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International Court
of Justice

THE HAGUE

Cour internationale
de Justice

LA HAYE

YEAR 1997

Public sitting

held on Monday 13 October 1997, at 10 a.m., at the Peace Palace,

Vice-President Weeramantry, Acting President, presiding

in the case concerning Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United Kingdom)

Preliminary Objections

VERBATIM RECORD

ANNEE 1997

Audience publique

tenue le lundi 13 octobre 1997, à 10 heures, au Palais de la Paix,

sous la présidence de M. Weeramantry, vice-président, faisant fonction de président

en l'affaire relative à des Questions d'interprétation et d'application de la convention de Montréal de 1971 résultant de l'incident aérien de Lockerbie (Jamahiriya arabe libyenne c. Royaume-Uni)

Exceptions préliminaires

COMPTE RENDU

Present:	Vice-President	Weeramantry, Acting President
	President	Schwebel
	Judges	Oda
		Bedjaoui
		Guillaume
		Ranjeva
		Herczegh
		Shi
		Fleischhauer
		Koroma
		Vereshchetin
		Parra-Aranguren
		Kooijmans
		Rezek
	Judges *ad hoc*	Sir Robert Jennings
		El-Kosheri
	Registrar	Valencia-Ospina

Présents : M. Weeramantry, vice-président faisant fonction de président en l'affaire
M. Schwebel, président de la Cour
MM. Oda
Bedjaoui
Guillaume
Ranjeva
Herczegh
Shi
Fleischhauer
Koroma
Vereshchetin
Parra-Aranguren
Kooijmans
Rezek, juges
Sir Robert Jennings
M. El-Kosheri, juges *ad hoc*

M. Valencia-Ospina, greffier

The Government of the Libyan Arab Jamahiriya is represented by:

H. E. Mr. Hamed Ahmed Elhouderi, Ambassador, Secretary of the People's Office of the Great Socialist People's Libyan Arab Jamahiriya to the Netherlands,

as Agent;

Mr. Mohamed A. Aljady,

Mr. Abdulhamid Raeid,

as Counsel;

Mr. Abdelrazeg El-Murtadi Suleiman, Professor of Public International Law, Faculty of Law, University of Benghazi,

Mr. Ian Brownlie, C.B.E., Q.C., F.B.A., Chichele Professor of Public International Law, University of Oxford,

Mr. Jean Salmon, Professor of Law emeritus, Université libre de Bruxelles,

Mr. Eric Suy, Professor of International Law, Catholic University of Louvain (K.U. Leuven),

Mr. Eric David, Professor of Law, Université libre de Bruxelles,

as Counsel and Advocates;

Mr. Nicolas Angelet, Principal Assistant, Faculty of Law, Catholic University of Louvain (K.U. Leuven),

Mrs. Barbara Delcourt, Assistant, Faculty of Social, Political and Economic Sciences, Université libre de Bruxelles; Research Fellow, Centre of International Law and Institute of European Studies, Université libre de Bruxelles,

Mr. Mohamed Awad,

as Advisers.

The Government of the United Kingdom of Great Britain and Northern Ireland is represented by:

Sir Franklin Berman K.C.M.G., Q.C., Legal Adviser to the Foreign and Commonwealth Office,

as Agent and Counsel;

The Right Honourable the Lord Hardie Q.C., The Lord Advocate for Scotland,

Le Gouvernement de la Jamahiriya arabe libyenne sera représenté par :

S. Exc. M. Hamed Ahmed Elhouderi, ambassadeur, secrétaire du bureau populaire de la Grande Jamahiriya arabe libyenne populaire socialiste aux Pays-Bas,

comme agent;

M. Mohamed A. Aljady,

M. Abdulhamid Raied,

comme conseils;

M. Abdelrazeg El-Murtadi Suleiman, professeur de droit international public à la faculté de droit de l'Université de Benghazi,

M. Ian Brownlie, C.B.E., Q.C., F.B.A., professeur de droit international public, titulaire de la chaire Chichele à l'Université d'Oxford,

M. Jean Salmon, professeur émérite de droit à l'Université de Bruxelles,

M. Eric Suy, professeur de droit international à l'Université catholique de Louvain (K.U. Leuven),

M. Eric David, professeur de droit à l'Université libre de Bruxelles,

comme conseils et avocats;

M. Nicolas Angelet, premier assistant à la faculté de droit de l'Université catholique de Louvain (K.U. Leuven),

Mme Barbara Delcourt, assistante à la faculté des sciences sociales, politiques et économiques de l'Université libre de Bruxelles, collaboratrice scientifique au Centre de droit international et à l'Institut d'études européennes de l'Université libre de Bruxelles,

M. Mohamed Awad,

comme conseillers.

Le Gouvernement du Royaume-Uni sera représenté par :

Sir Franklin Berman, K.C.M.G., Q.C., conseiller juridique du Foreign and Commonwealth Office,

comme agent et conseil;

le très honorable Lord Hardie, Q.C., procureur général d'Ecosse,

Professor Christopher Greenwood, Professor of International Law at the London School of Economics,

Mr. Daniel Bethlehem,

as Counsel;

Mr. Anthony Aust C.M.G.,

as Deputy Agent;

Mr. Patrick Layden T.D.,

Mr. Norman McFadyen,

Ms Sarah Moore,

Ms Susan Hulton,

as Advisers.

M. Christopher Greenwood, professeur de droit international à la London School of Economics,

M. Daniel Bethlehem,

comme conseils;

M. Anthony Aust, C.M.G.,

comme agent adjoint;

M. Patrick Layden, T.D.,

M. Norman McFadyen,

Mme Sarah Moore,

Mme Susan Hulton,

comme conseillers.

The VICE-PRESIDENT, Acting President: Please be seated. The sitting is open. The Court meets today, pursuant to Article 79, paragraph 4, of the Rules of Court, to hear the oral statements of the Parties on Preliminary Objections raised in two cases by the respondent: the United Kingdom of Great Britain and Northern Ireland in the case concerning *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya* v. *United Kingdom)*, and the United States of America in the case concerning *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya* v. *United States of America)*.

Although there are two separate proceedings, instituted by two separate applications, the position of the applicant in each case is the same. The same holds true of the applicant's position as respondent to the Preliminary Objections in each case, for its responses to the two sets of Preliminary Objections proceed on substantially the same basis. Consequently, the Court considered it necessary to organize the course of the oral proceedings in this phase of the case in such a manner as to avoid unnecessary duplication of arguments. Such steps had already been taken during the previous phase of these cases in the proceedings relating to the requests for interim measures. After having consulted the Governments concerned, the Court has decided to proceed as follows: it will first hear oral argument from the United Kingdom on the objections it raised in the case of *Libya* v. *United Kingdom*, which was the first of these two cases to be entered in the General List; it will then hear oral argument from the United States of America in the case of *Libya* v. *United States*. Finally, it will hear the response from Libya to these arguments in both cases.

Article 32 of the Rules of Court provides that, if the President of the Court is a national of one of the parties in a case, he shall not exercise the function of the presidency in respect of that case. The President of the Court, Judge Schwebel, will therefore not be exercising the functions of the presidency in the case between Libya and the United States of America. Though the case between Libya and the United Kingdom is not covered by this article, President Schwebel has thought it appropriate that he should not exercise the functions of the presidency in that case as

well. It falls to me, then, in my capacity as Vice-President of the Court, to exercise the functions of the presidency in both cases, in accordance with Article 13 of the Rules of Court.

The Registrar informed the Parties to the two cases, by letters dated 23 November 1995, that, in accordance with Article 24, paragraph 1, of the Statute of the Court, Judge Higgins had asked to be excused from participation in both cases, since prior to her election to the Court, she had acted as Counsel for the United Kingdom in the case of *Libya* v. *United Kingdom*. By a letter dated 5 March 1997, the Deputy Agent of the United Kingdom, referring to Articles 31 of the Statute and 37 of the Rules of Court, informed the Court of its intention to choose Sir Robert Jennings to sit as judge *ad hoc* in the case of *Libya* v. *United Kingdom*, in accordance with Article 37, paragraph 1, of the Rules of Court, which provides that if

> "a Member of the Court having the nationality of one of the parties is or becomes unable to sit in any phase of the case, that party shall thereupon become entitled to choose a judge *ad hoc* within a time-limit to be fixed by the Court".

In accordance with Article 35, paragraph 3, of the Rules of Court, a copy of that letter was communicated by the Registrar to the Libyan Government, which was informed that 7 April 1997 had been fixed as the time-limit within which Libya could submit such observations as it might wish to make. No observation from the Libyan Government reached the Court within the time-limit thus fixed. By letters dated 30 May 1997, the Registrar informed Libya and the United Kingdom, as well as the United States of America, that the Court was prepared to accept from them, no later than 30 June 1997, any observations they wished to make in respect of Article 31, paragraph 6, of the Statute. That clause is worded as follows:

> "Should there be several parties in the same interest, they shall, for the purpose of the preceding provisions [relating to the choice of judges *ad hoc*], be reckoned as one party only. Any doubt upon this point shall be settled by the decision of the Court."

Each of the three Governments submitted observations to the Court within the prescribed time-limit. By letters of 16 September 1997, the Registrar informed Libya and the United Kingdom, as well as the United States, that the Court had, after deliberating on the question, found that the appointment of the judge *ad hoc* by the United Kingdom was admissible in this phase of the case;

and that Sir Robert Jennings would therefore sit on the Bench for the present hearings in the case of *Libya* v. *United Kingdom*, and would take part in the deliberation.

I come now to the pleasant duty of installing Sir Robert Jennings as a Judge *ad hoc* in the case between Libya and the United Kingdom. There is clearly no need for any introduction of this eminent personality, well known to the Court and to you all. Sir Robert, after a long and brilliant career as an academic and as a highly regarded Counsel and adviser of various governments, was a Member of this Court from 1982 to 1995, and was its distinguished President from 1991 to 1994. We are both honoured and delighted to have him amongst us once more. Article 20 of the Statute provides that every Member of the Court shall, before taking up his duties, make a solemn declaration in open court that he will exercise his powers impartially and conscientiously; pursuant to Article 31, paragraph 6, of the Statute, that provision also applies to judges *ad hoc*. Furthermore, Article 8, paragraph 3, of the Rules of Court specifies that judges *ad hoc* are to make the declaration in relation to any case in which they are participating, "even if they have already done so in a previous case". Accordingly, I now invite Sir Robert Jennings to make the solemn declaration provided for by Article 20 of the Statute and I ask you all to rise.

Sir ROBERT JENNINGS:

"I solemnly declare that I will perform my duties and exercise my powers as judge honourably, faithfully, impartially and conscientiously."

The ACTING PRESIDENT: Thank you. Please be seated. I place on record the solemn declaration made by Sir Robert Jennings and declare him duly installed as judge *ad hoc* in the case concerning *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya* v. *United Kingdom)* (Preliminary Objections).

I would point out, moreover that, since the Court does not include upon the Bench a judge of Libyan nationality, Libya has, in each of the two cases, availed itself of its right under Article 31, paragraph 2, of the Statute, to proceed to the choice of a judge *ad hoc;* Judge El Kosheri, chosen

to sit in this capacity in both cases, was duly installed in 1992, during the phase of these cases devoted to the requests for the indication of provisional measures.

The proceedings were initiated on 3 March 1992 by the simultaneous filing in the Registry of the Court of two separate applications by the Libyan Arab Jamahiriya, one against the United Kingdom of Great Britain and Northern Ireland and the other against the United States of America, regarding disputes which, according to the applications, relate to the interpretation or application of the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, signed at Montreal on 23 September 1971. Both those applications refer to the destruction, on 21 December 1988, over Lockerbie (Scotland), of Pan Am flight 103, and to charges against two Libyan nationals, brought respectively by the *Lord Advocate* of Scotland and a United States *Grand Jury* in November 1991, according to which those two Libyan nationals, *inter alia,* caused a bomb to be placed aboard the aircraft, which bomb had exploded causing the aeroplane to crash.

In each of its applications, Libya states that the allegations contained in the charge constitute an offence under Article 1 of the 1971 Montreal Convention, that that Convention is the only applicable convention in force between the Parties dealing with such offences and that the Parties are bound to act in accordance with that Convention in all questions relating to Pan Am flight 103 and the accused. Libya maintains that, whereas it has fully complied with all its obligations under the Montreal Convention — in particular by taking all the necessary measures required by the fact that the accused were on its territory —, the United Kingdom and the United States have breached and are continuing to breach their obligations — in particular by trying to prevent Libya from establishing its legitimate jurisdiction over the matter, by putting pressure on Libya to surrender the accused and by refusing to afford the assistance requested by the Libyan judicial authorities in order to enable them successfully to complete the criminal proceedings initiated by them. At the end of each of the applications, Libya requests the Court to adjudge and declare that the respondent

> "is under a legal obligation immediately to cease and desist from such breaches and from the use of any and all force or threats against Libya, and from all violations of the sovereignty, territorial integrity and the political independence of Libya".

The applications invoke as the basis for jurisdiction Article 14 (1) of the Montreal Convention which provides that:

> "Any dispute between two or more Contracting States concerning the interpretation or application of this Convention which cannot be settled through negotiation, shall, at the request of one of them, be submitted to arbitration. If within six months from the date of the request for arbitration, any one of those Parties are unable to agree on the organization of the arbitration, any one of those Parties may refer the dispute to the International Court of Justice by request in conformity with the Statute of the Court."

On 3 March 1992, having filed its applications instituting proceedings, the Government of the Libyan Arab Jamahiriya also submitted in each case a request for the indication of provisional measures in accordance with Article 41 of the Statute of the Court. Those requests were, on the one hand, for the prohibition of any action against Libya calculated to coerce Libya to surrender the accused individuals, and, on the other, to ensure that no steps were taken that would prejudice the rights of Libya with respect to legal proceedings pending before the Court. By Orders dated 14 April 1992, the Court, referring to resolution 748 (1992) adopted by the Security Council on 31 March 1992, found that the circumstances of the case were not such as to require the exercise of its power, under Article 41 of the Statute, to indicate provisional measures.

By Orders of 19 June 1992, the Court fixed 20 December 1993 as the time-limit for the filing by Libya of a Memorial in each case, and 20 June 1995 as the time-limit for the filing by the United Kingdom and the United States of America respectively of Counter-Memorials. The Memorials were filed within the prescribed time-limits. Within the time-limits fixed for the filing of Counter-Memorials, the United Kingdom and the United States of America each filed Preliminary Objections, on the jurisdiction of the Court and on the admissibility of the Application. The procedure to be followed after preliminary objections have been filed is governed by Article 79, paragraph 3, of the Rules of Court; under that provision, upon receipt by the Registry of a preliminary objection, the proceedings are suspended and a special procedure has to be organized to enable the Court to examine these objections. By Orders of 22 September 1995, the Court fixed 22 December 1995 as the time-limit within which Libya could file written statements of its observations and submissions on the Preliminary Objections raised respectively by the United

Kingdom and the United States of America. Within the prescribed time-limits, Libya submitted such statements, at the end of which it requested the Court to reject the Preliminary Objections and to proceed to the merits in each case.

By letter of 12 March 1992, the Registrar informed the Secretary-General of the International Civil Aviation Organisation (ICAO), in accordance with Article 34, paragraph 3, of the Statute, that the interpretation of the Montreal Convention was questioned in the two cases. By letter dated 19 February 1996, the Registrar forwarded copies of the written pleadings in accordance with that provision and, referring to Article 69, paragraph 2, of the Rules of Court, specified that, if the Organization wished to present written observations to the Court, at this stage, these should be limited to questions of jurisdiction and admissibility. By letter dated 26 June 1996, the Secretary-General of the Organization informed the Court that the Organization "had no observations to make for the moment" but wished to remain informed about the progress of the two cases, in order to be able to determine whether it would be appropriate to submit observations later.

It now falls to the Court to hear the Parties on the questions relating to its jurisdiction and the admissibility of the Application in each of the two cases. As indicated earlier, the Court will first hear the United Kingdom in the case of *Libya* v. *United Kingdom*.

Before giving the floor to the Agent of the United Kingdom, I must announce that, having ascertained the views of the Parties, the Court has decided, in accordance with Article 53, paragraph 2, of the Rules of Court, that the Preliminary Objections of the United Kingdom and the United States of America, and the observations and submissions of Libya on them will be made accessible to the public. Annexes will be made available to public at the same time with the exception of Number 16 of the U.K. Annexes.

I now give the floor to Sir Franklin Berman, Agent of the United Kingdom of Great Britain and Northern Ireland.

Sir Franklin BERMAN: Mr. Acting President, Members of the Court, may it please the Court:

1.1. It is as always an honour to appear before you as Agent for the Government of the United Kingdom of Great Britain and Northern Ireland. It is a pleasure also to appear in that capacity so soon after the previous occasion, even though I may on this occasion occupy the somewhat less comfortable position of representing the Respondent, defending an action before the Court. May I however take this first opportunity that comes my way to offer my personal congratulations and those of my Government to you and to Judge Schwebel on your recent election to the offices of Vice-President and President of the Court, and to express our satisfaction at your own presence in the Presidential chair for the present proceedings? Your deep grounding in public international law, together with your legal roots in a system that combines elements of Roman law and of the common law, and the fact that you have written on Islamic law, makes you particularly well qualified to preside with understanding over a case in which Scottish criminal law and procedure, treaty law and the law of the United Nations Charter are intermingled in so unusual and challenging a way. I must also express my own particular and very personal satisfaction at the return to your Bench of that eminently distinguished and much admired past President, Sir Robert Jennings — even if not seated in his accustomed place!

1.2. Mr. President, I described our position before the Court as that of Respondent, defending an action brought against the United Kingdom by the Government of Libya, but of course we appear today to present as you have said our Preliminary Objections, in which we ask the Court to dismiss the Libyan action at the preliminary stage; thus our position combines that of Applicant and Respondent. Our Preliminary Objections were filed in written form as required, and we shall be referring the Court to them and to the Annexes as the oral argument proceeds. We intend throughout the argument to refer to our written pleading as 'the United Kingdom's Preliminary Objections' and to the Libyan comments and observations on them as 'the Libyan Response'. To spare the Court's time we propose also not to spell out in full the references to all authorities or documents we refer to or quote from, but instead to include them in the written texts we hand in to the Registrar. May I now introduce to the Court our legal team? — Lord Hardie, the Lord Advocate, Professor Christopher Greenwood and Mr. Daniel Bethlehem as Counsel;

Mr. Anthony Aust of the Foreign & Commonwealth Office as Deputy Agent; and Mr. Patrick Layden of the Lord Advocate's Department, Mr. Norman McFadyen, the Deputy Crown Agent, Ms Susan Hulton and Miss Sarah Moore, of the Foreign & Commonwealth Office, as Advisers. I shall explain to the Court in a moment how our oral argument will be divided up, but before doing so must make a number of preliminary points.

1.3. Let me start by thanking you, Mr. President, and the Court for the flexibility you have shown in making arrangements for hearing together these oral proceedings and those in the separate case brought against the United States of America. We have made some sacrifices in accepting them, but are convinced that the arrangements taken as a whole will operate for the convenience of the Parties as well as of the Court, and will do our utmost to present our case concisely and to conform to the agreed timetable. We are conscious in particular that what we have put before the Court are preliminary issues, and will proceed accordingly, avoiding issues of substance that can, and should, only be tried on the merits - if , of course, the case does proceed to a merits phase.

1.4. Our substantive Submissions are that the Court should adjudge and declare that: it lacks jurisdiction over the claims brought against the United Kingdom by the Libyan Arab Jamahiriya and/or the claims brought against the United Kingdom by the Libyan Arab Jamahiriya are inadmissible. We ask the Court to dismiss accordingly the proceedings instituted by the Libyan Application.

1.5. The Court will observe that these Submissions are put forward both cumulatively and in the alternative, and that the first goes to the jurisdiction of the Court under Article 36(1) of the Statute, while the second goes to what might be called admissibility more broadly under Article 79 of the Rules. More precisely, the Objection to the Court's jurisdiction is based upon the fact that, in our submission, there is no substantive dispute in any recognized sense of the term between the Parties relating to the interpretation or to the application of the Montreal Convention, that being the treaty on which the Applicant seeks to found the jurisdiction of the Court. We will show: that Libya has not been able to point to any conduct of the United Kingdom which can plausibly be maintained is a violation of the Montreal Convention; and that the conduct Libya complains of

is either not that of the United Kingdom at all or is conduct for which the United Kingdom does not carry legal responsibility. In short what the Applicant is seeking by these proceedings is simply not a Montreal Convention matter, but is a scarcely veiled attempt to frustrate the exercise by the Security Council of its responsibilities under the United Nations Charter. Some of the argument was before the Court already in the 1992 proceedings on Libya's application for Provisional Measures of Protection. If the Court upholds our Submission, it will of course dismiss the Libyan Application for want of jurisdiction.

1.6. We will also show however (and this is our second Objection) that what Libya claims to be the issue or issues in dispute between it and the United Kingdom are now regulated by decisions of the Security Council, taken under Chapter VII of the Charter of the United Nations, which are binding on both Parties and that (if there is any conflict between what the Resolutions require and rights or obligations alleged to arise under the Montreal Convention) the Resolutions have overriding effect in accordance with Article 103 of the Charter. It follows, in our submission, that the relief which Libya seeks from the Court under the Montreal Convention is not open to it, and that the Court should therefore exercise its power to declare the Libyan Application inadmissible.

1.7. We believe, Mr. President, that both of these are Objections of an essentially preliminary character, and we ask the Court for a decision on them under Article 79 of the Rules before any further proceedings take place on the merits. I need say no more in this respect about the first Objection relating to jurisdictions since it is self-evident why it is desirable that an Objection on jurisdictional grounds should be disposed of as a preliminary issue. In our view, the same goes for the second Objection which is based on broader admissibility grounds. I would however add one further factor for the Court's consideration. In our view it is a factor of the greatest importance.

1.8. At the heart of the Libyan case lies the prosecution of the two Libyan citizens who are accused of the Lockerbie bombing. This by no means exhausts the issues we will ask the Court to take into account, but it lies at the heart of Libya's case. It would seem that there is no issue between the Parties that the accused must stand trial; the only issue is where. The requirement

that they stand trial is moreover an essential part of the Resolutions of the Security Council. It must therefore be incumbent on the Parties and on the Court to conduct this case with that objective in mind and certainly not to create any obstacle that may stand in its way. It is also clear that the only way in which the evidence against the accused can be fully tested and their guilt or innocence established is in a criminal trial offering all the necessary guarantees of fairness.

1.9. Against that background, we believe that the most careful attention must be paid to the relationship between the proceedings in this case and an eventual trial of the accused. It seems to us self-evident that nothing must be done which would jeopardize a trial being held, and by the same token that nothing must be done which would jeopardize the rights of the accused when facing trial. The Lord Advocate will have more to say about this later on.

1.10. We cannot of course be certain at this stage how future stages of this case might develop. I would be remiss however if I did not alert the Court to the possibility that it might face serious difficulty in trying the Libyan claims on their merits. The difficulty will arise if the production of evidence that the Court felt it needed in order to try the issues fairly ran the risk of prejudicing a criminal trial of the accused. This point is of course a different one from the sheer difficulty of dealing with complex factual and forensic evidence under the procedures of this Court, to which the United Kingdom has already drawn attention in its Preliminary Objections themselves[1]. I may say that for present purposes we for our part have found it possible to cover the facts in outline only, but we cannot be sure that that would still be so at a merits stage. We therefore feel under an obligation to put these points before the Court now, inasmuch as they constitute in our submission a weighty reason why the Court should determine these Objections if at all possible as a preliminary question at a preliminary stage.

1.11. So much for background, Mr. President. As to substance the United Kingdom's argument will be deployed as follows. The Lord Advocate will open with the factual background and the criminal investigation into the Lockerbie incident. He will explain the Scottish criminal

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[1] Paragraphs 2.105-2.107

process and the safeguards that protect the inherent right of the accused to a fair trial, and he will describe to the Court the special arrangements the Scottish authorities are prepared to make to ensure that in this case the particular interest of the international community in the fairness of the trial is fully respected. Against that background and against the background of Libya's established record of encouragement, support and participation in international terrorism, he will detail also the efforts made by the United Kingdom to secure the presence of the accused for trial and the reasons why, when those efforts did not succeed, the Government of the United Kingdom referred the resulting situation to the United Nations Security Council.

1.12. Thereafter Mr. Bethlehem will take the Court through the three directly relevant Resolutions of the Security Council, but against the background of the Security Council's long history of concern with international terrorism, notably terrorism directed against international civil aviation, because of the threat it poses to international peace and security, and against the background also of the Security Council's prior interest in the Lockerbie incident itself. He will draw the Court's attention to the very specific chronology of the steps taken by Libya in relation to the proceedings before the Security Council, and the great importance they have for a proper understanding of the present case before the Court.

1.13. Professor Greenwood will then deal with the requirements of Article 14, paragraph 1, of the Montreal Convention on which Libya seeks to found the jurisdiction of the Court. He will show that Libya's Application fails to fulfil the requirements of that jurisdictional clause and that Libya has still five-and-a-half years after first suddenly invoking the Montreal Convention failed either in its dealings with the United Kingdom or before the Court to show the existence of a dispute under that Convention which is thus capable of falling within the jurisdictional clause.

1.14. Lord Hardie will then conclude the legal argument by showing what bearing the requirements of the Security Council have on the issues Libya has brought before the Court; by showing that the Security Council resolutions have overriding force for both Parties and thus exclude the relief which Libya is seeking from the Court, and that the Court should accordingly declare the Libyan Application inadmissible irrespective of any finding as to jurisdiction under the

Montreal Convention. He will draw particular attention, again, to the chronology of Libyan actions, and to its importance for the questions facing the Court. And I will then conclude with a short summary and resumé of the United Kingdom's case.

1.15. May I however, Mr. President, elaborate on just two aspects of the above? I mentioned that the Lord Advocate would be dealing, amongst other things, with the factual background to the dispute. It is for me, however, as Agent, to take up one aspect of the Libyan allegations against the United Kingdom. In 1992, at the time of the hearings on the Libyan request for provisional measures of protection, the air was thick with dire predictions that the United Kingdom was threatening the imminent resort to force in pursuit of its objectives over the Lockerbie affair. The accusation was totally without foundation then, and the course of events in the five or so years since then has proved this beyond any doubt. And yet our opponents continue doggedly to trot it out: in the Libyan Memorial in 1993 and yet again in the Libyan Response at the end of 1995. Mr. President, to maintain the accusation without the slightest shred of proof or even probability is nothing less than shameful. It ought now in all conscience to be withdrawn, and I call on our opponents to do so before the Court.

1.16. My final point, Mr. President, relates to the second Preliminary Objection, in which we ask the Court to rule that the intervening resolutions of the Security Council have rendered the Libyan claims without object in consequence of which the Court should dismiss them. The Lord Advocate will elaborate the legal argument tomorrow. But let me preface his treatment with some introductory remarks. The United Kingdom is acutely conscious that this head of its Preliminary Objections leads the Court onto exceedingly delicate and important ground. The United Kingdom does so soberly and in full consciousness of the significance of the issues involved. Our sole motive is the proper operation of the system laid down in the United Nations Charter. The United Kingdom is of course deeply attached to the standing and judicial prerogatives of this Court, and if I may say so it regularly demonstrates that attachment by its deeds as well as in words; we recognize that the particular function performed by the Court is a significant element in the maintenance of international peace and security. The United Kingdom must be conscious at the

same time of the special and particular burden which the Charter lays on the Security Council for the maintenance of international peace and security, and of the responsibilities which it itself bears both as a Member of the United Nations and in particular as a Permanent Member of the Security Council.

1.17. It is the United Kingdom's firm belief that the roles of the Court and of the Council do not stand in opposition to one another, but complement one another in a comprehensive *system* for the maintenance of international peace and security. We are confident therefore that there is in this case a proper interpretation of that Charter system which respects the functions of both Court and Council in relation to one another and in relation to the particular issues of international terrorism and the Montreal Convention. So while we are aware of the controversy and high drama that has been created in some legal circles about the present proceedings and about the issue of the reviewability of decisions of the Security Council, we do not ourselves view matters in that light, as if this were some battle between the Titans in which one or the other must emerge victor. We are not even sure that an abstract general issue of Court versus Council presents itself at all in this case. We do not, as the late Judge Lachs aptly put it, believe in a "blinkered parallelism of functions" between the Council and the Court, but in a "fruitful interaction".

1.18. Mr. President, with your leave I will now ask Lord Hardie to address the Court.

The ACTING PRESIDENT: Thank you, Sir Franklin. I give the floor now to the Lord Advocate, Lord Hardie.

Lord HARDIE: Mr. President, Members of the Court,

Legal, Factual and Policy Issues

2.1. It is a distinct honour for me to appear before you today. The Government I represent took office just five months ago. And they have publicly pledged support for this Court as an institution and to the rule of law in the United Kingdom's international relations. Despite the United Kingdom's long-standing attachment to this Court and to its compulsory jurisdiction, I am the first Lord Advocate to appear before you, although one of my predecessors — Lord Rodger of

Earlsferry — appeared when he was Solicitor General for Scotland. As Lord Advocate, that is as the senior Law Officer of the Crown in Scotland and a Minister of the Government of the United Kingdom, I will have something to say about my constitutional functions and about their connection with the prosecution of the two accused persons which lies at the heart of this case. But I appear before you today not in that specific capacity, but as counsel for the United Kingdom to expound and explain our Preliminary Objections.

2.2. The United Kingdom's case is in essence very simple. It starts from the fact that Libya is seeking from the Court certain specific relief under the Montreal Convention. I have no intention, however, of going into the nature of that relief, as that would be largely be a matter for the merits — if the case were ever to reach that stage. I intend, therefore, to limit my argument to issues of a preliminary character and will endeavour to avoid introducing extraneous material or straying into the underlying issues of substance.

2.3. Mr. President, the United Kingdom's arguments are the following: *first,* when one examines the matter there is no real dispute between the Applicant and the Respondent under the Montreal Convention; and *second,* even if there were some residual matter in dispute between them under the Convention, the point in issue is covered by binding resolutions of the Security Council.

2.4. We shall concentrate our arguments before you today and tomorrow on those two essential points. But first I have to introduce some preliminary matters in order to ensure that this litigation is seen in its proper context. I will keep this to the minimum and will not stray into the merits. I am, however, obliged to say something about the facts of the case and something about the nature of criminal proceedings under the Scottish legal system.

Importance of the facts

2.5. I start with the facts, both because they are essential to a proper understanding of the issues before this Court and because of some strange assertions in the Libyan Response. Libya complains about the very presence in our Preliminary Objections of a section dealing with the facts of the case. These are said to have nothing to do with the matters actually before the Court (namely, the interpretation and application of the Montreal Convention), but to be an attempt by

us to distort the issues by use of rhetorical and ideological arguments, which Libya represents as a "strategy of deception"[1].

2.6. This is an extraordinary complaint to make. Is Libya really saying that this Court should be deciding this case as if it were some wholly abstract issue and in deliberate disregard of its factual context? Law does not operate in a vacuum. It is to facts which the law has to be applied. In the present case — even though we are only at the Preliminary Objections stage — the Court needs to have a full understanding of the relevant facts in order to appreciate the arguments of both sides and to see the case in its proper context. For example, the submissions by Professor Greenwood on jurisdiction will rely not only on analysis of legal texts and principles but on the conduct of Libya and the United Kingdom at the relevant times. Similarly, Libya claims that mandatory resolutions of the Security Council are invalid. Although a surprising claim, it has to be answered. For this purpose it is necessary not only to analyse the powers conferred on the Council by the Charter, but also the practice of the Council and, in particular, how it has responded to the threat posed by terrorism to international peace and security.

2.7. I am confident that the Court will see this case — like any other — as a case embedded in its own peculiar facts, and will demand a proper appreciation of these facts; but of course only so far as is necessary to dispose fairly of the preliminary issues before it.

2.8. Therefore, I will describe the crime and the criminal investigation. I will then explain the criminal process in Scotland and, in particular, the guarantees of a fair trial afforded by the law of Scotland. I will then, in conclusion, touch upon the record of Libya's involvement in terrorism.

The crime

2.9. This case starts from and centres around a crime of massive proportions. On 21 December 1988, a Boeing 747 aircraft of Pan American Airways exploded over the small town of Lockerbie in Scotland, killing all 259 passengers and crew and eleven

residents of Lockerbie. Seventeen of the victims were babies or children under 16. This was by far the worst terrorist incident which has ever affected my country. You can imagine the impact which it made upon everyone in Scotland at the time. There can be no doubt (nor is it contested) that the explosion was caused by a bomb which had been introduced into one of the aircraft's luggage holds. There can be no doubt (nor, again, is it contested) that that bomb was introduced deliberately, with the intention of causing the explosion. In other words, this was a major terrorist outrage, one of the worst in the entire history of civil aviation. These are incontestable facts, which were to supply the essential context to what followed, and which would have applied whoever the perpetrator or perpetrators might have been, and whatever the purpose or motive might have been. But there are other essential and incontestable facts: the explosion happened in British airspace, the aircraft was American, and the innocent passengers, crew and local residents who perished were of 21 nationalities. That gave the tragedy and the subsequent criminal investigation an undeniably international dimension. As a major incident of international terrorism, it was automatically transformed from one of purely Scottish, or purely British, concern into one of international concern.

2.10. I notice, however, Mr. President, that the Libyan response takes offence at our use of the word "international" to describe the investigation. Of course the Scottish criminal investigation was "international" — necessarily so by reason of the international elements of the crime. It therefore involved the co-operation and assistance of various official and judicial bodies in a number of countries. But it was not an investigation designed to satisfy other Governments or the world community. Indeed, it was not designed to "satisfy" the British Government either. It was an investigation designed, like any other criminal investigation, to uncover evidence and to allow the prosecuting authorities to decide on that basis — applying the normal rules and principles of all cases — whether there was sufficient evidence to justify bringing formal criminal charges. What we have then is not some quixotic or optional intervention by British authorities, still less

one dishonestly designed as a pretext for political pressure against Libya. Faced with a terrorist attack of this gravity, any responsible government is under a duty to ensure that there is a serious, determined and complete criminal investigation, and at the same time to meet the inevitable and natural demand on governments collectively that they act resolutely and decisively to meet the menace of international terrorism, especially that affecting international civil aviation.

2.11. If we are agreed thus far, Mr. President, then it follows that the demand that those believed to be responsible for such acts be found and brought to trial is both natural and entirely justifiable. And that that demand is heard as loudly from amongst the wider international community as it was — and is — from Scotland. For the British authorities to have been less determined and less persistent in pursuing the criminal investigation would have been a breach of their duty towards the victims and their families of this atrocity and at the same time an abdication of their international responsibilities. Any responsible government would have done the same. But let me make it plain to the Court that the aims and intentions of the United Kingdom have throughout been simple and straightforward so far as the Lockerbie disaster is concerned. Those aims are to identify those believed to be responsible for the outrage, and to ensure that they are brought properly to trial; and, so far as international terrorism is concerned, to join resolutely with other governments and international bodies to ensure that this menace to international peace and harmony is stamped out. I make a distinction between the Lockerbie disaster as such and the fight against international terrorism more broadly in order to bring home that the criminal investigation was conducted in exactly the same way as any other investigation into a serious crime in Scotland. Given that their case revolves entirely around the question of the trial of the accused, it is beyond me to understand how the authors of the Libyan response can maintain that the essentials of that criminal investigation and its outcome have nothing to do with the issues before this Court.

2.12. The details of the investigation are set out carefully in our Preliminary Objections[2]. I do not need to restate them now, though I shall refer briefly to one or two of the essential elements in developing my argument.

2.13. The scale of the investigation is demonstrated by the fact that the search area, over which the wreckage and debris were strewn, extended to 2,190 square kilometres reaching across to the east coast of England. Within 15 hours of the crash 2,000 personnel from police, armed forces, emergency services and other support agencies were dedicated to the disaster and its aftermath. The ice-rink at Lockerbie had to be commandeered to serve as a temporary mortuary; a huge shed at the Central Ammunition Depot at Longtown, Carlisle, some 20 miles from Lockerbie, was taken over for the purpose of examining every aircraft part recovered, every single item being laid out in an enormous jigsaw resulting in 80 per cent of the aircraft being pieced together. A warehouse in Lockerbie was taken over to receive and house items of property, luggage and cargo, relate property to owners and identify items requiring further examination. It was only after this painstaking process of gathering debris from the wreckage of houses and from open country, and the careful sifting through of the enormous quantities of material, that 4,000 items were retained for further examination or evidence.

2.14. After the week of the explosion, scientific evidence of the wreckage had established that the aircraft had been destroyed by plastic explosive and that the disaster was, therefore, the result of a criminal act. The wide-ranging criminal investigation then spread far beyond Lockerbie, and indeed far beyond Scotland and beyond the United Kingdom, to reach 70 different countries. Judicial, prosecuting and investigating agencies from many countries co-operated in an investigation which was of an unprecedented scale and my Government is grateful to those countries for that cooperation.

2.15. The conclusions of the investigation were announced on 14 November 1991. An outline of the Case against the accused is in our Preliminary Objections[3]. A fuller account of the evidence against the accused was transmitted to the Libyan Government that very same day, together with a request for the surrender of the two accused to stand trial in Scotland.

This Statement of Facts was placed before the Court at the Provisional Measures stage as a confidential document and has been presented to the Court in the United Kingdom documents[4]. I will explain later why it has not been published other that being presented to the Court[5] on such a confidential basis.

Scottish Criminal Proceedings

2.16. Mr. President, the Libyan response lacks any understanding of the essential nature of Scottish criminal procedure, but makes much out of its misunderstanding. Since it is so important to the case, I will turn to offer a condensed description of the Scottish criminal legal process. Much of what I am going to say will not be new to Members of the Court, especially to those accustomed to criminal procedure as it operates in common-law, adversarial system.

2.17. As the Court is aware, within the United Kingdom, Scotland has its own distinctive legal system, and it is within the jurisdiction of that system that the Lockerbie crime has to be dealt with. The distinctive nature of the Scottish system for the investigation and prosecution of crime in Scotland is again described in the Preliminary Objections[6]. In its historical origins the Scottish system combines elements drawn from the civil law and elements drawn from the common law and those of you from civil law jurisdictions will be familiar with what is now said about the role of an official called the Procurator Fiscal.

2.18. In Scotland, the local Procurator Fiscal is the prosecutor. For hundreds of years, he has been responsible for the investigation of all sudden and suspicious deaths and for the investigation and prosecution of all crimes arising in his district. In Scotland, therefore, the police are subject to the direction of the Procurator Fiscal in the investigation of crime. The Procurator Fiscal is, in fact, encouraged to go to the scene of all suspicious deaths and must take charge of arrangements for the initial investigation, particularly arrangements for autopsies and scientific examinations. In the case of sudden deaths, the Fiscal normally concludes that investigation without a public hearing. In some cases,

however, he is required by statute, or by the Lord Advocate, to arrange for the holding of a Fatal Accident Inquiry. This is held in public before a judge.

2.19. As I have said, the Lockerbie investigation was treated in exactly the same way as any other case. The Procurator Fiscal was contacted immediately the incident occurred and went to the scene. He made arrangements for the holding of autopsies and gave directions to the police on the conduct of their investigations. As in any homicide, he was required to make reports to the Lord Advocate. As in any case of this nature, he was required to consider whether the holding of a Fatal Accident Inquiry was necessary and you will be aware that one was in fact held in the later part of 1990 into the earlier part of 1991. By that time, the criminal investigation had not yet reached the stage where criminal charges could be brought against named individuals, but it was very active and it was necessary for my predecessor to consider whether the Fatal Accident Inquiry could properly proceed at that time. It is important, where a criminal prosecution may be commenced, that nothing is done at a Fatal Accident Inquiry which may prejudice a prosecution. The Lord Advocate concluded, nonetheless, that there was a need to establish the circumstances surrounding the deaths, and in particular to examine publicly any deficiencies in airport security, provided the Inquiry did *not* explore any issues relevant to criminal responsibility. And we turn briefly to the office of Lord Advocate.

Office of the Lord Advocate

The Lord Advocate is appointed by the Queen on the recommendation of the Prime Minister. One of the functions of the Lord Advocate is to advise the Government on all questions of civil law. An entirely *separate* function is that of prosecuting all crimes in Scotland and investigating all sudden deaths. He carries out this latter function through the local Procurators Fiscal. The Lord Advocate and the Procurators Fiscal are entirely independent in carrying out that function and are not subject to any form of political direction or control. Political considerations play no part in the decision to prosecute

particular cases, nor in the selection of counsel to represent the Crown in any particular issue.

2.21 Since one of the matters which the Fatal Accident Inquiry was properly able to explore was the adequacy of airport security arrangements and the role of relevant Government Departments in relation to those arrangements, the then Lord Advocate, who was appointed by a Conservative Government, appointed me to as Crown Counsel at the Fatal Accident Inquiry to present most of the evidence. At that time I was in practice at the Scottish Bar and was known to be of a different political persuasion from the Government. That was an indication of the exercise by the then Lord Advocate of his independence in appointing someone of a different persuasion, particularly when a Government Department might well be criticized on security matters.

2.22. As I have said, the Fatal Accident Inquiry was not concerned with issues of criminal responsibility and I was not, at that time, given any detailed briefing on the criminal investigation, nor was I entitled to. I was, however, able to gain a considerable insight into the Lockerbie disaster, its effect on the community and its effect on the country at large. I shall never forget the grim detail of the evidence which was given to the Inquiry over many months, and I shall always remember, and I would like again to pay tribute to the touching and dignified presence — and in some cases participation — of the relatives of the victims at that Inquiry.

2.23. When I was appointed Lord Advocate in May of this year I had, therefore, some familiarity with the details of the Lockerbie tragedy, but naturally I wanted to be briefed fully about the criminal case. I am the fourth successive holder of the office of Lord Advocate to consider this case. My three predecessors had been appointed under Conservative administrations and I hold office under the new Labour Government. Each of us, exercising our independent judgement and responsibility, has concluded that the evidence justifies the criminal charges which have been brought, so that it can be tested in proper proceedings in court. It was for us and for us alone to make that decision. Nor is

it true that other leads suggesting that the crime was committed by others were not followed up. Those claims by Libya are based on little more than newspaper stories. Each of my predecessors made it clear — as I have made it clear and I am prepared to repeat today for the avoidance of any doubt — that any new evidence will be considered and any relevant line of inquiry suggested by such evidence will be pursued vigorously.

The criminal charges

2.24. Although I have stressed that the case has been dealt with in the same way as any other criminal case, it has, of course, been on a scale which was quite unprecedented in Scotland and the investigation therefore involved more personnel and a greater geographical area than in any other case before or since. Although, as I have already indicated, there was considerable co-operation and assistance given by the judicial, prosecuting and investigating authorities of many other countries, the investigation carried out by the Procurator Fiscal, and the Chief Constable under his direction, was one which was independent of any other investigation and those carrying it out were ultimately accountable only to the Lord Advocate of the day. It was the Lord Advocate alone who concluded, after consultation with the Procurator Fiscal, and upon consideration of all the available evidence, that criminal charges should be brought in Scotland. There was, of course, close co-operation with the relevant United States authorities in the investigation of the case and the Court will be aware that the timing of the public statements was coordinated with those made by the prosecuting authorities in the United States, following the handing down of an indictment by a Grand Jury there. Nonetheless, the decisions to institute criminal proceedings was taken independently by the authorities in each jurisdiction following their own investigations and procedures.

2.25. Under Scottish criminal procedure, once he is satisfied that there is sufficient evidence to prosecute a serious case, the Fiscal presents a Petition to a local judge (known in Scotland as a Sheriff) setting out the criminal charges and applying for a warrant for the arrest of the accused. These charges outline the allegations against the accused. Libya

complains in its Response that the charges in this case are expressed in the indicative mood[7]. They are only thus expressed because this is the practice in bringing forward charges; it does not mean that the accused are presumed to be guilty. Where the Procurator Fiscal has brought charges, as he has in this case, the police are not then entitled to interview the accused about the charges, since they are not simply suspects wanted for interview, but accused persons, who come under the protection of the Court as soon as they are arrested.

2.26. The Court should be in no doubt about the nature of the criminal charges which have been brought in this case. This is not, as is sometimes suggested, simply a case where it is alleged that the accused happen to have been Libyan state employees. With the Court's permission, I will read briefly from the criminal petition which sets out the charges which have been brought in Scotland. It is to be found in Annex 17 and it alleges that the two accused

> "did conspire together and with others to further the purposes of the Libyan Intelligence Services by criminal means, namely the commission of acts of terrorism directed against nationals and the interests of other countries and in particular the destruction of a civil passenger aircraft and murder of its occupants".

2.27. It is important to bear in mind what underlies Libya's case before this Court is Libya's claim to be entitled to try the case against the two accused itself. Even if it were only a case of allegations of terrorism having been brought against two Libyan officials it would be unacceptable for Libya to try this case. But given the explicit character of the charges which have been brought, that is as charges of terrorism alleged to have been carried out in furtherance of the purposes of the Libyan Intelligence Services, how could justice conceivably be seen to be done by a trial in Libya? And if it is accepted that Libya cannot, on the principle *nemo judex debet esse in propria sua causa,* provide a forum for the trial of the criminal case, the whole basis of its case before this Court falls away. Professor Greenwood will address this critical question further in the context of the Montreal Convention.

Principle of a Fair Trial

2.28. Mr. President, Libya asserts that the United Kingdom is seeking to convince the world of the guilt of the two accused by keeping the evidence carefully concealed and making statements which presuppose guilt[8]. That assertion is again based on a misunderstanding of the nature of the criminal process in Scotland. In common with many other legal systems, in Scotland the evidence in the case cannot be made known publicly by the prosecutor until the case is brought to trial. This is to ensure that the jury are not influenced by what they have read or heard of the prosecution case. I and my predecessors have been only too conscious of our responsibility as prosecutors not to prejudice a fair criminal trial by releasing the evidence.

2.29. Although it is not normal to make public any further information about the evidence at that stage, in this case it was necessary to seek the co-operation of the Libyan Government in making the accused available for trial. For that reason additional information, summarizing the case was set out in the Statement of Facts[9]. As I said earlier, this was delivered to the Libyan authorities along with a copy of the Petition containing the charges[10] as long ago as 14 November 1991. It is because it reveals more information than would be customary in criminal proceedings at this stage that the Statement of Facts has not been published, but was placed before the Court on a confidential basis. The Libyan Memorial complains that the United Kingdom has always refused to provide Libya with the slightest proof of the allegations against the two accused. The Statement of Facts is a more detailed summary of the case than would have been required for extradition from many countries and has been with Libya for nearly six years. Libya can be in no doubt whatsoever as to the basis of the charges. My position as prosecutor in this case is not different from any other case where the accused have yet to be arrested. Charges — that is allegations — have been brought on the basis of an assessment that there is a case to answer. However, no prejudgment is made as to the guilt of the accused; they are

presumed innocent until proved guilty. Furthermore, the decision on the innocence or guilt of the accused rests solely with a jury of 15 ordinary citizens selected at random.

2.30. My predecessors and I have therefore carefully avoided making any statements which presuppose guilt. Such constraint is fundamental to the fairness of our system and has been respected throughout by British Ministers and diplomatic representatives. Once accused persons are arrested and brought before a court in Scotland they will, of course, receive details of the witnesses, documents and other items of evidence to be used against them. Indeed, in preparing for trial, they are entitled to have their lawyers pursue their own enquiries, including the private interview of witnesses, in accordance with our practice. We do not — as the Libyan Response suggests — pay "purely verbal homage to the presumption of innocence"[11]. We have been most careful to respect that presumption in all that we say and do. The Libyan suggestion that we are sheltering behind the independence of the judiciary as a pretext for not adducing more evidence[12] shows again a serious misunderstanding of the basic principles of the Scottish legal system which shares with many other legal systems the fundamental principle of a fair trial.

2.31. Before I move on to other matters, it is necessary for me, therefore, to answer certain criticisms made in the Libyan response with regard to the fairness of a trial in Scotland.

2.32. Any suggestion that the accused will not receive a fair trial in Scotland is unfounded. I have already referred to the independence of the Scottish prosecutors from Government. Prosecutors in Scotland are under specific duties to act fairly. The regulations for the Procurator Fiscal Service make it clear that a Procurator Fiscal must never act unfairly, that he must disclose to the defence any information which supports the defence, even though it may be damaging to the Crown case, and he must assist the defence to enable the defence representatives to contact witnesses whether they are on the Crown list or not. The prosecutor has a primary duty not of securing a conviction but of assisting the Court and of trying to secure that justice is done.

2.33. In addition, the Scottish courts provide strong protection for the fair trial of accused persons, both when awaiting trial and during the trial. The courts will protect the accused against interrogation or any unfair treatment; they will exclude evidence which has been unfairly obtained and they will deal swiftly and firmly with any prejudicial reporting by the media.

2.34. Mr. President, in September 1993 Libya raised a number of questions about Scottish criminal procedure and sought assurances that the accused would receive a fair trial[13]. These were answered and the necessary assurances given[14]. Libya has confirmed that these assurances were satisfactory[15]. It is therefore curious that the Libyan response casts doubt on the independence of Scottish courts. This is especially so given that, in addition to having accepted our assurances about fair trial in Scotland, Libya has many times itself proposed a Scottish trial, provided it is held outside Scotland.

2.35. I give my personal assurance to this Court and to the international community that the trial will be entirely fair. That is an easy assurance for me to give, because it is one of my duties as Lord Advocate — as it is the duty of our independent judiciary — to see that every trial in Scotland is fair. But justice must be seen to be done; and because of the widespread international interest in this case we are willing to make special arrangements. Early last month the United Kingdom Government renewed to the United Nations Secretary-General its offer for international observers to attend the trial and monitor the proceedings in Scotland. The entire trial will, of course, as any other trial be held in public, but I can advise the Court that I personally have been in touch with the Scottish court authorities, who have stated that they are prepared to make special seating arrangements available in court for observers from the United Nations or any other reputable international organizations for them to view the proceedings; and they are also prepared to make any necessary arrangements for simultaneous translation of the proceedings. Observers would thus be able to satisfy themselves as to the fairness of the conduct of the proceedings and to report back to their respecitve organizations.

2.36. I have gone further, Mr. President, and I have contacted the Scottish prison authorities. I can confirm that, while the accused are in custody awaiting trial and during the trial, they will be held in a special prison facility. If the accused so choose and it is their choice they would be able to receive visits from international observers at any reasonable time. That could be every day if the accused wish.

2.37. While the precise location of the trial and place of detention of the accused cannot be determined until it is known that they are to be made available for trial, the Scottish court and prison authorities have also advised me that arrangements can be made for representatives of international organizations to view now or in near future the sort of court and prison facilities which will be available.

Evidential safeguards

2.38. It is a distinctive feature of the law of Scotland that no person may be convicted of a crime on the evidence of only *one* witness or on evidence from only *one* source. The essential facts in any criminal case must be proved beyond reasonable doubt by *corroborated* evidence. The then Lord Advocate was, by November 1991, satisfied that there was a case which could be established by corroborated evidence against two Libyans, Abdelbaset Ali Mohmed Al Megrahi and Al Amin Khalifa Fhimah, acting in furtherance of the purposes of the Libyan intelligence services. He came to this conclusion only on the basis of a comprehensive investigation, and on the basis of available evidence. I am of the firm view that that evidence must now be properly tested before the criminal courts.

2.39. As I have already said, my predecessors were ready, as I am, to consider and evaluate any *evidence* which tends to show either that the case against the two accused is unsound or that other parties were involved. Despite the many speculative accounts which have appeared in the media, neither the police, nor I, nor my predecessors, have seen any *evidence* which would warrant reconsideration of the charges which have been made.

Conspiracy theories

2.40. Nevertheless, in its response Libya seeks to cast doubt on the basis for the case against the accused. It is of course all too easy to speculate on the facts of a criminal case before the trial where, for the reasons I have already explained, the evidence cannot be made public. During the almost six years since the charges were laid there has been a host of speculative comment in the media and by others about the case. A prime example is the privately commissioned television film, the *Maltese Double Cross*. We note that Libya has tendered a videotape of it to the Court. It is not clear to us on what basis this has been done. The film does not provide evidence of any material fact and, in any event, is open to question whether it is admissible. I must therefore specifically reserve all of the United Kingdom's rights in this regard. I may nonetheless mention to the Court, since it is a matter of public judicial record, that only last month one Lester Knox Coleman, who was one of the principal participants in the film and upon whose account much of the theory put forward in the film was based, pleaded guilty in the United States of America to having given false evidence in an affidavit sworn by him in connection with the major civil case arising out of the Lockerbie incident. He has now judicially confessed that his story, repeated in the television film, was false.

2.41. As a typical example of the dangerous and often scurrilous speculation which has surrounded this case, it is wholly irrelevant to the issues before this Court, except as an object lesson in the danger of speculation. Responsible prosecuting authorities do not act on the basis of ill-informed speculation; they act on the basis of facts, of evidence. That is the sole basis upon which I and my predecessors as Lord Advocate have proceeded.

History of Libyan involvement in terrorism

2.42. As the Court is aware, there was no satisfactory response from Libya to the charges and the demand for the surrender of the accused. Mr. President, the Court is entitled to a word of explanation why the United Kingdom then took this state of affairs to the Security Council. The truth is that Libya had a long history of vocal support and

encouragement for international terrorism. This is well documented in our Objections[16]. Worse, Libya had shown itself willing to resort to violence in other countries in pursuit of its own ends, without regard to the sovereignty of those countries or the safety of their inhabitants. The United Kingdom had itself been the victim of this behaviour.

2.43. During the 1980s Libya mounted a well-publicized campaign of violence against Libyan dissidents abroad. In 1980 Libyan revolutionary committees ordered the killing of two dissidents in the United Kingdom. One Musa Kusa, then the head of the Libyan diplomatic mission in London, publicly voiced his approval of that decision. As a result, the Government ordered him to leave. In 1990 Musa Kusa became Deputy Foreign Minister, and he subsequently became Head of the External Security and Intelligence Organization of Libya.

2.44. In 1984 a number of people were injured and a policewoman, Yvonne Fletcher, was killed by shots fired from the Libyan diplomatic mission in London. Libya refused to co-operate in the criminal investigation of this most serious crime, and diplomatic relations were broken off.

2.45. In 1986, the Libyan Parliament called for the creation of "suicide commandos", whose task would be, *inter alia*, to "strike at American and Zionist interests everywhere", and in that year plastic explosives placed in the "La Belle" discotheque in Berlin killed three people and injured over 200. This year the Berlin Public Prosecutor indicted five people, four of whom are now in custody. The prosecutor alleges, on the basis of evidence, that the accused — although not Libyan nationals — committed the crime on the orders of the Libyan State Intelligence Service and with the help of the Libyan diplomatic mission in what was then the German Democratic Republic.

2.46. In 1989 UTA flight 772 was sabotaged in flight causing the loss of 171 lives. The French judicial inquiry into the crime has implicated several Libyan nationals.

2.47. A telling example of Libya's attitude towards terrorism is Colonel Qadhafi's reference in the Libyan Parliament in 1991 to the IRA where he said:

"we support it, terrorism or no terrorism".

As the Court well knows, the IRA has committed numerous acts of terrorism in the United Kingdom and other parts of Europe. However, following the decision of the Security Council in resolution 748 that Libya must "cease all forms of terrorist action and all assistance to terrorist groups" Libya informed the United Nations that it "severs relations with all groups and organizations involved in international terrorism of any kind". In particular, Libya offered to supply information to the British Government about its assistance to the IRA[17]. The Court will note the telling use of the word "severs" in the statement; Libya made no effort to deny its involvement in international terrorism.

2.48. In light of Libya's track record of promotion of terrorism, is it therefore so surprising in the circumstances that when Libya made no satisfactory response to the outcome of the criminal investigation into the Lockerbie incident, the United Kingdom decided to refer the situation to the Security Council? The Security Council had, as Mr. Bethlehem will show, long been concerned at terrorism of this kind, and had indeed already expressed itself on the Lockerbie incident. And Chapter VI of the United Nations Charter is replete with indications that it is the Security Council's business to deal with situations whose continuation is likely to endanger the maintenance of international peace and security. I would remind the Court that the Members of the United Nations are, in terms of Article 37 of the Charter, expected to refer situations of this kind to the Council.

2.49. Mr. President, Members of the Court, I thank you for your attention. This may be a convenient point at which to break, after which Mr. Bethlehem will address the Court on the issue of the Security Council's involvement.

The ACTING PRESIDENT: Thank you, Lord Hardie. The Court will adjourn for fifteen minutes.

The Court adjourned from 11.10 to 11.20 a.m.

The ACTING PRESIDENT: Please be seated. I give the floor now to Mr. Bethlehem.

Mr. BETHLEHEM: Thank you, Mr. President, Members of the Court.

3.1. It is a great privilege and pleasure for me to appear before you this morning and an honour to do so representing my country.

3.2. Mr. President, the Lord Advocate has described the factual background to the case — the investigation, the evidence, the charges — as well as the essential features of the Scottish criminal procedure, including the safeguards afforded to accused persons. He also drew attention, albeit briefly, to Libya's long and well documented record of involvement in international terrorism, a factor which is material to an appreciation of the United Kingdom's actions in bringing the matter before the Security Council and also to the Security Council's response. It is my task now to describe the involvement of the Council — how it came about and the nature of its concerns. In particular, I would like to take you, Members of the Court, through the precise chronology of the Council's consideration of the matter as, quite apart from its intrinsic importance, an appreciation of the chronology also sheds light upon the motivation behind Libya's application to the Court.

3.3. Throughout this case, Mr. President, right from its Request for Provisional Measures in March 1992, Libya has cast itself in the role of injured party whose attempts to bring this matter before the Court the United Kingdom has sought to frustrate by

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[1] Para. 1.2.
[2] Paras.2.28 to 2.51.
[3] Paras. 2.36 to 2.42.
[4] Ann. 16.
[5] Para. 2.29, *infra.*
[6] Paragraphs 2.28 to 2.32 and Annex 18
[7] Paragraph 1.5
[8] Libyan Response, Paragraphs 1.4, 1.8 and 1.9
[9] Annex 16 to the Preliminary Objections
[10] Annex 17 to the Preliminary Objections of the United Kingdom
[11] Paragraph 1.8
[12] Paragraphs 1.6 and 1.7 of the Libyan Response
[13] Annex 67 to the Preliminary Objections of the United Kingdom
[14] Annex 68
[15] Annex 69
[16] Paragraphs 2.15 to 2.27
[17] Preliminary Objections, Paragraphs 2.25 to 2 26 and Annex 55

resorting to the Security Council. An examination of the facts shows, however, that this is the opposite of what actually happened. The reality is that, far from the United Kingdom resorting to the Security Council in an attempt to oust the jurisdiction of the Court or to set aside the Montreal Convention, Libya's resort to the Court, and its invocation of the Montreal Convention for that purpose, is a barely concealed attempt to subvert and to circumscribe the Security Council's exercise of its responsibilities under the Charter.

3.4. Mr. President, this proposition is clearly illustrated by the chronology of events. Let me summarize the position to give you something of a map through my submissions. The Members of the Security Council were actively considering the matter — the incident at Lockerbie and the allegations of Libyan involvement — when Libya first made reference to the Montreal Convention. The Council had already acted, in the form of resolution 731, when Libya initiated proceedings before this Court in reliance on the Convention. Indeed, Libya initiated proceedings on the very day on which the Secretary-General reported to the Council that Libya had not complied with the terms of resolution 731. The Council did not suspend its consideration of the matter. On the contrary, it remained seized of the issues and went on to adopt two further resolutions — resolution 748 and resolution 883 — acting pursuant to its enforcement powers under Chapter VII of the Charter. The Council remain seized of the matter to this day.

3.5. Mr. President, Members of the Court, those are the bare bones. Let me now flesh out each of these elements in a little bit more detail.

November-December 1991

3.6. There was no satisfactory response by Libya to the 14 November 1991 demand for the surrender of the accused. As a result, the United Kingdom and the United States issued a Joint Declaration on 27 November 1991. Members of the Court, you will find this Joint Declaration at TAB 7 of the United Kingdom's Documents[2]. You should have both

[2] A/47/827* and S/23308*, 31 December 1991.

a French and an English version of the documents in front of you. It is in Volume I of the documents. In this Declaration, at TAB 7, over the page, on page 2, the United Kingdom and the United States called upon Libya to surrender the accused for trial, to accept responsibility for the actions of Libyan officials, to disclose all it knew of the crime and allow full access to the evidence, and to pay appropriate compensation. Mr. President, I will refer to this document a little bit later.

3.7. On the same day, France joined with the United Kingdom and the United States in a tripartite Declaration on terrorism which, in respect of the bombing of Pan Am flight 103 and UTA flight 772, required that Libya comply with the demands made of it by the three States in respect of those incidents. The Declaration also required that Libya commit itself to cease all forms of terrorist action[3].

3.8. Mr. President, Members of the Court, given the circumstances, the United Kingdom thought it right to take the matter to the United Nations. On 20 December 1991, therefore, it sent these Declarations, the Declarations I have just referred to, and other related documents to the United Nations Secretary-General. On 31 December 1991, the documents were circulated as documents both of the General Assembly and of the Security Council.

3.9. The United Kingdom did not take the matter to the Security Council lightly without first giving Libya an opportunity to address the issues bilaterally. It did so only after careful deliberation, in the light of weighty evidence pointing to Libyan involvement in the incident and in response to an unsatisfied demand for the surrender of the accused. Moreover, the United Kingdom considered that this was a matter appropriately brought to the attention of the Security Council as the Council, and the United Nations more generally, had previously concerned itself with issues of international terrorism. In bringing the

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[3] A/46/828* and S/23309*, 31 December 1991; at Annex 8 of the United Kingdom's Documents.

matter to the attention of the Council, the United Kingdom was not therefore seeking to take the Council outside of its established field of competence. Nor was it seeking to oust the application of any other instrument or mechanism. Indeed, Members of the Court, at no stage up until this point had Libya invoked the Montreal Convention in its dealings with the United Kingdom or with anyone else.

The Security Council's Concern with International Terrorism

3.10. Mr. President, it may be appropriate at this point for me to recall briefly some aspects of the United Nations concern with international terrorism since the competence of the Security Council in respect of such questions is one of the matters put in issue by Libya in these proceedings.

3.11. The concern of the United Nations with international terrorism goes back many decades and has been well documented by Judge Guillaume in his lectures at The Hague Academy entitled *Terrorisme et Droit.* In respect of terrorism against civil aviation, the first notable step came in 1970 with the adoption by the Security Council of resolution 286 which followed a spate of attacks against the civil aircraft of a number of countries. By that resolution, the Council called on States "to take all possible legal steps to prevent further hijackings or any other interference with international civil air travel"[4].

3.12. Resolution 286 was followed two years later, on 20 June 1972, by a presidential statement which was also directed to the issue of attacks against civil aviation[5]. The statement manifestly illustrates the gravity with which Members of the Council viewed such attacks.

3.13. In the period following the adoption of resolution 286 and the presidential statement of June 1972, the Security Council was seized of matters relating to international terrorism on many occasions. Between 1970 and 1987 the Council adopted various resolutions and issued statements condemning terrorism in many forms, including hijacking

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[4] S/RES/286 (1970); at Annex 24 of the United Kingdom's Documents.
[5] S/10705, 20 June 1972.

and other interference with international civil aviation, the bombing of airports, hostage-taking and kidnapping. The Council also acted on an *ad hoc* basis in relation to specific acts of terrorism. Prominent examples of this action are documented in our Preliminary Objections[6].

3.14. Members of the Court, it was against this background that the Security Council reacted to the destruction of Pan Am flight 103 over Lockerbie and it did so virtually immediately, as soon as it had been established that the incident was not just some tragic accident but a criminal act of the gravest kind. Acting on behalf of Members of the Council, the President of the Council issued a statement on 30 December 1988 — nine days after the incident — condemning the destruction of the flight and calling "on all States to assist in the apprehension and prosecution of those responsible for this criminal act"[7].

3.15. This presidential statement was followed, on 14 November 1989, by the adoption by the Security Council, unanimously, of resolution 635 which condemned all acts of unlawful interference against the security of civil aviation and called on all States to co-operate in measures to prevent acts of terrorism[8]. The resolution also urged the International Civil Aviation Organization to intensify its work on devising an international régime for the marking of plastic explosives for the purposes of detection. A Convention on this subject was adopted at Montreal in March 1991.

December 1991 - January 1992

3.16. Members of the Court, having decided that the matter should be brought to the attention of the Security Council, the United Kingdom consulted — quite properly, and as is usual in the circumstances — with other States closely affected, in this case with France and with the United States. Consultations were also held with a wider group of States.

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[6] Paragraph 2.3.
[7] SC/5057, 30 December 1988; at Annex 38 of the United Kingdom's Documents.
[8] S/RES/635 (1989); at Annex 40 of the United Kingdom's Documents.

The fact that consultations between Members of the Council were being held would have been widely known from as early as 4 January 1992[9].

3.17. Following these consultations, on 10 January 1992, the three Governments circulated to all the Members of the Council a draft of what was to become Security Council resolution 731. The fact that a draft resolution had been circulated and was being considered by Members of the Council was widely known almost immediately and, indeed, was commented upon in the international press from as early as 11 January 1992[10].

3.18. Mr. President, the day *after* the draft resolution was first circulated to Members of the Security Council for their consideration — that is, on 11 January 1992 — when the involvement of the Council was already known, Libya sent a letter to the International Civil Aviation Organization in which it mentioned the Montreal Convention for the first time. In none of its earlier statements to the United Nations, to the International Civil Aviation Organization, to the United Kingdom, had Libya referred to the Convention. Then, on 18 January, a week later, Libya sent a letter to the United Kingdom requesting that a dispute be submitted for arbitration under Article 14, paragraph 1, of the Convention. This took place at a time when the Members of the Security Council were already actively engaged in discussion on the draft resolution. It was the first occasion on which Libya referred to the Montreal Convention in its communications with the United Kingdom. Resolution 731 was adopted three days later on 21 January 1992.

Resolution 731 (1992)

3.19. Mr. President, Members of the Court, if you will allow me I would like to take you through resolution 731 and the principal documents to which it refers in some detail. You will find the resolution at TAB 2 of the United Kingdom's documents.

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[9] See, for example, New York Times, Late Edition - Final, Saturday, 4 January 1992, p. 2.

[10] New York Times, Late Edition - Final, Saturday, 11 January 1992, p. 3.

3.20. As you will see if you go to the sixth preambular paragraph (which, in the English version, is the last one at the bottom of the first page; same in the French version), reference is there made to five documents submitted to the Council in connection with the legal procedures related to the attacks against Pan Am flight 103 and UTA flight 772. Let me, therefore, first of all, take you to the most important of these documents:

- The first document, to be found at TAB 5[11] of the United Kingdom materials, concerns the French judicial inquiry into the attack on the UTA aircraft of 19 September 1989. As you will see from the opening paragraph of the communiqué on page 2, the inquiry placed "heavy presumptions of guilt for this odious crime on several Libyan nationals". The communiqué then goes on to demand that the Libyan authorities co-operate with French justice by *inter alia* producing all material evidence and facilitating access to documents and witnesses.
- The second document is to be found at TAB 8[12]. This the tripartite declaration by France, the United Kingdom and the United States to which I referred earlier. In paragraph three, of that tripartite declaration, which is on page 3 of the document, the declaration requires Libya to comply with the demands of the three Governments relating to the judicial procedures underway in respect of the bombings of Pan Am flight 103 and UTA flight 772. The Declaration also requires Libya to "commit itself concretely and definitively to cease all forms of terrorist action and all assistance to terrorist groups".
- The third document is to be found at TAB 6[13]. This contains two Statements of 14 November 1991, the first by the then Lord Advocate announcing the charges against the accused, that commences on page 3, the second by the then British

[11] S/23306, 31 December 1991.
[12] S/23309, 31 December 1991.
[13] S/23307, 31 December 1991.

Foreign Secretary setting out the essentials of the matter for Parliament, that commences on page 7. It also contains the Declarations issued by the British and American Governments of 27 November 1991. In its American form, this Declaration is to be found in the fourth document referred to in resolution 731 which is at TAB 7[14].

3.21. Members of the Court, the final document referred to in the resolution is the indictment issued by the US District Court[15].

3.22. Members of the Court, if I may, against this background, let me take you back to resolution 731 which is at TAB 2. As you will see in the preambular parts of the resolution, the Council notes its concern with acts of terrorism in general and acts directed against civil aviation in particular, the first two preambular paragraphs, and goes on to reaffirm resolutions 286 of 1970 and 635 of 1989 to which I referred earlier, that is in the preambular paragraphs 3 and 4. Thereafter, as you can see, the Council recalled the presidential statement on the Lockerbie incident of 30 December 1988, in preambular paragraph 5. As this illustrates, the Council saw the incident at Lockerbie and the destruction of the UTA flight in the context of its more general concern with international terrorism. It also indicates that the particular situation with which the Council was concerned was not one on which it was focusing for the first time. Rather, the Council was reasserting its competence over a matter that had already come before it and about which it had already expressed strong and considered views.

3.23. Members of the Court, turning to the operative parts of the resolution, let me simply draw their terms to your attention:

- paragraph 1 - in which the Council *condemns* the destruction of the Pan Am and UTA flights;

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[14] S/23308, 31 December 1991.
[15] S/23317, 23 December 1991.

- paragraph 2 - in which the Council *strongly deplores* the fact that the Libyan Government had not yet responded effectively to the French, British and American "requests to co-operate" contained in the documents which we have just examined;
- paragraph 3 - in which the Council *urges* Libya to provide a full and effective response to the requests for co-operation;
- paragraph 4 - in which the Council *requests* the Secretary-General to seek Libya's co-operation; now I shall have more to say about this in just a moment;
- paragraph 5 - in which the Council *urges* all States to seek the co-operation of the Libyan Government to provide a full and effective response to the requests by the United Kingdom, France and the United States; and finally
- paragraph 6 - in which the Council decides to remain seized of the matter.

3.24. Mr. President, Members of the Court, the terms of the resolution are unambiguous. The resolution was adopted unanimously. Libya was left in no doubt, therefore, *in no doubt* as to what was required of it by the Council.

3.25. Before I leave resolution 731, Members of the Court, let me briefly give you a flavour of the debate in the Council during the meeting at which resolution 731 was adopted[16] by highlighting two contributions by Members of the Council which illustrate the gravity with which this situation was regarded.

3.26. First, there is the statement by the representative of Hungary and I quote:

> "The attacks on Pan Am and UTA aircraft are acts that obviously threaten international peace and security. As a result, we feel that it is entirely justified and highly appropriate for the Security Council, the United Nations body entrusted with the primary responsibility for the maintenance of international peace and security, to consider these terrorist manifestations.
>
> . . . . . .
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> Hungary believes that the question of eradicating international terrorism has a legitimate place among the concerns of the Security Council, which, on

[16] S/PV.3033, 21 January 1992; Annex 10 of the United Kingdom's documents.

the basis of its mandate under the Charter, is obliged to follow closely any event which might endanger international peace and security[17]."

3.27. Second, Mr. President, let me refer briefly to the statement made by the representative of Venezuela in the same proceedings.

"The countries that sponsored this resolution . . . worked with the group of non-aligned countries represented in the Council and made the clear declaration that this resolution is exceptional by its nature and cannot be considered in any way as a precedent but is intended only for those cases in which States are involved in acts of terrorism.

. . . . . .

This is a matter where vagueness or equivocation cannot be tolerated. It is not enough just to issue a declarations against terrorism.

Finally, I should like to say that our decision-making process took very much into account the three-year investigations which were carried out by three countries universally recognised for their respect for the principles of law and the independence of their judicial branches. The tribunals of those countries have condemned no one and have confined themselves exclusively to determining the existence of evidence that would justify impartial criminal proceedings".[18]

3.28. As these statements illustrate, resolution 731 was adopted unanimously, not because the Members of the Council considered the matters addressed therein to be simply vague statements of principle or intent which could be contained in some pious resolution and then shunted into the sidings of history. On the contrary, the Members of the Council had before them information in support of the allegations levelled at the accused and implicating Libya. They focused on the gravity of the incident and of the accusations. They considered the question of the Security Council's competence in such matters. And, they - the Council - decided that this was a matter in which it was appropriate for the Council to act.

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[17] S/PV.3033, 21 January 1992; Annex 10 of the United Kingdom's documents; at p. 91-92.
[18] S/PV.3033, 21 January 1992; Annex 10 of the United Kingdom's documents; at p. 101.

3.29. Mr. President, before I turn to the other resolutions, one further observation concerning resolution 731 is required by way of an aside. In its Response, Libya contends that resolution 731, together with resolutions 748 and 883 to which I will refer shortly, are invalid as the United Kingdom, the United States and France were not entitled to take part in the voting on these resolutions[19]. In support of its contention, Libya relies on the proviso to Article 27, paragraph 3 of the Charter. This provides that decisions of the Security Council on non-procedural matters shall be made by the affirmative vote of nine members, including the concurring votes of the permanent members, "provided that, in decisions under Chapter VI, and under paragraph 3 of Article 52, a party to a dispute shall abstain from voting".

3.30. I will not dwell on Libya's contention insofar as it relates to resolutions 748 and 883, both resolutions adopted under Chapter VII of the Charter and, therefore, excluded from the operation of the proviso to Article 27, paragraph 3. The position in respect of such resolutions is clear. As regards resolution 731, the settled law, affirmed in the Opinion of this Court in the *Namibia* case, is that the proviso "requires for its application the prior determination by the Security Council that a dispute exists and that certain Members of the Council are involved as parties to such a dispute"[20].

3.31. Members of the Court, there was no such determination. Nor was there any suggestion from Members of the Council that a determination of this nature was necessary. Moreover, the agenda item under which the matter came before the Council was appropriate to a "situation", not to a "dispute". The matter did not, therefore, come within the scope of the proviso to Article 27, paragraph 3. The proposition that resolution 731 is formally invalid, therefore, has no basis in either fact or in law. It must also be recalled that resolution 731 was adopted unanimously, it did not depend for its adoption on the affirmative vote of the three States against whom Libya now rails. Any suggestion,

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[19] Libyan Response, at paragraphs 4.43 - 4.48.
[20] *Namibia Advisory Opinion, I.C.J. Reports 1971*, p. 17, at para. 26.

therefore, that the outcome would have been different if the United Kingdom, France and the United States had abstained has no basis in reality.

The Secretary-General's Report, Libya's Application to the Court and Resolution 748 (1992)

3.32. Mr. President, pursuant to paragraph 4 of resolution 731, the United Nations Secretary-General, through his Special Envoy, sought Libya's co-operation to provide a full and effective response to the British, French and American requests as was required by the resolution. The Council did not, therefore, proceed directly to enforcement action. Libya was given every opportunity to respond. Unfortunately, it did not do so. Following an initial report on 11 February 1992[21], the Secretary-General reported to the Security Council on 3 March 1992 that his consultations with Libya about complying with the terms of the resolution had been unsuccessful[22].

3.33. On the very same day as the Secretary-General reported to the Council, on 3 March 1992, *on the very same day*, Libya filed its Application in the present case and its Request for Provisional Measures. Nevertheless, consultations amongst Members of the Council about a further resolution to impose sanctions on Libya continued. These resulted in the adoption by the Council, on 31 March 1992, of resolution 748.

3.34 Members of the Court, you will find resolution 748 at TAB 3 of the United Kingdom's Documents. The format in the French and the English versions is slightly different but the resolution is the same. As you will see, resolution 748 opens with a statement by the Council noting its deep concern that Libya had still not provided a full and effective response to the requests identified in Resolution 73; that is in preamble paragraph 3. The Council then goes on to affirm its concern with acts of international terrorism including, in the sixth preambular paragraph, which is at the bottom of the page in the english version in the middle of the second column in the french text, the

[21] S/23574, 11 February 1992; Annex 13 to the United Kingdom's documents.
[22] S/23672, 3 March 1992; Annex 14 to the United Kingdom's documents.

reaffirmation that "every State has the duty to refrain from organizing, instigating, assisting or participating in terrorist acts". Then, and this is, of course, critical, the Council goes on to *determine*, with a clear reference back to the previous paragraph, 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".

3.35. The Council then goes on to affirm expressly that it is "*Acting* under Chapter II of the Charter."

3.36. This determination, the extract that I have just quoted is, of course, a determination under Article 39 of the Charter. Significantly, as these paragraphs make clear, this determination identifies the threat to international peace and security not only in Libya's failure to respond fully and effectively to the requests in resolution 731 but also in Libya's support for international terrorism more generally. The Security Council was, therefore, concerned with the broader picture, not simply with the allegations in respect of the incident at Lockerbie.

3.37. Members of the Court, turning to the operative parts of the resolution, in paragraph 1, as you will see, the Council *decides* that Libya must now "comply without any further delay with paragraph 3 of resolution 731 regarding the requests" of the three Governments. That requirement thus became a binding decision of the Council with all that that entails. Moreover, in paragraph 2, the Council went on to *decide* further that Libya must commit itself "definitively" to cease all forms of terrorist action and assistance to terrorists and demonstrate this by concrete action. Thereafter, in paragraphs 3 to 6, the Council went on to impose various economic and other sanctions against Libya pending its compliance with the terms of paragraphs 1 and 2, these provisions requiring that *all* States adopt the measures in question. In respect of these measures, the Council, in paragraph 7 also *called* upon all States and international organisations to act strictly in accordance with the provisions of the present resolution, notwithstanding, "the existence

of any rights or obligations conferred or imposed by any international agreement or any contract ". As you will see in the succeeding paragraphs, the Council went on to establish machinery for the monitoring and enforcement of sanctions. Finally, in paragraph 14 of the resolution, the Council decided that it would remain seized of the matter. The resolution was adopted by 10 votes in favour, *none against* and five abstentions.

3.38. Mr. President, on 14 April 1992 the Court gave its Order on the Request for Provisional Measures in which it held that the obligations of Libya and of the United Kingdom under Article 25 of the Charter to carry out the decisions of the Security Council extended *prima facie* to the decision contained in resolution 748. It held further that, in accordance with Article 103, the obligations of the Parties in respect of the Charter and resolution 748 prevailed over their obligations under any other international agreement, including the Montreal Convention. We are, of course, no longer at the provisional measures stage, and the Court can examine these issues more closely, but we nevertheless adopt this formulation by the Court. The question in these proceedings is thus whether Libya is able to rebut the presumption that the obligation under Article 25 of the Charter extends to the carrying out of the decision contained in resolution 748. In our view, Libya cannot do so; but that is a matter that will be addressed by the Lord Advocate tomorrow morning.

Resolution 883 (1993)

3.39. In the 20 months following the adoption of resolution 748, Libya sent numerous communications to the United Nations in which it claimed to be in compliance with resolution 731 and that, accordingly, resolution 748 was unjustified. The Security Council disagreed. In view of Libya's failure to comply with the terms of resolutions 748 and 731, the Security Council adopted resolution 883 on the 11th November 1983. Members of the Court, this resolution is at TAB4 of the United Kingdoms' documents. I really just refer you very briefly to some of its essential provisions. In the second preambular paragraph the Council refers expressly to Libya's failure to comply with the

terms of the earlier resolutions. The sixth preambular paragraph then goes on to determine that Libya's continued failure to demonstrate its renunciation of terrorism and its failure to respond fully and effectively to the requests and decisions in resolutions 731 and 748 "constitute a threat to international peace and security". Once again it goes on to affirm that it is acting under Charter VII of the Charter.

3.40. As you will see, the operative parts of the resolution require, in paragraph 1, that Libya "comply without any further delay with resolutions 731 (1992) and 748 (1992)". Thereafter, in paragraphs 2 to 8, the resolution goes on to extend the scope of the sanctions imposed against Libya. In paragraph 12, the Council, as it had done in resolution 748, the Council *called upon* all States and the international organizations to act in accordance with the resolution notwithstanding "the existence of rights and obligations conferred or imposed by any international agreement". In paragraph 16, the Council expresses its readiness to *review* the sanctions with a view to suspending them and to lift the sanctions once Libya has complied fully with resolution 731 and 748. Libya has continued to prevaricate.

3.41. The resolution was adopted by 11 votes in favour, *no votes against* and four abstentions.

The Chronology in Summary

3.42. Mr. President, Members of the Court, that is the involvement of the Security Council and the sequence by which it unfolded. The matter was brought to the attention of the Members of the Council in late-December 1991. Informal consultations amongst those Members took place in early January 1992. Following these consultations, a draft resolution was circulated to Members of the Council on the 10 January 1992. Thereafter, on 11 January 1992, Libya referred, for the first time, to the Montreal Convention. It did so, however, not in a communication with the United Kingdom, but in a communication to the International Civil Aviation Organization.

3.43. The first time Libya raised the matter with the United Kingdom was in a letter of 18 January, at a time in which it would have been aware that the Security Council was actively considering the matter. Three days later resolution 731 was adopted.

3.44. In accordance with this resolution, the Secretary-General sought Libya's co-operation. On the 3 March 1992, he reported that his endeavours had been unsuccessful. On the very day Libya lodged its Application to the Court in the present case. The Council nevertheless remained seized of the matter and, on 31st March, acting under Chapter VI, it went on to adopt resolution 748 and subsequently resolution 883 on the same date.

3.45. Mr. President, the chronology speaks for itself. 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 responsibility under the Charter.

"Some Post Box, Some Bailiff"

3.46. Members of the Court, let me close this part of the United Kingdom's submissions by addressing one last matter briefly — a matter on which you will hear more from my learned friends in due course. Libya has contended that the Security Council, in all of this, was simply acting as a "post box" and "bailiff" for the United Kingdom, France and the United States[23] . I am tempted to retort, adopting the phrasing of a great statesman: *some* post box, *some* bailiff. Behind this, however, is a serious point. The Council is not some puny entity within the scheme of the United Nations. It is, like the Court, one of the Organization's principal organs. Moreover, it is the organ charged with primary responsibility for the maintenance of international peace and security and is invested with considerable powers to so do. When it acts, it acts as the Security Council of the United Nations, not as the agent for some or other State. Libya's comments are a

[23] Libyan Response, at paragraph 2.11.

grave imputation on the standing of those States which are, or have been, Members of the Council and have acted, collectively, in its name.

3.47. It should also be noted that the composition of the Council has changed over the years. It is extraordinary to suggest that all the succeeding newly elected Members of the Council have been content to regard themselves simply as echo chambers for what went before. I should also stress that *no votes were cast against any of the three principal resolutions with which we are here concerned.* Libya's contention that the Security Council has merely acted as post box and bailiff can have no credibility whatsoever.

3.48. Mr. President, Members of the Court, I thank you for your indulgence; that completes my submissions to you this morning. With your leave, Professor Greenwood will make our submissions on the question of jurisdiction.

The ACTING PRESIDENT: Thank you, Mr. Bethlehem. I give the floor now to Professor Greenwood.

Mr. GREENWOOD: Mr. President, Members of the Court, may it please the Court.

The Montreal Convention

4.1. It is always a privilege for any international lawyer to appear before this Court but Members of the Court will understand that it is a particular honour for me to appear before you today on behalf of my country. In his opening remarks the Agent for the United Kingdom explained that there were two distinct, yet related, limbs to the Preliminary Objections of the United Kingdom. In my submissions this morning, I shall expound the first of those objections, that the Court lacks jurisdiction because there is no dispute between the United Kingdom and Libya which falls within Article 14, paragraph 1, of the Montreal Convention, the sole basis for jurisdiction which Libya has advanced.

4.2. The United Kingdom's submissions on the subject of jurisdiction have already been set out at some length, and with citation of authority, in Part 3 of our Preliminary Objections, while Libya's argument is contained in Chapter II of the Libyan Response. So

far as possible, therefore, Mr. President, I shall not burden the Court by repeating the arguments which have already been expounded in writing. Instead, I shall concentrate upon what the pleadings suggest are the main points of disagreement between the Parties.

4.3. I should like to begin with a few brief observations about the basis on which Libya seeks to found the jurisdiction of the Court. In the course of those remarks, I shall submit that Article 14, paragraph 1, provides a basis for jurisdiction only in respect of a carefully defined category of disputes and that it is for Libya to demonstrate that its complaint against the United Kingdom falls within that category. We submit that Libya has failed to do that.

4.4. I shall then turn, Mr. President, to the three main submissions which I wish to put before you and which I shall now summarize.

First, it is not enough for Libya to make a general assertion that it regards the Montreal Convention as applicable and then to complain that the United Kingdom has taken a different view. For there to be a justiciable dispute between Libya and the United Kingdom regarding the *application* of the Convention (as opposed to an abstract disagreement about its *applicability*), Libya must be able to point to conduct on the part of the United Kingdom which could reasonably be regarded as capable of constituting a violation of the Convention, either in the sense that the United Kingdom has done something which the Convention, properly interpreted, prohibits it from doing or that the United Kingdom has not done something which the Convention requires it to do.

Secondly, Mr. President, although Libya has accused the United Kingdom of violating several specific provisions of the Montreal Convention, I shall submit that closer examination shows that these are provisions which imposed upon the United Kingdom no obligation at all, or, at least, none which is relevant to the present case. These are not provisions by which the conduct of the United Kingdom can be judged and there is accordingly no dispute regarding their application.

Finally, Libya's Response makes clear that it has misunderstood both the nature and the significance for the Court's jurisdiction of the involvement of the Security Council, it has also misunderstood the reliance which the United Kingdom places upon that involvement.

Since it will be necessary for me to refer to several provisions of the Montreal Convention in the course of these submissions, Members of the Court might find it convenient to have the text of that agreement before them. It can be found at TAB 1 of the United Kingdom's first volume of annexes.

I. The Basis for the Jurisdiction of the Court advanced by the Applicant

4.5. Mr. President, with regard to my opening remarks about the basis for the jurisdiction advanced by the Applicant, it is of course, axiomatic that in contentious proceedings the Court has jurisdiction only if the Applicant can identify some act by which both the Applicant and the Respondent have given a valid consent to the jurisdiction of the Court. Even then if such an act is identified, the Court will have jurisdiction only in respect of such claims as fall within the scope of that act of consent. These two propositions are of course elementary but they are also fundamental to the Court's system of jurisdiction and had been reaffirmed in its 1996 decisions in the *Genocide* and *Oil Platforms* cases[24].

4.6. In the present case, the only basis for the jurisdiction of the Court which is advanced by Libya is Article 14, paragraph 1. That provision is thus so central to the matters before the Court that I beg the Court's leave to quote it in full. It states:

> "Any dispute between two or more Contracting States concerning the interpretation or application of this Convention which cannot be settled throughnegotiation, shall, at the request of one of them, be submitted to arbitration. If, within six months from the date of the request for arbitration the Parties are unable to agree on the organization of the arbitration, any one of those parties may refer the

[24]Case concerning the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia)*, Judgment of 11 July 1996 and case concerning *Oil Platforms (Islamic Republic of Iran* v. *United States of America)*, Judgment of 12 December 1996.

dispute to the International Court of Justice by request in conformity with the Statute of the Court."

The question, Mr. President, is whether this provision satisfies the requirement for an act of consent and thus furnishes a basis for the jurisdiction of the Court in the present case. The United Kingdom says that it does not, and cannot, do so.

4.7. The Montreal Convention has, of course, been in force for both Libya and the United Kingdom at all relevant times. There is thus no doubt of its general applicability. The question remains, however, whether Article 14, paragraph 1, is applicable *ratione materiae* to the claims brought by Libya. The terms of that provision are quite specific in this regard. They confer jurisdiction upon the Court only if there is a dispute regarding the interpretation or application of the Montreal Convention and only in respect of such a dispute[25].

4.8. That means that jurisdiction will not extend to claims that the Respondent has violated obligations under general international law or other treaties. The Court will not permit an Applicant to use a specific treaty provision of this kind as a vehicle to bring before the Court a dispute about the application of other rules of international law.

4.9. That is not to say that rules of international law or legal instruments existing independently of the Montreal Convention have no bearing upon this case. Clearly if an applicant complains that a respondent has violated the provisions of the Montreal Convention, that respondent may rely upon other rules of international law which provide a defence[26]. Similarly, in the preliminary phase of a case, when the Court is enquiring whether it has jurisdiction on the basis of a disputes clause in a multilateral treaty, it has the competence to declare that claims made in relation to that treaty are inadmissible because of the existence of an obligation existing outside the treaty.

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[25]See, e.g., the decision of the Permanent Court in the case concerning *Mavrommatis Palestine Concessions, Judgment No. 2, 1924, P.C.I.J. Reports, Series A, No. 2*, p. 11, and the decisions of the Court in the recent *Genocide* case, *I.C.J. Reports 1992*, p. 3 at p. 19, p. 325 at p. 344, and the Judgment of 11 July 1996 at paragraph 30.

[26]Thus, the decision of the Court in the *Oil Platforms* case clearly envisages that the law on self-defence could be invoked on the merits.

The Function of the Court at the Preliminary Objections Stage

4.10. Mr. President, before turning to Libya's submissions on whether there exists a dispute regarding the application of the Montreal Convention, I should like to say a few words about what the Court has treated as the proper approach to a question of this kind.

4.11. The Court has made clear, in its recent decision in *Oil Platforms* that when, in the exercise of its *compétence de la compétence*, it is called upon to determine whether there exists a dispute regarding the application of a treaty, it cannot confine itself to generalities but must actually interpret the treaty. The Court noted that the parties to that case differed "on the question whether the dispute between the two States with respect to the lawfulness of the actions carried out by the United States against the Iranian oil platforms is a dispute 'as to the interpretation or application' of the Treaty of 1955", the Treaty on which Iran sought base jurisdiction, and the Court then held that:

> "In order to answer that question, the Court cannot limit itself to noting that one of the Parties maintains that such a dispute exists, and the other denies it. It must ascertain whether the violations of the Treaty of 1955 pleaded by Iran do or do not fall within the provisions of the Treaty and whether, as a consequence, the dispute is one which the Court has jurisdiction *ratione materiae* to entertain pursuant to [the compromissory clause in that Treaty]."[27]

4.12. In approaching this task, the Court has accepted that it cannot work on an impressionistic basis, it must conduct a detailed analysis of each provision of the Montreal Convention which Libya claims has been violated by the United Kingdom. In the language used by the Court in *Oil Platforms*, the question is whether the lawfulness of the United Kingdom's *conduct* is capable of being evaluated by reference to each of those provisions[28].

Libya's argument that there is a dispute falling within Article 14, paragraph 1

4.13. Mr. President, it is for Libya, as the Applicant, to identify the dispute which it claims exists between itself and the United Kingdom and to demonstrate that that dispute falls within the scope of Article 14, paragraph 1. It is, after all, Libya which has invoked the jurisdiction of the

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[27]Judgment of 12 December 1996, par. 16.
[28]Judgment of 12 December 1996, para. 51.

Court and it is therefore Libya which must satisfy the Court that this is a case in which the jurisdictional requirements of the Court are satisfied and the conditions exist for the exercise of the judicial function. Similarly, Libya must show the United Kingdom what case we have to meet. In our Preliminary Objections we have shown that Libya has been far from consistent in the way in which it has attempted to formulate the dispute which it wishes to place before the Court. That inconsistency is important because it betrays the difficulty which Libya has had throughout this case in seeking to formulate a dispute which can be shown to fall within Article 14.

4.14. In that context, it may be tempting to reason that there are, in fact, *two* disputes: a narrow, bilateral dispute over the Lockerbie incident and a broader dispute over support for international terrorism more generally. If so, the argument runs, the Court would be right to apply the Montreal Convention — and the Montreal Convention alone — to the narrower dispute, while accepting that a broader set of rules, including those of the United Nations Charter, are applicable to the broader dispute. Such reasoning would seem to lie behind the puzzling, but oft repeated, insistence of the Applicant that the Court should rule that the Montreal Convention is the "only instrument applying to the dispute".

4.15. But, Mr. President, that cannot be right. In contentious proceedings, the Court is not called upon to judge a "case" as if it were some abstract entity, existing in a vacuum. It has to judge the rights and obligations of the parties, as they apply to a particular dispute. To proceed otherwise would lead to an absurdly barren result. Let us suppose that the Court were minded, in the present case, to consider the questions raised by Libya on the Montreal Convention without regard to the effect of the Security Council resolutions. That might require the Court to proceed to a hearing on the merits of those questions. If, at that stage, and contrary to our submissions, the Court preferred the Libyan analysis of the Montreal Convention, the Court would presumably pronounce judgment on that basis in the full knowledge that the judgment would be an empty one. It would be empty because it was neither applicable nor enforceable given the terms of prior decisions of the Security Council which remained in force. We cannot believe that that is a proper exercise of the judicial function. And it finds no support in the jurisprudence of the Court itself.

4.16. If we turn to the dispute as Libya has sought to formulate it, we can see at the outset that several of the claims advanced by Libya manifestly do not come within the terms of Article 14. That is the case, for example, with Libya's wholly unsubstantiated allegations that the United Kingdom has threatened to use force, contrary to the provisions of the United Nations Charter, and with its complaints that the imposition of sanctions by the Security Council was unfair and discriminatory. The first matter is plainly not a dispute regarding the interpretation or application of the Montreal Convention. The second is not only not about that Convention, it is not even a dispute between Libya and the United Kingdom at all but, rather, a matter between Libya and the Security Council. It is clear, therefore, that some of the claims made by Libya cannot, on any analysis, fall within the scope of the Court's jurisdiction under Article 14, paragraph 1.

4.17. The United Kingdom's objections, however, go deeper than that. Our submission is that, properly analysed, the Libyan Application and subsequent pleadings fail to disclose any dispute — in the *legal* sense of the term — between Libya and the United Kingdom which falls within the scope of Article 14, paragraph 1, of the Montreal Convention.

II. Libya's General Assertion that the Montreal Convention is Applicable is not sufficient to establish Jurisdiction

4.18. I turn now to the first of my three main submissions. Libya has asserted throughout this case that the Montreal Convention is applicable, that Libya has complied with its provisions and that the United Kingdom has created a dispute with Libya by its refusal to apply the Convention. Libya further contends that it is entitled to "have the Convention applied" and not to have it "set aside" by the United Kingdom. Central to this argument is Libya's submission that the Convention constitutes an exclusive mechanism, displacing even the United Nations Charter, on the ground that the Montreal Convention is *lex posterior* and *lex specialis* vis-à-vis the Charter[29]. Mr. President, with great respect these arguments are patently false.

4.19. The problem which the Convention, the Montreal Convention, was designed to address was that some terrorists responsible for attacks upon aircraft were not being brought to trial because

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[29]Libyan Response, paragraph 2.16 *et seq.*

of what were perceived to be gaps in the system of jurisdiction which already existed under the rules of customary international law and the network of extradition arrangements under existing treaties. The purpose of the Convention was to remedy these deficiencies. It did not replace or supplant the existing rules by which jurisdiction could be established. Nor did it supersede the existing arrangements for extradition and the surrender of suspects. The Montreal Convention was designed to supplement the existing law, not to supplant it.

4.20. That design is apparent in several provisions of the Convention. For example, after Article 5, paragraphs 1 and 2 have laid down certain circumstances in which a State is required to take steps to establish its jurisdiction in respect of conduct falling within the scope of Article 1. Article 5, paragraph 3, goes on to provide that "this Convention does not exclude any criminal jurisdiction exercised in accordance with national law". It is clear, therefore, that existing provisions establishing jurisdiction were not affected. Indeed, both the United Kingdom and Libya assert jurisdiction over the two accused on the basis of provisions of national law which existed before the Montreal Convention was adopted[30].

4.21. Likewise, Article 11 of the Convention, on which Libya also relies, makes clear that it is intended to supplement, not supplant, other treaties regarding mutual assistance in criminal law matters. The second paragraph of that Article provides:

> "The provisions of this Article shall not affect obligations under any other treaty, bilateral or multilateral, ... which governs or will govern, in whole or in part, mutual assistance in criminal matters."

4.22. The provisions of Article 8, regarding extradition, are also clearly intended to supplement existing extradition arrangements. Article 8, paragraph 1, for example, takes effect by building on existing extradition treaties, while Article 8, paragraph 3, builds on the existing arrangements made by States which do not make extradition dependent on the existence of a treaty. In many cases, a defendant could be delivered from one State to another to stand trial for an offence falling within the definition in Article 1 of the Montreal Convention, without reference to the

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[30] See, respectively, para. 2.46 to the United Kingdom Preliminary Objections and Ann. 17 and 19; and para. 2.7 to the Libyan Memorial and Ann. cited therein.

Convention. For example, if State A wanted to bring to trial a person suspected of such a crime and that person had fled to State B, with which State A had an extradition treaty, there is no reason why extradition could not be requested and granted simply under the terms of that treaty. Indeed, to suggest that the States concerned would be acting contrary to the Montreal Convention by behaving in this way would be absurd.

4.23. Nor is there anything in the Montreal Convention which precludes one State from calling on another to surrender an accused person for trial outside the framework of the Convention, even where there are no bilateral extradition arrangements. That is exactly what happened in the present case. Having called upon Libya to surrender the two accused for trial in Scotland, the United Kingdom was, of course, not entitled to take any steps to enforce that demand which were contrary to the rules of international law, and it did not do so. But that does not mean that the United Kingdom's original demand had to be based upon a legal entitlement with which Libya had a corresponding legal duty to comply.

4.24. That point, Mr. President, was explained with great clarity in the joint declaration of Judges Guillaume, Evensen, Tarassov and Aguilar Mawdsley in the 1992 proceedings. The joint declaration stated:

> "Before the Security Council became involved in the case the legal situation was, in our view, clear. The United Kingdom and the United States were entitled to request Libya to extradite the two Libyan nationals charged by the American and British authorities with having contributed to the destruction of the aeroplane lost in the Lockerbie incident. For this purpose they could take any action consistent with international law. For its part, Libya was entitled to refuse such an extradition . . ."[31].

Mr. President, the United Kingdom has never contended that the Montreal Convention required Libya to surrender the two accused for trial in the United Kingdom. Nor does the Montreal Convention either require the United Kingdom to make such a demand or preclude it from doing so. As the joint declaration puts it, in general international law, "every State is at liberty to request extradition and every State is free to refuse it"[32].

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[31] *I.C.J. Reports 1992*, p. 24, para. 1.
[32] *I.C.J. Reports 1992*, p. 24, para. 2.

4.25. Or, as Judge Oda recognized, in his declaration in the 1992 proceedings[33], only if the United Kingdom had sought to enforce its demand by means which were not only incompatible with international law but also contrary to the provisions of the Montreal Convention, only then, would there be the basis for a dispute between Libya and the United Kingdom falling within the scope of Article 14, paragraph 1. Yet what did the United Kingdom do? Having received no satisfactory response from Libya, it referred the matter to the Security Council, together with the United States and France. How could that possibly have been contrary to international law? As Mr. Bethlehem has explained, the Security Council had long been concerned with issues of terrorism and had already taken certain steps in connection with the Lockerbie incident itself. It undoubtedly possessed the competence to deal with this issue.

4.26. Despite that fact, Libya objects that (and I quote from the Court's translation of its pleadings) "the system of the Montreal Convention is, in relation to the system of the United Nations Charter, both a *lex posterior* and a *lex specialis*"[34]. According to Libya, the result is that, as regards questions which come within the scope of the Montreal Convention, the Convention must *a priori* take precedence over the system provided for in the Charter.

4.27. Mr. President, Members of the Court, this really cannot be the case. Libya's argument wholly ignores the special position of the United Nations Charter in the international legal order and the all important role which the Charter allocates to the Security Council in the maintenance of international peace and security. Article 103 of the Charter, by providing that the obligations of a State arising under the Charter shall take priority over inconsistent obligations under all other international agreements, expressly creates a hierarchy of treaties and thus sets the Charter apart from the application of the ordinary principles regarding treaties which are *lex posterior* or *lex specialis*. The special position of the Charter in this respect is acknowledged in Article 30 of the Vienna Convention on the Law of Treaties, which makes provision for priority between different treaties but opens with the statement that its provisions are "subject to Article 103 of the Charter".

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[33] *I.C.J. Reports 1992*, p. 19.
[34] Libyan Response, para. 2.16.

The special status of the Charter has also been recognized in the jurisprudence of this Court[35] and in the principal commentaries[36].

4.28. The principle that the operation of the Charter and, in particular, the powers of the Security Council to address a threat to international peace and security is not dependent upon other international agreements, even if those agreements are *lex specialis* or *lex posterior* has been demonstrated on numerous occasions. The Council has taken decisions regarding air traffic which have been applied notwithstanding the provisions of the Chicago Convention and other international agreements[37]. It has taken measures regarding navigation which have prevailed over the special régime on the River Danube[38] and it has created international tribunals with jurisdiction over grave breaches of the Geneva Conventions, notwithstanding the express provisions on *aut dedere, aut judicare* contained in those Conventions[39].

4.29. Moreover, even the International Civil Aviation Organization, under whose auspices the Montreal Convention was concluded, is obliged, under the terms of the agreement by which it became a specialized agency, to render "such assistance to the Security Council as that Council may request, including assistance in carrying out decisions for the maintenance or restoration of international peace and security"[40].

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[35] Case concerning *Military and Paramilitary Activities in and Against Nicaragua, I.C.J. Reports 1984*, paras 106-107; see also the 1992 Order in the present case.
[36] See, e.g., Goodrich, Hambro and Simmons, *Charter of the United Nations* (3rd edition, 1969), pp. 614 *et seq.* and Simma (ed.) *The Charter of the United Nations* (1994), pp. 1116 *et seq.*
[37] See, e.g., resolution 670 (1990), para. 3 and resolution 757 (1992), para. 11.
[38] Resolution 820 (1993), paras. 12 to 30. See also the Final Report of the Sanctions Committee established pursuant to resolution 724, United Nations Doc. S/1996/946, paras. 4 and 33-40.
[39] Resolutions 827 (1993) establishing the International Criminal Tribunal for the Former Yugoslavia and resolution 955 (1994) establishing the International Tribunal for Rwanda. See also Geneva Convention I, relative to the Treatment of Wounded and Sick Persons on Land, 1949, *75 UNTS 31*, Art. 49; Geneva Convention II relative to the Treatment of Wounded, Sick and Shipwrecked Persons at Sea, 1949, *75 UNTS 85*, Art. 50; Geneva Convention III relative to the Treatment of Prisoners of War, 1949, *75 UNTS 135*, Art. 129; Geneva Convention IV relative to the Treatment of Civilian Persons in Time of War, 1949, *75 UNTS 287*, Art. 146.
[40] Article VII of the *Agreement between the United Nations and the International Civil Aviation Organization 8 UNTS (1947) 315.*

4.30. Mr. President, I do not draw this to the Court's attention for the purpose of suggesting that the International Civil Aviation Organization had any particular responsibilities of relevance in respect of the incident at Lockerbie. I do so simply to highlight that it is well accepted, even in the field of civil aviation, that the Security Council may have responsibilities in this area and that, where it does and those responsibilities result in the adoption of binding resolutions for the maintenance or restoration of international peace and security, those decisions prevail.

4.31. As Mr. Bethlehem has explained, the Security Council was concerned with the Lockerbie incident from the outset. For the United Kingdom then to go to the Council and raise the question of Libyan involvement in this and other acts of terrorism was therefore entirely compatible with the obligations of the United Kingdom under the Montreal Convention. That is clear from the place which the Charter occupies in the system of international law. It is clear from the place which the Security Council's responsibility for addressing threats to international peace and security occupies within the system of the Charter. It is clear from the reaction of other Members of the Security Council and other Parties to the Montreal Convention, with the unsurprising exception of Libya itself. And it is clear from the text of the Convention itself, for that text, contains no provision which expressly or by implication seeks to restrict the right of a Member of the United Nations to raise an issue of such importance with the Security Council.

4.32. The explosion which destroyed Pan Am flight 103 occurred in United Kingdom territory. The right of the United Kingdom under international law to try those responsible for the crime — a right which Libya has expressly accepted existed from the beginning — is not derived from the Montreal Convention but stems from the long established rule of customary international law that a State has jurisdiction over crimes committed within its own territory. When the United Kingdom made public the results of its investigation of the Lockerbie atrocity and called upon Libya to surrender the accused to stand trial, it did not rely upon the Montreal Convention. It has not done so at any subsequent stage.

4.33. But what is even more important, Mr. President, is that Libya itself made no reference to the Convention until almost two months after the United Kingdom asked for the surrender of the

two accused. As Mr. Bethlehem has shown, despite the fact that Libya now assures the Court that the Montreal Convention is the only international agreement relevant to the Lockerbie question, Libya did not mention the Convention until it wrote, not to the United Kingdom but to ICAO, on 11 January 1992, the day after the United Kingdom, the United States and France circulated the draft of what became resolution 731 to the Members of the Security Council. The first time that Libya raised the application of the Montreal Convention with the United Kingdom was in its letter of 18 January 1992, which was written at a time when Libya would have been well aware that this draft resolution was circulating.

4.34. The fact that Libya now asserts that the Montreal Convention is nevertheless applicable is not sufficient to create a dispute between the two States regarding the application of the Convention. In the *Oil Platforms* case, Iran maintained that the 1955 Treaty of Amity between itself and the United States was applicable to the United States action, the United States denied that the Treaty was applicable to the use of force. The two States evidently took different views about the applicability of the Treaty. The decision of the Court shows, however, that this difference between them was not, in itself, sufficient to give rise to a dispute about the application of the Treaty in respect of which the Court would have had jurisdiction. On the contrary, the Court insisted that it had to ascertain whether the actions of the United States which Iran alleged were contrary to the Treaty did in fact fall within the scope of its provisions[41]. The Court looked, not at the general assertions about the applicability of the Treaty, but at specific questions concerning its application by the United States. That required the Court to ask whether the conduct of the United States could constitute a violation of the Treaty. Only where the Court held that the United States conduct was capable of amounting to such a violation did it find that it had jurisdiction. Similarly, Mr. President, in the present case it is necessary to consider whether the conduct of the United Kingdom is capable of being assessed by reference to specific provisions of the Montreal Convention in order to establish whether there is a dispute falling within Article 14, paragraph 1.

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[41] Judgment of 12 December 1996, para. 16.

4.35. Nor can Libya establish the existence of such a dispute by its assertion that it has itself complied with the Montreal Convention and is therefore entitled to exercise jurisdiction with respect to the two accused[42]. There is no dispute, in the legal sense identified by the Permanent Court in the *Mavrommatis* case regarding Libya's claim to have complied with the Convention. It is Libya, not the United Kingdom, which has brought this case and which is making accusations about violations of the Montreal Convention. An assertion by a State that it is acting in accordance with a treaty does not itself create a dispute between that State and another party regarding the application of that treaty.

4.36. Nor, is there any substance at all in Libya's argument that there is a dispute falling within Article 14, paragraph 1, merely because Libya suggested in January 1992 that the International Court should be asked to give a ruling on the application of the Convention and the United Kingdom did not accede to that suggestion. Such an argument is completely circular. It amounts to saying that, for the purposes of Article 14, paragraph 1, a dispute regarding the application of the Montreal Convention comes into existence simply because one party invokes the settlement of disputes provisions in that Treaty. The dispute to which Article 14, paragraph 1, refers cannot be a dispute about whether or not to apply that provision itself. It must refer to a dispute regarding the interpretation or application of some other provision of the Convention. To hold otherwise, Mr. President, would mean that a dispute regarding the interpretation or application of a multilateral treaty existed merely because one of the parties said so. The Court's jurisprudence on this subject, from *Mavrommatis* in the days of the Permanent Court to *Oil Platforms* last year, makes clear that such an approach to disputes provisions in multilateral treaties cannot be accepted.

III. The Specific Provisions relied upon by Libya

4.37. Mr. President, with your permission I shall turn now to my second point, that Libya has failed to show that the United Kingdom has done anything which was prohibited by specific

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[42] Memorial, para. 8 (1) *(b)*.

provisions of the Montreal Convention or that it has abstained from doing anything which the Convention requires it to do.

4.38. In this context, Libya now invokes five provisions of the Convention: Article 5, paragraphs 2 and 3, Article 7, Article 8, paragraph 3 and Article 11, paragraph 1. In keeping with the decision of the Court in the *Oil Platforms* case, to which I have already referred, the question at this stage of the proceedings when the Court has to determine whether or not it has jurisdiction is: are any of these provisions by which the lawfulness of the United Kingdom's actions in the present case can be measured[43]?

4.39. If we begin, Mr. President, with Article 5, paragraph 2, that provides:

> "Each Contracting State shall likewise take such measures as may be necessary to establish its jurisdiction over the offences mentioned in Article 1, paragraph 1 *(a)*, *(b)* and *(c)*, and in Article 1, paragraph 2, in so far as that paragraph relates to those offences, in the case where the alleged offender is present in its territory and it does not extradite him pursuant to Article 8 to any of the States mentioned in paragraph 1 of this Article."

That provision requires each party to the Convention to "establish" its jurisdiction over offences covered by the Convention in certain circumstances. The natural meaning of the phrase "establish its jurisdiction" is that the State concerned should take whatever measures are necessary within its own legal system to ensure that its courts have jurisdiction to deal with an offender who is brought before them in the circumstances described in the provision. It does not require the State to try an alleged offender, only to put in place the mechanism which would enable it to do so.

4.40. That interpretation of Article 5, paragraph 2, is reinforced by a reading of the other provisions of the Convention. Paragraph 1 of Article 5 also requires at least three different States to "establish" their jurisdiction over the offences covered by the Convention. Mr. President, if, as Libya suggests, the duty to "establish" jurisdiction is to be read as a duty to "exercise" jurisdiction, then that duty would be imposed simultaneously upon several different States. It surely cannot have been the intention of the Parties that all of those States should simultaneously prosecute the

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[43] Judgment of 12 December 1996, para. 51.

offender. But it is perfectly reasonable to say that all of them must ensure that their law is such that they could exercise jurisdiction should the occasion arise.

4.41. Furthermore, Article 7 of the Convention requires a State which does not extradite an alleged offender "to submit the case to its competent authorities for the purpose of prosecution" and then provides that those authorities "shall take their decision in the same manner as in the case of any ordinary offence of a serious nature under the law of that State". That provision would be redundant if the requirement in Article 5, paragraph 2, to "establish" jurisdiction is interpreted, as Libya suggests, as a duty to "exercise" jurisdiction. Moreover, Article 7 clearly leaves open the possibility that the competent authorities of a State, acting in the manner required by the second sentence of Article 7, might decide not to prosecute in a particular case. How can the existence of such a possibility be reconciled with the notion of a duty to exercise jurisdiction under Article 5, paragraph 2. The logical conclusion is that Article 5, paragraph 2, is concerned with the *creation* of jurisdiction and Article 7 with the *exercise* of that jurisdiction.

4.42. Once it is realized that Article 5, paragraph 2, refers to the *creation*, not the *exercise* of jurisdiction, it becomes clear that this provision has no relevance here. The United Kingdom has never suggested that Libya has not established its jurisdiction as required and the United Kingdom has itself done nothing — indeed could do nothing — to impede the creation of such jurisdiction as a matter of Libyan law. Moreover, even if, as Libya maintains, Article 5, paragraph 2, should be interpreted as requiring the exercise of jurisdiction, it would impose obligations only upon Libya, not upon the United Kingdom or other States.

4.43. A similar argument applies to Article 5, paragraph 3. This is a saving provision. I have already referred to it. It is designed to make clear that nothing in the Convention operates to restrict the exercise of existing criminal jurisdiction under national law. Such a provision does not impose obligations upon any State.

4.44. The next provision to which Libya refers is Article 7. As I have already explained, Mr. President, that provision requires a State in whose territory an alleged offender is found to submit the case to its competent authorities for the purpose of prosecution if it does not extradite

the alleged offender. Libya says it has done so and the United Kingdom does not contest this. Where, then, is the basis for the existence of any dispute under this Article? Article 7 does not impose obligations on States other than the State in which the alleged offender is found. So, if Libya has any complaint about the Scottish criminal charges being brought, it cannot be under Article 7. Likewise for the United Kingdom's request for surrender of the two accused, and its resort to the Security Council in support of that request. There is no dispute regarding the application of that Article which would give rise to jurisdiction under Article 14, paragraph 1.

4.45. Then there is Article 8, paragraph 3, upon which Libya now relies. Members of the Court will recall that that provides :

> "Contracting States which do not make extradition conditional on the existence of a treaty shall recognize the offences as extraditable offences between themselves subject to the conditions provided by the law of the requested State".

In its Response, Libya describes this provision as constituting "the *basis* of Libya's refusal to hand the suspects over to the United Kingdom"[44]. Members of the Court may find that language surprising in view of the fact that Libya did not mention Article 8, paragraph 3, either in its Application to the Court or in the 1992 hearings, by which time it had already decided not to hand over the two suspects and had presumably given the basis for that refusal some thought.

4.46. But Article 8, paragraph 3, takes Libya no further. It is clear that that provision means that the Montreal Convention requires a State which does not make extradition dependent upon the existence of an extradition treaty to treat offences falling within the Convention as extraditable offences. It does not, however, require a State to extradite an alleged offender in circumstances that would be contrary to the domestic law of that State. The United Kingdom has never suggested that Article 8, paragraph 3, does place Libya under an obligation to extradite the two suspects. The provision does not impose any obligations upon the United Kingdom. Again, there cannot be a dispute between the United Kingdom and Libya regarding the application of this Article.

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[44] Libyan Response, para. 2.26.

4.47. Since Libya has now made clear that it no longer wishes to rely upon Article 8, paragraph 2, which it referred to in its Application, and in 1992, the United Kingdom will not address the Court upon that provision.

4.48. That leaves Article 11, paragraph 1,

> "Contracting States shall afford one another the greatest measure of assistance in connection with criminal proceedings brought in respect of the offences. The law of the State requested shall apply in all cases."

In its Observations, Libya makes much of the United Kingdom's comment on Article 11, paragraph 1, in paragraph 3.32 of our Preliminary Objections. Libya treats this comment as a concession that a dispute exists between the parties regarding the application of that provision. In truth, however, this so-called "concession" is not what Libya seeks to suggest.

4.49. The basis for Libya's claim regarding Article 11, paragraph 1, appears to be that letters of enquiry were sent by Libya to the Attorney-General for England and Wales on 27 November 1991 and the Lord Chancellor on the 14 January 1992 requesting the provision of information relating to the charges against the accused. Neither of those letters made any reference to the Montreal Convention. The United Kingdom had already provided Libya with copies of the Scottish charges, the warrant for the arrest of the accused and the Statement of Facts prepared by the Lord Advocate, and it declined to provide Libya with more information.

4.50. In considering whether the conduct of the United Kingdom in this regard might violate Article 11, a number of points need to be borne in mind. First, at the time that these requests were made, Libya had not itself invoked the Montreal Convention in any of its correspondence with the United Kingdom. Nor had the United Kingdom relied upon that Convention. For the failure of the United Kingdom to supply further information to Libya to constitute a violation of Article 11, the Convention must at least have been invoked by one of the States concerned.

4.51. Secondly, there were good reasons why Libya was not regarded as an appropriate forum but Scotland was. As the Lord Advocate has explained, the two accused were charged with having committed offences as members of the Libyan Intelligence Service and in furtherance of the objectives of that service.

4.52. Moreover, once the Security Council adopted resolution 731, a matter of only three days after the second letter to which I have just referred, there was a unanimous expression of view by the Security Council, which the United Kingdom could not ignore, to the effect that Libya was not an appropriate forum in which to try the two accused. The adoption of resolution 731 was followed by a series of contacts between the Secretary-General's Special Representative and the Government of Libya. These contacts were marked by a variety of, often contradictory, proposals emanating from Libya, most of which involved suggestions for a trial to take place outside Libya. This period culminated with the adoption of resolution 748. The United Kingdom submits that its conduct during this period cannot be regarded as a violation of Article 11, paragraph 1.

4.53. Finally, Mr. President, once Security Council resolution 748 was adopted on 31 March 1992, Libya came under a binding obligation to surrender the accused for trial, an obligation with which it has still not complied, five and a half years later. Once that obligation came into being, there was no question of a trial taking place in Libya and any obligation which the United Kingdom might have had to provide evidence to Libya was clearly superseded by the provisions of the resolution.

4.54. Article 11, paragraph 1, differs from the other provisions on which Libya has relied, in that it does impose obligations upon other States. It is thus capable, *in the abstract*, of giving rise to a dispute between Libya and the United Kingdom in a way that the other provisions on which Libya relies are not. However, once Article 11, paragraph 1, is subjected to a thorough analysis against the background of the facts of this case, it can be seen that there is no dispute between Libya and the United Kingdom here either.

The ACTING PRESIDENT: Do you think you might resume tomorrow ? Whatever suits you.

Sir Franklin BERMAN: Mr. President, Mr. Greenwood's presentation will take five minutes longer.

The ACTING PRESIDENT: Certainly. Thank you very much.

Mr. GREENWOOD: Thank you, Mr. President. I am conscious of the passage of time.

IV. Libya Has Misunderstood the Significance of the Security Council's Involvement

4.55. My third point is that Libya's arguments on the issue of jurisdiction show that Libya has misunderstood the nature and significance of the Security Council's involvement. This point is obviously closely linked to the United Kingdom's argument on the effect of the Security Council resolutions and will be dealt with in greater detail tomorrow. For the moment, I just wish to make two short points.

4.56. First, the United Kingdom is not contending that the Montreal Convention was rendered inapplicable because the United Kingdom took the question of Libyan support for terrorism and the Lockerbie atrocity to the Security Council. The United Kingdom does not argue, as Libya suggests, that the act of seising the Security Council "institutionalized" the dispute. The United Kingdom maintains that there has never been any dispute between itself and Libya regarding the application of the Montreal Convention. What we do say is that once the Security Council took action, the legal terrain changed, as the Court recognized in its Order of 14 April 1992. By virtue of Article 103 of the Charter, the obligations of all Members under the Charter prevail over their obligations under other international agreements, including the Montreal Convention. It follows that, in assessing whether a particular course of conduct is capable of amounting to a violation of the Convention, it is impossible not to take account of the overriding obligations created by the resolutions.

4.57. Secondly, the United Kingdom maintains that in so far as Libya's complaint is that the sanctions imposed upon it are unfair or unlawful and that the United Kingdom has enforced sanctions against Libya, this complaint is not capable of coming within the scope of Article 14, paragraph 1, of the Montreal Convention.

4.58. Once a situation has been duly referred to the Security Council, the subsequent handling of that item in the Council becomes the responsibility of the Council itself as a collective body, and ceases to be that of the members for the time being in their national capacities. This is so notwithstanding the fact that particular actions such as draft resolutions may be put forward on the

initiative of individual members of the Council, since a proposal, once taken up, passes out of the hands of the originator and becomes a matter for collective decision by the Council in the exercise of its powers under the Charter. It follows that proceedings in the Council and decisions taken by the Council cannot give rise to a cause of action against an individual State, whatever may have been the role of that State in the proceedings of the Council. If Libya has a dispute with anyone regarding the adoption and application of measures by the Council, that dispute is with the Security Council itself.

4.59. Nothing which the United Kingdom has done with regard to the enforcement of sanctions against Libya, gives rise to a dispute between Libya and the United Kingdom regarding the interpretation or application of the Montreal Convention. In so far as there is a dispute at all regarding the application of sanctions, Mr. President, it is a dispute between Libya and the Security Council, which of course, is not, and cannot, be a party to these proceedings. The United Kingdom cannot bear legal responsibility for the actions of the Council.

V.Conclusion

4.60. Mr. President, once you cut away the undergrowth, you see that the entire Libyan case rests upon the proposition that Libya is endowed with an indefeasible right to try these accused, to the exclusion of trial in another State. Without that proposition, Libya's entire case falls to the ground. But the Court will find no support for such a proposition in the provisions of the Montreal Convention. That no doubt explains why, five and a half years after lodging the Application, Libya is still struggling to demonstrate to the Court (let alone to us as the Respondent) exactly what — under the Convention — the Parties are meant to be in dispute about.

4.61. Let me simply repeat a brief passage from the dissenting opinion of Judge El-Kosheri at the Provisional Measures phase:

> "in view of the fact that the two Libyan suspects were or are still working for the government of their country, and that their trial could eventually lead to the emergence of a subsequent case of State international responsibility against Libya, I feel that this factual situation constitutes sufficient grounds to doubt that the interests of both the United States and the United Kingdom in ensuring a fair trial could be adequately safeguarded in case the trial were conducted in Libya. Whatever may be the merits of the Libyan judicial system under normal circumstances, the need for an even-handed and just solution leads me to consider, within the

> special circumstances of the present case, that the Libyan courts could not be the appropriate forum. This conclusion derives logically and necessarily from the fundamental legal principles deeply rooted in the legal traditions of the major systems, particularly Islamic law . . . according to which *nemo debet esse judex in propria sua causa.*"[45]

4.62. That is a view with which many may find it difficult to disagree. I observe only that neither that view, nor the reasoning behind it, derives from the Montreal Convention.

4.63. In conclusion, Mr. President, the United Kingdom submits that Libya has failed to demonstrate the existence of a dispute between itself and the United Kingdom within the scope of Article 14. Throughout its pleadings, Libya has asserted that the Montreal Convention is the only treaty applicable to this aspect of its relations with the United Kingdom, that it occupies a position so central that even the United Nations Charter itself must take a secondary place. Yet Libya itself made not a single mention of the Convention until action by the Security Council was imminent and even now, five and a half years after it first applied to this Court, it is no nearer to formulating a dispute which truly falls within the scope of Article 14. Libya's general assertions that the Convention is applicable do not create such a dispute. Nor has Libya been able to point to a provision of the Convention which might have been violated by the conduct of the United Kingdom.

4.64. Moreover, Libya's arguments are fundamentally flawed in that they completely fail to understand the significance of the Security Council's actions in this matter. Tomorrow, Mr. President, the Lord Advocate will demonstrate that in resolutions 748 and 883 the Security Council took decisions which created binding legal obligations for Libya and for the United Kingdom and that, in accordance with Article 103 of the United Nations Charter, the obligation which arises under Article 25 to comply with those decisions of the Council takes priority over any rights or obligations which Libya might possess by virtue of the Montreal Convention. Until then, Mr. President, that concludes the submissions of the United Kingdom.

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[45] *ICJ Reports, 1992*, p. 112.

The ACTING PRESIDENT: Thank you very much, Professor Greenwood. The Court stands adjourned until 10 o'clock tomorrow morning.

The Court rose at 1.12 p.m.