

**QUESTIONS OF INTERPRETATION AND APPLICATION OF THE 1971
MONTREAL CONVENTION ARISING FROM THE AERIAL INCIDENT AT
LOCKERBIE (LIBYAN ARAB JAMAHIRIYA v. UNITED STATES OF AMERICA)
(PRELIMINARY OBJECTIONS)**

Judgment of 27 February 1998

In its Judgment on the preliminary objections raised by the United States in the case concerning Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United States of America), the Court found that it had jurisdiction to deal with the merits of the case brought by Libya against the United States of America concerning the aerial incident at Lockerbie. It also found that the Libyan claims were admissible.

The Court was composed as follows in the case: Vice-President Weeramantry, Acting President; President Schwebel; Judges Oda, Bedjaoui, Guillaume, Ranjeva, Herczegh, Shi, Fleischhauer, Koroma, Vereshchetin, Parra-Aranguren, Kooijmans, Rezek; Judge ad hoc El-Kosheri; Registrar Valencia-Ospina.

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The full text of the operative paragraph of the Judgment is as follows:

“53. For these reasons:

THE COURT,

(1) (a) by thirteen votes to two, *rejects* the objection to jurisdiction raised by the United States on the basis of the alleged absence of a dispute between the Parties concerning the interpretation or application of the Montreal Convention of 23 September 1971;

IN FAVOUR: Vice-President Weeramantry, Acting President; Judges Bedjaoui, Guillaume, Ranjeva, Herczegh, Shi, Fleischhauer, Koroma, Vereshchetin, Parra-Aranguren, Kooijmans, Rezek; Judge ad hoc El-Kosheri;

AGAINST: President Schwebel; Judge Oda;

(b) by thirteen votes to two, *finds* that it has jurisdiction, on the basis of Article 14, paragraph 1, of

the Montreal Convention of 23 September 1971, to hear the disputes between Libya and the United States as to the interpretation or application of the provisions of that Convention;

IN FAVOUR: Vice-President Weeramantry, Acting President; Judges Bedjaoui, Guillaume, Ranjeva, Herczegh, Shi, Fleischhauer, Koroma, Vereshchetin, Parra-Aranguren, Kooijmans, Rezek; Judge ad hoc El-Kosheri;

AGAINST: President Schwebel; Judge Oda;

(2) (a) by twelve votes to three, *rejects* the objection to admissibility derived by the United States from Security Council resolutions 748 (1992) and 883 (1993);

IN FAVOUR: Vice-President Weeramantry, Acting President; Judges Bedjaoui, Guillaume, Ranjeva, Shi, Fleischhauer, Koroma, Vereshchetin, Parra-Aranguren, Kooijmans, Rezek; Judge ad hoc El-Kosheri;

AGAINST: President Schwebel; Judges Oda, Herczegh;

(b) by twelve votes to three, *finds* that the Application filed by Libya on 3 March 1992 is admissible.

IN FAVOUR: Vice-President Weeramantry, Acting President; Judges Bedjaoui, Guillaume, Ranjeva, Shi, Fleischhauer, Koroma, Vereshchetin, Parra-Aranguren, Kooijmans, Rezek; Judge ad hoc El-Kosheri;

AGAINST: President Schwebel; Judges Oda, Herczegh;

(3) by ten votes to five, *declares* that the objection raised by the United States according to which the claims of Libya became moot because Security Council resolutions 748 (1992) and 883 (1993) rendered them without object, does not, in the circumstances of the case, have an exclusively preliminary character.

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IN FAVOUR: Vice-President Weeramantry, Acting President; Judges Bedjaoui, Ranjeva, Shi, Koroma, Vereshchetin, Parra-Aranguren, Kooijmans, Rezek; Judge ad hoc El-Kosheri;

AGAINST: President Schwebel; Judges Oda, Guillaume, Herczegh, Fleischhauer.”

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Judges Bedjaoui, Ranjeva and Koroma appended a joint declaration to the Judgment of the Court; Judges Guillaume and Fleischhauer appended a joint declaration to the Judgment of the Court; Judge Herczegh appended a declaration to the Judgment of the Court. Judges Kooijmans and Rezek appended separate opinions to the Judgment of the Court. President Schwebel and Judge Oda appended dissenting opinions to the Judgment of the Court.

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Review of the proceedings and submissions (paras. 1-15)

On 3 March 1992, Libya filed in the Registry of the Court an Application instituting proceedings against the United States in respect of a “dispute between Libya and the United States concerning the interpretation or application of the Montreal Convention” of 23 September 1971 for the Suppression of Unlawful Acts against the Safety of Civil Aviation (hereinafter called “the Montreal Convention”). The Application referred to the destruction, on 21 December 1988, over Lockerbie (Scotland), of the aircraft on Pan Am flight 103, and to charges brought by a Grand Jury of the United States in November 1991 against two Libyan nationals suspected of having caused a bomb to be placed aboard the aircraft, which bomb had exploded causing the aeroplane to crash. The Application invoked as the basis for jurisdiction Article 14, paragraph 1, of the Montreal Convention.

On 3 March 1992, immediately after the filing of its Application, Libya submitted a request for the indication of provisional measures under Article 41 of the Statute. By an Order dated 14 April 1992, the Court, after hearing the Parties, found that the circumstances of the case were not such as to require the exercise of its power to indicate provisional measures.

Libya filed a Memorial on the merits within the prescribed time limit. In the Memorial Libya requests the Court to adjudge and declare:

“(a) that the Montreal Convention is applicable to this dispute;

(b) that Libya has fully complied with all of its obligations under the Montreal Convention and is justified in exercising the criminal jurisdiction provided for by that Convention;

(c) that the United States has breached, and is continuing to breach, its legal obligations to Libya under

Article 5, paragraphs 2 and 3, Article 7, Article 8, paragraph 3, and Article 11 of the Montreal Convention;

(d) that the United States is under a legal obligation to respect Libya’s right not to have the Convention set aside by means which would in any case be at variance with the principles of the United Nations Charter and with the mandatory rules of general international law prohibiting the use of force and the violation of the sovereignty, territorial integrity, sovereign equality and political independence of States.”

Within the time limit fixed for the filing of its Counter-Memorial, the United States filed Preliminary Objections to the jurisdiction of the Court and the admissibility of the Application. Libya for its part filed a statement of its observations and submissions on the Preliminary Objections within the time limit fixed by the Court. Hearings were held between 13 and 22 October 1997.

At the hearing the United States presented the following final submissions:

“The United States of America requests that the Court uphold the objections of the United States to the jurisdiction of the Court and decline to entertain the case concerning *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United States of America)*.”

The final submissions of Libya read as follows:

“The Libyan Arab Jamahiriya requests the Court to adjudge and declare:

— that the Preliminary Objections raised by ... the United States must be rejected and that, as a consequence:

(a) the Court has jurisdiction to entertain the Application of Libya;

(b) that the Application is admissible;

— that the Court should proceed to the merits.”

Jurisdiction of the Court (paras. 16-38)

The Court first considers the objection raised by the United States to its jurisdiction. Libya submits that the Court has jurisdiction on the basis of Article 14, paragraph 1, of the Montreal Convention, which provides that:

“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.”

The Parties agree that the Montreal Convention is in force between them and that it was already in force both at the time of the destruction of the Pan Am aircraft over

Lockerbie, on 21 December 1988, and at the time of filing of the Application, on 3 March 1992. However, the Respondent contests the jurisdiction of the Court because, in its submission, all the requisites laid down in Article 14, paragraph 1, of the Montreal Convention have not been complied with in the present case.

The United States contests the jurisdiction of the Court mainly on the basis of Libya's failure to show, firstly, that there exists a legal dispute between the Parties, and, secondly, that such dispute, if any, concerns the interpretation or application of the Montreal Convention and falls as a result within the terms of Article 14, paragraph 1, of that Convention. However, at the hearings, the United States also made reference, in passing, to the arguments it had advanced, in the provisional measures phase of the proceedings, as to whether the dispute that, in the opinion of Libya, exists between the Parties could be settled by negotiation, whether Libya had made a proper request for arbitration and whether it had respected the six-month period required by Article 14, paragraph 1, of the Convention.

After an examination of the history of the alleged dispute between the Parties the Court concludes that it could not be settled by negotiation or submitted to arbitration under the Montreal Convention, and the refusal of the Respondent to enter into arbitration to resolve that dispute absolved Libya from any obligation under Article 14, paragraph 1, of the Convention to observe a six-month period starting from the request for arbitration, before seizing the Court.

Existence of a legal dispute of a general nature concerning the Convention
(paras. 22-25)

In its Application and Memorial, Libya maintained that the Montreal Convention was the only instrument applicable to the destruction of the Pan Am aircraft over Lockerbie. The United States does not deny that, as such, the facts of the case could fall within the terms of the Montreal Convention. However, it emphasizes that, in the present case, from the time Libya invoked the Montreal Convention, the United States has claimed that it was not relevant because it was not a question of "bilateral differences" but one of "a threat to international peace and security resulting from State-sponsored terrorism".

The Court concludes that consequently, the Parties differ on the question whether the destruction of the Pan Am aircraft over Lockerbie is governed by the Montreal Convention. A dispute thus exists between the Parties as to the legal regime applicable to this event. Such a dispute, in the view of the Court, concerns the interpretation and application of the Montreal Convention, and, in accordance with Article 14, paragraph 1, of the Convention, falls to be decided by the Court.

Existence of a specific dispute concerning Article 7 of the Convention
(paras. 25-28)

The Court finds that in view of the positions put forward by the Parties with respect to the rights and obligations which Articles 1, 5, 6, 7 and 8 of the Convention would entail for them that there exists between them not only a dispute of a general nature, as defined above, but also a specific dispute which concerns the interpretation and application of Article 7 — read in conjunction with Article 1, Article 5, Article 6 and Article 8 — of the Convention, and which, in accordance with Article 14, paragraph 1, of the Convention, falls to be decided by the Court.

Article 7 is worded in the following terms:

"Article 7

The Contracting State in the territory of which the alleged offender is found shall, if it does not extradite him, be obliged, without exception whatsoever and whether or not the offence was committed in its territory, to submit the case to its competent authorities for the purpose of prosecution. Those authorities shall take their decision in the same manner as in the case of any ordinary offence of a serious nature under the law of that State."

Existence of a specific dispute concerning Article 11 of the Convention
(paras. 29-32)

Furthermore, having taken account of the positions of the Parties as to the duties imposed by Article 11 of the Montreal Convention, the Court concludes that there equally exists between them a dispute which concerns the interpretation and application of that provision, and which, in accordance with Article 14, paragraph 1, of the Convention, falls to be decided by the Court.

Article 11 is worded as follows:

"Article 11

1. Contracting States shall afford one another the greatest measure of assistance in connection with criminal proceedings brought in respect of the offences. The law of the State requested shall apply in all cases.
2. The provisions of paragraph 1 of this Article shall not affect obligations under any other treaty, bilateral or multilateral, which governs or will govern, in whole or in part, mutual assistance in criminal matters."

Lawfulness of the actions of the Respondent
(paras. 33-35)

With respect to the last submission of Libya (see above, submission (d) of the Memorial) the United States maintains that it is not for the Court, on the basis of Article 14, paragraph 1, of the Montreal Convention, to decide on the lawfulness of actions which are in any event in conformity with international law, and which were instituted by the Respondent to secure the surrender of the two alleged offenders. It concludes from this that the Court lacks

jurisdiction to hear the submissions presented on this point by Libya.

The Court points out that it cannot uphold the line of argument thus formulated. Indeed, it is for the Court to decide, on the basis of Article 14, paragraph 1, of the Montreal Convention, on the lawfulness of the actions criticized by Libya, insofar as those actions would be contrary to the provisions of the Montreal Convention.

Effect of the resolution of the Security Council
(paras. 36-37)

In the present case, the United States has contended, however, that even if the Montreal Convention did confer on Libya the rights it claims, those rights could not be exercised in this case because they were superseded by Security Council resolutions 748 (1992) and 883 (1993) which, by virtue of Articles 25 and 103 of the United Nations Charter, have priority over all rights and obligations arising out of the Montreal Convention. The Respondent has also argued that, because of the adoption of those resolutions, the only dispute which existed from that point on was between Libya and the Security Council; this, clearly, would not be a dispute falling within the terms of Article 14, paragraph 1, of the Montreal Convention and thus not one which the Court could entertain.

The Court finds that it cannot uphold this line of argument. Security Council resolutions 748 (1992) and 883 (1993) were in fact adopted after the filing of the Application on 3 March 1992. In accordance with its established jurisprudence, if the Court had jurisdiction on that date, it continues to do so; the subsequent coming into existence of the above-mentioned resolutions cannot affect its jurisdiction once established.

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In the light of the foregoing, the Court concludes that the objection to jurisdiction raised by the United States on the basis of the alleged absence of a dispute between the Parties concerning the interpretation or application of the Montreal Convention must be rejected, and that the Court has jurisdiction to hear the disputes between Libya and the United States as to the interpretation or application of the provisions of that Convention.

Admissibility of the Libyan Application
(paras. 39-44)

The Court will now turn to consider the objection of the United States according to which the Libyan Application is not admissible.

The United States emphasizes that the measures which Libya opposes are those taken by the Security Council under resolutions 731 (1992), 748 (1992) and 883 (1993).

According to the United States, by seizing the Court, Libya was endeavouring to “undo the Council’s actions”. The United States argues that, even if Libya could make valid claims under the Montreal Convention, these are

“superseded” by the relevant decisions of the Security Council under Chapter VII of the Charter, which impose different obligations. The said decisions thus establish the rules governing the dispute between Libya and the United States. Those rules — and not the Montreal Convention — define the obligations of the Parties; and the claims of Libya based on the Convention are therefore inadmissible.

For its part, Libya argues that it is clear from the actual terms of resolutions 731 (1992), 748 (1992) and 883 (1993) that the Security Council has never required it to surrender its nationals to the United States or the United Kingdom; it stated at the hearing that this remained “Libya’s principal argument”. It added that the Court must interpret those resolutions “in accordance with the Charter, which determined their validity”, and that the Charter prohibited the Council from requiring Libya to hand over its nationals to the United States or the United Kingdom. Libya concludes that its Application is admissible “as the Court can usefully rule on the interpretation and application of the Montreal Convention ... independently of the legal effects of resolutions 748 (1992) and 883 (1993)”. Libya furthermore draws the Court’s attention to the principle that “[t]he critical date for determining the admissibility of an application is the date on which it is filed”.

In the view of the Court, this last submission of Libya must be upheld. The date, 3 March 1992, on which Libya filed its Application, is in fact the only relevant date for determining the admissibility of the Application. Security Council resolutions 748 (1992) and 883 (1993) cannot be taken into consideration in this regard, since they were adopted at a later date. As to Security Council resolution 731 (1992), adopted before the filing of the Application, it could not form a legal impediment to the admissibility of the latter because it was a mere recommendation without binding effect, as was recognized moreover by the United States. Consequently, Libya’s Application cannot be held inadmissible on these grounds.

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In the light of the foregoing, the Court concludes that the objection to admissibility derived by the United States from Security Council resolutions 748 (1992) and 883 (1993) must be rejected, and that Libya’s Application is admissible.

Objection that the Applicant’s claims are without object
(paras. 45-50)

The Court then considers the third objection raised by the United States. According to that objection, Libya’s claims have become moot because Security Council resolutions 748 (1992) and 883 (1993) have rendered them without object; any judgment which the Court might deliver on the said claims would thenceforth be devoid of practical purpose.

The Court notes that it already acknowledged, on several occasions in the past, that events subsequent to the filing of an application may “render an application without object” and “therefore the Court is not called upon to give a

decision thereon". Thus formulated, the Respondent's objection is that there is no ground for proceeding to judgment on the merits, which objection must be examined within the framework of this jurisprudence.

The Court must satisfy itself that such an objection does indeed fall within the provisions of Article 79 of the Rules, relied upon by the Respondent. In paragraph 1, this Article refers to "Any objection ... to the jurisdiction of the Court or to the admissibility of the application, or *other objection*" (emphasis added); its field of application *ratione materiae* is thus not limited solely to objections regarding jurisdiction and admissibility. However, if it is to be covered by Article 79, an objection must also possess a "preliminary" character. Paragraph 1 of Article 79 of the Rules of Court characterizes as "preliminary" an objection "the decision upon which is requested before any further proceedings". The Court considers in this respect that insofar as the purpose of the objection raised by the United States that there is no ground for proceeding to judgment on the merits is, effectively, to prevent, *in limine*, any consideration of the case on the merits, so that its "effect [would] be, if the objection is upheld, to interrupt further proceedings in the case", and "it [would] therefore be appropriate for the Court to deal with [it] before enquiring into the merits", this objection possesses a preliminary character and does indeed fall within the provisions of Article 79 of the Rules of Court.

Libya does not dispute any of these points. What Libya contends is that this objection — like the objection of inadmissibility raised by the United States, and for the same reasons — falls within the category of those which Article 79, paragraph 7, of the Rules of Court characterizes as objections "not possess[ing], in the circumstances of the case, an exclusively preliminary character".

On the contrary, the United States considers that the objection concerned possesses an "exclusively preliminary character" within the meaning of that provision. It contends, in particular, in support of this argument, that this objection does not require "the resolution of disputed facts or the consideration of evidence".

The Court finds that thus it is solely on the question of the "exclusively" or "non-exclusively" preliminary character of the objection under consideration that the Parties are divided and on which the Court must now make a determination; and it concludes that it must therefore ascertain whether, in the present case, the United States objection considered here contains "both preliminary aspects and other aspects relating to the merits" or not.

The Court observes that that objection relates to many aspects of the dispute. By maintaining that Security Council resolutions 748 (1992) and 883 (1993) have rendered the Libyan claims without object, the United States seeks to obtain from the Court a decision not to proceed to judgment on the merits, which would immediately terminate the proceedings. However, by requesting such a decision, the United States is requesting, in reality, at least two others which the decision not to proceed to judgment on the merits would necessarily postulate: on the one hand a decision

establishing that the rights claimed by Libya under the Montreal Convention are incompatible with its obligations under the Security Council resolutions; and, on the other hand, a decision that those obligations prevail over those rights by virtue of Articles 25 and 103 of the Charter.

The Court therefore has no doubt that Libya's rights on the merits would not only be affected by a decision not to proceed to judgment on the merits, at this stage in the proceedings, but would constitute, in many respects, the very subject matter of that decision. The objection raised by the United States on that point has the character of a defence on the merits.

The Court notes furthermore that the United States itself broached many substantive problems in its written and oral pleadings in this phase, and pointed out that those problems had been the subject of exhaustive exchanges before the Court; the United States Government thus implicitly acknowledged that the objection raised and the merits of the case were "closely interconnected".

The Court concludes that if it were to rule on that objection, it would therefore inevitably be ruling on the merits; in relying on the provisions of Article 79 of the Rules of Court, the Respondent has set in motion a procedure the precise aim of which is to prevent the Court from so doing.

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The Court concludes from the foregoing that the objection of the United States according to which the Libyan claims have become moot as having been rendered without object does not have "an exclusively preliminary character" within the meaning of that Article.

Having established its jurisdiction and concluded that the Application is admissible, the Court will be able to consider this objection when it reaches the merits of the case.

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Lastly, the United States requested the Court, in the alternative, in the event that, notwithstanding the United States' objections, it should declare that it has jurisdiction and deem the Application admissible, to "resolve the case in substance now" by deciding, as a preliminary matter, that the relief sought by Libya is precluded.

As the Court has already indicated, it is the Respondent which sought to rely, in this case, on the provisions of Article 79 of the Rules. By raising preliminary objections, it has made a procedural choice the effect of which, according to the express terms of Article 79, paragraph 3, is to suspend the proceedings on the merits. The Court cannot therefore uphold the claim of the United States.

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The Court finally specifies that in accordance with Article 79, paragraph 7, of the Rules of Court, time limits for the further proceedings shall be fixed subsequently by it.

Joint declaration of Judges Bedjaoui, Ranjeva and Koroma

Judges Bedjaoui, Ranjeva and Koroma consider that to qualify the United States objection of mootness as *not exclusively preliminary* and to refer it back to be considered at the merits stage means that it is not sufficient to invoke the provisions of Chapter VII of the Charter so as to bring to an end ipso facto and with immediate effect all argument on the Security Council's decisions.

Joint declaration of Judges Guillaume and Fleischhauer

In a joint declaration, Judges Guillaume and Fleischhauer have stated their views as to how the Court should have dealt with the objection of the United States according to which "Libya's claims have become moot because Security Council resolutions 748 (1992) and 883 (1993) have rendered them without object".

Judges Guillaume and Fleischhauer think that the Court could have decided on that objection without pronouncing on the merits of the rights and obligations of the Parties under the Montreal Convention. They reach the conclusion that the objection had an exclusively preliminary character and that the Court could and should have taken a decision as of now. They regret that the decision on the objection has been put off and underline that the solution arrived at by the Court runs counter to the objective of the revision in 1972 of Article 79 of the Rules of Court, i.e., the simplification of procedure and the sound administration of justice.

Declaration of Judge Herczegh

In his declaration, Judge Herczegh summarizes the reasons why he voted against paragraph 2 (a) and (b), and against paragraph 3 of the operative part. He considers that the Libyan claims are governed by the binding Security Council resolutions which rendered the Libyan Application without object. The objection raised by the Respondent in that connection has an exclusively preliminary character. The objection should therefore have been upheld and the Libyan claim rejected.

Separate opinion of Judge Kooijmans

In his separate opinion, Judge Kooijmans expresses his support for the conclusions of the Court. He wishes to place on record, however, his views with regard to a number of arguments brought forward by the Parties. In his opinion the motives which the Applicant may have had when filing its Application, are irrelevant to the Court whose only function is to determine whether there is a justiciable dispute. The fact that a situation has been brought to the attention of the Security Council and that the Council has taken action with regard to that situation can in no way detract from the Court's own competence and responsibility to objectively determine the existence or non-existence of a dispute.

With regard to the objection that the Libyan claims have been rendered without object or moot by Security Council

resolutions 748 (1992) and 883 (1993), Judge Kooijmans shares the Court's view that this objection has not an exclusively preliminary character. He is, however, also of the opinion that these resolutions, although authoritative, have no final and definitive character, and therefore cannot render the case moot in the preliminary phase.

Separate opinion of Judge Rezek

Judge Rezek deems that the Judgment would more fully convey the line of argument advanced by the Parties were it to devote a few lines to the subject of the jurisdiction of the Court in relation to that of the political organs of the Organization.

He is of the opinion that the Court has full jurisdiction to interpret and apply the law in a contentious case, even when the exercise of such jurisdiction may entail the critical scrutiny of a decision of another organ of the United Nations. It does not directly represent the member States of the Organization but it is precisely because it is impermeable to political injunctions that the Court is the interpreter par excellence of the law and the natural place for reviewing the acts of political organs in the name of the law, as is the rule in democratic regimes.

Dissenting opinion of President Schwebel

In Judge Schwebel's view, the Court's Judgment does not show (as contrasted with concluding) that the Respondent can be in violation of provisions of the Montreal Convention; with the possible exception of Article 11 of the Convention, the Court does not show that there is a dispute between the Parties over such alleged violations. There is dispute over the meaning, legality and effectiveness of the pertinent resolutions of the Security Council. That dispute may not be equated with a dispute under the Convention, the sole basis of the Court's jurisdiction in the case.

The fact the Security Council resolutions 748 (1992) and 883 (1993) were adopted after the filing of Libya's Application is not determinative. While jurisdiction is normally determined as of the date of application, it need not invariably be so. The cases on which the Court relies are not in point.

The Court rejects the Respondent's contention that Libya's case is inadmissible on the sole ground that the critical date for determining admissibility of an application is the date on which it is filed. But the single case on which the Court relies is distinguishable. Moreover, that case, as others, recognizes that events subsequent to the filing of an application may render an application without object.

In this case, Security Council resolutions 748 (1992) and 883 (1993) supervene any rights of Libya under the Montreal Convention, and thus render reliance upon it without object and moot. By virtue of Article 103 of the United Nations Charter, decisions of the Security Council prevail over any rights and obligations Libya and the Respondent may have under the Montreal Convention.

The Court finds that it cannot uphold the mootness claim because it is not exclusively preliminary in character under the Court's Rules. But since jurisdiction in this case flows only from the Montreal Convention, a plea citing resolutions of the Security Council in bar of reliance upon that Convention is of an exclusively preliminary character.

The Court's Judgment may be seen as prejudicing the efforts of the Security Council to combat terrorism and as appearing to offer recalcitrant States a means to parry and frustrate its decisions by appeal to the Court. That raises the question of whether the Court possesses a power of judicial review over Council decisions.

In Judge Schwebel's view, the Court is not generally so empowered, and it is particularly without power to overrule or undercut decisions of the Security Council determining whether there is a threat to the peace and what measures shall be taken to deal with the threat. The Court more than once has disclaimed a power of judicial review. The terms of the Charter furnish no shred of support for such a power. In fact, they import the contrary, since, if the Court could overrule the Council, it would be it and not the Council which would exercise dispositive and hence primary authority in a sphere in which the Charter accords primary authority to the Council.

The terms and drafting history of the Charter demonstrate that the Security Council is subject to the rule of law, and at the same time is empowered to derogate from international law if the maintenance of international peace requires. It does not follow from the fact that the Council is so subject, and that the Court is the United Nations principal judicial organ, that the Court is authorized to ensure that the Council's decisions do accord with law. In many legal systems, the subjection of the acts of an organ to law by no means entails the subjection of the legality of its actions to judicial review. The tenor of the discussions at San Francisco indicate the intention of the Charter's drafters not to accord the Court a power of judicial review.

To engraft upon the Charter regime a power of judicial review would not be a development but a departure justified neither by Charter terms nor by customary international law nor by the general principles of law. It would entail the Court giving judgment over an absentee, the Security Council, contrary to fundamental judicial principles. It could give rise to the question, is a holding by the Court that the Council has acted *ultra vires* a holding which of itself is *ultra vires*?

Dissenting opinion of Judge Oda

In his dissenting opinion, Judge Oda began by stating that the crux of the case before the International Court of Justice is simply the different positions adopted by both Parties concerning the surrender of the two Libyans,

presently located in Libya, who are accused of the destruction of Pan Am flight 103 over Lockerbie in United Kingdom territory.

What, in fact, occurred between the United States and Libya was simply a demand by the United States that the suspects located in Libya be surrendered to it and a refusal by Libya to comply with that demand. No dispute has existed between Libya and the United States "concerning the interpretation or application of the [Montreal] Convention" as far as the demand for the surrender of the suspects and the refusal to accede to that demand — the main issue in the present case — are concerned. In Judge Oda's view, the Application by which Libya instituted proceedings against the United States pursuant to Article 14, paragraph 1, of the Montreal Convention should be dismissed on this sole ground.

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If the Court's jurisdiction is denied, as Judge Oda believes it should be, the issue of whether the Application is or is not admissible does not arise. He considers it meaningless to discuss the question of admissibility. However, after finding that it has jurisdiction, the Court continues to deal with the question of admissibility by rejecting the objection to admissibility derived by the United States from Security Council resolutions 748 and 883. Judge Oda then commented on the impact of those Security Council resolutions in the present case. In his view, if the adoption of Security Council resolutions 748 and 883 is to be dealt with in connection with the question of admissibility of the Application, it should be dealt with at the present (preliminary) stage irrespective of whether this question possesses or not an *exclusively* preliminary character. The question of whether Libya's 3 March 1992 Application has become without object after the adoption of these two Security Council resolutions, is totally irrelevant to the present case. The Security Council manifestly passed those resolutions because it believed that Libya's refusal to surrender the accused constituted "threats to the peace" or "breaches of the peace". Judge Oda expressed his view that these Security Council resolutions, having a political connotation, have nothing to do with the present case, since the case must cover only legal matters existing between the United States and Libya before the resolutions were adopted.

If there is any dispute in this respect, it could be a dispute between Libya and the Security Council or between Libya and the United Nations, or both, but *not* between Libya and the United States. The effect of the Security Council resolutions upon member States is a matter quite irrelevant to this case and the question of whether the Application has become without object after the adoption of those resolutions hardly arises.