

The Lockerbie Incident Cases: Libyan-Sponsored Terrorism, Judicial Review and the Political Question Doctrine

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THE LOCKERBIE INCIDENT CASES: LIBYAN-SPONSORED TERRORISM, JUDICIAL REVIEW AND THE POLITICAL QUESTION DOCTRINE

SCOTT S. EVANS*

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I. INTRODUCTION

In the field of international law, a primary concern is the realization that in a "new world order,"¹ the rule of law² is central to establishing a global order where community replaces chaos. Before a new world order may be achieved, however, we must address the treatment of low-intensity conflict in international law.³

Combatting terrorism is essential to national security; only recently have broad strides been taken in the international legal community to expose state-sponsored terrorism as a form of low-intensity aggression. While there has been much written on the subject of terrorism,⁴ and individual states have taken steps to combat or effec-

1. As defined by President Bush,

[The new world order is] an order in which no nation must surrender one iota of its own sovereignty, an order characterized by the rule of law rather than the resort to force, the cooperative settlement of disputes rather than anarchy and bloodshed, and an unstinting belief in human rights.

1991 PUB. PAPERS 1203.

2. For a discussion and application of the rule of law see JOHN NORTON MOORE, *LAW AND THE GRENADA MISSION 1* (1984). "Law . . . is vitally important. Even in the short run, law serves as a standard of appraisal for national actions and as a means of communicating intentions to both friend and foe, and perceptions about lawfulness can profoundly influence both national and international support for particular actions." *Id.*

3. "Experts largely agree that international terrorism is likely to increase and become bloodier. Recent terrorism attacks in Lebanon and Kuwait, in Washington, D.C., in Jerusalem and France, among other places, have confirmed their prediction." John F. Murphy, *The Control of International Terrorism*, in NATIONAL SECURITY LAW 445 (John N. Moore, Frederick S. Tipson & Robert F. Turner eds., 1990) [hereinafter Murphy]. For a discussion of terrorism and low-intensity conflict, see John Norton Moore, *Low-Intensity Conflict and the International Legal System*, A Paper Prepared for the Low-Intensity Conflict Symposium, The Naval War College (Apr. 9-10, 1992) [hereinafter Moore] (unpublished manuscript, on file at the Center for National Security Law at the University of Virginia School of Law).

4. See e.g., Richard B. Lillich and John M. Paxman, *State Responsibilities for Injuries to Aliens Occasioned by Terrorist Activities*, 26 AM. U. L. REV. 217 (1977); A.E. Evans, *Perspectives on International Terrorism*, 17 WILLAMETTE L. REV. 151

tively respond to this aggression,⁵ international bodies are just beginning to assume an active role.⁶

Recently, the United Nations Security Council passed two resolutions condemning the use of terrorism by Libya, one of which included sanctions against that state.⁷ Most recently, the International Court of Justice (ICJ) refused Libya's request for provisional measures in two cases brought before the ICJ (the "Lockerbie Incident Cases") which had the potential to countermand the Security Council's resolution providing for sanctions against Libya (the "Order").⁸ Additionally, although the ICJ has yet to rule on the merits of the cases, on November 12, 1993, the Security Council passed a resolution expanding sanctions against Libya.⁹

The Orders in the Lockerbie Incident Cases reaffirmed and potentially expanded the role of the Security Council and the ICJ as primary international fora for the exposition of the rule of law. This Article sets forth the story behind the resolutions and the subsequent ICJ Order.

(1980); John Dugard, *International Terrorism and the Just War*, 12 STAN. J. INT'L STUD. 21 (1977); and JOHN F. MURPHY, LEGAL ASPECTS OF INTERNATIONAL TERRORISM: SUMMARY REPORT OF AN INTERNATIONAL CONFERENCE (1978).

5. E.g., 18 U.S.C. § 2331 (Supp. 1992) provides for extraterritorial jurisdiction over terrorists acts abroad against U.S. nationals. The United States used this statute, along with extradition treaties, to pursue and prosecute terrorists such as Fawaz Yunis. Scott S. Evans, *International Kidnapping in a Violent World: Where the United States Ought to Draw the Line*, 137 MIL. L. REV. 187, 189-92 (1992).

6. For example, the United States is a party to several multilateral anti-terrorist conventions, including the International Convention Against the Taking of Hostages, 34 U.N. GAOR, 34th Sess., Supp. No. 39, at 23, U.N. Doc. A/34/39 (1979), regional agreements, such as the Organization of American States Convention to Prevent and Punish the Acts of Terrorism Taking the Forms of Crimes Against Persons and Related Extortion That Are of International Significance, Feb. 2, 1971, 22 U.S.T. 3849, T.I.A.S. No. 8413, and bilateral agreements such as the U.S.-Cuba Memorandum of Understanding on Hijacking of Aircraft and Vessels and Other Offenses, Feb. 15, 1973, 24 U.S.T. 737, T.I.A.S. No. 7579.

7. SCOR Res. 731, U.N. SCOR (1992) and SCOR Res. 748, U.N. SCOR (1992) (including sanctions).

8. Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libya v. U.K.), 1992 I.C.J. 1 (Apr. 14) (request for the indication of provisional measures). The United States also received the same order in Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libya v. U.S.), 1992 I.C.J. 114 (Apr. 14) (request for the indication of provisional measures). Collectively, these cases will be referred to as the "Lockerbie Incident Cases" and the orders refusing the indication of provisional measures as the "Order." Although these cases were not consolidated, the arguments were heard together.

9. SCOR Res. 883, U.N. SCOR (1993).

First, the Article examines the events that led up to the Order, including the terrorist acts sponsored by Libya and the legal context in which those factual events arose.¹⁰ Second, the Article recounts the arguments for and against both the provisional measure and the Order itself.¹¹ Third, the Article explores the major issues raised by the Order on both an academic and a practical level.¹² Collectively, this analysis provides insight into the new world order and the rule of law and discusses the roles of the Security Council and the ICJ in the global legal scheme.

II. BACKGROUND

A. *The Factual Context of the Order*

Rarely do events occur in a vacuum. Indeed, the Lockerbie Incident Cases are the culmination of a history of Libyan state-sponsored terrorism. Specifically, the cases and the Orders are the direct consequence of two terrorist attacks in which more than 441 people died.¹³

1. The History of Libyan Terrorism

For more than twenty years and under the direction of Libyan leader Mu'ammar Qadhafi, Libya has supported, sponsored and conducted terrorism on a global scale. Although no widely accepted definition of terrorism exists,¹⁴ for purposes of collecting statistical data on international terrorism, the State Department defines terrorism as "premeditated, politically motivated violence perpetrated against non-combatant targets by sub-national groups or clandestine state agents, usually intended to influence an audience."¹⁵

That definition, however, should be expanded to include any act of violence, military or economic, perpetrated against non-combatants *or* against anyone in a non-aggressive setting. This expanded definition would include and condemn such incidents as the bombing of the U.S. Marine barracks in Beirut, Lebanon in October, 1983 by the Islamic Jihad.¹⁶

10. See *infra* part II.

11. See *infra* part III.

12. See *infra* part IV.

13. Verbatim Record of the United States at 8, *Libya v. U.S.*, 1992 I.C.J. 114 [hereinafter U.S. Brief].

14. Murphy, *supra* note 3. For a list of definitions of terrorism, see JAY M. SHAFRITZ ET AL., *ALMANAC OF MODERN TERRORISM* 263 (1991).

15. U.S. DEP'T OF STATE, *PATTERNS OF GLOBAL TERRORISM: 1986* (1988).

16. Thomas L. Friedman, *State-Sponsored Terror Called a Threat to U.S.*, N.Y.

Apart from the bombing of Pan Am Flight 103 and UTA Flight 772, Libya has a history of using terrorism as an instrument of foreign policy. In 1972, Qadhafi "publicly offered to help extremist movements, including the Provisional Irish Republican Army and the Black Power movement in the United States, and to support any group in the Middle East willing to attack Israel."¹⁷

Furthermore, Qadhafi's brother-in-law, Abdalla Sanussi, is the principle orchestrator of the Libyan terrorist network.¹⁸ Prior to the terrorist acts that precipitated the Lockerbie Incident Cases, Libya was involved in the following terrorist acts:¹⁹

- In 1973, Qadhafi sent terrorists to Italy to shoot down an Israeli airliner;²⁰
- In 1975, Qadhafi ordered the assassination of several Libyan dissidents living abroad;²¹
- In 1977, Libya intended to assassinate a U.S. Ambassador;²²
- In August 1986, at least six terrorists attacked a British Air Base at Akrotiri, Cyprus, and escaped by representing themselves as members of a Libyan Arab Airlines flight. They had the help of the airline captain. Additionally, the weapons used were part of shipments to Libya in the 1970s;²³
- In September 1986, the Abu Nidal Organization, which is sponsored by Libya, bombed a synagogue in Istanbul, Turkey, killing twenty-one persons with explosives supplied by Libya;²⁴ and
- In March 1987, a bomb exploded, killing eleven and wounding fifty in a cafe in Djibouti, Djibouti. The Popular Struggle Front claimed responsibility for the bombing and carried out the attack "under threat of losing Tripoli's financial support."²⁵

TIMES, Dec. 30, 1983, at A1; William E. Farrell, *Unanswered Question: Who Was Responsible?*, N.Y. TIMES, Oct. 25, 1983, at A16.

17. U.S. DEP'T OF STATE, LIBYA'S CONTINUING RESPONSIBILITY FOR TERRORISM, WHITE PAPER NOV. 1991, 1 [hereinafter WHITE PAPER].

18. Wallace H. Spaulding, *Organization and Personnel of Libya's "Anti-Imperialist" Complex*, in POLITICAL WARFARE: INTELLIGENCE, ACTIVE MEASURES & TERRORISM REPORT (formerly SOVIET INTELLIGENCE AND ACTIVE MEASURES), Fall 1991, at 5.

19. This is not an all-inclusive list. For further information see WHITE PAPER, *supra* note 17, at 9-12.

20. *Id.* at 1.

21. *Id.*

22. *Id.*

23. *Id.* at 11.

24. *Id.*

25. *Id.*

Although Qadhafi professed to renounce terrorism as recently as 1987,²⁶ the acts continue:

- In May 1990, the Palestine Liberation Front, with planning and weapons aid from Libya, attempted a seaborne raid on Israel;²⁷
- In March 1990, an explosion rocked the Hilton in Addis Ababa, Ethiopia, near the suite of the Israeli Ambassador. Two Libyan diplomats were expelled by the Ethiopian Government for their perceived involvement in the incident.²⁸
- Most recently, Qadhafi publicly invited two well-known Palestinian terrorists, Ahmed Jibril and Abu Nidal, to visit Tripoli to conduct diplomatic relations.²⁹

Libya has been heavily involved in terrorist activities during the past twenty years. While many terrorist acts are carried out by individuals or individual organizations with extreme personal goals, the previously mentioned acts, as well as the acts that led up to the Lockerbie Incident Cases, are of a fundamentally different nature. These are acts of state-sponsored terrorism, and therefore are more clearly acts of ongoing and sustained aggression by a recognized state in violation of the U.N. Charter. Perversely, this type of terrorism is often less widely condemned than individual acts of terrorism either because it is misunderstood or governments are reluctant to take action for fear of state-sponsored retaliation.

Even when Libyan agents are not directly implicated in terrorist activities, Libya has supported the global terrorist network by providing funding and training for terrorists throughout the world. For example, Libya supports the Abu Nidal Organization with training facilities and several million dollars annually and has provided the Popular Front for the Liberation of Palestine with well-over one million dollars.³⁰

26. In October 1989, Qadhafi renounced terrorism. AL MUSSAWAR (Cairo), Oct. 25, 1989 cited in Spaulding, *supra* note 18, at 19 n.2.

27. WHITE PAPER, *supra* note 17, at 9.

28. *Id.*

29. Thomas W. Lippman, *Clinton To Honor Pan Am Victims; Memorial to Flight 103 Reflects Commitment Against Terrorism*, WASH. POST, Dec. 20, 1993, at A6.

30. WHITE PAPER, *supra* note 17, at 5. The Abu Nidal Organization is responsible for at least 100 terrorist attacks and 280 deaths since its inception. *Id.* Additionally, Libya provides training and financial support to such groups as the Palestine Liberation Front, the Communist Party of the Philippines, the New People's Army, the Islamic Jihad and the Provisional Irish Republican Army. *Id.* See also OVID DEMARIS, BROTHERS IN BLOOD—THE INTERNATIONAL TERRORIST NETWORK 139, 151, 159, 175, 177, 179, 183-84, 316 (1977) (Libyan support for terrorist groups); Spaulding, *supra* note 18, at 3 (detailing several "Libyan-dominated non-governmental" organizations).

Libya also has several training camps, including camps at Al Qalah (the principle training ground for the Abu Nidal Organization), the Seven April Training Camp, Sidi Bilal Port Facility, Bin Ghashir and Ras al Hilal.³¹ Additionally, Libya uses several marginally legitimate business organizations as fronts for continuing terrorist activities. These organizations include Neutron International, a Libyan intelligence service, the Germa Shipping and Stevedoring Company, Libyan Arab Airlines and the Islamic Call Society.³²

In the context of Libya's continued sponsorship and support of international terrorism, the bombings of Pan Am Flight 103 and UTA Flight 772, the Security Council Resolutions 731 and 748 and, eventually, Lockerbie Incident Cases arose.

2. Bombing of Pan Am Flight 103

On December 21, 1988, Pan American Flight 103, on its way to New York's John F. Kennedy Airport, exploded over Lockerbie, a town in southern Scotland.³³ All 259 passengers on board were killed.³⁴ Eleven Lockerbie residents also were killed as the shattered civilian carrier crashed to the ground.³⁵

The investigation that followed indicated that Libya and Libyan agents were almost exclusively responsible for the bombing.³⁶ On November 14, 1991, the United States handed down indictments against Abdel Basset Ali Al-Megrahi and Lamen Khalifa Fhimah for their parts in the murder of the passengers and crew of Flight 103.³⁷ The Scottish courts also issued a warrant for the arrest of these two individ-

which support "unconventional political activities").

31. WHITE PAPER, *supra* note 17, at 6.

32. *Id.* at 4. For example, the Libyan Arab Airlines serves legitimate transportation purposes but also is used to run weapons and transport terrorists. *Id.* It is estimated that thirty percent of Libyan Arab Airlines employees are intelligence personnel. *Id.*

33. Michael Wines, *U.S. Will Try Diplomatic Action Before Military Strike on Libya*, N.Y. TIMES, Nov. 16, 1991, at A4.

34. Verbatim Record of the United Kingdom at 11, *Libya v. U.K.*, 1992 I.C.J. 3 [hereinafter U.K. Brief].

35. Wines, *supra* note 33.

36. WHITE PAPER, *supra* note 17, at 1. *But see* Robert H. Kupperman & Tamara Kupperman, *Pan Am 103: Facts vs. Politics*, N.Y. TIMES, Nov. 16, 1991, at A19 (suggesting that Iran and Syria also were largely responsible for the bombing).

37. Tom Post et al., *Who Paid for the Bullet?*, NEWSWEEK, Nov. 25, 1991, at 26. The indictments are reprinted and recorded at U.N. GAOR, 46th Sess., Annex, Agenda Item 125, at 2, U.N. Doc. A/46/831 (1991).

uals based on the extensive evidence gathered.³⁸

As a result of the indictments and warrants, both the United States and the United Kingdom demanded the surrender of the individuals. On November 21, 1991, the United States transmitted the indictments to Libya, directing, "As part of an acceptable Libyan response, the Government of the United States demands that the Government of Libya transfer Abdel Basset Ali Al-Megrahi and Lamén Khalifa Fhimah to the United States, in order to stand trial on the charges contained in the indictment."³⁹

While Libya acknowledged the requests, it made no satisfactory response.⁴⁰ As a result, the United States and the United Kingdom issued a joint declaration requesting that Libya:

- surrender, for trial, all those charged with the crime;
- accept responsibility for the actions of Libyan officials;
- disclose all it knew of the crime; and
- pay appropriate compensation.⁴¹

Again, no satisfactory response was received.⁴² 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.⁴³ 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.

3. Bombing of UTA Flight 772

On September 19, 1989, the French airliner Union des Transports Aériens (UTA) Flight 772, exploded over southeastern Niger, killing

38. U.S. DEP'T OF STATE, PATTERNS OF GLOBAL TERRORISM: 1991, App. D, at 75 (Apr. 1992) [hereinafter TERRORISM: 1991].

39. U.S. Brief, *supra* note 13, at 22.

40. U.K. Brief, *supra* note 34, at 18.

41. *Id.* In response, Libya renounced terrorism and claimed that it was not involved in terrorist activities. U.N. GAOR, 46th Sess., Annex, Agenda Item 127, at 2, U.N. Doc. A/46/845 (1991).

42. In fact, in a letter dated November 20, 1991, Libya denied any involvement with the bombing. U.K. Brief, *supra* note 34, at 3. Libya later indicated that it had looked into the accusations. *Id.* at 2.

43. White House spokesman Marlin Fitzwater stated: "This consistent pattern of Libyan-inspired terrorism dates from early in Qadhafi's leadership and cannot be ignored." Andrew Rosenthal, *U.S. Accuses Libya as 2 are Charged in Pan Am Bombing*, N.Y. TIMES, Nov. 15, 1991, at A1. Additionally, a State Department spokesman stated: "The bombers were Libyan Government intelligence operatives. This was a Libyan Government operation from start to finish." *Id.* at A8.

171 passengers and crew.⁴⁴ Although the Islamic Jihad essentially claimed responsibility for the bombing,⁴⁵ the investigation report submitted by the Congolese investigation team and endorsed by French judiciary officials stated that the bombing was "conceived and financed by Libya."⁴⁶

As a result of the bombing and subsequent investigation, a French magistrate issued arrest warrants for four Libyan officials.⁴⁷ Additionally, France requested that Libya make the individuals available for questioning and take other appropriate action.⁴⁸ Along with the United States and the United Kingdom, France called for Libya to cease all terrorist activities and condemn terrorism.⁴⁹

B. The Legal Context of the Order

1. The U.N. Charter

Most of the actions taken in response to Libya's sustained support of terrorism were taken pursuant to the United Nations Charter. Both the Security Council resolutions condemning the Libyan acts and imposing sanctions and the submission of the case by Libya to the ICJ find their root in the workings of the U.N. and its Charter. It is useful, therefore, to examine briefly the legal context of the Order in the Lock-

44. Investigation Report, No. 0096/PR/PCM/MDS/DCSM/CE, Peoples' Republic of the Congo (From the Investigation Commission of the Central Directorate of Military Security responsible for the case of the attack against the UTA DC 10 To the Chairman of the Central Committee of the Congolese Labor Party, President of the Republic, Head of State, Head of Government, Minister of Defense and Security) (June 3, 1990) *reprinted in* POLITICAL WARFARE: INTELLIGENCE, ACTIVE MEASURES & TERRORISM REPORT (*formerly* SOVIET INTELLIGENCE AND ACTIVE MEASURES), Nov. 1991 (Tina Delia, trans.) [hereinafter Investigation Report].

45. The Islamic Jihad, while it did not specifically claim responsibility for the bombing, stated:

We are proud of this action, which was very successful. We would like to say the French are warned not to exchange information regarding Sheik Obeid with the Israelis no more [sic]. We demand the freedom of Sheik Obeid and otherwise we will refresh the memories of the bombings in Paris of '85 and '86. Long live the Islamic Republic of Iran.

Youssef M. Ibrahim, *Bomb Suspected in Midair Wreck of French DC-10*, N.Y. TIMES, Sept. 21, 1989, at A10.

46. Investigation Report, *supra* note 44, at 11.

47. U.S. Brief, *supra* note 13, at 19.

48. U.N. GAOR, 46th Sess., Annex, Agenda Item 127, U.N. Doc. A/46/825 (1991); U.K. Brief, *supra* note 34, at 18.

49. U.N. GAOR, 46th Sess., Annex, Agenda Item 127, U.N. Doc. A/46/828 (1991).

erbie Incident Cases.

The U.N. Charter, to which all parties to this dispute are signatories, prohibits aggression. 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."⁵⁰

While aggression is not specifically defined in the Charter,⁵¹ the Charter has been read to include both the direct and indirect threat or use of force intended to induce a state to act in a certain way.⁵² Direct aggression is usually easily identified as an armed attack by one state against another, such as the recent Iraqi invasion of Kuwait.⁵³

More difficult, however, is defining and demonstrating an accepted notion of indirect aggression. The United Nations General Assembly definition of aggression accepts the notion of indirect aggression; ag-

50. U.N. CHARTER art. 2(4).

51. The Charter does not specifically define aggression, but a General Assembly resolution does.

Article 3. Any of the following acts, regardless of a declaration of war, shall qualify as an act of aggression:

(a) The invasion or attack by the armed forces of a State . . . of another State or part thereof;

. . . .

(f) The action of a State in allowing its territory, which it has placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State;

(g) The sending by or on behalf of a State of armed bands, groups, irregulars, or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein.

Definition of Aggression, G.A. Res. 3314, U.N. GAOR, 29th Sess., Supp. No. 31, at 142, U.N. Doc. A/9631 (1974) [hereinafter Aggression Resolution]. According to President Truman, the omission of a concrete definition was intentional because such a definition was a "trap for the innocent and an invitation to the guilty" and the Security Council has the power to determine aggression on a case-specific basis. *Quoted in* Nonaggression, 5 *Whiteman Digest* § 22, at 740.

52. Myres McDougal & F. Feliciano, *The Debate About Definitions*, in *NATIONAL SECURITY LAW 89-90* (John N. Moore, Frederick S. Tipson & Robert F. Turner eds., 1990).

53. The author uses the term "usually" because sometimes even an overt armed attack is not called aggression. Such was the case with the Soviet invasion of Afghanistan in the early 1980s. In that case, the General Assembly resolution condemning the action did not mention aggression. In comparison, the South African raids into Angola, which occurred around the same time as the Soviet invasion, were condemned as acts of aggression. These examples illustrate the political and emotional nature of the term aggression.

gression may be characterized by the

sending by *or on behalf of* a State of armed bands, groups, irregulars, or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above [invasion, military occupation, use of weapons, etc.], *or its substantial involvement therein*.⁵⁴

Indirect aggression, sometimes referred to as “low-intensity aggression”⁵⁵ or “unconventional violence,”⁵⁶ falls somewhere short of full-scale armed invasion across national borders and may include external assistance to insurgents, secret warfare, massive human rights violations or narcotics trafficking.⁵⁷

Recent examples of indirect aggression arguably include the early stages of the Vietnam conflict,⁵⁸ or the “war” in Central America.⁵⁹

54. Aggression Resolution, *supra* note 51, art. 3(g) (emphasis added).

55. Moore, *supra* note 3, at 3.

56. JOHN F. MURPHY, *THE UNITED NATIONS AND THE CONTROL OF INTERNATIONAL VIOLENCE* 175 (1982).

57. Moore, *supra* note 3, at 4. Senator Sam Nunn has stated:

In normal times, criminal activity operates at the margins in most societies. . . . [D]rug cartels have long since crossed over these margins, feeding the country's economy and gaining in return some support from the public. As a result, they are now locked in a power struggle not merely for the marketing territory against another drug gang, but for national political power and authority against the country's established Government.

Structure of the International Drug Trafficking Organizations: Hearings Before the Permanent Senate Subcomm. on Investigations of the Comm. on Government Affairs, 101st Cong., 1st Sess., at 2 (1989). Or as former State Department Legal Advisor Abraham Sofaer stated:

In recent months, evidence has accumulated that some of these traffickers have been trained in terrorist tactics. They have enormous resources and small armies at their command. Their modus operandi is to try to intimidate or disrupt the legal process in States. . . . They have been provided safe-haven, or given approval to transit, by governments in complicity with the drug traffickers.

FBI Authority to Seize Suspects Abroad: Hearing Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary, 101st Cong., 1st Sess., at 37 (1989) [hereinafter *FBI Authority*]. General Assembly Resolution 46/51, concerning the elimination of international terrorism, also notes the connection between drug traffickers and terrorist organizations. G.A. Res. 46/51, U.N. GAOR, 46th Sess., 67th plen. mtg., Agenda Item No. 125, U.N. Doc. A/RES/46/51 (1991).

58. John Norton Moore, *International Law and the United States Role in Vietnam: A Reply*, in *THE VIETNAM WAR AND INTERNATIONAL LAW* 401, 403-08 (R. Falk ed. 1968).

59. Military and Paramilitary Activities in and against Nicaragua (Nicar. v.

This type of aggression often gives rise to the permissible right of defense. More controversial examples of "aggression" include the slaughter of Cambodians by Pol Pot, an act of genocide,⁶⁰ and the sustained drug trafficking in Peru.⁶¹

Most importantly, however, the concept of impermissible indirect aggression has been used to describe terrorist acts, especially when they are state-sponsored.⁶² The General Assembly employed this description in its resolution on measures to eliminate international terrorism. The resolution recalled the definition of aggression, thereby impliedly including terrorism as a form of aggression.⁶³

The Security Council resolutions responding to the Libyan aggression specify article 2(4)⁶⁴ as the basis for international action. According to Resolution 748, the Security Council was "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."⁶⁵

U.S.), 1986 I.C.J. 1 (dissenting opinion of Judge Schwebel); John Norton Moore, *The Secret War in Central America and the Future World Order*, 80 AM. J. INT'L L. 43 (1986).

60. See Richard B. Lillich, *Humanitarian Intervention: A Reply to Dr. Brownlie and a Plan for Constructive Alternatives*, in *LAW AND CIVIL WAR IN THE MODERN WORLD* 229 (John N. Moore ed. 1974) (defining some humanitarian intervention as an acceptable response to an article 2(4) violation).

61. See Andrew K. Fletcher, Note, *Pirates and Smugglers: An Analysis of the Use of Abductions to Bring Drug Traffickers to Trial*, 32 VA. J. INT'L L. 233 (1992) (arguing that the response of abducting drug traffickers is an acceptable response to their aggression).

62. "[S]uch activities, when emanating directly from the Government itself or indirectly from organizations receiving from it financial or other assistance or closely associated with it by virtue of the constitution of the State concerned, amount to a breach of International Law." 1 LAUTERPACHT INTERNATIONAL LAW 293 (8th ed. 1955). See also Lillich & Paxman, *supra* note 4, at 217 (arguing that States may be held responsible for terrorist activities which take root within their State when the State allows such activity). This is also the U.S. government's position, as stated by Judge Sofaer who noted:

Every State retains the right of self-defense, recognized in Article 51 of the U.N. Charter. Thus, a State may take appropriate action in order to protect itself and its citizens against terrorist attacks. . . . State-sponsored terrorism has created new dangers for civilized peoples, and the responses of the United States in Libya and elsewhere have gained ever wider recognition as having been necessary and effective methods for defending Americans.

FBI Authority, *supra* note 57, at 34-36.

63. G.A. Res. 46/51, U.N. GAOR, 46th Sess., 67th plen. mtg., Agenda Item No. 125, U.N. Doc. A/RES/46/51 (1991).

64. See Aggression Resolution, *supra* note 51.

65. S.C. Res. 748, U.N. SCOR (1992).

The Resolution states directly:

Reaffirming that, in accordance with the principle in Article 2, paragraph 4, of the Charter of the United Nations, every State has the duty to refrain from organizing, instigating, assisting or participating in terrorist acts in another State or acquiescing in organized activities within its territory directed towards the commission of such acts, when such acts involve a threat or use of force.⁶⁶

It is interesting and relevant to note that article 2(4) was not mentioned in the Gulf War Resolutions, the first and only time since the founding of the United Nations that one member state attempted to annex the entire territory of another member state by force.⁶⁷ The specific reference to article 2(4) in this instance evidences the Security Council's intent to include state-sponsored terrorism as an illegal act of aggression prohibited by article 2(4).⁶⁸

The corollary to the prohibition of aggression in the U.N. Charter is the doctrine of self-defense. To preserve world order and security, states must not only react forcefully against the aggressive use of force, they must support other states' responses to aggression. Article 51 of the Charter permits the defensive use of force, either individually or collectively.⁶⁹ The defensive use of force must, however, be necessary

66. *Id.*

67. Oscar Schachter, *United Nations Law in the Gulf Conflict*, 85 AM. J. INT'L L. 452, 452-53 (1991).

68. John F. Murphy's view is helpful in understanding the importance of this statement.

In theory, the Security Council could conclude that a state's support of international terrorism constituted a threat to international peace and security and authorize member states of the United Nations to utilize armed force to bring such support to an end. However, for a variety of political and perhaps legal reasons . . . this is not a realistic possibility.

Murphy, *supra* note 3, at 465. While the Security Council did not authorize an armed response, it did authorize sanctions. See *infra* part II.B.3. (pursuant to the aggression defined in article 2(4)).

69. Article 51 reads:

Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defense shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time

and proportional⁷⁰ and, at least in the low-intensity setting, responsive to an ongoing and sustained pattern of aggression.⁷¹ Therefore, any action against the Libyan government under the foregoing conditions should be viewed as a permissible response to aggression, and not aggression itself.

The basic framework within which the Security Council may respond to aggression is found in Chapter VII.⁷² Article 39 allows the Security Council to "determine the existence of any threat to the peace, breach of the peace, or act of aggression and [to] make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42 to maintain or restore international peace and security."⁷³

The existence of a "threat to the peace" is determined by the Council on an *ad hoc* basis.⁷⁴ Both Resolutions 731 and 748 specifically mention that international terrorism constitutes a threat to international peace and security.⁷⁵ Once a threat to international peace and security is established, the Security Council may authorize forceful action under article 42⁷⁶ or "non-forceful" action under article 41.⁷⁷

Specifically relevant to the Lockerbie Incident Cases is article 41, which states:

such action as it deems necessary in order to maintain or restore international peace and security.

U.N. CHARTER art. 51. It is interesting to note that the French translation of article 51 permits the defense against aggression rather than against an "armed attack" ("aggression armée" as a "droit naturel").

70. LOUIS HENKIN, *HOW NATIONS BEHAVE* 141 (2d ed. 1979); Myres McDougal & F. Feliciano, *Conditions and Expectations of Necessity*, in *LAW AND MINIMUM PUBLIC ORDER* 231-41 (1961); *The Caroline*, 2 MOORE DIGEST § 217, at 412.

71. Moore, *supra* note 3, at 29.

72. U.N. CHARTER ch. VII. Resolution 748 specifically mentions that the sanctions imposed by the Security Council were taken pursuant to the powers in this chapter. S.C. Res. 748, U.N. SCOR.

73. U.N. CHARTER art. 39.

74. See generally LELAND M. GOODRICH ET AL., *CHARTER OF THE UNITED NATIONS* 295-300 (1969).

75. S.C. Res. 748, U.N. SCOR.

76. U.N. CHARTER art. 42. It should be noted, however, that Professor Louis Henkin makes a fairly persuasive argument against the use of military force to respond to acts of terrorism, but only in cases where the terrorism is not ongoing and sustained. Louis Henkin, *Use of Force: Law and U.S. Policy*, in *RIGHT AND MIGHT: INTERNATIONAL LAW AND THE USE OF FORCE* 62 (1989). Military force may be a legal response to terrorist aggression when that aggression is ongoing and sustained. See Evans, *supra* note 5, at 236-37; Moore, *supra* note 3, at 15.

77. U.N. CHARTER art. 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.⁷⁸

This article was utilized in Resolution 748.⁷⁹

Other relevant Charter articles include articles 1, 24, 25 and 103. Article 1 defines the purposes of the United Nations.⁸⁰ Specifically, one of the purposes of the United Nations is the maintenance of international security.⁸¹ Toward that end, the United Nations is to "take effective collective measures for the prevention and removal of threats to the peace."⁸² Additionally, articles 24 and 25 establish that the Security Council has "*primary* responsibility for the maintenance of international peace and security"⁸³ and the power to bind signatories to the decisions of the Security Council.⁸⁴ Finally, the Charter directs that when obligations under the Charter and obligations arising out of other international obligations conflict, the Charter prevails.⁸⁵

The role of the ICJ also is defined in the United Nations Charter. Article 92 states that the ICJ is the principal judicial organ of the United Nations.⁸⁶ Although each Member of the United Nations is an *ipso facto* party to the Statute of the International Court of Justice,⁸⁷ the jurisdiction of the ICJ is voluntary.⁸⁸ The Charter does not, however, define the balance of power between the ICJ and the Security Council, nor does it state that the ICJ has the power of judicial review over actions taken by other branches of the United Nations. Rather:

78. *Id.*

79. *See infra* part II.B.3.b.

80. U.N. CHARTER art. 1.

81. *Id.* art. 1(1).

82. *Id.*

83. U.N. CHARTER art. 24 (emphasis added).

84. *See* U.N. CHARTER art. 25.

85. U.N. CHARTER art. 103.

86. U.N. CHARTER art. 92.

87. U.N. CHARTER art. 93.

88. *See* STATUTE OF THE INTERNATIONAL COURT OF JUSTICE art. 36(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 and conventions in force.").

The 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 one of superiority. Consequently, it does not exist as a general "constitutional Court" of the United Nations. There is no duty on anyone to seek its opinion on the legal issues when questions of the meaning of the Charter arise. In fact, it was decided at the San Francisco Conference that each organ of the United Nations would be free itself to interpret the Charter as and when the circumstances require.⁸⁹

It should be noted, however, that although the Court may decide issues brought before it, the Security Council has the primary responsibility for the maintenance of international peace and security.⁹⁰

2. The Montreal Convention

Interpretation of the 1971 Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (the "Montreal Convention")⁹¹ provides much of the substance of the Libyan application to the ICJ. The ultimate resolution of the Lockerbie Incident Cases depends upon the ICJ's interpretation of the Convention. Without the Montreal Convention, Libya may never have brought the Lockerbie Incident Cases before the Court.⁹²

Libya first indicated its intent to arbitrate the issues surrounding the prosecution of Al-Megrahi and Fhimah under the Montreal Convention in a letter dated January 17, 1992,⁹³ in which Libya invoked the Montreal Convention and requested arbitration of the dispute.⁹⁴ Libya claimed that under the Montreal Convention, Libya has the right and the duty to investigate and prosecute the individuals and to

89. SHABTAI ROSENNE, *THE WORLD COURT: WHAT IT IS AND HOW IT WORKS* 32, (4th rev. ed. 1989).

90. U.N. CHARTER art. 24. For a further discussion of this issue, see *infra* part IV.A.

91. Convention on Suppression of Unlawful Acts Against the Safety of Civil Aviation, Sept. 23, 1971, 24 U.S.T. 565, 974 U.N.T.S. 177 [hereinafter *Montreal Convention*]. For a detailed collection of other anti-terrorist treaties and conventions see Murphy, *supra* note 3, at 455-62.

92. Libya relies on the Convention to show that the sanctions are impermissible and will cause needless and irreparable damage if Libya's interpretation of the Convention prevails. See *infra* part III.B.1.

93. U.S. Brief, *supra* note 13, at 43.

94. A copy of the letter is recorded at U.N. SCOR, 47th Sess., Annex, U.N. Doc. S/23441 (1992). Libya, the United States and the United Kingdom are all signatories to the Montreal Convention.

exercise jurisdiction over them.⁹⁵ Specifically, the letter called for the "implementation of article 14" of the Convention.⁹⁶

The Montreal Convention is concerned with the protection of civil aviation.⁹⁷ Its central purpose of establishing legal consequences for the destruction of civil aircraft is illustrated in article 1:

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.⁹⁸

It is unquestionable that the allegations against Al-Megrahi and Fhimah, if true, would comprise such offenses, and are therefore under the umbrella of the Convention if properly invoked.

However, Libya primarily relied upon article 14, which provides:

Any dispute between two or more Contracting States concerning the interpretation or application of this Convention which cannot be settled through negotiation, shall, at the request of one of them, be submitted to arbitration. If within six months from the date of the request for arbitration the Parties are unable to agree on the organization of the arbitration, any one of those Parties may refer the dispute to the International Court of Justice by request in conformity with the Statute of the Court.⁹⁹

95. *Id.* Libya claimed that it was acting in accordance with article 5, paragraph 2 of the Montreal Convention.

96. *Id.*

97. It is interesting to note that the Montreal Convention does not make any specific reference to terrorism.

98. Montreal Convention, *supra* note 91, art. 1, 974 U.N.T.S. at 178-79.

99. *Id.* art. 14(1), 974 U.N.T.S. at 183.

Libya relied upon this article to establish the Court's jurisdiction and to request the provisional order enjoining sanctions.

In addition to these two articles, several other provisions of the Convention also bear upon the issue at hand. For example, article 5(2) entitles Libya to establish jurisdiction over Al-Megrahi and Fhimah because they were present in Libyan territory.¹⁰⁰ Article 5(3) allows Libya to exercise criminal jurisdiction over the individuals in accordance with Libyan national law.¹⁰¹ Article 7 requires Libya to submit the case to competent authorities for prosecution.¹⁰² Finally, article 11(1) requires the United States and the United Kingdom to provide assistance with the criminal proceedings against Al-Megrahi and Fhimah.¹⁰³ Libya has asserted that each of these articles has been violated.¹⁰⁴

3. The Security Council Resolutions

United Nations Security Council Resolutions 731¹⁰⁵ and 748¹⁰⁶ provoked Libya's request for provisional measures in the Lockerbie Incident Cases. Together, these resolutions punished Libya for its failure to surrender Al-Megrahi and Fhimah, the two individuals allegedly involved in the bombing of Pan Am Flight 103.¹⁰⁷

a. Resolution 731

Resolution 731 requested Libya to comply with U.S., U.K. and French requests concerning the bombing of Pan Am Flight 103 and

100. *See id.* art. 5(2), 974 U.N.T.S. at 181.

101. *See id.* art. 5(3), 974 U.N.T.S. at 182.

102. *See id.* art. 7, 974 U.N.T.S. at 182.

103. *See id.* art. 11(1), 974 U.N.T.S. at 183. Article 11(1) reads: "Contracting States shall afford one another the greatest measure of assistance in connection with criminal proceedings brought in respect of the offenses. The law of the State requested shall apply in all cases."

104. U.N. SCOR, 47th Sess., Annex, U.N. Doc. S/23441 (1992).

105. S.C. Res. 731, U.N. SCOR (1992).

106. S.C. Res. 748, U.N. SCOR (1992). It is important to note that Resolution 748 was not implemented until after Libya had submitted its claim to the ICJ. It did, however, anticipate that sanctions such as those mandated by Resolution 748 would be requested and approved, and in that sense, Libya's request to the ICJ was a preemptive precaution.

107. Libya essentially acceded to France's demands concerning the individuals involved in the bombing of UTA Flight 772; France did not request their surrender. The resolutions were concerned with Libyan terrorism as a whole, but the sanctions revolve around the surrender of Al-Megrahi and Fhimah.

UTA Flight 772.¹⁰⁸ The resolution states:

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

.....
Strongly deplores the fact that the Libyan Government has not yet responded effectively to the above requests to cooperate fully in establishing responsibility for the terrorist acts referred to above against Pan American flight 103 and Union de transports aereens flight 772.¹⁰⁹

Under the terms of the resolution, the three governments required Libya to renounce terrorism, to provide information regarding the individuals involved in the bombing of UTA Flight 772 and to surrender the individuals involved in the bombing of Pan Am Flight 103. None of the requests were unusually bold—except the request to surrender Al-Megrahi and Fhimah. This was an unprecedented request for the Security Council; it was the first time the Council had requested the surrender of a member nation's nationals as well as the first time the Council had ever directly implicated a member state in involvement in state-sponsored terrorism.¹¹⁰ Ultimately, the request for the surrender of the two suspects was the stumbling block to Libya's compliance with the resolution.¹¹¹

In addition, the resolution requested the Secretary-General to "seek the cooperation" of the Libyans in responding to the resolution.¹¹² Although the resolution was made under Chapter VI of the U.N. Charter and was, therefore, non-binding,¹¹³ non-binding Security

108. S.C. Res. 731, U.N. SCOR (1992). The resolution was passed unanimously. Paul Lewis, *Libya Unyielding Despite U.N. Demand*, N.Y. TIMES, Jan. 22, 1992, at A8.

109. S.C. Res. 731, U.N. SCOR (1992) (citations omitted).

110. Lewis, *supra* note 108, at A8; Paul Lewis, *Libya is Expected to Get U.N. Demand on Bomb Suspects*, N.Y. TIMES, Jan. 21, 1992, at A1.

111. See *infra* parts III.A and IV.B.2.

112. S.C. Res. 731, U.N. SCOR (1992). For a description of the Secretary-General's report, see *infra* part III.A.

113. U.N. CHARTER art. 36(1). The Security Council is not required to declare

Council resolutions, nevertheless, carry substantial weight as evidence of international law and will. This is particularly true in light of the fact that Resolution 731 addresses the universal concern about "acts of international terrorism that constitute threats to international peace and security."¹¹⁴

b. Resolution 748

When the requests of Resolution 731 were not adequately addressed by Libya,¹¹⁵ the Security Council adopted Resolution 748.¹¹⁶ This resolution was adopted under Chapter VII of the United Nations Charter and imposed mandatory sanctions on Libya.¹¹⁷

Specifically, Resolution 748 called for three types of actions. First, the resolution demanded the surrender of Al-Megrahi and Fhimah in compliance with paragraph three of Resolution 731.¹¹⁸ Second, it required that Libya demonstrate its renunciation of terrorism by "concrete actions."¹¹⁹ Finally, the resolution imposed specific sanctions.¹²⁰

explicitly under which chapter it is acting, but the language in Resolution 731, which includes the terms "concerned," "urges," "requests," and the like indicates that the action was taken under Chapter VI.

114. S.C. Res. 731, U.N. SCOR (1992).

115. See *Libya; Over the Top*, ECONOMIST, Apr. 18, 1992; Trever Rowe, *U.N. Votes to Put Embargo on Libya; April 15 Deadline Set for Surrendering Lockerbie Bomb Suspects*, WASH. POST, Apr. 1, 1992, at A1 (both discussing Libya's failure to hand over the suspects). Resolution 748 specifically cited this failure: "*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." S.C. Res. 748, U.N. SCOR (1992).

116. S.C. Res. 748, U.N. SCOR (1992). The vote to impose sanctions was ten for and five abstentions. Those states which abstained (Cape Verde, China, India, Morocco and Zimbabwe) did so because they desired the ICJ to rule on the issue (the applications had previously been submitted by Libya) and wished a greater attempt at a negotiated solution. Rowe, *supra* note 115, at A1.

117. S.C. Res. 748, U.N. SCOR (1992). Because the resolution was adopted under Chapter VII of the United Nations Charter, it is binding upon all member states. Chapter VII specifically provides:

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 art. 41. The Council also acted under article 50 of Chapter VII. S.C. Res. 748, U.N. SCOR (1992).

118. S.C. Res. 748, U.N. SCOR (1992), para. 1.

119. *Id.* para. 2. The "concrete actions" that are acceptable are not specifically

The sanctions included the following:

- A prohibition of air flights to take off from, land in, or overfly a state's territory if the aircraft has taken off from, or is destined to land in, Libya. This prohibition does not apply in the case of "significant humanitarian need;"¹²¹
- A prohibition of the supply or maintenance of Libyan aircraft;¹²²
- A prohibition of the sale or supply to Libya or its nationals of military weapons, ammunition, vehicles, equipment or parts;¹²³
- A prohibition of the supply to Libya or its nationals of military training or advice;¹²⁴
- A requirement for states to withdraw any nationals in Libya who advise Libya on military matters;¹²⁵
- A requirement for states to "significantly reduce the number and the level of the staff at Libyan diplomatic missions and consular posts and restrict or control the movement within their territory of all such staff who remain;"¹²⁶
- A requirement of states to prevent the "operation of all Libyan Arab Airlines offices;"¹²⁷
- A requirement to expel or deny entry of Libyan nationals who have been involved in terrorist activities.¹²⁸

These sanctions were applied as of April 15, 1992 and remain in effect as of the time of this writing.¹²⁹

delineated. U.S. officials, however, have suggested that closing five terrorist training camps would be a good start. Rowe, *supra* note 115, at A1. This language is undoubtedly in response to Libya's habit of verbal renunciation of terrorism while continuing to support it.

120. S.C. Res. 748, U.N. SCOR (1992), paras. 4-6. Additionally, the resolution called for states to abide by the resolution, set up reporting requirements, review the sanctions and continue Secretary-General coordination with Libya. *Id.* paras. 7-13.

121. *Id.* para. 4(a).

122. *Id.* para. 4(b).

123. *Id.* para. 5(a).

124. *Id.* para. 5(b).

125. *Id.* para. 5(c).

126. *Id.* para. 6(a).

127. *Id.* para. 6(b).

128. *Id.* para. 6(c).

129. Although the sanctions are reviewed periodically, they continue pursuant to Resolution 748 until the Security Council acts to remove them. *See* S.C. Res. 883, U.N. SCOR (1993), para. 16 (expressing readiness to review sanctions if Libya surrenders the bombings suspects). To date, there has been no serious effort to remove the sanctions and they have, in fact, been expanded by Security Council Resolution 883 (1993).

III. THE ORDER OF THE INTERNATIONAL COURT OF JUSTICE

A. *Pre-Order Events*

A combination of events led to the Libyan decision to challenge the imposition of sanctions in the International Court of Justice. Libya could have satisfied the conditions required by the resolution, thereby averting the sanctions. Libya, however, did not. The basic block was the demand for surrender of Al-Megrahi and Fhimah.¹³⁰

Because Libya did not surrender the two Libyans, Libya was found not to have complied with the resolutions and the sanctions went into effect. The Libyans refused to surrender the individuals and then brought the Lockerbie Incident Cases before the ICJ for three reasons. First, Libya was concerned that to surrender Al-Megrahi and Fhimah would be tantamount to admitting guilt, a proposition the Libyan government was probably unwilling to face.¹³¹ Second, the refusal to surrender the men and the following application to the ICJ were attempts to stall the prosecution and the sanctions.¹³² Finally, according to Libya, it could not surrender Al-Megrahi and Fhimah because Libyan domestic law prohibits the extradition of nationals.¹³³

While the first two explanations of Libya's refusal are unspoken and practical, its third and stated reason merits closer scrutiny. Following the requirements of Resolution 731, the Secretary-General attempted to cooperate with the Libyan government so that the Libyans could fully and effectively respond to the Council's requests.¹³⁴ The

130. See *infra* part IV.B.2. for some of the reasons that the United States and the United Kingdom demanded their surrender.

131. This is not at all surprising considering Libya's continued public denial of sponsoring terrorism while privately maintaining training camps and funding terrorist organizations. See *supra* part II.A.1. See also *ECONOMIST*, *supra* note 115. ("The vehemence with which Mr. Qaddafi refuses to hand over the wanted men strikes some of his accusers as an admission of guilt.").

132. The State Department noted as much. See Barbara Crossette, *U.S. Dismisses Libyan Offer on Neutral Trial Site for Bomb Suspects*, N.Y. TIMES, Mar. 3, 1992, at A10 ("The State Department said today that a Libyan offer to turn over to a neutral country for trial the two suspects in the 1988 bombing of a Pan Am jet was nothing more than a delaying tactic.").

133. U.N. SCOR, 47th Sess., para. 4(a), U.N. Doc. S/23672 (1992). Additionally, Libya may have been concerned that even if Al-Megrahi and Fhimah were handed over to U.S. or U.K. authorities, the sanctions would not be lifted because Resolution 748 calls for "concrete actions" renouncing the support for terrorism. S.C. Res. 748, U.N. SCOR (1992).

134. S.C. Res. 731, U.N. SCOR (1992), para. 4. The reports of the Secretary General are found at U.N. SCOR, 47th Sess., U.N. Doc. S/23574 (1992) and U.N. SCOR, 47th Sess., U.N. Doc. S/23672 (1992).

Libyan government claimed, however, that it could not comply with the resolution because it could not extradite Al-Megrahi and Fhimah. According to Ali Treiki, the Libyan representative to the Arab League, "[T]here is no law which requires us to hand over our citizens. . . . This is something we can't do."¹³⁵ Specifically, the Libyan government argued that there are "constitutional obstructions preventing Colonel Qaddafi or the Libyan administration from handing over Libyan citizens abroad for trial in the absence of an extradition treaty."¹³⁶ There is no extradition treaty between Libya and the United States nor between Libya and the United Kingdom.¹³⁷

The pretextual nature of this claim is evident, however, from Libya's offer to hand over Al-Megrahi and Fhimah to a neutral country for trial.¹³⁸ According to Ibrahim Bishari, Libya's Foreign Minister, Libya was ready to have the individuals tried "in front of a neutral court in any neutral country."¹³⁹ Therefore, despite Libya's claims to the contrary, it appears that Libya indeed does have mechanisms by which the Libyan government can surrender citizens to third-party tribunals.

Instead of handing over Al-Megrahi and Fhimah to the United States, the United Kingdom, or a neutral third country, the Libyan government has claimed that Al-Megrahi and Fhimah have been charged by Libya and that legal proceedings have begun.¹⁴⁰ In addi-

135. Lewis, *supra* note 108, at A1.

136. U.N. SCOR, 47th Sess., U.N. Doc. S/23672 (1992). Libya also stated: I should like to say that the Jamahiriya, . . . did not refuse extradition in itself. The domestic institutions of the Jamahiriya, however, whether administrative or judicial, were faced with a legal obstacle, namely that the Libyan law which has been in force for more than 30 years does not permit the extradition of Libyan nationals. . . . The competent authorities in the Jamahiriya could find nothing that would enable them to respond to the requests made by these States other than by violating the law, and this is something that cannot be done in any civilized State which is a Member of the United Nations.

Id.

137. Such an impediment, however, could be overcome by an appeal to the Libyan People's Committee, but such an appeal would delay proceedings and offer no guarantee that the Libyan People's Committee would vote to surrender the individuals. *Id.*

138. U.N. SCOR, 47th Sess., Annex I, U.N. Doc. S/23672 (1992).

139. Crossette, *supra* note 132, at A10.

140. U.N. SCOR, 47th Sess., U.N. Doc. S/23574 (1992). The United States may not have wanted the Libyans or another group to try Al-Megrahi and Fhimah because it feared that another jurisdiction would hinder the trial, either for political or practical reasons. For example, the Arab League may decide that politically they could not afford to convict the individuals, or many states, including Libya, may not be practically able to provide the protections to the accused nor the investigatory sophistication com-

tion, Libya has proposed that an inquiry be conducted by neutral parties on Libyan soil, that an international tribunal conduct a trial (although there are no international criminal tribunals), and either that Al-Megrahi and Fhimah be surrendered to the Secretary-General or that Al-Megrahi and Fhimah be turned over to the League of Arab States pending the judgement of the ICJ.¹⁴¹ None of these alternatives was acceptable to the United States or the United Kingdom who continued to demand the surrender of Al-Megrahi and Fhimah.

The final noteworthy pre-Order event was Libya's invocation of article 14 of the Montreal Convention.¹⁴² Libya appealed to the ICJ on March 3, 1992 naming the United States and the United Kingdom as party-respondents.¹⁴³ Libya did not include France as a party-respondent in its application to the ICJ because France did not include extradition or surrender requests in its demands to Libya.¹⁴⁴

*B. Arguments Before the ICJ*¹⁴⁵

1. Libya

On March 3, 1992, Libya applied to the ICJ to institute proceedings against the United States¹⁴⁶ and the United Kingdom [the "Application"].¹⁴⁷ The basis for the Application was article 14(1) of the Mon-

mon to cases in the United States or the United Kingdom. See N.C. Livingston, *Straight Talk About National Principles*, in *SEA POWER* 21-22 (Oct. 1991) (discussing German hesitation, due to "political and economic," reasons to convict Abbas and Mohammed Hamadi for their part in the 1985 murder of U.S. Navyman, Robert Dean Stethem, during the 1985 hijacking of TWA Flight 847).

141. Verbatim Record of Libya, at 14, *Libya v. U.S.*, 1992 I.C.J. 114, [hereinafter *Libyan Brief*]. Libya filed two separate applications, one against the United States and one against the United Kingdom. They are essentially the same.

142. U.N. SCOR, 47th Sess., Annex, U.N. Doc. S/23441 (1992).

143. Application Instituting Proceedings Submitted by the Government of the Socialist Peoples' Libyan Arab Jamahiriya (against the United States), *Libya v. U.S.*, 1992 I.C.J. 114 [hereinafter *Application*].

144. *Libyan Brief*, *supra* note 141, at 14.

145. It is important to recognize that Libya's argument and the U.S. and U.K. responses discussed in this Article, concerning the Order, are separate and distinct from the arguments that will be delivered in the merits phase of the Lockerbie Incident Cases. The issue emanating from the Order is whether the ICJ may enjoin the Security Council from imposing sanctions while the merits are considered. On the other hand, the issue to be considered on the merits is whether the Montreal Convention applies either to give Libya exclusive jurisdiction over the accused or to require the parties to the dispute to arbitrate the issue of jurisdiction over the accused.

146. *Libya v. U.S.*, 1992 I.C.J. at 115.

147. Application Instituting Proceedings Submitted by the Government of the So-

trear Convention which requires arbitration when a dispute arises between signatory states concerning the interpretation or application of the Convention.¹⁴⁸ If arbitration proves unsuccessful, article 14(1) provides that after six months, one of the parties may submit the case to the ICJ.¹⁴⁹ The ICJ, in turn, accepts jurisdiction for "matters specially provided for . . . in treaties and conventions in force."¹⁵⁰ The dispute over interpretation and application of the Convention concerns the surrender of Al-Megrahi and Fhimah.

Libya contended that it has complied with the terms of the Convention in establishing jurisdiction over the accused and in submitting them to the proper Libyan authorities for prosecution while denying extradition pursuant to Libyan domestic law. Libya asserted that the U.S. demand for the surrender of Al-Megrahi and Fhimah and refusal to aid the Libyan investigation violate the Convention.¹⁵¹ Furthermore, Libya argued that negotiation has failed and international arbitration has been rejected by the United States in violation of the Convention.¹⁵² In sum, because the Convention is the "only appropriate Convention in force between the Parties" the Convention is binding and the two suspects ought to be tried in Libya.¹⁵³

On the same day that the applications were filed, Libya also requested the indication of provisional measures for protection against the United States¹⁵⁴ and the United Kingdom.¹⁵⁵ The requests for provisional protection measures were the subject of arguments before the ICJ; however, the actual requests, as well as the arguments, were made prior to the Security Council's adoption of Resolution 748, which imposed the sanctions, on March 31, 1992.¹⁵⁶

cialist Peoples' Libyan Arab Jamahiriya (against the United Kingdom), *Libya v. U.K.*, 1992 I.C.J. 3 [hereinafter Application against the U.K.].

148. Application, *supra* note 143, at 1. See Montreal Convention, *supra* note 91, art. 14(1), 974 U.N.T.S. at 183.

149. Montreal Convention, *supra* note 91, art. 14, 974 U.N.T.S. at 183.

150. STATUTE OF THE INTERNATIONAL COURT OF JUSTICE art. 36(1).

151. Application, *supra* note 143, at 7-9.

152. *Id.* at 6.

153. *Id.* at 7.

154. Application, *supra* note 143, at 1. Interim protection is available to the parties under article 73 of the Rules of the Court of International Justice.

155. Application against the U.K., *supra* note 147.

156. The timing of the requests indicates that Libya anticipated that some sort of action would be taken against it and was taking steps to avoid that action. The application demonstrates that Libya was concerned about this eventuality, especially in terms of the use of force. The application requested the ICJ to rule that the United States is under a legal obligation 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

Although some have suggested that the application and request for interim protection were submitted by Libya as a delaying tactic,¹⁵⁷ Libya's stated reason for the request for interim protection was preservation of Libya's rights. According to the request:

The United States has indicated that 'standard procedures are clearly inapplicable', and that it may seek or impose economic, air and other sanctions against Libya if Libya does not comply with the United States' demands. While such actions are clearly illegal and inappropriate under the applicable provisions of the Montreal Convention, particularly when Libya is complying in full with that Convention, of cause for even greater concern is the United States' refusal to rule out the use of armed force against Libya if the accused are not surrendered. . . . [I]t is imperative that a situation not be permitted to arise whereby Libya's rights would be irreparably damaged either in fact or in law.¹⁵⁸

As a result, Libya requested the Court to enjoin the United States from any action designed to compel the accused's surrender and to ensure that "no steps are taken that would prejudice in any way the rights of Libya with respect to the legal proceedings."¹⁵⁹

The Libyan argument for provisional measures to enjoin the United States from any further action against Libya focused on three key points. First, Libya asserted that the dispute concerning the Montreal Convention and the Montreal Convention itself, gave the ICJ jurisdiction to hear both the provisional measures argument and the merits phase. Second, Libya argued that the requisite conditions necessary for the indication of interim measures were present. Finally, Libya asserted that the relationship between the Security Council and the ICJ did not preclude the Court from hearing this matter.

Libya contends that the Montreal Convention gives the ICJ jurisdiction to hear the Lockerbie Incident Cases¹⁶⁰ because the Montreal

from all violations of the sovereignty, territorial integrity, and the political independence of Libya. Application, *supra* note 143, at 10. Resolution 748 imposing sanctions was, however, in effect as of the date of the Order (Apr. 14, 1992).

157. See Crossette, *supra* note 132 and accompanying text. The delaying tactic theory may also be supported by the fact that Libya has requested eighteen months to prepare for the merits phase of the case.

158. Application, *supra* note 143, at 1-2.

159. *Id.* at 3.

160. Additionally, for interim measures to be imposed, there must be a showing of *prima facie* jurisdiction in relation to the principal application to the ICJ. Military and

Convention provides the sole mechanism through which a dispute between the parties over individual acts of terrorism may be settled. Furthermore, the general jurisdiction of the ICJ includes all cases "which the parties refer to it and all matters specially provided for in the Charter of the United Nations or in treaties and conventions in force."¹⁶¹ The Montreal Convention gives the ICJ such jurisdiction.¹⁶²

Under Libya's interpretation of the Montreal Convention, when a dispute arises between contracting parties concerning the interpretation or application of the Convention and the parties are not able to agree on an arbitration procedure to settle the dispute, a party may refer the case to the ICJ.¹⁶³ Libya noted that such a dispute existed over the surrender of Al-Megrahi and Fhimah and further noted that its request for arbitration was refused.¹⁶⁴ More importantly, and probably in anticipation of the American and British defense, Libya contended that the major issue concerned their right to try Al-Megrahi and Fhimah as individual terrorist actors and not as state agents carrying out state objectives. According to Professor Salmon, who argued this aspect of the case before the ICJ:

Even if we were to accept that there was *another dispute*, as was alleged during the Council's meeting on 21 January 1992, and one which would be Libya's implication and international responsibility through its two nationals, the fact would nevertheless remain that the question of the culpability of the two nationals is a necessary, yet all the same not sufficient, condition for acknowledging Libya's international responsibility. . . . The culpability of the two nationals is the key to the whole case. Failing this culpability, there is no responsibility of the Libyan Government. Hence, this *condition* is *necessary*. Yet it is not *sufficient*.¹⁶⁵

Therefore, Libya contended that the primary dispute involved Libya's right to exercise jurisdiction over the two nationals, pursuant to the Montreal Convention.

Libya also claimed that the six month requirement under article

Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.), 1984 I.C.J. 169, 179 (Order of Provisional Measures of May 10); ROSENNE, *supra* note 89, at 96.

161. STATUTE OF THE INTERNATIONAL COURT OF JUSTICE art. 36(1).

162. Montreal Convention, *supra* note 91, art. 14, 974 U.N.T.S. at 183.

163. Libyan Brief, *supra* note 141, at 39.

164. *Id.* at 40-44.

165. *Id.* at 45.

14(1) of the Montreal Convention did not bar the jurisdiction of the Court. Professor Salmon argued that the alleged American and British refusal to negotiate or arbitrate acted as a pre-emptory dismissal of the six month waiting period indicated in article 14(1).¹⁶⁶

Once *prima facie* jurisdiction over the principal application is established, requested interim measures must meet the necessary conditions.¹⁶⁷ The power to impose interim measures is "exceptional" and the power is not taken lightly by the Court.¹⁶⁸ Generally it is done, much for the same reasons that injunctions are issued in the United States, to preserve the respective rights of the parties.¹⁶⁹ Libya argued that the right to be preserved was Libya's right to try its nationals without U.S. or U.K. intervention.¹⁷⁰

Professor Brownlie, arguing this segment before the ICJ, pointed to five conditions rendered necessary for indication of interim measures. First, the requested interim measures relate to the protection of rights in dispute in the Application.¹⁷¹ Enjoining the United States and the United Kingdom from taking any action which would compel Libya to surrender its nationals would protect Libyan rights. Second, there is a "reasonable possibility" that the rights the applying state wishes to protect exist.¹⁷² In this case, Libya claimed the right under the Montreal Convention to try its nationals.¹⁷³ Third, the claims in the Application are *prima facie* admissible.¹⁷⁴ Libya asserted that under article 14(1) of the Montreal Convention, the claim is admissible.¹⁷⁵ Fourth, there is a risk of irreparable damage to the claimed rights if interim measures

166. *Id.* at 42, 48.

167. *Id.* at 30.

168. ROSENNE, *supra* note 89, at 96; Aegean Sea Continental Shelf (Greece v. Turk.), 1976 I.C.J. 3 (Interim Protection Order of Sept. 11).

169. STATUTE OF THE INTERNATIONAL COURT OF JUSTICE art. 41; ROSENNE, *supra* note 89, at 95. This is one of the reasons enunciated in the Libyan oral argument. Libya also stated two additional purposes behind the indication of provisional measures. The second purpose behind provisional measures is the prevention of the aggravation or extension of the dispute. The third purpose is the preservation of the proper administration of justice. Libya declared that all purposes were met in this case. Libyan Brief, *supra* note 141, at 27-29.

170. Libyan Brief, *supra* note 141, at 28.

171. *Id.* at 30.

172. *Id.* at 31. This condition risks the appearance of prejudgment and so its standard is less than a decision on the merits, but more than merely a bald assertion of a right. *Id.*

173. *Id.* at 43.

174. *Id.* at 33.

175. See *supra* notes 148, 149 and accompanying text.

are not indicated.¹⁷⁶ According to Libya, "[T]he persistence of the tactics of the Respondent States with a view to pre-empting the legal order of the Montreal Convention, if permitted to succeed, would involve irreparable prejudice to the rights of Libya in accordance with the Convention."¹⁷⁷ The final condition present, according to Libya, is a state of urgency.¹⁷⁸ Libya cited American statements that the United States had "not ruled out" any particular response to the specific charges of Libyan state-sponsored terrorism.¹⁷⁹

The final issue addressed by Libya involved the interplay of the ICJ and the Security Council. The primary concern was that the Security Council had already spoken, through Resolution 731, and was considering the sanctions that were later imposed through Resolution 748, and the same issue was now before the ICJ.

Libya first argued that the two organs could exercise simultaneous or subsequent competence.¹⁸⁰ This is so because the nature of the two organs is different: the ICJ is a judicial organ and the Security Council is a political organ.¹⁸¹ Of particular importance to the Libyan position was that the party who brought the case before the Court, Libya, was not the same party who brought the issue before the Security Council.¹⁸² Libya also argued that because Resolution 731 was not issued under Chapter VII of the Charter, no affirmative duty was created and, hence, Libya was not under a "firm obligation to surrender the suspects to the courts of a foreign country."¹⁸³ A combination of these factors, according to Libya, made the concurrent commitment to the issue appropriate.

176. Libyan Brief, *supra* note 141, at 34.

177. *Id.* at 35.

178. *Id.*; I.C.J. RULES OF COURT, art. 74. Urgency is required because interim measures are exceptional and unless there is reason for urgency, the Court could wait for the merits phase to make the important determination.

179. Libyan Brief, *supra* note 141, at 37. The urgencies that Libya claimed existed were the threat of economic sanctions and the threat of the use of force. Application, *supra* note 143, at 3.

180. Libyan Brief, *supra* note 141, at 57.

181. *Id.* Additionally, the argument cited other differences between the Court and the Security Council including the competence of the bodies, the approach of the bodies and the composition of the two organs. *Id.* at 57-59. Libyan counsel, Mr. Suy, also cited several cases to support his proposition. *Id.* at 60-65. This aspect will be explored further at *infra* part IV.A.

182. *Id.* at 66.

183. *Id.* at 68.

2. United States

Following Libya's oral argument, the United Kingdom and the United States were given a chance to respond. The United States offered four reasons for denying the request for provisional measures. First, the United States claimed that it is inappropriate for the Court to interfere with the Security Council. Second, the United States argued that the Montreal Convention provided that the Court could exercise jurisdiction over a dispute only after six months had elapsed since the request for arbitration, and six months had not yet elapsed. Third, the United States contended that the conditions necessary for the indication of provisional measures—irreparable harm and urgency—were nonexistent. Finally, the United States asserted that the Court should not act when the Security Council is actively seized with the issue.

a. Court cannot interfere with the Security Council

The United States argued that the requested provisional measures, which would enjoin the United States from freely participating in the work of the Security Council, impermissibly conflicted with the function of the Security Council¹⁸⁴ and with the role of the United States as a member of the United Nations. In making this argument, the United States referred to article 24 of the Charter which states that the Council has the primary responsibility for the maintenance of international peace and security.¹⁸⁵ According to U.S. advocate Bruce Rashkow:

The United States agrees that the Council's functions are of a political nature and the Court exercises purely judicial functions. The United States also agrees that the Court and the Council may properly exercise their respective functions simultaneously in regard to the same matter. It is difficult to see, however, how the fact that two organs have independent competencies can be twisted into an argument that permits one organ to interfere in the work of the other. I would think [the] Security Council would be astounded at the proposition that this Court could enjoin a State from going to the Council or from participating in the work of the Council as a member of

184. See U.S. Brief, *supra* note 13, at 31.

185. *Id.* at 32. The United States asserted, "Having agreed, under Article 24, that the Security Council, in carrying out its primary responsibility for maintaining international peace and security, acts on its behalf, Libya cannot be heard to ask this Court to enjoin the United States, or other Members of the Council, from fulfilling this fundamental responsibility" *Id.* at 33.

the Council.¹⁸⁶

Additionally, although Libya argued that article 36 of the Charter required that legal disputes be referred to the ICJ, article 36 is written in permissive, not mandatory, terms.¹⁸⁷

b. Jurisdictional bar under the Montreal Convention

As mentioned above, before interim measures are indicated, the applicant must demonstrate a prima facie case that the Montreal Convention provides a basis for jurisdiction. In its Application, Libya based the jurisdiction of the Court on article 14(1) of the Convention. Article 14(1), however, establishes conditions to be met before a dispute is taken to the ICJ, including: (1) an initial attempt at settlement through negotiation; (2) upon failure of negotiation, the dispute must be submitted to arbitration (which is exclusive); and (3) upon failure of arbitration after a period of six months from the date of the arbitration request, a party refer the dispute to the ICJ.¹⁸⁸

These conditions, according to the United States, are not mere formalities but rather "prerequisite[s] to the Court's jurisdiction."¹⁸⁹ According to the United States, the Application was filed on March 3, 1992, only forty-five days after Libya had "invited the United States to agree to arbitration" on January 18, 1992.¹⁹⁰ Since the Application was not filed six months after the request for arbitration, and because article 14(1) of the Montreal Convention provides the sole basis for the Court's jurisdiction, there is no prima facie jurisdiction.¹⁹¹

186. *Id.* at 35.

187. *Id.* at 33. "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" U.N. CHARTER art. 36(3).

188. U.S. Brief, *supra* note 13, at 41. Montreal Convention, *supra* note 91, art. 14(1), 974 U.N.T.S. at 183.

189. U.S. Brief, *supra* note 13, at 41.

190. *Id.* at 43.

191. The ICJ addressed this question in two prior cases involving a parallel clause in the 1973 Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons. In the *Nicaragua* Case, Judge Singh stated "[A] lapse of six months from the date of the request for arbitration [is] a condition precedent to referring the dispute to the International Court of Justice." Military and Paramilitary Activities In and Against Nicaragua (Nicar. v. U.S.), 1984 I.C.J. 446 (Nov. 26) (separate opinion of Judge Singh). See also United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran), 1980 I.C.J. 53 (May 24) (Morozov, J., dissenting) ("[O]nly if the other party in the course of six months has not accepted a request to organize

The United States rejected the Libyan contention that the six month requirement was effectively waived by the American failure to respond formally to Libya's request for arbitration.¹⁹² The United States contended that a lack of formal response, "can in no way be construed as a refusal to arbitrate."¹⁹³ The United States asserted that this was especially true in light of the perception of the Secretary-General and of the United States that Libya was moving toward compliance with Resolution 731 without arbitration.¹⁹⁴

c. Provisional measures are inappropriate

The United States argued that the conditions necessary for the indication of provisional measures—urgency and the ability to preserve the rights of each party—were not present. The United States considered each in turn.

Libya claimed the urgencies of the threat of economic sanctions and the threat of the use of force.¹⁹⁵ While the United States conceded that there was a threat of economic sanctions,¹⁹⁶ it argued that action by the Security Council is not a proper subject for interim measures.¹⁹⁷ "[A]lthough there may be urgency regarding the United States' efforts in the Council, there cannot be any legal harm to be avoided through provisional measures."¹⁹⁸ The United States also rejected Libya's fear of military force¹⁹⁹ as constituting the requisite urgency.²⁰⁰ The United States contended that statements by American officials, particularly the statement by Vice President Quayle that nothing had been ruled out, did not mean the United States was contemplating the use of force.²⁰¹

arbitration" is recourse to the Court available.).

192. U.S. Brief, *supra* note 13, at 45.

193. *Id.* at 45.

194. *Id.* at 46-47.

195. Application, *supra* note 143, at 3.

196. The United States noted that the threat of economic sanctions was a real one at the time inasmuch as the Security Council was then considering what would later become Resolution 748. U.S. Brief, *supra* note 13, at 55.

In fact, on March 31, five days after the U.S. argument, sanctions were authorized against Libya if they did not comply with Resolution 731 pursuant to Resolution 748. See *supra* part II.B.3.b.

197. U.S. Brief, *supra* note 13, at 55.

198. *Id.*

199. *Id.*

200. Libya based this fear on public statements that no responses to Libya's refusal to surrender the two nationals had been ruled out. Libyan Brief, *supra* note 141, at 37.

201. U.S. Brief, *supra* note 13, at 56.

In addition, the United States cited two Reuters reports which stated that the Libyans themselves did not believe that the United States was considering a military response to the dispute.²⁰² Instead, the United States maintained that it was working peacefully within the confines of the Security Council to achieve "a concerted response to Libyan support for terrorism."²⁰³

Furthermore, the second condition necessary for the indication of provisional measures, ability to preserve the rights of the respective parties, was not met. The United States argued that the request for measures did not relate to three of the four basic rights claimed by Libya.²⁰⁴ The only measure which related to the right claimed in the Application is the measure to cease any breach of the Montreal Convention.²⁰⁵ The remaining measures—a determination of a violation of the Montreal Convention by the United States, an order for the United States to cease and desist from all threats, and a request that the United States refrain in the future from violating the Convention—fall outside the scope of provisional measures.²⁰⁶ Moreover, the United States asserted that Libya failed to establish the rights it claimed were violated by the United States under the Montreal Convention.²⁰⁷ The basis for this assertion is that, under the Convention, Libya does not have the exclusive right to try the individuals as Libya contended, but is rather one of many states with the right to prosecute the individuals.²⁰⁸ The objective of the Convention is to guarantee effective prosecution, not exclusive jurisdiction.²⁰⁹

Finally, the United States argued that the interim measures would undermine the sovereign rights of the United States to bring matters of international concern to the Security Council and to act as a Member of that Council.²¹⁰ As a respective party, the rights of the United States would not be preserved.

202. *Id.*

203. *Id.* at 55.

204. *Id.* at 58.

205. *Id.*

206. *Id.* at 58-59.

207. *Id.* at 60.

208. "Libya has apparently confused its *duty* to extradite or prosecute suspects under this Article with the vested *right* to be the only Party to exercise jurisdiction. . . . Under international law, several States may have authority to prosecute . . ." *Id.*

209. "The legal regime . . . is one that assures effective prosecution—not one that guarantees complicitous States a claim against all other parties to insist upon exclusive jurisdiction." *Id.* at 63.

210. *Id.* at 64.

d. The Security Council is actively seized with the issue

Finally, the United States argued that the ICJ should not give a ruling on an issue with which the Security Council is actively seized.²¹¹ The United States conceded the Court's authority, but argued that the Court must be careful not to render another organ's actions moot.²¹² Rather, the Court should work to promote the objectives of the entire United Nations organization.²¹³

In past cases in which the Court and the Security Council have simultaneously considered similar issues, the same party brought the case before the Court and the Security Council.²¹⁴ In this case, the parties are not the same—Libya is attempting to undo and prohibit the work of the Security Council.²¹⁵ Provisional measures would create two conflicts with the Security Council. First, they would prohibit the United States and the United Kingdom from participating as Members of the Council in the Council's consideration of actions under Chapter VII of the Charter.²¹⁶ Second, they would contradict the action taken by the Council under Resolution 731. Prior to issuing Resolution 731, the Council heard and rejected Libya's arguments against adoption of the resolution.²¹⁷ The Court's granting of provisional measures would undermine the role of the Security Council and endanger the maintenance of international peace and security.²¹⁸

C. The Order

The Orders of the Court were handed down on April 14, 1992.²¹⁹

211. *Id.* at 68.

212. *Id.* at 70.

213. *Id.* See also SHABTAI ROSENNE, *THE LAW AND PRACTICE OF THE INTERNATIONAL COURT* 70 (1965).

214. Cases in which it was decided that the Security Council and the Court may exercise their respective functions with regard to similar circumstances include: *Nicar. v. U.S.*, 1984 I.C.J. 392 (Jurisdiction and Admissibility Judgment); *United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran)* 1980 I.C.J. 3; and *Greece v. Turk.*, 1976 I.C.J. 28 (separate opinion of Judge Elias). In each of these cases, the party that sought help from the Security Council was the same party that brought the issue before the Court.

215. U.S. Brief, *supra* note 13, at 71.

216. *Id.*

217. *Id.* at 71-72.

218. *Id.* at 73.

219. Two orders were handed down on April 14—one for *Libya v. the United Kingdom* and one for *Libya v. the United States*. The texts of the two are slightly different due to the U.S. desire to point out Resolution 748 to the Court after its adoption. See *Libya v. U.K.*, 1992 I.C.J. 3 and *Libya v. U.S.*, 1992 I.C.J. 114.

The request for the indication of provisional measures was denied by a vote of eleven to five.²²⁰ The Order provides key insights into both the reasoning behind the decision and the future prospects for the decision on the merits.

Perhaps the most important event cited in the Order was the adoption of Resolution 748 which imposed sanctions.²²¹ Resolution 748 is a binding resolution made pursuant to Chapter VII of the Charter; it, therefore, carries tremendous weight as international authority. Because of the timing of oral arguments before the Court, its subsequent consideration of the issues, and the Security Council's intermediate adoption of Resolution 748, the United States gave the text of the resolution, along with a letter, to the Court on April 2, 1992.²²² In the letter, the United States contended that the Council's adoption of the resolution was an additional reason to deny provisional measures.²²³ Libya, given an opportunity, pursuant to article 62 of the Rules of the Court, to respond to the implications of the resolution,²²⁴ reiterated the comments it made at oral argument.

The Court rejected Libya's contentions and stated five reasons that Resolution 748 could not be countermanded or superseded by an order indicating provisional measures. First, the Court noted that under article 25 of the Charter, Libya, the United States and all other Member States are obliged to carry out decisions of the Security Council.²²⁵ Second, the Court stated that, at least *prima facie*, Resolution 748 was a binding decision.²²⁶ Third, the Court held that obligations arising under article 25 and Chapter VII supersede obligations arising under the Montreal Convention.²²⁷ Fourth, while not deciding the legal effect of Resolution 748, the Court stated, "[W]hatever the situation previous

220. *Libya v. U.S.*, 1992 I.C.J. at 127.

221. *See id.* at 140 (separate opinion of Judge Shahabuddeen) ("The Court's Order is based solely on Security Council resolution 748 (1992)."). Importantly, the Order came down after the Security Council had voted to impose sanctions in Resolution 748 on March 31.

222. *Id.* at 125.

223. *Id.*

224. *Id.*

225. *Id.* at 126. This may not have been the case if only Resolution 731 were operative at the time of the Order. As noted previously, Resolution 748 was adopted under Chapter VII of the Charter and framed as a binding decision whereas Resolution 731 was adopted under Chapter VI and was, therefore, arguably non-binding.

226. *Id.*

227. *Id.* This is in accordance with article 103 of the Charter. Note that the Court did not rely on article 2(4) and its prohibition of aggression. *See infra* part IV.A.3. for a discussion of this issue.

to the adoption of that resolution [748], the rights claimed by Libya under the Montreal Convention cannot now be regarded as appropriate for protection by the indication of provisional measures."²²⁸ Finally, the Court stated that the indication of provisional measures would likely impair the rights of the United States vis-a-vis the adoption and implementation of Resolution 748.²²⁹

In addition to the reasons specific to Resolution 748, the Court stated another reason that the indication of provisional measures would be inappropriate. "[The] right of the Parties to contest such issues [of fact or law relating to the merits] at the stage of the merits must remain unaffected by the Court's decision."²³⁰ This language indicates that, apart from Resolution 748, certain issues presented by Libya are so fundamental, both to a determination whether to indicate provisional measures and a decision on the merits, that it would be impossible to consider them at this preliminary stage of the case.

Also important is that the Order did not deny the request for the indication of provisional or interim measures because the Court found that it lacked *prima facie* jurisdiction. Because the Court denied interim measures on other grounds, inferentially, it found jurisdiction, at least at this preliminary stage, based on the Montreal Convention.²³¹ However, the Court's finding of jurisdiction in this preliminary stage is no guarantee that the Court will find jurisdiction in the merits phase.

D. Post-Order Events

Since the Order issued, the status of the Lockerbie Incident Cases remains the same. The sanctions imposed by Security Council Resolution 748 went into effect on April 15, 1992 and remain in effect today. However, the Security Council has recently passed new sanctions to force the surrender of Fhimah and Al Megrahi. On November 12, 1993, the Security Council passed Resolution 883.²³² The new resolu-

228. *Libya v. U.S.*, 1992 I.C.J. at 126-27.

229. *Id.* at 127.

230. *Id.* at 126.

231. The Order did not take issue with Libya's assertion of jurisdiction based upon the Montreal Convention stated in paragraph one of the Order. *Id.* at 115. Additionally, Acting President Oda stated that jurisdiction is not obviously lacking at this stage. *Id.* at 130 (declaration of Acting President Oda). *Prima facie* jurisdiction, however, was not met according to at least one Judge, Judge Ni, who found the six month waiting period embodied in the Montreal Convention to be dispositive. *Id.* at 135 (declaration of Judge Ni). See *infra* part IV.A.2. for further discussion of this issue.

232. Resolution 883 specifically states: "Convinced that those responsible for acts of international terrorism must be brought to justice" and that Libya must respond

tion, which took effect December 1, 1993, imposes three restrictions on the international community. First, Resolution 883 requires a ban on sales to Libya of equipment for refining and exporting petroleum.²³³ Second, it places a limited freeze on Libyan financial assets overseas.²³⁴ Finally, the resolution restricts Libya's diplomatic missions, blocks that country's national airlines and hinders the maintenance of its airfields.²³⁵

Beyond the impositions of sanctions, Resolution 883 is one of the strongest and clearest Security Council expressions decrying state-sponsored terrorism. The Council stated: "Convinced also 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."²³⁶ The statements in Resolution 883 are remarkable given the past reluctance of the Security Council to make a positive political statement regarding state-sponsored terrorism.

Most striking about the implementation of the sanctions is that the Arab nations fully complied with the embargo and even frustrated an attempt by Syria to break the embargo.²³⁷ In itself, the embargo is important as the first instance of concrete responsive coordinated action by the international community against state-sponsored terrorism.²³⁸

The Libyan government has been active with regard to the trial of the two suspects. Libya has attempted to hire several lawyers and representatives, including the Reverend Jesse Jackson and former Department of State Legal Advisor Abraham Sofaer.²³⁹ Additionally, on several occasions, Libya has offered and withdrawn its offer to have the suspects tried in various locations, usually Scotland.²⁴⁰ The suspects re-

fully with Resolutions 731 and 738 which call for the surrender of the suspects. SCOR Res. 883, U.N. SCOR, U.N. Doc. S/RES/883 (1993).

233. *Id.*

234. *Id.*

235. *Id.* See generally, Julia Preston, *U.N. Council Adds Sanctions on Libya*, WASH. POST, Nov. 12, 1993, at A39.

236. *Id.*

237. *Even the Arabs Boycott Libya*, N.Y. TIMES, Apr. 17, 1992, at A26. After Resolution 748 took effect, Damascus attempted to send an aircraft to Tripoli; however, several Arab states refused to allow the aircraft to travel in their airspace. *Embargo Its Oil if Libya Continues Defying U.N.*, NEWSDAY, Apr. 21, 1992, at 44. See also Anne Swardson, *Libya Waging Intense Campaign to Avoid Trial for Bombing Suspects*, WASH. POST, Oct. 2, 1993, at A12 (sanctions creating "considerable hardship" on Libya).

238. *Shut Down Until Further Notice; The U.N. Embargo Against Libya Begins, but Gaddafi Won't Relent*, TIME, Apr. 27, 1992, at 15.

239. Swardson, *supra* note 237, at A12.

240. *Id.*; Thomas W. Lippman, *Libyans Hire Scot Lawyer In Bombing Quick*

main in Libya, however.²⁴¹

Two other recent developments are worthy of note. First, the claim that Syria was the main culprit in the bombing of Flight 103 has been renewed, although the notion is dismissed by the U.S. government.²⁴² Second, a memorial has been constructed in Arlington National Cemetery to honor the victims of the bombing.²⁴³ This act clearly demonstrates the growing view that victims of state-sponsored terrorist attacks are victims of state violence. Never before has the United States sent such a somber signal that victims of terrorism, at least in this case, are victims of war.

Finally, the merits phase of the cases has yet to be completed. Libya was given until December 20, 1993, to submit its brief on the merits and the United States was given until June 20, 1995, to respond.²⁴⁴ At the present time, the Libyan document has been submitted and the United States is formulating its response.

IV. ANALYSIS

A. *The Role of the Court*

1. Security Council Decisions as Law

The U.N. Security Council is one of the four primary organs of the United Nations.²⁴⁵ Chapter V of the Charter declares that the Council has the primary responsibility for the "maintenance of international peace and security."²⁴⁶ The Charter states that the Security Council has the responsibility to determine what constitutes a threat to international peace and security²⁴⁷ and the ability to recommend appro-

Trial Not Seen In Pan Am 103 Case, WASH. POST, Sept. 8, 1993, at A22; Norman Kempster, *Libya OKs Trial for 2 in Scotland in Pan Am Bombing*, L.A. TIMES, Sept. 30, 1993, at A4; *Libya Would Release Pair to Jackson*, ASSOCIATED PRESS, June 28, 1993.

241. Thomas W. Lippman, *U.N. Chief Sees Pan Am Case Failure*, WASH. POST, Nov. 2, 1993, at A13.

242. Thomas W. Lippman, *Clinton To Honor Pan Am Victims; Memorial to Flight 103 Reflects Commitment Against Terrorism*, WASH. POST, Dec. 20, 1993, at A6; Swardson, *supra* note 237.

243. Lippman, *supra* note 242, at A6.

244. *Libya v. U.S.*, 1992 I.C.J. at 234-35 (Order of June 20, 1992).

245. U.N. CHARTER art. 7. The main organs are the General Assembly, the Security Council, the Secretariat and the International Court of Justice. The Charter also includes the Economic and Social Council and the Trusteeship Council as organs, but they play little role in the dispute at hand. *Id.*

246. U.N. CHARTER art. 24.

247. U.N. CHARTER art. 39.

prate procedures for settling disputes which endanger that security.²⁴⁸ The Council may take either peaceful or forceful measures to enforce its will.²⁴⁹ Thus, it is the essential political enforcement organ of the United Nations,²⁵⁰ and Member States are obliged to abide by binding decisions of the Council.²⁵¹ These decisions prevail over any conflicting existing treaty obligations,²⁵² and, in essence, become international law.²⁵³

Libya is a Member State of the United Nations and Resolution 748 is binding as it was expressly taken under Chapter VII of the Charter and was framed as a "decision."²⁵⁴ Therefore, the resolution overrides any obligations which may have existed under the Montreal Convention.

The Security Council clearly intended Resolution 748 to be binding. Resolution 748 added the teeth of duty to Resolution 731²⁵⁵ by stating that the Security Council "[d]ecides that the Libyan Government must now comply without any further delay with paragraph 3 of Resolution 731 [the requests for elimination of international terrorism]."²⁵⁶ One Judge stated that without Resolution 748, the indication of interim measures may have been appropriate.²⁵⁷

While it is clear that a binding decision of the Security Council may override conflicting provisions in a treaty,²⁵⁸ it is not clear that the Security Council has the authority to interfere in domestic law that exists independently of any treaty. In this case, independent of the Montreal Convention, Libyan constitutional law prohibits extradition

248. U.N. CHARTER art. 36.

249. U.N. CHARTER arts. 41, 42.

250. *See* *Nicar. v. U.S.*, 1984 I.C.J. at 435 ("The Council has functions of a political nature assigned to it . . ."). Additionally, the Council is a political organ precisely because its members are not independent.

251. U.N. CHARTER art. 25.

252. U.N. CHARTER art. 103; *Nicar. v. U.S.*, 1984 I.C.J. at 440.

253. For example, in a separate opinion issued with the Order, Judge Lachs stated, "[The Court] is bound to respect, as part of that law, the binding decisions of the Security Council." *Libya v. U.S.*, 1992 I.C.J. at 138 (declaration of Judge Lachs).

254. *See supra* part II.B.3.b. Judge Lachs and Judge Shahabuddeen specifically found the binding nature of resolution essential. *Libya v. U.S.*, 1992 I.C.J. at 138 (declaration of Judge Lachs); *id.* at 140 (declaration of Judge Shahabuddeen).

255. Libya argued that Resolution 731 was based on Chapter VI and was, therefore, not binding. *See supra* note 183 and accompanying text.

256. S.C. Res. 748, U.N. SCOR (1992); S.C. Res. 731, U.N. SCOR (1992).

257. *Libya v. U.S.*, 1992 I.C.J. at 140 (separate opinion of Judge Shahabuddeen) ("But for [Resolution 748], I should have thought that Libya had presented an arguable case for an indication of provisional measures.").

258. *See supra* note 254.

of its nationals.²⁵⁹ Therefore, even if the provisions of the Montreal Convention that permit a state to exercise jurisdiction over suspects within its territory are superseded, the Security Council contradicts the domestic law of Libya if it requests extradition. Although the inability to act under domestic law does not provide a defense to non-compliance with a treaty,²⁶⁰ one is left to wonder how far the Council may intrude on the legal rights of states.²⁶¹

Although it may be impermissible for the United Nations to interfere with domestic law, nothing prevents the Council from acting under Chapter VII. In fact, article 2(7) addresses this point.²⁶² In taking enforcement measures, the Council is granted broad power to maintain international peace and security.²⁶³ Therefore, contrary domestic law will not prevent binding Security Council action, nor Council action aimed at combatting aggression.

2. Concurrent Jurisdiction and the *Nicaragua* Case

While the Security Council is the primary quasi-political organ of the United Nations, the ICJ is the primary judicial organ.²⁶⁴ Its principle function is to decide legal disputes brought before it.²⁶⁵ Under Chapter VI of the Charter, the Security Council is required to consider the peaceful settlement of disputes and is advised to refer legal issues to the ICJ.²⁶⁶ The actions taken under Resolution 748 were, however,

259. See U.N. SCOR, 47th Sess., para. 4(a), U.N. Doc. S/23672 (1992).

260. *Libya v. U.S.*, 1992 I.C.J. at 141 (declaration of Judge Shahabuddeen).

261. Judge Shahabuddeen wondered:

[I]s there any 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?

Id. at 142.

262. U.N. CHARTER art. 2(7). The article states:

Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VI.

Id.

263. See U.N. CHARTER arts. 36, 39.

264. U.N. CHARTER art. 92.

265. STATUTE OF THE INTERNATIONAL COURT OF JUSTICE art. 36. For an application see *U.S. v. Iran*, 1980 I.C.J. at 3 ("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 . . .").

266. U.N. CHARTER art. 36(3) states: "In making recommendations . . . the Se-

taken under Chapter VII which contains no such language.²⁶⁷ The reasoning behind this omission is clear: in collective response situations, the Security Council must act quickly.²⁶⁸ Therefore, the ICJ should not become embroiled in matters which are predominantly political,²⁶⁹ and the Security Council should avoid attempting to resolve matters which are predominantly legal.²⁷⁰ Nevertheless, according to Professor Rosenne, a noted ICJ scholar, "the Court 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."²⁷¹

Unfortunately, whether an issue is political or legal is not always clear. Just as the U.S. notion of "separation of powers" remains more pure in theory than in application, the jurisdiction of the Court and the Council often overlap. "The framers of the Charter, in providing for the existence of several main organs, did not effect a complete separation of powers, nor indeed is one to suppose that such was their aim."²⁷² In the instant case, Judge Lachs elegantly stated this principle: "One may therefore legitimately suppose that the intention of the founders was not to encourage a blinkered parallelism of functions but a fruitful interaction."²⁷³ Additionally, although the framers of the Charter did not effect a complete separation of powers between the Court and the Council, neither did they grant one body supremacy over the other. According to Professor Rosenne:

The 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 one of superiority. Consequently, it does not exist as a general "constitutional Court" of the United Nations.

curity 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"

267. Additionally, Resolution 731 which was taken under Chapter VI was adopted by unanimous vote thereby representing the consideration of the role of the Court in this dispute.

268. See Heidi K. Hubbard, Note, *Separation of Powers Within the United Nations: A Revised Role for the International Court of Justice*, 38 STAN. L. REV. 165, 180-81 (1985) (suggesting the ICJ should not take use of force cases because of the Security Council's need to act quickly in certain situations).

269. ROSENNE, *supra* note 89, at 33.

270. It should be noted, however, that the Council does act as a quasi-judicial body inasmuch as it does settle disputes. HANS KELSON, *THE LAW OF THE UNITED NATIONS* 476-77 (1950). Similarly, as a practical matter, any case brought before the Court takes place in a political context. *U.S. v. Iran*, 1980 I.C.J. 3.

271. ROSENNE, *supra* note 89, at 33-34.

272. *Libya v. U.S.*, 1992 I.C.J. at 138 (declaration of Judge Lachs).

273. *Id.*

There is no duty on anyone to seek its opinion on the legal issues when questions of the meaning of the Charter arise. In fact, it was decided at the San Francisco Conference that each organ of the United Nations would be free itself to interpret the Charter as and when the circumstances require.²⁷⁴

The issue decided by the Security Council was primarily political, not legal.²⁷⁵ The Council determined that the issue was state-sponsored terrorism and took steps to combat it. Application of the Montreal Convention, upon which the Court's jurisdiction is based, was mooted by the binding decision of the Council. Binding decisions prevail over conflicting treaty provisions.²⁷⁶ Without the Convention to establish jurisdiction, and without a request for extradition with which, as a matter of customary international law, no one is obligated to comply, the issue becomes primarily political and not legal.

The parity between the Court and the Council, and the ability of both organs to exercise concurrent jurisdiction could lead to direct conflict between the organs. In at least three cases,²⁷⁷ the Court has approved the exercise of concurrent jurisdiction. According to the ICJ:

Whereas Article 12 of the Charter expressly forbids the General Assembly to make any recommendation with regard to a disputed situation while the Security Council is exercising its functions in respect of that dispute or situation, no such restriction is placed on the functioning of the Court by any provision of either the Charter or the Statute of the Court. 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.²⁷⁸

274. ROSENNE, *supra* note 89, at 32.

275. However, one commentator has gone so far as to claim that the Security Council's request for "extradition" of the suspects was tantamount to that body rendering a decision on the merits of Libya's legal claim. Robert F. Kennedy, Note, *Libya v. United States: The International Court of Justice and the Power of Judicial Review*, 33 VA. J. INT'L L. 899.

276. See *supra* note 253 and accompanying text.

277. *Nicar. v. U.S.*, 1984 I.C.J. 392 (Judgment of Nov. 26); *U.S. v. Iran*, 1980 I.C.J. 3; *Greece v. Turk.*, 1976 I.C.J. at 28 (separate opinion of Judge Elias).

278. *U.S. v. Iran*, 1980 I.C.J. at 22.

The *Nicaragua* case illustrates the concurrent jurisdiction of the Court and Council. In 1984, Nicaragua brought a complaint and a draft resolution to the Security Council in an attempt to stop the mining of Nicaraguan harbors.²⁷⁹ The draft resolution failed because of a negative vote by the United States.²⁸⁰ Five days after the draft resolution was submitted, Nicaragua filed a request for the indication of provisional measures with the ICJ.²⁸¹ The United States argued that the Court could not hear the case because the adverse decision of the Security Council precluded the Court from examining the issue.²⁸²

The Court disagreed:

The argument of the United States as to the powers of the Security Council and of the Court is an attempt to transfer municipal-law concepts of separation of powers to the international plane, where these concepts are not applicable to the relations among international institutions for the settlement of disputes. . . . [T]he fact that a matter is before the Security Council should not prevent it being dealt with by the Court and that both proceedings could be pursued *pari passu*.²⁸³

The Court went on to state that "there is no *necessary* inconsistency between Security Council action and adjudication of the Court."²⁸⁴

The Libyan case is different from the *Nicaragua* case, as well as the other concurrent competence cases in two crucial and decisive ways. First, in each of the three cases, the same party initiated the claim in both the Council and in the Court. In such cases, the Council is able to address the political and security issues and the Court is able to address the legal issues. In the present case, the United States and the United Kingdom initiated the action in the Council while Libya initiated the action in the Court, thereby creating the potential for direct conflict with the Council's objectives.²⁸⁵ Second, this case represents the only instance in which a state has attempted to prevent the Council from taking action. In the *Nicaragua* case, the Council had

279. *Nicar. v. U.S.*, 1984 I.C.J. at 397.

280. *Id.* at 432-35.

281. *Id.*

282. *Id.*

283. *Id.* at 433.

284. *Id.* at 432. "From a juridical standpoint, the decisions of the Court and the actions of the Security Council are entirely separate." *Id.*

285. *See Libya v. U.S.*, 1992 I.C.J. at 140 (separate opinion of Judge Shahabuddeen) ("In this case, it happens that the decision which the Court is asked to give is one which would directly conflict with a decision of the Security Council.").

already taken action and the request was denied by the Court. In the instant case, part of the action had been taken and further action was being considered.

These two distinctions are vital in this case because Libya is essentially asking the Court to frustrate the workings of the Council. This is an exceptional request; the organs of the United Nations are designed to complement, not thwart, one another. "The Court . . . ought to collaborate in the accomplishment of [the maintenance of security]."²⁸⁶ If the Court were to render a Council decision invalid, it would pervert the intentions of the founders of the Charter. Instead, the Court "must cooperate in the attainment of the aims of the Organization and strive to give effect to the decisions of the other principal organs, and not achieve results which would render them nugatory."²⁸⁷ More detrimental, however, would be the Court's decision to prohibit the Council from exercising its legitimate functions in the future. In discussing the treatment of litispence between the Court and the Council, one commentator observed:

Even though the situation can involve many interesting justiciable issues, adjudication by the Court, pending proceedings in the Council, could unnecessarily complicate and aggravate the situation. Accordingly, in such a situation, instead of promoting the peaceful settlement of disputes the Court could endanger the maintenance of international peace and security, the very backbone of the organization.²⁸⁸

This reasoning was decisive to at least two Judges in the present case. In the words of Judge Lachs:

Hence it is important for the purposes and principles of the United Nations that the two main organs with specific powers of binding decision act in harmony—though not, of course, in concert—and that each should perform its functions with respect to a situation or dispute, different aspects of which appear on the agenda of each, without prejudicing the exercise of the other's powers.²⁸⁹

286. *Greece v. Turk.*, 1976 I.C.J. at 28 (separate opinion of Judge Tarazi).

287. ROSENNE, *supra* note 213, at 70.

288. THOMAS ELSÉN, *LITISPENCE BETWEEN THE INTERNATIONAL COURT OF JUSTICE AND THE SECURITY COUNCIL* 69 (1986).

289. *Libya v. U.S.*, 1992 I.C.J. at 139 (declaration of Judge Lachs). Judge Shahabuddeen also found this issue important. *See id.* at 141.

Not everyone, however, feels the Order was correctly decided. Jean Salmon, one of the lawyers for Libya, stated that "[t]his ruling places the Security Council above the World Court."²⁹⁰ Another commentator suggested that the "coercive" authority of the U.S. State Department had become the "final arbiter of world justice."²⁹¹ The Court has not abdicated its power in the face of the Security Council or the U.S. State Department, but has, rather, exemplified both a *realpolitik* as well as legal reflection of the way the United Nations system works and the way in which the Court is integrated into that system.

3. Judicial Review and the Political Question Doctrine

Rather than abdicating power, the Court may have expanded its power by venturing into heretofore unexplored areas of judicial review. As noted, the ICJ has exercised concurrent competence with the Security Council in three prior cases, but this is the first case in which the Court was asked by the sanctioned party to forestall sanctions imposed by the Council. Two commentators have suggested that the power exercised by the Court is akin to the power exercised by the U.S. Supreme Court in *Marbury v. Madison*.²⁹²

In *Marbury*, 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; the U.S. Constitution gives no explicit power to the Supreme Court to perform this function. While the Supreme Court did not decide the issue, it declared its power to decide. Thomas Franck drew an analogy between the present case and *Marbury*, stating that the Order gave the Court the power to review and limit actions of the Security Council as *ultra vires*, even though provisional measures were denied.²⁹³ Robert Kennedy, on the other hand, stated that no such sweeping analogy could be made

290. William Drozdiak, *World Court Rejects Libyan Bid to Avert Sanctions*, WASH. POST, Apr. 27, 1992, at A1. The International Court of Justice is often referred to as the "World Court".

291. Todd Howland, *The State Department—New Arbiter of World Justice?*, CHRISTIAN SCI. MONITOR, Apr. 24, 1992, at 19. Additionally, Lord Kennet suggested that the decision was akin to the "judiciary of a country declaring the executive branch excused from the provisions of the law." *Libya Sanctions*, THE TIMES, Apr. 20, 1992. This proposition is patently absurd as the action taken by the Council was unanimous and not merely the result of State Department pressure.

292. 5 U.S. (1 Cranch) 137 (1803).

293. Thomas M. Franck, *The "Powers of Appreciation": Who is the Ultimate Guardian of U.N. Legality?*, 86 AM. J. INT'L L. 519 (1992).

before the merits were decided.²⁹⁴ Kennedy's contention is that the merits could be decided in a number of ways, some of which would have no bearing on the Court's power of judicial review.²⁹⁵ Both commentators miss several key points and the answer to their debate lies, not unexpectedly, somewhere in the middle.

First, the Court has exercised judicial review in previous cases. For example, in the *Nicaragua* case, the Court reviewed the decision of the Security Council not to impose sanctions. There, too, the United States argued that the Court did not have the power to review the Council's decisions, although the issue was not whether the Council had acted *ultra vires*.²⁹⁶ This case is different, however, both in the degree of conflict between the Council and the Court and the potential claim of *ultra vires*. The parties requesting sanctions are the respondents in the ICJ case, and therefore a decision for the applicant will conflict with the decisions of the Security Council.

Second, Franck seems to subscribe to the modern interpretation of *Marbury*. This interpretation suggests that *Marbury* stood primarily for judicial supremacy. Franck implies this construction when he writes: "In extreme cases, the Court may have to be the last-resort defender of the system's legitimacy if the United Nations is to continue to enjoy the adherence of its members. This seems to be tacitly acknowledged judicial common ground."²⁹⁷ The traditional interpretation of *Marbury* is less extreme; it suggests, instead, that the Supreme Court is not "supreme," but can only decide cases where the power to hold an act of a political body *ultra vires* is incidental to its power to try cases. In this respect, because of the voluntary jurisdiction of the ICJ, the Court will never have the traditional power of judicial review.

The Lockerbie Incident Cases may have nothing to do with the traditional notion of judicial review. In order to be placed under the rubric of traditional judicial review, the Court would have to determine, in a case it is required to hear, that a coordinate branch has acted *ultra vires* or contrary to the Charter. The Court would then have to determine whether there were "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 limits, what are those limits and what body, if other than the Security Coun-

294. Kennedy, *supra* note 275, at 915.

295. *Id.* ("[I]t is possible that the Court will reach a decision without implicating any power of review, in which case Franck's theory will remain untested").

296. Verbatim Record of the United States, *Nicar. v. U.S.*, 1984 I.C.J. 1.

297. Franck, *supra* note 293, at 523.

cil, is competent to say what those limits are?"²⁹⁸ Should the Court find that there are limits, the Court must determine who decides those limits. Only if the Court holds itself responsible for determining the limits of the Security Council is the traditional power of judicial review recognized.

These questions, however, were not answered in the Order and may not be answered in the merits phase either. The Court could merely interpret the Montreal Convention and wholly disregard the action of the Security Council; thus, the concept of judicial review would not be implicated. Alternatively, the Court could decide that the issue is political rather than legal, thereby mooting any discussion of the doctrine of judicial review.²⁹⁹ However, this is not to say that the Court, in its Order, has not expanded the concept of judicial review. Four factors suggest that the Court has extended its power.

First, the Court has chosen, at least as a *prima facie* matter, to hear a case in which the applicant is seeking to overrule an affirmative decision of the Council.

Second, despite the notion that each organ would determine its own competence,³⁰⁰ several Judges stated that it is possible for the Security Council to overstep its bounds. Like *Marbury*, this dicta provides the later substance of judicial review. For example, Acting President Oda stated that the case would have been different had Libya asserted a more general ground of *ultra vires* than the Montreal Convention for its proposition that the Council had acted contrary to general principles of international law.³⁰¹ Judge Shahabuddeen cited the possible limitations on the Council's power to override the legal rights of states.³⁰² Additionally, Judge Lachs stated, "While the Court has the vocation of applying international law as a universal law, operating both within and outside the United Nations, it is bound to respect, as part of that law, the binding decisions of the Security Council."³⁰³ Franck notes that the language is "to respect" and not "defer to" indicating that the Court is not abdicating its powers.³⁰⁴

Third, several of the judges stated that Resolution 748 was the

298. *Libya v. U.S.*, 1992 I.C.J. at 142 (declaration of Judge Shahabuddeen).

299. *See infra* part IV.B.

300. ROSALYN HIGGINS, *THE DEVELOPMENT OF INTERNATIONAL LAW THROUGH THE POLITICAL ORGANS OF THE UNITED NATIONS* 66 n.27 (1963) ("The view was preferred that each organ would interpret its own competence."). *Id.*

301. *Libya v. U.S.*, 1992 I.C.J. at 131 (declaration of Acting President Oda).

302. *Id.* at 142 (separate opinion of Judge Shahabuddeen).

303. *Id.* at 138 (declaration of Judge Lachs).

304. Franck, *supra* note 293, at 522.

basis of the Order; this suggests that had the Council left its action under Resolution 731, the Request for Provisional Measures may have been granted.³⁰⁵ Had the Court granted Libya's request for provisional measures, it would have exercised a form of judicial review by preventing the sanctions from being applied and, thus, essentially nullifying Resolution 731. That the several opinions suggest a willingness to ignore the article 2(4) (illegal aggression) basis for Resolution 731 portends the Court's future application of the judicial review doctrine.

Finally, had the Court wished, it could easily have avoided any questions of judicial review. The Court could have denied jurisdiction on the basis that the six month arbitration proviso contained in article 14(1) of the Montreal Convention had not been met. Only Judge Ni found this issue dispositive:

I consider that [the request for provisional measures] should be denied on the sole ground of non-fulfillment of the temporal requirement provided in Article 14(1) of the 1971 Montreal Convention without having to decide at the same time on the other issues, such as the existence of rights claimed by the Applicant, irreparable damage, urgency, etc.³⁰⁶

It was clear, at least to Judge Ni, that there had been neither a refusal to arbitrate nor a failure of negotiations. The negotiations were ongoing, and the Secretary-General indicated that progress was being made. Although the sanctions imposed by Resolution 748 indicated the futility of further negotiation, as a strictly legal matter, the Application and Request for Provisional Measures were filed at a time when negotiations may still have been useful. Additionally, the purpose of the automatic right contained in article 14(1) of the Montreal Convention is to compel parties to seek a resolution of the dispute before going to the Court.³⁰⁷ The Court's dismissal of the six month proviso as "too legalistic" is indicative of its willingness to assert some measure of judicial control in the form of judicial review.

Perhaps a better analogy than the relationship between the Court's Order and judicial review is an analogy between the Court's Order and

305. *See, e.g.*, *Libya v. U.S.*, 1992 I.C.J. at 140 (separate opinion of Judge Shahabuddeen) ("But for [Resolution 748], I should have thought that Libya had presented an arguable case for an indication of provisional measures."). *But see id.* at 129 (declaration of Acting President Oda) (stating that Resolution 748 was not the sole basis for his decision).

306. *Id.* at 135 (declaration of Judge Ni).

307. *See supra* part II.B.2.b.

the "Political Question Doctrine."³⁰⁸ The political question doctrine states that the courts of the United States will consider an issue non-justiciable when there are serious separation of powers concerns. The doctrine is employed in cases involving an issue that is committed to another branch of the government and in cases in which judicial consideration is unconstitutional or prudence renders it unwise.³⁰⁹ *Baker v. Carr* established six factors indicative of the political question doctrine: 1) "a textually demonstrable constitutional commitment of the issue to a coordinate political department;" 2) a lack of judicially manageable standards; 3) the necessity of making an initial policy determination beyond the realm of judicial discretion; 4) the potential of a resolution that would indicate a lack of respect for other branches; 5) the "unusual need for unquestioning adherence to a political decision already made;" and 6) the likelihood that the resolution, by conflicting with pronouncements of other governmental branches, would embarrass the United States.³¹⁰

The Supreme Court has indicated that before determining the justiciability of an issue, it must first decide the merits. According to Chief Justice Warren:

In order to determine whether there has been a textual commitment to a co-ordinate department of the government, we must interpret the Constitution. In other words, we must first determine what power the Constitution confers upon the House . . . before we can determine to what extent, if any, the exercise of that power is subject to judicial review.³¹¹

Political issues obviously are implicated in the Libya case. At the heart of the dispute is the Council's power of exclusive jurisdiction over the maintenance of international peace and security. In a sense, then, the Lockerbie Incident Cases and the Order implicate an issue committed to a co-ordinate branch as well as an issue that has previously been determined by the Council. Applying the logic of the Supreme Court, before the ICJ can determine whether this is a political question, it must first reach the merits of the case and decide whether the Court

308. This term was coined by the U.S. Supreme Court. The most often cited case on the political question doctrine is *Baker v. Carr*, 369 U.S. 186 (1962).

309. See LAURENCE TRIBE, *AMERICAN CONSTITUTIONAL LAW* 96-107 (2d ed. 1988) for a description of the political question doctrine and the notion that the doctrine is a mix of constitutional and discretionary considerations.

310. 369 U.S. at 217.

311. *Powell v. McCormick*, 395 U.S. 486, 519 (1969).

has the power to preside over an issue which is, at least in part, political.

In order to deny the request for provisional measures, the Court had to determine not only that it had the power to review a Security Council decision, but also that the Council's decision trumped judicial concerns. In rejecting the request for provisional measures and upholding Resolution 748, the Court indicated that there are some "political questions" which may be non-justiciable, but also indicated that it reserves the right to determine when politics and prudence will be outweighed by the demands of justice.³¹² The next section discusses the politics involved in the Lockerbie Incident Cases.

B. Dealing With Low-Intensity Aggression

1. The Response to State-Sponsorship

It is key to the Court's decision that Resolutions 731 and 748 were adopted as a response to Libyan state-sponsored terrorism. As previously noted, the Security Council has the primary authority to respond to issues which threaten international peace and security and the primary responsibility to determine when those threats arise. Libya's attempt to confuse the issue and shift the focus from the political nature of the dispute to a series of legal claims has been partially successful. However, the Order prevented Libya from hiding behind the Montreal Convention.

Several ICJ judges acknowledged the real issue at hand. Acting President Oda recognized that Resolution 748 addressed, primarily, the problem of international terrorism.³¹³ Judge Lachs found these facts particularly relevant:

Libya's Application and request were placed before the Court when the Lockerbie catastrophe and the wider problem of international terrorism, which merits condemnation in all its mani-

312. It is important to note, however, that in the merits phase of the case the Court could conceivably reverse its position and hold the resolution invalid, thereby strengthening its power of judicial review and ignoring the arguments that this is a political question unsuitable for judicial determination. If the Court chooses this route, as a practical matter it may lose power by attempting to assert it. By the time the merits are decided, the sanctions will have been imposed for several years and the Security Council may assert that it is not obliged to obey the Court in this matter. This is akin to the fear held by Chief Justice Marshall when he asserted the power of judicial review in *Marbury*. This fear may explain why he asserted the power but chose not to exercise it at that point.

313. *Libya v. U.S.*, 1992 I.C.J. at 129 (declaration of Acting President Oda).

festations, were already on the agenda of the Security Council, which had brought them together under the terms of Resolution 731 (1992). The Council, by moving onto the terrain of Chapter VII of the Charter, decided certain issues pertaining to the Lockerbie disaster with binding force.³¹⁴

Therefore, for at least some of the Judges, the primary issue was Libyan international terrorism and the Council's efforts to respond to it.

In the debates over the adoption of Resolution 731, several States specifically commented that they considered the issue one of international state-sponsorship of terrorism. The Indian representative stated, "[T]he Council is specifically addressing the question of international terrorism."³¹⁵ The Russian representative expressed a similar sentiment noting that the resolution was a "necessary measure of reaction" to the "transnational challenge" of international terrorism.³¹⁶ The Representative of Venezuela put the issue most succinctly: "There can be no doubt that the decision taken unanimously by the Security Council confers legitimacy and representativeness of this resolution, the premise of which is limited strictly to acts of terrorism involving State participation."³¹⁷ It is clear, therefore, that the Security Council considered the issues and felt it extremely important to meet Libyan state-sponsored terrorism with a vigorous response.

The political nature of the resolutions and their focus on state-sponsorship is especially evident in the Council's endorsement of the demands of the United States and the United Kingdom for compensation.³¹⁸ The demands were incorporated into Resolutions 731 and 748.³¹⁹ The request for compensation was made without regard for the eventual outcome of the trial of the two individuals.³²⁰ Since the re-

314. *Id.* at 138 (separate opinion of Judge Lachs).

315. U.N. Doc. S/PV.3033 (Jan. 21, 1991) at 94.

316. *Id.* at 89.

317. *Id.* at 99.

318. U.N. GAOR, 46th Sess., Agenda Item 127, U.N. Doc. A/46/827 (1991) (U.S. statement); U.N. GAOR, 46th Sess., Agenda Item 127, Annex III, U.N. Doc. A/46/826 (1991) (U.K. statement) ("The British and American Governments today declare that the Government of Libya must: . . . Pay appropriate compensation.").

319. S.C. Res. 731, U.N. SCOR (1992) (incorporating U.N. GAOR, 46th Sess., Agenda Item 127, Annex, U.N. Doc. A/46/827 (1991) (U.S. statement); U.N. GAOR, 46th Sess., Agenda Item 127, Annex III, U.N. Doc. A/46/826 (1991) (U.K. statement)) and S.C. Res. 748, U.N. SCOR (1992) (incorporating in para. 1 U.N. GAOR, 46th Sess., Agenda Item 127, Annex, U.N. Doc. A/46/827 (1991) (U.S. statement)).

320. Judge Shahabuddeen suggested that this fact indicates that the two suspects

quest was made without regard to the eventual guilt or innocence of the two suspects, it is clear that the legal issue of their guilt is separate from the political issue of Libya's involvement in international terrorism, specifically Libya's involvement in the bombing of Pan Am Flight 103 and UTA Flight 772. If this were not the case, compensation would have been contingent upon a finding of guilt of the two suspects.

2. Confusion Over Extradition vs. Surrender

Perhaps the best indication that Resolutions 731 and 748 were political responses to state-sponsored terrorism was that the United States and the United Kingdom framed their demands for the two suspects in terms of "surrender" rather than "extradition." All of the key documents which were eventually incorporated in Resolutions 731 and 748, especially the joint declaration of the United States and the United Kingdom of November 27, 1991, use the term surrender. Specifically, this declaration states: "The British and American Governments today declare that the Government of Libya must: Surrender for trial all those charged with the crime"³²¹ The U.S. cover note that was sent with the indictment to the Libyan government demanded the "transfer" of the suspects³²² and the oral argument by the United States consistently referred to the demand of the "surrender" of the two suspects.³²³ The U.K. oral argument made this point well:

The United Kingdom has not, however, sought the extradition of the two accused under Article 8(2) [of the Montreal Convention concerning extradition]—indeed, it has not sought their extradition (in the technical sense of the term) at all—but has instead maintained that Libya should, for reasons unrelated to the Montreal Convention, surrender the two accused.³²⁴

Unfortunately, the terms "extradition" and "surrender" or "transfer" have often been confused. The press,³²⁵ writers of scholarly articles

have, in essence, already been found guilty by the United States and the United Kingdom, thereby precluding the possibility of a fair trial in either requesting country. *Libya v. U.S.*, 1992 I.C.J. at 141 (separate opinion of Judge Shahabuddeen).

321. U.N. GAOR, 46th Sess., Agenda Item 127, U.N. Doc. A/46/827 (1991) (U.S. statement); U.N. GAOR, 46th Sess., Agenda Item 127, Annex III, U.N. Doc. A/46/826 (1991) (U.K. statement).

322. Cover note *cited in* U.S. Brief, *supra* note 13, at 22.

323. *See id.* at 13, 19, 22, 28 and 30.

324. U.K. Brief, *supra* note 34, at 48.

325. *See, e.g.*, Eric L. Chase, *To End Terrorism, Punish its Sponsors*, N.Y.

on the Order,³²⁶ and even several ICJ Judges³²⁷ loosely use the term "extradition." As a result, the distinction between the two terms is either lost or considered an unimportant matter of semantics.

The difference between "surrender" and "extradition," however, is not a mere semantic difference. To surrender someone is a political act. Extradition, however, carries with it a great deal of legal history. Most countries extradite people pursuant to extradition treaties.³²⁸ Without an extradition treaty, countries are generally not obliged to extradite an individual.³²⁹ The surrender of an individual implies a less formal process whereby a state exercises control over an individual within its jurisdiction and voluntarily hands that individual over to the requesting authority.

There are several technical and practical reasons why the United States and the United Kingdom would demand surrender rather than extradition. First, Libyan domestic law prohibits extradition.³³⁰ Faced with a demand for extradition, Libya would be required either to violate or to change its domestic law, both harsh directives for the United States to command. Of course, the binding nature of Resolution 748 may allow the Security Council to bend customary international law,³³¹ or to ignore domestic law.³³² If this is the case, extradition could have been requested. Second, a legal constraint upon extradition is the rule

TIMES, Jan. 28, 1992, at A21; Paul Lewis, *Libya Expected to Get U.N. Demand on Bomb Suspects*, N.Y. TIMES, Jan. 21, 1992, at A1; John M. Goshko and Trever Rowe, *Libya to Cooperate with France on Probe; Defiance of U.S., Britain on Demand for Pan Am 103 Bombing Suspects Continues*, WASH. POST, Feb. 13, 1992, at A42; Crossette, *supra* note 132.

326. See, e.g., Franck, *supra* note 293; Kennedy, *supra* note 275.

327. See, e.g., *Libya v. U.S.*, 1992 I.C.J. at 136 (joint declaration of Judges Evensen, Tarassov, Guillaume and Mawdsley); *id.* at 129 (declaration of Acting President Oda); *id.* at 144-45 (Bedjaoui, J., dissenting).

328. The United States has extradition treaties with over one hundred countries. See John G. Kester, *Some Myths of United States Extradition Law*, 76 GEO. L.J. 1441, 1454 (1988).

329. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 475, cmt. a (1987). See also *Factor v. Laubheimer*, 290 U.S. 276 (1933) (principles of international law recognize no right to extradition apart from treaty).

Even pursuant to a treaty, many countries have explicitly reserved the right to refuse extradition on the basis of the well-known political offense exception. RESTATEMENT (THIRD), § 476, cmt. g; Manual R. Garcia-Mora, *The Present Status of Political Offenses in the Law of Extradition and Asylum*, 14 U. PITT. L. REV. 371 (1953); Exemptions from Extradition, 6 WHITEMAN DIGEST § 15, at 799-857 (collecting cases).

330. See U.N. SCOR, 47th Sess., Enclosure, U.N. Doc. S/23672 (1992).

331. See Kennedy, *supra* note 275.

332. *Libya v. U.S.*, 1992 I.C.J. at 141 (separate opinion of Judge Ni).

of specialty.³³³ The rule of specialty states that an extradited individual may only be tried for those charges for which he or she is specifically extradited.³³⁴ The United States and the United Kingdom may well fear that the suspects were involved in terrorist activities beyond the bombing of Pan Am Flight 103. If they were extradited and charged in the extradition request solely on this basis and further investigation uncovered other crimes, U.S. courts would still be restricted to the charges contained in the extradition papers.

However, it was not necessary to raise such difficult issues. Extradition was not requested nor was it denied.³³⁵ Rather, the request for the surrender of the suspects avoided domestic and international legal difficulties as well as the potential rule of specialty. It was clear that Libya could surrender the individuals if the individuals handed themselves over to the Libyan government,³³⁶ or Libya could surrender the individuals to a neutral country for trial.³³⁷ Therefore it is clear that not only was it possible for Libya to surrender the suspects, it had contemplated doing so.

Finally, because the request was for the surrender of the suspects, and not for their extradition, the request was governed by political rather than legal considerations. Therefore, the requests embodied in Resolutions 731 and 748 were well within the province of the Security Council as the political organ of the United Nations. This contradicts Judge Bedjaoui's dissenting opinion which stated:

But the difficulty in the present case lies in the fact that the Security Council not only has decided to take a number of political measures against Libya, but also has demanded from it the extradition of its two nationals. It is this specific demand of the Council that creates an overlap with respect to the substance of the legal dispute with which the Court must deal, in a legal manner, on the basis of the 1971 Montreal Convention and international law in general. The risk thus arose of the extradition question receiving two contradictory solutions, one legal, the other political, and of an inconsistency between the de-

333. RESTATEMENT (THIRD), *supra* note 329, § 477.

334. The rule was set out in *United States v. Rauscher*, 119 U.S. 407 (1886).

335. U.N. SCOR, 47th Sess., Enclosure, U.N. Doc. S/23672 (1992).

336. U.N. SCOR, 47th Sess., para. 4(d), U.N. Doc. S/23672 (1992).

337. See U.N. SCOR, 47th Sess., para. 4(e), U.N. Doc. S/23672 (1992) ("The possibility of handing over the suspects to the authorities of third countries for trial may be considered.")

cision of the Court and that of the Security Council.³³⁸

Given that there was no extradition demand, and the demand for surrender is of a uniquely political nature, Judge Bedjaoui's concern is ill-founded.

V. CONCLUSION

At the most basic level, the dispute in the Lockerbie Incident Cases and over Resolutions 731 and 748 is a dispute of competing competencies. The Council attempted to advance its agenda of eliminating international state-sponsored terrorism and the Court found itself thrust into a political struggle wherein it was urged to find legal grounds to declare a binding decision of the Security Council invalid. In his separate opinion, Judge Ni explained the dilemma of competing competence eloquently:

Here the mention of *complementary* functions should not be overlooked. Although both organs deal with the same matter, there are differing points of emphasis. In the instant case, the Security Council, as a political organ, is more concerned with the elimination of international terrorism and the maintenance of international peace and security, while the International Court of Justice, as the principal judicial organ of the United Nations, is more concerned with the legal procedures such as questions of extradition and proceedings in connection with prosecution of offenders and assessment of compensation, etc. But these functions may be correlated with each other. What would be required between the two is co-ordination and co-operation, not competition or mutual exclusion.³³⁹

Herein lies the difficulty as well as the answer to the dilemma posed by the Lockerbie Incident Cases. Libya, in its Application and Request for Provisional Measures, requested that the Court ignore the need for co-ordination and co-operation. The Council determined that the Libyan actions that gave rise to Resolutions 731 and 748 maintained a threat to international peace and security. As the organ responsible for determining both the existence of such threats and the appropriate political response, it was well within the Council's competence to demand the surrender of the two individuals accused of bomb-

338. *Libya v. U.S.*, 1992 I.C.J. at 144-45 (Bedjaoui, J., dissenting).

339. *Id.* at 134 (declaration of Judge Ni).

ing Pan Am Flight 103.

Libya, however, attempted to subvert the Council's determination with a series of questionable legal claims aimed at shifting the focus from Libyan sponsorship of international terrorism to the alleged violation of legal rights created by the Montreal Convention. Although the work of the Court could be undone at the merits stage of the case, in the Order, the Court did not allow the claims to succeed. Even though the Court expanded its judicial review power, and threatened to expand it further, the Court acknowledged the political nature of the issues before it by refusing to overturn a binding decision of the Security Council. In this manner, the Court maintained its power and did not undermine the Security Council's attempt to end state-sponsored terrorism.