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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 11.45 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 States of America)*

Preliminary Objections

VERBATIM RECORD

ANNEE 1997

Audience publique

tenue le mardi 14 octobre 1997, à 11 h 45, 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. Etats-Unies d'Amérique)*

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
Judge *ad hoc* 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
El-Kosheri, juge *ad hoc*
- M. Valencia-Ospina, greffier
-

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

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Mr. Mohamed Awad,

as Advisers.

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Mr. Michael J. Matheson, Principal Deputy Legal Adviser, U.S. Department of State,

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Ms Elisabeth Zoller, Professor at the University of Paris II,

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M. Brian Murtagh, du département de la justice des Etats-Unis,

comme conseils.

The ACTING PRESIDENT: Please be seated. The Court meets now to hear the arguments of the United States of America. Mr. David Andrews.

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

1.1. My name is David Andrews. I am the Legal Adviser of the Department of State of the United States of America. I appear before you for the first time this morning as Agent of the United States.

1.2. No lawyer can fail to be moved by the honour and responsibility of representing his country before this great Court. My responsibility is particularly great because of the importance of this case. The human tragedy it represents is horrendous — the murder by a terrorist bomb of 270 innocent men, women, and children in the air and on the ground at Lockerbie, Scotland on 21 December 1988. People of some 20 different nationalities were killed. Many of these people were on their way home to families for the holidays. Their lives and those of their families and friends were brought to an end or changed forever.

1.3. However, this case is significant for another, perhaps equally compelling reason. It poses a fundamental challenge to the authority of the United Nations Security Council in maintaining international peace and security. In the origins of the Pan Am 103 murders, the Council identified a threat to peace and security. It specified measures that Libya, the United States, and other countries are obliged to take in response to that threat. Libya comes before this Court contending that actions taken by the United States violate its rights under the Montreal Convention, a treaty designed to bring aircraft terrorists to justice. As we will show in the course of our presentations, Libya's claims are nothing more than collateral attacks on the decisions taken by the Security Council in its efforts to maintain international peace and security. It is our view that the Court does not have jurisdiction over such attacks. This Court should decline to accept Libya's claims in any event because the claims are inadmissible, and have been rendered moot and without practical purpose by the decisions of the

Council. Even if the Court believes it should exercise jurisdiction, it should dismiss the Libyan claims in substance on the basis of the legal effect of the Council's decisions.

1.4. It is on these grounds that the United States filed Preliminary Objections to the Application filed by the Government of Libya. In the course of our presentation, we will refer to decisions of the Court, exhibits in the record, and other supporting materials. With the Court's indulgence, we will not read the citations to these materials, but they are included in the texts which we have submitted to the Registry.

1.5. I will not enter into an extended discussion of the facts leading to our presence here this morning. Although the arguments made and positions taken by the United States are distinct from those taken by the United Kingdom, many of the underlying facts are the same.

These facts were well explained by the Lord Advocate yesterday morning. I endorse and incorporate by reference the substance of that factual presentation. I will stress, however, a few points.

1.6. The Lockerbie bombing was not the first time that agents or officials of the Government of Libya have been implicated in acts of international terrorism. The Lord Advocate yesterday referred to Libya's recurring involvement in such acts. Notably, these acts often have been accompanied by Libyan denials of responsibility. Recent events, however, call these denials into question.

1.7. Let us consider, first, the bombing of the La Belle discotheque in Berlin in 1986. In November 1993, during the Security Council deliberations on resolution 883, the Libyan representative proclaimed that Libya had nothing to do with this bombing and that it had been exonerated completely of any responsibility. However, in February of this year, prosecutors in Germany announced the indictments of five Libyan operatives for their role in that very bombing. The bomb, which was filled with iron nails, killed three and wounded over 200 people. The German authorities allege that this bombing was committed on direct orders of the Libyan State intelligence service. The five defendants are scheduled to go to trial next month.

1.8. Second, let us consider the 1989 bombing of UTA flight 772 over Niger, which killed 171 people. The plane exploded during its flight from Brazzaville, Congo to Ndjamena, Chad. In a letter of 8 January 1992, from the Permanent Representative of Libya to the United Nations addressed to the Secretary-General (US Exhibit 14), the Government of Libya categorically rejected allegations of Libyan involvement in the bombings of UTA 772 and Pan Am 103. Yet, in May of this year, French investigating magistrate Jean-Louis Brugiere handed over the results of his investigation into the UTA bombing. He concluded that there was compelling evidence to recommend prosecution of six Libyan intelligence operatives for the attack. Six individuals were indicted, among them the brother-in-law of Colonel Qadhafi and the former second in command of the Libyan State intelligence service. The defendants will be tried in absentia next year.

1.9. Even now, in respect of the facts of this case, the same pattern seems to be emerging. The Libyans have tendered a videotape of a British commercial television programme, the "Maltese Double Cross", which suggests that non-Libyan actors may have been responsible for the Pan Am 103 bombing. We have serious doubts as to whether this film is admissible evidence and we reserve our rights in this regard. Nevertheless, it is telling that a key participant in that programme pleaded guilty to perjury regarding these same matters last month in a federal court. He admitted giving false statements with respect to the allegations he made regarding the involvement of the US and other foreign governments in the incident.

1.10. In short, the Court is faced with an extraordinary situation. The Applicant State has a long history of using violence as an instrument of policy and supporting those who use terror to advance their political agendas. The Security Council has required that Libya must cease terrorist action and support for terrorist groups, and that Libya must surrender the persons accused for trial to one of two other States that are authorized under international law to conduct such a trial. Yet the Applicant State is asking this Court to decide that Libya alone has the legal right to investigate and prosecute two of its nationals charged in other States with blowing up an airliner and killing 270 people.

1.11. The criminal charges brought against these two individuals were the result of an international criminal investigation of extraordinary breadth and thoroughness. It took three years of painstaking investigation to assemble the evidence indicating that two Libyan intelligence operatives, one a senior Libyan intelligence official and the other a former official of the Libyan Arab Airlines station at Luqa Airport in Malta, should face criminal charges for the Pan Am 103 bombing. On 14 November 1991, a US federal grand jury handed down an indictment, alleging that the two Libyan intelligence operatives caused the insertion of the suitcase containing the bomb into the international aviation baggage system that led to the destruction of Pan Am 103. The US Government is prepared to present and offer proof of these allegations in a fair and open trial in the United States, subject to the full panoply of safeguards applicable to all defendants, including the presumption of innocence, the privilege against self-incrimination, and the right of cross-examination.

1.12. As counsel for the United Kingdom explained yesterday, the result of this investigation led to action by the United Nations Security Council. On 21 January 1992, the Council adopted resolution 731, followed on 31 March 1992, by resolution 748. In resolution 748, the Council, acting under its Chapter VII authority, decided that Libya "must commit itself definitively to cease all forms of terrorist action and support for terrorist groups". It directed Libya to turn over for prosecution in the United States or Scotland the persons charged with blowing up Pan Am 103. The adoption of resolution 748 prompted a quick response in Libya. There were mob attacks in Tripoli on the Embassies of Security Council Members that voted for resolution 748. The Embassies of Venezuela (then the President of the Council) and of Russia were seriously damaged.

1.13. Resolutions 731 and 748 were reaffirmed by the Council in resolution 883 on 11 November 1993. These resolutions, read together, establish clear legal requirements that the Government of Libya must meet in order to resolve the present situation. It has been several years since those resolutions were adopted. Libya, however, has yet to comply with the Security Council resolutions.

1.14. Libya's case here is fundamentally an effort to undo the Council's actions. In its written response to the United States Preliminary Objection, the Government of Libya denies both the truth and the relevance of its past involvement in international terrorism. Instead, Libya seeks to portray itself as an aggrieved, innocent, and law-abiding State that has been deprived of its rights under the Montreal Convention and under general international law by the actions of the United States and of the Security Council.

1.15. For the reasons we will develop here, the Court should dismiss Libya's claims. On the basis of Article 79 of the Rules of Court, the United States requests that the Court address its Preliminary Objections before any further proceedings in the case. In this connection, the United States maintains all previous arguments advanced in 1992 not specifically addressed here. At the same time, we reserve all rights under the Statute and the Rules of Court, including the right to introduce a counter-claim. We raise four basic objections.

1.16. First, the Court does not have jurisdiction to entertain these claims. The Court only has jurisdiction over a dispute involving "the interpretation or application" of the Montreal Convention. Libya, however, does not raise any valid claim under the Montreal Convention. Even if Libya could make such a claim, any such claims are superseded by the relevant decisions of the Security Council under Chapter VII of the United Nations Charter, which impose different obligations. Thus, Libya's claims can be seen for what they really are — a challenge to the lawfulness of the Council's actions under the Charter. That is not a dispute with the United States over the interpretation or application of the Montreal Convention.

1.17. Second, even assuming the Court had jurisdiction under the Montreal Convention, the Court should dismiss Libya's claims because they are inadmissible. Acceptance of these claims would require the Court to overturn binding decisions of the Security Council that were adopted in the exercise of the Council's Chapter VII functions. We believe that the Council's decisions were plainly lawful and that the proper role for the Court must be to deny Libya's claims for relief.

1.18. Third, even if the Court had jurisdiction to consider these claims and considered them to be admissible, the Court should decline to grant the relief requested by Libya because its claims have been rendered moot by the Council's resolutions. Under the Charter, the obligations created by the Council's decisions under Chapter VII take precedence over inconsistent obligations that might otherwise apply. Ruling on Libya's claims under the Montreal Convention therefore would have no practical effect and serve no valid purpose, and Libya's claims therefore must be dismissed.

1.19. Fourth, should the Court decide that it has and should exercise jurisdiction, and that Libya's claims are admissible, it should resolve the case in substance at this preliminary objections stage. The Court should decide, as a preliminary matter, that the decisions of the Security Council preclude the relief sought by Libya. This case can be disposed of on this basis; there is, therefore, no justification for further proceedings on Libya's claims under the Montreal Convention.

1.20. Mr. President, Members of the Court, our presentation will be as follows. First, Dr. Sean Murphy will demonstrate that Libya cannot establish a basis for jurisdiction within the terms of the Montreal Convention. He will refute Libya's underlying assumption that the Montreal Convention is the exclusive means for addressing acts of the aircraft sabotage. To the contrary, the Convention is just one piece of a large tapestry of laws and international instruments designed to create multiple opportunities to bring accused terrorists to justice. The Montreal Convention, by its terms, does not displace these other laws and instruments, nor does it eliminate the United States' right through peaceful, diplomatic means to promote Libya's surrender for trial of these persons.

1.21. Dr. Murphy will also review the five treaty provisions cited by Libya. He will show that these provisions are not germane to the present situation or are not in dispute. Libya in the past has pointed in particular to Article 11 of the Convention. Dr. Murphy will show that this provision creates a general legal obligation, that the United States acted in a manner consistent with the provision, and that the provision did not require the disclosure of further sensitive information to a State whose own agents had been indicted for the crimes in question.

1.22. Next, Mr. John Crook, Assistant Legal Adviser for United Nations Affairs, will demonstrate that even if Libya had a valid claim under the Montreal Convention at one time, any such claim has been superseded by the binding decisions of the Council. These decisions were taken under Chapter VII of the Charter in response to Libya's support for terrorism and its suspected involvement in the Pan Am 103 murders. They were validly adopted by a proper majority of the Council and are legally binding on the United States, Libya, and all other Members of the United Nations under the Charter. As such, they prevail over any allegedly inconsistent obligations under the Montreal Convention. As I pointed out earlier, Libya is reduced to a complaint that the Council acted unlawfully, not a complaint over "the interpretation or application" of the Montreal Convention.

1.23. Mr. Crook will demonstrate how Libya's claims for relief are not admissible. Libya's claims are, on their face, inconsistent with the relevant Security Council decisions. Therefore, the Court could accept Libya's claims only if it is prepared to review and overturn the Council's decisions. The Court cannot and should not take this extraordinary step. The Council acted properly within the scope of its Charter authorities in adopting the relevant resolutions. It was exercising functions that the Charter gives to the Council and to the Council alone — that of determining that a threat to the peace has occurred and what measures should be imposed to address such a threat. Its decisions concerning Libya were well-founded, appropriate, and consistent with its actions in other situations.

1.24. Professor Oscar Schachter, Hamilton Fish Professor emeritus at Columbia University School of Law, will then examine the role of the Court in this case. Professor Schachter is well known to the Members of the Court from his lifetime of scholarship and dedication to international law. He will argue that the proper function of this Court, when faced with a challenge to Security Council decisions adopted under Chapter VII, can only be to underscore the authority vested in the Council to adopt such decisions. This is not an abdication of the Court's special judicial role, but rather a recognition of the legal and political framework established by the United Nations Charter. Accordingly, he concludes,

this Court should find Libya's claims to be inadmissible or in any event should decline to exercise jurisdiction over them.

1.25. Next, Professor Elizabeth Zoller of the University of Paris II will elaborate further on the reasons why Libya cannot establish the Court's jurisdiction over its claims, and why those claims are inadmissible. She will explore the distinction between the Court's advisory and contentious jurisdiction, and show how the validity of Security Council action can only be addressed in the context of a proper request for an advisory proceeding, not, as here, by way of a contentious proceeding between two States. The questions posed by Libya's claims involve fundamental ones regarding the allocation of powers under the United Nations Charter. As such, they cannot be viewed as "incidental" to the Court's limited jurisdiction relating to the interpretation or application of the Montreal Convention. In addition, Professor Zoller will show how Libya's claims are inadmissible because Libya lacks capacity to contest the validity of Council resolutions. Moreover, Libya cannot show that it had any legal right or interest infringed by the United States as the result of the Security Council's adoption of those resolutions.

1.26. Mr. Michael Matheson, the Principal Deputy Legal Adviser of the Department of State, will present our final argument. He will review the issues before the Court, and explain why the Court should grant the United States Preliminary Objections now. He will show that the objections of the United States are of a properly preliminary character within the meaning of Article 79 of the Rules of Court, so that the Court can and should render a final judgment at this stage. He will show further that the Court need not decide any disputed factual issues in order to uphold the United States Preliminary Objections; that the controlling legal issues have been fully developed; and that there is accordingly no need for the Court to subject itself and the Parties to further unnecessary proceedings.

1.27. I will then return to the podium for some closing remarks. Mr. President, that concludes my introduction. I thank the Court for its attention and ask it to invite Dr. Murphy to the podium to begin our presentation.

Thank you.

The ACTING PRESIDENT: Thank you, Mr. Andrews. I now give the floor to Dr. Sean Murphy.

Dr. Sean MURPHY:

The Montreal Convention

Mr. President, Members of the Court, it is once again a great honour and pleasure to appear before you.

2.1. In my presentation, I will address whether the actions upon which Libya's case is based fall within the provisions of the Montreal Convention and whether, as a consequence, the dispute is one which the Court has jurisdiction *ratione materiae* to entertain, pursuant to Article 14 of that Convention. I will not address the relevance of the Security Council to any obligations that may exist under the Montreal Convention; my focus will be exclusively on the Convention itself.

2.2. Libya alleges that the United States has violated five provisions of the Montreal Convention: Articles 5, paras. 2 and 3, 7, 8, para. 3, and 11. As Mr. Matheson will discuss later in the United States presentation, it is appropriate for the Court at this stage in the proceedings to decide whether there exists a dispute between Libya and the United States concerning the interpretation or application of any of these provisions.

2.3. Mr. President, my presentation will focus on two propositions. My first proposition is that Libya's claims are grounded on a flawed syllogisme. Libya contends that the Montreal Convention is the exclusive means by which one State may pursue criminal jurisdiction over a suspect located in another State, at least where the two States are parties to the Montreal Convention; Libya further contends that the United States did not pursue criminal jurisdiction with respect to the two suspects in the Lockerbie incident through resort to the Montreal Convention; *ergo*, Libya concludes that the United States has violated Libya's rights under the Convention. (see Libyan Application, Part III (a);

Libyan Memorial, para. 3.2; Libyan Observations and Submissions on the Preliminary Objections, para. 2.12).

2.4. The syllogism is flawed because the major premise is wrong: the Montreal Convention is not the exclusive means by which one State may pursue criminal jurisdiction over a suspect located in another State, even when the two States are parties to the Montreal Convention. The Montreal Convention was intended to *increase* the opportunities for bringing offenders to justice, but was *not* intended to *foreclose* other opportunities outside the Convention. As such, pursuit of those other opportunities by the United States cannot be said to violate any rights of Libya under the Montreal Convention and, concomitantly, cannot give rise to a dispute cognizant under Article 14.

2.5. My second proposition is that, whether or not the Montreal Convention is the exclusive source of law in this area, none of the provisions of the Montreal Convention identified by Libya prohibit, expressly or implicitly, a party from pursuing through peaceful, diplomatic means the surrender for trial of an offender (see Libyan Application, Part I, pp. 4-5 (the United States is "pressuring Libya into surrendering the accused"); Libyan Memorial, para. 2.44 (the United States is pursuing United Nations economic sanctions); Libyan Observations and Submissions on the Preliminary Objections, paras. 2.1 and 2.25 (the United States is "calling" for the suspects to be handed over)). Consequently, since none of the actions of the United States identified by Libya can reasonably be regarded as potentially violating the Montreal Convention, there is no basis for the Court's jurisdiction in this case.

2.6. I will address each of these propositions in turn.

I. By Adopting the Montreal Convention, States Did Not Relinquish Their Right to Pursue Prosecution of a Suspect Located in Another State Based on Their National Criminal Jurisdiction

2.7. With respect to the first proposition, I think it fair to say that the drafters of the Montreal Convention would have been quite surprised to learn that they had crafted the exclusive means

by which one State may pursue criminal jurisdiction with respect to a suspect located in another State. To explain why, I think it is helpful to place in context the adoption of the Montreal Convention.

2.8. As is well known, global civil aviation expanded enormously in the decades following the Second World War, growing from some 13.2 million passengers in 1945 to some 177 million passengers in 1965. (Jin-Tai Choi, *Aviation Terrorism: Historical Survey, Perspectives and Responses* 2 (1994)). Unfortunately, terrorist acts against civil aircraft grew as well, and consisted of hijacking, sabotage, and attacks on airline facilities and passengers. From 1945 to 1990, there occurred more than 2,200 sabotage bombings of civil aircraft (*ibid.*, at p. 8).

2.9. How did States respond to these terrorist acts? Well, the first step was to increase dramatically the level of security procedures at airports. The second step was to pursue legal means for bringing offenders to justice. The principal means for doing this was through national criminal laws, whereby a State declared jurisdiction over acts against the State's civil aircraft that occurred either in that State or abroad (see, e.g., A. Evans & J. Murphy, *Legal Aspects of International Terrorism* (1978); A.I. Mendelsohn, "The Inflight Crime: The International and Domestic Picture under the Tokyo Convention", *Virginia Law Review* 509-63 (1967); C.S. Thomas & M.J. Kirby, "The Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation", 22 *ICLQ* 163, 171 (1973)). Further, international law did not prohibit a State from seeking the surrender of an offender located abroad. Thus, when a criminal act occurred, a State would undertake national court proceedings once the State had custody over the offender, which at times required the State to seek surrender of the offender from another State.

2.10. Of course, States could not, in all instances, obtain custody of the offenders. Consequently, some States negotiated bilateral agreements and memoranda of understanding so as to coordinate their national processes with those of other States. These agreements took the form of mutual legal assistance agreements, extradition agreements, or agreements dealing with specific problems of international terrorism against aircraft (see, e.g., U.S.-Cuba Memoranda of Understanding on the

Prevention of Aerial and Maritime Hijacking, 15 February 1973 (discussed in Jin-Tai Choi, *ibid.*, at p. 26)). Not surprisingly, States also sought to address this problem through a variety of regional and global conventions, including of course the Montreal Convention (see, e.g., the 1982 Law of the Sea Convention, A/CONF. 62/122 (1982) (Art. 105), the 1958 Geneva Convention on the High Seas, 450 *UNTS* 82 (Arts. 14-18), the 1963 Tokyo Convention on Offences and Certain other Acts Committed on Board Aircraft, 704 *UNTS* 219, the 1970 Hague Convention for the Suppression of Unlawful Seizure of Aircraft 859 *UNTS* 105, the 1988 Protocol of the Montreal Convention for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, 974 *UNTS* 178, the 1977 European Convention on the Suppression of Terrorism, 1137 *UNTS* 93, the 1979 International Convention Against the Taking of Hostages, 1316 *UNTS* 178, and the 1991 Convention on the Marking of Plastic Explosives for the Purpose of Detection).

2.11. Separate from these agreements and conventions, States raised their concerns in various international fora, which passed important resolutions seeking to harmonize State action for the enhancement of the security of civil aviation (see, e.g., Council of Europe's 1979 resolution 450 on Air Piracy; European Union's European Parliament resolution of 10 March 1988 on Terrorist Attacks on Civil Aviation; resolution on Measures to Prevent International Terrorism, G.A. Res. 40/61, United Nations, *General Assembly Official Records, 40th Session, Supplement No. 53*, at 30, United Nations Doc. A/40/53 (1985); and resolutions of the Assembly of the International Civil Aviation Organization, *reprinted in* Omer Y. Elagab, ed., *International Law Documents Relating to Terrorism*, part II (1995) *and in* Yohah Alexander, ed., *International Terrorism: Political and Legal Documents* (1992)).

2.12. Thus, the Montreal Convention was drafted as a part of a broad mosaic of laws, instruments, and fora — at the national, regional, and global level — that all had the objective of addressing acts of violence against civil aircraft. Although only a part of this mosaic, the Montreal Convention *is* important in strengthening the efforts to bring offenders to justice.

2.13. How does it do this? Article 1 of the Montreal Convention — like its sister Convention, the 1970 Hague Convention on hijacking — describes a series of acts that constitute offences under the Convention; these acts concern violence against civil aircraft and associated facilities.

2.14. Articles 3 and 5 require each State to make those offences punishable under their national laws when there is a connection to that State and, beyond this, to establish its jurisdiction over such offences when an offender is present in their territory and the Contracting State does not extradite the offender.

2.15. Article 6 of the Convention requires the State to take into custody alleged offenders.

2.16. Article 7 obligates a Contracting State to submit the case of an alleged offender to its competent authorities for purposes of prosecution if it does not extradite him. This obligation is frequently called the obligation to "prosecute or extradite".

2.17. Article 8 requires Contracting States to include the offences as "extraditable offences" in any extradition treaty existing with another Contracting State or, for States that extradite even in the absence of a treaty, to recognize the offences as extraditable offences. These provisions constitute the core of the Montreal Convention.

2.18. Adoption of the Montreal Convention was by no means intended to displace national laws and international instruments that I have referred to. Rather, the Montreal Convention was intended to deter criminal acts by expanding the opportunities for bringing to justice those who committed violent acts against aircraft. It did this by ensuring, so far as possible, that States would pass national laws making such acts offences — even when committed outside the State's territorial jurisdiction — and by preventing States from providing refuge to the offender. While it created new opportunities for prosecution of offenders, the Montreal Convention did not diminish opportunities for States to seek surrender for trial of offenders pursuant to their national legislation.

2.19. The appropriateness of regarding the Montreal Convention in this way is readily apparent from the language of the Convention itself. The preservation of these national laws was an important

element of the Montreal Convention, as can be seen in Article 5, paragraph 3, which clearly states: "This Convention does not exclude any criminal jurisdiction exercised in accordance with national law." The proper interpretation of this provision is clear from the text, but it is also supported by recourse to its negotiating history. Article 5, paragraph 3, was adopted without opposition by the Montreal Conference (*I ICAO, International Conference on Air Law, Minutes and Documents*, p. 163 (1971)) by simply using the same language that appears in Article 4, paragraph 3, of the 1970 Hague Convention and in Article 3, paragraph 3, of the 1963 Tokyo Convention. The negotiating histories of the earlier Conventions make abundantly clear that the drafters intended to establish in the initial paragraphs of this Article obligations on States to establish jurisdiction over the offences set forth in the relevant Conventions, but also intended — pursuant to this provision — not to exclude other criminal jurisdiction exercised in accordance with national law (see, e.g., ICAO, Legal Committee, Seventeenth Session, Minutes and Documents Relating to the Subject of Unlawful Seizure of Aircraft, pp. 47-48 (1970) (comments of delegate of France, chairman of the drafting group, on the provision that would become Hague Convention Article 4, paragraph 3)).

2.20. Further evidence that the Montreal Convention does not preempt national laws and international instruments, but supplements them, may be found in Article 11. Paragraph 1 of Article 11 calls for the application of national law when one State provides assistance to another in connection with criminal proceedings. Paragraph 2 makes clear that obligations under other international instruments regarding provision of legal assistance are *not* affected.

2.21. Turning now to the facts of the case before this Court, the United States has not, at any time, sought the surrender for trial of the two suspects by invoking the Montreal Convention. Rather, the United States has sought to exercise its own national criminal jurisdiction without reference to the Montreal Convention, as Article 5, paragraph 3, of the Convention makes clear it is permitted to do. The United States has criminal jurisdiction to prosecute the two Libyans implicated in the bombing of

Pan Am 103, based on the US nationality of the aircraft and on the US nationality of many of the passengers and crew. In the exercise of that jurisdiction, the US is fully empowered to seek custody of these alleged offenders. The Montreal Convention, by its terms, expressly states that such efforts are *not* excluded.

2.22. Seen in this light, the core issue in this case does not concern Libya's rights under the Montreal Convention; it concerns the right of the United States under general principles of international law to pursue a diplomatic initiative for the surrender for trial of the suspects. Like any other State, the United States has sovereign rights to conduct diplomatic relations, and, more specifically, to seek the surrender for trial of persons alleged to have committed certain crimes against US persons and aircraft.

2.23. The United States also has the right under the United Nations Charter to bring situations which might lead to international friction to the attention of the Security Council and of the General Assembly (United Nations Charter, Art. 35, para. 1). For years prior to and after the adoption of the Montreal Convention, States have referred to the United Nations situations concerning terrorism against civil aviation, as well as international terrorism generally (see US Preliminary Objections, Chap. III). In light of that history, it is simply untenable for Libya to argue that membership in the Montreal Convention precludes referral of a situation of aviation terrorism to the United Nations, or indeed to any other fora, simply because a suspect has turned up in another member State. Were the Court to accept this argument, it could have severe consequences for the ability of States to refer situations to the United Nations concerning not just aviation terrorism, but other forms of terrorism, war crimes, human rights, and drug trafficking as well, since in all of these areas there are treaties with "prosecute or extradite" provisions similar to that of the Montreal Convention (see, e.g., 1949 Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 75 *UNTS* 287; 1973 Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons,

Including Diplomatic Agents, 1035 *UNTS* 167; 1979 Convention on the Physical Protection of Nuclear Material, *TLAS* No. 11080; 1984 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, General Assembly resolution 39/46 (Ann.), United Nations, *General Assembly Official Records, 39th Session, Supplement No. 15*, at 197, United Nations, Doc. A/39/51 (1985); 1988 Convention for the Suppression of Unlawful Acts of Violence Against the Safety of Maritime Navigation, IMO Doc. SUA/CONF/15/Rev.1 (1988); 1988 United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances).

2.24. Issues regarding the pursuit of such diplomatic initiatives do not arise under the Montreal Convention, but rather under other norms of international law outside the scope of the Court's jurisdiction in this case. Libya's own efforts to find "compromise solutions" confirms this point (see Libyan Observations and Submissions on the Preliminary Objections, para. 2.8). Pursuit of these solutions, which are not contemplated under the terms of the Montreal Convention, undermines Libya's contention that the Montreal Convention is the exclusive source of law in this area. Libya tries to explain away its action as simply "applying the alternative obligation of *aut dedere aut judicare* for which the Montreal Convention provides" (*ibid.*, para. 2.27). But, with respect, it simply does not make sense to claim that the State in which the suspects have turned up can engage in creative diplomatic initiatives to bring about a result other than that contemplated in the Montreal Convention, while all other States have to remain silent.

2.25. The reality, Mr. President, is that neither Libya's so-called "compromise" solutions, nor the United States diplomatic initiative, were actions envisaged in the "prosecute or extradite" mechanism of the Montreal Convention, and yet neither were these actions unlawful, at least until the Security Council acted as it did. They were simply diplomatic initiatives by the two States with no relevance to the Montreal Convention.

2.26. The views of the judges during the interim measures phase of this case support the argument I am making. Several judges noted that general international law permits a State to exercise criminal jurisdiction over crimes done by aliens abroad and, to that end, to seek the surrender for trial of the offender. This ability to seek surrender for trial is not affected by the Montreal Convention, which simply imposes an obligation on Contracting States to surrender for trial or submit to national prosecution alleged offenders who are in their territory. (See case concerning *Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libya v. United States of America)*, *I.C.J. Reports 1992*, p. 130, Order on Provisional Measures, declaration of Judge Oda; joint declaration of Judges Evensen, Tarassov, Guillaume, and Aguilar Mawdsley, pp. 136-137; see also *ibid.*, p. 131, declaration of Judge Oda; United States effort to obtain surrender does not relate to interpretation or application of the Montreal Convention.)

2.27. In summary, Mr. President, the Montreal Convention represents one important means for combating violent actions against civil aircraft. It is not, however, the exclusive means. There are other sources of law — national law, customary international law, and international instruments, including the United Nations Charter — that play a critical role in establishing criminal jurisdiction over those who commit acts of terrorism against civil aircraft. Libya's theory, if correct, would preclude resort to these other sources of law for addressing this problem, as well as preclude resort to international fora where this problem is discussed, a result that is not only inconsistent with the language of the Montreal Convention, but, even worse, is inconsistent with its fundamental object and purpose.

II. The Provisions of the Montreal Convention Do Not Prohibit a State from Seeking the Surrender for Trial of Offenders

2.28. Let me turn now to my second proposition. Whether or not the Montreal Convention is the exclusive source of law in this area, the Convention does not contain rules that address this matter,

in particular rules that prohibit the United States from pursuing the surrender for trial of offenders through peaceful, diplomatic means. Allow me to discuss, in turn, the ordinary meaning of each of the Articles of the Montreal Convention that Libya claims has been violated by the United States, so as to show that they do not lay down any norms applicable to this particular case and cannot therefore form the basis of the Court's jurisdiction" (case concerning *Oil Platforms, Judgment on Preliminary Objections*, para. 36, 12 December 1996).

Articles 5, paragraphs 2 and 3, 7 and 8, paragraph 3

2.29. *Article 5 paragraph 2.* Article 5, paragraph 2, says that each Contracting State is obligated to take such measures as may be necessary to establish its jurisdiction over specified offences whenever the alleged offender is present in its territory. Thus, under this provision, the United States and Libya are obligated to take steps to ensure that US courts and Libyan courts, respectively, have jurisdiction over persons covered by the Convention that turn up in the United States or Libya. The United States has taken such steps. Libya claims that it has taken such steps, at least in the context of this case (Libyan Application, Part I, pp. 2-3; Libyan Memorial, paras. 2.7 and 6.38; Libyan Observations and Submissions, para. 1.47). Thus, Libya has not pointed to any action by the United States that could reasonably be regarded as potentially violating the ordinary meaning of Article 5, paragraph 2.

2.30. *Article 5, paragraph 3.* As we have seen Article 5, paragraph 3, says that the Convention does not exclude any criminal jurisdiction exercised in accordance with national law. This provision does not impose any obligation on States; it simply makes clear that the Convention does not pre-empt criminal jurisdiction that otherwise exists in Contracting States. Here, too, Libya has not pointed to any action by the United States that could reasonably be regarded as potentially violating the ordinary meaning of Article 5, paragraph 3.

2.31. *Article 7.* Article 7 of the Convention obligates a Contracting State to submit for prosecution an alleged offender found within its territory or to extradite him. Thus, under this provision

the United States is obligated either to prosecute an offender found in the United States or to extradite him. Obviously, the United States is fully prepared to prosecute the alleged Libyan offenders should they be surrendered to the United States for trial. Once again, Libya has not pointed to any action by the United States that could reasonably be regarded as potentially violating the ordinary meaning of Article 7.

2.32. *Article 8, paragraph 3.* Let me state at the outset that Libya has been rather inconsistent in telling us whether its claim is based on paragraph 2 or paragraph 3 of this Article. (See Libyan Application, Parts III (e) and IV (b); *Aerial Incident at Lockerbie*, hearing on Provisional Measures, CR 92/2 at pp. 52 and 54; CR 92/5 at pp. 30 and 35; Libyan Memorial, para. 3.3 (referring to Art. 8, para. 2); see also *Aerial Incident at Lockerbie (Libya v. United States of America)*, *I.C.J. Reports 1992*, paras. 4, 6 and 7, Order on Provisional Measures, Court interpretation of Art. 8, para. 2; but see Libyan Memorial, paras. 4.31 and 8.1 (c); Libyan Observations and Submission, para. 2.16, referring to Art. 8, para. 3.) Nevertheless, Libya apparently is conceding that Article 8, paragraph 2, is not applicable in this case (Libyan Memorial, para. 4.21).

2.33. However, Article 8, paragraph 3, is also not applicable in this case. Article 8, paragraph 3, obligates certain Contracting States to recognize the offences set forth in the Convention as extraditable offences. Libya stresses that it is not obligated to extradite the two suspects under Article 8, paragraph 3 (Libyan Memorial, para. 4.31), but the United States has not argued that Libya must extradite these suspects pursuant to Article 8 paragraph 3, or, for that matter, pursuant to any other provision of the Montreal Convention. Once again, Libya has not pointed to any action by the United States that could reasonably be regarded as potentially violating the ordinary meaning of this provision.

2.34. Mr. President, Libya cannot find any support for its position in the ordinary meaning of these provisions. Consequently, Libya asks the Court to read into these provisions an implicit obligation. That implicit obligation, according to Libya, is an obligation on all Montreal Convention

parties to "recognize" that the State in which a suspect turns up has an exclusive right to choose whether to prosecute or extradite the suspect (Libyan Observations and Submissions on Preliminary Objections, para. 2.25). This obligation to "recognize" apparently includes the obligation to refrain from taking any actions that promote the surrender of the suspect for trial abroad. Libya would have the Court find within these provisions an implied obligation that would read something like:

"Contracting States shall not inform the Contracting State in which the alleged offender is found regarding their views on where an offender should be prosecuted, and shall not raise the matter in any international fora for consideration."

Yet no such obligation exists in the Montreal Convention and none can be read "between the lines".

2.35. Indeed if one were to try to read "between the lines", it seems quite clear from Articles 5, paragraph 1, and 6, paragraph 1, of the Convention that, once an offender is apprehended, other relevant States who also have jurisdiction to prosecute the offender will be informed that he has been taken into custody, and will make known their views about whether the offender should be surrendered to them for trial. Thus, the structure of the Convention is to promote communications among Contracting Parties regarding the apprehension of terrorists and regarding where those terrorists should be prosecuted.

2.36. Why are those communications important? The "prosecute or extradite" formula was designed to ensure that one of many possible fora would exercise authority to prosecute, but it does not establish a priority for doing so (see *Aerial Incident at Lockerbie*, Provisional Measures hearing, CR 92/4 at pp. 60-61 (noting that efforts to create priority of jurisdiction in both the Montreal and Hague Conventions failed)). States are left to sort that out on their own. Libya itself has conceded that the Montreal Convention does not establish a prioritization of jurisdiction and that Libya "cannot claim any priority or exclusivity whatsoever for the purposes of prosecution" (*Aerial Incident at Lockerbie*, Provisional Measures hearing (CR 92/5 at p. 3); see also Libyan Memorial, para. 4.21)).

2.37. Libya may not like the fact that the United States has actively expressed its views on where these suspects should be prosecuted, to the point of addressing the matter to the Security Council. But this is not running afoul of any obligation that exists in the Montreal Convention, anymore than an arms control treaty is violated when one contracting party urges another contracting party to reduce its stockpiles below the ceiling set in the treaty. The Montreal Convention clearly contemplates the surrender of offenders as a perfectly valid alternative to prosecution of the suspects in the State where they are first found. Consequently, pursuit of a diplomatic initiative that promotes surrender for trial does not frustrate the objective of the Convention, particularly where there are implications that the State with custody of the offender may be involved in the offence.

2.38. In short, the only dispute between the United States and Libya at issue here concerns the United States' right through diplomatic means to promote Libya's surrender for trial of these persons, a right that neither arises from nor is denied by the Montreal Convention. As such, this right is not a matter that entails the interpretation or application of the Montreal Convention, and therefore is not properly before this Court under Article 14 of the Montreal Convention.

Article 11

2.39. Now in its pleadings, Libya stresses that the United States has violated Article 11 of the Montreal Convention, which provides that "Contracting States shall afford one another the greatest measure of assistance in connection with criminal proceedings".

2.40. Libya has not pointed to any action (or inaction) that could reasonably be regarded as potentially violating Article 11. To explain why, let me first note that the obligation expressed in Article 11 is very general in nature; the Parties are called upon to "afford" each other "the greatest measure of assistance". Unlike Article 13 of the Convention, where it is clear that the Contracting State is obligated to communicate specific types of information, Article 11 does not specify the type of assistance that shall be afforded.

2.41. Further, Article 11, paragraph 1, expressly says that the national law of the requested State — in this case, that would be the law of the United States — applies when considering what "measure of assistance" is to be granted. If you compare the original text of Article 11 that was proposed by the ICAO Legal Committee to the Montreal Conference (*ICAO, II International Conference on Air Law, Montreal, September 1971 (Documents), Doc. 9081-LC/170-2 at 17 (1973)* ("Contracting States shall, in accordance with the applicable law, afford one another the greatest measure of assistance in connection with proceedings brought in respect of the offences in Article 1")) with the version that you have before you today, it is clear that the drafters purposefully clarified the language in Article 11 so as to explicitly call for the application of the national law of the requested State. As such, under Article 11, a requested State need not provide assistance where doing so would conflict with the requirements of national law or where it would impair legal proceedings under way pursuant to national law.

2.42. The language of Article 11 may be contrasted with the much more detailed provisions that appear in conventions where States are obligated to provide specific types of legal assistance (e.g., 1970 Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, *847 UNTS 231*; 1965 Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, *658 UNTS 163*). When States intend to obligate themselves in this way, they know how to do so. In the case of Article 11 of the Montreal Convention, this was not done.

2.43. One might also contrast the language of Article 11 with the analogous provision in the near-contemporaneous 1973 Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents (*1035 UNTS 167*). In that Convention, Article 9 contains no reference to the application of national law and specifies that the legal assistance shall include "the supply of all evidence at their disposal necessary for the proceedings". No such language appears in Article 11 of the Montreal Convention. No such language should be inferred.

2.44. The United States has satisfied the general obligation imposed by Article 11. On 21 November 1991, the United States transmitted to Libya through the authorities of the Government of Belgium copies of the grand jury indictment of the two Libyans. That indictment, which appears at Exhibit 1 of the US Preliminary Objections, provides detailed information regarding the facts underlying the charges against the two Libyan officials and the US laws that these acts violated. Thus, Libya is fully cognizant of the basic elements of the legal proceeding in the United States.

2.45. Article 11 cannot be viewed as obligating the United States to provide further information. Indeed, Article 11 preserves the right of the United States, under US law, to refuse to disclose additional details regarding the investigation, such as evidence derived from confidential sources. As we have described in our written pleading (US Preliminary Objections, Part I, Chap. I, Sect. 2), US law contains provisions protecting the confidentiality of our grand jury process, protecting the prosecutor's evidence in advance of trial so as not to compromise the case, and protecting US national security.

2.46. As a practical matter, it is difficult to see how the Court can define specific forms of additional assistance that must be provided under Article 11. For the Court to try to inject into Article 11 specificity as to the level of assistance that is required — such as the provision of witness statements or other information — would simply be unworkable and could inhibit co-operation in an area that the drafters of the Montreal Convention deliberately did not seek to regulate. Different incidents of terrorism, involving different investigations among different States, that operate under different national laws and are party to different bilateral and multilateral mutual legal assistance agreements, will necessarily lead to different results in the kinds of assistance one Contracting State can and should provide to another.

2.47. As a final point, I note that Libya is not seeking to use Article 11 as a means of obtaining greater assistance from the United States in connection with criminal proceedings in Libya. Rather,

Libya wishes to use Article 11 to sustain the core submission set forth in its Application (p. 10, para. (c)) and its Memorial (para. 8.1 (d)), which ask the Court essentially to declare that the United States is obligated to "stand down" from further seeking the surrender of the two alleged offenders. As is the case with the other articles of the Montreal Convention, Article 11 cannot support the weight of that claim.

Conclusion

2.48. In conclusion, even on the facts of this case as stated by Libya, there is no dispute between the Parties regarding the interpretation or application of the Montreal Convention. The United States has not sought surrender for trial of these two offenders by invoking the Montreal Convention; rather, it has done so pursuant to both its sovereign right to seek the exercise of its criminal jurisdiction and its right under the United Nations Charter to refer a matter to the Security Council, neither of which has been precluded by the Montreal Convention.

2.49. Moreover, none of the provisions of the Montreal Convention cited by Libya can possibly support Libya's claims. With respect to the provisions other than Article 11, none of these provisions impose obligations on the United States relevant to this case. The general obligation imposed on the United States under Article 11 has manifestly been met, and, in any event, does not support the basic claim that Libya is bringing in this case.

2.50. For all these reasons, the Court should find that it does not have jurisdiction to entertain Libya's claims under Article 14 of the Montreal Convention.

2.51. Mr. President, Members of the Court, I thank you for your attention. I ask that you now call upon Mr. Crook to continue the United States presentation.

The ACTING PRESIDENT: Thank you, Dr. Murphy. I now give the floor to Mr. Crook. Please let me know when you wish to break off your argument for the day.

Mr. CROOK: I will Mr. President. I will be beginning a long presentation. I will try to complete my first point. That should be very close to 1 o'clock. If it takes me a moment or two longer, I hope I could have the indulgence of the Court.

Mr. President, Members of the Court.

3.1. It is a great honour for me to appear before you on behalf of the United States of America.

3.2. Dr. Murphy has just shown how Libya does not have valid claims under the Montreal Convention entitling it to relief from this Court. I will now show how, even if the Convention might be applied in this case, any claims by Libya under it have been supplanted by binding resolutions of the Security Council adopted under Chapter VII of the Charter. As a result, this dispute is no longer a dispute regarding the Montreal Convention over which this Court has jurisdiction. Moreover, even if the Court had jurisdiction, these binding Security Council resolutions would preclude the relief sought by Libya. They would thus render Libya's requests inadmissible.

3.3. My presentation will have four parts, of which I will try to complete the first this morning. I will first review the specific legal rules made applicable to this dispute by Security Council resolutions, notably resolutions 748 and 883. Second, I will review how the rules created by those resolutions are binding on Libya and all other Members of the United Nations, in particular under Articles 25, 48 and 103 of the Charter. Third, I will answer Libya's claims that these resolutions were not validly adopted and show how they were a proper exercise of powers that the Charter vests solely in the Security Council. Fourth, I will show how, even if the Court had jurisdiction, and found these claims to be admissible, the Court should nevertheless decline to uphold them, since they have been rendered moot by the Council's decisions.

I. SECURITY COUNCIL RESOLUTIONS 748 AND 883 ESTABLISH SPECIFIC LEGAL RULES BINDING ON LIBYA AND THE UNITED STATES.

3.4. In this first part of my argument, I will review the specific obligations that apply in this case as a result of actions taken by the Security Council. I will begin by recalling some of the procedural history leading to the Council's actions.

3.5. Yesterday, Mr. Bethlehem of the British team discussed the events leading to the Security Council's several resolutions related to the bombing of Pan Am 103. I will not repeat that. I will note only a few key points.

3.6. The Council's first resolution addressing the charges of Libya's involvement in the destruction of Pan Am 103 was resolution 731, which was adopted *unanimously* by the Council on 21 January 1992 (US Exhibit 18; the Security Council debate is US Exhibit 19). In that resolution, all fifteen members of the Council expressed themselves "deeply concerned over the results of the investigations, which implicate officials of the Libyan Government" in the bombings of Pan Am 103 and UTA 772. The Council deplored "the fact that the Libyan Government has not yet responded effectively" to the French, British and United States Governments' requests for its cooperation in establishing responsibility for those bombings. It urged Libya to respond fully to specific requests from those three Governments contained in several Security Council documents. I will briefly review the three key documents.

3.7. The first, (Doc. S/23308, US Exhibit 9), is the Declaration of the British and United States Governments issued soon after the Scottish and United States criminal charges were announced in November 1991. The two Governments called for Libya to surrender for trial the persons charged with destroying Pan Am 103, to accept responsibility for their actions, to provide full disclosure, and to pay appropriate compensation.

3.8. The second document (Doc. S/23306, US Exhibit 10) was a communiqué from the Presidency of the French Republic and the French Ministry of Foreign Affairs. It demanded that Libya

produce evidence and otherwise co-operate in France's investigation of the bombing of UTA flight 772, which killed 171 people on 19 September 1989.

3.9. The third document (Doc. S/23309, US Exhibit 11) is a tripartite French/British/United States declaration of 27 November 1991. In it, the three Governments "require that Libya comply with all . . . [their] demands, and, in addition, that Libya commit itself concretely and definitively to cease all forms of terrorist action and all assistance to terrorist groups".

3.10. Through resolution 731, the Security Council unanimously agreed upon these three calls for specific actions by the Government of Libya as the proper criteria for assessing Libya's further conduct in relation to the fatal bombings of Pan Am 103 and UTA 772.

The Chronology Leading to Further Council Action

3.11. Mr. President, yesterday, Mr. Bethlehem also described the course of events in the first three months of 1992. He showed how Libya's belated invocation of the Montreal Convention, and its subsequent Application to this Court, were part of a deliberate strategy to forestall further action by the Security Council. I will not repeat that discussion, but I do ask that the Court bear in mind the sequence of events that was described there.

3.12. Resolution 731 was adopted on 21 January 1992. It was clear then that the Council saw the possibility of further action if Libya did not respond appropriately to the resolution (e.g., S/PV.3033, 21 January 1992, p. 81, US Exhibit 19). Libya did not respond in a fashion satisfactory to the Council. The first report of the Secretary-General to the Council on 11 February did not show that Libya was prepared to comply with resolution 731 (US Exhibit 20). On 3 March 1992, the Secretary-General made a second report to the Council, indicating that as of that date, resolution 731 "has not yet been complied with" (US Exhibit 21).

3.13. On the very same day, Libya filed its Application in this Court. Libya's subsequent arguments made clear that the objective was to have this Court bar the United States and the

United Kingdom from exercising their rights to seek any further action by the Security Council (e.g., CR 92/5, 28 March 1992, at p. 52 [original] and 45 [translation]).

3.14. All the while, however, Members of the Security Council were continuing to discuss and negotiate concerning possible further actions with respect to Libya. The international press reported on 17 March that France, the United Kingdom and the United States were circulating a draft of a resolution that, following negotiations, would become resolution 748. During the proceedings here in this Court on 26, 27 and 28 March, both sides recognized that imminent action by the Security Council was possible (case concerning *Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie*, Order of 14 April 1992, *I.C.J. Reports 1992*, p. 124, para. 32). Thus, resolution 748 was not a sudden or unexpected action taken because of the pending proceedings in this Court. It was instead the conclusion of a process of discussion, negotiation, debate and ultimately, action by the Security Council in pursuit of its responsibilities.

3.15. The Security Council of course recognized that Libya was seeking provisional measures to preclude the United States and the United Kingdom from seeking action by the Council at the very time that the Council was considering measures against Libya. The Security Council decided that it was nevertheless necessary for it to act. The President of the Council, the Representative of Venezuela, described the situation clearly:

'[B]oth the Council and the International Court of Justice are independent of each other . . . [E]ach of these organs in the United Nations system must exercise its jurisdiction autonomously . . . [T]he absence of a simultaneous decision cannot inhibit the actions which the one or the other may take, and . . . their actions do not imply a disregard for their respective responsibilities.' (S/PV. 3063, 31 March 1992, p. 84, US Exhibit 22.)

The Role of Individual Council Members

3.16. Mr. President, resolution 748 establishes the legal rules that must be applied in this dispute. It was adopted by ten votes, with no negative votes and five abstentions. Austria, Belgium, Ecuador, France, Hungary, Japan, Russia, the United Kingdom, the United States and Venezuela voted for the

resolution.

3.17. Libya consistently ignores or dismisses the role and responsibility of the many Members of the Security Council who, together with the United States, joined to address the Lockerbie and UTA bombings. This is incorrect, both factually and legally. The United States did not and could not act alone in adopting any of these resolutions. These measures were adopted by the Council only because a number of conscientious States, each one bearing significant responsibilities as a Member of the Security Council, concluded that they were necessary and appropriate. Libya's contrary arguments are a distortion. They are also a slight to the many States that worked together and to common purpose in the Council.

A Chapter VII Resolution.

3.18. In adopting resolution 748, the Council clearly was exercising its powers under Chapter VII. It stated so explicitly. It found explicitly that Libya's failure "to demonstrate by concrete actions its renunciation of terrorism and in particular its continued failure to respond fully and effectively to the requests in resolution 731 . . . constitute a threat to international peace and security". The relevant operative paragraphs begin with the verb "decides". It is clear that resolution 748 exercises the Council's mandatory authority under Chapter VII of the Charter.

Mr. President, I have not quite completed my first point, but I think this might be an opportune time to break. I look forward to coming back tomorrow morning to continue the discussion to show why these resolutions impose binding obligations that are applicable in these proceedings.

The ACTING PRESIDENT: Thank you, Mr. Crook. The Court will now adjourn until 10 o'clock tomorrow morning.

The Court rose at 1.05 p.m.
