judicata. Accordingly, the request was inadmissible and it was unnecessary to examine whether there was a "dispute as to the meaning or scope of the judgment" for the purposes of Article 60.

The Court arrived at its decision by 13 votes to three and there is nothing in the dissenting opinions of Judges Weeramantry, Koroma and Ajibola to cast substantial doubt on its correctness. Since the present Court has had only two previous requests to interpret a judgment,[23] the ruling is a useful addition to a sparse jurisprudence on Article 60. Whilst the Court has confirmed that that provision covers every type of judgment, by emphasising the principle of *res judicata* and rejecting Nigeria's request it has sought to discourage the use of Article 60 as a mere time-wasting tactic. Thus the proceedings relating to Article 60, even if somewhat contrived, resulted in a judgment containing a number of points of interest for students of the Court, something which can also be said of the earlier proceedings on jurisdiction and admissibility.

J. G. MERRILLS

THE LOCKERBIE CASES[1]

A. Background

The background to this case has been covered in previous issue.[2] Though diplomatic efforts continued to secure a trial of the two Libyan nationals indicted in Scotland, United Kingdom, and in the District of Columbia, United States, for the Lockerbie bombing, UN sanctions against Libya remained in place and the cases initiated before the International Court of Justice by Libya against United Kingdom the and the United States continued to run their course. Having found in April 1992 that the circumstances of the case were not such as to require the indication of provisional measures, time limits were duly fixed by the Court for the submissions of written memorials in the merits phase.[3] Libya duly filed its memorial and the United Kingdom and the United States responded by submitting preliminary objections to the jurisdiction of the Court and the admissibility of the application. Libya was then invited to submit, and did submit, its observations and submissions on the preliminary objections and the case proceeded to hearing on the issues raised. Oral arguments were heard in October

23. See the *Request for Interpretation of the Judgment of 20 Nov. in Asylum case*, Judgment I.C.J. Rep. 1950, 395, where the request was denied, and the *Application for Revision and Interpretation of the Judgment of 24 February 1982 in the case concerning the Continental Shelf* (Tunisia/Libyan Arab Jamahiriya) (*Tunisia* v. *Libyan Arab Jamahiriya*), Judgment, I.C.J. Rep. 1985, 192, where it was granted. For a review of the issues raised by Art.60 see J. G. Merrills, "Reflections on the Incidental Jurisdiction of the International Court of Justice", in M. D. Evans (Ed.), *Remedies in International Law: The Institutional Dilemma* (1998), p.51.

1. *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie. (Libyan Arab Jamahiriya* v. *United Kingdom*), Judgement, ICJ Rep. 1998, 9; (Libyan Arab Jamahiriya v. United States of America), ICJ Rep. 1998, 115.

2. For an account of the events in question see F. Beveridge, "The Lockerbie Affair" (1992) 41 I.C.L.Q. 907.

3. Order of 12 June 1992.

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1997, following which written questions were put to the parties by members of the Court, and written replies submitted.

B. The Procedure for the Case and the Composition of the Court

Given the similarity of the two case the Court agreed to hear the cases together, though they were not joined.[4]

The composition of the Court raised two issues. First, the Court having no judge of Libyan nationality, Libya was entitled to appoint, and did appoint, a judge *ad hoc*, Judge El-Kosheri. Second, the member of the Court having UK nationality had asked to be excused from taking part in the decision. Consequently the United Kingdom was also entitled to appoint a judge *ad hoc*[5] for the case against it and appointed the recently retired president of the Court, Sir Robert Jennings The composition of the court thus differed in each case, being composed of 15 judges in the case against the United States and 16 judges for that against the United Kingdom, though this did not have a critical effect on the outcome.

The third issue concerned the Presidency of the Court. Judge Schwebel, the President of the Court, was unable, by virtue of being a national of one of the parties (the United States) to one of the cases, to preside therein;[6] in addition, Judge Schwebel thought it inappropriate that he preside in the other case. Hence Vice-President Weeramantry presided in both cases.

The United Kingdom and the United States raised objections to the jurisdiction of the Court, the admissibility of the Libyan application, and the purpose of the action which, they claimed, had been rendered without object by the adoption of certain Security Council resolutions.

C. Objections of the United Kingdom and the United States to the Jurisdiction of the Court

Essentially, the UK and US claims were that Libya had failed to show that there existed a legal dispute between them concerning the Montreal Convention, Article 14(1) of which was relied on by Libya as establishing the jurisdiction of the Court.[7]

1. The temporal limitation under Article 14(1) of the Montreal Convention

In the request for provisional measures the United Kingdom and the United States relied, as an alternative submission, on the non-compliance by Libya with the six-month period set out in Article 14(1). They did not seek to rely on this in the preliminary objections phase, arguing instead that the timing of Libya's commencement of the action was evidence of Libya's intent to use the fact of

4. There is no evidence to suggest that joinder was requested by any party or considered by the Court.

5. Art.31, ICJ Statute and Art.37, Rules of Court.

6. Art.32, para.1, Rules of Court.

7. The Art. provides for negotiation and/or arbitration of disputes concerning the application or interpretation of the Convention; referral of the dispute to the ICJ can occur after six months has passed since the request for arbitration: Art. 14(1), Convention of 23 Sept. 1971 for the Suppression of Unlawful Acts against the Safety of Civil Aviation (the Montreal Convention).

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proceedings before the International Court to derail the negotiations at the Security Council, under way at that time, on the adoption of Resolution 731. For instance, in the oral pleadings the United Kingdom argued: "The reality is that Libya's resort to this court, and its invocation of the Montreal Convention for this purpose, was, and continues to be, an exercise designed to place obstacles in the way of the Security Council's exercise of its responsibilities under the Charter."[8]

The Court took up the point, noting that the United Kingdom and the United States had consistently refused to acknowledge the applicability of the Montreal Convention, and hence the existence of any dispute; moreover, they had failed to respond directly to Libya's request for arbitration (made on 18 January 1992) and had clearly expressed their intention not to accept arbitration in the Security Council when adopting Resolution 731 (1992) (on 21 January 1992). Consequently, the Court held that the alleged dispute could not be settled by arbitration or negotiation and the refusal of the United Kingdom and the United States to enter into arbitration "absolved Libya from any obligation under Article 14, paragraph 1, of the convention to observe a six-month period starting from the request for arbitration, before seising the Court".[9] Thus the issue was disposed of.

2. The existence of a dispute

It will be recalled that Libya claimed from the outset that this case fell squarely within the ambit of the Montreal Convention, concerning in particular its rights and obligations under Article 7, the *aut dedere aut judicare* provision. The United Kingdom and the United States, on the other hand, argued that the presence of an additional element, that is, the alleged State support of terrorist activities, placed the situation outside the framework of the Convention. Moreover, it was argued that nothing in the Montreal Convention prevents a State from requesting the extradition of alleged offenders outside the scope of the Convention and that Libya had failed to show that there was any real dispute over the interpretation or application of any specific provision of the Convention; in particular that Libya had failed to establish the breach of any of its provisions by the United Kingdom or the United States. The United Kingdom argued with some force that "the mere invocation of Article 14 does not create a dispute justiciable under that provision".[10]

Libya argued in its application and memorial, *inter alia*, that the actions which brought about the destruction of the Pan Am aircraft over Lockerbie constituted one of the offences covered in Article 1, of the Montreal Convention, and hence as *lex specialis* the Convention must be applied. It argued that the United Kingdom and the United States, through the Security Council resolutions, had attempted to eclipse the judicial proceedings which, it argued, were properly founded and in accordance with the obligation to seek peaceful settlement of disputes.

The Court based its conclusions on a range of evidence. First, it referred to its previous jurisprudence on the existence of a dispute, in particular the *South West Africa* case,[11] establishing that it must be shown that the claim of one party is

8. Oral Pleadings of the UK, para.3.45.
9. Judgment, para.21.
10. CR 97/22, para.2.4.
11. *South West Africa, Preliminary Objections*, judgment, I.C.J. Rep. 1962, 328.

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positively opposed by the other, and the *Interpretation of Peace Treaties* case,[12] establishing that the existence of a dispute is a matter for objective determination.[13] The court concluded that the dispute between the parties as to whether the incident in question was governed by the Montreal Convention was a dispute concerning the interpretation and application of the Montreal Convention within the meaning of Article 14(1) and hence fell to be decided by the Court. The Court also found that there was a more specific dispute over the interpretation and application of Article 7 read in conjunction with Articles 5, 6 and 8 of the Montreal convention (i.e. the *aut dedere aut judicare* and related articles).[14]

Additionally, the Court found that there was a dispute concerning Article 11 of the Montreal Convention, that is, whether the United Kingdom and the United States had fulfilled their respective obligations fully to assist Libya with the preparation of criminal proceedings against the accused parties.

Finally, the Court dismissed the argument that Libya's rights under the Montreal Convention had been superseded by Security Council Resolutions 748(1992) and 883(1993), finding in accordance with its previous jurisprudence that the date at which the existence of a dispute was to be determined was the earlier date of filing of the application.[15]

Thus the objection to jurisdiction was dismissed.[16]

D. The UK and US Objections to the Admissibility of the Case

The argument of the United Kingdom and United States on admissibility was in essence that whatever the situation prior to the adoption of Resolution 748, the effect of this Resolution and of Resolution 883 was to impose obligations on Libya which were determinative of any dispute previously existing, so that Libya's claim was inadmissible. This followed from the special responsibilities imposed on the Security Council under the Charter, and the powers vested in the Security Council to enable it to discharge those responsibilities; the obligation imposed on Libya by the Security Council in this case requiring it to surrender the accused for trial in Scotland or the United States and the fact that obligations imposed by Security Council resolutions prevail over any other rights and obligations of the parties.[17]

Libya contested the effect of these resolutions, arguing that the Court had the power to review their validity and must interpret them in accordance with the Charter; the Charter, it argued, prohibited the Security Council from requiring Libya to hand over its nationals to the United Kingdom or the United States. Thus, it argued, the UK and US objections raised questions which were not of an exclusively preliminary nature and accordingly the Court should proceed to the

12. *Interpretation of Peace Treaties with Bulgaria Hungary and Romania, First Phase*, advisory opinion, I.C.J. Rep. 1950, 74.

13. Judgment, para.22.

14. *Idem*, para.29.

15. *Idem*, para.38. The Court referred to the *Nottebohm Case, Preliminary Objection*, judgment, I.C.J. Rep. 1953, 122; and *Right of Passage over Indian Territory, Preliminary Objections*, judgment, I.C.J. Rep. 1957, 142.

16. By 13 votes to 3 in the case against the UK; 13 to 2 in that against the US: judgment, para.53.

17. CR 97/17, para.5.3.

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merits of the case. Finally, Libya argued that, as with the question of jurisdiction, the critical date for the determination of admissibility was the date on which Libya's application to the Court had been filed, prior to the adoption of the two Security Council resolutions at issue.

The Court found for Libya but only on the final of these points, the critical date.[18] The UK and US objections derived from Security Council resolutions adopted after that date were therefore unfounded.

E. The Object of Proceedings

The United Kingdom and United States argued that the intervening Security Council resolutions had rendered Libya's application to the Court without object and the Court accepted that since the purpose of this objection was to prevent any consideration of the case on the merits, this objection did have a preliminary character and should *prima facie* be dealt with at this stage. However, Libya disputed that the objection was of an *exclusively* preliminary character in substance.

Various arguments were advanced to address this point. Again the two intervening Security Council resolutions featured: the United States argued: "The only way in which this Court can grant to Libya the relief it requests is for it to review and invalidate the binding decisions of the Security Council ... the Court cannot and should not do so."[19] Since Libya argued that this was precisely what the Court should do to determine the merits of its claim, that is, review the legality of the Security Council resolutions,[20] it was difficult to see how this could be regarded as determinative of the issue at a preliminary phase, and this argument was advanced by Libya. Further arguments from the United States as to the "political" nature of the question, and to the effect that the exercise of jurisdiction by the Court would undermine the functions of the Security Council, also turned on the central question of the reviewability of Security Council decisions, reinforcing the Libyan argument that the issues were not of an exclusively preliminary character.

Finally, the United Kingdom also argued that the potential difficulties posed by continuing the case to the integrity of the criminal process constituted a "powerful argument" in favour of the Court deciding on the present issues as a preliminary matter.[21]

The Court upheld the Libyan viewpoint, finding that many issues relating to the merits had been the subject of written and oral pleadings in this phase of the case and concluding that the issues underlying this objection were "inextricably interwoven" with the merits, in the sense laid down in the *Barcelona Traction* case.[22] Hence they concluded that they should proceed to the merits.

18. By 12 votes to 4 in the case against the UK; 12 to 3 in that against the US: judgment, paras.44 and 53.

19. CR 97/19, para.3.86. Similar arguments were advanced by the UK.

20. Judgment, para.42.

21. CR 97/17 para.4.

22. Judgment para.50, citing *Barcelona, Traction, Light and Power Co. Ltd, Preliminary Objections*, judgment, I.C.J. Rep. 1964, 46. Judgment in the instant case was given by 10 votes to 6 in the case against the UK; in that against the US: judgment, para.53.

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F. Conclusions

There were a number of joint and separate opinions, together with the dissenting judgments of Judges Schwebel, Oda and Judge *ad hoc* Jennings. Judges Guillaume, Herczegh and Fleischhauer joined the dissent on the third point relating to the object of the proceedings. Taken together these judgments do not give any appearance of cohesion within the Court: indeed, there is evidence of frustration on both sides at the course of proceedings, with the majority appearing to feel that the preliminary objections have unnecessarily rehearsed many issues relating to the merits, while the dissenting judges appear frustrated at the somewhat tentative and cautious approach of the Court (particularly in relation to the object of the proceedings) which militated against early disposal.

These proceedings serve to demonstrate precisely the question which successive judgments of the Court on preliminary issues have sought to address: how to strike a balance between the expeditious and efficient disposal of a case and the desire to save the parties the time and expense of a full exposition and hearing, only to see the case dismissed on a preliminary matter. The revision of the Rules of Court in 1972 appears to have had little impact in this regard. The problem is particularly acute where, as in this case, the referral of a case to the Court by one party is regarded by the other merely as an attempt to fetter the legitimate exercise by the Security Council (or another third party) of its powers. There is in such circumstances a need for a quick determination as to whether a genuine dispute exists which gives rise to jurisdiction, yet "the Court cannot limit itself to noting that one of the Pates maintains that such a dispute exists, and the other denies it".[23]

It remains a clear possibility in the present case, if it is not withdrawn before reaching the merits phase, that the Court will agree with the United Kingdom and the United States that the facts fall outside the scope of the Montreal Convention. However, in the absence of any clear legal path or precedent in the field of State-sponsored terrorism this was intrinsically unlikely to be disposed of as an issue of exclusively preliminary character, and the outcome is far from certain. The majority on the Court was clearly of the view that the issues raised went to the merits but were powerless to avoid this lengthy and costly jurisdiction phase. The adversarial nature of the proceedings ensures this, and the existence of divisions in the Court makes little difference. The growing number of cases being referred to the Court can only serve to aggravate the problem. The delay in reaching the merits which this detour has imposed may, of course, turn out to suit the parties themselves: efforts to secure the handover of the two accused Libyans for trial under Scots law have now come to fruition. For some the attainment of that objective will in itself be enough. However, it will be accompanied by great frustration if it means that the now well-rehearsed arguments of the three parties in this dispute remain unresolved.

FIONA BEVERIDGE

23. *Oil Platforms (Islamic Republic of Iran* v. *United States), Preliminary Objections*, I.C.J. Rep. 1996, para.16.

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