

**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)

COUNTER-MEMORIAL

SUBMITTED BY

THE UNITED STATES OF AMERICA

31 MARCH 1999



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INTRODUCTION AND OVERVIEW

1. Pursuant to the Court's orders of 30 March and 17 December 1998, the United States of America submits its Counter-Memorial in this case.

2. The United States had hoped that before this submission was to be filed with the Court, Libya would have responded positively to an initiative by the United Kingdom and the United States that sought to end the impasse over the trial of those accused of destroying Pan Am 103. On 24 August 1998, the United Kingdom and the United States proposed to the Secretary-General that the accused be tried in a special Scottish court sitting in The Netherlands.¹ The Security Council rapidly and unanimously endorsed this initiative through Resolution 1192.² Both before and after this initiative was taken, Libya

¹ The Exhibits in the volume accompanying this Counter-Memorial are identified throughout as "Counter-Memorial Exhibit ___." The joint letter of the Acting Permanent Representatives of the United Kingdom and the United States to the Secretary-General proposing trial in a Scottish court in the Netherlands is Counter-Memorial Exhibit 2.

As requested by the Court, we have not reproduced documents the United States has submitted to the Court previously. As necessary, this Counter-Memorial will refer to documents contained in the two volumes of United States documentary exhibits submitted on 25 June 1995 with the U.S. Preliminary Objections. Such documents will be referred to as "1995 U.S. Exhibit ___."

² The full text of Resolution 1192 is at Counter-Memorial Exhibit 3. Resolution 1192 was adopted under Chapter VII of the Charter. In its operative paragraphs, the Council:

1. Demands once again that the Libyan Government immediately comply with above-mentioned resolutions;
2. Welcomes the initiative for the trial of the two persons charged with the bombing of Pan Am flight 103 ("the two accused") before a Scottish court sitting in the Netherlands, as contained in the letter dated 24 August 1998 from the Acting Permanent Representatives of the United

publicly stated its support for such a trial. However, as of this writing, seven months after the initiative was proposed, Libya has not transferred the accused.

3. Part I of this Counter-Memorial describes several relevant factual developments occurring since Libya initiated these proceedings. The Counter-Memorial then examines three sets of legal issues in light of the Court's judgment of 27 February

Kingdom of Great Britain and Northern Ireland and of the United States of America ("the initiative") and its attachments, and the willingness of the Government of the Netherlands to cooperate in the implementation of the initiative;

3. Calls upon the Government of the Netherlands and the Government of the United Kingdom to take such steps as are necessary to implement the initiative, including the conclusion of arrangements with a view to enabling the court described in paragraph 2 to exercise jurisdiction in the terms of the intended Agreement between the two Governments, attached to the said letter of 24 August 1998;

4. Decides that all States shall cooperate to this end, and in particular that the Libyan Government shall ensure the appearance in the Netherlands of the two accused for the purpose of trial by the court described in paragraph 2, and that the Libyan Government shall ensure that any evidence or witnesses in Libya are, upon the request of the court, promptly made available at the court in the Netherlands for the purpose of the trial;

5. Requests the Secretary-General, after consultation with the Government of the Netherlands, to assist the Libyan Government with the physical arrangements for the safe transfer of the two accused from Libya direct to the Netherlands;

6. Invites the Secretary-General to nominate international observers to attend the trial;

7. Decides further that, on the arrival of the two accused in the Netherlands, the Government of the Netherlands shall detain the two accused pending their transfer for the purpose of trial before the court described in paragraph 2;

8. Reaffirms that the measures set forth in its resolutions 748 (1992) and 883 (1993) remain in effect and binding on all Member States, and in this context reaffirms the provisions of paragraph 16 of resolution 883 (1993), and decides that the aforementioned measures shall be suspended immediately if the Secretary-General reports to the Council that the two accused have arrived in the Netherlands for the purpose of trial before the court described in paragraph 2 or have appeared for trial before an appropriate court in the United Kingdom or the United States, and that the Libyan Government has satisfied the French judicial authorities with regard to the bombing of UTA 772;

9. Expresses its intention to consider additional measures if the two accused have not arrived or appeared for trial promptly in accordance with paragraph 8;

10. Decides to remain seized of the matter.

1998.³ Part II demonstrates how the United States has not acted contrary to any obligation owed to Libya under the Montreal Convention. Part III demonstrates that, in any case, the applicable legal rules here are not those of the Montreal Convention. Instead, the rights and obligations of the parties are established by mandatory resolutions adopted by the Security Council in the exercise of its powers under Chapter VII of the UN Charter. Under the Charter, those rules prevail over any inconsistent claims by Libya under the Montreal Convention. Part IV concludes by showing how the Security Council's decisions were properly adopted by the Council and are not subject to review and revision by this Court.

4. The Court's judgment of 27 February 1998 makes clear that the Court has jurisdiction with respect to Libya's claims only insofar as they concern the interpretation or application of the Montreal Convention.⁴ In its Memorial, and elsewhere in its written and oral arguments, Libya has directed other claims against the United States, including claims that the United States has wrongly threatened the use of force against Libya in violation of the Charter. As such claims do not concern the interpretation or application of the Montreal Convention, they are not within the scope of the dispute over which the Court found that it had jurisdiction. Accordingly, this Counter-Memorial will not refute them in detail.

³ Case Concerning Questions of Interpretation and Application of the 1971 Montreal Convention Arising From the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United States of America), Preliminary Objections, Judgment of 27 February 1998 (hereinafter, "Judgment of 27 February 1998").

⁴ Idem, para. 38.

5. As set forth in the U.S. grand jury indictment,⁵ the United States believes that Abdel Basset Ali Al-Megrahi (hereinafter "Abdel Basset") and Lamem Khalifa Fhimah (hereinafter "Lamen Fhimah"), both believed to be Libyan intelligence agents, were responsible for the destruction of Pan Am 103. However, the guilt or innocence of the persons accused of this crime is not an issue before the Court. The Court can and should decide the case before it without attempting to resolve this question.

6. The Security Council has indicated that the courts of the United Kingdom or the United States are to be responsible for ascertaining the guilt or innocence of the accused. Disclosure of the detailed evidence of this crime in these proceedings, prior to a criminal trial of the accused in a United Kingdom or United States court as provided by the Security Council, could seriously compromise the integrity of that criminal trial and the rights of the accused. Accordingly, it would be inappropriate for the United States to introduce such detailed evidence before this Court.

7. In any case, no determination of the guilt or innocence of the accused is necessary here. As we will demonstrate, the United States has not violated any obligations owed to Libya under the Montreal Convention, however the question of guilt or innocence may eventually be resolved. Moreover, mandatory decisions of the Security Council preclude the claims asserted by Libya under the Montreal Convention. The Council had an ample and compelling predicate for its decision that Libya's conduct posed a threat to international peace and security -- a decision that is within the unique

⁵ 1995 U.S. Exhibit I.

responsibility of the Council. These points are fully supported by the existing record of this case.

PART I**THE FACTS****CHAPTER I****RECENT FACTUAL DEVELOPMENTS BEARING ON THIS CASE**

1.1 In light of the Court's request that parties seek to limit the volume of their written submissions,⁶ this Part does not repeat at length factual materials the United States has already submitted to the Court. For a review of facts related to the destruction of Pan Am 103, the subsequent massive criminal investigation and the criminal charges brought against Messrs. Abdel Basset and Lamén Fhimah in the United Kingdom and the United States, the Court is respectfully referred to the Annex of Factual Background at Counter-Memorial Exhibit 1. Not surprisingly, Libya has objected to our previous detailed discussion of the destruction of Pan Am 103 and of the ensuing criminal investigation and charges.⁷ However, these matters cannot be disregarded, since they are fundamental to the actions of the United Kingdom, the United States and the Security Council. The facts show that there was a reasonable and sufficient basis for believing

⁶ Annex to I.C.J. Press Communiqué, Doc. 98/14, 6 April 1998.

⁷ Observations and Submissions of the Great Socialist Peoples Libyan Arab Jamahiriya on the Preliminary Objections Raised by the United States (hereinafter, "Libyan Observations and Submissions"), para. 1.1.

that the Government of Libya is implicated in the destruction of Pan Am 103. The following discussion addresses several more recent factual developments relevant to this case.

Section 1. The Proposed Scottish Trial in the Netherlands

1.2 The United Kingdom and the United States on 24 August 1998 proposed that a Scottish Court be constituted to sit in the Netherlands to conduct the trial of the two persons accused of destroying Pan Am 103. The letter of the Acting Permanent Representatives of the United Kingdom and of the United States to the Secretary-General presenting this initiative is Counter-Memorial Exhibit 2. This initiative was endorsed on 26 August by the Security Council in Security Council Resolution 1192, a Chapter VII resolution adopted by a unanimous vote of all fifteen Council members.⁸ In paragraph 4 of Resolution 1192, the Council decided:

that all States shall cooperate [to implement the initiative for a Scottish trial in the Netherlands] . . . and in particular that the Libyan Government shall ensure the appearance in the Netherlands of the two accused for the purpose of trial by the court described in paragraph 2

1.3 As will be discussed more fully, Resolution 1192 reflects the Security Council's firm and unanimous judgment that Libya's support for terrorism, its implication in the destruction of Pan Am 103 and its long-standing failure to comply with the Council's previous resolutions, constitute a threat to international peace and security. The resolution also reiterates the Security Council's binding legal requirement that Libya turn the defendants over for trial, underscoring that the Council has not (as Libya has argued here) simply invited negotiations or counter-proposals.

⁸ Counter-Memorial Exhibit 3.

1.4 This initiative also is consistent with the calls of the Organization of African Unity,⁹ the Non-Aligned Movement,¹⁰ the League of Arab States¹¹ and the Islamic Conference¹² and of other states and organizations which encouraged such a trial.

1.5 Libya too has repeatedly endorsed a trial by Scottish judges applying Scottish law in a venue outside of Scotland or the United States. In its filings in this case, Libya suggested trying the suspects in such a venue "without opposition to the trial being conducted by a Scottish Court applying Scottish law."¹³ Writing to the Secretary-General in July 1994, the Secretary of the General People's Committee for Foreign Liaison and International Cooperation, H.E. Omar Mustafa Muntasser, said that Libya "can in principle accept the holding of the trial outside Libyan territory" and that this could be done through "the holding of the trial at the seat of the International Court of Justice at

⁹ Letters dated 26 June 1997 from the Permanent Observers of the League of Arab States and the OAU to the President of the Security Council, Doc. S/1997/497, 27 June 1997; and 9 July 1997 from the Permanent Representative of Zimbabwe to the President of the Security Council, Doc. S/1997/529, 9 July 1997. Counter-Memorial Exhibit 4.

¹⁰ Final document of the Twelfth Ministerial Conference of the Movement of Non-Aligned Countries, pages 52-53, Doc. A/51/912 - S/1997/406, 12 July 1997. Counter-Memorial Exhibit 5.

¹¹ Letters dated 31 March 1994, 4 October 1995 and 3 April 1997 from the Permanent Representative of the Libyan Arab Jamahiriya to the President of the Security Council, Docs. S/1994/373, 31 March 1994; S/1995/834, 4 October 1995; and S/1997/273, 3 April 1997, transmitting relevant resolutions of the League of Arab States. Counter-Memorial Exhibit 6.

¹² Letter dated 15 January 1997 from the Permanent Representative of the Libyan Arab Jamahiriya to the President of the Security Council, Doc. S/1997/35, 15 January 1997. (Transmitting Resolution 14/24-P adopted by the Islamic Conference of Foreign Ministers). Counter-Memorial Exhibit 7.

¹³ See, e.g., Libyan Observations and Submissions, paras. 1.12, 1.50; Exhibit 38 in the Annex to Libyan Observations and Submissions, p. 1 ("Based on a recent proposal of the Council of the League of Arab States, Libya had accepted the idea of trying the two suspects by Scottish judges, under Scottish law, at the Seat of the International Court of Justice.").

The Hague by a Scottish court applying Scots law.”¹⁴ Secretary Muntasser confirmed this position in his 20 March 1998 statement to the Security Council, expressing approval of the proposals by important regional organizations to try the two suspects by Scottish judges, at the seat of the International Court of Justice in The Hague, under Scottish law.¹⁵ The United Kingdom/United States initiative differs from proposals by Libya only in that the Scottish courtroom and associated facilities are to be located on a Netherlands Air Force installation rather than at the seat of the Court in The Hague. This arrangement was strongly preferred by the Government of the Netherlands for administrative reasons and to best ensure the security of all participants.¹⁶

1.6 Libya initially seemed to accept the United Kingdom/United States initiative. On 26 August 1998, the General People’s Committee for Foreign Affairs and International Cooperation issued a communiqué indicating Libya’s acceptance:

The Committee regrets that so many years had to pass before this solution, supported by every international organization, was finally accepted, just as it regrets the scant regard for the wishes of the international community and of the International Court of Justice.

In stating its acceptance of this evolution in the position of the Governments of the United Kingdom and the United States of America, an evolution which it has demanded constantly, the General People’s Committee for Foreign Affairs and International Cooperation emphasizes the need to end the sanctions imposed under Security Council resolutions 748 (1992) and 883 (1993).¹⁷

¹⁴ Letter dated 28 July 1994 from the Secretary-General to the President of the Security Council, Doc. S/1994/900 of 29 July 1994, pp. 4-5. Counter-Memorial Exhibit 8.

¹⁵ 3864th Meeting of the Security Council, 20 March 1998, Doc. S/PV.3864, pp. 6, 9, 11. Counter-Memorial Exhibit 9.

¹⁶ The text of the draft Agreement between the United Kingdom and the Kingdom of the Netherlands concerning a Scottish trial in the Netherlands is annexed to the 24 August 1998 letter of the U.S. and U.K. Acting Permanent Representatives. Counter-Memorial Exhibit 2.

¹⁷ Communiqué annexed to letter dated 26 August 1998 from Libya’s Chargé d’Affaires a.i to the President of the Security Council, Doc. S/1998/808 (Emphasis added). Counter-Memorial Exhibit 10.

1.7 Libya's statement to the Security Council the next day even more clearly accepted the initiative. On 27 August 1998, Libya's representative told the Council:

[T]he Libyan Arab Jamahiriya accepts that the two suspects should be tried in a Scottish court in the Netherlands by Scottish judges, according to Scots law. We reaffirm this position today; we have already stated it, as has been officially recorded in the Security Council. This is a serious irreversible position.¹⁸

1.8 Notwithstanding such public statements and its previous representations to the Court, Libya has not yet complied with its obligations, in particular those under paragraph 4 of Security Council Resolution 1192. The Secretary-General has worked to arrange for the transfer of the two accused, as requested in Resolution 1192. He has sought to clarify detailed legal and practical points raised by Libya, and has personally visited Libya.¹⁹ The Secretary-General's efforts to bring about compliance with Resolution 1192 are continuing. However, to date, those efforts have not been met by Libyan compliance with the requirements of Resolution 1192.

Section 2. Further Indications of Libya's Support for Terrorism

1.9 The second set of developments bearing upon the factual background of this case involves information that has come to light regarding Government of Libya's long-term involvement in acts of terrorism. This provides additional background for the Security Council's calls in Resolutions 731, 748, 883 and 1192 for Libya to renounce its support for terrorism and for the Council's associated measures affecting Libya. It also

¹⁸ 3920th Meeting of the Security Council, 27 August 1998, Doc. S/PV.3920, p. 4. Counter-Memorial Exhibit 11.

¹⁹ See, e.g., UN Press Releases, Doc. SG/T/2161, 9 December 1998, and Doc. SG/SM/6896, 16 February 1999. Counter-Memorial Exhibit 12.

relevant to assessing Libya's claims against the United States under the Montreal Convention.

1.10. First, shortly before the deadline for printing this Counter-Memorial, there were important developments related to the 9 September 1989 bombing of UTA Flight 772 over Niger that resulted in the deaths of 170 people. According to press accounts, on 10 March 1999, a French court in Paris found six Libyan intelligence officers, including Abdallah Senoussi, deputy head of Libya's secret services and brother-in-law of Colonel Qaddafi, guilty of the bombing of UTA 772 following a trial in absentia. The six defendants were sentenced to life imprisonment.²⁰

1.11. UTA Flight 772 was destroyed by a bomb while in flight from Brazzaville, Congo to N'djamena, Chad. An 8 January 1992 communication from Libya to the Secretary-General²¹ "denied categorically" allegations of Libyan involvement in the bombings of UTA 772 and Pan Am 103. However, in 1997, French examining magistrate Judge Jean-Louis Brugière completed an inquiry into the bombing. Judge Brugière's investigation, which led to the 10 March, 1999 guilty verdict, is described in his letter to the Minister of Foreign Affairs of France transmitted to the Security Council on 6 November 1997.²²

²⁰ Initial press reports are at Counter-Memorial Exhibit 13. The United States is seeking official information regarding the verdict, the evidence presented to the French court, and related French civil proceedings now underway. The United States may wish to submit to the Court additional information regarding these proceedings as it becomes available.

²¹ Letter dated 8 January 1992 from the Permanent Representative of the Libyan Jamahiriya to the Secretary-General, Doc. A/46/841-S/23396, 9 January 1992. 1995 U.S. Exhibit 14.

²² Letter dated 6 November 1997 from the Permanent Representative of France to the Secretary-General, Doc. S/1997/858 (6 November 1997). Counter-Memorial Exhibit 14.

1.12 Judge Brugière found compelling evidence to recommend prosecution of six Libyan nationals believed to be intelligence operatives for the attack on UTA Flight 772. Arrest warrants were issued for all six; none are in French custody. Judge Brugière's chilling conclusions regarding the charges and evidence against these Libyan officials are summarized in an earlier judgment of the Cour d'Appel of 12 June, 1998.²³

1.13 Other developments also illustrate Libya's involvement with terrorism. Since it brought this case in 1992, Libya has made significant public statements regarding its involvement in terrorism. On 14 May 1992, Libya's Permanent Representative sent the Secretary-General a Libyan Government communiqué declaring, *inter alia*, that "Libya severs relations with all organizations and groups involved in international terrorism of any kind."²⁴ The communiqué continued that "in implementation of the above," Libya would "comply with the United Kingdom's request concerning its previous relations with the Irish Republican Army." This confirms that Libya had relations with one important terrorist organization. The wording (the use of the verb "severs" in the present tense, the reference to "all organizations and groups") also suggests that Libya maintained such relations with several terrorist organizations and that those relations continued until at least 1992. (Whether those relations have in fact been severed is another issue.)

²³ Relevant excerpts of the court's 12 June 1998 judgment are at Counter-Memorial Exhibit 15. Also included for the convenience of the Court's translators is a commercially-prepared translation of these pages. This translation has not been reviewed by the Department of State's Office of Language Services and is not therefore certified.

²⁴ Letter dated 14 May 1992 from the Permanent Representative of the Libyan Arab Jamahiriya to the Secretary-General and attached communiqué, Doc. S/23917. Counter-Memorial Exhibit 16.

1.14 On the same day, Libya's Permanent Representative sent the Secretary-General a second communication expanding upon this communiqué. This was a letter from H.E. Ibrahim M. Bishari, Secretary of the People's Committee of the People's Bureau for Foreign Liaison and International Cooperation, indicating in greater detail the nature of Libya's tangible support for the IRA. Secretary Bishari stated that:

Libya will comply promptly and effectively with the United Kingdom's request for information concerning Libya's links with the Irish Republican Army, including details of financial assistance, provision of weapons, training of personnel and names of contact points.²⁵

By the only reasonable reading, this shows that Libya's past "links" with the IRA included financial assistance, weapons, and training. Secretary Bishari then continued that "Libya does not *now* have any link with Abu Musa or Abu Nidal." (Emphasis added.) The choice of words indicates that Libya previously had links with these prominent terrorists. (In fact, reports in the press suggest that Abu Nidal may have been present in Libya until the summer of 1998.)²⁶

1.15 Although Libya has thus sometimes acknowledged its support for terrorism, charges of complicity in specific terrorist attacks often have evoked denials of responsibility, as they have with the UTA 772 and Pan Am 103 bombings.²⁷ denials often are accompanied by efforts to place blame on others. Thus, a 1996 Libyan letter to the Security Council made the extraordinary and false claim that the United States was

²⁵ Letter dated 14 May 1992 from the Permanent Representative of the Libyan Arab Jamahiriya to the Secretary-General, Doc. S/23918. Counter-Memorial Exhibit 17.

²⁶ "Bomb Mastermind Abu Nidal Arrested," The Times (London) (26 Aug. 1998). Counter-Memorial Exhibit 18.

²⁷ E.g., Letter dated 20 November 1991 from the Permanent Representative of the Libyan Arab Jamahiriya to the President of the Security Council, Doc. S/23226. 1995 U.S. Exhibit 12.

responsible for the murder of Police Constable Yvonne Fletcher in front of the Libyan Embassy in London in 1984, when she was struck by a bullet fired from within the Embassy.²⁸ In a similar vein, Libya sought to support its Memorial in this case with a videotape of a British commercial television program, the "Maltese Double Cross." This program contends that non-Libyan groups were responsible for the Pan Am 103 bombing. Libya's Memorial gives no explanation or foundation for this video, which is filled with wild and unsubstantiated charges. It has no probative value and should not be considered as evidence for Libya's claims.

1.16 Finally, there have been interesting developments in Germany relating to the 1986 bombing of the "La Belle" discotheque in West Berlin. The discotheque was a nightspot frequented by off-duty members of the United States Armed Forces. The bomb, which was filled with iron nails, killed three people and wounded over a hundred persons. In November 1993, during Security Council deliberations on Resolution 883, Libya's representative stated that Libya had nothing to do with this bombing and had been completely exonerated.²⁹ Libya has maintained this position.³⁰

²⁸ Letter dated 10 April 1996 from the Permanent Representative of the Libyan Arab Jamahiriya to the President of the Security Council, Doc. S/1996/269, 11 April 1996. Counter-Memorial Exhibit 19. ("The facts show that [Police Constable Fletcher] . . . was killed by a bullet fired by a United States intelligence agent in order to put a strain on relations between the Jamahiriya and the United Kingdom . . ."). The United States denies this outrageous allegation. The Government of the United Kingdom's response is contained in Doc. S/1996/360, dated 21 May 1996. Counter-Memorial Exhibit 20.

²⁹ 3312th Meeting of the Security Council, 11 November 1993, Doc. S/PV.3312, p. 9. 1995 U.S. Exhibit 33.

³⁰ Letter dated 10 April 1996 from the Permanent Representative of the Libyan Arab Jamahiriya to the President of the Security Council, Doc. S/1996/269 ("[T]he Libyan Arab Jamahiriya is innocent of the charges falsely made against it and contrived by United States intelligence, beginning with the accusation of terrorism. They include the charge of having bombed a West Berlin nightclub in 1986 . . ."). Counter-Memorial Exhibit 19.

1.17 However, in February 1997, German prosecuting authorities made public the indictments of five Libyan operatives allegedly involved in the La Belle bombing. These persons are presently undergoing trial, and none has been convicted. However, the indictments contain numerous allegations of direct involvement by, and responsibility of, the Libyan People's Bureau in East Berlin, particularly through the actions of two Libyan intelligence agents attached to the People's Bureau, Messrs. Keshlaf and Chraidi, who are alleged to have arranged the attack.³¹

1.18 The indictments, together with the evidence being adduced at trial, suggest substantial Libyan Government involvement. The indictment of Mr. Mahmoud alleges that Mr. Keshlaf was, at the time of the La Belle bombing, the head of the intelligence office at the East Berlin Libyan People's Bureau.³² Chraidi was an operative accredited to the East Berlin office of the People's Bureau, but active mostly in West Berlin.³³ Chraidi is also alleged to have assassinated a Libyan opposition figure in West Berlin upon orders from Tripoli and then to have been hidden and assisted by the East Berlin People's Bureau and its employees.³⁴ The indictment charges that the plan was to attack a discotheque frequented by American soldiers or a U.S. military facility. "The purpose

³¹ The indictment of one of the accused, Mr. Imad Mahmoud, is Counter-Memorial Exhibit 21.

³² Idem, p. 7.

³³ Idem, pp. 9, 14.

³⁴ Idem, p. 8.

was to cause the deaths of as many American citizens as possible."³⁵ The trial in the case began in November 1997 and is continuing.

1.19 These developments -- the guilty verdicts against Libyan intelligence officers in the UTA 772 case, Libya's admissions of its involvement with terrorist groups, and the trial in the La Belle discotheque bombing -- add force to the conclusion that Libya, at the times relevant to this proceeding, was deeply involved in supporting and procuring acts of international terrorism. They must be taken into account in assessing Libya's claims under the Montreal Convention and its requests that this Court overturn decisions of the Security Council.

³⁵ Idem, p. 10.

PART II
THE MONTREAL CONVENTION DOES NOT
SUPPORT LIBYA'S CLAIMS

CHAPTER I
INTRODUCTION TO THE MONTREAL CONVENTION

2.1 The Court's Judgment of 27 February 1998 establishes the Court's jurisdiction to consider Libya's claims only insofar as those claims concern the interpretation and application of the Montreal Convention.³⁶ The Court has not decided that the Montreal Convention applies.³⁷ Rather, it has recognized that:

[T]he parties differ on the question whether the destruction of the Pan Am aircraft over Lockerbie is governed by the Montreal Convention. A dispute thus exists between the Parties as to the legal regime applicable to this event.³⁸

2.2 The Court's judgment of 28 February 1998 identified four specific disputes between the parties regarding interpretation and application of the Montreal Convention:

-- The first concerns "the question whether the destruction of the Pan Am aircraft over Lockerbie is governed by the Montreal Convention,"³⁹

³⁶ E.g., Judgment of 27 February 1998, paras. 24, 28, 32-35.

³⁷ The text of the Montreal Convention is at 1995 U.S. Exhibit 17.

³⁸ Judgment of 27 February 1998, para. 24.

³⁹ Idem, para. 24.

-- next is Libya's claim that there has been a violation of Article 7 of the Convention, read in conjunction with other cited articles;⁴⁰

-- third is Libya's claim that the United States violated Article 11;⁴¹

-- finally, the Court identified a dispute involving Libya's claim that the United States caused the Convention to be set aside contrary to its requirements.⁴²

This Part demonstrates that the United States is not required by the Montreal Convention to do or refrain from doing the things asserted by Libya, and that in any case the United States has not violated the Convention.

2.3 In order to analyze Libya's contentions regarding the Convention, it is necessary to recall the Convention's background and significance. The Montreal Convention is an important component in the legal structure established by the international community to combat attacks on civil aircraft:

The Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation [citation omitted] is the final stage in the triad of efforts by the international community to maintain safety in the air and to safeguard the operation of civil aviation throughout the world. The Tokyo Convention on Offences and Certain Other Acts Committed on Board Aircraft 1963⁴³ and the Hague Convention for the Suppression of Unlawful Seizure of Aircraft 1970⁴⁴ left a lacuna in this area, namely the problem of aircraft sabotage, which this convention seeks to fill.⁴⁵

⁴⁰ Idem, para. 28.

⁴¹ Idem, para. 32.

⁴² Idem, para. 35.

⁴³ Convention on Offences and Certain Other Acts Committed on Board Aircraft (Tokyo Convention), signed 14 September 1963, 704 U.N.T.S. 219. Counter-Memorial Exhibit 22.

⁴⁴ Convention on the Suppression of Unlawful Seizure of Aircraft (Hague Convention), signed 16 December 1970, 860 U.N.T.S. 105. Counter-Memorial Exhibit 23.

⁴⁵ C.S. Thomas and N.J. Kirby, "The Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation," 22 Int'l and Comp. L.Q., p. 163 (1973). See also G. Guillaume, "Terrorisme et Droit International," 215 Recueil des Cours de l'Academie de Droit International de la Haye, pp. 287, 312 (1989-III).

2.4 In aid of their primary objective of protecting civil aviation from criminal attacks, the Tokyo, Hague and Montreal Conventions all include provisions establishing a treaty basis to ensure that at least one state -- and often several states -- have international and domestic legal authority to exercise criminal jurisdiction and, where appropriate, to impose severe penalties, with respect to such attacks. The three conventions are related parts of a system, in which one convention often provides context or guidance for interpreting the others. They were negotiated as part of a continuing endeavor to strengthen the legal regime against attacks on aircraft. Particularly the case of The Hague and Montreal Conventions (which were negotiated within a few months of each other), there are many similar or even identical provisions. This is because in drafting the Montreal Convention, "the Committee used the yet unsanctioned Hague Convention as a directive model, which accounts for the many parallel provisions of the two documents."⁴⁶

2.5 *Inter alia*, the Conventions addressed previous uncertainty and confusion as to which state -- if any -- had jurisdiction over particular acts threatening the safety of aviation. Prior to the Conventions, it was generally acknowledged that states could prosecute persons for crimes committed in their territory or elsewhere by their own nationals,⁴⁷ but there were no generally accepted views on other important matters. As a

⁴⁶ N.D. Joyner, Aerial Highjacking as an International Crime, p. 219 (1974). Indeed, following a proposal by the Netherlands Delegation, the Montreal Conference adopted Articles 4-14 of the Hague Convention as its starting point for the corresponding articles of the Montreal Convention. ICAO, International Conference on Air Law, Montreal, September 1971, Volume I, MINUTES, ICAO Doc. 9081-LC/170-1, pp. 19-20 (1973) (hereinafter, "1971 Montreal Conference Records"). Counter-Memorial Exhibit 24.

⁴⁷ See, e.g., D.P. O'Connell, II International Law 824 (2d ed. 1970).

senior International Civil Aviation Organization lawyer noted while the Tokyo Convention (the first of the three) was under negotiation in 1962-63:

The absence of uniform international rules concerning offences and certain other acts committed on board aircraft gives rise to serious problems. If, for example, a passenger commits a criminal act on board an aircraft flying over the high seas, it is possible that no state may have jurisdiction over the act. Again, if a crime is committed on board an aircraft flying internationally at great speed and at very high altitude though the airspace of several states in a short period of time, some or all of the states traversed during the commission of the crime might seek to take jurisdiction over the suspected offender with resultant conflicts.⁴⁸

Article 3 of the 1963 Tokyo Convention resolved some of these uncertainties. It established that at least one state -- the state of the aircraft's registration -- "is competent to exercise jurisdiction over offenses and acts committed on board." Article 3(2) of the Convention then required that each party "shall take such measures as may be necessary to establish its jurisdiction as the state of registration over offences committed on board aircraft registered in such state."

2.6 The Tokyo Convention was followed by the 1970 Hague Convention, which authorized several additional states to exercise jurisdiction over the hijacking of an aircraft. Article 2 of the Hague Convention requires parties to make the unlawful seizure (hijacking) of aircraft punishable by severe penalties. Article 4 then requires that each state party establish its jurisdiction over hijacking in four different situations: where an offense is committed on board an aircraft registered in that state; where a hijacked aircraft lands on its territory with the hijacker on board; where an aircraft is leased without crew to a lessee whose principal place of business is in the state; and where a hijacker is

⁴⁸ G.F. Fitzgerald, "The Development of International Rules Concerning Offences and Certain Other Acts Committed on Board Aircraft," 1 Canadian Ybk. Int'l Law, pp. 230-31 (1963). See also R. Hirano, "Convention on Offences and Certain Other Acts Committed on Board Aircraft of 1969," 7 Japanese Annual of International Law, pp. 7-8 (1963).

present in the state's territory and is not extradited. Hence, in a particular case, "jurisdiction may be lawfully exercised by any of four potentially involved states."⁴⁹

2.7 The Montreal Convention, the third part of the structure, was adopted in 1971, soon after completion of the Hague Convention. It was developed rapidly, in response to an initiative by European governments following bombing attacks against Swissair and Air Austria flights in February 1970.⁵⁰ Article 3 of this Convention requires that each state make bombing of aircraft and other specified offenses "punishable by severe penalties." Then, following the pattern of the Hague Convention, the Montreal Convention authorized several different states to exercise jurisdiction over a particular terrorist attack. As Professor Lillich observed:

The Convention attempts to establish a form of universal jurisdiction. It recognizes, in addition to the traditional territorial jurisdiction, the jurisdiction of (1) the State of registration; (2) the State of first landing; (3) the State in which the lessee has its principal place of business or permanent residence in the case of an aircraft leased without crew; and (4) the State where the alleged offender is present and is not extradited (Article 5).⁵¹

2.8 Each of these Conventions seeks to strengthen the international regime for deterring attacks on aircraft. The Montreal Convention's preamble makes this goal clear:

[U]nlawful acts against the safety of civil aviation jeopardize the safety of persons and property, seriously affect the operation of air services, and undermine the confidence of the peoples of the world in the safety of civil aviation;

Considering that the occurrence of such acts is a matter of grave concern;

Considering that, for the purpose of deterring such acts, there is an urgent need to provide appropriate measures for punishment of offenders

⁴⁹ N.D. Joyner, *supra* note 46, p. 181.

⁵⁰ *Idem*, pp. 216-17.

⁵¹ R.B. Lillich, Transnational Terrorism: Conventions and Commentary. A Compilation of Treaties, Agreements and Declarations of Especial Interest to the United States, p. 39, (1982).

(The Preamble of the Hague Convention is very similar; the Tokyo Convention does not have a preamble.) As part of an effort to strengthen international protection against attacks on aircraft, each of the three conventions seeks to *increase* the number of states with clear authority under international and domestic law to prosecute an offender implicated in an attack, and thus to increase the likelihood of effective prosecution.⁵²

2.9 The core of this system -- the object and purpose of the Montreal and other conventions -- is to require and facilitate vigorous, *bona fide* national criminal prosecution of persons accused of prohibited attacks on aircraft. The Montreal Convention must be construed and applied to give effect to this goal. Libya's position in this case thus involves a terrible irony. Libya's alleged intelligence operatives have been accused by the competent authorities in the United Kingdom and the United States of destroying Pan Am 103. As noted in Part I, other Libyan operatives have recently been convicted in absentia in France of having also destroyed UTA 772. However, Libya asks the Court to interpret and apply the Montreal Convention so as to prevent the United Kingdom and the United States, both entitled to exercise jurisdiction under both customary law and the Convention, from doing so in the case of Pan Am 103. Instead, Libya asks the Court to give it the sole right to submit the case for the purpose of prosecution. Interpreting and applying the Convention as Libya seeks would fundamentally contradict its object and purpose. As President Schwebel observed, "the

⁵² See G. Guillaume, *supra* note 45, pp. 341-42.

Convention would hardly have deterrent effect if the State accused of having directed the sabotage were the only State competent to prosecute the persons accused of the act.”⁵³

2.10 In this situation, as Professor Tomuschat concluded:

[O]ne could proceed from the proposition that the Montreal Convention cannot be held to grant rights of prosecution to a state which has no intention whatsoever of making use of those rights. Indeed, the Convention seeks to establish an effective system of criminal prosecution with regard to persons endangering the security of international air traffic. If, on the contrary, a State just seeks to frustrate the objectives of criminal justice, it must be debarred from invoking to its benefit the stipulations of the Convention. In such a case, only the alternative of extradition can apply.⁵⁴

⁵³ Judgment of 27 February 1998, dissenting opinion of President Schwebel, p. 1.

⁵⁴ C. Tomuschat, “The Lockerbie Case before the International Court of Justice”, 48 Review of the International Commission of Jurists, p. 38, at pp. 42-43 (1992).

CHAPTER II

**THE MONTREAL REGIME IS NOT EXCLUSIVE AND DOES NOT
LIMIT THE RIGHT OF THE UNITED STATES TO SEEK CUSTODY
OF THE PERSONS ACCUSED OF BOMBING PAN AM 103**

2.11 The first dispute concerning the application and interpretation of the Montreal Convention identified by the Court poses the question whether the Convention governs the destruction of Pan Am 103.⁵⁵ Libya essentially contends that the Montreal Convention assigns to Libya, and to Libya alone, the sole right to determine the disposition of the two persons accused of destroying Pan Am 103. However, as Judge Oda observed at the provisional measures stage, the legal regime of the Montreal Convention is not the exclusive source of legal rules potentially applicable in this situation. The Convention does not bar the United States (or the United Kingdom) from seeking to exercise jurisdiction over the accused through other legal avenues. As Judge Oda observed:

[A]ny State may exercise criminal jurisdiction over crimes committed in its own territory or may claim criminal jurisdiction over acts done abroad by aliens which are prejudicial to its security or certain offences recognized by the community of nations as of universal concern.⁵⁶

The Montreal Convention does not take away these rights of the United States (or the United Kingdom) under customary international law. In particular, it does not bar the

⁵⁵ Judgment of 27 February 1998, para. 24.

⁵⁶ 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), Provisional Measures, I.C.J. Reports 1992, Declaration of Acting President Oda, p. 130 (hereinafter "Provisional Measures").

United States (or the United Kingdom) from requesting custody of the accused for trial and from pursuing diplomatic initiatives seeking to obtain such custody outside of the framework of the Montreal Convention, including through recourse to the Security Council.

2.12 The Court has emphasized that the existence of rights and obligations under a treaty does not impair the continued existence and validity of related rights and obligations under customary international law. Thus, in the Case Concerning Military and Paramilitary Activities in and against Nicaragua, the Court noted that:

even if the customary norm and the treaty norm were to have exactly the same content, this would not be a reason for the Court to hold that the incorporation of the customary norm into treaty-law must deprive the customary norm of its applicability as distinct from that of the treaty norm. The existence of identical rules in international treaty law and customary law has been clearly recognized by the Court in the North Sea Continental Shelf cases.⁵⁷

Similar principles apply here. The existence of a treaty authorizing states to exercise jurisdiction in certain circumstances involving bombing attacks on aircraft does not wipe away the rights of other states under customary international law also to act in relation to such attacks.

2.13 Libya's effort to bring this matter exclusively within the ambit of the Montreal Convention rests on a flawed syllogism. Libya claims that the Montreal Convention is the exclusive means by which one state party may seek to exercise criminal jurisdiction over those accused of a covered attack on an aircraft. The United States did

⁵⁷ Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, I.C.J. Reports 1986, pp. 94-95, para. 177.

not pursue these suspects through resort to the Convention. Therefore, Libya contends, the United States has violated the Convention.⁵⁸

2.14 The major premise of this syllogism is wrong. The Montreal Convention is *not* the sole means by which one state party may seek to exercise criminal jurisdiction over a suspect located in another's territory. The Convention was intended to *increase* the opportunities for bringing offenders to justice, *not to limit them*. It does not foreclose other avenues not involving the Convention. The text of the Convention itself emphasizes this point.

2.15 Article 5(3) confirms that the Convention does not limit exercises of national jurisdiction outside the Convention framework. It provides that "[t]his Convention does not exclude *any* criminal jurisdiction exercised in accordance with national law."⁵⁹ (Emphasis added.) Hence, the Convention does not limit national efforts to exercise criminal jurisdiction on bases other than the Convention. Article 5(3) confirms that the United Kingdom and the United States retain the right to seek to exercise criminal jurisdiction over those accused of destroying Pan Am 103, including appropriate efforts to gain custody of the accused through diplomatic initiatives and by bringing the situation to the attention of the Security Council.

2.16 The history of Article 5(3) shows the importance that the parties attached to preserving their right to act outside the Convention framework. Article 5(3) repeats

⁵⁸ See Libyan Application, Part III (1); Libyan Memorial, para. 3.2; Libyan Observations and Submissions, para 2.12.

⁵⁹ The same language appears in Article 3(3) of the Tokyo Convention and Article 4(3) of the Hague Convention.

verbatim the text of Article 4(3) of the 1970 Hague Convention and Article 3(3) of the 1963 Tokyo Convention.⁶⁰ The ICAO Legal Committee, in preparing the draft that became the Hague Convention, specifically considered whether the new convention could in any way restrict or exclude resort to national court jurisdiction. The Committee's discussion confirmed that it would not. For example, the Delegate of Barbados expressed concern that a draft article would prevent a State leasing an aircraft registered in another State from exercising jurisdiction over a hijacker of the leased plane. The Delegate of France, who served as Chairman of the drafting Subcommittee, answered that the provision of concern to Barbados:

did not exclude any other criminal jurisdiction exercised in accordance with national law. At the present time, French legislation provided for jurisdiction over any offence committed either by an alleged offender of French nationality or against a victim of French nationality, no matter where this occurred and on aircraft of any registration. Thus, the Barbadian problem seemed capable of being dealt with by national law which could establish jurisdiction beyond what was contemplated in Article 4(1).⁶¹

No delegation questioned France's explanation that the text did not restrict or foreclose resort to national legal remedies apart from the Convention.

2.17 Thus, the Montreal Convention is just one element of the system of conventional and customary international legal rules potentially bearing upon the pursuit and prosecution of persons accused of bombing attacks on aircraft. The Convention establishes that several States party to the Convention potentially can exercise

⁶⁰ 1971 Montreal Conference Records, p. 162-63.

⁶¹ See, e.g., ICAO, Legal Committee, Seventeenth Session, 9 February – 11 March 1970, Minutes and Documents Relating to the Subject of Unlawful Seizure of Aircraft, ICAO Doc. 8877-LC/161, p. 47 (1970) (comments of delegate of France, chairman of the drafting group, on the provision that would become Hague Convention Article 4(3)) (hereinafter, "1970 Legal Committee Records") Counter-Memorial Exhibit 25.

international and domestic legal authority to prosecute persons accused of such attacks. However, the Convention is by no means the sole avenue for addressing such attacks, nor does it limit the capacity of states to address such attacks through the exercise of rights under customary international law. Libya ignores both the Convention's clear terms and its underlying logic to construe it as exclusive and as a bar to actions by states outside the Convention framework. The Court should reject Libya's first Montreal Convention Claim.

CHAPTER III

THE UNITED STATES DID NOT VIOLATE ARTICLE 7 OF THE MONTREAL CONVENTION

2.18 The second dispute identified in the Court's judgment of 27 February 1998 regarding the interpretation and application of the Montreal Convention involves Article

7. As to that provision:

[T]he Court finds that there exists . . . a specific dispute which concerns the interpretation and application of Article 7 -- read in conjunction with Article 1, Article 5, Article 6 and Article 8 -- of the Montreal Convention, and which . . . falls to be decided by the Court.⁶²

The judgment thus establishes that several other articles of the Convention cited by Libya (notably Articles 1, 5, 6, and 8) cannot be viewed as posing separate disputes between the parties. Instead, they are germane to this case only insofar as they relate to or are read in conjunction with Article 7. This Chapter demonstrates that there has been no violation of Article 7, or of Articles 1, 5, 6 and 8.

2.19 Article 7 states in relevant part that:

The Contracting State in the territory of which the alleged offender is found shall, if it does not extradite him, be obliged, without exception whatsoever and whether or not the offense was committed in its territory, to submit the case to its competent authorities for the purpose of prosecution.

The United States has not violated this requirement. The text of Article 7 creates an obligation only for the state in whose territory an alleged offender is found. The two persons accused of destroying Pan Am 103 are not in the territory of the United States. If

⁶² Judgment of 27 February 1998, para. 28.

they enter U.S. territory, the United States will ensure that the case will be submitted to its competent authorities for the purpose of prosecution (unless it decides to extradite them to another state for trial), as United States has made clear by its actions and statements since 1991.

2.20 Hence, Libya's claim that the United States has violated Article 7 must rest upon the contention that there is an *implicit* obligation not found in the Convention's text. Libya must be contending that Article 7 implicitly gives Libya, where the accused persons apparently are located, a right to investigate and perhaps try them that is superior to the right of any other Convention party. In addition, this implicit right precludes other parties to the Convention from seeking to exercise jurisdiction if Libya says it intends to do so. However, as the previous Chapter demonstrated, the Montreal Convention is not exclusive. It does not take away states' rights under customary international law to seek custody of persons accused of destroying their national aircraft. In addition, this Chapter shows that the Convention does not give legal priority to a party where an alleged offender is located so as to preclude other parties from seeking custody. The Montreal Convention simply does not create priorities among the several states it authorizes to exercise jurisdiction.

Section 1. The Convention Does Not Give Priority to a State Holding an Alleged Offender

2.21 The United States has not invoked and need not rely upon the Montreal Convention to provide a basis under international law for its exercise of criminal jurisdiction in relation to Messrs. Abdel Basset and Lamem Fhimah. Its rights in this respect are firmly based in customary international law. However, had the United States

invoked and relied upon the Convention,⁶³ Libya's claim to jurisdiction under the Convention would not be superior or entitled to priority over the U.S. claim.

2.22 As the previous discussion of the Tokyo, Hague and Montreal Conventions makes clear, the Montreal Convention intentionally authorizes *several* different states to prosecute persons accused of an offense. The Convention's language, structure and history show that it does not give any of these states priority over the others. Article 5 of the Convention requires as many as five potentially interested states to ensure that they have criminal jurisdiction to prosecute an offense. Thus, Articles 5(1) and (2) require that a state party ensure that it has jurisdiction:

- (a) when the offence is committed in the territory of that state;
 - (b) when the offence is committed against or on board an aircraft registered in that state;
 - (c) when the aircraft on board which the offence is committed lands in its territory with the alleged offender still on board; and
 - (d) when the offence is committed against or on board an aircraft leased without crew to a lessee who has his principal place of business or, if the lessee has no such place of business, his permanent residence in that state.
- (2) Each contracting party shall likewise take such measures as may be necessary to establish its jurisdiction over [certain offences, including an attack similar to that on Pan Am 103] . . . in the case where the alleged offender is present in its territory and it does not extradite him pursuant to Article 8 to any of the States mentioned in paragraph 1 of this Article.

2.23 The Convention requires every party to amend its domestic law to ensure its ability to prosecute offenders in each of these five situations. Libya does not claim that

⁶³ Article 5(1)(b) of the Convention requires the United States to ensure its domestic criminal jurisdiction over an attack like that on Pan Am 103 "committed against or on board an aircraft registered" in the United States.

the United States has failed to amend U.S. domestic law as the Convention requires. Instead, Libya contends that the United States must defer to Libya's wish to exercise its jurisdiction over the alleged offenders. There is no basis for this claim that the Convention gives Libya such priority.

2.24 Neither the plain language of Article 7 nor of any other part of the Montreal Convention supports Libya's claim. Under the familiar principles of Article 31 of the Vienna Convention on the Law of Treaties, "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose."⁶⁴ This fundamental rule -- that interpretation must rest on the ordinary meaning of the text -- means that Libya cannot force into the Montreal Convention a significant obligation not contained in its text.

2.25 Commentators have observed that the Tokyo-Hague-Montreal sequence of treaties does not establish priorities among the several states authorized to exercise jurisdiction over an offense. The Tokyo Convention, the first of the group, affirmed that the state of registration was competent to exercise jurisdiction,⁶⁵ but also expressly disclaimed excluding other "criminal jurisdiction exercised in accordance with national law."⁶⁶ A senior ICAO legal official characterized the result:

[T]he article on jurisdiction does not supersede any basis for criminal jurisdiction which a state might have incorporated into its national laws. Hence, more than one state might have, and claim, jurisdiction over a given offence committed on board an aircraft, and

⁶⁴ Vienna Convention on the Law of Treaties, signed 23 May, 1969, 1155 UNTS 331, Art. 31.

⁶⁵ Tokyo Convention, Article 3.

⁶⁶ Idem, Article 3(3).

this could give rise to a conflict of criminal jurisdictions. Proposals to solve such conflict by including a system of priorities in the Convention have been rejected⁶⁷

Indeed, some writers criticized the Tokyo Convention precisely because it did not establish priorities among potential claims to jurisdiction.⁶⁸

2.26 The 1970 Hague Convention, upon which the Montreal Convention is closely based, is similar. It requires that several states potentially connected to an offense be able to exercise jurisdiction, but it does not give priority to any of them. During the Hague diplomatic conference, the lack of a system of priorities under the Tokyo Convention was recognized. However, the conference decisively rejected two proposals, one by the Union of Soviet Socialist Republics and Poland, and a second by Ghana, to provide that that state of the aircraft's registry would have priority to claim jurisdiction.⁶⁹

As a result, there is no system of priorities under the Hague Convention:

The jurisdiction of the state of registration, the state of landing, the state of the lessee and the state where the offender is present, are concurrent. No priorities have been fixed despite a proposal to this effect in the Legal Committee and the Diplomatic Conference, and despite the fact that it was pointed out that the difficulty in accepting the Tokyo Convention has been the question of multiple jurisdiction, for the reason that it would be too difficult to determine the priorities.⁷⁰

2.27 The Montreal Convention was rapidly developed in 1970-71 following bomb attacks on Swiss and Austrian airliners. The negotiators used the provisions of the

⁶⁷ G.F. Fitzgerald, supra note 48, p. 238.

⁶⁸ R. Hirano, supra note 48, p. 45. See also Alec Samuels, "Crimes Committed on Board Aircraft: Tokyo Convention Act 1967," 42 Brit. Ybk. Int'l Law, p. 272 n. 7 (1969).

⁶⁹ Several delegations to the Seventeenth Session of the ICAO Legal Committee argued for the need to establish which state has priority in the event of overlapping jurisdiction. See 1970 Legal Committee Records, pp. 119, 135, 153. However, the Conference ultimately rejected proposed amendments to that effect. See ICAO, International Conference on Air Law, The Hague, December 1970, Volume I, MINUTES, ICAO Doc. 8979-LC/165-1, pp. 70-74 (1972). Counter-Memorial Exhibit 26.

⁷⁰ S.K. Agrawala, Aircraft Hijacking and International Law, p. 42 (1973) (footnotes omitted).

recently concluded Hague Convention as a reference point, repeating many articles verbatim.⁷¹ The debates at Montreal demonstrate that, as with the Tokyo and Hague Conventions, the Montreal Convention gave no priority to any of the states it authorized to prosecute an offense.

2.28 As at the Hague Conference, the delegation of the USSR again offered unsuccessful proposals to give priority for prosecution to the state of registry of the aircraft, arguing that:

as an offence against an aircraft, crew and passengers might lead to several States wishing to claim jurisdiction, his proposal was that the State of Registry of the aircraft should have primary jurisdiction.⁷²

However, these proposals to give priority to one of the states potentially authorized to prosecute were rejected by the Conference by large margins.⁷³ Other delegations suggested that other states entitled to exercise jurisdiction besides the state of registry might be best situated to do so; in the view of the delegate of France, for example:

[i]t was the State in the territory of which the aircraft landed that would be in the best position to deal with the offender and to start prosecution.⁷⁴

However, no such suggestion gained general acceptance.

2.29 During the debate at Montreal, several delegations commented on the absence of a system of priorities in the new convention:

Austria -- "in the field of international criminal law and extradition law, there had already been some initiatives to establish a hierarchy of jurisdiction, but none had

⁷¹ N.D. Joyner, *supra* note 46, pp. 218-19.

⁷² 1971 Montreal Conference Records, p. 61. Counter-Memorial Exhibit 24.

⁷³ *Idem*, pp. 52-54, 58, 61-62.

⁷⁴ *Idem*, p. 58.

succeeded. He doubted whether it would be possible in this instance either to establish any hierarchy of jurisdiction or of requests for extradition⁷⁵

Indonesia - "he had difficulty in accepting any concept of priority of jurisdiction. He could accept the concept of alternative jurisdictions, as had been done in the Hague."⁷⁶

People's Republic of the Congo -- "The USSR proposal threw doubt on the flexibility which had been so laboriously achieved at the Hague and with which he believed the present convention should be aligned."⁷⁷

Bulgaria -- "discussion at the previous meeting had clearly demonstrated the various claims which could be made to jurisdiction . . . he considered it logical that there should be an order of priority. Because he believed that this problem required solution he did not accept the argument that the question had already been debated at the Hague. . . ."⁷⁸

As these statements show, there was no agreement to add any system of priorities to the Montreal Convention, and none was written into the text. The delegates at Montreal did not give any of the states authorized to exercise jurisdiction under the convention priority over any other.

⁷⁵ Idem, pp. 61-62.

⁷⁶ Idem, p. 62.

⁷⁷ Idem, p. 62.

⁷⁸ Idem, p. 62.

Section 2. Other Provisions Identified by the Court Do Not Alter the Meaning of Article 7

2.30 None of the four other provisions identified in paragraph 28 of the Court's judgment as potentially bearing upon the construction of Article 7 -- Articles 1, 5, 6 and 8 -- materially alters the meaning of Article 7. They do not support Libya's claim for a priority or create other relevant obligations. If anything, they support the conclusion that Libya has neither an exclusive right to prosecute nor a priority in prosecution.

2.31 Article 1 defines offenses against the Convention. There seems to be no dispute between Libya and the United States that the destruction of Pan Am 103 can be viewed as an offense under the Convention. Article 5 obliges parties to the Convention to establish domestic criminal jurisdiction over offenses in specified situations. As noted, the United States has done so, and Libya contends that it has done so. There is no dispute between the parties in this respect. Libya has pointed to no conduct by the United States that can reasonably be understood as a violation of Article 5.

2.32 Article 6 requires a contracting state to take into custody offenders or alleged offenders found in its territory. It also requires that state to notify several other states of the arrest, including all those authorized to prosecute the offender under Article 5(1). Insofar as Article 6 may bear upon the interpretation of Article 7, it seems to confirm that the Montreal Convention does not give priority to a state holding the accused. Article 6's requirement that the state holding an offender notify each of the other states entitled to exercise jurisdiction allows each of them to consider whether it will seek to exercise that right. If so, it can take action through diplomatic, law

enforcement or other appropriate channels to seek a transfer of custody. There is no basis for concluding that the United States is in violation of any obligation under Article 6.

2.33 Article 8 concerns the interaction of the Convention with extradition treaties. Libya has identified no actions by the United States contrary to Article 8, nor has it explained how this Article is thought to support Libya's claim to priority under Article 7. The most relevant aspect of Article 8 appears to be that it illustrates the enabling, facilitating character of the Montreal Convention. The article contains several provisions that may facilitate the transfer of accused persons between states, either in the context of existing extradition treaties or otherwise. This shows how the Montreal Convention is aimed at assisting states in bringing about the effective prosecution of offenders, not at limiting their right or capacity to do so.

2.34 Thus, none of the additional provisions invoked by Libya and noted by the Court in paragraph 28 of its judgment -- Articles 1, 5, 6 and 8 -- has been violated by any action by the United States. None supports Libya's claim to have an exclusive right or priority in the investigation and prosecution of those accused of destroying Pan Am 103.

CHAPTER IV

THE UNITED STATES HAS NOT VIOLATED ARTICLE 11

2.35 The previous Chapter showed that the United States has not violated Article 7 of the Montreal Convention. In its judgment of 27 February, the Court also decided that “there equally exists between [the parties] . . . a dispute which concerns the interpretation and application” of Article 11.⁷⁹ Article 11 provides:

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

This Chapter demonstrates that there has been no violation of Article 11.

2.36 So far as we are aware, Libya’s claims under Article 11 rest upon just one request, contained in a 27 November 1991 letter in Arabic from Judge Ahmad Al-Tahir al-Zawi, Judge of the High Court, addressed to the foreman of the federal grand jury in the District of Columbia.⁸⁰ That letter did not mention the Montreal Convention or

⁷⁹ Judgment of 27 February, 1998, para. 32.

⁸⁰ 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, Counter-Memorial Exhibit 27. (Rule 6(e) of the Federal Rules of Criminal Procedure provides that “the court shall appoint one of the jurors to be foreperson The foreperson shall have the power to administer oaths and affirmations and shall sign all indictments. The foreperson . . . shall keep a record of the number of jurors concurring in the finding of every indictment and shall file the record with the clerk of the court” See 1995 U.S. Exhibit 4). A letter dated 18 January 1992 from Libya’s Permanent Representative to the President of the Security Council, 1995 U.S. Exhibit 16, refers to a communication said to have been sent by Judge Al-Zawi to the “Attorney General of the United States of America.” We have not located such a communication to the Attorney General. However, in context, it appears that there may be a typographical error in the text of the 18 January Libyan letter. The communication referred to may have been addressed to the Attorney General of the United

identify itself as a request for assistance pursuant to Article 11 of the Convention. It was not transmitted in conformity with the normal procedures for inter-state requests for assistance in criminal matters. It did not indicate that the Government of Libya in any way believed the requested assistance was legally required. Instead, the letter contained a general request that the foreman of the grand jury provide access to "all the documents and investigative reports related to this grievous incident."

2.37 A state called upon to provide law enforcement assistance that the requester claims to be legally required surely is entitled to be told of the requester's position and of the legal basis for the request. Judge al-Zawi's request did not do either. His letter did not refer in any way to the Montreal Convention. It did not suggest that there was any obligation to provide the material sought. Instead, the letter was framed as a request, in language indicating that compliance by the addressee was voluntary. ("We *hope* that you will make this *possible . . .*") (Emphasis added.)

2.38 In addition, the assistance requested could not lawfully be provided. Assuming, *arguendo*, that Judge al-Zawi's letter was an effective request for assistance under the Montreal Convention -- which we believe is highly doubtful -- the United States was not obliged to provide the material requested. First, through its resolutions, the Security Council has determined that United Kingdom or United States courts, and not Libyan courts, are the appropriate venue for trial of the accused. In light of the Council's actions, any criminal proceedings by Libya against the accused would be inconsistent with the legally controlling allocation of jurisdiction. Accordingly,

Kingdom, who would be expected to have received such a communication but is not otherwise listed as having received one.

following the Security Council's actions, the United States could not be obligated to respond to any Libyan request for assistance under Article 11, since any such requirement would conflict with the Council's decisions allocating jurisdiction to United States or United Kingdom courts.

2.39. Second, the terms of Article 11 did not require the United States to provide the additional material Libya requested. The United States gave Libya a substantial description of the case against the two accused. The United States transmitted to the Libyan authorities, through the Government of Belgium, the United States grand jury's detailed indictment⁸¹ containing the charges against them. The indictment contained a detailed description of the charges and of the criminal acts the defendants allegedly committed.⁸² The indictment made Libya well aware of the criminal case against the accused, and offered a "road map" for any substantial bona fide criminal investigation. Judge al-Zawi asked no specific questions regarding the contents of the indictment. Instead, he made a sweeping request to the grand jury for all documents and investigative reports.

⁸¹ 1995 U.S. Exhibit 1.

⁸² Libya regularly contends that the indictment shows that the U.S. judiciary has pre-judged the guilt of the accused (E.g., Libyan Observations and Submissions, paras. 1.6, 1.54). This suggests an important misunderstanding of the U.S. criminal process. Under U.S. criminal procedure, the indictment of persons accused in a case is not the act of a judge. Indictments are accusations drafted on the basis of available evidence by career government prosecutors. These charges must be presented to and approved by a grand jury, which is a group of up to 23 ordinary citizens who act as a check on the power of prosecutors to bring unwarranted prosecutions. The grand jury hears evidence and determines whether there is sufficient basis to proceed with the charges in the form of an indictment. The charges in the indictment must then be proved beyond a reasonable doubt at the trial before an impartial judge and jury. The role of the indictment in U.S. criminal procedure is more fully described in Appendix 1 to the Annex of Factual Background. Counter-Memorial Exhibit 1.

2.40 Article 11 did not require the United States to turn over this additional extensive and sensitive material. The requirement to provide assistance under the first sentence of Article 11(1) must be read together with the second sentence, that: “[t]he law of the State requested shall apply in all cases.” Assistance can be provided under Article 11 only if it conforms to the legal requirements of the requested state. As we shall show, the applicable provisions of United States law directly bar providing the material Libya requested.

2.41 There was only a short discussion of Article 11 at the Montreal Conference, after which the delegates adopted a slightly modified version of the text of Article 10 of the earlier Hague Convention.⁸³ However, this discussion emphasized that the national law of the requested state controls the extent of any assistance to be provided. In answer to an Australian request for clarification of the second sentence (containing the reference to national law), the conference secretary explained:

that the sentence was in fact borrowed from certain European instruments regarding extradition. Article 10 required that States afford each other the greatest measure of assistance and it was necessary to specify what in fact this “greatest measure” would be. If both States were party to a multilateral extradition treaty, there would be no problem because the national laws in this regard would be in conformity with that multilateral document; however, if either the requesting or the requested States were not party, then, by the provision of Article 10, the national law of the requested State would apply.⁸⁴

2.42 The negotiating history also indicates the importance that delegates attached to ensuring that the extent of cooperation under Article 11 was subject to the requirements of national law. A working text proposed by the Chairman of the ICAO

⁸³ Article 10(1) of the Hague Convention reads: “Contracting States shall afford one another the greatest measure of assistance in connection with criminal proceedings brought in respect of the offence and other acts mentioned in Article 4. The law of the State requested shall apply in all cases.”

⁸⁴ 1971 Montreal Conference Records, p. 66. Counter-Memorial Exhibit 24.

Legal Committee stated that "Contracting States shall, in accordance with the applicable law, afford one another the greatest measure of assistance"⁸⁵ However, some delegates viewed this as ambiguous. Accordingly, the conference decided to re-use the Hague Convention text, which places the national law reference in a separate sentence and leaves no doubt that assistance under Article 11 is required only if it satisfies the requirements of national law.

2.43 It would be contrary to United States law to provide the specific assistance requested by Libya. As noted, Libya's claims under Article 11 seem to rest upon the 27 November 1991 letter from Judge Al-Zawi to the foreman of the federal grand jury in the District of Columbia.⁸⁶ United States law expressly forbids grand jurors from disclosing material that comes to them in the performance of their duties. Rule 6(e) of the Federal Rules of Criminal Procedure states in relevant part:

A grand juror, an interpreter, a stenographer, an operator of a recording device, a typist who transcribes recorded testimony, an attorney for the government, or any person to whom disclosure is made under paragraph (3)(A)(ii) of this subdivision shall not disclose matters occurring before the grand jury, except as otherwise provided for in these rules.⁸⁷

No exceptions to this rule of secrecy apply to grand jurors or the foreperson. For them, the rule of non-disclosure is absolute, and any knowing violation "may be punished as a contempt of court." Rule 6(e) thus barred that foreperson of the grand jury from providing the materials requested by Judge al-Zawi.

⁸⁵ ICAO, International Conference on Air Law, Montreal, September, 1971, Volume II, DOCUMENTS, Doc. 9081-LC/170-2 at 17 (1973). Counter-Memorial Exhibit 24.

⁸⁶ Counter-Memorial Exhibit 27.

⁸⁷ The full text of Rule 6(e) and associated rules are at 1995 U.S. Exhibit 4.

2.44 Even were the particular assistance requested by Libya not directly prohibited by United States law, Article 11 does not require turning over the extensive material related to the prosecution that Judge al-Zawi requested ("all the documents and investigative reports"). The wording adopted at The Hague and carried forward at Montreal indicates that in determining the level of assistance to be provided, context -- the particular circumstances involved -- are to be taken into account. A requested state is not required to provide all assistance requested or all that might hypothetically be possible. Rather, it is to provide the greatest measure of assistance that can be provided in the circumstances.

2.45 In the circumstances of this case, it was appropriate -- indeed necessary -- for the United States to take into account the substantial indications that the accused were agents of the requesting state in deciding how to respond to Libya's request for assistance. Clearly, in these circumstances, the provision of assistance could frustrate, and not promote, the effective prosecution of offenders. (And, as noted in paragraph 2.38, it would also conflict with the directives of the Security Council regarding the states that should exercise criminal jurisdiction in this case.)

2.46 Interpreting Article 11 as Libya demands conflicts with the object and purpose of the Convention -- assuring the effective exercise of jurisdiction over persons accused of attacks on civil aviation. When Judge al-Zawi sent his request in late November 1991, extensive investigations by United States and United Kingdom authorities had established substantial grounds for believing that alleged operatives of Libyan intelligence had destroyed Pan Am 103. The results of these investigations were all the more serious in light of Libya's history of using and supporting terrorist violence.

2.47 In these circumstances, it was reasonable for U.S. officials to conclude that complying with Libya's request would probably result in the premature disclosure to the alleged perpetrators of a terrorist act of the evidence against them prior to their appearance before the court.⁸⁸ This would give those perpetrators a powerful tool to disrupt further investigations and to prevent an effective trial. In these circumstances, it would defeat the whole purpose of the Convention to interpret Article 11 to require that materials presented to the grand jury be handed over as Libya asked.

⁸⁸ Under U.S. criminal law and procedure, defendants who have not made an initial appearance before the court do not have the discovery rights that are available to them after they have surrendered to the jurisdiction of the court.

CHAPTER V

THE UNITED STATES DID NOT UNLAWFULLY 'SET ASIDE'
THE MONTREAL CONVENTION

2.48 The fourth and final dispute regarding interpretation and application of the Montreal Convention identified in the Court's judgment of 28 February 1998 involves Libya's claim that the United States somehow caused the Montreal Convention to be "set aside" contrary to the Convention's requirements.⁸⁹

2.49 The Court should also reject this claim. As the Separate Opinion of Judge Kooijmans⁹⁰ and the Joint Declaration of Judges Guillaume and Fleischhauer point out, the Court can have jurisdiction over this claim "only if, and in so far as, it concerns the interpretation and application of one or more of the provisions of the Convention."⁹¹ Libya's claim, however, is that the United States has acted to "set aside" the Convention by means that are "at variance with the principles of the United Nations Charter and . . . the mandatory rules of general international law prohibiting the use of force and the violation of the sovereignty, territorial integrity, sovereign equality and political

⁸⁹ Judgment of 27 February 1998, paras. 33-35.

⁹⁰ *Idem*, Separate Opinion of Judge Kooijmans, para. 8.

⁹¹ *Idem*, Joint Declaration of Judges Guillaume and Fleischhauer, p. 4. See also Case Concerning Oil Platforms (Islamic Republic of Iran v. United States of America), Preliminary Objection, Judgment, I.C.J. Reports 1996, p. 814, para. 28, in which the Court confirmed that Article I of the United States-Iran Treaty of Amity did not incorporate and thereby bring within the Court's jurisdiction all the rules of general international law regulating peaceful and friendly relations between states.

independence of States.”⁹² The United States denies that its actions have violated the Charter or the rules of general international law invoked by Libya. However, disputes between the United States and Libya regarding the Charter or the rules of general international law manifestly do not concern the interpretation and application of the Montreal Convention. The Court does not have jurisdiction over them under Article 14 of the Montreal Convention.

2.50 Perhaps this final Libyan claim rests upon the view that the United States has violated another unwritten obligation in the Montreal Convention. This time, the unwritten obligation requires that the United States (and presumably all other states as well) not appeal to the Security Council concerning a matter claimed to be completely and exclusively regulated by the Convention,⁹³ or that it exhaust the Convention’s procedures before appealing to the Council.⁹⁴ We have demonstrated that the Montreal Convention is not the exclusive legal framework for states to deal with the bombing of their airliners, and that the Convention does not preclude states party from exercising jurisdiction on other bases, or from seeking the surrender of accused persons for the purpose of exercising such jurisdiction. Thus, even within the framework of the Convention, Libya is not entitled to the jurisdictional priority it asserts.

2.51 Even were this not so, the Court should not accept Libya’s final claim. Libya contends that by applying to the Security Council to try to have it oblige Libya to

⁹² Judgment of 27 February 1998, para. 33.

⁹³ Libyan Observations and Submissions, para. 2.16.

⁹⁴ Idem, para. 2.20.

surrender the accused to them the respondent deprives Libya of a right explicitly recognized it by the Montreal Convention. However, it cannot violate international law for a state to bring before the Security Council a situation that state believes threatens international peace and security. The right to do so is recognized by Article 35 of the Charter, which makes clear that any Member of the United Nations has the right to bring to the Security Council's attention any situation likely to endanger the maintenance of international peace and security. Many -- indeed, perhaps most -- of the situations in which the Security Council is urged to act in response to threats to peace and security are regulated in some degree by treaties or involve claims of rights by states under treaties. That is part of the reason for including Article 103 in the Charter.⁹⁵ It cannot violate those treaties for one of the states concerned to exercise its right under the Charter to appeal to the Security Council.

⁹⁵ Article 103 of the Charter is analyzed in greater detail in Part III, infra.

CHAPTER VI

LIBYA'S CLAIMS UNDER THE MONTREAL CONVENTION
HAVE BECOME MOOT

2.52 This Part has shown that the United States has not violated Articles 7 or 11 of the Montreal Convention or any other Article referred to by Libya. However, the Court need not decide Libya's claims under the Convention, for the issues raised by those claims have become moot. As Part III of the Counter-Memorial shows, the legal rules applicable in this dispute are those established by binding resolutions of the Security Council. Accordingly, any decision by the Court on Libya's claims under the Montreal Convention would be without practical object or effect.

2.53 At the Preliminary Objections stage of this case, the Court decided that the Security Council's Chapter VII resolutions were not a bar to the admissibility of Libya's Montreal Convention claims because those resolutions were adopted after the Application was filed.⁹⁶ Nevertheless, the resolutions must be taken into account at the current merits stage. The situation as to Libya's Montreal Convention claims is thus like that in the case concerning the Northern Cameroons, where the Court declined to decide the Cameroons' claims because doing so would be without legal consequence. In that case, as with Libya's Montreal Convention claims here:

The Court must discharge the duty to which it has already called attention -- the duty to safeguard the judicial function. Whether or not at the moment the Application was filed there was jurisdiction in the Court to adjudicate upon the dispute submitted to it, circumstances that have since arisen render any adjudication devoid of purpose. Under

⁹⁶ Judgment of 27 February 1998, para. 43.

these conditions, for the Court to proceed further in the case would not, in its opinion, be a proper discharge of its duties.⁹⁷

2.54 The Court followed the same wise course in the Nuclear Tests cases, declining to decide the Applicants' claims where the dispute that gave rise to them had disappeared:

The Court, as a court of law, is called upon to resolve existing disputes between States. Thus the existence of a dispute is the primary condition for the Court to exercise its judicial function . . . The dispute brought before it must therefore continue to exist at the time when the Court makes its decision. It must not fail to take cognizance of a situation in which the dispute has disappeared

Thus the Court concludes that, the dispute having disappeared, the claim advanced by Australia no longer has any object. It follows that any further finding would have no raison d'être.⁹⁸

For the same reasons, the Court should not decide Libya's claims based upon the Montreal Convention. Those claims have become moot as a result of the Security Council's mandatory resolutions. As to them, "no further pronouncement is required The object of the claim having clearly disappeared, there is nothing on which to give judgment."⁹⁹

⁹⁷ Case Concerning the Northern Cameroons, Judgment, I.C.J. Reports 1963, p. 38.

⁹⁸ Nuclear Tests (Australia v. France), Judgment, I.C.J. Reports 1974, pp. 270-271, paras. 55-56.

⁹⁹ Idem, pp. 271-272, para. 59.

PART III

**THE SECURITY COUNCIL'S RESOLUTIONS
PRECLUDE THE CLAIMS ADVANCED BY LIBYA**

3.1 Part II of this Counter-Memorial showed why the Court should reject Libya's four claims that the United States has violated the Montreal Convention. But were any of these claims under the Convention valid, the binding resolutions of the Security Council adopted under Chapter VII of the Charter have nevertheless displaced them. Those binding resolutions establish the controlling legal rules in this case.¹⁰⁰

3.2 The Court has already recognized the controlling effect of the Security Council's resolutions. In its 14 April 1992 Order denying Libya's request for provisional measures, the Court was not prepared to decide finally the legal effect of Security Council Resolution 748. However, the Court's Order clearly recognized the legal authority of the rules established by Security Council Resolutions, and made clear states' duty to comply with them:

Whereas both Libya and the United States, as Members of the United Nations, are obliged to accept and carry out the decisions of the Security Council in accordance with Article 25 of the Charter; whereas the Court, which is at the stage of proceedings on provisional measures, considers that *prima facie* this obligation extends to the decision contained in Resolution 748 (1992); and whereas, in accordance with Article 103 of the Charter, the obligations of the Parties in that respect prevail over their obligations under any other international agreement, including the Montreal Convention¹⁰¹

¹⁰⁰ The legal effect of the Security Council's resolutions was argued at the preliminary objections stage. However, the Court concluded that the United States arguments regarding the resolutions' effect did not, "in the circumstances in the case, have an exclusively preliminary character." Judgment of 27 February 1998, para. 53(3).

¹⁰¹ Provisional Measures, p.126, para. 42.

The Court has thus concluded that prima facie the obligations imposed by Resolution 748 govern this case. Libya has shown no reason to reverse that conclusion at this final stage.

3.3 Judge Weeramantry, while dissenting from the judgment of the Court on other grounds, described the legal effect of the resolutions clearly:

Without expressing definitive views on the matter at this stage of provisional measures, I take the view that resolution 748 (1992) must be treated as binding on Libya as on all countries in terms of Article 25 of the United Nations Charter and that, in terms of Article 103, the obligations it lays down prevail over the obligations flowing from any other international agreement. In specific terms, this means that Libya is, prima facie, bound by the provisions of that resolution even if they should conflict with the rights Libya claims under the Montreal Convention. In this respect, I am in agreement with the view of the majority of the Court.¹⁰²

3.4 Chapter I of this Part reviews the specific legal rules established by Security Council Resolutions 748, 883 and 1192. Chapter II analyzes how the rules established by those resolutions are binding on Libya and other Members of the United Nations under the Charter. This Chapter also rebuts several Libyan arguments against the controlling effect of the resolutions. Chapter III shows how the Security Council properly adopted its resolutions in the exercise of powers conferred by the Charter. It also refutes several additional Libyan arguments that these resolutions were not validly adopted or are otherwise invalid or ineffective.

¹⁰² *Idem*, Dissenting Opinion of Judge Weeramantry, p. 177.

CHAPTER I

LIBYA'S OBLIGATIONS UNDER THE RESOLUTIONS ARE CLEARLY INCONSISTENT WITH ITS CLAIMS IN THIS CASE

3.5 The United States maintains that Security Council Resolutions 748, 883 and now 1192 require the transfer of the two Libyan suspects for trial in a United Kingdom or United States court, including the proposed Scottish court to be convened in The Netherlands. Libya has denied that resolutions 748 and 883 have this effect, instead contending that they should be interpreted merely as requests for Libyan proposals, offers to negotiate, or other significantly lower standards of compliance.¹⁰³ This Chapter shows that the applicable Security Council resolutions do indeed impose a legal obligation to transfer the suspects for trial.

3.6 The Court may wish to begin consideration of this issue by recalling Resolution 1192 relating to the United Kingdom/United States initiative for a trial of the accused in The Netherlands, adopted by the Security Council on 26 August 1998.¹⁰⁴ In Resolution 1192, the Council emphasized that Libya had not complied with its past resolutions, and demanded in operative paragraph 1 that Libya immediately do so. In paragraph 4, the Council:

Decides that all States shall cooperate [to implement the initiative]. . . , and in particular *that the Libyan Government shall ensure the appearance in the Netherlands of the two*

¹⁰³ E.g., Libyan Memorial, para. 6.6, et seq.

¹⁰⁴ Counter-Memorial Exhibit 3.

accused for the purpose of trial by the Court described in paragraph 2 (Emphasis added.)

3.7 Thus, Libya's obligation under the applicable Security Council resolutions is not to make counter-proposals or to offer to negotiate, as Libya would have it. Rather, as the Security Council reiterated in Resolution 1192, it is to "ensure the appearance . . . of the two accused for the purpose of trial." Libya's representative clearly acknowledged that the resolution had this effect during the Security Council debate prior to adoption of Resolution 1192.¹⁰⁵

3.8 Prior to Resolution 1192, the nature of Libya's obligation to transfer the accused was likewise quite clear. The starting point in the structure of Libya's obligations is Security Council Resolution 731, adopted unanimously on 21 January 1992.¹⁰⁶ In that resolution, all fifteen Council members declared themselves "deeply concerned over the results of the investigations, which implicate officials of the Libyan Government" in the bombings of Pan Am 103 and UTA 772. The Council urged Libya to respond fully to specific demands from the British, United States and French governments contained in several Security Council documents. Three of these documents merit particular mention:

-- Document S/23308¹⁰⁷ is a Declaration of the United Kingdom and United States Governments issued soon after the Scottish and U.S. criminal charges were announced in November 1991. The two Governments called for Libya to surrender for trial before United Kingdom or United States courts the persons

¹⁰⁵ 3920th Meeting of the Security Council, 27 August 1998, Doc. S/PV.3920, p. 5. Counter-Memorial Exhibit 11.

¹⁰⁶ 1995 U.S. Exhibit 18.

¹⁰⁷ 1995 U.S. Exhibit 9.

charged with destroying Pan Am 103, to accept responsibility for their actions, to provide full disclosure, and to pay appropriate compensation.

-- Document S/23306¹⁰⁸ was a communiqué from the Presidency of the French Republic and the French Ministry of Foreign Affairs, demanding that Libya produce evidence and otherwise cooperate in France's investigation of the 1989 bombing of UTA Flight 772.

-- Document S/23309¹⁰⁹ was a tripartite French/British/United States declaration of 27 November 1991. In it, the three Governments "require that Libya comply with all . . . [their] demands, and, in addition, that Libya commit itself concretely and definitively to cease all forms of terrorist action and all assistance to terrorist groups."

Through Resolution 731, the Security Council unanimously adopted these demands for specific actions by Libya as its own.

3.9 The Council next adopted Resolution 748, which established Libya's legal duty to transfer the accused. It was adopted by 10 votes in favor, with no negative votes and five abstentions. Austria, Belgium, Ecuador, France, Hungary, Japan, Russia, the United Kingdom, the United States and Venezuela voted for it. Resolution 748 directs that Libya "must now comply without any further delay with paragraph 3 of Resolution 731." (Paragraph 3 refers to the documents containing the French, British and U.S. demands summarized above.) The Council thus placed a binding legal obligation upon Libya to do the things specified in those documents. Libya was legally required, among other things, to surrender for criminal trial in the courts of Scotland or the United States, the persons charged with destroying Pan Am 103.

¹⁰⁸ 1995 U.S. Exhibit 10.

¹⁰⁹ 1995 U.S. Exhibit 11.

3.10 It was well understood by Council members that, in adopting Resolution 748, the Council was imposing a legal obligation to transfer the accused for trial in a United States or United Kingdom court. The representative of the United States expressed this understanding.¹¹⁰ Libya, too, understood Resolution 748 this way. Before this Court, Libya objected to Resolution 748 precisely because it required Libya to transfer its nationals for trial. The Court's Order of April 14 1992 records Libya's contemporaneous understanding of Resolution 748:

[W]hereas in its observations on Security Council resolution 748 (1992) presented in response to the Court's invitation, Libya contends [that] . . . by deciding, in effect, that Libya must surrender its nationals to the United States and the United Kingdom, the Security Council infringes . . . rights conferred on Libya . . .¹¹¹

3.11 The Security Council subsequently confirmed its requirements. On 11 November 1993, Resolution 883¹¹² found that Libya's continued failure to demonstrate its renunciation of terrorism, and to respond effectively to the Council's earlier resolutions, constituted a threat to international peace and security. Paragraph 16 of Resolution 883 reiterated and made clear the Council's requirement to bring about the transfer of the accused for trial in United Kingdom or United States courts. In paragraph 16, the Council expressed its readiness to suspend sanctions against Libya:

*immediately if the Secretary-General reports to the Council that the Libyan Government has ensured the appearance of those charged with the bombing of Pan Am 103 for trial before the appropriate United Kingdom or United States court and has satisfied the French judicial authorities with respect to the bombing of UTA 772 . . .*¹¹³

¹¹⁰ 3063rd Meeting of the Security Council, 31 March 1992, Doc. S/PV 3063, p. 66. 1995 U.S. Exhibit 22.

¹¹¹ Provisional Measures, p. 125, para. 38.

¹¹² 1995 U.S. Exhibit 32.

¹¹³ Emphasis added.

Resolution 883 was adopted by eleven votes to none. Brazil, Cape Verde, France, Hungary, Japan, New Zealand, Russia, Spain, the United Kingdom, the United States and Venezuela joined in voting for it. The statements of the Representatives of the United States, France, the United Kingdom, Russia, Spain and Hungary demonstrate the Council's understanding that its resolutions required Libya to hand over the suspects for trial.¹¹⁴

3.12 As noted earlier, Resolution 883 was recently followed in August 1998 by Resolution 1192, through which a unanimous Council called attention to Libya's failure to comply with its duty under previous resolutions to surrender the two accused, and again demanded "that the Libyan Government immediately comply" with those resolutions. The Council also expressly required "that the Libyan Government shall ensure the appearance in the Netherlands of the two accused for the purpose of trial"

3.13 Thus, notwithstanding Libya's imaginative contrary interpretations, Resolutions 748, 883 and 1192 create clear and binding international legal obligations. They require Libya to surrender for a proper criminal trial those accused of having destroyed Pan Am 103. They further require Libya to provide all relevant testimony and evidence to the Scottish court to be convened in The Netherlands as that Court may direct. These requirements are inconsistent with Libya's assertions that it has the sole right to try the accused, and that the United States must hand over to Libya the evidence considered by the grand jury and the record of its proceedings.

¹¹⁴ See 1995 U.S. Exhibit 33, pp. 41, 44-45, 55, 58, 62.

CHAPTER II

THE RESOLUTIONS PREVAIL OVER ANY INCONSISTENT CLAIMS OF RIGHTS UNDER THE MONTREAL CONVENTION

3.14 This Chapter examines Libya's international legal obligation to honor the requirements of Resolutions 748, 883 and 1192. Libya must comply with these resolutions, even if their requirements might conflict with rights asserted by Libya under the Montreal Convention.

3.15 This legal situation follows directly from some of the most clear and fundamental provisions of the United Nations Charter, principles that Libya's arguments often disregard or distort. Through the Charter, the Members of the United Nations gave the Security Council primary responsibility for the maintenance of international peace and security. They also empowered the Council to act on their behalf in seeking to maintain international peace and security. As Article 24(1) of the Charter establishes:

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.

3.16 The Council's powers relating to the maintenance of international peace and security are of course not unlimited. The Council, like all other organs of the United Nations, must exercise its powers in accordance with the limitations and requirements of

the Charter.¹¹⁵ Nevertheless, under Article 39 of the Charter, the Council has the duty and authority to determine the existence of threats to the peace, breaches of the peace, or acts of aggression. To deal with such situations, the Council has the exceptional power to authorize the use of force. Under Article 41, the Council is also authorized to:

decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio and other means of communication, and the severance of diplomatic relations.

3.17 Where the Council makes decisions in the exercise of these powers, Members of the United Nations have undertaken an unquestionable commitment to implement those decisions. In Article 25, Members specifically agreed "to accept and carry out the decisions of the Security Council in accordance with the present Charter."

Article 48(1) is to similar effect:

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

Article 103 establishes that in case of any conflict between the obligations of members under the Charter and under any other international agreement, their Charter obligations prevail.

3.18 Thus, the Charter's clear system requires all States, and in particular Libya, to carry out Resolutions 748, 883 and 1192. Nevertheless, Libya has presented an array of arguments seeking to evade these Charter obligations. Some involve dubious

¹¹⁵ Conditions of Admission of a State to Membership in the United Nations (Article 4 of the Charter), Advisory Opinion, I.C.J. Reports 1947-48, p. 64 (hereinafter, "Admissions Case").

interpretations of the Charter; others rest upon other grounds. None of them provides a lawful basis for relieving Libya of its duty to implement the Council's resolutions.

Section 1. The Council can require actions inconsistent with treaty provisions

3.19 Libya first argues that the Council's power to require Members to carry out its decisions is limited by the requirements of other treaties. Libya in effect contends that the Council cannot require any State to take any action contrary to its rights under treaties such as the Montreal Convention.

3.20 This argument seems based in two Charter provisions. First, Article 24(2) requires that, in discharging its duties, the Council "shall act in accordance with the Purposes and Principles of the United Nations." Article 1(1) lists some of those Purposes, including the settlement of international disputes "in conformity with the principles of justice and international law." Therefore, Libya's argument goes, the Security Council can take no action which conflicts with existing requirements of international law, including treaties such as the Montreal Convention.¹¹⁶

3.21 This argument cannot withstand analysis. It does not reflect the language of the Charter, or the long-standing practice of States. To begin, the argument's minor premise fails because it selectively takes the reference to the principles of international law out of the limiting context of Article 1(1) of the Charter. This fundamentally distorts the scope and effect of the reference. Article 1(1) must be read in its entirety:

¹¹⁶ See Libyan Memorial, paras. 6.64, *et seq.*

The Purposes of the United Nations are:

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

3.22 Thus, Article 1(1) establishes as the first Purpose of the United Nations “to maintain international peace and security.” To that end, the Organization carries on two broad types of activities, corresponding to the types of activities foreseen by Chapters VI and VII of the Charter. First, it may “take effective collective measures” to prevent and remove threats to the peace, as authorized by Chapter VII. Second, it is to “bring about by peaceful means” the settlement of international disputes, as authorized by Chapter VI. The reference to the principles of international law occurs in this latter clause of Article 1(1), corresponding to the Organization’s activities under Chapter VI. Libya’s argument, however, ignores this context, and instead seeks to expand the phrase to cover as well actions taken in Chapter VII situations.¹¹⁷ This is not a correct reading of Article 1(1).

3.23 The reference to the principles of international law received close attention in the drafting of Article 1 at San Francisco. The Committee concerned intentionally moved the phrase “in conformity with the principles of justice and international law” from the first part of paragraph 1 to its present location in the latter part, so that it would only apply to the adjustment or settlement of international disputes or situations.¹¹⁸ The

¹¹⁷ E.g., Libyan Observations and Submissions, para. 4.13.

¹¹⁸ See 6 Documents of the United Nations Conference on International Organization, “Report of Rapporteur of Committee 1 to Commission I,” Doc. 944 I/1/34(1), pp. 446, 453-54, (June 13, 1945) (hereinafter, “DUNCIO”); see also Judgment of 27 February 1998, Dissenting Opinion of President Schwebel, p. 11.

Committee Rapporteur's Report showed that this change was made to ensure that the critical task of preventing or removing threats to and breaches of the peace could include measures that might conflict with particular rules of international law otherwise applicable.¹¹⁹

3.24 Thus, it was clear from the outset that preventive or enforcement action under the Charter could -- and often would -- require measures over-riding the legal rights of states under treaties. However when it came to "adjusting or settling" disputes or situations in the non-coercive framework of Chapter VI, the Organization would be expected to act in conformity with existing treaties. This corresponds to the system of Chapters VI and VII of the Charter. Actions by the Security Council in Chapter VI situations are in essence recommendations to the parties to a dispute. Implementation requires consent of the parties, because Chapter VI does not give the Security Council the power to impose solutions. In this context, involving the peaceful settlement of disputes based on the consent of the parties, existing treaties may provide a central framework for constructing recommendations likely to be accepted and implemented.

3.25 Situations involving the exercise of the Council's powers under Chapter VII are fundamentally different. These by definition involve at least a threat to international peace, if not an actual breach of the peace or act of aggression. They characteristically require more substantial and intrusive measures to restore peace and security. Recognizing this, the drafters of Chapter VII gave the Council the exceptional power under Article 42 to authorize the use of force. In other Chapter VII cases not requiring

¹¹⁹ 6 DUNCIO, p. 453.

the use of the force, the Council likewise was authorized to act vigorously to compel compliance. This necessarily includes the power to decide upon measures conflicting with the rights of States under treaties and under general international law. Absent such power, the Charter's regime for meeting threats to or breaches of the peace without the use of force would become a paper tiger.

3.26 This power of the Council is confirmed by several Charter provisions, by commentators, and by widespread and important international practice.

Section 2. The Power to Require Measures Inconsistent with Treaties Necessarily Follows From Articles 103, 48 and 25 of the Charter

A. The Importance of Articles 103, 48 and 25

3.27 Articles 103, 48 and 25 of the Charter confirm the Council's power under Chapter VII to require measures inconsistent with treaties and general international law.

Article 103 provides:

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

Article 48 requires that action to carry out Security Council decisions "shall be taken by all the Members of the Security Council or by some of them, as the Security Council may determine." In Article 25, Members "agree to accept and carry out the decisions of the Security Council in accordance with the present Charter," thus explicitly obliging UN Members to carry out Council decisions. The Court has emphasized the particular importance of this obligation:

[W]hen the Security Council adopts a decision under Article 25 in accordance with the Charter, it is for member States to comply with that decision To hold otherwise

would be to deprive this principal organ of its essential functions and powers under the Charter.¹²⁰

3.28 Read together, these fundamental Charter provisions establish beyond question that the Council can adopt measures requiring actions which conflict with pre-existing rights and obligations under a treaty such as the Montreal Convention. Under Articles 25 and 48, States are bound to carry out such decisions. Under Article 103, this obligation under the Charter prevails over obligations "under any other international agreement."

3.29 Nevertheless, questions have been raised regarding the effect of Article 103. Article 103 by its terms applies to "obligations . . . under the present Charter." It has been suggested that this wording encompasses only obligations stemming directly from the articles of the Charter itself and not obligations stemming from Security Council resolutions.¹²¹ However, states' duty to comply with resolutions is derived directly from Articles 25 and 48 of the Charter. The force of the Security Council's Chapter VII resolutions stems from states' obligations under the Charter to carry them into effect. Thus, Members' obligations to carry the Council's resolutions into effect are "obligations of the Members of the United Nations under the present Charter." As Professor Bernhardt concludes regarding Article 103:

To the extent that the Charter provides for the competence of UN organs to adopt binding decisions, measures taken in accordance with such provisions can lead to obligations of the members that prevail under Art. 103, notwithstanding any other commitments of the

¹²⁰ Legal Consequences of States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276, Advisory Opinion, I.C.J. Reports 1971, p. 54, para. 116 (hereinafter, "Namibia Opinion").

¹²¹ Judgment of 27 February 1998, Separate Opinion of Judge Rezek, para.2.

members concerned. This holds true for decisions and enforcement measures of the SC under Chapter VII. As far as members of the UN are bound by Art. 25 'to accept and carry out the decisions of the Security Council in accordance with the present Charter', they are also bound, according to Art. 103, to give these obligations priority over any other commitments.¹²²

3.30 It has also been noted that Article 103 speaks only of states' "obligations" under their treaties and not of their "rights." Hence, it is suggested that the primacy of Charter obligations under Article 103 may not extend to "rights" under a treaty or under general international law. This suggestion also gives too little weight to states' obligations under the Charter. The obligation to comply with Security Council decisions under Articles 25 and 48 of the Charter applies equally to decisions affecting the rights and to those affecting the obligations of states.

3.31 The Charter creates an unqualified duty to accept and carry out the Council's decisions. The duty to carry out the Council's decisions will often require states to forego the exercise of rights otherwise available to them under treaties or under general international law. Accordingly, in interpreting this aspect of the Charter, this Court has not recognized any distinction between "rights" and "obligations." It has instead stressed the breadth and importance of these Charter provisions.¹²³ Commentators have also stressed the breadth of states' obligations to carry out the decisions of the Council and do not support the view that their duty does not include actions affecting "rights."¹²⁴

¹²² R. Bernhardt, "Article 103," in *The Charter of the United Nations: A Commentary*, p. 1120 (B. Simma ed. 1994) (hereinafter, "Simma"). See T. Flory, "Article 103," in *La Charte Des Nations Unies*, pp. 1382-83 (J.P. Cot & A. Pellet 2d ed. 1971) (hereinafter "Cot & Pellet"); J. Combacau, *Le Pouvoir de Sanction de L'O.N.U.*, p. 283 (1974).

¹²³ See, e.g., *Namibia Opinion*, p. 54, para. 116.

¹²⁴ See, e.g., R. Bernhardt, in *Simma*, *supra* note 122, p. 1120 *et seq.* ("As far as members of the UN are bound by Art. 25 'to accept and carry out the decisions of the Security Council in accordance with the present Charter', they are also bound, according to Art. 103, to give these obligations priority over any

B. Enforcement Measures Often Affect Rights Under Treaties

3.32 Enforcement measures by the Security Council under Article 41 often require one state to forego commerce with another state, or to prevent its nationals from investing or doing business there, even though the rights to trade, invest or do business may otherwise be protected by treaty or customary international law. Such measures may likewise require states to limit their diplomatic contacts or take other actions inconsistent with customary international law rights otherwise available. Such measures obviously have the effect of preventing, at least temporarily, the exercise of otherwise existing treaty and legal rights and obligations of states. Yet, because they are expressly provided for by the Charter, they prevail notwithstanding such conflicting legal rights and obligations by operation of Article 103.

3.33 There are many historical examples of decisions by the Security Council under Article 41 that pose conflicts with treaty obligations or rights under general international law. In this case, Resolutions 748 (1992) and 883 (1993)¹²⁵ directed a variety of measures limiting commerce and diplomatic relations with Libya. The Security Council has taken similar steps in many other situations as well. After Rhodesia unilaterally declared independence, Security Council Resolution 232 (1966)¹²⁶ ordered Member States to completely interrupt economic relations with the new regime and to

other commitments. This was recently demonstrated by SC Res. 670 (1990), adopted in connection with the Iraq/Kuwait crisis, in which the Council recalls 'the provisions of Article 103 of the Charter' and 'Decides that all State, notwithstanding the existence of any rights or obligations conferred or imposed by any international agreement, shall deny . . .' (Emphasis added); E. Suy, "Article 25," in Cot & Pellet, *supra* note 122, p. 471.

¹²⁵ Resolution 748, United Nations Security Council, 3063rd Meeting, 31 March 1992, Doc. S/RES/748.

¹²⁶ Resolution 232, United Nations Security Council, 1340th Meeting, 16 December 1966, Doc. S/RES/232.

impose an arms embargo. The Council also charged specific countries to take specific actions intended to disrupt Rhodesia's economy. Thus, Resolution 221 (1966)¹²⁷ called upon Portugal to prevent the pumping of oil from Mozambique to Rhodesia and called upon the United Kingdom, using armed force if necessary, to interdict the arrival in Mozambique of tankers with oil for Rhodesia. (Resolution 221 included a grant of authority to arrest and detain a specific vessel.) The Security Council also required an arms embargo under Article 41 on South Africa,¹²⁸ a complete economic boycott on Iraq after its invasion of Kuwait,¹²⁹ a general and complete embargo on all deliveries into Yugoslavia of weapons and military equipment,¹³⁰ a general and complete embargo on all deliveries of weapons and military equipment into Somalia,¹³¹ a general and complete arms embargo against Liberia,¹³² a limited trade embargo and assets freeze against Haiti,¹³³ and a boycott and weapons embargo against rebels in Angola.¹³⁴ Each of these enforcement actions interfered to some degree with otherwise binding treaty obligations or rights recognized under international law. However, their legal legitimacy was not subject to any serious question.

¹²⁷ Resolution 221, United Nations Security Council, 1277th Meeting, 9 April 1966, Doc. S/RES/221.

¹²⁸ Resolution 418, United Nations Security Council, 2046th Meeting, 4 November 1977, Doc. S/RES/418.

¹²⁹ Resolution 661, United Nations Security Council, 2933rd Meeting, 6 August 1990, Doc. S/RES/661.

¹³⁰ Resolution 713, United Nations Security Council, 3009th Meeting, 25 September 1991, Doc. S/RES/713.

¹³¹ Resolution 733, United Nations Security Council, 3039th Meeting, 23 January 1992, Doc. S/RES/733.

¹³² Resolution 788, United Nations Security Council, 3138th Meeting, 19 November 1992, Doc. S/RES/788.

¹³³ Resolution 841, United Nations Security Council, 3238th Meeting, 16 June 1993, Doc. S/RES/841.

¹³⁴ Resolution 864, United Nations Security Council, 3277th Meeting, 15 September 1993, Doc. S/RES/864.

C. Article 41 Confirms the Security Council's Power to Act Notwithstanding Inconsistent Claims of Rights Under Treaties

3.34 Article 41 of the Charter specifically lists several non-forcible measures available to the Security Council under Chapter VII, including "complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio and other means of communication, and the severance of diplomatic relations." Embargoes, bans on the sale of arms, bans on air flights and other compulsory measures adopted by the Council pursuant to this Article often prevent States from exercising rights under treaties, but that is what the clear language of Article 41 anticipates. The Security Council's non-forcible measures to restore international peace and security under Chapter VII, by their very nature, can and must prevail over inconsistent rights of states.

D. Libya's Claims that the Montreal Convention Prevails as Lex Posterior or As a Lex Specialis Are Unavailing

3.35 Libya also seeks to avoid its obligation to comply with the Security Council's resolutions through flawed arguments derived from treaty law. Libya contends that the Montreal Convention was *lex posterior* to the Charter and, further, that it constitutes a *lex specialis* as to its subject matter.¹³⁵ It is therefore asserted that Libya's claimed rights under the Montreal Convention are superior to its obligations under the Charter.

3.36 These are unsound and dangerous arguments, for they would open the door to the destruction of the legal regime of the Charter. No state practice, scholarly opinion,

¹³⁵ Libyan Observations and Submissions, para. 2.18.

or other persuasive authority is cited to support them. However, it is not necessary to reach their merits. There is no necessary inconsistency between Libya's Charter obligations and its situation under the Montreal Convention; the two can be construed in harmony. When states negotiated the Montreal Convention, they did so subject to their common agreement in Article 103 of the Charter to accord priority to their obligations under the Charter. Libya has referred to nothing in the language or history of the Montreal Convention indicating that the Parties sought to change or supersede this basic Charter commitment.

3.37 Even if Libya's arguments did not fail on this basis, the Court should not accept them. As shown previously, the superiority of obligations under the Charter over obligations under prior or subsequent treaties is a basic principle affirmed by Article 103. Libya's *lex posterior* argument would render Article 103 a nullity as to any treaty concluded by any state following its acceptance of the UN Charter.

3.38 The *lex posterior* rule advocated by Libya cannot bring about by implication the repeal of treaty obligations established by the Charter. Article 30(1) of the Vienna Convention on the Law of Treaties, which expresses the rule that a treaty later in time generally prevails, clearly recognizes this. The general rule contained in Article 30(1) is made expressly "[s]ubject to Article 103 of the Charter of the United Nations."

3.39 A similar response must be given to Libya's argument that the Montreal Convention is *lex specialis* prevailing over the more general provisions of the Charter. Under Libya's theory, almost any treaty addressing a specific subject matter could be deemed superior to the Charter. Again, this would conflict with Article 103 and with the basic premises of the Charter.

3.40 Thus, Libya's arguments for the superiority of the Montreal Convention over the Charter would fundamentally weaken the legal regime of the United Nations. They would permit States to "contract out" of Chapter VII or of any other Charter provisions they found burdensome or inconvenient. These are pernicious and unsupported doctrines. They should not be sanctioned by the Court.

E. Individual UN Members Do Not Have the Right to Choose Whether Or Not to Comply With Security Council Resolutions

3.41 Libya also contends that it need not comply with Resolutions 748 and 883 -- that the Resolutions are not "opposable" to it -- because it believes those resolutions are not based upon the Charter or exceed the Council's powers.¹³⁶ This argument is also dangerous and must fail.

3.42 In Article 24 of the Charter, members gave the Security Council the primary responsibility for the maintenance of peace and security and agreed that the Council acts on their behalf in carrying out this responsibility. Under Article 39, the Council is responsible for determining the existence of threats or breaches of international peace and security and for determining the measures required in response. Under Article 25, states are obliged to carry such decisions into effect.¹³⁷ Once the Council has made such decisions, an individual UN member cannot refuse to comply with them because it disputes the legal validity of the Council's action. This argument, like others advanced

¹³⁶ E.g., Libyan Memorial, para. 6.44, et seq.

¹³⁷ Namibia Opinion, p. 53, para. 115 (Security Council resolutions "adopted in conformity with the purposes and principles of the Charter and in accordance with Articles 24 and 25 . . . are consequently binding on all States Members of the United Nations, which are thus under obligation to accept and carry them out.")

by Libya, could produce grave damage to the legal order established by the Charter.¹³⁸ (The final Part of the Counter-Memorial, shows how, in any case, the measures taken by the Council were reasonable and appropriate in relation to the threat to peace and security associated with the bombings of Pan Am 103 and UTA 772.)

¹³⁸ J. Delbrueck, "Article 25," in Simma, supra note 122, p. 413 ("If the binding nature of decisions under Art. 25 rested on *ad hoc* acceptance by the members, the general and objectively guaranteed binding character of these decisions would be lacking. Furthermore, construing the binding nature of SC decisions only on the basis of *ad hoc* acceptance would contradict the nature of these decisions as decisions taken by a collegiate body. A decision under Art. 25 is not the sum total of individual wills but an act by an organ which is to be binding upon all UN members no matter what their position is towards the particular decision.").

CHAPTER III

RESOLUTIONS 748, 883 AND 1192 WERE VALID EXERCISES OF THE SECURITY COUNCIL'S AUTHORITY

3.43 This Chapter shows how the relevant resolutions were a proper exercise of the Council's mandate and were validly adopted. It also answers a barrage of Libyan attacks on the substance and procedure of the Security Council's actions.

Section 1. The Council Followed Appropriate Procedures

3.44 Resolutions 731, 748, 883 and 1192 all were adopted at regular meetings of the Council following debates in which Libya was able to participate. They received the majorities required by Article 27 of the Charter. Under Article 27(3), a resolution requires nine affirmative votes and no veto. Resolutions 731 and 1192 were adopted unanimously. Resolution 748 received ten votes. Resolution 883 received eleven. No members of the Security Council voted against any of these four resolutions.

3.45 In such a case, the Court has made clear that the Council's resolutions must be presumed to have been validly adopted:

A resolution of a properly constituted organ of the United Nations which is passed in accordance with that organ's rules of procedure, and is declared by its President to have been so passed, must be presumed to have been validly adopted.¹³⁹

Nevertheless, Libya deploys a wide variety of arguments against the validity and effectiveness of the resolutions.

¹³⁹ Namibia Opinion, p. 22, para. 20.

A. *Libya's Attack Upon the Voting Procedure*

3.46 Libya first asserts that it was improper for France, the United Kingdom and the United States to participate in the Council's voting on these matters and that this impropriety deprives the resolutions of legal effect.¹⁴⁰ Libya argues that none of these three countries should have voted when Resolution 731 was unanimously adopted, and that doing so tainted or invalidated both Resolution 731 and all subsequent Chapter VII Resolutions. These arguments fail.

3.47 Libya's argument appears to rest on Article 27(3) of the Charter, which requires that "in decisions under Chapter VI . . . a party to a dispute shall abstain from voting" (emphasis added). The text makes clear that this rule applies only to Council proceedings involving Chapter VI, not to those under Chapter VII. In addition, had France, the United Kingdom and the United States done as Libya now demands and not joined the other Council members in voting for Resolution 731, the resolution (which passed unanimously) still would have received twelve votes, three more than required.

3.48 Moreover, Article 27(3) did not require that France, the United Kingdom and the United States refrain from voting on Resolution 731. The text of the Resolution, and the circumstances of its adoption, make clear that the Council sought to address a *situation* within the ambit of Articles 34 and 35 of the Charter, not a *dispute* subject to Article 27(3). There is no obligation to abstain from voting in relation to situations:

If the obligation to abstain were extended to situations, the SC would be unable to reach decisions on important questions affecting many of its members in the context of Article VI, although it would be capable of reaching decisions without restriction in the context of Chapter VII. This is contradictory because the

¹⁴⁰ Libyan Observations and Submissions, para. 4.34.

application of Chapter VI ought ideally to make action under Chapter VII unnecessary.¹⁴¹

The text of Resolution 731 shows that the Council was not dealing with a narrow dispute between two states, but rather with a far broader situation affecting international peace and security. The Council was concerned by the broad problems of terrorism and of attacks on aircraft; Libya's suspected involvement in the attacks on Pan Am 103 and UTA 772 and its past conduct were considered as part of a broader situation.

3.49 The fact that the United States and Libya and the United Kingdom and Libya may also have had ongoing disagreements as to which of them should exercise criminal jurisdiction over the accused does not change the fact that Resolution 731 addressed a situation. As Simma and Brunner note:

A situation and a dispute can exist simultaneously, parallel to one another, so that the existence, more specifically, of a dispute does not exclude the presence of a situation.¹⁴²

3.50 The practice of the Council shows that "it is the Council itself rather than the parties that determines whether a dispute exists. . . [I]f there is any question about an obligatory abstention under Article 27(3), the matter should be settled before voting takes place."¹⁴³ In this regard, the Council clearly did not view Resolution 731 as involving a dispute in which France, the United Kingdom and the United States should refrain from voting. When Libya addressed the Council just before the vote on Resolution 731, it questioned "the participation of the parties to this dispute in the voting" on the

¹⁴¹ B. Simma and S. Brunner, "Article 27," in Simma, *supra* note 122, p. 458.

¹⁴² Idem, p. 459.

¹⁴³ S.D. Bailey and S. Daws, The Procedure of the UN Security Council, p. 257 (3rd ed. 1998).

resolution.¹⁴⁴ No member of the Council supported Libya's position. In any case, Libya's claim has no legal consequence. Questions concerning voting on Resolution 731 cannot affect the validity of the Council's subsequent actions under Chapter VII, to which Article 27(3) of the Charter clearly does not apply.

3.51 Libya also contends that France, the United Kingdom and the United States were precluded from voting for Resolutions 748 and 883 because the Council was performing a "quasi-judicial task" in adopting them.¹⁴⁵ This claim too lacks foundation. The Charter neither contains nor suggests any limitation of the kind Libya urges. But, in any case, the Security Council's resolutions were not judicial actions. Their texts show that the Council was addressing the threat of terrorism to peace and security, a political and not a judicial role. The Council did not purport to establish the guilt or innocence of the persons accused of destroying Pan Am 103. Instead, it identified the national courts that should be the judicial forum to examine the charges and evidence and to determine guilt or innocence.

B. Libya's Unwarranted Demand for Exhaustion of Other Means of Settlement

3.52 Libya next contends that Article 33 of the Charter requires that the parties to a dispute first seek peaceful settlement through the various means listed in that Article, and that only after the parties attempt and exhaust such means can the Security Council lawfully act.¹⁴⁶ This argument essentially construes the Chapter VI of the Charter to

¹⁴⁴ 3033rd Meeting of the Security Council, 21 January 1992, Doc. S/PV.3033, pp. 24-25. 1995 U.S. Exhibit 19.

¹⁴⁵ See *Libyan Observations and Submissions*, para. 4.36.

¹⁴⁶ *E.g.*, *Idem*, para. 2.20; CR 97/20, p. 49, para. 4.22, *et seq.*

establish an implicit "exhaustion of remedies" rule as a precondition to Security Council action under Chapter VII.

3.53 Libya's argument has no basis in the language or history of the Charter or in state practice, and rests upon an unjustifiably selective and narrow reading of the inter-related elements of Chapter VI of the Charter. Article 33 is located in Chapter VI and is part of that Chapter's system for promoting the pacific settlement of disputes. The actions of the Security Council attacked by Libya were not taken in the context of Chapter VI. They were taken under Chapter VII, as the Council acted to maintain or restore international peace and security.

3.54 As a practical matter, the Security Council attempted through Resolution 731 to bring about a resolution of the situation it faced prior to resorting to the exercise of its mandatory powers under Chapter VII. In paragraph 4 of Resolution 731, the Council requested the Secretary-General "to seek the cooperation of the Libyan Government to provide a full and effective response" to the requests put to Libya. For his part, the Secretary-General diligently but unsuccessfully sought Libyan cooperation in order to bring about such a settlement.¹⁴⁷

3.55 However, the Charter does not require that either the Security Council or the parties to a dispute progressively work their way through all the possible steps of peaceful settlement in the framework of Chapter VI before the Council can act. The Council did not have to exhaust Chapter VI's options for peaceful settlement with Iraq before it could

¹⁴⁷ See Report of the Secretary-General Pursuant to Paragraph 4 of Security Council Resolution 731, Doc. S/23574, 21 January 1992, 1995 U.S. Exhibit 20; Further Report of the Secretary-General Pursuant to Paragraph 4 of Security Council Resolution 731, Doc. S/23672, 3 March 1992, 1995 U.S. Exhibit 21.

act following Iraq's 1990 invasion of Kuwait. The Council could not meet its Chapter VII responsibilities if each time it faced a threat to or breach of the peace, it were limited to encouraging the parties to exhaust the various means of peaceful settlement.

3.56 The Court has properly refused to allow the introduction into the Charter of elements that are not stated there.¹⁴⁸ It should do the same here. The Court should refuse to add an exhaustion of remedies rule to Chapter VII.

C. Libya's Claim That There Was No Fair Hearing and No Factual Justification

3.57 Following from its contention that the Security Council was performing a "quasi-judicial task," Libya contends that the Council can only act on the basis of "fully demonstrated" facts. The suggestion seems to be that the Council had an inadequate factual predicate for its actions.¹⁴⁹ Libya seems to contend that there should have been some form of adversarial process, in which the United States and Libya each presented its evidence, to be tested and debated before the Council.

3.58 As is more fully discussed elsewhere in this Counter-Memorial, the Security Council had a substantial factual basis for the decisions it took. Nevertheless, neither the terms of the Charter nor the rules or practice of the Council require the formal fact-finding procedures Libya asks the Court to impose. It is not appropriate or realistic to demand that the Council hold a formal evidentiary hearing before taking decisions to meet a particular threat to peace. To fulfill its responsibilities, the Security Council must make vital decisions in evolving and complex disputes. Often, it must act rapidly and at

¹⁴⁸ *Admissions Case*, pp. 62-63.

¹⁴⁹ *Libyan Observations and Submissions*, para. 4.17.

unpredictable hours. Each Member brings to the Council's deliberations its own store of information and experience, supplemented by information provided by the Secretariat and by interested states (including, in this case, Libya). There is no basis for this Court to prescribe a process of formal fact-finding or a standard of evidence or "burden of proof" that the Council must meet before it can act under either Chapter VI or Chapter VII of the Charter.

Section 2. The Council Was Not Otherwise Precluded From Acting In These Circumstances

A. The Security Council's Actions Were Not Invalidated by a Supposed Threat of Force

3.59 Libya has several times charged that the United States threatened to use force against Libya at the time of the adoption of the Security Council resolutions. Libya did so in the 1997 oral proceedings, where Professor Brownlie repeated in substantially similar language arguments he first advanced in 1992.¹⁵⁰ The supposed relevance of this canard to the Montreal Convention has not been explained. Standing alone, Libya's claim that the United States illegally threatened the use of force is outside the Court's jurisdiction in this dispute as to the interpretation and application of the Montreal Convention, as suggested by the declaration of Judge Guillaume and Fleischhauer accompanying the Court's February 28 Judgment.¹⁵¹ As this Libyan claim is manifestly outside the jurisdiction of the Court, it will not be rebutted further here.

¹⁵⁰ See CR 97/21, pp. 51-54, paras. 80-92 (Professor Brownlie).

¹⁵¹ Judgment of 27 February 1998, Joint Declaration of Judges Guillaume and Fleischhauer, p. 4.

B. The Security Council Is Not Precluded From Acting In Matters Involving Criminal Justice

3.60 Finally, Libya argues that it need not comply with the Security Council's resolutions because the Council does not have the power to act in matters concerning criminal justice. Libya contends that the "principles of a sound administration of justice" made it inappropriate or even *ultra vires* for the Council to adopt Resolutions 748 and 883.¹⁵² Libya supplements this argument with a more narrowly focused claim that the Council cannot require a State to transfer persons for trial outside its territory absent some treaty obligation requiring this result. It invokes the principle of *aut dedere aut judicare* (that a state may elect whether to prosecute or extradite an alleged offender) in support of its claim that Libya alone can decide whether to transfer its nationals for prosecution abroad.

3.61 Nothing in the Charter or in the practice of the Security Council or of states supports Libya's claim that the Council, when acting within the framework of Chapter VII, cannot require that particular offenses or types of offenses be tried in a particular court. Nothing about the doctrine of *aut dedere aut judicare* gives it superior status precluding such action by the Council under Chapter VII, either here or in the context of other situations such as the former Yugoslavia or Rwanda. Indeed, state practice shows that the doctrine is not a rule of customary international law. States generally do not view themselves as having an obligation under customary international law to prosecute every accused person whom they decline to extradite. If there were such a customary principle,

¹⁵² E.g., Libyan Observations and Submissions, para. 4.16, *et seq.*

the Montreal Convention and other treaties creating a specific treaty obligation to this end would be unnecessary.

3.62 The Security Council has taken several important initiatives relating to the transfer of persons for criminal trial, initiatives that have received widespread support and approbation from the international community. In creating the International Criminal Tribunals for the former Yugoslavia and Rwanda, the Council required that individuals accused of certain crimes of international concern be subjected to international criminal jurisdiction and did not find that this was precluded by the principle of *aut dedere aut judicare*.¹⁵³

3.63 The Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia has recognized the power of the Council to require the trial of an accused person in a tribunal prescribed by the Security Council, in the Appeal of Dusko Tadić.¹⁵⁴ In the Tribunal's Trial Chamber, Mr. Tadić filed a motion challenging the Tribunal's jurisdiction, which was denied. On appeal he argued, *inter alia*, that the Security Council could not require that he be tried in the International Tribunal in lieu of trial in the domestic courts of Germany or Bosnia-Herzegovina. The Tribunal's Appellate Chamber rejected this line of argument finding that, pursuant to the Statute of the International Tribunal (which derives legal authority from a Chapter VII resolution of the Security Council), Mr. Tadić could be tried in the International Tribunal.¹⁵⁵

¹⁵³ See Resolution 827, United Nations Security Council, 3217th Meeting, 25 May 1993, Doc. S/RES/827, para. 4 (Yugoslavia Tribunal); Resolution 955, United Nations Security Council, 3453rd Meeting, 8 November 1994, Doc. S/RES/955, para. 2 (Rwanda Tribunal).

¹⁵⁴ *Prosecutor v. Tadić (Jurisdiction)*, decision of 2 October 1995, 35 I.L.M. 32 (1996).

¹⁵⁵ *Idem*, paras. 49-60, 35 I.L.M. pp. 48-52.

3.64 The Council also adopted Resolutions 1044, 1054, and 1070¹⁵⁶ following the attempted assassination of President Mubarak of Egypt while attending the OAU Summit in Addis Ababa. Through these resolutions, the Council sought to encourage Sudanese authorities to comply with the OAU's request to extradite to Ethiopia persons accused of involvement in the assassination attempt. The Council also adopted sanctions aimed at bringing about compliance. In this situation, the Council chose to encourage the transfer of the accused by means of extradition, since that was the procedure endorsed by the OAU. However, as in the cases of Libya, the former Yugoslavia and Rwanda, the Council's goal was to bring about the criminal trial of accused persons in an appropriate court.

3.65 Thus, the Security Council has taken several important decisions under Chapter VII aimed at establishing which courts should conduct particular criminal trials where the Council has concluded that such trials will help to maintain or restore international peace and security. In all of these cases, the Security Council has not itself acted as a criminal court deciding the guilt or innocence of persons accused of particular crimes. Rather, the Council has determined which jurisdiction or jurisdictions are, in the particular circumstances, best situated to carry out a just and effective trial.

¹⁵⁶ Resolution 1044, United Nations Security Council, 3627th Meeting, 31 January 1996, Doc. S/RES/1044; Resolution 1054, United Nations Security Council, 3660th Meeting, 26 April 1996, Doc. S/RES/1054; Resolution 1070, United Nations Security Council, 3690th Meeting, 16 August 1996, Doc. S/RES/1070.

Section 3. The Security Council Had Ample Foundation for Its Decisions

3.66 The preceding section demonstrated that the Security Council's resolutions imposed binding legal obligations upon Libya that prevail over any inconsistent claims asserted under the Montreal Convention. Under the Charter, the Security Council's adoption of these resolutions required decisions that the Council alone has the power and responsibility to make, because they involve the fundamentally political question of what constitutes a threat to international peace under Article 39 of the Charter. As Judge Weeramantry observed:

[T]he determination under Article 39 of the existence of any threat to the peace, breach of the peace or act of aggression, is one entirely within the discretion of the Council. It would appear that the Council and no other is the judge of the state of affairs which brings Chapter VII into operation.¹⁵⁷

3.67 Nevertheless, the Council had ample basis to decide as it did. Its decisions were justified and appropriate. The Council was not "incoherent, inconsistent, or irrational" as Libya claims.¹⁵⁸ In order to exercise its authority under Chapter VII, the Security Council had to make two types of determinations. Under Article 39 of the Charter, it first had to determine whether the circumstances before it -- including Libya's support for terrorism, its implication in the violent deaths of several hundred people in attacks on two aircraft, and its failure to comply with the Council's resolutions -- constituted a threat to international peace. The Council three times decided that they did. The Council then had to decide what measures should be taken to maintain or restore

¹⁵⁷ Judgment of 27 February 1998, Dissenting Opinion of Judge Weeramantry, p. 176. Libya may not dispute this principle: paragraph 4.3 of the Libyan Observations and Submissions speaks of "the fact that only the Security Council is authorized to determine the existence of a 'threat to the peace'"

¹⁵⁸ Libyan Observations and Submissions, para. 4.55.

international peace and security. Libya now is asking this Court both to find that the determination of the Security Council was wrong and to put those measures aside, particularly Libya's obligation (recently reaffirmed by Resolution 1192 (1998)) to transfer the accused for trial.

3.68 The Council weighed a variety of factors in concluding that the situation involved a threat to peace. It was mindful of the grave threats posed by international terrorism and of Libya's past support for terrorist actions against other states. Several hundred people were dead after two carefully planned attacks on civilian airliners. These deaths demonstrated an actual and continuing threat. Painstaking investigations involving a number of states indicated that Libya played a direct role in these deaths. Specific criminal charges had been brought in two countries against two persons who allegedly acted on Libya's behalf. Of course, these charges did not establish the guilt of the accused; that would require a proper criminal trial in a qualified court with appropriate safeguards of the defendants' human rights. However, the charges were necessarily relevant to the Council's appreciation of the situation. The Council was also aware of Libya's unsatisfactory responses to its calls for clarification and cooperation, first in Resolution 731, and then in Resolutions 748 and 883. These circumstances provided a compelling foundation for the Council's decision that international peace and security were threatened.

3.69 The measures the Council adopted under Article 41 of the Charter in response were likewise justified in the circumstances. These measures were precise, limited and did not involve the use of armed force. The Council sought to meet the threat to peace and security in part by seeking to bring about a legitimate and fair criminal trial

of the individuals accused of destroying Pan Am 103. The Council was not unconcerned about the human rights of the accused. However, in the extraordinary circumstances before it, the Council was not persuaded of Libya's willingness or capacity to provide an appropriate trial.

3.70 In these circumstances, the Council's decision to require that the accused individuals be transferred for trial by the judicial authorities of another State was a reasonable and appropriate measure. As Professor Tomuschat concluded regarding the Council's decision:

[O]ne finds little which gives rise to serious objections. Extradition of major criminals is a legitimate concern within the framework of a strategy aimed at combating terrorism. Eradication of terrorism presupposes the effective elimination of any shelter and refuge to terrorists.¹⁵⁹

3.71 In summary, the Council's resolutions reflected decisions taken in the exercise of its vital -- and unique -- responsibility under the Charter. The Council's determination that there was a threat to international peace and security and that enforcement measures were necessary to meet it did not rest on conjecture or theory. Acts of terrorism had cost hundreds of lives. Intensive factual investigation pointed to the responsibility of agents of Libya. Libya failed to respond effectively to the Council's requirements. World wide concern called for effective responses. It was thus appropriate for the Security Council to view the situation as a threat to peace and to decide to adopt enforcement measures under Article 41.

¹⁵⁹ C. Tomuschat, *supra* note 54, p. 44.

Section 4. Libya's Claims Based on Article 2(7) of the Charter Must Fail

3.72 Particularly given the substantial and compelling basis for the Security Council's actions described above, it is also clear that that the Court should reject Libya's attacks on the Council's actions based upon Article 2(7) of the Charter.¹⁶⁰ Article 2(7) provides that the Charter does not "authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state." However, it also states that "this principle shall not prejudice the application of enforcement measures under Chapter VII." It is precisely such enforcement measures that Libya asks the Court to annul or set aside on the basis of Article 2(7). Libya's argument must fall before the plain text of Article 2(7).

3.73 In addition, the matters leading to the Council's decisions, such as Libya's support for terrorism, its apparent involvement in the attacks on Pan Am 103 and UTA 772, and its failure to comply with the Council's resolutions, were not "matters which are essentially within the domestic jurisdiction" of Libya. These were matters of profound and legitimate international concern. They were appropriate for Security Council action in the discharge of its responsibilities under the Charter. The Court should reject Libya's arguments based upon Article 2(7).

¹⁶⁰ Libyan Memorial, paras. 6.84, et seq.

PART IV

**THE COURT CANNOT SUBSTITUTE ITS
JUDGMENT FOR THE SECURITY COUNCIL'S**

CHAPTER I

INTRODUCTION

4.1 The United States is mindful that this case has stimulated much discussion and commentary regarding the relationship between the Court and the Security Council and, in particular, regarding the possibility of judicial review by the Court of the actions of the Council. Some writers have encouraged the Court to seize upon the case as a vehicle to assert inherent judicial authority to review the actions of the Security Council. However, such commentary does not alter the Court's responsibility carefully and conscientiously to perform its proper judicial role in deciding this case.

4.2 This Part of the U.S. Counter-Memorial examines the Court's relationship to the Security Council. It shows how the Charter clearly establishes the respective roles of Court and Council, and has not allocated to the Court the authority to substitute its judgment for the Council's regarding the matters disputed by Libya. The Charter has not conferred on the Court the authority to review the Council's determinations under Article 39 of the Charter, or other related decisions taken under Chapter VII for the purpose of maintaining or restoring international peace and security, except where the Court may do

so in performing its advisory function. Accordingly, the Court's responsibility here is to avoid weakening the effectiveness of the Security Council in dealing with threats to international peace and security. Doing so would not be an abdication of the Court's function as the principal judicial organ of the United Nations. Rather, it would be to recognize and carry into effect the legal structure created by the Charter.

CHAPTER II

THE CHARTER SYSTEM

4.3 The Charter establishes the respective roles of the Court and of the Security Council. It does not allocate to the Court the authority to substitute its judgment for the Council's as to matters assigned to the Council.

Section 1. The Role of the Court

A. There is No Charter Basis for Judicial Review

4.4 Under Article 92 of the Charter, the Court "shall be the principal judicial organ of the United Nations" and "shall function in accordance with" the Statute. Article 36 of the Statute provides that:

The jurisdiction of the Court comprises all cases which the parties refer to it and all matters specially provided for in the Charter of the United Nations or in treaties and conventions in force.

The Court thus has the power to decide a matter only if its jurisdiction has been established by the reference of a case by the parties, or is "specially provided for in the Charter." Yet, it is clear that the Charter *does not* provide for jurisdiction of the Court to review and set aside determinations and decisions of the Security Council. No provision of the Charter or of the Statute allocates to the Court the authority to review, pass judgment upon and potentially modify or set aside actions of the Security Council under Chapter VII. Indeed, as will be shown, the drafters of the Charter considered and deliberately rejected conferring such powers on the Court.

4.5 This proposition is simple, but it is vital to the maintenance of the legal order created by the Charter. The Court, like other organs and bodies of the UN, is bound to

respect and follow the Charter.¹⁶¹ It simply is not open to the Court to exercise jurisdiction in a way that has no basis in either the agreements of states or in the Charter.

B. Judicial Review Was Deliberately Excluded From the Charter

4.6 The power of judicial review was considered and deliberately rejected by the framers of the Charter.¹⁶² At San Francisco in 1945, the Belgian delegation argued that the Conference should decide which organ of the Organization should be empowered to render definitive interpretations of the meaning of the Charter.¹⁶³ The precise question referred to the Legal Problems Committee of Commission IV (Judicial Organization) of the Conference was: "how and by what organ or organs of the Organization the Charter should be interpreted."¹⁶⁴ The Legal Problems Committee debated the question at some length, considering the appropriateness of constituting the General Assembly (as the most broadly representative organ), or the Court (as the principal judicial organ) as the final arbiter of the meaning of the Charter. There was also discussion of dividing responsibility, with a committee of legal experts to answer routine questions of a time-sensitive nature; more complex questions (where time was not of the essence) being

¹⁶¹ See Admissions Case, p. 64.

¹⁶² See generally L. Sohn, "The UN System as Authoritative Interpreter of its Law," in 1 United Nations Legal Order, pp. 171-74 (O. Schachter & C. Joyner eds. 1995) (hereinafter, "UN Legal Order").

¹⁶³ 3 DUNCIO, "Dumbarton Oaks Proposals Concerning the Establishment of a General International Organization: Amendments Submitted by the Belgian Delegation," General Doc. 2 G/7(k)(I), p. 339, (May 4, 1945).

¹⁶⁴ 13 DUNCIO, "Summary Report of Twelfth Meeting of Committee IV/2," Doc. 664 IV/2/33, p. 633, (May 29, 1945).

reserved for the Court; and grave questions requiring "an authentic and constitutional interpretation" being answered through amendments to the Charter.¹⁶⁵

4.7 At the end of the debate, there was no consensus on any particular approach and Belgium maintained its position that one organ must have ultimate responsibility for interpreting the Charter. The Legal Problems Committee then referred the matter to a subcommittee for further study.¹⁶⁶ The subcommittee's report recommended the far more flexible approach which came to be reflected in the structure of the Charter and which has been implemented in the life of the Organization:

In the course of the operations from day to day of the various organs of the Organization, it is inevitable that each organ will interpret such parts of the Charter as are applicable to its particular functions. The process is inherent in the functioning of any body which operates under an instrument defining its functions and powers. It will be manifested in the functioning of such a body as the General Assembly, the Security Council, or the International Court of Justice. Accordingly, it is not necessary to include in the Charter a provision either authorizing or approving the normal operation of this principle.

Difficulties may conceivably arise in the event that there should be a difference of opinion among the organs of the Organization concerning the correct interpretation of a provision of the Charter. Thus, two organs may conceivably hold and may express or even act upon different views. Under unitary forms of national government the final determination of such a question may be vested in the highest court or in some other national authority. However, the nature of the Organization and of its operation would not seem to be such as to invite the inclusion in the Charter of any provision of this nature. If two member states are at variance concerning the correct interpretation of the Charter, they are of course free to submit the dispute to the International Court of Justice as in the case of any other treaty. Similarly, it would always be open to the General Assembly or to the Security Council, in appropriate circumstances, to ask the International Court of Justice for an advisory opinion concerning the meaning of a provision of the Charter. Should the General Assembly or the Security Council prefer another course, an *ad hoc* committee of jurists might be set up to examine the question and report its views, or recourse might be had to a joint conference. In brief the members or the organs of the Organization might have recourse to various expedients in order to

¹⁶⁵ *Idem*, pp. 633-34; see also 13 DUNCIO, "Revised Summary Report of Fourteenth Meeting of Committee IV/2," Doc. 873 IV/2/37(1), p. 653, (June 9, 1945).

¹⁶⁶ 13 DUNCIO, "Summary Report of Twelfth Meeting of Committee IV/2," *Idem*, pp. 634-35.

obtain an appropriate interpretation. It would appear neither necessary nor desirable to list or to describe in the Charter the various possible expedients.¹⁶⁷

4.8 This important report was approved by the Legal Problems Committee,¹⁶⁸ while the Belgian proposal was affirmatively rejected.¹⁶⁹ Commission IV unanimously approved the Committee's Report, and thus elected not to establish a mechanism for authoritative interpretation of the Charter.¹⁷⁰ Thereafter, the San Francisco Conference Plenary unanimously approved the Commission's Report.¹⁷¹ This brief history offers several significant lessons. First, it documents that the UN's founders directly and carefully considered whether to grant the Court the power as the ultimate interpreter of the Charter and, hence, the power of "judicial review" of the acts of other organs. They recognized that in some (but certainly not all) national systems, courts or other bodies may have such power. "However, the nature of the Organization and of its operation would not seem to be such as to invite the inclusion in the Charter of any provision of this

¹⁶⁷ 13 DUNCIO, "Report of the Special Subcommittee of Committee IV/2 on the Interpretation of the Charter," Doc. 750 IV/2/B/1, pp. 831-32, (June 2, 1945).

¹⁶⁸ 13 DUNCIO, "Summary Report of Sixteenth Meeting of Committee IV/2," Doc. 934 IV/2/43, p. 701, (June 12, 1945); 13 DUNCIO, "Report of the Rapporteur of Committee IV/2 as Approved by the Committee," Doc. 933 IV/2/42(2), pp. 709-10, (June 12, 1945); 13 DUNCIO, "Revised Summary Report of Fourteenth Meeting of Committee IV/2," *Idem*, pp. 653-54 (Committee approved Subcommittee report "on interpretation of the Charter which suggested that if two member states are at variance concerning the interpretation of the Charter, they are free to submit the dispute to the Court, and that if two organs are at variance concerning the correct interpretation of the Charter they may either ask the Court for an advisory opinion, establish an ad hoc committee of jurists to examine the question and report its views, or have recourse to a joint conference").

¹⁶⁹ 13 DUNCIO, "Revised Summary Report of Fourteenth Meeting of Committee IV/2," *Idem*, p. 653 ("The Committee decided to reject the Belgian suggestion of referring interpretive disagreements on the Charter between organs to the Court as an established procedure").

¹⁷⁰ 13 DUNCIO, "Revised Verbatim Minutes of Second Meeting of Commission IV," Doc. 1153 IV/12(1), pp. 101-05, (June 22, 1945).

¹⁷¹ 1 DUNCIO, "Verbatim Minutes of Ninth Plenary Session," Doc. 1210 P/20, pp. 625-27, (June 27, 1945).

nature." The framers expressly chose not to make such an exclusive grant -- to the Court or any other UN organ or entity. As Professor Sohn concludes:

The San Francisco statement on the interpretation of the Charter of the United Nations recognized that the International Court of Justice, though it was the principal judicial organ of the United Nations, did not have the exclusive power to provide an authoritative interpretation of the Charter.¹⁷²

4.9 Thus, not only did the founders *not* allocate to the Court the ultimate responsibility for interpreting the Charter, they instead made other organs primarily responsible for construing and applying it in relation to their mandates. The Security Council and the General Assembly were given responsibility to construe and apply relevant provisions of the Charter in the course of their work. Of course, they could decide to seek the advice of the Court through the mechanism of advisory opinions, as both organs have done on some important questions.

4.10 From the UN's early days, the principal organs carried into effect the system adopted at San Francisco. For example, although Belgium's proposal was rejected in 1945, Belgium continued to seek opportunities for the Court to review actions of other organs. In 1947, during the Security Council's consideration of the Indonesian question, Belgium introduced a resolution calling for the Council to seek advice from the Court as to whether the Council was competent to deal with the problem. It was argued that "such referrals could with the passage of time build up a body of jurisprudence which should enable the Security Council 'to judge exactly' its competence in any given matter." However, other delegations opposed the Belgian proposal on the grounds that the

¹⁷² L. Sohn, UN Legal Order, supra note 162, pp. 169, 171-74, 203-04, 226.

Security Council could not deal with the complex social and political issues before it if it viewed them in predominantly legal terms, and the proposal ultimately was rejected.¹⁷³

4.11 Professor Rosenne has stressed the need for the Court to avoid revising treaties, for reasons that are particularly compelling in the case of the Charter. The Court:

being a court of law, . . . has the duty, in relation to international treaties, to interpret them and not to revise them, and it would exceed its judicial functions were it to revise a treaty on the pretext of remedying a default for the occurrence of which the treaty has made no provision, or were its conclusions to involve "radical changes and additions" to the provisions of the treaty. The court will so act even if the consequences may not appear to be entirely satisfactory.¹⁷⁴

In this spirit, important commentators have emphasized the importance of maintaining the allocation of competences agreed upon in San Francisco and incorporated into the Charter. Judge Jessup observed that:

The Charter is the embodiment of the international treaty-agreement which the Members have concluded. The rights and powers of the United Nations organs are therefore treaty rights. These rights are vested and cannot be altered except as provided in the Charter itself.¹⁷⁵

C. The Court Does Not Have the Inherent Power to Review the Security Council's Decisions

4.12 The Court does not have inherent power stemming from its position as the United Nations' principal judicial organ to review the actions of the Security Council in adopting decisions under Chapter VII. The Court, like other UN organs, is created by

¹⁷³ G. Weissberg, "The Role of the International Court of Justice in the United Nations System: The First Quarter Century" in *The Future of the International Court of Justice*, p. 131, at 153-54, (L. Gross ed. 1976) (quoting SCOR 2nd Yr., 194th Mtg., Aug. 25, 1947, p. 2218, 2220).

¹⁷⁴ S. Rosenne, *The Law and Practice of the International Court, 1920-1996*, pp. 172-73 (3d ed. 1997).

¹⁷⁵ P. Jessup, "Parliamentary Diplomacy: An Examination of the Legal Quality of the Rules of Procedure of Organs of the United Nations," 89 *Recueil des Cours de l'Academie de Droit International de la Haye* 201 (1956) (quoted in M. Bedjaoui, *The New World Order and the Security Council: Testing the Legality of its Acts*, p. 74 n.26 (1994)).

Charter and derives its authority from the Charter. As the preceding discussion makes clear, the drafters of the Charter consciously decided at San Francisco, after extensive debate, *not* to empower the Court to review and reverse the decisions of the political organs. This is reflected in the Charter they drafted, which confers no such power. There is no well of "inherent judicial power" from which the Court can draw to change the Charter scheme. There is no inherent authority to perform functions that the framers deliberately decided the Court should not perform.

4.13 Nevertheless, Libya argues that the Court has such power,¹⁷⁶ building its argument upon Judge Fitzmaurice's dissent in the Namibia case to the effect that the Court when asked for an advisory opinion may have to determine whether a Council resolution is binding or recommendatory.¹⁷⁷ This argument misses Judge Fitzmaurice's point. This Court -- like any court -- may need to interpret a pertinent legal instrument or decide upon its legal effect. That is a fundamental aspect of the judicial function. But such an interpretive determination is entirely different from this case, where the Council has not requested the Court's advice and where Libya asks the Court to annul Council decisions or to hold that they cannot be applied to Libya. There is a fundamental distinction between a Court's exercise of its inherent power to interpret and apply a legal rule in a case before it, and the assertion of a power of judicial control to annul or deny the applicability of decisions of an independent body not subordinate to it. The inherent powers of the Court to interpret texts cannot be stretched to create a power of review,

¹⁷⁶ E.g., Libyan Observations and Submissions, paras. 3.1 et seq.

¹⁷⁷ Namibia Case, Dissenting Opinion of Judge Fitzmaurice, p. 293, para. 112.

much less the power to annul the Security Council's decisions or to find that they cannot be applied to the very state at which they are directed.

4.14 This is a matter of fundamental importance in the law of the United Nations. It cannot be obscured by referring to an inherent judicial power. It would likely astonish the legal communities in the many countries that do not have judicial review should this Court announce that judicial power inherently includes the authority to override decisions by constitutional political organs where constitutional provisions do not provide for such review.

4.15 As a judicial organ, this Court does have certain inherent characteristics, but judicial review of the decisions of the political organs is not among them.¹⁷⁸ Hence, as Professor Rosenne concludes, “[s]ince the court is not a constitutional court for the United Nations system, it has no general power of judicial review to determine the ‘constitutionality’ of the actions or decisions of any other organ or subdivision of the United Nations.”¹⁷⁹ Many other writers affirm the same conclusion.¹⁸⁰

¹⁷⁸ See H. Mosler, “Article 92”, in Simma, *supra* note 122, p. 985 (judicial review not among the enumerated characteristics typical of courts and judicial bodies).

¹⁷⁹ S. Rosenne, The World Court: What it Is and How it Works, p. 37 (5th ed., 1995).

¹⁸⁰ See e.g., O. Schachter, “The UN Legal Order: An Overview,” in UN Legal Order, *supra* note 162, p. 13 (“The key point, however, is that the International Court has not been given review or appellate power to pass on decisions of the political organs unless it is asked for an advisory opinion by the organ”); D. Ciobanu, “Litispence Between the International Court of Justice and the Political Organs of the United Nations,” in The Future of the International Court of Justice, pp. 209, 242-43, (L. Gross ed. 1976) (San Francisco Conference rejected Belgian proposal to give ICJ power to render binding Charter interpretations); T. Elsen, Litispence Between the International Court of Justice and the Security Council, p. 54 (1986) (same).

Section 2. The Court Has Recognized That It Does Not Have the Power of Judicial Review

4.16 In light of the principles described above, the Court has wisely and consistently declined to assert any claim to authority to render binding opinions on the validity of the acts of other UN organs, and has indeed expressly disclaimed such power. It has occasionally registered observations on the legality of the acts of other organs, but only where necessary in order to answer a particular question on which another organ has requested the Court's advisory opinion pursuant to Article 96 of the Charter and Article 65 of the Statute. This has occurred in several advisory opinions where the particular questions presented required the Court to address matters of the authority or competence of other UN bodies, or where the Court had to consider such matters in order to confirm its own jurisdiction.

4.17 Thus, in the Certain Expenses of the United Nations advisory opinion,¹⁸¹ the Court was asked to provide its opinion as to whether certain expenditures authorized by the General Assembly to meet peacekeeping expenses in the Congo and in the Middle East were "expenses of the Organization" for purposes of Article 17(2) of the Charter. In order for the Court to answer the question asked, it had to establish "whether the resolutions authorizing the operations here in question were intended to carry out the purposes of the United Nations and whether the expenditures were incurred in furthering these operations."¹⁸²

¹⁸¹ Certain Expenses of the United Nations (Article 17, Paragraph 2, of the Charter), Advisory Opinion, I.C.J. Reports 1962, p. 151, et seq.

¹⁸² Idem, p.158.

4.18 The particular question posed thus required the Court to inquire into the powers and responsibilities of the Security Council and the General Assembly, including analysis of possible limits on the Assembly's budgetary authority bearing upon the meaning of 'expenses' under the Charter.¹⁸³ To answer the General Assembly's question, the Court had to assess the conformity of the actions of two other principal organs with their powers under the Charter. However, in so doing, the Court made clear the limited scope of its powers in relation to *other* organs:

In the legal systems of States, there is often some procedure for determining the validity of even a legislative or governmental act, but no analogous procedure is to be found in the structure of the United Nations. Proposals made during the drafting of the Charter to place ultimate authority to interpret the Charter in the International Court of Justice were not accepted; the opinion which the Court is in course of rendering is an *advisory* opinion. As anticipated in 1945, therefore, each organ must, in the first place at least, determine its own jurisdiction. If the Security Council, for example, adopts a resolution purportedly for the maintenance of international peace and security and if, in accordance with a mandate or authorization in such resolution, the Secretary-General incurs financial obligations, these amounts must be presumed to constitute "expenses of the Organization."¹⁸⁴

4.19 The Court thus stressed that even a limited advisory assessment of the work of other organs was guided by the "presumption" that their acts were "not *ultra vires* the Organization."¹⁸⁵ Certain Expenses shows the Court's keen awareness of the limitations of its position in relation to the decisions of other organs. The Court recognized that it does not have authority to render binding judgments on the consistency with the Charter of the acts of other UN organs. It may provide advisory opinions on legal questions

¹⁸³ Idem, p. 162.

¹⁸⁴ Idem, p. 168 (emphasis in original).

¹⁸⁵ Idem, p. 168.

asked by another organ, but it must approach even this limited task with a strong presumption that other organs exercise their authority in conformity with the Charter.¹⁸⁶

4.20 The Namibia opinion is similar.¹⁸⁷ There, the Security Council requested the Court's advisory opinion¹⁸⁸ as to "the legal consequences for States of the continued presence of South Africa in Namibia, notwithstanding Security Council resolution 276 (1970)."¹⁸⁹ (Resolution 276 aimed to give effect to the conclusions of General Assembly Resolution 2145, which terminated the South African mandate over Namibia, by declaring South Africa's continued presence in Namibia to be illegal and by calling upon States to act accordingly.) The Court began carefully by emphasizing that it "[u]ndoubtedly . . . does not possess powers of judicial review or appeal in respect of the decisions taken by the United Nations organs concerned."¹⁹⁰ However, in order to answer the particular question posed to it, the Court addressed objections raised by the Governments of South Africa and France to the Security Council and General Assembly resolutions.¹⁹¹ To do what was asked of it, the Court had to determine whether these resolutions had consequences for States and whether the resolutions were consistent with

¹⁸⁶ See, also, Sohn, *supra* note 162, pp. 201-02.

¹⁸⁷ Namibia Opinion, p. 14, *et seq.*

¹⁸⁸ Professor Weissberg suggests that "perhaps the chief reason for the substantial number of abstentions on the resolution seeking the opinion" was precisely the Council's concern that a request for an advisory opinion on the question *post factum* would elevate the Court to the role of ultimate arbiter. See G. Weissberg, *supra* note 173, p. 140.

¹⁸⁹ Namibia Opinion, p. 17, para. 1.

¹⁹⁰ *Idem*, p. 45, para. 89 (emphasis added).

¹⁹¹ *Idem*, p. 45, para. 89.

the Charter.¹⁹² In these narrowly defined circumstances, the Court addressed the validity of the acts of other organs in order to answer the question it was asked.

4.21 These advisory opinions assessing particular actions of political organs in relation to the Charter underscore that the Court does not have the far broader powers of judicial review urged by Libya. As Judge Bedjaoui points out:

[T]he fact that the San Francisco founders avoided including in the Charter any explicit provision on interpretation, which would have opened the way to testing of validity, is expressive of the preference they intended to give to interpretation by the political organs themselves.¹⁹³

This choice by the founders did not exclude “the role of interpretation that could be played by the International Court of Justice . . . through its advisory function,” but only if another organ so requests.¹⁹⁴ In no contentious case has the Court asserted the right to judge whether the Security Council or the General Assembly has acted *ultra vires* of the Charter.

Section 3. The Role of the Security Council

4.22 Just as the Court’s powers and role are prescribed by the Charter, so too are the Security Council’s. Through Article 24 of the Charter, the members of the United Nations gave the Council primary responsibility for peace and security, and authorized it to act on their behalf:

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.

¹⁹² *Idem*, p. 53, para. 114.

¹⁹³ M. Bedjaoui, *supra* note 175, p. 60.

¹⁹⁴ *Idem*, p. 61.

4.23 The pertinent resolutions here -- Resolutions 748, 883 and 1192 -- were adopted under the general powers of the Council in Articles 24 and 25 and the specific powers laid down in Chapter VII of the Charter, in particular Articles 39, 41 and 48 (which affirms that the actions required to carry out the decisions of the Council shall be taken by all or some of the members as the Council shall determine).

4.24 The Charter makes the Article 39 determination of the existence of any threat to the peace, 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. It may have to act at great speed or in the face of rapidly evolving situations. Most importantly, the Council must be able to act authoritatively. Its ability to meet a breach of the peace or other grave situation it determines to fall under Article 39 would be gravely impaired if that determination (and the related decisions regarding measures to be taken under Articles 41 and 42) were not authoritative and binding on member states, but could instead be reviewed and reversed months or years later by another UN organ.

4.25 Pursuant to its powers and responsibilities under the Charter, the Council has imposed binding obligations not only on Libya but on all other members of the United Nations. As we have explained, these enforcement measures may have the effect of depriving or curtailing the legal rights of the affected states under treaties, most drastically the rights of a target state. However, when a state appeals to this Court to vindicate its legal rights as against the Council's sanctions, the juridical question, as Judge Shahabuddeen observed, is not the collision between the competence of the

Security Council and that of the Court.¹⁹⁵ It is instead a collision between rights that the state may assert under treaties and the obligations imposed as a result of the Council's actions. As we have shown, Article 103 of the Charter and Chapter VII (e.g., Articles 25 and 48) leave no doubt that the obligations under the Charter prevail. They are the applicable rule of law in this case.

4.26 In discharging its responsibilities, the Council is not above the law. It must act as the Charter requires.¹⁹⁶ However, the Charter makes the fifteen Council members responsible for assessing the existence of threats to security and the appropriateness of measures to meet them. The Security Council is indeed pre-eminently a political organ, whose members generally apply political criteria and make political judgments. However, they are not indifferent to the principles and rules of the Charter, or incapable of reaching decisions based on the Charter. It is very much in their collective interest to maintain the basic framework of their authority, and the records of the Council amply demonstrate that Council members take account of Charter provisions and resolve differences by reference to the Charter and accepted principles of interpretation.

4.27 The changing group of permanent and elected members of the Council are broadly representative, and the maintenance of their collective authority requires that their constitutional compact be observed.¹⁹⁷ Hence, the Court alone is not the guardian of legality. Under the Charter, the Security Council along with the other principal organs,

¹⁹⁵ Provisional Measures, Separate Opinion of Judge Shahabuddeen, p. 141.

¹⁹⁶ See Admissions Case, p. 64.

¹⁹⁷ Counter-Memorial Exhibit 28 lists all of the non-permanent Members of the United Nations that have served as members of the Security Council since 1992.

share that responsibility. And, in the final analysis, it is the member states that have the power -- and the duty -- to ensure that their Charter is maintained and respected, for they, after all, are accountable to their peoples for international peace and security.

4.28 Libya consistently disregards the role and responsibility of the many Members of the Security Council who joined together to deal with the destruction of Pan Am 103. In so doing, Libya ignores a fundamental Charter mechanism for ensuring international legality. The Council has repeatedly adopted measures directed against Libya only because a number of conscientious States, each one bearing significant responsibilities as a Member of the Security Council, concluded that they were legally appropriate within the Charter framework.

Section 4. The Indirect Review Libya Seeks Is Likewise Precluded

4.29 Libya has also urged the Court to engage in a more limited and indirect notion of judicial review, arguing that the Court should find that the Security Council's resolution cannot be applied to Libya because they result from an abuse or misuse of power by the Council.¹⁹⁸ This line of argument rests upon principles of administrative law found in some national legal systems. However, the Court lacks both the sweeping power to annul actions by political organs and the narrower power to hold that a particular Security Council decision cannot be applied to Libya. The principles of domestic administrative law relied upon by Libya do not alter the Charter regime, nor are they rules of international law that can be applied by this Court under Article 38(1) of the Statute. They are not treaties. They do not reflect customary international law. As their

¹⁹⁸ E.g., Libyan Memorial, para. 6.109, et seq.

origin in a particular national legal tradition suggests, they are not general principles of law. Instead, they are principles specifically designed for a particular form of domestic legal order, which is quite different from the international legal order, including the UN Charter. These principles do not alter the legal regime established by the Charter.

Section 5. The Council Did Not Act Improperly in Adopting Resolutions While Libya's Claims Were Before the Court

4.30 Finally, it has been suggested that the Security Council acted inappropriately in adopting Resolution 748 in April 1992 while Libya's requests for preliminary measures against the United States and the United Kingdom were pending. The United States does not agree. The Court's jurisprudence takes the position that one organ of the United Nations may act within its sphere of responsibility where another organ may also be involved in the same matter.¹⁹⁹ The same principles operate here as well.

4.31 The representative of Venezuela summed up the relationship between Court and Council very well when the Council adopted Resolution 731:

[B]oth the Council and the International Court of Justice are independent of each other [E]ach of these organs in the United Nations system must exercise its jurisdiction autonomously [T]he absence of a simultaneous decision cannot inhibit the actions which the one or the other may take, and . . . their actions do not imply a disregard for their respective responsibilities.²⁰⁰

¹⁹⁹ See S. Rosenne, I The Law and Practice of the International Court, 1920-1996, pp. 127-38 (1997).

²⁰⁰ 3063rd Meeting of the Security Council, 31 March 1992, Doc. S/PV. 3063, p. 84. 1995 U.S. Exhibit 22.

Section 6. Concluding Observations

4.32 What is the Court's role when faced with Libya's challenge to the validity of mandatory Security Council decisions in this contentious case? As demonstrated here, this issue, and this case, cannot be resolved simply by referring to the Court's role as the principal judicial organ of the United Nations. Libya's challenge to the Council's decisions calls into question the basic constitutional institutional structure established by the Charter, as well as the understanding of member states regarding the powers they delegated to the Council and to other organs.

4.33 It is beyond the competence and responsibility allocated to the Court by the Charter for it to second-guess the Council when the Council found a threat to peace and security and decided upon measures in response. The framers of the Charter gave the Security Council -- and the Council alone -- the duty and power to decide, in its discretion, that a situation came within the terms of Article 39 and called for enforcement action under Article 41. The proper function of the Court faced with this challenge to the Council's decisions therefore can only be to abstain from questioning the authority given to the Council by the Charter. The Council's authority is not against or outside of the law. It is grounded in the Charter itself. The Court would properly exercise its judicial responsibility by recognizing that the obligations imposed on Libya by the Security Council constitute the applicable rule of law in this case.

PART V
CONCLUSION AND SUBMISSION

5.1 Thus, the claims of the Libyan Arab Jamahiriya against the United States of American should be rejected by the Court. As Part II of this Counter-Memorial has shown, each of the Libya's four claims against the United States based on the Montreal Convention must be rejected. The destruction of Pan Am 103 is not exclusively regulated by the Montreal Convention. The United States has not violated Articles 7 of the Convention, or Article 11, or of any of the other Articles invoked by Libya. By appealing to the Security Council as provided in the Charter, the United States has not violated the Convention. Moreover, as Part III has shown, the applicable legal standards in this case the requirements of the Security Council's mandatory resolutions, not those of the Montreal Convention. These resolutions are binding on Libya, and impose clear obligations that Libya has not met. Finally, as Part IV has shown, neither the Charter nor the Court's judicial character confer upon it the authority to substitute its judgment for matters the Charter has made the responsibility of the Security Council.

5.2 The position of the United States set out in this Counter-Memorial is without prejudice to the right of the United States, at an appropriate later time, to initiate separate proceedings against the Libyan Arab Jamahiriya for breach of its obligations to the United States under the Montreal Convention or otherwise.

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On the basis of the facts and arguments set out above, the Government of the United States of America requests the Court to dismiss the claims of the Libyan Arab Jamahiriya.



David R. Andrews
Agent of the United States of America

