CR 97/24 (translation)

CR 97/24 (traduction)

Wednesday 22 October 1997

Mercredi 22 octobre 1997

Le VICE-PRESIDENT, faisant fonction de PRESIDENT : Veuillez vous asseoir. La Cour reprend ses audiences aujourd'hui pour entendre les exposés oraux de la Jamahiriya arabe libyenne dans la phase relative à la compétence des instances introduites contre les Etats-Unis d'Amérique et le Royaume-Uni concernant les *Questions d'interprétation et d'application de la convention de Montréal de 1971 résultant de l'incident aérien de Lockerbie (Jamahiriya rabe lbyenne c. Etats-Unis d'Amérique).* Je donne maintenant la parole à l'agent de la Jamahiriya arabe libyenne.

Mr. ELHOUDERI: Mr. President, Members of the Court, on Monday morning the United Kingdom and the United States had the opportunity of replying to Libya's arguments concerning the jurisdiction of the Court and the admissibility of the Application. After these replies, it is apparent that there are fewer points of disagreement but that on major issues disagreement subsists. Libya will concentrate on the issues of law which it deems fundamental.

In one way, the Respondents have saved us precious minutes by saying not a word about the political background, a background which is nonetheless useful in interpreting the conduct of these States in particularly tragic circumstances, preferring to discuss, often in academic terms, points of law which do not raise any particular problem[1]. Thus they dismissed in one sentence the theories and doubts regarding their versions of the facts which have been raised in the international media[2].

There is one point on which Libya and the United Kingdom agree: "La Cour est en mesure d'apporter sa propre contribution pour faciliter le jugement des accusés en écartant les obstacles artificiels qui ont été dreessés sur cette voie."[3] Libya has never asked for anything else. Moreover, it is pleased to note this quasi-explicit recognition of the tangible effects which might arise from a judgment of the Court in the present case.

On all other points the Respondents persist in a biased and even erroneous interpretation of Libya's positions. Counsel who will speak after me will clarify the exact tenor of the requests

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[1]See for example the considerations on Article 79 of the Rules of Court put forward by Sir Franklin Berman, Oral Submissions of the United Kingdom, CR 97/22, pp. 10-11.

[2]David R. Andrews, Oral Submissions of the United States, CR 97/23, p. 8, paras. 1-3.

[3]Sir Franklin Berman, CR 97/22, p. 12.

submitted to the Court in order to clear up misunderstandings fostered by the United States and the United Kingdom.

Mr. Jean Salmon will make a few general points;

Mr. Eric David will speak on the jurisdiction of the Court with regard to the Montreal Convention;

Mr. Eric Suy will address some aspects relating to the admissibility of the Application;

Mr. Ian Brownlie will deal with other aspects relating to admissibility, and the relevance of the issue of the threat to use force.

Mr. President, I shall take the floor again to set forth Libya's submissions in the present case. May I now, Mr. President, request you to give the floor to Mr. Jean Salmon.

Le VICE-PRESIDENT, faisant fonction de PRESIDENT : Je vous remercie infiniment. Je donne la parole à Monsieur Salmon.

Mr. SALMON:

Clarification of some general points

Mr. President, Members of the Court, at this stage of the proceedings I shall confine myself to clarifying three general points.

I. The question of the place of trial in the oral arguments of the Respondents

2.1. Both Respondents (Sir Franklin Berman[4] and Mr. John Crook[5]) maintained that Libya claimed that its territory was the only place where the trial of the two accused might be held; that this was fixed to the exclusion of any other place of trial. It is incorrect that this is the position of Libya.

2.2. Libya is well aware that general international law and the Montreal Convention do not exclude any place of trial provided that the courts of the State concerned have jurisdiction as provided for under their domestic law. Libya has never denied that the courts in Scotland or the United States

[4]"La Libye a énoncé à la Cour la proposition selon laquelle la convention de Montréal lui donne le *droit juridique* d'affirmer avec insistance, de façon unilatérale, que le procès doit être tenu en Libye à l'exclusion de tout autre ressort." (Public hearing of 20 October, CR 97/22, p. 9.)

[5]"un droit prétendument exclusif de la Libye de décider «soit d'engager des poursuites, soit d'extrader»". (Public hearing of 20 October, CR 97/23, p. 11, para. 2.4.)

respectively were entitled to deal with the alleged offences, on the basis of territorial jurisdiction in the case of the United Kingdom or on the basis of jurisdiction based on the passive personality principle or the flag flown in the case of the United States. The Montreal Convention respects this possibility.

2.3. However, this is not the question. The question at the heart of this case is under what conditions the accused might be prosecuted or judged before the Respondents' courts.

Several possibilities may be envisaged, let us say hypothetical possibilities:

First possibility: the accused are tried *in absentia*. This practice is commonplace in the criminal law of many States. It is not contrary to international law and might by envisaged were it not for the fact that Anglo-Saxon law systems generally give no place to proceedings *in absentia*; this holds true of the Respondents.

Second possibility: the United States or the United Kingdom succeed in having Libya extradite the suspects. It is here that Libya's *right* to judge or to extradite (*aut dedere aut judicare*) intervenes and comes into play.

This possibility of choice is enshrined in the Montreal Convention which is binding upon the Respondents. From the outset Libya has stated that it chooses the second option (*judicare*) because its domestic law makes no provision for the extradition of its citizens.

Certainly, when resolutions 731 and 748 of the Security Council invited Libya to find a way of responding to the Respondents' requests, the Libyan Government — as its Agent told the Court in 1992[6] — put the question to the People's Congress. The People's Congress expressed its views in a resolution forwarded to the Secretary-General of the United Nations on 29 June 1992[7], which is found moreover in the Annexes of the Libyan Memorial and also in Annex 58 of the Preliminary Objections of the United Kingdom. In its resolution the People's Congress did not endorse a modification of the Libyan Criminal Code or the Libyan Code of Criminal Investigation; on the other hand it stated that

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[6]Public hearing of 26 March 1992 (CR 92/2, p. 20).

[7] "8. The Basic People's Congresses affirm their adherence to the Libyan Criminal Code and the Libyan Code of Criminal Procedure. They raise no objection to the conduct of the investigation and the trial through the seven-member Committee established by the League of Arab States or through the United Nations before a just and impartial court to be agreed on." (UN Doc. S/24209, 30 June 1992, Ann. 154 of the Libyan Memorial of 20 December 1993, also reproduced in Vol. III, Ann. 58 of the Preliminary Objection of the United Kingdom.)

it had no objection to the trial being held through the intermediary of the United Nations before a just and impartial court to be agreed.

This is where the issue of a fair trial emerged as the key to the whole problem. Sir Franklin Berman recognized this in excellent terms:

> "Il est communément admis que tout procès doit être équitable et que l'on doit voir qu'il est équitable : équitable, bien entendu, pour l'accusé, mais équitable aussi, disons-nous, pour les intêrets des victimes et de leurs familles, les Etats affectés et l'intêret international plus général."[8]

Libya and at least the majority of the international community deem that the British and American courts do not meet this condition. We did not hope to convince the Respondents of this rapidly, since these questions are so bound up with cultural prejudices, no more than we could convince them that a Libyan judge would be impartial. There is no point in pursuing this debate.

The essential point in all this is not that *Libya has an exclusive right* to try the suspects, but that *the Respondents do not have the right to force Libya* to accept an extradition or a "surrender" which would breach the Montreal Convention or ordinary international law which respects the sovereign equality of States.

I come now to the third possibility of ensuring the presence of the accused at the trial: it's simple, the suspects would be kidnapped and forcibly brought before the Respondents' judges. Although such an act is not very likely on the part of the United Kingdom, it is known that the United States have made use of this practice on several occasions and that, for them, there is nothing unlawful in this: the Alvarez Machain or Noriega cases are examples. A long history of relations with Mexico frequently recurs in American practice manuals. A substantial number of legal writers in the United States and Libya disagree. The Libyan Government could never have been sure that the United States would not one day, attempt this type of raid on their territory.

Fourth possibility: succeed in having the Security Council decide on this extradition. Here, the first point to be emphasized is that Libya does not challenge, as was claimed, the right of any Member of the United Nations to refer a matter to the Security Council, of course it does not; what it is does challenge is that such a reference is made with the aim of finding a justification *a posteriori* for the

[8]CR 97/22, pp. 8 and 9.

violation of sovereign rights of a member State under the Montreal Convention and the violation of its right to the peaceful settlement of a bilateral legal dispute.

2.4. Libya's second point — and I refer the Court to Mr. Suy's previous and forthcoming statements on this issue — is that the Respondents did not pull off their coup. A correct interpretation of the texts results in the conclusion that the Council did not endorse the Respondents' request.

II. The relevance of general international law

2.5. Point number two, the second point I now wish to address is the Respondents' claim that Libya raises questions of general international law which have nothing to do with the application of the Montreal Convention.

We may begin by remarking that they have no hesitation in making use of this law, the law which they would deny Libya, for their own ends. In an endeavour to evade their obligations under the Montreal Convention, the Respondents invoke two objections based on general international law:

1.Firstly, the freedom they claim is theirs to choose the place of trial. I have just dealt with this.

2.Secondly, the alleged orders of the Security Council.

2.6. Mr. President, Members of the Court, it must be clear that if the Respondents rely on the rules of international law in order to have the Montreal Convention set aside, and if in the Respondents' opinion the Court has jurisdiction to hear these rules as a defence, the Applicant may in turn rely upon the rules of international law which prevent such pleas being taken into consideration by the Court.

2.7. It is in this spirit that Libya has shown the importance of the principle of the peaceful settlement of disputes, both as an integral part of the procedure of Article 14 of the Montreal Convention and as an obligatory preliminary to any form of enforced execution of the "claims" of the Respondents or of their alleged right to choose the place of trial.

2.8. The violations of international law through threats and failure to observe the rules of international responsibility similarly illustrate the intent to set aside the Montreal Convention. It is in this spirit again that Libya has shown that the principle of an impartial trial is a prerequisite to any form of "surrender" of the suspects (I find the word indeed difficult to utter). Libya does not believe

that a single one of the Security Council resolutions ever invited Libya to take an action which would be contrary to this fundamental principle, in the circumstances of the present case.

2.9. It is still in this spirit, in order to show that it complied with the decisions of the Council on their various points, that Libya has set out the conditions under which, on its recommendation, the suspects' lawyers were prepared to accept the various forms of a fair trial proposed by several international organizations with the aim of settling the dispute between Libya and the Respondents.

2.10. The use of these defences by Libya is not the same as "bargaining with the Security Council" as Sir Franklin Berman termed it[9]; on the contrary it shows that Libya's action complies with the decisions of the Council and that the objection to admissibility raised by the Respondents, based on an alleged conflict with the decisions of the Security Council, is unfounded and cannot therefore be taken into consideration by the Court.

III. The question of the distinction between preliminary objection and the merits of the case

2.11. In a third observation, Libya expresses its unease at the way in which the Respondents refer to the merits of the case in presenting their arguments on the Preliminary Objections.

In presenting the objection to the Court's jurisdiction, the Respondents, relying on the precedent of the *Oil Platforms* case, insist that the Court must consider the facts of the case in order to establish whether a dispute truly exists. Libya holds this method to be legitimate, since it should enable the Court to determine whether there is indeed a true conflict of opinion prima facie; were the Court to find that there is such a conflict and that it does therefore have jurisdiction, the determination of the correct interpretation among those proposed would be postponed until the proceedings on the merits.

However, the extension of this practice to the issues of inadmissibility which concern almost all the rest of the case is more problematic.

2.12. In the course of the written and oral proceedings, Libya has had occasion to formulate a series of hypotheses on the relations between the Montreal Convention and the resolutions of the Security Council. Mr. Suy will address this issue once again in a little while. In Libya's opinion, in most of these hypotheses, there is no possible conflict between the two sides of the equation. This

[9]Public hearing 20 October 1997 (CR 97/22, p. 9)

should be sufficient to quash the objections to admissibility raised by the Respondents, based on an alleged conflict and on the primacy of the resolutions of the Security Council, an objection which clearly cannot apply if there is no conflict. In one instance, Libya does envisage the possibility of there being a contradiction on a limited point, but that should result in an *inopposabilité* vis-à-vis Libya, in order to comply with the Charter of the United Nations itself.

All these issues, Mr. President, Members of the Court, are undoubtedly questions of substance.

2.13. It is possible to understand the concern of this Court, reflected in Article 79 of the Rules of Court, that the Court's role should be eliminated as soon as possible in cases which manifestly lie outside its jurisdiction or which have a particular characteristic which definitely rules out their admissibility. If this is not the case, if the questions of substance are complex, it would be difficult to understand the Court declaring them to be inadmissible or disposing of the merits — as Mr. Matheson requests it to do[10] — before hearings on the merits are held under normal conditions.

What has happened in the present case? The Respondents were made aware of Libya's views on the merits of the case in its Memorial filed on 20 December 1993. This was almost four years ago. They have had time to study it. Libya is still awaiting their Counter-Memorial in order to have a detailed response to all its arguments. The proceedings might normally be pursued by means of a reply and a rejoinder. If the Respondents can request the Court to decide on the merits of the case after such summary proceedings, what is left of the equality of the Parties? Is not such an approach incompatible with the concept of the proper administration of justice? We are convinced that the Court will pay close heed to these serious issues which far exceed the context of the present case.

I thank the Court for its kind attention.

Mr. President, may I request you to give the floor to Mr. David to continue Libya's statements.

Le VICE-PRESIDENT, faisant fonction de PRESIDENT : Je vous remercie, Monsieur Salmon. Monsieur David, s'il vous plaît.

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[10]CR 97/23, p. 29, para. 4.12.

Mr. DAVID:

The Jurisdiction of the Court

3.1. Mr. President, Members of the Court, it falls to me to re-examine the Court's jurisdiction to hear the present dispute in accordance with Article 14, paragraph 1, of the Montreal Convention.

In view of time constraints, Libya will confine its reply to the principal arguments of its opponents; the fact that it remains silent on some of their replies, which in certain cases, incidentally, distort or misinterpret Libya's arguments, does not of course imply that Libya acknowledges the relevance or the validity of those replies, apart from the cases in which it has been able to find a certain convergence of points of view.

In reality, from all aspects of the Court's jurisdiction, Libya maintains its contentions in full and respectfully requests the Court to take into consideration its Memorial on the merits as well as its written observations on the Respondents' objections and the oral proceedings of the past week.

3.2. In the present statement, I shall follow a plan similar to that of my statement in the first round. I shall therefore confirm, and enlarge upon as necessary, the following four points:

primo: there exists between the Respondents and Libya a dispute which falls within the Montreal Convention (I);

secundo: the Respondents cannot act in such a way as to prevent Libya from exercising its rights under the Montreal Convention (II);

tertio: the seisin of the Security Council by the Respondents does not dispose of the dispute relating to the Montreal Convention (III);

quarto: the Court can entertain not only the claims of Libya relating to the Montreal Convention but also those which are directly connected with it (IV).

If you will allow, let us take up these different points in succession.

I.There exists between the Respondents and Libya a dispute which falls within the Montreal Convention

3.3. Mr. President, Members of the Court, in challenging this assertion, the Respondents refer to certain provisions of the Montreal Convention. We shall therefore follow them along the same path.

The United States, through Mr. Crook, expressed surprise at hearing Libya invoke Article 1 of the Montreal Convention "for the first time", according to the United States[11], a surprise which the United Kingdom does not appear to share, and for good reason, since Libya had already referred to that provision in its Memorial both implicitly[12] and explicitly[13].

3.4. Professor Greenwood moreover, for the United Kingdom, does not deny that "the charges, if proved, would disclose an offence falling within Article 1"[14]. That formulation remains ambiguous, since if we understand Professor Greenwood rightly, it tends to suggest that it is not yet proved that an attack was committed against Pan Am flight 103! Be that as it may, the United Kingdom acknowledges also that the Montreal Convention has established a mechanism applicable to this kind of terrorist act[15]; and the United States even invokes certain provisions of the Convention to its advantage, in repeating either on the basis of Article 5, paragraph 3, that the Montreal Convention authorizes the United States to prosecute suspects according to its own laws[16], or on the basis of Article 11 that it has fulfilled its obligation of judicial assistance by transmitting the indictment to Libya[17].

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[11]CR 97/23, pp. 11-14, paras. 2.4-2.12.

[12]Memorial of 20 December 1993, p. 87, para. 4.1.

[13]*Ibid.,* p. 88, para.4.3.

[14]CR 97/22, p. 18, para. 2.7.

[15]*Ibid*, para. 2.8.

[16]CR 97/23, p. 12, paras. 2.7-2.9.

[17]*Ibid*., p. 14, paras. 2.14-2.15.

Libya does recognize that Article 5, paragraph 3, permits the United States to rely on its national law in order to take criminal proceedings against persons suspected of having committed acts contemplated by the Convention. At the same time, it believes that the judicial assistance in the criminal sphere contemplated in Article 11 is not simply confined to transmitting an indictment unsupported by any material proof.

3.5. However, besides the issues proper to one or other provision of the Convention, Libya wishes to point out that, contrary to what Professor Greenwood contends, it too considers that international law is a "*system*, which has to be seen as a whole"[18].

This moreover is precisely what it means when it talks of an "ordering of international society"[19], and when it acknowledges that the Montreal Convention is not *necessarily* "the only instrument applicable to this case"[20].

That is why Libya makes the observation that international law contains certain structural rules such as those which can be inferred from the *lex specialis*, the *lex posterior* or Article 33 of the Charter — rules which are a bar to a direct recourse to the Security Council that bypasses the appropriate instruments.

Lex specialis/lex posterior and Article 33: let us consider these two points again, since they confirm the extent to which Libya recognizes the integrated nature of international law.

3.6. The United Kingdom mentioned the *lex specialis* and the *lex posterior* solely in referring to its preceding submissions[21] while the United States repeated that this argument (on the *lex posterior* or the *lex specialis*) was inconsistent with Article 30, paragraph 1, of the Vienna Convention on the Law of Treaties[22] which, in the case of successive treaties relating to the same subject-matter, provides for the *lex specialis*, but subject to Article 103 of the Charter.

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[18]CR 97/22, p. 18, para. 2.10.

[19]CR 97/20, p. 35, para. 4.18.

[20]*Ibid.*, p. 37, para. 4.23.

[21]Professor Greenwood, CR 97/22, p. 22, para. 2.20.

[22]Mr. Crook, CR 97/23, p. 20, para. 2.32.

This argument adds nothing to the Respondents' case. Article 30, paragraph 1, of the Vienna Convention, in reserving the case of Article 103, simply repeats a rule which Libya has never challenged — the primacy of the Charter over any other convention in the event of a conflict between the obligations under the one and the obligations under the other. In the present case, Libya considers that there is no conflict between Article 103 and the Montreal Convention, as Professor Suy and Professor Brownlie will soon show.

Let us repeat that the Montreal Convention is a *lex specialis* and a *lex posterior* in relation to the Charter; and what Libya accuses the Respondents of is having sought to ensure that the Security Council leaves no room for the Convention to produce its effects. Article 103 would doubtless apply had the autopsy shown that Libya was not playing the game correctly, but that has never been proved.

3.7. Article 33 confirms both the idea of the *lex specialis/posterior* and the Libyan vision of the integration of international law.

In the view of Libya, it is mistaken to see Article 33 as a provision whose effects are limited to matters falling within Chapter VI, as the Respondents contended in the first round of oral proceedings. Libya has shown that in reality this provision was merely a development of Article 2, paragraph 3[23], whose effects it would be every bit as absurd to restrict to Chapter I of the Charter. The Respondents have not replied to that argument.

The United Kingdom has merely observed that the Charter gives any State "an unrestricted right" to ask the Security Council to take action under Chapter VII when the States considers that a situation threatens international peace and security and that the decision taken by the Council falls within its discretion[24].

3.8. These contentions sit uneasily with the general duty of a State "to fulfil in good faith the obligations assumed by it *in accordance with the Charter of the United Nations*" (emphasis added), a duty set forth in the General Assembly Declaration on Principles of International Law concerning

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[23]Cf. C. Tomuschat, in *The Charter of U.N.: A Commentary*, ed. by B. Simma, New York, Oxford University Press, 1994, p. 506 and the references.

[24]Professor Greenwood, CR 97/22, p. 23, para. 2.24.

Friendly Relations and Co-operation among States[25]; they sit uneasily too with the duty of States, acknowledged in that Declaration, "to take joint and separate action in co-operation with the United Nations *in accordance with the relevant provisions of the Charter*"[26] (emphasis added). Article 33, paragraph 1, certainly forms part of the pertinent provisions of the Charter, and pursuant to the principles of co-operation and good faith I have just mentioned, it limits the right of States to move the Security Council unrestrictedly.

3.9. More specifically, authoritative commentators on the Charter — for example, Goodrich, Hambro and Simons — have written that in the event of a conflict of the kind contemplated in Article 33, the Parties "are expected to make *a real effort* to reach an agreed solution before coming to the Council" and that "[the] real intent of Article 33 was to establish an obligation to be fulfilled by the Parties *prior* to their enlisting the Council's assistance"[27] (emphasis added). In the same vein, another scholarly writer says in regard to the words "first of all" that

> "*first of all*, it is incumbent upon the parties themselves to take remedial action; in the case of a failure of their efforts, the procedures of Chapter VI — or of Chapter VII — become applicable"[28] (emphasis added).

The least that can be said is that one finds it difficult to see in what way the Respondents made *a real effort* to solve the dispute as it presented itself in 1991-1992, in accordance with the Montreal Convention and with what Libya had asked of them.

3.10. Apart from these particular answers to our opponents' specific arguments, I wish to emphasize again what I have called the "ordering of international society", a process which in the final analysis is nothing other than a kind of international division of labour among rules, among State actors and among institutions. This is a fact of which Article 33 and the ideas of *lex specialis* and *lex posterior* are the expression. Here are one or two significant examples.

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[25]A/RES/2625, 24 October 1970, seventh principle, first para.

[26]*Ibid.*, fourth principle, second para., *(d)*.

[27]L. M. Goodrich, E. Hambro and A. P. Simons, *Charter of the United Nations Commentary and Documents*, New York/London, Columbia Univ. Press, 1969, pp. 260-261.

[28]Cf. Tomuschat, *loc.cit.*, p. 506.

The first example is drawn from the preamble to the Montreal Convention itself, in which the States Parties consider that "for the purpose of deterring" acts of violence against the safety of international civil aviation "there is an urgent need to provide appropriate measures for punishment of offenders"; that provision, and just as much the Convention, what is more, would be meaningless if the Security Council had to intervene each time an act of violence contemplated by the Convention took place somewhere.

Scholarly opinion has pointed out that this Convention, like others of the same kind, was intended to fulfil certain precise functions, including stopping the gaps in extradition treaties[29]. It is obviously not for the Security Council to concern itself with extradition problems: the Convention therefore occupies a specific place in the body of international law, and *a priori* it is not for the Security Council to deprive it of that position.

Another significant example of the ordering of international law lies in the fact that the drawing-up of conventions of the same kind as the Montreal Convention, and having related aims, continues even today. A case in point is the present draft international convention for the suppression of terrorist bombings[30]. Well, what would be the purpose of such an instrument if it sufficed in any event to maintain that the acts contemplated threatened international peace and security in order for them to be *ipso facto* dealt with by the Security Council?

A third example is drawn from the actual practice of the Security Council. That practice, to which the decisions adopted in the Lockerbie drama are no more than unfortunate exceptions, confirms everything which has been said in regard to decentralization and the international division of tasks. In point of fact, whenever appropriate, the Security Council refers to the pertinent instruments. We have already alluded to this in connection with the Council's decision in the matter of the attempt on the life of President Mubarak, in which the Council asked for the extradition treaty between Ethiopia and the Sudan to be applied[31]; this example, concerning which the Respondents have not seen fit to reply, is far from isolated.

[29]G. Guillaume, "Terrorisme et droit international", *RCADI,* 1989, III, p. 356.

[30]UN doc. A/C/6/52/WG.1/CRP.45/Rev. 2, 2 October 1997.

[31]CR 97/20, p. 34, para. 4.15.

Let us look for example at what the Security Council did in the matter of the American hostages at Teheran in 1979: it began by reaffirming on 4 December 1979

"the solemn obligation of all States parties to both the Vienna Convention on Diplomatic Relations of 1961 and the Vienna Convention on Consular Relations of 1963 to respect the inviolability of diplomatic personnel and the premises of their missions"[32].

Then, on 31 December, the Council envisaged the adoption of "effective measures under Articles 39 and 41 of the Charter" if Iran did not implement the preceding resolution as well as the Order made by the Court two weeks earlier[33]. A draft resolution embodying those measures was subsequently put before the Council on 13 January 1980, but it was not adopted because of the veto of a permanent Member.

Here we have a sequence of events which illustrates to perfection both the requirements of Article 33 and those of the *lex specialis* and of the *lex posterior*: firstly, reference to the convention normally applicable, in this case the 1961 and 1963 Conventions, then a finding by the Council that the convention has not been applied, and lastly the adoption or tentative adoption of measures of coercion against the defaulting State.

The linkages and interactions of the international criminal tribunals and the Court itself with the Security Council partake of the same philosophy[34]. I shall not go into that point here.

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3.11. Mr. President, Members of the Court, what has been said shows that, once the dispute fell within the Montreal Convention, the latter had to apply, and the fruitless efforts of our opponents to refute this amply confirm the existence of a dispute on the application of the Convention.

We shall now turn to the second argument: that the Respondents cannot act in such a manner as to prevent Libya from exercising its rights under the Montreal Convention.

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[32]S/RES 457, 4 December 1979, last preambular para.

[33]S/RES 461, 31 December 1979, paras. 2-6.

[34]Rules of Procedure of the ICTY and the ICTR, Arts. 59B and 61E; United Nations Charter, Art. 94, para. 2.

II.The Respondents cannot act in such a way as to prevent Libya from exercising its rights under the Montreal Convention

3.12. The Respondents have vigorously attacked the Libyan contention that their resorting to the Security Council in the present case violates the Montreal Convention: in the view of Professor Greenwood, "that contention is quite simply nonsense"[35], and Mr. Crook charges the Court "in the strongest terms . . . not to accept that position"[36]. In both cases, our learned opponents consider that the Libyan argument is totally incompatible with the fundamental rights of States under the Charter.

3.13. Mr. President, Members of the Court, we shall begin by observing that it is not the resort to the Security Council *per se* which is regarded by Libya as a breach of the Montreal Convention: it is solely the resort to the Security Council *for the purpose of depriving the Montreal Convention of its effects*.

Such a use by a State of a power which may, at first sight, seem absolute is a full-scale violation of the Convention, combined, as we have just pointed out, with the rule in Article 33, paragraph 1, of the Charter and the principles of the *lex posterior* and the *lex specialis*.

3.14. Less specifically, it is well known in international law as in law generally that the exercise of a power, even a discretionary one, must always remain *reasonable* and be in *good faith*. International case-law has laid down the requirement of reasonableness in the most varied spheres; let us cite at random: the regulation of the fishing rights of foreign nationals[37], the application of a domestic law on protective education[38], the withdrawal or termination of an instrument containing no

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[35]CR 97/22, p. 21, para. 2.17.

[36]CR 97/23, p. 14, para. 2.13.

[37]*Pêcheries de l'Atlantique nord, RGDIP, 1912*, p. 452.

[38]Guardianship Convention of 1902, *I.C.J. Reports 1958*, pp. 91 and 99.

duration clause[39], and the passage of a "reasonable time" between the events and the filing of an application[40].

As an example closer to the present case, the Permanent Court considered that the requirement of diplomatic negotiations as a preliminary to the reference of a dispute to the Court made inadmissible

> "as serious a step as summoning another State to appear before the Court without having previously, within reasonable limits, endeavoured to make it quite clear that a difference of views is in question which has not been capable of being otherwise overcome"[41].

This quotation could easily apply *mutatis mutandis* to the seisin of the Security Council by the Respondents under Article 33 of the Charter.

3.15. If for such limited questions the conduct of the State is to be gauged by the yardstick of reasonableness and good faith, the same must be all the truer of such a momentous act as the seisin of the Security Council in respect of a situation presented, by reference to the Charter, as threatening international peace and security. As one of the United States counsel rightly wrote in a noted work of which the author will be readily recognized:

> "When called upon to determine the reference criteria in relation to which States must exercise the rights they enjoy under a treaty-based commitment, the judge or the arbitrator often combines two expressions: 'reasonably' and 'good faith'. The State must, in general, comply with the duties or rights deriving from a treaty it has concluded, reasonably and in good faith."[42] *[Translation by the Registry.]*

Libya says nothing else: the seisin of the Security Council by the United Kingdom and the United States for the purpose of preventing Libya from being able to secure application of the Montreal Convention breaches that duty of good faith, attaching as much to application of the Convention (the Montreal Convention) as to application of the United Nations Charter.

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[39] *Interpretation of the Agreement of 25 March 1954 between the WHO and Egypt, I.C.J. Reports 1980*, p. 96, para. 49; *Military and Paramilitary Activities in and against Nicaragua, I.C.J. Reports 1984*, pp. 419-420, para. 63.

[40] *Certain Phosphate Lands in Nauru, I.C.J. Reports 1992*, pp. 253-254, paras. 31-32.

[41] *Factory at Chorzów, P.C.I.J. Series A, No. 13*, pp. 10-11; this dictum is reproduced in the case of the *Application for Revision and Interpretation of the Judgment of 24 February 1982, I.C.J. Reports 1985,* p. 218, para. 46; see also *Continental Shelf UK/France, RIAA, XVIII,* p. 359, para. 12.

[42] Zoller, E., *La bonne foi en droit international public*, Paris, Pédone, 1978, p. 87 No. 78.

3.16. The Respondents do not of course share this point of view, which is further evidence, if such were needed, that a dispute exists as to the application of the Montreal Convention.

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3.17. We can now go on to our third argument, which is that the seisin of the Security Council by the Respondents does not remove the dispute regarding the Montreal Convention.

III.The seisin of the Security Council by the Respondents does not remove the dispute regarding the Montreal Convention

3.18. The Respondents imperturbably assert that they have no dispute with Libya regarding the Montreal Convention[43]. For the United Kingdom, Professor Greenwood repeats that, even if there were such a dispute — which he says there is not — the decisions of the Security Council render Libya's Application in respect of that dispute inadmissible[44]. Libya developed this point at length last week, relying in particular on the *Northern Cameroons* (1963) case; it also made reference to the cases concerning *United States Diplomatic and Consular Staff in Tehran* (1980) and *East Timor* (1995)[45]. The Respondents have not disputed the relevance of these precedents and said nothing new on the subject in their reply on Monday.

It is therefore pointless for Libya to repeat what it has already said.

3.19. One point though: Mr. Crook recalled that the United States had transmitted to Libya the indictment of the suspects and that such transmission fully met the requirements of Article 11, paragraph 1, of the Convention[46]. This prompts three observations:

Primo: Mr. Crook asserted that the Convention did not apply[47] just after saying that the United States had complied with Article 11, paragraph 1. Would it be that the United States nevertheless recognizes the application of the Convention?

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[43]Professor Greenwood, CR 97/22, p. 15, paras. 2.2 and 2.3; Mr. Crook, CR 97/23, p. 15, para. 2.16.

[44]Professor Greenwood, CR 97/22, p. 15, para. 2.3.

[45]CR 97/20, pp. 52-55.

[46]CR 97/23, p. 14, paras. 2.14-2.15.

Secondo: Article 11, paragraph 1, requires that "Contracting States shall afford one another the *greatest measure* of assistance" (emphasis added). Can it really be contended that the mere sending of a statement of alleged acts not backed by any evidence corresponds to "the greatest measure of assistance"? Even though United States rules regarding the confidentiality of particular items might possibly warrant their retention, it does not seem acceptable that the Applicant State should be denied the *entire* file of evidence.

Tertio: These questions of evidence are particularly essential for Libya since the Government of Malta and the company Air Malta, contrary to the Respondents' assertions, had no hesitation in collaborating with the Libyan Government for the purposes of the investigation. They thus informed Libya that they had found no evidence to support the allegation that an unaccompanied item of luggage left Malta by Air Malta on the date stated in the indictment[48]. These facts were confirmed by a former senior British Airways security officer who conducted an independent investigation in Malta as an expert witness in a civil case before the British courts, a case to which these facts were relevant[49].

3.20. The discussions on the scope of Article 11, paragraph 1, like those on the scope of Article 5, paragraphs 2 and 3, and Articles 7 and 8, paragraph 3, once more reveal and *in concreto* the existence of a dispute regarding the interpretation and application of the Montreal Convention.

For Libya can but observe that when one repeats *ad nauseam* on the one hand that a convention applies and, on the other, that it does not apply, it becomes difficult to assert that there is no dispute regarding the application of the Convention. In the 1996 Judgment in the *Genocide* case, the Court notes that the Parties have "radically differing viewpoints" on a question "which clearly belongs to the merits"[50], or again that the Parties are "in disagreement with respect to the meaning and legal scope of

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[47] *Ibid.*, p. 15, para. 2.16.

[48] Libyan Memorial of 20 December 1993, p. 15.

[49] See the video submitted to the Court by Libya: *The Maltese Double Cross*; see also the television broadcast of 14 October 1997 on the BBC Scotland programme: *Silence over Lockerbie.*

[50] Judgment of 11 July 1996, para. 31.

several . . . provisions"[51]. It needed no more than that for the Court to recognize that there indeed existed a dispute between Bosnia and Herzegovina and Yugoslavia regarding the application of the 1948 Convention. Those reasons adduced are transposable just about word for word to this case.

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3.21. We can now move on to our last point, which is that the Court may entertain not only the complaints of Libya regarding the application of the Montreal Convention but also those directly linked thereto.

IV.The Court may entertain not only the complaints of Libya regarding the application of the Montreal Convention but also those directly linked thereto

3.22. The United Kingdom has questioned the Court's jurisdiction to deal with this part of Libya's Application. In Professor Greenwood's view, it is quite simply wrong to claim that the Court's jurisdiction can extend to violations of international law on the basis of a compromissory clause in a convention owing to the connection of such violations with the dispute concerning that convention[52].

3.23. Mr. President, Members of the Court, this objection springs from a narrow view of the jurisdiction of the Court, and one that is moreover at odds with its case-law.

For instance, in the 1974 *Fisheries Jurisdiction* case the Court considered that the compromissory clause that gave it jurisdiction to hear the case regarding the unilateral extension by Iceland of its fisheries jurisdiction also authorized it to deal with the disagreements between the Parties concerning their rights over their fishery resources. The Court took the view that the dispute must "be considered in all its aspects" and that it must take into consideration "all relevant elements in administering justice between the Parties"[53].

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[51]*Ibid.*, para. 33.

[52]CR 97/22, p. 16, para. 2.5.

[53]*I.C.J. Reports 1974*, pp. 21-22, paras. 47-48.

Libya considers that the same should hold good in this case: nothing but the dispute regarding the application of the Montreal Convention, but also the whole dispute, including the question of the opposability of Security Council resolutions. This is in the very interests of justice.

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3.24. Mr. President, Members of the Court, at the close of this statement I can but repeat that it does not suffice to claim that the Lockerbie tragedy constitutes a threat to international peace and security for it to fall outside the normally applicable law of the Montreal Convention; it has further to be shown that such is indeed the case, for which no evidence has been forthcoming.

Libya nevertheless notes that some points unite the Parties, and in particular a common love of Magritte. This gives Libya some reason to hope that respect for legal realities will ultimately prevail over any other consideration.

I should like once more to say that it has been an honour for me to defend Libya's interests before the Court and I thank it for the quality of its attention.

Le VICE-PRESIDENT, faisant fonction de PRESIDENT : Je vous remercie, Monsieur David. L'audience est suspendue et reprendra dans 15 minutes.

The Court adjourned from 11.15 to 11.30

Le VICE-PRESIDENT, faisant fonction de PRESIDENT : Veuillez vous asseoir. Je donne la parole à Monsieur Suy.

Mr. SUY:

The effect of Security Council resolutions 731, 748 and 883

Mr. President, Members of the Court,

I shall reply briefly to last Monday's oral arguments of the United Kingdom and the United States, where they have a bearing on my statement of Friday. The Court will remember that I showed that the admissibility of Libya's Application could be conceived in three different ways.

4.1. The Respondents have not disputed the first possibility, namely that the Court could properly rule on the matter without taking account of the Security Council resolutions.
So I come straight to the second possibility, which is the Court's power to interpret resolutions with due regard to the powers of the Security Council under the Charter.

The Respondents wrongly contend that Libya's position on this point is inconsistent. Libya has already noted last week that its observations on the Preliminary Objections must be read in conjunction with its Memorial, to which they make systematic reference.

In its 1993 Memorial, Libya showed that the resolutions did not require it to surrender those charged to the Respondents. Libya relied in that respect on the text of the resolutions and the other relevant Council documents.

It argued that otherwise the resolutions would be contrary to the Charter. This finding reinforces the interpretation adopted by Libya, but also underpins a subsidiary argument, which is a third possible way of conceiving the admissibility of Libya's Application: should the Council unambiguously require Libya to surrender the accused to the Respondents, its resolutions would — to that extent — not be opposable to Libya.

In their Preliminary Objections the Respondents carefully avoided following this graded reasoning. They merely *asserted* that the Council required Libya to hand over those charged.

It is therefore entirely logical that Libya, in its Preliminary Objections, should have concentrated on that assumption, to say that *if that is so* the decisions are contrary to the Charter.

In order to facilitate their reading, the Libyan observations did not systematically repeat the hypothetical character of this violation of the Charter. But this could only mislead those who wanted to be misled. In broaching the effect of the Council resolutions, Libya specified that it would follow on that point the arguments developed by the Respondents (*Libya* v. *United Kingdom*, p. 84; *Libya* v. *United States*, p. 74). It then made systematic reference to its Memorial — to say, for example, that Libya had already contended in its Memorial that the

Security Council had violated its elementary rights to a "due process of law". On consulting Libya's Memorial on this point, the Respondents must have immediately seen that the Libyan position was in fact more qualified, for nowhere in the Memorial is it said that the Council is in actual fact violating Libya's rights.

I therefore do not think it necessary to go into the legal consequences of the alleged inconsistency in Libya's position. I shall not dwell on the fact that the position of Libya, which is not a Member of the Council, does not determine the interpretation of its resolutions. Quite clearly, the Respondents have tried by any means to elude the Libyan argument regarding interpretation of the resolutions.

4.2. The Respondents seem in fact, on this point, to be in a very difficult position. Let us rapidly examine what they replied to Libya's analysis.

The United Kingdom recognizes the power of the Court to interpret the resolutions (CR 97/22, p. 26, para. 3.6), and has not questioned the principle that the resolutions must be so interpreted as to guarantee their conformity with the Charter.

It questions the Libyan interpretation with sole reference to the Secretary-General's report of 3 March 1992. Now in that report the Secretary-General says that he has transmitted the British and United States requests to Libya, notifies the Council of the Libyan proposals, and concludes that there has been a certain shift in Libya's position of which the Council might wish to take account in deciding on its line of conduct. This only bears out Libya's interpretation.

Mr. Crook (CR 97/23, pp. 10 *et seq.*), for his part, insists on the binding character of the resolutions but avoids the real question, which is that of the *scope* of these obligations. He points out that in resolution 748 the Council decides that Libya "must comply now", but he does not tell us *with what*. We showed last Friday that it was not at all a question of complying with the requests of the Respondents. Everything is in the reference to resolution 731.

Libya's analysis of the actual *text* of the resolutions, which is of course all-important, is therefore unaffected.

The same goes in regard to Mr. Crook's attempt to offset the Libyan analysis of the statements made by the Council Members. With regard to resolution 748, Mr. Crook relied on the

statement of *three* Members, including the United States itself. That does not represent the point of view of the majority of the Council. Cape Verde, whose statement Mr. Crook invokes, raised a great many objections, including the fact that:

> "la Constitution du Cap-Vert ne permet pas l'extradition de nos ressortissants. Par conséquent, il nous est difficile de sanctionner des mesures qui *vont* ['could' in English] à l'encontre de notre propre principe constitutionnel" (S/PV.3063, p. 46; emphasis added).

According to Cape Verde, the measures of the Council *could* violate the principle of the non-extradition of nationals. They therefore do not necessarily violate it. This means that resolution 748 does not necessarily require Libya to surrender its nationals to the Respondents. If Cape Verde observes that it could nevertheless result in that, this is of course because, once the enforcement measures have been adopted, Libya and the Security Council as a whole are at the mercy of the Respondents and their intransigence.

Hungary, also solicited by Mr. Crook, said nothing that contradicts Libya's interpretation: it does not say that Libya must surrender those charged to the Respondents, but that it must respond to the requests contained in resolution 731 (S/PV.3063, p. 76). Libya has already analysed the real meaning of that form of words. Hungary also refers to the efforts of the United Nations Secretary-General and of the Arab League (p. 76), with whose proposals we are familiar.

I should like to add the statement of Austria, which voted in favour of resolution 748, that:

> "En tant que partie à tous les instruments pertinents contre le terrorisme, l'Autriche estime que toute mesure prise par le Conseil dans ce domaine devrait s'inspirer des principes consacrés dans ces conventions." (S/PV.3063, p. 76)

The same goes for resolution 883. Here again the United States relies on the statements of three Members only. The statement by France (S/PV.3312, pp. 42 *et seq.*) in no way contradicts its very clear-cut position in the Sudanese case, to which I referred on Friday.

Venezuela, also called to the rescue by Mr. Crook, said nothing to consolidate the Respondents' position, far from it:

> "Nous lançons un appel à toutes les parties concernées pour qu'elles continuent de faire preuve de l'esprit de souplesse qu'elles ont manifesté jusqu'à présent dans la recherche d'une solution qui s'inspirerait de l'esprit et des objectifs des diverses résolutions adoptées par le Conseil de sécurité." (S/PV.3312, p. 76.)

The United States is quite wrong in relying on the fact that the sanctions against Libya have remained in place (Mr. Andrews, CR 97/23, p. 9). The Council has not renewed the sanctions; its President merely stated that there was no consensus to lift them. They have remained in place owing to the Respondents' constant opposition to their lifting. The fact that the membership of the Council has changed since 1992 is therefore quite irrelevant.

4.3. I now come to my next point, which concerns the Council's powers under Chapter VII of the Charter.

The Respondents completely gloss over the distinction between the Security Council's supervisory action and its activity concerned with adjudicating the merits of a dispute or a situation.

This is patently clear in Professor Greenwood's analysis of the taking of evidence (CR 97/22, p. 22, para. 2.19). I shall not revert to this.

The same applies to the British position on the Council's power to impose fresh obligations on member States. Lord Hardie's reply (CR 97/22, p. 30) distorts the Libyan argument, which was nevertheless clearly expounded in the Libyan Memorial (pp. 193 *et seq.*). It is clear, Mr. President, Members of the Court, that the Council can create fresh obligations, and suspend the application of a treaty, when it announces enforcement action, such as a trade embargo. However, another matter is *what the Council can achieve through enforcement action.* And it is on this point, and on this point alone, that Libya states — and has amply demonstrated in its written pleadings — that the Council cannot impose upon member States fresh obligations in order to settle the merits of a dispute or a situation.

The resolutions adopted in other cases, which Lord Hardie referred to last Monday, are therefore all irrelevant. They involve either supervisory and provisional measures, or enforcement action for implementation by all member States (an embargo for example).

Much more relevant to the question which concerns us is the Security Council's practice regarding the boundary between Iraq and Kuwait. The issue there was to pass on the merits of the dispute between those States. And what was the Council's approach on this point?

On the adoption of resolution 687 (1991), the British Representative stated:

> «Cette résolution ne s'efforce pas de fixer la frontière entre ces deux pays; cela a été fait par l'Accord de 1963... Nous n'avons aucun désir ni aucune intention d'annuler le principe selon lequel il appartient aux parties en question de négocier et de parvenir à un accord, comme cela a été fait en 1932 et en 1963 (S/PV.2981, p. 112 et 113.)

> The American Representative asserted that:
> «Les Etats-Unis ne cherchent certainement pas à obtenir pour le Conseil de sécurité un nouveau rôle — rôle qu'ils ne soutiendront pas — en tant qu'organe chargé de délimiter les frontières internationales. Les conflits de frontière sont des questions qui doivent être négociées directement entre les Etats ou réglées par d'autres moyens pacifiques de règlement existants, tels qu'énoncés dans le chapitre VII (sic) de la Charte (supra, p. 86)»

Other Members of the Council made similar declarations, denying the Council's power to fix a new boundary (see, for example, China, *loc cit.*, p. 96, and India, *loc. cit.*, p. 78). This principle was enshrined in the third recital of resolution 773 (1992):

> "*Recalling* in this connection that through the demarcation process the Commission is not reallocating territory between Iraq and Kuwait but is simply carrying out the technical task necessary to demarcate for the first time the precise coordinates of the boundary set out in the 'Agreed Minutes between the State of Kuwait and the Republic of Iraq . . .'"

This clearly shows that the Council cannot, under Chapter VII of the Charter, impose on member States fresh obligations in order to pass on the merits of a dispute or regulate a situation.

There is no getting round this fact by invoking Article 103 of the Charter. The primacy established by this Article *presupposes* an obligation established in accordance with the Charter. It therefore presupposes, in this case, a decision of the Security Council respecting the limits which the Charter imposes upon it.

4.4. I now come to the assertion made by the Respondents to the effect that Libya is requesting the Court to substitute its own subjective determination for that of the Security Council.

Not a bit of it. Libya contends that, in requiring the accused to be surrendered to the United States or the United Kingdom, the Council would be violating the limits to its powers laid down by the Charter. These limitations are legal ones, and consequently may form the subject-matter of an objective determination by the Court.

The same applies to the argument expounded in the Libyan observations (*Libya* v. *United States*, pp. 93 *et seq*.; *Libya* v. *United Kingdom*, pp. 84 *et seq.*), according to which the threat to peace allegedly determined by the Council as the basis of a request — a hypothetical one — for surrendering the accused to the Respondents constituted a misuse of power.

First of all, let us quote Madame Zoller's quite remarkable analysis of the misuse of power in the law of international organizations. Like Professor James Fawcett and Mr. Amerasinghe, whose analyses have been quoted in the Libyan Memorial (pp. 223 *et seq.*), Madame Zoller accepts that the prohibition on the misuse of power applies in the law of international organizations. Madame Zoller says — and I am quoting an extract from her work referred to on page 237 of the Libyan Memorial:

> "no subjective element comes into the determination of such unlawfulness. It is a matter of seeing whether the purpose of the power exercised (final result) is appropriate to and compatible with the purpose and object of the constituent instrument." (E. Zoller, *La bonne foi en droit international public,* 1977, p. 197.)

This analysis applies perfectly to the Libyan argument. To the extent that the determination of a threat to the peace justifies the requirement that Libya should surrender the accused to the Respondents, this determination would constitute an *excès de pouvoir* or a misuse of power.

As you know, the Council's power to determine the existence of a "threat to the peace" is broadly discretionary, but it is not unlimited and cannot be exercised arbitrarily. The Tribunal for the Former Yugoslavia underlined this by pointing out that, under Article 24 of the Charter, the Council must exercise its powers in accordance with the Purposes and Principles of the Charter (see the quotation in the observations of *Libya* v. *United Kingdom*, p. 86).

Consequently, while it is true that the Court cannot substitute its subjective determination for that of the Security Council, this does not prevent the Court, on the basis of an *objective* determination of the facts and of the law, from verifying the *excès de pouvoir* or misuse of power which might vitiate a characterization as a "threat to the peace".

In the above-mentioned case, the characterization as a "threat to the peace" in resolution 748 would very clearly constitute an *excès de pouvoir* or misuse of power.

In its normal sense, the word "threat" refers to a future event. The Council cannot therefore, so many years after the Lockerbie bombing, determine that there is a "threat" by referring to this bombing *alone*.

The question is therefore what additional element warrants the characterization of a "threat". More precisely, what happened between resolutions 731 and 748 to warrant this characterization?

Did the threat to the peace result from Libya's refusal to surrender the accused to the Respondents? This would constitute a manifest *excès de pouvoir*. Even if the characterization in Article 39 were justified, the Council could not decide, under Chapter VII of the Charter, that Libya must surrender the suspects to the United States or the United Kingdom. It is not very clear how Libya's refusal to comply with a requirement at odds with the Charter might constitute a threat to the peace!

The fact that Libya did not comply with the British and American requests to reveal the names of all the guilty or to hand over the remaining timers cannot warrant the characterization as a "threat" either. Indeed, this requirement presupposes Libya's guilt, which has not been proven.

One must therefore bow to the facts, Mr. President. In so far as the Council used the characterization "threat to the peace" in order to justify the requirement — this is still hypothetical as I hope you will forgive me for repeating *ad nauseam* — that Libya should surrender the accused to the Respondents, this recourse to Chapter VII could not be used to prevent the Court from exercising its judicial function, and to do so solely for the benefit of the individual interests of the Respondents. The Council would thus have committed a misuse of power. The resolutions must be interpreted in such a way as to avoid this conclusion.

4.5. I now come, finally, to the United Kingdom's attempt to draw a distinction between the judicial review of the procedural validity of the resolutions and the review of their substantive validity.

I showed you last Friday that this distinction had no basis, since the Council's powers are limited both *ratione materiae* and by procedural rules.

Lord Hardie sought in vain to refute this argument (CR 97/22, p. 26, para. 3.5). His argument shows that the two limits on the Council's powers — procedural and material limits — are indissociably linked.

Lord Hardie first quotes the example of the declaration by the President of the Council dated 20 June 1972 relating to terrorism against civilian aircraft. Lord Hardie remarks that this declaration — it is a declaration of principles, of a general nature, which has no connection with a particular case — is in reality a "decision". Lord Hardie continues:

> «Si une question devait se poser quant au statut de cet acte — par exemple, celle de savoir s'il équivaut à une «décision du Conseil aux fins des articles 25 et 48 de la Charte — le Royaume-Uni admet que la Cour pourrait, et devrait, l'examiner.»

But this is a question concerning the substantive powers of the Council! What has to be established, in particular, is whether the Council may adopt legislative decisions which impose obligations on all its member States, outside the context of a particular case.

This question is wholly comparable to the one raised here by Libya, which is how far the Council's resolutions in the Libyan case, certain paragraphs of which bear the title "decision", can have binding effects on Libya.

Lord Hardie also accepts that the Court may review whether a decision has been adopted with the required majority, or whether it has been adopted under Chapters VI or VII of the Charter. This question is also indissociable from that of the substantive powers of the Council under these various Chapters. I am referring on this point to the Libyan observations (*Libya* v. *United Kingdom*, p. 106 and *Libya* v. *United States of America*, p. 88).

Lastly, Lord Hardie asserts that "The power of substantive review is not contemplated by the Charter". If this means that this power is not expressly laid down in the Charter, the same applies to the Court's power to review the procedural validity of Council resolutions. This argument is thus baseless and I showed you last Friday, referring to the *travaux préparatoires* of the Charter, what meaning should be attributed to this absence of comment in the Charter.

4.6. Libya has thus relied upon the text of the Charter, the wishes of its authors, the recent practice of the Security Council, and the point of view expressed in various quarters of the international community.

Mr. President, Members of the Court, one cannot overlook, either, the political context forming a backdrop to the Security Council's actions since the end of the cold war. It is this new situation which led the then Secretary-General Mr. Boutros Boutros-Ghali in 1994 to raise the following fundamental questions at a ceremony in Madrid:

> «La nouvelle situation dans laquelle se trouve le Conseil de sécurité nous incite à soulever de nouvelles questions juridiques ou à revenir sur certaines, comme celles-ci : est-ce que l'unanimité des Membres permanents confère au Conseil des pouvoirs illimités ? Jusqu'où le Conseil peut-il étendre sa compétence ? Est-il le seul organe habilité à interpréter ses pouvoirs ? Son action échappe-t-elle à tout contrôle ? Ce sont là des questions juridiques très complexes qui ne sont nullement théoriques, car elles ont un effet direct sur les modalités d'exercice du pouvoir de décision à l'échelle mondiale.» (Communiqué de presse SG/SM/94/53 du 20 avril 1994.) *[Traduction du Greffe.]*

These words from a great specialist on the law of international organizations, are revealing of the new trends which have been emerging for a number of years with respect to the workings of the international community.

I conclude, Mr. President, with an argument put forward by the Agent of the United Kingdom, Sir Franklin Berman, who asserted that a continuation of the present proceedings would prejudice the integrity of the Charter.

Naturally there would be no question of this if the Court were to rule on the interpretation and application of the Montreal Convention without taking account of the Council's resolutions.

But matters would be no different if the Court interpreted the resolutions in the light of the Charter, or declared that they could not be invoked against Libya. Indeed, it is clear that it is the attempt by the United States and the United Kingdom to utilize the Security Council for their own interests which prejudices the integrity of the Charter.

The attempt by the Respondents to argue the merits of the case in order to conclude that the Libyan Application is inadmissible, clearly shows that the question of admissibility deserves to be joined to the merits. Further, the Court should not overlook the fact that this approach by the defendants is a breach of the rights of Libya, which has never had an opportunity to examine these arguments in a written memorial since there was none.

Thank you, Mr. President, Members of the Court, for your kind attention. May I ask you now to kindly give the floor to my eminent colleague, Professor Ian Brownlie.

Le VICE-PRESIDENT, faisant fonction de PRESIDENT : Je vous remercie Monsieur Suy. M. Brownlie va maintenant s'adresser à la Cour. Monsieur Brownlie, je vous prie.

M. BROWNLIE : Merci, Monsieur le Président. Je vais commencer par une synthèse des questions relatives à la recevabilité. l'Etat demandeur invoque les dispositions d'une convention multilatérale valide. Les Etats défendeurs allèguent qu'il y a des circonstances qui constituent une justification en droit pour ne pas appliquer certaines dispositions de cette convention vis-à-vis de la Libye. Il s'agit là d'une question de fond. A titre subsidiaire, ils allèguent que les dispositions de la Charte justifient une immunité *ratione matériae* du Conseil de sécurité lorsqu'il adopte une résolution en vertu du chapitre VII. Toutefois, selon moi, cet argument tend à la même fin ultime, celle d'essayer de se servir des dispositions de la Charte pour justifier l'inexécution de la convention de Montréal dans les présentes affaires.

L'argument de l'immunité *ratione materiae* n'est qu'un argument de repli. Premièrement, on dit que les violations de la convention sont justifiées par la Charte (y compris l'article 103). Deuxièmement, on dit que, de toute façon, la question de fond ne peut pas être examinée par la Cour, car les mêmes dispositions de la Charte y font obstacle.

Compte tenu de cette analyse, je vais passer en revue, provisoirement, les questions de droit en litige qui peuvent à l'évidence faire l'objet d'un examen à titre de questions de fond, même en présence de résolutions «obligatoires» du Conseil de sécurité adoptées en vertu du chapitre VII.

Avant d'aborder mon examen provisoire, il peut être utile que j'explique pourquoi les dispositions de l'article 103 ne présentent pas, aux fins actuelles, un veto *ab initio* et *de jure* pour les points de droit.

L'article 103 dispose que les obligations issues de la Charte «prévaudront» en cas de conflit avec les obligations en vertu de tout autre accord international.

On peut exprimer l'essence de l'argumentation de la Libye en tenant compte de l'article 103.

Premièrement : la nature du différend comporte une tentative, de la part des Etats défendeurs, pour invoquer les résolutions du Conseil de sécurité comme une justification en droit de l'inexécution de la convention de Montréal dans les présentes affaires.

Il ne saurait suffire de soutenir que seul le caractère justiciable de la question est en litige, car les Etats défendeurs se sont fondés avec insistance sur l'article 103, qui est une disposition de fond et non de procédure.

Pendant le premier tour, l'équipe du Royaume-Uni a invoqué l'article 103 à cinq reprises : d'abord, une fois par sir Franklin Berman (CR 97/16, p. 16, par. 1.6); trois fois par M. Greenwood (CR 97/16, p. 64, par. 4.27; CR 97/16, p. 74, par. 4.56; CR 97/16, p. 76, par. 4.64); et une fois par lord Hardie (CR 97/17, p. 18-19, par. 5.37-5.38).

Les Etats-Unis ont invoqué l'article 103 à neuf reprises : M. Crook, cinq fois (CR 97/18, p. 32, par. 3.3; CR 97/19, p. 9, par. 3.25; CR 97/19, p. 10, par. 3.29; CR 97/19, p. 11, par. 3.35; CR 97/19, p. 12, par. 3.38); M. Schachter, une fois (CR 97/19, p. 31, par. 4.18); M. Matheson, une fois (CR 97/19, p. 46, par. 6.3); M. Andrews, deux fois (CR 97/19, p. 52, par. 7.2; CR 97/19, p. 54, par. 7.5); et bien entendu; il y a eu d'autres mentions de l'article 103 au deuxième tour.

Compte tenu de cette insistance de nos adversaires sur la pertinence de l'article 103, il est nécessaire de souligner, une fois encore, que cet article se rapporte à des questions de fond. Il n'a rien à voir avec les pouvoirs des organes ou avec le caractère justiciable.

Deuxièmement : il se peut que les résolutions du Conseil de sécurité et les éléments de preuve documentaires qui s'y rapportent *constituent ou ne constituent pas* la preuve déterminante d'obligations issues de la Charte en conflit avec la convention de Montréal. Pour statuer sur cette question, il faut examiner avec soin les termes des résolutions et les circonstances dans lesquelles elles ont été adoptées; la portée de ce processus a été expliquée par mon éminent collègue, M. Suy, pendant le premier tour.

Troisièmement : dans le même contexte général, il peut y avoir des comportements des Etats défendeurs qui n'aient absolument aucun rapport avec les résolutions, qui précèdent les résolutions dans le temps et qui mettent en cause de graves violations d'obligations issues de la Charte.

Comme je l'ai indiqué au cours de l'argumentation du premier tour, les menaces bilatérales d'emploi de la force émanant des responsables supérieurs des Etats défendeurs sortent du cadre des résolutions. Elles impliquent des violations des principes de la Charte des Nations Unies et constituent, à ce titre, des violations d'une convention multilatérale valide, que l'invocation de l'article 103 ne saurait rendre légitimes. Les menaces d'emploi de la force pour inciter la Libye à accepter l'inexécution de la convention de Montréal ne peuvent pas être justifiées par référence à l'article 103.

Quatrièmement : des motifs importants autorisent à estimer qu'un procès pénal honnête n'est possible ni en Ecosse, ni aux Etats-Unis. Les considérations pertinentes ont été exposées dans le *mémoire* de la Libye (p. 133-134, par. 5.56-5.82).

D'après des sources respectables, le droit à un procès pénal équitable est considéré comme un droit fondamental de l'homme. Tel a été l'avis de l'Institut de droit international, exprimé dans une résolution adoptée à la session de Cambridge en 1983 (mémoire de la Libye, p. 133, par. 5.53).

Monsieur le Président, il est généralement admis que les principes fondamentaux des droits de l'homme font partie des principes de la Charte des Nations Unies. Parmi les sources faisant autorité à l'appui de cette façon de voir figurent les suivantes : avis consultatif de la Cour sur *la Namibie (C.I.J. Recueil 1971*, p. 57); affaire des *Otages de Téhéran* (*C.I.J. Recueil 1980*, p. 42); Restatement, 3e éd., *Foreign Relations Law of the United States*, 1987 (par. 701, commentaire *d)*)

La portée des résolutions du Conseil de sécurité, ainsi que des dispositions de la convention de Montréal doit être déterminée par référence aux principes de la Charte. Les principes de la Charte ne se limitent pas à la teneur du chapitre VII.

A ce point il est nécessaire de revenir aux dispositions de l'article 103 de la Charte.

Celui-ci se réfère aux obligations fondées sur la Charte par rapport à celles qui se fondent sur d'autres instruments internationaux.

Ensuite, il y a l'article 24, aux termes duquel le Conseil de sécurité «agit conformément aux buts et principes des Nations Unies»; et l'article 25, aux termes duquel les Etats Membres appliquent les décisions du Conseil de sécurité «conformément à la Charte».

Dans cette perspective l'article 103 ne fournit pas de solution. Bien plutôt, il pose le problème, c'est-à-dire que la mention des principes des Nations Unies met en cause *deux* sortes d'obligations fondées sur la Charte, d'une part les dispositions des articles 24 et 25, d'autre part, les principes fondamentaux des droits de l'homme.

Cet alignement d'obligations fondées sur la Charte indique que, dans les circonstances des présentes affaires, le recours à l'article 103 ne produit ni un résultat simple, ni une priorité préfabriquée des obligations.

Je me réfère maintenant à la question des menaces d'emploi de la force.

Dans ma plaidoirie du premier tour, j'ai expliqué la pertinence des menaces d'emploi la force du point de vue des questions juridiques de fond relatives à la convention de Montréal. Si M. X passe un contrat avec M. Y et si, à quelque moment ultérieur, M. X menace d'employer la force pour empêcher M. Y d'exercer une option qu'il a en vertu du contrat, c'est là dis-je, une rupture de contrat. Le comportement de M. X peut inclure aussi une responsabilité non contractuelle, mais même de la sorte il ne cesse pas d'être une rupture de contrat.

Ainsi, quand mon éminent adversaire M. Greenwood s'est plaint, lundi, que la Libye n'ait pas indiqué l'«acte par lequel la convention a été écartée», je donne de cette manière la réponse à sa question, ou du moins une partie de la réponse. Le Royaume-Uni et les Etats-Unis n'assistent guère la Cour par leur rejet péremptoire des éléments de preuve de la Libye relatifs aux menaces d'emploi de la force. Examinons un moment la nature de ces preuves.

D'abord, ces éléments de preuve sont constitués par des citations directes de déclarations de responsables supérieurs en réponse à des questions.

Les réponses ont été fournies par le département d'Etat des Etats-Unis en la personne de M. Boucher; président, M. Bush; secrétaire à la défense, M. Cheney; ministre d'Etat, Foreign Commonwealth Office, M. Douglas Hogg; Vice-Président, M. Quayle et la porte-parole du Foreign Commonwealth Office à Londres.

Les sources dans lesquelles ces hautes personnalités ont été citées étaient les suivantes :
a) le *Federal News Service* des Etats-Unis rendant compte d'instructions du département d'Etat,
b) une allocution télévisée du président Bush à l'association des journaux du Sud,

c) le compte-rendu d'une interview de la NBC sur le programme : «*Meet the Press*»,

d) le compte-rendu officiel des débats parlementaires au Royaume-Uni,

e) le *Middle East Economic Digest*; et, en dernier lieu,

f) le journal *The Scotsman*.

Donne-t-on à entendre que ces diverses sources aient inventé les questions et les réponses ? Comment peut-on expliquer la cohérence de la phraséologie ? Les responsables usaient-ils de télépathie ?

C'est un fait frappant que les menaces ont continué même après que la résolution 748 avait été adoptée le 31 mars 1992. Le 2 avril M. Pickering, représentant des Etats-Unis auprès des Nations Unies, a répondu, selon un rapport du *Washington Post*, à la question de savoir si l'on envisageait de nouvelles actions : «nous ne pouvons ni inclure ni exclure aucune action particulière» (*Washington Post*, 3 avril 1992, p. A24, col. 3).

Ainsi, le 2 avril 1992, un responsable américain se servait-il encore de la formule menaçante qui était apparue pour la première fois dans le dossier quand les instructions du département d'Etat avaient été données le 14 novembre 1991, quatre mois plus tôt.

L'éminent agent du Royaume-Uni s'est référé à ces déclarations officielles de divers responsables comme à des «déclarations publiques ambiguës» (CR 97/22, p. 14).

Or, Monsieur le Président, l'ambiguïté était une ambiguïté parfaitement mesurée et, compte tenu de l'expérience de la Libye, elle comportait une gamme d'actions qui incluaient l'emploi d'une force très considérable contre les villes libyennes, sans prévenir, à deux heures du matin.

On peut illustrer l'effet des déclarations réitérées avec soin en se reportant à l'opinion du correspondant économique du *Times* de Londres dans le numéro du 21 mars 1992:

> «La livre et les valeurs ont fini la semaine presque comme elles l'avaient commencée, une semaine pourtant pleine d'indices économiques sinistres.
>
> Après des chiffres d'où résultait la baisse du taux annuel de l'inflation en février au-dessous du taux allemand pour la première fois en près de vingt-cinq ans, la livre sterling était hier à 2,8619 marks à la fermeture officielle de la banque d'Angleterre, c'est-à-dire près de la moitié d'un pfennig en plus de son niveau de clôture de jeudi. Elle avait commencé la semaine à 2,8572 marks.
>
> Les girations de la semaine ont laissé hier la livre à 1,7007 dollars des Etats-Unis, c'est-à-dire plus d'un cent en-dessous du taux de la clôture précédente. L'indice

> pondéré du sterling en fonction des échanges internationaux est resté stable à 89.8, précisément là où il avait commencé la semaine. La force du dollar a été la caractéristique principale des marchés des changes hier. La monnaie américaine a progressé après des rapports selon lesquels le président Bush était en train de discuter de l'Iraq avec ses chefs d'Etat-major. Par crainte d'une action militaire dans le Golfe, ou contre la Libye, les investisseurs ont cherché refuge dans le dollar, le port sûr traditionnel.
>
> Bien que l'inflation annuelle de la Grande-Bretagne soit restée stable à 4.1 pour cent en février, ce qui a un peu déçu la cité, les changeurs ne se sont pas laissé impressionner par les données. La livre a été aidée surtout par le mark plus mou, dont l'attrait avait aussi souffert de nouvelles grèves du personnel des banques allemandes.»

Se référant aux indices économiques de la semaine précédente, le correspondant économique M. Colin Narbrough déclare dans son rapport : «Par peur d'une action militaire dans le Golfe, ou contre la Libye, les investisseurs ont cherché refuge dans le dollar, le port sûr traditionnel.» Ainsi n'était-ce pas la seule Libye qui avait conscience de la situation en mars 1992, mais il y avait aussi d'autres assemblées du suffrage.

Pour conclure sur les éléments de preuve des faits, les déclarations publiques invoquées comme preuves de menaces d'emploi de la force ont été faites officiellement dans l'intention précise «d'envoyer des signaux» annonçant que les Etats-Unis, en particulier, étaient prêts à employer la force contre la Libye, si bon leur semblait, pour atteindre leurs buts politiques.

Dans cette perspective, il est fort étrange d'entendre nos adversaires mentionner «les allégations ignominieuses et sans fondement de la Libye à l'égard de menaces d'emploi de la force...» (Voir M. Greenwood, CR 97/22, p. 17, par. 2.5.)

Il convient aussi d'apprécier le cadre juridique. L'affaire des *Essais nucléaires* a établi que l'intention d'un gouvernement peut être inférée de déclarations faites aux médias par des ministres et par le chef d'Etat. De telles déclarations constituent des déclarations publiques d'individus dans l'exercice de leurs fonctions officielles.

Pour conclure il convient de faire observer que les menaces d'emploi de la force proférées contre la Libye ne font pas seulement partie de l'histoire de la présente affaire. Comme M. El-Murtadi Suleiman l'a établi pendant le premier tour, les Etats-Unis ont menacé d'employer des armes nucléaires contre les installations de Tarhunah encore en avril de l'année dernière (CR 97/20, p. 15, par. 2.10).

Je peux maintenant passer à l'argument des Etats-Unis selon lequel une décision de la Cour sur le fond dans les présentes affaires serait «moot», ou sans objet.

Pendant le premier tour, M. Crook a monté cet argument, citant l'affaire du *Cameroun septentrional* et celle des *Essais nucléaires* (CR 97/19, p. 23-24, par. 3.82-3.86). L'argument figure aussi dans les plaidoiries du deuxième tour de MM. Matheson et Andrews (M. Matheson, CR 97/19, p. 47, par. 6.5; CR 97/22, p. 28, par. 4.11; p. 30-31, par. 4.18-4.20; M. Andrews, CR 97/22, p. 33-34, par. 5.5).

L'argument tiré du manque d'objet est entaché de défauts graves sur deux plans.

Premièrement, cet argument n'est rien de plus qu'une nouvelle formulation de celui qui consiste à soutenir que l'examen judiciaire des décisions des organes politiques est exclu, ou à tout le moins limité de diverses manières.

Deuxièmement, cet argument est contredit par les réalités des affaires dont il s'agit. J'ai déjà souligné que les menaces bilatérales d'emploi de la force ne sont pas validées par les résolutions du Conseil de sécurité et que les violations de la convention de Montréal comportent donc une dimension temporelle. C'est l'une des questions à examiner lors de la procédure sur le fond. En d'autres termes, même si les résolutions pouvaient empêcher une sorte quelconque de violations pendant une période, elles n'auraient pas cet effet pour la période antérieure au 31 mars 1992.

Dans ce contexte, rien n'établit que les résolutions soient permanentes ou d'effet dispositif. Des résolutions peuvent être modifiées, des sanctions peuvent être levées, des appréciations politiques peuvent être modifiées.

Il n'y pas là de manque d'objet, ni d'analogie politique ou juridique avec les situations des affaires du *Cameroun septentrional* et des *Essais nucléaires*.

Je passe enfin à la question générale de la possibilité d'examiner les décisions des organes politiques de l'Organisation des Nations Unies. Dans cette perspective les Etats-Unis se sont plaints (en la personne de M. Matheson) qu'au premier tour je n'ai cité «aucun précédent où la Cour a annulé une décision du Conseil ou affirmé qu'elle était en droit de le faire» (CR 97/23, p. 27, par. 4.4).

Monsieur le Président, ici et ailleurs, mes adversaires passent à côté de la question. Dans chacune des affaires que j'ai citées, la Cour n'a pris en compte par référence *aucune* version de la possibilité d'un examen provisoire ou d'un principe de limitation de la fonction judiciaire. La décision en l'affaire de *Nauru* est un exemple utile. Il s'agissait d'une résolution de l'Assemblée générale établissant l'indépendance de la République de Nauru. La résolution était d'effet dispositif et obligatoire. Cependant la Cour n'a eu absolument aucune hésitation à interpréter la résolution et à en évaluer les effets juridiques. Dans l'affaire de l'*Admission* le même processus a été appliqué à une catégorie entière de résolutions du Conseil de sécurité.

Voilà dans quel contexte mes éminents adversaires ont émis des objections contre le fait d'invoquer des affaires relatives à des avis consultatifs. Ils se sont plaints que les invoquer ne tienne pas compte de la distinction entre la compétence contentieuse et la compétence consultative(voir Mme Zoller, CR 97/19, p. 41-42, par. 5.11; lord Hardie, CR 97/22, p. 28, par. 3.10; M. Matheson, CR 97/23, p. 27, par. 4.4-4.7).

Bien entendu, le présent débat ne porte pas sur la différence entre les deux sortes de juridiction. Le point pertinent, c'est que, *mutatis mutandis*, quand la Cour exerce sa compétence consultative, elle prend des décisions sur les effets juridiques des actes des organes politiques.

La Cour ne se tient pas à l'écart, bien qu'elle ait le pouvoir de le faire. Les questions de recevabilité peuvent être invoquées par la Cour à propos de l'exercice de sa compétence consultative, étant donné qu'elle tient une certaine discrétion de l'article 65 du Statut.

Toutefois, dans les affaires que j'ai citées lors du premier tour, la Cour ne s'est pas tenue à l'écart.

Pour achever mes observations sur ce point, je voudrais signaler que mes éminents adversaires n'ont pas tenté de contredire les opinions de sir Gerald Fitzmaurice relatives à l'importance et au caractère juridique des avis consultatifs.

Au bout du compte, la Cour n'évite pas de procéder à des évaluations juridiques des actes des organes politiques, que ce soit en vertu de sa compétence contentieuse ou à propos de la compétence qu'elle a pour donner des avis consultatifs.

L'attitude de la Cour est illustrée par le passage suivant de son avis consultatif en l'affaire de l' *Admission* :

«le caractère politique d'un organe ne peut le soustraire à l'observation des dispositions conventionnelles qui le régissent, lorsque celles-ci constituent des limites à son pouvoir ou des critères à son jugement. Pour savoir si un organe a la liberté de choisir les motifs de ses décisions, il faut se référer aux termes de sa constitution. En l'espèce, l'article 4 fixe le cadre dans lequel s'exerce cette liberté, cadre qui comporte une large liberté d'appréciation. Il n'y a donc aucune contradiction entre, d'une part, les fonctions des organes politiques et, d'autre part, le caractère limitatif des conditions prescrites.

On a cru trouver dans les responsabilités politiques assumées par le Conseil de Sécurité en vertu de l'article 24 de la Charte, un argument justifiant la nécessité d'assurer, tant au Conseil de Sécurité qu'à l'Assemblée générale, une liberté complète d'appréciation en matière d'admission de nouveaux Membres. Mais la disposition de l'article 24, en raison même de sa très grande généralité, ne peut, en l'absence de tout texte, affecter la réglementation spéciale de l'admission telle qu'elle ressort de l'article 4.» (*C.I.J. Recueil 1947-1948,* p. 64.)

Il n'y a donc aucun signe d'inhibition judiciaire dans cet avis consultatif.

J'ai maintenant atteint mes conclusions.

La première est qu'aucune limitation de droit ne restreint la fonction de la Cour dans l'examen des effets juridiques des résolutions des organes politiques. De plus, aucune limitation de droit de ce genre n'est reconnue dans la pratique de la Cour.

La deuxième conclusion, c'est qu'il y a, à l'ordre du jour, des questions de premier plan relatives au fond de l'affaire, et qu'elles ne sont préliminaires en aucun sens.

Dans cette perspective, l'application de l'article 103 ne résout pas les problèmes que les Etats défendeurs affrontent quand ils essayent d'imposer à la Cour un principe d'immunité *ratione materiae*.

La troisième conclusion, c'est que les demandes de la Libye ne sont en aucun sens «moot» (ou sans objet).

Ainsi s'achève mon argumentation du deuxième tour. Je voudrais vous demander de donner la parole à l'agent de la Jamahiriya Arabe Libyenne. Je vous remercie.

Le VICE-PRESIDENT, faisant fonction de PRESIDENT : Je vous remercie, Monsieur Brownlie. L'agent de la Libye a maintenant la parole.

Mr. ELHOUDERI: Mr. President, Members of the Court, at the end of our oral arguments, and in accordance with Article 60, paragraph 2, of the Rules of Court, Libya confirms that it requests the Court to adjudge and declare:

— that the Preliminary Objections raised by the United Kingdom must be rejected and that, as a consequence:

*(a)*the Court has jurisdiction to entertain the Application of Libya,

*(b)*that the Application is admissible,

— that the Court should proceed to the merits.

A signed text containing these submissions will be communicated to the Court.

Mr. President, let me take this opportunity to thank you, and also the distinguished Members of this Court, for the patience and attention with which they have listened to our oral arguments. I also thank the Registry for its valuable assistance during the proceedings. May I also take this opportunity to wish Judge Kooijmans a speedy recovery.

Mr. President, Members of the Court, today we leave this Court confident that it will reach a just and equitable decision, for which we thank it in advance.

Thank you, Mr. President.

Le VICE-PRESIDENT, faisant fonction de PRESIDENT : Je vous remercie, Monsieur Elhouderi. La Cour prend note des conclusions finales dont vous avez donné lecture au nom de la Jamahiriya arabe libyenne dans les deux affaire. Deux membres de la Cour souhaitent poser des questions aux Parties. Je donne d'abord la parole à M. Schwebel.

M. SCHWEBEL : Je vous remercie, Monsieur le Président. Ma question s'adresse à la Libye et toutes observations du Royaume-Uni et des Etats-Unis sont également les bienvenues.

M. Suy a prétendu aujourd'hui que la décision du Conseil de sécurité dans la résolution 748, selon laquelle le fait que la Libye n'ait pas donné suite à la résolution précédente du Conseil constituait une menace contre la paix et la sécurité internationales, est une décision *ultra vires* qui constitue un détournement de pouvoir. Cela signifie-t-il que la Libye considère que la Cour peut

substituer son jugement sur ce qui constitue une menace contre la paix à la décision du Conseil de sécurité sur ce qui constitue pour lui une menace contre la paix ?

Le VICE-PRESIDENT, faisant fonction de PRESIDENT : Je vous remercie, Monsieur Schwebel. Je donne maintenant la parole à M. Koroma qui souhaite poser une question à toutes les Parties.

M. KOROMA : Je vous remercie, Monsieur le Président. Ma question s'adresse à toutes les Parties qui comparaissent devant la Cour dans cette affaire.

Il a été soutenu en la présente instance que la Cour pouvait exercer un contrôle judiciaire sur les résolutions du Conseil de sécurité, notamment sur celles qui intéressent directement la question dont nous sommes saisis. Dans quelle mesure ce contrôle peut-il, le cas échéant, porter sur la validité de ces résolutions, ou ce contrôle peut-il avoir pour effet de porter sur la validité de ces résolutions à tous égards ?

Je reconnais que les Parties ont abordé ces questions dans leurs écritures et plaidoiries, mais il pourrait s'avérer instructif pour elles de regrouper et d'énoncer leurs ultimes conclusions.

Le VICE-PRESIDENT, faisant fonction de PRESIDENT : Je vous remercie Monsieur Koroma. Ceci nous mène au terme de cette série d'audiences. La Cour saurait gré aux Parties si celles-ci pouvaient lui faire tenir les réponses aux questions qui viennent d'être posées dans un délai de deux semaines. Des copies des questions seront fournies aux Parties.

Je voudrais adresser l'expression de mes sincères remerciements aux agents, conseils et avocats de toutes les Parties pour l'aide précieuse qu'ils ont apportée à la Cour dans l'accomplissement de sa tâche, de même que pour la courtoisie et la coopération dont ils ont fait preuve au cours de cette procédure. Conformément à la pratique habituelle, je prie les agents de rester à la disposition de la Cour pour toute autre information dont elle pourrait avoir besoin et, sous cette réserve, je déclare maintenant close la procédure orale sur les exceptions préliminaires dans l'affaire relative à des *Questions d'interprétation et d'application de la convention de Montréal de 1971 résultant de l'incident aérien de Lockerbie (Jamahiriya arabe libyenne c. Royaume-Uni)* et dans 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). La Cour va maintenant se retirer afin de délibérer. Les agents des Parties seront informés, en temps utile, de la date à laquelle la Cour rendra ses arrêts.

Aucune question ne devant être dans l'immédiat examinée par la Cour, celle-ci va se retirer.

L'audience est levée à 12 h 35.