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LEGAL IMPLICATIONS OF

PAN AM FLIGHT 103 DISASTER

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the Faculty of Graduate Studies and Research
in partial fulfillment of the requirements
for the degree of Masters of Law

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RÉSUMÉ

L'explosion du vol Pan Am 103 au-dessus de Lockerbie en Écosse a choqué la communauté internationale. Cependant, la portée de la tragédie dépasse largement la simple désintégration d'un aéronef. Cette tragédie a ébranlé les fondations mêmes sur lesquelles repose le système des Nations Unies. Cet événement a également servi de catalyseur à la remise en cause de l'ordre légal établi qui a cours dans le système des Nations Unies. En effet, le Conseil de Sécurité ainsi que la Cour Internationale de Justice se sont retrouvés, dans l'exercice de leurs pouvoirs respectifs, en conflit direct suite à ces événements. Cette thèse examinera les événements qui ont mené à cette situation de même qu'en analysera les aspects légaux.

Le premier Chapitre retracera les événements qui ont permis de déterminer la cause de l'accident ainsi que de découvrir les responsables de l'attentat. Y seront exposés également la série de démarches entreprises pour que les suspects soient livrés à la justice et pour que la Libye coopère en ce sens. Il tracera les grandes lignes des dispositions légales régissant la situation soit la Convention de Montréal, la Charte des Nations Unies ainsi que les règles générales de droit international.

Le second Chapitre sera consacré à l'analyse légale de la Charte des Nations Unies, particulièrement des dispositions octroyant les pouvoirs au Conseil de Sécurité ainsi qu'à la Cour Internationale de Justice de même que les obligations générales qu'elle leur impose.

Finalement, le dernier Chapitre sera dévoué à l'étude de la complexe question des relations entre le Conseil de Sécurité et la Cour Internationale de Justice.

ABSTRACT

The tragedy of Pan Am Flight 103 explosion over Lockerbie, Scotland shocked the world for we never get use to such atrocities. However, the scope of the tragedy was more than just an aircraft explosion. It shook the very foundations upon which the United Nations system rests. It also served as a catalyst to the reevaluation of the established United Nations legal order. The Security Council as well as the International Court of Justice found themselves thrown in a direct collision course by the exercise of their respective powers. This thesis will analyze the events that lead to such a legal and political impasse and look into the legal issues involved.

The first Chapter will retrace the events leading to the determination of the cause of accident as well as the identification of the suspects. Will also be examined the series of steps taken to bring the suspects to justice as well as obtain Libya's cooperation. We will finally look into the legal principles applicable to the situation such as those contained in the United Nations Charter, the Montreal Convention as well as those included in general international law.

The second Chapter will be devoted to the legal study of the United Nations Charter, specifically the provisions concerning the Security Council's and the International Court of Justice's powers as well as the general obligations the Charter imposes on them.

Finally, the last Chapter will focus on the complex issue of relationship between the Security Council and the International Court of Justice.

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INTRODUCTION

In December 1988, Pan Am Flight 103 exploded over Lockerbie, Scotland. It resulted in the death of 270 people. Investigation led the British and American authorities to conclude that the explosion was caused by a bomb placed onboard the aircraft. Evidence also pointed towards the implication of two Libyan nationals as well as the Libyan government itself. From that moment on, the crisis resolution procedure took an international turn; international institutions were called on to participate to resolve the situation.

The Security Council, at the demand of the United States, United Kingdom and France, adopted two Resolutions to force Libya to cooperate and surrender the two suspects. For its part, Libya relied on the Montreal Convention to refuse to surrender its two nationals and took a different dispute settlement approach in that it instituted proceedings in the International Court of Justice.

We will study the terms of Resolutions 731 and 748, their legal basis as well as determine their validity according to the United Nations Charter, the Montreal Convention and general international law. We will also look into the Lockerbie, provisional measures, case to learn more about the Montreal Convention and to find out in which way that case contributed to the international legal knowledge

Additionnaly, the study of the Lockerbie legal saga offers an excellent opportunity to examine the complex issue of the Security Council and the International Court of Justice relation.

In the Lockerbie case, the international community was confronted for the first time with the possibility that two United Nations organs reach conflicting decisions as to the same

dispute. The United Nations Charter does not contain any provisions with respect to the relationship the International Court of Justice and the Security Council should entertain.

The international community is left with many questions unanswered such as determining the boundaries, if any, the S.C. must respect when exercising its powers, the role the International Court of Justice plays in the United Nations system and in the review of the Security Council's actions and also the nature and basis of the relationship between the Security Council and the International Court of Justice. This thesis proposes to outline the basic legal norms and issues at play concerning their relationship and suggests some avenues to be explored in order to find solutions to the problems faced by the international legal community.

We should note, however, that this study will focus on the Lockerbie case from a legal perspective only. The political interests involved in the Lockerbie saga, although very interesting, fall beyond the scope of this paper.

CHAPTER 1: FACTS-GENERAL-BACKGROUND INFORMATION

A. GENERAL FACTS

1. The accident

Pan Am flight 103 departed from London's Heathrow Airport on the evening of 21 December 1988 at 6:25 p.m., 25 minutes behind schedule. The Boeing 747 named "Maid of the Seas" bound for New York tragically ended its flight thirty-eight minutes later. At an altitude of 31,000 feet, the aircraft suddenly exploded over the small village of Lockerbie, in southern Scotland. All 259 passengers and crew members on board perished along with 11 local residents on the ground. Within a week, British authorities had revealed that a bomb made of plastic explosives was responsible for the crash.[1] In a statement by the President, the United Nations (U.N.) Security Council (S.C.) condemned the incident and called on States to assist in the apprehension and prosecution of those responsible.[2]

After a thorough investigation, authorities determined that a bomb planted in a radio-cassette player located in the plane's luggage compartment had caused the explosion. The main part of the aircraft crashed in the village setting ablaze a gas station, at least a dozen row houses and several cars on a highway to Glasgow. Other pieces of the 747 and debris as well as bodies were scattered over the countryside on an 80-mile arc. This accident was the worst single plane crash in Pan Am's history and the worst airline accident on British records. Shocking scenes of raging fires, devastated houses and cars as well as shambles of aircraft wreckage were broadcasted throughout the world less than 20

[1] B. Timmeney, "International-Extraterritorial Jurisdiction-The Lockerbie Tragedy: Will Western Clout or International Convention Win the Extradition War?" (1993) 11:2 Dick. J. Int'l L. 477.

minutes after the tragedy. Never have scenes of a plane crash come so quickly, brutally, and vividly, to struck us in the comfort of our homes.[3]

2. Investigation - possible suspects

An exhaustive investigation into the cause of explosion conducted in cooperation by both British (Scottish) and American authorities[4] immediately began. Lockerbie soon became the focus of one of the world's biggest, most exhaustive and complex investigations in

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[2] SC/RES/5057 (30 December 1988).

[3] For facts on catastrophe and investigation, see in general: U.S. President's Commission on Aviation Security and Terrorism, Report to the President by the President's Commission on Aviation Security and Terrorism, Washington D.C. 1990, p. 1-25 [hereinafter *President's Report*]; S. Emerson, "On the Trail of Terrorists- Pan Am 103: The FBI's hunt for clues" U.S. News and World report (13 February 1989) 36 [hereinafter *Emerson I*]; U.S. Dept of State Dispatch (18 Nov. 1991) 854 at 854-58 [hereinafter *Dispatch1*]; A.M. Gunn, "Council and Court: Prospects in Lockerbie for an International Rule of Law" (1993) 52:1 Tor. F. L. Rev. 206 at 209; F. Beveridge, "Current Developments- The Lockerbie affair" (1992) 41 Int'l Comp. L. Quart. 907; G.P. McGinley, "The I.C.J.'s Decision in the Lockerbie Case" (1992) 22:3 Georgia J. Int'l Comp. L. 577 at 579; V. Lowe, "Lockerbie: Changing the Rules During the Game" (1992) 51:4 Camb. L. J. 408; Timmeney, *supra* note 1; J.M. Sorel, "Les Ordonnances de la Cour Internationale de Justice du 14 Avril dans l'Affaire Relative à des Questions d'Interpretation et d'Application de la Convention de Montréal de 1971 Resultant de l'Incident Aérien de Lockerbie" (1993) 97 Rev. D.I.P. 689 at 691; M. Weller, "The Lockerbie Case: a Premature End to the New World Order" (1992) 4:2 RADIC 302 at 303; I. Scobie, "The Lockerbie Cases: Interim Measures" Scots L. Times (18 May 1992) 159; "Libyan Officials Indicted for Bombing of Pan Am Flight 103" (1992) 2:4-5 Foreign Policy Bulletin 124 [hereinafter *Foreign*]; P. Watson, "In Pursuit of Pan Am" (1995) 2:203 ILSA J. Intr'l Comp. L. 204; D. Kash, "Libyan Involvement and Legal Obligations in Connection with the Bombing of Pan Am Flight 103" (1994) 17 Studi. Confl. Terr. 23; S.S. Evans, "The Lockerbie Incident Cases: Libyan-Sponsored Terrorism, Judicial Review and the Political Question Doctrine" (1994) 18 Md J. Intr'l L Tr. 21 at 27; E. McWhinney, "The International Court as Emerging Constitutional Court and the Co-ordinate UN Institutions (Especially the Security Council): Implications of the Aerial Incident at Lockerbie" (1992) A.C.D.I. 261 at 263; A. Vishesh, "Leading Cases" (1992) XVII-II Ann. Air Sp. L. 519 at 520; B. Duffy, "The Pan Am Bombers" U.S. News and World Report (25 Nov. 91) 24 [hereinafter *Duffy1*]; Fotos, "Lockerbie Panel Urges Major Security Reform" Aviation week and Space technology (21 May 1991) 122 ss (on security); the Lockerbie accident and following investigation were discussed in great details in the following books: R. Grandt, *Skygods: the fall of Pan Am* (New York: William Morrow, 199) at 271 ss; T. Petzinger, *Hard Landings* (New York: Random House, 1995) at 358-360 and 379-388; J.M. Pontaut, *L'attentat. Le Juge Bruguière accuse la Libye* (France: Fayard, 1992) at 37 ss; D. Johnston, *Lockerbie: The Real Story*, (London: Bloomsbury, 1989); M. Cox & T. Foster, *Their darkest day*, The Tragedy of Pan Am 103 and its Legacy of Hope (New York: Grove Weidenfeld, 1992); D. Goddard & L. Coleman, *From Beirut to Lockerbie. Inside the DIA* (London: Bloomsbury, 1993); S. Emerson & B. Duffy, *The Fall of Pan Am 103* (New York: Putnam, 1990); L.A. Davis, *Man-made catastrophes* (New York: Facts on File, 1992) at 100-101.

[4] The U.S. had to get involved since it was the State of registry of the aircraft, the airline involved was American, American lives were lost and perhaps most importantly, that flight might have been involved in some kind of drug covert operation.

history.[5] Investigators conducted more than 14 000 interviews, traveled to more than 50 countries and devoted an incalculable number of hours to studying forensic evidence.[6]

Evidence first seemed to implicate Syria and Iran.[7] The bomb was of a type used by a Syrian-based terrorist group backed by Iran and many saw the events as a possible retaliation for the shooting down of an Iranian airbus by United States (U.S.) Navy warship Vincennes on 3 July 1988.[8] Because plastic explosives were involved, suspicion also rose towards two Palestinian terrorist groups to have played a part in the downing of Pan Am 103.[9]

Investigations also revealed evidence that the Pan Am 103 route had been regularly used by the Drug Enforcement Agency (D.E.A.) to fly informants and suitcases full of heroin from the Middle East to Detroit. Suitcases of heroin were placed on planes, apparently without the regular security checks, through Pan Am baggage operation in Frankfurt. under an arrangement with the D.E.A.. It was thus possible that either an agent or an informer for the D.E.A. was unknowingly carrying the bomb on that flight. [10]

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[5] *Foreign, supra* note 3; Watson, *supra* note 3.

[6] Kash , *supra* note 3; Gunn, *supra* note 3, *Foreign, supra* note 3; *Emerson1, supra* note 3.

[7] *Emerson1, supra* note 3; *Dispatch1, supra* note 3 at 858; McGinley, *supra* note 3; Evans, *supra* note 3 at footnote 36; *Duffy1, supra* note 3 at 24-26.

[8] *Dispatch1, supra note* 3 at 858; Gunn, *supra* note 3; McWhinney, *supra* note 3.

[9] The suspected groups were PFLP General Command led by Ahmed Jabril and Fatah Revolutionary Council, led by Abu Nidal, see Davis, *supra* note 3 at 101; Gunn, *supra* note 3 at footnote 14; *Emerson1, supra* note 3; *Dispatch1, supra note* 3 at 858; *Duffy1, supra* note 3 at 24 ss.

[10] Nazir Khalid Jafaar, of Detroit, was on board flight 103 and was involved in this kind of operations. He or someone else could have carried the bomb onboard flight 103. But that possibility was afterwards dismissed with the new evidence found according to Davis, *supra* note 3 at 101; however, Lester Coleman is convinced the DEA involvement should not be dismissed and claims he was part of the operation and that now is being framed by the U.S. government, see Goddard & Colemen, *supra* note 3 in general, on that theory; for other theories of CIA involvement, see B. Duffy, "The Mystery Man in the Lockerbie Case" U.S. News and World Report (9 March 1992) at 44 [hereinafter *Duffy2*]; A. Blum, "Ex-Spy Says U.S. Indicted Him for Role in Pan Am Case" National Law Journal (25 September 1995) A11.

3. Evidence against Libya

American and British investigators through the inch-by-inch search of the 845-square-mile area around the crash site came upon a most revealing piece of evidence and from that moment on the investigation took a different turn. They had discovered pieces of the bomb's timing device and evidence was now pointing almost exclusively if not solely to Libyan involvement.[11] The individuals responsible for the bombing were identified: Libyan nationals Abdel Baset Ali Mohamed al-Megrahi and Al Amin Khalifa Fhimah. Some analysts suggest that the bomb was planted by Libyan terrorists in retaliation for the 1986 attack on Colonel Muammar el-Qaddafi by the U.S..[12]

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[11] From the blast a tiny fragment, smaller than a fingernail, was found embedded in a piece of a shirt that had been in the suitcase containing the bomb. Scientists determined it to be part of Pan Am 103 bomb's timing device. It was compared and matched to the electronics of other timing devices confirmed to have been used in other Libyan bombs. They retraced its manufacturer, a Swiss firm that had produced the only existing MST-13 timers all for Libyan intelligence. Many of those timers were confiscated from Libyans and one is known to have been used in another aircraft bombing: Flight UTA 772 on 19 September, 1989. This piece of evidence also dismissed the PLO trail since they used different triggering devices; see *Dispatch1*, *supra* note 3 at 854-56; Gunn, *supra* note 3 at 209-210 and footnote 16; *Foreign*, *supra* note 3: Beveridge, *supra* note 3; Sorel, *supra* note 3; Evans, *supra* note 3; McGinley, *supra* note 3; Secretary to the Foreign Office Douglas Hurd affirms in a declaration that no other country seems to be implicated in the bombing and that he wishes Libya will fully accede to the demands by delivering the accused to justice, Sorel, *supra* note 3; as for Syrian and Iranian responsibility, some still believe they played a role in the series of events, see Evans, *supra* note 3 at footnote 36, referring to White paper, and N.Y. Times (suggesting that Iran and Syria were also largely responsible for the bombing); as is put in Davis, *supra* note 3 at 102 "Iran bankrolled it. Syrian-based terrorists planned it. Libyans executed it."; some believed Iran and Syria were exonerated in thanks for their cooperation with the U.S. (in Gulf War, in release of hostages, and in Middle East situation, in which they cooperated with U.S.), see A. Rubin, "Libya, Lockerbie and the Law" (1993) 4:1 Diplomacy and Statescraft 1 at 1, 5-6; see also A. Palmair, "Lies, Libya and Lockerbie" The Spectator (28 March 1992) 13 at 13-14 [hereinafter *Palmer1*]: "The deciding factor isn't who is responsible, but who can be hit without damaging any of America's current interests in the Middle East [Iran and Syrian responsibility but current U.S. political friends compared to Libya who is not an ally]"; see also A. Palmer, "Crying out for Vengeance" The Spectator (28 January 1995) 19 at 19-20 [hereinafter *Palmer2*] (Libya and others involved); the U.S. does officially admit their role but for lack of evidence, they claim, Iran and Syria will not be charged "(...) [Libyan responsibility] (...) We cannot rule out a broader conspiracy between Libya and other governments or terrorists organizations, but the available information does not support that conclusion (...)[(...) primary political sponsor (...) broadly aware (...) strong ally] (...). Despite these links, the United States lacks information indicating direct collaboration among Iran, Syria and Libya .", in *Dispatch1*, *supra* note 3 at 858.

[12] U.S. News & World Report (25 Nov. 1991) at 25: "The motive? Retaliation for the 1986 U.S. bombing of Libya, ordered (...) after the Libyans directed an attack on a West Berlin discothèque that killed two American servicemen (...)"; see also *Palmer1*, *supra* note 11 at 13 ss; Davis, *supra* note 3 at 101.

4. Warnings

What is even more troublesome in this tragedy is that evidence shows that the U.S. government had received many warnings, in the most precise way, of the bombing of Pan Am flight 103.[13] The whole tragedy could have been prevented.

5. What happened - official investigation results leading to indictment

It was established the accident was the result of a bomb. The explosive device, made of approximately 300 grams of Semtex plastic explosives, had been concealed within a portable Toshiba radio cassette player[14] hidden along with some clothes in a brown-colored Samsonite suitcase.[15]

Since the suitcase was located in a forward cargo bay, it was established beyond doubt the luggage was an interline bag; it had been transferred from another carrier and placed on a Pan Am flight at some point in its journey. Because of its location, it was established it could have only come from Frankfurt.[16]

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[13] Watson, *supra* note 3 at 208-210; Davis, *supra* note 3 at 101; President's report, *supra* note 3, in general, but specially at 6 ss.

[14] A tiny fragment of a green circuit board had been driven by the blast into the walls of a luggage container and experts determined it was the board of a Toshiba radio, see *Foreign, supra* note 3; Gunn, *supra* note 3 at 209-210; *Dispatch1*, *supra* note 3 at 854-55.

[15] In Great Britain, a Fatal Accident Inquiry (F.A.I.) (an official inquiry in open court before a judge, with witnesses and production of documents) took place between 1 October 1990 and 13 February, 1991 as reported in Watson, *supra* note 3 at 205-207, to determine how exactly the bomb was transferred onboard the ill-fated flight; for American account of investigation's result, see indictment charges in *Dispatch1*, *supra* note 3 at 854; *Foreign, supra* note 3; see also footnotes in this section for results of investigation, specially footnote 19.

[16] The Air Accident Investigation Board (A.A.I.B.) transported the recovered plane debris to a hanger in Longtown, Scotland. Reassemblement of metal pieces and fragments revealed the bomb had been loaded on the left side of the plane and exploded just below the large 'P' in the Pan Am logo. Further analysis pointed to cargo bay 14L, which contained almost no bags from Heathrow, see Emerson & Duffy, *supra* note 3 at 152, 156-7; see also *Foreign, supra* note 3, Gunn, *supra* note 3 at 211, President's report, *supra* note 3 at 1 ss; *Dispatch1*, *supra* note 3 at 854.

The baggage tags led to a precise indication that the suitcase in question was an interline transfer bag from Air Malta Flight KM180 from Luqa Airport, Malta.[17] The unaccompanied bag[18] was transferred in Frankfurt's Main Airport, Germany on the feeder flight Pan Am 103A which carried it to Heathrow. It was placed in cargo container AVE 4041 PA, without further inspection. In London, that container (holding bags from Pan Am 103A) was transferred directly from that aircraft to Pan Am 103 to New York, John F. Kennedy Airport. Thus the bags were not counted, weighed, reconciled with the passenger list, nor x-rayed at Heathrow. Consequently, the bag, which was loaded at Frankfurt, traveled to London and was located on Flight 103 without ever being identified as an unaccompanied bag.[19]

6. The two individuals

Two Libyans, Abdel Baset Ali Mohamed al-Megrahi and Al Amin Khalifa Fhimah, were charged with having placed the bomb or caused it to have been placed on board Air Malta Flight to Frankfurt Airport.[20]

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[17] As for the security procedures in the Malta airport, Watson says of them "[t]hey were symbolic at best.", Watson, *supra* note 3 at 208.

[18] A computerized baggage loading list showed that a 13th suitcase had been transferred from Air Malta Flight KM 180 to Pan Am 103A as an unaccompanied bag. The list had been printed by an employee working the night Pan Am 103 went down. Had she not made the printout, the information might well have been lost forever since the computer system purged such data after eight days, see Cox and Foster, *supra* note 3 at 137; Gunn, *supra* note 3 at 210-211; A. Blum, "Indictments of Libyans In Pan Am Bombing Help Negligence Suit" National Law Journal (2 December 1991) at 7.

[19] Gunn, *supra* note 3 at 210-211; Watson, *supra* note 3 at 207-208; see also Watson, *supra* note 3 at 208-209 for Pan Am security procedures and practices in general (Pan Am had had a report advising they should have a baggage reconciliation procedure and revealing they were very exposed to terrorist attacks, especially unaccompanied bags and plastic explosives, and saying they relied too much on X-Ray, and the personnel was untrained); President's report, *supra* note 3, in general and specially at 11 ss (on security); *Dispatch1*, *supra* note 3 at 854; C.P.; Fotos, *supra* note 3; Kash, *supra* note 3 at 23-24; Weller, *supra* note 3; *Foreign*, *supra* note 3; see also for more details books cited in footnote 3; for update on screening and detection technology, see D. Clery, "Can we Stop Another Lockerbie" New Scientist (27 February 1993) at 21.

[20] They are also charged with having fabricated, along with co-conspirator, the plastic explosives bomb as well as the timing device and to have placed it in a Toshiba radio, see *Foreign*, *supra* note 3.

By tracing the origin of items of clothing, including a shirt, showing blast damage (indicating it was in the same suitcase as the bomb) investigators were able to determine they had been acquired in Malta. From their labels, the specific store where they had been purchased was identified. They traced back that store and the shopkeeper was able to identify, from a photograph, Abdel Baset Ali Mohamed al-Megrahi as the individual who had purchased the items.[21]

Al Amin Khalifa Fhimah, for his part, was a station manager of Libyan Arab airlines in Malta who had unlimited access to the baggage area for Air Malta flights. Investigators determined he had stolen Air Malta baggage tags enabling him to route the bomb-rigged suitcase as an unaccompanied luggage on the flight that went to Frankfurt. Furthermore, they found an entry in his diary reminding himself to bring the tags and noted when Megrahi was to arrive in Malta.[22]

B. LEGAL FACTS

1. Indictments

The investigation concluded based on evidence uncovered over the three years following the tragedy that the two Libyans had planted the bomb responsible for the crash of Pan

[21] The shopkeeper could vividly remember him buying clothes at random as well as an umbrella. One of the umbrellas found in the wreckage did present blast damage, see Gunn, *supra* note 3 at 210, footnote 17; Cox and Foster, *supra* note 3 at 138-9; a piece of the timing device was also embedded in a shirt known to have been bought by Megrahi and found in the plane wreckage, see Kash, *supra* note 3 at 23-24; *Dispatch1*, *supra* note 3 at 854.

[22] Kash, *supra* note 3 at 24; Gunn, *supra* note 3 at 210, footnote 18; *Foreign*, *supra* note 3; Cox and Foster, *supra* note 3 at 174; Watson, *supra* note 3 at 208: "Libyan airlines used the same baggage tickets as Air Malta, and on 21 December, 1988, the Libyan Airlines flight to Tripoli was proceeded at the same time and the same counter as Air Malta Flight 180."

Am 103[23] and it resulted in the simultaneous U.S. and United Kingdom (U.K.) indictment of the two Libyan nationals.[24]

On 14 November 1991, the Lord Advocate of Scotland (Chief Prosecutor of Scotland) announced Abdel Baset Ali Mohamed al-Megrahi and Al Amin Khalifa Fhimah had been charged with conspiracy, murder and contravention of the *Aviation Security Act* of 1982,[25] and issued warrants for their arrest.[26]

On the same day, a U. S. federal grand jury issued indictments in Washington D.C. against the same accused on charges of having caused the bomb to be placed on Pan Am 103 in a 193-count indictment.[27] In both indictments, authorities had also identified the two accused as officials of Libyan Arab Airlines and members of Libya's intelligence organization.[28]

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[23] Additional to the precedingly discussed evidence against the suspects, Kash, in Conflict, *supra* note 3 at 24, adds that a U.S. guarded Libyan defector, number two man in Libyan Arab Airlines office in Malta at the time of bombing, claims he saw them buy the clothes and prepare for the attack (and even manipulate plastic explosives).

[24] The indictments are reprinted and recorded at UN Doc. S/23317 (A/46/831) (23 December 1991) and U.N. Doc. S/23307 (A/46/826) (20 December 1991), the latter document includes a declaration of Secretary to the Foreign Office Douglas Hurd in which he precises that no other country seem to be implicated in the bombing and that he wishes Libya will fully accede to the demands by delivering the accused to justice.

[25] *Aviation Security Act* (U.K.), 1982, c.36.

[26] The *Announcement by the Lord Advocate of Scotland*, 14 November 1991, is reproduced in Annex I to U.N. Doc. S/23307 (20 December 1991), reproduced at 31 I.L.M. (1992) 717 at 718 (the announcement goes into the details of the charges and allegations against the two Libyan nationals); see also Scobie, *supra* note 3 (that publication places on the 13 November the date of the Scottish announcement (sic)); Evans, *supra* note 3 at 27-28; Gunn, *supra* note 3 at 210; Weller, *supra* note 3 (gives more details on Scottish charges); Sorel, *supra* note 3; Beveridge, *supra* note 3; McGinley, *supra* note 3; Lowe, *supra* note 3; Timmeney, *supra* note 1 at 408; V. Gowlland-Debbas, "The Relationship Between the International Court of Justice and the Security Council in the Light of the Lockerbie Case" (1994) 88 AJIL 643 at 644; *Foreign*, *supra* note 3; Rubin, *supra* note 11 at 1.

[27] *Foreign*, *supra* note 3 (summarizes the indictments and allegations against the two Libyan accused); *Dispatch1*, *supra* note 3 at 854; Gunn, *supra* note 3 at 210; Scobie, *supra* note 3; Weller, *supra* note 3; Evans, *supra* note 3; Sorel, *supra* note 3; Beveridge, *supra* note 3; McGinley, *supra* note 3; Lowe, *supra* note 3; Timmeney, *supra* note 1; Gowlland-Debbas, *supra* note 26; Rubin, *supra* note 11 at 1; Kash, *supra* note 3; Vishesh, *supra* note 3.

[28] Kash, *supra* note 3 at 23-24; Beveridge, *supra* note 3; *Foreign*, *supra* note 3; Gowlland-Debbas, *supra* note 26; McGinley, *supra* note 3 at footnote 18; Gunn, *supra* note 3 at 210; Weller, *supra* note 3; Libya has admitted during the oral hearings that the two suspects are officials of the Libyan government and in its application, that they are present on Libyan territory, see Scobie, *supra* note 3.

2. Libyan State responsibility

American and British authorities officially blamed the Libyan State to be behind the bombing and, through many official statements, they asserted to have evidence revealing State responsibility.[29] As Professor Weller points out: "The allegations and claims put forward by the United States and the United Kingdom extend to State responsibility and individual responsibility concurrently."[30]

State department spokesperson Richard Boucher said: "The bombers were Libyan Government intelligence operatives. This was a Libyan government operation from start to finish. We hold the Libyan Government responsible for the murder of 270 people over Lockerbie, Scotland."[31]

Libya denied involvement, rejected the charges,[32] and rather offered to submit the legal issues (of the arrest warrants) to the International Court of Justice (I.C.J.) or some other impartial tribunal.[33] The later proposal being rejected by the U.S. State Department.[34]

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[29] Marlin Fitzwater, White House spokesperson, affirmed that "[t]his consistent pattern of Libyan-inspired terrorism dates from early in Qaddafi's leadership and cannot be ignored.", SC/5057, 30 December 1988, Annex II; see also Gunn, *supra* note 3 at 211; Kash, *supra* note 3 at 24; also Douglas Hurd, U.K. Foreign Secretary, speaking in the British House of Commons on 14 November 1991, stated that he regarded the case as one of "[m]ass murder, which is alleged to involve the organs of government of a State.", SC/5057, 30 December 1988, Annex II; see also Gunn, *supra* note 3 at 211; Weller, *supra* note 3 at 304; *Dispatch1*, *supra* note 3 at 855-56; see Rubin , *supra* note 11 at 1: "The three Western governments did not directly hold Libya responsible for the two civil aviation atrocities. But in various unofficial statements they implied that Libya's refusal to turn over the two accused officials for trial in the United States, or in the United Kingdom, would itself be an indication of Libyan culpability."

[30] Weller, *supra* note 3 at 305 and also, on the same page, Professor Weller exposes in great details the various liabilities, both in individual and State responsibility, at play in the Lockerbie case as well as discusses the issues of terrorism and State-sponsored terrorism.

[31] *Dispatch1*, *supra* note 3 at 856; Gunn, *supra* note 3 at 211, footnote 22; Kash, *supra* note 3 at 24.

[32] Gunn, *supra* note 3 at 211; Rubin, *supra* note 11 at 1.

[33] Gunn, *supra* note 3 at 211; Rubin, *supra* note 11 at 1-2; details on Libya's offers to cooperate will be exposed throughout this thesis.

[34] *Ibid.*

The possibility of Libyan State involvement didn't come as a shock since Libya bears a long history of involvement in and support of terrorism.[35]

3. Demand for surrender and Libya's response

As a result of the warrants and indictments, both the U. S. and the U. K. demanded the surrender of the individuals to be handed over to their authorities.[36] Through diplomatic correspondence, the U. S. and the U. K. had immediately conveyed copies of the warrants and charges to the Libyan government.[37] Even though there did not exist an extradition treaty between the involved countries, they called upon Libya to hand over the accused for trial.[38]

Libya did acknowledge the requests but it made no satisfactory response.[39] It rejected the accusations, denied involvement, refused to hand over the two accused, reserved its right to legitimate self-defense before a fair and impartial jurisdiction, and confirmed its willingness to settle the dispute in accordance with Article 33 of the U.N. Charter.[40]

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[35] On the topic of Libyan's history in terrorism, see Evans, *supra* note 3 at 25-27; Kash, *supra* note 3 at 24 - 25; *Dispatch1*, *supra* note 3 at 856-57; see also footnote 29 for other references.

[36] See references in footnotes 26 and 27; see also Evans, *supra* note 3 at 28; Beveridge, *supra* note 3; Scobie, *supra* note 3.

[37] On 21 November 1991, the U.S. transmitted, along with the indictments, the following direction: "As part of an acceptable Libyan response, the Government of the United States demands that the Government of Libya transfer [the two accused] to the United States, in order to stand trial on the charges contained in the indictment.", as cited in Evans, *supra* note 3 at 28; see also Scobie, *supra* note 3; *Foreign*, *supra* note 3.

[38] Kash, *supra* note 3 at 27: "It is a widely known principle in international law that in absence of a treaty, one nation is not obligated to extradite fugitives from justice who are within its territory."; see also C. Tomuschat, "The Lockerbie Case Before the International Court of Justice" (1992) 48 Review: Int'l Comm. Jurists 39 at 45; Scobie, *supra* note 3; Evans, *supra* note 3 at 43; Timmeney, *supra* note 1 at 482; Sorel, *supra* note 3 at 706 ss.

[39] Evans, *supra* note 3 at 28.

[40] Letter dated 15 November 1991 from the Permanent Representative of the Libyan Arab Jamahiriya to the United Nations addressed to the President of the Security Council, S/23221, 16 November 1991, Annex and Letter dated 20 November 1991 from the Permanent Representative of the Libyan Arab Jamahiriya to the United Nations addressed to the President of the Security Council, S/23226, 20 November 1991, Annex; Charter of United Nations, 26 June 1945 (Washington DC: US Gov. Print Office, 1945); see also Gunn, *supra* note 3 at 211; Weller, *supra* note 3 at 309 (U.S. and U.K. did not respond to the requests).

Instead, it invited the requested countries to cooperate in the Libyan investigation and judicial proceedings.[41] On the following 18 November, less than a week after the British and American indictments, Libya announced the opening of a judicial inquiry headed by Supreme Court Justice Ahmed al-Taher al-Zawi to look into the allegations.[42] It also called on the participation of American and British legal authorities and confirmed its willingness to cooperate with them.[43]

4. U.S.-U.K. Joint Statement

On 27 November 1991, the U. S. and U. K. governments demanded in a joint declaration that Libya, *inter alia*, promptly and in full:

1. surrender for trial all those charged with the crime, and accept responsibility for the actions of Libyan officials;
2. disclose all it knows of the crime, including the names of all those responsible, and allow full access to all witnesses, documents and other material evidence, including all the remaining timers;
3. pay appropriate compensation.[44]

These demands will later be endorsed by the S.C. in Resolutions 731 and 748.[45]

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[41] They also recalled in a 20 November declaration the condemnation by the U.N.G.A. of the aerial raid of 15 April 1986 on Libya by the U.S. reserving its right of self-defense by virtue of Article 51 of the U.N. Charter, reproduced in U.N. Doc. S/23317 (A/46/831) (23 December 1991) and S/23307 (A/46/826) (20 December 1991); see also Sorel, *supra* note 3; Rubin, *supra* note 11 at 1.

[42] Gunn, *supra* note 3 at 211; Sorel, *supra* note 3; Weller, *supra* note 3 at 309.

[43] Gunn, *supra* note 3 at 211(they also announced the nomination of a new intelligence chief); Weller, *supra* note 3 at 309; Sorel, *supra* note 3.

[44] Statement issued by the US government on 27 November 1991 regarding the bombing of Pan Am 103, Annex to U.N. Doc. S/23308 (20 December 1991), reproduced at 31 I.L.M. (1992) 717 at 723; Statement issued by the British Government on 21 November 1991, Annex to U.N. Doc S/23307 (20 December 1991), reproduced at 31 I.L.M. (1992) 717 at 722; see also *Foreign*, *supra* note 3 at 124-125 and U.S. Dept. of State Dispatch (2 December 1991) 875 [hereinafter *Dispatch2*], for reproduction of the declaration; see also Beveridge, *supra* note 3; Scobie, *supra* note 3; Weller, *supra* note 3 at 304; McGinley, *supra* note 3; Lowe, *supra* note 3; Gowland-Debbas, *supra* note 26; Evans, *supra* note 3 at 28; Gunn, *supra* note 3 at 211; Sorel, *supra* note 3 at 692; Vishesh, *supra* note 3 at 520-521.

[45] UN Doc. S/RES/731 (1992) reproduced at 31 I.L.M. (1992) 731 at 732 and UN Doc. S/RES/748 (1992), reproduced at 31 I.L.M. (1992) 749; for account and analysis of Resolution 731, see Weller, *supra* note 3 at 312-314; W.M. Reisman, "Notes and Comments-The Constitutional Crisis in the United Nations" (1993) AJIL 83 at 87; Vishesh, *supra* note 3 at 521; McWhinney, *supra* note 3 at 265; Lowe, *supra* note 3 at 409;

5. Libya's responses to the Statement and other diplomatic efforts

Libya did not, once again, effectively respond to the requests contained in the declaration.[46] It expressly denied any official involvement in the accident and did not comply with the demands contained in the U.S.-U.K. joint declaration.[47] It instead agreed to institute legal proceedings against the suspects with the presence of foreign observers since its domestic law did not allow for the extradition of nationals.[48] The Libyan government issued a *communiqué*, announcing that they would take care of the application in a serious manner and in accordance with international law principles.[49]

The two Libyan suspects were placed under house arrest, were questioned, and would face death penalty if convicted, as announced by Judge al-Zawi. He also said the suspects would not be handed over to any other country for trial. He called for the assistance of the American and British authorities, offering to review evidence and to cooperate with his counterparts. He suggested to hold a meeting of legal experts from the involved countries and Libya to aid his investigation,[50] and to even have American and British

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Timmeney, *supra* note 1 at 483; McGinley, *supra* note 3 at 579-80; Tomuschat, *supra* note 38 at 39; Beveridge, *supra* note 3 at 909-912; Evans, *supra* note 3 at 38-40; Sorel, *supra* note 3 at 692; Scobie, *supra* note 3; Kash, *supra* note 3 at 24; Gunn, *supra* note 3 at 213; Rubin, *supra* note 11 at 5.

[46] Evans, *supra* note 3 at 28; Scobie, *supra* note 3; also, in response, Libya reiterated it renounced terrorism and claimed it was not involved in terrorist activities, see U.N. GAOR, 46th Sess, Annex, Agenda Item 127, at 2, U.N. Doc. A/46/845 (1991); Weller, *supra* note 3 at 310; Resolution 731 strongly deplores the facts that the Libyan government has not effectively responded to the request contained in the joint U.S.-U.K. declaration.

[47] Lowe, *supra* note 3; Evans, *supra* note 3 at 28: "Libya's refusal to accept responsibility for the actions of Libyan officials strengthened U.S. conviction that the bombing was not the act of rogue agents but rather an act of the Libyan government. The belief that Libya was involved in these acts of terrorism led both the United States and the United Kingdom to seek action from the United Nations Security Council."; Sorel, *supra* note 3 at 692.

[48] [Libyan] Criminal procedure code, 28 November 1953, art. 493-510, as cited in McGinley, *supra* note 3 at footnote 16.

[49] Gunn, *supra* note 3 at 211-212.

[50] *Ibid.* at 212 and also, on the same page, reference is made to the Libyan delegate to the Arab League (Ali Treiki), indicating that his government would accept a judge nominated by the U.N. to make a determination on the issue.

observers present at the proceedings.[51] The American and British authorities never acquiesced to these proposals.[52]

6. French involvement - UTA Flight 772

On 9 September 1989, Flight 772 of the French airliner Union des Transports Aériens (UTA) exploded over Niger's southern part, killing all 171 passengers and crew. The investigation report stated the bombing was conceived and financed by Libya.[53]

France indicated by a *communiqué* in September 1989 that a judicial inquiry into the attack placed "[h]eavy presumptions of guilt for this odious crime on several Libyan nationals".[54] As a result, judge Jean-Louis Bruguière issued on 30 October 1991 international arrest warrants against Libyan individuals suspected to be government officials.[55] These warrants, although similar to the American and British ones, differ from them in one important respect in that France merely requested the cooperation of Libya with its continuing investigations and that it did not claim there existed a duty to extradite.[56] Libya responded to France by proposing a high degree of cooperation between

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[51] McGinley, *supra* note 3 at 579; Gunn, *supra* note 3 at 211-212.

[52] Gunn, *supra* note 3 at 212; McGinley, *supra* note 3; Weller, *supra* note 3 at 310.

[53] Evans, *supra* note 3 at 29 (even though the Islamic Jihad claimed responsibility for the bombing, the investigation showed Libyan responsibility), especially footnote 44, for reference to investigation report; Sorel, *supra* note 3 at footnote 5; Gunn, *supra* note 3 at 212, footnote 29; Lowe, *supra* note 3; Weller, *supra* note 3; see also Pontaut, *supra* note 3, for a book devoted on the investigation of that accident.

[54] Annex to UN Doc. S/23306 (20 December 1991), document reproduced at 31 I.L.M. (1992) 717 at 718; see also Beveridge, *supra* note 3; Gowlland-Debbas, *supra* note 26.

[55] Weller, *supra* note 3; Sorel, *supra* note 3 at footnote 5; *Foreign*, *supra* note 3 at 125; France also requested that Libya make the individuals available for questioning and take other appropriate actions, in Evans, *supra* note 3 at 29.

[56] For French demands, see Annex to UN Doc. S/23306 (20 December 1991), reproduced in 31 I.L.M. (1992) 717 at 718 (for exemple, France demanded to produce evidence (...) to facilitate the contacts and meetings (...) to authorize the responsible Libyan officials to respond to any request made by the examining magistrate); see also Beveridge, *supra* note 3; Weller, *supra* note 3 at 303-4 (gives more details on actual French demands); Gowlland-Debbas, *supra* note 26, footnote 6; Sorel, *supra* note 3; Rubin, *supra* note 11 at 1.

the countries which was accomplished to a certain extent but the results were still unsatisfactory to France.[57]

The issues arising out of the attack against UTA Flight 772 were also included in S.C.'s Resolution 731, but were not an issue before the I.C.J..[58]

7. U.S.-U.K.-France: concerted action and Joint Statement

Unsatisfied with Libya's responses, the U. S., France and U. K. began in December 1991 a diplomatic crusade to win international support for sanctions against Libya.[59]

On 20 December 1991, the matter was put by France, the U.K. and the U.S., acting in concert, before the U.N. S.C. and the General Assembly (G.A.) under the rubric of international terrorism.[60]

A joint statement was issued by the three States reiterating their condemnation of terrorist activities and their demands for cooperation from Libya. The statement also sets out a common position of the three States regarding State responsibility for terrorist activities:

> The three States reaffirm their complete condemnation of terrorism in all its forms and denounce any complicity of States in terrorist acts. The three States reaffirm their commitment to put an end to terrorism.
>
> They consider that the responsibility of States begins whenever they take part directly in terrorist actions, or indirectly through harboring, training, providing facilities, arming or providing financial support, or any form of

[57] Rubin, *supra* note 11 at 1 (as a comparison, Libya had refused the British and American requests).
[58] Gowlland-Debbas, *supra* note 26; since surrender of the suspect was not demanded by France, Libya did not institute proceedings in the I.C.J. against it, as was the case with U.S. and U.K., Sorel, *supra* note 3.
[59] See for more details on the three's campaign, Gunn, *supra* note 3 at 212.
[60] Beveridge, *supra* note 3 at 907-908; Scobie, *supra* note 3; Lowe, *supra* note 3; Sorel, *supra* note 3.

> protection and they are responsible for their actions before the individual States and the United Nations.[61]

In this connection, following the investigations carried out into the bombing of Pan Am 103 and UTA 772, the three States have presented specific demands to Libyan authorities related to the judicial procedures underway. They required that Libya comply with all these demands, and, in addition, that Libya commit itself concretely and definitively to cease all forms of terrorist action and all assistance to terrorist groups. Libya had to promptly, by concrete actions, prove its renunciation of terrorism.[62]

These three States persisted in their demands, while Libya maintained that, though it was willing to cooperate with inquiries, it could not extradite the two nationals under the terms of its constitution.[63] Libya refused to submit to the requirements/demands of the involved countries, and received support from the Arab league.[64] Libya also announced the opening of a judicial inquiry into the UTA tragedy, on 9 December 1989.[65]

On 8 January 1992, Libya addressed a communication to the Secretary General (S.G.), still denying any involvement in the bombing, and condemning terrorism in all its forms.[66] It deplores the fact that it has been persecuted by the involved countries, even though it is taking all the proper legal procedures to seek that justice is being served in

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[61] Annex to U.N. Doc. S/23309 (20 December 1991), reproduced at 31 I.L.M. (1992) 717 at 723; declaration also reproduced in *Foreign, supra* note 3 at 125 and in *Dispatch2, supra* note 44.

[62] *Ibid.*; see also Evans, *supra* note 3 at 29; *Foreign, supra* note 3 at 125; Sorel, *supra* note 3 at 692; U.S. Dept. of State Dispatch (2 December 1991), p. 852.

[63] Beveridge, *supra* note 3 at 908, specially footnote 5; McGinley, *supra* note 3; Tomuschat, *supra* note 38 at 46 (many countries prohibit the extradition of their nationals, some even go as far as to include it in their constitution); Evans, *supra* note 3 at 43; Timmeney, *supra* note 1 at 479; Sorel, *supra* note 3 at 706 ss.

[64] Sorel, *supra* note 3; the Arab League adopted a resolution affirming its solidarity with Libya, applauded its cooperation in trying to expose the facts and called for the establishment of a joint Arab League and U. N. Commission, see Resolution adopted by the Council of the League of Arab States, on 16 January, 1992, Annex to U.N. Doc. S/23436 (17 January 1992), reproduced at 31 I.L.M. (1992) 724 at 727; see also Weller, *supra* note 3 at 310; similarly, the Islamic Conference gave its full solidarity with Libya, see Weller, *supra* note 3 at 310 and Sorel, *supra* note 3 at 692.

[65] Sorel, *supra* note 3 at 692.

[66] It also recalls being the innocent victim of the deliberate downing of a Libyan civil aircraft over Sinai in 1973 and the U.S. military attack on "peaceble" Libyan cities in 1986 (on the pretext that Libya was responsible for the bombing of a Berlin nightclub).

both the UTA and Lockerbie accidents, in all fairness and impartiality. It confirms its acceptance in principle of a fair and impartial international inquiry or recourse to the I.C.J.. It offered to enter into a dialogue with the U.K., U.S. and France and to submit the investigation records to Libyan judges who are investigating the bombing. It also accused the U.S. of committing terrorist actions and regretted the fact that the disputing States rejected the offer of a peaceful settlement.[67]

C. INTERNATIONAL MECHANISMS

1. Montreal Convention

a. Libya's request for arbitration and refusal to surrender

As it saw the S.C. move towards the adoption of a resolution condemning its actions and before the debates were held, Libya invoked the 1971 Montreal Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation (Montreal Convention).[68] All the concerned States are parties to this treaty without reservation.[69] Libya qualified the issues at stake between the disputing countries to be regarding the interpretation of the obligations established by the Montreal Convention. Libya claimed that, under the Montreal Convention, it had the right and duty to investigate, to prosecute

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[67] Letter dated 8 January 1992 from the Permanent Representative of the Libyan Arab Jamahiriya to the United Nations addressed to the President of the Security Council, U.N. Doc. S/23396 (9 January 1992), reproduced at 31 I.L.M. (1992) 724 at 725; see also Weller, *supra* note 3 at 310

[68] Montreal Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, 23 September 1971, ICAO Doc. 8966, 974 UNTS 177, reproduced in 10 I.L.M. (1971) 1151; Scobie, *supra* note 3: "The charges made against the accused constitute an offense within the meaning of art. 1.1 of the 1971 Convention (...)."

[69] Scobie, *supra* note 3; Lowe, *supra* note 3; Evans, *supra* note 3 at 36, footnote 94; Rubin, *supra* note 11 at 2; Weller, *supra* note 3 at 311; Reisman, *supra* note 45 at 87.

the individuals, to exercise jurisdiction over them and had no obligation to surrender the accused.[70]

On 18 January 1992[71], Libya indicated its intent in a letter to the U. S. and U. K.[72], to submit the dispute regarding these issues to arbitration under Article 14.1 of the Montreal Convention and asked the U.S. and U.K. to give their "[p]rompt agreement to arbitration (...)" and for their general cooperation.[73] By the same token, Libya reminded that all three countries were parties to the Montreal Convention and notified that Libya had done all that the Convention required of it, more specifically that it had complied with Articles 5 and 7 of the Montreal Convention.[74] It also calls upon the application of Article 33 of the U.N. Charter.[75] Libya once again took the opportunity to deny any involvement in both accidents and to affirm its "[u]nqualified condemnation of terrorism in all its forms."[76] Both the U. S. and U. K. rejected the requests contained in the letter.[77]

To this day, the Libyan government maintains that it has complied with all its obligations under the Montreal Convention, and relying on it, says it is not obliged to surrender the suspects and it has constantly refused to do so to either the British or American authorities for trial.[78] As we will see, Libya will go to the I.C.J. with this theory.

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[70] Beveridge, *supra* note 3 at 908; Evans, *supra* note 3 at 36-37; Lowe, *supra* note 3 at 408-409; Rubin, *supra* note 11 at 3; Weller, *supra* note 3 at 310-311.

[71] See Gunn, *supra* note 3 at 213 and Evans, *supra* note 3 at 36, both saying the letter was dated 17 January, 1992.

[72] The letter was sent by Ibrahim Mohammed Elbushari, Libya's Secretary of the People's Committee for Foreign Liaison and International Cooperation, and addressed to James A. Baker, U.S. Secretary of State, and Douglas Hurd, U.K. Secretary of State for Foreign and Commonwealth affairs, see reference in footnote 73.

[73] Libyan letter to the President of Security Council transmitting letter to U.S. Secretary of State and to U.K. Foreign Affairs Minister, 18 January, 1992, U.N. Doc. S/23441 (18 January 1992), reproduced at 31 I.L.M. (1992) 724 at 728 (in its letter, Libya claimed that it was acting in accordance with Article 5, paragraph 2 of the Montreal Convention); see also Beveridge, *supra* note 3 at 908; Lowe, *supra* note 3 at 408-409; Scobie, *supra* note 3; Gunn, *supra* note 3 at 213; Evans, *supra* note 3 at 36-37.

[74] *Ibid.*

[75] *Ibid.*

[76] *Ibid.*

[77] Gunn, *supra* note 3 at 213.

[78] Kash, *supra* note 3 at 24-25; Timmeney, *supra* note 1; Sorel, *supra* note 3 at 692.

b. Relevant Montreal Convention provisions

The Montreal Convention deals with the protection of civil aviation -although it does not make any specific reference to terrorism. Article 1 sets out the legal consequences for the destruction of civil aircraft and covers the following cases:

> Any person commits an offence if he unlawfully and intentionally:
> (a) performs an act of violence against a person on board an aircraft in flight if that act is likely to endanger the safety of that aircraft; or
> (b) destroys an aircraft in service or causes damage to such an aircraft which renders it incapable of flight or which is likely to endanger its safety in flight; or
> (c) places or causes to be placed on an aircraft in service, by any means whatsoever, a device or substance which is likely to destroy that aircraft, or to cause damage to it which renders it incapable of flight, or to cause damage to it which is likely to endanger its safety in flight.[79]

The allegations, against Abdel Baset Ali Mohamed al-Megrahi and Al Amin Khalifa Fhimah, if there is enough evidence to prove them, would thus seem to fall under the scope of the Montreal Convention. Since Libya qualifies the dispute as one falling under the umbrella of the Convention, it relies on Article 14 for the dispute settlement procedure:

> 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.[80]

The Montreal Convention also provides that a State Party, in which a person alleged to have committed crimes covered by the Convention is found, has the obligation to submit the case to its competent authorities for the purpose of prosecution, if it does not extradite

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[79] Montreal Convention, *supra* note 68.
[80] *Ibid.*

them.[81] Each Contracting State undertakes to establish jurisdiction over such offenses and make them punishable by "severe penalties" according to Article 3. Any State in the territory of which the alleged offender is present is obliged to take him or her into custody and notify other interested parties of the arrest.[82]

These interested States can request extradition, but the requested State is not legally bound to comply since it can elect to prosecute the alleged offenders in its own court. Article 7 provides that :

> The Contracting State in the territory of which the alleged offender is found shall, if it does not extradite him, be obliged, without exception whatsoever and whatever or not the offence was committed in its territory, to submit the case to its competent authorities for the purpose of prosecution.[83]

There is no other obligation in the Montreal Convention to surrender or otherwise turn over any persons accused of offenses defined in the Convention except by "extradition". The alternative to extradition is trial in the country where the accused is found.

These are the provisions on which Libya relies to refuse surrender and claim criminal jurisdiction over the accused. It argues that the charges made against the accused constitute an offense within the meaning of Article 1.1 of the Montreal Convention, that it has done all that the Convention requires of it and, accordingly, is in its right to refuse to surrender its accused nationals to either the Americans or the Britishs.[84]

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[81] *Ibid.*: Article 5(2) entitles Libya to establish jurisdiction over the two accused because they were present in Libyan territory and Article 5(3) allows Libya to exercise criminal jurisdiction over the individuals in accordance with Libyan national law and Article 11 requires the U.S. and the U.K. to provide assistance with the criminal proceedings; Libya had admitted that the individuals are officials of the Libyan government and that they are present on Libyan territory, in Scobie, *supra* note 3; see also Lowe, *supra* note 3; Evans, *supra* note 3 at 38.

[82] Article 6, Montreal Convention, *supra* note 68.

[83] Montreal Convention, *supra* note 68.

[84] Timmeney, *supra* note 1; Lowe, *supra* note 3 at 408-409; Scobie, *supra* note 3.

Libya is also bound by the Montreal Convention to cooperate with the French investigation, but so is France to cooperate with Libya. So they both have.[85]

2. Security Council Resolution 731

a. Events before the adoption of Resolution 731 and parties' positions

On 8 January 1992, Libya addressed a letter to the S.C., confirming its acceptance in principle of a fair and impartial inquiry into the matter or recourse to the I.C.J.. It also regretted the fact that so far the claimant States had rejected its offers of peaceful settlement.[86]

The case against Libya, as presented in the statements of the representatives of France, the U.S. and the U.K., was one of complicity in acts of terrorism against civil aviation.[87] The U.S. and U.K. believed that:

> [w]hile the prosecution of the suspects for the two terrorists acts outlined above provided the impetus for the dispute, it was the alleged involvement of the Libyan State which was relied on to lift the dispute out of the area of State jurisdiction and to justify action by the Security Council.[88]

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[85] Article 11, Montreal Convention, *supra* note 68; see also 31 I.L.M (1992) 744 ss for exemples of judicial cooperation between Libya and France; see also Rubin, *supra* note 11 at 3.

[86] Letter dated 8 January 1992 from the Permanent Representative of the Libyan Arab Jamahiriya to the United Nations addressed to the President of the Security Council, *supra* note 67; see also Sorel, *supra* note 3 at 692; Weller, *supra* note 3 at 310.

[87] Beveridge, *supra* note 3 at 909, cites the following declaration from the U.K. representative "The accusations leveled at Libyan officials are of the gravest possible kind. The charges allege that the individuals acted as part of a conspiracy to further the purposes of the Libyan Intelligence Services by criminal means. This was a mass murder, one in which we have good reason to believe the organs of a State Member of the United Nations were implicated."

[88] *Ibid.*

The sponsoring States also claimed that Libya's responses to their demands were inadequate and that all its declarations of willingness to cooperation were not genuine.[89]

Libya denied the allegations made by the U.S. and U.K. that it was responsible for the bombing, termed the issue as a pure legal question concerning surrender/extradition, affirmed it had met all its legal obligations and asserted that the S.C. should recommend settlement through legal channels.[90] Debates were held before the adoption of the Resolution. Many delegations expressed the view that the situation should be resolved in accordance with international law and accordingly gave their support to Libya. Others expressed the view that extradition of one's nationals is a very delicate issue, even impermissible in the law of many States, and that the principle of *aut dedere, aut punire* contained in the Montreal Convention should be respected.[91]

Canada, Italy, Belgium, Russia, India, Japan and many other States supported the draft Resolution but did emphasize on the unique nature of the situation and stated it could not constitute a broad precedent for dealing with terrorism - a point even made by the sponsors of the draft. It was the alleged involvement of the Libyan State that made the situation so exceptional and that rendered the normal mechanisms inappropriate.[92]

b. Adoption of Resolution 731 and text

After two months of intense diplomatic efforts and in the face of Libya's failure to respond to the requesting States' demands, the S. C. unanimously adopted Resolution 731

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[89] *Ibid.* at 910.

[90] U.N. Doc. S/PV.3033 (1992) at 14-15; see also Weller, *supra* note 3 at 310; Beveridge, *supra* note 3 at 909-10: "In Libya's view these matters fell entirely within the scope of existing international conventions, in particular the Montreal Convention, and did not give rise to any issue concerning the maintenance of international peace and security. Thus it argued that the S.C. was not competent to consider the matter. Furthermore, Libya considered that it had fulfilled its obligations under the Charter to seek peaceful settlement of the dispute, by indicating its willingness to cooperate and by seeking arbitration in accordance with the Montreal Convention."

[91] Beveridge, *supra* note 3 at 910; Weller, *supra* note 3 at 311-12.

[92] Weller, *supra* note 3 at 312; Beveridge, *supra* note 3 at 910.

on 21 January 1992.[93] The demands of the U.S.-U.K. joint statement were endorsed by the Resolution which urged Libya "[t]o provide full and effective response to those requests."[94] It confirmed that the S. C., determined to eliminate international terrorism,

> 1. *Condemns* the destruction of Pan American flight 103 and Union de transports aérens flight 772 [sic: aériens] 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 [by the United States and the United Kingdom] to cooperate fully in establishing responsibility for the terrorist acts referred to above against Pan American flight 103 and Union des transports aérens [sic: aériens] flight 772;
> 3. *Urges* the Libyan Government immediately to provide full and effective response to those requests so as to contribute to the elimination of international terrorism;
> 4. (...)
> 5. *Urges* all States individually and collectively to encourage the Libyan Government to respond fully an effectively to those requests.[95]

The States in the preambular dispositions of the Resolution reaffirmed their deep concern with the "[w]orld-wide persistence of acts of international terrorism in all its forms. including those in which States are directly or indirectly involved (...)" and by "[a]ll illegal activities directed against international civil aviation (...) and reaffirming the right of all States (...) to protect their nationals from acts of international terrorism that constitute threats to international peace and security."[96]

In Resolution 731, the S.C. also reaffirmed Resolution 286 (1970) of 9 September 1970, in which it "[c]alled on States to take all possible legal steps to prevent any interference

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[93] Resolution 731, *supra* note 45; for account and analysis of Resolution 731, see Weller, *supra* note 3 at 312-314; Reisman, *supra* note 45 at 86-87; Vishesh, *supra* note 3 at 521; McWhinney, *supra* note 3 at 265; Lowe, *supra* note 3 at 409; Timmeney, *supra* note 1 at 483; McGinley, *supra* note 3 at 579-80; Tomuschat, *supra* note 38 at 39; Beveridge, *supra* note 3 at 909-912; Evans, *supra* note 3 at 38-40; Sorel, *supra* note 3 at 692; Scobie, *supra* note 3; Kash, *supra* note 3 at 24; Gunn, *supra* note 3 at 213; Rubin, *supra* note 11 at 5.

[94] Resolution 731, *supra* note 45; see also Gowlland-Debbas, *supra* note 26; Beveridge, *supra* note 3 at 909; Evans, *supra* note 3 at 39.

[95] Resolution 731, *supra* note 45.

[96] *Ibid.*

with international civil air travel (...)." It also reaffirmed Resolution 635 (1989) of 14 June 1989, in which it condemned "[a]ll 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 (...)." Finally, the States stated their deep concern over "[t]he results of investigations, which implicate officials of the Libyan Government (...) [in connection with Pan Am 103 and UTA 772]."[97]

To ensure the follow up of the Resolution, the S.G. was asked to seek cooperation and the S.C. remained seized of the action.[98]

c. Events following Resolution 731

Libya once again affirmed its opposition to terrorism, and declared its willingness to cooperate with the S.G. in attempts to solve the crisis in a manner consistent with the U.N. Charter and international law.[99] Efforts also continued to persuade Libya to adhere to the sponsoring States' demands as well as focused on finding an acceptable way for the Libyan nationals accused to be surrendered and on a suitable venue for a trial.[100]

On numerous occasions Libya expressed doubts about the possibility of a fair trial held in the U.K., and especially in the U.S. Furthermore, it reaffirmed its view that it was not obliged by either customary international law or applicable treaty law (specially the Montreal Convention) to surrender the suspects, and to that extent it challenged the validity of the Resolution.[101]

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[97] *Ibid.*
[98] *Ibid.*
[99] This communication was released a day after the Resolution was adopted, see Weller, *supra* note 3 at 314; see also 31 I.L.M. (1992) 731 at 737-743 on Libya position and efforts.
[100] Beveridge, *supra* note 3 at 911; Weller, *supra* note 3 at 313-314.
[101] Beveridge, *supra* note 3 at 911; see also another expression of doubt that the accused might receive a fair and impartial trial in the U.S. or U.K., McWhinney, *supra* note 3 at 270.

Following the mandate given to him in the Resolution, the S.G. conducted talks with Libya and reported to the S.C. on Libya's position.[102] On 11 February 1992, the S.G. submitted its first Report.[103]

The S.G. reported that Libyan leader, Colonel Qaddafi, had reiterated Libya's willingness to cooperate, that legal proceedings in Libya were underway and that he was not prepared to violate the Libyan Constitution by extraditing the two suspects. Qaddafi rather suggested that lawyers from sponsoring States attend any trial held in Libya.[104] Libya confirmed that it was willing to satisfy the French demands since they did not conflict with Libyan law.[105] It was also suggested by Libya that the S.G. should attempt to create some "mechanism" whereby Resolution 731 could be implemented.[106]

The Report concluded that, although Resolution 731 had not been complied with yet, there had been a certain evolution in Libya's position. None of the alternatives proposed by Libya were deemed acceptable by the U.S. and U.K. (since they did not include the

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[102] Two reports were written: Report by the Secretary-General pursuant to Paragraph 4 of the Security Council Resolution 731 (1992), UN Doc. S/23574 (11 February 1992), reproduced at 31 I.L.M. (1992) 731 at 733 [*hereinafter* Report1] and Further Report by the Secretary-General Pursuant to Paragraph 4 of the Securuty Council Resolution 731 (1992), UN. Doc. S/23672 (3 Mar. 1992), reproduced at 31 I.L.M. (1992) 731 at 735 [*hereinafter Report2*].

[103] *Report1*, *supra* note 102; *The* S.G. had dispatched a Special Envoy to meet, talk and cooperate with Libyan officials acting under the terms of Resolution 731. The Libyan leadership appeared to respond constructively. It accepted French demands and hinted the possibility of surrendering the two suspects to a third State or International body. In the second Report, the S.G. indicated that the three claimant States supported the initiative regarding the response to the French demands. They also accepted the suspects be handed through the U.N., but did not respond to the proposition of trial in a third State, see Weller, *supra* note 3 at 314-15; see also Evans, *supra* note 3 at 42-44.

[104] *Report1*, *supra* note 102; Evans, *supra* note 3 at 42-44; Beveridge, *supra* note 3 at 911-912.

[105] *Report1*, *supra* note 102; Beveridge, *supra* note 3 at 912.

[106] For example: the handing over of the suspects for questioning to a U.N. mission, establishment of a legal committee to look into the accusations, possibility that a trial might be held in a neutral third State if the charges prove to be serious, the guaranty by the S.G. of a fair and just trial and in response to the French demands, the welcoming of a French Judge and giving him copies of documents; Libya also took the opportunity to renounce and denounce once again terrorist activities, see for more details Weller, *supra* note 3 at 315-16; Evans, *supra* note 3 at 42-44; see also *Report1*, *supra* note 102.

surrender to them of the two accused), and they appeared to press for a stronger Resolution by the S.C.[107]

The response of the sponsoring States was:

> It is clear from the Secretary General's report that Libya is seeking to confuse the issue and remains unwilling to comply in any meaningful way with the Resolution ... Libya has not turned over promptly the persons accused of the bombings for trial; Libya has not disclosed all it knows of the crime; Libya has not paid appropriate compensation, and Libya has not taken concrete action to end its support for terrorism.
>
> The Libyan answer claims that no mechanism exists for compliance. There are a number of ways Libya could take action to comply with the Resolution, and Libya knows full well that they are.
>
> We will be consulting with the other members of the SC about next steps.[108]

By the intermediary of the S.G., the sponsoring States indicated that Libya would need to show and take "concrete measures". The second report of the S.G., on 3 March 1992, showed that Libya's position had not advanced significantly, and later that month negotiations on another resolution, this time including sanctions, began.[109]

3. Libya's application to the International Court of Justice

a. Applications - merits

On 3 March 1992, Libya filed applications to the I.C.J. against the U.S. and the U.K.. It based its application on Article 14(1) of the Montreal Convention which provides for

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[107] *Report1*, *supra* note 102; Evans, *supra* note 3 at 43-44; Weller, *supra* note 3 at 317.
[108] Beveridge, *supra* note 3 at 912; see also *Report2*, *supra* note 102
[109] *Report2*, *supra* note 102; Beveridge, *supra* note 3 at 912.

arbitration when a dispute arises between signatory States concerning the interpretation or application of the Montreal Convention, and which provides that in the face of failing arbitration, the parties may submit the case after a period of 6 months for adjudication to the I.C.J.. The applications focused almost exclusively on issues concerning Libya's preexisting rights and duties under the Montreal Convention: Libya alleged violations of its rights under the Montreal Convention which it deemed applicable since it considered the acts that had been committed in Lockerbie to be an offense within the scope of Article 1.[110]

Libya contended 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. It also argued that the U.S. and the U.K. had rejected Libyan efforts to resolve the matter under the framework of international law and the Montreal Convention and that these countries were pressuring Libya into surrendering its nationals.[111] Lastly, Libya put forward that it had complied with the Montreal Convention, applicable to the situation and binding upon the parties, and had no obligation to surrender the accused and that the demand for surrender is illegal.[112]

The I.C.J. was asked to adjudge and declare the following:

1. that Libya had fully complied with all of its obligations under the Montreal Convention;

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[110] See *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya* v. *United States of America), Provisional Measures,* Order of 14 April 1992, [1992] I.C.J. Rep. 114 at 115-118 [*hereinafter Lockerbie-provisional],* reproduced at 32 I.L.M. (1992) 662 and *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United Kingdom), Provisional Measures,* Order of 14 April 1992, [1992] I.C.J. Rep. 3; see also Gowlland-Debbas, *supra* note 26 at 645; Weller, *supra* note 3 at 317; Vishesh, *supra* note 3 at 520-21; McWhinney, *supra* note 3; McGinley, *supra* note 3 at 580; Beveridge, *supra* note 3 at 908-09 and 916-17; Evans, *supra* note 3 at 44 ss; Scobie, *supra* note 3 at 160; Gunn, *supra* note 3 at 214; Sorel, *supra* note 3 at 693.

[111] *Lockerbie-provisional, supra* note 110, and also at 121; Weller, *supra* note 3 at 308; Evans, *supra* note 3 at 45; McGinley, *supra* note 3 at 580; Sorel, *supra* note 3 at 693-94.

[112] *Lockerbie-provisional, supra* note 110, and also at 121; Evans, *supra* note 3 at 45.

2. that the United States and the United Kingdom had breached, and are continuing to breach, their legal obligations to Libya under Article 5(2), 5(3), 7, 8(2) and 11 of the Montreal Convention; and
3. that the United States and the United Kingdom are under a legal obligation immediately to cease and desist from such breaches and from the use of any and all force or threats against Libya, including the threat of force against Libya, and from all violations of the sovereignty, territorial integrity, and the political independence of Libya.[113]

More particularly, the alleged breaches complained about by Libya were that of Article 7 of the Montreal Convention incorporating the principle *aut dedere aut judicare*, according to which Libya had a choice between extradition and prosecution of the alleged offenders: that of Article 5(2), by preventing Libya from establishing its jurisdiction over the alleged offenders present in its territory; that of Article 5(3), by preventing Libya from exercising criminal jurisdiction under its national law; that of Article 8(2), by which extradition is subordinated by national law and that of Article 11, by refusing judicial assistance in connection with criminal proceedings.[114]

Parallel with its application to the Court, Libya offered to hand the two accused over to a neutral country for trial.[115] The I.C.J. moved quickly to hear the request for provisional measures and proceeded from 26 to 28 March 1992.[116] As for the merits case, Libya deposited its Memorial within the prescribed time period. The U.S. and U.K. however respectively filed on the 16 and 20 June 1995 preliminary objections to the jurisdiction of the I.C.J. to entertain Libya's applications. The proceedings on the merits are thus suspended until the preliminary objections can be settled.[117]

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[113] *Lockerbie-provisional, supra* note 110, and also at 117-118; see also Gowland-Debbas, *supra* note 26 at 645; McGinley, *supra* note 3 at 580; Gunn, *supra* note 3 at 214; Evans, *supra* note 3 at 45; Weller, *supra* note 3 at 317; Beveridge, *supra* note 3 at 916-917.
[114] *Lockerbie-provisional, supra* note 110; see also Gowland-Debbas, *supra* note 26 at 645.
[115] Gunn, *supra* note 3 at 214.
[116] Weller, *supra* note 3 at 308; McGinley, *supra* note 3 at 580; Beveridge, *supra* note 3 at 909, 916.
[117] Hague Yearbook of International Law, (Hague: Netherlands, 1995) vol. 8 at 113.

b. Applications -provisional measures

i. General

On the same day the applications were filed Libya also requested the indication of provisional measures against the U.S. and U.K. to protect its rights pending the rendering of the merit judgment.[118] The I.C.J. has the power to indicate measures under Article 41 of its Statute, pending final judgment, "[i]f it considers that the circumstances so require (...) to preserve the respective rights of either party."[119] The requests for provisional protection measures were the subject of arguments before the I.C.J.. The actual requests, as well as the arguments, were made prior to the S.C.'s adoption of Resolution 748 so the I.C.J. gave the opposing parties an opportunity to bring forward new arguments.

Although some have suggested that the applications and requests for interim protection were submitted by Libya as a delaying tactic, Libya's stated reason for the request for interim measures was preservation of its rights since the U.S. and U.K. were already talking about imposing sanctions. It wanted to prevent them from taking any action to coerce it to hand over the two suspects to them. It also alleged they were working on bypassing the provisions of the Montreal Convention by threatening to force Libya to surrender its two accused nationals.[120]

Libya asked the I.C.J. to indicate provisional measures as follows:

1. to enjoin the United States from taking any action against Libya calculated to coerce or to compel Libya to surrender the accused

[118] *Lockerbie-provisional, supra* note 110 at 118 ss (since the order rendered in the U.S. and U.K. cases are identical, reference will be made in this thesis to the U.S. order only for the purpose of simplification).
[119] Statute of the International Court of Justice, 26 June 1995, Documents of the United Nations Conference on International Organization (San Francisco: UN, 1945) Vol. 15 (Washington DC: US Gov. Print Office, 1945).
[120] Vishesh, *supra* note 3 at 521: "In the course of the oral proceedings before the ICJ, reference had been made by both the United Kingdon and the United States to the possibility of sanctions being imminently imposed by the Security Council on Libya in order to require it to extradite the accused to the United States or United Kingdom."; see also *Lockerbie-provisional, supra* note 110 at 118; Evans, *supra* note 3 at 46; Weller, *supra* note 3 at 317; Beveridge, *supra* note 3 at 916-917; Sorel, *supra* note 3 at 695.

individuals to any jurisdiction outside Libya or otherwise prejudice the rights claimed by Libya; and
2. to ensure that no steps are taken that would prejudice in any way the rights of Libya with respect to the legal proceedings that are the subject of Libya's Application.[121]

In the following sections, we will expose Libya's arguments, and the U.S. and U.K. responses with respect to the request on provisional measures. We have to point out that they are separate and distinct from the arguments presented in the merits phase of the Lockerbie cases. The issue at stake at the provisional measures stage is whether the I.C.J. may order the S.C. not to impose sanctions while the merits are considered. On the other hand, the legal issue at stake at the merits phase is whether the Montreal Convention applies to give Libya exclusive jurisdiction over the accused, or to require the parties to arbitrate the issue of jurisdiction over the accused.[122]

ii. Libya's arguments

Libya's argument in requesting provisional measures, enjoining the U.S. from any further action against Libya, focused on three points:

1. Libya asserted that the dispute concerned the Montreal Convention and that the I.C.J. had *prima facie* jurisdiction (because of the Montreal Convention itself) over the dispute at the provisional measures stage.
2. Libya submitted evidence of the urgency of such requests since the threat of prejudice was imminent and that the requisite conditions necessary for the indication of interim measures were present.
3. Libya asserted that the relationship between the S.C. and the I.C.J. did not preclude simultaneous or subsequent recourse to the I.C.J..[123]

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[121] *Lockerbie-provisional, supra* note 110 at 118-121; see also Gowlland-Debbas, *supra* note 26 at 645; McWhinney, *supra* note 3; McGinley, *supra* note 3 at 580; Evans, *supra* note 3 at 44-46; Gunn, *supra* note 3 at 214; Weller, *supra* note 3 at 317-318.

[122] Evans, *supra* note 3 at 44, footnote 145.

[123] *Ibid.* at 46 (goes into great details in exposing Libya's arguments); see Weller, *supra* note 3 at 317-318; Beveridge, *supra* note 3 at 916-17; Scobie, *supra* note 3 at 160-61 on object and function of interim measures procedings; *Lockerbie-provisional, supra* note 110 at 118-119, 121-122.

Libya also submitted that the S.C., by its Resolution 731, encouraged the parties to peacefully settle the dispute and that the I.C.J. application was made precisely to that end. It continued by saying that Resolution 731 was not adopted under U.N. Charter Chapter VII but rather was a non-binding decision under U.N. Charter Chapter VI and, consequently, it did not have a legal obligation to unconditionally surrender its two nationals.[124]

iii. U.S. and U.K. arguments

The U.S. and U.K. contended the following points, each of which was contested by Libya:

1. Libya had failed to provide the I.C.J. *prima facie* jurisdiction due to the absence of a dispute;
2. if such a dispute existed, Libya had failed to show that it could not be settled through negotiations;[125]
3. even if the dispute could not be resolved through negotiation, Libya's request for arbitration was inadequate;
4. even if the request for arbitration had been adequate, the matter had been brought prematurely with respect to the six-month period in Article 14 (10) of the Montreal Convention;
5. there was no connection between the rights sought to be protected and the provisional measures requested;
6. there was insufficient urgency (and no proof of irreparable harm) to warrant interim protection; and
7. a failure to indicate interim measures would not result in irreparable harm to Libya.[126]

The U.K. also argued that the I.C.J. should not grant Libya's request for interim measures for it was seeking to use the I.C.J. with the sole intent of precluding the S.C. from

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[124] Weller, *supra* note 3 at 318; Beveridge, *supra* note 3 at 917.

[125] It is surprising to hear this argument coming from the U.S. and U.K. since through their respective delegates, T. Pickering and D. Hannay, they had publicly announced that they regarded the dispute as unsuitable for negotiation, Tomuschat, *supra* note 38 at 39.

[126] Gunn, *supra* note 3 at 214-215; *Lockerbie-provisional*, *supra* note 110 at 122; for greater analysis on U.S. and U.K. arguments, see Evans, *supra* note 3; Weller, *supra* note 3 at 318; Beveridge, *supra* note 3 at 917.

exercising its powers, and to prevent it from broadening its action to include Libya as a State actor in terrorism, and take measures under U.N. Charter Chapter VII. The U.S. also asserted that the I.C.J. should not grant provisional measures since the S.C. was already seized of the matter.[127]

iv. Additional arguments

The I.C.J. responded to the adoption of Resolution 748, by inviting the parties to submit in written form observations about the legal implications of the Resolution on the proceedings.[128]

1. Libya

The Libyan Government submitted that Resolution 748 did not preclude its right to ask for interim measures. Because there is no competition or hierarchy between the S.C. and the I.C.J. within the U.N., each exercising its own competence, the risk of conflicting decisions by the two bodies did not render the Libyan claim inadmissible. Libya regarded both resolutions as contrary to international law and as infringing, or threatening to infringe, on the enjoyment and the exercise of its rights conferred by the Montreal Convention. Finally, it criticized the S.C.'s invocation of United Nations Charter Chapter VII as a pretext to elude application of the Montreal Convention.[129]

2. U.S. and U.K.

Conversely, the U.S. and U.K. submitted the same argument they had previously put forward on the topic of S.C. and I.C.J. relationship (jurisdiction and powers). They also argued that Resolution 748 had imposed specific overriding obligations on the parties

[127] Gunn, *supra* note 3 at 215; Weller, *supra* note 3 at 318; *Lockerbie-provisional, supra* note 110 at 122.
[128] *Lockerbie-provisional, supra* note 110 at 125.
[129] Gunn, *supra* note 3 at 216; Weller, *supra* note 3 at 321; Vishesh, *supra* note 3 at 522 ss; McGinley, *supra* note 3 at 589; Scobie, *supra* note 3 at 161; *Lockerbie-provisional, supra* note 110 at 125-126.

according to Articles 25 and 103 of the U.N. Charter and that it precluded any conflicting order by the I.C.J..[130]

4. Security Council Resolution 748

a. Resolution and legal basis

Three days after the I.C.J. hearings, on 31 March 1992, the S.C., acting under Chapter VII of the U.N. Charter, adopted Resolution 748. It was to become operational only two weeks later - as luck would have it - the day after the I.C.J. rendered its decision on interim measures.[131] Its purpose was to impose sanctions on Libya for failure to comply with Resolution 731.[132]

This time, the basis of the Resolution was made explicit and it used very precise language. The S.C. clearly expressed that the suppression of international terrorism is "[e]ssential for the maintenance of peace and security", and that action was being taken according to U.N. Charter Chapter VII.[133] Resolution 748, unlike Resolution 731, is binding, since the former was adopted under U.N. Charter Chapter VII. Consequently, the measures adopted thus clearly fall under Article 41 and represent a new development in the interpretation and application of U.N. Charter Chapter VII; no form of terrorism

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[130] *Ibid.*

[131] Resolution 748, *supra* note 45; see also Weller, *supra* note 3 at 319-22; Reisman, *supra* note 45 at 87; Gowlland-Debbas, *supra* note 26 at 645; Vishesh, *supra* note 3 at 521; McWhinney, *supra* note 3 at 265; Lowe, *supra* note 3 at 409; Timmeney, *supra* note 1 at 483; Rubin, *supra* note 11 at 9-10; McGinley, *supra* note 3 at 580-81; Tomuschat, *supra* note 38 at 38; Beveridge, *supra* note 3 at 912 ss; Evans, *supra* note 3 at 40 ss; Sorel, *supra* note 3 at 696; Scobie, *supra* note 3 at 160; Kash, *supra* note 3 at 25; Gunn, *supra* note 3 at 215 ss.

[132] Tomuschat, *supra* note 38 at 38; Beveridge, *supra* note 3 at 912; Gunn, *supra* note 3 at 215.

[133] Resolution 748, *supra* note 131; Vishesh, *supra* note 3 at 521; Reisman, *supra* note 45 at 88; Beveridge, *supra* note 3 at 912.

had previously been found to constitute a threat or use of force within the meaning of Article 39 of the U.N. Charter.[134] As Beveridge puts it:

> As is made clear in the wording of the Resolution and supported by the statement made by members of the Security Council, it is the continuing threat of terrorism, together with the element of State involvement, which are relied upon to bring the matter within the ambit of Chapter VII.[135]

The unanimity reached by the S.C. in the adoption of Resolution 731 had disappeared and Resolution 748 was adopted by ten votes to none, with five abstentions (including China).[136]

The resolution reaffirmed Resolution 731 and continued as follows:

> *Noting* the reports of the Secretary General,
> *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 (...) the members of the Council expressed their deep concern over acts of international terrorism, and emphasized the need for the international community to deal 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 (...),
> *Determining* (...) that the failure by the Libyan Government to demonstrate by concrete action 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.[137]

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[134] Beveridge, *supra* note 3 at 912.
[135] *Ibid.*
[136] Weller, *supra* note 3 at 320; Lowe, *supra* note 3 at 409; McGinley, *supra* note 3 at 589; Gunn, *supra* note 3 at 215: "China indicated its opposition to sanctions against individual countries. After voicing this position, China was advised by the United States, Britain and France that it would risk losing trade preferences from the United States and seriously impair relations with the other two countries were Beijing to veto a resolution on the sanctions."
[137] Resolution 748, *supra* note 131.

According to Article 39 of the U.N. Charter, the S.C. must determine that such a threat exists, if it wishes to take action under U.N. Charter Chapter VII. The Resolution thus provides that:

> *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) (...);
> 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; [and]
> 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.[138]

The following sanctions were decided and were to remain in place until the S.C. decided that compliance had been achieved:

> (1) suspension of all air flights to and from Libya;
> (2) prohibition of the supply of any aircraft components, servicing of aircraft, certification of aircraft or provision of insurance for Libyan aircraft;
> (3) prohibition of the provision of arms and related, materials and services;
> (4) prohibition of the provision of any technical advice, assistance or training relating to armament;
> (5) withdrawal of military personnel from Libya;
> (6) significant reductions in staff of Libyan diplomatic missions
> (7) closing down offices of the Libyan Arab Airline; and
> (8) denial of entry to or expulsion by States of Libyans who have been denied entry to or expelled from other States because of their involvement in terrorist activities.[139]

The sanctions went into effect on 5 April 1992.[140]

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[138] *Ibid.*

[139] Beveridge, *supra* note 3 at 913; Resolution 748, *supra* note 131.

[140] Resolution 748, *supra* note 131; the sanctions are reviewed every 120 days, Beveridge, *supra* note 3 at 913; Evans, *supra* note 3 at 41; reports of measures taken are made to the S.G., Beveridge, *supra* note 3 at 915.

b. Preceding events

The Resolution was not adopted on a unanimous basis and is the result of a fragile consensus. Concessions had to be made on the text of the Resolution so to obtain enough votes for it to pass.[141] Also, during the divisive debates preceding the adoption of Resolution 748, several delegates insisted that the S.C. should wait until the I.C.J. had the opportunity to make its ruling.[142]

c. Following events

Following the entry into effect of the sanctions, the Libyan government passed a draft resolution allowing the surrender of the suspects and gave the names of I.R.A. terrorists trained by Libya to the British intelligence service as well as expelled Palestinian terrorist Abu Nidal.[143] The Libyan government also continued forward with the trial of the two suspects and made several offers, all the soonest withdrawn, to have the suspects tried in various locations.[144] Libya's ambassador to Morocco even went as far as to say that Libya was willing to surrender the suspects to the U.S. or British authorities, if the I.C.J. were to order it to do so.[145]

But in the end, nothing had changed, and the two Libyan accused have still not been surrendered yet.[146] Libya also rejected Resolution 748 on the basis that it had already manifested its readiness to comply, when possible, with Resolution 731 and continued to affirm that the request for the two suspects to be surrendered violated its sovereign

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[141] For more details, see Beveridge, *supra* note 3 at 913-15.
[142] Weller, *supra* note 3 at 320 (Venezuela also said that both organs operate independently and each should be able to exercise its jurisdiction); McGinley, *supra* note 3 at 589; Beveridge, *supra* note 3 at 914.
[143] McGinley, *supra* note 3 at 581; Beveridge, *supra* note 3 at 916-17; Kash, *supra* note 3 at 25.
[144] For more details, see Evans, *supra* note 3 at 57; Gunn, *supra* note 3 at 216; Kash, *supra* note 3 at 25, 32 ss.
[145] Kash, *supra* note 3 at 32.
[146] Gunn, *supra* note 3 at 216.

rights.[147] Efforts continued to persuade Libya to cooperate and a U.N. Special Envoy was sent to that effect.[148]

After Resolution 748 was passed, the I.C.J. which had still not rendered its judgment on the provisional measures, allowed the parties to present their views on the impact of the Resolution on the judicial proceedings. A few days after the Resolution passed, the I.C.J. rendered its judgment on the provisional measures.[149]

The sanctions imposed were also expanded by S.C. Resolution 883, adopted on 12 November 1993 and which took effect 1 December 1993.[150] It is one of the strongest and clearest S.C. message denouncing State-sponsored terrorism and one of the first real concrete responsive coordinated action by the international community to fight it.[151]

As for the "merits" phase, it is not yet completed since the U.S. and U.K. filed preliminary objections.[152]

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[147] Beveridge, *supra* note 3 at 914.

[148] *Ibid.* at 915: "[the special envoy] reported that Colonel Qaddafi had stated in a meeting that he was ready to accept Resolution 731; however, it seems that the Libyan position on extradition remained the same"and mentions also that Reports on measures taken have been transmitted to the S.G.; Report of the Secretary General, 31 I.L.M. (1992) 749 at 755.

[149] We will discuss the I.C.J. order in the following section.

[150] U.N. Doc. SC/RES/883 (1993); Resolution 883 exposes that: "Convinced that those responsible for acts of international terrorism must be brought to justice" and that Libya must respond fully with Resolutions 731 and 748 which call for the surrender of the suspects. It imposes three other restrictions. It imposes a ban on sales to Libya of equipment for refining and exporting petroleum, places a limited freeze on Libyan financial assets overseas, restricts Libya's diplomatic missions, blocks its national airlines and hinders the maintenance of its airfields, see.

[151] Evans, *supra* note 3 at 56-7.

[152] See footnote 117.

5. International Court of Justice decision on the provisional measures

a. General

On 14 April 1992, the I.C.J., in a rather brief decision (the U.S. and U.K. cases were separate but conjoined and the reasons given in the two orders are identical), denied the request for the indication of interim measures by 11 votes to 5 and accepted the arguments advanced by the U.S. and U.K..[153] Specifically, the *ratio* of the decision lies in paragraphs 41 to 45. The I.C.J. did not reject the demand on the basis of absence of jurisdiction but rather held that the circumstance of the case did not require the exercise of its powers under Article 41 of the Statute of the I.C.J. to indicate provisional measures.[154] The decision revealed few clues as to what will be the issue of the merits phase.[155] A fact of capital importance in the dispute on the provisional measures was the adoption of Resolution 748, which literally changed the nature of the game:

> [w]hatever the situation previous to the adoption of that resolution, the rights claimed by Libya under the Montreal Convention cannot now be regarded as appropriate for protection by the indication of provisional measures.[156]

The juridical grounds for declining to indicate interim measures stemmed from the disappearance of the object of the application which was the rights Libya sought to

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[153] *Lockerbie, Provisional, supra* note 110 at 127; for analysis of decision, see in general Scobie, *supra* note 3 at 161; Gunn, *supra* note 3 at 217 ss; Weller, *supra* note 3 at 321-22; Vishesh, *supra* note 3 at 524 ss; McWhinney, *supra* note 3 at 264 ss; Gowlland-Debbas, *supra* note 26 at 646 ss; Lowe, *supra* note 3 at 409-410; Reisman, *supra* note 45 at 87 ss; Sorel, *supra* note 3 at 712 ss; Evans, *supra* note 3 at 54 ss; McGinley, *supra* note 3 at 581 ss (very detailed analysis); Beveridge, *supra* note 3 at 918 ss.

[154] On conditions for indication of provisional measures, see Gowlland-Debbas, *supra* note 26 at 647; Tomuschat, *supra* note 38 at 39 ss; Sorel, *supra* note 3 at 699 ss.

[155] On possible issue of merits proceedings, see Scobie, *supra* note 3 at 161 ss; Tomuschat, *supra* note 38 at 39 ss.

[156] *Lockerbie-provisional, supra* note 110 at 126-127, para 43; the issue might have turne Evans, *supra* note 3 at 56-7d out quite differently since Resolution 731 was cast in recommendary language only and several of the judges' declarations lead us to believe that Resolution 731 by itself would not have preempted Libya's rights under the Montreal Convention, Reisman, *supra* note 45 at 87.

protect. The I.C.J. held that Resolution 748 was taking precedence over all other obligations:

> [b]oth Libya and the United States, as members of the United Nations, are obliged to accept and carry out the decisions of the Security Council in accordance with Article 25 of the Charter; (...) [that] *prima facie* this obligation extends to the decision contained in resolution 748 (1992); and (...) [that] in accordance with article 103 of the Charter, the obligations of the Parties in that respect prevail over the obligations under any other international agreement, including the Montreal Convention (...).[157]

The I.C.J. could not grant the request for provisional measures for the additional reason that it would *prima facie* deprive the U.S. and U.K. of their rights under Resolution 748.[158]

In declining to indicate provisional measures, the I.C.J. made it clear that it was not definitively deciding the question of its jurisdiction to entertain the merits of the case, the parties' rights with respect to that point remaining unaffected. It also noted that, under Article 41, it could not make definitive findings either of fact or of law on the issues relating to the merits; the I.C.J.'s order, therefore, did not affect the parties' rights to contest such issues at the stage of the merits.[159] The I.C.J. will have to make a determination at the merits stage on the legitimacy of the Resolution in terms of the U.N. Charter. This means that the respondent States, in the mean time, may use the *prima facie* presumption of legitimacy so to put pressure on Libya to extraditing the alleged offenders.[160]

Since the I.C.J. decision is rather succinct, we will examine the separate opinions and especially the dissenting ones for discussion on important issues. Only 3 of the 11 majority judges adopted the majority opinion without comment, the other 8 manifesting some level of dissatisfaction and providing with some specific comments. The 5 judges

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[157] *Lockerbie-provisional, supra* note 110 at 126, para 42.
[158] *Ibid.* at 127, para 44.
[159] *Ibid.* at 126-127 para 41, 43, 45 and at 150, para 16.
[160] McGinley, *supra* note 3 at 582.

left individually formulated dissenting opinions.[161] As McWhinney puts it: "[t]his proliferation of judicial opinion-writing reflects the rather novel international and constitutional law aspects of the cases" and also reflects the doubts that were cast about the Libyan responsibility for the Lockerbie bombing.[162]

b. Concurring declarations and opinions

The decision was based not only on Resolution 748, but also on a broader basis as we can notice from the concurring judgments. Not to have relied on Resolution 731 (even impliedly) ran the risk of giving the impression that without Resolution 748, the I.C.J. would have granted Libya the provisional measures. "This, in turn, would have implied a willingness by the I.C.J. to reach a decision incompatible with the actions of the S.C."[163]

The S.C.'s action and reliance of the I.C.J. on Resolution 748, however, troubled many judges, including some of the majority, because they saw a source of potential conflict between the I.C.J. and the S.C., and a possible challenge to the I.C.J.'s jurisdiction under the U.N. Charter. Of the majority, Judges Oda and Ni preferred to refuse the indication of provisional measures on grounds other than Resolution 748.

Acting President Oda, in his short three-page opinion, indicated that provisional measures should have been refused on the basis of a "[m]ismatch between the object of the [Libyan] Application and the rights sought to be protected (...)" and not on the sole ground of Resolution 748.[164] Judge Ni, for his part, would have refused provisional

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[161] Gunn, *supra* note 3 at 217; Gunn, in his article, provides for a most structured and logical order of analysis into the *Lockerbie-provisional* case. Its structure and order of analysis were followed for it provided a logical, organized and insightful look of the Order, all in a succint fashion, *supra* note 3 at 217 ss; additionnaly, heavy reliance was placed on the Order itself by citing relevant passages thus reducing the risks of misinterpretation of a Judge's motive, rational and line of thinking, which can occur when paraphrasing.

[162] McWhinney, *supra* note 3 at 264.

[163] Gunn, *supra* note 3 at 217.

[164] *Lockerbie-provisional, supra* note 110 at 131 (Oda, J., decl.): he viewed the rights, protection of which was sought, as falling beyond the scope of the action and hence not being susceptible to protection in the instant case but he rallied in support of the constitutional principle of the supremacy of the S.C. resolution.

measures solely upon the "[g]round of non-fulfillment of the temporal requirement provided in Article 14 (1) of the Montreal Convention (...)" since the 6-month period had not elapsed.[165] In their joint declaration, Judges Evensen, Tarassov, Guillaume, and Aguilar Mawdsley agreed with the I.C.J. decision, taking Resolution 748 into account and refusing the request for interim measures, and gave only additional comments.[166]

Judge Lachs thought that the basis of the I.C.J.'s order on Resolution 748 was legitimate. However, he has over the years rejected the notion of rigid and artificial constitutional separation of powers between the S.C. and I.C.J. and pushed instead for "[f]ull complementary powers and inter-institutional comity and cooperation."[167] He pointed out in the Lockerbie case that the I.C.J. and the S.C. should each "[p]erform its functions (...) without prejudicing the exercise of the other's powers" and that "[t]he two main organs with specific powers of binding decision [should] act in harmony - though not of course in concert."[168] The order, refusing to indicate measure, should therefore not be seen as an abdication of the I.C.J.'s powers but rather as a reflection of the system within which the I.C.J. is supposed to render justice. [169]

The Libyan application to the I.C.J. raised the important question of whether or not a S.C. Resolution could be examined by the I.C.J., the main judicial organ of the I.C.J.. Judge Shahabuddeen, in his separate opinion, endorsed the order (legitimate basis of order on Resolution 748) but with reluctance. He suggested that provisional measures would not have been granted in the absence of Resolution 748. But because of the S.C. adopted

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[165] *Ibid.* at 135 (Ni, J., decl.); Tomuschat, *supra* note 38 at 39-40 is of the opinion that since six-months will have elapsed anyway at the time the case will be heard, this should not create an irreparable defect preventing the I.C.J. from exercising jurisdiction.

[166] *Lockerbie-provisional, supra* note 110 at 136; They indicated their view that prior to the adoption of Resolution 748 Libya was within its right to refuse the extradition request of the U.S. and U.K. (and to prosecute before its own authorities), while the U.S. and U.K. had the right to request the extradition. They noted that the S.C., if unsatisfied with the impasse, could issue resolutions compelling Libya to extradite. They characterized the matter in terms of a political change of circumstance not impinging on the authority of the I.C.J., *ibid.*; Gunn, *supra* note 3 at 217-18.

[167] McWhinney, *supra* note 3 at 268.

[168] *Lockerbie-provisional, supra* note 110 at 138-139 (Lachs, J., sep. op.).

[169] *Ibid at 139.*

Resolution 748, the I.C.J. had the obligation to take it into account in finding the applicable law.[170] The validity of the Resolution had to be presumed at that stage. Articles 25 and 103 of the U.N. Charter "rendered unenforceable whatever rights Libya might formerly have held."[171] He is of the opinion that there is no imposition of superior authority, but he also raised a number of questions that go to the heart of the problem:

> 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 limitations on 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?[172]

He also considered the decision stemmed "[n]ot from a collision between the competence of the Security Council and the Court but rather from a collision between the obligations of Libya under the decision of the Security Council and any obligations which it may have under the Montreal Convention. The Charter says the former should prevail."[173]

c. Dissenting opinions

The five dissenting judges wrote individual opinions and each were of the opinion that considering the circumstances the I.C.J. should have indicated provisional measures (in such a manner as to avoid a conflict with Resolution 748). Judge Bedjaoui was strongly critical of the I.C.J. for its reliance on Resolution 748. The other dissenting judges

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[170] *Lockerbie-provisional, supra* note 110 at 138, 140-141.
[171] Gunn, *supra* note 3 at 218.
[172] *Ibid.* at 142 (Shahadbudden, J., sep. op.).
[173] *Ibid.* at 141.

thought that the I.C.J. could and should indicate provisional measures despite Resolution 748.

They also took note of the organic but autonomous nature of the U.N. organs and they agreed that this autonomy had the consequence of making it perfectly proper for the S.C. and the I.C.J. to be contemporaneously seized with the same matter. They referred to a number of prominent cases demonstrating that the jurisdiction of the two organs had already been invoked concurrently.[174]

However, ''the unique aspect of the Lockerbie application - namely that the I.C.J. and the S.C. had been approached by opposing parties in the dispute - raised the possibility of inconsistent treatments of the dispute by the Security Council and the Court, a prospect to which the dissenting judges reacted differently.''[175]

Judge Bedjaoui was seriously concerned by such an inconsistency and by the fact that the I.C.J.'s role was not to exercise appellate jurisdiction over the S.C. no more than the S.C. should impair the integrity of the I.C.J.'s international judicial function.[176] As for Judge Weeramantry, he concluded that both the S.C. and the I.C.J. must exercise its independent judgment in accordance with the Charter and it follows that their assessments of a given situation will not (and need not) always be in complete concordance.[177]

Others Judges raised serious concerns about the way in which the dispute was dealt with. Judge Ajibola was worried that the 27 November 1991 joint statement forming the basis of the S.C. resolution, all appeared to ignore the presumption of innocence of the two

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[174] Gunn, *supra* note 3 at 218-219; see also *Anglo-Iranian Oil Co. (United Kingdom* v. *Iran), Interim Protection,* [1951] I.C.J. Rep. 89 [hereinafter *Anglo-Iranian Oil, Interim Protection*]; *Aegean Sea Continental Shelf Case (Greece* v. *Turkey), Interim Protection,* [1976] I.C.J. Rep. 3 [hereinafter *Aegean Sea, Interim Protection*]; *Case Concerning United States Diplomatic and Consular Staff in Tehran (U.S.A. v. Iran), Merits,* [1980] I.C.J. Rep. 3 [hereinafter *Hostages, Merits*]and *Case concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Provisional Measures,* [1984] I.C.J. Rep. 169 [hereinafter *Nicaragua, Provisional Measures*].

[175] Gunn, *supra* note 3 at 218-219.

[176] *Lockerbie-provisional, supra* note 110 at 145, para 7 (Bedjaoui, J. diss. op.).

[177] *Ibid.* at 169 (Weeramantry, J. diss. op.).

accused.[178] Judge Shahabuddeen was concerned that an impartial trial would not be possible in the U.S. nor the U.K. because of a possible prejudgment of the case by them.[179] Judge *ad hoc* El-Kosheri was of the opinion that the two accused "[c]ould not possibly receive a fair trial, neither in the United States or in the United Kingdom, nor in Libya."[180] Judge Bedjaoui criticized the fact that the majority considered Resolution 748, even though it was adopted subsequent to the closure of oral proceedings. He contended Resolution 748 was outside the purview of the case since it did not have any legal existence when the proceedings before the I.C.J. came to an end.[181]

The dissidents had different opinions on the degree of scrutiny to which they would subject S.C. resolutions at the provisional stage. Judge Bedjaoui considered such resolutions as binding and enjoying a presumption of validity and of lawfulness in preliminary stages.[182] He also noted that since it was not seized of the vaste dispute (the wider political dispute of State-sponsored terrorism), the I.C.J. should refrain from reviewing the exercise by the S.C. of its power of discretionary characterization of the situation as one likely to threaten international peace and security.[183] But, Judge Bedjaoui immediately qualified this presumption by exempting a resolution that has "[a]s its object, or effect, not to withdraw a right from an applicant State, but to prevent the exercise, by the I.C.J. itself, of the judicial function with which it has been invested by the Charter."[184] In such a situation, conflicting decisions by the I.C.J. and the S.C. "would

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[178] *Ibid.* at 191 (Ajibola, J., diss. op.).
[179] *Ibid.* at 141 (Shahabuddeen, J., diss. op.).
[180] *Ibid.* at 216 (El-Kosheri, J., diss. op.).
[181] *Ibid.* at 151, para 17 (Bedjaoui, J., diss. op.).
[182] *Ibid.* At 151-155; but he also said the "[q]uestion of validity is liable to raise two major problems, at once serious and complex, namely, whether the Security Council should, in its action, firstly respect the United Nations Charter and secondly respect general international law" and concluded that it would not be unreasonable to affirm that the S.C. must respect both of them, *ibid.* at 155; see also Gunn, *supra* note 3 at 219-220.
[183] *Lockerbie-provisional, supra* note 110 at 151, para 18 (Bedjaoui, J., diss. Op.); see also Gunn, *supra* note 3 at 219-220.
[184] *Lockerbie-provisional, supra* note 110 at 156, n. 1 (Bedjaoui, J., diss. Op.); see also Gunn, *supra* note 3 at 219-220.

apparently be acceptable since conflict would arise from an exercise of independent judicial function in laying down international legality."[185]

Similarly, Judge Weeramantry noted that "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 peace, breach of peace, and act of aggression is one entirely within the discretion of the Council."[186] For this reason, he observed that the S.C. is the only judge of circumstances that would activate U.N. Charter Chapter VII: "[a]ny matter which is the subject of a valid S.C. decision under Chapter VII does not appear, *prima facie*, to be one with which the Court can properly deal."[187] He concluded that "[t]he Court would not place itself in a position of confrontation with the Council where that organ has already exercised its powers in a manner which places obligations upon all United Nations Members (...)"[188] In areas not covered by the S.C.'s "binding decisions under Chapter VII, the Court is free to use its influence and authority to serve the purposes of international peace."[189]

But, Judge Bedjaoui's and Judge Weeramantry's conclusions confounded their premise. As Gunn puts it:

> If S.C. resolutions are beyond censure at the provisional stage, how is the I.C.J. to discern the resolutions that, by purpose or effect, prevent its exercise of the judicial function (and are thus invalid)? Assuming that the S.C. would not voice its malign purposes, how is the I.C.J. to divine them otherwise? If only the S.C. can assess the circumstances that engage U.N. Charter Chapter VII, what would prompt it to declare its own actions invalid? If instead, it is the I.C.J. that should distinguish valid decisions from invalid ones, how at the provisional stage could a U.N. Charter Chapter VII decision ever be declared invalid, given Judge Weeramantry's *prima facie* presumption of validity?[190]

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[185] Gunn, *supra* note 3 at 219-220; see also *Lockerbie-provisional, supra* note 110 at 156 (Bedjaoui, J. diss. op.).
[186] *Lockerbie-provisional, supra* note 110 at 176 (Weeramantry, J., diss. op.).
[187] *Ibid.*
[188] *Ibid.* at 180.
[189] *Ibid.*
[190] Gunn, *supra* note 3 at 220.

Judge *ad hoc* El-Kosheri looked at the situation from a different angle. He cited numerous authorities to suggest that not all authorities regard U.N. members as obliged to carry out all decisions of the S.C.. [191] He thought it possible "[t]o consider that the Security Council , when adopting paragraph 1 of Resolution 748 (1992), the S.C. [may have] impeded the Court's jurisdiction freely to exercise its inherent judicial function."[192] In doing so, the S.C. exceed its authority in a violation of Article 92 of the U.N. Charter.[193]

This *ultra vires* character of Resolution 748 was vitiated in light of the warnings of several S.C. delegates[194] regarding the risks of hasty adoption of its draft and a lack of respect for the I.C.J.'s credibility and judicial function. Even on a *prima facie* basis, therefore, judge El-Kosheri regarded the resolution as having no legal effect on the I.C.J.'s jurisdiction.[195]

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[191] Such as the decision *Legal Consequences for States of the Continues Presence of South Africa in Namibia (South West Africa), Notwithstanding Security Council Resolution 276 (1970), Advisory Opinion,* [1971] I.C.J. Rep. 16 [hereinafter *Namibia, Advisory*] and Kelsen, The Law of the United Nations- A Critical Analysis of its Fundamental Problems, London, 1950, *Lockerbie-provisional, supra* note 110 at 205-207 (El-Kosheri, J., diss. Op.); see also Gunn, *supra* note 3 at 220.

[192] *Lockerbie-provisional, supra* note 110 at 210, para 33 (El-Kosheri, J., diss. op.).

[193] *Ibid.*

[194] Gunn, *supra* note 3 at 220, footnote 72.

[195] *Ibid.* at 220-221.

CHAPTER 2: LEGAL ANALYSIS OF THE SITUATION

A. LEGAL BASIS

1. United Nations Charter

a. General

All the States involved in the Lockerbie dispute maintain the actions they took were pursuant to the U.N. Charter. S.C. Resolutions condemning Libya's involvement in terrorist acts and imposing sanctions as well as the submission of the case by Libya to the I.C.J. find their legal basis within the framework of the U.N. and its Charter. All the States involved in the dispute are signatories. We will examine the legal context in which the Lockerbie saga evolved.

i. United Nations general principles and purposes

The "principles and purposes" of the U.N. are found in Chapter I of the U.N. Charter. Fundamental in the study of the actions taken in the Lockerbie affair is the purpose found in Article 1(1):

> To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to peace, and for the suppression of acts of aggression or other breaches of the peace, and bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace.[196]

[196] U.N. Charter, *supra* note 40.

The Organization and its Members shall, in pursuit of the purposes set forth in Article 1, act in accordance with certain principles. All the members shall fulfill in good faith the obligations assumed according to the U.N. Charter, settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered, refrain in their international relations from the threat or use of force against another State.[197]

ii. The U.N. Charter and the fight against terrorism: Article 2(4)

1. Article 2(4) prohibits aggression

The U.N. Charter prohibits aggression and specifically, Article 2(4) states: "All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations."[198]

While aggression is not specifically defined in the U.N. Charter, a U.N. G.A. Resolution has been adopted on the subject.[199] The definition of aggression it contains accepts the notions of both direct and indirect aggression. So the U.N. Charter has been read to include both the direct and indirect threat or use of force against another State (i.e. aggression). Direct aggression is usually easily described as an armed attack by one State

[197] U.N. Charter, Article 2 (2), (3), (4), *ibid.*

[198] U.N. Charter, *ibid*; The doctrine of self-defense is a corollary to the principle of prohibition of aggression contained in the U.N. Charter. To preserve world order and security Article 51 of the Charter permits the defensive use of force either individually or collectively, until the S.C. has taken measures necessary to maintain international peace and security. The defensive use of force must, however, be necessary and proportional. Some people think this Article is still applicable even though the S.C. is "on the case" and believe therefore that "any action against the Libyan government under the foregoing conditions should be viewed as a permissible response to aggression, and non-aggression itself", Evans, *supra* note 3 at 33-34.

[199] The Charter does not specifically define aggression, but a General assembly resolution does: GA/RES/3314 (1974), U.N. Doc. A/9631 (1974); see also for more information on that resolution and other definitions of aggression Evans, *supra* note 3 at 30 ss.

against another. More difficult however, is circumscribing an accepted notion of indirect aggression.[200]

However, the concept of (impermissible) indirect aggression has been used to characterize terrorist acts, particularly when they are State-sponsored.[201] The G.A. used this description in a Resolution adopting measures to eliminate international terrorism. The Resolution recalled the definition of aggression, thereby impliedly including terrorism as a form of aggression.[202]

2. Article 2(4) as legal basis for both Resolutions

The S.C. Resolutions adopted in the Lockerbie affair specify Article 2(4) as the basis for its international fight against terrorism in response to "the Libyan aggression". For example, Resolution 748 states explicitly that the S.C. was "[c]onvinced that the suppression of acts of international terrorism, including those in which States are directly or indirectly involved, is essential for the maintenance of peace and security (...)" and reaffirms that "[i]n accordance with the principle in Article 2, paragraph 4, of the Charter (...) 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."[203]

That specific reference to Article 2(4) clearly indicates the S.C. intended to include State-sponsored terrorism as an illegal act of aggression prohibited by Article 2(4).[204]

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[200] For more details, see Evans, *supra* note 3 at 30 ss.
[201] *Ibid.; ibid.* at 24, 32 for explanation and definition of terrorism; see also Weller, *supra* note 3 at 305 ss for definitions and discussions on terrorism.
[202] GA/RES/46/51 (1991), U.N. Doc. A/RES/46/51 (1991); see also Evans, *supra* note 3 at 32 ss.
[203] Resolution 748, *supra* note 45.
[204] Evans, *supra* note 3 at 33.

iii. Article 33

The parties to a dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, inquiry, mediation, conciliation, arbitration, judicial settlement, or other peaceful means of their choice. Should the parties fail to settle the dispute in the recommended manner, they shall refer the matter to the S.C..[205]

iv. Article 103

When a conflict between a U.N. Charter obligation and an obligation under any other international agreement arises, the U.N. Charter orders the former obligation to prevail.[206]

b. Security Council

i. General

Article 7 of the U.N. Charter establishes the S.C. as a principle organ of the U.N. and Article 23 provides for its composition.[207] Articles 24 identifies its functions and powers:

> 1. In order to ensure prompt and effective action by the United Nations, its Members confer on the Security Council primary responsibility for the maintenance of international peace and security (...)
> 2. In discharging these duties the Security Council shall act in accordance with the Purposes and Principles of the United Nations. The specific powers granted to the Security Council for the discharge of these duties are laid down in Chapters VI, VII, VIII, and XII.[208]

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[205] U.N. Charter, *supra* note 40, Article 37; Articles 33 and 36 allow the S.C. to intervene in that it can call upon the parties to settle their dispute and can take appropriate measures, U.N. Charter, *ibid.*

[206] U.N. Charter, *ibid.*, Article 103.

[207] It provides that the S.C. consists of fifteen members, five of which are permanent: U.S., U.K., France, China and the "U.S.S.R.", U.N. Charter, *ibid.*

[208] U.N. Charter, *ibid.*; member States also agree that in carrying out its duties, the S.C. acts on their behalf, U.N. Charter, *ibid.*

The Members of the U.N. agree to accept and carry out the decisions of the Security Council in accordance with the U.N. Charter.[209]

The S.C. can take action under either U.N. Charter Chapter VI or Chapter VII of the U.N. Charter.

ii. United Nations Charter Chapter VI

U.N. Charter Chapter VI concerns the pacific settlement of disputes. The S.C. shall, when it deems necessary, call upon the parties to pacifically settle their disputes in the way prescribed by Article 33 and should such a settlement fail, the parties shall refer their dispute to it.[210] Additionally, any Member or non-Member of the U.N. may bring a dispute to the attention of the S.C..[211]

The S.C. may at any stage of a dispute referred to in Article 33 or a situation of like nature, recommend appropriate procedures or methods of adjustment.[212] If the S.C. deems that the continuance of the dispute is in fact likely to endanger the maintenance of international peace and security, it shall decide whether to take action under Article 36 or to recommend such terms of settlement as it may consider appropriate.[213]

iii. United Nations Charter Chapter VII

The basic framework within which the S.C. may respond to aggression is found in U.N. Charter Chapter VII since the S.C. is allowed greater latitude and powers than in U.N.

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[209] U.N. Charter, *ibid.*, Article 25.
[210] U.N. Charter, *ibid.*, Article 33 and Article 37; Article 34 provides that the S.C. may conduct investigation to determine if a situation is likely to endanger international peace and security, U.N. Charter, *ibid.*
[211] U.N. Charter, *ibid.*, Article 35.
[212] U.N. Charter, *ibid.*, Article 36 (1); 36 (2) and 36 (3) enounce that the S.C. shall take into consideration any procedures for the settlement of the dispute which have already been adopted by the parties and in making recommendations under this Article, it shall take into consideration that legal disputes should, as a general rule, be referred by the parties to the ICJ, U.N. Charter, *ibid.*,
[213] U.N. Charter, *ibid.*, Article 37 (2).

Charter Chapter VI.[214] In order to use the mechanisms available in that U.N. Charter Chapter, the S.C. shall, according to Article 39, "[d]etermine the existence of any threat to peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Article 41 and 42, to maintain or restore international peace and security."[215]

The existence of a threat to peace is determined by the S.C. on an *ad hoc* basis.[216] Both Resolutions 731 and 748 specifically mention that international terrorism constitutes a threat to international peace and security.[217] Once a threat to international peace and security is established, the S.C. may authorize forceful action under Article 42 or non-forceful action under Article 41.[218] Article 41 was utilized in Resolution 748.

c. International Court of Justice

The I.C.J. was established as one of the principle organs of the U.N.[219] and as its principal judicial organ.[220] Its jurisdiction is made explicit in Article 36 of the I.C.J. Statute:

> 1. The jurisdiction of the Court comprises all cases which the parties refer to it and all matters specially provided for in the Charter of the United Nations or in treaties or conventions in force.[221]

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[214] UN Charter, *ibid.*; Resolution 748, *supra* note 45, specifically mentions that the sanctions imposed by the Security Council were taken pursuant to the powers in this chapter.
[215] U.N. Charter, *supra* note 40.
[216] Tomuschat, *supra* note 38; "(...) it certainly enjoys a wide margin of discretion when it is called upon to evaluate a situation [to determine if there is a threat to peace]", *ibid. at 47.*
[217] *Supra*, note 45.
[218] U.N. Charter, *supra* note 40, Article 41: "The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations."; U.N. Charter, *ibid.*, Article 42: "Should the Security Council consider that measures provided for in Article 41 would be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations."
[219] U.N. Charter, *ibid.*, Article 7.
[220] U.N. Charter, *ibid.*, Article 92. and I.C.J. Statute Article 1, *supra* note 119.

Although all members of the U.N. are *ipso facto* parties to the I.C.J. Statute[222] the jurisdiction of the I.C.J. is voluntary.[223] U.N. Members must comply with the decisions of the I.C.J. in any case to which it is a party. If a party fails to do so, the other party may have recourse to the S.C., which may make recommendations or take measures.[224]

d. International Court of Justice and Security Council relation

The U.N. Charter does not, however, define the balance of power between the I.C.J. and the S.C., nor does it state that the I.C.J. has the power of judicial review over the actions taken by other branches of the UN. The heart of the problem in the Lockerbie case stems right from that lack of such a definition and the last Chapter of this study will be devoted to an analysis of the I.C.J. and S.C. relation.

2. Montreal Convention

The relevant Montreal Convention provisions have already been studied in Chapter 1 so one can refer to it for relevant provisions.

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[221] I.C.J. Statute, *supra* note 119; see also Article 38, I.C.J. Statute, *ibid.*, which provides that the I.C.J. shall decide in accordance with international law (convention, customs, general accepted principles of law) the disputes submitted to it.

[222] U.N. Charter, *supra* note 40, Article 93.

[223] I.C.J. Statute, *supra* note 119, Article 36(1); the States parties may declare that they recognize as compulsory the jurisdiction of the I.C.J., see I.C.J. Statute, *ibid*, Article 36(2).

[224] U.N. Charter, *supra* note 40, Article 94.

B. LEGAL ANALYSIS

1. Security Council Resolutions

The maintenance of international peace and security represents one of the most important purposes of the U.N. and the S.C. plays a pivotal role in its preservation and restoration with the decisions and measures it adopts. More specifically, the S.C. plays an important role in the fight against terrorism and it is to be encouraged, as cases of terrorism can be considered in certain circumstances to represent threats to international peace and security. However, in the case at hand, one can't help but to wonder if such a threat existed at the time the S.C. adopted its measures. We will study the validity of Resolutions 731 and 748 in general, but also in the perspective of absence or presence of a threat to international peace and security.

a. Was there a threat to international peace or security

Terrorism can constitute a threat to peace. But the use of that label retroactively in the Lockerbie case which, when the accident had occurred three years earlier was not a threat to international peace and security, might not fit in that perspective.[225] As Lowe points out:

> The original Lockerbie bombing was not characterized as a threat to international peace and security; and it is hard to see how the mere refusal of Libya to surrender the suspects, which was entirely legitimate until the adoption of Resolution 748, could constitute such a threat. It is not self-evident that the Security Council was right in determining that there was a threat to international peace and security at the time of the adoption of Resolution 748.[226]

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[225] Weller, *supra* note 3 at 323.

[226] Lowe, *supra* note 3 at 410; "The response to Saddam Hussein's invasion of Kuweit was an entirely other matter. It was not excessive to characterize his government actions and its huge arsenal of chemical, biological and soon nuclear as a threat to peace", Lowe, *ibid.* at 410; "The threat was not such in the

Some people are even more critical of the S.C.'s attitude by declaring that "[i]t is very hard to see the relationship between old atrocities [UTA and Lockerbie] and a current threat. The words used by the Security Council seem unrelated to reality."[227]

The fact that there might have not existed a real threat to international peace and security raises several questions as to the validity of the actions taken by the S.C. in the Lockerbie saga. We will look into that concern as well as other relevant issues concerning the validity of S.C. Resolutions 731 and 748.

b. Issues related to Resolution 731

i. Unknown legal basis

There is no clear indication whether Resolution 731 has been adopted pursuant to U.N. Charter Chapter VI, or as a non-binding recommendation under Article 39 of U.N. Charter Chapter VII. The legal basis for Resolution 731 is not expressed explicitly, whether in the text of the Resolution or in the accompanying statements. No determination is made that the situation constitutes a "threat to peace"; furthermore, the request contained in the Resolution do not constitute measures within the meaning of Articles 41 and 42.[228]

The Resolution was cast in recommendary language. In the Resolution's operative parts, the meanest word used is "urge", which is clearly non-mandatory. Consequently, we

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Lockerbie case three years after the events", Reisman, *supra* note 45 at 86; "The claimant states put great political pressure on other members of the S.C. in order to secure the adoption of Resolution 748", see Lowe, *supra* note 3 at 410 and see also Weller, *supra* note 3 at 323; Rubin, *supra* note 11 at 13 (the absence of urgency is also reflected in the number of votes in favor of the Resolution: 10 votes for, and five abstentions).

[227] Rubin, *supra* note 11 at 11; "there was no threat to peace since the events had occurred many years ago and the suspects had been identified" *ibid.* at 8.

[228] Beveridge, *supra* note 3 at 910; Reisman, *supra* note 45 at 87.

could reasonably assume that the S.C. was exercising its powers under U.N. Charter Chapter VI, in particular Articles 33(2), 34 and 36(1).[229] But still, the S.C. could have been more careful and somewhat clearer in drafting Resolution 731.[230]

ii. Other remarks

The Resolution is unusual in that it urges Libya to comply with demands which are incorporated only by reference. These demands are far from uncontroversial and have very serious implications. The S.C. could have been more direct.

The Resolution was adopted unanimously, on the strength of allegations made by three permanent members of the S.C. who had themselves put the matter before the S.C. and had "illegally" voted. Moreover, the evidence in support of these allegations was never made public and, on top of all, the claimants had refused to submit evidence to an impartial investigatory body. Libya had denounced these facts and it is disappointing the S.C. did not seem to mind.[231]

iii. States and Council did not try to pacifically settle the dispute

1. Article 33

The S.C. has an obligation, pursuant to Article 33, paragraph 2 of the U.N. Charter, to invite the U.S. and U.K. to settle their conflict with Libya using the pacific means enumerated in Article 33 paragraph 1. This includes the arbitration process provided by Article 14 of the Montreal Convention. The S.C. neglected to respect that obligation

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[229] *Ibid.*

[230] See Timmeney, *supra* note 1 at 483, where the author seems to entertain no doubts as to Resolution 731's legal basis; Rubin, *supra* note 11 at 6: " [Resolution language not clear] Resolution 731 uses the word "decides " in only one place: the Security Council "decides to remain seized of the matter". It is hard to see what legal obligation that imposed on Libya."

[231] Weller, *supra* note 3 at 313; Rubin, *supra* note 3 at 10 (the evidence against Libyan was never made public and consequently by endorsing the U.K. and U.S. demands the S.C. acted irrationally).

when it adopted Resolution 731 without trying first to settle the dispute by pacific means. The S.C. contravened to the letter of that Article.

Article 14 of the Montreal Convention did specifically provide for an arbitration process. The S. C. as well as its members should have at least given a chance to the process before they took any action that would interfere with or prejudice the arbitration process. In particular, the U.S. and U.K. should have pursued peaceful means for the settlement of this conflict with Libya - particularly arbitration under Article 14 - for the members of the S.C. to have lawfully adopted Resolution 731 (under the U.N. Charter). This is specially true when it comes to taking sanctions against Libya under U.N. Charter Chapter VII like in Resolution 748.

2. Article 36

The U.N. Charter Article 36, paragraph 2 provides quite clearly "[t]he Security Council should take into consideration any procedures for the settlement of the dispute which have already been adopted by the parties." All the parties to this dispute were parties to the Montreal Convention and consequently had agreed to its Article 14. The S.C. can be said to have had no lawful authority to adopt Resolution 731 which did not urge for arbitration of this dispute. Consequently, one can submit that Resolution 731 contravenes to Article 36(2) of the U.N. Charter.

Moreover, Article 36, paragraph 3 states rather plainly that the S.C. should as a matter of principle encourage the parties to a legal dispute of this nature to refer the dispute to the I.C.J.:

> In making recommendations under this Article the Security Council should also take into consideration that legal disputes should as a general rule be referred by the parties to the International Court of Justice in accordance with the provisions of the Statute of the Court.

Article 14 of the Montreal Convention provides in unequivocally clear terms that if the Parties to a dispute can't agree on the organization of the arbitration tribunal, within six months following the request for arbitration, any party can take the dispute to the I.C.J.. The S.C. also had the obligation to, at least, consider deferring the dispute to the I.C.J..

3. Council did not respect United Nations Charter provisions

For these reasons, the S.C. itself as well as its Member States had the obligation under Articles 1, 2(3), 24, 33(1) and (2), and 36(2) and (3), *entre autres*, to push for and follow compulsory dispute settlement procedures provided by Article 14 of the Montreal Convention. This treaty obligation can be said to still apply today. Sanctions adopted by the Member States of the S.C. against Libya would even more so constitute a violation of their obligations under the mentioned Articles of the U.N. Charter and the Montreal Convention to respect, encourage, and require the pacific settlement of this international dispute.

iv. States and Council rejected the application of Montreal Convention

In the course of the debates preceeding the adoption of Resolution 731, the the U.S. and U.K. representatives voiced their view that the Montreal Convention was not applicable to this situation. However, Article 14 states unmistakably that "[a]ny dispute (...) concerning the interpretation or application of this Convention (...) shall (...) be submitted to arbitration."

Only an international tribunal has the power and the right to determine if the Montreal Convention applies to the Lockerbie case, not the U.S. or U.K.. Otherwise, it would mean the Montreal Convention itself could be pushed aside and violated by contracting States unilaterally proclaiming that the Convention does not apply, according to self-serving interests. This procedure would directly contradict the basic international rule of law principle of *pacta sund servanda*. The U.S. and U.K. do not seem to mind.

The U.S. and U.K. also rejected negotiations. In so doing they directly contravened the letter of Article 14 of the Montreal Convention, which explicitly conveys the obligation of negotiations between the parties to any dispute that might arise from its application or interpretation before resorting to international arbitration or adjudication. The U.S. and U.K. governments could be considered to have made it virtually impossible for a pacific settlement of this dispute to happen precisely because it has refused negotiations, even more so arbitration or adjudication.[232]

v. Procedural flaws

We have concluded earlier that the S.C. seems to have adopted Resolution 731 according to its powers under U.N. Charter Chapter VI which provides for the pacific settlement of international disputes. But in this regard, Article 27 cites unmistakably:

> Decisions of the Security Council on all other matters shall be made by an affirmative vote of nine members including the concurring votes of the permanent members; provided that, in decisions under Chapter VI, and underparagraph 3 of Article 52, a party to a dispute shall abstain from voting.

The U.S., U.K. and France should have abstained from the vote on Resolution 731. They are parties to the dispute with Libya in the situations concerning the Lockerbie and UTA bombings --the very situations dealt with by that Resolution. We must consider the possibility this flaw might invalidate Resolution 731.

This violation of Article 27 by the three most powerful members of the S.C. also brings up the possibility of influence these States might have exerted by voting on the Resolution on the other votes cast in favor of Resolution 731 by the non-permanent members of the S.C.. It is possible the only remaining superpower and two of strongest

[232] Maybe their main goal right from the beginning of the dispute was to go for sanctions against Libya.

secondary powers might have used their overpowering force and influence to "induce and coerce" the other Member States of the S.C. to condemn Libya.[233]

c. Common issues to Resolutions 731 and 748

i. Resolutions break new ground

Resolutions 731 and 748 are particularly noteworthy with respect to three issues. Never before had the S.C. ever demanded the surrender/extradition of a member nation's nationals to stand trial in another country. It is the first time as well the S.C. had ever directly accused a member State in involvement in State-sponsored terrorism.[234] It also represents a new development in that it is the first form of terrorism that has ever been found to constitute a threat to international peace and security (according to U.N. Charter Article 39).[235] Ultimately, the request for the extradition of the two Libyan national suspects was the stumbling block to Libya's compliance with the Resolution.[236]

ii. Purposes and Principles of the United Nations

Articles 1 and 2 of the Charter set the principle that parties shall try to settle their disputes by peaceful means and the S.C. could be charged to have acted beyond its powers when it adopted Resolutions 731 and 748. Charter Article 24, paragraph 2 expressly states that the S.C. should act according to the purposes and principles of the U.N.. There was and still is no lawful authority or power conveyed upon the S.C. to adopt a resolution that ignores, abrogates, or eludes the basic principle of international law commanding the

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[233] Reisman, *supra* note 45 at 93: " [the voting] prohibition is largely cosmetic in the Charter system. Resolutions under chapter VI are recommendatory", thus even though there is a procedural flaw, it is of no great consequence. By not indicating whether it was acting under Chapter VI or VII, the S.C. tried to circumvent this procedural flaw; see also Weller, *supra* note 3 at 313.

[234] Kash, *supra* note 3 at 24; Tomuschat, *supra* note 38 at 44; Evans, *supra* note 3 at 39; Gunn, *supra* note 3 at 213.

[235] Beveridge, *supra* note 3 at 912; U.N. Charter, *supra* note 40.

[236] Evans, *supra* note 3 at 39.

peaceful resolution of international disputes.[237] The U.S., U.K. and France's aggressive pursuit of their claim against Libya is not in harmony with these principles and consequently their conduct, as well as the S.C.'s do not respect Articles 1 and 2 of the U.N. Charter.

iii. Libya's response to the demands

The demand that Libya, by "concrete action," prove its denunciation of terrorism is rather vague. It could be said to be of insignificant legal importance in the context of a U.N. Charter Chapter VI resolution such as 731 which is only recommendatory; however, the absence of these "concrete actions" was of great significance in the light of Resolution 748.[238] The S.C. did not sin by the clarity of its text and could be said to have set Libya a trap for the S.C. did not specify *in concreto* what action Libya was supposed to take and then went ahead and complained it had not taken such (unknown) action.

Additionally, Libya was urged to respond fully and effectively to the demands, but the nature of such a response was not specified. "The statements of a number of delegations in the S.C., in particular those of the Arab States, indicated that they considered compliance with international law a full and effective response. The vigorous application of the Montreal Convention by the Libyan authorities might, therefore, have amounted to a full and effective response."[239]

The Resolutions state as a fact that Libya had not responded effectively to the demands. From the facts we have exposed in the previous Chapter, we can see Libya offered to defer the dispute to the I.C.J., to surrender the accused to a neutral party or organization and to cooperate on many occasions. Weren't such actions to be considered a full and

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[237] This sacro-saint principle dates back to the Treaty Providing for the Renunciation of War as an Instrument of National Policy of August 27, 1928 (Paris Peace Pact). The U.S., U.K. and France are parties to it. Articles I and II are of relevance in their condemning of war to settle international controversies or to use it as an instrument of nationl policy and their promoting the pacific settlement of disputes.

[238] Beveridge, *supra* note 3 at 911.

[239] Weller, *supra* note 3 at 313-14.

effective response? Since Libya might not have been under any legal obligation to surrender the accused or to pay compensation before the accused were tried (as we will submit later), we could make the argument that Libya has responded fully and effectively to the lawful U.K. and U.S. demands.[240]

For both reasons we can submit the hypothesis that both Resolutions were uncalled for considering Libya's actions.

Additionally, if one considers that Libya had responded effectively to its international legal obligations by conducting investigations, demonstrating its willingness to peacefully settle the situation and trying the two accused, it then confirms there existed no genuine threat to the international peace and security emanating from Libya at that stage of the dispute. Moreover, its attempt to clarify the legal situation at the I.C.J. can hardly be regarded as constituting such a threat.[241]

Of course, it is quite understandable to entertain doubts about the vigor and effectiveness of Libyan prosecution.[242] In light of a possible Libyan violation of the Montreal Convention, the U.S. and U.K. would not have been left without a remedy since they could have chosen arbitration or judicial settlement under the terms of the Montreal Convention. It would then have been proper to enforce an I.C.J. judgment in their favor by a S.C. Resolution like 748.[243] The threat to peace was not such that to wait for an I.C.J. judgment would have put the world's international peace and security in jeopardy.

But also one may legitimately ask whether there existed some justification for the interference with Libya's right to prosecute and not extradite on the account that the

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[240] Rubin, *supra* note 11 at 7-8.

[241] Weller, *supra* note 3 at 323; the vagueness in which Resolution 731 is phrased renders difficult to see what legal obligations were imposed on Libya and the "assertion as a fact that Libya had not responded effectively is incomprehensible" since Libya offered to cooperate on many occasions and extradition was not the only acceptable response, Rubin, *supra* note 11 at 4-5.

[242] However the U.S. and U.K. might bear some blame in the ineffectiveness of Libya's judicial proceeding since they did not make available evidence to the Libyan magistrate, Weller, *supra* note 3 at 322.

[243] Weller, *supra* note 3 at 322; Rubin, *supra* note 11 at 4.

Montreal Convention "[c]annot be held to grant rights of prosecution to a state which has no intention whatsoever of making actual use of those rights."[244] Can Libya claim to be the victim of actions taken in response of its own inaction? As the saying goes: *nemo auditur propriam turpitudinem allegans.*

The U.S. and U.K., owing to their belief that the Libyan State was implicated in the terrorist attack, might just have good reason to entertain no confidence in the efficiency, impartiality and objectiveness of Libya's judicial system. But such an involvement is very difficult to prove.[245] The future will tell what will have become of the criminal proceedings in Libya.

iv. Payment of compensation before guilt determined

Another defect of Resolutions 731 and 748 lies in the fact that they incorporate by reference the joint declaration of the U.S. and U.K. that Libya immediately pay compensation for the Lockerbie bombing. This gives the impression it is a predetermination of the guilt of the two Libyan nationals suspects, before they have been found guilty or even tried, as well as of Libya's responsibility. [246] This may well indicate an abuse of powers from the S.C.:

> If Libya's failure to immediately pay compensation forms one of the grounds for the Security Council's determination that Libya is not responding in a concrete manner to the requests of Resolution 731, the Resolution 748 is based on a factual determination that is outside the Council's power and competence.[247]

By endorsing the demand for compensation the S.C. apparently endorsed the view that Libya has breached international law and should make reparations, even before a fair trial

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[244] Tomuschat, *supra* note 38 at 42-43.
[245] *Ibid.* at 43.
[246] Vishesh, *supra* note 3 at 521; McGinley, *supra* note 3 at 599.
[247] McGinley, *supra* note 3 at 599.

was held.[248] This situation seems to violate Articles 2(4) and 1(1) of the Charter. These articles lay out the principle that the S.C. must bring about the settlement of international disputes in conformity with 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."[249] The S.C. might have gone too far in that respect.

v. Legal dispute or political dispute

By going to the S.C. without waiting for the I.C.J.'s decision, the claimant States might be said to have rejected and set aside the legal aspects of the dispute and litterally transformed it into a political dispute, rather than a legal one. In doing so, they might have tried to elude certain legal issues such as extradition or the application of the Montreal Convention.[250]

The international community was left with the impression the U.S. and U.K. lacked confidence in the substance of their submissions to the I.C.J., felt the judicial inclination towards Libya during the proceedings and elected to use (if not abuse) their preeminent role in the S.C. to decide their own case in their favor.[251]

One can make the argument that the U.S. and U.K. took the initiative within the S.C. for the purpose of impairing Libya's right to exercise its own jurisdiction over the accused. A question also arises as to whether by acting promptly as it did before the I.C.J. had rendered its opinion, the S.C. preempted the jurisdiction of the I.C.J., the principal

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[248] Vishesh, *supra* note 3 at 521; Beveridge, *supra* note 3 at 911.
[249] McGinley, *supra* note 3 at 599.
[250] Weller, *supra* note 3 at 323.
[251] *Ibid*; see also Reisman, *supra* note 45 at 86-87; Lowe, *supra* note 3 at 410: "Until the adoption of Resolution 748, Libya looked (...) like it was set to win."; Tomuschat, *supra* note 38 at 43: "[the S.C.] acted at the last minute to provide support to the case of the two defendant states, certainly not in ignorance of their delicate procedural situation before the Court."

judicial organ of the U.N., and thus acted contrary to the principles and purposes of the U.N. (specially Article 1), in violation of paragraph 24(2) of the Charter.[252] However, the opposite argument can be made since some view Libya's suit in the I.C.J. for alleged violations of the Montreal Convention as the "[c]ynical ruse of a government implicated in State terrorism to evade condemnation and sanctions by the Security Council."[253]

If the U.S. and U.K. charges were serious, there was everything to gain and nothing to lose for these States by letting the case be decided by I.C.J. in absence of urgency. Rushing to the S.C. made Libya appear the victim of Franco-Anglo-American vengeance. Their failure to use the tools available to them "[l]eft sympathetic and concerned observers wondering that other factors were at play; whether something more significant were not being hidden."[254]

vi. Extradition issues

The U.K. and U.S. tried to avoid the legal issues and complications surrounding the extradition of nationals of another State. They carefully worded their demands using the word "surrender" instead.[255] There exists no international law concept legally charged called "surrender" individual and distinct from "extradition". In fact, even if the U.S. and U.K. used the word surrender, everyone considered that it amounted to a request for the extradition of the two individuals.[256]

The S.C. Resolutions, by endorsing the demand for surrender, requested the extradition of the two accused, even though there did not exist extradition treaties between the

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[252] Vishesh, *supra* note 3 at 521, 525.
[253] Reisman, *supra* note 45 at 86; Vishesh, *supra* note 3 at 521 (Libya was trying to preclude the U.S. and U.K. to go to the S.C. but in the purpose to prevent them from impairing its right to exercise its jurisdiction over the accused).
[254] Rubin, *supra* note 11 at 5; the ICJ's objectivity in the matter is of no worry, since it is doubtful it would jeopardize its reputation in order to protect from prosecution the two accused, *ibid.* at 4.
[255] Weller, *supra* note 3 at 323.
[256] Rubin, *supra* note 11 at 7-8; however, Evans is of a different opinion and explains in great details the distinction between the two and the reason why a surrender, contrary to an extradition, is a lawful request, Evans, *supra* note 3 at 75.

concerned countries and Libyan domestic law did not allow it.[257] It is a widely accepted principle in international law that in the absence of a treaty, one nation is not obliged to extradite fugitives from justice who are within its territory and many nations don't allow their national to be extradited. [258] Libya is under no obligation to extradite nor surrender them. The S.C. was placing great political pressure on Libya to do something which legally it was not obliged to do.[259] It was also contravening to a general rule of international law.[260]

One could also argue that the S.C. acted in violation of paragraph 1(1) of the U.N. Charter, since by demanding the extradition of the Libyan nationals before they were tried in their home State, the S.C. completely ignored the fundamental customary international law principle of *aut dedere, aut judiciare* (try or extradite). This principle is a corollary of a State's sovereignty over its nationals, a most important principle in international law.[261] It also interferes with Libya's right under Article 7 of the Montreal Convention which enshrines the same principle.[262]

Moreover, it can be argued that the S.C. had no authority to handle with individual cases of extradition for its primary function is to protect international peace and security in interstate relations. However, that long shot argument doesn't resist scrutiny. The S.C. has never distinguished between "general" issues of international peace and security and "individual" cases affecting it. The S.C. acted within the confines of its powers.[263]

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[257] However, Evans, at *supra* note 3 at 43, wonders how come, if there exists no mechanisms by which Libya could surrender/extradite its nationals, Libya has offered on many occasions to hand them over to various organizations, it thus appears Libya does have such mechanisms.

[258] Vishesh, *supra* note 3 at 521; Sorel, *supra* note 3 at 706 ss; see also footnote 63 for Libyan domestic law on extradition and footnote 38 for extradition treaty.

[259] Beveridge, *supra* note 3 at 911.

[260] Tomuschat, *supra* note 38 at 45-46: "Within the framework of Chapter VI, the S.C. only has powers to make recommendations. In that respect, it should not be allowed to propose solutions that contravene general international law principles, such as was the case in Resolution 731. However, considering the broad powers attributed to it by Chapter VII and the purpose of Resolution 748 (fighting terrorism), the request for extradition was justified."

[261] Vishesh, *supra* note 3 at 526; Tomuschat, *supra* note 38 at 42.

[262] Tomuschat, *supra* note 38 at 42.

[263] *Idem* at 45.

The U.S. and U.K. also tried circumvent the legal problems concerning extradition by treating the dispute as a political matter rather than a legal one. They chose the S.C. as their forum instead of the I.C.J..

> "The attempted distinction between the legal issue of whether or not Libya was obliged to surrender the two suspects, and the demand for an effective response was semantic only. For, Libya had given assurances with respect to the other demands made by the U.S. and U.K.. There was no doubt that the Resolution was intended by its sponsors to aim precisely at the surrender of the two Libyan nationals."[264]

vii. Concerns about a fair trial in U.S. or U.K.

Libya has expressed the concern that the suspects could not be guaranteed a fair trial in the U.S. or U.K. considering all the publicity the case has received in those countries, the vindictive mood of the population and the fact that their demands for surrender were accompanied by demands for compensation by Libya, which gives the impression the issue of the suspects' guilt and Libya's involvement is prejudged. The S.C. did not give much thought on that concern by asking to surrender the two Libyan nationals to these States instead of surrender to a third country or a neutral organization.[265]

d. Issues related to Resolution 748

i. Council vs Court

In the (possible) absence of threat to international peace and security, the S.C. by adopting Resolution 748, a legally binding and preemptive determination, a mere three

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[264] Weller, *supra* note 3 at 313-14.

[265] McWhinney, *supra* note 3 at 270; Lowe, *supra* note 3 at 410; see also *Lockerbie-provisional, supra* note 110 at 140 ss (Judge Shahabudden).

days after the end the I.C.J. hearings on basically the same issue "[d]isplays, on the face of it, a legal insensitivity to the obligations of constitutional comity and mutual deference and co-operation that are enjoined upon the co-ordinate institutions in the same constitutional system."[266]

The S.C. should uphold international law, not the particular interests of some of its members, no matter how powerful.[267] The U.S. and U.K. may well have contributed to an abuse of rights by the S.C. since one can argue there was no threat to peace and security and thus no need at that stage for Resolution 748.[268] Whether or not the I.C.J. has the jurisdiction and power to do something about it will be studied in the next Chapter.

ii. Procedural flaws

China's abstention raises another difficulty with respect to Article 27(3) of the Charter. The voting procedure on S.C. "decisions" requires an affirmative vote of nine members including the concurring votes of the five permanent members.[269] As we have previously seen previously in our criticism of Resolution 731, in decisions looking toward the peaceful resolution of tensions, a party to a dispute shall abstain from voting.[270]

On the first issue, in the *Namibia, Advisory* case, the I.C.J., recognizing the S.C. practice, did not consider that the abstention of a permanent member invalidated a resolution.[271] Also, starting with the Korean War votes of 1950 and throughout the Cold War, an

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[266] McWhinney, *supra* note 3 at 270; "But if the Court acted prudently [in its determination respecting the S.C.] the same cannot be said of the authors of Resolution 748", Lowe, *supra* note 3 at 410.
[267] Lowe, *supra* note 3 at 411.
[268] Weller, *supra* note 3 at 323; however, Reisman is of the opinion that Resolution 731 was a Chapter VII resolution "in disguise" and that Resolution 748 "merely served to make explicit the latter's implicit chapter VII undertones", Reisman, *supra* note 45 at 89.
[269] U.N. Charter, *supra* note 40; see also McGinley, *supra* note 3 at 589, 599-600; Rubin, *supra* note 11 at 14.
[270] U.N. Charter, *supra* note 40, Article 27(3); see also Rubin, *supra* note 11 at 14.
[271] *Namibia, Advisory, supra* note 191 at 22, para. 21-22; see also McGinley, *supra* note 3 at 599-600.

abstention from a permanent member was not regarded as blocking a S.C. decision since it would have resulted in the virtual paralysis of the S.C..[272]

This practice as well as the *Namibia* decision may have been wise in the context of the operational defects of the S.C. during the Cold War. In the present context, however, considering the current political climate and the probable political motivations behind the Resolution, one can argue that the explicit procedural requirements of the Charter should be followed.[273]

As for the second requirement, that the involved parties in the dispute abstain from voting on the Resolution, disaster was avoided. The number of members in favor required to pass a resolution is nine, the vote being cast at ten in favor, withdrawing the favorable votes of France, U.K. and U.S. would have resulted in the death of Resolution 748. That legal disaster was avoided by shifting the focus from peaceful resolution to enforcement action, where there is no such prohibition on voting. [274] This represents a major shift in policy. One wonders what was the original goal intended by the members of the S.C..

e. Resolutions 731 and 748 in the context of the fight against terrorism

Both Resolutions were adopted in reaction to Libya's failure to fulfill the claimant States' demands, specially the surrender of its two accused nationals. But it is the continuing threat of terrorism, together with the element of State involvement which particularly prompted States to act through the S.C.. "From a legal viewpoint, there can be no doubt that State-sponsored terrorism endangers international peace and security."[275] Terrorism

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[272] Rubin, *supra* note 11 at 14.

[273] McGinley, *supra* note 3 at 599-600; Rubin, *supra* note 11 at 14 (goes also into details about the post Cold War reasons why abstention should now be considered a real defect); Reisman, *supra* note 45 at 93 (political climate means S.C. has found consensus needed to adopt mandatory measures under Chapter VII U.N. Charter).

[274] Reisman, *supra* note 45 at 93; Rubin, *supra* note 11 at 15.

[275] Tomuschat, *supra* note 38 at 47; "Given the publicly available amount of evidence showing Libya's past involvment in terrorist activities it was not illegitimate for the Security Council to also assume a relationship with the destruction of Pan Am 103 (...) Therefore, to base Resolution 748 on Chapter VII was no arbitrary act", *ibid.*

resulting from the ill-will of individuals is one thing, but when it is the consequence of State activities, it brings out a whole new dimension of the problem. We will now consider the S.C.'s actions in the light of an existing threat to international peace and security.

The Resolution was drafted at a time when all the States were greatly concerned with State-sponsored terrorism,[276] specially that of Libya. Its longtime implication in State-sponsoring terrorist activities[277] is no secret and States felt it was time to put an end to it.

Professor Tomuschat is of the opinion that in Resolution 748 the S.C. established "[L]ibyan State responsibility for international terrorism under the Charter by associating terrorist acts to Article 2(4)."[278] This was done by implicitly endorsing the accusations of individual member States contained in S.C. documents that Libya had breached international law and in consequence should make reparation.[279] The issue before the S.C. was accordingly more than just legal principles and obligations but rather that of terrorism encouraged by a State and its threat on international peace and security. The acceptation as a fact that the situation prevailing at the time of the adoption of both Resolutions 731 and 748 represented a threat to international peace and security validates the S.C. actions.

Relying on Article 41 of the U.N. Charter, the S.C. "was authorized to encroach on rights that Libya may have had under general international law or the Montreal Convention by requesting that it discharge its responsibility by surrendering its two nationals."[280] Moreover, by reason U.N. Charter Article 103, States required to implement sanctions were exonerated from their legal obligations under the Montreal Convention inasmuch as

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[276] See Timmeney, *supra* note 1 at 478 ss on history of terrorism in general and international actions.
[277] For references on Libya's history State-sponsored terrorism, see footnote 35.
[278] Tomuschat, *supra* note 38 at 47.
[279] Gowlland-Debbas, *supra* note 26 at 660.
[280] *Ibid.*

they were incompatible with their obligations under Article 25 of the U.N. Charter.[281] Thus the combined effect of Articles 103 and 25 sets aside all other non-Charter legal obligations.

The U.N. operates as a whole within the bounds of general international law. For the circumstances foreseen in Chapter VII, the U.N. Charter permits derogations from existing rights and obligations under both customary international law and general international law.[282] When the S.C. takes a decision under U.N. Charter Chapter VII that concerns a State and the decision is inconsistent with some other treaty-based right claimed by that State, the S.C. decision prevails. That was the determination in the Lockerbie case.[283]

There are limits, however, to these derogations. Professor Tomuschat explains one of these limits in the following terms:

> As a rule, resolutions of UN organs can be deemed to bind member states, with the particular effect bestowed upon them by Article 103, only if they are lawful, having been brought about in full consonance with the procedural as well as substantive requirements of the Charter.[284]

We have raised such issues of validity and we will investigate in the next Chapter the possibility of judicial review of the validity of S.C. resolutions.

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[281] *Ibid.* at 660-663; "[i]n effect, there is an absence of rights to protect, since they have effectively been suspended", *ibid.* at 660.
[282] *Ibid.* at 662.
[283] See also Reisman, *supra* note 45; Lowe, *supra* note 3 at 410: "No-one could reasonably argue that the mere fact of an application to the ICJ should prevent the Security Council from exercising its proper functions."
[284] Tomuschat, *supra* note 38 at 44.

2. International Court of Justice decision on provisional measures

The I.C.J. provisional order takes but a glance at the important issues at stake since it was only called upon to decide them in the context of an award on provisional measures. These issues of I.C.J. jurisdiction, Libya's rights under the Montreal Convention such as the six-month arbitration period and the right to try the suspects and to refuse to extradite, and finally the respective powers of the S.C. and the I.C.J. will most probably be looked in depth at the merits stage. However, the issue of I.C.J. and S.C. respective jurisdictions and powers and their inter-relation seems to have deeply troubled many Judges at the provisional stage. We will devote the next Chapter to that subject.

CHAPTER 3:THE RELATIONSHIP BETWEEN THE SECURITY COUNCIL AND THE COURT AND THEIR RESPECTIVE POWERS

A. THE ISSUES RAISED

1. General

The S.C. and the I.C.J. are two of the most important organs of the U.N. system. They bear different roles and responsibilities but sometimes issues might overlap their respective jurisdictions as we witnessed in the Lockerbie case. The fundamental question of the relationship between the judicial and political organs was raised but was not studied in depth at the stage of the provisional measures. But still, it provides a suitable point of departure for our study.

We will examine the relationship between the I.C.J. and the S.C. from the perspective of the U.N. Charter and in the context of general international law. We will study how competences between two principal U.N. organs are established, delimited and regulated in the exercise of their concurrent powers.[285]

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[285] See in general McWhinney, *supra* note 3; Gunn, *supra* note 3; Evans, *supra* note 3; McGinley *supra* note 3; J. Alvarez, "Judging the Security Council" (1996) 90 AJIL 1; Gowlland-Debbas, *supra* note 26; Although Alvarez's article on the topic of this Chapter proved to be quite interesting and thought provocative, it was rather theoretical and philosophical; the other authors also studied the issues at hand,some rather briefly, other at greater length, but none came close to Gowlland-Debbas's level of research into the matter; it is without contest the most complete, thorough and comprehensive study of the topic in recent years; her structure, as well as order of analysis are the basis of this Chapter, although we felt more than compelled and quite free and confortable to add a few comments of our own.

2. Security Council's tradition of waiting

The Lockerbie case with respect to at least two aspects, represents a new situation. First, the S.C. did not give way and wait for the I.C.J. to make a determination.[286] Also, there was a possibility of conflicting issue resolutions since different parties called on different organs to resolve the dispute.

Judge Alvarez, in his dissenting opinion in the *Anglo-Iranian Oil* case, estimated that if a case submitted to the I.C.J. constituted a threat to international peace, then the S.C. could seize itself of the case to the exclusion of the I.C.J.'s jurisdiction.[287] This statement seems somewhat radical, particularly considering the I.C.J.'s power to determine its own jurisdiction.[288]

However, in the past, the S.C. has generally not proceeded with a matter pending judicial determination while it did not deny itself the right to proceed with a matter handled by the I.C.J.[289] Lockerbie represents the first time that the two organs' decisions might have come into potential conflict.[290]

Moreover, the S.C. has in the past either deferred the matter to the I.C.J. or, by reason of veto obstruction, been unable to carry on. In the *Corfu Channel* (Merits) case [291], the S.C. recommended that the parties should immediately refer their dispute to the I.C.J.. In the

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[286] See McGinley, *supra* note 3 at 587-589 for debate on that topic in the S.C., and at 590-596, for I.C.J's opinion the the topic of S.C. waiting.

[287] *Anglo-Iranian Oil Co.*, (U.K. v. Iran), *Jurisdiction*, [1952] I.C.J. Rep. 93 at 134 (Alvarez dissenting) [hereinafter *Anglo-Iranian Oil, Jurisdiction]*; McGinley, *supra* note 3 at 587.

[288] McGinley, *supra* note 3 at 587: "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."

[289] *Ibid.*

[290] *Ibid.*

[291] *Corfu Channel (U.K. v. Alb.), Merits*, [1949] I.C.J. Rep. 4 [hereinafter *Corfu Channel*]; see also McGinley, *supra* note 3 at 587.

Anglo-Iranian Oil Co.[292] case, S.C. debates were suspended until the I.C.J. had determined its own competence on the matter.[293]

In the *Aegean Sea Continental Shelf* case,[294] the S.C. suggested to Greece and Turkey to "[t]ake into account the contribution that appropriate judicial means, in particular the International Court of Justice, are qualified to make the settlement of (...) their dispute."[295] Finally, in the *Hostages* case[296] the U.S. was basically looking for the same remedies in the S.C. as it was in the I.C.J. but in the end, it only obtained a recommendatory resolution, and in the *Nicaragua* decision[297], Nicaragua was unable to get the S.C. to act on its behalf.[298]

Likewise, the G.A. has postponed voting on a motion which might have preempted an I.C.J. determination.[299] "[I]t is interesting to note that in the early days of the I.C.J., 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. [300]

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[292] *Anglo-Iranian Oil, Jurisdiction, supra* note 287.
[293] U.N. SCOR, 6th Sess., 565th mtg at 12, U.N. Doc. S/PV.565 (1951), as cited in McGinley, *supra* note 3 at 588, footnote 79; see also *ibid. for more details;* see also *ibid.* for more details.
[294] *Aegean Sea, Interim Protection, supra* note 174; McGinley, *supra* note 3 at 588.
[295] S.C. Res. 395, U.N. SCOR, 31st Sess., 1953rd mtg at 15, 16, UN Doc. S/12187 (1976), as cited in McGinley, *supra* note 3 at footnote 81.
[296] *Concerning United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran), Provisional Measures,* [1979] I.C.J. Rep. 7 [hereinafter *Hostages, Provisional Measures*]; see also McGinley, *supra* note 3 at 588.
[297] *Nicaragua, Provisional Measures, supra* note 174; S.C. Res. 461, U.N. SCOR, 34th Sess., 2184th mtg at 24-25, U.N. Doc. S/13711/Rev. 1 (1979) a was draft resolution calling for sanctions and was vetoed by the Soviet Union, see footnote 83 of McGinley, *supra* note 3 at 588.
[298] McGinley, *supra* note 3 at 588.
[299] *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, as cited in McGinley, *supra* note 3 at 588.
[300] McGinley, *supra* note 3 at 588, and specially footnote 87.

3. Possibility of conflict

The Lockerbie case, as we have mentioned, is not the first conflict to have been brought simultaneously before the I.C.J. and the S.C., since this was also the case in the *Aegean Sea Continental Shelf, Hostages, Nicaragua Corfu Channel* cases.[301] The parallel and co-existing jurisdiction of political and judicial organs is created by the U.N. Charter itself by its Articles 35(1) and 36(1) offering States the possibility of deferring a matter to either of them.

The Lockerbie dispute, however, constitutes the first such case to be put before the I.C.J since the end of the veto-blocking era of the Cold War and the new found possibilities of actions under Chapter VII of the U.N. Charter. The case instituted by Bosnia against the Federal Republic of Yugoslavia (Serbia and Montenegro) proves that Lockerbie will not be the last such case.[302]

The Lockerbie dispute is also different from the other concurrent competence cases in two important respects. First, in previous cases, it was the same party initiating the claims in both the S.C. and the I.C.J.. In the Lockerbie case, however, the U.S. and U.K. initiated procedures in the S.C. whereas Libya instituted proceedings in the I.C.J.. This situation creates a potential for direct conflict. Second, the Lockerbie case represents the only occurrence of a State trying to prevent the S.C. from using its powers and take action.[303]

In previous cases involving concurrent jurisdiction, it was the same State that sought the help from the two organs; basically the State was seeking the same solution to the dispute,

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[301] *Aegean Sea Continental Shelf, Interim Protection, supra* note 174; *Hostages, Merits, supra* note 174; *Nicaragua, Provisional Measures, supra* note 174; *Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.), Jurisdiction and Admissibility*, [1984] I.C.J. Rep. 392; *Corfu Channel, supra* note 291; see also Gunn, *supra* note 3 at 244;

[302] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia & Herzegovina v. Yugo. (Serbia & Montenegro)), Provisional Measures*, 1993 I.C.J. Rep. 325 (Order of 13 September); see also Gowlland-Debbas, *supra* note 26 at 643.

[303] Evans, *supra* note 3 at 62-64; Gunn, *supra* note 3 at 245 (this potential conflict should not prevent the I.C.J. from making a pronouncement on the validity of a resolution); see also Gowlland-Debbas, *supra* note 26 at 643-644.

only through different means. Lockerbie creates a potential for conflict between two organs of the U.N. since they were seized by different parties to a dispute seeking contradictory solutions.

B. THE RELATIONSHIP IN THE LIGHT OF THE LEGAL/POLITICAL DISTINCTION

1. The classic legal/political distinction

a. The theory

There exists a theory establishing a distinction between legal and political disputes. It is based on the principle that certain categories of disputes are appropriate for judicial settlement and that some are not and should be resolved on the political level. Therefore the political disputes should be resolved by the "political branch" of the U.N., the legal ones, by the "judicial branch." [304]

For example, in the Lockerbie case, Libya perceived the issue before the S.C. as a purely legal dispute concerning the application of a Convention, the jurisdiction and a request for extradition; accordingly it considered it should have been referred to the I.C.J.. On the opposite, the U.K. and the U.S. recognized the dispute as a political one concerning terrorism and the maintenance of peace, thus commanding S.C. action.[305]

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[304] Gowlland-Debbas, *supra* note 26 at 649-648ss; Evans, *supra* note 3 at 61; Gunn, *supra* note 3 at 239 ss.
[305] *Ibid.*

b. Not a valid distinction

Unfortunately, whether an issue is political or legal is not always clear.[306] Moreover, an issue can present both a legal and a political side to it. Furthermore, in the game of international law, most serious issues involve political considerations. Even if the distinction were clear, it would fail to identify the organ which would have the authority to be seized of the dispute.[307]

However, one can make the argument that as long as the I.C.J. is seized of the matter, the dispute is a legal one. When the parties to a dispute agree on the I.C.J.'s jurisdiction it is called upon to decide a (legal) matter since it must apply international law.[308] The I.C.J. can also settle a dispute that presents a legal nature by deciding whether it has jurisdiction.[309] But that theory was not accepted by the I.C.J.; it has treated the issues of justiciability and jurisdiction as separate ones.[310]

As the I.C.J has shown in the *Hostage*s case, disputes are not inherently or exclusively of either a political or legal nature:

> [L]egal disputes between sovereign States by their very nature are likely to occur in political contexts, and often form only one element in a wider and long-standing political dispute between the States concerned. Yet never has the view been put forward before that, because a legal dispute submitted to the I.C.J. is only one aspect of a political dispute, the I.C.J. should decline to resolve for the parties the legal questions at issue between them.[311]

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[306] Gowlland-Debbas, *supra* note 26 at 649; see also Evans, *supra* note 3 at 61 (makes the comparison with the notion in U.S. law of "separation of powers"; Gunn, *supra* note 3 at 242 ss.
[307] Gunn, *supra* note 3 at 243.
[308] U.N. Charter, *supra* note 40, Article 38.
[309] U.N. Charter; *supra* note 40, Article 36(6).
[310] Gowlland-Debbas, *supra* note 26 at 650-651.
[311] *Hostages, Merits, supra* note 174 at 20 and also at 22: "It is for the Court, the principal judicial organ of the United Nations, to resolve any legal questions that may be in issue between parties to a dispute; and the resolution of such legal questions by the Court may be an important, and sometimes decisive, factor in promoting the peaceful settlement of the dispute (...)"; see also *Aegean Sea Continental Shelf, Interim Protection, supra* note 174.

The I.C.J. will not allow the fact that a dispute is possessed of both political and legal aspects to prevent it from examining the legal questions that are involved. And in the *Nicaragua* case, the I.C.J. stated that it "[h]as never shied away from a case brought before it merely because it had political implications."[312] Starting with the *Corfu Channel* case, the I.C.J. has heard numerous cases charged with important political implications.[313] By virtue of its position as a principal organ of the U.N., as Rosenne points out, the I.C.J. plays a role in the maintenance of international peace and security which is bound to involve political issues.[314]

The I.C.J. did refuse in the past to exercise its jurisdiction but that decision was based on judicial impropriety rather than lack of jurisdiction for grounds of political issues being at stake.[315] The I.C.J.'s view on the distinction between a legal and a political question "[l]ies not in its inherent nature but in the distinction between a political and a legal method of solving the dispute."[316]

c. Parallel powers rather than exclusive ones

Additionally, the two organs are meant to work together and their powers and functions are intertwined. As was put in Lockerbie: "The Council has functions of a political nature assigned to it, whereas the Court exercises purely judicial functions. Both organs can therefore perform their separate but complementary functions with respect to the

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[312] *Nicaragua, Jurisdiction*, *supra* note 301 at 435; but see *Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.), Merits*, [1986] I.C.J. Rep. 14 at 220-37 (June 27) (Oda, J., dissenting) [hereinafter *Nicaragua, Merits*]; see also *Aegean Sea Continental Shelf* (Greece v. Turk.), *Merits*, [1978] I.C.J. Rep. 3 at 12-13 [hereinafter *Aegean Sea, Merits*].

[313] Gowlland-Debbas *supra* note 26 at 652.

[314] As cited in Gowlland-Debbas, *supra* note 26 at 652; Evans, *supra* note 3 at 61.

[315] Gowlland-Debbas, *supra* note 26 at 652; Evans, *supra* note 3 at 61; however, some authors make an analogy with the U.S. theory of "Political Doctrine Question" whereas courts in the U.S. will consider an issue non-justiciable when there are serious separation of powers concerns, see Evans, *supra* note 3 at 9.

[316] Gowlland-Debbas, *supra* note 26 at 652 and the same page cites Kelsen:

> The legal or political character of a dispute does not depend, as the traditional doctrine seems to assume, on the nature of the dispute, that is to say, on the subject matter to which the dispute refers, but on the nature of the norms to be applied in the settlement of the dispute. A dispute is a legal dispute if it is to be settled by the application of legal norms, that is to say, by the application of existing law.

same events."[317] Their relationship is therefore one of "[c]oordination and functional cooperation (...)" in the attainment of the aims of the Organization, not one of "[c]ompetition or mutual exclusion (...)"[318] and "[t]he framers did not effect a complete separation of powers, nor indeed is one to suppose that such was their aim."[319]

The I.C.J.'s position is that it rejects the view that there are purely and inherently legal or political disputes; the legal/political distinction comes from a functional distinction between the two organs in the pursuit of the same purpose, the peaceful settlement of disputes and it considers that there is no hierarchy between the two organs. However, since there is some overlap, each should function in such a way as to not prevent the other from exercising its functions or reach results that would render decisions of the other inoperative.[320]

2. Functional Distinction between the I.C.J. and the S.C. in the Peaceful Settlement of Disputes

The I.C.J. in Lockerbie clearly perceives the U.N. Charter and its Statute as setting a clear separation between it and the S.C. with respect to the pacific settlement of disputes. Judges Ni and Bedjaoui distinguished between the S.C.'s political method of dispute settlement and the legal one exercised by the I.C.J..[321] Their functions, as Judge El-Kosheri pointed out, are "fundamentally different in nature" and "operating

[317] *Lockerbie, Provisional, supra* note 110 at 134 (quoting *Nicaragua, Jurisdiction, supra* note 301 at 434-35) (Ni, J., Declaration); Gunn, *supra* note 3 at 244 (a dispute should be regarded as both legal and political, then it follows that the same dispute may be submitted to both the S.C. and the I.C.J., each of which impose a hybrid of legal and political procedure).
[318] *Lockerbie, Provisional, supra* note 110 at 134.
[319] *Ibid.* at 138 (Lachs, J.) and on the same page Judge Lachs continues: "[t]he intention of the founders was not to encourage a blinkered parallelism of functions but a fruitful interaction."
[320] Gowland-Debbas, *supra* note 26 at 648-649; Evans, *supra* note 3 at 61-62.
[321] *Lockerbie, Provisional, supra* note 110 at 134, 144.

methods".[322] These differences are reflected in the nature of their responsibilities, composition, methods of operation and powers.

Both organs have different responsibilities: the I.C.J. is the principal judicial organ of the U.N. whereas the S.C. is the organ with primary responsibility for the maintenance of international peace. Their composition is different since in one case impartial judges are elected regardless of their nationality and in the other, governmental representatives decide, influenced by their government's positions, even on legal matters.[323]

Both organs enjoy responsibilities in the peaceful settlement of disputes but have different functions. The I.C.J. decides in accordance with international law legal disputes deferred to it by the consent of the parties. In contrast, under U.N. Charter Chapter VI, the S.C., may act on its own initiative or on that of any one member (whether party or not to the dispute), may chose to take the actions it deems appropriate (ex. investigation, recommendations, sanctions) and may determine if a situation represents a threat to international peace and security. The S.C. is not bound by judicial proceedings; nor must it apply international law when it recommends such terms of settlement as it may deem appropriate.[324]

Thus, as Judge Weeramantry, in his dissenting opinion in the Lockerbie case, observed with respect to the I.C.J.: "The concepts it uses are juridical concepts, its criteria are standards of legality, its method is that of legal proof. Its tests of validity and the bases of its decisions are naturally not the same as they would be before a political or executive organ of the United Nations."[325]

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[322] *Ibid.* at 201 (El-Kosheri, J., dissenting); see also Submission of Counsel for Libya, ICJ Verbatim Record CR 92/2, at 62-64 (1992) as cited in Gowlland-Debbas, *supra* note 26 at 648-649; see also Gowlland-Debbas, *ibid.*, for more details.

[323] U.N. Charter, *supra* note 40; see also Gowlland-Debbas, *supra* note 26 at 653-654.

[324] *Ibid.*

[325] *Lockerbie, Provisional, supra* note 110 at 166; Gowlland-Debbas, *supra* note 26 at 653-54.

Finally, in peaceful settlement of disputes, the I.C.J has the power to issue binding decisions (though only for the parties and in respect of the particular case) whereas the S.C. may only recommend under U.N. Charter Chapter VI procedures or terms of settlement, which are not binding.[326]

3. Absence of a Hierarchy between the Two Organs

Both the U.K. and the U.S. argued that interference with the S.C.'s exercise of its primary responsibility for the maintenance of international peace and security was Libya's (sole) reason and goal for applying to the I.C.J.. Their view was that "[m]atters concerning international peace and security lie within the exclusive competence of the Security Council (...) and that the Court must defer them to the S.C."[327]

The I.C.J. rejected both contentions in its jurisprudence. In all three previous cases of concurrent jurisdiction it reaffirmed its authority to decide issues over which it had jurisdiction. For example, the I.C.J. remarked in the *Hostages* case (referring to S.C. Resolution 461 (1979) acknowledging the I.C.J.'s provisional measures) that:

> [I]t does not seem to have occurred to any member of the Council that there was or could be anything irregular in the simultaneous exercise of their respective functions by the Court and the Security Council (....) The reasons are clear. It is for the Court, the principal judicial organ of the United Nations, to resolve any legal questions that may be in issue between parties to a dispute; and the resolution of such legal questions by the Court may be an important, and sometimes decisive, factor in promoting the peaceful settlement of the dispute.[328]

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[326] U.N. Charter, *supra* note 40, Articles 37(2) and 38; I.C.J. Statute, *supra* note 119, Article 59; see also Gowlland-Debbas, *supra* note 26 at 654-655.
[327] Gowlland-Debbas, *supra* note 26 at 655.
[328] *Hostages, Merits*, *supra* note 174 at 21-22; see also Gowlland-Debbas, *supra* note 26 at 655.

Also Article 24 uses the wording "primary responsibility" and not "exclusive responsibility", a fact the I.C.J. indicated in its advisory opinion in the *Expenses* case.[329] The word primary implies a secondary or residual role which the I.C.J. may play.[330] In the *Nicaragua* case the I.C.J. said that, "[e]ven after a determination under Article 39, there is no necessary inconsistency between Security Council action and adjudication by the Court."[331]

The I.C.J. has sustained that no hierarchy exists between the I.C.J. and the S.C. Judge Ni indicated (in a separate opinion) in the Lockerbie case "[i]n the *Hostages* case the Court decided that the adoption of resolutions by the Security Council and even the setting up of an investigatory commission by the S.G. did not preclude it from exercising its judicial functions."[332] The I.C.J. continued by saying that although U.N. Charter Article 12 forbids the G.A. "[t]o make any recommendation with regards to a dispute or situation while the Security Council is exercising its functions in respect of that dispute or situation (...)" no such restriction is placed on the I.C.J..[333] Consequently, both proceedings could be pursued parallely.[334] By contrast, no such obligation is placed upon the S.C.; it must only consider other procedures for settlement and consequently it maintains full discretion to deal with a matter and to adopt a resolution on it.[335]

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[329] *Certain Expenses of the United Nations (Article 17, paragraph 2 of the Charter), Advisory Opinion,* [1962] I.C.J. Rep. 151 at 163 [hereinafter *Expenses, Advisory*] (at that time, the Court found that the General Assembly was entitled to claim this residual responsibility in questions affecting international peace and security); see also *Nicaragua Jurisdiction, supra* note 301 at 434; see also Gowlland-Debbas, *supra* note 26 at 656 (but since the I.C.J. is the U.N. principal judicial organ, shouldn't the S.C. play a secondary judicial role!).

[330] Gunn, *supra* note 3 at 229-30.

[331] *Nicaragua, Jurisdiction, supra* note 301 at 432, quoted in Declaration by Judge Ni, *Lockerbie, Provisional, supra* note 118 at 133 and also at 134: "[t]he [U.N.] Charter does not confer exclusive responsibility upon the Security Council for the maintenance of international peace and security"; see also Gowlland-Debbas, *supra* note 26 at 655-656.

[332] *Lockerbie, Provisional, supra* note 110 at 132-33; see also Dissenting Opinion of Judge Ajibola, *ibid.* at 183; see also Gowlland-Debbas, *supra* note 26 at 656.

[333] *Hostages, Merits, supra* note 174 at 22; see also Gowlland-Debbas, *supra* note 26 at 656.

[334] *Nicaragua, Jurisdiction, supra* note 301 at 433; see also Gowlland-Debbas, *supra* note 26 at 656.

[335] U.N. Charter, *supra* note 40, Article 36; see also Gowlland-Debbas, *supra* note 26 at 656.

Could we make a parallel with the concept of litispendence present in many domestic legal systems? Litispendence prevents a second similar body to be seized of a dispute if there is identity of parties, question and forum, thus prevent the possibility of two different bodies reaching conflicting decisions. Would such a concept be applicable in the international framework?

The general view is "[t]hat these conditions are seldom met at the interstate level (...)" but it does not automatically mean that the doctrine of litispendence has no application in interstate relations between judicial and nonjudicial jurisdictions, as appears to be the case in the *Corfu Channel* Case."[336] However, litispendence, even in its broad interpretation, cannot be applied to the relations between the I.C.J. and the S.C., and the decision in Lockerbie seems to corroborate it. Accordingly, the S.C. nor the I.C.J. must defer to the other and both can exercise their jurisdiction over a dispute simultaneously.[337] Gowlland-Debbas explains the situation as follow:

> As Rosenne states, this "well illustrates the functional parallelism of two principal organs of the United Nations, each of which has competence, under the combined Charter and Statute, to deal with the same "dispute". Yet as a matter of policy, it was the Council, in the past, that awaited the decision of the Court before proceeding to a decision on a dispute.[338]

C. THE RELATIONSHIP BETWEEN JUDICIAL SETTLEMENT AND SANCTIONS

The I.C.J.'s conception of "functional parallelism" as we exposed it, relies on the difference between third-party adjudication (I.C.J.) and political non-mandatory

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[336] Gowlland-Debbas, *supra* note 26 at 657.
[337] *Ibid.* at 658.
[338] *Ibid.*; *see also Lockerbie, Provisional, supra* note 110 at 154; *Anglo-Iranian Oil Co., Jurisdiction,* 1952 I.C.J. 93 at 134 (Alvarez, J., dissenting).

procedures of dispute settlement (S.C. acting under U.N. Charter Chapter VI), each organ being seized with different aspects of the same dispute.

The Lockerbie case raised two issues before the I.C.J. (extradition and State responsability):

> [T]he 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 Security Council, at the request of the United Kingdom and the United States.[339]

But when the S.C. is no longer acting under U.N. Charter Chapter VI but rather using its enforcement action powers under U.N. Charter Chapter VII, the situation is different. Both the S.C. and the I.C.J. are concerned with the same issue: State responsibility (and both determinations are binding). Is it satisfactory to simply say the I.C.J. will treat the legal aspects of the issue and the S.C. the political ones? Can we still rely on the concept of functional parallelism? What role dpes the S.C. play, complementary or conflicting.

Judge Bedjaoui deems that "[s]o long as no aspect of these political solutions adopted by the Council sets aside, rules out or renders impossible the juridical solution expected of the Court (...)" the legal/political distinction between the S.C. and I.C.J. is acceptable.[340]

The S.C.'s recent enforcement measures actions are closely tied to State responsibility. When the S.C. has taken mandatory measures under U.N. Charter Chapter VII, it relied in

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[339] *Lockerbie, Provisional, supra* note 110 at 144 (Judge Bedjaoui); see also Dissenting Opinion of Judge Ajibola, *ibid. at 184,* stating:

> [T]he Montreal Convention on which Libya's Application is based squarely presents the Court with issues of "rights" and "disputes" under international law, involving, in particular, extradition, while the Security Council is dealing with the issue of the "surrender" of two suspects and the problem of international terrorism as it affects international peace and the security of nations--i.e., matters of a political nature.

see also Dissenting Opinion of Judge El-Kosheri, *ibid.* at 201; Gowlland-Debbas, *supra* note 26 at 659.

[340] *Lockerbie, Provisional, supra* note 110 at 154; see also *ibid.* at 139 (Lachs, J., sep. op.).

most cases on a finding that a State had breached an international fundamental obligation rather than to limit itself to a prior determination under Article 39 that there existed a threat or breach to peace.[341]

Thus, Resolution 748 established Libyan State responsibility for international terrorism under the Charter in associating terrorist acts to Article 2(4), implicitly confirming the accusations (U.S. and U.K.) that Libya had breached international law and should make reparations.[342] Article 41 of the U.N. Charter authorized the S.C. to enfringe on Libya's rights under general international law or the Montreal Convention by ordering that it assumes and fulfills its responsibility by surrendering two of its nationals.[343]

Moreover, because of Article 103, States under obligation to implement sanctions are exonerated from their obligations under the Montreal Convention as far as they are incompatible with their obligations under Article 25 of the Charter. Consequently, as noted by the I.C.J., there is an absence of rights to protect, since they have technically been suspended.[344]

The statement by U.K. representative during the S.C. debate on Lockerbie is most eloquent:

> The Council is not (...) dealing with a dispute between two or more Contracting Parties concerning the interpretation or application of the Montreal Convention. What we are concerned with here [i.e., in the Council] is the proper reaction of the international community to the situation arising from Libya's failure, thus far, to respond effectively to the most serious accusations of State involvement in acts of terrorism.[345]

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[341] Gowlland-Debbas, *supra* note 26 at 659-60.

[342] By invoking state terrorism, the S.C. can thus assert the irrelevance, for its own purposes, of the Montreal Convention, see Weller, *supra* note 5, at 318; see also Gowlland-Debbas, *supra* note 26 at 660.

[343] Gowlland-Debbas, *supra* note 26 at 660 and on the same page she states that "Article 103, which refers to the obligations of member states under other international agreements, is not concerned either with the rights of the targeted state under such agreements or with its sovereign rights under general international law"; see also Joint Declaration of Judges Evensen, Tarassov, Guillaume and Aguilar Mawdsley, *Lockerbie, Provisional,supra* note 118 at 136-37.

[344] Gowlland-Debbas, *supra* note 26 at 660.

[345] UN Doc. S/PV.3033 (1992) at 104; see also Gowlland-Debbas, *supra* note 26 at 660.

We are no longer faced with two alternative methods of dispute settlement, a political and a legal one, "[b]ut of two alternative processes available to States within the legal framework of State responsibility: the distinction between the function of the I.C.J. and that of the S.C. becomes the distinction between judicial settlement procedures in disputes concerning responsibility and institutionalized countermeasures or sanctions."[346]

This situation brings up two major issues. Even though we cannot technically talk about litispendence between the S.C. and the I.C.J. (similar quasi-judicial findings and judicial implications but distinct processes, different elements of a question etc.) a situation might arise in which the outcome in one forum (ex. mandatory measures under U.N. Charter Chapter VII) could deprive the solution in the other of any practical and meaningful application. The second issue is that while unilateral State actions and measures responding to them may be challenged in court, those taken by the S.C. in response to its primary responsibility for the maintenance of peace are authoritative and binding when linked to determinations under Article 39.[347] One must then ask whether there could be a judicial review process regarding those two issues?

D. THE ROLE OF THE INTERNATIONAL COURT OF JUSTICE REGARDING THE MAINTENANCE OF PEACE AND SECURITY

Even when the S.C. has taken measures under U.N. Charter Chapter VII, the I.C.J., if it has jurisdiction, has and will continue to play a double role. The first is, as Judge Lachs put it, to be "guardian of legality".[348] Through interpretation and some form of review of S.C. resolutions, the I.C.J. can control and limit the S.C.'s actions with respect to the

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[346] Gowlland-Debbas, *supra* note 26 at 661 (sanctions are a means of collective enforcement, defined in the International Law Commission's commentaries as reactive measures applied by virtue of a decision taken by an international organization following a breach of an international obligation having serious consequences for the international community as a whole).
[347] *Ibid.* at 661.
[348] *Lockerbie, Provisional, supra* note 110 (Lachs, J., sep. op.).

Charter and international law. The I.C.J.'s second role is to "exercise its independent judicial function" in disputes concerning State responsibility for breaches of fundamental obligations which in the S.C.'s view represent a threat to or breach of the peace.[349]

1. The Court as "Guardian of Legality"

a. Boundaries to the Security Council's powers under U.N. Charter Chapter VII.

As Judge Shahabuddeen so precisely wrote it concerning the limits to the S.C.'s actions: "[w]hether a decision of the Security Council may override the legal rights of States, and, if so (...) are there any limits to the Council's powers of appreciation? (...) and what body, if other than the Security Council, is competent to say what those limits are?"[350]

The U.N. system operates within the confines of general international law.[351] However, when acting under Chapter VII, the Charter authorizes derogations from existing rights and obligations under conventional as well as general international law. It is within that general framework that the S.C. uses its broad discretionary powers, including enforcement measures. These powers, however, are limited and many I.C.J. findings point it out.[352]

The S.C.'s powers are first limited by the U.N. Charter itself. Articles 24(2), 25 and 27 set both procedural and substantive limitations on them, as we have seen before.[353] More

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[349] Gowlland-Debbas, *supra* note 26 at 662

[350] *Lockerbie, Provisional, supra* note 110 at 142.

[351] Gowlland-Debbas, *supra* note 26 at 662-63: "[i]n theory the Organization, as a subject of international law, not only could commit acts that would be unlawful under its constituent instrument, e.g., assertion of competence by the wrong organ, but also, under international law, could commit the same kinds of illegal acts as states."

[352] *Ibid.* at 662.

[353] U.N. Charter, *supra* note 40, Article 24 provides that in discharging its duties, the S.C. shall act in accordance with the purposes and principles of the U.N. which Article 1 enumerates; see Vishesh, *supra* note 3 at 525-26: " [i]t would not be unreasonable to State that the Security Council must respect the Charter, because it is the instrument that the Security Council owes its very existence to, and also because

generally, one can also assume that organs of the U.N. operate within constraints to their competence and consequently since boundaries exist, U.N. organs may act invalidly. The Charter does not grant an unlimited authority to do simply anything that a political majority can feel like doing at any given time. The Charter by establishing the competences of each organ by the same ambit establishes their limits. Evans is of the opinion that:

> [their powers are delegated (...) such organs cannot derive authority but through the Charter (...) it delemits their competence and authority] Once the principles of the Charter are compromised beyond reasonable bounds of flexibility, and community interests are subordinated to particularistic interests of nation states, the conduct of a United Nations body becomes both invalid and inimical to the purposes of the organization.[354]

One may also invoke the theory of abuse of rights/powers as a limit to the S.C.'s discretionary powers under Article 39. This theory concerns the failure to exercise rights in good faith and with due regard to the consequences; it may stem in the international law context from Article 2(2) of the Charter.[355] If a threat to peace exists under Article 39 of the U.N. Charter, then whatever discretion the S.C. has used is valid; however, if the existence of such a threat is determined arbitrarily, then the S.C.'s discretion will have been used outside the scope of the Charter, rendering the actions (measures or resolutions) invalid.[356]

Opinions in I.C.J. cases support the application of the theory of abuse of rights in international law and indicate that the freedom entrusted to U.N. members has limits and that, even if they posess a discretionary right, they may not abuse it.[357] In the Lockerbie

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the Council serves the Charter and the United Nations Organization.''; see also Reisman, *supra* note 45 at 92 ss.

[354] Gunn, *supra* note 3 at 222 ss, more particularly 225, 227, 228.

[355] Gowlland-Debbas, *supra* note 26 at 663.

[356] Gunn, *supra* note 3 at 228 ss (he deems that such a valid determination of threat is a condition *sine qua non* to the validity and competence of S.C.'s actions and measures and also proposes a test of validity); see also Reisman, *supra* note 45 at 93 (outlines some possible criteria for determining the validity of S.C. actions).

[357] For example, *Namibia*, *supra* note 191 at 293-94, 340 (Fitzmaurice & Gros, JJ., dissenting, respectively); *Corfu Channel*, *supra* note 291 at 48 (Alvarez, ind. op.):

case, Libya argued the S.C. improperly used its power under U.N. Charter Chapter VII to simply avoid applying the Montreal Convention since the Lockerbie situation did not constitute a threat.[358] Judge Bedjaoui observed, that the obligation to respect an "instrument" is juridically independent from the existence of an organ exercising control.[359]

Another potential limit to the S.C.'s power comes from rules of general international law. We should ask the question of whether and to what extent the S.C. must respect these rules. No clear answer can be given to those questions since it has hardly been discussed in the legal doctrine or addressed by the jurisprudence.[360] As Judge Weeramantry pointed in the Lockerbie case, when the S.C. is acting under the framework of Chapter VI of the U.N. Charter, it should not be allowed to adopt recommendation which contravene general rules of international law.[361]

However, when the S.C. is acting under Chapter VII of the U.N. Charter, the situation is different. When the S.C. finds there exists a threat to international peace and security, it has the freedom to take appropriate actions in derogation from existing rights and obligations under both conventional and general international law. But to what limit? Judge Bedjaoui's opinion, in Lockerbie also, affirmed that the S.C. should respect the principles of justice and international law.[362]

U.N. Charter Article 103 provides for the issue of a conflict between a treaty obligation and one under the Charter.[363] However, the U.N. Charter is silent on the issue of potential

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> I consider that in virtue of the law of social interdependence this condemnation of the misuse of a right should be transported into international law. For in that law the unlimited exercise of a right by a State, as a consequence of its absolute sovereignty, may sometimes cause disturbances or even conflicts which are a danger to peace.

see also Gowland-Debbas, *supra* note 26 at 663.

[358] *Lockerbie-provisional*, *supra* note 110 at 126, 153, 156; see also Gowland-Debbas, *supra* note 26 at 663.

[359] *Ibid.* at 93.

[360] Tomuchat, *supra* note 3 at 46; Gunn, *supra* note 3 at 232 ss; Reisman, *supra* note 45 at 92.

[361] *Lockerbie-provisional*, *supra* note 110 at 176.

[362] *Ibid.* at 155.

[363] Gowland-Debbas, *supra* note 26 at 667.

incompatibility between S.C. resolutions on sanctions and certain basic norms of international law (genocide, right of self-determination, sovereignty of State (including right not to extradite)).[364] Judge Lauterpacht in the Bosnia case wrote:

> [T]he prohibition of genocide, unlike the matters covered by the Montreal Convention in the Lockerbie case to which the terms of Article 103 could be directly applied, has generally been accepted as having the status not of an ordinary rule of international law but of jus cogens (...). The relief which Article 103 of the Charter may give the Security Council in case of conflict between one of its decisions and an operative treaty obligation cannot--as a matter of simple hierarchy of norms--extend to a conflict between a Security Council resolution and jus cogens.[365]

Judge Weeramantry, in the Lockerbie case, had a different opinion in that he thought "[t]he right of Libya to exercise its criminal jurisdiction over its own subjects is a fundamental right derived from the sovereignty of the State, a right which cannot be derogated from."[366] There might just be some rules even the all mighty and powerful S.C. could not contravene.[367]

b. The legal authority for judicial control

Since we have established the S.C.'s powers are restricted, the next question naturally comes to mind: which of the U.N. organs is competent and best suited to enforce the boundaries within which the S.C. must operate? Can the I.C.J. exercise judicial control?

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[364] Gunn, *supra* note 3 at 232 ss (the U.N. itself is a subject of international law, and so are the S.C. and its members, they must accordingly act in accordance with the purposes and principles of the U.N. ; if the S.C. does not respect such principles and purposes, its actions could be considered ultra-vires); *Namibia, Advisory, supra* note 191 at 294, para 115 (Fitzmaurice, J., diss. opninion.); see also Gowland-Debbas, *supra* note 26 at 667.

[365] 1993 I.C.J. Rep. at 440 (Lauterpacht, J., sep. op.); see also *Namibia, supra* note 191 at 55, 56 (the I.C.J. held that the obligation of States under the Resolution not to enter into treaty relations with South Africa could not be applied to certain general conventions such as those of a humanitarian character); see also Gowlland-Debbas, *supra* note 26 at 668 ss.

[366] *Lockerbie-provisional, supra* note 110 at 163.

[367] Evans, *supra* note 3 at 59-60 also addresses the question of S.C.'s authority to interfere in domestic law that exists independant of treaty (in the Lockerbie case, for example, Libyan domestic law prohibited extradition). He is of the opinion that contrary domestic law "will not prevent binding Security Council action, nor Council action aimed at combatting aggression."

There has been extensive debate over this question; many different conclusions have been reached.[368]

Both the Charter and the I.C.J. Statute, the I.C.J.'s constituent instruments, are silent on the existence of such a power of "constitutional process" of judicial review with compulsory effect.[369] Consequently, the I.C.J. does not have express and strong powers of judicial review.

Moreover, at the San Francisco Conference, a proposition providing for the referral to the I.C.J. of disputes between organs concerning interpretation of the Charter "as an established procedure" was rejected.[370] It was agreed instead that each organ would be responsible for interpreting those parts of the Charter applicable to its functions, although "[i]f an interpretation made by any organ of the Organization (...) is not generally acceptable it will be without binding force."[371] The I.C.J. itself has clearly stated that such a validity control procedure did not exist.[372]

However, some have pointed out that if a Resolution adopted by the S.C. could not be examined by the I.C.J., we would be placed in a situation where the S.C. would be free to act without any concern of legality and it could lead to the defeat of the principles and purposes of the United Nations as stated in Article 1.[373]

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[368] See in general, McWhinney, *supra* note 3 at 262; Gunn, *supra* note 3 at 236 ss; Evans, *supra* note 3 at 58 ss; McGinley *supra* note 3 at 587 ss.

[369] Gowland-Debbas, *supra* note 26 at 664; Gunn, *supra* note 3 at 238 ss; the theory of judicial review was elaborated in the U.S. by the case *Marbury* vs. *Madison*, 5 U.S. (I Cranch) 137 (1803) where the Supreme Court by upholding an act of a political branch of the U.S. government, delegated to itself the power to decide whether a political branch had acted constitutionally (whereas the U.S. Constitution delegates no explicit power to the Supreme Court to perform such a function); many authors use this case when analyzing the Lockerbie case, see for example Evans, *supra* note 3; T.M. Franck, "The "Powers of appreciation": Who is the Ultimate Guardian of UN Legality" (1992) 86 AJIL 519.

[370] Gowland-Debbas, *supra* note 26 at 664; Gunn, *supra* note 3 at 223-24.

[371] Franck, *supra* note 369 at 520; Gowlland-Debbas, *supra* note 26 at 664; see also *Expenses, Advisory*, *supra* note 329 at 168 (Each organ must, in the first place at least, determine its own jurisdiction) and at 203 (Fitzmaurice, J., ind. op.).

[372] *Expenses, Advisory, supra* note 329 at 168.

[373] Vishesh, *supra* note 3 at 525-26; McWhinney, supra note 3 at 262 and also at 270 he comments that some poeple observe that the U.N.system is in need of a mechanism to operate a form "[o]f constitutional check-and-balance against the political unbridled power of the Security Council" since the previous system

We should not entirely dismiss the possibility of some judicial review since questions over interpretation might sometimes be asked to the I.C.J..[374] In its past jurisprudence, the I.C.J. has "[a]sserted its competence both to interpret U.N. resolutions in the light of the Charter and to make judicial pronouncements on the legality and validity of U.N. resolutions with respect to their conformity with the constituent instrument",[375] both of which bear some significance for S.C. enforcement action.

However, Professor Rosenne points out that "[t]he fact that the Court is one of several principal organs means that it exists on a par with them, being neither in a position of inferiority nor in superiority. Consequently, it does not exist as a general "constitutional Court of the United Nations."[376] But we should also consider that the I.C.J., as a non-political and independent organ might just be the best organ in the system U.N. to accomplish the most essential task of judicial review.[377]

c. Interpretation by the International Court of Justice

Over the years, the I.C.J. in its study of the U.N. Charter has shown an inclination towards interpreting the Charter differently than ordinary treaties: it chose to give the Charter an evolutive interpretation instead of a static one.[378]

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of check-and-balance, in the form of Cold War era of veto blocking, has but all disappeared; see also Reisman, *supra* note 45 at 95.

[374] Reisman, *supra* note 3 at 92-93; Gowlland-Debbas, *supra* note 26 at 664 (but we should remember the S.C. and G.A. may themselves interpret or if they might have recourse to an *ad hoc* committee of jurists or a joint conference).

[375] Gowlland-Debbas, *supra* note 26 at 664-665.

[376] As cited by Evans, *supra* note 3 at 61.

[377] But is it that impartial and independant, for each Judge might in practice still be influenced by its government and also, the simple fact that an organ is impartial and independent doesn's justify the automatic granting of powers of judicial review, Gunn, *supra* note 3 at 240 ss.

[378] The Vienna Convention on the Law of Treaties, opened for signature May 23, 1969, 1155 UNTS 331, does not distinguish between the constituent instruments of international organizations and ordinary treaties; see also Gowland-Debbas, *supra* note 26 at 665-666.

The *Namibia* and the *Aegean Sea* cases confirm that such an international instrument is "[t]o be interpreted and applied within the framework of the entire legal system prevailing at the time of the interpretation, providing that the concepts included in the treaty are inherently evolutionary and that it was the intention of the parties to have them considered as such," specially when the parties have used broad and vague terms, such as "purposes" and "principles", so the scope of their obligations can follow the evolution of international law.[379] Logically, the same evolutive approach should prevail when interpreting the S.C.'s powers and jurisdiction since they are a creation of the U.N. Charter. The same evolutive interpretation should also apply when analyzing the S.C.'s compliance with the U.N.'s purposes and principles.[380]

The I.C.J. has resorted to what Gowlland-Debbas calls a "[t]eleological and dynamic view of Charter interpretation, relying on the purposes of the Organization to justify the use of inherent powers by U.N. organs."[381] She continues by saying:

> So far the Court's conclusions have been based on the premise that, although the U.N. organs' competence to interpret the Charter is not unlimited, "when the Organization takes action which warrants the assertion it was appropriate for the fulfillment of one of the stated purposes of the United Nations, the presumption is that such action is not ultra vires the Organization.[382]

This evolutive interpretation of the Charter had the consequence of expanding international jurisdiction and powers of the U.N. towards restrictive assertions of

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[379] *Namibia, Advisory, supra* note 191 at 31; *Aegean Sea, Merits, supra* note 312 at 32-34; Gowlland-Debbas, *supra* note 26 at 666 cites a most eloquent quote of Sir Percy:

> Where, as in the case of the Charter, the purposes are directed to saving succeeding generations in an indefinite future from the scourge of war, to advancing the welfare and dignity of man, and establishing and maintaining peace under international justice for all time, the general rule [that expressions should be given the meaning they bore at the conclusion of the treaty] does not mean that the words in the Charter can only comprehend such situations and contingencies and manifestations of subject-matter as were within the minds of the framers of the Charter.

[380] Gowland-Debbas, *supra* note 26 at 665

[381] *Ibid.*

[382] *Ibid.* at 665 (she points out, however, that such implied powers should not be derived from the general purposes of the Charter, but should only be those which are necessary to the effective accomplishment of the explicitly stated powers.); see also *Expenses, Advisory, supra* note 329 at 168.

sovereignty by member States.[383] Other schools of thought believe that the application of these principles today could have an opposite power constraining effect, particularly with respect to the powers of the S.C. under U.N. Charter Chapter VII.[384]

d. Review of constitutional validity by the International Court of Justice

In examining questions referred to it by U.N. organs, the I.C.J., while disclaiming any "[p]owers of judicial review or appeal in respect of the decisions taken by the United Nations organs concerned",[385] has not backed away from reviewing the validity of S.C. and G.A. resolutions or their conformity with either the Charter or general international law.[386] Such examples are the *Expense* case and the *Namibia* case.[387]

The I.C.J. has not revealed its colors in the Lockerbie provisional case since it decided that while it could not make definitive findings of fact or law on issues relating to the merits issues at provisional measures stage, the right of the parties to contest these issues would remain unaffected by its decision.[388] The Lockerbie merits case could become the

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[383] Gowlland-Debbas, *supra* note 26 at 667.

[384] *Ibid.* at 667.

[385] *Namibia, Advisory, supra* note 191 at 45; see also Gowlland-Debbas, *supra* note 26 at 669.

[386] *Lockerbie, Provisional supra* note 110 at 176 (Weeramantry, J., dissenting): "[T]he distinction is a fine one. It is not for this Court to sit in review on a given resolution of the Security Council but it is within the competence of the Court and indeed its very function to determine any matters properly brought before it in accordance with international law."; see also Weller, *supra* note 3 at 323-24; Gowlland-Debbas, *supra* note 26 at 669.

[387] *Expenses, Advisory, supra* note 329 at 157, 168, France had introduced an amendment to the G.A. resolution requesting an advisory opinion that would have put the question of the validity of G.A. and S.C. resolutions directly before the I.C.J.. The I.C.J. refused to interpret the G.A.'s rejection of the French amendment as meaning that the I.C.J. was thereby precluded from considering whether the expenditures were "decided on in conformity with the Charter, if the I.C.J. finds such consideration appropriate." In its *Namibia, Advisory, supra* note 191 at 143-44, 331-32 (Onyeama, J., sep. op., & Gros, J., dissenting), the I.C.J. also found that it could not determine the legal consequences of the resolutions in question without first passing on their validity; see also *Hostages, supra* note 174 and 296; *Anglo-Iranian Oil, Interim Protection, supra* note 174 and 287.; see also Gowlland-Debbas, *supra* note 26 at 669-670.

[388] *Lockerbie, Provisional, supra* note 110 at 127; other judges were also of the same opinion, see dissenting opinions of Judges Bedjaoui, *ibid. at* 156; Ajibola, *ibid.* at 196 and Judge Weeramantry, *ibid.* at 66, 176 (any matter which is the subject of a valid S.C. decision under Chapter VII does not appear, *prima facie*, to be one with which the I.C.J. can properly deal), and Judge Oda, *Lockerbie, Provisional, supra* note 110 at 129: "a decision of the Security Council, properly taken in the exercise of its competence, cannot be summarily reopened."; see also Gowlland-Debbas, *supra* note 26 at 669.

first review of the validity of a U.N. resolution in contentious proceedings but as in previous cases, the I.C.J. acted on the presumption of validity of U.N. resolutions.[389]

In considering the validity of U.N. resolutions:

> [t]he Court has therefore always confirmed that they were adopted in conformity with the Charter; in the process the Court has upheld the legality and validity of certain practices, for example those of the Security Council [*Namibia, Avisory* case]. Moreover, the Court cannot be expected in the future lightly to choose to pronounce a United Nations resolution invalid, particularly a decision adopted by the Security Council within the framework of its primary responsibility for the maintenance of international peace. Such a course would pose certain problems, though they are not insurmountable and should not act as a bar to future action.[390]

e. Problems arising from the review of validity.

The absence of an established procedure of judicial review creates important limitations to the role the I.C.J. can play in matters of interpretation and review of the validity of U.N. resolutions. Additionally, the non-authoritative nature of the I.C.J.'s opinions in this respect and the absence of a coherent theory of the legal effects of illegal acts of international organizations constitute other limits.[391]

For the I.C.J. to have jurisdiction, the vote on a resolution to ask for an advisory opinion requires the majority in the organ making the request (for S.C. there is also a veto possibility). Consequently, it is improbable that the question referred to the I.C.J. will focus specifically on the validity of a resolution adopted by that same majority,[392] unless

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[389] See, for example, Separate Opinion of Judge Shahabuddeen, *Lockerbie, Provisional, supra* note 110 at 140 and only dissenting Judge El-Kosheri *ibid.* at 206-10, pronounced Resolution 748 to be ultra vires at this stage of the proceedings; see also Gowlland-Debbas, *supra* note 26 at 669.

[390] Gowlland-Debbas, *supra* note 26 at 670; see also *Namibia, Advisory, supra* note 191 at 45, 53.

[391] *Ibid.* at 670.

[392] Even the General Assembly cannot ask for an advisory opinion beyond the scope of its activities, i.e., jurisdiction, even though this is not explicitly stated in Article 96(1). Thus, it may not question a Security

it is seeking the I.C.J.'s "blessing" of the measures already taken. Any review of the validity of a resolution by the I.C.J., therefore, can only be incidental.[393] In contentious cases as well, the State parties will rarely be able to raise the matter of the validity of a resolution.[394]

The I.C.J. may also deem inappropriate a process of review in the context of certain claimed powers. It may consider there are limits it cannot trespass in the process of judicial review of the S.C.'s actions. The I.C.J. has said that "[t]he precise nature and scope of the measures by which the power of creating a tribunal was to be exercised, was a matter for determination by the General Assembly alone."[395] Gowlland-Debbas is of the opinion that this reasoning applies without a doubt, in the absence of a gross irregularity or abuse of power, to the facts and conclusions of a S.C. determination of a threat to or breach of the peace.[396]

As we have seen, the S.C. and I.C.J. should act together. They are designed to "[c]omplement, not thwart each other."[397] One could consider that if the I.C.J. were to render a S.C. decision invalid, it would go against the wish of the founders of the Charter. Instead, the I.C.J. should cooperate with the S.C. in order to reach the goals of the Organization and try to give effect to its decisions, not take measures which would render S.C. actions inoperative. It would also have the adverse effect of limiting the S.C.'s powers in the future.[398] However, Gunn is of the opinion that although there is an identity

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Council interpretation of Charter provisions governing the functioning of the Security Council, though it could request an advisory opinion on a matter involving the functioning of that organ.

[393] Gowlland-Debbas, *supra* note 26 at 670-671; only in one case was the I.C.J. asked to answer a question explicitly on the subject of the validity of an act of an international organ (in this instance, that of the Assembly of the IMO), *Constitution of the Maritime Safety Committee of the Inter-Governmental Maritime Consultative Organization*, [1960] I.C.J. Rep. 150, 171[herinafter *Maritime*].

[394] Gowlland-Debbas, *supra* note 26 at 671.

[395] As cited in Gowlland-Debbas, *ibid.*

[396] *Ibid.*

[397] Evans, *supra* note 3 at 64.

[398] *Ibid.* at 64.

of question resulting in a possibility of conflict, "[s]uch conflict should not deter the Court from pronouncing on a resolution's validity."[399]

A further limitation on the I.C.J.'s review powers stems from the non-authoritative nature of its opinions. Even if it were competent to decide on the constitutionality of U.N. resolutions, there lies the question of the opposability or authoritative nature of the I.C.J.'s conclusions. An advisory opinion is, by definition, advisory. We could make an argument to the effect that its opinions, since based on international law, are declaratory of the law and consequently it is obligatory for the organs and States concerned to follow them. The requesting organ may also chose to accept and endorse the decision.[400]

As for contentious cases, the I.C.J.'s declaration of validity (or invalidity) of a S.C. resolution could bind only the parties and for the particular case alone. However, a S.C. resolution on sanctions is binding upon all the member States; this would create a most peculiar situation![401]

Finally, what would be the consequence if acts of international organizations were declared illegal? It can be said that only "an important irregularity in the procedure by which they were adopted or a substantive invalidity so patent as to amount to a manifest usurpation" would open the door to the study of their validity by the I.C.J.). [402] The I.C.J. distinguished as well in the *Expenses* case between "procedural illegality"--an act of an organ exceeding its competence under the Charter--and "substantive illegality"--e.g. non-conformity with the Purposes and Principles of the Charter. Only in the case of "substantive illegality" could we question the validity of the act. [403] However, as

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[399] Gunn, *supra* note 3 at 245.
[400] Gowland-Debbas, *supra* note 26 at 671 and on same page: "[t]he essential distinction between advisory opinions and judgments in contentious cases is not their respective "non-binding" or "binding" nature, for the significance of this is not always clear, but rather that the advisory opinion does not order a state or organ to do anything."
[401] *Ibid.* at 671-72.
[402] *Ibid.* at 672.
[403] *Expenses, Advisory, supra* note 329 at 168.

Lauterpacht indicates there is no satisfying answer to the question of the legal effect of illegal acts of international organizations.[404]

An opinion by the I.C.J. on the invalidity of a resolution would not have for consequence the absolute nullity of the act. It would simply mean that until an opinion has been obtained and accepted, the (alleged) unlawful act is effective and effect to the opinion must be given from the moment the opinion is accepted. It simply is void for the future.[405]

This conclusion has the advantage of maintaining the effectiveness of the S.C.'s decisions since they should not be undermined by having them become null retroactively, even more so since they might be effective immediately upon adoption. This situation is particularly important since when adopting collective security measures, the S.C. must act quickly and there is an initial need for certainty to assure their implementation.[406]

But more and more the S.C. maintains sanctions resolutions in place for an indeterminate time (and more particularly because of the "reverse veto" which blocks the S.C. from terminating an action that has already been adopted);[407] consequently, judicial review is of significant importance. No matter what is the weight of an I.C.J. opinion on the invalidity of a U.N. resolution it certainly "[s]erves to undermine the legitimacy of the acts in question, and should lead to a serious reconsideration of its decision by the organ concerned. It should also serve to preempt future acts of a similar nature."[408]

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[404] Lauterpacht as cited in Gowlland-Debbas, *supra* note 26 at 672.
[405] The only case on the subject: *Maritime, supra* note 393 at 171; see also Gowlland-Debbas, *supra* note 26 at 673.
[406] Gowlland-Debbas, *supra* note 26 at 672; Evans, *supra* note 3 at 61.
[407] Gowlland-Debbas, *supra* note 26 at 672; see also *Nicaragua, Merits*, *supra* note 312 at 237.
[408] *Ibid.*

2. The International Court of Justice in the Independent Exercise of Its Judicial Function

As dissenting Judge Weeramantry proposed in his opinion in the Lockerbie case:

> [T]he determination under Article 39 of the existence of any threat to the peace, breach of the peace or act of aggression, is one entirely within the discretion of the Council. It would appear that the Council and no other is the judge of the existence of the state of affairs which brings Chapter VII into operation. Once [that decision is] taken, the door is opened to the various decisions the Council may make under that Chapter.[409]

The I.C.J., as pointed out during the debates in the Lockerbie case, "[s]hould not allow its jurisdiction to be used as an appeal court from the political assessments made by the Security Council."[410] The S.C. can use (not abuse) its discretionary powers to make a finding under U.N. Charter Article 39; it is bound within certain limits. Such a finding could not be contested by the I.C.J..[411] Rather the I.C.J. can "make separate determinations concerning the responsibility of States for violations of international law, where these form a constituent element of threat to the peace, and it can only be declaratory of the existing situation in international law."[412]

In some cases, its independent judgment on the responsibility of the involved parties may well serve to support the S.C.'s position and reinforce the authority and legitimacy of its resolutions; the I.C.J. would then contribute to the interpretation and development of international legal norms. However, "[n]o argument based on judicial propriety (i.e. refusal to adjudicate a case for reasons other than lack of jurisdiction) should lead it to balk at the exercise of its judicial function if such exercise might lead it to a different and conflicting conclusion."[413]

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[409] *Lockerbie, Provisional, supra* note 110 at 176.
[410] Gowlland-Debbas, *supra* note 26 at 673.
[411] *Ibid.*
[412] *Ibid.*
[413] *Ibid. at* 674; see for example, *Nicaragua, Merits, supra* note 312 at 237.

As Judge Onyeama stated in a separate opinion in the *Namibia* case:

> In exercising its functions the Court is wholly independent of the other organs of the United Nations and is in no way obliged or concerned to render a judgment or opinion which would be "politically acceptable". Its function is, in the words of Article 38 of the Statute, "to decide in accordance with international law.".[414]

Though the I.C.J., as a principal organ, must cooperate with the other U.N. organs and must try to give maximum effect to their decisions, "[i]t is always subject, as Rosenne indicates, to overriding considerations of international law that it cannot disregard."[415] Ultimately, when the I.C.J. plays its role, we can say in the end it does play a political role and take into account political considerations.[416]

As Gowlland-Debbas summarizes the situation:

> However, where *erga omnes* or peremptory norms are concerned--the most likely situations deemed to constitute threats to international peace and security--a pronouncement by the I.C.J. within the framework of traditional proceedings can be seen as declaratory; in that sense, it would go beyond Article 59 of the Statute because, arguably, all States would be subject to the automatic consequences flowing from such a determination. Thus, the I.C.J.'s rendering of a verdict on a specific violation of international law would not constitute "[a] mere academic function" but would have practical consequences in the sense of altering the legal situation between the State committing the breach and all other States.[417]

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[414] *Namibia, supra* note 191 at 143.
[415] Gowlland-Debbas, supra note 26 at 574-675.
[416] *Ibid.*
[417] *Ibid.*

E. CONCLUDING REMARKS

We have established that the S.C. must act within certain boundary norms. Outside these norms, S.C. actions might be considered invalid. However, this remains all theoretical if there does not exist a body to enforce those boundaries and determine such validity. The U.N. system remains silent as to whom should be that "guardian of legality". We have studied the possibility it might be the I.C.J., but many issues remain unresolved.

The U.N. should seriously look into that issue and it became of greater importance since the end of the Cold-War. If the U.N. really wants to uphold the interests of its member States, and not only of the few who control the S.C., it should provide for a certain review mechanism of the validity of S.C. actions. It should not however serve as to tie the S.C.'s hands behind its back since it must remain free to act quickly in order to react to emergency situations. The I.C.J. and S.C. should work "hand in hand" to further the purposes and principles of the U.N. Charter.

CONCLUSION

The Lockerbie tragedy made us all feel vulnerable, on an individual basis as well as on a collective basis, to terrorist attacks. Since the world is become a "global village" and aviation knows no boundaries, aviation absolutely needs an international system to insure its safety and security. Prevention through legislation and treaty represents the first step in achieving such a goal but such measures, if they cannot be enforced, are useless.

The United Nations system represents the ideal forum for such an application. Parties can seek judicial settlement of their disputes through the International Court of Justice, as was the case with Libya in the Lockerbie conflict. If a particularly urgent and volatile situation requires it, States can also seek the help of the Security Council. It can take measures and enforce them on an international level when international peace and security are endangered. State-sponsored terrorism can be considered to be constituting such a threat.

The Lockerbie saga gives us a great example of how the international community can pull together in times of tragedy when international peace and security is concerned. However, it made us feel vulnerable with respect to another matter. How are we protected against abuse of rights of the Security Council? Are there any limits to the broad discretionary powers granted to the Security Council? Since the end of the Cold-War era, the veto-opposing system of "checks-and-balance" has disappeared and there is now no way of stopping the only "super-power" left and and its strong allies of dictating their views on international matters in the Security Council. After all "might is right".

The International Court of Justice might just be what the world needs to ensure that the Security Council is not used to further the cause of individual States instead of that of the principles and purposes of the United Nations. It could play a role in insuring the

Security Council doesn't exceed its powers. However, this solution creates as many problems as it tends to solve.

The United Nations Charter did create all of its organs equally. However, it remains silent on the subject of Security Council and International Court of Justice relations. What role could the International Court of Justice play? What is the legal basis of such a role? By exercising such review powers wouldn't that create a hierarchy between two equal organs? Will such a review system get in the way of the Security Council which needs to act quickly in matters of urgency? These are only a few of the questions that come to mind.

Such questions could receive answers at the merits stage of the Lockerbie case. It has not yet been heard and it would provide an unprecedented and invaluable opportunity for these constitutional questions to be addressed. The Lockerbie, provisional measures, case does not shed much light on what might be the issue at the merits stage. But one can surely predict that the task waiting the International Court of Justice Judges is far from an easy one.

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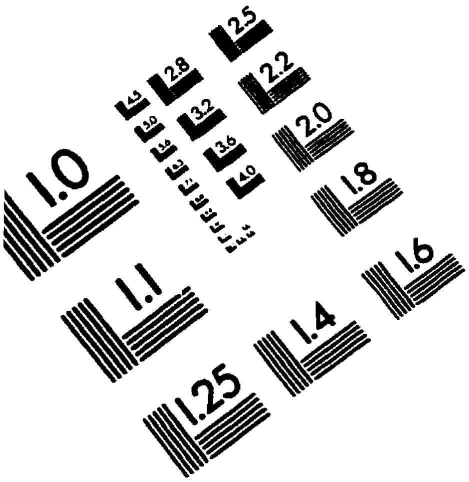
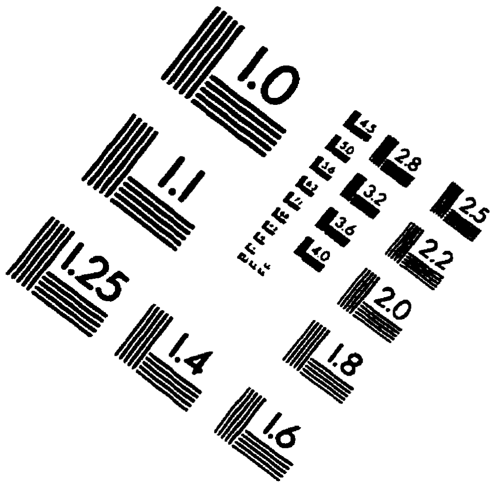
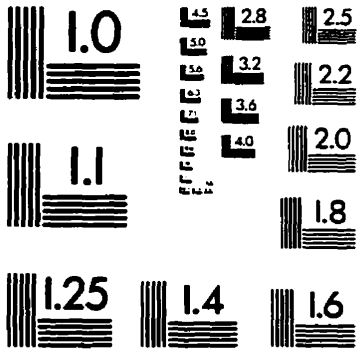
IMAGE EVALUATION TEST TARGET (QA-3)







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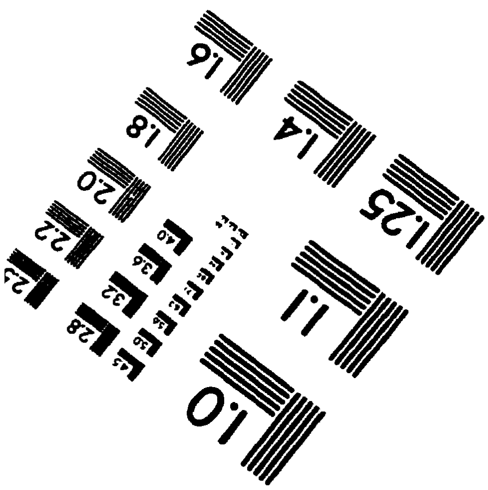

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