CR 97/23

International Court
of Justice

THE HAGUE

Cour internationale
de Justice

LA HAYE

YEAR 1997

Public sitting

held on Monday 20 October 1997, at 11.40 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 lundi 20 octobre 1997, à 11 h 40, 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-Unis d'Amérique)

Exceptions préliminaires

COMPTE RENDU

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

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

M. Valencia-Ospina, greffier

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

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

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

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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 second round of oral submissions by the United States of America, and the first speaker will be the Agent of the United States.

Mr. ANDREWS:

1.1. Mr. President, Members of the Court. I welcome the opportunity to respond to the statements made by the Government of Libya in response to our arguments in support of the United States Preliminary Objections.

1.2. After listening to the Libyan response, I have heard very little that is new and very little that is responsive to the points we made last week. We demonstrated that the Court should dispose of the Libyan Application now at this stage. The Court lacks jurisdiction under the Montreal Convention and, in any event, the claims made by Libya are inadmissible. The Libyan response largely ignored the oral submission made by the US team, and where it purported to respond, it frequently distorted our positions. In its oral presentations, counsel for Libya revised some of its earlier positions and thereby introduced important inconsistencies into Libya's case. They relied on a number of different bodies of law, including the law of State responsibility, the peaceful settlement of disputes, and human rights, all of which are outside the scope of this Court's jurisdiction. Libyan counsel also repeated many of the same irrelevant and tendentious political points that they raised in Libya's attempt to obtain provisional measures in 1992. In short, Libya has not raised anything that justifies the continuation of this case beyond the preliminary objections stage.

1.3. Mr. President, the three speakers after me will examine in more detail the various arguments and statements made by Libya's counsel. My task here will be to respond briefly to certain of the factually unsupported statements that were made by Libya's counsel in the course of their presentations. Indeed, while this is my first appearance before this honourable Court, I must confess surprise at the reliance placed by our distinguished adversaries on speculative television programs and other media accounts concerning the Lockerbie incident. Fortunately, we do not have to delve into the factual accuracy of these materials, but, I note that they are, in any event, unsubstantiated and irrelevant to the issues before the Court.

1.4. *First,* Mr. President, I would like to respond to Libya's continued reference to supposed threats of the use of force by the United States. The use of this emotional appeal is clearly designed to supplement arguments lacking in legal content. Mr. Brownlie largely repeats the same speech he gave on this subject in 1992 at the Court's hearing on Libya's request for provisional measures. Mr. Brownlie's claims were unwarranted and irrelevant then, and they certainly are now — five years later. I will not repeat all of the reasons why, but refer the Court to US arguments made at the provisional measures stage of this case (CR 92/4, pp. 55-57, in the case concerning *Questions of Interpretation and Application of the 1971 Montreal Convention Arising From the Aerial Incident at Lockerbie*). Libya's claims are based on a handful of public statements in 1992 that simply confirm that no decision had been made on any option, and that do not amount to a threat of the use of force. The United States has throughout sought a peaceful solution through action of the United Nations Security Council. It continues to do so today, five years later, despite Libya's continued refusal to comply with Council resolutions.

1.5. *Second,* Libya's counsel referred to certain statements made by regional organizations, suggesting a lack of international support for the Security Council's decisions with regard to Libya. As we have previously pointed out, the Security Council decisions were adopted by a broadly representative and properly constituted Council. Many countries other than the United States and the United Kingdom voted in support of these resolutions. Moreover, in paragraph 13 of resolution 748, the Council provided for a review of the sanctions imposed on Libya every 120 days. Through 16 such reviews — during which time the membership of the Council has changed and included members of the regional organizations mentioned by Libya — the sanctions have remained in place. In addition, during the five years that sanctions have been in effect, there has been widespread adherence to them by the international community. In any event, it is not for the Court to assess the political support these sanctions may or may not enjoy; this is precisely the sort of calculus that is left to the political organs such as the Security Council.

1.6. Mr. President, we will have three speakers and then I will return to offer some closing remarks. In the course of our presentations, we ask that the Court keep in mind certain underlying strands of our argument. First, it is not the United States that is relying on the Security Council to preclude the Court from exercising its proper judicial function; rather, it is Libya that is seeking

to annul clear and legally binding Council decisions through an abuse of the processes of this Court. In its rush to get to the Court, Libya has failed to locate any valid claim under the Montreal Convention, and, even if it had, the Council resolutions set forth the controlling law. Moreover, the consequence of adopting Libya's arguments would be to disrupt the framework established under the United Nations Charter for addressing threats to international peace and security. Finally, Libya has not put forth any rationale why the Court should prolong this case and not dispose of Libya's claims at the preliminary objections stage. Mr. President, when all is said and done, Libya's case is predicated on the groundless proposition that it was unlawful for the United States, when faced with what it considered a threat to peace and security, to bring the matter before the United Nations.

1.7. Mr. President, I now ask the Court's permission to call Mr. John Crook to the podium.

The ACTING PRESIDENT: Thank you, Mr. Andrews. I now call on Mr. Crook to address the Court.

Mr. CROOK:

Montreal Convention and Security Council Issues

2.1. Mr. President, distinguished Members of the Court. Within the short time available to me this morning, I will discuss several issues regarding: (1) the Court's lack of jurisdiction under the Montreal Convention and (2) the status and effect of the Security Council resolutions. Nothing the Court heard from the Libyan team last Friday affects the conclusion that the Court lacks jurisdiction and that Libya's claims are inadmissible. However, a few points call for comment from our side.

I. Montreal Convention Issues

2.2. Mr. President, my comments on the Montreal Convention will be brief. We do not believe that this Court has jurisdiction under the Convention, because there is no dispute regarding its interpretation or application that falls within the scope of Article 14, the dispute settlement clause. The brevity of this part of my presentation does not reflect any lessening of our conviction that the Court lacks jurisdiction. Instead, I can be brief because Libya failed to respond to most of the arguments made in our initial presentation.

2.3. Libya argues that there obviously exists a dispute under the Montreal Convention because Libya claims that the Convention applies to and regulates this situation while the United States claims that it does not (Mr. David, CR97/20, p.38, para. 4.7). This simplistic approach to what constitutes a dispute, however, is inappropriate in light of the Court's recent jurisprudence, by including the recent *Oil Platforms* case, where the Court found that "the Court cannot limit itself to noting that one of the Parties maintains that such a dispute exists, and the other denies it" (case concerning *Oil Platforms (Islamic Republic of Iran* v. *United States), Preliminary Objections, Judgment, I.C.J. Reports 1996*, para. 16). It is also inappropriate in light of the language and history of the Court's rule on preliminary objections, which we discussed last week .(CR 97/19, pp. 47-51, paras. 6.8-6.22). The appropriate approach is for the Court to consider at this stage whether the provisions of the Montreal Convention "lay down any norms applicable to this particular case as we have shown the Montreal Convention does not (case concerning *Oil Platforms (Islamic Republic of Iran* v. *United States), Preliminary Objections, Judgment, I.C.J. Reports 1996.*)

2.4. Libya further contends that even if the *Oil Platforms* approach is applied, there is a dispute under the Montreal Convention because Libya invokes provisions of the treaty that support an alleged exclusive Libyan right to choose whether to "extradite or prosecute" (CR 97/20, pp. 38-39, paras. 4.8-4.9, Mr. David). To that end, Libya announced for the first time last week that it is relying on Article 1 of the Convention. Libya, however, only touched upon, but does not fully address, the two fundamental propositions of the United States presented by Dr. Murphy last week.

2.5. Our first proposition is that the Montreal Convention is not the exclusive means for pursuing criminal jurisdiction over those who attack civil aircraft. Rather, the Montreal Convention is just part, it is an additional component in a broad mosaic of laws, conventions, and fora that are available for addressing terrorist acts against civilian aircraft. In fact, Libya concedes this point when it acknowledged that the Montreal Convention does not expressly prohibit a State from invoking a different mechanism than that envisaged in the Convention (CR 97/20, pp. 44-45, para. 4.14, Mr. David).

2.6. Libya's theory is that any other mechanism, aside from Montreal, can be used only if it does not set aside "le droit commun", by which Libya apparently means not customary international

law but, rather, the Montreal Convention. This, too, is a significant concession. This is because the United States has not made use of any mechanism that is incompatible with the rules of the Montreal Convention. As Dr. Murphy explained, the Montreal Convention (like its predecessors, the Tokyo and Hague Conventions) is designed to *increase* the number of States where jurisdiction may be exercised over an offender. It is not designed to *decrease* the ability of Contracting States to exercise their own national criminal jurisdiction (CR 97/18, pp. 17-24, paras. 2.7-2.27)

2.7. Article 5, paragraph 3, of the Montreal Convention makes this clear. It states that: "This Convention does not exclude any criminal jurisdiction exercised in accordance with national law." The ordinary meaning of Article 5, paragraph 3, reinforced by its negotiating history, makes quite clear that the exercise of national criminal jurisdiction is an alternative that is fully compatible with the "prosecute and extradite" mechanism of the Montreal Convention. Thus, under Libya's own theory of the exclusivity of the Montreal Convention, the United States position prevails. Interestingly, Libya omitted from its oral presentation any reference to Article 5, paragraph 3.

2.8. The reason why Article 5, paragraph 3, preserves national criminal jurisdiction as a means of combating aerial terrorism is readily apparent in the case now before the Court. The charges brought against the two suspects under US law (US Preliminary Objections, para. 1.07) are not limited to Montreal Convention "offences". For example, they include the crime of conspiracy (codified in United States Code, Title 18, section 371, reprinted in US Preliminary Objections, Exhibit 7). In order to maintain existing means for bringing suspects to justice, States were left free to exercise national criminal jurisdiction against persons who attack aircraft, whether or not the particular charges involve "offences" within the meaning of the Convention.

2.9. The intent behind Article 5, paragraph 3, of the Montreal Convention is clear from the negotiating history and associated materials regarding Article 3, paragraph 3, of the Tokyo Convention, where the language preserving national criminal jurisdiction was first developed and later appropriated for use in the Montreal Convention (see, e.g., ICAO Secretariat Commentary on the Draft Convention Relating to Offenses Committed on Board Aircraft, Legal Committee, Twelfth Session, LC/Working Draft No. 584 (1959); Message from the President of the United States Transmitting The Convention on Offences and Certain Other Acts Committed on Board Aircraft Signed at Tokyo on 14 September 1963, Senate Exec. Doc. L, 90th Cong., 2d Sess (1968):

"Paragraph 3 provides that this Convention does not exclude any criminal jurisdiction exercised in accordance with national law" and "was intended to reflect the fact that the jurisdiction over offences or acts committed on board an aircraft while in flight was an additional concurrent criminal jurisdiction which a State could exercise without prejudice to other criminal jurisdictions that a State might exercise under its national laws"; see also N. Joyner, *Aerial Hijacking as an International Crime* pp. 136-138 (1974); A. Mendelsohn, *In-Flight Crime: The International and Domestic Picture Under the Tokyo Convention*, 53 Va. L. Rev. 509, 515 (explaining the use of a "mixed basis" theory of jurisdiction in the Tokyo Convention, by which jurisdiction "may be predicated upon the registration of the aircraft, or *upon any other basis provided for in the municipal law of a contracting State*") (emphasis added)).

2.10. Mr. President, the United States has never invoked the Montreal Convention in the course of exercising its national criminal jurisdiction over the two Libyans. Libya contends that this does not show the absence of a dispute under the Montreal Convention. It cites the Court's 1988 Advisory Opinion on the United Nation Headquarters Agreement (CR 97/20, pp. 39-42, para. 4.9, Mr. David). The case before the Court today, however, is very different. Our argument is not just that the United States did not invoke the Convention. Rather, it is that the Montreal Convention does not and was never intended to preempt the exercise of our national laws. US exercise of its national criminal jurisdiction, including the pursuit of diplomatic initiatives to obtain custody of a suspect, cannot be regarded as potentially violating the Montreal Convention.

2.11. Our second proposition is that a review of each of the articles cited by Libya does not show that any of them creates a right for Libya to prevent other States from seeking custody of an offender. As we explained in our initial presentation (CR 97/18, pp. 24-31, paras. 2.28-2.47), all of these articles are designed to impose obligations on a State to take certain steps if an offender turns up there. The steps that the State is obliged to take include either prosecuting or extraditing the offender. These provisions, however, do not also impose obligations, expressly or implicitly, on other States to refrain from taking actions pursuant to other global, regional, or national instruments or in other fora to bring the offender to justice. Moreover, when other articles of the Montreal Convention are taken into account, it is clear that the basic thrust of the Convention is to

establish various fora where an offender might be prosecuted and to allow States to work out where such prosecution should occur, without any priority being given to one jurisdiction over another.

2.12. Libya's reference for the first time to Article 1 on Friday does not change this analysis. Article 1 merely lists the categories of offences covered by the Convention, without creating any right by Libya to prevent other States from seeking custody of an offender.

2.13. Mr. President, Libya claims that the United States' resort to the Security Council violates Libya's allegedly exclusive right to prosecute or extradite. In the strongest terms, the United States urges the Court not to accept this position. It could seriously harm the ability of States to raise issues before the Security Council, the General Assembly, and other fora in many important, sensitive areas (CR 97/18, pp. 22-23, para. 2.23). Moreover, Libya's position is wholly inconsistent with the fundamental rights of States under the Charter. It should not be sanctioned by this Court.

2.14. Libya contends that the United States cannot be said to have met its obligation under Article 11 of the Montreal Convention. I will not repeat all of our points regarding the general nature of this obligation and its dependency on what is permissible under the national law of the requested State (CR 97/18, pp. 28-31, paras. 2.39-2.47). However, I must stress that US law, here including the United States Code and the Federal Rules of Criminal Procedure, requires a prosecutor not to reveal sensitive evidence when doing so may compromise prosecution of the case or may prejudice the rights of the accused to a fair trial (United States Constitution, Sixth Amendment; United States Code, Title 18, section 3500; US Federal Rules of Criminal Procedure, Rules 6 *(e)* & 16).

2.15. At the same time, the United States has furnished to Libya in the indictment detailed factual allegations regarding this situation, including: Libyan procurement of twenty prototype timers; the storage of plastic explosives by one of the suspects in the Libyan Airlines Office in Malta; air travel to and from Malta by the suspects on specified dates; diary entries by one suspect about obtaining luggage tags from Air Malta; and the departure of one suspect from Malta on 21 December 1988, using an alias on a Libyan Airlines' flight at the same time as the boarding of the Air Malta flight, which carried the unaccompanied bag to Frankfurt — the bag that ultimately destroyed Pan Am 103 (see US Preliminary Objections, Exhibit 1, Count One, paras. 1-22 and

38-39). This information provided ample basis for Libya to conduct its own investigation in Libya had it truly wished to do so. Article 11 cannot be construed as obligating the United States to do anything more.

2.16. In summary, Mr. President, our fundamental concerns remain intact. The Montreal Convention is not the exclusive means by which offenders are brought to justice. Yet, even if one looks at the provisions of the Convention, it confers no right on Libya to prevent other States from seeking custody of an offender who turns up in Libya. There is no dispute before you legitimately involving the interpretation or application of the Montreal Convention.

II. Security Council Issues

2.17. As we explained last week, the Libyan application is not admissible because of the binding actions taken by the Security Council in adopting resolutions 748 and 883. Under Articles 25, 48 and 103 of the Charter, Libya, the United States and the other Members of the United Nations are obliged to carry these resolutions into effect. It is not the submission of the issue to the Security Council that is the heart of the position. It is the fact that the Security Council has adopted binding resolutions. Professors David and Suy thus appear to misunderstand our position in this regard (CR 97/20, paras. 4.28 *et seq.*; CR 97/21, para. 5.5).

The Meaning of Resolutions 748 and 883

2.18. The compulsory legal effect of resolutions 748 and 833 is clear. As I explained last week, resolution 731 established a series of demands that had been expressed in three documents emanating from the Governments of France, the United Kingdom and the United States as the Council's benchmarks for assessing Libya's behaviour in relation to the bombing of Pan Am 103 and of UTA 772. These included the demands that the individuals accused in the Lockerbie bombings be transferred to the United States or the United Kingdom for trial. In resolution 731, which did not draw upon the Council's binding powers, the Council simply "urged" Libya's compliance with the demands of the three governments.

2.19. Resolution 748, a binding Chapter VII resolution, changed the legal situation. Paragraph 1 of resolution 748 states that the Council "*Decides* that the Libyan Government must *now comply* without any further delay with paragraph 3 of resolution 731 regarding the requests made" in the three documents containing the French, British and United States demands (emphasis added). The verb used is "decides". This shows that this is a legally binding action of the Council that must be carried into effect by Libya under Article 25 of the Charter. What must Libya do? It "must now comply" with paragraph 3 of resolution 731. Libya must now respond fully and effectively to the demands of the three governments. In resolution 731, the Council "urged". In 748, it decided that Libya must comply. Compliance does not mean counter-proposals. It means action.

2.20. Professor Suy, however, asks the Court to read it differently. He resurrected an argument that was rebutted at great length in our written Preliminary Objections (US Preliminary Objections, pp. 80 *et seq.*) and was subsequently not mentioned in Libya's most recent written pleadings. This is the argument that the Court should reinterpret the language of resolutions 748 and 883 in new and unjustifiable ways so as to relieve Libya of its duty to transfer the accused for trial and at the same time to avoid the need for the Court to explicitly overturn Libya's resolutions. Professor Suy contends (CR 97/21, pp. 5.19 *et seq.*) that the Security Council has not really imposed a duty on Libya to transfer the accused individuals for trial in Scotland or the United States. Rather, the Council only invited Libya to make proposals and negotiate with the Council in order to arrive at some procedure for an eventual criminal trial agreeable to Libya.

2.21. The Security Council does not see the ambiguity claimed by Libya. Professor Suy claimed to find support for his reinterpretation in preambular paragraph 7 of resolution 883, which "took note" of Libya's stated intention to encourage the accused to appear for trial. His theory is that the Council would not have said this if it really found Libya's performance to be unsatisfactory and not in keeping with what the Council had required.

2.22. This ignores the central reality of resolution 883. Through that resolution, the Security Council imposed substantial new sanctions on Libya precisely because Libya had not met the Council's requirements, particularly its obligation to transfer the accused for trial. This is clear throughout resolution 883. Its second preambular paragraph speaks of Libya's failure to comply. Its fourth preambular paragraph highlights the Council's determination that "those responsible for acts of international terrorism must be brought to justice". The first and second operative paragraphs demand, again, that Libya comply with past resolutions, impose strong new sanctions to encourage such compliance.

2.23. Operative paragraph 16 of resolution 883 states explicitly what the Security Council required. It says that the Council will consider immediate suspension of its sanctions "if the Secretary-General reports to the Council that the Libyan Government has assured the appearance of those charged with the bombing of Pan Am 103 for trial before the appropriate United Kingdom or United States court". The Council could not be much more clear than that. Its resolutions require the presence of the accused for trial, not Libyan counter-proposals.

2.24. Libya's proposed reinterpretation also flatly contradicts clear explanations of both resolution given when the Security Council voted on them, when resolution 748 was adopted. The US representative spoke in terms that made clear that transfer for trial was required. He referred to the need under it for Libya to "turn over the two suspects in the bombing for trial either in the United States or the United Kingdom" (S/PV.3063, 31 March 1992, p. 66; US Exhibit 22). The representative of Cape Verde explained his abstention as partly based on the fact that his country did not permit the extradition of its nationals, and he was therefore concerned by Security Council measures inconsistent with that principle (*id.*, p. 46). The representative of Hungary explained he supported the resolution because he found Libya's conduct — evidently including the sorts of

negotiations and counter-proposals discussed by the Libyan side — not to satisfy the requirements of the Council's earlier resolution (*id.*, p. 76).

2.25. Similar statements were made when resolution 883 was adopted. The French representative spoke then of the Council's requests that Libya "hand over the two suspects in the attack on Pan Am 103" (S/PV.3312, 11 November 1993, p. 42; US Exhibit 33). The representative of Spain spoke of the need for Libya to "do everything necessary to ensure [his words] that the two persons charged with the bombing of Pan Am flight 103 do indeed appear before the Scottish courts" (*id.*, p. 58). The representative of Venezuela spoke in similar terms (*id.*, p. 62). These supporters to the resolutions and in one case an abstainer, made clear what the resolutions required — the transfer of the accused individuals for trial.

2.26. The proposed reinterpretation of the two Chapter VII resolutions is also quite inconsistent with Libya's other recent positions in this case. Before Professor Suy began to speak on Friday, Libya portrayed the central issue before the Court as the Court's capacity to review and annul these resolutions. The whole structure and argument of Libya's Observations and Submissions was in these terms. That document makes it abundantly clear that Libya understood the resolutions to require the transfer of the accused for trial. For example, paragraph 3.1 thus stated that "Libya will show that the Court is perfectly well able to examine the validity of Security Council resolutions and there is no point in taking refuge behind those resolutions." Now, why would Libya say such things, unless it previously understood clearly what the resolutions require?

2.27. The proposed reinterpretation is also inconsistent with the interpretations of the resolutions adopted by others on the Libyan team. Professor Brownlie argued at some length (although as Mr. Matheson will show, not to very great effect) that the Court can review the validity of Security Council resolutions (CR 97/21, paras. 38, 44, 45, 61). Presumably he did so because he saw the resolutions as requiring the transfer of the accused for trial, a requirement that Libya wished to set aside.

2.28. Mr. President, we do not say that one cannot come to a better understanding of a legal text through study and reflection. But the change of interpretations here is so substantial and so inconsistent with the Applicant's previous practice as to lead to serious doubts about its validity. The proposed reinterpretation of the Security Council's resolutions does not conform to the language

the Council used, to the past understanding of the Parties, including Libya, the statements made at the time of adoption. The Council's actions in resolutions 748 and 883 were clear and were clearly understood by Libya and the rest of the international community. These resolutions make clear what Libya is obliged to do. There is no ambiguity. There is certainly no reason for this Court to decline to give the resolutions the effect the Security Council intended them to have. The Court should find Libya's claims inadmissible.

Attacks on the Powers and Procedures of the Council

2.29. Mr. President, this next section will deal rather quickly with several points, most made by Professor David, attacking both the legal basis for the Security Council's actions and the procedures followed by the Council. We anticipated and answered many of these in our presentations last week; the Libyan side did not really join issue with many of these arguments. Should they decide to do so in their final rebuttal, the tactic would of course deny us the opportunity to reply.

2.30. First, Professor David reiterated Libya's argument to the effect that the Security Council cannot alter any rights Libya has under the Montreal Convention *unless Libya consents* (CR 97/20, para. 4.14). I answered this line of argument last week (CR 97/19, pp. 9 *et seq.*). The Security Council does have the power under the Charter, when acting under Chapter VII, to alter existing rights under treaties. The consent of a State that is the target of measures under Chapter VII is not required.

2.31. Professor David admitted that the Council can *sometimes* affect rights under treaties (CR 97/20, para. 4.18). The Lockerbie situation, however, is different in his view. It was not sufficiently extreme. Hence, the Council lacked a sufficient predicate to act and accordingly, could not validly exercise its Chapter VII powers. Because the Security Council could not properly act, the Montreal Convention continues to control. We fully answered this objection last week. The Charter gives the Security Council, and not Libya, the power and the responsibility to determine whether there is a threat to peace and security and to determine what measures are necessary in response. We also showed how — although it is not legally relevant — there was ample

justification for the Council's actions (CR 97/19, paras. 3.57 *et seq.*). Libya did not respond at all to that part of my presentation.

2.32. Professor David also repeated Libya's arguments that the Montreal Convention should be viewed as superior to Libya's obligations under the Charter because it is both a *lex posteriori* and a *lex specialis*. Again, we showed last week how this analysis disregards the central position of the Charter in the post-war legal world (CR 97/19, pp. 10 *et seq.*). It is also inconsistent with Article 30, paragraph 1, of the Vienna Convention on the Law of Treaties. It would allow States to eviscerate the Charter by concluding treaties inconsistent with Charter provisions they do not like. The Court should not adopt so dangerous a doctrine.

2.33. The same must be said for Professor Salmon's exhaustion of remedies argument, as was enlarged by Professor David (CR 97/20, para. 4.22). We showed last week why the actions of the Security Council under Chapter VII are not subject to a requirement for prior exhaustion of avenues for peaceful dispute settlement (CR 97/19, p. 14). Professor Salmon did not respond to our analysis, instead invoking a 1972 Swiss legal opinion, that a State must refrain from imposing sanctions until it has exhausted all available remedies for the peaceful settlement of disputes (CR 97/20, para. 3.15).

2.34. It is not clear that the Swiss opinion reflects the law. The Award in the 1979 United States-French Civil Aviation Arbitration shows that a State can in appropriate circumstances take unilateral measures that might otherwise be illegal to assist in bringing about the settlement of a dispute. But in any case, the Swiss opinion is irrelevant. It appears to be addressed to the taking of countermeasures that would otherwise be illegal. It cannot be illegal for a State to exercise its right under the Charter to apply to the Security Council for assistance in seeking the peaceful resolution of a matter believed to threaten peace and security.

2.35. Professor David invoked this argument as well, but nothing he said impairs the response we made last week. Article 33 of the Charter did not require that Kuwait exhaust the peaceful means of dispute settlement with Iraq before it called on the Security Council for help under Chapter VII following the 1990 invasion. Chapter VII does not contain an exhaustion of remedies requirement.

2.36. The Libyan side has also sought to make much of Article 36, paragraph 3, of the Charter, which provides that in making recommendations for peaceful settlement under Chapter VI, the Council should take into consideration that legal disputes should "as a general rule" be referred to this Court. I can do no more in response than to draw attention to the words used in the Charter. This provision calls for the Council to "take into consideration" the important potential role of this Court in constructing recommendations under Chapter VI of the Charter. It is not a limit on the power of the Court to act as required in a Chapter VII situation.

The Right to Apply to the Security Council

2.37. Mr. President, let me address here a recurring and somewhat irritating point made by Libya. Both Professors Salmon and David denounce the United States in ringing terms for failure to respect international law and for abusive conduct. The core element of their arguments, however, is that it was abusive and contrary to international law for the United States to appeal to the Security Council to deal in a non-violent fashion with a situation seen by the United States and other States to endanger peace and security. It cannot be that such conduct is a violation of international law. The United States, no less than any other State, has the right under the Charter to bring such matters before the Council. It is not reasonable for Libya to denounce the United States both for imagined threats of the use of force, and for seeking the peaceful involvement of the Security Council in accordance with the Charter.

2.38. Professor Salmon also repeated Libya's argument about official prejudgment, contending that the accused cannot enjoy a fair trial in Scotland or the United States. Last week, we described in detail the human rights safeguards that would operate in any trial in the United States. The Lord Advocate did so in greater detail for any trial that would take place in Scotland. Professor Salmon did not address these United States or British explanations, instead repeating Libya's points about the supposed impossibility of a fair trial. However, the position taken now is inconsistent with the views expressed in writing elsewhere by the government of Libya.

US Exhibit 31 includes the text of the 29 September 1993 letter from Mr. Almuntasser, Secretary of the General People's Committee for Foreign Liaison and International Cooperation, a document which Libya asked to have circulated by the United Nations (US Exhibit 31, Annex II).

That letter records Libya's views that the position, at least in Scottish courts, is "adequate and acceptable" from Libya's standpoint. Now, Professor Salmon necessarily went to desperate lengths to explain away this letter. He did not succeed in doing so.

2.39. Mr. President, I have come to the end. I again thank the Court for its courtesy and attention. I hope that I have shown you that nothing that was said by the Libyan side on Friday affects our basic contentions, first, that this Court does not have jurisdiction because of the absence of a dispute regarding the interpretation or application of the Montreal Convention, and, second, that Libya's claims are rendered inadmissible by the operation of binding resolutions of the Security Council.

2.40. I now suggest that the Court invite Professor Zoller to continue our rebuttal. Thank you.

The ACTING PRESIDENT: Thank you Mr. Crook. I now call on Professor Zoller to address the Court.

Mme ZOLLER :

3.1. Monsieur le Président, Messieurs de la Cour, le Gouvernement des Etats-Unis attendait avec intérêt les arguments de la Libye sur la question des relations entre la Cour et le Conseil de sécurité. Pour la raison très simple qu'avec ce problème, nous sommes au cœur de la demande libyenne. Rappelons-nous, en effet, que ce que la Libye demande à la Cour, c'est le «respect de [son] droit à ce que la Convention de Montréal ne soit pas *écartée* par des moyens qui seraient au demeurant en contradiction avec les principes de la Charte des Nations Unies» (mémoire, p. 52, par. 3.3; les italiques sont de moi). Comme ces «moyens», ce sont les résolutions du Conseil de sécurité, il est bien certain que pour satisfaire la demande libyenne, il faut — pour reprendre un terme cher à la Libye — «écarter» ces moyens. Ce dont la Libye se plaint, c'est qu'on ait «écarté» la convention de Montréal; ce qu'elle vous demande, c'est d'«écarter» les résolutions du Conseil de sécurité. A ce jeu de l'«écarté», chacun choisit son droit, comme dans le jeu de cartes du même nom où chaque joueur peut, si l'adversaire l'accorde, écarter les cartes qui ne lui conviennent pas et en recevoir de nouvelles (voir *Le Grand Robert, Langue française*, tome 3, p. 724). En la présente espèce, c'est exactement ce que la Libye sollicite de la Cour.

3.2. La Libye vous demande de lui reconnaître le droit de choisir son droit. Et la raison qu'elle invoque — parce qu'il faut bien un motif pour justifier une prétention aussi extravagante — c'est que ces résolutions sont entachées d'excès de pouvoir. C'est pour cela que la démarche libyenne est d'une audace inouïe. C'est la première fois qu'un Etat vient devant la Cour pour lui demander d'exercer un contrôle sur les actes du Conseil de sécurité. A ce formidable défi, le Gouvernement des Etats-Unis a opposé une réponse nuancée. Il vous a expliqué que, pour des raisons qui tiennent à la répartition des compétences contentieuses et consultatives, si vous possédez un pouvoir de contrôle juridictionnel sur les actes des organes de l'Organisation, ce pouvoir ne peut valablement s'exercer que dans un cadre consultatif. Le Gouvernement des Etats-Unis se félicite de voir que, tout au moins sur ce point, la Libye partage nos vues. M. Brownlie, qui s'est prévalu de la haute autorité doctrinale de sir Gerald Fitzmaurice pour vous démontrer que vous aviez un pouvoir de contrôle sur les actes du Conseil de sécurité, a eu la main suffisamment heureuse pour retenir des textes du grand juge anglais écrits en 1952 et se référant justement à la procédure consultative (CR 97/21, p. 36, par. 16, M. Brownlie). Pour comble de bonheur, il en est de même des analyses conduites par M. Skubiszewski, elles aussi, amplement rapportées par M. Brownlie (*ibid.*, p. 39, par. 24). Pour les Etats-Unis, il n'est donc pas du tout question que «la Cour *se taise*» comme l'a brutalement asséné le conseil de la Libye, M. Suy (CR 97/21, p. 16, par. 5.12, M. Suy; les italiques sont dans le texte). Il est question que la Cour choisisse de parler dans un contexte digne de ses fonctions de tribunal et de nature à lui donner l'assurance d'être entendue. Ce contexte, le Gouvernement des Etats-Unis pense qu'il ne peut être que celui de la procédure consultative.

3.3. La Libye n'a pas répondu à cet argument. Ou plutôt, elle y a répondu en reformulant sa demande, en en minimisant la portée. Pour elle, il ne s'agirait pas du tout d'«annuler» les décisions du Conseil de sécurité (CR 97/21, p. 19, par. 5.17, M. Suy); il ne serait question que de les «interpréter» (*ibid.*, CR 97/21, p. 27, par. 5.24); il ne s'agirait que d'«obtenir des éclaircissements» (*ibid.*, CR 97/21, p. 15, par. 5.12). Mais de qui se moque-t-on ? Pour satisfaire la demande de la Libye, il faut que la Cour fasse bien plus que d'interpréter les résolutions 731, 748 et 883 du Conseil de sécurité. Il faut qu'elle les écarte. C'est cela que la Libye demande à la Cour. Le conseil qui a parlé avant M. Suy vous l'a très clairement rappelé. M. David vous a expliqué qu'il s'agissait de «dire si, dans les circonstances de l'espèce, il est exact que les résolutions

invoquées par les défendeurs sont *opposables* à la Libye» (CR 97/20, p. 19, par. 4.43, M. David; les caractères gras sont dans le texte, les italiques sont de moi).

«Opposables», Monsieur le Président. Retenons bien le mot. Il mérite qu'on s'y arrête. Derrière lui se profile la remarquable habilité de notre adversaire qui consiste à présenter en termes anodins ce qui est en vérité une question capitale. La Libye vous fait croire sur un ton faussement candide que tout ce qu'elle demande, c'est, non pas une annulation, mais seulement une déclaration d'inopposabilité. Benoîte, elle vous explique qu'il n'a jamais été question pour elle de vous inviter à tenir le rôle d'un censeur du Conseil de sécurité. Elle vous demande seulement — dit-elle — d'«interpréter» les résolutions du Conseil de sécurité. Pour un juriste formé à la tradition de la famille romano-germanique (*civil law system*), c'est un peu comme si elle vous disait : «Non, nous ne cherchons pas à faire de vous un juge de l'excès de pouvoir. Nous ne vous demandons pas d'annuler l'acte juridique, nous vous demandons seulement de l'interpréter comme peut et doit le faire le juge ordinaire». Bref, elle joue sur une différence importante dans la tradition juridique continentale, la distinction entre l'inopposabilité et la nullité.

3.4. Monsieur le Président, l'inopposabilité et la nullité partagent la même nature d'être l'une comme l'autre la sanction d'un acte frauduleux. Mais c'est dans leurs effets qu'elles se différencient radicalement. L'inopposabilité prive l'acte juridique d'effet seulement à l'égard de certaines personnes (notamment les créanciers) alors que la nullité consiste dans l'anéantissement de l'acte et a des effets *erga omnes*. En présentant sa demande sur le terrain de l'opposabilité, elle veut vous faire croire qu'il ne s'agit nullement pour vous de toucher à la validité des résolutions du Conseil de sécurité. Il ne s'agirait que de les priver d'effet à l'égard de la Libye, étant entendu qu'elles resteraient par ailleurs valables en tous points. Mais ce raisonnement ne tient pas, et ceci au moins pour trois raisons.

3.5. En premier lieu, sur le plan des principes, l'effet des résolutions du Conseil de sécurité n'est pas divisible. Ou bien une résolution est valable pour tous les Etats, ou bien elle n'est valable pour aucun d'entre eux. Une résolution du Conseil de sécurité prise sur la base du chapitre VII participe de la loi, pour ainsi dire. En tant qu'elle est obligatoire, il est impossible qu'elle puisse être opposable à certains Etats, mais non à d'autres. En droit international comme en droit interne, la «loi» est la même pour tous soit qu'elle protège, soit qu'elle punisse. Elle ne peut pas être

opposable aux uns, inopposable aux autres. Il n'y aurait plus d'égalité entre les Etats s'il en allait différemment. C'est bien pourquoi vous ne pouvez pas satisfaire la demande libyenne. Vous ne pouvez pas, sans introduire une divisibilité dans les effets des résolutions du Conseil de sécurité, dire qu'une résolution obligatoire est opposable à un Etat, mais non à un autre. Encore une fois, ou bien les résolutions sont valables pour tous, ou bien elles ne sont valables pour personne. Entre les deux, il n'y a pas de moyen terme, contrairement à ce que tente de vous faire croire la Libye en vous présentant l'inopposabilité comme une troisième voie entre l'absence de contrôle et l'affirmation d'un droit de contrôle juridictionnel.

3.6. En second lieu, sur le plan pratique, la prétention libyenne à ne vous faire prononcer qu'une simple déclaration d'inopposabilité n'a aucun sens. Si les résolutions 731, 748 et 883 du Conseil de sécurité ne sont pas opposables à la Libye, elles sont à toutes fins utiles privées de tout effet pratique. Ces résolutions sont adressées à la Libye *intuitu personae*. C'est elle le destinataire de ces actes. Si ces résolutions ne devaient plus lui être opposables, alors elles n'auraient plus d'effets juridiques. Elles seraient écartées exactement comme le recherche la Libye, écartées comme si elles étaient entachées d'un excès de pouvoir. N'obligeant plus leur destinataire, les résolutions seraient annulées *de facto*, mais non *de jure*. C'est bien pourquoi la déclaration d'inopposabilité que sollicite la Libye est à la vérité une déclaration de nullité et c'est pourquoi, au coeur de la présente affaire, il y a la question de savoir si vous avez ou non un pouvoir de contrôle juridictionnel sur les décisions des organes de l'Organisation. Remercions la Libye de nous avoir planté le décor. Nous sommes bien en présence du tableau de René Magritte : «Ceci n'est pas une pipe.» Comme le peintre, la Libye affirme : «Ceci n'est pas un recours en annulation». Mais si, justement, c'est un recours en annulation parce que, pour satisfaire la demande libyenne, il faudrait que vous déclariez les résolutions 731, 748 et 883 du Conseil de sécurité privées d'effet pour leur destinataire, donc emportant les mêmes effets que si vous prononciez leur nullité.

3.7. La troisième raison qui exclut la thèse libyenne de la simple déclaration d'inopposabilité tient à la notion même d'opposabilité. Au sens rigoureux du terme, l'opposabilité est l'aptitude d'un acte à faire sentir des effets à l'égard de *tiers*. La notion d'opposabilité se conçoit parfaitement dans le droit des traités parce qu'il y a des tiers. Les traités sont évidemment inopposables aux tiers *(res inter alios acta)*. Mais cette notion n'a aucun sens dans le droit de l'organisation internationale.

Les Etats Membres des Nations Unies ne sont pas des «tiers» par rapport aux actes des organes de l'Organisation. Ce n'est pas en termes d'opposabilité, mais en termes d'obligation que se pose le problème des rapports entre les Etats membres et les résolutions du Conseil de sécurité. La Libye est tenue par les actes qu'elle conteste. La question n'est donc pas de savoir si ces actes lui sont opposables. Ils le sont nécessairement puisqu'ils sont obligatoires. Il en résulte que la demande libyenne de déclaration en inopposabilité est sans objet.

Monsieur le Président, Messieurs, je vous remercie de votre attention.

Avec votre permission Monsieur le Président, je vous prie de bien vouloir appeler à la barre M. Matheson.

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

Mr. MATHESON:

Review of Council Decisions; Preliminary Character of US Objections

4.1. Mr. President, Distinguished Members of the Court, In my presentation this morning, I will focus on two aspects of Libya's arguments during the first round of these proceedings: first, concerning the authority of the Court to review decisions of the Security Council; and second, concerning the preliminary character of the objections of the United States.

4.2. Mr. Crook has already shown, contrary to Libya's argument on Friday, that resolutions 748 and 883 do in fact obligate Libya to surrender the accused individuals for trial in the United States or the United Kingdom, and that under the Charter these resolutions supersede any inconsistent obligations under the Montreal Convention. Professor Zoller has shown that Libya's suggestion that the Court declare these resolutions "inopposable" to Libya amounts in fact to a request for annulment of those decisions.

4.3. The United States, of course, has argued that the Court does not have the authority to annul or invalidate decisions of the Council. In particular, the Court has no authority to review and invalidate the Council's determination that a threat to the peace has occurred or its choice of means to deal with that threat under Chapter VII. I refer the Court in particular to the extensive

argumentation of Professor Schachter that is contained in paragraphs 4.1 through 4.18 of the Verbatim Record for 15 October.

4.4. In his presentation on Friday, Counsel for Libya did not address himself to Professor Schachter's arguments. Nor did he cite any case in which the Court had annulled a decision of the Council or asserted the right to do so. Rather, he referred to a series of cases in which the Court interpreted or applied Council decisions, or commented on the validity of such decisions in the course of giving an advisory opinion. He suggested that these cases defeated a principle of general "immunity" or "non-justiciability" of Council decisions supposedly asserted by the United Kingdom — and by inference, the United States as well.

4.5. With respect, we disagree. The United States does not assert that the Court is precluded from applying Chapter VII decisions of the Council or assessing their legal effect in the course of deciding contentious cases within its jurisdiction. Nor do we assert that the Court would be precluded from opining on the validity of Council decisions when properly asked to do so by a request for an advisory opinion. Thus the Court cases cited by counsel for Libya are in no way inconsistent with anything argued by the United States, but rather confirm our view of the proper scope of the Court's authority with respect to Chapter VII decisions of the Council.

4.6. Counsel for Libya suggested that such distinctions are impossible, but gave no convincing reason why this should be so. In particular, he ignored the significant differences between the Court's contentious and advisory jurisdictions that were elaborated by Professor Zoller on Wednesday (CR 97/19, pp. 32-45, paras. 5.1-5.17).

4.7. As Professor Schachter explained last Wednesday, the drafters of the Charter clearly rejected proposals to give the Court the power to review decisions of the Council in contentious cases, and the Court itself has recognized that it does not have such a power. This does not mean that the Council is infallible or above the law. It simply means, as in many legal systems, that the judicial authority does not have a superior right to overturn decisions of the political authority. That is the law and structure of the Charter, and attempts to evade that principle by invoking inherent judicial powers must be rejected by the Court. To do otherwise, as Libya proposes, would place the Court in opposition to an essential element of the compact of 1945 that is embodied in the Charter.

4.8. Mr. President, I will now turn to Libya's arguments that the Objections of the United States are not of a preliminary character. In its presentation on Friday, counsel for Libya chose not to address the arguments presented on this point by the United States on Wednesday. Therefore I can only refer the Court once again to the detailed argumentation found in paragraphs 6.1 through 6.25 of the US presentation, which in our view completely answers the Libyan arguments.

4.9. The Court will recall that the United States has suggested four possible ways of analysing the present case, each of which results in the conclusion that the Libyan complaint should be dismissed at this preliminary stage. Our *first* argument is that the Court lacks jurisdiction over the claims brought by Libya, because Libya has not pointed to any conduct by the United States that could possibly violate the Montreal Convention, and because any Libyan claim under the Convention has been superseded by binding decisions of the Security Council. This jurisdictional argument is patently preliminary in character.

4.10. Our *second* argument is that Libya's claims are inadmissible since they are, on their face, inconsistent with binding decisions of the Council. The Court could only accept those claims by reviewing and overturning the Council's decisions under Chapter VII, which we believe the Court has no authority to do, and in any event, the Council's decisions in the present case were clearly lawful and were abundantly justified by the circumstances. Such a challenge to admissibility is also patently preliminary and within the scope of Article 79 of the Rules of Court.

4.11. Our *third* argument is that the Court should decline to grant the relief sought by Libya because its claims have been rendered moot by decisions of the Council. In accordance with the *Northern Cameroons* case (case concerning *The Northern Cameroons (Cameroons* v. *United Kingdom), Preliminary Objections, Judgment, I.C.J. Reports 1963,* p. 15), a decision of the Court on the Libyan claims under the Montreal Convention would no longer have any object or practical effect in light of the decisions of the Council. Whether this is seen as an aspect of admissibility or a separate grounds for objection, it is clearly preliminary in character under the Rules and jurisprudence of the Court (CR 97/19, pp. 48-49).

4.12. Our *fourth* argument is that, even if the Court were to conclude that it has and should exercise jurisdiction and that Libya's claims are admissible, the Court should nonetheless resolve

the case in substance now by deciding, as a preliminary matter, that the decisions of the Council (which contain the law applicable to the situation) preclude the relief sought by Libya. We have shown that the Court has the authority to resolve the case on this basis at the preliminary phase, and that it should do so in light of the considerable disadvantages of conducting proceedings on the merits that could have no purpose in light of the decisions already taken by the Council (see CR 97/19, pp. 49, paras. 51-52).

4.13. The United States has already responded in detail to the Libyan argument, in its Observations on the Preliminary Objections of the United States, that the US Objections are not preliminary in character, because they would require the Court to consider matters of treaty interpretation or other points of substantive law (CR 97/19, pp. 50-51). As we have shown, neither the Rules nor the jurisprudence of the Court suggest that such matters should be avoided in deciding on preliminary objections, and in fact the Court has on recent occasions enquired extensively into such matters in the course of ruling on preliminary objections.

4.14. Accordingly, the argument presented by Counsel for Libya on Friday, to the effect that the US Objections are not preliminary in character because "the nature of the dispute is inextricably bound up with the various issues of substance concerning the powers of the Security Council" (CR97/21, para. 65), is not correct. There is nothing in the Rules or jurisprudence of the Court which precludes it from considering preliminary objections that involve interpretation of the Charter or analysis of the powers of the Council, and Libya has cited nothing that would support such a proposition. The legal effect of the decisions of the Council on the Libyan claims under the Montreal Convention is a discrete legal question which can readily be resolved without involving the Court in the factual and legal issues that would be presented at a merits phase. In the *Oil Platforms* (case concerning *Oil Platforms (Islamic Republic of Iran* v. *United States of America), Preliminary Objections, I.C.J. Reports 1996*) and *Genocide* (case concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Judgment, I.C.J. Reports 1996*) cases, the Court demonstrated that nothing precludes it from dealing with such "substantive" issues in disposing of preliminary objections.

4.15. A variation of this argument was presented by counsel for Libya on Friday — namely, that certain of the Preliminary Objections of the United States in reality constitute merely a

"justification of breaches of treaty provisions" which, says counsel for Libya, "is clearly a question of merits" (CR 97/21, paras. 74-78). Of course, the United States does not agree that Libya has pointed to any conduct that could possibly constitute a breach by the United States of the Montreal Convention, which is the only treaty on which the Court's jurisdiction could even arguably be based.

4.16. Further, this is a basic mischaracterization of the US Preliminary Objections. The US contention that the Council's decisions have superseded the provisions of the Montreal Convention with respect to the investigation and trial of the accused in this case is not an assertion that the Council has justified a breach of the Convention, but that it has, in effect, substituted one set of obligations for another. This is a classic preliminary question about the applicability of a source of law which the Applicant alleges to have been breached. Nor is the Libyan argument a fair characterization of the US contention that the Libyan claims no longer have any object or practical effect, which is not the assertion of defenses to a treaty breach.

4.17. But in any event, as we have shown, nothing in the Rules or jurisprudence of the Court precludes it from resolving a discrete issue at the preliminary phase merely because it has substantive content or negates a substantive claim of the Applicant. Article 79 of the Rules of Court allows at the preliminary phase any "objection the decision upon which is requested before any further proceedings on the merits", and permits the Court to hear "all questions of law and fact" which bear on the issue. The Court should decide on whether to consider objections at the preliminary phase, not on the basis of arbitrary characterizations of their substance or type, but on whether their consideration at the preliminary phase would assist in the fair and efficient resolution of the case. In the present case, no purpose would be served for the Court to conduct an arduous merits proceeding, only to find that the case must in the end be dismissed on grounds that were already established at the preliminary phase.

4.18. Finally, on Friday counsel for Libya attempted to distinguish the present case from the *Northern Cameroons* case for these purposes on the grounds that "the circumstances in the present case are in no way comparable" (CR 97/21, para. 59, Professor Brownlie). With respect, the distinguishing elements cited by counsel for Libya in no way negate the support which the *Northern Cameroons* decision gives to the comparable argument of the United States in the present case.

Northern Cameroons stands for the proposition that where the relief sought by the Applicant would have no practical effect on the rights and obligations of the parties because of an intervening event, then ruling on the Applicant's claim would not be within the proper judicial function of the Court, and in such a case the Court should dismiss the claim at the preliminary stage, rather than labour through a futile proceeding on the merits. This was true in the *Northern Cameroons* case because the Trusteeship Agreement in question had been terminated by the General Assembly; it is true in the present case because any rights that Libya might have under the Convention have been superseded by the Security Council. The fact that specific remedies have been requested by Libya is irrelevant, because those remedies are either precluded by the Court's decisions or would be mere hypothetical declarations without practical purpose or effect.

4.19. Nor does it make any difference that the Council's decisions are, as Libya says, not "irreversible". The hypothetical (and highly unlikely) possibility that the Council might at some time revoke resolutions 748 and 883 without resolving the matter of the trial of the accused no more justifies a decision on the merits than the hypothetical possibility in the *Northern Cameroons* case that the General Assembly might have reversed its termination of the Trusteeship Agreement.

4.20. What the *Northern Cameroons* case shows is that the Court should not decide issues in the abstract in a contentious case, but only in the context of present circumstances where that decision has practical effect and a concrete factual setting. That proposition applies equally well to the present case, where a decision on the Libyan claims under the Montreal Convention could have no concrete effect on the present rights and obligations of the Parties.

4.21. Mr. President, this concludes my presentation. As always, I am grateful for the Court's attention and for the honour of appearing before it. I now suggest that the Court invite the United States Agent, Mr. Andrews, to conclude the presentation of the United States and to present its formal submission. Thank you, Sir.

The ACTING PRESIDENT: Thank you, Mr. Matheson. Mr. Andrews, please.

Mr. ANDREWS:

5.1. Mr. President, Members of the Court, I will now offer a few brief closing remarks and present the final submission of the United States. The speakers before me have dealt with many of the arguments raised by the counsel for Libya and explained why these arguments are incorrect or, in many cases, simply irrelevant. There remains no impediment for the Court to dispose of this case now, without the need for further proceedings. I will not repeat the substance of the earlier presentations, but I will try to place them in the context of a few major themes that go to the heart of this case.

5.2. First, as we indicated, the Court should dismiss Libya's Application on the grounds that there is no dispute in this case regarding the interpretation or application of the Montreal Convention. If the Court nevertheless believes it necessary to consider the relevance of the Security Council resolutions to Libya's claims, we note that counsel for Libya have made conflicting statements about the interpretation or review of Council resolutions. However Libyan counsel dress their arguments, it is clear is that the ultimate object they seek is the annulment of binding Security Council decisions through an abuse of the processes of this Court. As we have shown, Libya referred to the Montreal Convention for the first time only after it was well known that the draft of what was to become resolution 731 was circulated to the Members of the Council. Libya filed its Application with this Court on the same day that the Secretary-General reported that Libya had failed to comply with resolution 731. Libya also was aware that if it did not comply with resolution 731, the Council would continue to examine the matter and consider further measures to achieve Libyan compliance. In short, Libya first attempted to use its Application for provisional measures as a way to disrupt the ongoing processes of the Council in addressing what it perceived to be a threat to peace and security. Having failed in that attempt, Libya now returns to the Court, some five years later, to achieve some kind of judicial "stamp of approval" on its continuing refusal to comply with those binding Council decisions. This second attempt likewise should be rejected. The three Security Council resolutions (731, 748, and 883) reflect a process of discussion, negotiation, debate, and decision by the Council in the pursuit of its Charter responsibilities, and they remain in place pursuant to the regular reviews of the Council right up until today. The Court should not countenance Libya's attempt to disrupt this process.

5.3. Second, the consequence of adopting Libya's arguments would be to disrupt the framework established under the United Nations Charter for addressing threats to international peace and security. The Charter specifically assigns to the Council the power to determine what is a threat to peace and security and what measures should be taken to address that threat. The framers of the Charter directly considered the possibility of judicial review of binding Council decisions at the San Francisco Conference and rejected such an approach. Accordingly, the proper role for the Court is not to "second guess" the Council's determinations here, but, at most, to exercise its judicial function and apply the governing law — the Council resolutions. The Libyan counsels' distortions notwithstanding, the United States is not saying that the Court cannot interpret Council resolutions under any circumstances. Nor do we contest that the Council is obliged to act in accordance with the Purposes and Principles of the Charter and within the limits of its power. Instead, we are saying that the Court cannot annul binding decisions made by the Council in the context of this case.

5.4. Third, the Court should decide the case now. None of Libya's claims can reasonably be said to fall within the terms of the Montreal Convention. This is readily apparent at this stage in the proceedings, and need not be held over to another stage. Even if the Court finds it has jurisdiction in this case, the ultimate outcome is clear. The Security Council resolutions speak for themselves. There is no mistaking, by anyone, including Libya, that Libya is directed to surrender the accused individuals promptly for trial in the United States or United Kingdom. The Council's decisions are obligatory on Libya and the Council's determination as to the grounds for its decision and its required action are matters left to the discretion of the Council. Whatever questions are raised in this respect can be dealt with by the Court in the present phase of this case. There is no reason for the Court to put off its decision. A subsequent hearing to deal with possible questions of interpretation would be an unnecessary prolongation of a case that has gone on far too long. There is no doubt that the law of the United Nations Charter applies and that the Council resolutions are clear, specific, and legally binding.

5.5. In closing, I emphasize again that the Court should dismiss this case under any one of four analyses: (1) that it lacks jurisdiction under the Montreal Convention, (2) that even if it had jurisdiction, Libya's claims are inadmissible, (3) that it should decline to grant the relief sought by Libya because these claims have been rendered moot by the Council's decisions, and (4) even if it

had jurisdiction and the ability otherwise to hear this case, it should nevertheless resolve the case in substance now by deciding, as a preliminary matter, that the Council's decisions preclude the relief sought by Libya. At the end of the day, Mr. President, Libya's case is based on one amazing proposition — that it was unlawful for the United States, when faced with what it considered to be a threat to peace and security, to bring the matter before the United Nations. The irony in this is all too apparent. For many years, the United States has been criticized for taking action unilaterally, only to find that its efforts to address a serious situation through recourse to United Nations-authorized, non-forcible sanctions would also be charged as an unlawful act.

5.6. Mr. President, distinguished Members of the Court, I thank you for your attention and patience. It has been a special privilege for me to appear before this Court for the first time in these proceedings, particularly in a case that has great significance for the maintenance of international peace and security and collective responses to State-sponsored terrorism.

5.7. I now have the honour to confirm that the final submission of the United States of America remains as set out in its Preliminary Objections, namely: the United States of America requests that the Court uphold the objections of the United States to the jurisdiction of the Court and decline to entertain 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*). Thank you.

The ACTING PRESIDENT: Thank you very much, Mr. Andrews. The Court will meet on Wednesday to hear the second round of oral submissions by Libya. The Court is now adjourned.

The Court rose at 1 p.m.