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International Court of Justice

THE HAGUE

Cour internationale de Justice

LA HAYE

YEAR 1997

Public sitting

held on Monday 20 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 20 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
		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
Rezek, juges
Sir Robert Jennings
M. El-Kosheri, juges *ad hoc*

M. Valencia-Ospina, greffier

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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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as Advisers.

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

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Mr. Daniel Bethlehem, Barrister, London School of Economics,

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Mr. Anthony Aust C.M.G.,

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Mr. Patrick Layden T.D.,

Mr. Norman McFadyen,

Ms Sarah Moore,

Ms Susan Hulton,

as Advisers,

Ms Margaret McKie,

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M. Patrick Layden, T.D.,

M. Norman McFadyen,

Mme Sarah Moore,

Mme Susan Hulton,

comme conseillers,

Mme Margaret McKie,

comme secrétaire.

The ACTING PRESIDENT: Please be seated. The Court meets today to resume its hearings in the cases 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 *(Libyan Arab Jamahiriya* v. *United States of America)*. The first round of hearings was completed last week and today we commence the second round. The Court will first hear the oral submissions of the United Kingdom and thereafter those of the United States. Judge Parra-Aranguren is unable to be present during this round of pleadings for reasons which have been duly explained to me and Judge Kooijmans will also not attend. I now call upon the United Kingdom to commence its oral submissions and I give the floor to Sir Franklin Berman.

Sir Franklin BERMAN: Mr. President, Members of the Court, may it please the Court. Our opponents presented their case to the Court on Friday, and on examination it turns out, despite its rich mixture of law, fact and pure fiction, to be less complex than might have been thought. The United Kingdom can therefore be quite brief in its response. And this is what we intend to do this morning, confining ourselves as before to the essentials. The Court will wish to note that we maintain all of the arguments in our written Preliminary Objections, even where these have not been specifically reiterated in these oral proceedings. The purpose of oral proceedings as we understand them is, however, to narrow the issues between the Parties and to focus the attention of the Court on what those issues really are. That will be our approach.

I begin therefore by restating the United Kingdom's case in its essential elements. I do so with added zest because our opponents dangled before the Court on Friday an alternative version of the United Kingdom's case which corresponds neither to our intentions nor indeed to the way we have formulated them both in writing and orally. So, if the Court will allow me to be the authentic interpreter of the United Kingdom's arguments, they are as follows.

We start from the essential heart of the matter: that a terrorist crime of this magnitude naturally and inevitably gives rise to the demand that its perpetrators be found and put on trial. Moreover a terrorist crime of this magnitude, directed at international civil aviation, naturally and inevitably touches the interests of the international community as a whole as well as those of the individual States most directly affected. Libya appears to accept this; we hope so. It is common

ground that any trial must be fair and must be seen to be fair: fair of course to the accused but fair also, so we say, to the interests of the victims and their families, to the States affected and to the wider international interest.

But that is the point at which the paths diverge. Libya has brought before this Court the proposition that the Montreal Convention gives Libya the *legal right* unilaterally to insist that the trial must be held in Libya to the exclusion of all other venues.

May I remind the Court that that assertion is the very foundation stone of Libya's case? If you take away the Libyan claim to an exclusive right to try the accused, their entire case falls down.

Mr. President, the Court need not concern itself with the political acceptability of alternative Libyan offers of trial in a third country. They are not of course in any way consistent with Libya's insistence on an exclusive right to try in Libya which underpins its claims before this Court. Nor is the Court required to consider counsel's claim that large numbers of States — some of whom voted for the Security Council resolutions in question — support Libya's political position. Whatever these matters may be, they are assuredly not matters that arise under the Montreal Convention. Libya's attempts to bargain with the Security Council over the implementation of its resolutions is clearly a matter for the Council not the Court.

But I return, Mr. President, to the United Kingdom's own case. In their opening argument, learned counsel opposite misrepresented our position in a number of respects. We have never said, for example, that the resolutions of the Security Council "justified violations of the Montreal Convention" or "rendered that Convention inapplicable". We have never said that, in taking Libya's support for international terrorism to the Security Council, we "substituted a dispute between the Council and Libya for an earlier bilateral dispute" between ourselves and Libya about the Montreal Convention. Nor, despite Professor Brownlie's constant repetition of the phrase, have we ever claimed that the decisions of the Security Council enjoyed an "immunity" from the jurisdiction of the Court; the word appears nowhere in our Preliminary Objections — nor indeed, so far as we are aware, does it appear in the international jurisprudence either.

What we do say *firstly* is that the Court can have jurisdiction in this case only in respect of a dispute which is between the United Kingdom and Libya and which is a dispute about the

interpretation or application of the Montreal Convention. Linked to that is our *second* submission, that it is for Libya to show that such a dispute exists, but that there is not — and never has been — any such dispute before the Court in these proceedings. *Thirdly*, we say that, even if there had been such a dispute, the effect of the Security Council resolutions is to determine with overriding force what the Parties are required to do, so that the Libyan Application is inadmissible.

Those are accordingly our three submissions. They will be developed succinctly this morning, the first two by Professor Greenwood and the third by the Lord Advocate. The Lord Advocate will also recall some aspects of a trial in Scotland, to dispose of some allegations made by our opponents. These three submissions represent the true essence of the case before the Court and we invite our opponents too to confine themselves to the essential issues.

Before handing over to Professor Greenwood, Mr. President, I propose to deal (again succinctly) with the preliminary nature of our Objections and the reasons why the Court should decide them now without further proceedings on the merits. Our opponents have asserted that they are not genuine Preliminary Objections within the meaning of Article 79 of the Rules, and I thought that Professor David came close on Friday to suggesting that they were an abuse of the process of the Court. Presumably he had not read the first paragraph of Article 79 which lays down as a general rule for all cases that the time-limit for making a preliminary objection is that fixed for the delivery of the counter-memorial. Perhaps he also failed to notice paragraph 42 of the Court's Order of April 1992 on Interim Measures in which the Court expressly stated that its decision then leaves unaffected the rights of either Party to submit arguments relating to jurisdiction or other preliminary questions.

Now, Article 79 of the Rules, in its present form, foresees preliminary objections on grounds of *jurisdiction*, on grounds of *admissibility*, and adds "or other objection the decision upon which is requested before any proceedings on the merits". "Admissibility" is not defined, but left as a flexible concept, and the addition of the words which I quoted a moment ago show that the purpose was to leave the Court a broad discretion to dispose of a case before proceeding to the merits, but naturally only if the Court itself found that the Respondent's request raised a preliminary issue which could and should be disposed of as such. There can therefore be no room for doubt that the

United Kingdom's two Objections, one on strictly jurisdictional grounds and the other on wider grounds of admissibility, are squarely within the scope of the Rule. I refer the Court to the extensive treatment of the matter in Professor Rosenne's book on *The Law and Practice of the International Court* (3rd ed., Vol. II, Chap. 13). And the Court will find the references in the text we have given to the Registrar. I may say that the references are to the third edition of the book whose publication only a few days ago will have given so much pleasure to so many of us in this courtroom today. Mr. President, it requires no further establishment that a plea that the Applicant's case does not fall within the jurisdictional clause is by definition a preliminary objection. Professor Rosenne suggests an even wider definition from the practice of the Court under which most objections of a preliminary character, including those of the type of our second Objection, could be classed as "jurisdictional" (*ibid.*, at pp. 852 *et seq.*). We do not ourselves insist upon this characterization in view of the wide scope offered by the remaining language in paragraph 1 of the Rule. The request by the United Kingdom, as Respondent, that the Court decide these objections before further proceedings on the merits is based on grounds of jurisdiction and admissibility which suffice to bring them within Article 79. It remains only to show that the Court can properly deal with them as a preliminary matter and that it should do so.

I do not propose to take any of the Court's time in arguing these propositions in respect of our first objection, that which goes to the absence of jurisdiction under the Montreal Convention. It is trite law that the Court's contentious jurisdiction is based on consent, from which it follows that, as a matter of principle, a respondent State should not be obliged to defend itself before the Court against complaints over which the Court has no jurisdiction. The United Kingdom's jurisdictional objection is based largely on the absence of a relevant "dispute" and the Court has had ample opportunity, in accordance with its recent jurisprudence in the *Genocide* and *Oil Platforms* cases, to hear argument on the interpretation of the Montreal Convention sufficient to enable it to decide on whether a relevant dispute exists or not. There is moreover, in our submission, a sufficient element of uncontested factual material already before the Court at this preliminary stage to enable it to relate its provisional interpretation of the Montreal Convention to the case before it.

The broader objection as to "admissibility" is based upon the terms and effect of specified resolutions of the Security Council which, in our submission, render the relief Libya seeks without object. The terms of the resolutions themselves have been fully argued before the Court, as have the provisions of the United Nations Charter which lend them their specific effect on the subject matter of this case. The Court is not in need of any further material deriving from argument on the merits in order to enable it to interpret the decisions of the Security Council or determine their effects.

We thus maintain that the Court may properly determine both objections as preliminary questions.

We maintain also, Mr. President, that there are good reasons why the Court should do so. This submission goes beyond the general desirability, in the interests of a smooth flow of the Court's judicial business, of avoiding unnecessary merits proceedings likely to be lengthy and costly to both Parties and to the Court. It depends also on the considerations we have already put before the Court in my opening statement last week why the handling of evidentiary material in a merits phase of this case might raise serious problems, both for the Court itself and in relation to the common objective of bringing about a trial of those accused of perpetrating the Lockerbie bombing. We reiterate the real importance of those considerations as a factor conducive to disposing of the case now, if our preliminary objections are well-founded as we submit they are. Beyond that still, Mr. President, lies a further factor. As we have shown, this case has been turned into a well-publicized challenge to the exercise by the Security Council of its Charter responsibilities. Its continuation longer than need be therefore has a potentially subversive effect on the integrity of the Charter system. It is, moreover, serving as an excuse for Libya not to confront the need once and for all to comply with what the Security Council, acting as the Charter says on behalf of all member States, has decided Libya must do. The Court is in a position to make its own contribution to facilitating the trial of the accused by removing artificial obstacles that have been placed in the way.

For these reasons we ask the Court, as a responsible exercise of its judicial function as the "principal judicial organ of the United Nations", to uphold these Preliminary Objections, and not to join them to the merits as we infer Libya is now asking the Court to do.

Mr. President, I have two further points to make before I conclude.

The first relates to the motivation behind the whole attempt by Libya to seize the Court of this case. I would like to draw the Court's attention once again to the deep significance of the precise chronology of events presented by Mr. Bethlehem last week. In particular I ask you to note: Libya's failure to mention the Montreal Convention at all in its responses to the United Kingdom's requests for surrender of the two accused; its failure to indicate at any time that the letters from the Libyan investigating magistrate were the invocation of an "obligation" under the Montreal Convention; the fact that the very first mention of the Montreal Convention came not in a communication to the United Kingdom but in one to ICAO; the fact that the first mention of the Convention came after the Security Council was already in the process of considering what became resolution 731; the fact that Libya's so-called request to the United Kingdom for arbitration under Article 14 came a mere one week later, was the very first mention of the Convention in the dealings between the Parties and made no attempt to isolate the terms of a Convention dispute between them; the fact that Libya's Application to the Court followed a mere six weeks later in blatant disregard of the conditions under Article 14, paragraph 1; the fact that that Application was the vehicle to carry an application for an indication of provisional measures at a time when the Council was known to be considering further action; and the fact that the Applicant admitted in the hearings on provisional measures that its purpose was to secure an order which would require the United Kingdom and the United States to prevent further action in the Council.

Nothing that counsel for Libya have said explains these facts or controverts them. We thus maintain our assertion that these entire proceedings were conceived of, not in order to regulate any supposed "dispute" under the Montreal Convention, but as an attempt to subvert the operation of the United Nations Charter and the special role conferred by it on the Security Council. Now, more than five years after the Council has exercised those responsibilities so as to determine what the Parties must do, the Court is confronted with arguments by which (as I said last week) Libya seeks the Court's retrospective validation of its defiance of the Security Council.

Finally, Mr. President, Members of the Court, I have to come back, I regret, to the question of the threat to use force and the wholly unwarranted accusations made against my Government.

If the statements made by counsel in that regard on Friday were intended as an explanation or an apology, they fell far short of what the circumstances require. It will simply not do, Mr. President, to repeat, parrot-fashion, a series of stale allegations, either old or wholly removed from this case, as if the repetition constituted proof. Nor does it do to offer ambiguous public utterances as proof of so serious an allegation as an imminent threat to use force in the face of the observable *facts*, and the facts are not only the total absence of the use of force despite Libya's failure for more than five years to fulfil what counsel characterize as our "dictatorial demands". The facts reside in what we did. What we did was to refer the issue to the Security Council and to concentrate our diplomacy since then on insisting on the implementation of the decisions the Council took. That is *precisely* what the United Nations Charter demands of its member States. Counsel may perhaps vouchsafe to the Court in what way it was illegal. Perhaps he will come before the Court and allege that the United Kingdom threatened to use force against the other Members of the Security Council in order to compel them to vote for the draft resolutions? If so, I hope that he has some proof. But if he says (as he did on Friday) that the alleged threat of force "is central to his case", and those are counsel's actual words, then we trust that the Court will take due note of that. Mr. President, that concludes my opening argument. May I now, with your leave, invite Professor Greenwood to continue with the Montreal Convention arguments?

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

Mr. GREENWOOD:

Issues Pertaining to Jurisdiction under the Montreal Convention

Introduction

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

2.1. As Sir Franklin Berman has explained, I shall respond to the principal arguments raised by counsel for Libya regarding the alleged existence of a dispute falling within Article 14, paragraph 1, of the Montreal Convention. At the end of his submissions on Friday morning, Professor David summed up Libya's arguments on this point in four propositions:

First, that the issues of the surrender and trial of the accused were essentially matters falling within the scope of the Montreal Convention;

Secondly, that the right claimed by the United Kingdom to take the matter to the Security Council did not set aside *(écarter)* the application of the Convention;

Thirdly, that the treatment of the case by the Security Council did not transform a dispute between the United Kingdom and Libya into one between the Security Council and Libya;

Finally, Mr. President, Professor David alleged that the jurisdiction of the Court also extends to matters "closely connected", as he put it with the dispute under the Convention[1].

The Misstatement of the United Kingdom Argument regarding the Effect of Security Council action upon the "Dispute"

2.2. Mr. President, the last two points are ones of little substance and can conveniently be cleared out of the way first. Professor David's third argument, that the actions of the Security Council have not transformed a dispute between Libya and the United Kingdom into one between Libya and the Council, is based upon a misrepresentation of the United Kingdom's submissions, a misrepresentation in which Libya has persisted from the outset. The United Kingdom has never argued that the actions of the Council transformed a dispute between the two States into a dispute between Libya and the Council. That is the false thesis that the Council acted to "institutionalize" a bilateral dispute and I made clear last Monday in my submissions then that this was no part of the United Kingdom's case[2].

2.3. What the United Kingdom does say, Mr. President, is that, even if there were a dispute between the United Kingdom and Libya regarding the application of the Montreal Convention — and, of course, our principal contention is that no such dispute has ever existed — even if there were such a dispute the decisions of the Security Council render Libya's application in respect of that dispute inadmissible. That is because the Council's decisions are dispositive of the issues raised by that application. We also say that in so far as Libya's real complaint is about the effect of the decisions taken by the Council — and the oral arguments last week have shown that this is

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[1]CR 97/20, pp. 58-59, para. 4.44.

[2]CR 97/16, p. 74, para. 4.56.

indeed at the heart of Libya's case, much as counsel for Libya has tried to hide the fact — those decisions are the responsibility of the Council itself and not that of individual Members of the Council. We made this point both in our written argument[3] and in our oral submissions last Monday[4]. And we note that counsel for Libya did not contest that proposition.

2.4. I also note, in passing, the misunderstanding at the heart of Professor Suy's submission that the Security Council resolutions could not affect the "autonomy" of Article 14, paragraph 1, of the Montreal Convention. The United Kingdom is not suggesting that the decisions of the Council somehow suspended or set aside Article 14. They were plainly not intended to do so and there is no need, Mr. President, to borrow from the law of arbitration any concept of autonomy to establish that Article 14 remains in effect between the United Kingdom and Libya. It does; and that is precisely the basis on which we, as well as Libya, have been arguing this case. But Article 14 is *not* autonomous. It depends for its operation upon the existence of a dispute about the interpretation or application of one of the *other* provisions of the Montreal Convention. If the decisions of the Council render an application regarding the operation of those other provisions inadmissible, then there is nothing on which Article 14, paragraph 1, can bite. As the United Kingdom has already said, Mr. President the mere invocation of Article 14 does not create a dispute justiciable under that provision[5].

The Attempt to Expand Article 14, Paragraph 1, to Cover Alleged Violations of Other Rules of International Law

2.5. Mr. President, Professor David's fourth proposition can also be disposed of quite briefly, although for a different reason. The argument that the Court's jurisdiction under Article 14, paragraph 1, of the Convention extends beyond a dispute concerning the interpretation or application of that Convention and embraces alleged violations of other rules of international law which he maintains are closely connected with such a dispute is quite simply wrong. It ignores the fact that the foundation of the Court's jurisdiction in contentious cases is the consent of the parties. The

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[3]Preliminary Objections of the United Kingdom (June 1995), paras. 3.28-3.31.

[4]CR 97/16, pp. 74-75, paras. 4.57-4.59.

[5]CR 97/16, p. 68, para. 4.36.

need for a consensual basis for the jurisdiction of the Court is fundamental and it has implications both for the existence and the extent of the Court's jurisdiction. These implications were evident in the Court's decisions in the recent *Genocide* case, in which the Court insisted that its jurisdiction, under a clause similar to Article 14, paragraph 1, of the Montreal Convention, did not extend to disputes regarding the application of treaties *other* than that in which the compromissory clause was located. As was explained in one of the separate opinions:

> "The Court can only act in a case if the parties, both applicant and respondent, have conferred jurisdiction upon it by some voluntary act of consent . . . Whatever form the consent may take, the range of matters that the Court can then deal with is limited to the matters covered by that consent." [6]

Libya's disgraceful and unsubstantiated allegations of threats to use force, to which Sir Franklin Berman has already referred, clearly fall outside the scope of the act of consent contained in Article 14. So too, Mr. President, do Libya's complaints — to which Professor David made no reference but which are set out in Libya's written pleadings — that the imposition of sanctions upon Libya was unfair and discriminatory. Of course, rules of international law existing outside the Convention are relevant to these proceedings, as I shall explain in a minute, but there is a fundamental difference between saying that and using rules outside the Montreal Convention as the foundation for a claim, when the only basis for the Court's jurisdiction is Article 14 of the Montreal Convention[7].

Libya's Argument that the United Kingdom has Sought to Set Aside *(écarter)* the Montreal Convention

2.6. So much for that. Mr. President, the essence of Libya's arguments is to be found in Professor David's first two propositions. It is these which address the fundamental question of whether there is a dispute between the United Kingdom and Libya which falls within Article 14, paragraph 1, of the Montreal Convention. The two points are inextricably linked and they represent the conclusion of a series of steps in reasoning which are fundamentally flawed, because they rest upon a misunderstanding both of the propositions of law involved and of what took place between the 14 November 1991 and 3 March 1992.

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[6]Separate opinion of Judge *ad hoc* Lauterpacht, *I.C.J Reports 1993*, p. 412. See also the Orders of the Court at pp. 19 and 344-346.

[7]CR 97/16, p. 58, paras. 4.8-4.9.

2.7. The first step in the reasoning is that the offences with which the accused are charged fall within Article 1 of the Montreal Convention. Now this is a necessary step in Libya's reasoning but it is not in itself sufficient because the United Kingdom does not contest that the charges, if proved, would disclose an offence falling within Article 1. There is therefore no dispute on this point.

2.8. The second step in the reasoning is that the Convention establishes a mechanism, as Professor David put it, a set of "rules of the game" for dealing with acts of terrorism of this kind and that that mechanism was applicable between Libya and the United Kingdom. Again, Mr. President, there is no dispute on this point.

2.9. The third step in the reasoning is that the Convention is said to constitute the exclusive mechanism for addressing terrorist attacks upon civil aircraft, with the result that there is said to be a dispute because Libya sought to apply that mechanism, while the United Kingdom did not agree to do so but instead attempted to set aside, (or as my learned opponents put it *écarter*) the Convention. It is here that the process of reasoning breaks down, Mr. President.

2.10. It breaks down, first of all, because it assumes that international law consists of a series of entirely self-contained codes, each of which deals with a particular issue and none of which has any connection with the others. In effect, international law is represented as a multitude of sealed boxes with different labels, such as air terrorism, threats to international peace and so on. But Mr. President, international law is not like that at all. It is a *system*, which has to be seen as a whole. Indeed, Professor David himself said as much later in his speech, when he commented that: "*la convention de Montréal ne peut être dissociée du droit international général*"[8], — a sentiment, Mr. President, which is not easy to reconcile with Professor David's earlier approach to the Montreal Convention.

2.11. At the heart of the system of international law is the Charter of the United Nations, binding on all member States. The provisions of the Charter on threats to international peace are not confined to a box separate from that containing the rules on air terrorism. Nothing in the text, the purposes, the history or the subsequent practice of either the Charter or the Montreal Convention

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[8]CR 97/20, p. 57, para. 4.41.

supports such a contention. To see the Montreal Convention in the context of that system of international law and to act accordingly is not to set aside the Montreal Convention, still less is it to violate that Convention.

2.12. This step in Libya's reasoning is also flawed, Mr. President, because it ignores the principle in the *Oil Platforms* case, to which I referred in the first round[9] and which Professor David accepted[10], that a dispute about the *application* of a treaty does not come into being merely because two parties differ over an abstract proposition about the status of the treaty. What is required is that the conduct of a party be capable of being measured by reference to that treaty.

2.13. The same is true of the next step in Libya's reasoning: this next step is that Articles 5, paragraph 2, 7 and 8 paragraph 3, of the Montreal Convention give Libya an exclusive right: the right to choose whether to extradite an accused person or refer the case to its own prosecuting authorities. What counsel for Libya sought to portray as a right is in fact an obligation — if a State does not extradite an accused person, it comes under an obligation to set in motion its prosecution machinery. The other provisions to which counsel referred are irrelevant for the reasons I gave in the first round of submissions. The obligations which Article 7 imposes upon Libya cannot be seen in isolation from Libya's obligations under the Charter and the overriding status which the latter possess by virtue of Article 103 of the Charter. Moreover, if one looks at the conduct of the Parties by reference to those provisions of the Convention, it becomes clear, Mr. President, that there is no dispute regarding their application. In particular, the United Kingdom has not accused Libya of having violated Article 7, and Article 7 imposes no obligations upon the United Kingdom.

2.14. With regard to Article 11 to which Libya also refers, we made our submissions in the first round. In reply, our opponents, Professor Salmon and Professor David were reduced to arguing that the letter from the Libyan judge to the Attorney-General for England and Wales on 27 November 1991, though it made no mention of the Montreal Convention, was *impliedly* based on that provision. And that the United Kingdom's lawyers, to whom our opponents paid an elegant complement, would of course have recognized it as such. Now, as it happens, Mr. President, under

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[9]CR 97/16, p. 59, paras. 4.11-4.12, and p. 67, para. 4.34.

[10]CR 97/20, p. 38, para. 4.8.

our law, assistance in criminal proceedings is perfectly possible without a treaty. The United Kingdom's lawyers thus have no reason to assume that the Libyan letter was based upon the Montreal Convention or upon any other treaty. But that is not the point. The point, Mr. President, is that if, as Libya now asks the Court to rule, the Montreal Convention was an exclusive mechanism, it is, to say the least, surprising that no Libyan official made it clear, then or subsequently, that this letter was the invocation of an obligation claimed to be due from the United Kingdom under that Convention.

Libya's Failure to Identify an Act on the Part of the United Kingdom "Setting Aside" the Convention

2.15. And this leads us, Mr. President, to the most fundamental flaw of all in the Libyan reasoning. Libya's argument that there is a dispute because the United Kingdom has sought to set aside the Montreal Convention, to *écarter* the Convention fails to answer the all-important question: what is the act by which the Convention was *écartée*? What is it that the United Kingdom is said to have done which purports to set aside, let alone violate the Convention? And it is Libya's failure to find a satisfactory answer to that question which is the fatal weakness in the argument which counsel for Libya deployed last Friday. The answer cannot be the United Kingdom's request that Libya surrender the accused for trial in Scotland. Counsel for Libya rightly accepted that States can agree to substitute a mechanism of their choice for that contemplated by the Convention.[11] Well, if this would not be contrary to the Convention, nor can a request to do so be contrary to the Convention. And if a State may make one such request, it may repeat that request.

2.16. So the alleged act of "setting aside" must lie elsewhere. In its pleadings, and especially in its argument in 1992, Libya tried to argue that it was the threats of force of which it accused the United Kingdom. But the emptiness of Libya's argument on this point has already been demonstrated.

2.17. In fact, it was Professor David who at last confessed what it was that lay at the heart of Libya's case. According to him, it was the United Kingdom's action in going to the

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[11]CR 97/20, p. 44, para. 4.14.

Security Council and placing the matter before the Council which amounted to a violation of the Montreal Convention or an attempt to set that Convention aside[12]. Now, Mr. President, that contention is quite simply nonsense. Counsel for Libya asks you to turn the entire system of international law, the constitution of international society, on its head. Instead of the Charter being at the apex of the pyramid, it is to be placed at the base. Instead of the Security Council being entrusted with powers to take binding decisions for the maintenance of international peace and security which all States can be required to implement and which override obligations under other treaties, Libya contends that the powers of the Council and the right of States to take matters to the Council are subject to the "mechanisms" created by other treaties and that those treaties — for Montreal is, of course, only one among many to which this line of argument would apply — those treaties impliedly prohibit a State, even a Member of the Security Council, from raising with the Council conduct which it considers may be a threat to international peace if that conduct falls within the scope of one of those treaties. This conclusion is all the more remarkable because Professor Salmon had already told the Court that it was Libya which first referred the Lockerbie bombing to the Council in November 1991[13].

2.18. Mr. President, in an attempt to justify that remarkable conclusion, counsel for Libya was forced to adopt a series of increasingly unsustainable propositions. First, we had the argument that neither the Charter nor the Montreal Convention intended to confer upon the Security Council the jurisdiction to deal with individual acts of terrorism. Well no, Mr. President, but the Charter did entrust the Council with the power and the responsibility to deal with threats to the peace, whatever form those threats might take. The Charter did not, and the Montreal Convention could not, remove that power and that responsibility merely because the threat took the form of terrorist acts rather than action by regular armies. We have already shown that the Security Council had already been concerned with terrorism in general and the Lockerbie incident in particular[14].

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[12]CR 97/20, p. 43, para. 4.10.

[13]CR 97/20, p. 28, para. 3.11.

[14]CR 97/16, pp. 42-43, paras. 3.10-3.15 (Mr. Bethlehem).

2.19. Then we had the suggestion that the present case was different because this was not a case of a "real" threat to international peace and because the facts here had not been fully proved at the time the Council acted. This argument will be dealt with at length by the Lord Advocate. Suffice it to say for now that it depends first upon the wholly untenable thesis that the Council can act only when all relevant facts have been proved before it and, secondly, upon the Court being asked to substitute its view of what constitutes a "real" threat to international peace and security for that of the Council. There is ample authority for saying that this is something the Court will not and should not do. I refer the Court to your own statement to that effect, Mr. President, in your opinion in the 1992 proceedings[15].

2.20. Next, counsel for Libya repeated the argument that the Montreal Convention must take priority over the Charter because it is *lex posterior* and *lex specialis*. The United Kingdom has already dealt with this argument in the first round of oral submissions and I respectfully refer the Court to what was said there[16].

2.21. Finally, Professor David argued that the United Kingdom had acted unlawfully in going to the Council, because, so he said, Article 33, paragraph 1, of the Charter required the United Kingdom to exhaust the possibilities for peaceful settlement envisaged by Chapter VI — and in particular the "mechanisms" contained in the Montreal Convention before seeking action from the Council. This argument rests on two premises: first, that international law requires that a State *begin* by applying the relevant *lex specialis* (in Libya's view the Montreal Convention) and, secondly, that because Article 33, paragraph 1, refers to disputes "the continuance of which is likely to endanger the maintenance of international peace and security", the obligation in Article 33 to seek a solution of a dispute by the means set out therein is not limited to disputes being dealt with under Chapter VI.

2.22. Mr. President this argument betrays a misunderstanding of the Charter. It is clear from paragraph 2 of Article 33 and Articles 34 and 35 that the Council is given a wide discretion to investigate both disputes and situations which might lead to international friction and wide

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[15] *I.C.J. Reports 1992*, p. 3, at p. 66.

[16] CR 97/16, pp. 64-66, paras. 4.26-4.30.

discretion to decide what action to take if it finds that the continuance of a dispute or situation is likely to endanger international peace and security. Article 36 empowers the Council "at any stage" of a dispute or situation which is likely to endanger international peace and security to recommend ways of resolving it. And Article 37 places an obligation on parties to a dispute which cannot, for whatever reason, be settled to refer it to the Council.

2.23. Moreover, Chapter VI has to be read together with Chapter VII, for the Council has responsibilities under both Chapters. The reason is obvious. It is better for parties to a dispute to settle their differences peacefully, with or without help from the Council. But, Mr. President there is nothing in either Chapter VI or Chapter VII which requires a State, or the Security Council, to proceed through any of the procedures laid down in Chapter VI before the Council can take action under Chapter VII.

2.24. The two Chapters have the same objective — the maintenance of international peace and security — but employ different means. There is no procedural link between them and no hierarchy which places Chapter VI above Chapter VII. When a State considers that a situation or the consequences of a dispute threatens international peace and security, the Charter gives it an unrestricted right to ask the Council to take action under Chapter VII. Whether the Council does so is, of course, a matter for the Councils discretion.

2.25. In reality, Mr. President, it is the fact that the Council did take such action in this case and imposed obligations upon Libya — obligations which would not otherwise have existed — which is the real object of Libya's complaint. Five and a half years ago, it was the desire to prevent the Council from taking action which led Libya to come to this Court. Today, putting an end to the effect of those decisions remains Libya's real objective. But, of course, Libya cannot say in terms that this is so, for that would be fatal to its argument that the Court has jurisdiction. Libya's increasingly desperate attempts to read the Montreal Convention as though it contained an implicit prohibition on recourse to the Security Council are undertaken in order to get round that fundamental problem.

2.26. Mr. President, the Lord Advocate will now address this issue in relation to the Security Council resolutions themselves. I thank you for your attention and ask you to invite Lord Hardie to address you.

The ACTING PRESIDENT: Thank you, Professor Greenwood. I give the floor now to the Lord Advocate of Scotland, Lord Hardie.

Mr. HARDIE:

Issues Pertaining to the Involvement of the Security Council

3.1. Mr. President, Members of the Court, on Friday, counsel for Libya, Professors Suy and Brownlie, made a number of assertions concerning the involvement of the Security Council — its nature, the substance of what was decided and the competences of the Court in respect thereof. I do not propose to address all the issues they raised; nor do I think this is warranted. I cannot, however, let the misrepresentation of the United Kingdom's argument by counsel for Libya go unremarked. The significant inconsistencies in the Libyan position are also matters which warrant attention.

3.2. In opening, Professor Brownlie characterized the United Kingdom argument on the Security Council as one of "immunity". The United Kingdom, he says, presents an argument of "immunity from judicial examination of any kind"[1]. The question for the Court, in his view, is whether an application based on "normal legal grounds" is to be rejected "by reason of an alleged immunity of the decisions of the political organs from judicial scrutiny"[2].

3.3. This misrepresents the United Kingdom's position and completely ignores the issues of substance. The United Kingdom has *not* presented an argument of "immunity". The United Kingdom does *not* hold the view that acts of the Council are immune from scrutiny. It does *not* take the view that the Council is free to act without restraint or control. On the contrary, as I indicated in my submissions last week[3], the Council *is* subject to controls. Those controls operate,

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[1]CR 97/21, at p. 34, para. 9.

[2]CR 97/21, at p. 34, para. 5.

[3]CR 97/17, at pp. 13-15, paras. 5.19-5.22.

however, within the political rather than the legal sphere. The Council is responsible to its membership and to the membership of the United Nations generally. The question is not, as Professor Brownlie would seek to cast it, whether this raises justiciable or non-justiciable issues. Rather, it is the competence of the Council to determine the existence of a threat to the peace pursuant to Article 39 of the Charter and its competence to take action under Chapter VII, as is required of it by Article 24, paragraph 1, once such a determination has been made. At its most essential, the question with which the Court is faced is whether, under the Charter, the organ responsible for assessing threats to the peace and deciding upon the action to be taken to meet such threats is to be the Security Council, operating within the political sphere, or whether the Court is to be entitled to substitute, *ex post facto*, its judgment on such matters.

3.4. The distinction Professor Brownlie seeks to draw between applications based on, as he terms it, "normal legal grounds", and those in which an applicant seeks to impeach the *vires* of Security Council resolutions more directly, also ignores substance in favour of form. If I may borrow Professor David's analogy of the painting by Magritte of "The Pipe": if the artist disguised the pipe so that even a child could not recognize it as a pipe, people might be deceived into believing him when he said it was not a pipe. But the reality is that the pipe is still a pipe however well concealed or disguised. So too, the substantive review of Security Council decisions. Substantive review of decisions of the Security Council is substantive review of decisions of the Security Council, no matter how this is dressed up or whether this occurs incidentally or is the principal focus of the application. Professor Brownlie's argument also singularly fails to address the repercussions of such review, an issue I addressed to the Court in my submissions last Tuesday[4]. How are the Council's views to be represented in a bilateral dispute between States? Who would be *bound* by the judgment? Is implementation of the Council's decision, or the exercise of its powers, to be frozen until the outcome of the legal challenge is known? On all of this, Libya is silent.

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[4]CR 97/17, at pp. 24-25, paras. 5.51-5.52.

3.5. Then there is the argument that it is "legally impossible to limit the judicial function to the issue of the formal validity of resolutions"[5]. Unlike counsel for Libya, the United Kingdom sees no impossibility, or even great difficulty, in distinguishing between the two. Let me illustrate this by using an example drawn from one of the measures cited by Mr. Bethlehem last week. The Presidential Statement of 20 June 1972 directed to the issue of terrorist attacks against civil aircraft was in fact entitled a "Decision of the Security Council"[6]. If a question were to arise about the status of this act — whether, for example, it amounted to a "decision" of the Council for the purposes of Articles 25 and 48 of the Charter — the United Kingdom accepts that this would be a matter into which the Court could, and should, enquire. Similarly, the United Kingdom accepts that the Court could enquire into the question of whether a particular resolution was adopted by the required voting majority or, as, for example, in the case of resolution 731, whether it was adopted under Chapter VI or Chapter VII of the Charter. These are proper issues for this Court. All of these questions go to the formal validity and status of the act in question. The Court takes an act of a competent United Nations organ and considers first, its status and secondly, its legal consequences. This is exactly what the Court did in the *Expenses*[7] and *Namibia*[8] cases. These questions do not go to the exercise by the Security Council of its responsibility under the Charter. The appreciation of when to act and what action to take is a matter for the Council. The power of substantive review is not contemplated by the Charter. If now plucked from the ether by the Court, it would overturn the Charter machinery.

3.6. Mr. President, on Friday, Professor Suy went to some lengths to develop the contention that the Court is entitled to interpret the resolutions of the Security Council in question. We do not take issue with him on this point. On the contrary, we urge the Court to do so in this case as, in our view, the resolutions — particularly resolutions 748 and 883 — are dispositive of the matters now before the Court. In the light of Professor Suy's argument, it must also be recalled, however,

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[5]CR 97/21, at p. 35, para. 12.

[6]S/10705, 20 June 1972; see CR 97/16, at p. 42, para. 3.12.

[7]*I.C.J. Reports 1962*, p. 151.

[8]*I.C.J. Reports 1971*, p. 17.

that interpretation is an exercise in discovering the meaning of the words, the intention of the drafters and the object of the measure. It is *not* an exercise in assessing whether the organ which adopted the measure came to the right conclusion in the exercise of its powers of appreciation leading up to the adoption of the measure in question. We do not accept, as Professor Suy maintains, that the process of interpretation has to contort the meaning of the resolutions so that it complies with the terms of the Montreal Convention. The task of the Court is not, via a process of so-called "interpretation", to turn the resolutions into something they are not. Rather, it is to discover their intended meaning and to give effect thereto. If, in the course of this exercise, it becomes apparent that the obligations in the resolutions conflict with the obligations under some or other international agreement, that is the purpose of Article 103 of the Charter with its carefully conceived and clearly drafted provision as to the hierarchy of international obligations.

3.7. Mr. President, let me in this context address the argument now resurrected by Professor Suy that the resolutions do not require Libya to hand over the accused for trial in either the United Kingdom or the United States.

3.8. On our reading of the resolutions and the documents on which they are based, there can be no doubt that this is precisely what was required of Libya by the Security Council. Mr. Bethlehem took you through the relevant documents last week and there is, accordingly, no need for me to revisit them. Just as compelling is that our appreciation of the resolutions accords with that of the Secretary-General, who was asked to seek Libya's co-operation in complying with resolution 731. It also accords with that of Colonel Qadhafi himself. In support of this proposition I would simply refer the Court to the Report of the Secretary-General of 3 March 1992[9].

3.9. Let me move on to touch briefly on the equally baffling contention by Professor Suy that the Security Council cannot create new obligations for United Nations Members — "Il [le Conseil] ne peut pas créer de nouvelles obligations à la charge d'un Etat membre"[10]. This proposition is so surprising as to be hardly believable. It is surely beyond doubt that this is precisely what the Council is able to do in the context of its enforcement powers under Chapter VII of the Charter.

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[9]S/23672, 3 March 1992; reproduced as Annex 14 of the United Kingdom's documents. See, in particular, paragraphs 2 *(c)* and *(d)* and 4 *(a)*, *(b)*, *(d)* and *(e)* of the Report.

[10]CR 97/21, at pp. 30-31.

Indeed, it has done so on numerous occasions over the past few years in the context of its imposition of economic and other sanctions. In illustration, let me recall briefly the Council's action under Chapter VII in respect of Iraq, Yugoslavia, Haiti, Rwanda, Angola, Liberia, Somalia, Sudan and Sierra Leone, to say nothing of the earlier examples of southern Rhodesia and South Africa. In each case, the Council's actions, in fulfilment of its obligations under Article 24, paragraph 1 of the Charter, and in accordance with Chapter VII, created new obligations for United Nations Members. The response by the membership to the adoption by the Council of these measures indicates universal acceptance of the Council's competence to act in this regard and of the obligation of Members to carry out the decisions of the Council.

3.10. Mr. President, Members of the Court, before I turn to the inconsistencies in the Libyan argument, let me briefly address the array of cases that Professor Brownlie put before you on Friday. None of them sustain the proposition he was advancing. The issue is not whether advisory opinions contain authoritative statements of law. The issue is rather that the Court's advisory jurisdiction and its contentious jurisdiction are distinct, designed to achieve different ends and for the exclusive use of different participants. The Court itself has always been careful to preserve that distinction and not to merge one jurisdiction with the other. We do not accept that the functions which the Court may possess in advisory proceedings have any bearing on its treatment of Security Council resolutions in the context of contentious proceedings.

3.11. Other cases mentioned by Professor Brownlie include:

- the *Expenses* case, another Advisory Opinion, in which the Court, at the request of the General Assembly, examined incidentally various resolutions of the General Assembly and the Security Council for the purpose of interpreting Article 17, paragraph 2, of the Charter. There is no suggestion here of a general power of review of decisions of either organ. On the contrary, the Court there stated,

> "In the legal systems of States, there is often some procedure for determining the validity of even a legislative or governmental act, but no analogous procedure is to be found in the structure of the United Nations. Proposals made during the drafting of the Charter to place the ultimate authority to interpret the Charter in the International Court of Justice were not accepted."[11]

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[11] *I.C.J. Reports 1962*, p. 151, at p. 168.

The Court in that case went on to stress that it was engaged in rendering an advisory opinion. It also emphasized that, when the Organization takes action on the basis of an assertion that the action in question is appropriate for the fulfilment of one of the stated purposes of the United Nations, there is a presumption that such action is *not ultra vires*.

The same points were made nine years later by the Court in the *Namibia* case[12];

- as with *Expenses* and *Namibia*, the *Conditions for Admissions*[13] case also involved the advisory jurisdiction of the Court. Its probative value in the present circumstances is, therefore, limited;
- also prayed in aid by Libya was the *Northern Cameroons*[14] case. Here, however, as also with the *Nauru*[15] case, the Court was required to interpret certain resolutions of the General Assembly for the purpose of determining their legal effect. There was no question in either case of reviewing the competence of the General Assembly in adopting the resolutions in question. On the contrary, as the passage from the *Northern Cameroons* Judgment quoted by Professor Brownlie makes clear, the Court noted that "there is no doubt . . . that the resolution had definitive legal effect"[16].

  Professor Brownlie goes on to note, however, that "[t]he Court did not say that this was a subject-matter which was immune from examination"[17]. Neither do we. Both the cases concerned General Assembly rather than Security Council resolutions. In any event, the Court proceeded on the basis that the measures in question were *intra vires* and it did not enquire into issues of substantive validity;
- finally, I should also note the Court's decision on jurisdiction in the *Nicaragua* case, also prayed in aid by Professor Brownlie. In this regard, I would do no more than simply refer the Court to paragraph 98 of the Judgment, one of the paragraphs cited by Professor Brownlie but not quoted by him:

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[12] *I.C.J. Reports 1971*, p. 17, at para. 20.

[13] *I.C.J. Reports 1947-1948*, p. 61.
[14] *I.C.J. Reports 1963*, p. 15.
[15] *I.C.J. Reports 1992*, p. 240.
[16] *CR 97/21 at p. 38*, para. 19.
[17] *Ibid.*, at para. 20.

> "Nor can the Court accept that the present proceedings are objectionable as being in effect an appeal to the Court from an adverse decision of the Security Council. The Court is not asked to say that the Security Council was wrong in its decision, nor that there was anything inconsistent with law in the way in which the members of the Council employed their right to vote. The Court is asked to pass judgment on certain legal aspects of a situation which has also been considered by the Security Council, a procedure which is entirely consonant with its position as the principal judicial organ of the United Nations."[18]

There is nothing here which cuts across any of the United Kingdom's submissions to the Court in the present case.

3.12. Professor Brownlie raises, at paragraphs 37 to 41 of his speech, a variation of his argument that the exercise of powers under Chapter VII of the Charter is a justiciable issue. He concedes that the provisions of the Charter have priority over the Montreal Convention, but appears to suggest that obligations contained in resolutions under Chapter VII can prevail over other obligations of the Parties only if the resolutions are "in accordance with the Principles and Practice of the United Nations". I have already dealt with the basic question of reviewability this morning. In so far as any separate question is raised about the relationship between Article 103 and the Montreal Convention, I would refer the Court back to what I said on this matter last Tuesday[19].

3.13. I would now like to return briefly to the inconsistency and prevarication which characterize the Libyan position in this matter. I can illustrate what I mean with the examples from the speeches made last Friday.

3.14. First, it is a continuing theme of the Libyan presentation that the resolutions relevant to this case are tainted because the Security Council has been used as nothing more than a pawn of the United Nations and the United Kingdom. The allegation was repeated on Friday by Professor Suy, who said that "Chapter VII of the Charter was not created to give effect to the internal law of certain members of the Security Council". In the same speech, however, Professor Suy attempted to show, on the basis of a textual analysis, that the resolutions do not require Libya to hand over the two accused persons for trial. He bases that contention on differences between the original drafts of the resolutions, as produced by the United Kingdom and the United States, and the final versions, as approved by the Security Council. Professor Suy's

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[18] *I.C.J. Reports 1984*, p. 436, at para. 98.
[19] *CR 97/17, pp. 17-19*, at paras. 5.32-5.39.

proposition is presumably that the amendments made by or at the instance of the other Members of the Security Council resulted in a text which did not do what the United Kingdom and the United States wanted. What he does not tell us is how, if, as he says, the Security Council is simply acting for and on behalf of the United Kingdom and the United States, this situation came about. Libya is simultaneously claiming first, that the Security Council is acting at the behest of the United Kingdom and the United States and secondly, that amendments made by other members of the Council have defeated the objects of these two States.

3.15. The prevarication and inconsistency of the Libyan position is also apparent in more important areas than the internal infelicities in a speech by counsel. Libya has repeatedly talked about removing its constitutional impediment to the handing over of these two men, but has done nothing about it. The references which follow, I would ask to be taken as read and incorporated into the transcript.

> "*(a)* There are constitutional obstructions preventing Colonel Quaddafi or the Libyan administration from handing over Libyan citizens abroad for trial in the absence of an extradition treaty;
>
> *(b)* He may address an appeal to the Libyan people through the People's Committee, which might result in the removal of these obstructions. He did not indicate how long it would take to overcome the existing constitutional hurdles;
>
> *(c)* Although the Libyan authorities could not forcibly hand over the suspects for trial in a foreign country . . . [t]he possibility of handing over the suspects to the authorities for trial in third countries may be considered."[20]

> "The Libyan Government has not ruled out the possibility of amending its national law in order to remove the internal obstacle created by its prohibition of extraditing its nationals."[21]

> "The competent authorities in Libya have not rejected the principle of surrendering the two individuals under suspicion. Accordingly, they presented a number of initiatives and proposals in accordance with the legislation in force. Since these initiatives and proposals were not accepted by the other parties, they have referred the issue to the Basic People's Congresses (Libya's Legislative authority) for the adoption of a suitable position at the earliest opportunity."[22]

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[20]Report of the Secretary-General, S/23672, 3 March 1992, reproduced at Ann. 14 of the United Kingdom's Documents.
[21]Speech of the Libyan Agent, Provisional Measures Hearing, CR 92/2, p. 20 (original), pp. 14-15 (translation by the Registry).
[22]S/23918, 14 May 1992, Letter from the Secretary of the People's Committee of the People's Bureau for Foreign Liaison and International Co-operation to the Secretary-General of the United Nations, (reproduced at Ann. 56 of the United Kingdom's Documents, at p. 3, para. 4).

3.16. I would draw your particular attention to the statement by the Libyan Agent to this Court during the Provisional Measures hearing — "The Libyan Government has not ruled out the possibility of amending its national law in order to remove the internal obstacle created by its prohibition of extraditing its nationals."

3.17. If action had followed these words, there would be no obstacle to a trial in Scotland.

3.18. I have repeated to this Court the offer to international observers to attend and monitor the trial and detention of the accused. The Scottish courts have demonstrated their commitment to ensuring the fair trial of accused persons. The courts have the power to prevent a trial taking place if they are satisfied that a trial would be oppressive for the accused. The decision of the trial judge on that, and any other matter arising in the proceedings can be considered by the Appeal Court but the matter does not end there. Any matter relative to the fairness of the trial may also be considered under the European Convention on Human Rights.

3.19. Against that background, I find the statement, "professions of faith and incantations on the virtues and impartiality of Scottish or American judges are derisory"[23], I find that statement as offensive as it is without substance. No doubt Professor Salmon has accurately expressed the views of those instructing him, but the logical result of his proposition seems to be that, provided the crime is sufficiently horrific, justice must sit, hand on mouth, for fear of prejudicing the rights of the alleged criminals. In my experience, and I have acted for both the defence and the prosecution during the course of my career at the Scottish bar, Scottish juries are not influenced by pre-trial publicity. Once the trial begins, they are influenced by the evidence which is put before them.

3.20. In any event, it will not do, as Professor Salmon does, it will not do to say that a jury "bombarded for years by an official ideology unleashed against Libya" would presume the guilt of the accused[24]. As I have already shown, the United Kingdom has been at pains to avoid making statements which prejudge the criminal case. What any potential jurors are more likely to have been bombarded with are ubiquitous reports, films, books and articles putting forward alternative

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[23] *CR 97/20*, p. 24, para. 3.6. (Professor Salmon).
[24] *CR 97/20*, p. 24, at para. 3.6.

explanations for responsibility for the crime; and suggesting the innocence of the accused. As Professor Salmon himself points out a little earlier "D'autres pistes très sérieuses ont été avancées."[25]

3.21. The last example of Libyan prevarication to which I will refer this morning appears in the speech of Professor Salmon, who has sought to show that Libya is not opposed to the international community and refers to the Arab League, the Organisation of African Unity, the Non-aligned Movement and "the vast majority of the member States of the United Nations". I will only say this. It is from the whole membership of the United Nations that the changing membership of the Security Council is drawn. It is the whole membership of the United Nations who have entrusted the responsibility for international peace and security to the Security Council. It is the whole membership of the United Nations who have agreed to accept and carry out the decisions of the Security Council. It is the whole membership of the United Nations who now look to Libya to implement the resolutions of the Security Council without further evasion and procrastination.

3.22. Mr. President, Members of the Court, this is not an ordinary case. I remind the Court of my primary responsibility of Lord Advocate in Scotland. It is my duty to bring persons charged with crimes to justice. In this case justice is being delayed and justice has therefore been denied since Libya first refused to hand over these two accused in 1991. I want to discharge my duty, which amounts to no more and no less than the presentation of the case to a jury of 15 ordinary citizens, chosen at random.

3.23. There are, for the reasons outlined by Sir Franklin Berman, no grounds for linking the decision on the preliminary objections to the decisions on the merits. On behalf of the relatives of the dead, on behalf of the people of Scotland, on behalf of the broader international community, who are all watching these proceedings, I would urge this Court to reach a decision which will expedite a trial of these men in Scotland or in the United States of America.

I thank you for your attention. I would ask Sir Franklin Berman to conclude.

The ACTING PRESIDENT: Thank you, Lord Hardie. Sir Franklin, you have the floor.

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[25] *CR 97/20, p. 24*, at para. 3.5.

Sir Franklin BERMAN: Mr. President, I promised we would be brief and that in fact concludes the oral argument for the United Kingdom this morning. It remains for me in accordance with Article 60 of the Rules to confirm the Final Submissions of the United Kingdom. Before I do so, may I — although I have no authority to speak for the Parties in general, but I am sure that I represent their common view — ask you to convey our good wishes to your brother Judge who was taken ill on Friday, with our common wishes for his speedy recovery. Mr. President, in accordance with Article 60, paragraph 2, of the Rules of Court, I confirm that the final submissions of the United Kingdom are that the Court adjudge and declare that:

it lacks jurisdiction over the claims brought against the United Kingdom by the Libyan Arab Jamahiriya

and/or

those claims are inadmissible;

and we ask the Court to dismiss the Libyan Application accordingly.

Those submissions will be handed in in written form to the Registrar. Thank you, Mr. President.

The ACTING PRESIDENT: Thank you, Sir Franklin. The Court will now adjourn for 15 minutes.

The Court rose at 11.20 a.m.