THE I.C.J.'S DECISION IN THE LOCKERBIE CASES

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The United States firmly believes that a strong and active international court is an indispensable element of an international legal order. Prevention of the use or threat of force to settle international disputes is essential to the maintenance of international peace and security, and is most effectively assured by the development of an international legal order and resort to a strong and respected court.2

I. INTRODUCTION

In this, the United Nations’ Decade of International Law, a primary goal of which is to ensure full respect for the International Court of Justice,3 the United States and its allies have dealt the Court yet

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2 United States’ response to the United Nations Secretary-General’s questionnaire on the Role of the Court, 1974 Report of the Secretary-General (A/8382 at 13) [hereinafter United States’ Response].

3 United Nations Decade of International Law, U.N. GAOR, 44th Sess., 60th mtg. at 31, U.N. Doc. 44/23 (1989) (declaring 1990-1999 the Decade of International Law, with one of its main purposes being “[t]o promote means and methods for the peaceful settlement of disputes between States, including resort to and full respect for the International Court of Justice”).
another blow,\textsuperscript{4} this time in the ongoing attempt to destabilize the regime of Libya's Muammar el-Qaddafi.\textsuperscript{5} The United States has, of course, a long history of institutional engineering of the United Nations Charter for immediate political goals.\textsuperscript{6} On this occasion, using its new found ascendancy on the Security Council, the United States was able to use that organ to bring pressure on Libya to force an extradition of Abdel Basset Ali al-Megrahi and Lamen Khalifa Fhimah, two Libyans who were indicted by a federal grand jury for the bombing of Pan Am flight 103 which crashed over Lockerbie, Scotland in 1985.\textsuperscript{7} The United States was also able to block a Libyan appeal for interim measures in the International Court when the Security Council, acting under Chapter VII, adopted Resolution 748\textsuperscript{8} three days after the Court hearing and before a judgment was issued which ordered sanctions if Libya failed to hand over the alleged bombers.

The Court rejected Libya's request for interim measures on the basis that Libya's obligations under Articles 25 and 103 of the Charter prevailed over any rights Libya may have under the 1971 Montreal Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation (Sabotage).\textsuperscript{9} The Court considered that whatever the situation prior to the adoption of Resolution 748, it was no longer appropriate to grant provisional measures. In part this was due to the fact that to do so would likely impair the rights that the United States and the United Kingdom derived from Resolution 748.\textsuperscript{10}

\textsuperscript{4} The first blow was the Nicaragua decision. Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14 (June 27). For a discussion of the impact of the decision on the Court, see \textsc{Edward McWhinney, Q.C., The International Court of Justice and the Western Tradition of International Law} 99-136 (1987).

\textsuperscript{5} Bernard Gwertzman, \textit{Tension Over Libya: Trying to Topple Qaddafi}, \textsc{N.Y. Times}, Apr. 18, 1986, at A1 (indicating that the Tripoli raid was part of an ongoing attempt to unseat Qaddafi).

\textsuperscript{6} Thomas M. Franck, \textit{U.S. Foreign Policy and the U.N.}, 14 \textsc{Den. J. Int'l L. \\ \\
& Pol'y} 159, 163-68 (1986).

\textsuperscript{7} These individuals were similarly charged by the Scottish Lord Advocate with the same offence. Announcement by the Lord Advocate of Scotland on 14 November 1991, 31 I.L.M. 718-721 (1992).


\textsuperscript{10} Libya v. U.K., 1992 I.C.J. at 15, para. 41.
II. THE FACTS OF THE CASE

On the 21st of December 1988, Pan Am flight 103 exploded over Lockerbie killing all 259 people aboard and eleven on the ground.\textsuperscript{11} Although there was evidence implicating Iran and Syria in the bombing,\textsuperscript{12} United States and Scottish investigators, relying on fragments of a timer, identified the above mentioned Libyan agents as being responsible for the bombing.\textsuperscript{13} Following the indictment of the suspects before a grand jury in the District of Columbia and a charge by the Lord Advocate in Scotland,\textsuperscript{14} the United States and the United Kingdom issued a joint declaration on the 27th of November 1991, calling on Libya to surrender for trial those indicted, to supply information relating to the crime, and to \textit{immediately} pay appropriate compensation.\textsuperscript{15}

Libya claimed that its domestic law did not permit the extradition of nationals,\textsuperscript{16} but agreed to institute proceedings against the suspects and requested assistance from United States and United Kingdom investigators.\textsuperscript{17} Libya also offered an opportunity for observers from the two countries to be present at the proceedings.\textsuperscript{18} These requests were apparently ignored. On the 21st of January 1992, the Security Council passed Resolution 731 which expressed concern over the results of the indictment implicating officials of the Libyan govern-

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\textsuperscript{14} Id.
\textsuperscript{16} Libya v. U.K., 1992 I.C.J. at 51 (Weeramantry, J., dissenting); Libyan Criminal Code, 28 November 1953, arts. 8-10; Criminal Procedure Code, 28 November 1953, arts. 493-510.
\textsuperscript{18} Libya v. U.K., 1992 I.C.J. at 51 (Weeramantry, J., dissenting). Those suspected of the bombing were described in Resolution 731 as Libyan ‘officials’. See infra note 20. The Lord Advocate of Scotland described the two accused as allegedly being members of the Libyan Intelligence Service: Megrahi also held positions with the Libyan Arab Airlines and as the Director of the Centre for Strategic Studies in Tripoli and Fhima was Station Officer with the Libyan Arab Airlines in Malta. See Resolution 748 supra note 8, at 718-19.
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ment and deplored Libya's lack of response to the United States' and United Kingdom's joint declaration.¹⁹

On the 3rd of March, Libya filed two applications in the International Court, relying on Article 14(1) of the Montreal Convention,²⁰ contending that it had not been possible to settle the dispute by negotiation and that the parties had been unable to agree on the organization of an arbitration. Libya contended that the United States and the United Kingdom had rejected Libyan efforts to resolve the matter under the framework of international law and the Convention and that both Countries were pressuring Libya into surrendering the Libyan nationals.²¹ In one application, Libya requested the Court to declare on the legality of the actions of the respective parties under the Convention,²² and in the other, it asked the Court to enjoin the United States and the United Kingdom from taking action to compel or coerce Libya into surrendering the accused and to ensure that no steps be taken that would prejudice the rights of Libya with respect to the legal proceedings that were the subject of the application.²³

The Court heard the matter on the 26th to the 28th of March 1992. Three days later, on the 31st of March 1992, the Security Council, acting under Chapter VII of the Charter, adopted Resolution 748 wherein Libya was called upon to extradite the individuals concerned by the 15th of April or suffer sanctions.²⁴ On the 14th of April the International Court denied interim measures.²⁵ On the 15th

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²⁰ Article 14(1) provides:

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

²² Id. at 7, para. 7.
²³ Id. at 7, para. 9.
²⁵ IN FAVOUR OF THE COURT'S DECISION: Vice-President Oda, Acting President; President Sir Robert Jennings; Judges Lachs, Ago, Schwebel, Ni, Evensen,
of April sanctions were imposed.\textsuperscript{26} Subsequently, the Libyan General Peoples Congress has passed a tentative resolution approving of the surrender of the suspects,\textsuperscript{27} and the Libyan government has supplied the British intelligence service with the names of I.R.A. terrorists trained in special camps in Libya.\textsuperscript{28}

III. THE BASIS OF THE COURT’S DECISION

In its brief judgment denying interim measures, the Court stated that the parties were obliged to carry out the decisions of the Security Council in accordance with Article 25 of the Charter, and that at the interim measures stage of the proceedings, Resolution 748 was prima facie binding on the parties.\textsuperscript{29} In accordance with Article 103 of the Charter, the obligations of the parties under this Resolution superseded any obligations under other instruments,\textsuperscript{30} including the Montreal Convention.\textsuperscript{31} The indication of provisional measures would also prima facie deprive the United States and the United Kingdom of their rights under the Resolution.\textsuperscript{32} The Court made it clear that


\textsuperscript{27} \textit{Libyan Surrender}, THE AUSTL., June 18, 1992, at 8; \textit{see also}, LONDON TIMES, June 13, 1992, at 16.


\textsuperscript{30} Article 103 reads:

- 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.

\textsuperscript{31} \textit{Id.} at 15, para. 41. The particular rights, of which the United Kingdom and the United States might prima facie be deprived by the indication of provisional measures, were those demanded of the Joint Declaration of the United States and the United Kingdom of November 27, 1991. This called on Libya to:

- Surrender for trial all those charged with the crime; and accept responsibility for the actions of Libyan officials;
- Disclose all it knows of this crime, including the names of all those responsible, and allow full access to all witnesses, documents and other

U.N. CHARTER art. 103.

it was not definitively deciding the legal effect of Resolution 748 or its jurisdiction to entertain the merits of the case.\(^3\) The Court may therefore have to ultimately determine the legitimacy of the Resolution in terms of the Charter and could make an order inconsistent with the Security Council’s Resolution. The effect of the decision is that, in the interim, the respondent states may utilize the prima facie presumption of legitimacy in order to pressure Libya into extraditing the alleged offenders.

Of the majority, Judges Evensen, Tarassov, Guillaume and Aguilar Mawdsley appended a joint declaration vindicating the Court’s judgment, particularly the reliance of the Court on the Security Council’s Resolution. They characterized the situation as being one where the parties were within their rights to insist on different things: the United States and the United Kingdom to insist on the extradition and Libya to refuse extradition.\(^3\) In insisting on extradition, the respondent states were entitled to utilize any method consistent with international law.\(^3\) They also considered that the Security Council, if unhappy with this impasse, could, acting within the framework of Chapter VII, issue the resolutions compelling Libya to extradite, and the Court could properly take note of this change of circumstances.\(^3\) These judges seem, therefore, to characterize the matter in terms of a political change of circumstance not impinging on the authority of the Court.

Judges Shahabuddeen and Lachs similarly thought that the basis of the Court’s order on Resolution 748 was legitimate. Shahabuddeen preferred to view this situation not as a conflict between the Security Council and the Court, but rather as a conflict between the obligations of Libya under the Charter and under the Convention.\(^3\) Judge Lachs, on the other hand, considered that the two organs of the United

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material evidence, including all the remaining timers;
- Pay appropriate compensation.


Resolution 748 required in para. 1 that Libya immediately comply with para. 3 of Resolution 731 which in turn urged Libya to comply with the demands made in the Statement of November 27. See Annexes A and B.


\(^{34}\) Id.

\(^{35}\) Id. at 24, paras. 1-2 (joint declaration of Judges Evensen, Tarassov, Guillaume and Aguilar Mawdsley).

\(^{36}\) Id. at 25, para. 4.

\(^{37}\) Id. at 29 (separate opinion of Judge Shahabuddeen).
Nations with power to render binding decisions should act in harmony, although not in concert, without prejudicing the exercise of power by each other. The Security Council having already acted, the Court was faced with a new situation in which it could not indicate effective interim measures. Failure to act was not an abdication of the Court’s powers, but rather a reflection on the system under which the Court has to operate.\textsuperscript{38}

The Security Council’s action and the reliance of the Court on Resolution 748, however, troubled many of the judges, including some of the majority, because they saw a source of potential conflict between the Court and the Security Council, and a possible challenge to the Court’s jurisdiction under the Charter. Of the majority, two judges preferred to refuse the indication of provisional measures on grounds other than the Resolution.\textsuperscript{39} Acting President Oda thought that the Court should have based the denial on the ground that the encroachments on which Libya’s claim for provisional measures were based related to Libya’s sovereign rights under public international law and not the Convention.\textsuperscript{40} No state is obliged to extradite its own nationals unless there is a treaty obligation to the contrary.\textsuperscript{41} A state has a right to exercise jurisdiction over crimes committed in its own territory and may claim jurisdiction over crimes committed abroad by aliens if it affects its national security, or if there is universal jurisdiction.\textsuperscript{42} The reinforcement of an extradition request could be deemed contrary to international law as being an encroachment on the sovereign rights of the holding state.\textsuperscript{43} Thus, the application relates to protection of sovereign rights under general international law and not to the rights of Libya under the Convention.\textsuperscript{44} As the basis of Libya’s application was to seek a declaratory judgment on the application of the Convention, Judge Oda would not have indicated interim measures whether or not the Security Council had adopted Resolution 748.\textsuperscript{45} On this analysis the Court

\textsuperscript{38} Id. at 27 (separate opinion of Judge Lachs).
\textsuperscript{39} Id. at 20 [section IV] (declaration of Acting President Oda); \textit{Id.} at 23 [final para.] (declaration of Judge Ni).
\textsuperscript{40} Id. at 18-19 [section III, unnumbered paras. 1-2] (declaration of Acting President Oda).
\textsuperscript{41} Id. at 18-19 [section III, unnumbered para. 1].
\textsuperscript{42} Id.
\textsuperscript{43} Id. at 19 [section III, unnumbered para. 2].
\textsuperscript{44} Id. at 19 [section IV].
\textsuperscript{45} Id. at 18-19 (declaration of Acting President Oda).
could not be criticized for not acting before the Security Council. Judge Ni similarly preferred to base his decision to deny Libya's request for interim measures solely on the ground that the six month period provided by Article 14(1) of the Convention for a negotiated settlement had not yet elapsed.

Of the dissenting judges, Judge Bedjaoui was strongly critical of the Court for its reliance on Resolution 748. He viewed this as a matter extrinsic to the application and the reliance on it cast doubt on the integrity of the judicial function. The Court's order was not based on its discretionary power to refuse to indicate provisional measures, but appeared to be directly linked to the decision of the Security Council which bore directly on the very subject matter of the dispute. The other dissenting judges, Weeramantry, Ranjeva, Bola Ajibola, and Ad Hoc Judge El-Kosheri thought that the Court could and should indicate interim measures despite Resolution 748.

IV. LIBYA'S RIGHTS UNDER THE MONTREAL CONVENTION

The Montreal Convention is one of three multilateral treaties dealing with international terrorist acts against aviation. It was unfortunate, to say the least, that on the first occasion that a state was charged with supporting terrorist organizations it was not given an opportunity to show its bona fides under the Convention. The clear implication of the respondents' joint declaration is that Libyan judicial officials would be incapable of dealing with the matter in an impartial way. There is some irony in this as the United Kingdom certainly does not have a sterling record insofar as its treatment of persons accused of terrorist acts is concerned. Also, the extensive publicity put

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46 Id. at 19.
47 Id. at 23 (declaration of Judge Ni).
48 Id. at 40, para. 16 (Bedjaoui, J., dissenting).
49 Id. at 50 (Weeramantry, J., dissenting).
50 Id. at 73, para. 6 (Ranjeva, J., dissenting).
51 Id. at 88 (Ajibola, J., dissenting).
52 Id. at 107, para. 47 (El-Kosheri, Ad-hoc J., dissenting).
forward in the press by United States officials against Libya generally and specifically implicating Libya in the bombing would make it difficult for the suspects to receive an impartial jury trial.\textsuperscript{55} Added to this is the strong inference in the joint communique that the respondent states had pre-tried the suspects and found them guilty.\textsuperscript{56}

\textbf{A. The Six Month Arbitration Period}

Various judges in the Lockerbie decision commented on Libya’s right to bring the application within the six month period and its rights to try the suspects under the Montreal Convention. Article 14 of the Montreal Convention\textsuperscript{57} provides for a six month period for the parties to arrange an arbitration. After this period, if the parties fail to agree on the organization of an arbitration, the matter can be referred to the Court.\textsuperscript{58} Libya contended that the light of the respondents’ inflexibility in their demands, further negotiation was pointless.\textsuperscript{59} Judge Weeramantry agreed on the basis that if one party has repudiated the negotiation process, they cannot in turn insist that the other party abide by the original time frame while the first party, free from the conciliatory and judicial process, may pursue non-conciliatory procedures.\textsuperscript{60} Judge Bola Ajibola considered that the Court should not adopt a rigid approach to the six month requirement in view of the fact that had Libya waited for the period to elapse they still would have met with a refusal to arbitrate. Moreover, the use of the wording “If within six months from the date of the request for arbitration . . .” of Article 14(1)\textsuperscript{61} indicates that it is the demand

\textsuperscript{55} Libya v. U.K., 1992 I.C.J. at 112, para. 63 (El-Kosheri, Ad-hoc J., dissenting); \textit{Id.} at 31-32 (separate opinion of Judge Shahabuddeen); \textit{see also} Rosenthal, \textit{supra} note 13, at A1.

\textsuperscript{56} Libya v. U.K., \textit{supra} note 1, at 29-30 (separate opinion of Judge Shahabuddeen).

\textsuperscript{57} \textit{Convention on Suppression, supra} note 9, art. 14(1) provides:

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

\textit{Id.}

\textsuperscript{58} \textit{Id.}


\textsuperscript{60} \textit{Id.} at 51 (Weeramantry, J., dissenting).

\textsuperscript{61} \textit{Convention on Suppression, supra} note 9, art. 14, para. 1.
and refusal within the period that triggers the right of appeal to the Court.62

Judge Bedjaoui63 and Ad-hoc Judge El-Kosheri64 agreed with the two points made by Bola Ajibola. Acting President Oda also thought that, given the circumstances of the case, it would be overly legalistic to require the six month waiting period.65 Judge Ni alone would have denied Libya’s application to the Court on the basis that it was premature.66

B. Libya’s Right to Try the Suspects and to Refuse Extradition

The United States and the United Kingdom argued that Libya had no rights that could be protected by interim measures since the Montreal Convention imposed obligations but did not confer rights.67 Judges Evensen, Tarassov, Guillaume, and Aguilar in their joint declaration had no doubt that, under customary international law, Libya had a right to refuse to extradite the suspects, and that the refusal to extradite did not necessarily give rise to any action on the part of the soliciting state.68 The Montreal Convention did not create an obligation to extradite; its sole implication being that a failure to extradite meant that the affair should be submitted to the competent Libyan authorities.69

Judge Bedjaoui considered that the Montreal Convention covered not only acts of individual terrorism, but also acts of state-sponsored terrorism against aircraft. He noted that the Convention could prove ineffectual in the latter cases if the sponsoring state decides to try the individuals itself.70 He thought, however, that the Convention

63 Id. at 36-37, para. 9 (Bedjaoui, J., dissenting).
64 Id. at 108-09, paras. 50-53 (El-Kosheri, Ad-hoc J., dissenting).
65 Id. at 18 (declaration of Acting President Oda).
66 Id. at 22-23 (declaration of Judge Ni).
67 Id. at 38, para. 11 (Bedjaoui, J., dissenting).
68 “In so far as general international law is concerned, extradition is a sovereign decision of the requested State, which is never under an obligation to carry it out. Moreover, in general internation law there is no obligation to prosecute in default of extradition.” Id. at 24, para. 2 (joint declaration of Judges Evensen, Tarassov, Guillaume and Aguilar Mawdsley).
69 Id. at 24, para. 2, refering to Art. 5 requiring states to establish domestic jurisdiction over the acts in question, Art. 8 permitting the Convention on Suppression to be used as an extradition treaty between Member States without requiring extradition, and Art. 7 requiring Member States to extradite or submit the matter to their competent authorities.
70 Id. at 37, para. 10 (Bedjaoui, J., dissenting).
clearly gave Libya the option of trying the suspects or extraditing them and, moreover, that a state should be able to protect a right fundamentally derived from its sovereignty and not be hindered in carrying out its international obligations. Judges Weeramantry, Ranjeva, Bola Ajibola, and El-Kosheri also thought that Libya had the right to try or extradite the suspects under the Convention.

V. THE RESPECTIVE POWERS OF THE SECURITY COUNCIL AND THE COURT

A. Litispendence, the Security Council and the Court Prior to Lockerbie

In his dissenting judgment in the Anglo-Iranian Oil Co. case, Judge Alvarez thought that if a case submitted to the Court should constitute a threat to world peace, the Security Council may seize itself of the case and put an end to the Court’s jurisdiction. This seems an overly broad statement, particularly in light of the Court’s power to determine its own jurisdiction. The practice of the Security Council has indicated that, while that organ does not deny itself the right to proceed with a matter being dealt with by the Court, it has generally not proceeded with a matter pending judicial determination. This was the first time that the two organs of the United Nations with power of imposing mandatory orders on states have come into potential conflict.

In the past the Security Council has either deferred to the Court or, because of the veto, been unable to act. In the Corfu Channel case (Merits), the Security Council recommended that the parties

71 Id. at 38-39, para. 12.
72 Id. at 68-69 (Weeramantry, J., dissenting); id. at 72, para. 2 (Ranjeva, J., dissenting); id. at 81-82, para. 3 (Ajibola, J., dissenting); id. at 95, para. 4 (El-Kosheri, Ad-hoc J., dissenting).
74 Article 36(6) of the Court’s Statute provides that in the event of a dispute as to whether the Court has jurisdiction the matter shall be settled by a decision of the Court. Even without such a provision, an international tribunal, absent any agreement to the contrary, has the right to determine its own jurisdiction; Nottebohm Case (Liech. v. Guat.), 1953 I.C.J. 111 at 119-120 (Preliminary Objection).
should immediately refer their dispute to the Court.\footnote{Id. at 24.} In the \textit{Anglo-Iranian Oil Co.} case,\footnote{Anglo-Iranian Oil Co. (U.K. v. Iran), 1952 I.C.J. 93 (July 22).} the Security Council adjourned its debate until the International Court had ruled on its own competence in the matter.\footnote{U.N. SCOR, 6th Sess., 565th mtg. at 12, U.N. Doc. S/PV.565 (1951).} In the \textit{Aegean Sea Continental Shelf} case,\footnote{Aegean Sea Continental Shelf (Greece v. Turk.), 1976 I.C.J. 3 (Interim Protection Order of Sept. 11).} the Security Council invited Greece and Turkey to, “take into account the contribution that appropriate judicial means, in particular the International Court of Justice, are qualified to make to the settlement of . . . their dispute.”\footnote{S.C. Res. 395, U.N. SCOR, 31st Sess., 1953rd mtg. at 15, 16, U.N. Doc. S/12187 (1976).} Finally, in the \textit{Hostages} case\footnote{Concerning United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran), 1979 I.C.J. 7 (Order of Provisional Measures of Dec. 15).} the United States was seeking essentially the same remedies in the Security Council as it was in the Court but was eventually only able to get a recommendatory resolution,\footnote{S.C. Res. 461, U.N. SCOR, 34th Sess., 2184th mtg. at 24-25, U.N. Doc. S/13711/Rev.1 (1979). A draft resolution calling for sanctions was vetoed by the Soviet Union. \textit{See U.S. Asks Security Council To Impose Sanctions Against Iran}, 80 DEP'T ST. BULL., Feb., at 68-71.} and in the \textit{Nicaragua} decision,\footnote{Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.), 1984 I.C.J. 169 (Order of Provisional Measures of May 10).} Nicaragua failed to get the Security Council to act on its behalf.\footnote{Id. at 392, 432. See also McWHINNEY, \textit{supra} note 4, at 106-07, for the subsequent history of Nicaragua's attempt to have the Court's order enforced.} The General Assembly has similarly deferred voting on a motion which might have preempted an opinion of the Court.\footnote{\textit{Voting Procedure on Questions Relating to Reports and Petitions Concerning the Territory of South West Africa}, U.N. GAOR, Plenary Meetings, 328 (1954); G.A. Res. 904 (IX), U.N. GAOR, 9th Sess., Supp. No. 21, U.N. Doc. A/2890. For a general discussion of the uneven practice of the General Assembly, see CIOBANU, \textit{supra} note 76, at 218-226.} It is interesting to note that in the early days of the Court, some states, in order to prevent this conflict from arising, made a specific reservation to the jurisdiction of the Court suspending proceedings in any dispute in which the Security Council was exercising its functions.\footnote{See \textit{Texts Governing the Jurisdiction of the Court}, 1953-54 I.C.J.Y.B. 201, 210-11 (reservation of Australia in its declaration of 6 Feb. 1954); \textit{see also Texts Governing the Jurisdiction of the Court}, 1988-89 I.C.J.Y.B. 54, 78-81 (reservations of Malta and Mauritius excluding disputes arising from a discharge of functions pursuant to recommendation or decision of an organ of the United Nations).}
B. The Objection Lis Pendens in the Lockerbie Case

During the Lockerbie debates several delegates thought that the Security Council should wait until the Court had made a determination. The Zimbabwe delegate thought the action of the Security Council could lead to a major institutional crisis. Ten members, including Russia, voted in favour of the Resolution with five abstentions, including China. China’s abstention raises again the Article 27(3) difficulty of the requirement of a concurring vote by permanent members.

After the adoption of Resolution 748, the Court called on the parties to make observations on the effect of the Resolution. Libya’s contention was that the Security Council was infringing on its rights under the Convention as well as its rights under international law; that the risk of contradiction between the Resolution and the provisional measures requested did not make the application inadmissible as there was no hierarchy between the Court and the Security Council; and that the Security Council had acted contrary to international law and was employing Chapter VII merely as a means of depriving Libya of its rights under the Montreal Convention.

Under Article 25 of the Charter, members of the United Nations “agree to accept and carry out the decisions of the Security Council in accordance with the present Charter.” Without commenting on the legal effect of Resolution 748, the Court was prepared to give the Resolution prima facie legitimacy for the purposes of the request for interim measures. The majority was not, therefore, prepared to make any express comments on the respective powers of the Council and the Court. Other members of the Court were not so reticent.

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89 Id. at 53.
90 Voting for Resolution 748 were the United States, United Kingdom, France, Russia, Austria, Belgium, Ecuador, Hungary, Japan, and Venezuela; abstaining were China, Cape Verde, India, Morocco, and Zimbabwe. Boswell, supra note 25, at 6.
91 Decisions of the Security Council on all non procedural matters, “shall be made by an affirmative vote of nine members including the concurring votes of the permanent members.” U.N. CHARTER art. 27(3).
93 Id. at 14, paras. 35-36.
94 U.N. CHARTER art. 25.
C. Judge Bedjaoui’s Dissenting Opinion

Of the dissenting judges, Judge Bedjaoui was perhaps most critical of the actions of the Security Council. He noted that for the first time there was the possibility of one organ of the United Nations influencing the decision of the other and the possibility of conflict between the two decisions. On the facts of the case, he questioned the prudence of the Council in acting under Chapter VII: how is it that three years after the event the matter now constitutes an imminent threat to peace? He also noted that the evidence implicating the accused did not appear strong and drew attention to General Assembly Resolution 41/38 of November 20, 1986, indicating that the United States was engaging in a campaign of misinformation against Libya.

Insofar as the respective powers of the Security Council and the Court were concerned, Judge Bedjaoui recognized that the two organs were being asked to decide different questions. The Council considered Libya’s international responsibility for state sponsored terrorism, while the Court considered the question of the rights of the parties under the Convention. Moreover, the Court was making a legal determination and the Council a political one. It was the parties’ right to both legal and political determination of the matter which led to the possibility of contradictory solutions. The Security Council’s Resolution created a grey area of overlapping jurisdiction; however, while the Court could not be used as a Court of Appeal against the decision of the Security Council, the Security Council should not subvert the integrity of the Court’s legal function.

The Court, not having been asked to deal with the question of international responsibility for state sponsored terrorism, could not address that matter. Judge Bedjaoui also recognized the Security Council as the sole determiner of the position of a political dispute. He thought that while the Court should not interfere with the decision of the Security Council, that policy should only be maintained insofar as the Security Council does not interfere with the judicial function of the Court. Here, the very raison d’être of the Court’s function had been affected. His Honor thought that the Security Council

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96 Id. at 33, para. 2 (Bedjaoui, J., dissenting).
97 Id. at 41-43, paras. 18-21.
98 Id. at 34-35, paras. 4-7.
99 Id. at 41-42, para. 18.
100 Id. at 42-43, para. 20.
101 Id. at 46, para. 27.
102 Id. at 44, para. 22.
was bound to respect the goals and aims of the Charter to which it owed its existence. Under Article 1(1), the Security Council is obliged to adhere to the principles of international law and justice. As the Court is unable to make pronouncements on the constitutional validity of the Resolution, it benefits from a prima facie validity. However, Judge Bedjaoui thought that this was only the case if the Resolution were not an attempt to deprive the Court of its jurisdiction, as opposed to an attempt to deprive Libya of its rights. The former would deprive the Resolution of its effectiveness even at this stage of the proceedings. His Honor thought that it would be manifestly incompatible with the Charter if one organ were to prevent another from fulfilling its duties or to place it in a position of subordination. He regretted that the Security Council did not seek an advisory opinion of the Court since Article 36 of the Charter requires that all legal disputes be addressed to the Court. Under the circumstances of the case, Judge Bedjaoui thought that the Court should have indicated provisional measures even though their effect had been annihilated by the Council's action. Moreover, if the Court had thought that Libya would be unable to fulfill some condition before the indication of the requested provisional measures, he thought that the Court could have made a positive contribution to the Resolution of the dispute by indicating general proprio motu measures.

D. Judge Weeramantry's Dissenting Opinion

Judge Weeramantry's dissent also pointed to the difference between the legal and political roles of the Court and the Security Council in the United Nations system, and the duty that both organs owe to the Charter. He thought that the interpretation of the Charter is primarily a matter of law, and that when a matter is properly brought before the Court, it becomes the guardian of the Charter and international law. The Court, in the performance of its functions, will often come to conclusions consonant with those of the Security Council, but it does not follow that the Court should cooperate with the Security Council to the extent of desisting from exercising its independent power in a matter properly before it.

103 Id. at 45-46, paras. 24-26.
104 Id. at 47, para. 29.
105 Id. at 42, para. 9.
106 Id. at 48-49, paras. 32-34.
107 Id. at 53-55 (Weeramantry, J., dissenting).
108 Id. at 58.
mantry similarly thought that the Court should act on the basis of the validity of the Security Council Resolution. Under Chapter VII, the existence of a threat to peace is entirely within the discretion of the Council. He thought that Libya was bound by Resolution 748 even though it conflicted with the rights claimed by Libya under the Montreal Convention. His Honor, after referring to the travaux préparatoires of the Charter, stated:

that a clear limitation on the plenitude of the Security Council's powers is that those powers must be exercised in accordance with the well-established principles of international law. It is true this limitation must be restrictively interpreted and is confined only to the principles and objects which appear in Chapter 1 of the Charter . . . (T)he restriction nevertheless exists.  

Although Resolution 748 was binding, Judge Weeramantry thought that there was still room for the Court to frame appropriate measures *proprio motu*, while preserving full respect for the Resolution. In this context he would have indicated provisional measures against both parties preventing aggravation or extension of the dispute as might result from the use of force.

**E. Judge Ranjeva's Dissenting Opinion**

Judge Ranjeva, in his dissenting opinion, also believed that it was impossible for the Court to ignore Resolution 748. The first paragraph of the Resolution altered the legal framework while leaving the factual situation unmodified. The Resolution deprived any provisional measures which the Court might have indicated of any effect. Referring to the *Admissions* advisory opinion, Judge Ranjeva thought that the Security Council cannot, simply by virtue of being a political organ, deviate from the provisions of the Charter—particularly insofar as limitations on power are concerned. The Court could indicate *proprio motu* measures under Article 41 of the Statute independently of the applicant's request. Such measures would have called upon the parties not to aggravate or extend the dispute. While this might raise the objection that it goes beyond the strict legal function of

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109 *Id.* at 65-67.
110 *Id.* at 65.
111 *Id.* at 70-71.
112 *Id.* at 73-74, para. 8 (Ranjeva, J., dissenting).
113 *Conditions of Admission of a State to Membership in the United Nations, 1948 I.C.J.* 56, 64 (Advisory Opinion of May 28).
the Court, Judge Ranjeva believed this was fully in accordance with the Court's general duty under Article 1 of the Statute to act in a dynamic fashion with respect to pursuing the broader aims of maintaining international peace. In the *Frontier Dispute* and the *Passage Through the Great Belt* cases, the Court had acted *proprio motu* not only in issuing an appeal to the parties to negotiate, but also in seizing upon extra-judicial means in an attempt to bring an end to the dispute. The Security Council's action meant that the matter was no longer limited to a dispute between the parties in that it raised the question of the collective security of all states and their people. Because of this, the Court should not have taken a passive role, but should have challenged the qualification introduced by the Security Council and reminded the parties of their duty to avoid aggravating the dispute.

Judge Ranjeva thought that the Court should have pronounced on the merits of the applicant's request even though the effect of any pronouncement may have been abolished by Resolution 748. The Court should have acknowledged its inability to make an effective judgment in light of the Security Council's Resolution while calling on the parties to avoid any escalation of the dispute. He recognized that although this was an awkward solution, the case was important for all the parties to the Montreal Convention.

**F. Judge Ajibola's Dissenting Opinion**

Judge Bola Ajibola stated that while Resolution 748 fell within the power and function of the Security Council under Chapter VII, it was arguable that certain intrinsic defects might invalidate it. The Resolution may be invalid on the basis that no one may be a judge in their own cause; also, China's abstention may invalidate the Resolution under Article 27(3). However, in view of the wording of Resolution 748, he believed that the Court should have declined to indicate the provisional measures Libya sought. Instead, the Court should have indicated provisional measures *proprio motu* under Article 75 of the rules of the Court against both parties to ensure nonuse of force or aggravation of the dispute.

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117 Id.
G. Ad-hoc Judge El-Kosheri's Dissenting Opinion

Ad-hoc Judge El-Kosheri was the only judge who thought that Resolution 748 had no binding force. His Honor thought that the suppression of terrorism fell within the scope of the Security Council's functions. Citing the opinions in the Namibia case as authority, he thought that the Court had power to determine whether resolutions of the other organs of the United Nations had been taken in conformity with the Charter. He did not view the actions of the Council as an attack on the Court but as a design to put pressure on Libya to forfeit its sovereign rights under the Charter. He stated:

Yet the entire Organization is based on the principle of the sovereign equality of all its Members, and the exercise of domestic jurisdiction in matters such as extradition imposes on all other States, as well as on the political organs of the United Nations, an obligation to respect such inherent rights, unless the Court decides that such exercise is contrary to international law.

Referring to Ramos v. Diaz, which indicated that the United States was under no obligation to extradite absent a treaty, Judge El-Kosheri thought that what is lawful for the United States must be lawful for Libya. Therefore, he found the first paragraph of Resolution 748 without legal effect, even on a prima facie basis. The circumstances of the case indicated that the suspects might not get a fair trial in the United States or the United Kingdom. On the other hand, a trial in Libya of individuals who were employees

118 Id. at 96, para. 8 (El-Kosheri, Ad-Hoc J., dissenting).
119 Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970), 1971 I.C.J. 1 (Jan. 29), at 45, para. 89; id. at 46, para. 94; id. at 53, para. 115 (judgment of the Court); id. at 331, para. 18, 332; id. at para. 19 (Gros, J., dissenting); id. at 72 (separate opinion of Judge Ammoun); id. at 131 (separate opinion of Judge Petren); id. at 143-44 (separate opinion of Judge Onyeama); id. at 180 (separate opinion of Judge DeCastro); id. at 226, para. 10; id. at 280, para. 91; id. at 293, para. 113; id. at 294, para. 115; id. at 299-301, Annex paras. 1-8 (Fitzmaurice, J., dissenting).
121 Id. at 106, para. 42.
124 Id. at 111-12, paras. 61-63. Judge El-Kosheri referred to the record of the United Kingdom before the European Commission and the Court of Human Rights with regard to treatment of terrorists and the adverse impact that media coverage has on the possibility of a fair trial in the United States. Id.
of the government, the conviction of whom could lead to international responsibility of Libya, would not adequately protect the interests of the United States and the United Kingdom. His Honor would have indicated *proprio motu* provisional measures that the suspects be placed in the custody of another state that could provide a mutually agreeable and appropriate forum for their trial.

**H. Majority Opinions in the Lockerbie Case**

Of the majority, Acting President Oda was mildly critical of the members of the Council in that they must have been aware of the preemptive impact of the Resolution on the determinations of the Court. However, insofar as the powers of the Security Council were concerned, he thought that a Resolution could have binding force whether or not it was consonant with international law derived from other sources. He also thought that the Council did not have to evaluate all the circumstances before arriving at a decision. Because the Council appeared to be acting within its sphere of competence when it determined that there was a threat to peace and security, the Court had no choice but to recognize the preeminence of its Resolution. Judge Shahabuddeen agreed that the Court had to presume the validity of the Security Council Resolution and that Libya’s rights under the Convention could not be enforced during the life of the Resolution.

Several judges called for cooperation between the two organs. Judge Ni thought that the legal and political determinations of a dispute are complementary functions that need to be correlated and coordinated; they are not competitive or mutually exclusive roles. Indeed, the legal resolution of the dispute could be a decisive factor in the peaceful political resolution of the dispute. Similarly, Judge Lachs thought that the Court and the Security Council should perform their functions without prejudicing the other’s exercising its powers. After the passing of the Security Council’s Resolution, there was no room for further action by the Court. Because the dividing line between legal and political disputes is blurred and law becomes an integral part of international controversies, it is important that the two main

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125 *Id.* at 112, para. 64.
126 *Id.* at 112, para. 65.
127 *Id.* at 17-18 (declaration of Acting President Oda).
128 *Id.*
129 *Id.* at 28 (separate opinion of Judge Shahabuddeen).
130 *Id.* at 21 (declaration of Judge Ni).
organs with the power to issue binding decisions act in harmony with each other.\textsuperscript{131}

\section*{I. Opinions Concerning Appropriate Measures for the Court}

Of the five dissenting judges, Judge Bedjaoui would have indicated provisional measures although the indication would be ineffectual.\textsuperscript{132} Judge Ranjeva similarly would have pronounced on the merits of the case.\textsuperscript{133} All five thought that \textit{proprio motu} measures would have been appropriate.\textsuperscript{134} Judge El-Kosheri, though, would have indicated an order that the suspects be handed over to a third state while arrangements for an impartial trial were made.\textsuperscript{135} Of the majority, Judges Lachs,\textsuperscript{136} Shahabuddeen,\textsuperscript{137} and Ni\textsuperscript{138} also thought that the Court had the power to indicate measures even though the Security Council was seized of the matter by the wording of Resolution 748. All of the Judges, except Ad-hoc Judge El-Kosheri, thought that the Resolution was prima facie valid. Judge Shahabuddeen articulated the issues raised by Libya's application, as follows: could the Security Council override the rights of states under international law; if so, were there any limitations on the power of the Security Council to characterize a situation as an imminent threat to peace; are there legal limits on the Security Council's power; what are those limits and what body is competent to say what they are? Judge Shahabuddeen indicated that the view that the Security Council's powers were unfettered was not unsustainable in law. However, the extent by which the Court could determine these matters was a separate question.\textsuperscript{139}

\section*{J. Issues Raised by the Opinions in the Lockerbie Case}

Article 24(2) of the Charter states that the Security Council in carrying out its functions is to act in accordance with the purposes and principles of the United Nations.\textsuperscript{140} Article (1) of the Charter states that one purpose of the United Nations is "to bring about by

\begin{footnotesize}
\begin{enumerate}
\item Id. at 27 (separate opinion of Judge Lachs).
\item Id. at 48, para. 31 (Bedjaoui, J., dissenting).
\item Id. at 76, para. 12 (Ranjeva, J., dissenting).
\item Id.
\item Id. at 112, para. 65 (El-Kosheri, Ad-Hoc J., dissenting).
\item Id. at 26-27 (separate opinion of Judge Lachs).
\item Id. at 28-29 (separate opinion of Judge Shahabuddeen).
\item Id. at 21-22 (declaration of Judge Ni).
\item Id. at 32 (separate opinion of Judge Shahabuddeen).
\item U.N. CHARTER art. 24, para. 2.
\end{enumerate}
\end{footnotesize}
peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes . . ."\(^{141}\) Thus, it is clear that the Council must act in conformity with justice and international law. Chapter VII, however, gives the Council wide powers in determining whether there is a threat to international peace and security. But, under Article 25, Member States only agree to accept and carry out the decisions of the Security Council that are in accordance with the Charter. The basic problem, as articulated by Judge Shahabuddeen, is the extent to which this power can be used to override the legal rights of states. Judge Fitzmaurice in his dissent in the \textit{Namibia} case, thought that the Security Council is inherently limited in that it can only act to maintain and restore international peace and security. It cannot use its powers to affect permanent territorial or administrative changes.\(^{42}\) Forcing a state to extradite two suspects in order to prevent a threat to world peace probably does not constitute such a permanent alteration as to be outside the powers of the Council.

More difficult, however, is the possible abuse of the Council's power in characterizing a situation as constituting a threat to world peace when in fact no such threat is believed to exist. This difficulty is exacerbated by the Council's power to determine that a threat exists. In their dissents in the \textit{Namibia} case, Judges Fitzmaurice and Gros both point out how easy it is to characterize a situation as one posing a threat to world peace. They both thought that falsely characterizing a situation as threatening when an ulterior motive exists would be outside the power of the Security Council and that such a resolution would not be binding on Member States.\(^{43}\) It would be difficult to disagree with such a proposition.

The problem, therefore, lies in characterizing the situation as being one that does not pose an imminent threat to international peace and security without evaluating the political determination of the members of the Council. The United States and the United Kingdom may well argue that they would be prepared to use military force against Libya should it not extradite the two suspects. This of itself could be said to constitute an imminent threat to world peace. Moreover, in light of the United States' actions in Libya, Grenada, Ni-

\(^{141}\) U.N. \textit{Charter} art. 1, para. 1.

\(^{142}\) South West Africa, 1971 I.C.J. at 226, para. viii; \textit{id.} at 294, para. 115 (Fitzmaurice, J., dissenting).

\(^{143}\) \textit{Id.} at 294, para. 16; \textit{id.} at 340-41, paras. 34-35 (Gros, J., dissenting).
caragua, and Panama, the threat to use force could not be considered a hollow one. Thus, the characterization of the situation on this level would be a difficult one to challenge. In contrast, it would be more difficult to show that the United States and its allies had no intention of using force against Libya, did not believe that Libya’s action constituted an imminent threat to peace, and were merely using the compliance of the Council to bring pressure on the Libyan people to rid themselves of a political enemy of the United States.

In the Namibia case, the majority did not question the power of the Court to make a determination that a resolution of the Security Council was adopted in conformity with the purposes and principles of the Charter. There, the issue arose in the exercise of the Court’s judicial function. In making this determination, however, the Court merely looked to the wording of the Resolutions to determine whether the Security Council was acting within its power. This may simply be because of the difficulties involved in going behind a political decision to examine its motivating forces. Judges Gros and Fitzmaurice, on the other hand, saw no difficulty in looking to the motive behind the Resolution. In the Lockerbie cases, Judge Weeramantry, in his dissent, viewed the power of the Security Council when acting under Chapter VII as unassailable:

However, once we enter the sphere of Chapter VII, the matter takes on a different complexion, for the determination under Article 39 of the existence of any threat to the peace, breach of the peace or act of aggression is one entirely within the discretion of the Council. It would appear that the Council and no other is the judge of the existence of the state of affairs which brings Chapter VII into operation.

Judge Bedjaoui, on the other hand, thought that the Security Council’s Resolution could be challenged if the Resolution was an attempt to deprive the Court of its power. This implies an ability to make a determination of the underlying motivation of the Resolution.

144 Rosenthal, supra note 13, at A8.
146 Id. at 45, para. 89.
147 Id. at 51-52, paras. 107-10.
148 Id. at 294, para. 116 (Fitzmaurice, J., dissenting); id. at 340-41, paras. 34-35 (Gros, J., dissenting).
150 Id. at 47, para. 29 (Bedjaoui, J., dissenting).
On the whole, it seems that the Court will be either unwilling or unable to question Security Council Resolution 748 unless there is something on its face to indicate an excessive use of power. One defect of the Resolution is that it incorporates by reference to Resolution 731, the joint declaration of the United States and the United Kingdom that Libya immediately pay compensation for the Lockerbie bombing. On its face this constitutes a predetermination not only of the guilt of the two suspects, but also the responsibility of Libya for their action. If Libya’s failure to immediately pay compensation forms one of the factual grounds for the Security Council’s determination that Libya is not responding in a concrete manner to the requests of Resolution 731, then Resolution 748 is based on a factual determination that is outside the Council’s power and competence.

Further, calling on Libya to immediately pay the compensation, as Paragraph 1 of the Resolution seems to do, would also offend Articles 24(2) and 1(1) of the Charter. These Articles require the Council to bring about the settlement of international disputes in conformity with the principles of justice and international law. Since the Security Council cannot determine the guilt of the two suspects, it cannot determine the responsibility of Libya. Therefore, it cannot call Libya to pay immediate compensation without offending concepts of justice and international law. A problem with this argument is that Resolution 748 is also premised on Libya’s failure to extradite the two suspects. However, there is no way to sever one demand from the other, since the extradition of the suspects without the payment of compensation would still have resulted in sanctions under the clear wording of the Resolution.

The second prima facie defect of the Resolution is China’s failure to register a concurring vote as required by Article 27(3) of the Charter. In its advisory opinion in the Namibia case, the Court, relying on the practice of the Security Council, did not think that the abstention of a permanent member invalidated a resolution. This decision may have been a wise one in the context of the operational defects of the Security Council during the cold war. In the present context, however, where the political motivations behind the

151 UN CHARTER art. 1, para. 1; id. at art. 24, para. 2.
152 Id.
Resolution are suspect, one would think that the clear terms of the Charter should be followed.

VI. CONCLUSION

In the dog days of the Carter administration there was a joke doing the rounds that Carter had died and gone to heaven where he met Teddy Roosevelt. "Hey, Jimmy how are things in the U.S.A."? asked Roosevelt. "Not so good," said Carter, "the Iranians took our Embassy and held our diplomats hostage." "Hell," said Roosevelt, "you sent in the Marines, didn't you?" "No, but we took them to the World Court." "That doesn't sound so good Jim, but what else is happening?" "The Russians invaded Afghanistan." "The Russians! You must have sent in the troops this time." "Well no, Ted. But we didn't send our athletes to Moscow and applied economic sanctions." "Don't say anything more," said Roosevelt, "next you'll be telling me you gave away the Panama canal."

One cannot help but feel that President Roosevelt would be much happier with a report from Presidents Reagan and Bush concerning the current state of United States foreign policy. Many of the immediate goals sought by both administrations have been achieved by threats or use of force accompanied by a fluid interpretation of international law. The Lockerbie initiative seems to be yet one more example of the success of this policy. But what is the cost? One of the casualties must be the International Court and through it, international law itself. Whatever the terms of the Charter, plainly the present U.S. policy is to restrict the International Court to politically non-controversial issues heard, if possible, before chambers of judges from "like minded" states.

In the Nicaragua case, the United States argued that a complaint of a threat or use of force against the territorial integrity or political independence of any state in contravention of Article 2(4) of the Charter was a matter committed to the exclusive competence of the other organs of the United Nations, particularly the Security Council. The Court, moreover, could not deal with an ongoing armed conflict without "overstepping proper judicial bounds." This attitude re-
I.C.J.'s DECISION reflects a marked departure from the United States' policy towards the United Nations system in the 1950's when it found itself blocked in the Security Council,156 and in the 1970's when it was favorably disposed towards the Court.157

It is ironic that when the Security Council was able for the first time to act in the manner that was intended, it should do so in a way that undermines the judicial organ of the United Nations. The long term effect of the Lockerbie initiative may be evaluated by considering how well the incident reflects on the validity of an international rule of law, as formulated by Professor Henkin:

What matters is not whether the international system has legislative, judicial, or executive branches, corresponding to those we are accustomed to seek in a domestic society; what matters is whether international law is reflected in the policies of nations and in relations between nations. The question is not whether there is an effective legislature; it is whether there is a law that responds and corresponds to the changing needs of a changing society. The question is not whether there is an effective judiciary, but whether disputes are resolved in an orderly fashion in accordance with international law. Most important, the question is not whether law is enforceable or even effectively enforced; rather whether law is observed, whether it governs or influences behavior, whether international behavior reflects stability and order.158

The bombing of Pan Am flight 103 was a dreadful and barbarous act, and those responsible for it should be punished. But how high a price should we be prepared to pay for revenge?

between Security Council action and adjudication by the Court. From a juridical standpoint, the decisions of the Court and the actions of the Security Council are entirely separate.136 Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.), 1984 I.C.J. 392 at 432, para. 90 (Jurisdiction of Court and Admissibility of the Application).

156 See Franck, supra note 6; McWhinney, supra note 4, at 113-17.

157 See United States Response supra note 2 for quotation from State Department's reply to U.N. questionnaire.

158 LOUIS HENKIN, HOW NATIONS BEHAVE 26 (2d ed. 1979).
ANNEX A

RESOLUTION 731 (1992)

Adopted by the Security Council at its 3033rd meeting, on 21 January 1992

The Security Council,

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

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

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

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

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

Deeply concerned over the results of investigations, which implicate officials of the Libyan Government and which are contained in Security Council documents that include the requests addressed to the Libyan authorities by France, 1/, 2/ the United Kingdom of Great Britain and Northern Ireland 2/, 3/ and the United States of America 2/, 4/, 5/ in connection with the legal procedures related to the attacks carried out against Pan American flight 103 and Union de transports aeriens flight 772;

Determined to eliminate international terrorism,
1. **Condemns** the destruction of Pan American flight 103 and Union de transports aerens flight 772 and the resultant loss of hundreds of lives;

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

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

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

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

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

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S/23574
11 February 1992
ORIGINAL: ENGLISH

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1/ S/23306.
2/ S/23309.
3/ S/23307.
4/ S/23308.
5/ S/23317.
Adopted by the Security Council at its 3063rd meeting, on 31 March 1992

The Security Council,
Reaffirming its resolution 731 (1992) of 21 January 1992,
Noting the reports of the Secretary-General, 1/ 2/

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

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

Recalling that, in the statement issued on 31 January 1992 on the occasion of the meeting of the Security Council at the level of heads of State and Government, 3/ the members of the Council expressed their deep concern over acts of international terrorism, and emphasized the need for the international community to deal effectively with all such acts,

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

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

Determined to eliminate international terrorism,

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

Acting under Chapter VII of the Charter,
1. Decides that the Libyan Government must now comply without any further delay with paragraph 3 of resolution 731 (1992) regarding the requests contained in documents S/23306, S/23308 and S/23309;

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

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

4. Decides also that all States shall:
   (a) Deny permission to any aircraft to take off from, land in or overfly their territory if it is destined to land in or has taken off from the territory of Libya, unless the particular flight has been approved on grounds of significant humanitarian need by the Committee established by paragraph 9 below;
   (b) Prohibit, by their nationals or from their territory, the supply of any aircraft components to Libya, the provision of engineering and maintenance servicing of Libyan aircraft or aircraft components, the certification of airworthiness for Libyan aircraft, the payment of new claims against existing insurance contracts and the provision of new direct insurance for Libyan aircraft;

5. Decides further that all States shall:
   (a) Prohibit any provision to Libya by their nationals or from their territory of arms and related material of all types, including the sale or transfer of weapons and ammunition, military vehicles and equipment, paramilitary police equipment and spare parts for the aforementioned, as well as the provision of any types of equipment, supplies and grants of licensing arrangements, for the manufacture or maintenance of the aforementioned;
   (b) Prohibit any provision to Libya by their nationals or from their territory of technical advice, assistance or training related to the provision, manufacture, maintenance, or use of the items in (a) above;
   (c) Withdraw any of their officials or agents present in Libya to advise the Libyan authorities on military matters;

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

(b) Prevent the operation of all Libyan Arab Airlines offices;

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

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

8. **Requests** all States to report to the Secretary-General by 15 May 1992 on the measures they have instituted for meeting the obligations set out in paragraphs 3 to 7 above;

9. **Decides** to establish, in accordance with rule 28 of its provisional rules of procedure, a Committee of the Security Council consisting of all the members of the Council, to undertake the following tasks and to report on its work to the Council with its observations and recommendations:

   (a) To examine the reports submitted pursuant to paragraph 8 above;

   (b) To seek from all States further information regarding the action taken by them concerning the effective implementation of the measures imposed by paragraphs 3 to 7 above;

   (c) To consider any information brought to its attention by States concerning violations of the measures imposed by paragraphs 3 to 7 above and, in that context, to make recommendations to the Council on ways to increase their effectiveness;

   (d) To recommend appropriate measures in response to violations of the measures imposed by paragraphs 3 to 7 above and provide information on a regular basis to the Secretary-General for general distribution to Member States;

   (e) To consider and to decide upon expeditiously any application by States for the approval of flights on grounds of significant humanitarian need in accordance with paragraph 4 above;
(f) To give special attention to any communications in accordance with Article 50 of the Charter from any neighboring or other State with special economic problems that might arise from the carrying out of the measures imposed by paragraphs 3 to 7 above;

10. *Calls upon* all States to cooperate fully with the Committee in the fulfilment of its task, including supplying such information as may be sought by the Committee in pursuance of the present resolution;

11. *Requests* the Secretary-General to provide all necessary assistance to the Committee and to make the necessary arrangements in the Secretariat for this purpose;

12. *Invites* the Secretary-General to continue his role as set out in paragraph 4 of resolution 731 (1992);

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

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

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1/ S/23574.
2/ S/23672.
3/ S/23500.