Annex to LUS 92/17

Replies by Libya to the questions put by Judge Schwebel

Libya understands that the thrust of the three questions put by Judge Schwebel is to obtain the views of the Parties on the question whether the Montreal Convention (various Articles thereof, particularly 10 and 12) applies when the "person" who has committed the offence and is defined in Article 1 happens to be an agent of a State who has allegedly acted "in pursuance of the purposes of that State". For Libya the answer is in the affirmative in the three cases, the reasons being those set out below.

Before it embarks on this demonstration, Libya is nevertheless compelled to observe that the hypothetical case considered by Judge Schwebel rests on a characterization of the facts, put forward by the United Kingdom, which Libya categorically rejects, for which reason the questions put are purely theoretical in nature.

Question No. 1

1. The answer to both parts of Question No. 1 is "yes": on the one hand the Convention is fully applicable to persons acting as agents of a State and, on the other, there is *a priori* no reason why these persons should not be prosecuted by the State of which they are the agents.

Commentary

First sub-question

2. Article 1 of the Montreal Convention, which determines the scope of the Convention *ratione personae*, refers to "[a]ny person" (Art. 1, para. 1, first sentence, Art. 2, first sentence, as well as Art. 6, para. 3), without making any exception. This implies that "in accordance with the ordinary meaning to be given to the terms of a treaty" (Vienna Convention on the Law of Treaties of 1969, Art. 31, para. 1), the Convention applies equally to private individuals and State officials, even if the latter act in their official capacity.

3. The Convention should therefore be applied to the case where the offence has been committed by an official. There is no doubt that if the Contracting Parties had wished to make an exception of this nature they would have said so (*infra*, paras. 6-8). It is hardly likely that such was their intention, for it is altogether possible to imagine that agents of a State, a policeman, a gendarme, a member of the armed forces, a watchman, but also other officials, apparently peacefully inclined, conceal a vocation to terrorism.

4. This conclusion results, in the first place, from the text of the Convention: "any person", taken in its ordinary meaning (*supra*, para. 2), inasmuch as the *travaux préparatoires* are virtually silent in this regard. About the only relevant element that can be found in the records of the Montreal diplomatic conference is a proposal by the Czechoslovak delegation that in case the acts the Convention refers to were to be committed

> "by an employee of a State or airport authority or, for example, by someone entrusted with the regulation of air navigation safety (...) the convention should provide that the authority concerned must also bear responsibility for the act or omission in question" (ICAO, *Int. Confer. on Air Law*, Montreal, Sept. 1971, doc. 9081-LC/AO-I, vol. 1, *Minutes*, p. 46, para. 38).

The President of the Commission of the Whole then replied that: "That point might perhaps be covered by means of an exclusion in Article 4." (*Ibid.*).

In point of fact the question does not appear to have been the subject of any debate, whether in the Commission of the Whole or in the plenary; the exclusion to which the President referred is not contained in Article 4 and nowhere else does the Convention provide that the expression "any person" covers only private individuals.

5. Nor do the *travaux préparatoires* of the 1970 Hague Convention for the Suppression of Unlawful Seizure of Aircraft, which uses the same expression, namely, "any person" (Art. 1, Art. 6, para. 3), show that this Convention would not apply to agents of the State. On the contrary, the expression air "piracy" was not accepted for the purpose of designating the offence that the Convention refers to. To Colombia, which had proposed this designation (ICAO, International Conference on Airlaw, The Hague, Dec. 1970, Doc. 8979-LC/165-1, Vol. I, Minutes, p. 37, para. 3), the United Kingdom responded that "use of the term 'piracy' could cause confusion wih the term 'piracy *jure gentium*'" (*ibid.*, p. 38, para. 7; cf. also the statements in opposition by Yugoslavia and India, *ibid.*, pp. 38-39, paras. 9 and 17; cf. also G. Guillaume, "La Convention de La Haye du 16 décembre 1970, poiur la répression de la capture illicite d'aéronefs", *Annuaire français de droit international, 1970*, p. 39).

It appears from this that equally with respect to this Convention the intention was not to limit the offence covered to acts committed by private individuals, since the private character of piracy is one of the constituent elements of the offence (see Vienna Convention on the High Seas of 19 April 1958, Art. 15, para. 1; Montego Bay Convention of 10 December 1982 on the Law of the Sea, Art. 101 (*a*)).

6. A far stronger argument in support of the view that the expression "any person" applies to both private individuals and agents of a State is the fact that each time States have wished to *limit* the scope of a convention on international criminal matters to certain categories of persons they did not fail to so specify. Thus, as has

just been noted, piracy is expressly limited to acts "committed for private ends by the crew or the passengers of a *private* ship or a *private* aircraft ..." (emphasis added) (1958 Geneva Convention, Art. 15, para. 1, and Montego Bay Convention, Art. 101 (*a*)).

Similarly, the 1989 Convention against the Recruitment, Use, Financing and Training of Mercenaries, of 4 December 1989, defines the mercenary in such a way as to cover private individuals, that is,

> "any person who
>
> (*a*) ...
>
> (*b*) ...
>
> (*c*) ...
>
> (*d*) is not a member of the armed forces of a party to the conflict; and
>
> (*e*) has not been sent by a State which is not a party to the conflict on official duty as a member of its armed forces".

Another case in point is the United Nations Convention of 10 December 1984 against Torture and other Cruel, Inhuman or Degrading Treatment, which limits its scope *ratione personae* to agents of a State and persons *de facto* acting for a State. Acts of torture committed by private individuals are not covered by the Convention. Article 1, paragraph 1, of the Convention mentions, for purposes of the Convention, only pain or suffering

> "inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity".

7. It follows, *a contrario*, that in the instruments aiming to suppress international terrorism, such as the 1970 Hague Convention, the 1971 Montreal Convention, the New York Convention of 1973 (Offences against Internationally Protected Persons) and 1979 (Taking of Hostages), the 1980 Vienna Convention (Physical Protection of Nuclear Substances), the 1988 Rome Convention (Safety of Maritime Navigation), the expressions "any person" or "anyone" should be understood to refer, in accordance, it may be added, with their ordinary and primary meaning, to both private individuals and persons acting *de jure* or *de facto* on behalf of a State.

8. This view is confirmed by the *travaux préparatoires* of the United Nations Convention of 17 December 1979 against the Taking of Hostages and the IMO Convention of 10 March 1988 for the Suppression of Unlawful Acts against the Safety of Maritime Navigation. In the case of the former the Federal Republic of Germany stated that Article 1 of the Convention ("any person who seizes or detains ... another person ... commits the offence of taking of hostages ...")

> "covered the case of a person who, acting on behalf of a public institution or a State, committed an offence within the terms of this convention" (S. Shubber, "The International Convention against the Taking of Hostages", *BYBIL*, 1981, p. 212).

In the case of the latter Convention, the delegation of Kuwait proposed the inclusion of a provision to the effect that Article 3 of the Convention (which defines the offences covered) was to apply to the offences committed by a person acting on behalf of a government. Even though the participants endorsed the idea that the Convention should apply "to all types of international maritime terrorism, regardless of who the offender may be", the proposal by Kuwait was nevertheless rejected inasmuch as

> "it was felt that such an inclusion was not necessary as Article 3 applies to 'any person' and therefore does not regard status as a defence" (S.A. Williams, "International Law and Terrorism: Age-Old Problems, Different Targets", *RCADI*, 1988, p. 108; of the same view is D. Momtaz, "La Convention pour la répression d'actes illicites contre la sécurité de la navigation maritime", *Annuaire français de droit international*, 1988, p. 595).

Second sub-question

9. If the Montreal Convention applies to the agents of a State who have committed an act contemplated by the Convention, it follows that that State must prosecute those persons if it does not extradite them, in accordance with Article 7 of the Convention. The fact that the persons are agents of a State does not stand in the way of the application of the Convention. The whole of the system that has been built up for the prevention of war crimes and acts of genocide operates on the basis of the same principle. If the armed forces of a State commit war crimes the primary duty of that State is to punish those crimes. Thus Article 49 (I), 50 (II), 129 (III) and 146 (IV), common to the four Geneva Conventions of 12 August 1949, imposes on each of the High Contracting Parties

> "the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts. It may also, *if it prefers, and in accordance with the provisions of its own legislation*, hand such persons over for trial to another High Contracting Party concerned ..." (Emphasis added.) (See also the First Additional Protocol of 8 June 1977 to the Geneva Conventions of 1949, arts. 85-87.)

Even though we are dealing here with offences committed by agents of a State in the exercise of their functions, that State must ensure the punishment of these acts, *even if the crimes are committed on superior orders*. If the State fails to take such action, it incurs responsibility for the failure, a responsibility distinct from the one

it has already incurred by reason of the war crime committed by the member of its armed forces (cf. the Regulations annexed to the Fourth Hague Convention of 18 October 1909, Art. 3, and First Additional Protocol of 1977, Art. 91).

10. Similarly, if acts of genocide are committed by the authorities of a State in its own territory, it is nevertheless the case that in accordance with Article 6 of the Convention for the Prevention and Punishment of the Crime of Genocide the persons that are presumed to have perpetrated the acts

> "shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as ..."

One could also imagine similar cases in the area of drug trafficking for the purpose of generating revenue for the State.

11. In the sphere of State responsibility, analogous situations are found where the exhaustion of the local remedies makes it possible to deal with the acts of officials who have acted on superior orders contrary to international law. It is only after the remedies have been exhausted that, if they are not effective, the State concerned may be held responsible under international law (see draft Articles on State responsibility, Article 22, 1977 *Yearbook of the International Law Commission*, Vol. II, pp. 30 *et seq.*; for the difference between the personal criminal responsibility of the suspects and a hypothetical responsibility of the State of which they are nationals, cf. the statement by Professor Salmon in CR 92/2, transl., pp. 45-50).

12. The conventions on international criminal law, except as otherwise provided, therefore oblige the State to prevent acts committed by its own organs.

Moreover, this is the meaning of the resolutions adopted by the United Nations General Assembly in the sphere of international terrorism. Hence, resolution 40/61 of 9 December 1985

> "7. *Urges* all States not to allow *any circumstances* to obstruct the application of appropriate law enforcement measures provided for in the relevant conventions to which they are party to persons who commit acts of international terrorism covered by those conventions." (Emphasis added.) (See, in a similar vein, res. 46/51 of 9 December 1991, para. 4, h.)

Naturally, if the State fails to take such preventive action, it is violating the relevant convention and incurs international responsibility.

Questions 2 and 3

1. For the same reasons, the replies to these questions are affirmative: since the Montreal Convention envisages both acts committed by individuals and acts committed by persons acting on behalf of a State, the Convention applies in each of its provisions to the acts committed by these persons.

2. In general terms, it must be remembered that the violation of a convention by a State clearly does not rule out the applicability of the convention to the State, otherwise that would lead to the disintegration of the very basis of the rule of law: it would be enough for a subject of law no longer to apply the rule which binds him to render this rule no longer applicable!

Reply by Libya to the question posed by Judge El-Kosheri

There is no denying that, under Article 41, paragraph 1, of the Statute:

> "1. The Court shall have the power to indicate, if it considers that circumstances so require, any provisional measures which ought to be taken to preserve the respective rights of either party."

Further, Article 75 of the Rules provides in paragraph 2:

> ""When a request for provisional measures has been made, the Court may indicate measures that are in whole or in part other than those requested, or that ought to be taken or complied with by the party which has itself made the request."

Libya, for its part, would not object to the exercise by the Court of a power conferred upon it by its Statute, when the Court considers that circumstances so demand. It has itself referred to this power of the Court through its counsel (Prof. Brownlie, CR 92/2, p. 27; Prof. Suy, CR 92/5, pp. 50-51).
