
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)

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ABSTRACT

The Lockerbie incident took place on December 21, 1988, and involved the United Kingdom, the United States and Libya. The case was later brought before the international court of justice. It mainly concerned the 1971 Montreal Convention, which deals unlawful acts against civil aviation. The ICJ rejected the first objections made by the US and UK and decided to hear the case. The main question was whether the UN Security Council resolutions which demanded action against Libya, were fully legal. The UN Security Council is the strongest body under the UN Charter, responsible for international peace and security. However, this raised doubts about whether its decisions are above the law. The Lockerbie case is important because it asked if the ICJ can review the actions of the security council. It highlights the balance between international law, States rights and security.

INTRODUCTION:

The Lockerbie incident had happened on December 21, 1988. This incident involved three countries namely the United Kingdom, United States and Libya. The International Court of Justice rejected the preliminary objections of the US and UK in the cases concerning *Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie*. The disputes over Montreal convention are considered, but particular attention is paid to the legality of the UNSC resolutions. Through the United Nation's Charter, the UN Security Council represents the most powerful executive institutional body in the field of collective security. The Lockerbie case discuss the fundamental question to be examined whether the UNSC decisions can be subjected to judicial review by the International Court Justice.

FACT OF THE CASE:

The Lockerbie bombing incident took place on December 21, 1988. On this date a bomb had exploded and destroyed a Pan Am Flight 103 over Lockerbie, Scotland. This resulted in the death of all the present 259 passengers and crew members along with 11 residents of Lockerbie. An arrest warrant was issued against the Libyan spies who were involved namely Abdel Basset Ali al-Megrahi and Lamen Khalifa Fhimah in the bombing incident. Both the mentioned Libyan spies were convicted by the federal grand jury in some district of Columbia and they were accused by the Lord Advocate in Scotland.

On 27th of November, 1991, the United States and United Kingdom jointly had issued a declaration stating that Libya should hand over the two suspects for the purpose of trial and provide relevant information related to the crime. They were even asked to pay appropriate compensation in relation to the crime. However, Libya had agreed to initiate the proceedings against the suspects but it had asked for the assistance of US and UK investigators. Afterwards Libya mentioned that its own domestic laws prohibit the extradition of citizens. Instead, Libya offered that the suspects could be prosecuted domestically and observers from both the US and UK could attend the proceedings. These requests made by Libya were completely ignored by both the countries.

On 21st January, 1992 the Security Council had issued a Resolution 731 expressing its concern over Libya's lack of response to the joint declaration made by UK and US and urged Libya to

fully assist and cooperate with them. On 3rd March, Libya had filed two applications with reference to the Article 14(1) of the Montreal Convention to the International Court mentioning that the parties were not able to solve the dispute through negotiation. It even added that parties were not able to agree on how the arbitration would be set up. On one hand the US and UK had stated that Libya should surrender the suspects for the trial and while on the other hand Libya insisted on its right to negotiate and sought to question the legitimacy of the sanctions.

QUESTION OF THE JURISDICTION:

The Court's jurisdiction in contentious cases may be established in two ways:

1. Through the acceptance of the compulsory jurisdiction of the Court according to Article 36(2) of the Statute, or
2. by agreement of the parties according to Article 36(1) of the Statute.

In the latter case, the agreement may be either concluded ad hoc, or it may be contained in the form of a compromisory clause in an international treaty between the parties. In other cases, the jurisdiction of the Court extends only to the issues covered by a jurisdictional link between the parties.

Article 14 of the Montreal Convention, on which Libya had jurisdiction, covers only disputes concerning the interpretation or application of the Montreal Convention. However, it is questionable whether there was such a dispute between the parties with respect to the interpretation of any of the various provisions of the Montreal Convention cited by Libya.

Article 7 of the Montreal Convention be construed so as to guarantee Libya a right not to surrender the alleged offenders, then a conflict would exist between Article 7 and Security Council Resolutions 748 and 883, which require the surrender of the suspects. In this case, the Court would have had to decide which obligation should prevail, and this would have made an examination of the validity of the resolutions inevitable. Disputes that questions concerning the review of Security Council resolutions adopted under Chapter VII of the Charter tend to be of a highly in political nature.

Then bringing its claim in front of the ICJ, Libya pointed out that the alleged acts constituted an offence with the meaning of Article 1 of the Montreal Convention. Thus, it asserted that the

ICJ had jurisdiction to hear disputes between Libya and the respondent States concerning the interpretation or application of the provisions of the Convention. Following Libya's Applications, the US and the UK filed certain preliminary objections to the jurisdiction of the Court and to the admissibility of the claims. On 27 February 1998, the ICJ, the main judicial body of the United Nations, dismissed the Respondents' objections. It declared that it had jurisdiction on the basis of Article 14, paragraph 1 of the Montreal Convention, to hear the disputes between Libya and the respondent States concerning the interpretation of the Convention in relation to the incident that occurred in Lockerbie. It further declared the claims admissible.

THE SECURITY COUNCIL AND INTERNATIONAL COURT OF JUSTICE:

Security Council invoked Chapter VII of the United Nations Charter providing it with the power to attempt to restore peace and security by mandating that Libya comply, in an obligatory manner, with the dictates of the Resolution 731. As a means of ensuring compliance with these dictates, the Council adopted measures related to an embargo on: flights, the sale of weapons and military assistance, as well as measures aimed at ensuring that all States reduce the number of Libyan diplomats and restrict their movement abroad Resolution 883 of 11 November 1993 adopted further measures to secure the flight embargo: it instituted a freeze on Libyan funds and financial resources found abroad, and denied Libya the ability to obtain heavy equipment such as pumps, boilers, and furnaces¹.

This attempt to override the obligations of the Montreal Convention flows from the primacy accorded to the United Nations Charter as the constitutive instrument of the international system. By virtue of Article 103 of the UN Charter, if there is a conflict between a State's UN obligations and its "obligations under any other international agreement, their obligations under the present Charter shall prevail". Thus, by having the Security Council invoke Chapter VII, the United Kingdom and the United States sought to nullify the obligations they had towards Libya on the basis of the Montreal Convention. The onus was now on Libya to fulfil its obligations pursuant to Resolution 731, failing which, it was to endure the consequences of the sanctions imposed by Resolutions 748 and 883. *Prima facie*, the Permanent Members of the Security Council could expect Libya to fulfil their demands by placing Charter obligations

¹ *Id.* Note that funds related to the petroleum and agriculture sectors were exempt from the provisions of Resolution 883 (para. 4), however the denial of equipment did include items related to the petroleum sector (see Annex to the Resolution).

above those of the Montreal Convention. Libya had after all, as a member of the United Nations, agreed, under Article 25 of the Charter, “to accept and carry out the decisions of the Security Council in accordance with the present Charter”. However upon closer examination, it appears that the demands were based on legally questionable grounds.

Where the actions of the two permanent Members, in seeking to replace the obligations due to the Montreal Convention with those due to the Charter, are on legally questionable grounds, is in their relation to the final phrase of Articles 24(2) which mirrors the ending of Article 25 – *in accordance with the present Charter*. Actions undertaken by the Security Council must be in conformity with the Charter, that is: they must not only abide by the procedures prescribed within Chapter VII, but the UN Security Council must also discharge its duties, by virtue of Article 24(2), “in accordance with the Principles and Purposes of the Charter”. In this vein, the first purpose espoused by the UN Charter is:

To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, *and in conformity with the principles of justice and international law*, adjustment or settlement of international disputes or situations which might lead to a breach of the peace.²

Thus, the Security Council when attempting to thwart threats or breaches to the peace, or acts of aggression must act in conformity with international law. The basis of a challenge to the actions of the United Kingdom and the United States which transpired through the United Nations is to be found in validity of the Security Council’s determination that the situation constituted a threat to the peace, thus, ultimately allowing it to impose sanctions³. In relation to the issue of sanctions and the legality thereof, the fundamental issue falls to this: Did the unwillingness of Libya to conform “with Resolution 731 constitute a threat to international peace and security”⁴? Under Article 39, it is left to the Security Council to make such a

² Article 1(1). Emphasis added.

³ On the issue of judicial review of Security Council actions see generally Mohammed Bedjaoui, *The New World Order and the Security Council: Testing the Legality of its Acts*, 1994; John Dugard, “Judicial Review of Sanctions”; Vera Gowlland-Debbas, “The Relationship between the International Court of Justice and the Security Council in Light of the *Lockerbie* Case”, *American Journal of International Law*, Vol. 88, 1994, pp. 643-677; and Michael Reisman, “The Constitutional Crisis in the United Nations”, René-Jean Dupuy (ed.), *The Development of the Role of the Security Council*, Workshop of the Hague Academy of International Law, 1993, pp. 399-423.

⁴ See UN Security Council Resolution 748, 31 March 1992, S/RES/748, 1992; eight preambular paragraph; and UN Security Council Resolution 883, 31 March 1993, S/RES/883, 1993; sixth preambular paragraph.

determination:

The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.

The question that then begs is: what if such a determination was not truly based on a “threat to the peace” but was, instead, for instance based on an attempt by Permanent Members to avoid their obligations under say the Montreal Convention⁵? Would such a determination be *ultra vires* the powers of the Security Council and, as a result, fail to be “in conformity with the principles of justice and international law” as required by the primary purpose as noted in the Charter? If so, it would stand to reason that Member States would be under no obligation to carry out decisions of the Security Council which were not in accordance with the Charter.

The manner in which such a determination can be made is, of course, by considering the practice and *opinio juris* which has been manifest since the first determination by the Council that an act of ‘terrorism’ constituted a threat to the peace. While the Security Council’s actions in departing from its traditional understanding of what constituted a threat to the peace may have appeared *prima facie* to violate the established custom regarding threats to the peace, one would have to consider the reaction of the international community of States, in the guise of their *opinio juris*, so as to ascertain whether the determinations of the Council were indeed of a law-making as opposed to law-breaking nature. This was made plain by the International Court in the *Nicaragua* case where it stated that “reliance by a State [or in the case at hand – the UN Security Council] on a novel right or an unprecedented exception to the principle might, if shared in principle by other States, tend towards a modification of customary international law”⁶. As noted in the first segment of this study, by 1997, Arab, African, and developing States had questioned the legality of the sanctions imposed on Libya by the Security Council. In large part, these States were unwilling to support the sanctions regime as they considered the first manifestation of ‘terrorism’ as a threat to the peace to be *ultra vires* the competence of the Council. Thus, as far as this first manifestation of ‘terrorism’ as a threat to the peace was

⁵ This possibility was raised in the dissenting opinion of Judge Fitzmaurice in the *Legal Consequences for States of the Continued Presence of South Africa in Namibia* advisory opinion. See *I.C.J. Reports 1971*, paras. 112 and 116.

⁶ International Court of Justice, *Military and Paramilitary Activities in and against Nicaragua* (Nicaragua v. United States of America), Judgment, 26 June 1986, para. 207.

concerned, the practice of the Council came up against a mixed expression of *opinio juris* by the international community. Yet, its subsequent practice, the Security Council was able to gain support for its actions meant to curb terrorist threats and thus the *opinio juris* which lacked consensus in the case of Libya was to emerge to move what had appeared to be an example of law-breaking into a venture in law-making.

When considering issue of the emergence of custom, typically one examines whether a custom has evolved as between States, not within an organ of an inter-governmental organization such as the United Nations' Security Council. Yet, the International Court of Justice itself has made plain that such a 'local' custom can evolved within the framework of the actions of the Security Council. In the deliberations regarding the 1971 Advisory Opinion regarding the legal consequence of its continued presence in Namibia, South Africa argued that the Security Council resolution which requested the Court's opinion was invalid as two of the permanent members of the Council had abstained from voting on the request. South Africa maintained that these abstentions were not in conformity with Article 27(3) of the UN Charter which requires the "affirmative vote of nine members including the concurring votes of the permanent members" of the Council.

THE SECURITY COUNCIL AND THE COURT PRIOR TO LOCKERBIE:

In his dissenting judgment in the Anglo-Iranian Oil Co. case, Judge Alvarez thought that if a case submitted to the Court should constitute threat to world peace, the Security Council may seize itself of the case and put an end to the Court's jurisdiction. This seems an overly broad statement, particularly in light of the Court's power to determine its own jurisdiction. The practice of the Security Council has indicated that, while that organ does not deny itself the right to proceed with a matter being dealt with by the Court, it has generally not proceeded with a matter pending judicial determination. This was the first time that the two organs of the United Nations with power of imposing mandatory orders on states have come into potential conflict. In the past the Security Council has either deferred to the Court or, because of the veto, been unable to act.

THE OBJECTION LIS PENDENS IN THE LOCKERBIE CASE:

During the Lockerbie debates several delegates thought that the Security Council should wait until the Court had made a determination." The Zimbabwe delegate thought the action of the

Security Council could lead to a major institutional crisis. Ten members, including Russia, voted in positives of the Resolution with five abstentions, including China. China's abstention raises again the Article 27(3) difficulty of the requirement of a concurring vote by permanent members. After the adoption of Resolution 748, the Court called on the parties to make observations on the effect of the Resolution. Libya's contention was that the Security Council was infringing on its rights under the Convention as well as its rights under international law; that the risk of contradiction between the Resolution and the provisional measures requested did not make the application inadmissible as there was no hierarchy between the Court and the Security Council; and that the Security Council had acted contrary to international law and was employing Chapter VII merely as a means of depriving Libya of its rights under the Montreal Convention.

JUDGE BEDJAOUT'S DISSENTING OPINION:

Of the dissenting judges, **Judge Bedjaoui** was perhaps most critical of the actions of the Security Council. He noted that for the first time there was the possibility of one organ of the United Nations influencing the decision of the other and the possibility of conflict between the two decisions. On the facts of the case, he questioned the prudence of the Council in acting under Chapter VII: how is it that three years after the event the matter now constitutes an imminent threat to peace? He also noted that the evidence implicating the accused did not appear strong and drew attention to General Assembly Resolution 41/38 of November 20, 1986, indicating that the United States was engaging in a campaign of misinformation against Libya.

Insofar as the respective powers of the Security Council and the Court were concerned, **Judge Bedjaoui** recognized that the two organs were being asked to decide different questions. The Council considered Libya's international responsibility for state sponsored terrorism, while the Court considered the question of the rights of the parties under the Convention. Moreover, the Court was making a legal determination and the Council a political one. It was the parties' right to both legal and political determination of the matter which led to the possibility of contradictory solutions. The Security Council's Resolution created a grey area of overlapping jurisdiction; however, while the Court could not be used as a Court of Appeal against the decision of the Security Council, the Security Council should not subvert the integrity of the Court's legal function. The Court, not having been asked to deal with the question of

international responsibility for state sponsored terrorism, could not address that matter. **Judge Bedjaoui** also recognized the Security Council as the sole determiner of the position of a political dispute.

He thought that while the Court should not interfere with the decision of the Security Council, that policy should only be maintained insofar as the Security Council does not interfere with the judicial function of the Court. Here, the very *raison d'être* of the Court's function had been affected. His Honor thought that the Security Council was bound to respect the goals and aims of the Charter to which it owed its existence. Under Article 1(1), the Security Council is obliged to adhere to the principles of international law and justice. As the Court is unable to make pronouncements on the constitutional validity of the Resolution, it benefits from a prima facie validity. He regretted that the Security Council did not seek an advisory opinion of the Court since Article 36 of the Charter requires that all legal disputes be addressed to the Court.

JUDGE WEERAMANTRY'S DISSENTING OPINION:

Judge Weeramantry's dissent also pointed to the difference between the legal and political roles of the Court and the Security Council in the United Nations system, and the duty that both organs owe to the Charter. He thought that the interpretation of the Charter is primarily a matter of law, and that when a matter is properly brought before the Court, it becomes the guardian of the Charter and international law. The Court, in the performance of its functions, will often come to conclusions consonant with those of the Security Council, but it does not follow that the Court should cooperate with the Security Council to the extent of desisting from exercising its independent power in a matter properly before it. **Judge Weeramantry's** similarly thought that the Court should act on the basis of the validity of the Security Council Resolution. Under Chapter VII, the existence of a threat to peace is entirely within the discretion of the Council. He thought that Libya was bound by Resolution 748 even though it conflicted with the rights claimed by Libya under the Montreal Convention.

Although Resolution 748 was binding, **Judge Weeramantry** thought that there was still room for the Court to frame appropriate measures *proprio motu*, while preserving full respect for the Resolution. In this context he would have indicated provisional measures against both parties preventing aggravation or extension of the dispute as might result from the use of force.

JUDGE AJIBOLA'S DISSENTING OPINION:

Judge Bola Ajibola stated that while Resolution 748 fell within the power and function of the Security Council under Chapter VII, it was arguable that certain intrinsic defects might invalidate it. The Resolution may be invalid on the basis that no one may be a judge in their own cause; also, China's abstention may invalidate the Resolution under Article 27(3). However, in view of the wording of Resolution 748, he believed that the Court should have declined to indicate the provisional measures Libya sought. Instead, the Court should have indicated provisional measures *proprio motu* under Article 75 of the rules of the Court against both parties to ensure nonuse of force or aggravation of the dispute.

AD-HOC JUDGE EI-KOSHERI'S DISSENTING OPINION:

Ad-hoc **Judge El-Kosheri** was the only judge who thought that Resolution 748 had no binding force. His Honor thought that the suppression of terrorism fell within the scope of the Security Council's functions. Citing the opinions in the Namibia case as authority, he thought that the Court had power to determine whether resolutions of the other organs of the United Nations had been taken in conformity with the Charter. He did not view the actions of the Council as an attack on the Court but as a design to put pressure on Libya to forfeit its sovereign rights under the Charter. Therefore, he found the first paragraph of Resolution 748 without legal effect, even on a prima facie basis. The circumstances of the case indicated that the suspects might not get a fair trial in the United States or the United Kingdom. On the other hand, a trial in Libya of individuals who were employees of the government, the conviction of whom could lead to international responsibility of Libya, would not adequately protect the interests of the United States and the United Kingdom.

MAJORITY OPINIONS IN THE LOCKERBIE CASE:

Of the majority, **Acting President Oda** was mildly critical of the members of the Council in that they must have been aware of the preemptive impact of the Resolution on the determinations of the Court. However, insofar as the powers of the Security Council were concerned, he thought that a Resolution could have binding force whether or not it was consonant with international law derived from other sources. He also thought that the Council did not have to evaluate all the circumstances before arriving at a decision. Because the Council appeared to be acting within its sphere of competence when it determined that there was a threat

to peace and security, the Court had no choice but to recognize the preeminence of its Resolution. **Judge Shahabuddeen** agreed that the Court had to presume the validity of the Security Council Resolution and that Libya's rights under the Convention could not be enforced during the life of the Resolution. Several judges called for cooperation between the two organs. **Judge Ni** thought that the legal and political determinations of a dispute are complementary functions that need to be correlated and coordinated; they are not competitive or mutually exclusive roles.

CONCLUSION:

While the *Lockerbie* case remained on the docket of the International Court of Justice there was no escaping the centrality of the jurisprudential issue of judicial review. As the International Court did not deal with the merits of the case, it left open the issue of the extent to which, in fact, Security Council actions could be reviewed. Much as *Marbury v Madison* was a landmark decision in the United States, the possibility of the International Court rendering a judgment in favour of judicial review in the *Lockerbie* case would have been fundamental to establishing that the UN Security Council is not omnipotent, but that it too governed by the rule of law. Yet this did not come to pass. The discontinuation of the *Lockerbie* case thus mandates a re-evaluation of its possible legacy beyond that of judicial review. *In retrospect*, the manner in which the United Nations Security Council dealt with issues pertaining to the Lockerbie incident can best be understood as the first manifestation of 'terrorism' constituting a threat to the peace. Though this may not have been apparent at the time – and was clearly not so on 3 March 1992 – the actions of the Council in the domain of terrorism have been confirmed time and again. Furthermore, since 11 September 2001, the international system has moved issues of terrorism to the top of its agenda; the Security Council simply reflecting the will of, not only its membership, but of the international community of States at large. While the International Court was considering the *Lockerbie* case, its possible legacy in the annals of international law appeared to be tied to judicial review. Yet, a decision on the merits having failed to materialize, the legacy of Lockerbie may well be that it was the starting point of a customary norm regarding 'terrorism' as a threat to the peace.

It can be concluded that the Court will be either unwilling or unable to question Security Council Resolution 748 unless there is something on its face to indicate an excessive use of power. One defect of the Resolution is that it incorporates by reference to Resolution 731, the

joint declaration of the United States and the United Kingdom that Libya immediately pays compensation for the Lockerbie bombing. On its face this constitutes a predetermination not only of the guilt of the two suspects, but also the responsibility of Libya for their action. If Libya's failure to immediately pay compensation forms one of the factual grounds for the Security Council's determination that Libya is not responding in a concrete manner to the requests of Resolution 731, then Resolution 748 is based on a factual determination that is outside the Council's power and competence. It is ironic that when the Security Council was able for the first time to act in the manner that was intended, it should do so in a way that undermines the judicial organ of the United Nations. The long-term effect of the Lockerbie initiative may be evaluated by considering how well the incident reflects on the validity of an international rule of law.