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THE LOCKERBIE CONTROVERSY: TENSION BETWEEN THE INTERNATIONAL COURT OF JUSTICE AND THE SECURITY COUNCIL

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Pan American Flight 103 exploded midair over Lockerbie, Scotland on December 21, 1988. Investigations suggested that two Libyan nationals were to blame. When the U.N. Security Council imposed sanctions on the Libyan government in 1993 for its failure to cooperate with U.S. and U.K. extradition requests, Libya turned to the International Court of Justice (ICJ) for help. Libya asked the ICJ to declare that Libya was not obliged to extradite its nationals to the United States or the United Kingdom and further asked the Court to enjoin the U.S. and the U.K. from the use of force or threats against Libya. In 1998, the ICJ found it had jurisdiction to hear the case, which put two bodies of the United Nations on a collision course. The author explores how the U.N. system handles its internal tensions, and compares the international system with U.S. federalism and civil rights. How far can judicial review reach in the global system?

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I. INTRODUCTION

After Pan American Flight 103 exploded over Lockerbie, Scotland on December 21, 1988, with the death of 259 passengers and crew as well as eleven persons on the ground, fixing the blame became the subject of endless speculation and debate in the western media. One of the usual suspects, Ahmed Jibril, a Palestinian terrorist reputed to be operating out of Syria, was blamed for the crime. But as the criminal investigation progressed and the advanced techniques of the forensic sciences were put to work, the United States finally announced almost three years later that the true culprits were two agents of Libyan Intelligence: Abdel Basset Ali lal-Megrahi and Lamem Khalifa Fhimah. Both of these individuals were indicted in the United States in November, 1991.

In any event, there resulted an immediate outcry from the western press that the accused be "brought to justice" before American and Scottish courts. In an article appearing on November 14, 1991 in *Newsday* it was reported that, "[A]ccording to the *L.A. Times*, U.S. authorities believe that the attack on Flight 103 was orchestrated by Abdullah Sanussi, Gaddhafi's brother-in-law and the head of Libyan intelligence."¹ The case against Libya was apparently strengthened on account of a French investigation implicating Libya in a 1989 French UTA bombing. The suggestion was made that "forensic connections" were established between the UTA and Pan Am bombings. Nonetheless, the article quoted William Webster, recently retired as FBI chief, who suggested that "a number of nations" were involved. He went on to note that, "it has been pieced together like a mosaic with sometimes new information changing views on the exact players and the manner in which they played."² How this "mosaic" is reflected in the indictments remains unclear, although a considerable

1. *NEWSDAY*, Nov. 14, 1991, at 7.
2. *Id.*

amount of forensic evidence was released to the press.³ The *Economist* echoed the *Newsday* story in an article appearing two days later, but suggested that the Iranians hired the Libyans to arrange the bombing.⁴ On November 25, 1991 *Time* magazine carried an article by George J. Church entitled "Solving the Lockerbie Case."⁵ The article detailed reprisals that could be taken against Libya, which was implicated in part on the basis of the French investigation. The forensic evidence that was disclosed tied the bombing to Libya, based upon the CIA's capture of an unexploded bomb belonging to terrorists supported by Libyans in African Togo. In addition, the bomb's timing device was allegedly, ". . . one of twenty delivered to a Libyan official in 1985 and 1986."⁶ Additional evidence tied an official of Libyan Airlines to one of the accused and detailed the placement of the bomb on an Air Malta flight to Frankfurt where it was transferred to Flight 103.

While this evidence appeared more than sufficient to obtain indictments, considerable pressure was building in the western press that Libya be punished, notwithstanding the fact that the accused were yet to be brought to trial. George J. Church posed the question in the *Time* magazine article asking, "how can he [Ghaddafi] and his regime be punished?"⁷

Armed with the results of this criminal investigation and the forensic evidence which it produced, the U.S. and the U.K. demanded the extradition of the accused from Libya. Upon Libya's refusal, the U.S. and the U.K. took the matter to the United Nations Security Council.

On January 21, 1992, the Security Council adopted Resolution 731.⁸ This Resolution "implicated" officials of the Libyan government in the attack against Pan American Flight 103,

3. Douglas Frantz; Ronald J. Ostrow, *Jet Probe: Real-Life Whodunit History's biggest terrorism investigation spanned 40 countries. Two tiny electronics fragments and a diary were the keys to the Pan Am Case*, LOS ANGELES TIMES, 11/15/91, at 1.

4. *Lockerbie's Murderers*, THE ECONOMIST, Nov. 16, 1991, at 51.

5. George J. Church, *Solving The Lockerbie Case*, TIME, Nov. 25, 1991, at 62.

6. *Id.*

7. *Id.*

8. U.N. SCOR, 3033d mtg., U.N. Doc. S/RES 731 (1992).

“deplore[d]” the fact that the Libyan government “has not yet responded effectively to the above requests to cooperate fully in establishing responsibility for the terrorist acts referred to above. . . .” and concluded by urging the Libyan government to accede to the requests of the U.S. and the U.K. in cooperating with the prosecution of the persons charged.

Three days earlier Libya had requested that the dispute be arbitrated with the U.S. and the U.K. in accordance with the 1971 Montreal Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation.⁹ This request was rejected and on March 3, 1992 Libya sought relief in the International Court of Justice. Libya applied to the court for provisional measures against the U.S. and the U.K., including (a) a declaration from the court that Libya has fully complied with its obligations under the Montreal Convention; (b) that the United States has breached its legal obligations to Libya under Articles 5(2), 5(3), 7, 8(2), and 11 of the Montreal Convention; and (c) that the court declare the United States “immediately to cease and desist from such breaches and from the use of any and all force or threats against Libya, including the threat of force against Libya and from all violations of the sovereignty, territorial integrity, and the political independence of Libya”¹⁰ Libya informed the court on March 3, 1992 that provisional measures needed to be taken promptly to preserve Libya’s rights in light of the fact that “the United States had indicated that it might seek or impose economic, air and other sanctions against Libya if Libya did not comply with the demands of the United States, and that the latter had refused to rule out the use of armed force against Libya. . . .”¹¹ Finally, Libya argued “that only by granting provisional measures enjoining the United States from taking such actions against Libya was it possible to prevent Libya’s

9. Montreal Convention on the Suppression of Unlawful Acts Against The Safety of Civil Aviation, Sept. 23, 1971, 24 U.S.T. § 565, T.I.A.S. No. 7570.

10. International Court of Justice: Order With Regard To Request For the Indication of Provisional Measure In The Case Concerning Questions of Interpretation and Application of the 1971 Montreal Convention Arising From The Aerial Incident at Lockerbie (Libya v. United States), Apr. 14, 1992, 31 I.L.M. 662, 667.

11. *Id.*

rights from being irreparably prejudiced either in fact or in law. . . .¹²

By letter dated March 6, 1992 the United States responded to the court by stating that:

. . . taking into account both the absence of any concrete showing of urgency relating to the request and developments in the ongoing action by the Security Council and the Secretary General in this matter. . . the action requested by Libya . . . is unnecessary and could be misconstrued.¹³

On April 14, 1992 the court voted 11 to 5 against indicating provisional measures. As it will be shown, of considerable significance in reaching this decision was the impact of Security Council Resolution 748 which was adopted on March 31, 1992, barely two weeks before the court's decision.¹⁴ The Security Council announced its deep concern that the Libyan government had not effectively responded to Resolution 731 and announced its determination:

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

Purporting to act under Chapter VII of the Charter of the United Nations, the Security Council demanded (1) Libya's immediate compliance with Resolution 731; (2) that the Libyan government commit itself to cease from all forms of terrorist action and assistance to terrorist groups; and (3) enjoined "all states . . . [to] . . . adopt the measures set out below which shall

12. *Id.*

13. *Id.* at 668.

14. U.N. SCOR, 3036d mtg., U.N.Doc S/RES 748 (1992).

apply until the Security Council decides that the Libyan government has complied . . .”¹⁵ The Resolution then enumerated comprehensive sanctions against Libya, particularly with respect to the ingress and egress of aircraft from Libya, the supplying of aircraft or aircraft parts or maintenance, as well as the prohibition of arms transfers or the providing of military advisors to be followed by a reduction of Libyan diplomatic and consular staffs in each state.

On November 11, 1993 the Security Council passed Resolution 883¹⁶ upon Libya’s failure to comply with Resolutions 731 and 748. This time the Security Council made its position unmistakably clear that Libya must extradite the accused to the United Kingdom or the United States.¹⁷

On February 27, 1998, the ICJ rendered its judgment concerning its jurisdiction to proceed and adjudicate the dispute between the parties under the Montreal Convention, voting 13 to 2 to proceed with the case.¹⁸ The ICJ was now on a direct collision course with the Security Council.

15. Presumably, Libya's failure to surrender the accused is now the basis for the imposition of these sanctions. *Id.*

16. U.N. SCOR, 3312th mtg., U.N. Doc. S/RES 883 (1993).

17. Paragraph 16 provides: “. . . *Expresses its readiness* to review the measures set forth above and in resolution 748 (1992) with a view to suspending them immediately if the Secretary-General reports to the Council that the Libyan Government has ensured the appearance of those charged with the bombing of Pan Am flight 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 [Union de Transports Aeriens flight] 772, and with a view to lifting them immediately when Libya complies fully with the requests and decisions in resolutions 731 (1992) and 748 (1992); and requests the Secretary-General, within ninety days of such suspension, to report to the Council on Libya’s compliance with the remaining provisions of its resolutions 731(1992) and 748(1992)] and, in the case of non-compliance, expresses its resolve to terminate immediately the suspension of these measures . . .” *Id.*

18. International Court of Justice: Case Concerning Questions of Interpretation and Application of the 1971 Montreal Convention Arising From the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United States), February 27, 1998, 37 I.L.M. 587, 609.

II. THE INITIAL REQUEST BY LIBYA FOR THE INDICATION OF PROVISIONAL REMEDIES

The presumption of innocence is a fundamental tenet of Anglo-American law, deeply rooted in our judicial heritage. An indictment does not constitute evidence of guilt, at least in U.S. criminal jurisprudence. Every accused enters the court an innocent man, however compelling the evidence against him. Every American jury is so instructed by the court prior to retiring for its deliberations. The maxim *in dubio pro reo* is fundamental to certain civil law systems as well.

It should come as no surprise that Libya would seek provisional remedies in this case. The last time the Libyans found themselves in a dispute with the United States, the case involved the bombing of a nightclub in Berlin that was frequented by American servicemen. Libya suffered a humiliating bombing raid on her capital city, military installations and airports. The legality of that raid will not be discussed here; suffice it to say that it certainly would provide an impetus to Libya to preempt such action by resort to the ICJ.

The ICJ first noted that the Application by the Socialist Peoples Libyan-Arab Jamahiriya had been instituted on March 3, 1992 “in respect of □a dispute . . . between Libya and the United States over the interpretation of application of the Montreal Convention’ of September 23, 1971, a dispute arising from acts resulting in the aerial incident that occurred over Lockerbie, Scotland on 21 December, 1988 . . . ” The court found that the Application should be denied, but without prejudice to the exercise of jurisdiction over the underlying dispute.¹⁹

19. International Court of Justice: Order With Regard To Request For the Indication of Provisional Measure In The Case Concerning Questions of Interpretation and Application of the 1971 Montreal Convention Arising From The Aerial Incident at Lockerbie (Libya v. United States), Apr. 14, 1992, 31 I.L.M. 662, 665-666.

In its submission to the court, Libya emphasized that it was not a party to any extradition treaty with the U.S. and the U.K. and that no basis existed for the extradition of the accused under Article 8, Paragraph 2 of the Montreal Convention.²⁰ In requesting provisional measures, Libya asked the ICJ to declare that the Montreal Convention should govern the manner of resolving the dispute, and that resort to other measures should be precluded. In support of this argument, Libya pointed out that the U.S. and the U.K. had rebuffed efforts to resolve this dispute by resort to the procedures outlined in the Montreal Convention.²¹ Libya's ultimate objective was to enjoin the U.S. and the U.K. from compelling Libya to surrender the accused individuals or suffer the imposition of sanctions.

III. THE PROSPECT OF CONFLICTING JURISDICTION BETWEEN THE ICJ AND THE SECURITY COUNCIL

A. THE DILEMMA FACED BY THE ICJ IN CONSIDERATION OF PROVISIONAL REMEDIES

There appears to be general agreement among commentators that concurrent jurisdiction exists between the Security Council and the ICJ in disputes such as this.²² Article 35(1) of the United Nations Charter is the authority by which a member state may petition the Security Council in respect to "any dispute, or any situation of the nature referred to in Article 34, to the attention of the Security Council . . ." Article 34 of the U.N. Charter permits the Security Council to "investigate any dispute, or any situation which might lead to international friction or give rise to a dispute, in order to

20. *Id.* at 666-667. Article 8, Paragraph 2 of the Montreal Convention provides:

"Article 8.2. If a contracting State which makes extradition conditional on the existence of a treaty receives a request for extradition from another Contracting State with which it has no extradition treaty, it may at its option consider this Convention as the legal basis for extradition in respect of the offences. Extradition shall be subject to the other conditions provided by the law of the requested State."

21. *Id.* at 668-669.

22. See Vera Gowlland-Debbas, *The Relationship Between the International Court of Justice and the Security Council in the Light of the Lockerbie Case*, 80 AM. J. INT'L L. 643 (1994).

determine whether the continuance of the dispute or the situation is likely to endanger the maintenance of international peace and security." A reasonable belief by one state that another is responsible for detonating a bomb on one of its airliners certainly qualifies as a dispute likely to lead to international friction.

On the other hand, Article 38 of the statute of the International Court of Justice confers upon it jurisdiction to "decide in accordance with international law such disputes as are submitted to it . . ." Subsection A of the statute specifically provides that it apply international law to those disputes affecting "international conventions, whether general or particular, establishing rules expressly recognized by the contesting states . . ." Similarly, Article 36 of the statute expressly confers jurisdiction upon the court "in all legal disputes concerning . . . the interpretation of a treaty . . ." The treaty to be interpreted here is the Montreal Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation.²³ Article 14(1) of the treaty specifically confers jurisdiction upon the ICJ to adjudicate any dispute between two or more contracting parties, upon the failure of arbitration, at the request of any one of those parties.

The aerial incident occurred on December 21, 1988. The application for measures to be taken by the Security Council was not made until January 1992. The Security Council acted with remarkable alacrity, especially considering the remoteness of the incident to the indictment of the accused. The quality of the evidence submitted to the Security Council during the three days of hearings before it is beyond the scope of this article; one wonders however, whether it would have been sufficient in a United States court to convict the accused. As noted above, the indictment is not admissible as evidence of guilt. Based upon the record before the court, it is not surprising that it chose the prudent course of avoiding a direct collision with the Security Council on the question of

23. *Id.* See also 24 U.S.T. § 565.

provisional remedies without, however, abstaining from exercising jurisdiction over the dispute.

B. JURIDICAL BASIS FOR THE DENIAL OF PROVISIONAL REMEDIES

The application for provisional remedies was not unlike that which is made by a party seeking injunctive relief in an American court. The applicant must demonstrate there is lacking a plain, speedy and adequate remedy in the ordinary course of law and that injunctive relief is necessary to avoid irreparable harm and injury. Some of this equitable jurisprudence is evident from the arguments made by the parties. In this respect the juridical basis for denying provisional remedies is reasonable especially since the court did not foreclose the right of the parties to bring their disputes before the court according to the terms of the Montreal Convention. In this respect the Convention could provide an adequate remedy in the ordinary course of law.

The rush to adopt Security Council Resolution 748 on March 31, 1992 undoubtedly was designed to preempt the court from granting Libya's application for provisional remedies which had been pending since March 3rd. The Security Council betrayed its true motivation when it pressured Libya at a time when Libya was seeking the aid of the court. Perhaps the intention was to pressure the court as well.

Judge Shahabuddeen recognized the difficult position in which the court was placed by Resolution 748 when he observed in his separate opinion supporting the denial of provisional remedies:

The question now raised by Libya's challenge to the validity of Resolution 748 (1992) is whether a decision of the Security Council may override the legal rights of states, and, if so, whether there are any limitations of the power of the Council to characterize a situation as one justifying the making of a decision entailing such consequences. Are there any limits to the Council's powers of appreciation? In the equilibrium of forces underpinning the

structure of the United Nations within the evolving international order, is there any conceivable point beyond which a legal issue may properly arise as to the competence of the Security Council to produce such overriding results? If there are any limits, what are those limits and what body, if other than the Security Council, is competent to say what those limits are? If the answers to these delicate and complex questions are all in the negative, the position is potentially curious. It would not, on that account, be necessarily unsustainable in law; and how far the court can enter the field is another matter. The issues are however important, even though they cannot be examined *now*." (Emphasis Added.)²⁴

Judge Shahabuddeen had earlier pointed out in his opinion that an important ground for denying the provisional remedies to Libya was the fact that while sanctions were to be implemented through Resolution 748, *the use of force was not*. Because of the fact that the United States sought those sanctions, it could not legitimately resort to force without permission of the Security Council and on this basis Judge Shahabuddeen wrote "[s]o on this point the Resolution of the Security Council stands in the way, both on the law and on the facts."²⁵

This attitude is reflected in the order itself in which the court found that, "in accordance with Article 103 of the Charter, the obligations of the parties in that respect prevail over their obligations under any other international agreement, including the Montreal Convention . . ."²⁶ On that basis, the court found:

24. International Court of Justice: Order With Regard To Request For the Indication of Provisional Measure In The Case Concerning Questions of Interpretation and Application of the 1971 Montreal Convention Arising From The Aerial Incident at Lockerbie (Libya v. United States), Apr. 14, 1992, 31 I.L.M. 662, 679.

25. *Id.*

26. *Id.* at 671. Article 103 of the United Nations Charter provides:

. . . in order to pronounce on the present request for provisional measures, the court is not called upon to determine any of the other questions which have been raised before it in the present proceedings, including the question of its jurisdiction to entertain the merits of the case; and . . . the decision given in these proceedings in no way prejudices any such questions . . .²⁷

In other words, the court left all of its options open.

C. THE JURIDICAL BASIS FOR THE ALLOWANCE OF PROVISIONAL REMEDIES

In an eloquent dissenting opinion, Judge Bedjaoui brought into clear focus the need for recognizing the differing roles of the Security Council and the ICJ. He observed that here, while two separate organs of the United Nations are exercising jurisdiction over the same controversy, the Security Council is exercising essentially a political function while the court must exercise a judicial function.²⁸ As long as the court has jurisdiction over a controversy, it can and should do so without concern of the political consequences which implicate Security Council resolutions. While this may be a fine distinction, it is worth making; as Judge Bedjaoui observed, there are really two disputes between the parties:

. . . the first dispute concerns the extradition of two Libyan nationals and is being dealt with, legally, by the court at the request of Libya, whereas the second dispute concerns, more generally, state terrorism as well as the international responsibility of the Libyan state and is being dealt with politically, by the

“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.”

27. *Id.*

28. *Id.* at 680.

Security Council, at the request of the United Kingdom and the United States.”²⁹

Bedjaoui reasoned that provisional remedies were appropriate to preserve the *status quo* until the court could rule on the legal question while at the same time the Security Council was free to consider the political aspects of the “. . . demand of compensation for the families of the victims and the imposition of an obligation concretely to renounce terrorism . . .”³⁰

But where the dissent takes issue with the majority, “. . . lies in the fact that the Security Council not only has decided to take a number of political measures against Libya, but has also demanded from it the extradition of its two nationals.”³¹ Bedjaoui characterized this as an “overlap” with respect to the Security Council encroaching on the legal authority of the court to decide what is purely a legal matter “on the basis of the 1971 Montreal Convention and international law in general.”³²

Judge Bedjaoui recognized that Article 41 of the statute of the ICJ confers jurisdiction upon the court to render the provisional remedies requested and that the court was also obligated to “. . . grant every procedural safeguard to the alleged perpetrators and to protect them from the hasty judgments of public opinion or the mass media . . .”³³ At issue was Libya’s sovereignty and territorial integrity as well as the right under United Nations Charter and international law to be free from the threat or use of force.

Those dissenting judges supporting the application for provisional remedies generally believed that the court should have exercised its authority to prevail upon the parties to avoid

29. *Id.* emphasis added.

30. *Id.*

31. *Id.*

32. *Id.* at 681.

33. *Id.* at 682.

the use of force because of the inevitable aggravation of the dispute which would otherwise result.³⁴

IV. ASSUMPTION BY THE ICJ OF JURISDICTION TO HEAR THE MERITS OF THE CONTROVERSY

A. THE ARGUMENT IN FAVOR OF ASSUMING JURISDICTION

On February 27, 1998, the ICJ entered its judgment over the preliminary objections of the U.S. and the U.K. and assumed jurisdiction of this controversy. The vote was 13 to 2 with President Schwebel and Judge Oda dissenting.³⁵

The principal focus of the judgment is the applicability of the Montreal Convention which binds all of the parties before the court and which specifically provides for ICJ jurisdiction to resolve disputes under the treaty.³⁶ The arbitration provisions contained in the treaty were important to the court in assuming jurisdiction over this dispute. As the court pointed out in Paragraph 20 of the judgment:

Consequently, in the opinion of the court the alleged dispute between the parties could not be settled by negotiation or submitted to arbitration under the Montreal Convention, and the refusal of Respondent to enter into arbitration to resolve that dispute absolved Libya from any obligation under Article 14,

34. *Id.* at 669 (dissenting opinion by Judge Ajibola) and at 707 (dissenting opinion of Judge El-Kosheri).

35. International Court of Justice: Case Concerning Questions of Interpretation and Application of the 1971 Montreal Convention Arising From the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United States of America), February 27, 1998, 37 I.L.M. 587, 618, 631.

36. Article 14.1 of the Montreal Convention provides:

"Any dispute between two or more Contracting States concerning the interpretation or application of this Convention which cannot be settled through negotiation, shall, at the request of one of them, be submitted to arbitration. If within six months from the date of the request for arbitration the Parties are unable to agree on the organization of the arbitration, any one of those Parties may refer the dispute to the International Court of Justice by request in conformity with the Statute of the Court." 24 U.S.T. § 564, T.I.A.S. No. 7570, 10 I.L.M. 1151 (1971).

paragraph 1 of the Convention to observe a six-month period starting from the request for arbitration, before seising the court.³⁷

Of concern to the court was whether, as a matter of law, there existed a dispute over which it could exercise jurisdiction. Quoting from the judgment of June 30, 1995 *In the Case Concerning East Timor (Portugal v. Australia)*:

In order to establish the existence of dispute, "it must be shown that the claim of one party is positively opposed by the other." (*Southwest Africa, Preliminary Objections, Judgment, ICJ Reports 1962, page 328*); and further "[w]hether there exists an international dispute is a matter for objective determination" (*Interpretations of Peace Treaties with Bulgaria, Hungary and Romania, First Phase, Advisory Opinion, ICJ Reports 1950, page 74*). (*ICJ Reports 1995, page 100*).³⁸

Only the Montreal Convention could provide the framework for the resolution of this dispute.³⁹ As a sovereign state, Libya enjoys the right under international law and the Montreal Convention to exercise jurisdiction over the two alleged

37. International Court of Justice: Case Concerning Questions of Interpretation and Application of the 1971 Montreal Convention Arising From the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United States of America), February 27, 1998, 37 I.L.M. 587, 598.

38. *Id.*

39. In paragraph 22 of the judgment, the court listed the following reasons why the Montreal Convention governed the rights of the parties:

(a) the Respondent and Libya are bound by the Montreal Convention which is in force between the Parties;

(b) the Montreal Convention is specifically aimed at preventing that type of action (third paragraph of the Preamble);

(c) the actions ascribed to the Libyan nationals are covered by Article 1 of the Montreal Convention;

(d) the system of the Montreal Convention, as compared to the system of the Charter, is both a *lex posterior* and a *lex specialis*; [consequently,] for matters covered by that Convention, it must *a priori* take precedence over the systems for which the Charter provides; and

(e) there is no other convention concerning international criminal law in force which is applicable to these issues in the relations between Libya and the United States.

offenders, on the basis of the Libyan Penal Code, free of any interference from the U.S. or the U.K.⁴⁰

A more difficult and somewhat murky aspect of the judgment is found in a discussion under Paragraphs 48 and 49 in which the court attempts to dispose of the request of the United States that the court determine that it has no grounds for proceeding to judgment on the merits in light of the fact that the Security Council Resolutions 748 (1992) and 883 (1993) have rendered Libya's claims moot.⁴¹ The court found that to do so would require the parties to fully plead the merits which would result in "an unnecessary prolongation of an expensive and time-consuming procedure."⁴² The court did not feel that the alternative, i.e. resolving the matter at the preliminary stage, was viable under the circumstances of this case given the fact that a decision on the merits was implicated in the process of resolving preliminary objections to jurisdiction and mootness. As the judgment states in paragraph 49:

The court therefore has no doubt that Libya's rights on the merits would not only be affected by a decision not to proceed to judgment on the merits, at this stage in the proceedings, but would constitute, in many respects, the very subject matter of that decision. The objection raised by the United States on that point has the character of a *defense* on the merits. In the view of the Court, this objection does much more than "touch(ing) upon subjects belonging

40. *Id.* at 600.

41. Resolution 883 (1993) imposed additional sanctions upon Libya. These consisted of urging all states in which funds or financial resources of Libya were in their possession to freeze such assets; severe travel restrictions with respect to nationals of other states wishing to travel to Libya, close all Libyan Arab Airline offices within their territories; seize any commercial transactions with Libyan Airlines; prohibit the training of Libyan pilots; etc. Notably exempt from the sanctions were petroleum or petroleum products, including natural gas and natural gas products originating in Libya. *Id.* at 606 and *see also* S/RES 883(1993), *supra* note 15, at 1-6f.

42. International Court of Justice: Case Concerning Questions of Interpretation and Application of the 1971 Montreal Convention Arising From the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United States of America), February 27, 1998, 37 I.L.M. 587, 607.

to the merits of the case . . .”⁴³ (Emphasis added. Citations omitted.)

One is left with the impression that the court felt itself being led into a procedural trap by the United States the result of which would have either resulted in a summary dismissal of the case or an *ad hoc* decision on the merits in the course of disposing of preliminary objections.

B. THE ARGUMENT AGAINST THE ASSUMPTION OF JURISDICTION

The respondents succeeded in persuading only three judges of the correctness of their positions, those being President Schwebel, Judge Oda, and Judge Sir Robert Jennings.⁴⁴ On the question of jurisdiction, President Schwebel stated that no real dispute existed between the parties according to the provisions of the Montreal Convention principally because the United States, as a victim, had not invoked its provisions and by declining to do so had avoided creating a dispute between the parties which could be subject to the Convention. Because Libya itself as a state was accused of having procured the destruction of the aircraft (as opposed to those circumstances which are envisioned as purely terrorist acts by individuals over whom states may exercise criminal jurisdiction) the Convention could have no application. President Schwebel suggested “the 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.” He went on to note that “[a]t the same time, Article 1 of the Convention capaciously provides that □Any person’ commits an offense under the Convention if he performs an act

43. *Id.* at 607.

44. Judge Jennings sat as a member of the court in the companion case in which Libya named the U.K. as a respondent. See International Court of Justice: Case Concerning Questions of Interpretation and Application of the 1971 Montreal Convention Arising From the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. U.K.) (visited January 23, 1999) <<http://www.icj-cij.org/idocket/iluk/iluk2frame.htm>> (Sir Robert Jennings, J., dissenting).

thereafter listed. Moreover, Libya has not accepted that the accused were agents of its Government."⁴⁵

President Schwebel believed that Libya's failure to obtain a judgment on the merits from the court prior to the adoption of Security Council Resolutions 748 and 883 necessarily means that the Resolutions "are binding and govern the Montreal Convention by virtue of Article 103 of the Charter."⁴⁶ For the court to assume jurisdiction over this dispute would require it to assume authority to "overturn the Council's determination under Chapter VII of the existence of a threat to the peace and its choice of measures to deal with the threat."⁴⁷ Accordingly, because the Security Council has acted and the issues between the parties have been determined, there is nothing for the court to decide except to acknowledge its responsibility to accept and carry out the decisions of the Security Council.

Writing a dissenting opinion in the companion case in which the United Kingdom is the named respondent, Judge Sir Robert Jennings also argued that the court lacked jurisdiction over this controversy. Judge Jennings questioned the applicability of the Montreal Convention to the dispute, observing that, "[t]he citation of the Convention as a whole also invites speculation as to whether it was ever intended to deal with acts of terrorism allegedly committed by persons actually employed by a government also allegedly involved in the commission of those acts."⁴⁸ Because Libya has chosen neither to extradite the suspects nor try them by exercising Libyan criminal jurisdiction, he reasoned that the Montreal Convention has no application to the controversy and the parties are subject only to the provisions of the United Nations Charter as implemented by the Security Council. In other

45. International Court of Justice: Case Concerning Questions of Interpretation and Application of the 1971 Montreal Convention Arising From the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United States of America), February 27, 1998, 37 I.L.M. 587, 619 (Schwebel, J., dissenting).

46. *Id.* at 621.

47. *Id.* quoting from the language of Article 25.

48. International Court of Justice: Case Concerning Questions of Interpretation and Application of the 1971 Montreal Convention Arising From the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. U.K.) (visited January 23, 1999) <<http://www.icj-cij.org/idocket/iluk/iluk2frame.htm>> (Sir Robert Jennings, J., dissenting).

words, Libya could have avoided the necessity of applying to the court for provisional measures if Libya had simply chosen to prosecute the suspects in Libyan custody.

On the subject of extradition, Judge Oda suggested that, “[t]he rule of non-extradition of political criminals has long prevailed but that rule does not apply in the case of some universal crimes such as genocide and acts of terrorism.”⁴⁹ Judge Oda then observed that under the Montreal Convention Libya could assume the responsibility to prosecute the accused if they were not to be extradited and whether Libya chooses to do so or extradite them to a “politically neutral” state does not create an issue within the Montreal Convention. Judge Oda made the rather remarkable observation that no legal dispute existed between Libya and the U.S. which was covered by the Montreal Convention. This is based upon the premise that under the Montreal Convention, in the absence of extradition, the state where the accused is located is obligated to commence prosecution. The decision to prosecute itself is an exercise of sovereignty or, as Judge Oda put it, “. . . respective policies towards criminal justice . . .” which do not “. . . fall within the ambit of the Montreal Convention.”⁵⁰ Applying this reasoning, Judge Oda concluded that no dispute existed between the parties under the Convention and that no grounds could exist for the court to exercise jurisdiction to hear this case.

Despite the cleverness of the arguments of the dissenting judges against the assumption of jurisdiction, the plain language of Article 14 places jurisdiction of this dispute squarely with the ICJ.

49. International Court of Justice: Case Concerning Questions of Interpretation and Application of the 1971 Montreal Convention Arising From the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United States of America), February 27, 1998, 37 I.L.M. 587, 635.

50. *Id.* at 635.

V. THE PROSPECT OF JUDICIAL REVIEW OF SECURITY COUNCIL RESOLUTIONS BY THE ICJ

There has been a tremendous temptation among American commentators to draw analogies between the "judicial review" of Security Council resolutions by the ICJ with the power which John Marshall assumed for the United States Supreme Court in *Marbury v. Madison*,⁵¹ which established the power of the federal judiciary to review the constitutionality of acts of the legislative and executive branches.⁵²

But there are important distinctions to be made between the constitutional relationship between these three distinct branches of government and the relationship that exists between the Security Council, the General Assembly and the International Court of Justice under the U.N. Charter. While it is true that the United States Supreme Court has frequently abstained from exercising jurisdiction over controversies which it considers to be "political questions," it nonetheless possesses significant power arising directly from the Constitution to support the exercise of judicial review. The political question doctrine was succinctly defined by Justice Stevens where he wrote:⁵³

When a court concludes that an issue presents a nonjusticiable political question, it declines to address the merits of that issue. In invoking the political question doctrine, a court acknowledges the possibility that a constitutional provision may not be judicially enforceable. Such a decision is of course very different from determining that specific congressional action does not violate the Constitution. That determination is a decision

51. 5 U.S. (1 Cranch) 137 (1803).

52. See e.g., Robert F. Kennedy, *Libya v. United States: The International Court of Justice and the Power of Judicial Review*, 33 VA. J. INT'L L. 899 (1993) and see also, Gowlland-Debbas, *supra* note 22, at 643.

53. *United States Dep't of Commerce v. Montana*, 503 U.S. 442 (1992).

on the merits that reflects the exercise of judicial review, rather than the abstention from judicial review that would be appropriate in the case of a true political question.⁵⁴ (Citations Omitted)

The political question doctrine came before the United States Supreme Court the following year in *Nixon v. United States*.⁵⁵ In that case, Walter L. Nixon, a United States District Judge, impeached by the Senate, objected to the fact that he was not tried by the full Senate but rather a committee of senators guided by “managers.” The court reasoned that the Constitution does not contemplate judicial review of Senate procedures in impeachment matters which are exclusive to that body. The court contrasted the impeachment process with specific references in the Constitution to the availability of judicial review of certain acts of Congress having to do with bills of attainder and *ex post facto* laws.

M.C.W. Pinto made the observation⁵⁶ that in contrast, the U.N. Charter grants no specific authority to the ICJ to review the legality of Acts of the Security Council or General Assembly and as such there is no grant of “constitutional” authority for the court to act.

However, not all would agree that the Court may, in the absence of specific textual authorization from the Charter, make a determination of the legality of Security Council actions. In that connection, it is often recalled that the Belgian proposal at the San Francisco Peace Conference to confer on the court a general power to resolve disputes concerning interpretation of the Charter could not be adopted.⁵⁷ (Citations Omitted).

54. *Id.* at 457-458.

55. *Nixon v. United States*, 506 U.S. 224 (1993).

56. M.C.W. PINTO, *Pre-Eminence of the International Court of Justice*, INCREASING THE EFFECTIVENESS OF THE INTERNATIONAL COURT OF JUSTICE 280 (C. Peck and R.S. Lee, Eds., 1997).

57. *Id.* at page 301.

Nonetheless, Pinto and other commentators have observed that the court does have the power to render advisory opinions and has done so in connection with other important cases.⁵⁸ Advisory opinions may be requested by Article 96 of the U.N. Charter which specifically grants the power to the General Assembly or the Security Council to request an advisory opinion of the court on any legal question.⁵⁹

The question is presented differently in those situations where an active dispute exists between states and an advisory opinion is requested by one of them. This occurred in the Western Sahara Cases. But in those cases the legality of Security Council resolutions was not at issue, only ongoing disputes between Spain, Morocco and Mauritania.

In the *Namibia Case*, the ICJ had occasion to consider its powers of judicial review with respect to the contention by the governments of France and South Africa that General Assembly Resolution 2145 (XXI) was *ultra vires*. The court made the following observation in Paragraph 89 of its judgment:

Undoubtedly, the Court does not possess powers of judicial review or appeal in respect of the decisions taken by the United Nations organs concerned. The question of the validity or conformity with the Charter on General Assembly 2145 (XXI) or of related Security Council resolutions does not form the subject of the request for [an] advisory opinion. However, in the exercise of its judicial function and since objections have been advanced the Court, in the course of its reasoning, will consider these

58. See *Legal Consequences for States of the Continued Presence of South Africa in Namibia (S.W. Africa) Notwithstanding Security Council Resolution 276, 1971 I.C.J. 16 (Jun. 21)* and see also, *ICJ Advisory Opinion on the Western Sahara, 1975 I.C.J. 12 (Oct. 16)*.

59. By way of contrast, the United States Supreme Court will never render an advisory opinion; in the absence of an actual case or controversy before the court, a party lacks standing to seek any relief.

objections before determining any legal consequences arising from those resolutions.⁶⁰

When Judge Weeramantry wrote his dissenting opinion after the court's denial of Libya's application for provisional remedies on April 14, 1992, he provided a detailed historical and legal analysis of the propriety of ICJ judicial review of a Security Council resolution.⁶¹ While recognizing that the ICJ cannot function as an appellate court within the framework of the United Nations system, it must nonetheless recognize its role as ". . . the principle judicial organ of the United Nations charged with the task, *inter alia*, of deciding in accordance with international law such disputes as are submitted to it . . ."⁶² As such, ". . . the court acts as guardian of the Charter and of international law for in the international arena, there is no higher body charged with judicial functions and with the determination of questions of interpretation and application of international law."⁶³ Judge Weeramantry astutely observed that even in issues involving the maintenance of international peace and security, ". . . the Charter confers no exclusive competence on any one principal organ."⁶⁴

This view is in contrast to that espoused by Judge Sir Robert Jennings. In his dissenting opinion, Judge Jennings observed that the Court is obliged "to act always as the principal judicial organ of the United Nations."⁶⁵ In so doing, it must simply apply applicable United Nations law. However, once the Security Council, exercising its discretion under Article 39 of the Charter determines that there exists a "threat to the

60. 1971 I.C.J. 16 *supra* note 58 (advisory opinion).

61. International Court of Justice: Order With Regard To Request For the Indication of Provisional Measure In The Case Concerning Questions of Interpretation and Application of the 1971 Montreal Convention Arising From The Aerial Incident at Lockerbie (Libya v. United States), Apr. 14, 1992, 31 I.L.M. 662, 668-699.

62. *Id.* at 691.

63. *Id.* at 691. (Emphasis added).

64. *Id.* at 691. (Emphasis added).

65. International Court of Justice: Case Concerning Questions of Interpretation and Application of the 1971 Montreal Convention Arising From the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United Kingdom) (visited January 23, 1999) <<http://www.icj-cij.org/idocket/iluk/iluk2frame.htm>> (Sir Robert Jennings, J., dissenting).

peace,” the court has no business substituting its judgment for that of the Security Council. In his consideration of the *Namibia Case*, Judge Jennings wrote:

That there is no power of judicial review of Security Council decisions under Chapter VII of the Charter is not merely because of the dictum of the Court in the *Namibia* case. The position is established by the provisions of the Charter itself. Moreover it is evident from the records of San Francisco that a power of judicial review was proposed and rejected by the drafting conference. The Court is not a revising body, it may not substitute its own discretion for that of the Security Council; nor would it in my view be a suitable body for doing that; nor is the forensic adversarial system suited to the making of political decisions.⁶⁶

What is unique about the Lockerbie case is that the court is presented with a treaty violation under the Montreal Convention which in a sense has been “pre-judged” by the Security Council in Resolutions 731, 748 and 883 with particular reference to the demand that Libya surrender the accused to the United Kingdom or the United States for trial.

If the court should adjudicate the liability of the parties according to the treaty, Libya’s failure to bring the accused to trial within its own jurisdiction, absent an extradition treaty with the requesting states, can be construed as a violation of Article 7 of the treaty, which provides that in the absence of extradition that the case be submitted to the competent authorities for the purpose of prosecution. Article 7 also provides that, “[t]hose authorities shall take their decision in the same manner as in the case of any ordinary offense of a serious nature under the law of that state.”⁶⁷ Unquestionably, Libya has failed to do this arguing that the United States has

66. *Id.*

67. 24 U.S.T. § 571.

not cooperated under the treaty by providing the necessary evidence to support the prosecution of the accused. These questions undoubtedly will have to be resolved by the Court.

A larger question emerges with respect to the issue of sanctions. If the court is persuaded to address the propriety of sanctions under the Security Council resolutions after deciding culpability under the treaty, the issue of judicial review will have to be faced.

VI. CONCLUSION

Finding a path through this legal labyrinth is not easy. Unquestionably, the court had little choice but to accept jurisdiction of this treaty dispute upon Libya's Application. But it has not been asked for an advisory opinion and, instead, must settle an active dispute. Under Article 14 (1) of the Convention, it must adjudicate this dispute in conformity with Article 38 of the statute of the court. There is nothing in Article 38 which requires the court to accord any special legal effect to a resolution of the Security Council, except to the extent that a Security Council resolution is presumptively valid under the U.N. Charter. The ICJ may have to decide the question on the basis of the evidence presented and at the end of the day it will have to conclude whether the sanctions which have been imposed by the Security Council on Libya are justified.

One can envision the following scenarios:

- (1) The court affirms Libya's right under the Montreal Convention to decline extradition of the accused while at the same time finding that Libya has violated Article 7 of the treaty by failing to "submit the case to its competent authorities for the purpose of prosecution." The court may not be persuaded that Libya needs evidence from the United States to justify going forward with the prosecutions and Libya could be held to have violated this provision of the treaty. The sanctions could therefore be justified, to be followed by the

possibility of additional sanctions to include, for example, export restrictions on petroleum products.

(2) The court finds that the United States has acted in bad faith by refusing to supply the necessary evidence to justify prosecution of the accused, in which event Libya could be found justified in failing to bring the accused to trial in Libya. In that case, the justification for the sanctions would be called into question and international support for Resolutions 731, 748 and 883 would be undermined.

(3) An agreement is reached permitting the trial of the accused in the Netherlands under Scottish law. If this results in the lifting of sanctions, this should bring the matter to an end leaving the court with nothing to decide.

In short, a political solution to this dispute may well resolve the matter without the need for further proceedings before the court.⁶⁸ But a precedent has already been set. In the future, on the basis of the lengthy opinions which have been written by these eminent jurists, there now exists considerable authority for a state, wishing to challenge the legality of a Security Council resolution, to point to the Lockerbie cases as a basis for the ICJ to become involved in an international political dispute which has already precipitated action by the Security Council. The court could be persuaded to exercise its jurisdiction over a

68. In December, 1998, Secretary General Kofi Annan visited Libya in an effort to secure the surrender of the two suspects for trial in the Netherlands. On December 16, 1998, it was reported in the *Straits Times*, that shortly after he spoke to the Libyan General Peoples Congress, a spokesman for that country's top legislative body reported that it was satisfied with a plan to try the suspects in a neutral country "with all guarantees." On December 17, 1998, the court, on application of the United Kingdom granted an extension of time to March 31, 1999 for the filing of its Counter-Memorial, and a like order was entered on application of the United States. This followed a change of policy by the U.S. and the U.K. allowing the trial to be conducted in the Netherlands. However, the parties have yet to agree on all conditions.

treaty dispute which might be implicated in connection with a breach of the peace.⁶⁹

Whether this case will ultimately determine the contours of judicial review by the court of Security Council competence remains an open question. The very fact that the court has accepted jurisdiction and has chosen to adjudicate this controversy under the Montreal Convention will mean that these cases will likely serve as precedents for future applications by states wishing to avoid the impact of Security Council resolutions.

69. Judge Jennings envisioned the possibility that in such circumstances the court might be asked to interfere with peacekeeping operations (*supra* note 65). But if the peacekeeping operations are being undertaken illegally, why shouldn't a state have recourse to the ICJ?

