Non-Corrigé
Uncorrected

Traduction
Translation

CR 92/5 (traduction)
CR 92/5 (translation)

samedi 28 mars 1992
Saturday 28 March 1992

008 Le VICE-PRESIDENT faisant fonction de PRESIDENT : La Cour doit entendre ce matin la réplique de la Jamahiriya arabe libyenne aux déclarations faites par le Royaume-Uni et les Etats-Unis dans chaque affaire respectivement. Je donne donc maintenant la parole à S.Exc. M. Al-Faitouri, agent de la Libye.

M. AL-FAITOURI : Monsieur le Président, Messieurs de la Cour. Sans vouloir retenir très longtemps l'attention de la Cour, je vous prie de bien vouloir accorder la parole à notre conseil, M. Brownlie.

Le VICE-PRESIDENT faisant fonction de PRESIDENT : Je donne la parole à M. Brownlie.

M. BROWNLIE : Monsieur le Président et Messieurs de la Cour, je me propose, au deuxième tour, de traiter de trois questions : le caractère général de l'argumentation présentée au nom des Etats défendeurs, les menaces de recours à la force proférées contre la Libye par les Etats défendeurs, et certains aspects des conditions dans lesquelles des mesures conservatoires peuvent être indiquées.

Avant d'aborder cet ordre du jour, je voudrais tout d'abord récapituler les questions qui se posent dans la présente affaire.

Premièrement, il y a un différend entre la Libye, d'une part, et les Etats défendeurs, d'autre part. Ce différend a divers aspects dont certains sont probablement politiques mais dont d'autres sont certainement juridiques. Les aspects juridiques sont basés sur la convention de Montréal et sont exposés clairement dans la lettre en date du 17 janvier 1992 (pièce n° 23/annexe) qui a été adressée au nom de la Libye au secrétaire d'Etat des Etats-Unis et au ministre des affaires étrangères du Royaume-Uni.

Deuxièmement, les Etats défendeurs ont insisté que deux ressortissants libyens leur soient livrés, pour des motifs qui ne sont pas reconnus par le droit international général et qui sont incompatibles avec les dispositions de la convention de Montréal.

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Troisièmement, l'insistance ainsi mise sur une procédure en dehors des formes légales concernant la remise des intéressés s'est accompagnée et continue de s'accompagner d'une série de menaces systématiques de recourir à la force.

Quatrièmement, cette série de menaces systématiques n'est justifiée par le texte d'aucune résolution du Conseil de sécurité et a eu et continue d'avoir un caractère essentiellement bilatéral.

Cinquièmement, comme bien d'autres Etats, la Libye a saisi la Cour en invoquant des procédures standard et en se fondant sur une clause compromissoire d'un traité, comme les Etats-Unis l'ont fait dans l'affaire du *Personnel diplomatique et consulaire des Etats-Unis à Téhéran* et comme le Nicaragua l'a fait dans la procédure intentée contre les Etats-Unis en 1984.

Par conséquent, Monsieur le Président, la procédure a un caractère parfaitement normal et l'Etat requérant est un Etat qui a eu recours à la Cour à plusieurs occasions depuis son indépendance.

Il est indubitable que ce différend juridique a certaines ramifications politiques, mais cela est sans rapport avec la justiciabilité des questions de droit. Comme la Cour l'a déclaré dans l'affaire du *Personnel diplomatique et consulaire des Etats-Unis à Téhéran* :

> "aucune disposition du Statut ou du Règlement ne lui [la Cour] interdit de se saisir d'un aspect du différend pour la simple raison que ce différend comporterait d'autres aspects, si importants soient-ils" (*C.I.J. Recueil 1980*, par. 36).

En outre, la Cour a déclaré ce qui suit :

"Nul n'a cependant jamais prétendu que, parce qu'un différend juridique soumis à la Cour ne constitue qu'un aspect d'un différend politique, la Cour doit se refuser à résoudre dans l'intérêt des parties les questions juridiques qui les opposent." (*Ibid.*, par. 37.)

Le caractère général de l'argumentation présentée par les Etats défendeurs

Les aspects juridiques et judiciaires des questions qui se posent ne sont aucunement exceptionnels dans la présente affaire, et les Etats-Unis et le Royaume-Uni adoptent aujourd'hui des positions semblables à celles qu'a rejetées la Cour dans l'affaire du *Personnel diplomatique et consulaire des Etats-Unis à Téhéran*.

010 Etant donné la réalité du différend juridique exposé dans les pièces soumises à la Cour, les plaidoiries faites au nom des Etats défendeurs semblent, très franchement, sans rapport avec la réalité.

Et ce manque de rapport avec la réalité présente plusieurs aspects.

Le principal d'entre eux est peut-être l'accent qui est mis sur l'attaque dirigée contre le vol 103 de la PanAm.

Tant le Solicitor-General que M. Kreczko, pour les Etats-Unis, ont insisté sur les faits et ont mis en relief le nombre de victimes, leur nationalité et combien d'entre elles étaient des enfants.

Cet acte atroce a été rappelé dans tous ses détails et M. Kreczko a dit qu'il "constituait une violation flagrante d'un droit fondamental de la personne humaine, à savoir le droit à la vie".

L'on a également exposé à la Cour les raisons pour lesquelles il fallait poursuivre deux suspects de nationalité libyenne, telles que ces raisons sont conçues par les personnalités officielles britanniques et américaines.

Les questions juridiques qui se posent à la Cour dans le contexte des critères auxquels doit répondre une indication de mesures conservatoires ont trait à l'interprétation de la convention de Montréal.

La question qui se pose n'est pas celle de la responsabilité personnelle des deux suspects, mais plutôt des procédures juridictionnelles suivant lesquelles cette responsabilité doit être déterminée.

Et c'est là, Monsieur le Président, un autre aspect de ce manque de rapport avec la réalité.

La question de la responsabilité des morts de Lockerbie n'a pas encore été déterminée, et les autorités américaines ont, depuis 1988, manifesté des préférences changeantes quant aux candidats qui devraient endosser cette responsabilité.

Dans ce contexte, la tentative que font les Etats défendeurs de s'ériger en autorité morale est des plus contestables. En effet, Monsieur le Président, aucun doute ne subsiste quant à la responsabilité des raids aériens dirigés contre Tripoli et Benghazi en avril 1986.

011 Ces attaques étaient totalement injustifiées, et l'excuse invoquée à cette fin s'est avérée depuis lors dépourvue de fondement. Cette action, appuyée par le Royaume-Uni, a causé un grand nombre de morts, dont des enfants. Pour reprendre les termes employés hier par M. Williamson, ces attaques ont été "des violations flagrantes et obscènes du droit international".

Mais ces gouvernements n'ont exprimé aucun regret, n'ont payé aucune indemnité comme demandé par l'Assemblée générale, n'ont pas offert de traduire en justice ceux qui avaient organisé les raids.

Le manque de rapport avec la réalité, ici, provient d'une certaine confusion morale, à Londres et à Washington, tenant à la distinction arbitraire qui est faite entre le terrorisme et d'autres formes d'atrocités internationales. Des bombardements par des aéronefs militaires semblent avoir un caractère moral qui fait défaut dans le cas d'autres formes de recours à la violence politique.

Monsieur le Président, les victimes des raids aériens de 1986 n'avaient pas le bénéfice de la présomption d'innocence dont a parlé avec tant d'éloquence hier le conseil des Etats-Unis.

Les victimes ont été la cible d'un acte unilatéral de représailles pour un incident qui s'était produit à Berlin et qui a ultérieurement été imputé à une organisation n'ayant aucun lien avec la Libye.

012 Cela étant, la Libye est aujourd'hui accusée - comme l'a apparemment fait le Gouvernement des Etats-Unis lors d'une conférence presse qui a eu lieu hier - d'invoquer les dispositions d'une convention internationale et d'avoir saisi la Cour. Par ailleurs, la Libye a été informée par le conseil du Royaume-Uni dans la présente affaire que les droits dont elle demande la protection sont "illusoires".

En outre, l'on a dit à la Cour que les questions en jeu ont été soumises au Conseil de sécurité, ce qui impose des limites à la compétence de la Cour. Indépendamment d'autres considérations dont parlera M. Suy, il y a une bonne raison pratique pour laquelle cet organe politique ne saurait se substituer au principal organe judiciaire de l'Organisation des Nations Unies.

Lorsqu'un Etat en litige avec un membre permanent du Conseil comparaît devant ce dernier en tant que plaignant, que peut-il se passer ? L'Etat défendeur peut faire usage de son droit de veto. Il se peut même que ledit Etat ait peine à convaincre le Conseil de se réunir. Or, en 1986, la majorité des Etats à l'Assemblée-générale, y compris 29 Etats d'Afrique, dont, par exemple, l'Algérie et le Nigéria, ont condamné "l'attaque militaire" perpétrée contre la Libye, en tant que "violation de la Charte des Nations Unies et du droit international" (pièce n° 4 de la Libye).

La série systématique de menaces de recours à la force

La façon dont les Etats défendeurs traitent tous les éléments de preuve concernant les menaces de recourir à la force contre la Libye contribue aussi à ce manque de rapport avec la réalité.

Les représentants du Royaume-Uni et des Etats-Unis ont prétendu n'avoir jamais entendu parler des menaces dirigées contre la Libye avant jeudi matin. En outre, l'on constate un refus manifeste de prendre les éléments de preuve au sérieux.

013 Et c'est sur cette base que le conseil du Royaume-Uni a soutenu qu'il n'y avait "en fait" pas urgence (CR 92/3, p. 54).

Les preuves des menaces

Dans ma plaidoirie de jeudi, j'ai produit six éléments de preuve des menaces de recours à la force proférées contre la Libye en citant directement différentes déclarations de personnalités officielles.

Et, avec tout le respect que je dois au conseil du Royaume-Uni, j'ai cité intégralement la déclaration faite par le ministre d'Etat de ce pays (CR 92/2, p. 34).

Ce que je veux souligner, Monsieur le Président, c'est que la réponse des Etats défendeurs face à ces éléments de preuve est misérablement déficiente.

Les preuves de la constance des formules utilisées n'ont pas été réfutées, simplement parce que cette question n'a pas été associée à celle de l'existence d'une attitude systématique et d'une formulation commune. Ainsi, la phrase "je n'ai adopté ni exclu aucune solution" utilisée par M. Douglas Hogg a été employée par le président Bush le 19 novembre 1991, reprise par M. Cheney le 15 décembre, utilisée à nouveau par M. Hogg dans sa réponse à la Chambre des communes le 20 janvier et reprise encore une fois par une porte-parole du Foreign Office le 18 février, et ce n'est pas un accident.

Cette formulation reflète une politique concertée, une politique commune. Elle n'est pas le résultat d'un hasard.

Et cette formule a été utilisée par M. Bush dans un contexte tel que la force était manifestement au nombre des options envisagées, qui comprenaient les "mesures de rétorsion".

Aucun des Etats défendeurs n'a contesté ces déclarations en tant que telles, mais seulement leur interprétation.

En outre, les conseils des deux Etats semblent n'avoir absolument pas compris la valeur probante de déclarations faites publiquement par des personnalités officielles en tant qu'aveu contraire à leurs intérêts et en tant que preuve de leurs intentions. Cela ne peut certainement pas être attaqué sur la base du droit de la preuve.

014 En outre, il existe une certaine confusion. La Libye n'a pas cherché à établir que des personnalités officielles ont *promis* de recourir à la force mais seulement qu'il y a des preuves que l'on a menacé de recourir à la force au cas où cela serait nécessaire pour obtenir qu'il soit donné suite aux "*demandes*" des Etats défendeurs.

Il n'est pas inutile de rappeler que le concept juridique de menace a été défini comme suit dans une monographie publiée en 1963 :

> "Une menace de recours à la force est une promesse expresse ou implicite, de la part d'un gouvernement, d'employer la force si certaines de ses exigences ne sont pas acceptées." (Brownlie, *International Law and the Use of Force by States*, Oxford, 1963, p. 364.)

Aussi importe-t-il peu que M. Schwartz rappelle que M. Quayle, selon le *Washington Times*, a déclaré ce qui suit :

> "Le vice-président a refusé de spécifier les mesures qui seraient adoptées et a souligné qu'il ne disait pas que les Etats-Unis envisageaient de recourir à la force militaire." (Pièce n° 40 de la Libye."

Le fait demeure que, faisant observer que la patience des Etats-Unis n'était pas "illimitée", M. Quayle a dit : "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 de la Libye.)

Dans les circonstances de l'espèce, cette déclaration sous-entendait que les Etats-Unis étaient disposés à recourir à la force si besoin était et, comme je l'ai fait observer lors du premier tour de plaidoirie, c'est précisément cette conclusion qu'en a tirée le *Washington Times* (pièce n° 40 de la Libye).

Soit M. Quayle se référait (dans un contexte libyen) aux raids aériens de 1986, soit, peut-être, il se référait au fait que les Etats-Unis s'étaient montrés disposés à envahir et à occuper le Panama pour y appréhender un chef d'Etat à la suite d'accusations formulées par des agents du ministère public aux Etats-Unis.

D'une façon générale, les conseils des Etats défendeurs ont manifesté une insouciance surprenant face aux déclarations faites publiquement par le Président et par le Vice-Président des Etats-Unis.

015 Des personnes occupant de telles positions doivent, me semble-t-il, être présumées vouloir dire ce qu'elles disent et exprimer une position politique bien arrêtée. D'autant plus que les déclarations en question utilisent une formule précise qui a été répétée pendant une période de trois mois par différentes personnalités de deux pays différents.

Il me semble aussi que si l'on veut analyser en détail les éléments qui prouvent l'existence de menaces, il faut aussi tenir compte de toutes les circonstances pertinentes.

Sans vouloir trop s'étendre sur ce point, l'on peut raisonnablement dire que les circonstances pertinentes et les facteurs en jeu sont les suivants :

a) D'une façon générale, l'historique des relations entre les Etats-Unis et la Libye, particulièrement depuis 1978. A maintes occasions, les Etats-Unis se se montrés disposés à avoir recours à des

démonstrations navales et à employer la force pour imposer leurs vues touchant différents aspects du droit de la mer. Parmi les actes hostiles dirigés contre la Libye, l'on peut citer les complots visant à renverser le Gouvernement libyen, des manoeuvres navales et les incursions d'aéronefs militaires dans l'espace aérien de la Libye.

b) La présence persistance de la Sixième Flotte dans le centre de la Méditerranée.

c) L'utilisation de la Sixième Flotte, ainsi que de bases au Royaume-Uni, en vue des attaques aériennes de 1986. Une bonne part de ces attaques aériennes ont été menées par des appareils basés sur les porte-avions *America* et *Coral Sea*.

d) Le fait que, depuis 1986, le Gouvernement et les dirigeants, tant à Londres qu'à Washington, sont demeurés essentiellement les mêmes.

En conclusion, Monsieur le Président, tous ces éléments doivent être considérés ensemble, et le critère global doit être le suivant :

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> "Quel serait normalement l'effet de telles déclarations et d'un tel comportement d'une super Puissance et d'un important allié militaire dans les circonstances ?"

Ces circonstances seraient notamment la nature du rapport de force entre la Libye, d'une part, et les Etats-Unis et le Royaume-Uni agissant de concert, de l'autre.

A cet important facteur, il faut ajouter la nature du langage employé par les Gouvernements des Etats-Unis et du Royaume-Uni depuis novembre de l'an dernier.

L'un des premiers exemples du ton péremptoire qui a été utilisé se trouve dans la déclaration conjointe publiée par les deux gouvernements le 27 novembre 1991 :

> "Les Gouvernements britannique et américain déclarent ce jour que le Gouvernement libyen doit :

- livrer, afin qu'ils soient traduits en justice, tous ceux qui sont accusés de ce crime et assumer la responsabilité des agissements des agents libyens;

- divulguer tous les renseignements en sa possession sur ce crime, y compris les noms de tous les responsables, et permettre le libre accès à tous les témoins, documents et autres preuves matérielles, y compris tous les dispostifs d'horlogerie restants;

- verser des indemnités appropriées.

Nous comptons que la Libye remplira ses obligations promptement et sans aucune réserve."

Dans le langage diplomatique, cette déclaration est réellement péremptoire et est postérieure aux déclarations de personnalités officielles américaines dont la seule interprétation raisonnable est qu'elles avaient pour but de laisser ouverte l'option militaire.

Par la suite, les Etats défendeurs ont habituellement utilisé l'expression "demandes" dans leurs rapports avec le Gouvernement libyen et en ce qui concerne la remise des deux ressortissants libyens.

017 La déclaration conjointe du 27 novembre 1991, bien que brève, contient trois fois le mot "demandes" (pièce n° 18, annexe, de la Libye).

Il est intéressant de noter aussi que même dans le climat relativement édulcorant des présentes audiences, le Solicitor-General de l'Ecosse a parlé des "demandes formulées par le Royaume-Uni" (CR 92/3, p. 24).

Il y a lieu de souligner, Monsieur le Président, que cette attitude systématique de coercition bilatérale, liée aux "demandes" adressées à Libye, précède toute démarche auprès du Conseil de sécurité et n'a été légitimée par aucune résolution.

M. Schwartz a cité deux déclarations libyennes exprimant un doute quant à l'éventualité que la crise débouche effectivement sur un conflit. Je tiens à dire, au nom de la Libye, que de telles déclarations

non seulement sont tout à fait compatibles avec l'existence d'une coercition, mais encore prouvent que les autorités libyennes sont conscientes du fait que le recours à la force est à l'ordre du jour.

L'illicéité des menaces en droit international général

J'en ainsi terminé, Monsieur le Président, avec mon rappel des preuves de la coercition systématique exercée sur la Libye sur une base bilatérale pour obtenir la remise, en dehors des formes légales, de deux ressortissants libyens.

Avant d'en finir avec cette question, toutefois, je tiens à déclarer, au nom du Gouvernement libyen, que la menace de recourir à la force est contraire aux principes de la Charte des Nations Unies et, pour autant qu'ils soient distincts, aux principes du droit international coutumier ou général. Les références évidentes sont notamment l'article 2, paragraphe 4, de la Charte des Nations Unies et le premier des principes énoncés dans la *Déclaration des principes du droit international touchant les relations amicales entre les Etats* figurant dans la résolution 2625 (XXV) de l'Assemblée générale, qui est une interprétation de la Charte faisant autorité. L'on trouve également des références à cet effet, je regrette de le dire, dans un ouvrage publié par la personne qui vous parle en 1963 (Brownlie, *International Law and*

018 *the Use of Force by States*, 1963, p. 364-365) et, plus récemment, dans un excellent et très complet article publié par Romana Sadurska dans l'*American Journal of International Law*, vol. 82 (1988), p. 239-268.

L'illicéité des menaces conduit à présumer sans avoir guère de chance de se tromper qu'aucune mesure du Conseil de sécurité ne pourrait avoir pour but de légitimer *ex post facto* ou *ex nunc* l'exercice d'une coercition bilatérale.

Dans ce contexte, il convient de rappeler que l'article 2 de la Charte stipule que l'Organisation (ainsi que ses Membres) doivent agir conformément aux principes énoncés dans la Charte.

Les conditions dans lesquelles des mesures conservatoires sont indiquées

Dans la déclaration que j'ai faite lors du premier tour de plaidoirie, j'ai donné la Cour un aperçu général des critères en fonction desquels des mesures conservatoires sont soit indiquées, soit refusées (CR 92/2, p. 17-31). Certes, le conseil d'un Etat requérant peut tendre à mettre en relief les aspects les plus souples de ces critères, mais j'ai néanmoins essayé d'en donner à la Cour un exposé relativement objectif.

Il n'y a pas lieu de le répéter, de sorte que je me bornerai à commenter certains des points soulevés par les conseils des Etats défendeurs.

Le conseil du Royaume-Uni a soutenu que les droits que la Libye souhaitait voir protéger étaient "illusoires". Mon collègue, M. Salmon, répondra à cette prétention.

Par la suite, il a été dit que la Libye n'avait établi aucun lien entre les droits devant être protégés et les mesures conservatoires demandées (CR 92/3, p. 44-48). Ce que cela signifie, c'est simplement que les mesures demandées doivent être en rapport avec l'objet du différend.

Cela n'est pas controversé. Toutefois, le conseil du Royaume-Uni confond ce principe et la question différente de savoir ce qui est nécessaire pour éviter qu'un préjudice, un préjudice irréparable, soit causé aux droits qui font l'objet du différend quant au fond.

019 Dans la présente affaire, c'est la politique de pressions et de coercition qui menace directement les droits de la Libye en vertu de la convention de Montréal. Ainsi, les mesures demandées reflètent très naturellement les droits en cause et la forme d'ingérence dont il s'agit.

Il n'y a là qu'une question de bon sens. La référence faite par le conseil du Royaume-Uni à l'affaire du *Plateau continental de la*

mer Egée est sans aucun rapport avec la question car les mesures militaires visées n'avaient pas trait à l'objet du différend. La présente affaire offre à cet égard un contraste marqué.

Dans l'affaire du *Plateau continental de la mer Egée*, les mesures militaires ne pouvaient pas affecter les droits sur le plateau continental revendiqués par la Grèce. Dans la présente affaire, si les deux suspects sont remis sous la coercition, les droits de la Libye en matière de juridiction se trouvent lésés de façon irréparable. La situation est tout à fait différente.

Dans le contexte de ce critère aussi, l'on a fait valoir au nom du Royaume-Uni qu'il n'y avait aucun risque quun préjudice irréparable soit causé aux droits en question (CR 92/3, p. 49-53).

Je tiens à faire observer respectueusement que l'on comprend difficilement comment la remise de deux nationaux en dehors des formes légales sous l'effet de menaces illégales de recourir à la force pourrait ne pas constituer un préjudice irréparable.

L'on a dit aussi au nom du Royaume-Uni que l'urgence est une condition de fond à l'indication de mesures conservatoires (CR 92/3, p. 54-56). Cette affirmation ne me semble pas confirmée par les sources.

En ce qui concerne l'urgence, la condition indiquée dans l'ordonnance rendue dans l'affaire du *Passage par le Grand-Belt* (CR 92/2, p. 31) est certainement remplie en l'occurrence. Il y a donc urgence en ce sens qu'"il est probable qu'une action préjudiciable aux droits de l'une ou de l'autre partie sera commise" avant la décision quant au fond.

020 Par ailleurs, l'on a dit au nom du Royaume-Uni que les mesures conservatoires demandées par la Libye manquaient de précision (CR 92/3, p. 58-61). Cet argument est dépourvu de substance.

Vu la nature de la menace qui pèse sur les droits de la Libye, les mesures demandées sont appropriées. *Mutatis mutandis*, elles sont semblables à celles demandées dans l'affaire des *Activités militaires et paramilitaires au Nicaragua et contre celui-ci (Nicaragua c. Etats-Unis d'Amérique), C.I.J. Recueil 1984*, p. 169. Dans la présente affaire, nous sommes confrontés à des menaces et les mesures demandées reflètent cette circonstance particulière.

Il y a une dernière considération qui doit intervenir pour déterminer s'il convient ou non d'indiquer des mesures conservatoires. Les circonstances de la présente demande peuvent être comparées aux affaires dans lesquelles la Cour a décidé de ne pas exercer le pouvoir que lui confère l'article 41 du Statut.

Il faut tout d'abord mettre de côté les décisions clairement basées sur l'irrecevabilité de la demande, en ce sens par exemple que les mesures demandées auraient préjugé clairement du fond (*Réforme agraire polonaise, C.P.J.I. série A/B n° 58*) ou parce que les mesures demandées étaient sans rapport avec les droits faisant l'objet de l'action au fond dont la Cour était saisie (*Sentence arbitrale du 31 juillet 1989, C.I.J. Recueil 1990*, p. 64, par. 26).

Deuxièmement, la présente affaire n'a aucune similitude avec les demandes qui ont été rejetées pour le motif que le comportement incriminé ne pouvait aucunement porter préjudice aux droits en cause. Je pense ici à l'affaire du *Sud-est du Groenland* (*C.P.J.I. série A/B n° 48*, p. 287-288) ainsi qu'à l'ordonnance rendue dans l'affaire du *Passage par le Grand-Belt, C.I.J. Recueil 1991*, p. 19, par. 31-32).

021 L'affaire du *Passage par le Grand-Belt* constitue un cas particulier aussi eu égard au rôle joué par certaines assurances données par le Danemark, auxquelles la Cour a attaché de l'importance (*ibid.*, p. 17, par. 24; p. 18, par.27).

Cela laisse les ordonnances rendues dans l'affaire de l'*Interhandel* et dans l'affaire du *Plateau continental de la mer Egée*.

Dans la première de ces affaires, l'affaire de l'*Interhandel*, les questions concernant le préjudice avaient été subordonnées à l'issue de la procédure qui avait été reprise devant les tribunaux des Etats-Unis (*C.I.J. Recueil 1957*, p. 105).

L'ordonnance rendue dans l'affaire du *Plateau continental de la mer Egée* était basée en partie sur le raisonnement qu'alors même que les activités d'exploration sismiques turques risquaient de porter préjudice aux droits de la Grèce, il n'y avait pas de risque de "préjudice irréparable". La Cour a fait observer que le droit revendiqué par la Grèce, c'est-à-dire le droit de recueillir des renseignements sur les ressources du plateau continental pourrait "donner lieu à une réparation appropriée" (*C.I.J. Recueil 1976*, p. 11, par. 32-33). (Et l'on trouve aussi une référence semblable dans l'ordonnance rendue dans l'affaire du *Passage par le Grand-Belt*, *C.I.J. Recueil 1991*, p. 19, par. 31.)

022 Dans la présente affaire, il est parfaitement clair que les mesures que peut ordonner la Cour ne pourraient aucunement réparer l'usurpation de droits juridictionnels tentée par les Etats défendeurs. Il est clair que l'application des dispositions de la convention de Montréal ne peut pas être reconstituée après coup. Il n'y a pas de parallèle non plus avec les activités d'exploration sismiques dans l'affaire du *Plateau continental de la mer Egée* ou avec l'ouvrage fixe envisagé à travers le détroit du Grand-Belt. Dans cette dernière affaire, la Cour n'a pas exclu la possibilité d'ordonner une modification de l'ouvrage. Mais il est difficile de concevoir un tel processus de réparation en nature dans le cas de l'exercice d'une juridiction personnelle sur des individus.

J'en ai ainsi terminé, Monsieur le Président, avec mon deuxième tour de plaidoirie. Je tiens à remercier la Cour de l'amabilité et de la considération avec lesquelles elle m'a écouté, et je souhaiterais maintenant céder à la parole à mon collègue M. Salmon.

Le VICE-PRESIDENT, faisant fonction de PRESIDENT : Merci, Monsieur Brownlie. Monsieur Salmon, je vous donne la parole.

Mr. SALMON: Mr. President, Members of the Court. Before embarking on this second round, I scarcely need tell you how greatly impressed I was by the introduction of the British and American delegations on the victims of the Lockerbie bombing. I was all the more moved by it since

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the only Belgian victim was my son's best friend, a childhood friend whom we had seen grow up and whose death we learned of with dismay, sadness and outrage. This is another way of saying that, as much as anyone here, I consider that justice and the memory of the victims requires us to get to the bottom of this vile attack. Where I differ with the Respondents is in my belief that, in getting to the bottom of it and seeing that justice is done, due respect should be paid to the rules of international law.

The defence we have heard consisted in diverting the subject before the Court - a simple matter of the application of an international convention - into two areas having nothing to do with the proceedings before the Court. The first of these was to try the two accused, who are not here to defend themselves, using an impressive wealth of detail not supported by any evidence. The second and more perfidious one was to make a number of insinuations of a political nature, for the most part unproven, aimed at blackening Libya's name in order, quite apart from its legal personality, to attack the tenor of its legal argument.

Moreover, the totality of the principal thesis, which consists in presenting Libya as using the Court against the Security Council, conceals the political reality which is only too apparent: in other words, that the two Respondent Governments, who know full well that they have no legal basis in international law for demanding the extradition of the two suspects and that they are in breach of the Montreal Convention, are seeking to use the Security Council to prevent the Court from performing its task.

024 The Respondents have endeavoured, in a manner which, it must be acknowledged, was frequently intelligent and even brilliant, to spirit away the embarrassing Convention. The strategy adopted has been to restage in this Court the scenario which had enjoyed a qualified success in a political body, namely, the Security Council. The ploy is to invent a general dispute between States, which submerges the legal question before the Court. Yet there is a fundamental paradox here, for although the claim is that the problem calls into question the responsibility of a State, in concrete terms, it is the handing over of the two individuals which is demanded. The mixture of genres ruins the demonstration, since the "handing over" (I leave responsibility for this term to the authors of it) falls within the scope of the Montreal Convention.

It is international law, no doubt a more restricting and austere field than political insinuations, which I wish to discuss before the Court.

I. *Prima facie* Jurisdiction

I shall deal first with problem of the *prima facie* jurisdiction of the Court, which has been disputed using various arguments. The first of these involved the claim that there was no dispute between Applicant and Respondents.

I hesitate to tax the Court's patience by making endless quotations from its case-law, concerning the existence in law of a dispute. In the case of the German interests in Upper Silesia (*P.C.I.J., Series A, No. 6*, p. 14), where the issue was that "the attitude adopted by the other conflicts with its own views" and, moreover, that "a mere defect of form, the removal of which depends solely on the Party concerned cannot *stop* the Court".

In the *Northern Cameroons* case, the Court insisted on the opposing views of the Parties, which reveal the existence of a dispute:

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> "it is sufficient to say that, having regard to the facts already stated in this Judgment, *the opposing views of the Parties* as to the interpretation and application of relevant Articles of the Trusteeship Agreement, *reveal the existence* of a dispute in the sense recognized by the jurisprudence of the Court and of its predecessor, between the Republic of Cameroon and the United Kingdom at the date of the Application" (*Northern Cameroons, I.C.J. Reports 1963*, p. 27).

In the *South West Africa* case, the Court stated: "*that it must be shown that the claim of one Party is positively opposed by the other*" (*South West Africa, I.C.J. Reports 1962*, p. 328).

And it is no doubt in one of your recent Opinions of 26 April 1988 that the Court made a statement which perhaps comes closest to the present proceedings:

> "38. *In the view of the Court, where one Party to a Treaty protests against the behaviour or a decision of another Party, and claims that such behaviour or decision constitutes a breach of the Treaty, the mere fact that the Party accused does not advance any argument to justify its conduct under international law does not prevent the opposing attitudes of the Parties from giving rise to a dispute concerning the interpretation or application of the treaty.*" (*United Nations Headquarters Agreement, I.C.J. Reports 1988*, p. 28, para. 38.)

The existence of a dispute - in fact

It is in the light of these legal precepts that the facts need to be examined; essentially, there are two quite specific disputes, namely, determining the competent judge on the one hand and co-operation with the Libyan judges on the other.

(a) **First dispute: the competent judge**

Allow me, if you will, to recall a number of facts. On 18 November 1991 (Brit. Doc. No. 3) the Libyan General People's Committee for Justice received the request from the Procurator Fiscal MacDougall dated 13 November 1991 (Brit. Doc. No. 1). That same day, the Committee decided, pursuant to the Libyan Laws of 28 November 1953, No. 6 of 1982
026 and No. 51 of 1976, firstly, to have an investigation judge assigned by the General Assembly of the Supreme Court (which was done the dame day); secondly, to request all interested parties, in Britain and the United States, including families of victims, to submit the information and evidence in their possession, and thirdly, it affirmed its readiness to provide all the necessary facilities and co-operate with the legal authorities concerned (Lib. Doc. No. 7 and Brit. Doc. No. 3).

The Libyan authorities thus appointed immediately started their investigations.

Apparently, on 22 November 1991, the Italian Embassy, which represents the interests of the United Kingdom in Tripoli, informed the Committee for Foreign Affairs that the British authorities wished the suspects to be handed over to the British Courts, writing that:

> "It is right for the Libyan Government and its duty to surrender the named citizens to the Courts." (Brit. Doc. No. 4).

The following day, 23 November 1991, the Committe for Foreign Affairs replied to the Italian Embassy with a request to know what that meant, adding that:

"There are general principles in such situations governed by the sovereignty of countries, the principle of national independence and the conflict of laws and the conflict of jurisdiction." (Brit. Doc. No. 4.)

On 27 November, the examining magistrate took measures guaranteeing the presence of the accused to enable criminal proceedings to be instituted; their passports were confiscated.

The same day, 27 November, on the other side of the world, the United Kingdom and the United States served Libya with a veritable

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ulitimatum, which my friend and colleague Mr. Brownlie read out to you a moment ago, and which included the demand that the two suspects be surrendered to them (Lib. Doc. No. 18; S/23308).

In a statement of 2 December 1991, the Committee for Foreign Affairs clearly set out the Libyan position on the case of the two accused: Libyan law would be applied:

"2. If the issue of the incident of Pan Am flight 103 relates to the implementation of law in accordance with judicial procedures, then Libya sees that the investigation into the matters follows the law of criminal procedures issued in 1953 by way of an investigating Libyan judge, since the matter concerns Libyans. Libya accepts that judges from Britain and America participate with the Libyan judge in the investigations to make sure that the procedures are done in an unbiased and good manner. International organizations, human rights societies and the families of the victims can send observers or lawyers to attend the investigations. Those States, or any other requesting party, can look into the process of investigation. The investigating judge will take into consideration obtaining the previous investigations carried out regarding the incident including those in Scotland and the District of Columbia.

The specialized authorities in Libya will co-operate full with the Scottish and American investigators to arrive at the truth.

In addition, Libya declares its acceptance of the formation of a neutral international investigation committee to carry out that investigation." (Lib. Doc. No. 7.)

The text went on to say that, for the rest, if there was a political dispute, it concerned respect for the Charter, and that, despite this clear affirmation by the Libyan Government, which assumed jurisdiction in this case.

The demand for the suspects to be surrended and the refusal to accept Libyan jurisdiction were reiterated in the Security Council by the British and American permanent representatives (Lib. Doc. No. 24, S/PV.3033, pp. 28-80 and 104-105 of the English text); the inverse position by the Libyan permanent representative was also obviously reaffirmed. So much for the first dispute. Let us move on now to the second one.

028 *(b)* **Second dispute: co-operation with the Libyan judges**

On 27 November 1991, the Libyan investigating judge wrote to the Attorney General of Great Britain asking for the documents concerning this case to be sent (Lib. Doc. no 11).

A similar letter was sent on the same date to Foreman of the Grand Jury of the District of Columbia (Lib. Doc. No. 10).

On 4 December, the hearings of the suspects and witnesses by the investigating judge began. There were nine hearings between 16 December and 28 January, followed by another three in February.

On 29 December 1991, the examining magistrate requested a list of passengers from and to Malta during the period 5 to 12 December 1988.

Meanwhile another request for information was communicated to the United Kingdom Ministry of Justice on 14 January 1992 (Brit. Doc No. 6).

These requests never received any reply either from the United States or from United Kingdom. The United Kingdom officially acknowledged this in the following statement of 28 January 1992:

> "the Libyan authorities have made public the fact of their request that the Lord Advocate assist a Libyan judicial investigation. The Lord Advocate has made it clear that he is not prepared to co-operate in such an investigation ..." (Lib. Doc. No. 32).

Subsequently the United Kingdom and the United States were to persist in their attitude, refusing to co-operate with the Libyan

courts. No secret of this has been made by counsel of the two Parties before the Court. They have unfailingly said that their position was to refuse to co-operate with the partial Libyan judges (when I say the two Parties, I mean the two Respondents).

To claim, in such circumstances, that both in the dispute over the
029 Libyan judge and the one over co-operation with Libyan justice, we are not dealing with a the claim by one party being manifestly opposed by the other (*South West Africa, I.C.J. Reports 1962*, p. 328) or with a situation where the opposing attitude of the parties reveals the existence of a dispute (*Northern Cameroons, I.C.J. Reports 1963*, p. 27 and *Headquarters Agreement*, p. 19, para. 35) scarcely holds water. As we have seen, the Court is not formalistic in this respect.

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On 18 January 1992, the letter from the Permanent Representative, from which I read out large extracts during the sitting of 26 March (CR 92/2, p. 44) and which, with your permission, I shall refrain from quoting again here, clearly set out the Libyan positions, linking them to the specific Articles of the Montreal Convention, namely Articles 5 and 7, together with the requests for co-operation made on the basis of that Convention.

For their part, the British and American authorities were clearly careful not to provide any justification for their requests that the suspects be surrended to them. And they would have been hard pressed to do so in the absence of an extradition treaty between themselves and Libya. If they were careful to avoid invoking the Montreal Convention, the only international instrument governing relations between the

countries concerned in the field of co-operation in criminal matters, it was because they were aware that the Libyan authorities had decided to exercise their jurisdiction in conformity with that text.

The fact nevertheless remains that, whether United Kingdom counsel like it or not, it is not because they are burying their heads in the
030 sand that their relations with Libya on the matters under discussion are not founded on the Montreal Convention, since it is the only text in force between the Parties.

Hence, to maintain, as British counsel have done, that the United Kingdom had never seen claim sufficiently articulated before 3 March to enable it to decide whether there was a "positive opposition" between the two States is, therefore, a wholly artificial position (CR 92/3, p. 33).

The second argument invoked concerns Article 14(1) as basis of the Court's prima facie jurisdiction

Allow me, if you will, to read out the text of this Article, which you have as Document No. 1, again, for it is patently of fundamental importance:

> "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."

British and American counsel have pointed out that the various stages laid down by this Article have not been exhausted. In particular, the negotiation and the arbitration. For details, may I ask the Court to refer to the Libyan notes of 8 January (Lib. Doc. No. 20) and 18 January (Lib. Doc. No. 23), one of which called for negotiations and the other for arbitration. On 21 January, the proposal for arbitration was

reiterated by the Libyan Permanent Representative before the Council. He even put forward the possibility of reaching an arbitration agreement, which was not necessary, for the Article makes provision for a unilateral request. But this is symptomatic, and goes to show how anxious the Libyans were to reach agreement with the Respondents.

031 These Libyan requests for negotiation or arbitration met with an unequivocal refusal on the part of the two Respondents. In this regard the United States said that "the issue at hand is not some difference of opinion or approach that can be mediated or negotiated." In the Council the United Kingdom maintained that the Montreal Convention was altogether irrelevant, even though the Permanent Representative of Libya had recalled that at least part of the dispute that was the subject of the discussions in the Council bore on that Convention.

From the outset the Governments of the United Kingdom and the United States consistently refused to apply both the substantive and the procedural provisions of the Montreal Convention and this refusal is confirmed by all that counsel for these two Governments have maintained before the Court. Their arguments rest on a logic strangely recalling that of Lewis Caroll inasmuch as counsel for the two Governments contend at the same time that the States they represent have always refused to apply the Convention and that the Libyans have made no attempt either to negotiate or to organize an arbitration in accordance with the Convention. The Court will discuss the proper consequences from this.

Without reverting to the holdings we have cited in support of the view that it is not necessary to exhaust diplomatic negotiations (CR 92/2, Trans., pp. 48-50), I wish to bring to the attention of the Court the following additional holdings. In the *South West Africa* cases (Preliminary Objections), the Court observed that

> "the fact that a deadlock was reached in collective negotiations in the past and the further fact that both the written pleadings and oral arguments of the Parties in the present proceedings have clearly confirmed the continuance of this deadlock, compel a conclusion that no reasonable probability exists that further negotiations would lead to a settlement" (*I.C.J. Reports 1962*, p. 345).

The Court expressed its rejection of any formalistic attitude when it asserted in the same cases that

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> "in this respect it is not so much the form of negotiation that matters as the attitude and views of the Parties on the substantive issues of the question involved. So long as both sides remain adamant, and this is obvious even from the oral presentations before the Court, there is no reason to think that the dispute can be settled by further negotiations between the Parties." (*Ibid.*, p. 346.)

To borrow a view put forward by Judge Ago in his separate opinion in the Preliminary Objections phase of the case concerning *Military and Paramilitary Activities in and against Nicaragua*,

> "I am in fact convinced that prior resort to diplomatic negotiations cannot constitute an absolute requirement, to be satisfied even when the hopelessness of expecting any negotiations to succeed is clear from the state of relations between the parties, and that there is no warrant for using it as a ground for delaying the opening of arbitral or judicial proceedings when provision for recourse to them exists" (*I.C.J. Reports 1984*, pp. 515-516).

Finally, in the *Headquarters Agreement* case, the Court held that

> "taking into account the United States attitude [which denied the existence of a dispute and the Application of the Headquarters Agreement], the Secretary-General has in the circumstances exhausted such possibilities of negotiation as were open to him" (*I.C.J. Reports 1988*, p. 33).

In the present case it seems clear that, for the same reasons and given the Respondents' consistent refusal to deal with the matter in terms of the application of the 1971 Montreal Convention, Libya has exhausted the possibilities it had of bringing about negotiations. All the more so since, as is well known, diplomatic relations between the three States parties to the case have been severed: such circumstances surely do not provide an ideal framework for negotiations.

I come now to *the question of the six-month time-limit*, a matter with regard to which my reaction is no doubt awaited with some impatience.

As interpreted by counsel for the United Kingdom and the United States, Article 14, paragraph 1, forbids the filing of an 033 application with the Court before six months have elapsed since the first request for arbitration was made. This position is difficult to reconcile with the attitude of the Respondents, which, as I have already recalled, have consistently opposed a *non volumus* and a *non possumus* to the Libyan proposals for arbitration. This categorical refusal deprives of any object the temporal prerequisite that the Respondents derive from Article 14, paragraph 1. It is obvious that a procedural requirement, such as the one imposed by a time-limit, must be fulfilled only if it serves some purpose. International case-law adopted this principle long ago, for instance by holding, in a line of cases, that it was necessary for local remedies to be exhausted only if they presented a sufficient degree of effectiveness (cases of the *Finnish Vessels*, *RIAA*, Vol. III, pp. 1495 *et seq.*; Brown, *ibid.*, Vol. IV, p. 120; *Central Rodhope Forests*, *ibid.*, Vol. III, pp. 1420 and *S.S. Lisman*, *ibid.*, Vol. III, p. 1790). As pointed out succinctly by Judge Ago, "a remedy should not be used unless it holds out real prospects of success" (Commentary on Article 22 of the draft Articles on State responsibility, 1977 *Yearbook of the International Law Commission*, Vol. II, Part II, pp. 47-48).

The United States has itself subscribed in the most explicit manner to this way of thinking. In the case concerning *United States Diplomatic and Consular Staff in Tehran*, the United States based the competence of the Court to pass judgment on their claim against Iran on Article I of the Optional Protocols to the Vienna Conventions on Diplomatic and Consular Relations. The application of the United States

had, in that case, been filed with the Court prior to the expiration of the two-month time-limit provided for in Articles II and III of these protocols for recourse to arbitration and conciliation. The

934 United States did not see any impediment in this to the jurisdiction of the Court. To borrow the arguments advanced in the Memorials filed by the United States in that case

> "it would be completely anomalous to allow such a party [who has no interest whatever in arbitration or conciliation] to insist upon a two-month waiting period and to seek dismissal of a premature Application on the ground that the applicant should have afforded the respondent a two-month opportunity to pursue a goal in which the respondent in fact had no interest whatever. Such a rule would allow every violator of international law an automatic period of freedom from litigation without any justification whatever and totally without regard to the urgency, if any, of the applicant's need for judicial relief." (Memorial of the Government of the United States of America, 1980, p. 38.)

There are times when I very much admire the sagacity of the Americans.

The conclusions arrived at in the Memorial of the United States with regard to this point continue to be fully valid: they are to the effect that:

> "to hold that in the instant circumstances an application filed before the expiration of the two-month period is premature would be to adopt an interpretation which rewards unlawful coercion and penalizes respect for the procedures of peaceful settlement" (*ibid.*, p. 39).

Assuming that Article 14, paragraph 1, of the Montreal Convention requires that a time-limit of six months should have elapsed before the Court is seised, it is not necessary that this requirement be fulfilled in this case, regard being had to the hostile attitude of the Respondents towards any proposal for a settlement.

But, in any event, Libya is of the view that such an interpretation of Article 14, paragraph 1, is unfounded. This provision contains the words "within six months". It does not say "after six months" or

"following the expiration of a time-limit of six months". It says "within six months". The argument advanced by counsel for the United States when he refers to "the requirement that ... six months have passed" as a "clear prerequisite to the Court's jurisdiction" (oral arguments of the United States, p. 47) or that "prima facie, Article 14, paragraph 1, of the Montreal Convention requires that a period of
035 six months elapse ..." flies entirely in the face of the text of Article 14, paragraph 1. It is a clear violation of the rule that the text must be respected.

The meaning of the preposition used in this provision is clear. In French, "dans" [within] is used to "indique[r] un moment, une époque" [indicate a moment, a period of time], or "pour reporter à une date future" [to postpone to a future time], in which case it means "avant la fin de" [before the end of] (*Le Robert - Dictionnaire de la langue française*, 2éme éd., t. III, Paris, Le Robert, 1989, p. 149). The meaning of its English equivalent, "within", is even clearer. According to the *Concise Oxford Dictionary*, this word means "in a time no longer than, *before expiration* or *since beginning of*" (*Concise Oxford Dictionary of Current English*, 7th ed., Oxford, Clarendon, 1982, p. 1237). In all cases the term should be taken to mean "during", and certainly not "after".

The argument based on the six-month time-limit is therefore without substance. It cannot stand in the way of the Court being validly seised under the terms of Article 14, paragraph 1, of the Montreal Convention.

II. The substance of the rights protected

I turn now to the rights that my esteemed colleague, Professor Higgins, has characterized as "illusory rights" and our American colleagues, ever blunter, as non-existent rights.

In the Application by which it instituted proceedings, Libya invoked the fact that the American and British threats caused prejudice to the rights Libya derives from the Montreal Convention, namely, the three following rights:

- first, the right of every contracting State to establish its jurisdiction to prosecute and pass judgment on the alleged perpetrators of an offence, a right provided for in Articles 5, paragraphs 2 and 3, and 7;

036 - secondly, the right not to extradite alleged perpetrators if its national law does not so allow, a right guaranteed by Articles 7 and 8, paragraph 2;

- thirdly, the right to obtain judicial assistance in regard to criminal matters from the United Kingdom and the United States (Article 11 of the Convention)

One of counsel for the United States, Mr. Schwartz (pp. 69-73 of the Verbatim Record), endeavours to demonstrate that Libya has not established the existence of the rights it invokes on the basis of the Montreal Convention. His thesis turns on three arguments:

(1) that Convention, and particularly Article 7 thereof, allegedly does not confer rights on Libya, but only imposes obligations on it;

(2) the Convention accords no priority nor any exclusivity to Libya;

(3) if Libya's claim were to be accepted, the legal régime established by all the international criminal conventions adopted since 1949 would be ruined.

Let us examine each of these arguments in turn:

1. The Montreal Convention, and particularly Article 7 thereof, is only a source of obligations

Article 7 is admittedly drafted in the imperative mood: if the State does not extradite the alleged offender it shall submit the case

"*without exception whatsoever*" to the authorities charged with repressing crime. This provision can therefore correctly be considered to enunciate an obligation; but it should be noted that the obligation is an *alternative* one, an obligation that can be summarized by the famous formula *aut dedere, aut judicare*.

Now, the fulfilment of this alternative obligation necessarily implies the existence of a *right to opt* between the two branches of the obligation. This right is the one that every State party to the Convention has not to extradite a person, particularly when, in the case at hand, the law of that State does not allow such action. As has already been stated, the law of the Libyan State conforms to many other municipal laws in prohibiting not only the extradition of nationals but also extradition in cases where no treaty allows it. As a matter of fact the Montreal Convention does indeed admit the right of any State party to it not to extradite a person wanted for an offence covered by the Convention whenever the law of that State or treaties binding on it prohibit such action: this is, at times implicitly, and at times explicitly, clear from Articles 5, paragraph 2, and 8, paragraphs 1 to 3. The right that Libya invokes is therefore one derived from the Montreal Convention and is no wise a phantom right!

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I wish to add that, even if Libya could only rely on an "obligation" this would make no difference to the question; quite the contrary: on the one hand, if a State may claim respect for a right, that is, respect for a certain line of conduct that it is authorized to adopt, *a fortiori* may that State claim respect for its will to fulfil an obligation, that is, respect for a line of conduct imposed upon it.

2. The Montreal Convention allegedly accords no exclusivity, no priority to Libya with respect to its right to carry out criminal prosecutions

Libya cannot but subscribe to this assertion and it is precisely for that reason that the United Kingdom and the United States, no more than Libya, cannot claim any priority or exclusivity whatsoever for the purposes of prosecution. Libya is, therefore, fully entitled to demand that its right to prosecute the suspects be respected.

3. Were one to accept Libya's claim, the mechanism created by all the agreements on international criminal law would be ruined

I regret, it is exactly the contrary that is the case: the Libyan position is that the principle *aut dedere, aut judicare* should be respected: all the instruments relied upon by the United States are

038 based on the same optional principle: *aut dedere aut judicare*, The principle was, besides, proclaimed by the General Assembly, on 9 December 1991, by its resolution 46/51. The argument is, therefore, as unfounded as the preceding ones.

May I, with regard to the principle *aut dedere aut judicare*, be allowed to quote the views expressed in a lecture on international terrorism given at the Hague Academy of International Law by an eminent Member of this Court:

> "It is this option (*aut dedere aut prosequi*) that has been adopted at the Hague and in the conventions concluded subsequently. It was a considerable accomplishment as far as repression was concerned and at the same time it preserved, with regard to extradition, the power of governments to appreciate the circumstances, while safeguarding the right of granting asylum. To be sure, it had its limits, but they are those of any human endeavour seeking to reconcile various, if not contradictory, requirements." (*RCADI*, (1989-III), p. 371.)

* * *

As regards the United Kingdom, its counsel, Professor Higgins, prefers to speak of "illusory" rights; but, far from limiting this characterization, as her American colleague has done, to the rights

provided for in Article 7, she adds thereto those enunciated in Articles 5, paragraphs 2 and 3, and 8, paragraph 3. Let us examine her line of reasoning somewhat more closely.

As Mr. Schwartz does, Professor Higgins relies, in the first place, on the fact that Article 5(2) and Article 7 enunciate only *obligations* (Verbatim Record, pp. 4 and 6). What has been said in this regard therefore applies here too: if one may seek to protect a right, that is a line of conduct that is authorized, one may, *a fortiori*, claim the protection of an obligation, that is, a line of conduct that is imposed.

Furthermore, we have seen that the whole of the system created by Articles 5, paragraphs 2 and 3, 7 and 8 rests on the existence of a basic *right*, namely, the right to extradite or prosecute. This right is, accordingly, not a mirage; it is, on the contrary, so bright that it seems to blind the most learned beholders.

039 But Mrs. Higgins advances another argument in connection with Article 5, paragraph 2: the obligation it enunciates, that is, the obligation for the State to establish its jurisdiction - is merely to adopt legislation vesting its courts and tribunals with universal jurisdiction. Application of the article, by enacting legislation, would, as it were, entail its disappearance.

To consider that a legal provision is dissipated by its fulfilment is a curious manner of interpreting it. In reality, we do not have here a magical provision that disappears when one tries to grasp it. The effect that this article should be considered to produce is not only that of permitting the State to *establish* its jurisdiction on a case-by-case basis, but primarily that of *exercising* it in all cases. Now the coercive measures with which the United Kingdom and the United States are threatening Libya aim precisely at preventing it from exercising the right provided for in that article.

As for Article 5, paragraph 3, which provides that the Convention "does not exclude any criminal jurisdiction exercised in accordance with national law", Professor Higgins considers it to be no more than a "saving provision" intended to prevent the Convention from endangering the existing criminal jurisdiction of the contracting State; as an example she gives Article 6 of the Libyan penal code, which lays down the active personality basis of jurisdiction.

Now, in this case also, the measures that the United Kingdom and the United States intend to take against Libya aim to secure the surrender of the two suspects and therefore to prevent Libya from exercising a competence that, nevertheless, is granted to it by Article 5, paragraph 3. Consequently, what we have here is, indeed, a substantive right provided for in the Convention and not an optical illusion that Libya wishes to protect by requesting the Court to indicate provisional measures.

040 As for the rights protected by Article 11, Professor Higgins maintains that:

1. this Article is no more than an "ancillary" provision;

2. it applies only when it has been accepted that trials should take place in a particular State;

3. the United Kingdom may not be required to provide Libya with evidence, inasmuch as that would prejudice criminal proceedings in the United Kingdom.

Let us look at each one of these arguments.

1. The argument that Article 11(1) is an ancillary provision reflects a simple-minded conception of the problems raised by international judicial assistance in criminal matters. In reality, this provision is of fundamental importance since it assures the delicate balance that must exist between extradition and local prosecution. If

such prosecution is to be at all effective, it is absolutely necessary that the prosecuting State should obtain all that is necessary, for effective prosecution. This is the aim of this article, which speaks of "the *greatest possible* measure of assistance" (emphasis added).

At any rate, even if Article 11, paragraph 1, was no more than an ancillary provision - which is not reflected either in the *travaux préparatoires* of the Montreal Convention (Verbatim Records, pp. 65-66, 169), which, in this regard, take over the text of Article 10 of the Hague Convention, nor the *travaux préparatoires* of the latter (Verbatim Records, pp. 95-98, 192) - this allegedly ancillary nature of
041 the provision would not imply that it is not a rule of law. As such, it confers rights and it imposes reciprocal obligations on its addressees and the latter are, therefore, entitled to demand that it be respected.

2. The Montreal Convention by no means subordinates the jurisdiction of the local State to the acceptance of that jurisdiction by the other States concerned. As our American colleague, Mr. Schwartz, correctly pointed out in this respect, the Convention institutes neither priority nor exclusivity of jurisdiction. Libya is entitled to prosecute the suspects just as much as the United Kingdom and the United States.

3. Finally, whatever the reasons may be for which the United Kingdom and the United States refuse to supply uncertified copies of the evidence that is part of the records of the cases, the fact remains that Libya is entitled by the terms of Article 11 to take cognizance of these documents: to that extent, therefore, Libya certainly has a "substantive right" that should be protected.

Libya's rights are, accordingly, not illusory ones: they are clear to any first year law student from a cursory and reasonable reading of Articles 5, paragraphs 2 and 3, 7, 8, paragraph 2 and 11 of the Montreal Convention.

I apologize to my colleagues; but the conjurer's art is a difficult one and cannot be learned in one day.

* * *

A final word by way of conclusion.

The Respondents have not infrequently made merry over the alleged haphazardness of Libya's proposals. It is true that Libya has objectively put forward proposals; but if they are untidy, they reveal, to any person of good faith, an uncommonly vivid imagination on the part of Libya.

042 What the Respondents do not seem to understand is that one can hardly expect a hunted rabbit to keep his cool. Libya is coming up with all the proposals it can so as to be co-operative and at the same time safeguard the legal principle it considers fundamental, while seeking to lawfully evade the threats that an alleged lack of co-operativeness is visiting upon her. Reference was made yesterday to the anguish felt by air travellers; one should not forget the anguish that for the past four months all Libyans have been feeling at bedtime and that, if one is to give credence to the news CNN broadcast yesterday, is not going to be allayed, since some of the warships that are now in the Gulf could be transferred to the Mediterranean as a result of the Libyan problem.

Mr. President, Members of the Court, I have come to the end of the observations I proposed to make on behalf of the Libyan Government. I once again thank the Court for having heard me and request it, with the authorization of the President, kindly to give the floor now to Professor Suy.

The Court adjourned from 10.35 to 10.45 p.m.

Le VICE-PRESIDENT faisant fonction de PRESIDENT : Veuillez prendre place. Je donne la parole à M. Eric Suy.

Mr. SUY: Mr. President, Members of the Court. After the brilliant firework display that we have first witnessed, may I invite you to hear me in a sort of anti-climax at the conclusion of Libya's statement, which will end with a few words and conclusions from the Agent.

043 I should like to make a few brief further remarks on two matters. The first concerns the interpretation of Security Council resolution 731 (1992). The second deals with the question of the relations between the Security Council and the Court.

1. The interpretation of resolution 731 (1992)

The two Respondents submit that the Security Council adopted resolution 371 on 21 January this year because Libya had not taken action on the demands of the United States, the United Kingdom and France contained in documents that are now well known. In this resolution the Security Council "strongly deplores the fact that the Libyan Government has not yet responded effectively to the ... requests" and "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". These demands, as we know, essentially amount to the surrender of the accused to the United States and British courts.

According to counsel for the United Kingdom, this resolution must be placed within the context of Article 36, paragraph 1, of the Charter which provides that:

> "The Security Council may, at any stage of a dispute of the nature referred to in Article 33 or of a situation of like nature, recommend appropriate procedures or methods of adjustment."

And counsel for the United Kingdom states (on p. 71 of CR 92/3): "This is exactly what the Security Council has done in resolution 731", and "resolution 731 is ... the vehicle for resolving peacefully that problem".

044 This entirely confirms our view that resolution 731 is a recommendation. And the demand to surrender is therefore not mandatory.

But we can no longer follow counsel for the United Kingdom when she says that the surrender of the accused constitutes "an appropriate procedure of adjustment" within the meaning of Article 36, paragraph 1. The Security Council cannot, under this Article and this paragraph 1, recommend the terms of a settlement. Moreover, the procedure recommended cannot consist of an action or of conduct whose legality is the subject of a dispute between the Parties there I would refer you to the commentary on Article 36 in the outstanding work by B. Simma, *Charta der Vereinten Nationen*, p. 509, Nos. 19 and 22.

Professor Higgins also said that, in the draft resolution under consideration by the Members of the Security Council, she found no trace of a description of the Libyan refusal to surrender the accused as "a threat to peace and international security". However, paragraph G of the preamble of the draft of 17 March 1992 reads as follows:

> "G. *Determines* in this context that the failure by the Libyan Government to demonstrate, by concrete actions, its renunciation of terrorism, and in particular its continued failure to respond fully and effectively to the requests in resolution 731 (1992), constitute a threat to international peace and security."

The non-surrender of the accused is based on the choice left to Libya by international law and in particular by the Montreal Convention of 1971. By what right can that choice be considered as a violation of international law or of a "recommendation" of the Security Council? But the Respondents, for their own purposes, suddenly seem to consider

resolution 731 as a *decision* of the Security Council. Even
045 Mrs. Higgins falls into this trap when on page 73 of CR 92/3 she claims that "Only the Security Council can decide what further measures may be necessary to give effect to its *decisions*." And the Agent for the United States has confirmed that the Security Council is preparing sanctions under Chapter VII so as to force Libya to comply with its previous resolution (p. 89 of the text given us).

Thus the exercise by Libya of its right to exercise its criminal jurisdiction will therefore be described as a threat to international peace and security for the sole purpose of being able to impose sanctions.

We are told that the case before this Court bears upon the applicability of the Montreal Convention but that the case before the Security Council is totally different, much wider, namely it is the struggle against international terrorism. But the struggle amounts, in this case, to the demand for the extradition of two persons accused of acts of sabotage against civil aviation which are covered by the Montreal Convention.

In making this distinction between the case before the Court and the situation in the Security Council, the Respondents fully realize that legally their position is indefensible. How, otherwise, can their desperate efforts to deny applicability of the Montreal Convention be explained? When I referred to the ten great multilateral Conventions for combating international terrorism concluded since 1963 thanks to Western and particularly American initiatives, counsel for the United States minimized their value by saying that that reference to the important General Assembly resolution 41/55 was a rather vague description of a code of international law for the elimination of terrorism.

046 **2. The relations between the Security Council and the Court**

With respect to the relations between the Security Council and the Court, I should like to say first of all that the dialogue by the deaf that has started here, the argument that we are dealing with, and asking the Court to pronounce on, the applicability of the Montreal Convention, and that this has nothing to do with the struggle against international terrorism, this dialogue of the deaf also explains the difference of views on the respective roles of the Council and the Court. I repeat, the argument of the Respondents is quite simplistic: the Court, seised by Libya, deals with the question of the applicability of the Montreal Convention, whereas the Security Council deals with the situation concerning international terrorism. Consequently the provisional measures requested of the Court should not interfere with the activity of the Council.

Throughout the speeches of the three counsel for Libya we believe that we have given proof of the misleading nature of this position. Indeed, counsel for the United Kingdom admits this, when on page 75 of CR 92/3 she says that the Security Council was also dealing with "issues ... as to what Libya is required to do under general international law both in respect of the events surrounding the Lockerbie massacre and the prevention of terrorism in the future", in other words, that Libya should surrender the accused. May I point out in parentheses, that the obligation under general international law is none other than "*dedere aut judicare*".

Counsel for the United States has quoted several speeches made during the discussion in the Security Council on 21 January this year as evidence that the subject dealt with by the Security Council was the struggle against international terrorism and not the applicability of the
047 Montreal Convention. May I, Mr. President, quote several speeches that

clearly show that the Montreal Convention and respect for the principle *aut dedere aut judicare* were indeed present in the minds of the delegations.

1. For instance in his speech (pp. 58-60) the representative of Morocco said:

> "My country feels that we are touching on a principle of international law that is well established in both unwritten law and in various instruments, as well as in several recommendations of the United Nations General Assembly. That is the principle of 'extradite or prosecute'.
>
> In this instance, Morocco cannot share the view that adoption of the draft resolution [which became resolution 731] before us today enshrines any exception to that uncontested principle of international law."

2. The representative of Zimbabwe said:

> "In our view, the draft resolution on which we are about to take action seeks to achieve two main objectives. First, it seeks to send a clear message that the Council is determined to firmly with terrorism. Secondly, it seeks to ensure that the accused are brought to trial. It is Zimbabwe's view that this has to be achieved on the basis of the established legal norms and the existing international legal instruments applicable to acts of terrorism.
>
> My Government believes that in this regard the Security Council should be guided by the 1971 Montreal Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation. That Convention, like its sister Convention on the Suppression of Unlawful Seizure of Aircraft - the Hague Convention - designed to combat hijacking, which is another act of terrorism, seeks to implement the traditional precept of *aut dedere, aut punire*, generally translated as 'extradite or punish'. My Government understands the sensitivity that has always characterized the issue of extradition. The extradition of one's own nationals is impermissible in the laws of many States. That is why the existing international legal instruments make it clear that, if the State holding the alleged offender does not extradite, it shall be obliged, without any exception whatsoever, to submit the case to its competent authorities for the purposes of prosecution."

3. I shall continue, if you permit, with a quotation from the representative of Ecuador:

"However, my delegation worked with the other non-aligned
048 countries to ensure that the draft resolution would not be misinterpreted or be a negative precedent, which would run counter to the regular powers of United Nations bodies or which could be used as an example for possible action or intervention at a later date. Ecuador also expressed its belief that in this case as in any other it is essential to act in such a way that there can be no misinterpretation or prejudging of special situations, and to ensure that actions shall be subject to the clear legal principles with the competence of States, in particular with regard to extradition. In addition, the delegation of Ecuador agreed with the other non-aligned countries about the need to establish a reliable, step-by-step process to deal with the claims made by the United States, France and the United Kingdom against Libya and to preserve the right of the Libyan Government to clarify its position and fulfil its obligations.

Lastly, the delegation of Ecuador trusts that the draft resolution will be taken in context and used only for its unique purposes, to deal with those involved in acts of terrorism and the meeting out of punishment, if that is decided upon."

4. The representative of Cape Verde said:

"Our positive vote will also reflect our strong view that the authors of any such crimes should be brought to justice and punished according to the law.

Our vote, however, cannot and must not be interpreted or construed in any way as favouring the setting of any precedent that could change the well-established rules and international practice on extradition."

5. The representative of China said:

"China believes that prudent and appropriate, rather than high-pressure approaches, should be adopted to bridge such differences.

During previous rounds of consultations and discussions, we noticed that the non-aligned members of the Council expressed their concern over the fact that the Security Council might base its decision solely upon the unilateral investigations of certain countries and, in particular, that the issues of jurisdiction and extradition were involved."

And he ended his statement by saying:

"In conclusion, I should like to emphasize that the adoption of this resolution should not lead to any drastic action or to exacerbating tensions."

049 6. Lastly, a final quotation from the statement of the representative of India, from which the Agent of the United States also read an extract. The representative of India told the Security Council:

"careful note should be taken of the legal implications inherent in an issue of this kind as it is considered in the Council. We are dealing here with a case where three States, on the basis of evidence gathered by them, wish to enlist the membership of the Security Council in taking action. Such an approach immediately brings up the provisions of the United Nations Charter and of international law. It is my delegation's conviction that action by the Council should be within the ambit of and through the means provided by international law. That is why my delegation believes that today's decision of the Council cannot be considered precedent setting.

I would furthermore stress the importance of recognizing and respecting national sovereignty. The concept has been widely perceived to have come under some strain recently and deserves reiteration. This is all the more important where delicate and complex international issues with implications for national sovereignty, such as the one we are considering today in the Council, are concerned."

But the efforts of the Respondents to deny that, in this case, there might be some relation between the Council and the Court are becoming bogged down in arguments which either run counter to the Court's jurisprudence or are purely speculative.

In her presentation of Thursday afternoon, my friend, Mrs. Higgins, said that this parallelism and parallel competence between Court and Council stops as soon as the Security Council considers the dispute or the situation by virtue of Chapter VII of the Charter. My friend says that all the "assessments" that the Council might make concerning the existence of a threat to peace, concerning the necessity for economic or diplomatic measures to ensure that its decisions are respected or concerning the inadequate nature of these measures are appreciations that only the Council can make.

She draws three conclusions from this:

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1. "These matters of political appreciation are for the Security Council alone";

2. "Only the Security Council can decide what further measures may be necessary to give effect to its decisions";

3. "It would be completely inappropriate for the Court to indicate interim measures in any form that could be construed as striking at the Security Council in the exercise of its competences under Chapter VI and VII of the Charter".

We are not asking the Court to exercise its competence in order to function as a court of appeal against unfavourable decisions of the Council, for in this case there has been no decision. We are not asking the Court to function as a Court of appeal against political conclusions of the Council. We are asking the Court to pass judgment on certain legal aspects of a situation which, in our view, is also being considered by the Council. This is entirely consonent with the Court's position as the principal judicial organ of the United Nations (*I.C.J. Reports 1984*, p. 436, para. 98).

If one were to accept the argument that the Court could never indicate provisional measures which might be interpreted as striking against the Security Council in the exercise of its competences under Chapters VI and VII of the Charter, one might just as well say that the Security Council has carte blanche and that the whole jurisprudence of the Court on its judicial function could be sent to the Peace Palace archives.

To say that provisional measures would have the effect of preventing the Respondents from exercising their functions as members of the Security Council, from taking initiatives or even speaking in the Council is almost grotesque. Even supposing that the Court requests the Respondents, or even the Applicant, to refrain from any action that might exacerbate their relations, how would that prevent the Parties from seeking, both within the Security Council and outside it, to work for the maintenance of international peace and security?

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Libya is very well aware of the acute problem of the possiblity of the activities of the Security Council interferring with the judicial function of the Court. I do not believe that one should try to construct any academic theories. Let us, rather, see how this problem arises in the present case.

In resolution 731, the Security Council asked Libya to accede to the demands made, notably by the Respondents. Libya, while wishing to co-operate - and my colleague Mr. Salmon has given you all the evidence of this co-operation - considers that, for reasons founded in international law, it cannot extradite its own nationals but wishes to try them itself. Under general international law and, in particular, the Montreal Convention, it is allowed to take this stand.

The Respondents are now reacting by saying that, since Libya does not wish to surrender the suspects willingly, we shall institute proceedings before the Security Council in order to force it to abandon part of its sovereign rights.

The reaction of Libya is natural: it is requesting the Court to pronounce on the validity of its position with respect to the applicability of the Montreal Convention. At the same time, and to deal with the immediate threat of the Respondents to force its hand, it is asking the Court to indicate provisional measures so as to preclude those Parties from implementing their threats to force Libya by the use of sanctions to be decreed by the Security Council.

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The Respondents consider - as they said yesterday - that this recourse by Libya to the Court is scandalous, perverse and outrageous. Their efforts to convince the Court not to grant these measures are designed to allow them to continue and achieve their intentions - I should say: their pressing actions - to make Libya yield.

Given a request for provisional measures, the Court, in my view, must start from the presumption that the order that it might make on the substance - that is on the applicability of the Montreal Convention - might be favourable to the Applicant. In the light of this possibility, the Court should then ask itself what would be the position of the Applicant at the time of the Order, in the absence of provisional measures. The Court knows the answer to this question: Libya, by virtue of the actions of the Respondents, which will perhaps have led to sanctions, will be deprived of its sovereign right, recognized in international law, to exercise its criminal jurisdiction. The *aut dedere aut judicare* principle will have been the subject of the most flagrant violation in the history of international law.

These are the facts and the issue at stake in this case, with due respect to all those who are trying to put the Court on guard against intervening in any way in this new discovery of the "reserved domain" or let us rather say the "game preserve" of the Security Council.

Thank you for your patience, Mr. President, Members of the Court, and I ask you to give the floor to the Agent for Libya.

053 The ACTING PRESIDENT: Thank you very much Mr. Suy. I give the floor now to Mr. Al Faitouri, the distinguished Agent of the Libyan Arab Jamahiriya.

Submissions

Mr. AL FAITOURI: Mr. President, Members of the Court.

We have thus concluded our last statement and in accordance with Article 60, paragraph 2, of the Rules of Court,

Libya hereby confirms that it is requesting the Court to indicate the following provisional measures:

(a) to enjoin the United Kingdom and the United States, respectively,

from taking against Libya measures calculated to exert coercion on it or compel it to surrender the accused individuals to any jurisdiction outside of Libya; and

(*b*) to ensure that no steps are taken that could prejudice in any way the rights of Libya with respect to the proceedings instituted by Libya's Applications.

Mr. President, I seize this occasion to thank you, as well as the Members of the Court, for the patience and the attention with which you have heard our statements. I also wish to thank the Registry for its invaluable assistance during the proceedings. It is also my duty to thank the distinguished counsel for the great efforts they have made to put my country's case.

Mr. President, Members of the Court, we now leave this renowned hall in the confidence that the Court will arrive at a just and equitable decision. Thank you Mr. President, thank you Members of the Court.

054 Le VICE-PRESIDENT faisant fonction de PRESIDENT : Merci beaucoup, M. Al-Faitouri. La Jamahiriya arabe libyenne en a ainsi terminé avec sa réplique lors du deuxième tour de plaidoiries orales et avec ses conclusions dans les deux affaires, la première introduite par la Libye contre le Royaume-Uni et l'autre par la Libye contre les Etats-Unis. La Cour entendra cet après-midi la duplique du Royaume-Uni et des Etats-Unis respectivement. L'audience reprendra à 15 heures.

L'audience est levée à 11 h 30.
