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Return to Lockerbie and the Montreal Convention in the Wake of the September 11th Terrorist Attacks: Ramifications of Past Security Council and International Court of Justice Action

Keywords

Courts, International Court of Justice, Organizations, Politics, Terrorism, International Relations, Jurisdiction

A RETURN TO LOCKERBIE AND THE MONTREAL CONVENTION IN THE WAKE OF THE SEPTEMBER 11TH TERRORIST ATTACKS: RAMIFICATIONS OF PAST SECURITY COUNCIL AND INTERNATIONAL COURT OF JUSTICE ACTION

Jonathan A. Frank*

I. INTRODUCTION

Nearly thirteen years after the bombing of Pan Am Flight 103 over Lockerbie, Scotland in December, 1988,¹ the international community again faces the challenge of confronting the international legal ramifications surrounding the extradition and prosecution of alleged international state-sponsored terrorists. As has been explored in a number of previous works on the subject, United Nations Security Council actions in response to the Lockerbie bombing created significant tension between the Security Council and the International Court of Justice ("ICJ").² These tension-producing actions were a response to Libya's attempted invocation of various articles of the Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, otherwise known as the Montreal Convention of 1971.³

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1. See generally Lockerbie Trial Briefing Site, available at <http://www.ltb.org.uk/> (last visited March 15, 2002) (a site maintained by the University of Glasgow which provides a number of links related to the Lockerbie bombing as well as news and official documentation regarding the subsequent trial process).

2. See generally Omer Y. Elagab, *The Hague as the Seat of the Lockerbie Trial: Some Constraints*, 34 INT'L LAW. 289, 298 (2000); Gerald P. McGinley, *The I.C.J.'s Decision in the Lockerbie Cases*, 22 GA. J. INT'L & COMP. L. 577 (1992); Vera Gowlland-Debbas, *The Relationship Between the International Court of Justice and the Security Council in the Light of the Lockerbie Case*, 88 AM. J. INT'L L. 643 (1994); Deborah D'Angelo, *The "Check" on International Peace and Security Maintenance: The International Court of Justice and Judicial Review of Security Council Resolutions*, 23 SUFFOLK TRANSNAT'L L. REV. 561 (2000); Eric Zubel, *The Lockerbie Controversy: Tension Between the International Court of Justice and the Security Council*, 5 ANN. SURV. INT'L. & COMP. L. 259 (1999).

3. See Convention for the Suppression of Acts Against the Safety of Civil Aviation (Sabotage), Sept. 23, 1971, 24 U.S.T. 565 [hereinafter Montreal Convention]. See generally <http://www.undcp.org/>

Generally speaking, Libya's claims were grounded in the Montreal Convention's prescription for extradition processes of individuals accused of committing acts of aviation-related terrorism,⁴ as well as for adjudication in the ICJ in the case of disputes between party states arising from the Montreal Convention.⁵ The Security Council invoked its Chapter VII powers of the United Nations Charter at the same time as Libya instituted proceedings in the ICJ with respect to the above and in reference to disputes with the United Kingdom and the United States.⁶ Implemented at the urging of the United Kingdom and the United States, Security Council Resolutions 748 (1992), 883 (1993) and their progeny, built upon Resolution 731 (1992) and effectively bound Libya to Resolutions 748 and 883's term. These resolutions had the effect of rendering any ruling of the International Court of Justice and any further Libyan action subject to the mandates of the Security Council.⁷

terrorism.html (last visited Apr. 2, 2002); <http://www.asil.org/resource/crim1.htm#Terrorism> (last visited Apr. 4, 2002); <http://jurist.law.pitt.edu/terrorism/terrorism3a.htm> (providing links to general United Nations materials on terrorism, in addition to international treaties, United Nations General Assembly and Security Council Resolutions, including the text of the twelve United Nations treaties on the prevention of terrorism: the Convention on Offences and Certain Other Acts Committed On Board Aircraft ("Tokyo Convention", 1963); the Convention for the Suppression of Unlawful Seizure of Aircraft ("Hague Convention", 1970); the Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation ("Montreal Convention", 1971); the Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons (1973); the International Convention Against the Taking of Hostages ("Hostages Convention", 1979); the Convention on the Physical Protection of Nuclear Material ("Nuclear Materials Convention", 1980); the Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, supplementary to the Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation (1988); the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (1988); the Protocol for the Suppression of Unlawful Acts Against Fixed Platforms Located on the Continental Shelf (1988); Convention on the Marking of Plastic Explosives for the Purpose of Detection (1991); the International Convention for the Suppression of Terrorist Bombing (United Nations General Assembly Resolution, 1997); the International Convention for the Suppression of the Financing of Terrorism (1999)).

4. "It is noteworthy that in Libya's opinion the Montreal Convention applied to 'state' as well as 'ordinary' terrorism." NINA B. JØRGENSEN, *THE RESPONSIBILITY OF STATES FOR INTERNATIONAL CRIMES* 251 (2000).

5. See Montreal Convention, *supra* note 3, arts. 8 and 9.

6. See *id.* at art. 14. See also U.N. CHARTER arts. 39-51, available at <http://www.un.org/aboutun/charter/chapter7.htm> (last visited March 25, 2002). Article 39 of Chapter VII of the U.N. Charter reads: "The Security Council shall determine the existence of any threat to the peace, breach of the peace, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security." For a comprehensive study of the United Nations Security Council Chapter VII powers, see DANESH SAROOSHI, *THE UNITED NATIONS AND THE DEVELOPMENT OF COLLECTIVE SECURITY* (1999).

7. See JØRGENSEN, *supra* note 4, at 251. See also Peter H.F. Bekker, *Questions of Interpretation and Application of the 1971 Montreal Convention Arising From the Aerial Incidents at Lockerbie (Libyan Arab Jamahiriya v. United Kingdom) and (Libyan Arab Jamahiriya v. United States), Preliminary Objections, Judgments*, 92 AM. J. INT'L. L. 503, 506 (1998) (stating that the International Court of Justice, by majority, declared that Libya's claim within the Court was rendered "without object," and therefore moot, in light of Security Council Resolutions 748 and 883); *D'Angelo, supra* note 2, at 586 (citing to Questions of Interpretation and Application of the 1971 Montreal Convention Arising From the Aerial Incident at Lockerbie (Libya v. U.S.), 1992 I.C.J. 114 (Apr. 14), at 145, 180

This paper will attempt to elucidate upon the United Nations role with respect to international action taken in response to the tragic terrorist attacks upon the United States on September 11th. Furthermore, this paper will attempt to provide some insight regarding the question of whether states complicit in acts of international terrorism should have the opportunity to rely on international conventions as a course of responsive action in the international legal arena; prior to Security Council or unilateral State political action initiated under the Security Council's Chapter VII authority.⁸

II. LOCKERBIE: A BRIEF HISTORY OF UNITED NATIONS INVOLVEMENT

In the aftermath of the Lockerbie bombing, the United Nations played a significant role in facilitating the extradition of the accused Libyan terrorists for trial in a neutral state at the behest of the United States and the United Kingdom.⁹ During the nearly ten-year negotiation process leading up to the extradition of the accused terrorists from Libya, the United Nations Security Council, by way of Resolutions 731, 748, 883 and 1192 (1998), acted *a posteriori* in a positive manner with regards to only Libya and not with regards to other states known to harbor, financially assist, or otherwise support terrorists.¹⁰ Rather, the Security Council deferred to the United Nations Charter and General Assembly Resolutions 49/60 (1995) and 51/210 (1997) in its comparatively inert or passive historical "urgings" to other member and non-member States.¹¹

(Bedjaoui, J., dissenting)) [hereinafter the *Lockerbie* case]; McGinley, *supra* note 2, at 578; Zubeil, *supra* note 2, at 269.

8. Thank you to Dr. Omer Y. Elagab, whose paper "The Hague as the Seat of the Lockerbie Trial: Some Constraints," provided me with both a departure point and a wealth of informative analysis which have proved key to the ideas behind the authoring of this article. The question to which I am referring is put forth by Dr. Elagab as follows: "[t]he question to be addressed, however, is whether there are exceptional circumstances in which the option of prosecution should be denied to the state that is complicitous in acts of terrorism." See Elagab, *supra* note 2, at 298. (Additionally, Dr. Elagab points out that this was an issue that counsel for both the United States and the United Kingdom broached in their respective remarks in International Court of Justice Oral Hearings with regard to the Lockerbie Case).

9. See S.C. Res. 1373, U.N. SCOR, U.N. Doc. S/Res/1373 (2001) available at <http://www.un.org/Docs/scres/2001/res1373e.pdf>. See also U.N. SCOR, U.N. Doc SC/7158, Press Release, United Nations, Security Council Unanimously Adopts Wide-Ranging Anti-Terrorism Resolution; Calls for Suppressing Financing, Improving International Cooperation (Sept. 28, 2001), available at <http://www.un.org/News/Press/docs/2001/sc7158.doc.htm> (last visited Mar. 1, 2002); S.C. Res. 731, U.N. SCOR, U.N. Doc. S/Res/731 (1992), available at <http://www.un.org/documents/sc/res/1992/s92r731e.pdf> (last visited Mar. 1, 2002); S.C. Res. 748, U.N. SCOR, U.N. Doc. S/Res/748 (1992), available at <http://www.un.org/documents/sc/res/1992/s92r748e.pdf> (last visited Mar. 1, 2002); S.C. Res. 883, U.N. SCOR, U.N. Doc. S/Res/883 (1993), available at <http://www.un.org/docs/scres/1993/883e.pdf> (last visited Mar. 1, 2002); S.C. Res. 1192, U.N. SCOR, U.N. Doc. S/Res/1192 (1998), available at <http://www.un.org/docs/scres/1998/sres1192.htm> (last visited Mar. 1, 2002).

10. See Michael P. Scharf, *Terrorism on Trial: The Lockerbie Criminal Proceedings*, 6 ILSA J. INT'L & COMP. L. 355, 356 (2000). See also Elagab, *supra* note 2, at 291-94 (Dr. Elagab points out that the Security Council demanded that the government of Libya comply with Resolutions 731, 748 and 883, making it clear that Libya was the sole subject of these Resolutions.).

11. See S.C. Res. 748, *supra* note 9, at 1, para. 4; see also U.N. CHARTER, *supra* note 6, art. 2,

The distinction between general directives of the Security Council aimed at combating international terrorism and specific action taken (e.g., the imposition of sanctions or authorization of the use of force) in response to individual acts of international terrorism, such as Lockerbie and the September 11th attacks, is an important one insofar as attempting to discern a pattern of Security Council behavior and decision-making in response to international terrorist attacks. Security Council Resolutions 731 and 748 served to preempt Libya's lawful and timely claim for provisional measures that would have allowed for ICJ proceedings on the question of extradition in that case without the imposition upon Libya of United Nations Security Council sanctions.¹² Resolutions 883 and 1192 served to further strengthen and solidify the terms set forth in Resolutions 731 and 748.¹³

Libya's argument to the ICJ, grounded in the Montreal Convention, plainly contended that Libya was not bound to extradite her own nationals in the absence of a bilateral extradition treaty with either the United States or the United Kingdom.¹⁴ The adoption of United Nations Security Council Resolutions 731, 748, 883 and 1192 illustrated the shortcomings of the Montreal Convention in dealing with the extradition of state-sponsored terrorists insofar as the principle of *aut dedere aut judicare*.¹⁵ The Montreal Convention simply does not address situations in which a state is complicitous in a terrorist action.¹⁶ Furthermore, these Resolutions arguably established a precedent that the Security Council would act when necessary, and to the limits of its power, especially when such politically influential states as the United Kingdom and the United States are involved, to bypass the tenets of the Montreal Convention in situations where a State refuses to extradite her own ostensibly state-sponsored terrorist nationals for trial under the laws of the State in which the act of terrorism was carried out.¹⁷

In the intervening period between the Lockerbie bombing and the eventual extradition of the accused Libyan terrorists to a neutral third-party country, Libya refused all demands from both the United States and the United Kingdom for extradition of the alleged terrorist pair who were also found to be Libyan nationals.¹⁸ In the absence of a bilateral extradition treaty between either Libya

para. 4 (establishing a duty on behalf of all states to not assist or participate in terrorist activities); G.A. Res. 60, U.N. GAOR, 49th Sess., U.N. Doc. A/RES/49/60 (1994), available at <http://www.un.org/documents/ga/res/49/a49r060.htm> (last visited Mar. 1, 2002); G.A. Res. 210, U.N. GAOR, 51st Sess., U.N. Doc. A/RES/51/210 (1996), available at <http://www.un.org/documents/ga/res/51/a51r210.htm> (last visited Mar. 1, 2002) (delineating the United Nations General Assembly position on measures to eliminate international terrorism).

12. See Elagab, *supra* note 2, at 305; see also D'Angelo, *supra* note 2, at 583-91.

13. See S.C. Res. 731 (1992), S.C. Res. 748 (1992), S.C. Res. 883 (1993) and S.C. Res. 1192 (1998), *supra* note 9.

14. See generally Montreal Convention, *supra* note 3.

15. See Elagab, *supra* note 2, at 296 (stating that the principle of *aut dedere aut judicare* means "either surrender or prosecute"); see also Elagab, *supra* note 2, at 306.

16. See generally Montreal Convention, *supra* note 3.

17. See generally S.C. Res. 731, *supra* note 9, at 1; S.C. Res. 748 *supra* note 9, at 1; S.C. Res. 883 *supra* note 9, at 1; S.C. Res. 1192 *supra* note 9, at 1.

18. Compare Zubeidat, *supra* note 2, at 260 (commenting that both of the accused, Abdel Basset Ali al-Megrahi and Lamien Khalifa Fhimah were Libyan intelligence agents), and S.C. Res. 731 *supra*

and the United States, or Libya and the United Kingdom, Libya sought to rely on the articles of the Montreal Convention pertaining to extradition as the basis of its argument.¹⁹ Although there is generally not considered to be any international customary law pertaining to acts of international terrorism, the Montreal Convention was, and to an extent still is, one of the primary governing Conventions of extradition of accused individuals for acts of aerial terrorism.²⁰

According to Article 7 of the Montreal Convention, in a situation in which an accused State is in possession of a terrorist accused of acting abroad, the requested State(s) must either extradite that individual to the requesting State(s), or “[s]ubmit the case to its competent authorities for the purpose of prosecution” in accordance with the appropriate laws of that state.²¹ Furthermore, Article 8 of the Montreal Convention provides that signatory States may consider the Convention itself the legal basis for extradition in the absence of a bilateral extradition treaty between the requesting and the requested states.²² As there existed no extradition treaties between either the United States and Libya or the United Kingdom and Libya at the time of the bombings, it follows that Libya had no obligation to extradite its own nationals under the Montreal Convention.²³ Apart from the Montreal Convention, which does not in and of itself establish a principle of international customary law, there exists no international law requiring a state to extradite.²⁴ Under well-established principles of international law, no recourse exists on behalf of the claiming state(s) for failure of the requested State to extradite unless such recourse is authorized by the United Nations Security Council against a United Nations member State.²⁵

The Convention is, however, silent on the issue of extradition of a national from his own state, where that state itself has been shown to have sponsored one of their national's alleged terrorist activities.²⁶ In this sense, the shortcomings of the Montreal Convention are necessarily resolved by United Nations Security Council action with the goal of combating threats against the maintenance of international peace and security in accordance with the United Nations Charter.²⁷ The extensive investigation surrounding the Lockerbie case led authorities to the conclusion that the terrorists responsible for the bombing were Libyan intelligence agents who had been instructed to blow up Pan Am Flight 103 by individuals directly linked to the

note 9, para. 6 at 1 (mentioning “investigations which implicate officials of the Libyan Government”).

19. See Montreal Convention, *supra* note 3, art 5.

20. See generally *id.* at 1-5; see also Elagab *supra* note 2, at 301; GEOFF GILBERT, ASPECTS OF EXTRADITION LAW 8 (1991).

21. Montreal Convention, *supra* note 3, art. 7.

22. *Id.* art.8.

23. Elagab, *supra* note 2, at 296, 300 (Elagab comments that extradition is a “a sovereign decision of the requested State, which is never under an obligation to carry it out.” In this respect, the Montreal Convention does conform to the customary international law as it stood when the Convention was drafted and put in force).

24. See Elagab *supra* note 2, at 300-01; see also GILBERT *supra* note 15, at 8.

25. See Elagab *supra* note 2, at 301.

26. Montreal Convention, *supra* note 3.

27. See U.N. Charter, *supra* note 6, arts. 39-51.

Libyan government.²⁸ The United States and the United Kingdom realized this deficiency of the Montreal Convention in terms of forcing the extradition of a state-sponsored terrorist from his own country of citizenship, and pursued other avenues in an attempt to compel Libya to extradite the accused terrorists, namely through the levying of sanctions via United Nations Security Council Resolutions passed under Chapter VII authority.²⁹

Approximately two months after Security Council Resolution 731 was passed, the first such Resolution urging Libya to extradite the alleged terrorists, Libya filed suit in the ICJ seeking provisional measures to effectively delay or prohibit the implementation of sanctions by the United Nations until the matter of Libya's argument per the Montreal Convention was decided.³⁰ The reasoning behind the United States and the United Kingdom's strategy to seek a remedy through the Security Council was arguably founded in part on the premise established by Article 25 of the United Nations Charter, which reads: "The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the Present Charter."³¹ In effect, the Resolutions passed by the Security Council, in accordance with Article 25 of the United Nations Charter, preempted any injunctive action by the International Court of Justice as Libya is a permanent member of the United Nations and therefore bound to adhere to United Nations Security Council Resolutions.³² The ICJ ultimately decided that Security Council Resolution 748 was determinative on the issues presented in Libya's arguments, and that Libya therefore was obliged, per Article 25 of the Charter, to comply with that resolution.³³ Additionally, the ICJ held that the Court would not further entertain Libya's arguments premised on the Montreal Convention.³⁴

The language of Security Council Resolutions directed towards Libya, which followed Resolution 731, became increasingly intense on the issue of extraditing their nationals accused of committing the terrorist acts which led to the downing of Pan Am Flight 103 over Lockerbie. Resolution 748, adopted on March 31, 1992,

28. See Zubeil, *supra* note 2, at 260 (commenting that both of the accused, Abdel Basset Ali al-Megrahi and Lamen Khalifa Fhimah were Libyan intelligence agents), see also S.C. Res. 731 *supra* note 9, para. 6, at 1 (mentioning "investigations which implicate officials of the Libyan Government").

29. See generally S.C. Res. 731, *supra* note 9, at 1; S.C. Res. 748, *supra* note 9, at 1; S.C. Res. 883, *supra* note 9, at 1; S.C. Res. 1192, *supra* note 9, at 1.

30. See Case Concerning Questions of Interpretation and Application of the 1971 Montreal Convention Arising From the Aerial Incident at Lockerbie (Libya v. U.K.), 1992 I.C.J. 3, 15 (Apr. 14) [hereinafter Request for Indication of Provisional Measures]. Judges voting in favor of the decision included: Vice President Oda Acting President, President Sir Robert Jennings, Judge Lachs, Judge Ago, Judge Schwebel, Judge Ni, Judge Evensen, Judge Tarassov, Judge Guillaume, Judge Shahabuddeen, and Judge Aguilar Mawdsley. Judges voting against the decision included: Judge Bedjaoui, Judge Weeramantry, Judge Ranjeva, Judge Ajibola, and Judge *ad hoc* El-Kosheri., 1992 I.C.J. 3, 32 (Apr. 14) (separate opinion of Judge Shahabuddeen). See also Case Concerning Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. U.S.), 1998 I.C.J. 115 (Feb. 27) (preliminary objections).

31. See U.N. CHARTER art. 25; see also D'Angelo *supra* note 2, at 567-77.

32. See Elagab, *supra* note 2, at 305; see also D'Angelo *supra* note 2, at 583-91.

33. See generally Request for Indication of Provisional Measures, *supra* note 30; Libyan Arab Jamahiriya v. U.S., *supra* note 30.

34. 1998 I.C.J. 9, 105 (Feb. 27).

levied sanctions against Libya in consideration of that country's failure to accede to the repeated requests of the alleged terrorists' extradition by both the United States and the United Kingdom.³⁵ Security Council Resolutions 883 and 1192 further attempted to pressure the Libyan government by demanding compliance with the previous two Resolutions and strengthening the sanctions against that country.³⁶ With the possibility of seeking recourse in the ICJ gone, international pressure increasing, and United Nations sanctions taking their toll, Libya eventually capitulated to a long-debated plan to have the alleged terrorists extradited to the Netherlands to be tried by a Scottish Court.³⁷

III. LOCKERBIE SEPARATE OPINIONS AND DISSENTS:

Disagreement on the Competing Roles of the United Nations Security Council and the International Court of Justice

The question now raised by Libya's challenge to the validity of resolution 748 (1992) is whether a decision of the Security Council may override the legal rights of States, and, if so, whether there are any limitations on the power of the Council to characterize a situation as one justifying the making of a decision entailing such consequences. Are there any limits to the Council's powers of appreciation? In the equilibrium of forces underpinning the structure of the United Nations within the evolving international order, is there any conceivable point beyond which a legal issue may properly arise as to the Competence of the Security Council to produce such overriding results? If there are any limits, what are those limits and what body, if other than the Security Council, is competent to say what those limits are?

If the answers to these delicate and complex questions are all in the negative, the position is potentially curious. It would not, on that account, be necessarily unsustainable in law; and how far the Court can enter the field is another matter. . . .³⁸

At the provisional measures³⁹ stage of the "Case Concerning Questions of Interpretation and Application of the 1971 Montreal Convention Arising From the

35. S.C. Res. 748, *supra* note 9, para. 6, at 1 (indicating that Libya's failure to comply with demands for extradition constituted a "threat to international peace and security").

36. *See* S.C. Res. 883 *supra* note 9, at 1; S.C. Res. 1192 *supra* note 9, at 1; *see also* U.N. CHARTER art.7, para. 1-2.

37. *See* Scharf *supra* note 2, at 357-58 (outlining the specific arrangements involved in the extradition of the then alleged Libyan terrorists to stand trial in the Netherlands before a Scottish panel of judges).

38. *See* Request for Indication of Provisional Measures, *supra* note 30, at 28 (separate opinion of Judge Shahabuddeen).

39. *See* STATUTE OF THE INTERNATIONAL COURT OF JUSTICE art. 41, para. 1-2, available at <http://www.icj-cij.org/icjwww/ibasicdocuments/ibasicstext/ibasicstatute.htm> (stating "1. The Court shall have the power to indicate, if it considers that circumstances so require, any provisional measures which ought to be taken to preserve the respective rights of either party. 2. Pending the final decision, notice of the measures suggested shall forthwith be given to the parties and to the Security Council.")

Aerial Incident at Lockerbie,” eleven ICJ justices voted in favor of the Court’s decision to deny Libya’s request for provisional measures, and five ICJ justices voted against the majority decision.⁴⁰ Libya’s request for provisional measures were based on that State’s contention that the United Kingdom was violating Articles 5(2), 5(3), 7, 8(2) and 11 of the Montreal Convention, acting to abridge Libya’s rights, and that the United Kingdom was under an international legal obligation to refrain from doing so.⁴¹ In its decision with regard to Libya’s request, the ICJ based its denial of provisional measures in part on the passage of Security Council Resolution 748, in which the Security Council effectively invoked its Chapter VII powers and bound Libya to that Resolution, leaving the majority of the ICJ of the opinion that Libya’s request for provisional measures was then moot.⁴²

While by no means a focus of the work at hand, the issues presented to the ICJ by Libya’s application for provisional measures in light of concurrent Security Council action was nothing novel.⁴³ The *Lockerbie* case has now long served as a source for commentary regarding the function of the ICJ with respect to the Security Council, as well as being a source of speculation regarding Security Council *ultra vires* actions.⁴⁴ The *Lockerbie* case has also been a source of argument for judicial review of Security Council Resolutions by the ICJ.⁴⁵

40. See Request for Indication of Provisional Measures, *supra* note 30.

41. See *id.* at 6-7. See also Montreal Convention, *supra* note 3, arts. 5, 7, 8 and 11.

42. See generally S.C. Res. 748, *supra* note 9. See also Request for Provisional Measures, *supra* note 30, at 15 (stating as one of the reasons in the Order for the Court’s denial of Libya’s request for provisional measures, “[w]hereas, furthermore, an indication of the measures requested by Libya would be likely to impair the rights which appear prima facie to be enjoyed by the United Kingdom by virtue of Security Resolution 748 (1992)). See also S.C. Res. 748, *supra* note 9, para. 5 (The Security Council invokes its Chapter VII powers by stating “[d]etermining in this context that the failure of the Libyan Government to demonstrate, by concrete actions its renunciation of terrorism and in particular its continued failure to respond fully and effectively to the requests in resolution 731 (1992), constitute a threat to international peace and security. . .”).

43. Request for Indication of Provisional Measures, *supra* note 30, at 20 (declaration of Judge Ni).

44. See generally Jose E. Alvarez, *Judging the Security Council*, 90 AM. J. INT’L L. 1, 36 (1996) (stating that a finding of *ultra vires* action by the Security Council on the part of the International Court of Justice could have fundamentally changed the UN system of governance); Geoffrey R. Watson, *Constitutionalism, Judicial Review, and The World Court*, 34 HARV. INT’L L.J. 1, 2 (1993); Marcella David, *Passport to Justice: Internationalizing the Political Question Doctrine for Application in the World Court*, 40 HARV. INT’L L.J. 81, 90-91 (1999) (stating that *ultra vires* Security Council action was not at issue in the *Lockerbie* case, because the International Court of Justice assumed a valid obligation [to the applicable Security Council Resolutions] on the states involved); Richard B. Lillich, *The Role of the UN Security Council in Protecting Human Rights in Crisis Situations: Un Humanitarian Intervention in the Post Cold War World*, 3 TUL. J. INT’L & COMP. L. 1, 12 (1995); D’Angelo, *supra* note 2, at 586.

45. See generally Takane Sugihara, *The Judicial Function of the International Court of Justice with Respect to Disputes Involving Highly Political Issues*, in THE INTERNATIONAL COURT OF JUSTICE, ITS FUTURE ROLE AFTER FIFTY YEARS 125 (A.S. Muller, D. Raič and J.M. Thuránszky eds., 1997); Malcolm N. Shaw, *The Security Council and the International Court of Justice: Judicial Drift and Judicial Function*, in THE INTERNATIONAL COURT OF JUSTICE, ITS FUTURE ROLE AFTER FIFTY YEARS 125 (A.S. Muller, D. Raič and J.M. Thuránszky eds., 1997); Alain Pellet, Address at the Proceedings of the INTERNATIONAL COURT OF JUSTICE/UNITAR Colloquium to Celebrate the 50th Anniversary of the Court (April 1996), in INCREASING THE EFFECTIVENESS OF THE INTERNATIONAL COURT 234-53

Building upon other contentious ICJ cases, such as the *Hostages* case⁴⁶ and the *Nicaragua* case⁴⁷, the opinions of the ICJ in the *Lockerbie* case, specifically Libya's request for the indication of provisional measures,⁴⁸ provide important insight into the problematic political-judicial dynamic between the Court and the Security Council.⁴⁹ As evidenced by the circumstances surrounding the *Lockerbie* case, both the ICJ and the Security Council can be confronted by the same situation. However, because of this political-judicial dynamic, the two organs can come to conflicting decisions – decisions that, despite their political or judicial foundations, each have distinct judicial and political affects upon the countries involved.⁵⁰

Given the geopolitical context in which Libya made its request for the indication of provisional measures to the ICJ, the question thus becomes which organ should have the power to make the ultimate decisions regarding the rights of sovereign states where the prevention or punishment of state-sponsored international terrorism is at issue. To that end, this section is not meant by any means as a defense to States which sponsor, endorse or espouse international terrorist activities or tactics – all of which the author strongly believes to be heinous and deplorable criminal acts. Those individuals or States found guilty of which, deserve the harshest penalties allowed under applicable law. Rather, this section is meant to pose the political-legal question of what lengths can a Security Council member State, or States, go in order to legally invoke Security Council Chapter VII powers without encroaching upon the sovereign rights of the State accused of sponsoring acts of international terrorism.

As illustrated by the *Lockerbie* case, when situations of alleged state-sponsored terrorism are involved and the Security Council invokes its Chapter VII powers, the possibility for conflict between the Security Council and the ICJ becomes troublesome. As was stated in the Court's ruling in the *Nicaragua* case:

(Connie Peck and Roy S. Lee eds., 1997); Vera Gowlland-Debbas, Address at the Proceedings of the INTERNATIONAL COURT OF JUSTICE/UNITAR Colloquium to Celebrate the 50th Anniversary of the Court (April 1996), in INCREASING THE EFFECTIVENESS OF THE INTERNATIONAL COURT 254-66 (Connie Peck and Roy S. Lee eds., 1997); Ken Roberts, *Second-Guessing the Security Council: The International Court of Justice and Its Powers of Judicial Review*, 7 PACE INT'L L. REV. 281 (1995); John Quigley, *The United Nations Security Council: Promethean Protector or Helpless Hostage*, 35 TEX. INT'L L.J. 129 (2000); Alvarez, *supra* note 44; Mcginley, *supra* note 2; D'Angelo, *supra* note 2; Watson, *supra* note 44; Gowlland-Debbas, *supra* note 2.

46. See generally United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran), 1980 I.C.J. 3 (May 24) [hereinafter the *Hostages* case].

47. See generally Military and Paramilitary Activities (Nicar. v. U.S.) (Merits), 1986 I.C.J. 14 (June 27) [hereinafter the *Nicaragua Case*].

48. See generally Request for the Indication of Provisional Measures, *supra* note 33.

49. See Shaw, *supra* note 45, at 243 (citing the Courts decision in the *Nicaragua* case, *supra* note 47 at 435, Shaw includes the following quote: "the Council has functions of a political nature assigned to it, whereas the Court exercises purely judicial functions. Both organs can therefore perform their separate but complementary functions with respect to the same events.").

50. See Sugihara, *supra* note 45, at 126; Shaw, *supra* note 45, at 232-36. See also Alvarez, *supra* note 44, at 10 (stating that some have criticized Security Council actions as amounting to "quasi judicial" actions).

[u]ntil the Security Council makes a determination under Article 39, a dispute remains to be dealt with by the methods of peaceful settlement provided under Article 33, including judicial settlement; and even after a determination under Article 39, there is no necessary inconsistency between Security Council action and adjudication by the Court. From a juridical standpoint, the decisions of the Court and the actions of the Security Council are entirely separate.⁵¹

While Security Council resolutions and decisions of the ICJ pertaining to the same issue may not be mutually exclusive, it has been hypothesized that Security action may actually infringe upon the rights of a sovereign state. As illustrated by the *Lockerbie* case, the Council invoked its Chapter VII powers in Resolution 748. From one perspective, thus blocked Libya from obtaining the imposition of provisional measures against the United Kingdom in the International Court of Justice pursuant to the Montreal Convention.⁵² This perspective appears as a recurring theme throughout the Separate Opinions and Dissents of the five judges who voted against the International Court's Order with regard to Libya's request for the indication of provisional measures.⁵³ A survey of several of these separate opinions and dissents serve as an appropriate framework from which to discern competing arguments and begin to form some hypotheses with regard to the future invocation of Chapter VII powers by the Security Council in order to combat state-sponsored international terrorism.

Judge Lachs' separate opinion, the first and shortest opinion to be appended to the Court's Order, perhaps speaks most clearly to the multifaceted questions being broached by this article. In calling for harmonious action between the two entities of the United Nations which "[h]ave the delivery of binding decisions explicitly included in their powers under the Charter," Judge Lachs comments that "[i]t [the International Court of Justice] is its [international law's] principle guardian. Now, it has become clear that the dividing line between political and legal disputes is blurred, as law becomes ever more frequently an integral element of international controversies."⁵⁴

While couched in very diplomatic wording calling for cooperation between the Security Council and the International Court of Justice, Judge Lachs' most important commentary is that concerning the dichotomy between that which is

51. See *supra* note 45, at 125 (citing to the *Nicaragua* case). See also U.N. Charter, art. 39 *supra* note 6; U.N. Charter, art. 33 *supra* note 6 (Article 33 of the UN Charter reads as follows: "1. The parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice. 2. The Security Council shall, when it deems necessary, call upon the parties to settle their dispute by such means.").

52. See S.C. Res. 748, *supra* note 9. See also Request for the Indication of Provisional Measures, *supra* note 30, 3-16.

53. See Request for the Indication of Provisional Measures, *supra* note 30, at 26-112 (separate/dissenting opinions of Judges Bedjaoui, Weeramantry, Ranjeva, Ajibola and Judge ad hoc El-Koshi).

54. See Request for the Indication of Provisional Measures, *supra* note 30, at 26-28 (separate opinion of Judge Lachs).

political (the role of the Security Council) and that which is legal (the role of the International Court of Justice).

In terms of the *Lockerbie* case, and issues of state-sponsored terrorism generally, the distinction is of paramount importance. As the more states are labeled "sponsors of terrorism," the more these two competing roles will clash. As opposed to merely seeking to punish individual perpetrators of terrorist acts, it has become apparent post-September 11th that States and their respective regimes accused of sponsoring terrorism will also be likely targets of action resulting from initiatives taken under Security Council Chapter VII powers. Building upon the quotation included at the beginning of this section, how will the Security Council deal with accused States' legal challenges brought under any number of treaties to which both the accused State and the accuser State are parties? Will that in turn provide for actions contrary to those sanctioned by the Security Council under Chapter VII?

Judge Bedjaoui's dissenting opinion⁵⁵ also maintains a focus on the political-legal dichotomy between the roles of the Security Council and the International Court of Justice, referring to a creation of a "[g]rey area' in which powers may overlap and a jurisdictional conflict comes into being."⁵⁶ Judge Bedjaoui eludes to one of the underlying dilemmas in this so-called "grey area" when he includes quotes from the dissenting opinion of Judge Gros in the case of the Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa):

'[c]ertain 'limitations on the powers of the Security Council are necessary because of the all too great ease with which any acutely controversial international situation can be represented as involving a latent threat to peace and security, even where it is really too remote genuinely to constitute one. Without these limitations, the functions of the Security Council could be used for purposes never originally intended. . . [There was] no threat to peace and security other than such as might be artificially created as a pretext for the realization of ulterior purposes.'⁵⁷

The question is thus reiterated: to what lengths can member state(s) of the Security Council go to politically pursue an issue of international concern (as opposed to a genuine threat to international peace and security which would give the Security Council leave to invoke its Chapter VII powers), despite legal avenues in place provided for in treaties to which the states at hand are both parties? Additionally, to what lengths can accused States pursue legal action in the International Court of Justice before the Security Council in essence ties that

55. See generally Request for the Indication of Provisional Measures, *supra* note 30, at 33-49 (dissenting opinion of Judge Bedjaoui).

56. *Id.* at 35.

57. Legal Consequences for States of the Continued Presence of South Africa in Namibia (Southwest Africa) Notwithstanding Security Council Resolution 276 (1970) (S. Afr. v. Namib), 1971 ICJ 16 (June 21) (dissenting opinion of Judge Bedjaoui; dissenting opinion of Judge Gros, *quoted in* Request for the Indication of Provisional Measures, *supra* note 30).

State's hands with binding action under Chapter VII authority?

In response to recent events of global state-sponsored terrorism, the author's answer should come as no surprise. As Judge Bedjaoui states in his dissent:

[t]he most that can be said is that if the person that committed the offense acted as the organ of a State, the [Montreal] Convention could prove to be, not inapplicable, but rather ineffectual to the extent that the state that would opt not for extraditing but for prosecuting the suspects itself, which, obviously, would not be a satisfactory solution.⁵⁸

The Montreal Convention is indeed an ineffective means of dealing with state-sponsored terrorism generally, not to mention the extradition of state-sponsored terrorists from their homeland. As stated in the Security Council's most recent resolutions on the subject, terrorism, in all forms, poses a threat to international peace and security – a threat of such extreme proportions, which if proven, should be combated in the political sphere by the international community with whatever means necessary.⁵⁹ The Security Council, if not the international community at large, has opted for Chapter VII-authorized political solutions over more time-consuming legal alternatives.⁶⁰

IV. UNITED NATIONS SECURITY COUNCIL REACTIONS TO THE TERRORIST ACTS OF SEPTEMBER 11TH

The day after the September 11th attacks, the United Nations Security Council passed Resolution 1368 (2001).⁶¹ While Resolution 1368 espoused an appropriate level of outrage in response to the terrorist events that transpired the day before, it in essence constitutes a more strongly worded restatement of Resolution 1269 (1999), which stopped short of referring to international acts of terrorism as a threat to international peace and security.⁶² Seventeen days after the September 11th terrorist attacks against the United States, the Security Council adopted Resolution 1373 (2001).⁶³ An analysis of Resolution 1373 reveals that it provides for the freezing of assets linked to terrorists, terrorist organizations, or states supporting the activities of terrorists.⁶⁴ This built-in sanction against terrorist organizations and the states or entities that provide them with support seemingly represents a building upon the sanctions lodged against Libya after the Lockerbie bombing. Incorporating Security Council Resolutions 1269 and Resolution 1368 in name and substance, article 1, paragraph (d) of Resolution

58. Request for the Indication of Provisional Measures, *supra* note 30 at 37 (dissenting opinion of Judge Bedjaoui).

59. See S.C. Res. 1373, U.N. SCOR, 56th Sess., U.N. Doc. S/RES/1377 (2001), para. 3; See also S.C. Res. 1377, U.N. SCOR, 56th Sess., U.N. Doc. S/RES/1377 (2001), para. 7.

60. See S.C. Res., *supra* note 59.

61. See S.C. Res. 1368, U.N. SCOR, 56th Sess., U.N. Doc. S/RES/1368 (2001).

62. See S.C. Res. 1269, U.N. SCOR, 54th Sess., U.N. Doc. S/RES/1269 (1999).

63. S.C. Res. 1373, *supra* note 59, at 1-5.

64. *Id.* at 2 (note use of the positive term "shall" as opposed to more ambiguous term characteristic of other United Nations' documentation regarding terrorism).

1373 speaks directly to the international dilemma of state sponsored terrorism:

Acting under Chapter VI of the Charter of the United Nations, Decides that all States shall . . . Prohibit their nationals or any persons and entities within their territories from making any funds, financial assets or economic resources . . . available . . . for the commission of terrorist acts. . .⁶⁵

Additionally, article 3, paragraph (c) and (d) call upon all States to “[c]ooperate, particularly through bilateral and multilateral arrangements and agreements. . .” and to “[i]ncrease cooperation and fully implement the relevant international conventions and protocols relating to terrorism and Security Council Resolutions 1269 (1999) and 1368 (2001).”⁶⁶ As stated above, Resolutions 1373, 1377 (2001), 1378 (2001), 1383 (2001), 1386 (2001) and 1390 (2001), Security Council Resolutions 1269 and 1368 perpetuate the contradictory dichotomy between the calling upon states to cooperate in and implement international anti-terrorist conventions while simultaneously expressing the Security Council’s “readiness to take all steps necessary to respond to the terrorist attacks of 11 September 2001, and to combat all forms of terrorism, in accordance with its responsibilities under the Charter of the United Nations. . .”⁶⁷

Read in conjunction with Security Council Resolutions 731, 748, 883 and 1192, there is a discernable philosophical pattern regarding how the Security Council intends to treat state-sponsored terrorist incidents.⁶⁸ This evolving pattern of both philosophy and proposed action (viewed together with Security Council steps taken in response to the Lockerbie bombing) may indeed signify a crystallization process of international customary law regarding international responses to state-sponsored terrorism in general, and necessarily the extradition of nationals from a state proven to be a sponsor of that national’s terrorist activities. It is also apparent that with it’s acknowledgement of state-sponsored terrorism in Resolution 1373, the Security Council may no longer view the reliance upon, or formulation of a requested state’s defense based upon, the provisions set forth in the Montreal Convention as applicable to extradition proceedings where a national of a terrorist-sponsoring state is sought to be extradited for alleged terrorist activities.

V. CONCLUSION

United Nations Security Council Resolutions 731, 748, 883 and 1192 set a precedent for the avoidance of having to negotiate the jurisdictional quagmire posited by the Montreal Convention. Rather, via Article 24 of the United Nations Charter, the Security Council can formulate resolutions that take precedence over well-established multilateral treaties. This fact leaves United Nations Member

65. S.C. Res. 1373, *supra* note 59, at 2.

66. *Id.* at art.3.

67. *See generally* S.C. Res. 1269, *supra* note 62; S.C. Res. 1368, *supra* note 61.

68. *See generally supra* note 9, at 1-5; S.C. Res. 731, *supra* note 9, at 1; S.C. Res. 748 *supra* note 9, at 1; S.C. Res. 883 *supra* note 9, at 1; S.C. Res. 1192 *supra* note 9, at 1.

States with little or no recourse in the International Court of Justice, as exemplified by the plight of Libya in the wake of the Lockerbie bombing.⁶⁹ Security Council Resolution 1373 and its progeny further enforce the precedent established by Security Council Resolutions 731, 748, 883 and 1192. Resolution 1373 appears to deny terrorist-sponsoring states the right to prosecute their accused nationals at home, despite a call for States to “[i]ncrease cooperation and fully implement the relevant conventions and protocols relating to terrorism. . .”.⁷⁰ In light of the threats of international terrorism, the continued investigation of the September 11th attacks and an analysis of future Security Council action will likely be highly determinative in the possible crystallization of customary international law regarding international responses to transborder acts of terrorism, inclusive of the extradition of alleged terrorist nationals seeking refuge in their own terrorist-sponsoring countries.

The United Nations Security Council, in light of both the bombing at Lockerbie and the attacks of September 11th, is in essence doing away with the need for international anti-terrorism conventions, such as the Montreal Convention. These anti-terrorist conventions are meant to foster cooperation between states in matters regarding acts of international state-sponsored terrorism. The principle of international law that States are not obliged to extradite their own nationals, *aut dedere aut judicare*, is seemingly at odds with the current conventions on terrorism if the requested government in question itself supports terrorist activities of the nationals accused. Under the guise of combating and preventing international acts of terror, the precedent being set by the United Nations Security Council is that a State can levy sanctions, use military force, or merely enter an accused country and take the individuals sought in connection with terrorist acts; thus bypassing the conventions already in place as well as the principle of state sovereignty with regard to the extradition of accused international terrorists. Yet, when an accused terrorist-sponsoring State seeks legal relief in the International Court of Justice as prescribed by treaties to which all states are parties, there is no obligation to adhere to the treaty in light of binding Security Council action taken under Chapter VII authority.

Adopted in the intervening period between the Lockerbie bombing and the terrorist events of September 11, 2001 in the United States, Security Council Resolution 1269 has served as the foundation for the Security Council’s most recent actions taken in response to international terrorism.⁷¹ Resolution 1269 establishes a dichotomy – which begins to customarily appear in subsequent Security Council resolutions regarding international terrorism – between the role of the Security Council as the champion and protector of the principles of the United Nations Charter and the body’s role as an encouraging facilitator among member States in the implementation of international conventions.

Accordingly, Resolution 1269 states in part that the Security Council is

69. See U.N. CHARTER, *supra* note 6, art. 24.

70. See generally S.C. Res. 1373, *supra* note 59.

71. S.C. Res. 1269, *supra* note 67.

“[d]etermined to contribute, in accordance with the Charter of the United Nations, to the efforts to combat terrorism in all its forms. . .” Yet in a preceding clause, the Security Council supports “[t]he efforts to promote universal participation in and implementation of the existing international anti-terrorist conventions, as well as to adopt new international instruments to counter the terrorist threat. . .”⁷² If these two roles of the Security Council are in fact mutually-exclusive, it stands to reason that international law fostered by the Security Council, if not the international community in its entirety, is both conflicted and confounded. This confusion regarding the implementation of action by the Security Council, namely whether the Security Council will act in an arguably *ultra vires* capacity or in accordance with standing international anti-terrorism conventions, has affected both the political and legal aspects of the extradition of alleged international terrorists.

In the wake of the September 11th terrorist attacks in the United States, the United Nations Security Council built upon Resolutions 731, 748, 883, 1192 and 1269 by adopting Resolutions 1368, 1373, 1377, 1378, 1383, 1386, and Resolution 1390.⁷³ Security Council Resolution 1373 calls for the implementation of positive and definitive action regarding the prevention of terrorism and the punishment of any individual, entity, or state which has a hand in assisting, financing, or committing an act of terrorism.⁷⁴ In light of Resolution 1269, Security Council Resolution 1373, albeit indirectly, further calls into question the ability of the Montreal Convention to govern the extradition of international state-sponsored terrorists. It does so by simultaneously and confusingly referring to the principles of the United Nations Charter while calling upon states to implement treaties applicable to acts of international terrorism.⁷⁵

72. S.C. Res. 1269, *supra* note 67, at para. 5.

73. Security Council Unanimously Adopts Wide-Ranging Anti-Terrorism Resolution; Calls for Suppressing Financing, Improving International Cooperation, *supra* note 1, at 2;

74. *See id.*

75. *Id.* at 2-5.