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à 10 heures

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

Mr. ELHOUDERI:

1.01. Mr. President, Members of the Court, allow me first of all to say how honoured I am to appear for the first time before this prestigious Court as Agent for the Libyan Arab Jamahiriya.

This is not, however, the first time that Libya has appealed to the Court for justice. There is no need today to emphasize the difficult circumstances, the major preoccupations and the grounds which form the basis of the application my country had the honour to submit to the Court in 1992 relating to the dispute between itself and the United States of America and the United Kingdom on the interpretation and application of the Montreal Convention.

1.02. I would also take advantage of this occasion to congratulate the Judges who have been called to exercise this high responsibility since our last appearance before the Court. I have already been able to congratulate Judge Schwebel on his accession to the presidency of the Court. I thank his predecessor, Judge Bedjaoui, for the great wisdom with which he exercised his functions, and I also greet Vice-President Weeramantry, who is acting as President in this case. Finally, I welcome the presence in the Court of Sir Robert Jennings. It is an exceptional honour for me to be able to defend my country's case before a Court within which are gathered four Presidents and former Presidents.

1.03. Mr. President, Members of the Court, it is with great regret that, in June 1995, Libya heard of the Preliminary Objections raised by the United States of America and the United Kingdom regarding the jurisdiction of the Court and the admissibility of the Libyan Application. Our counsel will explain to the Court why those Objections, of which Libya fails to see the well-foundedness or the legal justification, must be set aside. I shall not dwell on this point which will be addressed

by Professors Salmon, David, Suy and Brownlie. I will merely say, at this stage, that we had hoped that our Application would be understood as a constructive measure and, that there was nothing unreasonable in the request that, by a decision, the Court remind each of their rights and obligations. Unfortunately, we have come to realize that, for reasons which it is not appropriate to rehearse here, the other Parties did not wish that to be so.

1.04. During the course of the statements which we have heard to date, allegations which are particularly serious for my country have been made before this Court. I do not intend to set them out here; our counsel will respond to them briefly. I will simply say something that a number of the Members of the Court already know, which is that since the 1970s, my country has supported a great number of movements for national liberation, some of the representatives of which are today Heads of State or of respected Governments such as President Nelson Mandela. At that time, as far as the defendants were concerned, these movements or individuals were sometimes described as terrorists. Clearly we do not regret the support which we gave to peoples who were struggling. At the same time, my country also participates in international efforts to fight against blind terrorism which strikes innocent victims.

1.05. Libya considers that it is in the interest of the whole of the international community that relations between States be established according to principals of law and of justice. My country has always attached the greatest importance to the work of the Court in this area. It is certain that one of the merits of the work of the Court is to reduce the tensions and difficulties in spheres which, although sensitive, nonetheless present aspects which, by their essence, are amenable to judicial regulation.

1.06. Moreover, it is clear to the Court that the dispute between Libya and the defendants has serious consequences for the life of a whole population and affects the whole of the region. Libya has brought proceedings before your esteemed Court in the desire to resolve a dispute which, by its prolongation, causes enormous and unjustified suffering to its people.

1.07. Mr. President, a constructive resolution in accordance with the legal principals in force, that is what my country hopes for and, to that end, it has repeatedly made proposals and suggested solutions, reconciling national law and the relevant rules of international law. My country has

always trusted the role of all the relevant regional organizations and accepts, in all sincerity, their initiatives to resolve the dispute. My country has expressed itself at the very highest level, by the voice of the Guide of the Revolution, Colonel Moammar El Qadhafi, in order to request and require that the truth be established as quickly as possible with regard to this tragedy, which has caused mental suffering to the families of the victims and to the Libyan people for far too long. Unfortunately, all those proposals and constructive initiatives were rejected by the defendant State.

Today, before the International Court of Justice, Libya remains faithful to its initial objectives: to obtain a judicial resolution to the dispute, based on the relevant rules of international law.

1.08. Mr. President, Libya has replied to the Preliminary Objections raised by the defendants in its written statement. At this stage of the procedure and in order to assist the Court as best as possible, our submissions will be limited to what is essential in accordance with Article 60 of the Rules of Court. For reasons of simplification, the United Kingdom and the United States of America, although they are the Applicants as regards the Objections, will hereafter be described as the defendants. References which were not mentioned in the statements appear in the texts which were transmitted to you.

1.09. The statements which counsel for Libya will have the honour to present during their turn to speak, will attempt to pinpoint further the viewpoints and the positions of Libya on the principal questions in the litigation. With your permission, Mr. President, we should like to present those positions today in the following order:

— Professor A. El-Murtadi Suleiman shall explain to the Court the background to the dispute and the fundamental reasons underlying the conduct of the defendants vis-à-vis Libya;

— Professor Jean Salmon will explain to the Court what is at stake from a legal point of view in this case;

— Professor Eric David will show that the Court has jurisdiction to hear the present dispute;

— Professors Eric Suy and Ian Brownlie will show that the Libyan Application is admissible in all its parts.

1.10. Mr. President, Members of the Court, Libya would like to reiterate the confidence it has in the wisdom of the Court and in the Judgment that the Court will give, a judgment which, by

clarifying the state of international law on a particularly sensitive question will undoubtedly contribute to peace and to the quality of the relations between States.

I thank you, Mr. President, Members of the Court, for the kind attention with which you have followed my preliminary statement. I would ask you now to let Professor El-Murtadi address you.

Le VICE-PRESIDENT, faisant fonction de PRESIDENT : Je vous remercie infiniment. Je donne la parole à M. El-Murtadi Suleiman.

Mr. EL-MURTADI SULEIMAN: Mr. President, Members of the Court,

The background to the dispute

2.01. It is a great honour to address the Court again, this time as counsel for Libya. My task is to set forth the historical and political background of the dispute; that is to say, the fundamental reasons explaining the line of conduct towards Libya adopted by the United States and the United Kingdom.

Mr. President, the Preliminary Objections raised by the United States and the United Kingdom must be understood in light of the particular relations between Libya and these two States. Their attitude has been steadfastly intransigent, prolonging tension and delaying the establishment of friendly relations based on mutual respect and sovereign equality.

Neither the time imparted to us nor the incidental nature of the proceedings allow us to describe in detail the meanderings, contentions and assertions which we have already refuted step by step in the written pleadings submitted to the Court. Nevertheless, Libya must return to certain factual aspects, since both the United States and the United Kingdom continue to put forward at length contentions which are not restricted to arguments *in law*, and which lead to a subjective, biased depiction of Libya. This week, right here, Libya has been presented as a terrorist State attempting to evade the application of the law.

2.02. Mr. President, firstly, I shall endeavour to show that such a depiction, of fairly long standing, far from being based on established facts, is dictated by subjective, particular interests, interests which constitute the true grounds of the dispute and which explain its prolongation.

Secondly, I shall endeavour to show that observance of the law and the will to settle disputes peacefully have shaped and continue to shape all the Libyan initiatives; these initiatives are designed to reach a fair solution to the dispute.

I. The True Grounds of the Dispute Between Libya and the Respondents

2.03. Mr. President, Members of the Court, it is difficult to separate out the true grounds of the dispute from the economic and geo-strategic interests of the United States and of the United Kingdom, interests which were indeed adversely affected as a result of the abolition of the Monarchy in 1969.

In geo-strategic terms, Libya was a key piece of the jigsaw in the hegemonic positions of the United States and the United Kingdom. Thus both States maintained military bases there until the late 1960s.

In economic terms, Libya's will to consolidate its sovereignty removed the exorbitant advantages which the United States, the United Kingdom and their commercial companies had enjoyed. Nor is Libyan activity within various international organizations, particularly OPEC, unrelated to the hostility towards it by these two States.

Lastly, in political terms, Libya's support for national liberation movements, particularly the Palestinian people, and its attachment to the principles of the new international economic order and to the groundswell of protest in the Third World in general, have again been interpreted as coming into conflict with the interests of the United States and the United Kingdom.

2.04. Thus, Mr. President, well before the emergence of this dispute, Libya was ranked on the list of "enemies" of the United States, on a similar footing to Cuba and Nicaragua. It has been the target of an unending campaign of destabilization and disinformation. The list of multiple manoeuvres and calumnies is extremely long.

Libya will not go through this list here, but will cite a few examples to illustrate the state of relations with the Respondents. It will also give further details relating to certain British and American allegations noted in this first round of oral arguments.

2.05. Mr. President, the Court has thus heard that Libya's responsibility for the murder of the British policewoman Yvonne Fletcher in 1984 in front of the Libyan Embassy is an established fact.

A documentary broadcast by a British television channel challenged this contention, relying on serious scientific and technical considerations which were subsequently endorsed by a no less serious newspaper[1]. The shots which killed the policewoman are said not to have come from the Libyan embassy, contrary to the official version.

2.06. After the bomb attacks on the airports of Vienna and Rome in 1985, the American Administration implicated the Libyan State and adopted a wide range of sanctions. The declarations of the Austrian Minister of Justice, denying the existence of any evidence against Libya, failed to quench the American thirst for vengeance.

2.07. Subsequently, a display of strength was organized in the Gulf of Sirte (another bone of contention) in March 1986; the clash between the Libyan and the American naval forces left 56 people dead or missing on the Libyan side.

2.08. The same scenario was played out following the bomb in the La Belle discotheque in Berlin on 5 April 1986. At the time the United States asserted that they had evidence of the involvement of the Libyan State: that line of enquiry was not confirmed at the time by the German judicial authorities responsible for the investigation.

A trial will soon be held in Germany. Some authorities have expressed scepticism regarding the proper conduct of this trial in view of the lack of co-operation on the part of the American Administration, which refuses to provide the evidence in its possession of the alleged Libyan involvement[2]. It has been stated in the press that such withholding of information may be explained by the fact that a number of people in Washington believe that the intercepted communications were ambiguous and do not provide conclusive evidence of the complicity of the Libyan State[3].

Nevertheless the Court will recall that it was on the basis of the alleged evidence of the involvement of Libya in this bomb attack that the United States, aided and abetted by the United Kingdom, bombed Tripoli and Benghazi. Mr. President, allow me to remind the Court that

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[1]The *Guardian*, 9 April 1996, reproduced in Annex II of the letter of 10 April addressed to the President of the Security Council by the Permanent Representative of the Libyan Arab Jamahiriya, S/1996/269, 11 April 1996.

[2]The *International Herald Tribune*, 24 May 1996.

[3]The *Washington Post*, 24 May 1996.

the military operation "El Dorado Canyon" launched in April 1986 produced many civilian casualties although it was supposed to hit military targets. The operation was condemned by the General Assembly of the United Nations (resolution of 20 November 1986), the draft resolution submitted to the Security Council remaining unadopted because of the veto of the United States and the United Kingdom.

2.09. The United States and the United Kingdom also used their right of veto when it came to examining the validity of the American accusations concerning an alleged chemical weapons factory at Rabta (east of Tripoli). Libya proposed to the United Nations that a site visit be organized. The Americans, for their part, once again brandished the threat of military intervention.

2.10. Fresh threats to use force were made in April 1996. This time the United States pointed the finger at a new factory at Tarhunah near Tripoli, claiming that it was designed to produce chemical weapons; they even stated that they were prepared to use a nuclear bomb in order to destroy the installations concerned, which are in fact designed for irrigation[4]. The Egyptian and French authorities requested further information from the American authorities before adopting a position[5]. Once again, with no result . . . The lack of any tangible element thus led President Mubarak to conclude that the whole story was a myth[6].

2.11. Mr. President, Members of the Court, the Lockerbie case is merely a similar intimidatory manoeuvre. The relevance of the film supplied by Libya, "The Maltese Double Cross", was challenged by the Respondents, who stated that Coleman, questioned in this document, had already admitted committing perjury. They were at pains to avoid saying that this admission was extracted from Coleman, laid low by cancer, against his release on bail.

In any event, we are delighted to note the statement by Lord Hardie that "any new evidence will be considered and any relevant line of enquiry suggested by such evidence will be pursued

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[4]The *New York Times*, 24 May 1996.

[5]The *International Herald Tribune*, 8 April 1996.

[6]The *International Herald Tribune*, 31 May 1996.

vigorously"[7]. In the past, however, we note that any such readiness to pursue other lines of enquiry did not amount to much. Today, the German authorities alone have decided to reopen the Lockerbie investigation in the light of new elements[8].

2.12. The American reactions following the destruction of the TWA Boeing in July 1996 also deserve mention. The first reaction, obviously, was once again to denounce "countries suspected of supporting terrorism", chief among them Libya! Even though the cause of the explosion of the TWA Boeing could have been anything, the American Administration clamoured for tighter sanctions, particularly against Libya. The investigation has taken several directions. At the present time, the most frequently suggested explanation for this terrible accident is a technical fault[9].

Despite these developments, the American Government redoubled its efforts to punish States which trade with Libya, Iran and Cuba; it adopted the d'Amato[10] and Helms-Burton Acts which have been widely challenged in the international community. A strategy which prompted a journalist for *Le Monde* to conclude that terrorism had become "the excuse for a trade war"[11]; something which Libya never doubted.

2.13. The General Assembly also addressed these shifts away from the issue. In its resolution of 17 December 1996, it asked

> "all States, with the aim of enhancing the efficient implementation of relevant legal instruments, to intensify, as and where appropriate, the exchange of information on facts related to terrorism and, in so doing, *to avoid the dissemination of inaccurate or unverified information*;"[12]

Libya can only applaud this stand and hope that it will inspire the future conduct of the Respondents.

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[7]Oral submissions of the United Kingdom: Monday, 13 October 1997, CR 97/16, p. 34.

[8]The *Guardian Weekly*, 13 July 1997.

[9]*Newsweek*, 19 May 1997.

[10]*Documents d'actualité internationale*, No. 19, 1 October 1996, pp. 778-782, see the European reaction of 21 August 1996, *ibid.*, p. 782.

[11]*Le Monde*, 30 July 1996.

[12]Resolution 51/210 of 17 December 1996, para. 4 (emphasis added).

Libyan Initiatives Aimed at Achieving the Settlement of the Disputes with the Two States

2.14. Mr. President, Members of the Court, under circumstances of extreme tension, with American threats to use force prompt to materialize, Libya has patiently and frequently made use of the many means which international institutions make available to States for settling their differences peacefully. The letters, complaints and other documents submitted by Libya to the Security Council over the last 20 years, with the objective of normalizing relations and of settling differences peacefully, bear witness to this. Such a settlement has been systematically hampered by the two States.

Libya has steadfastly put forward proposals which would enable tension to be defused and justice to be done; it is supported in this by a growing number of States and international organizations. Conversely, the United States and the United Kingdom persist in brushing aside any initiative whatsoever and vie with each other in repeating that only "surrendering the suspects" will be considered as a gesture of good will.

2.15. Yet, Mr. President, Libya has spared no effort. Firstly, as set forth in its Memorial lodged in 1992, it has taken all appropriate steps to complete the investigation (arrest, custody, appointment of an investigating magistrate, requests for international co-operation, etc.) and has done so in compliance with Libyan law and the Montreal Convention. None of these initiatives have defused the conflict.

2.16. Libya has pursued its endeavours, proposing further solutions with the aim of reconciling Libyan law, the rights of the suspects to a fair trial, the relevant rules of international law and the demands of peace and international security. All these proposals have been set forth in our written observations; let us take merely the most recent ones. In a letter dated 27 January 1996, Libya proposed that neutral observers visit Libya in order to verify the truth of the threat that Libya was said to pose to international peace and security by its alleged support for international terrorism; yet again it has demanded an independent inquiry into the exact circumstances of the explosion of the Pan Am aircraft[13].

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[13]S/1996/73, 31 January 1996, p. 4.

Libya has provided, to the satisfaction of the British authorities, information on its former relations with the IRA[14]. In the enquiry into the explosion of UTA's DC 10, the French investigating magistrate was received in Tripoli and given the information he sought, which, in Libya's view, complies with its obligations of co-operation under the Montreal Convention[15].

Lastly, far from refusing to have the suspects tried, Libya again reiterated in 1996 one of its proposals to have them tried at the Peace Palace by Scottish judges under Scottish law[16].

2.17. My country's actions have prompted all the regional organizations concerned to support the Libyan proposals for escaping from the impasse in which the United States and the United Kingdom had trapped it.

The **League of Arab States**, comprising 22 Members, has echoed the Libyan initiatives on several occasions, asking three western States to respond favourably[17].

The **Organization of the Islamic Conference**, comprising 52 States, also expressed support for Libya[18].

The **Organization of African Unity**, comprising 53 member States, has also urged the Parties involved, in several resolutions, to agree to have the suspects tried in a neutral country[19].

The **Non-Aligned Movement** representing over half the Members of the United Nations — or 113 States — has also supported the Libyan positions, urging that the alternatives jointly submitted by the OAU and the Arab League be taken into consideration[20].

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[14]This effort has been recognized as a positive step by the British Government . . ., see S/1996/73, p. 3.

[15]*Le Monde*, 6 July 1996, 20 September 1996; The *International Herald Tribune*, 21-22 September 1996.

[16]Letter dated 10 April 1996, S/1996/269, 11 April 1996, p. 2.

[17]See resolution 5373 of 27 March 1994, resolution 5431 of 15 September 1994, resolution 5506 of 21 September 1995, and meeting of the League and the OAU on 11 April 1996, see S/1996/369, 12 April 1996.

[18]24th meeting of Ministers of Foreign Affairs, *Document d'actualité internationale*, No. 5, 1 March 1996, pp. 199-200.

[19]33rd ordinary session of the Conference of Heads of State and of Government, Harare, 2-4 June 1997.

[20]12th Ministerial Conference of the NAM; Final Declaration, New Delhi, 4-8 April 1997, *Documents d'actualité internationale*, No. 13, 1 July 1997, p. 458.

These declarations also contain an appeal to the Security Council to lift the embargo which weighs heavily on the Libyan population, and express concern at the on-going threats to use force.

2.18. The position of the Vatican should also be noted. The Holy See resumed diplomatic relations with Libya in March of this year, arguing that it hoped to help give a special boost to international dialogue through the normalization of its relations with the Great Socialist People's Libyan Arab Jamahiriya[21].

2.19. Mr. President, Members of the Court, to conclude this statement, it is apparent that:

— firstly, the reactions of both States following the tragic explosion of the Boeing above Lockerbie may be explained by geopolitical and ideological considerations which bear little relation to the true facts; Libya and the families of the victims are still waiting for the exact circumstances of the tragedy to be explained. No one has ever had even a glimpse of the alleged evidence held by the American investigation services in this case, as in others;

— secondly, the determination to destabilize Libya is prompting both States to disregard the procedures and rules applicable to the peaceful settlement of disputes.

Mr. President, Members of the Court, I thank the Court for its patience in hearing me and would ask you, Mr. President, to give the floor to Mr. Salmon.

Le VICE-PRESIDENT, faisant fonction de PRESIDENT : Merci, Monsieur Suleiman. Je donne la parole à Monsieur Salmon.

Mr. SALMON:

Introductory observations on the legal issues

3.1. Mr. President, Members of the Court, it is always an honour for counsel to be able to address the Court; again I owe this privilege to the Libyan Government, which is before you once more in the cases concerning the interpretation of the Montreal Convention.

In order to grasp the fundamental legal issues at stake in these proceedings, it is important to give a brief account of certain facts.

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[21] *Le Monde*, 12 March 1997.

3.2. The question which concerns the Court today is whether the Montreal Convention applies to the facts I shall now address and which I shall enlarge upon in their context of general international law.

3.3. The tragic destruction of Pan Am flight 103 took place on 21 December 1988. Some three years later, on 14 November 1991, an indictment was handed down by the Grand Jury of the District of Columbia and a warrant of arrest was granted to the Procurator Fiscal of Scotland against two Libyan nationals accused of having placed on board the aircraft an explosive device said to have caused its destruction. These dramatic accusations were a source of consternation to the Libyan Government.

The documents containing the charges were communicated to it four days later on 18 November 1991, in the case of the United Kingdom, and on 20 November 1991 in the case of the United States. On 18 November, in Tripoli, the Department of Justice took the first steps towards criminal proceedings. The mutual assistance procedure was set in motion with the countries concerned. That shows the rapidity with which the Libyan Government took the accusation seriously and put matters in hand. In the absence of a mutual assistance treaty between the States involved, the Libyan request for judicial assistance fell implicitly within the framework of the Montreal Convention.

Eight days later, however, on 27 November 1991, without the slightest regard for the request made by the Libyan magistrate, the Governments of the United States of America and the United Kingdom published a joint declaration worded as follows:

> "The British and American Governments today declare that the Government of Libya must:
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> — surrender for trial all those charged with the crime; and accept responsibility for the actions of Libyan officials:
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> — 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;
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> — pay appropriate compensation.

We expect Libya to comply promptly and in full."[1]

322 3.4. No purpose is served, I believe, by emphasizing the highly 19th-century nature of the language and the dictatorial arrogance which such a presentation betrays. Yet, as we shall see, the form corresponds exactly with the substance. Moreover, this language was accompanied, on the part of the two States, by scarcely veiled threats of force[2]. Professor Brownlie will have occasion to comment further on this point this afternoon.

What subsequently became characteristic of the behaviour of the two States was the non-observance of international law and at the same time the non-observance of the rules relating to the settlement of disputes. These are the two points I should like to deal with this morning.

I. Non-observance of international law

This non-observance is evident as regards both the rules on the international responsibility of States and the rules relating to respect for human rights.

A. Violations of the rules on international responsibility

3.5. This Court has no need to be reminded of the elementary rules of the law of international responsibility of States. As described in the International Law Commission's draft:

"Article 1

Every internationally wrongful act of a State entails the international responsibility of that State"

and

"Article 3

There is an internationally wrongful act of a State when:

323 (*a*) conduct consisting of an action or an omission is attributable to the State under international law; and

(*b*) that conduct constitutes a breach of an international obligation of the State."

Consequently, for Libya to be able to incur international responsibility, it had to be proved that there was a wrongful act and that the act was ascribable to that State.

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[1]S/23308.

[2]See Libyan Memorial of 20 December 1993, para. 2.8.

For that purpose, the guilt of the Libyan nationals had first to be proved. Neither of those conditions was met in the present case, since the Respondents confined themselves to accusations and were naive or presumptuous enough to ask that Libya should furnish material evidence of their allegations.

On the supposition that this proof — this proof of guilt — had been forthcoming, which was not the case, proof would then have been needed that the acts of the persons accused were attributable to the Libyan Government and, again according to the principles of the law of international responsibility,

(*a*) either that they were private individuals and Libya must be shown to have failed in a duty of vigilance regarding terrorist activities deemed to have been within its knowledge and which it might — in the circumstances — have prevented;

(*b*) or that the acts were acts of agents of the Libyan Government or of persons who, although not agents of that State, had in the present case acted on behalf of the Libyan State.

On this latter point, Mr. President, the Libyan Government actually made things easier for the Respondents — while denying that the two accused persons had formed part of its secret service — by undertaking, in a formal guarantee expressed on 27 February 1992, to compensate the victims if it was proved that Libyan nationals had participated in the crime.

Their guilt, however, and the responsibility of the Libyan Government which might have ensued from it, have not been proved by anyone. There are merely accusations, put forward indeed with assurance, and with such a degree of bluff as to secure the subsequent support of the Members of the Security Council, but of a fragility widely dwelt on subsequently in the press, on television and even in literature devoted entirely to this question. Other very serious leads have been put forward. The Libyan Government will not revert to this aspect of the matter, which it has mentioned briefly in its pleadings in order of course to answer the Respondents' allegations.

It is nonetheless the case that in the eyes of the Respondents Libya is considered responsible and is called upon to make reparation, before the conditions of any such responsibility are established. Affirmation replaces demonstration.

B. Violations of the elementary rules of human rights relating to a fair trial

3.6. Independently of the Libyan State, the Libyan nationals in question are also judged before their time and sentenced in advance of trial, since the Libyan State is called upon to prove and to redress their alleged misdeeds. What remains of the presumption of innocence in these circumstances? And what fair trial can States capable of such action claim to offer the accused? How can a jury which for years has been bludgeoned with official anti-Libyan ideology hesitate to presume these persons guilty, when sinister photographs of them are published and four million dollars is offered to the person who will go and find these nationals of a State punished by the United Nations for their crimes?

Mr. President, Members of the Court, these circumstances show just how derisory are the professions of faith and the litany of virtues and impartiality of the Scottish and the American judges.

It would be a manifest violation of the right to a fair trial to surrender accused persons in circumstances of this kind. We know that in a similar situation Ireland refused to extradite to the United Kingdom members of the Irish Republican Army similarly convicted in advance through the manipulation of public opinion.

Article 3 of the Model Treaty on Extradition adopted by the General Assembly of the United Nations on 14 December 1990 (A/Res. 45/116) provides likewise that:

> "Extradition shall not be granted . . . *(f)* if the person whose extradition is requested . . . would not receive the minimum guarantees in criminal proceedings, as contained in the International Covenant on Civil and Political Rights, Article 14."

These actions show that the Respondent States are no more respectful of human rights than they are of the rights of weak States.

At this stage of my statement it is perhaps appropriate to correct the mistaken construction which may have been placed on the letter of 29 September 1993 addressed by Mr. Omar Mustafa Almuntasser, the Libyan Secretary for Foreign Liaison and International Co-operation, to the Secretary-General of the United Nations[3]. In that letter the Minister, in the

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[3]S/26523.

light of the assurances given by the United Kingdom authorities and communicated to him by the Secretary-General, indicated his wish that the two suspects should agree to give themselves up voluntarily and made it known that he urged them to do so. In addition to that, their lawyers had to be convinced that the guarantees were adequate. As we know, they took the view that such would be the case only if the trial were to take place, even before Scottish judges, but on neutral territory, and preferably at the Peace Palace in The Hague. Thenceforth the Libyan Government worked on that solution and on the other similar proposals to which Professor Murtadi drew attention a short while ago, and which are conducive to ensuring a proper trial for the persons concerned.

For the Libyan Government it was thus a question of producing an adequate and reasonable response, along the lines of the Security Council requests, that would reach beyond the issues dividing Libya and the two Respondents.

That kind of solution had already been envisaged by Judge El-Kosheri in the dissenting opinion which he appended to the Orders of the Court of 14 April 1992 on the requests for the indication of provisional measures. The Respondents have been very happy to cite paragraph 64 of the opinion, in which Judge El-Kosheri explained the reasons why in his view the Libyan courts could not constitute an appropriate forum. They have not breathed a word about paragraphs 61 to 63 of the same opinion, in which Judge El-Kosheri showed that the courts of the United Kingdom and the United States could not claim to guarantee the suspects a fair trial. Why? Here is a little riddle to which the Court will doubtless find an easy answer.

II. Non-observance of the rules on the peaceful settlement of disputes

3.7. Do the Respondents exhibit any greater degree of respect for international law in regard to the procedure for settling this dispute?

On the contrary, we find a systematic intent to avoid judicial settlement.

3.8. (1) It is not disputed that there exists between the countries concerned a specific convention, the Montreal Convention, which is specially designed to deal with repressions of this kind. That Convention has remained — until now — the preferred legal instrument for combating

aerial terrorism. Every year — and once more in resolution 51/210 of 17 December 1996 — the General Assembly of the United Nations recommends all States to envisage becoming Parties to the Convention as a matter of urgency, and to adapt their national legislation in such a way as to establish the jurisdiction of their courts over the perpetrators of terrorist acts and provide assistance and support to other States for these purposes. It is also the case that, besides, no extradition treaty exists between Libya and the Respondent States. The natural legal basis of any international criminal co-operation between those concerned is therefore either the Montreal Convention or their mutual consent based on the principle of the sovereign equality of States.

Libya's action is directly and totally in keeping with the provisions of the Montreal Convention.

3.9. (2) The United Kingdom and the United States, on the other hand, have from the outset established a strategy designed to set aside the Montreal Convention. They make no secret of this[4]. That strategy was apparent immediately, since the ultimatum was issued eight days after the diplomatic transmission to Libya of the domestic acts of procedure.

The text in question is indicative of a state of mind. The Respondents intend to secure the "surrender" (what a nice word) of the alleged suspects, by intimidation and, if necessary, by coercion. That is what Mr. Murphy modestly calls a "diplomatic initiative"[5]. Had the Respondents followed the only course open to them in the legal relationships existing between themselves and Libya, the Montreal Convention, they would have had to make a request for extradition in due and proper form. Libya would then have been entitled to refuse that request, since the Montreal Convention is governed by the principle *aut dedere aut judicare*, and the persons concerned are Libyan nationals.

The Respondents likewise intended to avoid any form of judicial co-operation with Libya, something which was nevertheless mandatory under the Convention. Moreover, recourse to that

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[4]See, e.g., the oral statement of Mr. Murphy, CR 97/18, para. 2.21.

[5]"A diplomatic initiative for the surrender for trial of the suspects", CR 97/18, para. 2.22.

would have permitted not only a scrutiny by Libya of the assertions put forward by the Respondents but also collaboration in seeking the truth.

When the diplomatic communication, this intimidatory step accompanied by scarcely veiled threats, proved fruitless, the United Kingdom and the United States stepped up their pressure by seeking a process of novation, transforming their requests, which were indisputably contrary to Libya's rights under the Montreal Convention, into a request emanating from the Security Council.

3.10. Faced with this body of threats, and since the differences of opinion on the application of the Montreal Convention were now patently obvious, Libya, in an attempt to resolve them, relied on the arbitration clause stipulating that jurisdiction lay with the International Court of Justice.

3.11. In this respect the Court will be mindful that the interesting exposition by Mr. Bethlehem of the chronology of events has the merit of bringing into the limelight the race which took place between a developing country and its two super-Power opponents to secure recognition for its rights through a process of peaceful settlement of disputes.

On this subject we ought to look briefly at an argument put forward by the Respondents on a number of occasions: the delay shown by Libya in invoking the Montreal Convention, namely on 11 January 1992[6], whereas the question had been brought to the attention of the Security Council as early as 16 November 1991.

There are nevertheless sins of omission as regards certain essential aspects of the chronology put forward by the Respondents: the first State to submit the Lockerbie issue to the Security Council was neither the United Kingdom nor the United States, but Libya, in a letter dated 16 November 1991[7]. It is interesting to note that in that letter, Libya, confronted for the first time with the circulation two days earlier of charges against itself and its nationals, at once urged the United Kingdom and the United States:

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[6]Mr. D. Bethlehem, CR 97/16, p. 44, para. 3.18; and p. 53, para. 3.42; Professor Greenwood, *ibid.*, pp. 66, 72, 76, paras. 4.32, 4.47-4.49, 4.63; Mr. J. R. Crook, CR 97/18, p. 34, para. 3.11.

[7]United Nations, Doc. S/23221, United Kingdom Preliminary Objections, Ann. 43.

"«de s'en remettre à la logique de la loi, à la sagesse et à la raison et de faire appel au jugement des commissions d'enquête internationales impartiales ou de la *Cour internationale de Justice*»[8] (les italiques sont de moi).

A letter relating to the Lockerbie drama was also transmitted by Libya to the Security Council and the United Nations General Assembly two days later, on 20 November 1991[9]. It was not until 20 December, one month later, that the Respondents and France laid documents on the matter before the United Nations[10]; these were circulated to the Security Council and the General Assembly on 31 December.

The previous day, however, Libya had already written to ICAO pointing out that the accusations against it were "violations of all the legal instruments which serve as a basis for activities relating to civil aviation"[11]. It was certainly 11 days later, on 1 January 1992, that Libya explicitly invoked the Montreal Convention for the first time. As we have already pointed out, however, by implication the request of 18 November for judicial co-operation was based exclusively on that instrument of co-operation between the States concerned.

That is the precise course of events, one which, as we can see, is at quite some remove from what has been described as a "deliberate strategy to forestall further action by the Security Council"[12]. On the contrary, a correct vision of the collaboration between the Council and the Court was envisaged by Libya from the outset.

As regards the technical point of the alleged delay in invoking the Montreal Convention, and in so far as this is necessary, Libya will merely observe that in the *Military and Paramilitary Activities in and against Nicaragua* case, in which the United States had waited far longer than 11 days before invoking a Treaty of Friendship, Commerce and Navigation of 1956 as the basis of the Court's jurisdiction, the Court stated that "the fact that the 1956 Treaty was not invoked in the

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[8] *Ibid.*

[9] United Nations, Doc. A/46/660 and S/23226, *ibid.*, Ann. 44.

[10] United Nations, Docs. A/46/825-828 and S/23306-23309, *ibid.*, Anns. 5-8.

[11] Observations of Libya on the Preliminary Objections raised by the United Kingdom, 22 December 1995, p. 36.

[12] Mr. J. R. Crook, CR 97/18, p. 34, para. 3.11.

Application as a title of jurisdiction does not in itself constitute a bar to reliance being placed on it in the Memorial"[13].

330 3.12. Without giving Libya an opportunity to have this legal issue of the application of the Montreal Convention dealt with according to the normal procedure, the Respondents went ahead with a draft resolution which was adopted by the Security Council on 21 January 1992 as resolution 731. Paragraph 3 of this resolution requested the Libyan authorities "to provide a full and effective response" to the requests — in particular to those of the two States.

3.13. That was the situation when, on 3 March 1992, Libya seised the Court with a view to obtaining from it a decision on the rights which it believes it possesses and on the obligations which, in its opinion, lie with the Respondents by virtue of the Montreal Convention.

In a separate Application on the same day, Libya filed a request to the Court for the indication of provisional measures.

In order to prevent the Court from ruling on the legal issues before it, the Respondents then caused the Security Council — with the case already before the Court and *sub judice,* and its decision not yet handed down — to adopt resolution 748 of 30 March 1992.

The sequel is common knowledge. Without making a determination on its jurisdiction on the principal issue, the Court, by its Orders dated 14 April 1992, decided that it was unable to grant the Libyan requests for the indication of provisional measures (*I.C.J. Reports 1992,* p. 15, para. 43).

However, since Libya had no intention of giving way to the demands of the United States and the United Kingdom, those two States succeeded in having the Security Council adopt resolution 883 (1993) imposing sanctions on Libya.

It is no secret to anyone that the United States uses the Council as an instrument of its foreign policy whenever it can. As Fred Hiatt wrote in the *Washington Post* of 26 August 1996,

331 > «Bush avait reconnu, comme l'a fait Clinton, que les Nations Unies peuvent être un instrument utile à la diplomatie des Etats-Unis, à laquelle il procure un puissant effet de levier, et qui ne peut en aucun cas être dirigé contre les Etats-Unis, en raison du droit de veto dont ils dispose»[14]

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[13] *Judgment of 26 November 1984, I.C.J. Reports 1984,* p. 426, para. 80.

[14] Page A 13.

3.14. Mr. President, Members of the Court, all this is surprising indeed. One would think oneself on another planet — perhaps the one where the much-vaunted international order is nicely established? For here we have a State being made the victim of sanctions on the basis solely of the assertion that it may — perhaps — have committed a wrongful act. And so the non-surrender of persons suspected by super-Powers becomes a threat to the peace!

3.15. Some consideration should be given in this respect to an opinion of 10 August 1972 in which the Legal Office of the Swiss Federal Political Department expressed views which, in my opinion, are sensible in the extreme:

> "2. The wrongful act must be duly evidenced. In the international practice followed in the 19th century, it would happen that a State, which was generally a major Power, reserved to itself the faculty of unilaterally characterizing as wrongful the conduct of another State, which was generally a weaker Power. It would then apply sanctions against that second State despite the latter's objections to the characterization of the act. This practice, which evokes the most unpleasant memories of international life, no longer corresponds to present needs in relations among States. Sanctions are inconceivable in our time without an objective mechanism enabling the violation of an international rule to be evidenced beforehand, with all the necessary safeguards. Moreover, the State which is accused of such a violation should have every opportunity of explaining and justifying its conduct before the organ which is required to hand down the decision." (*ASDI*, 1977, p. 237.)

The Legal Office of the Federal Political Department went on to say:

> "3. Even if the negative conclusion resulting from the preceding paragraph were not to be accepted, it would have to be agreed in any event that, in accordance with the present state of the law, the application of sanctions is unacceptable when a dispute settlement procedure exists between the State committing the alleged wrongful act and the State which is the victim of it. In other words, the application of a sanctions machinery against third States would at all events be impossible between States which had subscribed to the judicial settlement clauses of The Hague and Montreal Conventions or were bound by the optional clause in Article 36 of the Statute of the International Court of Justice (RS 0.193.501), or again had concluded a bilateral agreement for conciliation or arbitral or judicial settlement." (*ASDI*, 1977, p. 237.)

Earlier, in 1934, the Institute of International Law had said things of the same kind in connection with reprisals, and the International Law Commission adopted a similar position in its Draft Article 48 on State Responsibility.

3.16. Once again we cannot fail to notice, on the part of the two major Powers, a disdain of respect for the law and a propensity to impose their views by resorting to the primacy of power relationships. We are thus faced with a double abuse of process: on the one hand the use of the Security Council machinery for *personal* ends, so as to clothe the bilateral dispute in the guise of

an allegedly international dispute, and on the other the attempt by this new method to set aside the jurisdiction of the Court.

3.17. The first abuse of process consists in utilizing the Security Council machinery for personal ends, so as to clothe the bilateral dispute in the guise of an allegedly international dispute.

The novation is no more than apparent, however. The Members of the Court, all of whom are experts in international affairs, know perfectly well that if the United States and the United Kingdom consented to the proposals made to them by a number of regional international organizations for an impartial international enquiry and a neutral international judge, the dispute would long since have been settled.

These two States contend that Libya, by opposing the Council, is opposing the will of the international community: take for example the statement of Mr. Gnehm — speaking on behalf of the United States — before the United Nations General Assembly on 1 October 1996, or that of Mr. Hollis the same day:

> "Libya's refusal to meet the requirements of the Security Council shows the measure of its regard for the United Nations. Evasion of these requirements will not bring a solution to the problem between Libya and the world of nations." (A/51/PV.17, p. 28.)

> "This is not about a dispute between the Libyan Government and a number of countries. It is about the need for the international community to respond to acts of international terrorism . . ." (*Ibid.*, Mr. Hollis (United Kingdom).)

That Libya would oppose the United Nations? The international community? Would that not mean believing that these expressions exclude all those member States which have taken Libya's side? If so, it would mean believing that the Arab League[15], the Organization of African States, the Islamic Conference and the Non-Aligned Countries[16] formed no part of the international community. Is this possibly the new international order in a fresh reincarnation?

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[15]Decision 5373 of 27 March 1954 of the Council of the Arab League (S/1994/373 of 31 March 1994); decision 5506 of 21 September 1995 of the Council of the League (S/1995/834 of 4 October 1995).

[16]Resolution of 27 April 1995 (S/1995/381 of 10 May 1995): "a fair and impartial trial of those accused, to be held in a neutral country agreed upon by all Parties".

3.18. Mr. President, Members of the Court, everyone knows that the entire system is blocked by the obstinacy of two States — despite the calls from the great majority of the countries which make up the United Nations.

Must we draw attention to the three options suggested to the Security Council by the Conference of Heads of State of the Organization of African Unity at Harare in June 1997?

> "In order to contribute to the search for a rapid and just solution to the conflict . . ., the Conference expresses the wish that the Security Council may examine ways and means of solving the crisis rapidly and, to that end, submits to it the following proposals adopted jointly with the League of Arab States, and supported by the Non-Aligned Group of Countries:
>
> > First option: To hold the trial of the two suspects in a third and neutral country, to be designated by the Security Council.
> >
> > Second option: To have the two suspects tried at the seat of the International Court of Justice (ICJ) in The Hague, according to Scottish law and by Scottish judges.
> >
> > Third option: To establish a Special Criminal Tribunal to try the two suspects in The Hague, at the seat of the International Court of Justice."

Although the Security Council declared its conviction "that those responsible for acts of international terrorism must be brought to justice", a conviction which Libya for its part fully shares, the Council has not — as Professor Suy will explain later — endorsed as it stands the solution which the Respondents wish to impose. In particular, the Council has never had the opportunity to express its opinion on the solution of an impartial international tribunal, which the Council itself is invited to appoint.

That would be an appropriate course for ensuring that justice is done both to the memory of the victims, which requires that light be shed on the subject, and the right of the accused to impartial justice. There is no reason to think that, were it not for the obstinacy of the United States and the United Kingdom, the other Members of the Security Council would oppose the solutions proposed by the majority of the international community.

But alas, although the memory of the victims and the right of the accused to justice combine the safeguards which international law requires, the United States and the United Kingdom plainly demonstrate that they have no regard for them: one would think they wished to avoid the risk of

an independent external investigation and an impartial judgment that would undermine the condemnations put forward on suspect grounds, from the outset, with the purely political aim of destroying a régime which refuses to obey them.

3.19. The second abuse of process is represented by the attempt to employ this new method to set aside the jurisdiction of the Court.

Within the period laid down for filing the Counter-Memorial on the merits, the United Kingdom and the United States raised Preliminary Objections. This was a further manoeuvre to prevent the Court from handing down a decision on the merits.

The intention here is to render the jurisdictional clause of the Montreal Convention void. The claim is that no dispute exists that is based on the Montreal Convention. Professor David will reply to these allegations shortly.

It is contended that Libya seeks to have the resolutions of the Council annulled, something which is absolutely erroneous, as Professor Suy will show. The Court is presented with this spectre: that if it were to consider the merits of the Libyan Application, by so doing it would clash with the Council; the fear being, in actual fact, that the Court — a principal organ of the United Nations — would remember that the Security Council is also bound by international law, that those resolutions are not necessarily incompatible with respect for the Montreal Convention; or that the Court would find it necessary to interpret the Council's decisions in a way which does not conflict with those sources of law.

Here is the proof that the contention of the Respondents that justice should be done through the surrender of the alleged suspects is a pretext, and that the aim is to bolster up a discretionary and arbitrary power based on a partisan use of Chapter VII when one is the most powerful nation in the world.

3.20. The last obstacle remains to be overcome: escape from any judicial control.

The question is, will international justice agree to lend its authority to the various denials of law I have just mentioned or will it give a free rein to manoeuvres of this kind?

Libya, for its part, has shown on a number of occasions that it was prepared to put itself in the Court's hands in regard to important questions of maritime or territorial delimitation. It has

always complied with the Court's decisions, even when they went against it, which is not the case, I believe, with everyone.

Today the gnat has the temerity to confront the eagle and the lion and bring the case before you.

In the final analysis, Mr. President, Members of the Court, if these proceedings between Libya and the two major Powers conceal a conflict of institutions, it is not that of Libya against the Security Council but that of the United States and the United Kingdom against the Court.

I thank the Court for its kind attention. Professor David will be at the Court's disposal, I would suppose after the break. Thank you, Mr. President.

Le VICE-PRESIDENT, faisant fonction de PRESIDENT : Merci, Monsieur Salmon. Le moment me paraît convenu pour notre pause du milieu de le matinée.

The Court adjourned from 11.22 to 11.37 a.m.

Le VICE-PRESIDENT, faisant fonction de PRESIDENT : Veuillez vous asseoir. Je donne maintenant la parole à M. David.

Mr. DAVID: Thank you, Mr. President.

The jurisdiction of the Court

4.1. Mr. President, Members of the Court, it is always an honour to address the Court. It is also a great honour to have been chosen for the purpose by Libya, and it is a special honour to defend a cause where legal interests merge with the interests of a people which, for over five years, has been enduring a situation of distress, the extent of which is hard to imagine.

4.2. The task falling to me today is to show that the Court has jurisdiction to deal with this dispute in accordance with Article 14, paragraph 1, of the Montreal Convention. This point was set out in Libya's 1992 Application instituting proceedings and it was repeated in the Memorial on the merits filed in 1993.

Preliminary Objections having been raised by the Respondents in their Memorials filed on 20 June 1995, Libya replied thereto in its observations dated 22 December 1995.

4.3. Libya observes that the legal reasoning of the objections was not fully echoed in the oral arguments of the Respondents. Libya will therefore merely respond to the arguments submitted orally by the Respondents, without prejudice of course to the contentions developed in its written observations.

4.4. Mr. President, Members of the Court, one of the Respondents has spoken of the simplicity of the case[1] and this is a point on which Libya agrees, albeit not reaching the same conclusions: on 21 December 1988 a United States civil aircraft belonging to Pan Am was destroyed in flight following a bomb attack. Three years later the United Kingdom and the United States officially accused Libya of responsibility for the bombing, and they called on it to surrender two Libyan citizens presented as the alleged offenders.

Now Libya, the United States and the United Kingdom were and still are parties to the Montreal Convention, which organizes the co-operation of States in the suppression of unlawful acts of violence against the safety of civil aviation. Since the Lockerbie bombing corresponds exactly to the offences covered by the Convention, the latter should apply to the British and United States request for co-operation.

4.5. It is therefore indeed a simple problem. And yet what is simple for anyone capable of reading a text is not so for the United States and the United Kingdom, which are unwilling to apply the Montreal Convention for a medley of reasons that may be summarized in four sets of arguments, alleging that:

Primo: This dispute is not covered by the Montreal Convention.

Secundo: There is nothing to prevent the United States and the United Kingdom from seeking to exercise their penal jurisdiction in regard to the accused on the basis of general international law, and outside the Montreal Convention.

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[1]Lord Hardie, CR 97/16, p. 21, para. 2.2.

Tertio: The submission of the question to the Security Council precludes any dispute between the parties based upon the application of the Montreal Convention.

Quarto: Even if the Court could deal with the dispute, it would in any case lack jurisdiction to rule on questions unrelated to the scope of the Montreal Convention.

4.6. Mr. President, Members of the Court, we shall see that none of these arguments stands up to serious analysis. I apologize to the Court in advance for the time this rebuttal will take. I shall begin with the first set of arguments, namely that the dispute is not covered by the Montreal Convention.

I. This dispute is allegedly not covered by the Montreal Convention

4.7. Libya will not repeat what it has already written on the objective existence of a dispute between the Respondents and itself regarding the interpretation or application of the Montreal Convention[2]. The existence of such a dispute results, as it is, from a mere account of the events where we have first Libya calling for application of the Montreal Convention and then the Respondents eluding that and filing objections to jurisdiction in order to foil the application of the Convention[3]. What we have then is a dispute, namely, as the Court has said on several occasions and recently in the *East Timor* case,

> "a disagreement on a point of law or fact, a conflict of legal views or interests between the parties"[4].

4.8. Today, assuming that the Court no longer contents itself with a finding of a conflict of legal views, the test of the *Oil Platforms*[5] case, to which the Respondents have made copious reference[6], obliges the Respondent to show that the breaches of which it complains are covered by the provisions of the treaty it invokes. We shall see that such is the case: by using means designed

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[2]Observations and conclusions of Libya (22 December 1995) on the Preliminary Objections of the United Kingdom, paras. 2.6-2.11, and of the United States, paras. 2.5-2.10.

[3]*Ibid.*

[4]*East Timor, Judgment, I.C.J. Reports 1995*, p. 99, para. 22.

[5]*I.C.J. Reports 1996*, Judgment of 12 December 1996, Preliminary Objection, para. 16.

[6]Professor C. Greenwood, CR 97/16, pp. 57 *et seq.*, paras. 4.5, 4.9-4.12, 4.34, 4.38 *et seq.*; Mr. M.J. Matheson, CR 97/19, pp. 50-51, paras. 6.19 and 6.21.

to prevent application of the Montreal Convention, the Respondents are necessarily led to violate it.

4.9. Since the time allotted for Libya's pleadings precludes entering into the particulars of all relevant provisions of the Montreal Convention, we shall simply observe that at least five of them are directly applicable to the Lockerbie tragedy and to this case, namely Articles 1, 5, paragraph 2, 7, 8, paragraph 3, and 11, paragraph 1. I begin with Article 1:

(1) The case before the Court rests on imputing to Libyan nationals an "offence" having consisted in placing, as Article 1 of the Convention says, "unlawfully and intentionally . . . on an aircraft in service . . . a device or substance which is likely to destroy that aircraft", a device having indeed destroyed that aircraft. We can therefore see that:

— this act is covered by Article 1 of the Convention;

— the Convention is specifically intended to deter such acts, as made clear in its third preambular paragraph;

— the Convention is in force and binding on all parties.

The Convention, which the United Nations General Assembly has constantly repeated should be ratified by the entire international community[7] — to which Mr. Salmon alluded just now — must accordingly be applied, and the fact that the United States and the United Kingdom refrain from invoking it does not of course mean that it does not apply. In the Advisory Opinion on *Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947*, the Court said that the fact of not invoking a treaty:

> "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."[8]

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[7]See General Assembly resolutions on international terrorism, e.g. 40/61 of 9 December 1985; 44/29 of 4 December 1989; 46/51 of 9 December 1991; 49/60 of 9 December 1994; 51/210 of 17 December 1996. These resolutions were all adopted by consensus.

[8]Advisory Opinion of 26 April 1988, *I.C.J. Reports 1988*, p. 28, para. 38.

In other words, the fact of not invoking a rule regarding a given situation does not prevent that rule from governing that situation if the latter comes under it objectively, which is the case unless one is loath to call a spade a spade.

Let us go on to Article 5, paragraph 2, and Article 7.

(2) Article 5, paragraph 2, of the Convention obliges the State to establish its jurisdiction over any act referred to in Article 1 if the State declines to extradite the alleged offender; and Article 7 obliges the State to exercise that jurisdiction if it declines to extradite the alleged offender. In other words these two provisions, when taken together, recognize that the State has a *right*, Mr. President and Members of the Court, to choose between extradition and prosecution.

Admittedly, as Professor Greenwood has said[9], the United Kingdom is not questioning Libya's right to exercise that right. As to Dr. Murphy, he is thinking only of the right of the United States to prosecute, provided that Libya surrenders the accused to it, and he fails to see in what respect Libya could complain of a violation of its rights[10]. In short, everyone has rights and there would be no dispute on that score. Libya can see, however, that the reality is quite different.

If we take a careful look at what the Respondents are doing, we can see that instead of engaging in fair play with respect to the Montreal Convention by permitting Libya to prosecute the accused as the Convention allows, they begin by ignoring the Convention and, as that places them outside the Convention, they request the Security Council to *oblige* Libya to surrender the accused to them. In other words, they so act as to *deprive* Libya of the freedom of choice it enjoys under the Montreal Convention, as is the case for all major conventions in international criminal law. Now this freedom of choice is a right protected by the Convention; the action of the Respondents ultimately violates this right and it is therefore wrong to claim that Libya is left the right and the power to prosecute the accused.

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[9]Professor C Greenwood, CR 97/16, p. 71, para. 4.44.

[10]Dr. S. Murphy, CR 97/18, pp. 25-26, para. 2.31.

(3) I go on to Article 8, paragraph 3. This article stipulates that the offence covered by Article 1 is extraditable subject to the conditions provided by the law of the requested State. This reference to the law of the requested State is of course essential; being also present in all modern instruments of international penal law, this reference enables the requested State to refuse an extradition contrary to its national law. In this case, Libyan law, in common with many Roman-Germanic systems, precludes the extradition of nationals. Libya is therefore entitled to refuse extradition of the two accused to the Respondents.

Professor Greenwood and Dr. Murphy seem to accept this argument; according to them, the United Kingdom and the United States have never claimed that Article 8, paragraph 3, obliged Libya to extradite the suspects, and they therefore fail to see in what respect the Respondents may have breached that provision[11].

Yet it is simple. Here too, by applying to the Security Council to try to have it *oblige* Libya to surrender the accused to them, the Respondents deprive Libya of a *right* explicitly recognized it by the Montreal Convention, in common with all its sister conventions: the right not to extradite a person when national law precludes this. The non-extradition of nationals is a typical example of what is frequently provided for under national legislation. By manoeuvring to get round this prohibition, by so acting as to oblige Libya to surrender the accused to the Respondents, the latter are clearly in breach of the Convention.

(4) Let us now consider Article 11. Article 11, paragraph 1, provides that States Parties shall afford one another the greatest measure of assistance, and on that legal basis Libya is requesting the assistance of the Respondents in order to conduct the criminal proceedings it has instituted against the accused. Yet by merely sending Libya a copy of the statement of the facts and of the arrest warrant, the Respondents are not fulfilling their obligation to provide judicial assistance and co-operation in criminal cases, for those documents contain no evidence of which the Libyan judiciary could make use.

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[11]Professor C. Greenwood, CR 97/16, p. 71, para. 4.46; Dr. S. Murphy, CR 97/18, p. 26, para. 2.33.

We are then told that Libya did not invoke Article 11, paragraph 1, in its correspondence with the United Kingdom[12]. This is both flippant and surprising. Is the aim to suggest that this omission would prevent the Convention from applying and that the judicial services in Scotland were ignorant of the law, albeit international? The standard of British jurists makes this doubtful and, at all events, it is not because a legal instrument is not invoked that it does not apply, as already observed.

We are also told, from the United States side this time, that the requested State, on the very strength of Article 11, paragraph 1 *in fine* (which the United States then agrees to apply for the sake of the cause), is not obliged to provide assistance that would contravene its national law and, in particular, to disclose confidential information[13]. It must nevertheless be observed that apparently the *entire* dossier is confidential since the United States has supplied *no* information. Beyond the questions that such a general and absolute confidentiality raises as to the soundness of the evidence, we shall merely observe for the purposes of this exercise that it has not been demonstrated that any form of judicial assistance by the United States to Libya would in this case have violated the United States law to which Article 11, paragraph 1, refers.

4.10. Mr. President, Members of the Court, the foregoing points show that the Lockerbie tragedy is well and truly a situation covered by Article 1 of the Montreal Convention and that the manoeuvres of the Respondents to refer the situation to the Security Council necessarily lead to violation of the rights that the Montreal Convention confers on Libya. By applying to the Security Council to try to have it *oblige* Libya to adopt conduct different from that permitted under the Convention, the Respondents are indeed conducting action incompatible with the aforesaid provisions of the Convention. Between the Respondents and Libya, there thus exists objectively a dispute covered by Article 14, paragraph 1, of the Montreal Convention. By echoing *mutatis mutandis* what the Court said in the *Oil Platforms* case, we could say this:

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[12]Professor C. Greenwood, CR 97/16, p. 72, para. 4.50.

[13]Dr. S. Murphy, CR 97/18, pp. 29-30, paras. 2.41 *et seq.*

> "[The 1971 Convention] imposes on each of the Parties various obligations on a variety of matters. Any action by one of the Parties that is *incompatible* with those obligations is unlawful, *regardless of the means by which it is brought about.*"[14] (Emphasis added.)

The Montreal Convention lays down "norms applicable to this particular case" and they very exactly cover "the actions carried out" by the Respondents against Libya[15].

4.11. There are thus many reasons for concluding that the Montreal Convention applies to the Lockerbie tragedy and to some of its consequences. The refusal of the Respondents to accept this point of view and the converse desire of Libya constitute a dispute that the Court may entertain on the basis of Article 14, paragraph 1, of the Convention.

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4.12. We can now contemplate the second set of arguments of the Respondents: that there would be nothing, and certainly not the Montreal Convention, to prevent them from seeking to exercise criminal jurisdiction in regard to the accused on the basis of general international law[16].

II. There would be nothing to prevent the United States and the United Kingdom from seeking to exercise criminal jurisdiction in regard to the accused on the basis of general international law

4.13. According to the United States and the United Kingdom, the Montreal Convention would not prevent a State from calling for the surrender of a person outside the arrangements provided for in the Montreal Convention. The argument comprises three points. First, Libya could not complain of the fact of the Respondents submitting the Lockerbie tragedy to the Security Council. Second, the Montreal Convention is claimed to lack a *lex posterior* and *lex specialis* character in relation to the Charter. Third, it is in vain that Libya would invoke Article 33 of the Charter in this connection. Let us examine, if you will, each of these points.

First point:

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[14] *I.C.J. Reports 1996*, Judgment of 12 December 1996, Preliminary Objection, para. 21.

[15] *Ibid.*, para. 36.

[16] Professor C. Greenwood, CR 97/16, pp. 61 *et seq.*, paras. 4.19-4.25 and 4.31; Dr. S. Murphy, CR 97/18, pp. 17 *et seq.*, paras. 2.4 and 2.7-2.27.

A. The alleged right of the Respondents to submit the Lockerbie tragedy to the Security Council

4.14. Mr. President, Members of the Court, it is true that the Montreal Convention does not *expressly* prohibit a State Party from relying on an arrangement other than that provided for in the Convention for requesting another State Party to surrender a person suspected of having committed an act covered by the Convention. However, in order that this arrangement differing from that provided for in ordinary criminal law may be used to rule out what has been ruled, the consent of the State entitled to avail itself of the rule common to the parties is required. You do not change the rules of the game during the game without the consent of all players. Failing such consent, the requested State is perfectly justified in rejecting what is in derogation of general law; the requested State is entitled to secure recognition of its right to application of the arrangements specially intended and accepted for the purpose.

This is particularly true in a case like this one where there is no obligation for a State to surrender a person to another State outside an extradition treaty, and where the whole organization of the Montreal Convention confirms the pre-eminence of the sovereignty of the requested State for purposes of granting or refusing another State the extradition of a person sought for an act covered by the Convention.

4.15. It is significant that following the terrorist attempt on the life of President Mubarak of Egypt committed in Ethiopia on 26 June 1995 and the flight of those suspected of the attack to the Sudan, the Security Council, in its resolution of 30 January 1996, called upon the Sudanese Government to take the necessary action "to *extradite* to Ethiopia . . . the three suspects" sheltering in the Sudan, "*on the basis of the 1964 Extradition Treaty* between Ethiopia and the Sudan"[17]. In other words, the Security Council reasonably applied the rules of the game and referred the parties to the arrangements on which they had agreed in regard to extradition.

There is no reason why any other principle should apply in the present case.

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[17]S/RES/1044 of 31 January 1996, para. 4 *(a)*; likewise, S/RES/1054 of 26 April 1996 and S/RES/1070 of 16 August 1996 (emphasis added).

4.16. Libya and the Respondents agreed *in tempore non suspecto* that the international punishment of an attack against the safety of civil aviation would be submitted to a specific legal régime. The occurrence of such an attack is the prerequisite for application of the Convention. Once the act has been carried out, each of the States concerned is entitled to require the other State to apply the arrangements that they have drawn up by treaty and accepted for this type of act.

Failing acceptance by Libya and the Respondents of arrangements for the surrender of suspects other than those provided for in the Montreal Convention, the Respondents and Libya remain bound by those of the Montreal Convention. The Convention therefore applies and, in accordance with its Article 14, the Court has jurisdiction to determine whether or not the Libyan claims based on the application of the Convention are well founded.

Second point:

B. The *lex specialis* and *lex posterior* character of the Montreal Convention

4.17. Libya sees in the Montreal Convention a *lex posterior* or a *lex specialis* in relation to the Charter. The Respondents question this point of view: as they see it, the functional and logical primacy of the Montreal Convention over the Charter in the event of an attack on the safety of civil aviation would not stand up to Article 103 of the Charter[18].

4.18. Mr. President, Members of the Court, by asserting the *lex specialis* or *lex posterior* character of the Montreal Convention, Libya is not trying to claim that the Security Council could *never* substitute its action for that resulting from the application of an international convention. Libya does not say that, but it considers that action by the Security Council must be considered in a certain *ordering* of international society, a society in which each of the actors must play its role and solely that assigned to it, a system too in which each instrument must fulfil the function peculiar to it and that function alone. It is the stubborn refusal to admit of the respective roles and functions of all concerned that leads the Respondents to seek to give action by the Security Council precedence over application of the Montreal Convention.

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[18]Professor C. Greenwood, CR 97/16, pp. 64 and 65, paras. 4.26-4.29; Mr. J.R. Crook, CR 97/19, pp. 10 and 11, paras. 3.27-3.32.

4.19. The role of the Security Council, in accordance with Article 39 of the Charter, consists in taking action in extreme cases of a threat to international peace and security. The function of the Montreal Convention, as has already been said, is to organize the suppression of terrorist attacks against international civil aviation.

Now it does not suffice to say that an attack threatens international peace and security for one to be entitled to refer the matter to the Security Council, automatically removing it from the norms governing it — the Montreal Convention — and diverting the case from its "natural judge", here the International Court of Justice.

4.20. Let me remind you that the Montreal Convention was concluded in 1971, some 26 years after the signing of the United Nations Charter. Had the drafters of the Charter really intended to entrust the Security Council with settling any international incident, it is not very clear why States would have concluded this convention and so many other treaties to regulate their relations. Hence the system of the Montreal Convention may quite naturally be regarded, in relation to the system of the United Nations Charter, as both a *lex posterior* and a *lex specialis*; and hence for questions pertaining to the Convention it must *a priori* prevail over the systems provided for by the Charter, barring the application of Article 103 in cases to be specified by Professor Brownlie.

4.21. It is of interest to observe that the examples cited by one of the Respondents to dispute the idea that a treaty like the Montreal Convention may be seen as a *lex specialis* or a *lex posterior*[19], far from invalidating, actually bears out this contention. We were thus reminded that the Security Council had adopted resolutions replacing the law normally applicable without taking account of the special or posterior character of that law in relation to the Charter. References were thus made to resolutions 670 (para. 3) and 757 (para. 11), which limited air traffic without taking account of the Chicago Convention or other relevant instruments, but we were not told that those resolutions concerned aerial embargo measures in the Gulf War and in the Yugoslav conflict. Resolution 820 (paras. 12-30) limiting navigation on the Danube despite the existence of a treaty providing for freedom of navigation on the river was mentioned, but not the fact that what was

[19]Professor C. Greenwood, CR 97/16, p. 65, para. 4.28.

concerned, there too, was embargo measures in the Yugoslav conflict. Reference was also made to the establishment of the International Criminal Tribunals despite the existence of the 1949 Geneva Conventions with their express provisions on *aut dedere, aut judicare*, but it is immediately apparent that what was involved in one case was still the Yugoslav conflict and in the other what has been termed, alas, the "third genocide of the century"!

In short, it is manifestly clear that in all cases where the normally applicable *lex specialis* has indeed been set aside, the prevailing situation was either a classic one of a threat to international peace and security or one in which *no* problem of evidence or charges arose, unlike the Lockerbie tragedy! In other words, while everyone knew what happened in the conflicts of Kuwait, Yugoslavia and Rwanda, the same is not true of the Lockerbie tragedy, in which Libya or some of its nationals are blamed for conduct that is almost monthly contradicted by fresh revelations. In situations of this kind, it is inappropriate to speak of a threat to peace in respect of dubious imputations, and it is important *a priori* to resolve these matters within the particular law specifically applicable to the case.

I now come to the third point, concerning Article 33 of the Charter.

C. The role of Article 33 of the Charter

4.22. Article 33 of the Charter confirms the operational primacy of the Montreal Convention over the Charter. This is shown by the use of the words "first of all" in that Article. As we know, this Article lays down that, even if a dispute endangers international peace and security,

> "1. The Parties . . . shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or peaceful means of their own choice." (Emphasis added.)

4.23. This shows that, even if the Montreal Convention is not the only instrument applicable to this case, it is nevertheless of the *first importance*, and the logical starting point must be to try and exhaust the possibilities before turning to the Security Council. This is an obligation which results both from the letter and the spirit of Article 33 of the Charter and from the general obligation to perform in *good faith* any treaty in force (Vienna Convention on the Law of Treaties, Art. 26 and Declaration on Principles of International Law concerning Friendly Relations and

Cooperation among States in accordance with the Charter of the United Nations, 7th Principle, A/Res. 2625, 24 October 1970).

Only if the Convention is not correctly applied and if that failure to apply it threatens international peace and security can the matter be referred to the Security Council. But the exercise and correct application of international law require that the relevant instruments, which States have taken the trouble to conclude, are *first* applied, before suggesting that they are of no use. It runs counter to all legal logic to act as the Respondents do, immediately bringing the matter before the Security Council without using the Convention *specifically applicable*.

4.24. However, the United States argues that Article 33 does not apply here, since its scope is, according to it, limited to Chapter VI of the Charter, whereas the context is in fact Chapter VII[20]. This narrow interpretation must be rejected first because it takes for granted what still has to be proved, and then because it does not tally either with the letter of the provision or with its spirit.

The American interpretation sets out from the assumption that this is indeed a situation covered by Chapter VII, but although it is true that the Security Council followed the Respondents on this point, it will be demonstrated this afternoon by Professors Suy and Brownlie that this authoritarian categorization is highly questionable with respect to the facts of the case.

If the letter, the text of Article 33 is now examined more closely, we see that it applies to "any dispute, the continuance of which is likely to endanger the maintenance of international peace and security", i.e., a situation which may fall within the scope of both Chapter VI *and* Chapter VII. Article 33 is therefore a general introductory clause, which it would be absurd to confine solely to Chapter VI.

In reality, if we raise the tone of the discussion a little, Article 33 has the appearance of being a development of Article 2, paragraph 3, of the Charter on the obligation of States to settle their disputes by peaceful means; its scope should therefore, more or less, coincide with that of Article 2, paragraph 3. However, claiming that Article 33 is limited to Chapter VI is like saying

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[20]Mr. J. R. Crook, ICJ, CR 97/19, p. 14, paras. 3.45-3.48.

that Article 2, paragraph 3, is limited to Chapter I of the Charter and no longer applies outside that Chapter. This is patently not the meaning which may reasonably be given to this clause.

4.25. However, Libya recognizes that Article 33 should probably not apply were Libya to refuse to surrender its nationals for trial or were it to give them a mere parody of a trial resulting in an acquittal or a token sentence even though their culpability were established: in such a case, Libya would not be applying the Montreal Convention in good faith[21].

Yet far from seeking to shirk any responsibilities it may have, Libya, as has already been noted on various occasions, is multiplying its efforts to organize a proper trial for the accused, a trial which could be monitored by the entire international community, but it is the Respondents which are obstructing the Libyan court from exercising jurisdiction by refusing all co-operation with it.

Pending that, while Libya declares and maintains that it wishes to seriously apply the Convention, there is no *legal* reason to doubt that undertaking[22].

4.26. If the Respondents consider that the Convention is ineffective, let them prove it. There is little point in their harping on that Libya is involved in the Lockerbie bombing; they merely vie with one another in repeating a well-known tune, which proves nothing. And when Libya, on the contrary, testifies to its good faith by proposing, in a spirit of reconciliation, that the suspects should be brought before the criminal courts of a neutral State or before an international criminal court, it is highly significant that the only response of the United States and the United Kingdom is contemptuous silence, a silence which, all things considered, is suspicious.

The fact that the United States and the United Kingdom turned to the Security Council is thus not sufficient to set aside the application of the Montreal Convention, which remains an inescapable obstacle, an obstacle which must be overcome *"first of all"* . . .

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[21]Cf. diss. op. of Judge Bedjaoui, *Order of 14 April 1992, I.C.J. Reports 1992,* pp. 37 and 147.

[22]Cf. diss. op. of Judge Ajibola, *ibid.*, pp. 86-87, 191.

4.27. Mr. President, Members of the Court, having shown that the Respondents could not disregard the provisions of the Montreal Convention, we can now move on to the third category of arguments put forward by the Respondents to block the jurisdiction of the Court, namely, the fact that there is allegedly a dispute not between them and Libya, but between the Security Council and Libya.

III. The submission of the matter to the Security Council allegedly excludes any dispute between the Parties based on the application of the Montreal Convention

4.28. According to the United States and the United Kingdom, as this case was submitted to the Security Council, it falls within the Council's exclusive jurisdiction and excludes any application of the Montreal Convention[23].

4.29. The objection raised is closely akin to the earlier ones, and as already noted, it is not because the case was submitted to the Security Council that the Montreal Convention ceases to apply

— because the facts of the case fall under the Convention,

— because it has not been shown that, with respect to those facts, this Convention had no effect, and

— because it seems difficult to contend that there is a threat to peace when a State — Libya — does no more than call for international law to be respected, i.e., for a convention to be respected . . .

4.30. However, what the Respondents suggest is that, since the case has been dealt with by the Security Council, there is no longer a dispute between them and Libya, but between the Security Council and Libya.

4.31. This is a classic objection, which the United Kingdom had already sought in vain to raise in the case concerning *Northern Cameroons*. At the time, the Court quickly set it aside merely stating that it was not

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[23]Professor C. Greenwood, ICJ, CR 97/16 p. 74, paras. 4.55-4.59; Professor E. Zoller, CR 97/19, p. 32, para. 5.1.

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> "concerned with the question whether or not any dispute in relation to the same subject-matter existed between the Republic of Cameroon and the United Nations or the General Assembly. In the view of the Court it is sufficient to say that . . . 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 . . . between the Republic of Cameroon and the United Kingdom at the date of the Application."[24]

In the present case, it would be even more artificial to contend that a dispute between the Security Council and Libya has been substituted for the dispute between the Respondents and Libya. Not only does one not exclude the other, but an objective analysis of the reality shows that the dispute between the Respondents and Libya is the very *condition* of the dispute between the Security Council and Libya, supposing such a dispute existed. Moreover, Professor Suy will show that there is no dispute between the Security Council and Libya.

4.32. That the seisin of the Security Council does not exclude the dispute between the Respondents and Libya is self-evident. Not only did the dispute between the Respondents and Libya develop before the Security Council was seised, but it continued after the Security Council had adopted its resolutions 731, 748 (1992) and 883 (1993).

As we have pointed out, there is between the Parties "a conflict of legal views"[25], in which on the one hand the Respondents contend that the Montreal Convention does not apply and that Libya must surrender the suspects to them, and on the other hand Libya considers that the Convention applies and that, in accordance with it, Libya should not surrender the suspects to the Respondents. Thus, there is indeed a conflict of legal views between the Parties, i.e., a "dispute" according to the definition of this concept given by the Court.

4.33. This dispute did not disappear by virtue of the fact that the Security Council was seised by the Respondents. On the contrary, it continued because the Respondents *continued* to reject the application of the Montreal Convention, at the same time requiring Libya to surrender to them the

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suspects implicated in the Lockerbie bombing, whereas Libya *continued* to call for the application of that Convention and, in accordance with it, to claim its right to try these persons itself, the right

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[24] *Northern Cameroons, Judgment of 2 December 1963, I.C.J. Reports 1963,* p. 27.

[25] *East Timor (Portugal* v. *Australia), Judgment of 30 June 1995, I.C.J. Reports 1995,* p. 99, para. 22.

not to surrender them to the Respondents and the right to obtain the widest possible mutual legal assistance, without prejudice, naturally, to any other solution agreed between the Respondents and Libya for the trail of the accused.

4.34. In reality, if there were a dispute between the Security Council and Libya — *quod non* — the *result* of the dispute between the Respondents and Libya, or to put it another way, the dispute between the Respondents and Libya would be the *condition* of the dispute between the Security Council and Libya.

In fact, the Lockerbie disaster, Libya's desire to try the suspects or to achieve a solution protecting their rights, the desire not to surrender them to the Respondents, and to obtain the widest possible mutual legal assistance, conversely the desire of the Respondents to obtain the "handing over" of the suspects and to try them themselves are all matters specifically regulated by the Montreal Convention and consequently falling within the ambit of the Convention.

It is because, on the one hand, Libya wishes to apply this Convention to the Anglo-American request for the "surrender" of the suspects and, on the other hand, the Respondents reject the application of the Convention, that there is *objectively* a dispute regarding its application. The dispute would not exist if either Libya agreed to simply surrender the suspects to the Respondents without reference to any particular convention, or the Respondents agreed to faithfully apply the Montreal Convention and no longer to call for the "surrender" of the suspects.

As Libya refused to accept the unlawful orders of the Respondents, they decided to utilize the institutional strength of the Security Council. Hence, it is indeed the antagonistic intentions of the two Parties regarding the application or non-application of the Montreal Convention which condition what the Respondents refer to as the dispute between the Security Council and Libya.

4.35. However, no such dispute exists. It will be recalled that this matter was included on the agenda of the Security Council following letters addressed to the United Nations Secretary-General, notably by the United Kingdom and the United States, letters which requested

Libya to surrender the two accused to them[26]; However, the Security Council has never dealt with the question as though it were a matter of a dispute between itself and Libya.

Moreover, a mere glance at the seisin and resolutions of the Security Council shows that the Council is dealing with a *dispute between the Respondents and Libya* and that the alleged dispute between the Security Council and Libya — i.e., more precisely the treatment of the Lockerbie question by the Security Council — is not a consequence of the dispute between the Respondents and Libya; the Security Council will obviously no longer concern itself with the Lockerbie question once the dispute between the Respondents and Libya is resolved. Indeed, it is hard to imagine that the Security Council might continue to deal with the question if either the Respondents agree to apply the Montreal Convention, or Libya agrees to surrender the suspects to them.

The dispute between the United Kingdom and the United States on the one hand and Libya on the other thus retains complete legal autonomy[27] and the Court may deal with it separately, as it has already acknowledged in the past for other cases[28].

4.36. Admittedly, the United States and the United Kingdom imply that even if there is an independent dispute between them and Libya — which is the case — it would be *pointless* for the Court to resolve it with respect to the merits in view of Security Council resolutions 748 and 883, in conjunction with the effects of Articles 25 and 103 of the Charter. I shall not cover this point, which will be dealt with shortly by Professors Suy and Brownlie.

4.37. Mr. President, Members of the Court, there clearly was a dispute between the Respondents and Libya regarding the application of the Montreal Convention before the adoption of resolution 748 — a fact which, moreover, the Respondents do not appear to dispute. The fact

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[26]United Nations, Docs. S/23307, 22 December 1991, S/23308, 31 December 1991; Memorial of Libya (Merits), Anns. 45 and 46; see determination of the Security Council's agenda at its 3033rd Meeting, 21 January 1992, S/PV.3033, provisional, Memorial of Libya (Merits), Ann. 83, p. 3.

[27]*Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya* v. *United Kingdom), Provisional Measures, Order of 14 April 1992*, diss. op. Bedjaoui, *I.C.J. Reports 1992*, pp. 34 and 144, para. 4.

[28]*Northern Cameroons, Judgment of 2 December 1963, I.C.J. Reports 1963*, p. 27; *United States Diplomatic and Consular Staff in Tehran, Judgment of 24 May 1980, I.C.J. Reports 1980*, p. 20, para. 37.

that the Respondents brought the matter before the Security Council patently did not transform this dispute into a dispute between the Security Council and Libya. Unless, that is, one considered that the Security Council were now surrogate to the rights and obligations — of the United States and the United Kingdom — which would certainly come as something of a surprise to the international community . . .

But to be serious, it is clear that the dispute between the Respondents and Libya has not disappeared and that the Court is still competent to deal with it, in accordance with Article 14 of the Convention.

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4.38. Mr. President, Members of the Court, we now come to the fourth group of the Respondents' arguments on the Court's lack of jurisdiction to entertain some of Libya's claims because, in their view, they are in any event too remote from the Montreal Convention.

IV. According to the Respondents, even if the Court were able to entertain the dispute, it would in any case lack Jurisdiction to Rule on Matters which, in their view, are Unrelated to the Scope of the Montreal Convention[29]

4.39. These arguments concern the Libyan claims in the act instituting proceedings and relate to both the sanctions imposed on Libya by the Respondents **(A)**, and whether the Security Council resolutions can be invoked against Libya **(B)**.

Let us consider these two Libyan claims separately.

A. According to the first claim, the Court may consider the sanctions imposed on Libya by the Respondents

4.40. The Respondents dwelt very little on this point in their oral pleadings and Libya can therefore be brief. In any case, Libya notes with satisfaction the statements of the Agent of the United Kingdom suggesting that the United Kingdom never wished to use force against Libya to

[29]Professor Greenwood, CR 97/16, p. 61, para. 4.16.

achieve a solution of this case[30]. However, the United States did not make such a statement, and with good reason, as Professor El-Murtadi was saying a moment ago.

4.41. Regarding the jurisdiction of the Court to entertain this type of fact, one need only observe that the Montreal Convention cannot be dissociated from general international law, and particularly from the international law of treaties.

The principle of the prohibition of force set out, *inter alia*, in Article 52 of the 1969 Vienna Convention on the Law of Treaties concerning the *conclusion* of treaties, and therefore force with respect to the conclusion of treaties, applies equally to their *performance*. If, as Article 26 of this Convention stipulates, "[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith", this provision — Article 26 — is *a fortiori* violated when a State party to a convention resorts to threats in order to force the other contracting party to renounce its rights under that Convention.

This is exactly what the United States did when, on a number of occasions, it let it be understood "that no option was ruled out" in order to force Libya to surrender the suspects to them despite the rights accorded to Libya under the Montreal Convention.

An evaluation of the legality of these measures therefore forms an inextricable part of the dispute on the Montreal Convention, and as such, the Court is wholly competent to entertain it.

B. According to the second Libyan claim: the Court may entertain the Libyan complaints regarding the inopposability of the Security Council's resolutions

4.42. According to the Respondents, the Court lacks jurisdiction to rule on whether the Security Council resolutions can be invoked against Libya, its jurisdiction being allegedly limited solely to the interpretation of the Montreal Convention, and because that does not cover the question of whether the Security Council resolutions can be invoked against it.

4.43. This argument, Mr. President, Members of the Court, obscures the fact that it is the United States and the United Kingdom which invoke their own interpretation of the above-mentioned resolutions in order not to apply the Montreal Convention. These resolutions have the appearance of a ground for excluding the Montreal Convention; if so, they therefore form part

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[30]Sir Franklin Berman, *ibid.*, p. 19, para. 1.15.

of the dispute on the application of the Montreal Convention. If, for example, the United States and the United Kingdom invoked hardship, force majeure, a countermeasure or the state of necessity in order not to apply the Convention, the dispute would relate to these exceptions and the Court would be competent to entertain them on the basis of its jurisdiction to settle any dispute concerning the application of the Convention, whereas the Montreal Convention, however, refers neither to distress, nor to force majeure, nor to countermeasure nor to the state of necessity.

The Court therefore has jurisdiction, here too, to rule on whether, in the circumstances of the case, it is correct that the resolutions *invoked by the Respondents* can be set against Libya.

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4.44. Mr. President, Members of the Court, as we now reach the end of our argument on the jurisdiction of the Court, we note that none of the exceptions raised by the United States and the United Kingdom seriously pre-empts the Court from dealing with the merits of the dispute on the application of the Montreal Convention. Our observations may be summarized as follows:

— the problems of surrendering and trying the accused in essence fall within the Montreal Convention and, consequently, the Court has jurisdiction to deal with them, unless it looks, in the Convention, for restrictions and exceptions which do not stem from the text, from its spirit, or from the *travaux préparatoires*;

— the right alleged by the United States and the United Kingdom to bring the matter before the Security Council does not set aside the application of the Convention;

— the fact that the Security Council dealt with the matter does not transform the present dispute between the Applicants and Libya into an alleged dispute between the Security Council and Libya;

— lastly therefore, the Court's jurisdiction to settle a dispute on the basis of the Montreal Convention *also* authorizes it to regulate matters intimately connected therewith, in particular those relating to the threats to use force made by the Respondents, as well as matters concerning the in-opposability to Libya of the Security Council resolutions.

4.45. In conclusion, there is nothing in the present case that makes it possible to set aside the application of the Montreal Convention. It is neither because the United States and the United Kingdom refrain from invoking the Convention, nor even because the Security Council acts as though that Convention did not exist that the Convention ceases to exist and to produce its effects.

Mr. President, Members of the Court, the Respondents — though quite unconsciously — indulge in the same humour as my illustrious compatriot, the painter René Magritte, who entitles one of his pictures representing a pipe: "This is not a pipe". This is Magritte's way of saying that men refuse to see the reality of their eyes. However, a child who looks at the painting knows full well that it is a pipe which is represented on the canvas. Similarly, every lawyer of good faith knows that the Lockerbie disaster is the very type of fact for which the Montreal Convention was concluded.

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4.46. Mr. President, Members of the Court, let me thank you for your patience and attention.

Le VICE-PRESIDENT, faisant fonction de PRESIDENT : Je vous remercie, Monsieur David. Nous reprendrons cet après-midi à 15 heures.

L'audience est levée à 12 h 45.