now accepted an alternative to prosecution by its competent authorities. Pursuant to the requirements of United Nations Security Council Resolution 1192, it has surrendered the accused for trial before a Scottish court. Accordingly, a decision by this Court as to whether the Montreal Convention provided Libya with an exclusive right to choose the place of trial of the accused and obligated other States to refrain from seeking their surrender for trial elsewhere would be without effect.

2.6 Libya agrees that the United States has ceased the actions that Libya alleged had violated the Montreal Convention²⁷. The decisions of this Court confirm that when a judicial pronouncement with respect to an issue presented by an Application would be incapable of implementation, the Court will not make a declaratory statement of rights and obligations. In the Nuclear Tests cases²⁸, New Zealand and Australia sought to halt France's atmospheric nuclear testing in the South Pacific Ocean. During the proceedings, France announced the completion of the atmospheric portion of its nuclear testing program²⁹. The Applicants, however, sought a declaration from the Court that such testing was in violation of international law and requested that the Court order France not to resume such testing in the future³⁰. In each of the cases, the Court stated that "as a Court of law, it is called upon to

²⁷ See Libyan Reply, para. 2.2 ("Cet accord apparaissant comme une manière d'appliquer la convention de Montréal (*supra* § 1.29), les développements qui vont suivre ne concerne que l'époque où les défendeurs refusaient d'appliquer la convention.") ("Since the agreement seems to be one way to apply the Montreal Convention (*supra* §1.29), the arguments below concern only the period when Respondents were refusing to apply the Convention."); see also Libyan Reply, para. 1.30.

²⁸ Nuclear Tests (Australia v. France), Judgment, I.C.J. Reports 1974, p. 253 (hereinafter "Nuclear Tests (Australia v. France)"); Nuclear Tests (New Zealand v. France), Judgment, I.C.J. Reports 1974, p. 457 (hereinafter "Nuclear Tests (New Zealand v. France)").

²⁹ Nuclear Tests (Australia v. France), paras. 37 and 39; Nuclear Tests (New Zealand v. France), paras. 40 and 42.

³⁰ Nuclear Tests (Australia v. France), paras. 11 and 47; Nuclear Tests (New Zealand v. France), paras. 11 and 50.

resolve *existing* disputes between States³¹” and noted that “the objective of the Applicant has in effect been accomplished³²”. The Court concluded that because the dispute had disappeared, the relief requested by Australia and New Zealand in their respective Applications was without object³³. Accordingly, the Court found it could not grant the Applicants the relief requested.

2.7 Here, the controversy regarding the place of trial of the accused has been brought to a final conclusion, one at least as final as the resolution of the disputes before the Court in the Nuclear Tests cases. The Security Council has adopted Resolution 1192 and Libya has transferred the accused to the Netherlands for trial by a Scottish court. In light of these developments, the United States, like France in the Nuclear Tests cases, has ceased the actions of which Libya complained in its Application.

2.8 In the Nuclear Tests cases, the unilateral statement of France that it had ceased atmospheric testing, found by the Court to be binding on France, was sufficient to render the dispute without object. In the present case, Libya has accepted and implemented that portion of a Security Council resolution relating to the location of the trial of the accused, thus giving rise to a final resolution of the dispute Libya brought before this Court. In these circumstances, for the Court to pronounce on the dispute brought in Libya’s Application would be without object.

2.9 A decision of this Court as to the respective rights and obligations of the Parties with respect to Libya’s “request³⁴” for judicial assistance, like a decision on the rights and

³¹ Nuclear Tests (Australia v. France), para. 55; Nuclear Tests (New Zealand v. France), para. 58 (italics added).

³² Nuclear Tests (Australia v. France), para. 52; Nuclear Tests (New Zealand v. France), para. 55.

³³ Nuclear Tests (Australia v. France), para. 59; Nuclear Tests (New Zealand v. France), para. 62.

³⁴ The United States maintains that Libya did not submit an effective request for assistance under Article 11 of the Montreal Convention. This argument is set forth in this Rejoinder at Part III, Chapter IV.

obligations of the parties in regard to the surrender of the accused, would be a futile exercise. Assistance under Article 11 of the Montreal Convention is to be furnished in connection with on-going or contemplated criminal proceedings. Libya's request for assistance related to the two accused persons who had been indicted on 14 November 1991 by a United States federal grand jury³⁵. With Libya's agreement, these two individuals have already been tried before a Scottish court in the Netherlands. Libya does not claim that there is any further investigation or prosecution of them pending in Libya. Adjudicating its request for assistance would also, accordingly, be without object.

³⁵ See Letter dated 27 November 1991 addressed to the Foreman of the Grand Jury of the District of Columbia by Judge Ahmad Al-Tahir al-Zawi. Exhibit 27 to United States Counter-Memorial.

PART III

THE UNITED STATES DID NOT VIOLATE ANY LIBYAN RIGHTS
UNDER THE MONTREAL CONVENTION

CHAPTER I

LIMITED SCOPE OF COURT'S JURISDICTION UNDER THE CONVENTION

3.1 In the previous Part of this Rejoinder, the United States has demonstrated that a decision by this Court on Libya's claims would be without object in light of recent events. This Part will address Libya's claims under the Montreal Convention and show that they are unfounded.

3.2 In its Judgment of 27 February 1998, the Court found that it had jurisdiction "on the basis of Article 14, paragraph 1, of the Montreal Convention of 23 September 1971, to hear the disputes between Libya and the United States *as to the interpretation or application of the provisions of that Convention*³⁶." The Court identified four specific disputes between the parties regarding the interpretation and application of the Convention: whether the destruction of the Pan Am 103 over Lockerbie is governed by the Montreal Convention³⁷; whether the United States violated Article 7 of the Convention, read in conjunction with other articles³⁸; whether the United States violated Article 11³⁹; and whether the United States caused the Convention to be set aside contrary to its requirements⁴⁰. In its Counter-

³⁶ Judgment of 27 February 1998, para. 53(1)(b) (italics added).

³⁷ Idem, para. 24.

³⁸ Idem, para. 28.

³⁹ Idem, para. 32.

⁴⁰ Idem, para. 35. In its Reply, Libya also seeks a finding by the Court that Libya has complied with its obligations under the Montreal Convention. Libyan Reply, Conclusions I(d). This request for a generalized finding is not properly before the Court. Pursuant to the Judgment of 27 February 1998, the four specific disputes set forth in the text above are the only ones properly before the Court in this case.

Memorial, the United States addressed each of these disputes, demonstrating, respectively, that the Montreal Convention did not provide an exclusive regime governing the destruction of Pan Am 103⁴¹, that the United States did not violate Article 7 of the Convention, read in conjunction with other articles⁴², that the United States did not violate Article 11 of the Convention⁴³, and that the United States did not unlawfully cause the Convention to be set aside⁴⁴.

3.3 At this stage in the proceedings, it has become even clearer that there have been no violations of the Montreal Convention by the United States. In accordance with Security Council Resolution 1192, Libya has surrendered the two accused to a Scottish court sitting in the Netherlands and a trial has been conducted there and concluded. That trial took place with Libya's agreement and cooperation and Libya may be regarded as having acquiesced in the resolution of the matter. Libya's surrender of the accused for trial before a Scottish court in the Netherlands, which it regards as consistent with its obligations under the Montreal Convention, makes clear that the United States has not violated the Montreal Convention in connection with any aspect of its response to the bombing of Pan Am 103.

⁴¹ See United States Counter-Memorial, paras. 2.11-2.17.

⁴² See *idem*, paras. 2.18-2.34.

⁴³ See *idem*, paras. 2.35-2.47.

⁴⁴ See *idem*, paras. 2.48-2.51 (noting jurisdictional deficiencies of Libya's claim).

CHAPTER II

THE MONTREAL CONVENTION IS NOT AN EXCLUSIVE REGIME

3.4 As the United States emphasized in its Counter-Memorial, the Montreal Convention is not and was never intended to be an exclusive regime⁴⁵. The Convention's basic purpose is to promote the effective criminal prosecution of persons perpetrating attacks on civil aircraft by ensuring that its more than 170 Contracting States establish jurisdiction over such crimes. It neither entitles one State to assert a superior right to jurisdiction nor limits options for effective prosecution.

3.5 Libya now recognizes that the Convention cannot be read to limit options for prosecution to either domestic trial or extradition. In its Reply, Libya refers to the arrangement for trial of the Libyan suspects before the Scottish court in the Netherlands and states that "[c]et accord apparaissant comme une manière d'appliquer la convention de Montréal⁴⁶". By recognizing that the trial in the Netherlands is consistent with the Convention, Libya admits that the Convention is not an exclusive regime. Libya took a different view in its Memorial, where it argued that:

C'est donc en vain que le Royaume-Uni et les Etats-Unis refusent le caractère alternatif de cette obligation en prétendant contraindre la Libye à extraditer les suspects. Les règles applicables *in casu* prévoient explicitement une obligation alternative d'extradition ou de renvoi des suspects aux autorités pénales compétentes pour l'exercice de l'action pénale (art. 7) et les défendeurs doivent donc s'abstenir de toute action visant à empêcher l'application par la Libye de l'art. 7⁴⁷.

⁴⁵See United States Counter-Memorial, para. 2.11.

⁴⁶Libyan Reply, para. 2.2 ("the agreement seems to be one way to apply the Montreal Convention").

⁴⁷Libyan Memorial, para. 4.34 ("It is therefore futile for the United Kingdom and the United States to reject the 'either-or' nature of this obligation in seeking to compel Libya to extradite the suspects. The applicable rules *in casu* explicitly provide an obligation either to extradite or to refer the suspects to the appropriate criminal justice authorities to institute criminal proceedings (Article 7) and the Respondents must therefore refrain from any action that seeks to prevent Libya from applying Article 7.")

Libya also stressed in its Memorial that its Montreal Convention obligations under Article 7 were not only binding with regard to the United States and United Kingdom, but that the Convention "lie également la Libye à l'égard des quelque 135 autres Etats parties à la convention de Montréal"⁴⁸. This previous Libyan position insisted that the Montreal Convention would permit only domestic prosecution or extradition in any case to which it applied. The position Libya took in its Memorial would appear not to have provided the flexibility to adopt an arrangement not explicitly contemplated by the Convention. As the United States has argued throughout, however, the Montreal Convention is not exclusive⁴⁹. We welcome Libya's belated recognition of this fact.

3.6 As the Montreal Convention is not an exclusive regime, it follows that the solution sought by the United States -- to try the suspects in a court of the United States or the United Kingdom -- was fully consistent with the Convention. Nothing in the Convention limits the ability of a Contracting State to seek through diplomatic channels to exercise criminal jurisdiction over a suspect located in the territory of another Contracting State. Libya has recognized that arrangements that are neither extradition nor domestic prosecution can be consistent with the Convention⁵⁰. Indeed, it has argued at length in its Memorial and Reply that it was Libya that originated the proposal to hold the trial in front of a specially-constituted judicial forum in a third country. Libya also proposed at earlier stages the possibility of handing the accused over for trial to the authorities of a third country, such as

⁴⁸ Libyan Memorial, para. 4.11(iii) ("It also binds Libya vis-à-vis approximately 135 other States Party to the Montreal Convention.").

⁴⁹ Even if the Montreal Convention were an exclusive regime, the obligations of a Contracting State thereunder could be overridden by a Chapter VII resolution of the Security Council, as the United States will discuss in Part IV.

⁵⁰ See, e.g., Libyan Reply, para. 1.29.

Malta or an Arab country⁵¹. Libya surely viewed its own proposals as consistent with its obligations and alleged rights under the Montreal Convention, even though they deviated from the "extradite or prosecute" language of Article 7. Similarly, the proposal of the United States that Libya surrender the suspects for trial before a court of the United States or the United Kingdom was consistent with the Convention. Libya has cited increasingly vague "implicit rights" for its proposition that the United States breached an obligation under the Convention by engaging in conduct which, when engaged in by Libya, is claimed to have been consistent with the Convention.

3.7 Libya attempts to distinguish its proposed solutions from that of the United States and United Kingdom as respectful of "l'esprit de la convention de Montréal⁵²". This argument is without legal substance. The spirit of the Convention provides no legal basis for concluding that Libya's proposal and ultimate acceptance of a solution outside the Montreal Convention is consistent with its obligations while the proposal of such a solution by another Contracting State to the Convention is a violation of the obligations of that State.

3.8 In any event, the solution advocated by the United States to try the accused in a court of the United States or the United Kingdom was respectful of and entirely consistent with "l'esprit de la convention de Montréal⁵³". Throughout the pendency of this matter, the United States sought to ensure effective prosecution of the accused, a result which, in the circumstances, would not be achieved by a trial in the courts of Libya. The United States pursued this solution through lawful means; the eventual resolution of the matter was achieved by Libya's surrender of the accused in accordance with decisions of the Security

⁵¹ See Libyan Reply, para. 1.18 (*citing* United Nations Document S/23672, 3 March 1992).

⁵² Libyan Reply, para. 1.26 ("the spirit of the Montreal Convention").

⁵³ The United States will not detail again the background and objectives of the Montreal Convention, but respectfully refers the Court to the United States Counter-Memorial, paras. 2.1-2.10.

Council. To suggest that the actions of the United States were not respectful of the spirit of the Montreal Convention demonstrates a fundamental misunderstanding on the part of Libya of the Convention and its basic purpose, which is not to provide any State with an exclusive right to insist on a particular venue for prosecution, but to protect civil aviation by promoting the effective prosecution of terrorist acts.

CHAPTER III

THERE WAS NO VIOLATION OF ARTICLE 7 OF THE CONVENTION

3.9 The dispute identified by the Court concerning “the interpretation and application of Article 7 – read in conjunction with Article 1, Article 5, Article 6 and Article 8 – of the Montreal Convention⁵⁴” centers on Libya’s allegations that it had a right under the Convention to submit the matter for prosecution within Libya and that this right barred other States from seeking the surrender of the suspects for prosecution in another State. In its latest filing, Libya’s alleged right has become even more expansive; it argues that Article 7 confers on it not only a *de facto* right to exercise criminal jurisdiction over the suspects, but also, “implicite^{ment}, du droit de choisir le lieu du proc^{ès}”⁵⁵. As the United States explained in its Counter-Memorial and in previous arguments before the Court⁵⁶, nothing in the Montreal Convention confers upon Libya the rights that it claims.

3.10 Libya’s Reply denied that the Court’s judgment had narrowed the scope of the dispute to Article 7 and reasserted its arguments regarding Articles 5 and 8 of the Convention. Libya’s understanding of the Court’s judgment is incorrect; even if it were correct, however, neither Article 7 nor any of the other cited articles confers upon a State in which suspects are located an entitlement either (1) to block diplomatic steps by other States to seek custody of the suspects or (2) to insist on an exclusive right to prosecute them domestically. Article 1 defines offences for purposes of the Convention; Article 5 obligates Contracting States to take measures to establish jurisdiction over offences in certain

⁵⁴ Judgment of 27 February 1998, para. 28.

⁵⁵ Libyan Reply, para. 2.19 (“the implicit right to choose the venue of prosecution”).

⁵⁶ See United States Counter-Memorial, paras. 2.1-2.51; see also Argument of Dr. Murphy before the Court, Verbatim Record of Court Hearing on 14 October 1997, International Court of Justice, CR 97/18, pp. 16-31.

circumstances, thus contemplating that several States could prosecute suspected offenders, but offering no priority; Article 6 imposes obligations on a Contracting State in whose territory an alleged offender is found to take such offender into custody or otherwise ensure his presence – it does not provide that State with any right to prohibit efforts by other States to establish their own jurisdiction; finally, Article 8 deals with extradition by defining Convention offenses as extraditable offenses under existing extradition treaties and by offering Contracting States the option of treating the Convention as the legal basis for extradition. None of these articles provides or even implies that a State holding an alleged offender enjoys a *de jure* or *de facto* priority of jurisdiction, or that other States are precluded from seeking to secure jurisdiction over alleged offenders through diplomatic means.

Section 1. The Convention Does Not Give a State Holding an Alleged Offender the Exclusive Right to Choose the Venue of Prosecution

3.11 The United States demonstrated in its Counter-Memorial that Article 7 does not grant Libya a right to choose between extradition and prosecution that excludes efforts by other States to seek surrender of suspected terrorists through means outside the Convention. We respectfully refer the Court to the relevant portions of the United States Counter-Memorial⁵⁷, which were not rebutted by Libya. In its Reply, Libya sets forth a new and expanded argument on Article 7, to the effect that Article 7 gives Libya not only an implicit right to choose between extradition and prosecution to the exclusion of any other possibility, but also to choose any other prosecution arrangement that it may identify, and to block even the initiation through diplomatic means of any other proposals⁵⁸. As the United States has

⁵⁷ See United States Counter-Memorial, paras. 2.18-2.34.

⁵⁸ See Libyan Reply, para. 2.19.

already demonstrated⁵⁹, the Montreal Convention is not exclusive and does not preclude States from seeking to obtain jurisdiction over alleged offenders through means outside of the Convention. However, even if it were exclusive, Libya's expanded theory of rights would be without foundation. Libya would still be obligated to extradite pursuant to proper extradition proceedings or to submit the case to its competent authorities for the purpose of prosecution. It would not have a right to require prosecution outside the scope of Article 7 or to prevent other States from attempting to arrange for such prosecution through diplomatic means.

3.12 Libya's position here finds no support in the ordinary meaning of the relevant provisions in their context or in the light of the object and purpose of the Convention. In fact, such an interpretation would be inconsistent with the Convention's object and purpose of ensuring effective prosecution of suspected terrorists, since it would allow any Contracting State in the territory of which an alleged offender is present to take only minimal action to prosecute, while blocking diplomatic activity by other States to bring about an effective trial in an objective forum. It is also at odds with the negotiating history of the Convention, which clearly demonstrates a rejection of efforts to establish a priority of jurisdiction and an intention to expand opportunities for jurisdiction over such crimes⁶⁰.

Section 2. No Actions Taken by the United States Violated Article 7, Read in Conjunction With Other Relevant Convention Articles

3.13 Even leaving aside the question of the precise meaning of Article 7, the United States did not take any actions that infringed any asserted Libyan rights. We note that Libya generally fails to identify specific United States actions that it believes were unlawful, relying instead upon vague allegations that United States diplomatic activity violated the principle of

⁵⁹ See United States Counter-Memorial, paras. 2.11-2.17.

⁶⁰ For a discussion of the negotiating history of the Montreal Convention, see United States Counter-Memorial, paras. 2.3-2.10.

good faith application of treaties⁶¹. As shown in the Counter-Memorial, the general diplomatic activity of the United States in no way violated Libyan rights under the Montreal Convention⁶². In addition, it is clear that, to the extent Libya complains about specific United States actions, such actions did not violate any obligation of the United States under the Montreal Convention.

A. Refusing to Adopt Libya's Proposals as to Trial

3.14 Libya argues at length that the United States violated the Convention by refusing to adopt Libya's proposals to hold the trial in a third country. However, the Convention does not confer any right, upon a Party in the position of either Libya or the United States, to insist upon trial in a third country. Nor does it confer upon any State the right to insist that a proposal made outside the scope of the Convention be adopted. Indeed, the United States recognized this fact and did not rely upon the Convention as establishing the legal basis upon which Libya was obliged to surrender the accused. The eventual adoption by the Security Council of a resolution that contains a provision similar to that proposed earlier by Libya for a trial in the Netherlands does not reflect Libya's alleged legal right under the Montreal Convention to insist upon that proposal, but rather reflects a decision of the Security Council to address a threat to international peace and security through means outside the Montreal Convention. The United States, of course, agreed with the Security Council's action, although it was different from proposals it had made earlier.

⁶¹ Libya's arguments in this regard appear, to an extent, to allege that the United States violated an obligation to refrain from conduct depriving the Convention of its object and purpose. The Court has no jurisdiction under Article 14(1) of the Montreal Convention to entertain this argument, or any other argument arising under customary international law independently of the Montreal Convention, in these proceedings. See Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States), Merits, Judgment, I.C.J. Reports 1986, p. 14 at para. 271 ("[T]he Court does not consider that a compromissory clause ... providing for jurisdiction over disputes as to its interpretation or application, would enable the Court to entertain a claim alleging conduct depriving the treaty of its object and purpose.").

⁶² See United States Counter-Memorial, paras. 2.11-2.34.

However, it often occurs that parties in the early stages of negotiations reject proposals similar to those that are ultimately adopted and ultimately accept proposals similar to those they have rejected earlier. If accepting a proposal at the end of a negotiation were to cause a State to incur liability for not accepting it sooner, States would be unwilling to accept proposals similar to those presented at early negotiating stages. Such a principle of liability would hinder effective negotiation and resolution of disputes and there is no support for it in the Montreal Convention or anywhere else. Libya does not identify any such support in its Reply.

B. Referral of Dispute to Security Council

3.15 Libya further asserts that the United States violated the Montreal Convention by referring the dispute over Libyan involvement in terrorism to the Security Council.

According to Libya, this action was unlawful because of the underlying United States intent:

Chercher à éviter l'application de la convention en s'adressant au Conseil de sécurité revenait à ne pas respecter la convention. Si, en soi, le recours au Conseil de sécurité n'était évidemment pas illicite, il le devenait lorsque son objet consistait à éviter l'application de la convention conclue précisément pour régler la question soumise au Conseil⁶³.

Libya's argument fails in several respects. First of all, Libya recognizes that resort to the Security Council, in and of itself, is not unlawful. Indeed, the United States, as a member of the United Nations and in common with all other members of the United Nations, has an express right under Article 35 of the United Nations Charter to "bring any dispute, or any situation of the nature referred to in Article 34, to the attention of the Security Council or of the General Assembly". Secondly, Libya's allegation that the United States appealed to the

⁶³ Libyan Reply, para. 2.10 ("Trying to avoid application of the Convention by appealing to the Security Council was tantamount to not respecting the Convention. Even though, in and of itself, resorting to the Security Council was obviously not unlawful, it became unlawful when its purpose became avoiding application of a convention concluded precisely to settle a matter submitted to the Council.").

Security Council with the sole purpose of avoiding application of the Montreal Convention is unfounded. The United States, the United Kingdom and France brought the matter of Libyan involvement in terrorism, as evidenced, *inter alia*, by the Lockerbie bombing, to the Security Council, as they were entitled to do, because it concerned a threat to the maintenance of international peace and security.

3.16 Throughout this dispute, the United States has sought surrender of the accused through lawful means outside the scope of, but not inconsistent with, the Convention. Initially, the United States pursued this aim through diplomatic activity, communicating its requests to Libya and awaiting a response. When Libya failed to respond positively to requests by the United States and the United Kingdom, these States took the logical next step for such a grave situation – bringing the situation to the attention of the Security Council. As the United States noted in its Preliminary Objections, the Security Council has a long history of condemning acts of international terrorism and of taking action against such terrorism in order to maintain international peace and security⁶⁴. Finally, recent developments, in particular the production of evidence at the criminal trial of Messrs. Al Megrahi and Fhimah and the guilty verdict with respect to Mr. Al Megrahi, confirm that the United States had a strong basis for concluding that Libya's actions constituted a threat to international peace and security sufficiently serious to warrant referral to the Security Council.

3.17 In its Reply, Libya stated, in response to the position of the United States that Article 7 did not prevent it from submitting this matter to the Security Council, that “[I]’argument ne serait acceptable que s’il était dûment prouvé que la Libye avait été

⁶⁴ See Preliminary Objections Submitted by the United States of America, 20 June 1995 (hereinafter “United States Preliminary Objections”), paras. 1.47-1.49.

impliquée dans l'incident de Lockerbie⁶⁵". It thus appears that Libya itself recognizes that appealing to the Security Council, in circumstances in which a State is implicated in the terrorist bombing of a civilian aircraft, is fully consistent with the Montreal Convention. We submit that, as the Security Council has recognized and as the recent developments at the trial of the accused have confirmed, there is ample basis for the view that Libya was implicated in the destruction of Pan Am 103.

⁶⁵ Libyan Reply, para. 2.21 ("The argument would be acceptable only if it were duly proven that Libya had been involved in the incident at Lockerbie").

CHAPTER IV

THERE WAS NO VIOLATION OF ARTICLE 11 OF THE CONVENTION

3.18 The Court's Judgment of 27 February 1998 also recognized that there existed a dispute between the parties concerning the application and interpretation of Article 11 of the Montreal Convention⁶⁶. As discussed at Part II, Chapter I, the Court need not decide Libya's claim under Article 11 in light of the agreement to hold the criminal trial of the accused before a Scottish court in the Netherlands. Notwithstanding that adjudication of the Article 11 claim would now be without object, the United States maintains that it did not take any actions that would have constituted a violation of Article 11.

3.19 Although the United States position was explained in detail in the Counter-Memorial⁶⁷, there are points that merit further emphasis. Libya's claims under Article 11 are based upon one letter of 27 November 1991 from Judge Ahmad Al-Tahir al-Zawi to the foreman of the federal grand jury in the District of Columbia⁶⁸. This letter, written in Arabic, requested access to "all the documents and investigative reports related to this grievous incident⁶⁹". This letter cannot be seen as an effective request for judicial assistance between Contracting States under the Montreal Convention. The foreman of a federal grand jury is

⁶⁶ Judgment of 27 February 1998, para. 32.

⁶⁷ See *United States Counter-Memorial*, paras. 2.35-2.47.

⁶⁸ Letter dated 27 November 1991 addressed to the Foreman of the Grand Jury of the District of Columbia by Judge Ahmad Al-Tahir al-Zawi. Exhibit 27 to *United States Counter-Memorial*. Subsequent to the letter of 27 November 1991, in mid-January 1992, Libya made reference to the letter and the request for assistance it contained in communications to ICAO, the Security Council, and in a letter sent to then-Secretary of State Baker.

⁶⁹ *Idem*.

not an employee or representative of the United States Government; he is a private citizen⁷⁰. Although Article 11 contains few specifics regarding procedures for requesting assistance in connection with criminal proceedings, it is clear that it speaks to assistance as between Contracting States to the Montreal Convention and as such, a State requesting assistance would be expected to address its request to the competent authorities of the requested State, not to a private citizen.

3.20 Even assuming, *arguendo*, that Libya's "request" was effective, it would have required, at a minimum, translation, transfer from the grand jury foreman to responsible government officials, and identification and review, in a case of this magnitude, of a huge volume of information. However, on 21 January 1992, less than two months after transmission of the Libyan letter, the Security Council adopted Resolution 731 in which it expressed its deep concern "over the results of investigations, which implicate officials of the Libyan Government," and urged the Libyan Government "immediately to provide a full and effective response" to the requests of France, the United Kingdom and the United States, including the requests that Libya turn over for trial all those charged with the crime⁷¹. Once the Security Council adopted Resolution 731, it would have been inappropriate for the United States to proceed to comply with Libya's request for assistance as though Resolution 731 did not exist. The resolution made clear the Council's skepticism that Libya would be a proper venue for the trial of the suspects and, in urging Libya to provide a full and effective response to requests for a trial outside of Libya, made the issue of the appropriate trial venue a subject of international concern that could not properly be regarded as settled solely on the basis of

⁷⁰ The role of the federal grand jury in United States criminal cases is explained in the 31 May 1995 memorandum of the United States Department of Justice that is Exhibit 6 to United States Preliminary Objections.

⁷¹ Resolution 731, United Nations Security Council, 3033rd Meeting, 21 January 1992, Doc. S/RES/731. Exhibit 18 to United States Preliminary Objections.

Libya's previous position in the matter. Moreover, Resolution 748, a Chapter VII measure, was adopted on 31 March 1992, approximately four months after the Libyan letter was sent. This resolution, which required Libya to surrender for trial the two individuals accused in the Lockerbie bombing, made clear that Libya was not the appropriate forum for the trial of the suspects, and thus conclusively obviated Libya's request for assistance in any Libyan investigation and prosecution.

3.21 Even leaving aside the issues raised by the misdirected letter and the intervening resolutions of the Security Council, the actions of the United States with regard to the provision of judicial assistance to Libya were both lawful and prudent. The second sentence of Article 11(1) provides that "[t]he law of the State requested shall apply in all cases". This sentence clearly qualifies the general obligation under Article 11(1) to provide assistance and it makes the provision of assistance subject to both the procedural and substantive law of the Requested State. There is no support for Libya's contention that the second sentence of Article 11(1), which explicitly makes applicable the law of the State requested, should be read to refer only to procedures for responding to a request for assistance⁷². Indeed, under Libya's theory the second sentence of Article 11(1), and in particular the word "law", would be devoid of meaning, a result clearly not intended by the Contracting Parties⁷³. In this particular instance, the evidentiary materials requested were materials from a federal grand jury and, as such, were subject to a law of the United States mandating the secrecy of grand jury proceedings, Rule 6(e) of the Federal Rules of Criminal Procedures. Although Libya's Reply attempts to dismiss the effect of Rule 6(e) on the case at issue, Rule 6(e) is indeed a fundamental and important provision of the criminal law of the United States, codifying long-

⁷² See Libyan Reply, para. 2.40.

standing common law principles integral to the United States criminal justice system⁷⁴. Under Rule 6(e), the foreman of the federal grand jury was specifically prohibited from releasing any of the requested materials to Libya. The secrecy mandate of Rule 6(e) is not limited to grand jurors; it also binds, *inter alia*, government attorneys and their authorized assistants. Libya's assertions that the secrecy rule does not bind the United States Government and does not apply to relations between one judicial body and another⁷⁵ are plainly incorrect under United States law. While Rule 6(e) contains narrow exceptions from its secrecy mandate, it does not permit the sharing of materials within its scope with foreign governments or foreign officials absent a discretionary court order⁷⁶. Rule 6(e) is the law of the United States, the Requested State in this instance, and as such, it would apply to prevent the disclosure of the materials that Libya requested.

3.22 The United States transmitted to Libya a detailed indictment with respect to the accused. In these circumstances, the United States acted consistently with its law to safeguard the integrity of the eventual prosecution of the suspects in an objective forum. The holding of the criminal trial in the Netherlands, pursuant to a decision of the Security Council

⁷³ See United States Counter-Memorial, paras. 2.41-2.42, for a discussion of the negotiating history behind Article 11.

⁷⁴ See, e.g., Douglas Oil Company of California et al. v. Petrol Stops Northwest et al., 441 U.S. 211 at 218 ("We consistently have recognized that the proper functioning of our grand jury system depends upon the secrecy of grand jury proceedings.").

⁷⁵ See Libyan Reply, para. 2.39.

⁷⁶ Rule 6(e)(3)(C)(i) provides that disclosure of matters occurring before the grand jury may be made "when so directed by a court preliminarily to or in connection with a judicial proceeding". United States case law makes clear that such a court order would only be considered where, *inter alia*, there is a particularized need for specific information. Douglas Oil Company of California et al. v. Petrol Stops Northwest et al., 441 U.S. 211 at 222 ("Parties seeking grand jury transcripts under Rule 6(e) must show that the material they seek is needed to avoid a possible injustice in another judicial proceeding, that the need for disclosure is greater than the need for continued secrecy, and that their request is structured to cover only material so needed."). Libya's broad request for all the documents and investigative reports that were before the grand jury, for the purpose of conducting its own investigation, would clearly not meet the standard for such an order.

and with the consent of Libya, vindicates the United States' actions in carefully preserving the evidence of the crime for use at trial.

CHAPTER V

LIBYA'S ALLEGATION WITH RESPECT TO ALLEGED THREATS IS NOT WITHIN THE JURISDICTION OF THE COURT, AND, IN ANY EVENT, THE UNITED STATES DID NOT THREATEN THE USE OF FORCE

3.23 Libya's Reply expands upon its allegation that the United States violated the Montreal Convention by making unlawful threats of force against Libya⁷⁷. The alleged threats consist of certain statements by United States officials to the media, made in response to questions about possible United States action after evidence linked the Lockerbie bombing to Libya. As set forth in the United States Counter-Memorial⁷⁸, Libyan allegations of United States threats of force do not concern the interpretation or application of the Montreal Convention and consequently are not within the Court's jurisdiction as determined in its 1998 Judgment.

3.24 The Court's 27 February 1998 Judgment found that it had jurisdiction under Article 14, paragraph 1, of the Montreal Convention to decide "on the lawfulness of the actions criticized by Libya, in so far as those actions would be contrary to the provisions of the Montreal Convention⁷⁹". Relying on this language, Libya alleges that the United States threatened force against Libya in order to deprive it of the benefit of the jurisdictional provisions of the Convention⁸⁰. It thus asserts that these alleged threats violated the Convention and gave rise to liability on the part of the United States.

3.25 Libya's argument is flawed in several respects. First, the Montreal Convention does not address the issue of threats of force between States. Libya attempts to analogize the

⁷⁷ See Libyan Reply, paras. 4.1-4.27.

⁷⁸ See United States Counter-Memorial, Introduction and Overview, para. 4.

⁷⁹ Judgment of 27 February 1998, para. 35.

⁸⁰ Libyan Reply, para. 4.6.

present situation to the issues before the Court in the cases of Fisheries Jurisdiction (United Kingdom v. Iceland) and Fisheries Jurisdiction (Federal Republic of Germany v. Iceland)⁸¹. Libya's reliance on the Fisheries Jurisdiction cases to argue that its threat of force claims are within the Court's jurisdiction under Article 14, paragraph 1 of the Montreal Convention is, however, misplaced. In the Fisheries Jurisdiction cases, the parties had expressly agreed that either party could refer to the Court any dispute relating to an extension [by Iceland of its fishery jurisdiction]⁸². This language, which refers to a factual occurrence and permits recourse to the Court for any dispute relating to this factual occurrence, is much broader than the jurisdictional grant in Article 14, paragraph 1, of the Montreal Convention. Indeed, Article 14, paragraph 1, refers not to any dispute related to an open-ended factual occurrence, but only to disputes "concerning the interpretation or application of this Convention"⁸³. While "any dispute" relating to a factual occurrence seems broad enough to cover questions of customary international law or the United Nations Charter, the jurisdictional grant in the Convention's Article 14 is clearly limited to questions relating to the interpretation and application of the Convention⁸⁴.

⁸¹ Fisheries Jurisdiction (United Kingdom v. Iceland), Jurisdiction of the Court, Judgment, I.C.J. Reports 1973, p. 3; Fisheries Jurisdiction (Federal Republic of Germany v. Iceland), Jurisdiction of the Court, Judgment, I.C.J. Reports 1973, p. 49; Fisheries Jurisdiction (United Kingdom v. Iceland), Merits, Judgment, I.C.J. Reports 1974, p. 3; Fisheries Jurisdiction (Federal Republic of Germany v. Iceland), Merits, Judgment, I.C.J. Reports 1974, p. 175.

⁸² Fisheries Jurisdiction (United Kingdom v. Iceland), Jurisdiction of the Court, Judgment, I.C.J. Reports 1973, p. 3 at para. 13; Fisheries Jurisdiction (Federal Republic of Germany v. Iceland), Jurisdiction of the Court, Judgment, I.C.J. Reports 1973, p. 49 at para. 14.

⁸³ Indeed, if the jurisdictional grant of Article 14, paragraph 1 had been structured to be similarly broad to the compromissory clauses in the 1961 exchanges of notes, it could have given Parties the right to refer to the Court any dispute "concerning any acts of violence against the safety of civil aircraft". Such a broad jurisdictional provision was clearly neither envisioned by the Parties to the Montreal Convention nor incorporated in its text.

⁸⁴ The Court's jurisdiction herein is limited to issues for which the Montreal Convention provides the substantive law to be applied. Where the Court may resolve the legal issue put to it "without any interpretation or application of the relevant Treat[y]", Appeal Relating to the Jurisdiction of the ICAO Council, Judgment, I.C.J. Reports 1972, para. 28, the issue is outside its jurisdiction given the scope of the compromissory clause

3.26 Assuming, *arguendo*, that the Court's jurisdiction were to extend to Libya's threat of force claims, Libya's claims are nonetheless baseless because the United States did not threaten the use of force at any time during the dispute at issue. Libya's allegations of United States threat of force are founded solely upon five instances of public statements by United States officials to the effect that no options had been ruled in or out⁸⁵. For example, Libya claims that statements by State Department spokesman Richard Boucher, made during a lengthy press briefing regarding the Pan Am 103 bombing on 14 November 1991, were threats of force⁸⁶. In that instance, the press asked what steps the United States could take to ostracize Libya further, whether the United States was considering "attempting extradition without the permission of the country involved", and whether there was going to be an approach to the United Nations to take economic measures against Libya. Mr. Boucher replied in each instance that the United States was considering its options and keeping all of them open. Mr. Boucher made no suggestion of using force against Libya; rather, his statements demonstrate a repeated attempt to make clear to the press that no policy decision had been taken. The other four statements identified by Libya are similarly non-committal responses to press questions, not affirmative messages directed toward Libya. Such references to "keeping all options open" are common in the public statements of United States officials; they in no way imply that a certain option is being pursued, but are a manner of answering persistent press inquiries without revealing specific details of ongoing policy discussions. Significantly, Libyan officials did not view these public statements to be threats of force at the time they were made -- in late 1991, Libyan leader Qadhafi expressed to the

under which it is proceeding herein. *Idem*. The Montreal Convention does not provide the substantive law to be applied with respect to Libya's assertions concerning alleged United States threats of the use of force.

⁸⁵ See Libyan Reply, paras. 4.18-4.27.

⁸⁶ State Department Briefing of 14 November 1991, Annex to Libyan Memorial, Volume 1, Document 11.

press his view that the dispute over Libyan involvement in terrorism and the trial of the Lockerbie bombing suspects would not escalate to force, a view that was echoed by a Libyan foreign ministry official in early 1992⁸⁷.

3.27 Although the question of threat of force, distinct from the use of force, has not been well explored in international law⁸⁸, scholarly opinion and the Court's jurisprudence support the conclusion that the public statements at issue did not constitute a threat of force⁸⁹. In 1992, Professor Brownlie defined the threat of force according to a monograph he had written, as follows:

A threat of force consists in an express or implied promise by a government of a resort to force conditional on non-acceptance of certain demands of that government⁹⁰.

The word "promise" indicates a degree of certainty and determination that is clearly not met by vague statements that no options have been ruled in or out.

3.28 The jurisprudence of this Court demonstrates that there is a substantial threshold for finding threat of force: a threat requires some concrete action, beyond vague statements, on the part of the threatening party. In the Court's 1986 Merits decision in Case Concerning

⁸⁷ See Argument of Mr. Schwartz before the Court, Verbatim Record of Court Hearing on 27 March 1992, International Court of Justice, CR 92/4, p. 56; See also Documents 4 and 5 submitted to the Court by the United States during the 1992 Hearing.

⁸⁸ See Romana Sadurska, "Threats of Force", 82 American Journal of International Law 239 at pp. 239-241 (1988); Major Matthew A. Myers, Sr., "Deterrence and the Threat of Force Ban: Does the UN Charter Prohibit Some Military Exercises?", 162 Military Law Review 132 at p. 141 (1999); and Hilaire McCoubrey and Nigel D. White, International Law and Armed Conflict, p. 56 (1992).

⁸⁹ Much of the discussion of threats of force has occurred in the context of Article 2, paragraph 4 of the United Nations Charter, which the Court found to be declaratory of customary international law in Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, I.C.J. Reports 1986, p. 14 at paras. 187-200. Although claims under the Charter or customary international law are clearly not within the Court's jurisdiction in the present case, these sources are useful in illustrating the absurdity of Libya's claims that the United States threatened force.

⁹⁰ Argument of Professor Brownlie before the Court, Verbatim Record of Court Hearing on 28 March 1992, International Court of Justice, CR 92/5, p. 14 (citing to Ian Brownlie, International Law and the Use of Force by States, p. 364 (1963)).

Military and Paramilitary Activities in and Against Nicaragua, the Court examined, *inter alia*, whether United States military maneuvers with Honduras on Honduran territory near the Nicaraguan border, coupled with a "war of words" between the United States and Nicaragua, constituted a United States threat of force to Nicaragua's territorial integrity. The Court held that these circumstances did not constitute a breach on the part of the United States of the principle forbidding recourse to the threat or use of force⁹¹. Inasmuch as the military maneuvers and hostile rhetoric analyzed in the Nicaragua case did not rise to the level of a threat of force, evidently a vague statement, or even a series of vague statements, to the effect that all options are open, made in response to a question by a journalist, cannot constitute such a threat⁹².

3.29 It should further be noted that Libya, for close to a decade, failed to comply with the demands of the United States. Rather than respond with force or with any escalation in rhetoric, the United States continued to pursue through peaceful means an effective criminal trial of the suspects. The United States, with the United Kingdom, addressed the terrorist bombing of Pan Am 103 through diplomatic efforts and recourse to the Security Council, and avoided the threat or use of force. In this context, the statements identified by Libya can under no reasonable interpretation be construed as threats of the use of force.

⁹¹ Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, I.C.J. Reports 1986, p. 14 at para. 227.

⁹² The Court also considered the issue in its Advisory Opinion on Nuclear Weapons, holding that "a signalled intention to use force if certain events occur" could, under certain circumstances, constitute a threat within Article 2, paragraph 4 of the Charter. Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996, p. 226 at para. 47. Again, it is clear that some affirmative signal of intent to resort to force is required to find a threat. United States statements did not contain such an affirmative signal.

CHAPTER VI

LIBYA'S ATTEMPT TO RESERVE THE RIGHT TO BRING A NEW CLAIM INVOLVING NEW SUBSTANTIVE ALLEGATIONS HAS NO LEGAL EFFECT ON THESE PROCEEDINGS

Section 1. Libya Cannot Reserve the Right to Assert a New Claim at this Stage in the Proceedings

3.30 In its Application, Libya made clear that it sought the cessation of certain conduct by the respondents. Now Libya, in its Reply, suggests that it may make a *subsequent* claim for compensation for damages, including, it appears, damages resulting from new substantive claims about the conduct of the United States. While its most recent submissions do not go so far as to request compensation, Libya reserves a right to claim "réparations pour les faits illicites imputables au défendeur"⁹³. It provides no particulars: there is a statement neither of the nature of the new relief that Libya may choose at some later stage to seek nor of the nature of the injury it has allegedly suffered.

3.31 Article 38(2) of the Rules of Court requires an Applicant to specify the precise nature of its claim. Libya's claim, as specified in its Application, did not include a request for compensation. In the Application, Libya sought a judgment requiring the United States to cease certain conduct. Libya has introduced this new reservation only in its Reply, and at the stage when the remainder of the dispute has been resolved. To allow this reservation related to some possible future additional claim would be unfair and prejudicial to the United States; it is just such prejudice that Article 38(2) seeks to prevent.

3.32 Libya seeks to reserve the right to transform its claim from one that sought a judgment from the Court to enjoin the United States from continuing its efforts to have Libya turn the accused over to the courts of the United States or the United Kingdom for trial, to a

⁹³ Libyan Reply, Conclusions, Part II ("compensation for the unlawful acts attributable to the Respondent").

vague and undefined claim, apparently for compensation. Such a compensation claim would apparently be based, at least in part, on assertions requiring an examination of facts and issues not previously raised by Libya. For example, Libya asserts in its Reply that years of suffering of the Libyan people could have been avoided if the United States had accepted earlier Libya's proposals relating to trial of the accused and not supported the imposition of sanctions on Libya by the Security Council⁹⁴. The Application, of course, made no reference to sanctions imposed on Libya pursuant to Security Council action, because at the time of the Application there were no sanctions. The Memorial, which post-dated the imposition of sanctions, discussed the sanctions but did not indicate that Libya sought to hold the United States responsible for the effects of sanctions. Now, in its Reply, Libya suggests that the Montreal Convention could provide a basis for holding the United States responsible for sanctions imposed by the Security Council. Similarly, Libya alleges for the first time in its Reply that the refusal of the United States to accept any one of the succession of proposals relating to the trial of the accused made by Libya constitutes a violation of the Montreal Convention. Neither of these allegations was made in Libya's Application or Memorial and an analysis of each would require a detailed examination of facts and legal issues outside the scope of the original dispute.

3.33 The Court previously has made clear that an Applicant cannot add a significant additional claim to a case by means of its Memorial. This was reviewed carefully by the Court in its judgment on Australia's preliminary objection in Phosphate Lands in Nauru, where the Court held inadmissible a claim Nauru first presented in its Memorial. The Court

⁹⁴ See Libyan Reply, para. 1.13.

emphasized that the requirement that the claims be presented by way of Application is not optional or a mere technicality of pleading:

Article 40, paragraph 1, of the Statute of Court provides that the "subject of the dispute" must be indicated in the Application; and Article 38, paragraph 2 of the Rules of Court requires "the precise nature of the claim" to be specified in the Application. These provisions are so essential from the point of view of legal security and the good administration of justice that they were already, in substance, part of the text of the Statute of the Permanent Court of International Justice, adopted in 1920 (Art. 40, first paragraph), and of the text of the first Rules of that Court, adopted in 1922 (Art. 35, second paragraph), respectively⁹⁵.

3.34 If a new claim cannot be added in the Memorial, it surely cannot be added through a "reservation of a right" appearing for the first time in the Reply. Professor Rosenne explains that "the Court will not permit a dispute brought before it by application to be transformed by amendments in the submissions into another dispute which is different in character⁹⁶".

3.35 Libya cites no international law authority in support of its argument that it can add, at the Reply stage, a reservation of a right to make a new claim in ongoing proceedings. Libya attempts to circumvent the settled and sensible practice of the Court by noting that the United States has acknowledged that a violation of the Montreal Convention could give rise to a claim for compensation⁹⁷. Such an acknowledgement, however, would have no bearing on the question of whether Libya can seek to alter fundamentally the nature of these proceedings in its final written pleading.

⁹⁵ Certain Phosphate Lands in Nauru (Nauru v. Australia), Preliminary Objections, Judgment, I.C.J. Reports 1992, p. 240 at para. 69.

⁹⁶ Shabtai Rosenne, The Law and Practice of the International Court, 1920-1996, Volume III, p. 1268 (3d ed. 1997)(citing, *inter alia*, Factory at Chorzów, Merits, Judgment No. 13, 1928, P.C.I.J., Series A, No. 17, 25-29).

⁹⁷ Libyan Reply, para. 1.32.

Section 2. To Permit Libya to Reserve the Right to Make an Additional Claim at this Stage Would be Contrary to Sound Judicial Administration and the Practice of this Court

3.36 As the Applicant, Libya has a responsibility to be clear and precise as to the nature of its claims so that the Respondent can make an appropriate response. This requirement is stated in Article 49 of the Rules of Court and reflects the needs of sound judicial administration. Its application is confirmed by the Court's practice.

3.37 In the Fisheries Jurisdiction (Federal Republic of Germany v. Iceland) case, the Court applied this principle in rejecting Germany's request for a declaration that Iceland was under a duty to make compensation to the Federal Republic of Germany in respect of unlawful acts of interference with its fishing vessels⁹⁸. The Court noted that the Applicant was asking for a declaration adjudicating, with definitive effect, that Iceland was under an obligation to pay full compensation for the damage suffered by the Applicant as a consequence of Iceland's alleged unlawful acts⁹⁹.

3.38 The Court held:

The documents before the Court do not however contain in every case an indication in concrete form of the damages for which compensation is required or an estimation of the amount of those damages. Nor do they furnish evidence concerning such amounts. In order to award compensation the Court can only act with reference to a concrete submission as to the existence and the amount of each head of damage. . . . It is possible to request a general declaration establishing the principle that compensation is due, provided the claimant asks the Court to receive evidence and to determine, in a subsequent phase of the same proceedings, the amount of damage to be assessed. Moreover, while the Applicant has reserved all its rights "to claim compensation", it has not requested that these damages be proved and assessed in a subsequent phase of the present proceedings¹⁰⁰.

⁹⁸ Fisheries Jurisdiction, (Federal Republic of Germany v. Iceland), Merits, Judgment, I.C.J. Reports 1974, p. 175 at paras. 71-76.

⁹⁹ Idem, para. 74.

¹⁰⁰ Idem, para. 76.

3.39 The Court ruled that it was “prevented from making an all-embracing finding of liability which would cover matters as to which it has only limited information and slender evidence¹⁰¹”. In this case, the Court is similarly presented with a situation in which the Applicant, Libya, has sought to reserve its rights to add a further claim, but has made no request for a future proceeding. In fact, Libya has provided the Court with far less argument and evidence on which a possible claim for compensation could be based than had Germany in the Fisheries Jurisdiction case. Germany’s evidence as to the nature and the extent of the injury it suffered was incomplete; Libya’s is non-existent.

3.40 The Fisheries Jurisdiction case provides the way forward for the Court here. Libya’s Application defines the matter before the Court. That matter has now been resolved. To permit an Applicant to create a moving target through successive modifications of its claims would be at odds with sound judicial management. To permit an Applicant to change the nature of its claim, after the dispute presented in its Application has been resolved, would ill-serve the Court and the Parties appearing before it. As the Court stated in the Nuclear Tests cases, “while judicial settlement may provide a path to international harmony in circumstances of conflict, it is none the less true that the needless continuance of litigation is an obstacle to such harmony¹⁰²”.

3.41 The wisdom and, indeed, the necessity, of requiring that an Applicant specify the precise nature of its claim is demonstrated in the instant case. Now, at the final stage of the written proceedings, it is impossible for the United States to determine either the specific injury the Applicant claims to have suffered as a result of United States actions in alleged

¹⁰¹ Fisheries Jurisdiction, (Federal Republic of Germany v. Iceland), Merits, Judgment, I.C.J. Reports 1974, p. 175 at para. 76.

¹⁰² Nuclear Tests (Australia v. France), para. 58; Nuclear Tests (New Zealand v. France), para. 61.

violation of the Montreal Convention or the specific nature and extent of the relief that Libya seeks.

3.42 The inappropriateness of permitting Libya to proceed as it proposes to do is highlighted by the extent to which it would risk undermining the finality of the Court's treatment of preliminary questions during the earlier phase of these proceedings. In its judgment at the preliminary objections phase of this case, the Court upheld Libya's submission that "the critical date for the court's examination of the admissibility of the application is *the date on which it is filed*¹⁰³". In order for the Court's consideration of admissibility issues as of that date to be complete, however, the Application must accurately reflect the essence of the Applicant's case. Here, Libya would alter fundamentally the judgment requested in its Application subsequent to the preliminary objections phase of the proceedings.

3.43 There is a further point to be made in opposition to Libya's effort to alter its claim at this late stage in the proceedings. Pursuant to the Rules of Court, a Respondent must assert a counterclaim no later than the time of its Counter-Memorial¹⁰⁴. In determining whether to assert a counterclaim, a Respondent would wish to have before it a full appreciation of the claims made by the Applicant. To permit an Applicant to alter the nature of its claim at a time when the Respondent would not be permitted to file a counterclaim would violate the principle of equal treatment of the Parties which underlies the Rules of Court and the Court's practice.

¹⁰³ Judgment of 27 February 1998, para. 42 (*citing Border and Transborder Armed Actions (Nicaragua v. Honduras), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1988, p. 69 at para. 66*)(italics added).

¹⁰⁴ Rules of International Court of Justice, Article 80.

PART IV

THE OBLIGATION OF MEMBER STATES TO CARRY OUT DECISIONS OF THE SECURITY COUNCIL PREVAILS OVER THE OBLIGATIONS ALLEGED BY LIBYA

4.1 Part II of this Rejoinder showed that Libya's claims should now be dismissed because a decision on them by the Court would be without object, in light of the surrender and trial of the accused pursuant to Security Council Resolution 1192. Part III showed that Libya has not demonstrated any violation of the Montreal Convention by the United States. This Part will show that, in any event, the obligation of Member States of the United Nations to carry out decisions of the Security Council prevails over the obligations asserted by Libya to arise under the Montreal Convention.

4.2 The United States Counter-Memorial demonstrated in considerable detail that the decisions of the Security Council had, as a matter of substantive law, already precluded any Libyan claims based on the Montreal Convention, and that the Court had already recognized this fact, on a *prima facie* basis, in its 1992 Order on provisional measures.

4.3 Further, the Council's actions since the filing of the United States Counter-Memorial confirm that its resolutions obligated Libya to surrender the two accused for trial in the courts of the United Kingdom or the United States. Pursuant to Article 103 of the Charter, the obligations of Member States to carry out the decisions of the Security Council take precedence over any arguably inconsistent obligations in the Montreal Convention. They preclude the assertion that the United States acted illegally in pursuing the surrender of the two accused as required by the Council – an assertion that is at the heart of the Libyan case.

4.4 In addition, the events that have occurred since the filing of the United States Counter-Memorial in 1999 show that the Council acted properly in this matter. These events include the trial of the accused in accordance with terms agreed to by Libya and approved by the Council and the presentation of a large body of evidence at that trial, which resulted in Mr. Al Megrahi's conviction for crimes committed in his role as a senior officer of the Libyan Intelligence Services. There is thus no doubt that the Council was justified in its determination that Libya's conduct constituted a threat to international peace and security and its insistence that the accused be surrendered for trial by the courts of the United Kingdom or the United States.

4.5 These events also confirm that the decisions of the Council have effectively resolved the dispute before the Court, leaving nothing further for the Court to do but to dismiss Libya's complaint. The actions of the Council have disposed of all questions concerning the surrender and trial of the two accused, in a manner that has fully respected the interests of the parties to the dispute, the larger interests of the international community, and the interests of justice. Libya's repeated condemnations of the actions of the Council have been shown to be misguided, and its complaints to this Court about the actions of the United States to secure those results have likewise been shown to be without justification.

4.6 This Part will begin by showing that Libya's assertions that the resolutions of the Council did not require the surrender of the two accused are without merit. Next, it will show that these resolutions create obligations on Member States that prevail as a matter of law over any inconsistent obligations that may arise under the Montreal Convention. Further, it will show that the Council's decisions are not subject to review or reversal by the Court. Finally, it will show that, in any event, Libya cannot hold the United States responsible for its resort to the Council or for the effects on Libya of the decisions of the Council.

CHAPTER I

THE DECISIONS OF THE SECURITY COUNCIL REQUIRED THE SURRENDER OF THE TWO ACCUSED INDIVIDUALS

4.7 Libya continues, in its Reply, to argue that the decisions of the Security Council are not inconsistent with its asserted right under the Montreal Convention to refuse to surrender the two accused individuals for trial by courts of the United Kingdom or the United States. For this purpose, it continues to insist that the Security Council never required Libya to surrender the two accused for such a trial, but rather only required that Libya negotiate with the United States and the United Kingdom about appropriate means for resolving the question. The United States Counter-Memorial already addressed these arguments in considerable detail, and that analysis fully rebuts these Libyan contentions.

Section 1. The Language of Resolutions 731, 748 and 883 Clearly Shows that Libya was Required to Surrender the Two Accused to United Kingdom or United States Authorities

4.8 Libya asserts that the Council's demand in Resolution 731 that Libya "provide a full and effective response" to the requests of France, the United Kingdom and the United States meant only that Libya must make its thoughts about those demands known and make counter-proposals, with a view to settling the matter by common agreement¹⁰⁵. As explained at length in the United States Counter-Memorial¹⁰⁶, this is plainly not the case.

4.9 By the time of the adoption of Resolution 748, Libya had already made its views known and advanced counter-proposals; yet the Council made clear that Libya had not complied with its demand in Resolution 731 and insisted that Libya "must now comply

¹⁰⁵ See Libyan Reply, paras. 3.3-3.17.

¹⁰⁶ See United States Counter-Memorial, paras. 3.5-3.13.

without any further delay¹⁰⁷". Likewise, Resolution 883 took note of various Libyan statements making counter-proposals for the trial of the accused, but nonetheless directly stated that Libya had not yet complied with Resolutions 731 and 748¹⁰⁸. Resolution 883 made clear that the Council's requirement was to bring about the transfer of the accused for trial in the courts of the United Kingdom or the United States, and expressly conditioned the suspension of the sanctions imposed by Resolution 748 on Libya's ensuring the appearance of the two accused for trial before such courts¹⁰⁹. It is unlikely that the Council would have imposed extensive sanctions against Libya and maintained them for many years if – as Libya argues – it merely wanted Libya to offer its views and counter-proposals, which Libya did with regularity from the very beginning.

4.10 It is clear that Libya from the outset understood that the Council had required that the two accused be surrendered for trial by the United Kingdom or the United States. The Court's Order of 14 April 1992 recorded the fact that Libya had argued to the Court that Resolution 748 required it to surrender its nationals to the United Kingdom or the United States, which it considered to be an infringement of its rights¹¹⁰. In its Reply, Libya says that what it argued to the Court was only its first reading of the resolution, and that subsequent rigorous analysis of the text and its preparatory work revealed that, in fact, the Council had not meant what all parties had understood it to mean at the time¹¹¹. It is difficult to give any

¹⁰⁷ Resolution 748, United Nations Security Council, 3063rd Meeting, 31 March 1992, United Nations Document S/RES/748, para. 1. Exhibit 23 to United States Preliminary Objections.

¹⁰⁸ Resolution 883, United Nations Security Council, 3312th Meeting, 11 November 1993, United Nations Document S/RES/883, paras. 2nd & 6th preamb. Exhibit 32 to United States Preliminary Objections.

¹⁰⁹ *Idem*, para. 16.

¹¹⁰ 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), Provisional Measures, Order of 14 April 1992, I.C.J. Reports 1992, p. 114 (hereinafter "Order of 14 April 1992") at para. 38.

¹¹¹ Libyan Reply, para. 3.7.

credence to this explanation. Rather, it is apparent that Libya, when faced with the Court's *prima facie* acceptance of the preclusive effect of the Council's resolutions, hastened to reverse its earlier admission of the effect of these resolutions and looked for every possible way – however weak – of misinterpreting the Council's clear intent.

4.11 Libya specifically argues that the inclusion in Resolution 748 of an express demand that Libya “commit itself definitively to cease all forms of terrorist action and all assistance to terrorist groups” shows that it did not require Libyan compliance with the other demands cited in the resolution¹¹². But this is hardly persuasive – the fact that the Council chose separately to underline Libya's support for international terrorism and the overriding need for such support to cease, in no way shows that the Council had a permissive attitude towards its other demands on Libya. On the contrary, the Council had just imposed extensive sanctions under Chapter VII to compel Libya to meet these other demands.

4.12 Libya further points out that one paragraph of Resolution 883 refers to the requirement for Libya to “ensure the appearance of those charged”, arguing that this indicates that the Council only desired the voluntary surrender of the accused¹¹³. But such an interpretation is not sustainable, since a requirement to “ensure the appearance” of an accused hardly implies that no surrender is required if the accused declines to appear. The passage in question was obviously not so intended. The requirement that Libya ensure the appearance of the accused for trial by the United Kingdom or the United States became tied to the suspension of sanctions against Libya, making it clear that the requirement was a mandatory one.

¹¹² Libyan Reply, para. 3.6.

¹¹³ Idem, para. 3.8.

Section 2. The Council's Latest Resolution Confirms that its Earlier Resolutions Required Libya to Surrender the Two Accused

4.13 Libya argues in its Reply that Resolution 1192 of 27 August 1998 somehow confirms Libya's current interpretation of the Council's previous decisions¹¹⁴. On the contrary, Resolution 1192 confirms that the Council had always required the surrender of the accused for trial by courts of the United Kingdom or the United States. Specifically, paragraph 1 of the resolution begins with a reiteration of the Council's demand that Libya immediately comply with its previous resolutions – a clear reaffirmation that Libya had not yet complied, which is directly contrary to Libya's assertion that it was simply required to state its views and make counter-proposals. Paragraph 4 of the resolution then requires Libya to ensure the appearance of the accused (again, not simply to encourage a voluntary appearance) for trial before a Scottish court – a court of the United Kingdom. In other words, the Council expressly did what Libya now insists the Council could not and did not intend to do – namely, compel (if necessary) two of its nationals to appear before a United Kingdom court. Finally, paragraph 8 reaffirms that the sanctions previously imposed would continue in effect, and would only be suspended upon the appearance of the two accused for trial in a court of the United Kingdom or the United States.

4.14 Libya argues that all this is contradicted by the fact that the United Nations Secretary-General, in connection with Resolution 1192, evidently gave Libya certain assurances about the fairness of the proposed proceedings¹¹⁵. But this could hardly detract from the undeniable fact that Libya was required to surrender the two accused for trial in a Scottish court. On the contrary, it confirms that the Secretary-General understood that it was

¹¹⁴ See Libyan Reply, paras. 3.13-3.15.

¹¹⁵ See *idem*, para. 3.14.

his duty, in response to Libyan questions, to facilitate such a trial by removing any misconceptions about the fairness of Scottish procedures. In fact, the Secretary-General understood quite well that Libya was obligated to surrender the accused¹¹⁶. There was no leeway for Libya to try the two in its own courts or to insist that they be tried in the courts of a third country or by an international tribunal.

Section 3. The Plain Meaning of the Language of the Council's Resolutions is Confirmed by the Statements of Council Members

4.15 Libya asserts in its Reply that the United States has provided nothing to support its interpretation of the Council's resolutions other than the fact of their adoption¹¹⁷. On the contrary, the United States Counter-Memorial cites at length the documents to which the Council made reference in adopting those resolutions and the statements of Council members confirming their understanding that Libya was required to surrender the two accused and did not have the option of trying the accused in its own courts¹¹⁸.

4.16 Libya argues that its current interpretation is supported by the fact that various Council members favored the settlement of the situation, if possible, by mutual agreement¹¹⁹. But this proves nothing – there is generally a desire to resolve such situations by agreement, but where (as here) one party makes that impossible, the Council reserves the right to act by requiring that steps be taken to resolve the situation and end the threat to the peace, even if all parties do not agree. The language of the Council's resolutions and the statements of its

¹¹⁶ See Letter dated 5 April 1999 from the Secretary-General to the President of the Security Council, United Nations Document S/1999/378, 5 April 1999 (noting that the arrival of the two accused in the Netherlands for the purpose of trial before the Scottish court sitting in the Netherlands was a requirement of Resolution 1192 for suspension of sanctions). Rejoinder Exhibit 2.

¹¹⁷ Libyan Reply, paras. 3.7 and 3.9.

¹¹⁸ See United States Counter-Memorial, paras. 3.10-3.11.

¹¹⁹ See Libyan Reply, para. 3.4.

members make clear that the Council fully intended to require Libya to take steps it had not agreed to take and to impose sanctions on Libya to compel it to do so.

CHAPTER II

THE SECURITY COUNCIL'S RESOLUTIONS PRECLUDE THE RIGHTS ASSERTED BY LIBYA UNDER THE MONTREAL CONVENTION

Section 1. Libya's Claims are Inconsistent With the Council's Resolutions.

4.17 Libya's claims in this case are in direct conflict with the decisions of the Security Council. Libya's asserted rights under the Montreal Convention to deny the surrender of the accused and to try them in its own courts (or to insist that they be tried in some other forum) are plainly inconsistent with the Council's decisions that they be surrendered for trial in the courts of the United Kingdom or the United States. Likewise, the asserted obligation of the United States under Article 7 of the Montreal Convention to avoid taking steps aimed at the surrender of the two accused to the United Kingdom or the United States is also contrary to the Council's decisions. All Member States, including Libya, the United Kingdom and the United States, are obligated to accept and comply with such decisions.

4.18 Further, since Libya could not, consistent with these resolutions, prosecute the two accused, it follows that the resolutions superseded any right of Libya under paragraph 1 of Article 11 of the Convention to demand "assistance in connection with criminal proceedings brought" by Libya. Certainly Article 11 could not have contemplated that parties to the Convention would be obligated to assist in criminal proceedings that were precluded by binding decisions of the Security Council. In addition, the provision of evidence to Libya -- a State that the Security Council had recognized was implicated in the very crimes under investigation -- would have been inconsistent with the decisions of the Council that by their terms sought the effective prosecution of the accused in the courts of States other than Libya.

Section 2. The Council's Resolutions Take Precedence Over Libya's Claims Under the Montreal Convention

4.19 Under Article 25 of the Charter, “[t]he Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter.” Pursuant to Article 48 of the Charter, “[t]he 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.” Decisions of the Council for the maintenance of international peace and security include Resolutions 748 and 883. Under Article 103, “[i]n 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.” In fact, Libya now concedes in its Reply that, insofar as the Council makes a binding decision under Chapter VII, there results an obligation under the Charter for purposes of Article 103¹²⁰. As a result, even if Libya’s assertions concerning the Montreal Convention were accepted, the Council’s resolutions would take precedence over them.

4.20 The fact that Libya is asserting “rights” under the Montreal Convention – as opposed to “obligations” – is immaterial to the application of Article 103 in this context. The United States does not agree that the Convention provides the rights asserted by Libya. But even if Libya were deemed to have such rights, they would correspond to obligations of the United States, obligations that Libya, in its Application in these proceedings, has alleged that the United States has violated. Article 103 by its terms establishes the primacy of obligations

¹²⁰ Libyan Reply, para. 3.20.

arising out of the Charter over those arising out of other international agreements, and accordingly is fully applicable here¹²¹.

4.21 This Court has already recognized, on a *prima facie* basis, that the obligations imposed by the decisions of the Council in this case are of the type that are subject to Articles 25 and 103 and, therefore, would prevail over any obligations under the Montreal Convention with which they are in conflict. In its 14 April 1992 Order, the Court denied Libya's request for provisional measures on the basis of the binding decision taken by the Security Council in Resolution 748. The Court decided: (1) that Libya and the United States were obliged to carry out Resolution 748¹²²; (2) that this obligation prevailed over any inconsistent obligations under the Montreal Convention¹²³; (3) that, as a result, rights claimed by Libya under the Montreal Convention were not appropriate for protection by the indication of provisional measures¹²⁴; and (4) that such provisional measures would impair rights enjoyed by the United States under Resolution 748¹²⁵.

4.22 The basis for these conclusions was further explained by various separate opinions of members of the Court. For example, Judge Oda stated that the Council appeared to have been acting within its competence and that its decision cannot be summarily reopened¹²⁶. Judges Evensen, Tarassov, Guillaume and Aguilar Mawdsley stated that the

¹²¹ In this context, it is of no legal significance whether one discusses the legal position of the parties in terms of "rights" or "obligations". See, e.g., Order of 14 April 1992, Dissenting Opinion of Judge Weeramantry, p. 177 ("Libya is, *prima facie*, bound by the provisions of [] resolution [748] even if they should conflict with the *rights* Libya claims under the Montreal Convention") (italics added).

¹²² Order of 14 April 1992, para. 42.

¹²³ Idem, para. 42.

¹²⁴ Idem, para. 43.

¹²⁵ Idem, para. 44.

¹²⁶ Idem, Declaration of Acting President Oda, p. 129.

Council “was acting, with a view to combating international terrorism, within the framework of Chapter VII of the United Nations Charter” and that accordingly the Court was “fully justified” in refraining from indicating provisional measures¹²⁷. Judge Shahabuddeen stated that even “assuming Libya has the rights which it claims, prima facie they could not be enforced during the life of the resolution¹²⁸”.

4.23 In short, it is apparent the Court understood, in the context of the provisional measures proceeding, that the Council, in Resolution 748, had required Libya to surrender the two accused for trial by the United Kingdom or the United States and that such a decision by the Council under Chapter VII would prevail over any right Libya might arguably have under the Montreal Convention to refuse such surrender.

Section 3. The Council’s Resolutions Can and Do Supersede Inconsistent International Law Obligations

4.24 The United States Counter-Memorial explained in considerable detail that the Council can, in the exercise of its authority under Chapter VII, take actions that are inconsistent with existing international law obligations of the parties to a dispute, including those in treaties like the Montreal Convention. The Counter-Memorial pointed out that Article 1(1) and other provisions of the Charter distinguish between actions under Chapter VI, which are to be carried out “in conformity with the principles of justice and international law”, and actions under Chapter VII, which are not subject to that qualification¹²⁹.

4.25 In its Reply, Libya seems to accept this point, but argues that it only applies to certain decisions taken by the Council under Chapter VII – which Libya calls “mesures

¹²⁷ Order of 14 April 1992, Joint Declaration of Judges Evensen, Tarassov, Guillaume and Aguilar Mawdsley, p. 137.

¹²⁸ *Idem*, Separate Opinion of Judge Shahabuddeen, p. 140.

¹²⁹ United States Counter-Memorial, paras. 3.19-3.26.

coercitives” – and not to decisions in which the Council’s actions have the effect of resolving the merits of a dispute¹³⁰. No such distinction can be found in the Charter. Such a distinction would be inconsistent with the practice of the Council in the exercise of its Chapter VII powers, and would very substantially impede the effective exercise of those powers in the interests of international peace and security.

4.26 There is nothing in the Charter that precludes the Council from adopting measures under Chapter VII that might affect underlying disputes between the States involved in a situation that threatens the peace, and Libya points to none in its Reply. Article 41 is broad in scope, authorizing the Council to “decide what measures not involving the use of armed force are to be employed to give effect to its decisions” The Article states that these measures “may include” the interruption of economic and diplomatic relations, but clearly does not limit the Council to the measures enumerated. Likewise, neither Article 25 nor Article 48 gives any indication of a limitation; each applies broadly to “decisions of the Security Council” without any qualification concerning their effect on underlying disputes between the parties to a dispute or Member States. No such limitation can be found in the preparatory work of the Charter, notwithstanding Libya’s vague but unsubstantiated assertions to the contrary¹³¹.

4.27 Further, the practice of the Council shows that no such limitation is, or could be, observed by the Council without a severe impairment of its ability to maintain and restore the peace. For example, in its decisions following the conclusion of the Gulf War, the Council reaffirmed that Iraq was liable for various categories of damage resulting from Iraq’s

¹³⁰ Libyan Reply, para. 3.19 (“coercive measures”).

¹³¹ See United States Counter-Memorial, paras. 4.22-4.28.

violation of Kuwait's sovereignty¹³², even though this clearly had a significant effect on Iraq's legal position concerning its liability for such damage; and the Council required Iraq to respect its demarcated boundary with Kuwait¹³³, even though this clearly had a significant effect on Iraq's legal position on the location and validity of that boundary. During the Bosnian conflict, the Council required the States of the region to surrender persons indicted by the International Criminal Tribunal for the Former Yugoslavia¹³⁴, even though this clearly affected the legal position of the Federal Republic of Yugoslavia and others on the surrender of their nationals for trial elsewhere. In the case of Kosovo, the Special Representative of the Secretary General, acting under the authority of the Security Council, exercised the power to amend existing laws applicable in the territory and to adopt new ones¹³⁵, even though this clearly affected the legal position of the Federal Republic of Yugoslavia concerning its sovereignty and authority in Kosovo. Certainly there is no basis in the practice of the Council for Libya's suggestion that the Council may not seek to resolve a dispute or a situation under Chapter VII, or that in doing so it would be limited by any existing international agreements or obligations.

4.28 If it were true, as Libya seems now to suggest, that States could challenge any decisions taken by the Council under Chapter VII on the grounds that they had the effect of deciding the merits of a dispute or imposing terms of settlement, then the regime established by the United Nations Charter for the maintenance of international peace and security would

¹³² See Resolution 687, United Nations Security Council, 2981st Meeting, 3 April 1991, United Nations Document S/RES/687, paras. 16-19. Exhibit 38 to United States Preliminary Objections.

¹³³ See *idem*, paras. 2-4.

¹³⁴ See Resolution 827, United Nations Security Council, 3217th Meeting, 25 May 1993, United Nations Document S/RES/827. Exhibit 57 to United States Preliminary Objections.

be eviscerated. Any State could then routinely refuse to carry out the Council's decisions, claiming that they affected its position on some underlying dispute and were inconsistent with existing requirements of international law and agreements. Article 103, pursuant to which the obligations of two Member States under the Charter would prevail over their obligations under another international agreement where they agreed on the nature of the obligations arising under such other agreement, would be deemed to have a different application where the two States disagreed on the obligations arising under such other agreement, a result that finds no support in the Charter. States could routinely question decisions of the Council taken to maintain or restore international peace and security. The important work done by the Council in crisis situations would be undermined and peace threatened.

4.29 In any event, even if Libya's assertions about the authority of the Council were accepted, they would not have any application to the case currently before the Court. The Council's decision that the two accused Libyan nationals be surrendered for trial by courts of the United Kingdom or the United States did not determine the underlying question of the interpretation of the Montreal Convention, but only directed that the guilt or innocence of the accused be resolved in an impartial court of appropriate jurisdiction. The Council's authority under Chapter VII certainly includes directing that matters which threaten the peace be resolved in such a manner.

¹³⁵ See UNMIK Regulation 1999/1 on the Authority of the Interim Administration in Kosovo (25 July 1999), as amended by UNMIK Regulation 1999/25 (12 December 1999) and UNMIK Regulation 2000/54 (27 September 2000).

CHAPTER III

THE SECURITY COUNCIL'S EXERCISE OF ITS CHAPTER VII FUNCTIONS IS NOT SUBJECT TO REVIEW

4.30 In its Reply, Libya again asserts that, if the Council's resolutions did indeed require Libya to surrender the accused for trial in the courts of the United Kingdom or the United States, then these resolutions were beyond the authority of the Council and should be disregarded by the Court. The United States Counter-Memorial demonstrated that the Council had the authority to impose such a requirement and that, in any event, the responsibility for defining the extent of the authority of the Security Council under the Charter is a matter left by the Charter for determination by the Council. Security Council decisions under Chapter VII may not be reviewed or disregarded by any other body or any State. Further, the events that have occurred since the filing of the United States Counter-Memorial have dramatically confirmed that the Council was justified in its determination that Libya's actions constituted a threat to the peace, in its demand that Libya surrender the accused for trial, and in its imposition of sanctions to enforce its decisions.

Section 1. The Council Had the Authority to Require the Surrender of the Accused

4.31 Libya continues to maintain that the Council had no authority under the Charter to require Libya to surrender the accused for trial by courts of the United Kingdom or the United States¹³⁶. Previously, Libya made a variety of arguments along these lines which were answered in full in the Counter-Memorial¹³⁷. Libya's Reply no longer insists on some of these arguments – for example, that the Council could not have found that Libyan actions

¹³⁶ See Libyan Reply, para. 3.18 *et seq.*

¹³⁷ See United States Counter-Memorial, paras. 3.60-3.65.

had constituted a threat to the peace, or that the measures chosen by the Council had no relationship to the objective of restoring and maintaining international peace and security. The United States will focus here only on the points made in the Libyan Reply.

4.32 The Counter-Memorial demonstrated that the Council was in no way precluded from requiring States to surrender individuals to international tribunals or to the courts of another State, where this was judged necessary to resolve a threat to the peace, and that in fact the Council had done so on several occasions¹³⁸. In response, Libya attempts in its Reply to distinguish the present case from the other occasions in which such surrenders have been required¹³⁹.

4.33 There is no valid basis for distinguishing these prior cases. First, Libya asserts that these cases are different from the Lockerbie situation because the acts in question in these other cases were offenses under international law¹⁴⁰. But the legal basis for the Council's action under Chapter VII in these other cases was not enforcement of international law but the existence of a threat to or breach of the peace. Accordingly, if the trial by an appropriate national or international court of persons who have committed offenses that constitute threats to the peace is necessary, it does not matter whether those offenses are violations of local law, international law or both. For example, the courts established pursuant to decisions of the Security Council in Kosovo and East Timor do have the authority to try crimes that are not necessarily offenses under international law¹⁴¹, precisely because the

¹³⁸ See United States Counter-Memorial, paras. 3.60-3.65.

¹³⁹ See Libyan Reply, para. 3.21 *et seq.*

¹⁴⁰ See *idem*, para. 3.21.

¹⁴¹ See, e.g., UNMIK Regulation 1999/1 on the Authority of the Interim Administration in Kosovo (25 July 1999), as amended by UNMIK Regulation 1999/25 (12 December 1999) and UNMIK Regulation 2000/54 (27 September 2000); UNMIK Regulation 1999/24 on the Law Applicable in Kosovo (12 December 1999), as

maintenance of international peace and security in those territories requires the prompt and effective prosecution of offenses against local law as well as international law.

4.34 Similarly, Libya is incorrect in asserting that these other cases are distinguishable because they involved enforcement of an international obligation to prosecute the persons in question¹⁴². Again, the Council's authority under Chapter VII has its basis in the maintenance and restoration of international peace and security, not in the enforcement of international obligations. If the maintenance or restoration of international peace and security requires the prosecution of offenses in appropriate national or international courts, it does not matter whether such prosecution is otherwise required by international law or not. For example, there was no requirement under international law that persons committing common offenses in Kosovo and East Timor be apprehended, but the maintenance of international peace and security required it. Prior to the creation of the international criminal tribunals by the Council, there was obviously no requirement under international law to surrender persons to those tribunals. Security Council Resolution 1269 (1999), which Libya cites in its Reply, calls for the prosecution or extradition of persons who plan, finance or commit terrorist acts, whether or not such prosecution or extradition is otherwise required in each case by international law¹⁴³.

4.35 Libya further argues in its Reply that Resolution 1192 cannot be invoked to counter this analysis, insisting that the Council in Resolution 1192 did not impose a new obligation on Libya to surrender the accused, since Libya had already agreed in principle to

amended by UNMIK Regulation 2000/59 (27 October 2000); UNTAET Regulation 1999/1 on the Authority of the Transitional Administration in East Timor (27 November 1999).

¹⁴² See Libyan Reply, paras. 3.21-3.22.

¹⁴³ Resolution 1269, United Nations Security Council, 4053rd Meeting, 19 October 1999, United Nations Document S/RES/1269.

trial by a Scottish court in the Netherlands¹⁴⁴. But it is clear that paragraph 4 of Resolution 1192 *did* impose an obligation on Libya to surrender the accused, and it would not be a new obligation only if it is recognized that the Council's previous Chapter VII decisions had already obligated Libya to surrender these individuals. Resolution 1192 did not rely on Libya's good will or prior agreement in principle to the surrender, but provided that sanctions would continue unless and until the two individuals actually appeared in the Netherlands for trial.

4.36 In any event, the Council's decision to require Libya to surrender the two accused fits even within the misconceived framework suggested by Libya. The two accused were charged with committing offenses that are recognized under the Montreal Convention. That Convention recognizes that the State where the crime was committed and the State of nationality of the victims have jurisdiction to prosecute offenses thereunder. The Council neither invented the offense nor the courts before which the prosecution was to occur. The trial mandated by the Council vindicated international law, as well as the maintenance of international peace.

Section 2. Decisions of the Council under Chapter VII May Not Be Reviewed or Disregarded by Any Other Authority

4.37 The United States Counter-Memorial set out the position of the United States that decisions under Chapter VII are reserved by the Charter exclusively to the Security Council, and that neither the Council's determination of a threat to the peace nor its imposition of measures under Chapter VII can be reviewed or reversed by any other organ of the United Nations¹⁴⁵. In our view, that analysis provides a complete answer to Libya's

¹⁴⁴ See Libyan Reply, para. 3.22.

¹⁴⁵ United States Counter-Memorial, paras. 4.1-4.29.

demand that the Court review the Council's decisions and declare them to be invalid or inapplicable to Libya.

4.38 In particular, the Counter-Memorial demonstrated that the Court does not have the authority to review the Council's determinations under Article 39 of the Charter, or other decisions taken under Chapter VII for the purpose of maintaining or restoring international peace and security¹⁴⁶. As the Counter-Memorial pointed out, the Charter makes the Article 39 determination of the existence of any threat to or breach of the peace, or act of aggression, and the related decisions under Articles 41 and 42, entirely the Council's responsibility. The Council must take these decisions based on its unique political appreciation of particular situations and events, and may have to act at great speed and in the face of rapidly evolving situations. Most importantly, the Council must be able to act authoritatively. Any assertion by the Court of a right to review and reverse such a decision months or years later would seriously undermine the authoritative character of Council decisions and impair the ability of the Council to act effectively and quickly.

4.39 Further, the Counter-Memorial demonstrated at some length that no power of review by the Court of decisions of the Council was contemplated by the framers of the Charter, nor can such a power be implied from the judicial character of the Court's functions¹⁴⁷. The Charter does not provide for jurisdiction of the Court to review and set aside determinations of the Council; on the contrary, as shown in the Counter-Memorial, the drafters of the Charter considered and deliberately rejected the possibility of conferring such powers on the Court¹⁴⁸.

¹⁴⁶ See United States Counter-Memorial, paras. 4.22-4.28.

¹⁴⁷ See *idem*, paras. 4.4-4.21.

¹⁴⁸ See *idem*, paras. 4.6-4.11.

4.40 The Court has consistently declined to assert any such power and has indeed expressly disclaimed it. In its advisory opinion in the Certain Expenses of the United Nations case, the Court noted that the Charter contained no provision for judicial determination of the validity of the actions of United Nations political organs – with the exception of advisory opinions given at the request of those organs; it further confirmed that, even in the context of such an advisory opinion, the acts of the Council were presumed not to be *ultra vires*¹⁴⁹.

4.41 In its Reply, Libya now attempts to establish such a review power by suggesting that the Court should use its authority to interpret decisions of the Council in a manner that essentially disregards any decisions that are inconsistent with the Court's view of international law and the scope of the Council's authority¹⁵⁰. This, however, would be a gross distortion of the Court's proper function of interpreting decisions of the Council, amounting in effect to the creation of a right to review and annul decisions of the Council that is nowhere provided for in the language or the general scheme of the Charter.

4.42 Of course, the Court from time to time finds it necessary to interpret decisions of the Council for the purpose of giving them their proper effect. In doing so, the Court follows the normal rules of international law – specifically, to apply the terms of the Council's resolutions in accordance with their ordinary meaning, in light of their context and their object and purpose. In performing this function, the Court naturally consults the Council's practice and the record relating to the resolutions in question. However, this practice is entirely different from what Libya suggests the Court should do here -- specifically, that

¹⁴⁹ See Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter), Advisory Opinion, I.C.J. Reports 1962, p. 151 at p. 168.

¹⁵⁰ See Libyan Reply, para. 3.29 et seq.

instead of interpreting or applying the Council's resolutions the Court may review and adjust the Council's decisions to better conform them to the Court's view of the Charter.

4.43 Libya cites no credible authority for its suggestion that the Court should selectively interpret the Council's decisions in this manner. It notes that the Court's case law confers a presumption that the Council's decisions are consistent with the Charter¹⁵¹, but this in no way supports the proposition for which Libya cites it. Libya appears, in effect, to endorse the power of annulment of Council decisions through the guise of selective interpretation.

4.44 At the very least, the Charter clearly gives to the Security Council – and only the Council – the functions of determining the existence of a threat to or breach of the peace, or act of aggression, and deciding what measures are to be taken in consequence. As Judge Weeramantry stated at the provisional measures phase of this case:

... once we enter the sphere of Chapter VII, the matter takes on a different complexion, for the determination under Article 39 of the existence of any threat to the peace, breach of the peace or act of aggression, is one entirely within the discretion of the Council. It would appear that the Council and no other is the judge of the existence of the state of affairs which brings Chapter VII into operation. That decision is taken by the Security Council in its own judgment and in the exercise of the full discretion given to it by Article 39. Once taken, the door is opened to the various decisions the Council may make under that Chapter.

Thus, any matter which is the subject of a valid Security Council decision under Chapter VII does not appear, *prima facie*, to be one with which the Court can properly deal¹⁵².

If the Council has determined that there is a threat to or breach of the peace, or act of aggression, and has selected certain measures to deal with that situation – in this case, including a direction to Libya to surrender the accused for trial in the courts of the United

¹⁵¹ See Libyan Reply, para. 3.30.

¹⁵² Order of 14 April 1992, Dissenting Opinion of Judge Weeramantry, p. 176.

Kingdom or the United States – the Charter does not leave it to the Court to reach a different result.

4.45 In its Reply, Libya asserts that the United States has not responded to Libya's assertion that the exercise of the judicial function requires, when appropriate, that the Court refuse to implement a Security Council decision that would be contrary to the United Nations Charter¹⁵³. On the contrary, the United States Counter-Memorial addresses this assertion at considerable length, and demonstrates that no such function is given to the Court under the Charter with respect to decisions of the Council under Chapter VII¹⁵⁴.

4.46 The only citation to the contrary offered by Libya in its Reply¹⁵⁵ is a reference to the Court's Advisory Opinion regarding Namibia¹⁵⁶. That citation is unpersuasive. In that case, the Security Council requested an advisory opinion from the Court on the points at issue. To answer the questions posed by the Council, the Court had to address certain objections that had been raised as to the consistency with the Charter of the Council's resolutions on Namibia. The Court addressed those questions in that specific context, while reaffirming that it had no general power of judicial review over the decisions of United Nations organs¹⁵⁷. Thus the Court's review of the legality of Council decisions in the Namibia case was deliberately and expressly undertaken solely because the questions arose pursuant to a Council request for an Advisory Opinion, and has no relevance in this case,

¹⁵³ Libyan Reply, para. 3.32.

¹⁵⁴ See United States Counter-Memorial, paras. 4.4-4.29.

¹⁵⁵ Libyan Reply, para. 3.32.

¹⁵⁶ Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971, p. 16.

¹⁵⁷ See United States Counter-Memorial, para. 4.20 (discussing the Namibia case).

where the Council has determined for itself the scope of its authority and adopted resolutions to carry out its responsibilities for maintaining international peace and security.

CHAPTER IV

THE UNITED STATES CANNOT BE HELD RESPONSIBLE FOR RESORT TO THE SECURITY COUNCIL OR THE EFFECTS OF THE COUNCIL'S DECISIONS

Section 1. The United States Had the Right to Ask the Council to Take the Decisions in Question

4.47 In its Reply, Libya asserts that even though resorting to the Security Council is not by itself unlawful, it became unlawful when the purpose of doing so was to avoid the application of the Montreal Convention¹⁵⁸. As indicated previously, the United States does not accept that the resort of the United Kingdom, the United States and France to the Council was in any way inconsistent with the Convention, or that the action taken by the Council was in any way inconsistent with rights and obligations of the parties to the Convention.

4.48 In any event, it is, in fact, common for Member States to seek action by the Security Council under Chapter VII that may be inconsistent with their obligations under other international agreements. As explained in detail in the United States Counter-Memorial¹⁵⁹, this happens almost every time Member States seek action by the Council to impose economic sanctions, which may involve violations of international agreements governing trade, investment, air traffic and similar aspects of economic activity. If Libya's argument were correct, then the many Member States that sought economic sanctions against South Africa, Iraq and the Socialist Federal Republic of Yugoslavia may have been acting unlawfully. Since the Council has the authority under Chapter VII to create obligations on Member States that prevail over their obligations under other agreements where necessary to

¹⁵⁸ Libyan Reply, para. 2.10.

¹⁵⁹ See United States Counter-Memorial, paras. 3.32-3.33.

restore and maintain the peace, it cannot be unlawful for Member States to propose that the Council do so.

4.49 In its Reply, Libya also alludes to its previous arguments that the Montreal Convention operates as a *lex specialis* and an *electa via* with respect to obligations under the United Nations Charter¹⁶⁰. The United States Counter-Memorial showed that these arguments are plainly inconsistent with the Council's authority under Chapter VII and with Article 103 of the Charter¹⁶¹. In essence, these arguments are just another way of asserting that the Council cannot adopt measures that are inconsistent with previous treaty commitments, which is clearly not the case.

4.50 In a more fundamental sense, it cannot be the case that a Member State violates international law by resorting to the Council, whatever its proposals may be or its purposes in making those proposals. As noted above, resort to the Council is a fundamental right under the Charter¹⁶². Holding any State liable for proposing action by the Council would have a dangerous chilling effect on the access of States to the Council, which is fundamental to the maintenance of international peace and security.

Section 2. The United States Cannot be Held Responsible for the Decisions of the Council

4.51 The underlying basis for Libya's arguments in its Reply is the asserted illegality of action by the Council to require the surrender of the two accused for trial by the courts of the United Kingdom or the United States. The only hypothetical injuries that might

¹⁶⁰ Libyan Reply, para. 2.10.

¹⁶¹ See United States Counter-Memorial, paras. 3.35-3.40.

¹⁶² Article 35 of the United Nations Charter provides that: "Any Member of the United Nations may bring any dispute, or any situation of the nature referred to in Article 34, to the attention of the Security Council"

conceivably be alleged in this case are economic losses allegedly suffered as a result of the sanctions imposed by the Security Council under Chapter VII.

4.52 This cannot form the basis for a judgment against the United States. No Member State can be held responsible for decisions of the Council or for the consequences of such decisions. Article 24 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.

Accordingly, a decision of the Council is an action on behalf of all United Nations Members.

4.53 Decisions of the Council can only be taken with the affirmative vote of nine Members and in the absence of the negative vote of any Permanent Member. In fact, many Council Members voted in favor of the Council's decisions at issue in this case¹⁶³. These decisions were not – and could not have been – dictated by the United States or any other Member State.

4.54 As a result, a complaint about the effects of the observance of the Council's sanctions cannot be brought against the United States or any other Member State. It is a complaint against the Council and the Organization itself – neither of which are party to this case and neither of which may be challenged before this Court for such decisions¹⁶⁴. Libya's attempt to raise such a complaint in this proceeding is manifestly improper.

¹⁶³ The following Council Members voted for Resolution 731, 748 or 883: Austria, Belgium, Brazil, Cape Verde, China, Ecuador, France, Hungary, India, Japan, Morocco, New Zealand, Russian Federation, Spain, United Kingdom, United States, Venezuela and Zimbabwe.

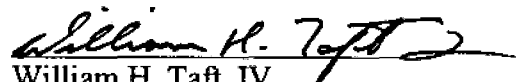
¹⁶⁴ Cf. "The Legal Consequences for Member States of the Non-fulfilment by International Organizations of their Obligations toward Third Parties", 66-II, Annuaire de l'Institut de Droit international, p. 444 (1995).

PART V

RESERVATIONS AND SUBMISSIONS

Accordingly, while reserving the right of the United States of America to initiate separate proceedings against the Libyan Arab Jamahiriya for breach of its obligations to the United States under the Montreal Convention or otherwise, and reserving the right to submit a further written statement should the pending Appeal of Mr. Al Megrahi so require, the United States asks the Court to adjudge and declare:

- (1) That it is not required to adjudicate on the merits of the claims submitted by the Great Socialist People's Libyan Arab Jamahiriya in its Application of 3 March 1992; or,
- (2) In the alternative, rejecting all submissions to the contrary, that the claims of the Great Socialist People's Libyan Arab Jamahiriya are dismissed.


William H. Taft, IV
Agent of the United States of
America

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

Exhibit 1. Letter dated 19 March 1999 from the Secretary-General to the President of the Security Council, transmitting a letter of 19 March 1999 from the Secretary of the General People's Committee for Foreign Liaison and International Cooperation of the Libyan Arab Jamahiriya to the Secretary-General, United Nations Document S/1999/311, 23 March 1999.

Exhibit 2. Letter dated 5 April 1999 from the Secretary-General to the President of the Security Council, United Nations Document S/1999/378, 5 April 1999.

Exhibit 3. "Report of Secretary-General on Arrival in Netherlands of Two Persons Charged with Pan Am 103 Bombings Welcomed by Security Council," Security Council Press Release, United Nations Document SC/6662, 5 April 1999.

Exhibit 4. Statement by the President of the Security Council, United Nations Document S/PRST/1999/10, 8 April 1999.

Exhibit 5. Opinion of the Court *in causa* Her Majesty's Advocate v. Abdelbaset Ali Mohamed Al Megrahi and Al Amin Khalifa Fhimah, Case number 1475/99, delivered on 31 January 2001.

Exhibit 6. Final Amended Indictment in the Case of Her Majesty's Advocate v. Abdelbaset Ali Mohamed Al Megrahi and Al Amin Khalifa Fhimah, indicating deletions made by the High Court of Justiciary at Camp Zeist in returning its Verdict on 31 January 2001. Obtained by the United States of America from the United Kingdom Crown Office and Procurator Fiscal Service.

