

DISSENTING OPINION OF JUDGE ODA

1. I regret that I am unable to agree with any of the three points in the operative part of the Judgment as I see the whole case from a different viewpoint to that of the Court.

I. LACK OF JURISDICTION — NO DISPUTE IN TERMS
OF THE 1971 MONTREAL CONVENTION

2. The crux of the case before us is simple in that, to use the expression used by Libya in its Application, the United States “continues to adopt a posture of pressuring Libya into surrendering the accused” and “is rather intent on compelling the surrender of the accused”.

The United States and Libya have adopted different positions concerning the surrender (transfer) of the two Libyans who are accused of the destruction of Pan Am flight 103 over Lockerbie and who are located in Libya. Those differing positions of the applicant State and the respondent State did *not*, however, constitute a “dispute . . . concerning the interpretation or application of the [1971 Montreal] Convention” to which both are parties (Montreal Convention, Art. 14, para. 1).

It is my firm belief that the Application by which, on 3 March 1992, Libya instituted proceedings against the United States pursuant to Article 14, paragraph 1, of the Montreal Convention should be dismissed on the sole ground that the dispute, if one exists, between the two States is not one that “concern[s] the interpretation or application of the [Montreal] Convention”.

In order to clarify this conclusion, I find it necessary to examine the chain of events which have occurred since the United States outlined, on 13 November 1991, its position on the Lockerbie incident and which led to Libya filing its Application on 3 March 1992.

A. The United States and Libya's Respective Claims

3. The destruction of the American Pan Am flight 103 occurred on 21 December 1988 over Lockerbie, Scotland, in the territory of the United Kingdom and involved the death of 11 residents of Lockerbie, 259 passengers and crew, including 189 United States' nationals and at least 29 United Kingdom nationals, and a number of citizens of another 19 States.

The United States' demand that Libya surrender the suspects

4. After carefully conducting a scientific investigation of the crash evidence for a period of over three years, the United States considered that it had identified the two persons responsible for the explosion — then located in Libya — who were said to have been acting as agents of the Libyan Government. The United States position is set out in the “indictment of the United States District Court for the District of Columbia” dated 14 November 1991, issued as United Nations document A/46/831 and S/23317, Annex.

5. On 27 November 1991, the United States Government issued a joint declaration of the United States and the United Kingdom, reading:

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

- surrender for trial all those charged with the crime; and accept complete 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.” (See United Nations doc. A/46/827; S/23308, Ann.)

The second point seems to me to be contingent on the first point and the third point is nothing but a subsidiary request which was apparently not pursued by the United States.

6. On the same day, the United States and the United Kingdom, together with France (which had also been the victim of the destruction of an aircraft in flight, a UTA DC10, on 19 September 1989, in an attack allegedly carried out by Libyan agents), issued a tripartite declaration on terrorism. The declaration reads in part:

“following the investigation carried out into the bombing[s] of Pan Am 103 . . . the three States have presented specific demands to the Libyan authorities related to the judicial procedures that are under way. They require that Libya comply with all these demands, and, in addition, that Libya commit itself concretely and definitively to cease all forms of terrorist action and all assistance to terrorist groups. Libya must promptly, by concrete actions, prove its renunciation of terrorism.” (See United Nations doc. A/46/828; S/23309, Ann.)

The main thrust of the United States claim was the demand for the surrender of the suspects. In demanding the surrender of the suspects, the United States took no further action other than issuing a statement or

declaration in this respect which was conveyed to Libya through the Belgium Government as the United States' protecting power.

Libya's response to the United States' demand

7. Libya responded to the accusation promptly on 15 November 1991 by means of a Communiqué issued by the People's Committee for Foreign Liaison and International Co-operation (hereinafter "the Libyan People's Committee") in which it "categorically denie[d] that Libya had any association with that incident" and "reaffirm[ed] its condemnation of terrorism in all its forms". The Communiqué continued:

"When a small, developing country such as Libya finds itself accused by super-Powers such as the United States [and the United Kingdom], it reserves its full right to legitimate self-defence before a fair and impartial jurisdiction, before the United Nations and before the International Court of Justice and other bodies.

.....

We urge the United States and the United Kingdom to be governed by the logic of the law, by wisdom and by reason and to seek the judgement of impartial international commissions of inquiry or of the International Court of Justice." (See United Nations doc. S/23221, Ann.)

8. The Libyan People's Committee commented in its 28 November 1991 Communiqué on the statements issued by the three States that:

"[a]ll the applications [of the three States] will receive every attention, inasmuch as the competent Libyan authorities will investigate it and deal with the matter very seriously, in a manner that accords with the principles of international legitimacy, including the rights of sovereignty and the importance of ensuring justice for accused and victims"

and that

"Libya takes a positive view of international *détente* and the atmosphere which it spreads and which establishes international peace and security and leads to the emergence of a new international order in which all States are equal, the freedom and options of peoples are respected and the principles of human rights and the United Nations Charter and the principles of international law are affirmed" (see United Nations doc. A/46/845; S/23417, Ann.).

9. On 2 December 1991, the Libyan People's Committee issued a further declaration refuting the United States accusation against Libya

and reiterating its readiness to see that justice was done in connection with the Lockerbie incident.

10. These responses from Libya dated 15 November 1991, 28 November 1991 and 2 December 1991 (as referred to above), which all three dealt with more general issues relating to acts of terrorism, certainly implied a categorical refusal by that State to accede to the United States' demand to surrender the suspects.

The real issues existing between the United States and Libya

11. Since making the announcement, on 14 November 1991, of the indictment for a criminal act relating to the Lockerbie incident, the United States has accused Libya in the strongest terms of having links with international terrorism. Libya, on the other hand, contended that no Libyan agent was linked to the Lockerbie incident but stated its willingness to make every effort to eliminate international terrorism and to cooperate with the United Nations for this purpose.

Despite the mutual accusations that were made in relation to the respective positions of the two States on international terrorism, that issue, however, is *not* in dispute between the two States in the present case. Rather, Libya insisted on carrying out any criminal justice procedure on its own territory where the suspects were to be found and made clear that it had no intention of surrendering them to the United States, although it later expressed its readiness to hand the two suspects over to a third, neutral, State or to an international tribunal. Libya accused the United States of attempting to cause difficulties in demanding the surrender of the suspects.

12. In fact, what occurred between the United States and Libya was simply a demand by the United States for the surrender to it of the suspects located in Libya and a refusal by Libya to comply with that demand.

In demanding the surrender of the two suspects, the United States made an attempt to justify that demand as an appeal that criminal justice be pursued. The United States did not claim that Libya would be legally bound under any particular law to surrender the two suspects. In *none* of the documents that it issued did the United States make any mention of the Montreal Convention *nor* did it accept that that Convention applied to the incident, including the matter of the surrender of the suspects. *Nor* did Libya, until January 1992, invoke the Montreal Convention as the basis of its refusal to surrender the two suspects to the United States.

Libya invokes the Montreal Convention only on 18 January 1992

13. On 18 January 1992, the Secretary of the Libyan People's Committee addressed a letter to the United States Secretary of State and the Foreign Secretary of the United Kingdom through the Embassies of Bel-

gium and Italy which were entrusted with looking after the interests of those two countries in Libya. After pointing out that the United States, the United Kingdom and Libya were States parties to the 1971 Montreal Convention, Libya's letter stated:

“out of respect for the principle of the ascendancy of the rule of law and in implementation of the Libyan Code of Criminal Procedure . . . as soon as the charges were made, Libya immediately exercised its jurisdiction over the two alleged offenders in accordance with its obligation under article 5, paragraph 2, of the Montreal Convention by adopting certain measures to ascertain their presence and taking immediate steps to institut  a preliminary enquiry. It notified the States . . . that the suspects were in custody . . .

As a State party to the Convention and in accordance with paragraph 2 of [article 5], we took such measures as might be necessary to establish our jurisdiction over any of the offences . . . because the alleged offender in the case was present in our territory.

Moreover, article 7 of the Convention stipulates that the Contracting Party in the territory of which the alleged offender is found shall, if it does not extradite him, submit the case to its competent authorities for the purpose of prosecution and that 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.” (See United Nations doc. S/23441, Ann.)

14. It was in Libya's letter of 18 January 1992, as quoted above, that the 1971 Montreal Convention was first mentioned. The United States did not respond to that letter. The United States was then informed by the Registrar of the Court on 3 March 1992 of Libya's Application in which reference was again made to the Montreal Convention. It is important that this point should not be overlooked in deciding whether there did or did not exist, on the date of the Application (namely 3 March 1992), “any dispute . . . concerning the interpretation or application of the [Montreal] Convention which cannot be settled through negotiation” (Montreal Convention, Art. 14, para. 1).

B. The Relevant Issues of International Law

The issues in the present case

15. There is no doubt that the 1971 Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation is, in general, applicable to the destruction of the American Pan Am aircraft which occurred in December 1988 over Lockerbie in the United Kingdom, as long as both Libya and the United States are parties to it.

Neither Party seems ever to have doubted that that destruction constituted a "crime" under the 1971 Convention. That point, however, is *not* in issue between the two States; *nor* is the prevention of international terrorism at issue in this case since proceedings were brought by Libya and *not* by the United States.

Furthermore, the question of whether the United States can hold Libya, as a State, responsible for the acts of Libyan nationals relating to the destruction of the American Pan Am aircraft over United Kingdom territory and of whether the explosion was caused by alleged Libyan intelligence agents (which would make Libya responsible for the acts committed by such persons), were *not* at issue either in the present Application which was instituted by Libya and *not* by the United States.

16. It would be wrong to consider that the present Application concerns the destruction of Pan Am flight 103 or, more generally, the Lockerbie incident as a whole which constituted an act of international terrorism. An application of that nature could have been filed by the United States but *not* by Libya.

The issues in the present case submitted by Libya to the Court relate solely to the demand of the Respondent, the United States, that the Applicant, Libya, surrender the two suspects identified by the indictment of the Grand Jury in the District of Columbia as having caused the destruction of the Pan Am aircraft (clearly a crime pursuant to the Montreal Convention) and Libya's refusal to accede to the Respondent's demand. Relations between those two States regarding the case went no further than this.

Criminal jurisdiction

17. No State is prevented from exercising its criminal jurisdiction over a person or persons who have committed a crime on its territory, or a person or persons who have committed serious damage to its interest or against it nationals, or who have committed a crime of universal jurisdiction anywhere in the world. Accordingly, there is no doubt that in this case the United States is competent to exercise its criminal jurisdiction over the two suspects, whoever they may be and wherever they may be located.

Conversely, nor is there any doubt that any State is entitled to exercise its criminal jurisdiction over a serious crime committed by its nationals anywhere, either on its own territory or abroad. Libya's rights in this respect do not seem to have been challenged by the United States.

18. Thus, the right to prosecute or punish criminals does not fall within the exclusive jurisdiction of any particular State, either the State whose interest has been damaged (in this instance, the United States) or

the State of which the criminal is a national (in this instance, Libya). The Libyan suspects in this case are subject to the concurrent jurisdictions of either the State where they have committed the crime or of the State where they are located. The Montreal Convention adds nothing to this general principle and does not deviate at all from it.

There is *no* difference in the views of the Applicant and the Respondent regarding the interpretation of those general rules of international law. There exists, apparently, *no* dispute in this respect.

19. The issues in this case arose *not* in relation to a legal question governing the rights and obligations of either Party to prosecute or punish the two suspects but are related rather to the fact that while the United States demanded that Libya transfer or surrender the two suspects located on its territory with a view to achieving criminal justice, Libya refused to accede to that demand, and, accordingly, the suspects have (so far) avoided the criminal jurisdiction of the United States.

Law of extradition

20. States have not been under an obligation to extradite accused persons under general international law but some specific treaties, either multilateral or bilateral, have imposed the obligation on contracting States to extradite accused persons to other contracting States. The Montreal Convention is certainly one of those treaties.

An exception to that obligation to extradite criminals is made, however, in the event that the accused are of the nationality of the State which is requested to extradite them. This rule of non-extradition of nationals of the requested State may not seem to be quite appropriate for the purposes of criminal justice, as the accused may more adequately be prosecuted in the country where the actual crime occurred. While no rule of international law prohibits extradition of nationals of the requested State, there is a long-standing international practice which recognizes that there is no obligation to extradite one's own nationals. The Montreal Convention is no exception as it does not provide for the extradition of nationals of the requested State even for the punishment of these universally recognized unlawful acts.

The rule of non-extradition of political criminals has long prevailed but that rule does not apply in the case of some universal crimes, such as genocide and acts of terrorism.

21. The Montreal Convention, however, goes one step further in the event that States do not extradite the accused to other competent States, by imposing the duty upon the State where the accused is located to bring the case before its own competent authorities for prosecution. Under the Montreal Convention, Libya would thus assume the responsibility to prosecute the accused if it did not extradite them. Libya has not challenged this point at all. Libya has claimed that it was proceeding to the prosecution of the suspects and it has also expressed its willingness to extradite them to what it maintains are certain politically neutral States.

C. Conclusion

22. Thus conceived, the question relating to the United States' demand that Libya surrender the two suspects and Libya's refusal to accede to that demand is not a matter of rights or legal obligation concerning the extradition of accused persons between the United States and Libya under international law *nor* is it a matter falling within the provisions of the Montreal Convention. Or, at least, there is no *legal* dispute concerning the interpretation or application of the Montreal Convention between Libya and the United States which could have been brought to arbitration or to the Court.

If there is any difference between them on this matter, that could simply be a difference between their respective policies towards criminal justice in connection with the question of which State should properly do justice on the matter. That issue does *not* fall within the ambit of the Montreal Convention.

From the outset, *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. Libya *neither* presented any argument contrary to that viewpoint *nor* proved the existence of such a legal dispute.

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23. I therefore conclude that *no* grounds exist on which the Court may exercise its jurisdiction to hear the present Application instituted by Libya.

II. THE QUESTION OF ADMISSIBILITY — THE EFFECT OF THE SECURITY COUNCIL RESOLUTIONS

24. As I have stated above, I am firmly of the view that the Court lacks the jurisdiction to consider this Application filed by Libya. If the Court's jurisdiction is denied, as I believe it should be, the issue of whether the Application is or is not admissible does not arise. For me, at least, it is meaningless to discuss the question of admissibility. However, the Court, after it

"finds that it has jurisdiction on the basis of Article 14, paragraph 1, of the Montreal Convention . . . to hear the disputes between Libya and the United States as to the interpretation or application of the provisions of that Convention" (Judgment, operative paragraph 53 (1) (b)),

continues to deal with the question of admissibility and finds that "the Application filed by Libya . . . is admissible" (para. 53 (2) (b)) by "*reject[ing]* the objection to admissibility derived by the United

States from Security Council resolutions 748 (1992) and 883 (1993)” (para. 53 (2) (a)). Despite the fact that I am of the view that the question of admissibility should not arise since the Court should dismiss the Application on the ground of lack of jurisdiction, I would now like to comment upon the impact of these Security Council resolutions, which is the only issue dealt with in the present Judgment in connection with whether the Application is admissible or not.

25. Before doing so, I also have to refer to another point in the Judgment on which I disagree. The Judgment states that the Court

“*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.” (Operative paragraph 53 (3).)

By finding the Application admissible, the Court certainly indicates that the objection of the United States that Libya’s claims are without object as a result of the adoption of the Security Council resolutions 748 (1992) and 883 (1993) does not have an exclusively preliminary character. In my view, however, this point should not form any separate or distinct issue from the question of admissibility but should be included in that question.

I believe that if the adoption of Security Council resolutions 748 (1992) and 883 (1993) 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. I reiterate that the question of whether Libya’s claims are without object because of the Security Council resolutions is a matter concerning admissibility which the Court should have dealt with at this stage.

A. Referral of the Incident to the United Nations — Particularly to the Security Council — by the Parties and Their Subsequent Actions

26. It should be noted that the majority of the documents issued by the United States and Libya were communicated to the United Nations with the request that they be distributed as documents of both the General Assembly and the Security Council or of the Security Council alone (see paras. 4-7 above).

Referral of United States and Libyan documents to the United Nations

27. The United States only transmitted the relevant documents to the United Nations as late as 20 December 1991: (i) the Joint Declaration of 27 November 1991 was transmitted to the United Nations Secretary-General on 20 December 1991 and distributed as document A/46/828 and

S/23309; (ii) the indictment of the Grand Jury in the District of Columbia was presented to the United Nations Secretary-General on 23 December 1991 and was distributed as document A/46/831 and S/23317.

28. It was, however, *Libya* that had already informed the United Nations Secretary-General of the statements of the United States in which the accusation that the two suspects were involved in the Lockerbie incident was made. This occurred well before the United States transmitted its documents to the United Nations.

Three documents were transmitted by *Libya* to the United Nations: (i) *Libya's* first Communiqué was transmitted on 15 November 1991 to the President of the Security Council and was distributed as document S/23221; (ii) *Libya's* Communiqué responding to the three States' (the United Kingdom, the United States and France) Joint Declaration of 27 November 1991 was transmitted on 28 November 1991, and was distributed as document A/46/845 and S/23417; and (iii) a letter dated 18 January 1992 from the Secretary of the Libyan People's Committee addressed to the United States Secretary of State and to the Foreign Secretary of the United Kingdom was transmitted on that same day to the President of the Security Council and was distributed as document S/23441.

Libya's notification of the events to the United Nations

29. The relevant documents were thus transmitted by *Libya* for distribution to the delegates in the General Assembly and particularly to the members of the Security Council. In addition, a few days after the United Kingdom and the United States announced the indictment of the two Libyan suspects, the Secretary of the Libyan People's Committee sent letters addressed directly to the United Nations Secretary-General (as indicated in paragraph 30 below) in an effort to draw the attention of the United Nations member States to the chain of events that had unfolded since 13 November 1991, particularly in relation to the transfer of the suspects. *Libya* seems to have believed that the matters involved were not legal issues but were concerned with international peace and security, and, as such, were to be dealt with by the United Nations.

30. In (i) its letter to the Security Council of 17 November 1991, issued as United Nations document A/46/660 and S/23226, *Libya* requested a dialogue between itself, on the one hand, and the United States and the United Kingdom, on the other, and expressed its readiness to co-operate in the conduct of any neutral and honest enquiry. *Libya* affirmed its belief in the peaceful settlement of disputes, as provided for in Article 33, paragraph 1, of the Charter, which lays down that the parties to any dispute "shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement . . ."; (ii) in its letter of 20 November 1991, issued as United Nations document A/46/844 and

S/23416, Libya stated its “unconditional readiness to co-operate in order to establish the truth” and declared its “readiness to co-operate to the full with any impartial international judicial authority”. This letter emphasized that the Charter “guarantees the equality of peoples and their right to make their own political and social choices, a right that is enshrined in religious laws and is guaranteed by international law”; (iii) in its letter of 8 January 1992, issued as United Nations document A/46/841 and S/23396, Libya stated:

“If it is a matter of political differences between the three countries and Libya, then the differences must be discussed on the basis of the Charter of the United Nations, which does not endorse aggression or the threat of aggression but rather calls for the resolution of differences by peaceful means. Libya has expressed its readiness to pursue any peaceful means that the three countries may desire for the resolution of existing differences.”

31. It is thus clear that the United States demand for surrender of the two suspects, and Libya’s immediate refusal to accede to that demand, had already been notified by Libya to the United Nations on 17 November 1991 — not apparently as legal issues existing solely between the two States but as matters concerning international peace and security in which the United Nations should be involved.

B. The Security Council Resolutions

Security Council resolution 731 (1992) of 21 January 1992

32. On 20 January 1992 — that is to say two days after the Libyan letter of 18 January 1992 addressed to the United States and to the United Kingdom was distributed as a Security Council document S/23441 (as stated above in paragraph 28) — the United States and the United Kingdom, together with France, presented a draft resolution for adoption to the Security Council (United Nations doc. S/23762), the main purpose of which was to encourage Libya to provide “a full and effective response to the *requests*” (emphasis added) made by the United States and the United Kingdom.

It should be noted that, in fact, the surrender of the two suspects to the United States (or to the United Kingdom) was not mentioned explicitly in this draft resolution except by a simple reference to letters reproduced in Security Council documents S/23306, S/23307, S/23308, S/23309 and S/23317 (the letters addressed to the United Nations by the United Kingdom and the United States; S/23306 was sent to the Security Council by France).

33. On the following day, 21 January 1992, the Security Council was convened and the agenda — *letters dated 20 and 23 December 1991 (S/23306; S/23307; S/23308; S/23309; S/23317)*: the letters indicated in

the agenda consisted of the letters addressed to the United Nations Secretary-General by France, the United Kingdom and the United States, mentioned above — was adopted.

34. Most of the arguments presented were directed at rather general questions relating to the condemnation or elimination of international terrorism, on the tacit understanding that the destruction of Pan Am flight 103 was caused by persons (allegedly Libyan intelligence agents) now residing in Libya.

The surrender of the two suspects by Libya to either the United States or the United Kingdom was barely addressed in the Security Council debates. Support for the surrender of the two suspects was mentioned in the debates in only the statements of the United States and of the United Kingdom. The United States representative said:

“The resolution makes it clear that the Council is seeking to ensure that those accused be tried promptly in accordance with the tenets of international law. The resolution provides that the people accused be simply and directly turned over to the judicial authorities of the Governments which are competent under international law to try them.” (United Nations doc. S/PV.3033, p. 79.)

The United Kingdom representative said:

“We very much hope that Libya will respond fully, positively and promptly, and that the accused will be made available to the legal authorities in Scotland or the United States . . . The two accused of bombing Pan Am flight 103 must face, and must receive a proper trial. Since the crime occurred in Scotland and the aircraft was American, and since the investigation has been carried out in Scotland and in the United States, the trial should clearly take place in Scotland or in the United States. It has been suggested the men might be tried in Libya. But in the particular circumstances there can be no confidence in the impartiality of the Libyan courts.” (*Ibid.*, p. 105.)

35. In the meeting that took place on 21 January 1992, the Security Council unanimously adopted resolution 731 (1992) which includes the following:

“*The Security Council,*

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Deeply concerned over the result of investigations . . . which are contained in Security Council documents that include the *requests* addressed to the Libyan authorities by . . . the United Kingdom . . . and the United States . . . in connection with the legal procedures related to the attac[k] carried out against Pan Am flight 103 . . . ;

Determined to eliminate international terrorism,

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 ac[t] . . . against Pan Am flight 103 . . . ;

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*” (emphasis added).

It should be noted that, although the surrender of the two suspects was not specifically mentioned in the resolution, the “request” referred to therein meant mainly the surrender of the suspects, and that the Security Council referred to the *request* of the United States and of the United Kingdom that Libya co-operate in establishing responsibility for the terrorist act, which *request*, as I repeat, included a call for the surrender of the two suspects.

36. The Secretary-General presented a report on 11 February 1992, issued as United Nations document S/23574, pursuant to paragraph 4 of Security Council resolution 731 (1992) in which the Secretary-General gave a report on the visit of his mission to Libya and transmitted Libya’s viewpoint. On 3 March 1992, the Secretary-General presented a further report on the same issue as United Nations document S/23672 which concluded that:

“it will be seen that while resolution 731 (1992) has not yet been complied with, there has been a certain evolution in the position of the Libyan authorities since the Secretary-General’s earlier report of 11 February 1992”.

It was on that very date, 3 March 1992, that Libya filed the Application in the present case instituting proceedings against the United States on “questions of interpretation and application of the [1971] Montreal Convention arising from the aerial incident at Lockerbie”.

The meaning of Security Council resolution 731 (1992)

37. It appears from this chain of events dating from November 1991 to the date of the Application, namely 3 March 1992, that what concerned Libya was the fact that, on the basis of a proposal made by the United States, the United Kingdom, as well as France, the Security Council had passed resolution 731 on 21 January 1992 by which it “urge[d] the Libyan Government immediately to provide a full and effective response to *those requests* so as to contribute to the elimination of international terrorism” (emphasis added) (“those requests” being mainly the requests of the

United States and the United Kingdom for surrender of the suspects).

The United States and the United Kingdom did *not* at that time appear to have considered that there was a “dispute” between themselves and Libya within the meaning of Chapter VI of the United Nations Charter, as is clear from the fact that the United States and the United Kingdom participated in the voting on that Security Council resolution 731 (1992). Libya appears to have considered that the United States and the United Kingdom would have been well aware that their demand, now called a “request”, would have had to be made simply from the standpoint of a political consideration that international terrorism should be condemned and eliminated.

38. The United States and the United Kingdom were apparently of the view, on 20-21 January 1992, that Libya’s refusal to surrender the two suspects named in connection with the Lockerbie incident would have consequences for the maintenance of international peace and security, and should have been dealt with by the Security Council which has primary responsibility for that object. It may be assumed that the United States and the United Kingdom would have known that the demand would not be a matter that could be dealt with from a legal point of view.

The fact that, on 21 January 1992, the Security Council dealt unanimously with the Lockerbie incident as a matter connected with international peace and security had nothing to do with the issue of whether or not the United States and the United Kingdom had legal competence to require the surrender of the two suspects and of whether or not Libya was obliged to surrender them under the provisions of the Montreal Convention. These separate issues should be examined on their own merits.

Security Council resolutions 748 (1992) and 883 (1993)

39. The United States and the United Kingdom appear, after the filing of Libya’s Application in the present case, to have considered that Libya’s firm resistance to the surrender of the two suspects would constitute “threats to the peace, breaches of the peace, and acts of aggression” (United Nations Charter, Chap. VII). In fact, the United States and the United Kingdom, together with France, submitted another draft resolution to the Security Council on 30 March 1992 (United Nations doc. S/25058). This appeal by the United States and the United Kingdom (as well as France) to the Security Council to adopt a draft resolution under Chapter VII of the United Nations Charter was not directly related to the present Application filed by Libya on 3 March 1992 and had been under negotiation in the Security Council before that date.

40. On 31 March 1992, the Security Council, “acting under Chapter VII of the Charter”, adopted resolution 748 (1992). The United States

and the United Kingdom, as sponsoring States, ensured that the proposal before the Security Council stated that it was “deeply concerned that the Libyan Government has still not provided a full and effective response to the *requests* in its resolution 731” (emphasis added).

During the meeting in the Security Council, the United States representative said:

“We have called upon Libya to . . . turn over the two suspects in the bombing of Pan Am 103 for trial in either the United States or the United Kingdom . . . This resolution also makes clear the Council’s decision that Libya should comply with those demands.” (United Nations doc. S/PV.3063, p. 66.)

The United Kingdom representative stated:

“We were especially grateful to the Arab Ministers who went to Tripoli last week to seek to persuade the Libyan leader to comply and hand over the accused so that they could stand trial. The three co-sponsors of the resolution have taken the greatest care to allow time for these efforts to bear fruit.” (*Ibid.*, p. 69.)

In fact the demand for the surrender of the suspects was inserted implicitly into that resolution, although its main purpose was to condemn the Lockerbie incident itself totally and also, more generally, acts of terrorism in which Libya was allegedly involved. The Security Council decided to impose economic sanctions upon Libya.

41. Having obtained no positive result from Security Council resolution 748 (1992), the United States and the United Kingdom (together with France) again took the initiative in proposing a renewed resolution to the Security Council (United Nations doc. S/26701) which, on 11 November 1993, adopted Security Council resolution 883 (1993), along similar lines to resolution 748 (1992). In that meeting the United States representative said “[w]e await the turnover of those indicted for the bombing of Pan Am 103” (United Nations doc. S/PV.3312, p. 41) and the United Kingdom representative stated:

“if the Secretary-General reports to the Council that the Libyan Government has ensured the appearance of those charged with the Lockerbie bombing before the appropriate United States or Scottish court . . . then the Security Council will review the sanctions with a view to suspending them immediately” (*ibid.*, p. 45).

C. Conclusion

42. The question remains whether these Security Council resolutions, particularly resolutions 748 (1992) and 883 (1993), which were adopted

after the filing of the Application in this case, bear on the present case brought by Libya. In other words, the question of whether Libya's 3 March 1992 Application has become without object after the adoption of these 31 March 1992 and 11 November 1993 Security Council resolutions, is distinct from the case as presented by Libya. 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 (adopted for the aim of maintaining international peace and security) upon the member States is a matter quite irrelevant to this case and the question of whether the Application of Libya is without object in the light of those resolutions hardly arises.

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43. Even though I found that Libya's Application should be dismissed owing to the Court's lack of jurisdiction, I nonetheless wanted to express my view that these Security Council resolutions, which have a political connotation in dealing with broader aspects of threats to the peace or breaches of the peace, have nothing to do with the present case, which, had there been jurisdiction, could have been submitted to the Court as a legal issue which existed between the United States and Libya, and between the United Kingdom and Libya, before the resolutions were adopted by the Security Council.

(Signed) Shigeru ODA.