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Traduction
Translation

CR 92/2 (traduction)
CR 92/2 (translation)

Jeudi 26 mars 1992
Thursday 26 March 1992

08 Le VICE-PRESIDENT, faisant fonction de Président : Veuillez vous asseoir.

Les explications données par le Président, Sir Robert Jennings, me dispensent heureusement de rappeler les raisons pour lesquelles je préside ici. Les instances qui ont été introduites par la Jamahiriya arabe libyenne, l'une contre le Royaume-Uni de Grande-Bretagne et d'Irlande du Nord, et l'autre contre les Etats-Unis d'Amérique, concernent l'une et l'autre des questions d'interprétation et d'application de la convention de Montréal du 23 septembre 1971 pour la répression d'actes illicites dirigés contre la sécurité de l'aviation civile. Ces affaires ont été introduites par deux requêtes séparées, présentées simultanément par la Libye au Greffe de la Cour le 3 mars 1992.

Dans chacune des requêtes, le Gouvernement de la Jamahiriya arabe libyenne déclare fonder la compétence de la Cour sur l'article 36, paragraphe 1, du Statut de la Cour, et l'article 14, paragraphe 1, de ladite convention de Montréal, qui dispose ce qui suit :

> "Tout différend entre des Etats contractants concernant l'interprétation ou l'application de la présente convention qui ne peut pas être réglé par voie de négociation est soumis à l'arbitrage, à la demande de l'un d'entre eux. Si, dans les six mois qui suivent la date de la demande d'arbitrage, les Parties ne parviennent pas à se mettre d'accord sur l'organisation de l'arbitrage, l'une quelconque d'entre elles peut soumettre le différend à la Cour internationale de Justice, en déposant une requête conformément au Statut de la Cour."

La Libye déclare dans chacune des requêtes qu'il existe manifestement un différend entre elle-même et le défendeur concernant l'interprétation ou l'application de la convention; qu'il n'a pas été possible de régler ce différend par voie de négociation; que, par suite de l'absence totale de réaction positive du défendeur à la proposition d'arbitrage faite par la Libye, les Parties n'ont pu se mettre d'accord sur l'organisation d'un arbitrage pour régler le différend; et que par conséquent la Cour est

compétente pour connaître des griefs de la Libye, eu égard, selon la Libye, à l'urgence qu'il y a à remédier aux violations continues de la convention de Montréal par le défendeur et à son refus de se soumettre à une procédure d'arbitrage.

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Les différends dont l'existence manifeste est alléguée résultent de la destruction de l'appareil assurant le vol 103 de la Pan-Am, le 21 décembre 1988, dont la plus grande partie des débris sont tombés à Lockerbie, en Ecosse. Dans ses requêtes, la Libye se réfère à l'accusation, prononcée par le procureur général pour l'Ecosse (Lord Advocate of Scotland) et par un jury d'accusation (Grand Jury) du tribunal fédéral de district du *District of Columbia*, respectivement, contre deux ressortissants libyens, accusés d'avoir fait placer une bombe à bord de l'avion assurant le vol de la Pan-Am, bombe qui explosa par la suite, provoquant la destruction de l'appareil. La Libye se réfère également, à cet égard, à l'article premier de la convention de Montréal et affirme que les actes allégués dans l'acte d'accusation constituent une infraction pénale aux fins de cet article. Selon la Libye, la convention de Montréal est la seule convention pertinente en vigueur entre les Parties qui traite de telles infractions; en conséquence, le Royaume-Uni et les Etats-Unis seraient tenus de se conformer aux dispositions de la convention de Montréal relatives à l'incident : ils seraient tenus d'agir en conformité avec la convention, et seulement en conformité avec elle, pour toute question relative au vol Pan-Am 103 et aux accusés.

La Libye affirme cependant que, alors qu'elle s'est elle-même totalement conformée à ses propres obligations au regard de la convention, les défendeurs ont violé, et continuent de violer, ces obligations. Elle explique, notamment, que les accusés se trouvant sur son territoire, la Libye a pris les mesures nécessaires pour établir sa

compétence aux fins de connaître des infractions, conformément à l'article 5, paragraphe 2, de la convention de Montréal; que la Libye a soumis l'affaire à ses autorités compétentes pour l'exercice de l'action pénale, conformément à l'article 7 de la convention de Montréal; que la Libye n'a pas extradé les accusés, du fait qu'il n'existe pas de traité d'extradition en vigueur entre les défendeurs et elle-même, ni de base justifiant cette extradition conformément à l'article 8, paragraphe 2 de
10 la convention, puisque le code libyen de procédure pénale interdit l'extradition des nationaux libyens; et que la Libye a demandé l'assistance du Royaume-Uni et des Etats-Unis dans la procédure pénale qu'elle avait engagée conformément à l'article 11, paragraphe 1, de la convention.

Mais la Libye fait valoir en outre, notamment, que, en violation de l'article 5, paragraphe 2, de la convention, les défendeurs tentent de l'empêcher d'établir sa compétence légitime pour connaître de la question, par leurs actions et leurs menaces contre elle; qu'en violation des articles 7 et 8 de la convention, ils ont fait pression sur la Libye pour qu'elle remette les accusés; qu'en violation de l'article 11 de la convention ils ont refusé d'accorder l'aide que sollicitaient les autorités judiciaires libyennes; et que, lorsque le Secrétaire du comité populaire pour les relations extérieures et la coopération internationale, par ses lettres du 17 janvier 1992, a invité les gouvernements défendeurs à consentir à l'arbitrage, ces gouvernements, sans répondre officiellement, ont laissé entendre qu'ils rejetaient cette voie et ont insisté pour que la Libye remette les accusés.

J'invite le Greffier à donner lecture des conclusions de la Libye telles qu'elles figurent dans ses requêtes.

Le GREFFIER : Dans l'affaire relative à des *Questions d'interprétation et d'application de la convention de Montréal de 1971 résultant de l'incident aérien de Lockerbie (Jamahiriya arabe libyenne c. Royaume-Uni)* :

"En conséquence, tout en se réservant le droit de compléter et modifier s'il y a lieu la présente conclusion en cours de procédure, la Libye prie la Cour de dire et juger :

a) que la Libye a satisfait pleinement à toutes ses obligations au regard de la convention de Montréal;

b) que le Royaume-Uni a violé, et continue de violer, ses obligations juridiques envers la Libye stipulées aux articles 5, paragraphes 2 et 3, 7, 8, paragraphe 2, et 11 de la convention de Montréal;

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c) que le Royaume-Uni est juridiquement tenu de mettre fin et de renoncer immédiatement à ces violations et à toute forme de recours à la force ou à la menace contre la Libye, y compris la menace de recourir à la force contre la Libye, ainsi qu'à toute violation de la souveraineté, de l'intégrité territoriale et de l'indépendance politique de la Libye."

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

"En conséquence, tout en se réservant le droit de compléter et modifier s'il y a lieu la présente conclusion en cours de procédure, la Libye prie la Cour de dire et juger :

a) que la Libye a satisfait pleinement à toutes ses obligations au regard de la convention de Montréal;

b) que les Etats-Unis ont violé, et continuent de violer, leurs obligations juridiques envers la Libye stipulées aux articles 5, paragraphes 2 et 3, 7, 8, paragraphe 2, et 11 de la convention de Montréal;

c) que les Etats-Unis sont juridiquement tenus de mettre fin et de renoncer immédiatement à ces violations et à toute forme de recours à la force ou à la menace contre la Libye, y compris la menace de recourir à la force contre la Libye, ainsi qu'à toute violation de la souveraineté, de l'intégrité territoriale et de l'indépendance politique de la Libye."

Le VICE-PRESIDENT, faisant fonction de Président : Le 3 mars 1992, ayant déposé ses requêtes introductives d'instance, le Gouvernement de la Jamahiriya arabe libyenne a également présenté dans chaque affaire une demande en indication de mesures conservatoires conformément à l'article 41 du Statut de la Cour. Dans chacune des demandes, la Libye allègue notamment que le défendeur s'efforce activement de contourner les dispositions de la convention de Montréal en menaçant de recourir à différentes actions - dont l'utilisation de la force n'est pas exclue - pour contraindre la Libye, en violation de la convention de Montréal, à remettre les accusés. La Libye fait valoir que, dans la mesure où les

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différends soumis à la Cour concernent l'interprétation ou l'application de la convention de Montréal, il incombe exclusivement à la Cour de statuer sur la validité des actions des Parties au regard de cette convention. Elle fait valoir en outre qu'il est indispensable d'empêcher que se crée une situation dans laquelle les droits de la Libye seraient irrémédiablement lésés, en fait ou en droit; que des mesures conservatoires sont de toute urgence requises pour que les défendeurs s'abstiennent de toute action pouvant avoir pour effet de préjuger des décisions de la Cour en l'espèce; que des mesures conservatoires sont aussi requises de toute urgence pour que les défendeurs se gardent de toute mesure qui risquerait d'aggraver ou d'élargir les différends respectifs; et que, la compétence de la Cour étant, en chaque affaire, établie *prima facie* en application de la convention de Montréal, il n'existe aucun empêchement à l'indication de mesures conservatoires.

J'invite maintenant le Greffier à donner lecture de l'exposé des mesures figurant dans ces demandes, que la Libye prie la Cour d'indiquer dans chaque affaire.

Le GREFFIER : Dans l'affaire relative à des *Questions d'interprétation et d'application de la convention de Montréal de 1971 résultant de l'incident aérien de Lockerbie (Jamahiriya arabe libyenne c. Royaume-Uni)* :

"En conséquence, en attendant un arrêt définitif dans la présente affaire, la Libye prie respectueusement la Cour d'indiquer sans délai des mesures conservatoires pour :

a) interdire au Royaume-Uni d'engager aucune action contre la Libye visant à contraindre ou obliger celle-ci à remettre les personnes accusées à une autorité judiciaire, quelle qu'elle soit, extérieure à la Libye;

b) veiller à éviter toute mesure qui porterait atteinte de quelque façon aux droits de la Libye en ce qui concerne la procédure judiciaire faisant l'objet de la requête libyenne.

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

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"En conséquence, en attendant un arrêt définitif dans la présente affaire, la Libye prie respectueusement la Cour d'indiquer sans délai des mesures conservatoires pour :

a) interdire aux Etats-Unis d'engager aucune action contre la Libye visant à contraindre ou obliger celle-ci à remettre les personnes accusées à une autorité judiciaire, quelle qu'elle soit, extérieure à la Libye;

b) veiller à éviter toute mesure qui porterait atteinte de quelque façon aux droits de la Libye en ce qui concerne la procédure judiciaire faisant l'objet de la requête libyenne.

Le VICE-PRESIDENT, faisant fonction de Président : Je vous remercie. Toute demande en indication de mesures conservatoires est traitée par la Cour comme prioritaire conformément à l'article 74 de son Règlement. De plus, la Libye, dans ses demandes, priait la Cour de les examiner de toute urgence et, à cet égard, priait le Président, en attendant que la Cour se réunisse, d'exercer le pouvoir qui lui est conféré par l'article 74, paragraphe 4, du Règlement, d'inviter les Parties à agir de manière que toute ordonnance de la Cour sur les demandes en indication de

mesures conservatoires puisse avoir les effets voulus. Après l'examen le plus attentif du toutes les circonstances portées à ma connaissance, je suis parvenu à la conclusion que, faisant fonction de Président il ne serait pas approprié que j'exerce ce pouvoir discrétionnaire.

Conformément à l'article 38, paragraphe 4, du Règlement de la Cour, des copies certifiées conformes des requêtes respectives ont été immédiatement transmises, par télécopie, aux gouvernements intéressés et, conformément à l'article 73, paragraphe 2, du Règlement de la Cour, des copies certifiées conformes des demandes en indication de mesures conservatoires ont été immédiatement transmises, par télécopie, à ces gouvernements. Au reçu d'une demande en indication de mesures conservatoires, la Cour est tenue, conformément à l'article 41,

14 paragraphe 1, de son Statut, et de l'article 74, paragraphes 1 et 2, de son Règlement, d'examiner d'urgence s'il existe un fondement juridique pertinent à l'exercice des pouvoirs découlant de l'article 41 de son Statut et si ces mesures devraient être indiquées. De plus, conformément à l'article 74, paragraphe 3, du Règlement, la Cour ou, si elle ne siège pas, le Président, fixe la date de la procédure orale de manière à donner aux Parties la possibilité de s'y faire représenter. Aussi, les Parties intéressées ont-elles été informées, par lettre du 6 mars 1992, de ce que la date d'aujourd'hui avait été fixée pour le début de cette procédure orale.

Le 17 mars 1992, le Gouvernement de la Jamahiriya arabe libyenne a notifié à la Cour qu'il se proposait d'exercer le droit que lui donne l'article 31 du Statut, de désigner un juge *ad hoc* dans chacune de ces affaires, y compris les demandes en indication de mesures conservatoires. Le Gouvernement de la Libye a également notifié à la Cour, en même temps, qu'il désignait M. Ahmed Sadek El-Kosheri, professeur de droit économique international et vice-président de

l'Université Senghor à Alexandrie, en Egypte, qui est membre de l'*Institut de droit international*. Aucune objection n'a été soulevée par les gouvernements défendeurs dans les délais fixés en vertu de l'article 35, paragraphe 3, du Règlement de la Cour. La Cour elle-même n'en voyant aucune, la désignation de M. El-Kosheri comme juge *ad hoc* est donc confirmée. L'article 31, paragraphe 6, et l'article 20 du Statut disposent qu'un juge *ad hoc*, avant d'entrer en fonction, prenne l'engagement solennel, en séance publique, d'exercer ses attributions en pleine impartialité et en toute conscience. J'invite donc M. El-Kosheri à faire cette déclaration, dont le texte figure à l'article 4 du Règlement de la Cour. Je demande à tous ceux qui sont présents de se lever pendant cette déclaration.

15 Monsieur le juge El Kosheri, je vous en prie.

M. El-KOSHERI :

"Je déclare solennellement que je remplirai mes devoirs et exercerai mes attributions de juge en tout honneur et dévouement, en pleine et parfaite impartialité et en toute conscience."

Le VICE-PRESIDENT, faisant fonction de Président : Je vous remercie, veuillez vous asseoir.

Je prends acte de la déclaration par M. El-Kosheri et le déclare dûment nommé juge *ad hoc* dans chacune des présentes affaires.

Je vois que les agents et d'autres représentants de la Jamahiriya arabe libyenne, du Royaume-Uni de Grande-Bretagne et d'Irlande du Nord et des Etats-Unis d'Amérique sont présents. Je vais donc inviter les agents des Parties à chaque affaire à présenter les observations orales de leurs gouvernements respectifs au sujet de la demande en indication de mesures conservatoires formée dans chaque affaire. Pour des raisons de commodité, et après avoir consulté les gouvernements intéressés, il a été décidé que la Libye, qui est le demandeur et l'Etat qui a demandé les

mesures conservatoires, prendra la parole en premier, sur les demandes présentées dans les deux affaires; elle sera suivie du Royaume-Uni dans l'affaire *Libye c. Royaume-Uni*, puis des Etats-Unis, dans l'affaire *Libye c. Etats-Unis*.

Ces dispositions pratiques ne préjugent en rien la décision que pourrait prendre la Cour ultérieurement, conformément à l'article 47 du Règlement, d'ordonner à tout moment que les instances dans ces deux affaires soient jointes ou d'ordonner une action commune au regard d'un ou de plusieurs éléments de ces procédures.

Je donne la parole à S. Exc. Al Faitouri, agent de la Libye.

M. AL-FAITOURI : Mr. President, Members of the Court. May I be allowed first of all, to say how honoured I am to be able to represent my country in this case before the most prestigious international judicial
16 body. I also ask for permission to convey to the Court the respectful greetings of the guide of the revolution, Brother Muammer Qaddafi, and the expression of his confidence in the Court and its legal decisions.

The Court will, I trust, recall that Libya is one of the States of the Third World that has thus far shown the most confidence in the International Court of Justice. Three times it has unhesitatingly submitted to the Court a problem that was essential where Libya's national resources and the extent of its sovereign rights in the maritime or terrestrial domain are concerned. At stake was the delimitation of its continental shelf, and those of Tunisia and Malta. These cases were followed by the conflict with Chad in respect of the Aozou strip, which can have a direct impact on the make-up of Libya's territory. In each of these cases my Government felt that the best way to resolve the underlying disputes, some of which were long-standing, was to have them settled on the basis of international law and by the International Court of Justice, which is its organ.

The circumstances that lead Libya to seise the Court today are no less serious. Under the neutral title of *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie* there lies, indeed, a fundamental question that the Court is asked to resolve, namely, that of the rights and obligations of the States parties to that Convention (see doc.1). The Convention provides, in particular, that a State on whose territory the alleged perpetrator of offences which the Agreement contemplates is found may, whether or not the offence has been committed on its territory, opt between submitting the case to its competent authorities for purposes of criminal prosecution, or extradite the alleged offender. This principle, often referred to by the Latin expression *aut dedere, aut judicare*, is common to as many as ten agreements concluded during the last 20 years in the area of international criminal law.

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The provision in question is unquestionably the keystone, the central point, ensuring the political equilibrium of all these conventions. The Montreal Convention is a particularly important one since about 135 instruments manifesting consent to be bound by it have been received. This figure places it among the multilateral conventions that have won the widest international acceptance. The line of conduct that the United Kingdom and the United States have adopted is, nevertheless, to claim, in spite of the clear obligations flowing from the Convention, that the alleged offenders should be surrendered to them. Such defiance of international law in this area is unprecedented.

The Third World has been deeply disturbed by this, as witness the resolutions adopted by the Arab League and the Islamic Conference at its Dabar summit. At first sight one might consider that what we have here is a north-south conflict. In our opinion this is not at all the case.

If the conduct of the United Kingdom and the United States were to be endorsed by the Court, a dangerous situation would arise, not only for the Third World, but also for all the States, large or small, that would be unable to resist the pressures of great Powers and would be unlucky enough to fall foul of the political arbitrariness of those Powers and be warned to surrender their nationals on pain of being punished for their audacity.

As is clear from the events known to the Court, Libya has for some months been threatened with various measures. Libya sees no reason why it should give in to this illegal and arbitrary blackmail. All the more so since Libya persists in solemnly declaring that it is not responsible, whether directly or indirectly, for the hideous crimes in which it is alleged to be implicated. Libya is, moreover, by no means convinced, and in this respect its position coincides with views voiced in serious quarters of the West, that the two Libyans now being charged before the

18 British and the American courts are guilty of the crimes of which they are accused. The more so since the accusers have at no time agreed to supply the Libyan courts with copies of the evidence they claim to possess.

Without wishing to engage the attention of the Court for too long, the Agent of Libya cannot but present it with a summary of the facts. He shall do so very briefly, requesting the Court to be so good as to refer, for fuller particulars, to the documents that Libya filed in the Registry last Wednesday.

On 14 November 1991, that is to say almost three years after the horrible crime committed at Lockerbie, the United States Federal District Court for the District of Columbia and the Advocate General of Scotland - acting in concert - both announced that warrants had been issued for the

arrest of two Libyan nationals, Messrs. Abdelbasset Ali Mohammed Al Megrahi and Al Amin Khalifa Fhimah. These communications were sent to Libya through diplomatic channels.

Four days later the General People's Committee for Justice asked a judge (a counsellor at the Supreme Court) to enquire into these charges and requested the American and British Governments to nominate lawyers to monitor the fairness and the propriety of the enquiry.

The examinining magistrate set in train judicial procedures to ensure the presence of the two suspects, began a preliminary investigation, issued a provisional warrant for their arrest and prohibited their departure from the territory. He applied to the American, British and Maltese judicial authorities, requesting permission to examine the records of the investigation or to arrange for a meeting with the accused in order that they undergo the interrogations necessary in order to arrive at the truth.

19 On 27 November 1991, the Governments of the United Kingdom and the United States issued a joint statement including the following requests:

"the Government of Libya must

- surrender for trial all those charged with the crime; and accept responsibility for the actions of Libyan officials;

- disclose all it knows of this crime, including the names of all those responsible, and allow full access to all witnesses, documents and other material evidence, including all the reamining timers;

- pay appropriate compensation."

The Court will note that these demands contrasted sharply with those made by France on 20 December 1991, which were the following:

"France calls upon Libya:

- to produce all the material evidence in its possession and to facilitate access to all documents that might be useful for establishing the truth;

- to facilitate the necessary contacts and meetings, *inter alia*, for the assembly of witnesses;

- to authorize the responsible Libyan officials to respond to any request made by the examining magistrate responsible for judicial information."

The Court will note, in particular, that France did not make any request for extradition, this being the reason why Libya has not instituted proceedings against it before the Court.

In a statement made on 27 November, to which France had associated itself, an additional demand was made, namely that Libya should

> "commit itself concretely and definitively to cease all forms of terrorist action and all assistance to terrorist groups. Libya must promptly, by concrete actions, prove its renunciation of terrorism."

As has been seen, for all their celerity, the requests for co-operation made by the Libyan judges did not receive any response and the United Kingdom as well as the United States reacted to them by
20 demanding, in an ever more pressing and threatening manner, the extradition pure and simple of the suspects. These are the circumstances in which Libya invoked the Montreal Convention, as our counsel will explain later.

The three States then brought the matter before the Security Council, which, on 21 January 1992, adopted resolution 731 (1992), by which it urged the Libyan Government immediately to provide a full and effective response to the requests of the three States so as to contribute to the elimination of international terrorism.

The Libyan Government stated that it agreed to the French requests and that it was willing to provide all necessary co-operation with respect to procedure; it proposed an enquiry conducted by neutral parties on Libyan soil, an international tribunal, the surrender of the suspects to the Secretary-General. The Libyan Government has not ruled out the possibility of amending its national law in order to remove the internal obstacle created by the prohibition of extraditing its

nationals. These statements were accompanied by various proposals looking to co-operation and collaboration with a view to seeking an end to the activities of terrorist groups (see the corresponding details in the two reports of the Secretary-General) all this was to no avail; the two countries want the two Libyan nationals to be surrendered to them.

To attain this end, following an ultimatum, that is to say, a dictatorial intervention into a domain in which Libya is acting in conformity with international law, and various veiled threats that do not exclude the use of force, the two States that now appear as Respondents activated the institutional apparatus of the Security Council to induce it to adopt measures amounting to an international embargo against Libya, accused of being a threat to the peace.

In these circumstances, the Libyan Government cannot but recall that as far back as 15 April 1986, the United States, after having, without any evidence in support, charged Libya with bombing a discotheque in Berlin and with a similar incident at the Rome airport, unleashed an air and naval attack against the cities of Tripoli and Benghazi that caused hundreds of casualties. Investigations conducted subsequently by the competent local authorities demonstrated that Libya had nothing to do with these crimes. Force was therefore used without the slightest justification. The action thus taken was condemned by General Assembly resolution 41/38 of 20 November 1986. The Libyan victims were entitled neither to expressions of regret on the part of the United States nor to reparations. Can one imagine Libya claiming the extradition of the perpetrators of this act of terrorism in order that they be tried by Libyan courts? And that in the absence of their immediate surrender sanctions should be adopted by the Security Council against the United States? Libya would be content if the United States were merely to prosecute before its courts the perpetrators of this outrage.

It is in order to avoid a re-enactment of this scenario that Libya has for several months been proposing various peaceful solutions that would ensure an impartial administration of justice, supported by various procedural guarantees, which is what the whole world wishes for and what the memory of the victims demands, respecting at the same time the sovereignty of nations and the international obligations that the Montreal Convention imposes on all the interested Parties.

We believe that the matter is a legal one, but Libya, a small and peaceful country, has been subjected to pressure and threats, which has compelled us to accept a peaceful solution provided it is based on international law, the sovereignty of States and the United Nations Charter.

These, Mr. President, Members of the Court, are the reasons why Libya has submitted to the Court an Application with respect to the dispute between it and the United Kingdom and the United States
22 concerning the interpretation and the application of the Montreal Convention, and, why, facing as it does threats that are growing ever more precise, Libya has also submitted a request for interim measures of protection. No unfriendly gesture towards those countries is intended by Libya, inasmuch as recourse to international justice is never an unfriendly act. Libya is confident that it will obtain from the Court, the principal judicial organ of the United Nations, a decision that is fair and consistent with international law and that will remind the interested Parties of their obligations under international conventions that have been lawfully adopted and under the peremptory norms of general international law.

The Arab League is engaged in a mediation; but the three States, indifferent to the examination by an international body of the stature of the International Court of Justice, are thwarting these methods of peaceful settlement by inposing sanctions on Libya.

We have therefore consented to placing both suspects at the disposal of the League of Arab States pending the judgment of the International Court of Justice regarding the jurisdiction of Libyan courts. This does not amount to the extradition of the suspects to Great Britain or the United States.

We insist on the application of the Montreal Convention and we confirm the requests we have made to your high Court.

I thank the Court for the attention with which it has heard my statement and respectfully request you, Mr. President, to be so good as to begin by giving the floor to Professor Ian Brownlie, counsel of the Libyan Government, who will explain to the Court the conditions in which Libya believes it is entitled to request the Court to order interim measures of protection in this case.

23 Le PRESIDENT, faisant fonction de Président : Je vous remercie Votre Excellence. Je donne de nouveau la parole à M. Brownlie .

M. BROWLIE : Monsieur le Président, Messieurs les Membres de la Cour. S'il plaît à la Cour, je vais maintenant présenter mes arguments au nom du Gouvernement libyen.

Mon propos est de faire valoir que, dans les circonstances actuelles, la Cour devrait indiquer les mesures conservatoires que demande la Libye.

Mon argumentation se fondera sur un examen des différents critères pertinents à une décision prise en conformité avec l'article 41 du Statut. Nous espérons ainsi être de quelque assistance à la Cour.

Les mesures demandées

La Libye a demandé l'indication des mesures conservatoires suivantes :

a) interdire aux Etats-Unis d'engager aucune action contre la Libye visant à contraindre ou obliger celle-ci à remettre les personnes accusées à une autorité judiciaire, quelle qu'elle soit, extérieure à la Libye; et

b) veiller à éviter toute mesure qui porterait atteinte de quelque façon aux droits de la Libye en ce qui concerne la procédure judiciaire faisant l'objet de la requête libyenne.

En une première étape indispensable, je voudrais analyser simplement ces deux demandes. Au vu de la requête, et de la preuve de la contrainte exercée, la demande se réfère à trois points différents mais liés.

24 Premièrement, il y a les mesures calculées pour forcer la Libye à renoncer aux droits d'exercer sa compétence que lui reconnaît et confirme la convention de Montréal.

Deuxièmement, ces mêmes mesures sont calculées pour contraindre la Libye à renoncer à ses droits découlant de la clause compromissoire qui figure à l'article 14, paragraphe 1, de la convention de Montréal. Dans ce contexte, la politique de l'Etat défendeur vise à empêcher la Libye de faire appel à la Cour.

Troisièmement, les déclarations faites par le représentant des Etats-Unis au Conseil de sécurité signifient clairement que la question qui oppose la Libye et les Etats défendeurs ne se prête à *aucune* procédure de règlement pacifique.

Cela peut paraître outrancier, Messieurs de la Cour, mais le discours en cause est consigné au compte rendu du Conseil de sécurité, et les passages clé, pour ce qui nous occupe ici, sont les suivants :

> "Il ne s'agit pas ici d'une question de divergence d'opinion ou de démarche pouvant faire l'objet de médiation ou être négociée. Il s'agit, comme le Conseil de sécurité vient de le reconnaître, d'un comportement qui nous menace tous et qui met directement en danger la paix et la sécurité internationales. Le mandat du Conseil de sécurité exige que le Conseil assume carrément ses responsabilités dans cette

> affaire. Il ne doit pas se laisser égarer par les efforts entrepris du côté libyen pour tenter de faire de cette question de paix et de sécurité internationales une question de divergences bilatérales." (S/PV 3033, 21 janvier 1992, p. 78 de la version française.)

Et, plus loin dans le même discours, M. Pickering ajoute :

> "Il ressort clairement de la résolution que ni la Libye ni en fait aucun autre Etat ne peut chercher à dissimuler son appui au terrorisme international derrière les principes traditionnels du droit international et de la pratique des Etats." (*Ibid.*, p. 80.)

Ces déclarations reflètent en fait les points de vue de l'administration des Etats-Unis et ne sont pas corroborées par le texte de la résolution adoptée, la résolution 731 qui est à la cote 28 dans le dossier de la Libye. De plus, rien dans la résolution ne justifie les menaces des Etats défendeurs contre la Libye.

25 Par conséquent, le troisième élément de la situation, selon nous, est la politique sans précédent des Etats défendeurs visant à forcer la Libye à agir comme s'il n'existait tout simplement pas de dispositif de règlement pacifique, tant dans le cadre de la convention de Montréal que plus généralement.

Les caractères particuliers de la compétence d'indication des mesures conservatoires

Toujours à titre préliminaire, il peut être utile à la Cour que je rappelle les caractères particuliers de l'exercice de cette forme de compétence incidente.

Cette compétence ne dépend pas d'un consentement direct donné par les parties, et elle fait donc "partie intégrante des pouvoirs permanents de la Cour en vertu de son Statut" (Fitzmaurice, *The Law and procedure of the International Court of Justice*, 1986, II, p. 533; traduction du Greffe).

Le résultat est que la compétence est spécialisée fonctionnellement et régie par les dispositions pertinentes du Statut et du Règlement de la Cour. Il ne s'agit pas d'une version provisoire, soit d'une phase d'exceptions préliminaires, soit du jugement au fond.

Il est certainement vrai que l'un des principaux objets de l'indication de mesures conservatoires est d'empêcher toute atteinte aux droits respectifs de l'une ou l'autre partie et d'éviter de préjuger l'issue de la demande sur le fond.

Mais la compétence d'indication des mesures conservatoires conserve son caractère particulier et son autonomie, et les critères selon lesquels une ordonnance est prononcée sont fondamentalement différents de ceux qui régissent les stades ultérieurs d'une affaire.

Après tout, l'article 41, paragraphe 1, est rédigé en termes très généraux. Les conditions à remplir restent essentiellement imprécises, et l'injonction de prendre des mesures "conservatoires du droit de chacun" laisse nécessairement à la Cour une importante discrétion.

26 Surtout, ces mesures sont prises "à titre provisoire".

Les articles 73 à 76 du Règlement se réfèrent chacun à l'indication de "mesures conservatoires".

L'existence d'une compétence sur le fond de l'affaire n'est pas requise, en dehors d'un fondement *prima facie*.

Il est nécessaire seulement de montrer une *possibilité* raisonnable que les droits à sauvegarder existent.

Et, ce qui va dans le même sens que tout cela, les mesures indiquées peuvent être rapportées ou modifiées (Règlement, article 76).

En conséquence, il est tout à fait possible, Monsieur le Président, que des mesures conservatoires soient ordonnées dans une affaire où, au stade des exceptions préliminaires, la Cour juge qu'elle n'est pas compétente ou rejette la demande.

Un exemple de la première situation est l'affaire *Anglo-Iranian Oil Co.* (*C.I.J. Recueil 1952*, p. 93). Dans cette affaire, les mesures conservatoires indiquées ont été déclarées frappées de caducité lorsque l'ordonnance originelle a cessé de produire des effets dès le prononcé de l'arrêt (*Ibid.*, p. 114).

Le même résultat s'est produit dans le contexte de l'admissibilité, dans les affaires des *Essais nucléaires* (*Australie c. France*) (*C.I.J. Recueil 1974*, p. 272, par. 61); et (*Nouvelle-Zélande c. France*) (*C.I.J. Recueil 1974*, p. 477-478, par. 64).

Monsieur le Président, cette esquisse sur la compétence pour indiquer des mesures conservatoires peut être complétée par le rappel du pouvoir qu'a la Cour d'indiquer des mesures d'office. L'article 75, paragraphe 2, du Règlement, dispose que

> "lorsqu'une demande d'indication de mesures conservatoires lui est présentée, la Cour peut indiquer des mesures totalement ou partiellement différentes de celles qui sont sollicitées, ou des mesures à prendre ou à exécuter par la partie même dont émane la demande".

27 Les auteurs faisant autorité considèrent ce pouvoir de prendre des ordonnances d'office comme particulièrement significatif (Hudson, *The Permament Court of International Justice, 1920-1942, 1943*, p. 424, par. 433; Rosenne, *The Law and Practice of the International Court*, 2e éd. rev., 1985, p. 426-427; Lauterpacht, *The Development of International Law by the International Court*, 1958, p. 256; Fitzmaurice, *The Law and Procedure of the International Court of Justice*, II, 1986, p. 544-545).

Et l'on peut rappeler que la Cour a fait un usage interprétatif de ce pouvoir dans son ordonnance sur l'affaire *Anglo-Iranian Oil Co., C.I.J. Recueil 1951*, p. 93-94.

Les buts de l'indication de mesures conservatoires

L'indication de mesures conservatoires peut tendre à une ou plusieurs de trois fins.

a) *Sauvegarder le droit de chacune des parties*

Il est admis en général que la fin principale, sinon exclusive, des mesures conservatoires est de sauvegarder le droit de chacune des parties en attendant un arrêt définitif dans l'affaire.

La Cour a affirmé cet objet dans son arrêt en l'affaire de l'*Anglo-Iranian Oil Co.* Selon les termes de la Cour :

> "Considérant que l'objet des mesures conservatoires prévues au Statut est de sauvegarder les droits de chacun en attendant que la Cour rende sa décision; que, de la formule générale employée par l'article 41 du Statut et du pouvoir reconnu à la Cour à l'article 61, paragraphe 6, du Règlement, d'indiquer d'office des mesures conservatoires, il résulte que la Cour doit se préoccuper de sauvegarder par de telles mesures des droits que l'arrêt qu'elle aura ultérieurement à rendre pourrait éventuellement reconnaître, soit au demandeur, soit au défendeur..." (*C.I.J. Recueil 1951*, p. 93.)

Tel et l'objet expressément défini à l'article 41 du Statut et sir Gerald Fitzmaurice l'a considéré comme l'objet principal, sinon unique, des mesures conservatoires (Fitzmaurice, *op. cit.* ci-dessus, p. 544).

28 Si on passe aux faits de la présente instance les Etats défendeurs ont adopté le principe d'une tactique extra-juridique conçue de manière à obtenir que le Gouvernement libyen abandonne les droits qu'il tient de la convention de Montréal. Si cette politique de coercition devait réussir, les dispositions de la convention et les principes du droit international général se trouveraient écartés de ce fait au profit d'un ensemble de normes atypiques imposées de façon unilatérale par des Etats puissants à un autre Membre de l'Organisation des Nations Unies.

b) ***Prévenir l'aggravation ou l'extension du différend***

Bien que la Cour ait usé de prudence à cet égard dans sa jurisprudence antérieure, il existe maintenant des sources du droit appréciables à l'appui de l'idée que la Cour dispose vraiment "du pouvoir d'indiquer des mesures conservatoires en vue d'empêcher l'aggravation ou l'extension du différend quand elle estime que les circonstances l'exigent". Ce pouvoir a été affirmé par la Chambre en l'affaire du *Différend frontalier (Burkina Faso c. Mali) (C.I.J. Recueil 1986, p. 9).*

Un tel objet des mesures conservatoires a reçu l'approbation de M. Elias, alors juge, dans son opinion individuelle en l'affaire du *Plateau continental de la mer Egée (C.I.J. Recueil 1976, p. 27).*

De plus, il ressort de la lecture attentive de l'ordonnance indiquant des mesures en l'affaire *Nicaragua c. Etats-Unis* qu'en la rédigeant la Cour a tenu compte des éléments d'emploi de la force dont se plaignait le Nicaragua. Le passage suivant est particulièrement significatif à cet égard :

> "32. Considérant que le pouvoir d'indiquer des mesures conservatoires que l'article 41 du Statut confère à la Cour a pour objet de sauvegarder les droits de chacune des Parties en attendant que la Cour rende sa décision; et considérant que les droits qui, d'après le Nicaragua, doivent être protégés par l'indication de mesures conservatoires sont les suivants :
>
> '- le droit des citoyens nicaraguayens à la vie, à la liberté et à la sécurité;
>
> - le droit du Nicaragua d'être à tout moment protégé contre l'emploi ou la menace de la force de la part d'un Etat étranger;
>
> - le droit du Nicaragua à la souveraineté;
>
> - le droit du Nicaragua de conduire ses affaires et de décider des questions relevant de sa juridiction interne sans ingérence ni intervention d'un Etat étranger quelconque;
>
> - le droit du peuple nicaraguayen à l'autodétermination';

29

> et qu'en outre la République du Nicaragua affirme que l'urgente nécessité des mesures demandées est attestée par le fait que 'la vie et les biens des citoyens nicaraguayens, la souveraineté de l'Etat, la solidité et le progrès de l'activité économique sont tous directement en jeu', que les Etats-Unis n'ont pas manifesté l'intention de 'renoncer à leurs actes illicites' mais s'efforcent au contraire de s'assurer les ressources nécessaires pour les oursuivre et les intensifier..." (*C.I.J. Recueil 1984*, p. 182.)

Par rapport à cet objet des mesures conservatoires il convient peut-être de faire observer que l'argumentation suivie en l'affaire du *Sud-est du Groenland* est parfois mal présentée ou mal comprise.

M. Rosenne a estimé que la justification rationnelle de la décision rendue en l'affaire du *Sud-est du Groenland* est que la compétence en matière de mesures conservatoires ne saurait s'appliquer pour prévenir des incidents.

De fait, ce que dit M. Rosenne, c'est que la compétence ne devrait pas être "normalement" invoquée pour prévenir des incidents (*The Law and Practice of the International Court*, 2e éd. revisée, 1985, I, p. 426).

Cependant, sir Gerald Fitzmaurice a fait observer que l'attitude de la Cour Permanente dans l'affaire du *Sud-est du Groenland* reposait en réalité sur une base différente, à savoir que les incidents évoqués ne pouvaient porter atteinte aux droits d'ordre juridique dont les parties pouvaient se prévaloir au bout du compte (Fitzmaurice, *The Law and Procedure of the International Court of Justice*, 1986, II, p. 547).

Telle n'est pas la situation en l'espèce, Monsieur le Président.

30 Les incidents dont il s'agit ici aujourd'hui, la kyrielle des menaces et des allégations selon lesquelles le système de la convention de Montréal serait inapplicable, se rapportent directement aux droits dont la Libye peut se prévaloir dans l'ordre juridique en vertu de la convention.

c) *Le pouvoir d'indiquer des mesures comme moyen d'aboutir à la bonne administration de la justice*

La fin qui consiste à indiquer des mesures pour favoriser la bonne administration de la justice est étroitement liée à celle de prévenir l'aggravation du différend, mais s'en distingue en fait.

Par exemple l'ordonnance de la Chambre en l'affaire du *Différend frontalier (Burkina Faso c. Mali)* contient l'important passage qui suit :

> "19. Considérant en particulier que, lorsque deux Etats décident, d'un commun accord, de saisir une chambre de la Cour, organe judiciaire principal des Nations Unies, en vue du règlement pacifique d'un différend, conformément aux articles 2, paragraphe 3, et 33 de la Charte des Nations Unies et que par la suite surviennent des incidents qui, non seulement sont susceptibles d'étendre ou d'aggraver le différend, mais comportent un recours à la force inconciliable avec le principe du règlement pacifique des différends internationaux, le pouvoir et le devoir de la Chambre d'indiquer, le cas échéant, des mesures conservatoires contribuant à assurer la bonne administration de la justice ne sauraient faire de doute." (*C.I.J. Recueil 1986*, p. 9.)

La pertinence de cette fin dans les circonstances de la présente affaire doit être évidente.

<u>Certaines conditions préalables de l'indication de mesures conservatoires</u>

Monsieur le Président, je puis maintenant examiner certains critères qui constituent presque assurément des conditions préalables de l'indication de mesures conservatoires.

a) *Les mesures demandées doivent se rapporter à la protection de droits en cause dans le litige dont le demandeur a saisi la Cour*

La première de ces conditions est que les mesures demandées doivent se rapporter à la protection de droits en cause dans le litige dont le demandeur a saisi la Cour. Cette condition est sous-entendue dans les dispositions du Statut et la Cour l'a appliquée dans l'ordonnance par laquelle elle a rejeté une demande en indication de mesures conservatoires en l'affaire relative à la *Sentence arbitrale du 31 juillet 1989* (*C.I.J. Recueil 1990*, p. 69-70, par. 24-27).

31

Une telle condition est évidemment remplie en l'espèce.

b) *La possibilité raisonnable de l'existence du ou des droits dont la conservation est demandée*

Bien que la question n'ait pas souvent suscité des difficultés en pratique, il faut aussi sous-entendre dans les dispositions de l'article 41 l'exigence que le demandeur établisse la possibilité raisonnable de l'existence du ou des droits dont il sollicite la protection. M. Shahabuddeen a examiné ce problème dans son opinion individuelle en l'affaire du *Passage par le Grand-Belt* (*C.I.J. Recueil 191*, p. 12, 28-36).

Comme M. Shahabuddeen l'indique de façon tout à fait claire dans son opinion, il ne faut pas oublier le danger de paraître préjuger du fond (*ibid.*, p. 29). D'autre part, la seule affirmation de certains droits ne suffit probablement pas (*ibid.*, p. 30) et M. Shahabuddeen conclut qu'un Etat qui demande l'indication de mesures conservatoires est tenu d'établir l'existence possible des droits qu'il cherche à faire protéger (voir les passages aux pages 28 et 36 (la conclusion)).

La nature des droits dont la protection est demandée en l'espèce sera examinée, dans la mesure nécessaire à ce point, par mon collègue, M. Salmon.

c) *Les dispositions invoquées par l'Etat demandeur doivent sembler, à première vue, constituer une base sur laquelle la compétence de la Cour peut être fondée*

Il existe une autre condition, c'est-à-dire que les dispositions juridictionnelles invoquées par l'Etat demandeur doivent sembler, à première vue, constituer une base sur laquelle la compétence de la Cour peut être fondée.

Cette proposition paraît correspondre aux formulationx les plus récentes.

Dans les ordonnances rendues en les affaires des *Essais nucléaires*, la Cour a déclaré ce qui suit :

32

"13. Considérant que, lorsqu'elle est saisie d'une demande en indication de mesures conservatoires, la Cour n'a pas besoin, avant d'indiquer ces mesures, de s'assurer de façon concluante de sa compétence quant au fond de l'affaire, mais qu'elle ne doit cependant pas indiquer de telles mesures si les dispositions invoquées par le demandeur ne se présentent pas comme constituant, *prima facie*, une base sur laquelle la compétence de la Cour pourrait être fondée...";
(*C.I.J. Recueil 1973*, p. 101.)

et si l'on passe au paragraphe 17 :

"17. Considérant que les éléments soumis à la Cour l'amènent à conclure, au stade actuel de la procédure, que les dispositions invoquées par le demandeur se présentent comme constituant, *prima facie*, une base sur laquelle la compétence de la Cour pourrait être fondée; et qu'en conséquence la Cour se propose d'examiner la demande en indication de mesures conservatoires présentée par le demandeur..." (*Ibid.*, p. 102.)

Des références semblables apparaissent dans l'ordonnance rendue par l'affaire du *Personnel diplomatique et consulaire* (*C.I.J. Recueil 1979*, p. 13, par. 15; p. 14, par. 18 et 20. Et encore, dans l'ordonnance rendue en l'affaire du *Nicaragua c. Etats-Unis* (*C.I.J. Recueil 1984*, p. 179, par. 24), et dans l'affaire du *Passage par le Grand-Belt* (*C.I.J. Recueil 1991*, p. 15, par. 14).

Avant de quitter ce critère consitué par l'existence à première vue d'une base de la compétence, il convient de rappeler de quelle manière précise il doit être appliqué.

L'exercice de la compétence qu'a la Cour pour déterminer sa propre compétence fait entrer en ligne de compte une forme déterminée de la juridiction incidente, la compétence de la compétence, que le Statut prévoit spécialement.

Quand la Cour décide, à propos d'une demande en indication de mesures conservatoires, qu'il existe à première vue une base de la compétence, cela ne saurait préjuger l'exercice de la compétence de la compétence.

L'exercice de la compétence en matière de mesures conservatoires est donc nécesairement indépendant et prélimianire par rapport à l'exercice, par la Cour, de sa compétence sur le fond.

33 Voilà dans quel cadre procédural précis doit être appréciée la décision sur le point de savoir s'il existe à première vue une base de la compétence (voir Fitzmaurice, *The Law and Procedure of the International Court of Justice*, 1986, II, p. 534).

Je ne me suis proposé que d'évoquer le critère pertinent : les questions de compétence comme telles seront présentées par mon collègue, M. Salmon.

d) **Les demandes de la partie requérante doivent apparaître, de prime abord, comme recevables**

J'en viens aux autres conditions. Bien que cette condition ne soit guère traitée par les auteurs, il est raisonnable aussi de supposer qu'il en va de la recevabilité comme de la compétence, et que les circonstances doivent justifier l'opinion que les demandes sont, de prime abord, recevables.

Le texte qui fait autorité à cet égard est l'ordonnance prise par la Cour dans l'affaire *des Activités militaires et paramilitaires au Nicaragua et contre celui-ci (Nicaragua c. Etats-Unis d'Amérique)*. Face à des arguments substantiels des Etats-Unis alléguant l'irrecevabilité des demandes, la Cour s'est exprimée dans les termes suivants :

> "39. Considérant que, vu les divers points mentionnés plus haut, la Cour conclut que les circonstances exigent qu'elle indique des mesures conservatoires, ainsi qu'il est prévu à l'article 41 du Statut, en vue de sauvegarder les droits invoqués..." (*C.I.J. Recueil 1984*, p. 186.)

Et il est significatif que les arguments des Etats-Unis quant à l'irrecevabilité des questions concernant les processus politiques en cours devant le Conseil de sécurité et/ou l'Organisation des Etats

américains n'ont pas été retenus (*C.I.J. Recueil 1984*, p. 185, par. 37). La question générale du rôle du Conseil de sécurité sera examinée par mon ami et collègue M. Suy.

34

e) Les circonstances doivent faire apparaître le risque d'un préjudice irréparable aux droits en litige dans l'instance

La jurisprudence de la Cour indique qu'il existe une autre condition : les faits de la cause doivent faire apparaître une "possibilité" ou un "risque" que les droits en litige ne soient irrémédiablement lésés.

Il est fait référence à cette condition dans l'ordonnance relative aux *Essais nucléaires* :

> "29. Considérant que, aux fins de la présente procédure, il suffit de noter que les renseignements soumis à la Cour, y compris les rapports du Comité scientifique des Nations Unies pour l'étude des effets des rayonnements ionisants présentés entre 1958 et 1973, n'excluent pas qu'on puisse démontrer que le dépôt en territoire australien de substances radioactives provenant de ces essais cause un préjudice irréparable à l'Australie;
>
> 30. Considérant qu'étant donné ce qui précède la Cour estime devoir indiquer des mesures conservatoires pour sauvegarder le droit invoqué par l'Australie dans le présent différend en ce qui concerne le dépôt de retombées radioactives sur son territoire" (*C.I.J. Recueil 1973*, p. 105.)

En fait, cette condition n'est pas formulée expressément dans le Statut et peut être considérée comme une glose des termes de l'article 41 : "si [la Cour] estime que les circonstances l'exigent".

Il n'est donc pas surprenant que l'on puisse se demander s'il s'agit bien d'une condition indépendante. Elle n'a pas été mentionnée, par exemple, dans l'ordonnance relative à l'affaire de l'*Anglo-Iranian Oil Co.* et, tout bien considéré, il semble s'agir seulement d'une formulation particulière de l'objet principal des mesures conservatoires, qui est de sauvegarder les droits respectifs des deux parties.

L'idée a été exprimée avec talent et concision par un ancien président de la Cour, le professeur Jiménez de Aréchaga, dans une conférence faite à La Haye en 1978 :

> "In all recent cases where interim measures were requested from the International Court of Justice the essential argument of the applicants concerned the impossibility or the extreme difficulty of restoring the existing situation if the judgment went in favour of the applicant and interim measures were refused." (*RCADI*, vol. 159, (1978-I), p. 159; voir aussi l'opinion individuelle de M. Jiménez de Aréchaga, *C.I.J. Recueil 1976*, p. 15.)

35 Quoi qu'il en soit, la formule employée le plus souvent par la Cour dans le passé récent mentionne la "possibilité" ou le "risque" d'un préjudice irréparable pour les droits en litige.

On peut citer à cet égard les ordonnances suivantes de la Cour :

- Affaire du *Plateau continental de la mer Egée* (*C.I.J. Recueil 1976*, p. 11, par. 32-33).
- Affaire relative au *Personnel diplomatique et consulaire des Etats-Unis à Téhéran*, (*ibid.*, 1979, p. 19-20, par. 36-44).
- Affaire du *Différend frontalier* (*ibid.*, 1986, p. 8-10, par. 13-21).
- Affaire du *Passage par le Grand-Belt (Finlande c. Danemark)* (*ibid.*, 1991, p. 17, par. 23).

C'est peut-être dans l'ordonnance relative à la *Mer Egée* que se trouve la meilleure formulation :

> "32. Considérant d'autre part que la simple possibilité d'une telle atteinte à des droits en litige devant la Cour ne suffit pas à justifier l'exercice du pouvoir exceptionnel d'indiquer des mesures conservatoires que la Cour tient de l'article 41 du Statut; que, d'après les termes exprès de cet article, ce pouvoir n'est conféré à la Cour que dans la mesure où elle estime que les circonstances exigent d'en faire usage pour protéger les droits de chacun; et que cette condition, comme on l'a vu, présuppose que les faits de la cause fassent apparaître le risque d'un préjudice irréparable aux droits en litige;" (*C.I.J. Recueil 1976*, p. 11, par. 32.)

Dans le cas de la présente requête, nous considérons que si on laissait les Etats défendeurs réussir dans la tactique qu'ils appliquent avec persévérence et qui tend à éluder l'ordre juridique de la convention de Montréal, il en résulterait un préjudice irréparable pour les droits que la Libye tient de la convention.

f) **Le facteur d'urgence**

Il a parfois été dit ou supposé que l'urgence est un critère nécessaire pour l'indication de mesures conservatoires (voir, de façon générale, la monographie de Sztucki, *Interim Measures in the Hague Court*, 1983, p. 112-122).

36 Si l'on admet que l'urgence est une condition, il me semble qu'elle en est une seulement en ce sens que, si un Etat requérant démontre par son comportement que la demande de mesures conservatoires ne présente plus d'urgence, la Cour considérera que la demande a cessé d'exister, et c'est ce qui s'est produit dans l'affaire du *Procès de prisonniers de guerre pakistanais* (*C.I.J. Recueil 1973*, p. 330, par. 10-1)4.

Mis à part ce type de situation exceptionnelle, l'urgence n'est probablement pas une condition distincte. Dans son ordonnance récente relative à l'affaire du *Grand-Belt*, la Cour a déclaré ceci :

> "Considérant que les mesures conservatoires visées à l'article 41 du Statut sont indiquées 'en attendant l'arrêt définitif' de la Cour au fond et ne sont par conséquent justifiées que s'il y a urgence, c'est-à-dire s'il est probable qu'une action préjudiciable aux droits de l'une ou de l'autre Partie sera commise avant qu'un tel arrêt définitif ne soit rendu..." (*C.I.J. Recueil 1991*, p. 12-17, par. 23.)

Conclusion

Aussi, Monsieur le Président, faut-il revenir sur l'objectif primordial de l'indication de mesures conservatoires, qui est de préserver les droits de l'une ou l'autre des Parties lorsque l'on risque qu'il y soit porté atteinte avant que la Cour puisse rendre une décision finale.

L'Etat requérant soutient qu'en ce sens, il y a une urgence très considérable. Qu'il s'agisse là ou non, en droit, d'une condition préalable à l'indication de mesures conservatoires, il y a certainement urgence en l'occurrence.

Depuis le 14 novembre de l'an dernier, les Etats-Unis et le Royaume-Uni ont eu une politique soigneusement orchestrée sur le recours à la menace ou à l'emploi de la force contre la Libye s'il n'était pas fait droit à leurs exigences.

Les principales preuves de ce recours systématique à la menace de la force se trouvent dans les déclarations faites au nom des deux gouvernements pendant la période pertinente.

37 Dans l'ordre chronologique, ces déclarations sont les suivantes :

1. Lors d'une conférence de presse organisée par le département d'Etat le 14 novembre 1991, le représentant du département d'Etat, M. Richard Boucher, a déclaré que "nous explorons toute une gamme d'options" et que :

> "à ce stade, je crains pouvoir seulement vous dire ceci : nous discutons de toute une gamme d'options, nous envisageons toute une gamme d'options" (transcription de la conférence de presse, p. 9 (voir la pièce n° 35)).

2. Lors d'une conférence de presse donnée le 19 novembre 1991, le président Bush a indiqué clairement que le recours à la force n'avait pas été écarté.

En réponse à une question posée au sujet des options envisagées, le président Bush a fait les remarques suivantes (entre autres) : "Troisièmement, nous n'avons rien exclu; nous n'avons ni exclu ni adopté aucune solution." Et Monsieur le Président, Messieurs de la Cour, je voudrais appeler particulièrement votre attention sur le passage suivant, car il est très important :

"Troisièmement nous n'avons rien exclu; nous n'avons ni exclu ni adopté aucune solution. Pour réagir à cet incident, nous devons garder nos options ouvertes, mais j'espère que vous comprenez l'importance qu'il y a, d'autre part, à ce que nos options restent secrètes. Je n'ai pas envie que ce que nous pourrions éventuellement entreprendre soit annoncé par sémaphore."

Le président Bush a également déclaré ce qui suit :

"Donc, pour ce qui est de votre question, j'espère que vous m'excuserez si je ne montre pas mes cartes, si je ne vous en dis pas plus sur les options dont nous disposons."

Et il a poursuivi en disant :

"Vous savez bien ce qu'on a pu lire sur les sanctions économiques et aussi sur les mesures de rétorsion, mais je n'entrerai pas dans le détail. Je voudrais seulement souligner que je continuerai à consulter nos alliés. Ce sont des gens qui ont, eux-aussi, perdu des compatriotes dans cet horrible acte de terrorisme, et quand nous prendrons une décision réfléchie au nom des Etats-Unis d'Amérique, je suis certain qu'à ce moment là le peuple américain soutiendra le président dans cette prise de position, qui dépasse de beaucoup la politique politicienne et la conjoncture de 1992 que j'ai évoquée il y a quelque temps." (Pièce n° 36.)

3. Le point 3 est une déclaration faite par le secrétaire à la défense des Etats-Unis le 15 décembre 1991. A cette occasion, la question suivante a été posée à M. Dick Cheney :

38

"Monsieur le ministre, il nous reste moins d'une minute. La Libye n'a pas encore livré les deux coupables présumés de l'attentat contre le vol 103 de la Pan Am. Est-ce que des mesures de rétorsion militaire contre la Libye sont réellement envisagées ?"

Sa réponse a été la suivante :

"Nous n'avons jamais adopté ni écarté aucune option. Bien entendu, telle est restée notre politique. Comme le président l'a indiqué, nous tenons beaucoup à amener devant la justice les gens qui sont responsables de l'attentat contre le vol Pan Am 103." (Pièce n° 37.)

4. A la Chambre des communes, le 20 janvier 1992, le ministre d'Etat, M. Douglas Hogg, a répondu à une question de M. Dalyell.

La question et la réponse étaient les suivantes :

"M. Dalyell : Le ministre peut-il répondre à la question posée par M. Jim Swire quant aux mesures à prendre pour éviter de déclencher un cycle de la violence ? Si une action militaire n'est pas écatée - et ce que le ministre a dit me donne l'impression que cette éventualité n'a pas été écartée - le ministre s'attend-il à autre chose qu'une riposte du tac au tac ? Ne devrions-nous pas reconnaître que toute cette tragédie a commencé lorsque Tripoli a été bombardé, lorsque les quartiers civils de Benghazi ont été bombardés et lorsque le *Vincennes*, dont on sait aujourd'hui qu'il se trouvait dans les eaux territoriales iraniennes, a abattu l'avion iranien ?

Si je lis tout cela, Monsieur le Président, c'est parce que c'est ainsi que la question était rédigée. Et la réponse de M. Hogg, ministre d'Etat, a été la suivante :

"Je n'ai jamais mentionné le recours à la force. J'ai dit ici et ailleurs que nous essayons de convaincre le Gouvernement libyen de faire droit à notre demande tendant à ce que les deux intéressés soient traduits en justice devant les tribunaux écossais ou américain. Nous espérons obtenir de l'Organisation des Nations Unies qu'elle adopte une résolution entérinant cette demande. Nous espérons que le Gouvernement libyen y fera droit. Manifestement, si tel n'est pas le cas, nous devons déterminer quelles mesures s'imposent. Je n'ai pas suggéré la force. Je n'ai rien écarté et je n'écarte rien."
(Pièce n° 38.)

39 Cette formule est donc répétée à nouveau, cette fois-ci par une personnalité britannique.

Cette déclaration du ministre d'Etat montre que l'on a clairement conservé le recours à la force comme moyen d'obtenir qu'il soit fait droit à la prétendue demande. Il ne s'agit pas d'une promesse inconditionnelle de recourir à la force, mais plutôt d'une déclaration selon laquelle la force pourra être utilisée si cela s'avère nécessaire. Cette déclaration constitue, en fait et en droit, une menace.

5. Le 10 février, le vice-président des Etats-Unis a été interviewé lors du programme télévisé Newsnight de la BBC. Soulignant que la patience des Etats-Unis n'était pas "illimitée", M. Quayle a dit ce qui suit :

"Il suffit de se référer au passé pour voir que nous avons la volonté politique de faire en sorte que ce genre de demande soit suivie d'effets." (Pièce n° 39.)

Le fait que cette déclaration est un rappel de sang froid des attaques aériennes de 1986 n'est pas une simple impression de l'Etat requérant étant donné que les médias ont interprété ces remarques comme un appel à la force (voir l'article paru dans le *Washington Times*, pièce n° 40).

6. Le 18 février, à Londres, une porte parole du Foreign Office a averti que "rien ne serait écarté" dans la campagne menée pour obtenir la remise des deux suspects (pièce n° 41).

Il apparaît clairement, Monsieur le Président, que les menaces sont systématiques, que la phraséologie est répétitive et constante. Il y a peut-être eu un document de base d'où provient cette phraséologie - je ne sais pas si cela importe ou non - mais il n'en demeure pas moins que les formules utilisées par les personnalités officielles, de M. Bush à la porte-parole du Foreign Office, sont constantes. Toutes ces déclarations ont été faites sur une période de trois mois. La première que j'ai citée et qui contenait cette formule est celle faite par M. Bush le
40 19 novembre, et la dernière celle faite par la porte-parole du Foreign Office le 18 février. Je soutiens par conséquent qu'il y a en fait eu une stratégie concertée, une stratégie conjointe de menaces.

D'ailleurs, la Cour a reconnu l'importance d'une telle déclaration dans ses arrêts sur le fond dans l'affaire du *Nicaragua*. Avec votre permission, je voudrais rappeler à la Cour le principe qu'elle a posé concernant la valeur de telles déclarations. La Cour a déclaré ce qui suit :

> "Le dossier soumis à la Cour contient également des déclarations de représentants d'Etats, parfois du plus haut niveau dans la hiérarchie politique. Certaines de ces organisations ont été faites devant des organes officiels de l'Etat ou d'une organisation régionale ou internationale et figurent dans les comptes rendus officiels de ces institutions. D'autres, prononcées lors de conférences de presse ou d'interviews, ont été rapportées par la presse écrite locale ou internationale. La Cour considère que des

> déclarations de cette nature, émanant de personnalités politiques officielles de haut rang, parfois même du rang le plus élevé, possèdent une valeur probante particulière lorsqu'elles reconnaissent des faits ou des comportements défavorables à l'Etat que représente celui qui les a formulées. Elles s'analysent alors en une sorte d'aveu." (*C.I.J. Recueil 1986*, p. 41, par. 64.)

Les preuves que constituent de telles déclarations officielles sont encore confirmées, si elles devaient l'être, par deux autres types de preuves.

Les premières résultent du fait que ces menaces sont de notoriété publique, non seulement en raison des déclarations susmentionnées, mais aussi parce que l'agence Associated Press et d'autres agences de presse, se saisissant très rapidement de la formule que j'ai citée plusieurs fois, ont mentionné de façon répétée que "la force militaire" n'avait pas été écartée (pour un exemple, voir la pièce n° 42).

Et je voudrais aussi respectueusement rappeler à la Cour que dans l'affaire relative au *Personnel diplomatique et consulaire des Etats-Unis à Téhéran*, la Cour s'est référée à des faits essentiels qui étaient "de notoriété publique" (*C.I.J. Recueil 1980*, p. 9, par. 12), et que l'on trouve une référence semblable dans l'arrêt sur le fond dans l'affaire du *Nicaragua* (*C.I.J. Recueil 1986*, p. 40-41, par. 63).

41 La deuxième source de confirmation tient aux déclarations d'Etats tiers. En février, des représentants du Gouvernement égyptien ont exprimé leur vive préoccupation devant la possibilité que les Etats-Unis déclenchent une attaque militaire contre la Libye (pièce n° 43). Plus récemment, le 12 mars, "des personnalités haut placées du ministère thaïlandais des affaires étrangères" ont fait savoir qu'au cours des quelques mois écoulés, les Etats-Unis avaient à plusieurs occasions demandé à la Thaïlande d'évacuer les travailleurs thaïlandais se trouvant

en Libye en raison de la possibilité d'attaques aériennes américaines (pièce n° 44). Cette nouvelle, rapportée par l'agence France Presse, a été publiée dans l'*International Herald Tribune* du 13 mars.

Monsieur le Président, j'ai presque terminé mon exposé des éléments de preuve qui étayent l'affirmation que je fais au nom de la Libye, à savoir qu'il existe un risque d'action préjudiciable avant que la Cour puisse rendre une décision finale.

Néanmoins, un tel exposé serait incomplet s'il ne mentionnait pas deux autres éléments.

Premièrement, la réalité de ces menaces ressort clairement de la brutalité des raids aériens déclenchés contre la Libye en 1986, qui étaient une tentative d'assassiner un chef d'Etat et sa famille et qui ont fait au moins 130 morts. Je n'ai pas le chiffre définitif ou officiel, mais c'est le chiffre publié dans *Keesing's Contemporary Archives* (vol. 32, p. 34456-34457). Ces attaques ont causé des dégâts considérables et quatre ambassades étrangères ont été endommagées par les bombardements. L'ambassade de France a été partiellement détruite. Tel était l'épisode que rappelait le vice-président Quayle à la BBC Television.

Deuxièmement, les Etats défendeurs ont en fait combiné leurs exigences à l'égard de la Libye à des menaces systématiques. Il en est résulté une stratégie politique d'ultimatum que l'on n'avait pas vu depuis plusieurs décennies.

En dernière analyse, Monsieur le Président, le comportement des Etats défendeurs représente un défi au principe de règlement pacifique des différends et a de sérieuses incidences pour l'ordre public international.

Pour terminer, je tiens à vous féliciter de votre accession aux fonctions de Président et, avec votre permission je souhaiterais céder la parole à mon ami et collègue, M. Jean Salmon.

42 Le VICE-PRESIDENT, faisant fonction de Président : Merci, Monsieur Brownlie. Normalement, le moment serait venu de marquer une pause, mais comme deux des conseils de la Libye doivent encore prendre la parole ce matin, nous allons devoir y renoncer, et je donne la parole à M. Salmon.

M. SALMON : Mr. President, Members of the Court, as my colleague and friend Mr. Brownlie has stated, it is my task to enlarge before you on two quite distinct aspects of Libya's request. The first concerns the jurisdiction of the Court, the prima facie jurisdiction of the Court, and the second the rights under threat, which will be considered from two aspects, their existence on the one hand and the fact that they form the object of the principal request on the other. I shall now deal with the first aspect.

First Aspect: the jurisdiction of the Court

I shall not recap Mr. Brownlie's comments concerning the Court's traditional position on its competence as regards provisional measures. As the Court has indicated in the *Nicaragua* v. *United States* case:

> "yet [the Court] ought not to indicate such measures unless the provisions invoked by the Applicant appear, prima facie, to afford a basis on which the jurisdiction of the Court might be founded" (*I.C.J. Reports 1984*, p. 179).

It is therefore necessary to set out the reasons of fact which justify the prima facie jurisdiction of the Court in relation to the principal Application.

43 This jurisdiction stems from the application of Article 36, paragraph 1, of the Statute, which I blush to read out before you and according to which:

> "The jurisdiction of the Court comprises all cases which the parties refer to it and all matters specially provided for in the Charter of the United Nations or in treaties and conventions in force."

More specifically, the jurisdiction of the Court is based on Article 14, paragraph 1, of the Montreal Convention of 23 September 1971, which you will find as Document No. 1 in the set we have provided you with.

It is not disputed that the Montreal Convention is a convention in force between the Parties before the Court. The instruments expressing consent to be bound by this Convention were deposited respectively and without reservations

- by the United States on 1 November 1972,
- by the United Kingdom on 25 October 1973, and
- by Libya on 19 February 1974. You will find the Libyan law concerning accession and an extract from it in the Official Gazette as Document No. 2.

The President read out the text of Article 14, paragraph 1, a moment ago and will surely allow me to repeat it in French:

> "1. Any dispute between two or more Contracting States concerning the interpretation or application of this Convention which cannot be settled through negotiation, shall, at the request of one of them, be submitted to arbitration. If within six months from the date of the request for arbitration the Parties are unable to agree on the organization of the arbitration, any one of those Parties may refer the dispute to the International Court of Justice by request in conformity with the Statute of the Court."

44

Essentially, this article lays down two conditions:

1. There must be a dispute between Contracting States concerning the interpretation or application of this Convention;

2. This dispute must be one concerning which the parties have not been able to agree on an arbitration procedure.

In the view of Libya, these two elements are present.

For confirmation thereof, one need only re-read the official positions adopted by the Parties. By an initial letter of 8 January 1991, Mr. Ibrahim M. Bishari, Secretary of the People's

Committee for Foreign Liaison and International Co-operation called for negotiations. This message was distributed as an official United Nations document (Document No. 20 in our set). On 18 January 1992, the same person sent a letter to Mr. James Baker, Secretary of State of the United States of America and Mr. Douglas Hurd, Minister for Foreign Affairs of the United Kingdom (also a Security Council document we have reproduced in our set) and I am going to take the liberty of reading out some excerpts from it, for I think they are relevant:

> "The United States of America, the United Kingdom and Libya are States parties to the 1971 Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation.
>
> Libya exercised its jurisdiction over the two alleged offenders in accordance with its obligation under Article 5, paragraph 2 of the Convention ...
>
> It is incontestable that the 1971 Montreal Convention ... does not exclude any criminal jurisdiction exercised in accordance with national law (in the present case Libyan Law) as stated in Article 5, paragraph 3.
>
> Moreover, Article 7 of the Convention stipulates that the Contracting Party in the territory of which the alleged offender is found shall, if it does not extradite him, submit the case to its competent authorities for the purpose of prosecution ...
>
> 45 After calling on the other parties concerned to co-operate, and while expecting the co-operation requested to be fully forthcoming, Libya has received from the United States of America and the United Kingdom not only the outright refusal of such co-operation but even the threat of the use of force and an aggregate reaction that has made any negotiated settlement impossible.
>
> It is to be noted that Article 14, paragraph 1, of the Convention stipulates that any dispute between two or more Contracting States which cannot be settled through negotiation shall, at the request of one of them, be submitted to arbitration."

And my quotation, this long quotation of the Minister's statement, ends as follows:

> "Libya urges the United States of America and the United Kingdom to be governed by the voice of reason and law, to give their prompt agreement to arbitration in accordance with Article 14, paragraph 1, of the Convention ..."

At the Security Council Meeting on 21 January 1992, Mr. Belgasem El-Tahli, Permanent Representative of Libya to the United Nations, drew attention *expressis verbis* to the terms of Article 14, paragraph 1; indeed he did so twice (Doc. No. 24 or 25) (S/PV. 3033, pp. 12 and 22 of the French text, pp. 13 and 23 of the English text). He also stated the following - and I apologize to the Court and to the interpreters for making them engage in a certain amount of juggling, but it strikes me as essential to read out some of these texts in English, either because they are more precise, or because that is exactly what their author speaking English wished to say, and, to avoid any translation problems, I would prefer you to put up with my poor English. Here, then, is what the Libyan Permanent Representative said:

> "Today before the Council, my country requests that both those countries be invited to enter promptly into negotiations with Libya on proceedings leading to arbitration and an arbitration panel. To ensure the speedy settlement of the dispute, we consider that a short and fixed deadline be set for those proceedings, after which, if no agreement is reached on arbitration, the matter would be brought before the International Court of Justice. My country expresses its willingness to conclude immediately, with any of the parties concerned, an *ad hoc* agreement to have recourse to the International Court of Justice as soon as the short deadline for reaching agreement on arbitration expires, or any other convenient and near date should the countries concerned agree to go beyond the arbitration stage and the proceedings of an arbitration panel." (Docs. Nos. 24 or 25.) (S/PV. 3033, pp. 22 and 23-25 of the French text; p. 23 of the English text.)

46

The same day, immediately after the adoption by the Security Council of its Resolution 731, the Permanent Representative of the United States to the United Nations, Mr. Pickering, replied as follows; here too I shall read a number of extracts:

> "The Council has been confronted with the extraordinary situation of a State and its officials which are implicated in two ghastly bombings of civilian airliners. This is a situation to which standard procedures are clearly inapplicable. The issue at hand is not some difference of opinion or approach that can be mediated or negotiated.

> The resolution just adopted ... makes a straightforward request of Libya: that it co-operate fully in turning over its officials who have been indicted ... The resolution provides that the people accused be simply and directly turned over to the judicial authorities of the Governments which are competent under international law to try them ...
>
> The Council was faced in this case with clear implications of Government involvement in terrorism as well as with the absence of an independent judiciary in the implicated State" (Docs. Nos. 24 or 26) (S/PV. 3033, pp. 78-80 of the English text).

This was a blanket objection on both the merits and the procedure for a peaceful settlement requested by Libya.

The reply by the Permanent Representative of the United Kingdom, Sir David Hannay, was even more explicit; here too, I hope the Court will permit me to read out some extracts:

> "Following the issue of warrants against the two Libyan officials, the British Government sought to persuade the Libyan Government to make available the two accused for trial in Scotland. No satisfactory response was received. So on 27 November 1991 the British and American Governments issued a statement declaring that the Government of Libya must surrender for trial all those charged with the crime ...
>
> Over two months have passed since we requested Libya to make the accused available for trial ... The letter dated 18 January concerning a request for arbitration under Article 14 of the Montreal Convention is not relevant to the issue before the Council. The Council is not, in the words of Article 14 of the Montreal Convention, dealing with a dispute between two or more Contracting Parties concerning the interpretation or application of the Montreat Convention ...
>
> We have thought it right, and indeed preferable to other ways of pursuing the matter, to come before the Council and seek the Council's support, through the resolution just adopted. We very much hope that Libya will respond fully, positively and promptly, and that the accused will be made available to the legal authorities in Scotland or the United States, and in France. ... It has been suggested the men might be tried in Libya. But in the particular circumstances there can be no confidence in the impartiality of the Libyan courts." (Docs. Nos. 24 or 27) (S/PV. 3033, pp. 104-105 of the English text.)

47

There is not question of replying here to all the allegations or reservations made by the two Governments relating to the merits and to which Libya, needless to say, does not subscribe in any way.

To demonstrate what we are concerned with here, we need only note the presence of the two elements necessary for recognition by the Court of its jurisdiction.

The first of these elements is the fact that there is a *legal dispute in international law* between the States parties to this dispute. In other words, to use the traditional terms of the Permanent Court of International Justice in the *Mavrommatis in Palestine Concessions* case: "a disagreement on a point of law or fact, a conflict of legal views or of interests between two persons" *P.C.I.J., Series A, No. 2*, p. 11). In the present case, the dispute between the Parties essentially concerns Libya's right, in application of the Montreal Convention, to try the two suspects before Libyan judges and secondarily, the duty of the two respondent Governments to co-operate under the terms of that Convention.

48

The United Kingdom and the United States quite simply claim that this Convention does not apply, thus aiming to deprive Libya of the benefit of its provisions. The Court will judge the value of such an argument as and when it sees fit; the fact nevertheless remains that, in our view, the claim that a convention does not apply is a dispute on the application of that convention.

I would add that this is *the only genuine serious dispute* remaining between the parties. And it is what results from a comparison, if one is prepared to make one in good faith, between, on the one hand, the bipartite and tripartite requests expressed on 27 November 1991 and, on the other hand, Libya's official acceptances.

The Court will recall that the American and British requests - which have already been read out, but I am going to read them out again - were as follows:

> "- surrender for trial all those charged with the crime; and accept responsibility for the actions of Libyan officials;
>
> - disclose all it knows of this crime, including the names of all those responsible, and allow full access to all witnesses, documents and other material evidence, including all the remaining timers;
>
> - pay appropriate compensation." (Doc. 18).

The additional request, made jointly with France, was:

> "that Libya commit itself concretely and definitively to cease all forms of terrorist action and all assistance to terrorist groups. Libya must promptly, by concrete actions, prove its renunciation of terrorism" (Doc. 19).

It will certainly not have escaped the Court's attention that the demands of the two countries form a singular contrast with the French demands which did not refer to extradition (Doc. No. 17). Of course, those who are familiar with international practice as regards mutual

49 legal aid in criminal matters, and who know the problems we are currently facing with the Schengen Agreement, are aware how far the French demands supposed an uncommon degree of co-operation. Yet Libya nevertheless accepted all of them, since they did not infringe its sovereignty (Report by the Secretary-General S/23574) (Doc. No. 31).

On the other hand, the American and British demands were, for their part, surprising. A lot could be said about presenting matters in a manner which assumes the guilt of the Libyan nationals and of their country before judgment has been pronounced. Nevertheless, Libya declared itself ready to compensate the victims if the Libyan nationals were ultimately judged to be guilty (Doc. No. 33) (S/23672). One could hardly ask for more.

It expressed "its readiness to receive investigators"; accepted an international investigation or a neutral investigating committee (Doc. 24) (S/P.V.3033, p. 11). Colonel Qadaffi authorized the British and American judges to come to Libya (Doc. 31) (S/23574) and agreed to the two suspects being questioned at the Office of the UNDP in Tripoli (Doc. 33) (S/23672). Lastly, very firm statements have been made on the subject of terrorism. Among other commitments it has made, Libya has stated its "readiness to co-operate in any matter that may put an end to terrorist activities and to sever its relations with all groups and organizations which target innocent civilians" (Doc. No. 33).

In the light of the foregoing, it is apparent that the only remaining point of any substance on which the parties are opposed is the question of extradition and, subsidiarily, the total refusal of the two Respondant Governments to co-operate with Libyan justice. In both cases, it is a problem concerning the application of the Montreal Convention that is at issue.

50 Even if we were to accept that there was another dispute, as was alleged during the Council's meeting on 21 January 1992, and one which would be Libya's implication and international responsibility through its two nationals, the fact would nevertheless remain that the question of the culpability of the two nationals is a necessary, yet all the same not sufficient, condition for acknowledging Libya's international responsibility.

Let us pause for a moment, if we may, at this extremely important point. The culpability of the two nationals is the key to the whole case. Failing this culpability, there is no responsibility of the Libyan Government. Hence, this condition is necessary. Yet it is not sufficient. For to prove that the acts of these two nationals who, admittedly, are officials of the Libyan Government, can be imputed to

Libya, it is still necessary to prove what is required by Article 5 of the draft Articles of the International Law Commission on the origin of international responsibility and which I blush to repeat here before such eminent persons who, as everyone knows, have devoted the greater part of their lives to ensuring that this text should come into being and enjoy all the importance it deserves. Article 5 of the draft states the following: for the purposes of the present Articles, the term 'State' under international law shall mean the conduct of any State again possessing this status under the internal law of the State concerned, to the extent that it has acted in that capacity in the case at issue.

There is not the least inkling of proof of any of this. With extraordinary candour, the two Respondent States are asking Libya to furnish evidence that Libya is responsible. This is a somewhat unexpected reversal of roles.

51 The mere assertion of suspicions, - as we all know, mud sticks - the mere assertion of suspicions put forward as certainties, can create an illusion in the eyes of an unsuspecting public opinion; yet it is not sufficient to convince a Court of Justice or international judges adjudicating according to international law.

And what is it that Mr. Hannay says to the Security Council ?

> "We are not asserting the guilt of these men before they are tried, but we do say that there is serious evidence against them which they must face in court." (Docs. 24 and 27) (*Ibid.*, p. 103.)

So Great Britain recognizes that it has no certainty that the two suspects are responsible, and indeed many voices, in the United Kingdom and the United States alike, have constantly favoured other possibilities.

The problem of the existence of this culpability and the appropriate methods for dealing with it are therefore central to the dispute. The question is therefore whether Libya is entitled to claim the right to judge the suspects itself or whether it should yield to the orders,

backed up by threats, of the United Kingdom and the United States. The correct application of the Montreal Convention is therefore the true dispute between the parties, and, what is more, it governs all subsequent arguments. It is the precondition of any implication of Libya as State in this horrific attack.

Alleging that the Libyan courts would not be impartial, the two countries refuse to allow Libya to exercise its right under the Montreal Convention. Were this extraordinary claim to be accepted as a tacit exonerating clause, because there is nothing of the kind in the Convention, from the provisions of the Convention, it would ruin the
52 entire system of conventions on terrorism, - not just the Montreal Convention - but a dozen other conventions cast in the same mould and which are based on the multiplicity and equivalence of jurisdictions and which each time make provision for the alternative *aut dedere aut judicare*.

Who cannot gauge the use to which this astounding claim could be put? The example I take here is not aimed at any particular country, but is purely imaginary. Let us suppose that some act was committed against France concerning a Basque of French nationality arrested in France, where he was charged, by French judges, of involvement in ETA terrorist acts in Spain? The question would thus be quite simple under this new international order; France would no doubt be obliged to extradite the suspects fortwith, because the national courts would obviously be regarded as being partial; obviously, France's responsibility would be immediately engaged with respect to those judged; obviously, immediate compensation is the rule. Here is what we are being proposed in a somewhat unexpected manner. In cases of this type, numerous examples of

which could be quoted, national courts would be under suspicion of partiality and, above all Governments of prior responsibility with an order for immediate compensation!

Nevertheless, strange as this claim may be, and a Court such as this one must be open to the imaginations of the litigants, for that is sometimes how one enriches ones own convictions. The fact nevertheless remains that what has to be established is, if this is a legitimate excuse for not applying the Montreal Convention, the Court is competent to hear the case.

Second element

I shall now go on to the second element necessary for the Court to have jurisdiction. There has to exist a dispute concerning which the Parties have been unable to agree on an arbitration procedure. How do matters stand in this case?

53 The two Governments, to some extent throwing out the baby with the bathwater, have rejected *a priori* and without appeal both the basic provisions and the compromissory clause of the Montreal Convention. Consequently they exclude any application of Article 14(1), and the arbitration proposals of the Libyan Government. I shall not repeat the quotations given in illustration a moment ago.

It is obvious that the Parties have not managed, in the words of the Montreal Convention, either to settle their dispute "through negotiation" or "agree on the organization of the arbitration". Libya is therefore authorized in accordance with the compromissory clause, to refer the dispute to the International Court of Justice by request in conformity with the Statute of the Court.

True, the Parties arrived at this conclusion rapidly, but it is not without precedent in the Court's jurisprudence. You will recall that in the case of the *Mavrommatis Palestine Concessions*, the Permanent Court of International Justice stated that:

"Negotiations do not of necessity always presuppose a more or less lengthy series of notes and despatches; it may suffice that a discussion should have been commenced, and this discussion may have been very short; this will be the case if a dead lock is reached, or if finally a point is reached at which one of the Parties definitively declares himself unable, or refuses, to give way, and there can therefore be no doubt that *the dispute cannot be settled by diplomatic negotation*." (*Series A, No. 2*, p 13.)

Your Court arrived at similar conclusions in the case concerning the *United States Diplomatic and Consular Staff in Tehran* (*I.C.J. Reports 1980*, p. 27) and in the case concerning *Military and Paramilitary Activities in and against Nicaragua* (*I.C.J. Reports 1984*, p. 28).

54 The defendants will doubtless submit, this afternoon and tomorrow, that Security Council resolution 731 is a reason for the Court not to take a decision on the Libyan requests for the indication of provisional measures. This important question is worthy of being treated specifically and indepth. Professor Erik Suy will do this shortly before the Court.

Second part: certain basic conditions that have to be present for the Court to consider the indication of provisional measures to be justified

Meanwhile it is for me to speak to the Court on a second point concerning some basic conditions that must be present for the Court to consider the indication of provisional measures to be justified. Mr. Brownlie has shown the threats and the urgency that made the provisional measures imperative. It remains for me to assure the Court, on the one hand, that the rights for which Libya demands protection are indeed *prima facie* rights that it may claim, and on the other hand that these rights are the subject of the principal application, since these are also the rights that must be protected.

1. *The rights must be acknowledged at least* prima facie *as belonging to the Applicant*

This very logical requirement was exhaustively explained by Judge Shahabuddeen in a separate opinion annexed to the Court's Order of 29 July 1991 in the case concerning the *Passage through the Great Belt* (*I.C.J. Reports 1991*, pp. 28 *et seq.*).

We believe that there is no doubt that this condition exists in this case. It is not contested that all the rights claimed by Libya are treaty rights binding all the Parties.

55 In view of the lateness of the hour I shall not impose on the Court a lengthy reading of the articles in my text, I suppose that I may comment on them very briefly and that the Registrar will agree that they should figure in the text as if I had read them. This will make it easier for everyone to read.

The existence of the condition, which must be a right at least *prima facie* of the Applicant, basically results from the fact that we are a party to the Montreal Convention.

Article 1 of that Convention describes the field of application of the Convention. This is exactly the case that concerns us: the charge against the two suspects.

> "(*b*) destroys an aircraft in service or causes damage to such an aircraft which renders it incapable of flight or which is likely to endanger its safety in flight;
>
> (*c*) places or causes to be placed on an aircraft in service, by any means whatsoever, a device or substance which is likely to destroy that aircraft, or to cause damage to it which renders it incapable of flight, or to cause damage to it which is likely to endanger its safety in flight."

In such an offence, Libya has carried out all its obligations under Article 5(2) and (3) of the Convention, in other words, it has taken the measures necessary to establish its jurisdiction over the offences.

Article 6 also covers specific procedural obligations and despite all the sarcastic remarks addressed to us, it has not been argued that Libya has failed to meet its obligations.

Article 7 is clearly the key article of the Convention and we cannot repeat this often enough.

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

56

This article which contains the classical principle *aut dedere aut judicare*, is at the very heart of the Libyan Application. It is the exercise of this discretionary and sovereign right that the United States and the United Kingdom, unlike France, wish to deny Libya. According to Libya this right is, however, unquestionable and must be respected by all.

It is true that Article 8, paragraph 2 provides further latitude, but this is a discretionary right not applicable here.

Lastly, Article 11 imposes obligations to co-operate on all the other States concerned:

> "1. Contracting States shall afford one another the greatest measure of assistance in connection with criminal proceedings brought in respect of the offences. The law of the State requested shall apply in all cases."

Great Britain and the United States have obstinately refused any co-operation under this article.

All the preceding provisions therefore make up a balance of rights and obligations for the contracting parties. They also include, as is proper, provisions that protect the rights of the accused. Any democratic system that respects the rights of the defence is based on the safeguard of a fair trial and the presumption of innocence.

At this stage in the present case, Libya hopes that it has adequately demonstrated to the Court that it and its nationals possess rights on the basis of the Convention, rights which must be respected by the co-signatories. It therefore remains to be seen whether the rights that you are asked to safeguard are the subject of the principal Application.

57 **2. The rights to be safeguarded must the subject of the Application**

I believe you will recall that the rights claimed in the principal Application are those deriving

- on the one hand from the Montreal Convention in Articles 5(2) and (3), 7, 8(2) and 11, almost all of which I have read out to you;
- on the other hand from the principle of the Charter of the United Nations and general international law of an imperative nature, which prohibits the use of force and the violation of the sovereignty, territorial integrity and political independence of States.

I shall not repeat the requests for provisional measures, which were just read out by the Registrar. They are still fresh in your minds!

There is no doubt that both first and second requests are aimed at protecting Libya's exercise of its rights and those of its nationals under the Montreal Convention of 1971 to exercise the provisions of that Convention and to expect that the defending co-signatories should respect their obligations under that instrument.

The rights that Libya means to preserve are those that are the subject of the Application:

- the right to establish its own jurisdiction over the two alleged offenders (Article 5(2) of the Convention);
- the right to apply Libyan law in the proceedings (Article 5(3) of the Convention);

- the right to submit the case to its own criminal courts (Article 7 of the Convention);

58 - the right of the alleged offenders to have a trial providing the appropriate judicial safeguards on the basis of Libyan national law in accordance with Article 5(2) and Article 7 of the Convention. This national legislation, moreover, incorporates the rights of the person, protected by the United Nations Covenant on Civil and Political Rights (ratified by Libya on 15 May 1970). The alleged offenders certainly have the right to refuse extradition left to their discretion as was said at one stage; this was a possibility, in view of the accusations against them not to speak of the outright condemnation by high officials and the press. An impartial trial can no longer be guaranteed in such conditions. There is no need to remind the Court that Ireland came to an identical conclusion for the same reasons some years ago and refused to extradite Ryan, although it generally agrees to the extradition of terrorists, because there was such an outcry in Great Britain that it was certain that there could be no impartial trial. We believe we are in a rather similar position. According to Article 14, paragraph 2, of the United Nations Covenant on Civil and Political Rights: "Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law."

What remains of this, Mr. President, Members of the Court, when we see the value set upon this provision by the two defending Governments? For them it is implicit that guilt has been established, since they are already accusing the Libyan State and calling for reparation.

59 Libya also intends to preserve the following rights that are the subject of the Application: the latitude under Article 8 and the right to co-operation by the two States concerned.

In conclusion, it remains for me to tell the Court this: if Libya, because of the *dictatorial intervention* in its domestic affairs, together with coercive economic measures, not to speak of the *use of force*, is forced to give up the two alleged offenders that are present on its territory, it will no longer will be able to exercise the rights conferred upon it by the Montreal Convention in Articles 5(2) and (3), 7, 8(2) and 11. By their refusal to accept the Libyan proposals and their threats of action if Libya does not bow to their demands, the defendants are prejudicing the rights referred to in the Libyan Application. In addition, there is a breach of the rules of imperative general law of public international scope, to refer to the opinion of my dear master Henri Rolain, to which the Court may spontaneously address itself within the general framework of its mission.

I thank the Court for its patience in listening to me. With the permission of the President, Libya hopes that the Court will kindly now hear Professor Erik Suy.

Le PRESIDENT : Merci M. Salmon. Le prochain orateur est M. Suy; mais je voudrais seulement savoir si vous êtes en mesure de terminer votre plaidoirie ce matin à 13 heures ou quelques mintues après.

M. SUY : Je devrais probablement continuer après 13 heures. [M. Suy poursuit en langue française]. Mr. President, Members of the Court, allow me first of all to say how honoured I feel to be able to appear for the first time as counsel before this Court and to add that I am certain of being able to count on the comprehension and indulgence you invariably show to all the ladies and gentlemen who for the first time plead before you.

60 The question of the relations between the respective competences of the Security Council and the International Court of Justice can be examined from several viewpoints. The question is, in the first place, one lying on the general plane, involving as it does the question whether the two organs can exercise at the same time the competences conferred on them by virtue of the Charter. Another important question is that of the extent to which the conclusions to which one of these organs arrives can have an influence on the examination of the same question by the other organ. These two questions are worthy of attention whenever a request for interim measures of protection is being examined, even though the former question, which has more to do with competence *ratione materiae*, has been dealt with, in proceedings before the Court, from the viewpoint of the admissibility of applications instituting proceedings.

On 21 January 1992, at its 3,033rd meeting, the Security Council adopted resolution 731 (1992), concerning the judicial procedures relating to the bombings of the Pan Am and UTA flights.

In the resolution the Security Council "urges the Libyan Government immediately to provide a full and effective response [to the requests mentioned in certain documents] so as to contribute to the elimination of international terrorism". The Security Council also requests the Secretary-General to "seek the co-operation of the Libyan Government to provide a full and effective response to those requests".

The requests in question - is there any need for me to repeat this - are essentially the surrender of the suspects to the American and British judicial authorities. The Libyan Government maintains that, in

61 international law, there is no obligation to surrender the suspects. It has nevertheless stated its readiness to find other solutions to the question of the judicial procedures.

The Governments of the United Kingdom and the United States of America nonetheless insist on the surrender of the suspects, which are alleged to be under the jurisdiction of Libya, and it is in that connection that, as has been shown by Professor Salmon, a dispute exists, between the Government of Libya, on the one hand, and the Governments of the United Kingdom and the United States, on the other. This dispute bears on very specific legal issues relating to the interpretation and the application of the Montreal Convention of 1971 for the Suppression of Unlawful Acts against the Safety of Civil Aviation. The Convention is known to be in force between the three Parties to this case. It is, in fact, the only international legal instrument concerning international criminal law that is binding on the Parties to the present dispute. That is why the Government of Libya relies on the 1971 Montreal Convention, both to establish the competence of the Court and to found its thesis that there exists between it and the United States, on the one hand, and the United Kingdom, on the other, a legal dispute.

Although it implies the existence of a dispute between the Government of Libya and the United Kingdom and the United States, resolution 731 (1992) flies in the face of the whole of the procedure for the peaceful settlement of disputes provided for in the Montreal Convention. This is the reason why the Government of Libya has filed its Application instituting proceedings before the International Court of Justice, in order to submit to it the legal aspects of the question which were neglected by the Security Council and should have been the object of

62 the recommendation contained in Article 36, paragraph 3, of the Charter, under which "legal disputes should as a general rule be referred by the Parties to the International Court of Justice".

The request for interim measures of protection does not conflict with resolution 731 (1992). On the contrary, that request complements the resolution. Its aim is to request the Court to preserve the rights of the requesting Party, which are no other than its rights to exercise its criminal jurisdiction consistently with the principles of international law and, in particular, consistently with the Montreal Convention of 1971. The right in question is a fundamental right derived from the sovereignty of the State, a right from which no derogation has been made.

Nor does resolution 731 (1992) derogate from it. That resolution could not possibly disregard the undertakings entered into by the Parties under the Montreal Convention. This legal point was the subject of discussions within the Security Council, which did not take it into account. That, again, is why the Libyan Government is requesting the International Court of Justice to clarify these aspects.

May I now be allowed to deal with the question of the parallel powers existing between the Security Council and the Court.

I. Recourse to the Council does not rule out simultaneous or subsequent recourse to the Court

1. The principles

(a) The nature of the two organs is not the same

The Security Council is a political organ, whereas the Court is "the principal judicial organ of the United Nations" (Art. 92 of the Charter).

It follows that, although legal elements may play a role therein, debates in the Council as well as their result are of a political character.

63 As a matter of fact, legal considerations should play an important role in those debates inasmuch as Article 1, paragraph 1, of the Charter provides that the purposes of the United Nations, and therefore also of

the Council, are to maintain international peace and security and to "bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations ...".

The Security Council should therefore have regard to international law, that is to say, to the rights and obligations freely consented to and accepted by the Parties.

The Council is not, I admit, an appropriate organ for the examination of the legal aspects of the questions submitted to it. For this reason, Article 36, paragraph 3, of the Charter provides that in making recommendations concerning peaceful settlement to the Parties , the Security Council should also take into consideration that legal disputes should as a general rule be referred by the Parties to the International Court of Justice.

Article 36, paragraph 3, already shows that parallel powers may perfectly well and quite normally exist between the Council and the Court. While the Council would deal with the political aspects, it should be possible to submit disputes of a legal nature to the Court.

The provision in question contrasts sharply with the one contained in Article 12 of the Charter to the effect that "the General Assembly shall not make any recommendation with regard to that dispute or situation" while "the Security Council is exercising ... the functions assigned to it ...".

(b) *The approach of the two organs is different*

Although it is true that all the organs of the United Nations have as their primary aim the quest for the peaceful settlement of disputes and situations, the only provisions specific to the Security Council are that this organ should help, assist, encourage the Parties in the search

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for a peaceful settlement. So much is clear from a comprehensive analysis of Chapter VI of the Charter. Even Articles 39 and 40 of the Charter - contained in Chapter VII - leave the Council the widest measure of discretion in the continuation of its hortatory functions.

It is otherwise with the International Court of Justice, whose approach is an altogether different one. The Court is the principal judicial organ of the Organization, functioning on the basis of its Statute, an integral part of the Charter. And Article 38 provides that the Court decides disputes submitted to it "in accordance with international law".

(c) *The competence of the two organs differs*

The Council may be seised by any State (Member of the United Nations or not) of any dispute or situation, whereas the competence of the Court is limited to all the cases that the Parties bring before it provided that they have recognized the competence of the Court.

(d) *The composition of the two organs differs*

It is perhaps unnecessary to underscore this obvious point. The members of the Security Council are States, whereas the International Court of Justice is composed of individuals exercising their functions independently and meeting the standards laid down in Articles 2 and 9 of the Statute.

These considerations suffice to show that a case may very well be dealt with at the same time by the Security Council and by the Court, even at the stage of a request for interim measures of protection. This possibility of parallel action is also valid as regards the merits of the case.

65 *2. Case law and practice*

Our position is supported both by the practice of States and by the jurisprudence of the Court, which is now very well settled.

The question of *pari passu* competences between the Security Council and the Court has been the subject of discussions and decisions in three recent cases, namely: the *Aegean Sea Continental Shelf* case, the case concerning *United States Diplomatic and Consular Staff in Tehran* and the case concerning *Military and Paramilitary Activities in and against Nicaragua*.

A characteristic common to these cases is that they were brought by one and the same State (Greece, the United States and Nicaragua) at the same time before the Security Council and the International Court of Justice. A second characteristic common to the cases concerns interim measures of protection, requested by the three Applicant States. Finally, it should be noted that in the three cases the question of the parallel competence of the two organs arose. I have outlined all this very briefly because the case law is fairly well known, the solutions adopted by the Court in order to avoid any confusion.

(a) *The Aegean Sea Continental Shelf case*

In this case, brought by Greece, on 10 August 1976, before both the Security Council and the Court, a request for interim measures of protection was also made. On 25 August 1976 the Security Council adopted a resolution (resolution 395 (1976)) by which it urged the Governments of Greece and Turkey "to do everything in their power to reduce the present tensions in the area so that the negotiating process may be facilitated" and "to resume direct negotiations over their differences".

66 The two Parties, Greece and Turkey accepted the terms of the resolution.

In its Order concerning the request for interim measures of protection, made a few days later, the Court referred to resolution 395 (1976) and stated that "it is not necessary ... to decide the question whether Article 41 of the Statute confers upon it [the Court] the power to indicate interim measures of protection for the sole purpose of preventing the aggravation or extension of a dispute" (*I.C.J. Reports 1976*, p. 13, para. 42).

The reason why the request was denied was no other than that the Security Council, in its recommedation, had, in effect, indicated the provisional measures necessary. But at no time did the Court - quite the contrary - hold that parallel actions would not be permissible.

(b) Case concerning the *United States Diplomatic and Consular Staff in Tehran (Hostages* case)

In this case once again a State, namely the United States, on 29 November 1979, filed an Application with the Court after requesting, on 9 November 1979, a meeting of the Security Council. The first meeting of the Council ended with a statement by the President appealing to Iran for the release of the hostages (S/13615, S/13616). On 25 November, the Council, on the initiative of the Secretary-General, met once again and the statement of the President was reiterated (S/13652) of 27 November 1979.

In this case the same scenario was played out. As you will recall, on 4 December 1979 the Security Council adopted a very important resolution, resolution 457 (1979), in which it demanded the immediate release of the hostages and made an appeal to the Parties for the settlement of the other disputes by peaceful settlement. It also requested the Secretary-General to lend his good offices. It should be noted that immediately after the adoption of this resolution, the Permanent Representative of the United States, Donald McHenry, made the following statement:

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"The United States wishes to place on the record that the adoption of this resolution 457 (1979) by the Security Council clearly is not intended to displace peaceful efforts in other organs of the United Nations. Neither the United States nor any other Member intends that the adoption of this resolution shall have any prejudicial impact whatever on the request of the United States for the indication of provisional measures of protection by the International Court of Justice." (Mr. Owen, Agent of the United States, on 10 December 1979, CR 79/1, p. 39.)

At the first hearing held by the International Court of Justice, the President of the Court asked the Agent of the United States what resolution 457 (1979) signified. In his reply the Agent emphasized that the function of the Court was to decide and adjudge disputes on the basis of international law (CR 79/1, 37 *et seq.*).

And the Court's Order of 15 December 1979, by which interim measures of protection were indicated, in effect reiterated the appeal contained in resolution 457 (1979), and there was no discussion as to a possible incompatibility between the function of the two organs.

A few weeks later, on 31 December 1979, the Security Council adopted a further resolution in the same case, resolution 461 (1979), in which it referred to the Court's Order of 15 December. The discussions in the Council also referred to the Court's Order, but at no time was the question of the simultaneity of the two procedures called into question and the two organs have never conceived of parallel and simultaneous proceedings as being incompatible.

Thus, in its Judgement on the merits of 24 May 1980, the Court pronounced on the question of the simultaneous exercise by the Court and the Security Council of their respective functions. And the Court observed:

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"Whereas Article 12 of the Charter expressly forbids the General Assembly to make any recommendation with regard to a disputed situation while the Security Council is exercising its functions in respect of that dispute or situation, no such

> restriction is placed on the functioning of the Court by any provision of either the Charter or the Statute of the Court. The reasons are clear. It is for the Court, the principal judicial organ of the United Nations, to resolve any legal questions that may be in issue between Parties to a dispute; and the resolution of such legal questions by the Court may be an important, and sometimes decisive, factor in promoting the peaceful settlement of the dispute." (*I.C.J. Reports 1980*, p. 22, para. 40.)

(c) *The case concerning* Military and Paramilitary Activities in and against Nicaragua

On 4 April 1984 Nicaragua lodged a complaint with the Security Council and submitted a draft resolution corresponding to the request for interim measures of protection filed with the Court five days later. Nicaragua's draft resolution failed of adoption by reason of a negative vote on the part of the United States. But the case remained before the Court.

Before the Court the United States argued that the request for interim measures of protection was identical with the requests rejected by the Security Council as a result of the exercise of the United States veto power and that, consequently, the Court had allegedly lost all competence *ratione materiae*, inasmuch as, the United States contended, what the Court was requested to do was in effect to hear an appeal before the Court from an adverse conclusion of the Security Council.

The Court of course rejected this view, observing, in particular:

> "The argument of the United States as to the powers of the Security Council and of the Court is an attempt to transfer municipal-law concepts of separation of powers to the international plane, where these concepts are not applicable to the relations among international institutions for the settlement of disputes." (*I.C.J. Reports 1984*, p. 433, para. 92.)

The Court recalled its decision in the *Hostages* case and was

> "of the view that the fact that a matter is before the Security Council should not prevent it being dealt with by the Court and that both proceedings could be pursued *pari passu*" (*I.C.J. Reports 1984*, p. 433, para. 93).

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And now, in this same Nicaragua case, the Court examined the argument of the United States that the question raised by Nicaragua concerned an aggression or an armed conflict as envisaged by Article 39 of the Charter. In other words, according to the United States, one was within the ambit of Chapter VII of the Charter and only the Security Council would be competent. In this connection the Court observed as follows:

> "It is clear that the complaint of Nicaragua is not about an ongoing armed conflict between it and the United States, but one requiring, and indeed demanding, the peaceful settlement of disputes between the two States. Hence, it is properly brought before the principal judicial organ of the Organization for peaceful settlement." (*I.C.J. Reports 1984*, p. 434, para. 94.)

But, having held that the case did not come under Chapter VII of the Charter, the Court might have reserved its position in this regard if there had actually been a Chapter VII situation. But what did the Court say? It recalled Article 24 of the Charter and observed that that Article does not confer an *exclusive* responsibility on the Security Council. After recalling Article 12, the Court observed that "there is no similar provision anywhere in the Charter with respect to the Security Council and the Court". And there followed the famous conclusion, which is this moment today's jurisdiction of the Court:

> "The Council has functions of a political nature assigned to it, whereas the Court exercises purely judicial functions. Both organs can therefore perform their separate but complementary functions with respect to the same events." (*I.C.J. Reports 1984*, p. 435, para. 95.)

Finally, the Court took a position on the argument of the United States that Nicaragua's request for interim measures of protection would constitute an appeal from an adverse decision of the Council. In this respect the Court asserted that it was being asked "to pass judgement on certain legal aspects of a situation which has also been considered by

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the Security Council, a procedure which is entirely consonant with its position as the principal judicial organ of the United Nations" (*I.C.J. Reports 1984*, p. 436, para. 98).

It may be useful to add that these dicta of the Court did not give rise to any comment in the individual and dissenting opinions of the Judges. What we have here is, therefore, a unanimous pronouncement by the Court on a matter that, since the *Aegean Sea Continental Shelf* case, had given rise, both within the Court and in the writings of commentators, to certain doubts and reservations.

I shall now go on to state the lessons and the conclusions that can be drawn from this analysis of the relevant case-law in connection with the case now brought before the Court by Libya.

II. The functions of the Security Council and the Court and the Application of 3 March 1992

There are obvious points of difference between the present cases and the ones that have just been analysed. The differences are at two levels. In the first place the Party that has made the request before the Court, Libya, is not the same as the one that brought the matter before the Security Council. Furthermore, and this goes without saying, the request for interim measures of protection corresponds by no means to what the requesting Parties in the above-mentioned cases had sought to obtain from the Security Council.

Libya is nevertheless of the view that these dissimilarities are not such as to modify in any way the nature of the relations between the powers of the Security Council and those of the Court, as elaborated by the relevant case-law.

71 **1. Identity of the initiators**

It is not indispensable for the initiators to be the same. The only significant question is whether the procedures can be *simultaneous or parallel*.

We have answered this question. Let us now return to the content of resolution 731 (1992).

The meaning and the scope of resolution 731 (1992) of 21 January 1992 should be interpreted in the light, *primarily*, of the text of the *operative part* of the resolution, in order to ascertain exactly what the Council intended. In this process of interpretation the *travaux préparatoires* and the preamble may be resorted to in order to clarify the operative part of the resolution. The Court has made use of these elements in the *Aegean Sea Continental Shelf* and then in the *United States Diplomatic and Consular Staff in Tehran* case.

Thus, examination of resolution 731 (1992) will involve reviewing all the facts and debates that led to its adoption.

- *The text of resolution 731 (1992)*

The key passage of this resolution - a passage we have already read out several times - is the request to the Libyan Government to hand over the suspects. It is contained in paragraph 3, which runs as follows:

> "*Urges* the Libyan Government *immediately* to provide a full and effective response to those requests so as to contribute to the elimination of international terrorism."

I shall return to this specific point at a later stage of my statement. But for the moment, I wish to concentrate on *the nature of this resolution* in the context of the Charter. Does it constitute a *decision* of the Security Council within the meaning of Article 25 of the Charter, which provides that:

> "The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter"?

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This Article is not an easy one to interpret, but it goes without saying that an analysis of the text of the resolution can shed more light on the question of its binding nature.

Resolution 731 (1992) of 21 January 1992 is not and was not taken within the context of Chapter VII of the Charter; otherwise the Council would, as it has made it a practice to do since 2 August 1990, have expressly referred thereto.

Althouth in the past one might have had doubts on this score, what was the legal basis of a resolution adopted by the Council? Since 2 August 1990, the Council indicates each time, if necessary, whether a reference to Chapter VII is necessary. This was not done in resolution 731 (1992). This resolution is, hence, necessarily based on Chapter VI .

The language of the resolution does not seem to imply a *duty*. It "urges the Libyan Government ...". Furthermore, in paragraph 4 the resolution "requests the Secretary-General to seek the co-operation of the Libyan Government ...", and, in paragraph 5, the Council "urges all States individually and collectively to encourage the Libyan Government to respond fully and effectively to these requests"

It is not possible to infer from this language the existence of a firm obligation to surrender the suspects to the courts of a foreign country.

What conclusions can one draw from the discussions within the Security Council?

- *The discussions within the Security Council*:

All we have available is, obviously, the statements made during the 3033rd meeting of the Security Council, at which resolution 731 (1992) was adopted on 21 January 1992. But it appears from the records that important consultations preceded the formal meeting and that certain members of the Council advanced very serious and basic legal arguments which are reflected in the statements but not mentioned at all in the resolution.

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The records that are among the documents we have made available to the Court reveal several things that are of importance to a judge and a lawyer:

1. The Council was perfectly well aware of the legal questions concerning the interpretation and application of the 1971 Montreal Convention;

2. The Council knew perfectly well that there existed serious problems concerning the requests for the surrender of the suspects with regard to the principle *aut dedere aut judicare*, adopted in the 1971 Convention, as well as in regard to the principles of international law concerning extradition.

3. It was possible to adopt resolution 731 (1992) unanimously only because the Members saw it as manifesting a general tendency within the United Nations and the Council, in particular, against international terrorism, a tendency that is entirely commendable and consistent with the policy of Libya.

4. A minority within the Council was - but without being able to substantiate its claim - of the view that the question transcended the problem of the 1971 Montreal Convention inasmuch as the accused were allegedly agents of the Libyan Government acting in the name and on behalf of the State. This would involve the responsibility of the State and would, hence, rule out the applicability of the Montreal Convention.

74 5. Several Members of the Security Council stated that that resolution should not constitute a precedent. This is obviously contradicted by the intention of the initiators of the resolution, who unquestionably wished to establish a new principle in the area of international criminal law by suppressing the principle of universal jurisdiction.

6. A close look at the debates of the Security Council also reveals a most interesting point. The point relates to paragraph 4 of resolution 731 (1992), by which the Secretary-General is requested: "to seek the co-operation of the Libyan Government to provide a full and effective response to those requests". Well, some Members of the Council considered that the Secretary-General should in fact persuade the Libyan Governments to consent to the surrender of the suspects not to the United Kingdom or the United States, but to a neutral court, either one of a neutral country, or an international criminal court. These States members of the Security Council were thus of the view that the solution was not to surrender or hand over the suspects to American or British courts.

It can be concluded from this that the unanimous vote by which resolution 731 (1992) was adopted therefore conceals many reservations and considerations of a legal nature, particularly as regards the application of the Montreal Convention and the principle *aut dedere aut judicare*.

- *The interpretation of paragraph 3 of resolution 731 (1992)*

I wish now to revert briefly to the provision of paragraph 3 of resolution 731 (1992) urging "the Libyan Government immediately to provide a full and effective response to those requests ...".

These requests - now we know what they are - are:

(*a*) that the suspects should be surrendered to the judicial authorities of the United Kingdom and the United States;

(*b*) In document S/23308, which also requests their surrender.

75 At this stage of the proceedings before the International Court of Justice, which relate to the request for interim measures of protection, it is probably premature to discuss the merits of the case. But it seems

to me that, for all practical purposes, the requirement that the accused be surrendered amounts - there can be no doubt in your minds about this - to the extradition by Libya of its own nationals.

But, as my predecessors pointed out to you, the 1971 Montreal Convention provides for the jurisdiction of the State in the territory of which the suspects are found. The jurisdiction of the Libyan courts is, therefore, unquestionable and judicial proceedings are in progress in Libya. And the exercise of such criminal jurisdiction is a sovereign right of that State.

It seems to us that the possible surrender of the suspects should be considered in the light of the law in force. But, as regards the repression of international terrorism, international law rests on the principle *aut dedere aut judicare*. There is, therefore, no obligation in international law to surrender nationals in the absence of specific extradition agreements, which did not exist in the present case.

The focus must therefore be on the jurisdiction of the State where the accused find themselves. The State of Libya has the sovereign right to try its own nationals. This principle is confirmed by the Montreal Convention. It is obvious that any action, whether it takes the form of intimidations, threat or use of force in order to compel a State to surrender its nationals, would even constitute a serious threat to the peace.

The interim measures of protection we are requesting have no other object than to preserve the rights of the Party requesting them with respect to the merits of the case. These rights concern precisely the power to prosecute and exercise criminal jurisdiction over its own nationals. Impairment of this right, which is the subject of the present request, would cause irreparable damage since it would, as a result of

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actions, pressures, threats and intervention of all kinds, compel the Applicant to relinquish forever its right to prosecute its own nationals.

Mr. President, the points I have made have emphasized the possibility of simultaneous and parallel action before the Security Council and before the Court. The latter should examine the situation in the light of existing international law.

In our request for provisional measures we have asked the Court to hold that the Respondents should refrain from taking any action that could irreparably impair Libya's right to have its nationals prosecuted by its own judicial organs. The attempt made by the Respondents to bring this conflict within the ambit of Chapter VII of the Charter and to take steps within the Security Council with a view to the taking of collective action against Libya is such as to jeopardize the rights of Libya. Without denying the Security Council's right to deal with this matter within the framework of Chapter VI, Libya requests the Court to order the Respondents to refrain from taking any initiative within the Security Council for the purpose of impairing the right to exercise jurisdiction that Libya asks the Court to recognize.

- In closing, I wish to revert briefly to the argument made by the Respondents, in the debates in the Security Council on 21 January 1992, that the Lockerbie case is a *sui generis* one since it involves the struggle against international terrorism.

77 - On 9 December 1991, the United Nations General Assembly adopted without a vote resolution 46/51, entitled "Measures to eliminate international terrorism".

In that resolution the General Assembly begins by recalling the existing international conventions concerning various aspects of the problem of international terrorism and mentions *ten conventions*

concluded since the adoption of the 1963 Tokyo Convention up until the adoption of the Convention on the Marking of Plastic Explosives for the Purpose of Detection, done at Montreal on 1 March 1991.

Allow me to describe some of the salient characteristics of this resolution.

In the first place, the General Assembly refers in the resolution to terrorism in general - international terrorism - and to the act of terrorism in all its forms. Secondly, the General Assembly expresses its conviction that if States were to fulfil effectively the obligation imposed on them by the international conventions to ensure that the necessary measures are taken, considerable progress would be made in the struggle against terrorism. Thirdly, and this, with your permission, Mr. President, is something I can talk about from my personal experience because, 20 years ago I presided over the Sixth Committee of the General Assembly where, for the first time, the question of terrorism was discussed, 20 years later the General Assembly adopted a preambular paragraph reading as follows:

> "*Recognizing* that the effectiveness of the struggle against terrorism could be enhanced by the establishment of a generally agreed definition of international terrorism."

And finally in the operative part of the resolution the Assembly states that States should fulfil the following obligations and should, for that purpose, seek to apprehend, prosecute or extradite the perpetrators of terrorist acts.

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At this moment these ten conventions constitute the code of international law concerning the elimination of international terrorism. What right does the Security Council have to ignore this important result of work done during the last 30 years to develop international law? What is it that inspires the Respondents with the idea of claiming that

the 1971 Montreal Convention - which is part of this Decalogue of the General Assembly - is not to be applied? How do these Parties dare maintain that from now on the struggle against international terrorism is no longer within the framework of the provisions of international law that have been specifically adopted to that end and that this series of ten conventions is no longer to be applied?

All this confirms that the Security Council acted as a political organ and that it deliberately set aside any consideration of the legal aspects of the matter.

The Respondents seem to believe that henceforth, within the framework of a new international order, the old rules have been transcended and that it is for the Council and only for it to take charge of eliminating international terrorism. This is in marked contrast to the position of the General Assembly. It also contrasts sharply with the position taken by the Respondents during the discussion of the draft resolution that was to become resolution 731 (1992), during which they stated that this draft - or this resolution, would not constitute a precedent.

But it clearly appears that resolution 731 (1992) was indeed a precedent and an unfortunate one since, in the draft resolution now circulating among the members of the Council, it is stated that refusal to extradite the accused constitutes a threat to international peace and security on the part of Libya that justifies resort to Chapter VII of the Charter.

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And what role is played in all this by positive international law, which has been codified in ten Conventions? In the exercise of its judicial function the Court can only apply the law in force. It may not create new law. This is the task of the members of the international

community, that is, of States, a task they carry out through their practice and therefore by means of precedents that are accepted as being the expression of law. A single precedent - which, I might add, claims not to be one! - could not, I do not know in how many days since the adoption of resolution 46/51 of 9 December 1991, modify, by, as it were, the wave of some magic wand, a legal system set in place to combat terrorism.

It may well be true that on account of many factors and events that have occurred in the international sphere over a period of time hardly longer than the last two years, world order tends to change. It can therefore not be ruled out that international law will follow that movement. But Libya has, for its part, advocated in that context the creation of an international body charged with examining the charges and the evidence against the accused. Within the General Assembly and the International Law Commission the question is being studied of the creation of an international criminal court. But we know that this process is a long drawn-out one. We also know that the role of the Court is to apply the existing law. Its contribution to the development of international law is, moreover, well known and appreciated. But this contribution must remain within the context of a practice that is clearly established and generally accepted by States. The proclamation by the international Community's political organ par excellence of a new policy does not by itself justify the abandonment by the principal judicial organ of that community of its role as the guardian of international law.

I thank you, Mr. President, Members of the Court, and beg your pardon for having made a statement that went on for too long.

Le VICE-PRESIDENT, faisant fonction de Président. Merci, Monsieur Suy. Il semble que l'exposé initial des thèse de la Libye soit terminé. On me dit que, dans l'affaire "contre le Royaume-Uni" l'agent du défendeur sera prêt à 15 heures, cet après-midi à commencer l'exposé des arguments de son gouvernement. La Cour va donc se retirer, pour se réunir de nouveau à 15 heures.

The Court rose at 1.30 p.m.
