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YEAR 1997

Public sitting

held on Wednesday 15 October 1997, at 10 a.m., at the Peace Palace,

Vice-President Weeramantry, Acting President, presiding

in the case concerning Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United States of America)

Preliminary Objections

VERBATIM RECORD

ANNEE 1997

Audience publique

tenue le mercredi 15 octobre 1997, à 10 heures, au Palais de la Paix,

sous la présidence de M. Weeramantry, vice-président faisant fonction de président

en l'affaire relative à des Questions d'interprétation et d'application de la convention de Montréal de 1971 résultant de l'incident aérien de Lockerbie (Jamahiriya arabe libyenne c. Etats-Unies d'Amérique)

Exceptions préliminaires

COMPTE RENDU

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

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

M. Valencia-Ospina, greffier

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The ACTING PRESIDENT: Please be seated. The Court meets today to resume its hearings in the case concerning *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya* v. *United States of America)*. Mr. Crook, Counsel for the United States, will resume his argument. Mr. Crook.

Mr. CROOK: Thank you, Mr. President and good morning. Good morning to Members of the Court. When I concluded my presentation yesterday I was just about to begin a discussion on the fashion in which resolution 748 imposes specific binding legal obligations upon Libya and with the leave of the Court I will continue there.

Binding Obligations to Transfer Persons for Trial

3.19. That resolution directs that Libya "must now comply without further delay with paragraph 3 of resolution 731". That is the paragraph that tied back to the documents containing the demands of the French, British and United States Governments that I summarized yesterday. The Council thus placed a binding legal obligation upon Libya to do the things specified in those documents. Libya is legally required, among other things, to surrender for criminal trial in Scotland or the United States, the persons charged with destroying Pan Am 103. Whatever Libya's legal position might otherwise have been under the Montreal Convention or general international law, its controlling legal obligations now are those imposed by resolution 748.

3.20. To encourage compliance with these obligations, the Security Council also adopted additional measures directed against Libya involving aviation, the sale of arms, and other matters. These measures remain in force until the Council "decides that the Libyan Government has complied with" the requirements of resolution 748. The Security Council has not so decided. It continues to meet every 120 days to review the matter. After 16 such reviews, the Council has not found Libya to be in compliance with its resolutions, nor has it found reasons to alter its earlier decisions.

3.21. The Security Council remained seized of the situation following resolution 748. On 11 November 1993, it adopted a second Chapter VII resolution. Resolution 883 reaffirmed resolutions 731 and 748 and expanded the scope of the United Nation's measures directed against

Libya. Resolution 883 was adopted by 11 votes to none. Brazil, Cape Verde, France, Hungary, Japan, New Zealand, Russia, Spain, the United Kingdom, the United States and Venezuela voted for it.

3.22. Thus, resolutions 748 and 883 create clear and binding international legal obligations. In particular, they require Libya to surrender for a proper criminal trial the persons alleged to have destroyed Pan Am 103.

II. THE CHARTER REQUIRES LIBYA AND OTHER STATES TO COMPLY WITH RESOLUTIONS 748 AND 883.

3.23. Mr. President, I will now turn to the second main head of my argument to show that the Charter requires Libya and other States to comply with resolutions 748 and 883. Libya is legally bound to comply with these resolutions. It must transfer the persons who are alleged to have destroyed Pan Am 103 for a criminal trial with appropriate safeguards of their rights in either Scottish or United States courts. Accordingly, Libya's claims in this proceeding based upon the Montreal Convention are inadmissible. The legal rules that govern this situation are those laid down by Security Council resolutions 748 and 883, not the rules of the Montreal Convention.

3.24. Article 25 of the Charter makes Libya's obligation to comply with the Council's resolutions quite clear: "The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter." Of course Article 48 of the Charter is to similar effect.

3.25. No claim of rights or obligations under the Montreal Convention can relieve Libya of its clear duty to carry out the Council's decisions. No country can invoke a treaty as an excuse for refusing to comply with such decisions. Again, the matter is clear from the Charter itself. Article 103 provides:

> "In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail."

3.26. Libya, however, argues that its claimed rights under the Montreal Convention and under general international law are entitled to priority over its Charter obligations. It advances a remarkable set of arguments to support this contention.

3.27. First, Libya argues that the Montreal Convention was subsequent in time to the Charter and is also a *lex specialis* regarding the matters it covers (Libyan Observations and Submissions, para. 2.18). Libya therefore urges that the rights it claims under the Montreal Convention take precedence over its obligations under the Charter. It relies on the familiar treaty law principles that the treaty obligation latest in time prevails, and that a *lex specialis* prevails over more general obligations, like the Charter.

3.28. These are imaginative, audacious, even dangerous arguments. Libya cites no convincing State practice, scholarly opinion, or other support for them. They are quite simply wrong.

3.29. In the first place, there is no necessary inconsistency between Libya's obligations under the Charter and its position under the Montreal Convention. The two can be construed in perfect harmony. When Libya adhered to the Charter, it agreed that the provisions of any other treaty it entered into — before or after that time, including the Montreal Convention — would be carried out in accordance with the Charter, including its Articles 25, 48 and 103.

3.30. Nothing in the Montreal Convention changes this. Nothing in its language or history suggests that the parties sought to change or supersede particular articles of the Charter. The Charter remains fully binding upon Libya.

3.31. Now Libya's argument is quite easily answered on this basis. But were this not so, the argument could not be accepted by this Court. The superiority of obligations under the Charter over obligations under subsequent treaties is clear in international law. This is reflected in Article 30, paragraph 1, of the Vienna Convention on the Law of Treaties, which states the rule that the treaty later in time generally prevails. However, this rule is made expressly "[s]ubject to Article 103 of the Charter of the United Nations". The Montreal Convention does not override Article 103 of the Charter.

3.32. Libya's contrary position would fundamentally weaken the Charter. Libya's claim would allow States to "opt out" of Chapter VII, or out of any other inconvenient part of the Charter, by concluding inconsistent new treaties. This is a dangerous and wholly unsupported doctrine. It should not be accepted by the Court.

3.33. Libya also contends that it need not comply with the Security Council's Chapter VII resolutions because those resolutions are not based on the Charter or somehow go beyond the scope of the Council's powers under the Charter (Observations and Submissions at para. 4.2). This argument also fails. The Charter gives the Members of the Security Council the responsibility for determining which measures are required to maintain or restore international peace and security. Once the Council has made a decision under Chapter VII, an individual Member of the United Nations cannot refuse to comply because it claims to disagree with the validity of that decision.

3.34. As with the previous argument, Libya's position here is one that could lead to grave damage to the legal order established by the Charter. But, in any case, as I shall show in the last part of my presentation, the measures taken by the Council were quite reasonable and appropriate in relation to the threat to peace and security associated with the bombings of Pan Am 103 and UTA 772.

3.35. It has also been suggested that Article 103 of the Charter, which speaks of obligations, may not extend as well to *rights* under a treaty or under general international law. Thus, it is appropriate to consider whether the rights of a State under a treaty or general international law can be superseded by action of the Security Council.

3.36. The obligation to comply with Security Council decisions applies fully both to decisions affecting the *rights* and to those affecting the *obligations* of States. The relevant provisions of the Charter are phrased broadly and are intended to be broad in effect. They must be in order to assure the effectiveness of the régime of Chapter VII and in interpreting this aspect of the Charter, this Court has not recognized any distinction between "rights" and "obligations". Instead, the Court has stressed the breadth and importance of these Charter provisions (see, e.g., *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276, Advisory Opinion, I.C.J. Reports 1971,* p. 54, para. 116; *Military and Paramilitary Activities In and Against Nicaragua (Nicaragua* v. *United States of America), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984,* p. 440). The scholarly literature has also stressed the breadth of States' obligations to carry out the decisions of the Council. It does not

support the view that this duty does not apply to "rights" (see, e.g., *The Charter of the United Nations. A Commentary* (B. Simma, ed.), pp. 1120 *et seq.*).

3.37. Moreover, this suggested limitation creates serious difficulties. Suppose a bilateral treaty gives the nationals of each party the right to invest in the territory of the other. Surely the Charter gives the Security Council the power in a Chapter VII situation to require that one party prohibit investments by its nationals in the territory of the other, notwithstanding these treaty provisions.

3.38. The explanation for this is to be found, not just in Article 103, but also in Articles 25 and 48. Their clear language requires States to carry out the decisions of the Security Council. If a State must forego the exercise of some treaty right in order to carry out the binding decisions of the Council, that is simply what the Charter requires. Embargoes, bans on the sale of arms, other compulsory measures adopted by the Council often prevent States from exercising rights under treaties or under general international law. A State may well be prevented by Council action from exercising rights under treaties, such as the right to carry on bilateral air traffic. But that is what the clear language of the Charter requires.

3.39. This Court summarized the situation aptly in its Advisory Opinion in the *Namibia* case:

> "[W]hen the Security Council adopts a decision under Article 25 in accordance with the Charter, it is for member States to comply with that decision . . . To hold otherwise would be to deprive this principal organ of its essential functions and powers under the Charter." (*Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276, Advisory Opinion, I.C.J. Reports 1971*, p. 54, para. 116.)

The Court Has Recognized the Effect of the Security Council's Resolutions Under Articles 25 and 103.

3.40. Mr. President, the Court has recognized and given effect to these legal principles regarding Articles 25 and 103 of the Charter. At the Interim Measures stage in 1992, the Court decided that it could not then finally decide the legal effect of resolution 748. Nevertheless, the Court's Order clearly recognized the legal authority of the rules that it established, and stressed States' duties to comply with them. This is clear in paragraph 42 of the Court's Order:

> "Whereas both Libya and the United States, as Members of the United Nations, are obliged to accept and carry out the decisions of the Security Council in accordance with Article 45 of the Charter; whereas the Court, at the stage of proceedings on provisional measures, considers that prima facie this obligation extends to the decision contained in resolution 748 (1992); and whereas, in accordance with Article 103 of the Charter, obligations of the Parties in that respect prevail over their obligations under any international agreement, including the Montreal Convention." (*Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya* v. *United States of America),* Provisional Measures, Order of 14 April 1992, *I.C.J. Reports 1992*, p. 126.)

The Court in 1992 thus concluded that prima facie the obligations imposed by resolution 748 governed the case. Libya has shown no reason to arrive at a different conclusion now, when the matter can be finally decided by the Court. The Court should now decide definitively that the obligations imposed by resolutions 748 and 883 govern the disposition of this case. Mr. President, I will now turn to the third main head of my argument, to show how these resolutions were validly adopted by the Council.

III. THESE RESOLUTIONS WERE VALIDLY ADOPTED BY THE COUNCIL.

3.41. This section will be brief. I will show how the resolutions were validly adopted, and answer some contrary contentions by Libya.

3.42. Resolutions 731, 748 and 883 were validly adopted by the Security Council. They were adopted at regular meetings of the Council following debates in which Libya expressed its views. They received the required majorities, and the President of the Security Council pronounced their adoption.

3.43. Under Article 27, paragraph 3, of the Charter, a resolution requires nine affirmative votes and no vetoes. At present resolution 748 received 10; resolution 883, 11. No Member of the Security Council voted against either resolution. China joined with other States in abstaining on both. However, the established practice of the Council for over 50 years has been that such an abstention by a Permanent Member is not a veto blocking a decision. The principle has been accepted by the international community and was affirmed by this Court in its *Namibia* Advisory Opinion *(Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276, Advisory Opinion, I.C.J. Reports 1971*, p. 22, para. 22.)

3.44. Thus, the situation is like that described by the Court there:

> "A resolution of a properly constituted organ of the United Nations which is passed in accordance with that organ's rules of procedure, and is declared by its President to have been so passed, must be presumed to have been validly adopted." (*Id.*, at *I.C.J. Reports 1971*, p. 22, para. 20.)

3.45. Nevertheless, Libya attempts to paint the Security Council's actions as procedurally deficient. It advances several arguments. None stands up. First, Libya contends that Article 33 of the Charter requires the parties to a dispute to seek peaceful settlement through the various means listed in that Article. Only after such means are attempted and exhausted can the Security Council act. Libya thus in effect reads the Charter to impose an "exhaustion of remedies" rule as a precondition to action by the Security Council.

3.46. This argument fails. It rests upon an unjustifiably selective and narrow reading of the inter-related elements of Chapter VI of the Charter. More important, however, Article 33 is located in Chapter VI. It is part of that Chapter's system for promoting the peaceful settlement of disputes. The Security Council actions Libya attacked were not taken in the context of Chapter VI. They were taken under Chapter VII. The Council was acting to maintain or restore international peace and security.

3.47. The Charter does not require in such a situation that the parties to the dispute work their way through the steps of Chapter VI before the Council can act. Kuwait and Iraq did not have to exhaust the options for peaceful dispute settlement under Chapter VI before the Security Council could act under Chapter VII following the 1990 invasion of Kuwait. It would cripple the Council's ability to carry out its Chapter VII responsibilities to protect peace and security if each time it faced a threat to or breach of the peace, the Council had to wait for the parties to exhaust the means of peaceful settlement before it could act.

3.48. The Court has in the past properly refused to read elements into the Charter that are not stated there. (See, e.g., *Conditions of Admission of a State to Membership in the United Nations, I.C.J. Reports 1948*, p. 57.) It should do the same here. It should refuse the request to add an exhaustion of remedies requirement to Chapter VII.

3.49. Libya's second major claim is that the Council can only act on the basis of "fully demonstrated" facts, and that the Council had an inadequate factual predicate for the actions it took in this Case (Libyan Observations and Submissions, para. 4.17). Libya seems to suggest that there should have been some adversarial process, in which the United States and Libya each presented its evidence to be tested and debated before the Council.

3.50. This is not what the Charter or the rules or practice of the Council require. It is not realistic or appropriate to demand that the Council hold a formal evidentiary hearing before acting in a specific situation. Given its functions and powers, the Security Council must make vital decisions in evolving and complex disputes. Often, it must act rapidly and at unpredictable hours. Each Member brings to the Council's deliberations its own store of information and experience, supplemented by information provided by the Secretariat, by other Governments, here including Libya. There is absolutely no basis for this Court to prescribe a process of formal fact-finding or a standard of evidence or some "burden of proof" that must be met before the Council can act.

3.51. Libya also complains that it was wrong for France, Great Britain and the United States to take part in the Council's voting on these matters. (Libyan Observations and Submissions, para. 4.34). Libya contends that none of these countries should have voted when resolution 731 was unanimously adopted, and that doing so somehow tainted or invalidated resolution 731 and the subsequent Chapter VII resolutions. Libya also claims that these three countries were barred from voting for resolutions 748 and 883 because the Council was performing a "quasi-judicial task" in adopting them.

3.52. Now, the second argument is wholly without foundation. Article 27, paragraph 3, of the Charter contains no such limitation on voting when the Council acts under Chapter VII. Nothing in Security Council practice supports Libya's claim. Libya is asking this Court to impose significant limits on the decision-making power of the Security Council that have no basis in the Charter.

3.53. The attack on resolution 731 likewise fails. The language of resolution 731 and the circumstances of its adoption show that the Council sought to address a *situation* within the ambit of Articles 34 and 35 of the Charter, not a *dispute* under Article 27, paragraph 3. As the text makes

clear, the Council was concerned by the broad problems of terrorism and of attacks on aircraft. Libya's suspected involvement in the attacks on Pan Am 103 and UTA 772 and its past conduct were addressed as part of that broader situation. But, in any case, Libya's claim has no legal consequence. Questions regarding voting on resolution 731 cannot affect the validity of the Council's subsequent actions under Chapter VII.

Mr. President, I will now turn to a rather long fourth head of argument to show that these resolutions were a proper exercise of the Security Council's responsibilities under the Charter.

IV. THE RESOLUTIONS WERE A PROPER EXERCISE OF THE SECURITY COUNCIL'S RESPONSIBILITIES UNDER THE CHARTER.

3.54. In this last section, I shall answer Libya's claims that the Security Council acted inappropriately or *ultra vires*. I shall also explain why, even if the Court concludes that it has jurisdiction and that Libya's claims are admissible, the Court should nevertheless decline to decide those claims.

3.55. In adopting resolutions 748 and 883, the Security Council had to make two types of determinations under Article 39 of the Charter. First, the Council had to determine whether the complex of circumstances before it — the violent deaths of several hundred people, the indications of Libyan responsibility, Libya's recurring and clear support of terrorism, and what the Council found to be Libya's unsatisfactory responses to its resolutions — constituted a threat to international peace and security. The Council concluded that they did. The Council then had to decide upon particular measures to maintain or restore international peace and security. The measures adopted include those that Libya now asks this Court to invalidate.

3.56. In making these decisions, the Security Council was not acting as a criminal court. In a proper criminal trial, the guilt of accused persons must be proved by evidence that meets a high standard of persuasiveness. Libya attacks the Security Council for not conducting its proceedings in accordance with such standards. But that is not the task that the Charter gives to the Council, and it is not the task it performed here. The Council sought here to ensure that there would be a proper, fair criminal trial of persons alleged to have committed a terrible crime, in some appropriate jurisdiction. Only though such a trial could the guilt of accused individuals be determined.

The Basis for the Council's Action.

3.57. Now, the Council's decisions under Article 39 are decisions that it alone has the power to make under the Charter. No other body can substitute its judgment for the Council's. Nevertheless, the Council had ample basis to decide as it did. Its decisions were well-justified and appropriate in the circumstances. The Council was not "incoherent, inconsistent, or irrational" as Libya claims. (Libyan Observations and Submissions, para. 4.55).

3.58. Now, clearly, the Council's determination that these matters indicated a threat to peace and security had ample foundation. Several hundred people were dead following carefully planned attacks on civilian airliners. These deaths indicated not just a threat to international security, but a massive breakdown of such security. The Council was also mindful of the grave threats posed by international terrorism and of Libya's past support for terrorist actions.

3.59. Painstaking investigations carried on by three States indicated that Libya played a direct role in these deaths. Specific criminal charges were brought by prosecuting authorities in two States against named persons alleged to have acted on behalf of Libya. Now of course, these charges did not establish the guilt of the accused. Only a proper criminal trial with appropriate safeguards of their human rights could do that. Nevertheless, these charges were facts that were relevant to the Council's appreciation of the situation. The Council also knew of Libya's unsatisfactory responses to its resolutions. Clearly, in these circumstances, the Council had a basis to decide that international peace and security were threatened.

3.60. The measures the Council adopted in response were likewise justified in the circumstances. The Council adopted a set of precise, measured, limited and non-violent actions. The Council also sought to ensure that the individuals accused of the Lockerbie murders faced a legitimate and fair criminal trial. It was not unconcerned about the human rights of the accused when it decided that they should be transferred to face trial. It acted in the expectation that they would receive a trial satisfying relevant international standards. This case does not raise any issue whether the Council could ever act inconsistently with basic norms of human rights.

3.61. However, in the extraordinary circumstances before it, the Council was not persuaded of Libya's willingness or capacity to provide an appropriate trial. For example, as the Court may

recall, a person who served as Minister of Justice of Libya was among those alleged by the American grand jury to have been involved in the bombing of Pan Am 103. (US Exhibit 1 (Indictment), para. 10). In this connection, it is also important to recall the views expressed by Judge El-Kosheri in his dissenting opinion in 1992. Judge El-Kosheri wrote:

> "[I]n view of the fact that the two Libyan suspects were or still are working for the Government of their country, and that their trial could eventually lead to the emergence of a subsequent case of State international responsibility against Libya, I feel that this factual situation constitutes sufficient grounds to doubt that the interests of both the United States and the United Kingdom in ensuring a fair trial could be adequately safeguarded in case the trial were conducted in Libya. Whatever may be the merits of the Libyan judicial system under normal circumstances, the need for an even-handed and just solution leads me to consider, within the special context of the present case, that the Libyan domestic courts could not be the appropriate forum." (Case concerning *Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libya* v. *United States)*, Dissenting Opinion of Judge El-Kosheri, *I.C.J. Reports 1992*, p. 217.)

3.62. The Council thus decided to require that the accused individuals be transferred for trial by the judicial authorities of another State. This was a reasonable and appropriate measure in the circumstances. As Professor Tomuschat has written concerning the Council's action:

> "[O]ne finds little which gives rise to serious objections. Extradition of major criminals is a legitimate concern within the framework of a strategy aimed at combating terrorism. Eradication of terrorism presupposes the effective elimination of any shelter and refuge to terrorists." (C. Tomuschat, The Lockerbie Case Before the International Court of Justice, 48 *International Commission of Jurists Review* 38, 44 (1992)).

The Council Did Not Determine Guilt or Discriminate Against Libya.

3.63. In calling for the transfer of these persons for trial, the Council was not making a legal judgment regarding their guilt or innocence. Guilt or innocence could only be determined by an impartial jury after a proper criminal trial respecting the rights of the accused.

3.64. Now here, I must respond to some mis-characterizations of US criminal procedure that appear throughout Libya's pleadings. In particular, Libya makes the recurring claim that the US judiciary has pre-judged the guilt of the accused (e.g., Libyan Observations and Submissions, paras. 1.6, 1.54). Libya argues that the US indictment somehow proves that the US courts have pre-judged their guilt and the Libyan pleadings thus speaks derisively of the "so-called 'independent' court". (Libyan Observations and Submissions, para 1.6).

3.65. Now this recurring argument suggests an important mis-understanding of the US criminal process. Immediately following the destruction of Pan Am 103, responsible US officials launched a massive criminal investigation. The US investigation proceeded in parallel, and in close cooperation, with Scottish investigators. US and Scottish prosecutors shared evidence. In due course, US prosecutors independently evaluated the results of the investigation. They determined that criminal charges in the form of an indictment should be brought under US law.

3.66. Under US criminal procedure, the indictment of the individuals accused in this case — as in any other criminal case — is not the act of a judge. In the US system, judges play no role in the process of bringing criminal charges. Indictments are merely accusations drafted on the basis of available evidence by career government prosecutors. Indictments are then presented to a grand jury, which is a group of 23 ordinary citizens who under US Constitutional law act as a check on the power of prosecutors to bring unwarranted prosecutions. At the beginning of the trial, the judge instructs what is called in American English the petit jury, which will decide the guilt or innocence of the accused, that the indictment is merely an accusation and that it is not evidence of the defendant's guilt.

3.67. No judge has reached any conclusions regarding the validity of the charges in the indictment. At a public trial, the prosecutors must prove the charges in the indictment to the jury by presenting evidence that proves the guilt of the accused beyond a reasonable doubt. The accused need not testify. The accused would be represented by counsel who can seek to discredit or rebut all of the prosecution's evidence and can cross-examine all of its witnesses.

3.68. This process, and the role of the grand jury, are explained in the US Preliminary Objections at paragraph 1.06 and in paragraphs 6 *et seq.,* of the Justice Department Memorandum at US Exhibit 6. As explained there, the sufficiency of evidence to prove the charges contained in the indictment can only be established though a criminal trial in which the accused are entitled to the presumption of innocence, and in which the charges against them must be proved to a jury beyond a reasonable doubt.

3.69. Let me briefly mention as well the US demand that Libya pay compensation for the destruction of Pan Am 103. Libya has also cited this as evidence of official prejudgment of guilt.

In November 1992, as today, the United States believed that compensation was due under the law of State responsibility for the destruction of Pan Am 103. The United States said so publicly, as States commonly do when they believe that they have suffered an international injury for which compensation is due. However, these views of the United States are not evidence. They would not be admissible in court and would not be considered in the criminal trial of the accused individuals.

3.70. Now in acting as it did, the Council was not discriminating against Libya or singling it out for unique measures. The Council has called for the transfer of persons for trial in other important situations as well. It has in effect required that persons, including nationals of the transferring State, be transferred for trial before both the International Criminal Tribunal for the Former Yugoslavia and the Tribunal created to prosecute persons for crimes in Rwanda (paragraph 4 of resolution 827 (Yugoslavia Tribunal), paragraph 2 of resolution 955 (Rwanda Tribunal)). In addition, through resolutions 1044, 1054, adopted following the attempted assassination of President Mubarak of Egypt while attending the OAU Summit in Addis Ababa, the Council, at the request of African States, called on the Sudanese authorities to comply with the OAU's request to extradite to Ethiopia suspects wanted in connection with the assassination attempt. The Council also adopted sanctions there aimed at encouraging compliance.

The Council Is Not Precluded from Requiring Transfer of Persons for Trial.

3.71. Libya contends that the "principles of a sound administration of Justice render it inappropriate or even *ultra vires* for the Council to adopt resolutions 748 and 883 (e.g., Libyan Observations and Submissions, paras. 4.16, *et seq.*)

3.72. The contention seems to be that the Council cannot act in matters that have a legal aspect, and in particular, it cannot require the transfer of persons for trial. This cannot stand. The Charter does not place such limits on the Council's powers. Judge Bedjaoui, while questioning the actions of the Council in other respects, confirms that the Council's demand that these individuals be transferred for trial "did not in itself, of course, lie beyond the Council's powers" (M. Bedjaoui, *The New World Order and the Security Council*, p. 70). The Appeals Chamber of the International

Criminal Tribunal for the Former Yugoslavia has also upheld the power of the Council to require the transfer of persons for trial in the *Tadic* case.

3.73. Libya cites the principle of *aut dedere aut judicare,* that a State may elect whether to prosecute or extradite the alleged offender. It also urges that general international law leaves Libya sole discretion to decide whether to transfer Libyan nationals for prosecution abroad. Libya sometimes contends as well that its constitution precludes the extradition of Libyan nationals.

3.74. I have previously answered Libya's broad claim that the Security Council cannot affect or alter the international legal rights and obligations of States. The Council clearly has extensive power to do so. Many of the forms of mandatory Council action listed in Article 41 of the Charter, such as the interruption of economic relations or of sea, postal or other forms of communication, are likely to impair or supersede pre-existing rights under treaties, customary law, or national law. Nevertheless, there is no doubt that the Council can adopt such measures.

3.75. Nothing in the Charter or in the practice of States or of the Council suggests that the Council's powers are subject to some implicit limit or qualification barring action because proposed decisions involve legal procedures or legal questions. As I mentioned a moment ago, the Council has taken a number of important Chapter VII decisions bearing upon such matters, to the general approbation of the international community. It has, for example, created the International Criminal Tribunals for the Former Yugoslavia and for Rwanda, Security Council resolutions 687, 827, and 955. The General Assembly has also created subsidiary bodies of a distinctly legal character, notably the United Nations Administrative Tribunal.

3.76. Some writers have suggested a more nuanced view of the situation. They suggest that a sort of hierarchy of international law rules may bear upon the decisions of the Security Council. They acknowledge that the Council can indeed act to alter the effects of some international law rules, including rules with a legal aspect. However, they argue that other rules — for example the prohibitions on genocide and torture — may be of a higher order, so that the Council cannot take actions that contradict them.

3.77. This idea leads to many difficulties. It is not apparent, for example, what the nature or legal foundations of the proposed hierarchy of legal rules might be, or how particular rules could

be classified into one category or another. But, whatever the intellectual interest of this notion, it is not relevant in this case. We are not dealing here with the Security Council displacing *jus cogens* or fundamental principles of human rights.

3.78. Certainly, there is nothing about the doctrine of *Aut dedere aut judicare* conferring upon it superior status precluding action by the Council. State practice shows that this is not a principle of customary international law. States do not in general regard themselves as having an international legal obligation to prosecute every person whom they may refuse to extradite to another State. If they did, the Montreal Convention would not have been necessary. Moreover, in other circumstances, notably the international criminal tribunals for the former Yugoslavia and Rwanda, the Security Council has required that individuals accused of certain crimes of international concern be subjected to international criminal jurisdiction and not be tried in accordance with this principle.

3.79. It is equally clear that some States' practice of not requiring their nationals to stand trial abroad is not a rule of customary international law. Many States, including my own (and, I understand, the United Kingdom as well), regularly extradite their own nationals. States regularly conclude treaties and arrangements by which they turn over their nationals for foreign prosecutions, without concern or protest from the international community. The obligations to transfer persons for trial before the International Criminal Tribunal for the Former Yugoslavia and Rwanda also extend to persons who are nationals of the transferring State. There are no principle of basic law involved here.

3.80. Indeed, notwithstanding its representations that the Libyan constitution bars it, Libya has made proposals involving trial of the accused, of these accused outside of Libya, although on conditions that do not meet the Security Council's requirements (e.g., Second Report of the Secretary-General, para. 4, US Exhibit 21).

3.81. Thus, the rules invoked by Libya have no special or exceptional status. They do not limit or condition the power of the Security Council to act under the Charter as it has done here.

Mr. President, I will now turn to my final argument to show why, in any event, the Court should decline to decide this case.

In Any Event, the Court Should Decline to Decide This Case

3.82. Dr. Murphy showed how this Court does not have jurisdiction because Libya has no claims that truly involve the application or interpretation of the Montreal Convention. I have shown how Libya's claims are inadmissible, because the governing rules are those resulting from mandatory decisions of the Security Council. In this argument, I will show how, even if the Court had jurisdiction and the claims were admissible, the Court should decline to decide the case. This is because the relief that Libya seeks has been rendered moot by the decisions of the Security Council.

3.83. In the *Northern Cameroons* case, *(Northern Cameroons, Judgment, I.C.J. Reports 1963,* p. 15*)*, the Court decided that it could not adjudicate upon the merits of a claim concerning alleged breaches by the United Kingdom of its Trusteeship Agreement for the Territory of the Cameroons on the grounds that the claim that had been rendered moot by a decision of the General Assembly terminating the Trusteeship. The Court stated that:

> "The function of the Court is to state the law, but it may pronounce judgment only in connection with concrete cases where there exists at the time of the adjudication an actual controversy involving a conflict of legal interests between the parties. The Court's judgment must have some practical consequence in the sense that it can affect existing legal rights or obligations of the parties." (*Id.*, pp. 33-34.)

3.84. Since the Trusteeship there had been terminated, the Court could no longer pronounce any judgment that would affect the rights and obligations of the parties concerning it. As the Court stated:

> "Whenever the Court adjudicates on the merits of a dispute, one or the other of the parties, or both parties, as a factual matter, are in a position to take some retroactive or prospective action or avoidance of action, which would constitute a compliance with the Court's judgment or a defiance thereof. That is not the situation here." (*Id.*, pp. 37-38.)

3.85. The same reasoning applies to the present case. Here, the Montreal Convention of course has not been terminated. However, the decisions of the Security Council have precluded as a matter of law the course of action that Libya claims it has a right to take under the Convention. Because of the actions of the Security Council, Libya cannot lawfully retain control of these individuals and conduct its own investigation and possible trial.

3.86. This Court's Judgment in the 1974 *Nuclear Tests* case *(Nuclear Tests (Australia* v. *France), Judgment, I.C.J. Reports 1974*, p. 253) is to similar effect. There, the Court decided that the claim before it no longer has any object and that the Court was therefore "not called upon to give a decision thereon". (*Id.*, p. 272.) The Court stated that "the present case is one in which circumstances have arisen [that] render any adjudication devoid of purpose" (*Northern Cameroons*), and that it "therefore sees no reason to allow the continuance of proceedings which it knows are bound to be fruitless". (*Id.*, p. 271.) Precisely the same considerations apply here. The only way in which this Court can grant to Libya the relief it requests is for it to review and invalidate the binding decisions of the Security Council. As our next two speakers, Professor Schachter and Zoller, will show, the Court cannot and should not do so. Accordingly, ruling on Libya's claims under the Montreal Convention cannot affect the legal rights or the obligations of the Parties, and would be devoid of purpose.

* * *

3.87. I am almost to the end. I am grateful to the Court for its continued attention and courtesy.

3.88. I have shown here how the Security Council's resolutions establish the legal rules that govern the dispute between Libya and the United States. These rules, and not the Montreal Convention, define the obligations of the Parties. Libya's claims based upon the Montreal Convention are therefore inadmissible. They are also without purpose and effect in light of the Council's actions.

3.89. Our next two speakers will show that the Court does not have jurisdiction to consider Libya's sweeping claims that the Council has committed errors in interpreting the Charter, in finding the facts, or in conducting its proceedings, and that these claims are also inadmissible. Nevertheless, I have also answered these claims by Libya, shown how the Council's decisions were a proper exercise with responsibility, responsibility that the Charter assigns solely to the Council.

3.90. Thus, the Court lacks jurisdiction, the claims are inadmissible. But even if this were not so, the Court should decline to uphold the claims, because the relief that Libya seeks is without purpose and effect in light of the actions of the Security Council.

3.91. I thank the Court for its patience and interest during a long presentation. It has been an honour for me to appear before you. It is also an honour for me to invite the Court to hear our next speaker, Professor Oscar Schachter. We would suggest that the Court might wish to recess for coffee following Professor Schachter's presentation. Thank you.

The ACTING PRESIDENT: Yes, thank you Mr. Crook. I now give the floor to Professor Schachter.

Professor SCHACHTER:

Relationship of the Court to the Council

4.1. Mr. President and Members of the Court, it is indeed an honour to appear before this Court and a privilege to do so in a case that holds much significance for the maintenance of international peace and security and the elimination of state-supported terrorism.

4.2. As Members of the Court have recognized, a central legal issue raised in this case concerns the relationship of the Security Council and the Court. The Court is faced with a challenge to binding decisions of the Security Council adopted pursuant to Chapter VII of the United Nations Charter. Underlying this challenge is the Libyan contention that the Court in the exercise of its judicial power has the authority and responsibility to judge the legality of the Council's decision. My comments will be addressed mainly to this argument.

4.3. Let me say, first, that the United States recognizes that the United Nations Security Council is an organ whose powers are defined and limited by the Charter of the United Nations. The pertinent resolutions of the Security Council, in this case resolutions 748 and 883, were adopted under the general authority of the Council in Articles 24 and 25 and pursuant to the specific powers laid down in Chapter VII of the Charter, in particular Articles 39 and 41. Article 48 of the Charter also affirms that the actions required to carry out the decisions of the Council shall be taken by all or some of the Members as the Council shall determine. Pursuant to these Articles, the Council has imposed binding obligations not only on Libya but on all other Members of the United Nations.

4.4. Such enforcement measures have the effect in many respects of depriving or curtailing the legal rights of the affected States, and most drastically the rights of the target State, Libya. When a State appeals to this Court to vindicate its legal rights as against the Council's sanctions, the juridical question, as Judge Shahabuddeen remarked, "results not from any collision between the competence of the Security Council and that of the Court" (*Questions of Interpretation and Application of the 1971 Montreal Convention Arising From the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya* v. *United States of America), Provisional Measures, Order of 14 April 1992, I.C.J. Reports 1992*, p. 141). Rather, he went on to say, it is more precisely and correctly a collision between rights that the State may have under treaties and the obligations imposed by the mandatory measures of the Council.

4.5. What then is the role of the Court, if it were properly seized of a case under a treaty, faced with a challenge to the validity of the mandatory Council decision? Libya has argued that in that case the Court has the intrinsic authority and responsibility to exercise its judicial function as laid down in the Charter and its Statute. The argument is important and we do not take it lightly. The United States places a high value on the role of the judiciary in international disputes and in particular on the contribution of this Court as a principal organ of the United Nations to the understanding of the Charter and the commitments of member States. We agree with Judge Lachs' much-quoted comment that the Court is the "guardian of legality", though we would add, not the sole guardian. The member States and the other principal organs are all bound to respect and conform to the Charter and international law.

4.6. The issue in the present case cannot be resolved simply by referring to the pre-eminent role of the Court in exercising its judicial function. The challenge by Libya to the Security Council calls into question the basic constitutional structure of the United Nations and the understanding of member States as to powers delegated to the organs and the manner of their application. True, this Court has recognized in one of its first cases that the

> "political character of an organ cannot release it from the observance of the treaty provisions established by the Charter when they constitute limitations on its powers or

> criteria for its judgment" (*Conditions of Admission of a State to Membership in the United Nations, Advisory Opinion, I.C.J. Reports 1948*, p. 64).

But it has also recognized that the Court "[u]ndoubtedly . . . does not possess powers of judicial review or appeal in respect of the decisions taken by the United Nations organs concerned" (*Legal Consequences of States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276, Advisory Opinion, I.C.J. Reports 1971*, p. 45). Both of these propositions have been generally accepted; we regard them as unimpeachable principles of United Nations law and relevant jurisprudence on the issues raised in this case.

4.7. The present case presents its own distinctive facts and juridical configuration. The Court is faced for the first time with a contentious case in which a State claims that a Council decision which has overridden its legal rights has violated the Charter and basic principles of international law. As we already indicated, we do not deny that the Council is obliged to comply with the Purposes and Principles of the Charter and to act within the limits of the powers granted to it.

4.8. However, the salient fact of juridical relevance is that the resolutions in question were decisions taken by the Council in the exercise of its supreme — and unique — responsibility under the Charter. The Council's determination that the situation constituted a threat to international peace and security and that enforcement measures were necessary did not rest on conjecture or theory. The acts of terrorism had cost hundreds of lives; intensive factual investigation pointed to the responsibility of agents of Libya. The worldwide reaction called for effective responses. It was reasonable — one might say, inevitable — that a majority of the Security Council would regard the situation as a threat to international peace and security and take action to ensure that those responsible for the attack would be punished. The Council took action under Chapter VII and imposed the sanctions that it alone was authorized to take.

4.9. It is surely beyond the competence and responsibility of the Court to "second-guess" the Council in its judgment as to the threat and the measures taken in response. The framers of the Charter had devoted a large part of their deliberations in San Francisco to the enforcement powers of Chapter VII. The majority were clear — sometimes emphatic — in concluding that the

Security Council, and the Council alone, had the duty to decide — in its discretion — that a solution came within the terms of Article 39 and called for sanctions within the terms of Chapter VII.

4.10. It is idle to speculate whether in a theoretical world one could formulate legal standards to govern decisions as to the threat of peace and measures to enforce the peace. The framers of the Charter and the member States by and large did not consider that such standards were "judicially discoverable and manageable" (to quote from a US Supreme Court decision). More than that, they considered it unwise and dangerous to subject the Council's political decisions to judicial control. The proper function of the Court faced with a challenge to the legality of Council decisions under Chapter VII can only be to underline the discretionary authority given to the Council by the Charter. Judge Weeramantry clearly summed up the legal position in his opinion in 1992, where he said: "It would appear that the Council and no other is the judge of the existence of the state of affairs which brings Chapter VII into operation." (*Questions of Interpretation and Application of the 1971 Montreal Convention Arising From the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya* v. *United States of America), Provisional Measures, Order of 14 April 1992*, p. 176.)

4.11. In presenting this conclusion we do not deny that the Court may exercise its judicial responsibility in some contentious cases that involve Security Council decisions. The United States Agent in the case concerning *United States Diplomatic and Consular Staff in Tehran* told the Court: "There is absolutely nothing in the United Nations Charter or in this Court's statute to suggest that action by the Security Council excludes action by the Court, even if the two actions might in some respects be parallel" (case concerning *United States Diplomatic and Consular Staff in Tehran (United States* v. *Iran), Pleadings*, p. 229 (Roberts Owen)).

4.12. One can conceive of situations in which contentious cases properly before the Court may involve interpretation of law raised by Council decisions. Of course, the Court's decisions in such cases would not bind the Security Council nor would it bind States not parties to the case (Article 59 of the Statute of the Court), but this may not matter if the dispute in question only

involves the States parties to the case and the dispute is justiciable. In short, the Court may still fulfil its judicial role in some contentious cases even if Security Council decisions are involved. However, such exercise of the Court's judicial role is critically different from the claim made by Libya in this case — a claim directed against the Council's exercise of its discretionary authority to determine that a situation is a threat to the peace and that enforceent measures under Chapter VII should be imposed. The non-reviewable authority of the Council in this case is not against or outside of the law. It is grounded in the Charter itself and the obligations based on the Charter. The Court would properly exercise its judicial responsibility by recognizing that the obligations imposed on Libya by the Security Council constitute the applicable rule of law in this case.

4.13. I shall turn now to two related points of legal significance. The first concerns the interesting question expressed succinctly by Judge Bedjaoui in his opinion — namely, whether the judicial function conferred on the Court by the Charter would be "impaired" if the Court were denied the right to furnish a legal solution to a question properly before it. Counsel for Libya resort to more sweeping charges, arguing that the denial of the Court's jurisdiction would violate the "rule of law" implicit in the principles of the Charter.

4.14. Both of these points emphasize the role of the Court in assuring respect for the law. We do not deny the importance of that judicial role. We submit that in this case the Court would furnish a legal solution by applying the governing rule of law — namely, the mandatory effect of the Security Council decision taken under Chapter VII. Surely there is no impairment of the judicial function or disregard of the rule of law in the Court's determining that the law of the Charter applies to the Council's decision. The Court would then be fulfilling its judicial function consonant with the rule of law.

4.15. Is there an inherent judicial power of the Court that would in these circumstances support judicial review of Council decisions adopted under Chapter VII? An argument to that effect has been made by counsel for Libya and suggested in some of the opinions of Members of the Court. Counsel for Libya look for support for that position, for example, in Judge Fitzmaurice's

observations in his dissenting opinion in the *Namibia* case — referring to his comment that the Court if asked for an advisory opinion may have to determine whether a Council resolution is binding or recommendatory.

4.16. Obviously, this Court — indeed any court, properly called upon for an opinion — may have to interpret a pertinent legal instrument or decide on its legal effect relevant to the issues. But an interpretive determination is entirely different from this case — where the Council has not asked for the Court's advice and the appellants demand that the Council decision must be annulled by the Court. There is patently a fundamental distinction between a Court exercising its inherent power to interpret and apply a legal rule in a case before it and the assertion of a power of judicial control that would annul decisions of an independent body not subordinate to it. The inherent powers of the Court to interpret texts cannot be stretched to a power of review and annulment. This is a matter of such fundamental importance in the law of the United Nations — as in national constitutional law — that it cannot be obscured by referring vaguely to an inherent judicial power. It would surely astonish the legal communities in many countries if this Court should announce that the judicial power inherently encompassed the authority to override decisions of political organs where constitutional provisions do not provide for such review.

4.17. I turn to a different question raised in the Libyan argument — namely, whether international law governs decisions of the Security Council — or more precisely, whether the Charter requires the Council to conform to the rules of international law in its decisions under Chapter VII of the Charter. Much of the legal argument on this question goes back to Article 1, paragraph 1, of the Charter which sets out the purposes of the United Nations and includes in its latter part the words "in conformity with the principles of justice and international law". As one might expect, this phrase received close attention in the drafting of Article 1 at San Francisco. The Committee concerned took a decision to move the phrase "in conformity with the principles of justice and international law" from the first part of paragraph 1 to the latter part, so that it would apply only to the "adjustment or settlement of international disputes or situations" (United Nations

Doc. No. 944, Report of Committee I/1). As stated in the report, this change was made to ensure that the "vital duty of preventing and removing threats to and breaches of the peace" would not be limited by existing law. It was clear then, as it is to us now, that preventive or enforcement measures could — and often would — entail overriding the legal rights of the States. However, when it came to "adjusting or settling" disputes or situations, the Organization would be expected to act in conformity with principles of justice and international law.

4.18. The distinction obviously makes sense. When the Council takes preventive or enforcement measures under Chapter VII — in a word "sanctions" — it will as a rule affect the legal rights of States and override some of these rights; in that particular sense, the measures would not conform to international law as distinct from the Charter itself. The Charter itself is the governing law, as affirmed by Article 103 and other Articles. This brings us back to the argument that judicial oversight of Council decisions is essential to ensure their legality and conformity to the Charter. There is an old saying — "to a shoemaker there is nothing like leather, to a lawyer there is nothing like a court". But much as we lawyers appreciate courts, they need not be — and are not — the sole guardians of legality. In the world of sovereign States, the States themselves collectively and individually have a responsibility and the capability to ensure adherence to their fundamental law. True, the Security Council is pre-eminently a political organ; its member States generally apply political criteria and make political judgments. That does not mean that they are indifferent to the principles and rules of the Charter or incapable of reaching decisions based on the Charter. It is surely in their collective interest to maintain the basic framework of their authority. The records of the Council amply demonstrate that the Members of the Council take account that the Charter provisions and on the whole resolve such differences as arise by reference to the Charter and accepted principles of interpretation. The Council (as we know) is not a monolithic body. Its Permanent Members and its elected Members are broadly representative of a plural world. It is essential to their collective authority to maintain their constitutional compact. We stress this point (though it may seem obvious) to respond to the suggestion that the Court alone is the guardian of

legality. Under the Charter, the Security Council along with other principal organs, share that responsibility. In the final analysis, it is the member States that have the power — and the duty — to ensure that *their* Charter is maintained and respected. It is they, after all, who are accountable to their peoples for international peace and security.

4.19. That concludes my statement, Mr. President. With your permission, Mr. President, I shall invite Professor Elizabeth Zoller of the University of Paris II to address the Court on questions of jurisdiction and admissibility.

The ACTING PRESIDENT: Thank you, Professor Schachter. I take it Professor Zoller would like to commence her submission after the break?

Mr. ANDREWS: That is correct, Mr. President.

The ACTING-PRESIDENT: Yes, so we will take our mid-morning break now and the Court will adjourn for 15 minutes.

The Court adjourned from 11.05 to 11.10 a.m.

The ACTING PRESIDENT: Please be seated. I give the floor now to Professor Elisabeth Zoller.

Nature d'un éventuel droit de contrôle de la Cour sur les actes du Conseil de sécurité

Mme ZOLLER : Monsieur le Président, Messieurs,

5.1. En me demandant de développer certaines de ses exceptions préliminaires à la requête de la Libye dans l'affaire de *Lockerbie*, le gouvernement des Etats-Unis m'a fait un double honneur. D'abord, il m'a donné la possibilité de parler devant la Cour pour la première fois et c'est un privilège dont je mesure le prix. Ensuite, il m'a confié la mission d'exposer le point de vue d'un membre permanent du Conseil de sécurité sur une question juridique importante du droit de

l'Organisation des Nations Unies. Cette question est celle de la nature d'un éventuel droit de contrôle de la Cour sur les actes du Conseil de sécurité.

Si cette question se pose, c'est parce que le véritable différend porté par la Libye devant la Cour n'est pas un différend qui l'oppose aux Etats-Unis; c'est un différend qui l'oppose au Conseil de sécurité et c'est contre lui en réalité qu'elle vient demander justice. En effet, comme l'a expliqué le Dr. Murphy, la Libye n'a pas un différend avec les Etats-Unis au sens de la convention de Montréal. Son adversaire, c'est le Conseil de sécurité, et M. Crook vous a expliqué longuement pourquoi, en tant qu'elles étaient dirigées contre le Conseil de sécurité, les prétentions libyennes étaient mal fondées. Après lui, le professeur Schachter a démontré que, si le Conseil de sécurité était bien soumis au droit, il n'appartenait pas à la Cour de se substituer à lui dans l'appréciation qu'il est amené à faire des situations de nature à mettre en danger la paix et la sécurité internationales. Il reste une dernière question. Si le Conseil de sécurité est bien soumis au droit, si l'Organisation des Nations-Unies est une organisation de droit comme on peut parler d'un «Etat de droit» (*Rechtsstaat*), alors qui contrôle cette soumission ?

Sur cette question, la position de la Libye est catégorique. Selon elle, la Cour est compétente purement et simplement pour contrôler au contentieux, par voie d'exception, la légalité des décisions du Conseil de sécurité. Le Gouvernement des Etats-Unis ne partage pas cette opinion dogmatique et il entretient sur la question des vues plus nuancées. Il ne pense pas que la Charte et le Statut autorisent la Cour à contrôler au contentieux la légalité des actes du Conseil de sécurité. Il considère donc que la Cour n'a pas compétence pour connaître de la requête libyenne et qu'au surplus cette requête est irrecevable. C'est à développer ces deux moyens que je vais essentiellement m'attacher.

I. L'incompétence de la Cour

5.2. S'agissant de la compétence de la Cour pour contrôler la légalité des résolutions 731, 748 et 883 du Conseil de sécurité, notre adversaire n'a qu'un argument, et un seul qui revient comme un leitmotiv dans sa démonstration. Selon la Libye, le pouvoir de la Cour d'examiner la légalité

des résolutions du Conseil de sécurité «puise son fondement dans le caractère judiciaire de la Cour» (mémoire, p. 183, par. 6.46). Selon elle, la Cour ne saurait — sauf à déchoir — renoncer à exercer ce pouvoir. Il en va — nous dit-elle — de «l'importance du maintien de l'intégrité de la fonction judiciaire» (observations et conclusions, p. 67, par. 3.11). Et à l'appui de sa démonstration, notre adversaire invoque deux affaires : d'une part, l'affaire concernant *Certaines dépenses* en 1962 où la Cour se serait appuyée sur «ses fonctions judiciaires» pour affirmer son pouvoir de contrôler la régularité des actions des organes de l'Organisation; d'autre part et surtout, l'affaire de la *Namibie* en 1971 qui pour la Libye revêt «une importance particulière» (observations et conclusions, p. 66, par. 36) et dans laquelle, toujours selon elle, la Cour aurait invoqué «sa fonction judiciaire» pour affirmer sa compétence à l'effet de se prononcer sur la validité de la résolution 2145 (XXI) de l'Assemblée générale.

Le Gouvernement des Etats-Unis n'entend ni approuver, ni infirmer l'interprétation que la Libye attache aux deux affaires précitées. Le point décisif, selon lui, est que ces deux affaires sont venues devant la Cour par la voie consultative, non par la voie contentieuse. Comme il l'a écrit dans son mémoire en défense (version française, p. 96, par. 4.11) : «Dans ces deux instances, la Cour a agi en réponse à une demande d'avis consultatif.» La Libye n'a jamais répondu sur ce point. Non pas qu'elle n'ait pas vu le problème; mais elle l'a éliminé sans le résoudre au motif selon elle que «la jurisprudence en matière consultative précitée s'applique également, si ce n'est à fortiori, au contentieux» (mémoire, p. 187). Pour appuyer cette affirmation, la Libye s'est fondée sur les opinions de trois juges : celles des juges Onyeama et Fitzmaurice dans l'affaire de la *Namibie* et celle du juge Bustamante dans l'affaire de *Certaines dépenses*. Nonobstant le respect dû à ces membres éminents de la Cour, il est permis de dire que la démonstration libyenne est un peu courte et pour le moins expéditive. La Cour est une juridiction collégiale et ses juges, à eux seuls, — quelle que soit leur autorité individuelle — ne créent pas de précédents. Or c'est justement parce que la Libye ne peut pas invoquer un seul précédent au contentieux qu'on ne comprend pas comment elle peut affirmer avec tant d'aplomb — «à fortiori» nous dit-elle (*eod. loc.*) — que ce

qui vaudrait en matière consultative vaudrait également en matière contentieuse. L'observation de la jurisprudence de la Cour invite à des observations plus nuancées.

5.3. Monsieur le Président, il est bien certain que la Cour exerce toujours une seule et même fonction, la fonction judiciaire, en sa qualité d'«organe judiciaire principal des Nations Unies» au sens de l'article 92 de la Charte. Concrètement, cela signifie que la Cour «dit le droit» tantôt au contentieux, tantôt à titre consultatif. Car la fonction judiciaire est la fonction de dire le droit. Et cette fonction de dire le droit, les rédacteurs de la Charte l'ont confié à titre principal à la Cour par l'effet de l'article 92 de la Charte.

Mais, si la fonction judiciaire est toujours une, s'il s'agit toujours de dire le droit, doit-on en conclure que ses conditions d'exercice soient identiques ? Autrement dit, les deux manières d'exercer la fonction judiciaire sont-elles équivalentes et la Cour peut-elle faire au contentieux ce qu'elle s'autorise à faire dans la procédure consultative ? Pour la Libye, la réponse à cette question ne fait aucun doute et il n'y a pour elle aucune difficulté à faire au contentieux ce qui est concevable dans le cadre consultatif et inversement. Pour elle il n'y a aucune autonomie entre les deux procédures et il est possible de passer de l'une à l'autre au gré des besoins. Les deux procédures sont pour ainsi dire fongibles et, forte de cette équivalence, elle demande à la Cour d'exercer son contrôle «à titre incident» (mémoire, p. 188).

5.4. Cette assimilation des deux procédures laisse sceptique. Jamais dans le cadre de la procédure contentieuse, la Cour s'est reconnue ou a laissé entendre qu'elle pourrait avoir un pouvoir de contrôle sur les actes du Conseil de sécurité. Jamais elle ne s'est considérée comme le juge ou le censeur du Conseil de sécurité, mais plutôt comme son bras droit et son conseil. Dans la procédure contentieuse, tout se passe comme si la Cour se considérait investie de la mission d'assister le Conseil de sécurité dans l'exercice de sa responsabilité principale de maintien de la paix. C'est ainsi qu'elle a interprétée sa compétence dans l'affaire du *Personnel diplomatique et consulaire des Etats-Unis à Téhéran* (1980) lorsqu'elle a remarqué qu'il ne saurait y avoir «rien d'irrégulier dans l'exercice *simultané* par la Cour et par le Conseil de sécurité de leurs fonctions respectives»

(*C.I.J. Recueil 1980*, p. 21, par. 40;les italiques sont de moi). Et elle a justifié cet «exercice simultané» par des «raisons ... évidentes», (*ibid.*, p. 22), à savoir que les deux organes poursuivant en même temps le même but, c'est-à-dire le règlement pacifique des différends, il est logique que la Cour puisse contribuer à «résoudre toute question juridique pouvant opposer des parties à un différend» (*ibid.*, p. 22, par. 40).

Quatre ans plus tard, dans l'affaire du *Nicaragua* (compétence, 1984), la Cour a été à nouveau priée de se saisir des aspects juridiques d'un différend qui était examiné par le Conseil de sécurité. Elle a repris exactement la même jurisprudence. Elle a séparé entre les «attributions politiques» du Conseil de sécurité et les «fonctions purement judiciaires» de la Cour, et elle a souligné que les deux organes pouvaient s'acquitter «de leurs fonctions distinctes mais *complémentaires* à propos des mêmes événements» (*C.I.J. Recueil 1984*, p. 435, par. 95; les italiques sont de moi). Dans cette affaire comme dans la précédente, la Cour a considéré qu'elle était compétente parce que, dans l'exercice de sa compétence, elle poursuivait le même but que le Conseil de sécurité. Elle a donc accepté de l'assister dans l'exercice de ses fonctions en se prononçant sur un point de droit afférent à un différend qui était porté devant lui. Deux adjectifs, utilisés par la Cour, résument fort bien sa position sur la manière dont elle conçoit son rôle au contentieux vis-à-vis du Conseil de sécurité : il s'agit de «simultané» et «complémentaire». En même temps et de concert avec lui, voilà la manière dont la Cour comprend son rôle dans le traitement des aspects juridiques d'une question examinée par le Conseil de sécurité.

5.5. Mais dans la présente affaire, la Libye ne demande pas du tout à la Cour de tenir un rôle complémentaire à celui du Conseil de sécurité et de poursuivre le même but que lui. Ce que la Libye demande à la Cour, c'est en vérité de défaire le but que poursuit le Conseil. Elle lui demande non pas de l'aider à faire face à une situation de nature à mettre en danger la paix et la sécurité internationales, mais bien au contraire de l'empêcher d'y faire face. Elle demande à la Cour d'arrêter le processus politique mis en œuvre par le Conseil de sécurité. Mais la Cour n'admet pas ce genre de démarche. Elle estime même qu'il lui appartient de soulever d'office le problème dans

l'hypothèse où il y aurait une quelconque ambiguïté dans la démarche du demandeur. C'est ce qui s'est passé dans l'affaire du *Nicaragua* (compétence). A l'objection selon laquelle l'instance introduite par le Nicaragua n'était «en fait [qu'] un appel devant la Cour d'une décision défavorable du Conseil de sécurité», la Cour a répondu ceci :

> «Il n'est pas demandé à la Cour de dire que le Conseil de sécurité a commis une erreur, ni que la manière de voter des membres du Conseil ait été en rien contraire au droit.» (*C.I.J. Recueil 1984*, p. 436, par. 98.)

Cela signifie que, si tel avait été le cas, c'est-à-dire si le demandeur avait cherché à faire juger une erreur ou une irrégularité des votes au Conseil de sécurité, la Cour aurait refusé d'examiner la requête au contentieux. Mais ici c'est exactement ce que la Libye demande à la Cour de faire. Elle lui demande d'abord d'invalider les résolutions 731, 748 et 883 eu égard justement «à la manière de voter des membres du Conseil de sécurité». Selon la Libye, les Etats-Unis, le Royaume-Uni et la France ne pouvaient pas participer au vote de ces résolutions (observations et conclusions, p. 88, par. 4.34). Et elle lui demande ensuite de censurer le Conseil de sécurité pour «erreur» et, très précisément pour quiconque est familier des cas d'ouverture du recours pour excès de pouvoir en droit administratif français, pour erreur de fait, erreur de droit, erreur de qualification juridique des faits, erreur de fait (les deux personnes que les Etats-Unis et le Royaume-Uni voudraient voir déférer à la justice ne seraient en rien impliquées dans la tragédie de Lockerbie), erreur de droit (le Conseil de sécurité aurait mal interprété les dispositions du chapitre VII), erreur de qualification juridique des faits (les suites de l'attentat de Lockerbie ne seraient pas de nature à justifier une application du chapitre VII). Avec l'invocation d'un «vice de forme» fondé sur la manière de voter des membres du Conseil de sécurité, avec l'invocation de la «violation de la loi» tirée des prétendues erreurs commises par celui-ci (voir mémoire, p. 219 et suiv.); observations et conclusions p. 93-94 et suiv.), il est clair que nous ne sommes plus dans le contentieux international, nous sommes dans le contentieux administratif français. La requête de la Libye est à la vérité un recours

en annulation déguisé, c'est un recours pour excès de pouvoir qui ne dit pas son nom. La difficulté c'est que la Cour n'a tout simplement pas compétence pour entretenir ce genre de demande au contentieux.

5.6. En effet, contrairement à ce que sous-tend la démarche libyenne, les deux chefs de compétence par lesquels la Cour exerce la fonction judiciaire, la compétence contentieuse et la compétence consultative, ne sont pas interchangeables. Ils ne sont pas reliés entre eux comme des vases communicants. Les dispositions de la Charte des Nations Unies complétées par celles du Statut de la Cour ont établi une répartition des compétences. La compétence contentieuse est une chose, la compétence consultative en est une autre. Cette répartition des compétences est inscrite dans les textes, d'abord dans la Charte qui traite des deux chefs de compétence dans des articles séparés (art. 36, par. 3, pour la compétence contentieuse et art. 96, par. 1, pour la compétence consultative), cette répartition des compétences elle est ensuite et surtout inscrite dans le Statut de la Cour qui envisage les deux chefs de compétence dans deux chapitres distincts (le chapitre II, qui traite de la compétence contentieuse et le chapitre IV, qui s'applique aux avis consultatifs). Ce traitement différencié des compétences contentieuses et consultatives signifie que la Cour consultative est une chose et que la Cour statuant au contentieux en est une autre. De cette distinction, la Cour est parfaitement consciente. Elle n'admet pas que ceux qui viennent devant elle, les Etats ou les organisations internationales, puissent manipuler les deux ordres de compétence à leur convenance. Elle s'oppose à ce que l'on puisse obtenir par la voie consultative ce qu'il ne serait possible d'obtenir que par la voie contentieuse, ou vice-versa.

5.7. Nous venons de voir avec l'affaire du *Nicaragua (compétence)* comment la Cour avait exclu toute possibilité de rechercher au contentieux un quelconque prononcé judiciaire sur une prétendue irrégularité commise par un organe de l'Organisation. Mais la réciproque est vraie. Pas plus qu'il n'est possible de se servir de la voie contentieuse pour atteindre un résultat qui ne serait envisageable que dans le cadre consultatif, il n'est pas possible d'utiliser la voie consultative pour atteindre un résultat qui ne pourrait être obtenu que par la voie contentieuse. L'affaire décisive ici

est celle du *Statut de la Carélie orientale* de 1923. Que nous apprend cet avis ? En quelques mots : qu'on ne peut pas régler un différend par la voie consultative. Je cite les trois phrases clés de l'avis pour ce qui nous concerne :

> «L'avis demandé à la Cour porte sur un différend actuellement né entre la Finlande et la Russie... [L]e consentement de la Russie n'a jamais été donné... [L]a Cour se voit dans l'impossibilité d'exprimer un avis sur un différend de cet ordre.» (*C.P.J.I. série B n° 5*, p. 27-28.)

Mutatis mutandis, nous sommes ici dans une situation similaire dans la mesure où la requête libyenne soulève au contentieux une «question juridique» dont le traitement ressortirait en principe de la voie consultative conformément aux dispositions de l'article 96, paragraphe 1, de la Charte. C'est la même solution, mais renversée, qui doit s'appliquer : on ne peut pas répondre à une «question juridique» au sens de l'article 96, paragraphe 1, de la Charte dans le cadre de la procédure contentieuse. La question n'ayant pas été posée sous forme d'une requête pour avis consultatif, la Cour est dans l'impossibilité de se prononcer. Et la Cour est dans cette impossibilité, non pas par choix d'opportunité, mais parce que les textes l'obligent à agir de la sorte.

5.8. En effet, de par son Statut, la Cour a une compétence contentieuse d'attribution et une compétence consultative de droit commun. S'il y a deux ordres de compétence, il y a nécessairement deux ordres de juridiction («juridiction» étant pris ici au sens matériel de *juris-dictio*, c'est-à-dire de fonction qui consiste à dire le droit). La difficulté est qu'on ne voit pas ces deux ordres de juridiction pour ainsi dire. Ils ne sont pas visibles. En d'autres termes, ces deux ordres de juridiction n'ont pas d'expression institutionnelle, en ce sens qu'ils ne s'expriment pas dans des organes distincts. C'est un même organe, la Cour internationale de Justice, qui exerce les deux compétences comme organe judiciaire principal des Nations Unies, un peu comme le Conseil d'Etat en France qui exerce des attributions consultatives et des attributions contentieuses. Mais dans les deux cas, que l'on soit dans le cadre consultatif ou dans le cadre contentieux, la Cour fait bien la même chose. Elle dit le droit. Mais — et c'est le point décisif — elle ne le dit ni aux mêmes fins, ni aux mêmes conditions. Le rôle de la Cour statuant au contentieux est de dire le droit pour trancher des litiges, pour résoudre des différends entre Etats. Le rôle de la Cour consultative est

de dire le droit pour assister un organe de l'Organisation des Nations Unies dans l'exercice de ses fonctions. Dans le premier cas, la compétence de la Cour est strictement limitée; dans le second, il n'est pas de «question juridique» qu'elle ne puisse examiner.

5.9. Alors bien entendu, le rôle de la Cour dans le maintien de la paix et de la sécurité internationale est si important que tous les hommes de bonne volonté travaillent sans relâche à faire avancer la cause de la justice internationale sur les deux fronts, le front consultatif et le front contentieux. Tous ces efforts participent de la recherche d'un développement du rôle de la Cour et du droit dans la société internationale et les Etats-Unis bien entendu s'en réjouissent. Dans ces recherches parfois fébriles, on ne voit pas, ou plutôt on ne veut pas voir la différence entre la compétence contentieuse et la compétence consultative parce que, dans les deux cas, la cause du combat est juste, c'est le combat pour le droit. Et c'est vrai que, dans un cas comme dans l'autre, la Cour exerce la fonction judiciaire au sens le plus haut qui soit : elle dit et elle doit dire le droit. Mais, dans l'exercice de cette grande fonction qui est la sienne, la Cour ne peut pas passer outre à la répartition des compétences entre la juridiction consultative et la juridiction contentieuse. Non pas seulement parce qu'il lui faut respecter les textes, mais aussi parce que la répartition des compétences entre les attributions consultatives et contentieuses de la Cour est dans l'intérêt direct d'une protection de la fonction judiciaire. Ce principe est essentiel à une bonne administration de la justice internationale. Il protège la Cour contre les plaideurs, Etats ou organisations, qui chercheraient à obtenir d'elle qu'elle rendît des services et non la justice. C'est ce que nous allons maintenant développer.

* * *

5.10. Si les rédacteurs de la Charte et du Statut ont voulu que la compétence contentieuse et la compétence consultative de la Cour soient et restent toujours deux juridictions séparées, c'est pour protéger l'intégrité de l'organe judiciaire principal des Nations Unies qu'est la Cour. C'est pour lui donner le pouvoir de rester toujours maîtresse de sa juridiction et de sa compétence. On ne le perçoit pas toujours clairement parce que les différences entre les deux chefs de compétence sont

généralement présentées sous une forme abstraite. On souligne, par exemple, qu'à la différence de la procédure contentieuse, il n'y a pas de «parties» dans la procédure consultative; qu'il n'y a pas non plus de «conclusions», mais une «question» qui est circonscrite par les termes de la demande d'avis; qu'il n'y a pas enfin de «réponse» faite à des Etats, mais un «avis» donné à l'organe de l'Organisation. Tout ceci reste bien théorique. Pour prendre la mesure des conséquences pratiques du principe de répartition des compétences consultative et contentieuse, il faut envisager un instant ce qui se passe concrètement lorsque l'examen de la validité des actes d'un organe de l'Organisation vient devant la Cour par la voie consultative, non par la voie contentieuse. Le point capital est que, lorsqu'une demande d'avis se présente à la Cour, la procédure que la Cour doit suivre n'a alors rien à voir avec celle que lui impose une demande au contentieux.

5.11. La première et la plus importante différence est qu'une requête pour avis consultatif est notifiée immédiatement à tous les Etats admis à ester devant la Cour. Il en résulte que — dans l'hypothèse où les accusations de la Libye seraient venues devant la Cour par la voie consultative, non par la voie contentieuse — le débat aurait été ouvert à tous ceux qui y sont intéressés. Or, ceci n'est pas possible au contentieux et c'est bien là que gît la difficulté. Comment admettre qu'un recours contre des résolutions du Conseil de sécurité reste une «affaire privée» entre trois Etats seulement ? L'éventuelle nullité de résolutions du Conseil de sécurité — qui plus est, de résolutions qui sont prises sur la base du chapitre VII — est une question d'ordre public pour la communauté internationale toute entière. Comment admettre que ceux qui ont voté pour les résolutions en question ne soient pas «intéressés» par le sort juridique des actes dont ils sont les auteurs ? S'il est vrai, comme le soutient la Libye, que la Cour a le pouvoir de contrôler la légalité des résolutions du Conseil de sécurité, il serait inconcevable que, dans l'exercice d'un tel pouvoir, la Cour accepte — pour reprendre la formule utilisée par elle dans l'affaire du *Statut de la Carélie Orientale* — de «se départir des règles essentielles qui dirigent son activité de tribunal» (*C.P.J.I. série B n° 5*, p. 29). Mais parmi ces «règles essentielles», il y a le principe du contradictoire et la Cour attache une importance fondamentale à ce principe. Et on la comprend car «la possibilité offerte aux personnes

dont les intérêts sont en jeu, de se faire entendre» est une des conditions essentielles de la procédure judiciaire, c'est-à-dire de cette «fonction judiciaire» qui préoccupe tant notre adversaire (sur la signification de la «fonction judiciaire», voir M. Hudson, Les avis consultatifs de la CPJI, 8 *RCADI* (1925, III) 345, 408). La Cour a jugé, par exemple, qu'il serait contraire à son «caractère judiciaire» de Cour de justice qu'elle puisse être juge d'un acte sans que ceux qui sont directement affectés par celui-ci soient admis à lui soumettre leurs vues et leurs arguments (cf. *Jugements du Tribunal Administratif de l'OIT sur requêtes contre l'Unesco, C.I.J. Recueil 1956*, p. 86).

5.12. La difficulté insurmontable est que ceci n'est tout simplement pas possible dans le cadre de la procédure contentieuse. Il ne serait tout de même pas concevable que les Etats-Unis tous seuls, même avec le Royaume-Uni, représentent les autres membres du Conseil de sécurité et qu'ils se mettent à défendre les résolutions que ces Etats ont adoptées. Il serait encore plus incongru que les Etats-Unis représentassent les Nations Unies elles-mêmes. Les Etats-Unis n'ont reçu aucun mandat pour parler au nom du Conseil de sécurité. Et de plus, à quel titre les Etats-Unis parleraient-ils au nom du Conseil de sécurité ? Le problème — qu'on ne peut tout de même pas évacuer sous prétexte qu'on ne peut pas le résoudre — c'est que, pour que les droits de la défense soient respectés, il faudrait que les Nations Unies, dont le Conseil de sécurité n'est qu'un organe, soient représentées à l'instance. Mais les Nations Unies ne peuvent pas être parties au contentieux. Les rédacteurs du Statut ont exclu que les Nations Unies puissent être parties devant leur organe judiciaire principal, réservant aux seuls Etats «qualité pour se présenter devant la Cour» (art. 34, par. 1, du Statut). On ne peut pas ne pas en tirer les conséquences qui s'imposent. Si la Cour venait à se reconnaître compétente pour examiner au contentieux par voie d'exception la régularité des actes du Conseil de sécurité, non seulement elle irait au-delà de ce que les textes autorisent, mais elle statuerait par la force des choses en méconnaissance de la règle *audi alteram partem*. Que resterait-il alors de l'«intégrité de sa fonction judiciaire» à laquelle la Libye tient tant ?

5.13. Monsieur le Président, les difficultés ne s'arrêtent pas là. Supposons encore — ce qu'à Dieu ne plaise — que vous fassiez droit aux conclusions qui vous sont soumises et que vous vous

reconnaissiez compétence à l'effet de contrôler au contentieux la régularité des décisions du Conseil de sécurité. Mais quel serait l'effet des éventuelles décisions d'annulation que vous prononceriez ? Pour les parties, elles auraient sans doute l'autorité de la chose jugée. Mais pour les tiers ? L'autorité de la chose jugée en droit international n'est pas absolue, mais seulement relative, en sorte que l'Organisation des Nations-Unies aurait deux voix, la vôtre et celle du Conseil de sécurité. Laquelle faudrait-il suivre ? Au surplus, l'Etat bénéficiaire de la mesure d'annulation serait-il admis à aller devant le Conseil de sécurité et à se prévaloir des dispositions de l'article 94, paragraphe 2, de la Charte relatif aux mesures d'exécution de l'arrêt ? Et si c'était le cas, faudrait-il considérer que les dispositions de cet article l'emportent sur celles de l'article 27, paragraphe 3, relatif au vote des membres permanents ?

5.14. Monsieur le Président, lorsqu'on les examine de près, les implications juridiques de la requête libyenne sont à proprement parler vertigineuses. De quelque côté qu'on la prenne, cette requête est un cadeau empoisonné fait à la Cour. La Libye a choisi de flatter la Cour, en excipant de sa dignité de tribunal qui lui ferait obligation de se prononcer sur la légalité des résolutions du Conseil de sécurité. Les Etats-Unis préfèrent s'en remettre à sa sagesse. Le droit et la sagesse — car ici les textes et le bon sens vont de pair — conduisent à reconnaître que l'excès de pouvoir dont se plaint la Libye ne peut pas être apprécié par la Cour statuant au contentieux d'une manière qui soit compatible avec sa fonction judiciaire. Ce n'est pas sans raison que les rédacteurs de la Charte ont voulu que la compétence contentieuse soit distincte de la compétence consultative. Il y a en particulier d'importantes différences dans la marge de liberté dont dispose la Cour pour dire le droit au contentieux et par la voie consultative. S'il est vrai que la Cour peut contrôler la légalité des résolutions du Conseil de sécurité, sa nature d'«organe judiciaire», telle qu'elle lui est conférée par la Charte, lui fait obligation de n'exercer éventuellement ce pouvoir que dans le cadre consultatif. Il en résulte que la question de la légalité des actes d'un organe de l'Organisation des Nations Unies est toujours ce que l'on pourrait appeler une «question préjudicielle» pour la Cour

statuant au contentieux et que la Cour n'a pas compétence pour se prononcer sur elle. J'aborde maintenant, Monsieur le Président, mon deuxième moyen. L'irrecevabilité de la requête de la Libye.

II. L'irrecevabilité de la requête de la Libye

5.15. Si par impossible la Cour ne devait pas suivre les Etats-Unis, si contre toute attente vous deviez affirmer votre compétence pour examiner au fond par voie d'exception la validité des résolutions 731, 748 et 883 du Conseil de sécurité, la requête de la Libye devrait néanmoins être rejetée au stade des exceptions préliminaires parce que cette requête n'est pas recevable. L'irrecevabilité de la requête libyenne a été déjà soulevée par M. Crook et par le professeur Schachter dans le cadre des développements qu'ils vous ont présentés sur les actes du Conseil de sécurité. Les irrecevabilités auxquelles je vais ici m'attacher sont présentées à titre subsidiaire. Elles s'imposeraient à vous dans l'hypothèse où vous ne vous considéreriez pas arrêtés par la question préjudicielle de votre incompétence pour contrôler au contentieux la légalité des actes du Conseil de sécurité. A supposer donc que l'exception d'incompétence ne vous arrête pas, vous seriez néanmoins conduits de toute façon à rejeter dans cette hypothèse la requête libyenne, d'une part pour défaut de qualité pour agir et, d'autre part pour absence d'intérêt juridiquement protégé.

5.16. La Libye n'a pas qualité pour contester la régularité des résolutions du Conseil de sécurité. Si cette régularité peut être examinée par la Cour, nous venons de démontrer que ce ne pourrait être éventuellement que par la voie consultative. Or les Etats n'ont pas qualité pour demander des avis à la Cour. C'était déjà le cas du temps de la Cour permanente de Justice internationale et la proposition faite à la conférence de San Francisco d'étendre aux Etats le droit de requérir des avis de la Cour a été expressément rejetée par la commission des juristes, rejet qui fut confirmé par le Comité IV/1 (UNCIO, vol. 14, p. 850; R. Russell, *A History of the United Nations Charter*, 1958, p. 891). Le défaut de qualité pour agir du demandeur ne saurait non plus être couvert par une éventuelle subrogation de la Libye dans les droits des organes de l'Organisation. Dans l'affaire du *Sud-Ouest africain, deuxième phase* (*C.I.J. Recueil 1966,* p. 29, par. 33), la Cour a jugé que l'existence de voies de droit spécifiques prévues au profit exclusif des

organes d'une organisation avait pour effet de priver ses membres considérés *ut singuli* de qualité pour agir à sa place.

5.17. En second lieu, s'agissant d'un prétendu excès de pouvoir qu'aurait commis le Conseil de sécurité en adoptant les résolutions 731, 748 et 883, la Libye ne saurait tirer de ces actes le moindre droit ou intérêt juridique à faire valoir en l'espèce contre les Etats-Unis. Comme tous les Membres des Nations-Unies, les Etats-Unis sont tenus d'obéir aux résolutions du Conseil de sécurité pris sur la base du chapitre VII de la Charte. Il en résulte qu'ils ne peuvent pas être individuellement responsables devant la Libye des actes qu'elle conteste. D'une manière générale, les Membres des Nations Unies ne sont pas responsables à titre distinct envers chacun des autres Etats Membres des actes pris par les organes de l'Organisation. Si c'était le cas, l'Organisation des Nations Unies ne pourrait pas avoir la personnalité juridique, solution qui est évidemment exclue par l'article 104 de la Charte et surtout par votre avis dans l'affaire de la *Réparation* (*C.I.J. Recueil 1949,* p. 174). A partir du moment où l'Organisation est plus qu'un conglomérat d'Etats, à partir du moment où elle est une personne juridique, la Libye ne pourrait avoir de droit à faire valoir que contre le Conseil de sécurité et les Nations Unies dans leur ensemble. Mais la Charte et le Statut la privent de tout recours à titre individuel. Il ne lui appartient pas de contourner cette interdiction en essayant d'obtenir par la voie contentieuse ce qui lui est interdit par la voie consultative. Devant les Etats-Unis, la Libye n'a aucun droit ou intérêt juridique à obtenir ce qu'elle demande. Sa demande est donc irrecevable.

Monsieur le Président, Messieurs, je vous remercie de votre attention. Avec votre permission, Monsieur le Président, je vous prie de bien vouloir appeler à la barre M. Matheson qui va développer le caractère proprement préliminaire des objections des Etats-Unis.

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

Mr. MATHESON: Mr. President, Distinguished Members of the Court.

The United States Preliminary Objections and Article 79

6.1. It is again my great honour and pleasure to appear before you on behalf of the United States. In my presentation this morning, I will explain the reasons for our view that the Court can and should act upon the objections of the United States at this preliminary phase of the case.

6.2. The central facts of this proceeding are that Libya has not pointed to any conduct by the United States that would be in violation of the Montreal Convention, and that Libya has asked the Court for relief which is precluded by mandatory decisions of the Security Council under Chapter VII of the Charter. We have suggested four possible ways of analysing this case in light of these central facts. In each, the logical result is the same — the complaint should be dismissed.

6.3. *First*, we have argued that the Court lacks jurisdiction over the claims brought by Libya. We have shown that Libya never had a valid claim under the Montreal Convention. But even if this were not true, any such claim has been superseded, pursuant to Article 103 of the Charter, by the binding decisions of the Security Council that imposed different substantive obligations. All that remains is Libya's complaint that the Security Council itself acted unlawfully, which is not a claim under the Montreal Convention, and is therefore not within the Court's jurisdiction in this Case.

6.4. *Second*, we have argued that Libya's claims are inadmissible, even if the Court had jurisdiction. Since those claims are, on their face, inconsistent with binding decisions of the Security Council, the Court could only accept Libya's claims by reviewing and overturning the Council's decisions. As we have argued, the Court has no authority to overturn or modify the Council's decisions, and certainly has no authority to overturn the Council's determination under Chapter VII that a threat to the peace had occurred, or its choice of measures to deal with that threat. In any event, the Council's decisions in the present case were clearly lawful and were abundantly justified by the circumstances. Therefore, the relief requested by Libya would be incompatible with the role of this Court, and in any event Libya has no standing to make such a request. Accordingly, Libya's claims are invalid and inadmissible.

6.5. *Third*, we have argued that the Court should decline to grant the relief sought by Libya because its claims have been rendered moot by the decisions of the Security Council. Any judgment by the Court in favour of the rights asserted under the Montreal Convention could have no lawful effect on the rights and obligations of the parties in light of the Council's binding decisions, and would, therefore, not be within the Court's proper judicial function. Accordingly, pursuant to the Court's decision in the *Northern Cameroons* case (case concerning *The Northern Cameroons (Cameroon* v. *United Kingdom), Preliminary Objections, Judgment, I.C.J. Reports 1963*, p. 15) the Court should dismiss the Libyan claims.

6.6. *Fourth*, even if the Court were to conclude that it has and should exercise jurisdiction and that Libya's claims are admissible, we have argued that the Court should nonetheless resolve the case in substance now by deciding, as a preliminary matter, that the decisions of the Security Council preclude the relief sought by Libya. The Court is under no compulsion to pass on the merits of Libya's claims under the Montreal Convention if it believes, as we do, that those claims are, as a matter of substantive law, superseded by the decisions of the Council, whether or not those claims are valid under the terms of the Convention. Nothing precludes the Court from deciding the case in substance on this basis, without having to inquire further into Libya's assertions under the Convention.

6.7. Under each of these four ways of analysing the case, there are compelling reasons to dismiss Libya's complaint at this preliminary stage. In our view, the objections of the United States are valid preliminary objections under any of these four alternative analyses.

6.8. Article 79 of the Rules of Court defines the scope of objections which may be made at this phase of the case. Specifically, paragraph 1 of Article 79 refers to "any objection by the respondent to the jurisdiction of the Court or to the admissibility of the application, or other objection the decision upon which is requested before any further proceedings on the merits".

6.9. The breadth of this Rule was deliberate. It was specifically intended to facilitate the disposition of as many matters as possible at an early stage of the proceedings. Prior to 1972, when

the current form of Article 79 was adopted, the Court had been criticized in the General Assembly for a tendency to join to the merits issues which could have been resolved at the preliminary phase (see, e.g., *Report of the Sixth Committee*, 11 December 1970, United Nations Doc. A/8238, US Exhibit 52, p. 19). Prior to 1972, the Court had felt compelled to join preliminary issues to the merits where the determination of a preliminary objection required consideration of questions of fact or law that might bear a close relationship to some of the issues on the merits of the case.

6.10. By contrast, the current Article 79 not only permits, but in fact encourages, the Court to deal at the preliminary phase with all objections raised by a respondent State before further proceedings on the merits. As Judge Jiménez de Aréchaga wrote in 1973 concerning the current Article:

> "The new paragraph 6 is intended to provide a different solution to the difficulties that in the past have compelled the Court to join to the merits a preliminary objection concerning its jurisdiction. In the presence of such an objection, the Court . . . would, according to paragraph 6, request the parties to argue at the preliminary stage those questions, even those touching upon the merits, which bear on the jurisdictional issue." (Eduardo Jiménez de Aréchaga, *The Amendments to the Rules of Procedure of the International Court of Justice*, 67 *AJIL* 13 (1973), US Exhibit 55.)

6.11. Each of the objections of the United States can readily be resolved at this phase of the proceedings. None requires the resolution of disputed facts or the consideration of evidence. Each turns on separate and discrete legal questions: the scope of the Montreal Convention or the binding effect of the decisions of the Security Council. These are matters which the Court can and should decide now, rather than waiting for the completion of the merits phase.

6.12. Each of the objections of the United States is genuinely preliminary in character. The official handbook of the Court, prepared by the Registry under the authority of the President, states that preliminary objections may include arguments that the Court has no jurisdiction; that the dispute no longer has any object, would be without practical effect, or would be incompatible with the role of a court; or that the Applicant State has no legal interest to assert the claims in question (ICJ, *The International Court of Justice* (4th ed. 1996), p. 58). The United States argues that the Libyan claims should be dismissed for precisely these reasons.

6.13. Our arguments that the Court lacks jurisdiction and that the Libyan claims are inadmissible are patently preliminary in character. Such arguments are expressly recognized as preliminary by the language of Article 79. However, Article 79 is expressly not limited to issues of jurisdiction and admissibility, but also includes any "other objection the decision upon which is requested before any further proceedings on the merits".

6.14. Our argument that the Court should dismiss the Libyan claims because they have been rendered moot by the decisions of the Council, is also clearly one of a preliminary character, in accordance with the *Northern Cameroons* decision. In that case, the Court found:

> "Whether or not at the moment the Application was filed there was jurisdiction in the Court to adjudicate upon the dispute submitted to it, circumstances that have since arisen render any adjudication devoid of purpose. Under these conditions, for the Court to proceed further in the case would not, in its opinion, be a proper discharge of its duties . . . No purpose accordingly would be served by undertaking an examination of the merits in the case for the purpose of reaching a decision which, in the light of the circumstances to which the Court has already called attention, ineluctably must be made." (Case concerning *The Northern Cameroons (Cameroon* v. *United Kingdom), Preliminary Objections, Judgment, I.C.J. Reports 1963*, p. 38.)

Likewise, in the *Nuclear Tests* case, the Court treated a similar question of mootness as one of those "questions which may not be strictly capable of classification as matters of jurisdiction or admissibility but are of such a nature as to require examination in priority to those matter (the merits of the claim)" (*Nuclear Tests (Australia* v. *France), Judgment, I.C.J. Reports 1974*, p. 259).

6.15. Our final argument — that the Court, if it exercises jurisdiction, should first resolve the case in substance by finding that the decisions of the Council preclude the relief sought by Libya — is likewise preliminary in character. It does not depend on matters which would be at issue in proceedings on the merits — such as the determination of responsibility for the destruction of Pan Am 103 or the propriety of trial of the suspects in United States courts. Rather, it addresses matters that are separate and discrete — notably the legal effect of the decisions of the Security Council. It would completely resolve the case, without any need to proceed to the merits phase.

6.16. Now, in the Libyan Observations on the Preliminary Objections of the United States, Libya argues that the United States objections are not preliminary in character, because their resolution would require the Court to rule on the applicability of the Montreal Convention and the binding effects of resolutions of the Security Council (Observations and Submissions on the Preliminary Objections Raised by the United States, paras. 5.2-5.13). We do not agree.

6.17. Nothing in the Rules or jurisprudence of the Court suggests that an objection is not preliminary because it may involve the interpretation or application of provisions of treaties or other legal questions. On the contrary, paragraph 1 of Article 79 of the Rules of Court refers to "any objection . . . the decision upon which is requested before any further proceedings on the merits". There is no exception for objections requiring the interpretation or application of treaty provisions. Paragraph 6 of Article 79 specifically states "the Court, whenever necessary, may request the parties to argue all questions of law and fact, and to adduce all evidence, which bear on the issue". Certainly this includes any interpretation of treaty provisions that is necessary for the resolution of the objection.

6.18. Further, Libya's argument conflicts with the modern practice of the Court under Article 79. The Court has on several recent occasions interpreted or applied treaty provisions in the course of ruling on preliminary objections, and has clearly not considered that this in any way negated the preliminary character of those objections or prevented the Court from acting on them.

6.19. For example, in its Judgment on the Preliminary Objections of the United States in the *Oil Platforms* case (case concerning *Oil Platforms, Judgment of 12 December 1996*), the Court went in considerable detail into the interpretation and application of three central articles of the 1955 Treaty of Amity between the United States and Iran, sustaining the United States objections with respect to two of them and declining to do so with respect to a third. In so doing, the Court determined whether these specific articles created legal obligations for the parties, what the scope and character of those obligations were, and whether they applied to the specific allegations made by the Applicant State. Since this process was necessary to resolve the preliminary objection —

in that case, concerning the jurisdiction of the Court under the 1955 Treaty — it was perfectly in order for the Court to rule on these questions during the preliminary phase of that case, and this in no way detracted from the preliminary character of the objection.

6.20. Similarly, in the *Genocide* case (case concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Judgment of 11 July 1996*), the Court had to interpret the Genocide Convention and apply it to the circumstances of the case before it, in order to decide whether it had jurisdiction. Specifically, the Court had to determine whether the Convention applied to acts allegedly occurring during internal armed conflict in territory not controlled by the Respondent. This in no way altered the preliminary character of the objection presented.

6.21. In both the *Platforms* and *Genocide* cases, the Court did not defer to the merits phase, issues posed by the preliminary objections because their resolution required the interpretation and application of substantive provisions of a treaty. Rather, the Court went straight to the substance of the interpretive questions and resolved them. This was a sensible and direct way of proceeding, which simplified each case by dealing at the outset with an issue that could otherwise have consumed additional time and effort later. It gave proper effect to the language and purpose of Article 79 of the Rules of Court.

6.22. The same is true in the present case. To the extent that the resolution of the preliminary objections of the United States requires the Court to interpret and apply the United Nations Charter or the Montreal Convention, this does not lead in any way to the conclusion that the US objections are not preliminary in character.

6.23. The resolution of these matters at this preliminary phase would be of substantial benefit to the Court and to the Parties. If the Court upholds any of the objections of the United States, a decision now would avoid the necessity for proceedings on the merits. Such proceedings would undoubtedly be lengthy, would require the resolution of many difficult factual issues, and would probe deeply into highly sensitive questions of national security and criminal conduct. The

exposure of evidence and witnesses in proceedings before the Court could raise questions of prejudicial publicity or otherwise compromise criminal trials at a later date.

6.24. No purpose would be served for the Court to conduct such an arduous proceeding, only to find in the end that none of these matters are relevant because the decisions of the Council had rendered them all moot.

6.25. So in conclusion, we believe that a decision of the Court on the objections of the United States at this preliminary stage would be perfectly proper and consistent with the Statute and Rules of Court. We respectfully urge the Court to take such a decision.

Mr. President, I now suggest that the Court invite the US Agent, Mr. Andrews, to summarize the arguments of the United States. Thank you, sir.

the ACTING PRESIDENT: Thank you, Mr. Matheson. The Agent of the United States will now have the floor.

Mr. ANDREWS: Mr. President, and distinguished Members of the Court.

7.1. I will now summarize the initial presentations of the United States in these proceedings, and in addition address certain fundamental mis-statements of the United States' position that appear in the Libyan Observations and Submissions on the Preliminary Objections raised by the United States.

7.2. In our view, the situation before this Court is straightforward. Libya has asserted claims under the Montreal Convention, which is the only possible basis for jurisdiction of the Court in this case. However, Libya has not pointed to any conduct which would violate the Convention. Further, Libya's claims are inconsistent with the binding decisions of the Security Council under Chapter VII, which take precedence pursuant to Article 103 of the Charter. Accordingly, Libya can only maintain its claims by attempting to persuade the Court to review and overturn those decisions of the Council.

7.3. In its Order of 14 April 1992 concerning the Libyan request for the indication of provisional measures, the Court demonstrated that it understood the situation quite well. In rejecting the Libyan request, the Court made the following five essential points:

- First, that "both Libya and the United States, as Members of the United Nations, are obliged to accept and carry out the decisions of the Security Council in accordance with Article 25 of the Charter" (case concerning *Questions of Interpretation and Application of the 1971 Montreal Convention Arising From the Aerial Incident at Lockerbie (Libya* v. *United States), Provisional Measures, Order of 14 April 1992, I.C.J. Reports 1992,* p. 126, para. 42);
- Second, that "the Court, which is at the stage of proceedings on provisional measures, considers that prima facie this obligation extends to the decisions contained in resolution 748 (1992)" *(id.)*;
- Third, that "in accordance with Article 103 of the Charter, the obligations of the Parties in that respect prevail over their obligations under any other international agreement, including the Montreal Convention" (*id.*);
- Fourth, that "the Court, while thus not at this stage called upon to determine definitively the legal effect of Security Council resolution 748 (1992), considers that, whatever the situation previous to the adoption of that resolution, the rights claimed by Libya under the Montreal Convention cannot now be regarded as appropriate for the protection of provisional measures" (*id.*, para. 43); and
- Fifth, that "an indication of the measures requested by Libya would be likely to impair the rights which appear prima facie to be enjoyed by the United States by virtue of Security Council resolution 748 (1992)" (*id.*, p. 127, para. 44).

7.4. Mr. President, the question that then remains is whether Libya has presented any argument that would cause the Court to change the judgment that it made, on a prima facie basis, in its 1992 Order. We submit that Libya has not done so.

7.5. Certainly Libya has presented nothing that would refute the Court's conclusion that the Parties are obliged to carry out decisions of the Council pursuant to Article 25 of the Charter, or that such decisions take precedence over any inconsistent obligations in the Montreal Convention pursuant to Article 103 of the Charter. These conclusions are a fundamental part of the Charter system, without which the Council's authority and effectiveness would be drastically compromised.

7.6. In our view, Libya has also has failed to make any cogent challenge to the Court's prima facie finding that these conclusions apply to the Council's decisions in resolution 748. As we have shown, that resolution was plainly inconsistent with Libya's demands in this case, since Libya's insistence on investigation (and, hypothetically, trial) of the two accused in Libya directly contradicts the Council's direction that they be promptly surrendered for trial in the United States or the United Kingdom. This is clearly the way that resolution 748 was understood by the Council and by the parties to the proceedings when the resolution was adopted.

7.7. This leaves only Libya's assertion that resolution 748 was invalid and its request that the Court review and overturn that decision. You have heard our arguments in opposition to this request. Professors Schachter and Zoller have explained our position that such review in a contentious proceeding would be inconsistent with the framework of the Charter and the jurisdiction of this Court. Mr. Crook has set forth our view that the situation presented to the Council abundantly justified its determination that there was a threat to peace, and its choice of measures to deal with that threat.

7.8. I would only add that Libya's request to this Court — in effect, that the Court review and invalidate resolution 748 — would be a step of fundamental significance that would, in our view, drastically alter the existing relationship between the Court and the Council, to the detriment of both institutions. If the Council's decisions under Chapter VII concerning the existence of a threat to peace, and the measures to be adopted to deal with such a threat, were subject to review and reversal by the Court, then the work of both the Court and the Council could be seriously compromised. In particular, the invalidation by the Court of the Council's decisions in the present

case would have a dramatic and negative effect on the credibility of the Council's actions to deal with international terrorism.

7.9. The viability of the Council's decisions under Chapter VII rests in very large part on their acceptance by States as binding decisions of the United Nations which must be promptly complied with. For example, the effectiveness and security of United Nations peacekeeping missions depend heavily on the prompt acceptance by States of a legal duty to comply with the Council decisions on which they are based. The review and reversal of such a decision by any other body could seriously compromise the authoritative character of those decisions in general, and gravely complicate the resolution of the threat to the peace in the situation in question. In particular, review of such decisions by the Court could be expected (as in the present case) to take years, during which period the validity and effectiveness of Council decisions would hang in dangerous suspense. For this very reason, the framers of the Charter gave to the Council the responsibility for making the determinations called for in Chapter VII and rejected the notion of judicial review over those determinations.

7.10. For the Court, there may appear to be a certain attractiveness in the prospect of exercising a power of review over Council decisions. In practice, however, the Court would be faced with the fact that the decisions made by the Council under Chapter VII are essentially political in character and not amenable to judicial standards and judicial processes. In effect, the Court would find itself in the midst of intensely political controversies without much prospect of making meaningful legal decisions.

7.11. At the same time, it is important that the record clearly show that it is not the case, as Libya asserted in its Observations and Submissions on the Preliminary Objections Raised by the United States, that the United States takes the position that the Council has unlimited power in Chapter VII functions, unconstrained by any obligation to comply with the norms of the Charter (Libyan Observations and Submissions on the Preliminary Objections Raised by the United States, pp. 60-63). As we have reiterated in these proceedings, the United States fully accepts that the

powers of the Council are limited by the provisions of the Charter. What we question is the propriety of judicial review of the Council's compliance with these provisions.

7.12. Likewise, it is not the case, as Libya asserted in its Observations, that resolution 748 was adopted "with the manifest aim of preventing the Court from doing its work and undermining the rule of law" (*id.*, p. 80). We have shown that the Council, in adopting resolution 748, acted not for the purpose of disrupting or pre-empting the Court's proceedings, but in response to the Secretary-General's report to the Council that Libya had failed to comply with the Council's earlier Chapter VI resolution. In doing so, the Council acted as it has done on many occasions where there was no involvement by the Court — that is, to follow a Chapter VI resolution with a Chapter VII decision when the Chapter VI measures had failed to bring about the desired result. The fact that this occurred in the present case at a time when Libya's application was pending before the Court was the result of a Libyan attempt to pre-empt the Security Council by prematurely proceeding to the Court, and not a United States attempt to pre-empt the Court by prematurely proceeding to the Council. In the normal and proper course of events, Libya would have waited the six-month period prescribed in Article 14 of the Montreal Convention before resorting to the Court, at which point the Council would long since have adopted a resolution, 748, in accordance with its normal practice.

Mr. President, this concludes the initial presentation of the United States in these proceedings. We thank the Court for its attention and consideration of our arguments.

The ACTING PRESIDENT: Thank you, Mr. Andrews. The Court will resume its sittings on Friday to hear the oral submissions that will be presented to it on behalf of the Libyan Arab Jamahiriya. The Court stands adjourned until 10 o'clock Friday morning.

The Court rose at 12.45 p.m.