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International Court
of Justice

THE HAGUE

Cour internationale
de Justice

LA HAYE

YEAR 1997

Public sitting

held on Tuesday 14 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 mardi 14 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,

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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 :

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M. Mohamed A. Aljady,

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M. Mohamed Awad,

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Le Gouvernement du Royaume-Uni sera représenté par :

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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,

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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 ACTING PRESIDENT: Please be seated. The Court will now resume its hearings 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 I now call upon the Lord Advocate, Lord Hardie to address the Court.

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

5.1. Yesterday, Professor Greenwood set out the first limb of the United Kingdom's preliminary objections — namely that the Court lacks jurisdiction over the claims brought by Libya, as there is no dispute between Libya and the United Kingdom which falls within the terms of Article 14 of the Montreal Convention. This morning, I shall address the second limb of our objections, which is broader in character. As the Court's Order in 1992 made clear, it is impossible to consider the present case without taking full account of the effect of the resolutions adopted by the Security Council. That is why Mr. Bethlehem took the Court through the main provisions of those three resolutions yesterday. Our submission is that resolutions 748 and 883 are legally binding and they create legal obligations for Libya and the United Kingdom which are determinative of any dispute over which the Court might have jurisdiction. In other words, even if there were a dispute between Libya and the United Kingdom which falls within the terms of Article 14 of the Montreal Convention, the effect of the resolutions is that Libya's claim is inadmissible and should be declared to be so at this stage.

5.2. In its pleadings Libya has sought to portray this issue as one of grand constitutional principle, as a clash between the judicial function and the political, as a challenge to the rule of law in the international community. Mr. President, it is nothing of the kind. The truth, as I shall endeavour to show, is far more simple. The Charter of the United Nations establishes a system for addressing what was in 1945 and still is today the biggest problem facing the international community, namely threats to, and breaches of, the peace. To respond to those threats, breaches and acts of aggression, it creates the Security Council, as a body which can take *action* to deal with such matters at any time. The Council is not placed in a hierarchical relationship with other United Nations organs. On the contrary, the Charter is based on the assumption that the principal

organs can work alongside one another. We submit that what this case calls for is a proper analysis of how that can and should be done, not the confrontational rhetoric of Council versus Court or Court versus Council.

5.3. Mr. President, I propose to address this argument under four broad propositions:

- *first*, the structure of the United Nations Charter imposes special responsibilities on the Security Council for the maintenance of international peace and security, and the Charter has endowed the Council with the competences necessary to exercise these responsibilities effectively (paras. 4.33-4.42 of the United Kingdom's Preliminary Objections),
- *second*, the obligations imposed by the Security Council in this case require Libya to surrender the accused for trial in Scotland or the United States of America (paras. 4.7-4.12),
- *third*, the obligations imposed by the Security Council resolutions prevail over any other rights and obligations of the Parties (para. 4.13), and
- *fourth*, the Libyan submission that the Court can pronounce upon the substantive validity of Security Council resolutions should be rejected (paras. 4.19-4.29).

I. The First Proposition: the Structure of the United Nations Charter Imposes Special Responsibilities on the Security Council for the Maintenance of International Peace and Security, and the Charter has Endowed the Council with the Competences Necessary to Exercise those Responsibilities Effectively.

5.4. Mr. President, Members of the Court, my first proposition is that the structure of the United Nations Charter imposes special responsibilities on the Security Council for the maintenance of international peace and security, and that the Charter has endowed the Council with the competences necessary to exercise those responsibilities effectively.

5.5. For present purposes, these essential competences which the Charter reserves to the Security Council can be summarized as follows:

- to determine the existence of any threat to the peace, breach of the peace, or act of aggression;
- to decide on the measures that are appropriate for responding to such situations; and
- to decide whether such requirements as may be set out in its decisions have in fact been met and, if not, what further measures ought to be employed to give effect to its decisions.

I shall deal with each of these points in turn.

Determining the Existence of a Threat to the Peace, a Breach of the Peace or an Act of Aggression

5.6. Members of the Court, as Mr. Bethlehem showed yesterday, the Security Council, in both resolutions 748 and 883, determined that Libya's conduct, including, in particular, its failure to respond fully and effectively to the requests in resolution 731 constituted a threat to international peace and security. In adopting resolutions 748 and 883, the Council was acting under Article 39 of the Charter. The terms of Article 39 are very familiar. I will simply remind the Court that it is cast in mandatory language — "[t]he Security Council *shall* determine the existence of any threat to the peace, breach of the peace, or act of aggression and *shall* make recommendations, or decide what measures shall be taken . . . to maintain international peace and security" (emphasis added).

5.7. This responsibility, put in issue in these proceedings by Libya, is a key pillar of the whole structure of the United Nations Charter. Article 39 should not be read in isolation. Indeed, it cannot be read in isolation from the enumeration in the Charter — which is, after all, the controlling instrument in this debate — of the functions and powers of the Security Council. Specifically, I would recall the terms of Article 24, paragraph 1 of the Charter which provides *inter alia* that the Members of the United Nations "confer on the Security Council primary responsibility for the maintenance of international peace and security".

5.8. The essence of the question now before the Court is whether, once the Council has acted under Article 39, its determinations can be the subject of substantive review by this Court. There is no correct "legal" answer to the question of whether international peace and security is threatened by a particular set of circumstances. The Security Council's assessment under Article 39 is necessarily an act of discretion. Within the scheme of the Charter, it is a matter for the Security Council alone. There are no "legal" criteria by which such a determination can be assessed. It follows, furthermore, from the absence of any legal yardstick for assessing such matters, that any assessment of such matters by some other body — such as this Court — would necessarily entail a substitution by that body of an alternative appreciation of the issues.

5.9. The duty of the Security Council, and the Security Council alone, to determine whether there is a threat to the peace, was a matter you addressed, Mr. President, in your dissenting opinion appended to the Order on Provisional Measures in this case in April 1992 in the following terms which are reported at page 66:

> "[T]he determination under Article 39 of the existence of any threat to the peace, breach of the peace or act of aggression, is one entirely within the discretion of the Council. It would appear that the Council and no other is the judge of the existence of the state of affairs which brings Chapter VII into operation."

Our concern is that Libya's invitation to the Court to review the substance of the resolutions in issue in this case amounts, in effect, to an invitation to the Court to substitute its own judgment on the matters in question for that of the Council. That is not the scheme of the Charter. To adopt again the language of Judge Lachs in his separate opinion in his Provisional Measures phase of this case:

> "[o]ne may . . . legitimately suppose that the intention of the founders was not to encourage blinkered parallelism of functions [as between the Council and the Court] but a fruitful interaction". (Order of 14 April 1992, *I.C.J. Reports 1992,* p. 3 at p. 26)

What Libya is asking of the Court could not be described as "fruitful interaction".

5.10. Libya challenges the Court to declare itself the ultimate arbiter of the correctness of any decision of the Security Council. It is "blinkered parallelism" of the most extreme kind. If such a principle were ever to be admitted, it would hang a sword of Damocles over every decision of the Security Council. The Security Council's intended role under Chapter VII would be rendered impossible if the Article 39 determination could itself be the subject matter of litigation.

5.11. Although I make much of this point, I do not, Members of the Court, anticipate that this will be an issue of great controversy when you come to deliberate on this case. The Court has already, in the context of its Opinion in the *Northern Cameroons Case* (*I.C.J. Reports 1963,* p. 15 at p .32), indicated that it is not prepared to go behind decisions of the General Assembly acting within its competence. This must be true of the Security Council, *a fortiori.*

Deciding on Measures that are Appropriate for Responding to Determinations of Threats to the Peace, Breaches of the Peace and Acts of Aggression

5.12. Members of the Court, the same considerations that apply in respect of my first contention on the competencies of the Council also inform an appreciation of the second. This

contention postulates, as you will recall, that the competence to decide on the measures that are appropriate for responding to situations determined to constitute a threat to the peace is also a matter for the Security Council alone.

5.13. The second competence reserved to the Council is to decide on the measures that are an appropriate response to a threat to the peace, breach of the peace or an act of aggression. That competence goes hand in hand with the responsibility to determine the existence of the threat or other situation in the first place. This flows from the very language of Article 39 and the structure of Chapter VII of the Charter. In the same breath, Article 39 speaks in terms of the responsibility to determine the existence of a threat to the peace or other situation *and* the responsibility to "make recommendations or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security". The structure of the succeeding Articles of Chapter VII, as with the title to the Chapter itself, make it clear that what is contemplated by Chapter VII is that the Security Council should act to counter threats to the peace, breaches of the peace, and acts of aggression.

5.14. Mr. President, it is widely accepted that an essential feature of the Charter system is that the responsibility to determine the existence of a threat to the peace and the responsibility to determine what measures are appropriate to meet that threat are inextricably linked. Both are and both have to be vested in the Security Council.

5.15. There is no foundation in the Charter or in the practice of the Organization for Libya's proposition that there is a power of judicial review of the measures ordered by the Council. If such a jurisdiction had been intended, or even contemplated, by the framers of the Charter, there would have been express provision to that effect. There is no such provision. Conversely, there is much in the Charter and in the practice of the Organisation to support the proposition that the determination of measures appropriate to meet a threat to the peace is a matter for the Security Council alone. Amongst the measures which the Council is authorized to employ is the use of force. A decision to take such measures would be particularly ill-suited for judicial review.

Determining Whether Requirements in Security Council Decisions Have been Met and, if not, What Further Measures Ought to be Employed to Give Effect to the Decisions

5.16. The third of the competences reserved to the Security Council is that of deciding whether the terms of its resolutions have been met. Our contention is that this follows naturally from the Council's responsibility of determining the existence of the threat to the peace and the measures to be taken to address that threat. A different approach would be tantamount to giving the Council powers to act while at the same time precluding it from determining when that action had achieved its objective. The Court will note that Article 41 gives the Council — in express terms — the power to decide what measures are needed to give effect to its decisions.

5.17. A good way of approaching this matter, in the present case, is to see what happened after the adoption of resolution 731. As Mr. Bethlehem pointed out yesterday, it was in the light of Libya's failure to comply with that resolution that the Security Council went on to adopt resolution 748. As the Japanese Representative said in the debate on resolution 748, "it was foreseen that the Security Council would be compelled to take further measures if Libya did not comply with [resolution 731]". The Court will note that both resolutions 748 and 883 indicate in terms that the sanctions they imposed were for the purpose of securing compliance with the Council's decisions.

5.18. As we understand it, Mr. President, Libya does not in terms contest that these discretions are vested in the Security Council and in the Security Council alone, but confuses this with an argument as to whether the powers of the Council are or are not "unlimited" ("*illimités*") and, more particularly, whether the Council may lay down requirements which are contrary to *le droit en vigueur*.

5.19. The more general of these arguments is, we submit, wholly abstract and without practical consequence. The issue is not whether there are limits on what the Council may do but who has the power to enforce these limits. The Applicant is simply wrong to assume that, in the context within which the Security Council has the responsibility to act to maintain international peace and security, the existence of limits to its authority implies the existence of judicial control. There is simply no room for such an *a priori* argument in the face of the terms of the Charter, or

of its negotiating history (documented at para. 4.17 in our Preliminary Objections), or of the jurisprudence of the Court itself (which is summarized also at paras. 4.23 and 4.24 in our Preliminary Objections).

5.20. As is implicit in what I have just said, our case is not that there are no controls on the actions of the Security Council. There are indeed controls. They operate, however, in the *political* rather than the legal sphere. One such control is the *membership* of the Council which, as our Preliminary Objections point out, is designed to be representative of the membership of the United Nations at large. As a result, a wide variety of views is brought to bear on the eventual decisions of the Council. Another control is the partial rotation of the Council's membership every year, which operates to much the same effect. A third control is the *responsibility* that the Council, as an organ of the United Nations, owes to the membership of the Organization at large, as is reflected, for example, in its annual reports to the General Assembly pursuant to Article 24, paragraph 3, of the Charter.

5.21. These are real controls but they are worlds away from the concept of a judicial control exercised *ex post facto* so as to validate or invalidate the decisions which the Council has taken in the exercise of its special responsibilities. The Applicant pretends in its response that there is a difference between the Court's substituting its discretion for that of the Council and the application by the Court of "objective criteria" to control the wayward exercise of the Council's discretion. But the Applicant is unable to say what these "objective criteria" are or where they come from. Nor is it able to say how a judgment by this Court holding that the Council was wrong, for example, in deciding that a particular situation represented a threat to international peace and security differs in any real sense from a finding by the Court that a particular situation did not represent a threat to international peace and security. That, in our submission, would be nothing other than a substitution by the Court of its discretion for that of the Council.

5.22. Mr. President, Members of the Court, the fact that there are *political* controls should not obscure either their effectiveness or the fact that they operate within a legal framework, namely that laid down by the Charter; the Members of the Council for the time being are acutely conscious of the fact that the Charter confers on them, not plenary powers, but special ones, for defined

purposes. Libya must face the reality that the Members of the Council adopted the decisions in the three resolutions as a conscious exercise of the responsibility conferred on them by the Charter.

II. The Second Proposition — the Obligations Imposed by the Security Council in this Case Require Libya to Surrender the Accused for Trial in Scotland or the United States.

5.23. My second proposition is that the obligations imposed by the Security Council in this case require Libya to surrender the accused for trial in Scotland or the United States.

5.24. The United Kingdom has invoked the three resolutions adopted by the Security Council which bear directly and specifically on the present case, 731, 748, and 883 (Anns. 2, 3 and 4 to the United Kingdom's Preliminary Objections). Mr. Bethlehem took the Court through their terms yesterday. My submission is that these resolutions require the surrender of the accused for trial in Scotland or the United States.

5.25. Various arguments are advanced by Libya in its Memorial to support its contention that the resolutions do not require surrender. These arguments, which have not been pursued in the Libyan response, are dealt with in detail in paragraphs 4.7 to 4.12 of the United Kingdom's Preliminary Objections, but I will summarize them here.

5.26. It is said first, that resolution 731 makes reference to the "Charter of the United Nations, and relevant principles of international law", and therefore precludes surrender. There is nothing inconsistent with the principles of international law in the Security Council's supporting a request that a person be surrendered for trial. As Judge Oda remarked in his opinion on the Request for Interim Measures, at page 19:

> "[A] State which has jurisdiction in respect of criminal proceedings against any person who happens to be in a foreign territory is free to request the territorial sovereign to extradite that person . . ."

It is hard to see how it could be in any way unlawful for the Security Council to support a request which was itself lawful.

5.27. It is also said by the Libyans that surrender could not have been intended because a fair trial could not be guaranteed in Scotland. I have dealt with that matter yesterday. In any event, it is clear that the Security Council simply did not share Libya's view of this matter.

5.28. The remaining Libyan arguments as to the requirements of the resolutions are nothing more than tributes to the ingenuity of learned counsel in discovering ambiguities where none exists. They are, as I say, dealt with in our Preliminary Objections and I shall not detain the Court further with them.

5.29. I will turn now to the binding nature of the obligations. Unlike the subsequent resolutions 748 and 883 which were adopted under Chapter VII, resolution 731 was not. Although the text does not say so expressly, the assumption must be that this resolution was adopted under Chapter VI of the Charter, which empowers the Security Council, among other things, to make recommendations for dealing with situations whose continuation is deemed likely to endanger the maintenance of international peace and security. Its importance lies in the broader context of the Security Council's concern with Lockerbie. Resolution 731 was designed to allow Libya a reasonable opportunity to respond to the call made on behalf of the international community; it was Libya's inadequate response to these requirements that formed the basis for the Security Council's decisions in resolution 748 and in due course in 883. Had Libya chosen otherwise, had Libya made a "full and effective response" to the requests of the United Kingdom, as the Security Council required of it in resolution 731, matters would without doubt have had a wholly different aspect today.

5.30. That, however, is "might-have-been". For the reasons already explained by Mr. Bethlehem, the Council was not satisfied with Libya's response: it adopted resolutions 748 and 883 and there can be no doubt, for the reasons already explained, that both resolutions were adopted under Chapter VII of the Charter and were intended by the Council to have the binding force provided for in Articles 24, 25, 41, 48 and 49 of the Charter. That too is not, as the United Kingdom understands it, contested by Libya.

5.31. Libya's only challenge to the two resolutions at this level is to argue that the process of their adoption was improper and therefore ineffective; a similar challenge is mounted to resolution 731. The question of formal validity of the resolutions was dealt with yesterday by Mr. Bethlehem.

5.32. Leaving questions of formal validity aside, therefore, in my submission there can be no doubt that resolutions 748 and 883 are binding decisions: they were adopted by the Council expressly under Chapter VII of the Charter, following express determinations that the circumstances constituted a threat to international peace and security, and they specifically declared that the obligations which they imposed on States were for the purpose of giving effect to the Council's decisions. These requirements were moreover cast in a prescriptive form which makes it abundantly clear that the Council's intention, having fulfilled the conditions laid down in Chapter VII, was to impose binding legal obligations on all Member States. The resolutions thus fall unambiguously within the undertaking by each Member State in Article 25 to "accept and carry out the decisions of the Security Council in accordance with the present Charter".

5.33. I might mention at this point, Mr. President, that Libya has tried to develop in its Pleadings an argument that that is not the end of the story, but that Article 25 only operates for the benefit of Security Council decisions which are "in accordance with the . . . Charter", and that that in turn implies a review of their substantive contents. That argument, with respect, is bad both in grammar and in law. The phrase "in accordance with the present Charter", being an adverbial phrase, is clearly meant to qualify the verbs "accept" and "carry out", but not the noun "decisions". The point is even clearer in the French text.

5.34. It is clearly the case, therefore, that the better reading in both languages is that Article 25 addresses itself not to what the Council must do, but to what the Member States are obliged to do following a decision by the Council. It is the second paragraph of Article 24 which requires the Council to act in accordance with the Purposes and Principles of the United Nations. That is, however, a completely different matter from saying that Article 25 gives every Member State the right to pick and choose which Chapter VII decisions of the Council to accept, according to whether that Member State considers them to conform to the Purposes and Principles of the United Nations or not. The question of the application of Article 25 of the Charter in relation to resolutions of the Security Council has of course been before the Court before, in the context of the Advisory Opinion of 1971 on Namibia (*I.C.J. Reports 1971*, p. 16). Some controversy remains over whether the Court was right in that Opinion to say that there could be binding decisions of the

Security Council under implied powers outside Chapter VII of the Charter. It is clear, however, that the question the Court was addressing was what were the consequences of a resolution duly adopted by the Security Council and not the question of whether Article 25 conferred on the Court a power to review the substantive contents of such a resolution.

5.35. In my submission, therefore, it is clear that these resolutions constitute a binding obligation upon Libya to surrender the two accused for trial in Scotland or the United States. I will now turn to my third proposition, namely the obligations imposed by the Security Council prevail over any other rights and obligations of the Parties.

III. The Third Proposition — the Obligations Imposed by the Security Council Prevail over any other Rights and Obligations of the Parties.

5.36. I should preface my remarks on this matter by dealing with a point which has apparently caused the Applicant some difficulty. Libya has acted before this Court throughout as if the resolutions were adopted with the purpose of overriding Libya's rights under the Montreal Convention, but that insinuation distorts both the chronology of Council action and the true nature of what it was that the Council did. The Council was simply taking appropriate action to deal with a threat to international peace and security. The United Kingdom Permanent Representative to the United Nations made that very point [S/PV.3033 (Annex 10 to the United Kingdom Preliminary Objections) at p.104]. Again, Mr. Bethlehem dealt with this yesterday.

5.37. Further, the Applicant alleges that the Security Council is bound by any legal obligations already in force as between the States involved in any situation which is brought before the Council. The Libyan Pleadings claim this in terms in various places when they say that the Council is not legally empowered to override the 'rights' conferred on Libya by the Montreal Convention. As Professor Greenwood has shown, the very existence of these 'rights' is a matter of considerable doubt and contestation — which itself casts doubt on the validity of the Libyan argument. But, leaving that aspect aside, the argument must surely founder on the rock of Article 103 of the Charter. I make no apology for quoting Article 103 which provides:

> "In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail."

5.38. I quote the Article, not because Members of the Court are unfamiliar with its terms but because its whole purpose is called into question by the arguments of the Applicant in this case. Article 103 is an essential part of the scheme of the Charter. It spells out the obligations of Member States to recognize the superior rule of international law which the Charter was intended to embody. In Article 24, Member States confer upon the Security Council primary responsibility for the maintenance of international peace and security. In Article 25 the Member States agree to accept and carry out the decisions of the Security Council. Chapter VII gives the Council powers of decision extending even to the use of armed force. Against this background, Article 103 simply completes the picture and says in terms that, in appropriate circumstances, the bilateral arrangements of Member States must give way to the greater good of preserving peace. The Article cannot mean that the Council's freedom of action is constrained by alleged treaty rights of one party; the provision means, in fact, quite the opposite.

5.39. It remains only to note that both the sense and the literal terms of Article 103 apply its effect to binding decisions of the Security Council as well as to the provisions of the Charter itself. The syllogism is simple: Member States are under a legal obligation to "accept and carry out" the binding decisions of the Council; that obligation is an "obligation under the Charter"; therefore that obligation prevails over "Member States obligations under any other international agreement". The French text is once again if anything even clearer than the English text in this regard. The obvious conclusion, already implicit in the reasoning in the Court's Advisory Opinion in the *Namibia* case (*I.C.J. Reports 1971,* p. 16), is clearly reflected by the Order of the Court of 14 April 1992 (*I.C.J. Reports 1992,* p. 3; see also paras. 4.62-4.64 of the United Kingdom's Preliminary Objections), refusing the application for provisional measures in the present case. Even the Members of the Court who dissented from that decision nonetheless emphasized the importance of Article 103 in relation to decisions under Article 25.

5.40. Mr. President, Members of the Court, I will now deal with the fourth part of my argument this morning, that the Libyan submission that the Court can pronounce upon the substantive validity of the resolutions in issue should be rejected.

IV. The Fourth Proposition — The Libyan Submission that the Court can Pronounce upon the Substantive Validity of these resolutions should be Rejected.

5.41. Libya has couched this question in terms of an abstract and general principle. The United Kingdom has not seen it in that light but, in deference to the arguments presented by our opponents, I will address the matter first on that basis before dealing briefly, with Libya's substantive objections to the validity of resolutions 748 and 883. I would like however to start, with a preliminary point.

5.42. The Libyan response — at paragraphs 3.18 and 3.28 — makes much of the argument that the United Kingdom "has not been able to produce one single legal text" in support of its contention that decisions by the Security Council are not open to substantive review by this Court. The Court will in fact find the authorities cited by the United Kingdom at paragraphs 4.17 to 4.24 of our Preliminary Objections. Moreover, it is not the United Kingdom which is advancing the non-reviewability of Security Council decisions as a substantive argument in its favour. What the United Kingdom did was to raise — as it was obliged to do especially in the light of the Court's Decision on the Application for Provisional Measures — the effect of the Security Council resolutions as a matter affecting the admissibility of the Libyan claims.

5.43. I will now address the question of a general competence in this Court to review the substantive validity of decisions of the Security Council. The United Kingdom's argument on the particular nature of the Security Council's powers is set out in our objections (part 4.IV of the United Kingdom's Preliminary Objections). I would merely like to single out one or two aspects to which I draw the Court's attention this morning.

5.44. The first is that the question has two aspects, jurisdiction and competence. Although linked, these two aspects are not identical: competence goes to whether the Court is, under the system of the United Nations Charter, endowed with a power to review, or *"contrôler"* the legality of decisions by the Security Council; jurisdiction on the other hand goes to whether, even if the Court had such a power, it could be exercised as an incidental matter in contentious proceedings brought under a compromissory clause like Article 14, paragraph 1 of the Montreal Convention.

The distinction between competence and jurisdiction is not mere formalism; there is for example, as paragraphs 4.19 to 4.22 of our Preliminary Objections point out, a fundamental qualitative difference between a request by the Council itself to the Court within the framework of the advisory procedure for an opinion as to the extent of the Council's powers, and the claim that the Court may exercise a power of judicial review as a purely incidental matter in the course of determining a bilateral dispute between two States. The jurisdictional aspects of this question were dealt with by Professor Greenwood yesterday.

5.45. Turning to the question of competence, therefore, let me draw the Court's specific attention to the clear indications the Charter itself gives. The primary responsibility imposed on the Security Council for the maintenance of international peace and security was not conferred for its own sake. It was conferred "[i]n order to ensure prompt and effective action by the United Nations"; those are the precise opening words of Article 24. Article 28 provides that the Security Council must be "so organized as to be able to function continuously". Together these constitute the clearest recognition that, in the minds of the framers of the Charter, "effective" action might well have to be "immediate"; and that that judgement must rest in the hands of the Council. It would not be consistent with the evident intention of the Charter, given the central part that the responsibilities of the Security Council were intended to play in achieving the Purposes and Principles of the United Nations, that the Council should be prevented from or delayed in the exercise of its responsibilities.

5.46. If the Conference which drew up the United Nations Charter had intended to enable States to challenge the substance of Security Council resolutions addressed to them, it might be thought that it would have made provision accordingly. As our Preliminary Objections show, Belgium did propose to the Conference at San Francisco in 1945 that:

> "Any State, party to a dispute before the Security Council, shall have the right to ask the International Court of Justice whether a recommendation or a decision made by the Council or proposed in it infringes on its essential rights. If the Court considers that such rights have been disregarded or are threatened, it is for the Council either to reconsider the question or to refer the dispute to the Assembly for decision." (United Nations Conference on International Organization Documents (UNCIO), Vol. 3, Docs. 335, 336.)

The limited nature of the Belgian proposal is clear from its terms, as is the fact that it would not have provided the remedy which Libya seeks before you today. The proposal was in any event withdrawn, and a subsequent Belgian proposal to establish a Committee on Legal Problems was also rejected. The clear view was that the Charter requirements, the ability of the major organs to ask for advisory opinions, and the entitlement of States to resolve their differences before this Court, provided sufficient guarantees of protection of sovereign rights by reference to international law (UNCIO, Vol. 13, Doc. 843 (IV/2/37), p. 645 and Doc. 933 (IV/2/42 (2)), pp. 709-710).

5.47. It is not, however, necessary to rely on the *travaux préparatoires* to dismiss this proposition as unsound. If the framers of the Charter had intended to confer on the Court a power to review the substance of Security Council resolutions it is inconceivable that they would not have provided it specifically. In the face of the evidence of the consideration of the matter which we derive from the *travaux préparatoires*, and in the notable absence of such provision on the face of the Charter, the Court is being asked to assume first, that it can somehow infer the existence of such a power and secondly, that the attributes of that power are to be those which happen to suit the Libyan submissions in this case. Nor does it help the argument to claim, without further demonstration, that such a power is "part of the normal exercise of the judicial function". With respect, that simply begs the question.

5.48. Libya has raised in its Memorial an argument as to the supposed "invalidity" or "inopposability" of the resolutions of the Security Council. It has claimed that the Court has the power to set these resolutions aside on that particular ground. It is therefore for Libya, not the United Kingdom, to produce the authority for this competence, for which there is no precedent in the jurisprudence of this Court (or its predecessor) or in the practice of the United Nations Organization (or its predecessor) in the 75 years of their existence. Libya has simply relied on concepts drawn from the administrative law of certain legal systems ("*excès de pouvoir*", "*détournement de pouvoir*"). It has not even attempted to show that, assuming that these legal concepts exist at all in international law, they apply to the law of the United Nations Charter and, more specifically, to the exercise by the Security Council of its special powers for the maintenance of international peace and security. It is not the case that every legal system has developed a

concept of judicial review of the acts of all political organs, and manifestly not the case that all such concepts as have been developed display the same features. Nor are analogies with municipal legal systems relevant here, given the special characteristics of the Charter system.

5.49. It is for Libya to demonstrate to your satisfaction the legal authority for the wholly novel propositions it asks this Court to accept and act upon. The authorities recited in the Libyan Memorial are all extrapolations from decisions on international administrative law, in the very limited and restrictive sense that the term is applicable, for example, to the internal legal regulation of an international organization. It concerns such matters as the employment of Secretariat staff or the relationship between different organs in matters like admission to membership. Thus, Dr. Amerasinghe, as the very title of his work indicates, *(The Law of the International Civil Service as Applied by International Administrative Tribunals* (1988)) is writing about the legal status of international civil servants; and Professor Fawcett is considering whether it would be lawful for the General Assembly, in deciding on the admission of new Member States, to take into account considerations other than those expressly listed in the Charter ("*Détournement de Pouvoir* by International Organizations", 33 *BYIL* (1957) 311 at 316). None of this has any bearing on the special powers conferred on the Security Council for the maintenance of international peace and security.

5.50. The only other authority mentioned by Libya is the decision in the *Tadic* case by the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia (105 *ILR* 453). The Applicant claims that this case is good authority for the existence of a power of judicial review. I will not dwell on the question at length, but will merely list the factors which, in our submission, distinguish that decision from this case. First, the *Tadic* case went to the whole legitimacy of the creation of the Tribunal, as a subsidiary organ of the Security Council. Given the particular nature of the Tribunal as a judicial institution with extensive powers over the rights and liberty of individuals, the challenge to the very basis of its jurisdiction had clearly to be dealt with. The Trial Chamber did so on the basis that it was not itself endowed with the legal competence to pass judgment on the Security Council's power to set up a Tribunal; the Appeals Chamber on the contrary held that the Security Council must be deemed to have that power. It is not for me to state

a view as to which was the better approach. I note simply that no such issue arises in the present case. There is no argument before us now as to whether the International Court of Justice was properly created, or as to whether it has jurisdiction over States in accordance with the Charter and its own Statute. Secondly, the International Criminal Tribunal was examining the legality of its own establishment solely for the purpose of ascertaining its own "primary" jurisdiction over the case before it. The Appeals Chamber in its decision explicitly disclaimed any more general power to review the acts of the Security Council. Thirdly, the issue in the *Tadic* case went to the extent of the Security Council's powers (was it empowered to set up a judicial tribunal with compulsory powers over individuals?) not to the manner of their exercise. With all due respect to the Applicants in this case, their challenge is not to whether the Security Council had the power to adopt the three resolutions but to the way in which it chose to exercise that admitted power in these particular circumstances. It is my submission that this aspect of the *Tadic* decision has no bearing on the present case.

5.51. Mr. President, a review function, of whatever its context, necessarily takes on the aspect of proceedings against the Council (which would certainly be true in the civil law system for an action for *excès de pouvoir* or *détournement de pouvoir*). However is the Security Council, whose decisions are *ex hypothesi* under attack, to be represented in a bilateral dispute? Who would be entitled to appear and to intervene on its behalf? Who would be the parties in review proceedings carried out incidentally in the course of adjudging a bilateral dispute? Further, who would be *bound* by the judgment? The interests of many others apart from the bilateral parties themselves would be directly affected by any decision which might be made by the Court. Are they to be heard and, if so, how?

5.52. I would like to develop this point a little further, and discuss the effect of any adverse pronouncement by the Court on the validity of a Security Council resolution. The United Kingdom has already drawn attention to the serious adverse effect on legal certainty if Security Council resolutions were to be opened to legal challenge at any time after adoption (paras. 4.26 to 4.37 of the Preliminary Objections). The Applicant cannot simply evade the question of what the effects would be on the international legal order if a power of review of the 'validity' of Security Council

decisions were to be admitted. Is the exercise of the Council's powers to be frozen until any legal challenge has been disposed of? Or is their implementation to be postponed? If so, for how long? What would be the consequence if the issue had to await the chance of a bilateral dispute arising *aliunde* — at whatever later time that might be? Suppose — to take a not wholly fanciful example — there had been in force in 1990 a Treaty of Friendship and Commerce between Iraq and Kuwait containing a compromissory clause. Would the Security Council's response to the Iraqi invasion and occupation of Kuwait have had to be put aside until this Court had been able to decide on a request by Iraq whether the economic sanctions were compatible with the commerce clauses in the Treaty? Further, if this Court has a power to review what the Council has done, would that include a power to review action which is *contemplated* by the Council? If the Applicant's submission is correct not much would remain of the Security Council's "primary responsibility" for the maintenance of international peace and security.

5.53. I will now turn, Mr. President, to the individual challenges made by Libya to the *bona fides* of resolutions 748 and 883. I, of course, have no authority to speak for the Security Council. It is, as I have already remarked, one of the peculiarities of the Applicant's position that it attempts to attack the validity of the actions of a body which cannot be represented before this Court in these proceedings. But the United Kingdom cannot pass over without comment the aspersions Libya casts on the motivation or intentions of these resolutions — or, to be more precise, on the collective motivations or intentions of the Members of the Security Council in adopting these resolutions.

5.54. This requires me to touch briefly on the insinuations underlying the claims in the Libyan response that resolutions 748 and 883 constitute, alternatively, a manifest *excès de pouvoir* or *détournement de pouvoir*. I do this without of course conceding that these concepts or their consequences exist in the law of the Charter, but simply to show that there is no basis for the criticisms which our opponents seek to cast on the Security Council.

5.55. The attempt by our opponents to apply the concepts of *excès de pouvoir* or *détournement de pouvoir* rests on a threefold allegation: that resolutions 748 and 883 were not based on the intrinsic facts of the case; that they looked — illegitimately — to the past and not to the future; and furtherly that the right to determine a threat to international peace and security

was abused simply to open the door to the exercise of compulsory powers under Chapter VII of the United Nations Charter. I would like to look at these allegations briefly in order to demonstrate that, like the rest of the Applicant's case in these proceedings, they all rest on the same fundamental misunderstanding of the nature of the Security Council's decisions with which we are concerned.

5.56. Mr. President, the first two parts of this three-part allegation go back once again to the mistaken appreciation that what the Security Council was dealing with in resolutions 731, 748 and 883 was the Lockerbie incident and nothing but that. I have already described to you however yesterday, that the United Kingdom's approach to the Council, in the light of its criminal investigation of the case and of the unsatisfactory Libyan response to the requests by the United Kingdom, France and the United States of America, was very clearly made in the broader context of Libya's demonstrated past record as a sponsor and supporter of international terrorism.

5.57. There is every indication from the debates and in the texts of the resolutions themselves that this is exactly the way in which the Members of the Security Council as a whole approached the matter. Mr. Bethlehem again dealt with that in some detail yesterday. It seems clear that, so far as the Security Council was concerned, the result of the criminal investigation into the Lockerbie incident was the "last straw that broke the camel's back".

5.58. It follows that the whole of the substantial piece consisting of 12 pages (193-205) of the Libyan Memorial and 11 pages (83-94) of the response is quite beside the point. It seems to us that our opponents in effect concede this at page 92 of the response when they accept that "*l'action dans l'affaire de Lockerbie viserait, selon le Conseil, à éviter de futurs actes terroristes*".

5.59. To evade this conclusion our opponents resort to the allegation that the Council has been inconsistent and that this inconsistency invalidates the Council's stated intention and the plain effect of its decisions. But the inconsistency argument is wholly without foundation. It rests in part on what can be no more than a supposition that the Council would not act in a similar fashion if comparable cases should arise in the future.

5.60. How the Council might act in any future case cannot be predicted in a mechanistic way. Its responses must be fitted to the circumstances of the individual problems which it faces. It cannot therefore be accepted that the binding decisions of the Security Council can be subject to

an *ex post facto* legal review of their validity on the allegation that one decision in one situation is inconsistent with another decision in another situation. That is wholly to contradict the wide-ranging discretion which the framers of the Charter conferred on the Security Council to deal with the maintenance of international peace and security on behalf of the membership as a whole, as Article 24 indicates. If the Security Council has to account after the event for the consistency of its decisions, it is in a purely political sense, to the membership at large on whose behalf it acts. I have dealt with that matter already. It is quite different from a legal review of validity.

5.61. Even on the facts, however, it is demonstrably false to suggest that the Council would never require any other State to surrender persons accused of crimes for trial in another country. In subsequent resolutions 1044 and 1054 adopted by the Council in January and April 1996 at the request of Ethiopia following an assassination attempt on the President of Egypt in Addis Ababa the Security Council called on Sudan to extradite to Ethiopia the three persons accused of the attempted assassination who were sheltering in Sudan. It subsequently determined that Sudan's failure to comply with this request constituted a threat to international peace and security and applied certain limited sanctions to Sudan under Chapter VII of the Charter. The Security Council resolutions establishing the Yugoslav and Rwanda International Criminal Tribunals both make provision for requiring States to surrender individuals, including their own nationals, for trial — in those cases by international tribunals (see S/RES/827 (1993), operative para. 4; and S/RES/955 (1994), operative para. 2).

5.62. So much for the supposition of inconsistency for the future. There is also in the Applicant's written Pleadings a bizarre allegation of inconsistency in the past, based upon the fact that the Council failed to apply sanctions to Israel over the Eichmann affair, or to France and to Sweden for refusals to extradite terrorist suspects in 1993 and 1995. But what possible connection can there be between those cases and the present one? Whatever the merits of the action taken in these cases, they are exactly the sort of isolated incident which Libya claims should *not* give rise to Security Council sanctions. The kidnapping of Eichmann was by definition a single and isolated piece of behaviour, but the Council considered it and denounced the Israeli action and indicated that a future repetition of such conduct could threaten international peace and security. Thereafter, in

the light of Israel's apology and of Argentina's acceptance that that was sufficient, the matter was allowed to rest. As regards the more recent French and Swedish cases, the actions taken by those two Governments, whether right or wrong, were most certainly not taken in direct defiance of resolutions of the Security Council! Is Libya asking us to accept that France and Sweden have records of support for and involvement in terrorism, and should be seen in the same light as Libya in this regard?

5.63. The allegation of inconsistency is another example of Libya's failure to recognize that the decisions of the Security Council were not directed solely and exclusively at the Lockerbie incident as an isolated happening but addressed the consequences of the Lockerbie incident in the light of much other material which was both directly and necessarily relevant.

5.64. I would next like to deal with the allegation that Article 39 determinations were misused so as to open the door to the Security Council's compulsory powers under Chapter VII. Once again, the United Kingdom is at a loss to know quite what this argument is intended to convey to the Court. Learned Counsel for our opponents have had close experience of the actual practice of the organs of the United Nations in their day-to-day operations. No United Nations organ acts spontaneously without being moved to do so by a Member State or group of States. The typical pattern, whether one is talking about a new agenda item or new action under an existing agenda item, is for one or more States to raise an issue and ask the organ in question to consider it. Nor do resolutions arise spontaneously; they have to be proposed by Member States. It is expected that the State or States raising an issue with action in mind will produce a draft resolution for the body to consider. This applies to the Security Council exactly as it applies to any other organ, whether it is a plenary body or a body of limited membership. What the body then does is to consider the merits of the action it is asked to take, including whether the action would be properly within its powers, to negotiate on the terms of a precise decision, and then to adopt it, if necessary by vote. In the case of the Security Council, if what is proposed is compulsory action under Chapter VII, the Council would of course be bound to consider, as well as the merits, whether that would be properly within its powers under the Charter. This is invariably the subject of lively discussion among Members of Council, both in the corridors and in the Council's regular Informal

Consultations of the Whole. The process is well documented in recent published studies of how the Council operates. If at the end of the process the Members of Council agree that Chapter VII action is necessary and appropriate, and within the Council's powers under the Charter, then of course the draft resolution for adoption will include an appropriate determination of a threat to the peace (or breach of the peace or act of aggression). There is nothing in the least mysterious or unusual about this procedure. Nor can we for the life of us see that there is anything legally questionable about it.

5.65. Mr. President, before I conclude my submissions to the Court, and ask Sir Franklin Berman to sum up, let me mention a final, but most important, aspect of this litigation.

5.66. It relates to Article 14 of the Montreal Convention on which the Applicant seeks to found the jurisdiction of the Court, and in particular to the 6-month time limit under that provision. The Court will recollect from what Mr. Bethlehem said yesterday that it was not until Members of the Security Council were actively considering what afterwards became resolution 731 that Libya first raised the question of the Montreal Convention. After the passage of the resolution, and after the Secretary-General's Special Envoy had attempted, unsuccessfully, to persuade Libya to comply with the requests to which that resolution referred, the Secretary-General prepared a report for the Security Council. On that very same day that that report was presented to the Security Council Libya filed its Application in the present case and made its Request for Provisional Measures.

5.67. Mr. President, the timing of the Libyan Application cannot go unremarked. The Court is well aware that Article 14, paragraph 1, of the Montreal Convention, upon which Libya relies to found jurisdiction, provides *inter alia* that a dispute concerning the interpretation or application of the Convention may be referred to this Court only if the parties could not settle it through negotiation and thereafter have been unable, within six months, to agree upon the organization of the arbitration contemplated by that provision. Judge Ni drew special attention to this question in his separate opinion on the Application for Provisional Measures, while implying that the time-limit would not necessarily act as a formal bar to jurisdiction under the Montreal Convention.

5.68. Mr. President, Members of the Court, let me make it plain that the United Kingdom does not wish to stand on formalism. We no longer rely on the non-fulfilment of the condition of

Article 14, paragraph 1, to oust the jurisdiction of this Court. That does not mean, however, that Libya's manifest and deliberate failure to observe the time-limits under the Montreal Convention has lost its relevance. Quite the contrary. At a time when the Security Council was actively seized of the matter and was bound, in the light of the Secretary-General's report of Libya's non-compliance with its earlier resolution, to consider what further measures might be taken to compel such compliance, Libya consciously moved to seize the Court prematurely. It is that premature seisin of the Court which now forms the basis of Libya's plea that the Security Council was wheeled into action to forestall the Court. The opposite is true. What happened in 1992 was a scarcely-veiled attempt by Libya to use the Court to frustrate the normal operation of the scheme of the United Nations Charter by seeking Provisional Measures to block further consideration by the Security Council of a draft resolution already before it. The ploy failed then, and we are left with its aftermath five and-a-half years later, dressed up now as an argument that the Court may overturn the decisions of the Council *ex post facto*.

5.69. Mr. President, Members of the Court, I thank you for your careful attention and I would now ask that Sir Franklin Berman be allowed to sum up.

The ACTING PRESIDENT: Thank you, Lord Hardie. I now call on Sir Franlin Berman to sum up the United Kingdom's arguments.

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

1. It is my task now to sum up the case for the United Kingdom in support of our Preliminary Objections. If I may remind the Court, they are under two heads: one going to the jurisdiction of the Court under Article 14, paragraph 1, of the Montreal Convention; and a further Objection on much wider grounds of admissibility, based on the existence of overriding legal obligations under binding resolutions of the United Nations Security Council.

2. I will not repeat the detailed argumentation, but will endeavour to draw together the threads and bring out the points that seem to us to be of most importance.

3. First, however, let me bring the Court back to what this case is all about. It is not about abstract issues of law, though law plays an essential part. It is not a heaven-sent opportunity to

provide the writers of text books with challenging new materials on the law of international institutions, though it does provide an opportunity for the Court to restate plainly certain fundamental principles of the United Nations Charter which are at risk of disappearing from view in a welter of imaginative argument. What this case is about is a human tragedy, a terrorist attack on a civil airliner in flight which deliberately caused the death of 270 innocent persons, and hit at the fundamental rights of international travel, commerce and communication which are a defining characteristic of our modern world. The case is about uncovering what happened and who was responsible, and more precisely it is about our duty to see to it that whoever committed this outrage is put fairly to trial, so that it can be seen that terrorism is not given refuge, or condoned. The Security Council, acting on behalf of the United Nations membership as a whole, insists on a proper trial and has laid down requirements as to its venue. We are confident that the Court, too, will make these objectives its own and, acting as the principal judicial organ of the United Nations, will lend its authority to achieving them.

4. We are however at a preliminary stage. The Court is not trying the main issue and we have explained (as we felt bound to do) the reasons why the Court might find itself in difficulties — not of its own making — in a trial of the main issue. This Court is not a criminal tribunal, and is not equipped to be a criminal tribunal, and it is assuredly not the place where the trial of the two accused will be held. So it behoves us all to avoid if we possibly can any situation in which the Court's fidelity to its judicial calling might ever come into conflict with the needs and requirements of a criminal trial. These reasons constitute, in our submission, a powerful argument in favour of the Court's deciding our Preliminary Objections as a preliminary matter before any question arises of proceeding further into the merits. We consider, in other words, that we are properly entitled to avail ourselves of the provisions of Article 79 of the Court's Rules which in its current version allows a respondent to raise not only objections to jurisdiction but also to admissibility or any other objection the decision on which is requested before any further proceedings on the merits.

5. Mr. President, Members of the Court, you will by now be very familiar with the two heads of our Preliminary Objections. But I would like to take you one stage further back. I would like

to ask you to look at what the Applicant actually seeks from the Court. And in truth it is not all that easy to discover quite what Libya is seeking. The principal text is of course the Libyan Memorial of 1993 and at the end of this Memorial Libya asks for relief of a declaratory character in terms that are often vague and imprecise. In what we take to be the main heads of its Conclusions at the end of the Memorial, that is letters *(c)* and *(d)*, Libya asks for a declaration that the United Kingdom has violated its legal obligations towards Libya under certain specified Articles of the Montreal Convention. Exactly what the core of those obligations is is not however specified and, as Professor Greenwood has shown you, once you approach those Articles close to, the asserted "obligation" under them begins to melt away, if what you are looking for is obligations laid on the United Kingdom. Certainly these Articles, as you would expect of treaty provisions, create obligations, but is it not true that in reality the obligations created by these Articles in the context of the Lockerbie case are obligations which rest on *Libya*? Nor indeed is there any contestation on our part that Libya has complied with its obligations under these Articles. But that is not, in truth, what Libya's Application is really about, as I shall show in a moment when I come to letter *(d)* of the Conclusions in the Libyan Memorial.

6. I must however make it plain that the absence of dispute about Libya's obligations under those Articles specified in the Memorial does not in any sense mean that Libya also has complied with all of its obligations under the Montreal Convention — which incidentally is what Libya asks the Court to declare under letter *(b)* of the Libyan Conclusions. Judge Schwebel posed some questions in the proceedings on the Request for Provisional Measures which highlight sharply the question whether a State whose operatives have themselves come under grave suspicion of carrying out a major and deliberate terrorist attack can be said to have complied with its Montreal Convention obligations to prevent and counter aviation terrorism. But that is not the question Libya has chosen to bring before the Court. It might arise on the merits but does not arise now.

7. I must also make it plain, though, that the United Kingdom does not at all accept that Libya has complied with all its obligations under the Convention, if only in one glaring respect: Libya has blatantly and deliberately chosen to set aside (*"écarter"*, if I may borrow a phrase) the requirements of Article 14, paragraph 1 — the settlement of disputes clause. And yet Libya comes

to the Court, basing its claim to jurisdiction on that clause, while asking the Court to waive in its favour the conditions laid down in the clause itself. Libya did not, before seizing the Court, identify a dispute with the United Kingdom under the substantive provisions of the Convention; Libya did not seek to regulate any such "dispute" by bilateral means; Libya did not make a good faith effort to have any such "dispute" settled by arbitration; and Libya paid scant regard to the six-month time-limit expressly laid down in the Article. Members of the Court will have their own views as to whether these failures, which were perfectly deliberate, would normally serve of themselves to exclude the Court's jurisdiction. As the Lord Advocate says, we do not ourselves rely on that. Our point is rather the very significant light they throw on the true nature of this case. And we hope that that light shines clearer and brighter after Mr. Bethlehem's careful chronology yesterday of happenings in New York and in The Hague at the time.

8. But this case, says Libya, is about the Montreal Convention. So let us come back to the Convention. The essence of Libya's case is that it has, under the Convention, an indefeasible right to try these two accused, which it may exercise to exclude any possibility of trial elsewhere. Professor Greenwood showed you that their whole case is built on that; if you take it away, the entire case falls down.

9. And that brings me to letter *(d)* of the Conclusions in Libya's Memorial. And here you find something very strange. You would expect to find a request to the Court to hold that the United Kingdom is legally bound to respect Libya's exclusive right to try the two accused. But no: what the final Libyan Conclusion says is that the United Kingdom is legally bound to respect Libya's right "not to have the Montreal Convention set aside by illegal means contrary to the United Nations Charter etc., etc., etc.". And that, Mr. President, we submit, that is code for "the Security Council".

10. So it is to the second head of our Preliminary Objections that I now turn, in which we ask the Court to find that, whatever the position under the Montreal Convention may be, the point at issue in this case (namely, the proper venue for the trial of the two accused) is now determined by decisions of the Security Council which bind both Parties and have overriding force. I will not,

with your leave, repeat Mr. Bethlehem's point-by-point account of what the Security Council decided. I am sure that it is plain enough from his description:

- that the decisions of the Council were a careful and considered response to a situation the Members of the Council assessed to be a threat to international peace and security;
- that that situation was in no sense exclusively the Lockerbie case in isolation, but a much wider range of Libyan international conduct; and
- that the Council was acting well within its powers in response to a subject (namely international terrorism against civil aviation) that was well within its established field of concern — and indeed in respect of a particular incident which the Council itself had previously considered.

11. I say all of this, Mr. President, not because I am empowered to speak for the Council, nor because my Government are in any way legally answerable for what the Council decided to do, but simply to forestall any further attempt by our opponents, following the line in their written pleadings, to insinuate that the Council acted wilfully or capriciously, that the Council set out to extend the normal reach of its concerns or of its powers just in order to be able to victimize Libya. If that had been any part of its intention, why on earth would the Council have given Libya, through resolution 731, the opportunity to "respond fully and effectively" before proceeding to enforcement measures? The Council was certainly not under any Cherter obligation to do so.

12. But let me come back to what some see as the issue of the reviewability of the decisions of the Security Council, though we prefer to call it the respective roles of the Court and the Council under the Charter. For our part, we do not presuppose that the Charter sets up a conflict between them, still less do we wish to provoke one. We do not believe that the drafters of the Charter had any such thought or any such intention. As the Lord Advocate told you indeed, the possibility of a form of judicial control over the decisions of the Council was directly considered at the San Francisco Conference and deliberately not adopted — not adopted because it was thought that to do so would upset the structure they envisaged, or (as we have put it to you today and yesterday) the Charter *system* for the maintenance of international peace and security. If that was true then, we cannot see that introducing it by a side door 50 years later can be any less likely to upset the

structure, or the system as it was designed to operate. What the Charter plainly envisages is that the actions of the Council and the Court, each in its own sphere, should reinforce the aim of preserving, maintaining and restoring peace and security in the world. That, we are confident, is what Judge Lachs meant by a "fruitful interaction".

13. So I have to insist, Mr. President, that this supposed conflict at the submerged core of the United Nations Charter is not part of our analysis; it is our opponents who seek to put it before the Court, not us. And we maintain that their doing so is a direct and logical consequence of the way this case was introduced in 1992: first an attempt to use Provisional Measures as an injunction against the Security Council, now an attempt to get the Court's retrospective approbation of Libya's defiance of decisions taken by the Council more than five years ago. The chronology which Mr. Bethlehem put before you is so telling, its connection (as the Lord Advocate showed) with Libya's wilful disregard of what Article 14, paragraph 1, of the Montreal Convention expressly lays down is so compelling, that we put it to the Court that only one conclusion can be drawn.

14. Mr. President, if there ever were to be a worthy case for considering the Court's judicial role in relation to decisions of the Security Council, it is not this one. Of course one can see that the Court might hesitate and require the clearest demonstration of any allegation that the Security Council had consciously and deliberately set out to extinguish established treaty rights. But that is not the case here; not the case twice over — it is not the case here because the rights Libya claims to have under the Montreal Convention are, as we put it to the Court at the Provisional Measures phase, illusory, and it is not the case here because what the Security Council decided was the normal exercise of its responsibility under the Charter to determine what measures were an apt response to a threat to international peace and security. I refer the Court to Professor Greenwood's analysis of our opponents' wholly misleading claims under the Montreal Convention and to Lord Hardie's and Mr. Bethlehem's analysis of our opponents' wholly misleading accounts of what the Council decided and why. So the Court need give no credence to the plea that Libya is the holder of clearly established treaty rights which have been unjustly taken away from it.

15. I will not say any more about the general and abstract issue of the reviewability of resolutions of the Security Council. The Lord Advocate has shown you that this thesis, seductively

dangled before the Court by our opponents, bristles with legal difficulties which our opponents simply ignore by their silence. He has also shown you, however, that the omission of a power of judicial review from the Charter was not the result of some accidental oversight, but that that does not mean that the Members of the Council for the time being are under no Charter control or are out of control.

16. Mr. President, Members of the Court, we have done our level best to explain, through the most authentic voice possible, that of the Lord Advocate himself, what the Scottish criminal procedure is, and the manifold guarantees it embodies for the protection of justice and of the rights of the accused. And the Lord Advocate has indicated, again with care and precision, the special arrangements the competent authorities are willing to make to recognize and meet the legitimate international interest in the process. The Security Council entertained no doubts that the accused would get a fair trial in Scotland. Nor should this Court.

17. Mr. President, Members of the Court, that concludes our opening case and I thank you for your attention.

The ACTING PRESIDENT: Thank you Sir Franklin. The Court will now adjourn for 15 minutes and will resume to hear the submissions of the United States of America.

The Court rose at 11.25 a.m.