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## NOTE

### AVOIDING A COLLISION OF COMPETENCE: THE RELATIONSHIP BETWEEN THE SECURITY COUNCIL AND THE INTERNATIONAL COURT OF JUSTICE IN LIGHT OF *LIBYA V. UNITED STATES*

SCOTT I. BORTZ

**R**EACTION in the wake of a horrible tragedy has clarified the political hierarchy of the United Nations and helped avoid a collision of competence between the Security Council and the International Court of Justice (Court). The destruction of Pan Am Flight 103 over Lockerbie, Scotland, in December 1988, ultimately called the applicability of an international agreement into question, exacerbated an already volatile political relationship between the United States and Libya, and led to case wherein the Court was able to clarify its relationship with the Security Council. In *Libya v. United States*,<sup>1</sup> (*Lockerbie*) a case that "may be the most important and jurisprudentially rich of any handed down by [the] Court since the end of the Cold War,"<sup>2</sup> the Court issued a decision that helped delineate the hierarchy of competence in the United Nations, and held that certain resolutions of the Security Council precluded the Court from taking judicial action.

In *Lockerbie*, Libya alleged that the request by the United States of Libya to extradite two Libyan nationals suspected of placing a bomb on Flight 103 violated the Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation (Montreal Convention).<sup>3</sup> The Montreal Convention provides punishment for offenders who perform unsafe acts against civil aviation, and, *inter alia*, maintains

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1. 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. 113 (April 14) (Request for the Indication of Provisional Measures), reprinted in 31 I.L.M. 662 (1992) [hereinafter *Lockerbie*].

2. Thomas M. Franck, *The "Powers of Appreciation": Who is the Ultimate Guardian of UN Legality?*, 86 AM. J. INT'L L. 519, 519 (1992). See Professor Franck's Editorial Comment for a brief yet thorough discussion of the decision, as analogous to *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

3. Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, Sept. 23, 1971, 24 U.S.T. 567, T.I.A.S. 7570.

guidelines which contracting states must follow to establish jurisdiction over certain offenses.

Before the case was decided, the United Nations established defense-related trade barriers against Libya in response to Libya's refusal to extradite to the U.S. the two Libyans suspected of causing the destruction of Flight 103. Libya alleged that the United States breached its treaty obligations under the Montreal Convention, estopping the U.S. from asserting jurisdiction over the two Libyans, when a grand jury of the district court for the District of Columbia indicted the two suspected Libyan nationals. Libya requested the Court to issue provisional measures preventing the economic embargoes. The events surrounding the destruction of Flight 103 have thus led to the ascension to the Court of a case which allowed a decision that helps the world understand the authoritative hierarchy of the separate branches of the United Nations.

This Note is not a traditional survey of specific law relevant to an individual case. Rather, based on the extraordinary recent global changes and the re-emergence of the United Nations as a powerful political force, this study examines the case that led to a clarification of the competence possessed by the branches of the U.N. As such, this Note serves multiple purposes in examining several interrelated topics. A survey of the investigation of the Lockerbie tragedy, the subsequent political events, and the actions of the United Nations provides a fascinating look at international relations, and is necessary in reference to Libya approaching the Court. Further, a brief survey of the Court's ability to take interim action in a case by issuing provisional measures is presented as a foundation for the following analysis of the case itself. Libya's reaction to the case is also detailed, and the Note concludes with a discussion of the reasoning used by the some of the deciding judges, illustrating how the Court delineates the powers of the branches comprising the United Nations and legitimately avoids a collision of competence between it and the Security Council.

## I. THE LOCKERBIE TRAGEDY

### A. *The Crash of Flight 103*

Even in the first minutes and hours, however, as the shattered Pan Am clipper and its passengers and crew were hurtling to earth, there were strange inklings that this was not the end of a very brief and

tragic tale, but the beginning of a much longer and more terrible story.<sup>4</sup>

Four days before Christmas in December 1988, the relatively unknown Scottish village of Lockerbie became a virtual synonym for tragedy and disaster. On that fateful evening, Pan American World Airways Flight 103 took off from London's Heathrow airport twenty-five minutes behind schedule<sup>5</sup> and headed toward New York. Fifty-two minutes later, the Boeing 747 disappeared from the radar screens of British air traffic controllers, and reports of fires and explosions in Lockerbie began to surface.<sup>6</sup> The crash of Flight 103 claimed the lives of 259 passengers and crew representing 32 nationalities,<sup>7</sup> as well as eleven Lockerbie residents killed on the ground.<sup>8</sup>

From the beginning, it appeared as if the disaster was not an accident.<sup>9</sup> The very first reports of the crash stated adverse weather did not play a factor, no problem with the aircraft was indicated, no mid-air collision occurred, and no emergency signal was sent from the plane.<sup>10</sup> As early as the day after the crash, official reports surfaced that British aviation authorities were speculating the disaster was caused by a terrorist-planted bomb,<sup>11</sup> and a pro-Iranian group claimed responsibility as revenge for the destruction of a commercial Iranian airliner over the Persian Gulf by the U.S. Navy cruiser Vincennes earlier in the year.<sup>12</sup> Also on that day, the Federal Aviation Administration revealed that on December 5, the U.S. government had notified

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4. STEVEN EMERSON & BRIAN DUFFY, *THE FALL OF PAN AM 103: INSIDE THE LOCKERBIE INVESTIGATION* 29 (1990). This source and Johnston, *infra* note 7, provide fascinating surveys of the Lockerbie tragedy and the subsequent international investigation led by the United States and Great Britain. Although the entire Lockerbie incident is an engrossing historical account involving terrorism, drug smuggling, fraud, corporate greed and incompetence, and the Central Intelligence Agency, the Federal Bureau of Investigation, and the National Security Council, the first section of this Note will focus only on the elements of history relevant to international relations and the ascension of the case to the judicial branch of the United Nations: the International Court of Justice.

5. Craig R. Whitney, *Jetliner Carrying 258 to U.S. Crashes in Scottish Town*, N.Y. TIMES, Dec. 22, 1988, at A1.

6. *Id.*

7. DAVID JOHNSTON, *LOCKERBIE: THE REAL STORY* 50 (1989).

8. *Id.* at 1.

9. See EMERSON & DUFFY, *supra* note 4, at 49, where it is stated that "[i]n the first few hours after the Boeing 747 disintegrated over Lockerbie, virtually no one, either police investigators or intelligence officers, believed it was an accident."

10. Whitney, *supra* note 5. The sources cited in the article include the British Defense Ministry, a spokesperson for Pan Am, and a spokesperson for the British Civil Aviation Authority.

11. Craig R. Whitney, *The Crash of Flight 103; Jetliner in Crash Blew Apart in Air*, N.Y. TIMES, Dec. 23, 1988, at A1.

12. *Id.* The *Vincennes* shot down the Iranian Airbus after it had erroneously identified the commercial aircraft as an attacking combat plane.

airlines, airports, and embassies in Europe of an "unsubstantiated" threat of a possible bomb attack against a Pan Am flight originating in Frankfurt, West Germany.<sup>13</sup> Flight 103 was just such a flight.<sup>14</sup>

On December 28, the Times of London reported that damage to the lining of Flight 103's luggage area likely indicated an explosion among the baggage.<sup>15</sup> The next day, British investigators announced "conclusive evidence" had been discovered revealing that a plastic explosive device destroyed the aircraft.<sup>16</sup> Also on that day, the New York Times reported that a British terrorism expert speculated the device contained Semtex, a Czechoslovak-made plastic explosive that had previously "come into Libyan hands,"<sup>17</sup> that the Libyan Fatah Revolutionary Council was at the top of the American suspect list,<sup>18</sup> and that Semtex had been previously provided to terrorist groups by Libya.<sup>19</sup> By the end of the year, the British investigators concluded that the piece of luggage containing the bomb had been placed aboard Flight 103 in Frankfurt.<sup>20</sup>

As 1989 began, the investigation intensified. In America, the Central Intelligence Agency, the Federal Bureau of Investigation and the National Security Agency were all involved in investigating the disaster.<sup>21</sup> Denials also began to appear: Libyan leader Colonel Muammar el-Qaddafi agreed that sabotage had caused the destruction of Flight

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13. John H. Cushman, Jr., *The Crash of Flight 103; Pan Am Was Told of Terror Threat*, N.Y. TIMES, Dec. 23, 1988, at A1. Aviation experts stated that the public was not notified of the threat in order to preserve existing security measures, deter "copy cat" threats, and deter passengers from canceling their flights. President Ronald Reagan stated that a public announcement "would literally have closed down all the air traffic in the world." John H. Cushman, Jr., *Countering the Threat of Airline Bombs: Experts Say Security Isn't Foolproof*, N.Y. TIMES, Dec. 24, 1988, § 1 (Foreign Desk), at 5.

14. *Id.*

15. Malcolm W. Browne, *Detecting a Bomb's Debris is Simple*, N.Y. TIMES, Dec. 28, 1988, at A3.

16. Sheila Rule, *Powerful Bomb Destroyed Pan Am Jet over Scotland, British Investigation Finds*, N.Y. TIMES, Dec. 29, 1988, at A1. The statement issued by the Air Accidents Investigation Branch of the British Department of Transport declared that "it has been established that two parts of the metal luggage pallet framework show conclusive evidence of a detonating high explosive." *Id.* at A10.

17. *Id.*

18. Michael Wines, *Bush Faces Test in Bomb Finding; 2 Anti-Arafat Groups Suspected*, N.Y. TIMES, Dec. 29, 1988, at A1.

19. *Id.*

20. *Trail of Bomb on Pan Am Jet is Said to Lead to Frankfurt*, N.Y. TIMES, Dec. 31, 1988, at 3.

21. Michael Wines, *Pan Am Blast: An Inquiry in Hot Pursuit*, N.Y. TIMES, Jan. 1, 1989, at 10. See also EMERSON & DUFFY, *supra* note 4, at 51. British author David Johnston wrote that C.I.A. agents were in Lockerbie immediately after the crash, disguised as Pan Am engineers. See JOHNSTON, *supra* note 7, at 53.

103, yet denied that Libya had a role in the tragedy.<sup>22</sup> The bombing evoked differing responses on the two sides of the Atlantic. While the American government vowed revenge, the British government emphasized cooperation.<sup>23</sup> As the investigation continued, the focus narrowed on two possibilities: evidence pointed to the Popular Front for the Liberation of Palestine (PFLP), a Palestinian terrorist group that worked together with the Iranian government, and to Libyan leader Colonel Qaddafi.<sup>24</sup>

From "painstaking and meticulous examination of debris," the British determined that the bomb was hidden in a radio-cassette player.<sup>25</sup> This disclosure strengthened the belief that the PFLP was responsible for the attack: in West Germany, the country of Flight 103's origin, plastic explosives concealed in a radio had been found when members of the terrorist group were arrested prior to the disaster.<sup>26</sup> As the months passed, American investigators identified the individual who unknowingly carried the bomb aboard Flight 103,<sup>27</sup> and security increased at airports on both sides of the Atlantic.<sup>28</sup> Throughout the summer of 1989, evidence increasingly pointed towards the PFLP.

September of 1989 proved to be quite unfortunate for Pan Am. In that month, U.S. federal investigators disclosed that the airline violated security regulations involving methods used to screen passengers and baggage at the Frankfurt airport, but did not directly link the violations to the Lockerbie disaster.<sup>29</sup> After the disclosure, the Federal Aviation Administration fined the airline \$630,000 for "security breaches in pre-board screening of passengers and baggage" in Frank-

22. *Qaddafi Denies Role in Sabotage of Plane*, N.Y. TIMES, Jan. 1, 1989, § 1 (Foreign Desk), at 10.

23. Then President-elect Bush, in his forever inimitable syntax, vowed "to seek hard and punish firmly, decisively, those who did this, if you could ever find them." Sheila Rule, *Thatcher Opposes Revenge for Bomb*, N.Y. TIMES, Jan. 2, 1989, § 1 (Foreign Desk), at 3. Prime Minister Margaret Thatcher stated "I do not think an eye for an eye or a tooth for a tooth is ever valid. I can understand the anger. We feel the anger very deeply. The most important thing to do is to try to get the cooperation of all nations to track down these people so that they are brought to justice." *Id.*

24. *Palestinian Group and Iran Tied to Pan Am Bomb*, N.Y. TIMES, Feb. 8, 1989, at A10.

25. John H. Cushman, Jr., *British Conclude Cassette Player Held Pan Am Bomb*, N.Y. TIMES, Feb. 17, 1989, at A1.

26. *Id.*

27. Thomas L. Friedman, *U.S. Inquiry Names Carrier of Bomb*, N.Y. TIMES, Apr. 13, 1989, at A9.

28. John H. Cushman, Jr., *Security at Airports Steadily Tightening*, N.Y. TIMES, May 14, 1989, § 1 (Foreign Desk), at 1.

29. John H. Cushman, *U.S. Found Pan Am Lax on Security Soon After Blast*, N.Y. TIMES, Sept. 17, 1989, § 1 (National Desk), at 1.

furt, but again did not link the violations to the incident at Lockerbie.<sup>30</sup>

### B. Libya Implicated

As 1990 began, it seemed as if PFLP founder Ahmed Jibril was responsible for the bombing and the act had been carried out for the benefit of Iran as revenge for the downing of the Iranian Airbus.<sup>31</sup> It was not until October that Libya was linked to the disaster. The French newsmagazine *L'Express* reported evidence surfaced indicating that after Western intelligence agents infiltrated the PFLP, Jibril paid Libyan agents to assemble and plant the bomb.<sup>32</sup> Eight months later, *L'Express* reported French officials believed that the Libyan government independently initiated the destruction of Flight 103 as retribution for the U.S. air raid on Tripoli in 1986.<sup>33</sup> The United States finally took official action and indicted two Libyan intelligence agents on November 15, 1991,<sup>34</sup> implicitly implicating Qaddafi himself.<sup>35</sup>

30. John H. Cushman, Jr., *U.S. Fines Pan Am for Lax Security on Day of Jet Bombing*, N.Y. TIMES, Sept. 21, 1989, at A10. Over seven months after the imposition of the fine, it was disclosed that a government panel investigating the bombing found that "evidence of serious flaws in [Pan Am's] security measures existed before and lingered long after" the disaster at Lockerbie. John H. Cushman, Jr., *U.S. Panel is Told of Pan Am Security Flaws*, N.Y. TIMES, Apr. 4, 1990, at A8. The chairwoman of the Presidential committee described one of the flaws involving the airline's method of searching baggage at Frankfurt as "rather significant to the bombing itself." *Id.*

31. EMERSON & DUFFY, *supra* note 4, at 251-259.

32. Michael Wines, *Libya Now Linked to Pan Am Blast*, N.Y. TIMES, Oct. 10, 1990, at A1.

33. Michael Wines, *French Suspect Top Libyans in Pan Am Blast, Report Says*, N.Y. TIMES, June 27, 1991, at A10. President Reagan ordered U.S. warplanes to bomb Tripoli and Benghazi in retaliation for Libyan missile attacks against American aircraft, and the allegedly Libyan terrorist bombing that year of a West Berlin discotheque frequented by U.S. servicemen. See LOUIS HENKIN, *INTERNATIONAL LAW* 706 (2d ed. 1987).

34. Andrew Rosenthal, *U.S. Accuses Libya as 2 are Charged in Pan Am Bombing*, N.Y. TIMES, Nov. 15, 1991, at A1. The indictments were issued against Abdel Basset Ali al-Megrahi and Lamem Khalifa Fhimah, both officials of Libyan Arab Airlines and reported members of Libya's intelligence organization. The Scottish government issued similar indictments concurrently. See Announcement by the Lord Advocate of Scotland on 14 November 1991, *reprinted in* 31 I.L.M. 718 (1992).

ABC News Senior European Editor Pierre Salinger interviewed the two suspects on November 26 and 27 in Libya, and broadcast excerpts; both men denied involvement with the Lockerbie disaster and connections to Libyan intelligence. See Craig R. Whitney, *Britain Tells ABC to Give Up Tapes*, N.Y. TIMES, Mar. 7, 1992, § 1 (Foreign Desk), at 7.

35. *Id.* A State Department official declared

The bombers were Libyan Government intelligence operatives. This was a Libyan Government operation from start to finish. The bombing of Pan Am Flight 103 was not a rogue operation. An operation of this magnitude, involving people so close to the Libyan leadership, could only have been undertaken with the approval of senior Libyan officials.

The indictments ended the three-year investigation and Attorney General-designate William Barr succinctly outlined the conspiracy at a news conference: the two Libyans and their associates built the bomb out of plastic explosives; the device was placed in a cassette recorder which was packed into a suitcase along with clothes; the suitcase was placed on a plane in Malta and was transferred on to Flight 103 in Frankfurt.<sup>36</sup> The day after the indictments were issued, Libya denied the charges<sup>37</sup> while the U.S. considered economic sanctions.<sup>38</sup> One week later, Libya officially refused to extradite the two intelligence agents.<sup>39</sup>

The United States and the United Kingdom joined to increase pressure on Libya and issued a joint declaration demanding the surrender of the two suspects.<sup>40</sup> France also joined the U.S. and the U.K. in the demands.<sup>41</sup> Qaddafi refused to turn over the agents, stating that the evidence against his country was "less than a laughable piece of a fingernail" and that Libyan law prevented the delivery of the suspects to the American, English, or French authorities.<sup>42</sup> The European Community joined the efforts of the U.S., U.K., and France and warned Libya that it may impose economic sanctions.<sup>43</sup> A Libyan judge then announced that the two accused agents were under house arrest, could only be tried in Libya, and would face the death penalty if convicted.<sup>44</sup>

36. *Id.* The indictment alleged that found in the plane's wreckage was a fragment of the timing device from the bomb, imbedded in a piece of a shirt that Megrahi had bought in Malta.

37. Michael Wines, *U.S. Will Try Diplomatic Action before a Military Strike on Libya*, N.Y. TIMES, Nov. 16, 1992, § 1 (Foreign Desk), at 4.

38. *Id.*

39. *Libya Rejects Extradition*, N.Y. TIMES, Nov. 21, 1992, at A5.

40. The Joint Declaration of the United States and United Kingdom stated

The British and American Governments today declare that the Government of Libya must:

- surrender for trial all those charged in the crime; and accept responsibility for the actions of Libyan officials;
- disclose all it knows of this crime, including the names of all those responsible, and allow full access to all witnesses, documents and other material evidence, including all the remaining timers;
- pay appropriate compensation.

We expect Libya to comply promptly and in full.

U.N. GAOR, 46th Sess., Agenda Item 125, annex at 2. U.N. Doc. A/46/827 (1991).

41. Declaration of the United States of America, France and Great Britain on Terrorism, reprinted in 31 I.L.M. 723 (1992). French courts accused Libyan agents of bombing Union de Transports Aeriens flight 772 over Niger in September of 1989. 170 people were killed. See Communiqué from the Presidency of the French Republic and the Ministry of Foreign Affairs, reprinted in 31 I.L.M. 718 (1992); Elaine Sciolino, *U.S. and Its Allies to Move on Libya over Air Bombings*, N.Y. TIMES, Dec. 19, 1991, at A1.

42. *Qaddafi Scoffs at Demands for Bombing Suspects*, N.Y. TIMES, Nov. 29, 1992, at A11.

43. Youssef M. Ibrahim, *Europeans Warn Libya of Possible Sanctions*, N.Y. TIMES, Dec. 2, 1991, at A7.

44. *Libya Says it Detains 2 in Jet Bombing*, N.Y. TIMES, Dec. 9, 1991, at A3.



In an effort to avoid sanctions, Libya offered to sever ties with all terrorist organizations and support the creation of an investigative tribunal; a U.S. government official called the offers "hokey."<sup>45</sup> As 1988 closed, Qaddafi offered a final concession and invited Western judges to come to Tripoli and participate in the trial; the U.S. refused.<sup>46</sup>

### C. *The Security Council Resolutions and the Court*

As 1992 began, the United Nations Security Council adopted Resolution 731<sup>47</sup> and implicitly demanded that Libya turn over the two accused agents or face economic sanctions. This was the first time in history that the Security Council demanded the extradition of one country's nationals to stand trial in another nation, or impliedly accused a member government of promoting terrorist activities.<sup>48</sup>

Libya's Minister for Strategic Industries, who addressed the Security Council before it voted, responded to Resolution 731 by asserting that the dispute involved questions of interpretation regarding the Montreal Convention; the U.S., France, and the U.K. all rejected the contention.<sup>49</sup> In response to paragraph four of Resolution 731, requesting the Security-General to "seek the cooperation of the Libyan Government,"<sup>50</sup> Under-Secretary-General Safronchuk went to Libya

45. Sciolino, *supra* note 41.

46. *Qaddafi Invites West to Terror Bomb Trial*, N.Y. TIMES, Dec. 28, 1991, § 1 (Foreign Desk), at 4.

47. S.C. Res. 731, 3033rd mtg., U.N. Doc. S/23547 (1992). In pertinent part, the Resolution stated:

*Determined* to eliminate international terrorism, [the Security Council]

1. *Condemns* the destruction of Pan American flight 103 and Union de transports aeriens flight 772 and the resultant loss of hundreds of lives;

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

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

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

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

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

*Id.* (Emphasis in original). See, e.g., 31 I.L.M. 732 (1992); *Text of U.N. Resolution Asking Libya's Help*, N.Y. TIMES, Jan. 22, 1992, at A8.

48. Paul Lewis, *Libya Unyielding Despite U.N. Demand*, N.Y. TIMES, Jan. 22, 1992, at A8.

49. *Id.*

50. See *supra* note 47.

and spoke with Qaddafi. Qaddafi told Safronchuk that the Libyan government had initiated legal proceedings against the suspects, a judge had been appointed to try them, the suspects had hired lawyers, and that further information was needed from the U.S. and U.K. in order for an adequate trial.<sup>51</sup> President Bush subsequently attempted to build support for sanctions at the United Nations,<sup>52</sup> and the Permanent Representative of Libya soon stated that "Libya was ready to cooperate fully with the Security Council and with the Secretary general 'in light of the statements made in the Security Council and in a way that would not infringe upon State sovereignty nor violate the Charter of the United Nations and principles of international law.'" <sup>53</sup> The Bush Administration rejected the message and reiterated the demands.<sup>54</sup>

The Libyan government tried to convince the world that some sort of legitimate trial was underway. Journalists were invited to attend a court hearing; it never occurred. A State Department spokesman dismissed the entire episode, stating "[w]e don't put much faith or credence in what a Libyan judge might say. We think that a Libyan investigation or hearing is a travesty of justice, amounts to nothing more than another attempt by Libya to delay and evade its responsibility."<sup>55</sup> When the efforts failed, the Libyan foreign minister announced that his country was willing to turn over the two suspects to a neutral country for adjudication.<sup>56</sup> The next day, the State Department declared Libya's offer "nothing more than a delaying tactic."<sup>57</sup>

In furtherance of its ongoing attempt to avoid sanctions, Libya then initiated legal proceedings in the Court,<sup>58</sup> alleging that the United

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51. Report by the Secretary-General Pursuant to Paragraph 4 of Security Council Resolution 731, *reprinted in* 31 I.L.M. 733, 734 (1992). Qaddafi suggested an international observation of the trial if it occurred.

52. Andrew Rosenthal, *Summit at the U.N.; Bush Asks Security Council to Put Sanctions on Libya*, N.Y. TIMES, Feb. 1, 1992, § 1 (Foreign Desk), at 6. The Bush Administration was seeking a ban on airline flights to and from Libya and an embargo on the sale of aircraft parts.

53. Paul Lewis, *Libya Offers Some Cooperation in Plane Bombings*, N.Y. TIMES, Feb. 13, 1992, at A9. In an attempt to avert the sanctions, Libya at this point stated that it would cooperate with the French investigation of the Union de Transports Aeriens bombing. *See also* Further Report by the Secretary-General Pursuant to Paragraph 4 of Security Council Resolution 731, *reprinted in* 31 I.L.M. 735 (1992).

54. Lewis, *supra* note 53.

55. Chris Hedges, *Libya, Fearing Attack, Braces for Clash with West*, N.Y. TIMES, Feb. 19, 1992, at A9.

56. *Libya Says Pan Am Suspects May Be Sent to 'Neutral' Site*, N.Y. TIMES, Mar. 2, 1992, at A2.

57. Barbara Crossette, *U.S. Dismisses Libyan Offer on Neutral Trial Site for Bomb Subjects*, N.Y. TIMES, Mar. 3, 1992, at A10.

58. Paul Lewis, *Qaddafi Parries Attempt to Impose Sanctions*, N.Y. TIMES, Mar. 5, 1992, at A12.

States and the U.K. had breached the Montreal Convention in their refusal to surrender evidence so the accused Libyan nationals could be tried in Libya.<sup>59</sup> On March 18, the Libyan government officially addressed the Secretary-General of the U.N., requesting that the dilemma be resolved at Court:

If the Security Council is of the view that the issue [regarding Resolution 731] is a legal one — and Libya is of this opinion — then the matter must be left to the highest impartial international body, namely the International Court of Justice, so that it may have its word, the issue, as is well known, being actually before it and the parties concerned having agreed to attend its sessions.<sup>60</sup>

With Libya requesting that the U.S. and Great Britain be ordered to refrain from coercing the surrender of the two suspects through economic sanctions, the Court announced that hearings would be held on March 26, 1992.<sup>61</sup>

On March 31, the Security Council adopted Resolution 748,<sup>62</sup> ordering Libya to comply with Resolution 731 within two weeks or face

59. *Id.*

60. Letter dated 18 March 1992 from the Secretary of the People's Committee for Foreign Liaison and International Cooperation of the Libyan Arab Jamahiriya addressed to the Secretary-General, *reprinted in* 31 I.L.M. 741 (1992).

61. *World Court Hearings Set*, N.Y. TIMES, Mar. 7, 1992, § 1 (Foreign Desk), at 7.

62. S.C. Res. 748, 3063rd mtg. (1992), *reprinted in* 31 I.L.M. 750 (1992). A lengthy list of demands was presented. The Resolution stated that Libya was to comply with Resolution 731 and cease all terrorist-related activities, or that on April 15, all member states would:

Deny permission to any aircraft to take off from, land in or overfly their territory if it is destined to land in or has taken off from the territory of Libya, unless the particular flight has been approved on grounds of significant humanitarian need by the Committee established . . . below; . . .

Prohibit, by their nationals or from their territory, the supply of any aircraft or aircraft components to Libya, the provision of engineering and maintenance servicing of Libyan aircraft or aircraft components, the certification of airworthiness for Libyan aircraft, the payment of new claims against existing insurance contracts and the provision of new direct insurance for Libyan aircraft; . . .

Prohibit any provision to Libya by their nationals or from their territory of arms and related material of all types, including the sale or transfer of weapons and ammunition, military vehicles and equipment, paramilitary police equipment and spare parts for the aforementioned, as well as the provision of any types of equipment, supplies and grants of licensing arrangements, for the manufacture or maintenance of the aforementioned; . . .

Prohibit any provision to Libya by their nationals or from their territory of technical advice, assistance or training related to the provision, manufacture, maintenance, or use of the items . . . above; . . .

Withdraw any of their officials or agents present in Libya to advise the Libyan authorities on military matters; . . .

Significantly reduce the number and level of the staff at Libyan diplomatic missions

sanctions. Protesting the threat of sanctions, the Libyan government organized riots in Tripoli where demonstrators attacked embassies of Security Council nations supporting the embargo.<sup>63</sup> Two days later, Qaddafi rejected the demands,<sup>64</sup> and the State Department advised Americans in Libya to leave the country immediately.<sup>65</sup>

On April 14, 1992, the Court handed down its decision in the case. Libya had requested the Court to indicate provisional measures in order to prevent the United States and Great Britain from infringing upon Libya's "economic, commercial and diplomatic rights."<sup>66</sup> Before a more detailed analysis of the Court's holding, and the international events subsequent to the decision, this Note will survey the power of the Court to take interim action by issuing provisional measures throughout the litigation of a case.

## II. PROVISIONAL MEASURES IN THE INTERNATIONAL COURT OF JUSTICE<sup>67</sup>

The International Court of Justice is the "principal judicial organ of the United Nations."<sup>68</sup> As such, all members of the United Nations are "ipso facto parties" to the statute of the Court.<sup>69</sup> Article 41 of the

and consular posts and restrict or control the movement within their territory of all such staff who remain; . . .

Prevent the operation of all Libyan Arab Airlines offices; [and]

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

*Id.* See also *Resolution on Libya Embargo: Barring Takeoff and Landing "to Any Aircraft,"* N.Y. TIMES, Apr. 1, 1992, at A12. Ten Security Council nations voted in favor of the resolution (the U.S., Great Britain, France, Russia, Austria, Belgium, Ecuador, Hungary, Japan, and Venezuela) while China, Morocco, India, Cape Verde and Zimbabwe abstained in favor of negotiating a settlement. See Paul Lewis, *Security Council Votes to Prohibit Arms Exports and Flights to Libya*, N.Y. TIMES, Apr. 1, 1992, at A1.

63. See Paul Lewis, *Libyans Riot at Embassies; U.N. Protests*, N.Y. TIMES, Apr. 3, 1992, at A8. As a result over the crisis, Libya called on foreigners to leave the country: a television announcer in Tripoli stated "We say to these countries: Evacuate your citizens and companies urgently and end all interests with us." *Id.*

64. See *Qaddafi Rejects U.N. Demands on Bomb Suspects*, N.Y. TIMES, Apr. 5, 1992, § 1 (Foreign Desk), at 13.

65. *Id.*

66. *Lockerbie*, 1992 I.C.J. at 125; 31 I.L.M. at 671.

67. For superb historical perspectives of provisional measures as a power of the Court and surveys of specific cases in which provisional measures were requested, see JEROME B. ELKIND, *INTERIM PROTECTION* (1981), and JERZY SZTUCKI, *INTERIM MEASURES IN THE HAGUE COURT* (1983).

68. U.N. CHARTER art. 92.

69. *Id.* at art. 93. Three non-U.N. members are also party to the Statute of the Court, which is composed of fifteen judges elected by the Security Council and the General Assembly voting separately. For a brief overview of the Court, see HENKIN, *supra* note 33, at 600-658.

statute entrusts to the Court the power to "indicate . . . provisional measures."<sup>70</sup> Provisional measures, also called interim protection,<sup>71</sup> are defined as "a suspensory remedy resembling an interim injunction by which the International Court of Justice can ask parties to a dispute before it to perform or refrain from performing certain acts pending the settlement of the dispute at bar."<sup>72</sup>

It is the purpose of this section to examine this dispute resolution mechanism possessed by the Court since "provisional measures, as a means of preservation of [the] status quo, almost automatically — though indirectly — acquired the rank of an integral part of the judicial peace-keeping machinery."<sup>73</sup> Indeed, in the present case, Libya approached the Court in an attempt to avoid economic sanctions and maintain then-current conditions. In general, provisional measures have served this status-quo maintaining function with good reason:

[P]arties to a case must abstain from any measure capable of exercising a prejudicial effect in regard to the execution of the decision to be given and, in general, not allow any step of any kind to be taken which might aggravate or extend the dispute.<sup>74</sup>

Thus, provisional measures serve a protectionist capacity within the international adjudicatory machinery. As Philip C. Jessup, former Judge of the Court stated, "invocation of such protection from the Court may lead the parties to reach an agreement on preserving the status quo until the merits of the claim are finally adjudged."<sup>75</sup>

Since 1946 and the inception of the Court, in no case in which the Court indicated provisional measures has the affected party willfully accepted them.<sup>76</sup> Although considerable controversy exists over the is-

70. Statute of the International Court of Justice, art. 41, para. 1, *reprinted in* SHABTAI ROSENNE, *PROCEDURE IN THE INTERNATIONAL COURT* 268 (1983). The full text of Article 41 reads

1. The Court shall have the power to indicate, if it considers that circumstances so require, any provisional measures which ought to be taken to preserve the respective rights of either party.

2. Pending the final decision, notice of the measures suggested shall forthwith be given to the parties and to the Security Council.

71. The Statute of the Court uses the term "provisional measures." Article III, section D, of the Rules of the Court entitles the first subsection "interim measures" while using the term "provisional measures" within the articles themselves. Rosenne has written that at least within the original and revised Rules, the terms are basically in harmony and that the differing usage "leav[es] unimpaired the conception or juridical concordance between the two language versions of the Rules." *Id.* at 149.

72. *Id.* at 3.

73. SZTUCKI, *supra* note 67, at 1.

74. *Electricity Company (Port. v. Bulg.)*, 1939 P.I.C.J. (ser. A/B) No. 79, at 199.

75. ELKIND, *supra* note 67, at xvl.

76. ROSENNE, *supra* note 70.

sue of whether “indicated” measures are advisory or binding, it is likely that they are in practice advisory<sup>77</sup> due to the Court’s lack of enforcement powers.<sup>78</sup> However, “[i]nterim measures express rules of law. A State which does not comply with them cannot be forced to do so. But compliance or noncompliance with interim measures is an accurate barometer of a State’s fidelity to the rule of law. . . . States ignore interim measures at their peril.”<sup>79</sup>

Nevertheless, as we shall see, the Court refused to grant Libya’s request for provisional measures in the current case. One reason for the refusal may be that “interim protection is best understood in conditions of desperation, crisis and urgency.”<sup>80</sup> Although “the Court is . . . under a duty to grant interim measures in any dispute where the threat of violence is imminent,”<sup>81</sup> the current case did not present such conditions. Even had Libya’s request been cloaked in the likelihood of probable and imminent armed conflict, the Court would likely have denied the measures all the same since Libya could not legitimately avoid the extradition of the accused by asserting rights under the Montreal Convention. As Professor D’Amato succinctly stated in a letter to the editor of the *New York Times*, “international terrorism — especially involving unlawful acts against the safety of civil aviation — is now a recognized crime under international customary law. . . . Libya cannot lawfully shield terrorists against international criminal prosecution.”<sup>82</sup>

Thus, the current case presented the Court with an issue more concerning the competence of the Court vis-a-vis the Security Council, and global relations in general, than irreparable injury to Libya based on the sanctions. From Libya’s perspective, the predicament with the West was, and currently is,<sup>83</sup> an issue that revolves around the application of the Montreal Convention. Yet Libya stirs into the mixture notions of sovereignty under customary international law: it alleged that the sanctions would “irreparably prejudice” Libya’s rights.<sup>84</sup> How-

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77. *Id.* at 150. This conclusion is justified by the fact that provisional measures have been indicated even though parties subject to them were objecting to the Court’s jurisdiction of the case itself.

78. Article 59 of the Statute of the Court states “the decision of the Court has no binding force except between the parties and in respect of that particular case.” See also ELKIND, *supra* note 67, at 256.

79. *Id.* at 257.

80. *Id.* at 258.

81. ELKIND, *supra* note 67, at 258.

82. Anthony D’Amato, *International Law Won’t Shield Libyan Agents*, N.Y. TIMES, Mar. 3, 1992, at A22 (letter to the editor).

83. See *infra* notes 130-146 and accompanying text.

84. *Lockerbie*, 1992 I.C.J. at 118. 31 I.L.M. at 667.

ever, it is to the political, not adjudicative, branch of the United Nations organization that such relational issues must fall. As Judge Lachs stated in his separate opinion, "[w]hile 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."<sup>85</sup>

The next section, a survey of the specific arguments asserted by Libya and refuted by the United States, indicates Libya's reliance on the fallacious syllogism that its sovereignty was to be violated by the indication of provisional measures. The subsequent sections, examining Libya's reaction to the Court's holding and exploring the reasoning underlying the holding itself, together reveal that obligations of parties to the United Nations prevail over those created among other international agreements.

### III. THE LOCKERBIE CASE

As 1992 began, the threat of economic sanctions against Libya grew more imminent. In its continuing diplomatic attempt to avoid the sanctions, especially after the Security Council passed Resolution 731, the Libyan government instituted proceedings at the International Court of Justice at The Hague. Libya filed its application with the Court on March 3, 1992, alleging

- (a) that Libya has fully complied with all of its obligations under the Montreal Convention;
- (b) that the United States has breached, and is continuing to breach, its legal obligations to Libya under Articles 5 (2), 5 (3), 7, 8 (2) and 11 of the Montreal Convention; and
- (c) that the United States is under a legal obligation immediately to cease and desist from such breaches and from the use of any and all force or threats against Libya, including the threat of force against Libya, and from all violations of the sovereignty, territorial integrity, and the political independence of Libya.<sup>86</sup>

#### A. *Libya's Application and the U.S. Reply*

Libya considered the Court's jurisdiction as "prima facie established under the Montreal Convention."<sup>87</sup> This assumption is persuasive evidence that Libya was engaging the Court quickly to avoid the

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85. *Id.* at 138; 31 I.L.M. at 677.

86. *Id.* at 117; 31 I.L.M. at 667.

87. *Id.* at 119; 31 I.L.M. at 668.

imminent sanctions. Under Article 14 of the Montreal Convention,<sup>88</sup> the parties may only engage the Court after six months has passed without an agreement on an arbitration process to deal with a dispute. Libya claimed that it had requested arbitration of the dispute, the United States had rejected the proposal, and the six-month requirement had been fulfilled.<sup>89</sup> In fact, it was disputed as to whether six months had passed. This rush to the Court absent a determination as to whether the temporal requirement of Article 14 had been fulfilled already doomed Libya's request for the indication of provisional measures in Judge Zhengyu's eyes.<sup>90</sup>

Libya obliquely requested that the Court indicate provisional measures "to enjoin" the United States from imposing the threatened sanctions.<sup>91</sup> Libya claimed that the indictment by the U.S. of the two Libyan nationals was a dispute that could be resolved only by an application of the Montreal Convention.<sup>92</sup> Libya argued that under the Montreal Convention it had jurisdiction over the two nationals absent any extradition or mutual assistance treaties between it and the United States.<sup>93</sup> Libya also contended the actions of the two nationals as alleged fall under the definitions provided in Article 1,<sup>94</sup> and that Libya possesses jurisdiction to try the two under Article 5 because the nationals are located in Libya.<sup>95</sup> Libya further contended that the Montreal Convention was the applicable tool to resolve the dispute since no extradition treaty exists between Libya and the United States.<sup>96</sup>

88. *Supra* note 3.

89. *Lockerbie*, 1992 I.C.J. at 121; 31 I.L.M. at 669.

90. *See infra* notes 151-152 and accompanying text.

91. *Lockerbie*, 1992 I.C.J. at 119; 31 I.L.M. at 668. Specifically, Libya requested the Court to indicate provisional measures

(a) to enjoin the United States from taking any action against Libya calculated to coerce or compel Libya to surrender the accused individuals to any jurisdiction outside of Libya; and

(b) to ensure that no steps are taken that would prejudice in any way the rights of Libya with respect to the legal proceedings that are the subject of Libya's Application.

92. *Id.* at 115; 31 I.L.M. at 666.

93. *See supra* note 3.

94. *Id.* Article one states, *inter alia*, that

[a]ny person commits an offense 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

(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 the aircraft . . .

95. *Id.* Article 5 states in pertinent part that under the applicable offenses listed in Article 1, a party has jurisdiction over alleged offenders present in the State not extradited under Article 8 of the Convention.

96. *Id.* Article 8 of the Montreal Convention declares at paragraph 2 that the Convention is the "legal basis" for extradition in cases where no extradition treaties exist between the contesting states.



Lastly, Libya claimed that the United States was breaching its obligations under Article 11 by refusing to provide details of the Lockerbie investigation.<sup>97</sup>

Facially, if one neglects to take into account any prior knowledge of Qaddafi's global actions and terrorist connections, Libya's claims appear reasonable. In its Application, Libya stated that it had established jurisdiction over the nationals under Article 5, paragraph 2, of the Montreal Convention after the United States indicted the accused and informed Libya that the two were present in the country.<sup>98</sup> Libya argued that it had initiated an investigation, had taken measures to keep the nationals in the country, and had no obligation to extradite the two under Article 8 of the Montreal Convention since Libyan law prohibits extradition of Libyan nationals.<sup>99</sup> Libya concluded by alleging that the United States breached its obligations by refusing to cooperate with the Libyan investigation under Article 11.<sup>100</sup>

Immediately after Libya filed its Application, the Legal Advisor of the Department of State notified the Court that the United States opposed the indication of provisional measures. The Advisor asserted a lack of urgency in the dispute and stated that Libya's request was "unnecessary" and "could be misconstrued" in light of the ongoing developments within the United Nations.<sup>101</sup>

### B. *The Public Hearings*

During oral hearings on the morning of March 28, Libya presented to the Court the submissions that

Libya hereby confirms that it is requesting the Court to indicate the following provisional measures:

- (a) to enjoin . . . the United States . . . from taking against Libya measures calculated to exert coercion on it or compel it to surrender the accused individuals to any jurisdiction outside of Libya; and
- (b) to ensure that no steps are taken that could prejudice in any way the rights of Libya with respect to the proceedings instituted by Libya's Application.<sup>102</sup>

That afternoon, the United States asked the Court to deny the request, and to not indicate the provisional measures.<sup>103</sup> In addition to

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97. *Id.* at Article 11.

98. *Lockerbie*, 1992 I.C.J. at 116-17; 31 I.L.M. at 665-66.

99. *Id.*

100. *Id.*

101. *Id.* at 119; 31 I.L.M. at 668.

102. *Id.* at 120-21; 31 I.L.M. at 668-69.

103. *Id.* at 121; 31 I.L.M. at 669.

the assertions listed in its Application,<sup>104</sup> Libya also contended during the oral proceedings that the dispute-resolving conditions in Article 14 of the Montreal Convention had been fulfilled.<sup>105</sup> Interestingly, although Libya alleged that the six-month time period in Article 14 had passed, the Court makes no mention of Libya asserting specific evidence to support the claim.<sup>106</sup>

In the course of the oral proceedings, Libya further claimed that "the rights for which it sought protection were established," and that the circumstances involved a "risk of imminent irreparable damage" to those rights.<sup>107</sup> Obviously concerned that the Security Council would soon take action more severe in effect than the precatory language of Resolution 731, Libya also asserted during oral proceedings that "the exercise by the Court and the Security Council of their respective powers" did not conflict.<sup>108</sup>

The United States responded initially that the Court should refrain from indicating provisional measures because Libya had failed to present a *prima facie* case that jurisdiction existed under the Montreal Convention, and that no "imminent risk of irreparable injury" existed because there was no proof that Libya was being threatened with economic sanctions.<sup>109</sup> The U.S. further argued that the requested measures did not relate to the rights Libya claimed in its Application, that Libya did not establish the existence of those rights under the Montreal Convention, and that the measures would not preserve the rights of the United States.<sup>110</sup>

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104. Specifically, Libya alleged in its Application that a dispute exists between Libya and the United States as to the interpretation or application of the Montreal Convention; that it has not been possible to settle this dispute by negotiation; that a request by Libya to the United States for arbitration of the dispute has been rejected by the United States, and that the parties have been unable to agree on the organization of such an arbitration; and that in the light of the urgency of rectifying the continuing violations by the United States of the Montreal Convention and the United States refusal to enter into arbitration, the Court has jurisdiction to hear Libya's claims arising under the Montreal Convention; whereas in its request for the indication of provisional measures, Libya submitted that the Court's jurisdiction in the case was *prima facie* established under the Montreal Convention . . . .

*Id.*

105. *Id.*

106. The Court simply states that Libya "contended that the various conditions laid down by Article 14, paragraph 1, of the Montreal Convention had been fulfilled, including the requirement related to the six-month period." It is interesting to note that no specific dates or communications are referred to in the Court's Order. *Id.*

107. *Id.* at 122; 31 I.L.M. at 669.

108. *Id.*

109. *Id.*

110. *Id.*

Lastly, the United States invoked the foundation of its argument, the contention on which the ultimate victory of the case was based. The U.S. claimed that the Security Council was aware of the situation between the two countries and Libya's request was "improperly directed to restrain[] action in the Security Council, including participation by member states."<sup>111</sup> To support the argument, the United States referred to both the declaration issued the previous year<sup>112</sup> and Resolution 731.<sup>113</sup>

The oral proceedings concluded with both sides referring to the possibility of the Security Council imposing sanctions in order to force Libya to surrender the two nationals.<sup>114</sup> Libya lastly asserted that the indication of provisional measures was required to prevent the United States from undertaking any actions prejudicial to the final outcome of the case, "and more specifically to refrain from taking any initiative within the Security Council for the purpose of impairing [the Court's] right to exercise jurisdiction" over the case.<sup>115</sup>

### C. *The Adoption of Security Council Resolution 748*

On March 31, three days after the conclusion of oral proceedings, the United Nations Security Council adopted Resolution 748.<sup>116</sup> The resolution gave Libya two weeks to surrender the two accused nationals or face the numerous prohibitions. The United States submitted a letter to the Court drawing attention to Resolution 748 and reasserting that Libya's request for the indication of provisional measures should be denied.<sup>117</sup>

In accordance with the applicable rules of the Court, the Court notified the parties that it would receive any observations relating to the implications of Resolution 748.<sup>118</sup> Libya responded by contending that the resolution did not eliminate Libya's right to request provisional measures because the resolution infringed upon Libya's sovereign economic, commercial, and diplomatic rights as well as its rights under the Montreal Convention.<sup>119</sup> Libya secondly claimed that "the risk of contradiction between the resolution and the provisional measures requested" did not eliminate the admissibility of the claim because the

111. *Id.*

112. *See supra* note 40 and accompanying text.

113. *See supra* note 47 and accompanying text.

114. *Lockerbie*, 1992 I.C.J. at 124; 31 I.L.M. at 670.

115. *Id.*

116. *See supra* note 62 and accompanying text.

117. *Lockerbie*, 1992 I.C.J. at 125; 31 I.L.M. at 671.

118. *Id.*

119. *Id.*

Court and the Security Council possess separate competence.<sup>120</sup> Libya lastly declared that it regarded the adoption of the resolution invalid under international law and alleged that the Security Council under the U.N. Charter "employed its power to characterize the situation for purposes of Chapter VII simply as a pretext to avoid applying the Montreal Convention."<sup>121</sup>

In response to the Court's request for observations regarding Resolution 748, the United States asserted that since the resolution was adopted under Chapter VII and "framed as a 'decision,'" the resolution was binding and no purpose would be served by the indication of provisional measures.<sup>122</sup> The U.S. further contended that as a member of the United Nations, Libya has a duty based on the U.N. Charter to comply with Resolution 748.<sup>123</sup> Lastly, the United States claimed that the indication of provisional measures would conflict with the work of the Security Council since the Council had rejected Libya's contention that the entire issue be resolved under the Montreal Convention.<sup>124</sup>

#### D. *The Court's Order*

On April 14, 1992, the Court handed down its decision declining to indicate the requested provisional measures.<sup>125</sup> The Court held that since Libya and the United States are both members of the United Nations, they are obligated to carry out decisions of the Security Council and that "prima facie this obligation extends to the decision contained in Resolution 748."<sup>126</sup> The Court cited Article 103 of the United Nations Charter<sup>127</sup> and stated that the parties' U.N. obligations prevailed over the Montreal Convention.<sup>128</sup> Lastly, the Court stated that in light of Resolution 748, the Montreal Convention is not appropriate as a vehicle for supporting the rights claimed by Libya, and that the rights of the United States under the resolution would be impaired by the indication of provisional measures.<sup>129</sup>

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120. *Id.* at 126; 31 I.L.M. at 671.

121. *Id.* As Judge Lachs stated in his separate opinion, "[t]he Council, by moving onto the terrain of Chapter VII of the Charter decided certain issues pertaining to the Lockerbie disaster with binding force." *Id.* at 138; 31 I.L.M. at 677.

122. *Id.*

123. *Id.*

124. *Id.*

125. *Id.* at 127; 31 I.L.M. at 672. The Court was divided with five dissenting votes.

126. *Id.* at 126; 31 I.L.M. at 671.

127. *Id.* "In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail." U.N. CHARTER art. 103.

128. *Lockerbie*, 1992 I.C.J. at 126; 31 I.L.M. at 671.

129. *Id.*

## IV. LIBYA'S REACTION

Libya accepts Security Council resolution 731 (1992), with a view to strengthening the role of the United Nations in the maintenance of international peace and security, declares once again that it definitively renounces all forms of international terrorism of whatever origin and, accordingly, is taking the following steps:

1. With regard to international terrorism

(i) It severs relations with all groups and organizations involved in international terrorism of any kind;

(ii) It affirms that there are no terrorist training camps or terrorist organizations or groups in its territory and invites a committee from the Security Council, the United Nations Secretariat or any appropriate United Nations body to investigate this at any time;

(iii) Libya will not in any way permit its territory, its citizens or its institutions to be used directly or indirectly for the perpetuation of terrorist acts. It is prepared to impose the severest penalties on anyone proved to be involved in such acts;

(iv) Libya undertakes to respect the national options of all States and to base its relations on mutual respect and non-intervention in internal affairs.<sup>130</sup>

And thus, in the issuance of this statement — the quintessential model of form over substance — Libya attempted to diplomatically avoid the sanctions after the Court refused the request for provisional measures. Subsequent to the Court's refusal to indicate provisional measures and its refusal to proclaim the sanctions "irreparably prejudic[al] either in fact or in law,"<sup>131</sup> Libya again failed to surrender the two accused agents and the United Nations-imposed air, trade, and diplomatic sanctions became effective on April 15, 1992.<sup>132</sup> The effects of the "first major punitive embargo the Security Council has proposed on a United Nations member since the end of the cold war" began to pressure Qaddafi to surrender the suspects.<sup>133</sup> With a wealth of countries complying with the embargoes, some not expected to observe such actions against acquainted nations before the fall of com-

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130. Letter Dated 14 May 1992 from the Permanent Representative of the Libyan Arab Jamahiriya to the United Nations Addressed to the Secretary-General, *reprinted in* 31 I.L.M. 741-42 (1992).

131. *Lockerbie*, 1992 I.C.J. at 118; 31 I.L.M. at 667.

132. Paul Lewis, *Sanctions on Libya Begin to Take Hold as Deadline Passes*, N.Y. TIMES, Apr. 15, 1992, at A1.

133. Paul Lewis, *Isolation of Libya Grows as Its Links to the World Are Cut*, N.Y. TIMES, Apr. 16, 1992, at A1.

munism, it appeared as if the sanctions would have some effect on Qaddafi.<sup>134</sup>

However, the Libyans — long accustomed to suffering for the actions of their revolutionary leader — counted the sanctions as “just one of many hurdles in their lives, and by most accounts not a very big one.”<sup>135</sup> Malta became the revolving door for those travelling to and from the country as Libya and her neighbors began creating alternate means of travel.<sup>136</sup> Syria, a sponsor of terrorism according to the State Department, threw support behind Libya and attempted to obtain airspace clearance from neighboring countries for a jet flight to Tripoli.<sup>137</sup> Qaddafi continued to defy the sanctions, deriving support from neighboring Arab countries that resented what was perceived as “American-led manipulation of the United Nations to the detriment of the broader Arab nation.”<sup>138</sup>

As relations between Libya and the world became increasingly strained, the relatives of those killed in Flight 103 brought a combined suit against recently bankrupt Pan Am.<sup>139</sup> The trial was expected to shed some light on the entire Lockerbie bombing investigation: Pan Am’s defense lawyers stated they would attempt to prove that the bomb did not originate in Malta, as the investigators claimed.<sup>140</sup> The jury, however, held Pan Am liable,<sup>141</sup> thus strengthening the United States position that the bomb was shipped in a suitcase from Malta to Frankfurt, where it passed through Pan Am’s lax security and was checked on to Flight 103 in London. Attorneys for Pan Am stated that they would appeal,<sup>142</sup> and a jury in one of the first damage trials subsequently awarded \$9.22 million to the family of a corporate lawyer killed in the bombing.<sup>143</sup>

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134. *Id.*

135. Chris Hedges, *Outlook in Libya: Adapt, Improvise*, N.Y. TIMES, Apr. 17, 1992, at A5.

136. *Id.*

137. Chris Hedges, *Syria Trying to Breach Air Embargo on Libya*, N.Y. TIMES, Apr. 21, 1992, at A5.

138. Alan Crowell, *The World; Why It's So Difficult to Make Qaddafi Give In*, N.Y. TIMES, Apr. 26, 1992, § 4 (Week in Review Desk), at 2.

139. John H. Cushman, Jr., *Civil Trial of Lockerbie Bombing Case Under Way*, N.Y. TIMES, Apr. 28, 1992, at A5.

140. *Id.*

141. Arnold H. Lubasch, *Pan Am is Held Liable in '88 Explosion*, N.Y. TIMES, July 11, 1992, § 1 (Foreign Desk), at 1. Under the Warsaw Convention, the victims would each be limited to \$75,000 in damages unless willful misconduct was found. The jury decided that Pan Am had indeed engaged in willful misconduct in not positively matching baggage with passengers (thus allowing the unaccompanied suitcase containing the bomb to be transferred in Frankfurt to Flight 103), and that the misconduct was a substantial factor in causing the disaster.

142. *Id.*

143. *Pan Am Jury Awards \$9 Million in First Case*, N.Y. TIMES, July 23, 1992, at A7.

And thus, for now, the story ends. Libya has not surrendered the suspects. Sanctions are still in place, and the Clinton administration has threatened Libya with a "global oil embargo" in response to Qaddafi's refusal to surrender the accused men.<sup>144</sup> Most recently, the Treasury Department reported that the U.S. government has frozen Libya's assets in the U.S., totalling \$903 million, in response to Libya's sponsoring of international terrorism.<sup>145</sup> Yet, many questions remain unanswered. Is Libya continuing to violate international law by refusing to surrender the accused? Is Libya, as a nation, liable for the actions of its nationals? And ultimately at the focus of this Note, was the Court correct in refusing the provisional measures and holding that Resolution 748 supersedes the parameters of the Montreal Convention?

#### V. THE RELATIONSHIP BETWEEN THE SECURITY COUNCIL AND THE COURT

In his Declaration appended to the Order, Acting President of the Court Shigeru Oda realizes the fundamental flaw in Libya's claim: Libya is requesting provisional measures as a form of protection of sovereign rights that fall not under the Montreal Convention but under general international law.<sup>146</sup> Specifically, Judge Oda explained in an analysis he himself deemed as overly technical that

although a State which has jurisdiction in respect of criminal proceedings against any person who happens to be in a foreign territory is free to request the territorial sovereign to extradite that person (a principle admittedly supported by the Montreal Convention), the immediate question put by Libya is whether or not the coercive reinforcement of that request could be deemed contrary to international law. This, to repeat, relates to protection of sovereign rights under general international law but not to the interpretation and application of the Montreal Convention, which is the subject-matter of the present case.<sup>147</sup>

Judge Oda acknowledges that under the United Nations Charter, Security Council resolutions have binding force under Article VII "irrespective of the question whether [the resolution] is consonant with

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144. Elaine Sciolono, *Christopher Signals a Tougher U.S. Line Towards Iran*, N.Y. TIMES, Mar. 31, 1993, at A3.

145. *U.S. Freezes Assets of 5 Terrorist States*, ST. PETERSBURG TIMES, May 5, 1993, at A7.

146. *Lockerbie*, 1992 I.C.J. at 131; 31 I.L.M. at 674.

147. *Id.* (Emphasis added).

international law derived from other sources”<sup>148</sup> and invokes as determinant the “mismatch between the object of the Application and the rights sought to be protected.”<sup>149</sup>

Judge Ni Zhengyu, while concurring with the denial of the provisional measures, indicates yet another flaw in Libya’s argument that is indicative of that nation’s abuse of the Court in order to avoid economic sanctions. He indicates that the sole justification for the correct declination of provisional measures should be the “temporal question” of the non-lapse of the six-month time period in Article 14 of the Montreal Convention.<sup>150</sup> This point is cogent and supported by research: the first time Libya invoked the arbitration clause of Article 14 was less than two full months before the Application was filed with the Court.<sup>151</sup> As stated by Judge Zhengyu, contrary to Libya’s allegations, no negotiations between the parties regarding arbitration had occurred.

Thus, two distinctions weaken the foundation of Libya’s argument. While on one hand arguing that the Montreal Convention is the applicable adjudicatory tool to solve the dilemma, Libya deceptively attempts to jump the temporal hurdle of Article 14. Additionally, and more significantly from the perspective of this Note, Libya confuses its sovereign rights under customary international law with its treaty-derived rights under the Montreal Convention. Consequently, it appears as if Libya’s Application to the Court is merely an elusive attempt to avoid economic sanctions. Although several points of contention are raised in the dissenting opinions appended to the Order of the Court, these too appear as legalistic arguments centered on details that elude the grand, overall transnational issue of sovereign and treaty-derived rights.

Libya wished to apply treaty-based rights — *legal* rights — in order to solve a political dilemma. The flaw is that the political dilemma in this case was already adjudicated by the Security Council. In his dissenting opinion, Judge Bedjaoui extrapolates this flaw to a logical, albeit fallacious, conclusion. In this instance, Libya can rightfully come before the Court to resolve the legal extradition issue while the United States can simultaneously come before the Security Council to determine Libya’s international responsibility.<sup>152</sup> Bedjaoui feels that

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148. *Id.* at 129; 31 I.L.M. at 673.

149. *Id.* at 131; 31 I.L.M. at 674.

150. *Id.* at 135; 31 I.L.M. at 676.

151. See Letter Dated 18 January 1992 from the Permanent Representative of the Libyan Arab Jamahiriya to the United Nations Addressed to the President of the Security Council, reprinted in 31 I.L.M. 728 (1992).

152. *Lockerbie*, 1992 I.C.J. at 144-45; 31 I.L.M. 680-81.



the Security Council created a jurisdictional “grey area” between itself and the Court when it combined political actions against Libya with a demand to extradite the two accused nationals.<sup>153</sup> As he explained, “[i]t 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.”<sup>154</sup> He concludes that this jurisdictional overlap could result in contradictory solutions — one legal, one political — from the Court and the Council. Thus, in Judge Bedjaoui’s opinion, provisional measures *should* be indicated in order to preserve Libya’s possible right to refuse to extradite the two accused nationals. This conclusion, however, is incorrect.

The United Nations is fundamentally, of course, an institution devoted to maintaining world peace. As such, it was created with separate branches of power, and no judicial review of Security Council action exists. As stated by Rosenne,

[T]he Court is *not* a constitutional court of the United Nations system. It has no general power of judicial review to determine the “constitutionality” of the actions or decisions of any other organ or subdivision of the United Nations. . . . [The Court] only pronounces itself on questions relevant to the case at bar, and does not engage in philosophical exercises or moral pronouncements or in the construction of legal theory, however important these activities may be in their own right.<sup>155</sup>

Thus, for the U.N. organization to perform consistently with effect, the individual branches must be able to exercise their specific powers legitimately without interference from other branches. The actions of the Security Council are *not* subject to judicial review by the International Court of Justice. A country cannot, as Libya attempts in the current case, recategorize a political issue under the guise of a legal question to avoid political consequences.<sup>156</sup> For to allow such an action would undercut the power of the Security Council to devise political solutions for political dilemmas. Thus, the grey area created in Judge Bedjaoui’s mind thus does not, as he states, create an overlap of power. The majority’s decision, quite contrary to Bedjaoui’s opin-

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153. *Id.*

154. *Id.*

155. SHABTAI ROSENNE, *THE WORLD COURT* 36-38 (4th ed. 1989) (emphasis added).

156. See W. Michael Reisman, *The Constitutional Crisis in the United Nations*, 87 AM. J. INT’L L. 83, 86 (1993), where the author states that “Libya’s suit . . . was widely viewed as the cynical ruse of a government implicated in state terrorism to evade condemnation and sanction by the Security Council.”

ion, actually delineates the Court's function. As stated by Professor Franck in reference to the decision, "it is reassuring to note that the Court has carefully, and quietly, marked its role as the ultimate arbiter of institutional legitimacy."<sup>157</sup>

## VI. CONCLUSION

Libya invoked distorted notions of sovereignty in an ill-fated attempt to defend itself against allegations of global wrongdoings. As stated by Louis Henkin, President of the American Society of International Law,

Governments raise iron curtains of 'sovereignty' to resist international cooperation and frustrate international norms and institutions, to conceal atrocities behind state boundaries, to prevent their investigation and discovery, to preclude judgments and condemnation under international law, and reaction by international institutions.<sup>158</sup>

This current use of sovereignty as a wall erected by governments to fend off international liability for universal wrongs is directly applicable to Libya's actions. The International Court of Justice correctly denied Libya the pretense of a defense based on such misguided grounds, and in doing so clarified the procedural structure within the United Nations.

The Court has acknowledged that separation of powers is fundamental to any functioning organization. Over two hundred years ago, James Madison wrote that "[t]he accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many . . . may justly be pronounced the very definition of tyranny."<sup>159</sup> It is this point that the Court has helped delineate: it would be antithetical to a democratic organization such as the U.N. to allow claims of sovereignty to be used to justify judicial review of Security Council action. To allow such a condition to exist would allow the Court to be a *de facto* legislator. Legislative and judicial functions must be separate to encourage and preserve legitimacy. As Montesquieu wrote, "[w]ere the power of judging joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control, for *the judge* would then be *the legislator*."<sup>160</sup>

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157. Franck, *supra* note 2, at 523.

158. Louis Henkin, *The Mythology of Sovereignty*, AM. SOC'Y INT'L L. NEWSLETTER 1 (March-May 1993).

159. THE FEDERALIST No. 47, at 301 (James Madison) (Clinton Rossiter ed., 1961).

160. *Id.* at 303 (emphasis in original).

In its decision, the International Court of Justice is in essence “pass[ing] on the legality of legislative decision making without . . . bringing itself into direct conflict with the political branches [of the United Nations].”<sup>161</sup> In bringing this case to the Court, Libya unknowingly provided a mechanism that allowed a clarification of the powers possessed by the separate branches of the U.N. By correctly<sup>162</sup> holding that the indication of provisional measures must be declined if those measures would fly in the face of an existing Security Council resolution, the Court exercised judicial restraint to avoid a collision of competence between the separate branches of the United Nations. In this acknowledgment that no judicial review of Security Council action exists, the Court implicitly recognizes that the U.N.’s political branch must apply political solutions to solve political problems.<sup>163</sup>

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161. Reisman, *supra* note 156, at 92-93.

162. *Id.* at 90 (“Under the circumstances of the case, it was constitutionally proper, indeed mandatory, for the Court to defer to the Council.”).

163. Unclear from the Court’s opinion, however, is whether Security Council Resolution 748 actually exceeds the Security Council’s power. Only time will reveal the answer to this sleeping issue.