DISSENTING OPINION OF JUDGE SIR ROBERT JENNINGS

I very much regret that I have to dissent from the decision of the majority of the Court in this case.

There are two main issues: the question of jurisdiction; and the question of admissibility. As I differ from the majority on both questions, I should briefly say why; dealing first with jurisdiction.

JURISDICTION

Jurisdiction of the Court in this case will be established if, and in so far as, there is shown to be a dispute or disputes "concerning the interpretation or application of this Convention", within the meaning of Article 14, paragraph 1, of the 1971 Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation. To find the answer to this question it is necessary to look at two things: Libya's submissions, not only in the present phase, but also in its Application of 3 March 1992 initiating the case against the United Kingdom — this in order to find out what is said to be disputed; and secondly, the provisions of the Convention that are said to be involved in the dispute. As the relevant provisions of the Convention are referred to in the submissions we shall consider the submissions (or requests as they are described in the Application and the Memorial) in turn. There are four of them: they request the Court to adjudge and declare as follows, in *(a)*, *(b)*, *(c)* and *(d)* below.

(a) *That the Montreal Convention Is Applicable to This Dispute*

The question the Court has to decide is which, if any, items of the Libyan claims are both disputed by the United Kingdom and necessarily "concern the interpretation or application" of the Montreal Convention; and therefore generate jurisdiction under Article 14 of the Convention. The broad terms of this submission *(a)* merely beg the question of which particular provisions of the Convention are supposed to be involved.

The citation of the Convention as a whole also invites speculation as to whether it was ever intended to deal with acts of terrorism allegedly committed by persons actually employed by a government also allegedly involved in the commission of those acts.

It is noteworthy that this submission *(a)* did not appear at all in the Libyan Application which initiated the case. It raises a question, now that the Court has found that it has some jurisdiction, how far Libya might further seek to change the content and nature of its case in pursuance of its reservation of "the right to supplement and amend these submissions as appropriate in the course of further proceedings".

(b) *That Libya Has Fully Complied with All of Its Obligations under the Montreal Convention and Is Justified in Exercising the Criminal Jurisdiction Provided for by That Convention*

There is here no dispute under the Convention because the United Kingdom has not sought to dispute that Libya has complied with all its obligations under the Convention. There was nothing contrary to the Convention in the United Kingdom's requesting the extradition of the two suspects. Nor is there any dispute that, under the terms of the Montreal Convention, Libya is justified in exercising its own criminal jurisdiction provided for by that Convention. The United Kingdom contention in this case is that Libya is not now justified in exercising that jurisdiction in so far as to do so would be contrary to decisions of the Security Council made under Chapter VII of the Charter; that is not a matter arising under the provisions of the Convention but one concerning the interpretation or application of the United Nations Charter; and to pretend that it is one that comes within Article 14, paragraph 1, of the Convention is not free from absurdity.

(c) *That the United Kingdom Has Breached, and Is Continuing to Breach, Its Legal Obligations to Libya under Articles 5 (2), 5 (3), 7, 8 (2), 8 (3) and 11 of the Montreal Convention*

It is necessary to consider each of these provisions of the Convention in turn to see whether there is a dispute which comes within the scope of Article 14 of the Convention.

Article 5 (2)

This is the Article which requires a party to "take such measures as may be necessary to establish its jurisdiction" over offences against the Convention, in lieu of extradition, where the offender is "present in its territory".

This creates a legal obligation upon Libya, as on all parties to the Convention, which obligation, according to Libya, it has indeed carried out. It is difficult to understand how it can be said that the United Kingdom is in breach, and seemingly continuous breach, of that obligation upon

Libya; much less to understand where the supposed dispute might be. Article 5, paragraph 2, is concerned with legislation and other measures which Libya, as a party to the Convention, is obligated to implement. It claims to have done so, and this has not been denied by the United Kingdom.

Article 5 (3)

"This Convention does not exclude any criminal jurisdiction exercised in accordance with national law."

Again, there is simply no scintilla of a dispute here between the Parties about the interpretation or application of the Convention. In fact this provision is entirely plain and there is nothing much to dispute about it.

Article 7

This provides:

> "The Contracting State in the territory of which the alleged offender is found shall, if it does not extradite him, be obliged, without exception whatsoever and whether or not the offence was committed in its territory, to submit the case to its competent authorities for the purpose of prosecution. Those authorities shall take their decision in the same manner as in the case of any ordinary offence of a serious nature under the law of that State."

Again, it is difficult to understand in what way the United Kingdom can be said to be in breach of this Article of the Convention.

The United Kingdom's request for extradition is not in breach of the Convention for extradition but is in accord with an alternative procedure actually contemplated by Article 7 itself. Even if the insistence on extradition rather than domestic prosecution be a breach of the Convention, then the complaint should be addressed to the Security Council and not to selected members of the Security Council. In any event it is difficult to see in what way Libya is actually prevented from prosecuting the two suspects and in fact according to its own pleading it is already in the process of doing precisely that — a process which has been curiously prolonged.

Article 7 of the Convention obliges Libya, as the place where the alleged offenders are to be found, *either* to extradite *or*, if it does not extradite, then itself to ensure that it prosecutes the offenders. The latter option is qualified by the Security Council resolutions, which by their terms remove the alternative option of domestic prosecution (surely a reasonable step where the charge is that the State party to the Convention is itself allegedly implicated in the offence). Libya disputes the effect of the Security Council resolutions; but this is not a dispute with the United Kingdom about the Convention but a dispute with the Security Council about its resolutions. It is not a dispute that can be reasonably

categorized as one coming within the intended ambit of Article 14, paragraph 1. For it is in no way a dispute that can be settled by reference to Article 7 or to any other part of the Convention. The real dispute is one about the meaning and applicability of the Charter of the United Nations, about Articles 25 and 103 in particular and about the meaning and application of Security Council resolutions 731 (1992), 748 (1992) and 883 (1993). The attempt to tack this "dispute" on to Article 14, paragraph 1, of the Convention, via Article 7, is an artifice that really ought not to beguile this Court. And in so far as it is now being entertained by the Court one must have in mind the multitudinous possibilities it opens up of using the normal and common jurisdiction clauses of bilateral treaties to frustrate and delay the peacekeeping measures of the Security Council.

Moreover, although there does seem to be some dispute between Libya and the United Kingdom about the meaning and interpretation of the Security Council resolutions, and if indeed according to Libya's own interpretation those resolutions do not at all require the surrender of the suspects, then the alternative option provided by Article 7, of a way in which Libya can perform her Convention obligations, actually remains intact.

It will be convenient at this point to mention the device with which the Court's Judgment endeavours to neutralize the effect of the Security Council resolutions made under its powers conferred by Chapter VII of the Charter. It is true that "the Security Council resolutions 748 (1992) and 883 (1993) were in fact adopted after the filing of the Application on 3 March 1992"; and that, "In accordance with its established jurisprudence, if the Court had jurisdiction on that date, it continues to do so" (Judgment, para. 38). But this fact is irrelevant. The Court's proposition assumes that there was, at the date of the Application, jurisdiction over a dispute covered by Article 14, paragraph 1, of the Convention; a dispute the effect of which the resolutions seek to change. This is not so. The point is not that the Security Council resolutions sought to take away an already established jurisdiction of the Court; the point is that there never was in any real sense any dispute between the Parties about the Montreal Convention. It is true that the legal status and meaning of all these Security Council resolutions have been vigorously questioned by Libya under cover of the present proceedings; but this is not a dispute under Article 14, paragraph 1, of the Convention.

Article 8 (2) and (3)

In its Application Libya cited Article 8, paragraph 2, which provides:

> "If a Contracting State which makes extradition conditional on the existence of a treaty receives a request for extradition from another Contracting State with which it has no extradition treaty, it may at its option consider this Convention as the legal basis for extradition in respect of the offences. Extradition shall be subject to the other conditions provided by the law of the requested State."

In its Memorial submissions, however, Libya cited only paragraph 3 of Article 8 which provision imposes an obligation upon States:

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

Again, one is simply at a loss to know in what way the United Kingdom is supposed to be in continuous breach with respect to either of these provisions, much less how it can be said that there is a dispute about its interpretation or application between the United Kingdom and Libya.

Article 11

This is the Article creating a treaty obligation to:

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

Libya alleges that the United Kingdom had not done as much as it was obliged to do in attempting to provide the assistance provided for under this Article. There is in any event no dispute here about the interpretation of the Convention; there *is* a question whether it applies, given the changed situation brought about by the Security Council resolutions. But that again is a question, or even dispute, that cannot be resolved by reference to the provisions of the Convention, about which there is no real dispute. It is a dispute about the effect of the resolutions and that dispute is not one that can be said to be one contemplated by Article 14 of the Convention.

In any case it will be noted that the "affording" (not a strong word at all) of information is, by the very terms of this Article, qualified, in this case, by the relevant Scottish law. Secondly, the United Kingdom surely has provided enough information to form a viable basis for a Libyan prosecution of the suspects, if that is how Libya wishes to proceed. Indeed one might reasonably have supposed that enough information and material has been provided to this Court. Thus, it is somewhat fanciful even to argue that there could be a dispute between the United Kingdom and Libya about the application of Article 11 of the Conven-

tion. Moreover, Libya has argued (see paragraph 26 of this Judgment) that "Libya has exercised its jurisdiction over the two alleged offenders on the basis of its Penal Code, and the Respondent should not interfere with the exercise of that jurisdiction". But this is manifestly incompatible with Libya's submission under Article 11 of the Convention, and Libya cannot have it both ways. So, quite apart from the question whether there is an Article 14 dispute, it is very doubtful whether there is here any dispute at all.

(d) *That the United Kingdom Is under a Legal Obligation to Respect Libya's Right Not to Have the Convention Set Aside by Means Which Would in Any Case Be at Variance with the Principles of the United Nations Charter and with the Mandatory Rules of General International Law Prohibiting the Use of Force and the Violation of the Sovereignty, Territorial Integrity, Sovereign Equality and Political Independence of States*

It is interesting to note how this submission, as it is in the Memorial version, has been radically amended since its first appearance in the Application (then submission *(c)*, conveniently reproduced in the Order of the Court of 14 April 1992, *I.C.J. Reports 1992*, p. 7). Originally it asked the Court to adjudge and declare that the United Kingdom was

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

In the latest version of this submission, the "immediately" has disappeared. No doubt it was thought inappropriate after rather more than five years of undisturbed peace with the United Kingdom. There might again also be thought to be a question how far a State may, by simply reserving "the right to supplement and amend" its submissions, change at its convenience and expediency as the case proceeds the basis of the case made in its original Application; at least without seeking the leave of the Court.

No doubt the most carefully considered and devised change is the introduction of the idea of "Libya's right not to have the Convention [i.e. the Montreal Convention] set aside by means", etc. This idea is no doubt intended to suggest that setting aside the Convention brings the dispute under the rubric of "the application" of the Convention as that phrase is used in Article 14, paragraph 1, the jurisdiction article, of the Convention.

It might suggest this but in my view in no wise establishes it. The only

"setting aside" of some parts of the Convention régime, if it can be said to occur at all, is in consequence of the Security Council resolutions. So any dispute over the "setting aside" is between Libya and the Security Council, and not with the United Kingdom. This dispute could not conceivably be said to come within Article 14, paragraph 1, of the Convention.

For all the above reasons the Court, in my view, does not have jurisdiction over this dispute. But before leaving the matter of jurisdiction there is a further comment I wish to make. That is that I find some aspects of the Applicant's argument about jurisdiction to be somewhat specious. In particular, the arguments deployed in the attempt to bring this essentially Security Council matter somehow, indeed anyhow, within the scope of Article 14, paragraph 1, of the Convention are factitious. The arguments are clever and even ingenious, and have been brilliantly successful in producing a five-year and more delay which was no doubt their primary purpose. But the whole endeavour constitutes a highly artificial device. It is fashioned to attract the legal cast of mind; though I believe most intelligent lay persons would give it very short shrift. It is indeed ironic that the jurisdictional clause of a Convention whose whole purpose is to control international terrorism over aircraft, should be thus employed, it seems successfully, to afford protection to persons alleged to have been involved in such terrorism who are nationals and officials of a State also alleged itself to have been thus involved. It seems extraordinary to interpret the Convention in such a way that a State, itself alleged to have been involved in the terrorist act, should have the sole right to try its own intelligence agents alleged to have carried out the crime. This is not only to nullify in this case the very purpose of the Convention, but also to fly in the face of common sense. I can only regret exceedingly that this Court has succumbed to the temptations so skilfully laid in its path.

THE QUESTION OF ADMISSIBILITY

If the Court had taken what I regard to be both the correct view and the wiser view, on the question of jurisdiction, there would have been no need in its Judgment to enter upon the rather less firm ground of admissibility. But in view of the Court's stance it is necessary to say something about this question.

Before entering upon the main substance of the admissibility argument, I wish first to look at the narrower, technical but at first sight puzzling Article 79, paragraph 7, of the Court's Rules, which, in a subsection headed "Preliminary Objections", provides:

> "7. After hearing the parties, the Court shall give its decision in the form of a judgment, by which it shall either uphold the objec-

tion, reject it, or declare that the objection does not possess, in the circumstances of the case, an exclusively preliminary character. If the Court rejects the objection or declares that it does not possess an exclusively preliminary character, it shall fix time-limits for the further proceedings."

The puzzling aspect of this is the phrase "exclusively preliminary character". It is well known that this phrase was a reaction to what happened in the 1966 *South West Africa* cases (*I.C.J. Reports 1966*, p. 6), and in the *Barcelona Traction, Light and Power Company Limited* case (*I.C.J. Reports 1970*, p. 3). But trying to provide against bad cases makes bad law. And, unfortunately, it is not easy to find *any* preliminary objection that can be said to be, in absolute terms, of an exclusively preliminary character. Even the question of jurisdiction, ordinarily regarded as being unquestionably preliminary, does, probably as often as not, require some excursion into the merits; as indeed did that question in the present case.

The questions of admissibility, lack of object and the like in the present case have, certainly in the arguments of both Parties, provoked very considerable excursions into the merits of the case. The question, therefore, arises whether that preliminary objection can be dealt with very simply by deciding that it is not "exclusively" of a preliminary character; though it is interesting that Libya was far from being content to rely on this possibility.

It is reasonable, therefore, to ask what is the *rationale* for taking certain pleas as preliminary matters. After all, all courts do it as a matter of course. The reason for doing so is surely that there are certain defences which, if they be accepted, result in the dismissal of the whole case there and then; so there is then no need to "fix time-limits for the further proceedings". Common sense demands, therefore, that such questions are examined first as "preliminary objections".

But what about the word "exclusively" — a strong word — in Article 79, paragraph 7, of the Court's Rules? Fortunately, the term is not there used without qualification. It is qualified by the phrase, "does not possess, *in the circumstances of the case*, an exclusively preliminary character" (emphasis added). It seems reasonable, therefore, to interpret "exclusively preliminary character" as referring to the quality of those pleas in a given case which, if accepted, signal the end of the case, and thus actually excluding the possibility of a merits stage.

This way of viewing the matter would appear to have been tacitly assumed by both Parties in the case; for those very considerable excur-

sions into the merits during the oral proceedings both indicate that this inadmissibility plea is not exclusively preliminary in character in any literal or absolute sense, but, nevertheless, a finding that the case is not admissible would have been the end of the matter.

It is thus necessary, at the outset of this admissibility question, to examine the meaning of "exclusively preliminary character" because though it is clearly tempting just to dispose of the admissibility argument by deciding that the inadmissibility objection is not an "exclusively" preliminary matter, this would be to incur the risk of this riposte being usable against almost any party in any case wishing to enter a preliminary objection to the exercise of jurisdiction.

It could no doubt be argued, on the other hand, that, if a plea be so intimately connected with the merits as the present Appellant evidently appeared to assume, there could be something to be said for examining the admissibility plea along with a full merits argument. But where the preliminary objection has already been entertained and heard, that argument is self-defeating. I am for these reasons unable to go along with the Court in using the drafting of Article 79, paragraph 7, of the Rules, to dispose of these preliminary objections, whether to jurisdiction or admissibility, on this highly legalistic and juridically doubtful ground.

* *

We may now turn to what the Court decides on the substance of the admissibility plea.

The Court rightly says that the principal argument of the United Kingdom is that:

> "the issue or issues in dispute between it [Libya] and the United Kingdom are now regulated by decisions of the Security Council, taken under Chapter VII of the Charter of the United Nations, which are binding on both Parties and that (if there is any conflict between what the resolutions require and rights or obligations alleged to arise under the Montreal Convention) the resolutions have overriding effect in accordance with Article 103 of the Charter" (see paragraph 41 of the Judgment).

The Court deals with this objection — apart, that is, from the Article 79 of the Rules point mentioned above — by an argument based upon the Court's decision in *Border and Transborder Armed Actions (Nicaragua v. Honduras), Jurisdiction and Admissibility* (*I.C.J. Reports 1988*, p. 95, para. 66), that "The critical date for determining the admissibility of an application is the date on which it is filed." And it is of course true that the Security Council resolutions 748 (1992) and 883 (1993), made under Chapter VII, were made after the date of the Libyan Application in this case. This situation the Court regards as definitive and on that basis rejects the United Kingdom's pleading in this regard.

It is important, however, to note that the words cited by the Court from the *Armed Actions* case, are qualified by the remainder of the paragraph which is as follows:

> "It may however be necessary, in order to determine with certainty what the situation was at the date of filing of the Application, to examine the events, and in particular the relations between the Parties, over a period prior to that date, and indeed during the subsequent period. Furthermore, subsequent events may render an application without object, or even take such a course as to preclude the filing of a later application in similar terms." (*Border and Transborder Armed Actions (Nicaragua* v. *Honduras), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1988*, p. 95, para. 66.)

It appears from the Judgment in the present case that the Court regards the critical-date-of-the-application rule as applicable to controlling admissibility cases in general; and indeed only just manages to avoid a circular argument defining the very plea of inadmissibility in terms of this critical date rule; so that the way to avoid getting enmeshed with this rule is apparently to enter a plea which cannot be regarded as, or at any rate is not called, one of "admissibility".

But there is a serious argument of substance which, in the opinion of the writer, the decision of the Court applying that rule to the United Kingdom inadmissibility objection has to encounter. One is bound to ask oneself whether the Court has fully appreciated and weighed the gravity of a decision to subject to the application-critical-date rule, an inadmissibility plea based squarely upon a decision of the Security Council under Chapter VII, and involving the peace-keeping operations of the Security Council. One must always have in mind other possible future cases. The practical effect of this decision is to establish an available procedure for delaying or frustrating decisions of the Security Council made in its peace-keeping capacity, is indeed to bring about a grave modification of the juridical and political scheme of the United Nations Charter, which the Court itself, as the Organization's principal judicial organ, is there, one might have supposed, to declare, explain and protect.

There is, however, another part of the Judgment over the non-admissibility defence to be considered; and that is the treatment of what is in effect the United Kingdom's fall-back position, that the case has, in consequence of the Security Council resolutions, become "without object", or "no case", or "moot"; these being different ways of expressing this particular objection. This, according to the Court, is no longer an "admissibility" matter and so not subject to the rule of the time-of-application critical date; though whether it could be equally expressed in the reverse,

that it is not an admissibility question *because* it is not controlled by that critical date is far from clarified by the reasoning of the Judgment.

The Court, however, reaches the same conclusion as before, by now applying another equally artificial and legalistic consideration: the strict, literal or absolute interpretation of Article 79, paragraph 7, of the Rules of Court. This has already been looked at above. Nevertheless it must be added that the conclusion of the Court on this matter also, which is really, and in its substance, just another way of putting the inadmissibility argument, is open to the same grave objections as those expressed above in regard to the Court's decision under the admissibility heading. It seems unfortunate to say the least, that a preliminary objection involving the viability of the peace-keeping provisions of the Charter of the United Nations should be dealt with on the basis of a legalistic argument grounded not in the Charter of the United Nations but in an interpretation of a somewhat controversial word — "exclusively" — in Article 79 of the Court's Rules.

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This case has also raised a question of basic principle of great importance which has been referred to in argument but which the present Judgment studiously avoids: the relationship between the respective competences of the Security Council and of the International Court of Justice as the "principal judicial organ of the United Nations". The Court in its Judgment has no doubt relegated this to the merits stage. It seems right, however, in this opinion to state one's present views on the question which in fact underlies every stage of this case; including the interim measures stage in 1992.

In every system of government there are political organs which make decisions on the basis of what may broadly be called political reasons; and there are courts and other judicial tribunals which make decisions on the basis of the interpretation and application of rules of law. Both kinds of decision are necessary in any civilized society governed by the rule of law. Neither kind of decision can be said to be *per se* superior to the other kind; they should rather be complementary.

But the different kinds of organs, political and judicial, may find themselves called upon to deal with the same matter, or different aspects of the same matter. How is the relationship between the two different organs and their respective decisions to be ordered? In a society governed by the rule of law this relationship is to be resolved according to the relevant

principles and rules of constitutional and administrative law. It is precisely the lot of a court of justice to apply those principles and rules; as indeed has happened in this case. So, the task of the Court in this case, as I see the matter, is simply to apply international law.

The first principle of the applicable law is this: that all discretionary powers of lawful decision-making are necessarily derived from the law, and are therefore governed and qualified by the law. This must be so if only because the sole authority of such decisions flows itself from the law. It is not logically possible to claim to represent the power and authority of the law and, at the same time, claim to be above the law.

That this is true of the United Nations Security Council is clear from the terms of Article 24, paragraph 2, of the Charter:

> "2. In discharging these duties the Security Council shall act in accordance with the Purposes and Principles of the United Nations. The specific powers granted to the Security Council for the discharge of these duties are laid down in Chapters VI, VII, VIII, and XII."

I therefore wholly agree with the Libyan argument that the Security Council decisions and actions should in no wise be regarded as enjoying some sort of "immunity" from the jurisdiction of the principal judicial organ of the United Nations; though I ought perhaps to add that the United Kingdom argument made no such claim.

In this kind of situation it seems to me that the Court is, according to the Charter, to act always as the "principal judicial organ of the United Nations". In short, the Court must administer and apply the law. This entails taking account of the applicable United Nations law; and that includes taking fully into account Articles 24, 25, 28, 39, 48 and 103 of the United Nations Charter. This must involve declaring, interpreting, applying and protecting the law of the United Nations as laid down in no uncertain terms by the Charter.

When, therefore, as in the present case, the Security Council, exercising the discretionary competence given to it by Article 39 of the Charter, has decided that there exists a "threat to the peace", it is not for the principal judicial organ of the United Nations to question that decision, much less to substitute a decision of its own, but to state the plain meaning and intention of Article 39, and to *protect* the Security Council's exercise of that body's power and duty conferred upon it by the law; and to protect the exercise of the discretion of the Security Council to "decide what measures not involving the use of armed force are to be employed to give effect to its decisions".

Furthermore, when the Security Council moved into its powers under Chapter VII of the Charter, it "decided certain issues pertaining to the Lockerbie disaster with binding force" (*Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya* v. *United Kingdom), Provisional Measures, Order of 14 April 1992, I.C.J. Reports 1992*, p. 26, separate opinion of Judge Lachs). There can be no doubt about that, for Article 25 of the Charter so provides. Moreover this competence is reasonable and necessary for the body that has been given "primary responsibility for the maintenance of international peace and security" (Art. 24); and this precisely "to ensure prompt and effective action by the United Nations".

There has been some talk amongst the commentators of the possibilities of some kind of power of "judicial review" by the International Court of Justice; though it should be borne in mind that the Court itself denied the possession of such powers in the *Namibia* case (*Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971*, p. 45, para. 89). Undoubtedly there are many difficult and as yet unresolved juridical questions that are bound to arise when organs such as this Court and other organs of the United Nations find themselves called upon to perform what have usefully been called "parallel functions" (see Judge Skubiszewski's illuminating article on "The International Court of Justice and the Security Council", in *Fifty Years of the International Court of Justice*, 1996, p. 606).

That there is no power of judicial review of Security Council decisions under Chapter VII of the Charter is not merely because of the dictum of the Court in the *Namibia* case. The position is established by the provisions of the Charter itself. Moreover it is evident from the records of San Francisco that a power of judicial review was proposed and rejected by the drafting conference. The Court is not a revising body, it may not substitute its own discretion for that of the Security Council; nor would it in my view be a suitable body for doing that; nor is the forensic adversarial system suited to the making of political decisions.

The legal position is therefore to my mind very clear. The function of the principal judicial organ of the United Nations is to apply the law laid down in the Charter of the United Nations. The Security Council is given primary responsibility for the maintenance of the peace; its decisions under Chapter VII are binding decisions, and all Members of the United Nations have agreed to carry them out; and Article 103 provides that obligations under the Charter shall prevail in the event of a "conflict" between those obligations.

The law of the Charter is the law which the Court should, above all, respect and apply in this case. The Court should not allow itself to be persuaded otherwise by skilled and worldly-wise advocacy, which seems to have been remarkably successful in persuading the Court to forget the cardinal fact that this is a case where the applicant Government is alleged to be implicated in the terrorist act, and that this is a situation with which the Montreal Convention does not even purport to deal.

* *

But a problem remains. Very many of these matters which arise in relation to the question of admissibility are also highly relevant to the merits. In fact, as already mentioned above, most if not all of them will certainly appear again at some length in the arguments at the merits stage. Accordingly, quite apart from the difficulties arising from the infelicities of the drafting of Article 79, paragraph 7, of the Rules, is there not something to be said for leaving all these matters raised under admissibility to be dealt with at the merits stage; as the majority of the Court has indeed decided?

In my opinion it would have been right for the Court to have disposed of all these questions at this preliminary stage. The first reason is that, as has been pointed out above, the relevant law to be applied is beyond doubt; and the truth is that the Court has now already heard all these questions argued by the applicant Government at considerable length in 1992 as well as in the two weeks of hearings in the present phase. The main reason, however, which I consider of great theoretical and practical importance, I can best express by quoting from the separate opinion of Judge Lachs in the Court's Order of 14 April 1992 (see *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya* v. *United Kingdom), Provisional Measures, I.C.J. Reports 1992*, p. 26). There, speaking of the "issues of concurrent jurisdiction as between the Court and a fellow main organ of the United Nations", he continued:

> "In fact the Court is the guardian of legality for the international community as a whole, both within and without the United Nations. One may therefore legitimately suppose that the intention of the founders was not to encourage a blinkered parallelism of functions but a fruitful interaction."

There might be thought to be room for the view that the permitting by the Court of what promises to be six or seven years of litigation, in three separate phases, over the legal effect of resolutions of the Security

Council made under Chapter VII of the Charter, is something short of a "fruitful interaction".

Moreover, one must also think of the effect of this decision on other possible cases. There are other multilateral conventions besides Montreal, which might lend themselves to hobbling litigation about United Nations action to maintain or restore the peace. Nor indeed need the risk be confined to multilateral conventions. One thinks of the dangers to United Nations sanctions measures from the possible use of treaties of Friendship and Commerce and their jurisdiction clauses, once the meaning and effect of Article 103 of the Charter is called in question. The decision of the Court in the present case, provides a *vade mecum* and precedent for those who might wish to delay United Nations action by a miasma of legalistic activity. There are other conventions, besides the Montreal Convention, that might lend themselves in other and future circumstances, to similar legalistic, and politically profitable employment to frustrate the Security Council in the performance of its Charter functions; and it should be remembered that the Security Council may, in certain circumstances, have to act very quickly. This possibility was of course foreseen by the drafters of the Charter when they drafted Article 103 with these possibilities in mind.

For all these reasons, I am of the view that the Court, given that it has been persuaded that it has jurisdiction, ought certainly to have found this claim inadmissible. I regret exceedingly a decision which, seen in a general perspective and quite apart from the particular circumstances of the present case, seems to me to be an unwise one for the Court to have made.

(Signed) R. Y. JENNINGS.