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THE HAGUE

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LA HAYE

YEAR 1992

Public sitting

held on Thursday 26 March 1991, at 3 p.m., at the Peace Palace,

Vice-President Oda, presiding

in the case concerning Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie

Request for the Indication of Provisional Measures

(Libyan Arab Jamahiriya v. United Kingdom)

in the case concerning Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie

Request for the Indication of Provisional Measures

(Libyan Arab Jamahiriya v. United States of America)

VERBATIM RECORD

ANNEE 1992

Audience publique

tenue le jeudi 26 mars 1992, à 15 heures, au Palais de la Paix,

sous la présidence de M. Oda, Vice-Président

en l'affaire relative à des Questions d'interprétation et d'application de la convention de Montréal de 1971 résultant de l'incident aérien de Lockerbie

Demande en indication de mesures conservatoires

(Jamahiriya arabe libyenne c. Etats-Unis d'Amérique)

en l'affaire relative à des Questions d'interprétation et d'application de la convention de Montréal de 1971 résultant de l'incident aérien de Lockerbie

(Jamahiriya arabe libyenne c. Royaume-Uni)

Demande en indication de mesures conservatoires

COMPTE RENDU

Present:

Vice-President Oda, Acting President
Judges Sir Robert Jennings, President of the Court
Lachs
Ago
Schwebel
Bedjaoui
Ni
Evensen
Tarassov
Guillaume
Shahabuddeen
Aguilar Mawdsley
Weeramantry
Ranjeva
Ajibola
Judge *ad hoc* El-Kosheri

Registrar Valencia-Ospina

Présents:

M. Oda, Vice-Président de la Cour, faisant fonction de Président
Sir Robert Jennings, Président de la Cour
MM. Lachs
Ago
Schwebel
Bedjaoui
Ni
Evensen
Tarassov
Guillaume
Shahabuddeen
Aguilar Mawdsley
Weeramantry
Ranjeva
Ajibola, juges
M. El-Kosheri, juge *ad hoc*

M. Valencia-Ospina, Greffier

The Government of the Libyan Arab Jamahiriya will be represented by:

H. E. Mr. Al Faitouri Sh. Mohamed, Secretary of the People's Office of the Socialist People's Libyan Arab Jamahiriya in Bruxelles,

as Agent;

Mr. Abdelrazeg El-Murtadi Suleiman, Professor of Public International Law at the Faculty of Law, Benghazi,

Mr. Abdulhamid M. Raeid, Adocate Before Supreme Court,

as Counsel;

Mr. Ian Brownlie, Q.C.,
Mr. Jean Salmon,
Mr. Eric Suy,

as Counsel and advocate;

Mr. Eric David,

as Counsel.

The Government of the United States of America will be represented by:

The Honorable Edwin D. Williamson, Legal Adviser of the Department of State,

as Agent and Counsel;

Mr. Alan J. Kreczko, Deputy Legal Adviser, Department of State,

as Deputy Agent and Counsel;

Mr. Charles N. Brower, White & Case,

Mr. Bruce C. Rashkow, Assistant Legal Adviser, Department of State,

Mr. Jonathan B. Schwartz, Assistant Legal Adviser, Department of State,

Counsel and Advocates;

Mr. Robert K. Harris, Département of State,

Mr. Robert A. Kushen, Département of State,

Mr. D. Stephen Mathias, Legal Attache, United States American Embassy,

Mr. Bryan Murtagh, Département of Justice,

Ms. Lucy F. Reed, Legal Counselor, United States American Embassy,

Attorney-Advisers.

Le Gouvernement de la Jamahiriya arabe libyenne sera représenté par :

S. Exc. Al Faitouri Sh. Mohamed, secrétaire du bureau populaire de la Jamahiriya arabe libyenne populaire et socialiste à Bruxelles,

comme agent;

M. Abdelrazeg El-Murtadi Suleiman, professeur de droit international public à la faculté de droit, Benghazi,

M. Abdulhamid M. Raeid, avocat à la Cour suprême,

comme conseils;

M. Ian Brownlie, Q.C.,
M. Jean Salmon,
M. Eric Suy,

comme conseils et avocats;

Mr. Eric David,

comme conseil.

Le Gouvernement des Etats-Unis d'Amérique sera représenté par :

L'honorable Edwin D. Williamson, conseiller juridique, département d'Etat,

agent et conseil;

M. Alan J. Kreczko, conseiller juridique adjoint, département d'Etat,

agent adjoint et conseil;

M. Charles N. Brower, White & Case,

M. Bruce C. Rashkow, assistant du conseiller juridique, département d'Etat,

M. Jonathan B. Schwartz, assistant du conseiller juridique, département d'Etat,

conseils et avocats;

M. Robert K. Harris, département d'Etat,

M. Robert A. Kushen, département d'Etat,

M. D. Stephen Mathias, attaché juridique, ambassade des Etats-Unis,

M. Bryan Murtagh, département de la justice,

Mme Lucy F. Reed, conseiller juridique, ambassade des Etats-Unis,

avocats-conseillers.

The United Kingdom of Great Britain and Northern Ireland will be represented by:

Mr. F. D. Berman, C.M.G., Legal Adviser to the Foreign and Commonwealth Office,

as Agent;

Mrs. Wilmshurst, Legal Counsellor in the Foreign and Commonwealth Office,

as Deputy Agent;

Mr. Alan Rodger Q.C., Solicitor General of Scotland,

Ms. Rosalyn Higgins, Q.C.,

Mr. Christopher Greenwood, Barrister-at-Law,

as Counsel;

Mr. Patrick Layden,
Mr. Norman McFayden,

as Advisers.

Le Gouvernement du Royaume-Uni sera représenté par :

M.F. D. Berman, C.M.G., conseiller juridique du ministère des affaires étrangères et du Commonwealth,

comme agent;

M. Mme E. S. Wilmshurst, conseiller juridique au ministère des affaires étrangères et du Commonwealth,

comme agent adjoint;

M. Alan Rodger Q.C., *Solicitor General* d'Ecosse,

Mme Rosalyn Higgins, Q.C.,

M.Christopher Greenwood, avocat,

comme conseils;

M. Patrick Layden,

M. Norman McFayden,

comme conseillers.

The ACTING PRESIDENT: Please be seated. The Court meets now to hear the presentation of the United Kingdom in the case brought against the United Kingdom and I call upon Mr. Berman, Agent for the United Kingdom.

Mr. BERMAN: Mr. President, Members of the Court. May it please the Court, I represent the United Kingdom of Great Britain and Northern Ireland in these proceedings. Ms. Elizabeth Wilmshurst is the Deputy Agent.

It is an honour for me to be appearing in this capacity before the Court. The high respect in which the United Kingdom holds the system for the judicial settlement of international disputes, and this Court in particular, needs no further demonstration. It is attested by the United Kingdom's acceptance of the compulsory jurisdiction under Article 36 of the Statute continuously since 1946 and before that for many years the compulsory jurisdiction of the Permanent Court of International Justice, and by the United Kingdom's acceptance of over 90 compromissory clauses in its bilateral and multilateral treaty relations, which confer jurisdiction on the Court. It may therefore seem paradoxical that the United Kingdom has not appeared as a party in contentious proceedings before this Court since 1974. This circumstance nevertheless makes it a special honour for me to do so today.

May I take this opportunity to express in open Court my Government's congratulations and good wishes to His Excellency Prince Bola Ajibola, who took his seat as a Member of the Court earlier today?

Mr. President, these are interlocutory proceedings and it is not my intention to detain the Court for long. I would like, with permission, to introduce counsel who will appear for the United Kingdom and to

indicate how the oral argument will be divided between them. To my immediate left is Mr. Alan Rodger, Q.C., of the Scottish Bar, and who holds the office of Solicitor General for Scotland. Next to him is Professor Rosalyn Higgins, Q.C., of the English Bar and Professor of International Law at the University of London. Next to her again is Mr. Christopher Greenwood, of the English Bar, Fellow and Director of Studies in Law at Magdalene College, Cambridge. The oral exposition for the United Kingdom will be divided into four parts: the Solicitor General will describe the factual circumstances, and will then deal with the Court's want of jurisdiction to hear the Libyan Application. He will be followed by Professor Higgins, who will show that Libya's request for interim measures of protection does not meet the criteria laid down in the Statute and developed in the jurisprudence of the Court; and that the measures sought by Libya are in any event inappropriate or improper, and should not be granted.

In brief, Mr. President, Members of the Court, we shall contend:

First, that Libya's Application is manifestly premature, having regard *inter alia* to the six month time-limit prescribed by Article 14 of the Montreal Convention, and that the Court should not accordingly entertain the request for provisional measures. The United Kingdom reserves the right to lodge a formal preliminary objection to the jurisdiction of the Court later in the proceedings, at the appropriate moment.

Second, that interim measures are an exceptional remedy which is only granted if necessary to protect rights which are in dispute before the Court, but that the interim measures sought by Libya do not meet this test, in particular because the so-called "rights" which Libya purports to claim under the Montreal Convention are illusory and do not require protection.

Third, that Libya's Application, while purporting to enjoin action by the United Kingdom against Libya, is in fact directed at interfering with the exercise by the Security Council of its functions and prerogatives under the United Nations Charter.

Mr. President, a brief outline of the way the argument will be developed has been made available to Members of the Court and to the opposing Party and I would now like to call upon Mr. Rodger.

The ACTING PRESIDENT: Thank you, Mr. Berman. I now call upon Mr. Rodger, please.

Mr. RODGER: Mr. President, Members of the Court. It is for me a very great honour to appear today before you on behalf of the United Kingdom. As our Agent, Mr. Berman, has just explained, Professor Higgins and I shall both be addressing you in support of the United Kingdom's case. As indeed Mr. Berman has indicated, I shall develop the first of the United Kingdom's three basic contentions, but before doing so I must first explain the context within which the Court comes to be considering this matter today. I shall give a brief account of the disaster, of the criminal investigation which followed and of the results of that investigation leading to the charges being brought against two Libyan nationals last November. Finally by way of introduction I shall outline some of the steps which have been taken by the United Kingdom and others between the time when the charges were brought and today.

I start therefore with the bombing itself.

The bombing of Pan Am 103

On 21 December 1988, at approximately three minutes past seven in the evening GMT, a Boeing 747 aircraft of Pan American Airways exploded in flight over the small town of Lockerbie, in the south of Scotland.

The aircraft crashed to the ground, killing all 259 passengers and crew on board and 11 residents of the town. The victims of this outrage included nationals of 21 countries in Europe, the Americas, Africa and Asia. Nineteen of them were children.

The aircraft was registered in the United States and was travelling as part of Flight PA 103 from Frankfurt in Germany to Detroit in the United States, via London Heathrow and New York John F. Kennedy Airports. The initial leg of the flight, from Frankfurt to London, Heathrow, had been on a smaller Boeing 727 aircraft. At London Heathrow 49 passengers from this smaller aircraft transferred to the Boeing 747 aircraft and joined up with a further 194 passengers. There were 16 crew members on board the Boeing 747. The route of the aircraft from London was determined by weather conditions. While it would normally have proceeded westwards on take-off, that evening, because of strong westerly winds, the aircraft first headed in a northerly direction over England and so into Scotland where the explosition occurred. Partly because of the very high winds, wreckage from the disaster was scattered over hundreds of square miles in the south of Scotland and the north of England.

The investigation and the facts disclosed

An international investigation was begun immediately and was based at Lockerbie. British police officers from a number of police forces were assisted in the investigation by agents of the United States Federal Bureau of Investigation. The investigation was under the overall direction of my colleague the Lord Advocate, the senior Law Officer for Scotland and the head of the independent prosecution service in Scotland.

In Lockerbie itself it was directed by the Procurator Fiscal of Dumfries, the Lord Advocate's local representative. But the investigaion spread far beyond Lockerbie, and far beyond Scotland and the United Kingdom to reach many countries in different continents. Judicial, prosecuting and investigative agencies from several countries co-operated in this unprecedented inquiry.

In southern Scotland and northern England, police officers combed an area of 845 square miles, i.e., 2190 square kilometres, in their search for items of significance to the investigation. In the course of the investigation, over 4,000 items were retained for examination or as evidence. Similarly, in the course of enquiries thousands of people were interviewed and more than 15,000 statements were taken.

After only a few days of enquiries, forensic, scientific and technical examination established that the explosion on Pan Am 103 had been caused by the detonation of an improvised explosive device utilizing high performance plastic explosive.

Thereafter, from detailed examination of the wreckage and debris experts were able to establish not only in which part of a particular cargo hold of the aircraft the explosion had occurred, but also the position of the explosive device within one particular luggage container. As a result of further work the experts were able to pinpoint the actual suitcase which had contained the device and to establish the nature of the device. It was a device constructed so as to be contained within a radio cassette recorder and to be detonated by an electronic timer. By further painstaking work the experts identified the other contents of the suitcase which had contained the explosive device. In particular, they identified a number of pieces of clothing from it.

These pieces of clothing were subjected to further examination as a result of which the investigators established scientifically that they had been both manufactured and sold in Malta.

By minute examination of the remains of the electronic timer, scientists were able to show that it was one of a number of timers manufactured by a particular company in Switzerland. Further enquiries were made, as a result of which there is evidence that this company designed and supplied 20 of these timers to the exclusive order of senior officials of the Libyan Intelligence Services and that the timers were tested in conjunction with explosives in Libya.

The Members of the Court will note how the investigation started from scientific work on fragments and items discovered after the bombing and how this led both to the conclusion that events in Malta had played a significant role and to the conclusion tht the Libyan Intelligence Services had been involved. Other evidence was obtained which pointed in particular to the involvement of two individuals, Abdelbaset Ali Mohmed Al Megrahi and Al Amin Khalifa Fhimah, both Libyan nationals. For instance, there is evidence that on 7 December 1988, in Malta, Megrahi purchased the clothing which was later placed in the suitcase along with the bomb. There is also evidence that Megrahi travelled to and from Malta under a false identity and that on 20 December 1988 he and Fhimah introduced into Malta a suitcase matching the description of the one which contained the bomb. Finally, there is evidence that these very men had in their possession and under their control in Malta high performance plastic explosive.

The investigation which I have described which uncovered this evidence was in fact the most extensive criminal investigation ever undertaken into a single crime. It was on the basis of the results of

this massive investigation and on no other basis - and I stress this - that the Lord Advocate was able, on 13 Novemer 1991, to seek and obtain from an independent judge, warrants for the arrest of Megrahi and Fhimah on charges of conspiracy and murder, which are both crimes at common law in Scotland and of a charge of contravention of Section 2 of the United Kingdom Aviation Security Act 1982. The Scottish Courts have jurisdiction, of course, on the basis that they are the courts of the locus of the offences. That basis of jurisdiction is one of the most fundamental recognized in customary international law and has nothing to do with the Montreal Convention.

The petition which sets out the charges on which the warrants were granted is before you, it is the Document No. 1 in the bundle of documents of the United Kingdom (Doc. No. 1). So, also before you is a detailed statement of facts in support of the charges (Doc. No. 2).

Now it is important in the context of the present proceedings to notice that the charges against the two accused, Megrahi and Fhimah, proceed on the basis, for which there is evidence, that they were both officers of those very Libyan Intelligence Services which were involved in the purchase and testing of the timers. Megrahi and Fhimah were also closely connected with the State-owned Libyan Arab Airlines. Megrahi was Head of Security of the airline throughout 1986 and was, from 1 January 1987, Director of the Centre for Strategic Studies in Tripoli, a part of the Directorate of Information, which is in turn part of the Directorate of the External Security Organization of Libya. Fhimah, for his part was, until shortly before the attack on Lockerbie, Station Manager of Libyan Arab Airlines at Luqa Airport in Malta and, indeed, retained his airside pass until 31 December 1988. For all this there is evidence.

As I have said, arrest warrants for Megrahi and Fhimah were granted on 13 November 1991. The following day, the Lord Advocate announced that the warrants had been granted and made the terms of the charges known publicly. Simultaneously, the Acting Attorney General of the United States of America announced the issue of warrants there, following the handing down of an indictment by the Grand Jury.

On the same day, copies of the charges and of the warrants, together with a statement of facts setting out in detail the basis of the charges, were supplied to the Libyan Government, through the Libyan Permanent Representative to the United Nations in New York and, subsequently, through the Italian Embassy in Tripoli, the Italian Government being the power protecting British interests in the absence of diplomatic relations between the United Kingdom and Libya.

These documents which the United Kingdom supplied to Libya explain very clearly the allegations in the Scottish criminal case, allegations which the Lord Advocate had formulated on the basis of his consideration on the evidence obtained after almost three years of painstaking, meticulous and cautious investigation. In particular on the basis of the facts which I have outlined to you the clear allegation made in the charges is that this criminal act of bombing the Pan Am 103 was carried out by Megrahi and Fhimah in pursuance of the purposes of the Libyan Intellegence Services.

We understand that these services are closely related to the criminal justice system in Libya and have influence on the function of the Libyan courts. Again this is not said lightly or without a basis of fact. For instance, one of the people named in the indictment raised by the United States, and named also in the statement of facts as having an involvement in matters relevant to the crime, and in particular involvement in obtaining the timers, that person has in the course of the last four years held significant postions in the Libyan criminal justice system, including the post of Minister of Justice.

Events following investigation

Mr. President, Members of the Court, I have felt it necessary to set before the Court the course of the investigation and some of the results. This has taken time, but I believe that it is important that the Court should appreciate that, in making the serious allegation which he does about the involvement of the Libyan authorities in this criminal act, the Lord Advocate as the prosecutor has not proceeded on rumour or speculation but on the results of a long investigation based on scientific analysis and on time-consuming police enquiries. Similarly it is against that background that the United Kingdom has sought the

surrender of the two accused for trial. It is against that background also that the United Kingdom insists that there could be no question of the demands of justice being met by any trial of these men in Libya.

Unfortunately, it cannot even be said that this involvement of the Libyan Government in an act of terrorism is an isolated incident. On the contrary, over a number of years there have been various incidents in which the Government has been involved. I shall not at this stage enumerate these incidents though I am ready to give further details if the Members of the Court so wish. Rather I think that is sufficient if I mention very briefly activities which have been directed against the United Kingdom. I can cite the murder of a woman police constable in a public street in London in 1984, a murder carried out by shots fired from the very premises of the Diplomatic Mission of the State of Libya by a member of staff of that mission. It was as a result of this incident that diplomatic relations were broken off and have not been restored. Above all there has been publicly expressed and active support for the Provisional IRA, a body responsible for repeated terrorist attacks in the United Kingdom and elsewhere. The practical support given by the Libyan Government included supplying and shipping arms and explosive for the use of the Provisional IRA in their acts of terrorism.

The Court need not simply accept what I say about this matter, for the head of the Libyan State, Colonel Gadaffi, has himself admitted Libya's involvement with the IRA, as recently as 7 December of last year in an interview in the newspaper *Al Ahram*, and again earlier this month, on 2 March, in his address to the General People's Congress.

The involvement of the Libyan Government in the crime of Lockerbie is therefore seeen by the United Kingdom Government as part of a pattern of involvement in terrorism. So the United Kingdom Government has

approached the matter with this in mind. Following the announcement of charges by the Lord Advocate on 14 November 1991, on the same day in Parliament the Foreign Secretary called upon Libya to comply with the Lord Advocate's demand that the accused be surrendered for trial in Scotland.

No satisfactory response was received from Libya to these demands and so on 27 November 1991 the British and United States Governments issued a declaration (A/46/827; S/23308) (Doc. 14) stating that Libya must:

> "- surrender for trial all those charged with the crime; and accept responsibility for the actions of Libyan officials
>
> - disclose all it knew of the crime;
>
> - and pay appropriate compensation.

At the same time a similar declaration was made by France in respect of the bombing of the UTA Flight 772. Simultaneously all three Governments issued another statement in which they required that Libya promptly commit itself to cease all forms of terrorist activities (Doc. 15).

When in due course the Libyan Government failed to respond appropriately to the calls made upon it by the United Kingdom, the United States and France, my Government therefore thought it right to take the matter to the United Nations. As the Members of the Court will be aware, the issue of terrorism has frequently been before the United Nations. The General Assembly has for many years had on its agenda an item, the title of which begins "Measures to Prevent International Terrorism". Terrorist operations such as hijacking have been subjects for discussion both in the General Assembly and in the Security Council, as well, of course, as in other fora such as the International Civil Aviation

Organisation. As long ago as 1970 the Security Council adopted a Resolution (SCR 286) on hijacking and other interference in international travel. It expressed grave concern at the threat to innocent civilian lives and called all States to take all possible legal steps to prevent any interference with international civil air travel. In its Resolution of 1989 (SCR 635) the Security Council condemned all acts of unlawful interference against the security of civil aviation and called on all States to co-operate in measures to prevent acts of terrorism, including those involving explosives.

So it was in the context of this frequently expressed General Assembly and Security Council concern about terrorism and its effects that the United Kingdom, the United States and France brought the subject of the destruction of Pan Am 103 and UTA flight 772 to the United Nations.

On 31 December 1991 the United Kingdom Permanent Representative circulated the Lord Advocate's statement about the investigation (A/46/826; S/23307) (Doc. 13) under the General Assembly item relating to terrorism.

It was put on the Security Council agenda. On the same day the Joint Declaration of 27 November by the United Kingdom and the United States about the bombing of Pam Am 103 was circulated (A/46/827; S/23308) (Doc. 14), as also was the Joint Declaration of the United Kingdom, France and the United States on terrorism, also dated 27 November 1991 (A/46/828; S/23309) (Doc. 15).

The original demand for the surrender of the two accused had been put to the Libyans on 14 November, as I have already explained. Two months passed without any effective reply to that demand. Libya did indeed make communications of various kinds, which we shall deal with later in our submissions. The communications did not however acknowledge that the Libyan Government had been involved in terrorism or agree to make the two accused available for trial or agree to meet the United Kingdom's other specific demands. Accordingly in January of this year the United Kingdom, France and the United States began consultations with other members of the Security Council on a draft resolution. On 18 January, while a draft resolution was under consideration, but before the debate on it in the Security Council, Libya addressed to the United Kingdom what is now claimed to be a request that a dispute be submitted for arbitration in terms of Article 14(1) of the Montreal Convention. On 21 January the Security Council unanimously adopted resolution 731 (Doc. 17). In the resolution the Security Council reaffirmed its earlier resolutions on terrorist threats to international aviation. The Council expressed its deep concern over the results of the Lockerbie investigations and its determination to eliminate international terrorism. It urged the Libyan Government to provide "a full and effective response" to the request of the three Governments.

The United Kingdom Permanent Representative made clear at the Security Council meeting on the adoption of the resolution that it was the United Kingdom Government's hope that Libya would indeed respond fully, positively and promptly to the resolution; such a response would be indicated by Libya making the two accused available to the legal authorities in Scotland or the United States, and with regard to the UTA incident, by co-operating with the legal authorities in France. He also made clear my Government's firm belief that in the particular circumstances of this case there could be no confidence in the impartiality of the Libyan courts; it would not be sufficient to allow these men to be made available for trial in Libya.

I pause to observe that it was a recurring theme of the speeches made on behalf of the Applicant this morning that by asking for the accused to be handed over the United Kingdom was somehow violating the principle that their innocence was to be presumed until they had been found guilty.

It is certainly true that my colleague the Lord Advocate has sufficient evidence to justify charging these two men but if they are handed over for trial in Scotland their guilt or innocence will be determined not by the Lord Advocate nor by the United Kingdom but by a jury of 15 ordinary men and women. Again it was said, more than once this morning, that Libya somehow had a right to try these men which it was entitled as a matter of sovereignty to exercise and that if Libya were not allowed to exercise it, this would in effect put an end to the system of international law on terrorism built up in 10 Conventions.

Nothing, in my submission, could be further from the truth. The objective of these Conventions is to institute a system to combat terrorism not to promote the jurisdictional rights of one State over

another. Nothing could more quickly reduce that fragile system of Conventions to ruins than the ability of a State which is itself accused of complicity in the acts of terrorism to defy the legitimate claims of victim States by insisting on an illusory right to try the suspects itself.

But returning to the sequence of events, following on the adoption of resolution 731 and pursuant to paragraph 4 of that resolution, the Secretary-General's representative undertook consultations with the Libyan authorities. The result of those consultations was very confusing indeed. An account may be found in two reports from the Secretary-General, which are before you (S/23574 and S/23672; Docs. 19 and 20 respectively). I intend to return very shortly to the difficulties which these documents present to anyone trying to discover what are the Libyan intentions with regard to the two accused. For the moment I simply record that neither the results of these consultations with the Libyan authorities nor any subsequent actions of those authorities gave evidence of a clear Libyan intention to comply with the terms of Security Council resolution 731. The three Governments have accordingly been discussing with the other members of the Security Council a further decision by the Security Council directed at obtaining the implementation of this resolution. Discussions among Council members on the precise terms of that dcision are continuing even, indeed, as I speak. However, it is envisaged that any such decision should, under Chapter VII of the UN Charter, impose selective sanctions on Libya with the aim of securing compliance with resolution 731.

Mr. President, Members of the Court, as I turn now from outlining the events which have preceded the hearing today, I must first point out that the United Kingdom has had difficulty in understanding Libya's

application to this Court and its Request for Interim Measures in the light of its stated position. Some at least of our difficulty stems from what I can only call the inconsistencies of Libya's position. Let me give three examples.

In the first place Libya has been inconsistent as to the nature of the dispute. In its Application to the Court and in its Request for Interim Measures, the Applicant refers to certain articles of the Montreal Convention by virtue of which, it is claimed, Libya is entitled to try the alleged offenders. In his speech to the Security Council prior to the adoption of resolution 731, the Libyan Representative indeed stated the view of his authorities that there was a dispute of a purely legal nature between Libya and the three Governments. As such, he said, it was one which should not be considered by the Security Council. I refer in particular to the passage in his speech on pages 12 to 16 of the official English verbatim record of the Security Council proceedings, which is before you (S/PV 3033; Doc. 18).

But, Mr. President and Members of the Court, you also have before you today a letter dated 13 March 1992 (Doc. 21) from Mr. Bisharri, the Libyan Minister of Foreign Affairs in which he refers to the proceedings before this Court as merely "complementary" to those in the Security Council. Yet only four days later in a further letter (Doc. 22) Mr. Bisharri reverts to the opinion that the whole matter consists of a legal dispute which must be referred to this Court. To make matters still more confused he goes on to say that the alternative is that the whole dispute is a political one and should be resolved by political means. It is plain in my submission that Libya is unable even to define the nature of the dispute, far less the precise issues allegedly in dispute.

We have had great difficulty too in understanding what the Applicant considers to be the rights under the Montreal Convention, which, it claims, are the subject of the dispute. This difficulty is indeed not suprising since, as we shall explain later, those so-called rights are devoid of substance. But for the present I ask the Court to note that in all its varied communications to the three Governments and to the United Nations and in all its requests for various forms of co-operation, the first time that the Libyan Government actually mentions its so-called rights under the Convention is in its request of 18 January 1992 to arbitrate under the Convention (Doc. 16). Until that date Libya was not claiming any right under any international treaty. It is our submission that at that late stage Libya only alighted upon the Montreal Convention as an afterthought and in order to provide it with an argument to be deployed first in the Security Council debate which took place only three days later and now in the Court.

The conviction that the Applicant is grasping at any argument, however weak and however inconsistent with its previously stated positions, is strengthened by reference to Libya's statements about the basis of the jurisdiction upon which it relies to prosecute the two accused. Libya's original position was that it founded its jurisdiction on a provision of the Libyan Penal Code of 28 November 1953 which gave it jurisdiction over Libyan nationals who had committed offences abroad. I refer, for instance, to the statement issued by the Libyan Justice Committee oan 18 November 1991 (Doc. 3), and to the message to the United Kingdom Attorney General from the Libyan investigating judge, appended to the Note Verbale of the Libyan Foreign Affairs Committee, dated 27 November 1991 (Doc. 5). In each of these documents, Libya founds on a provision of its domestic law which has nothing whatever to do with the Montreal Convention and which indeed existed long before the Montreal Convention was even thought of. By contrast, when we turn to its Application to this Court, we find that Libya purports to trace its entitlement to try the two accused to Articles 5 (2) and 5 (3) of the Montreal Convention. In fact, as we shall show in more detail later, Article 5 (2) has nothing whatever to do with the matter and Article 5 (3) is nothing more than a statement which preserves any existing jurisdiction of the contracting States. Once again, therefore, Libya has departed from its earlier publicly stated position and has, at a late stage, contrived a specious argument to drag in the Montreal Convention simply in order to try to bring this whole matter within the jurisdiction of the Court.

Perhaps the most striking example of inconsistency in Libya's stated positions is to be found, however, in the Applicant's statements about the impossibility of extraditing the accused.

In its Application to the Court, at page 8, Libya states that Article 493 (A) of the Libyan Code of Criminal Procedures prohibits the extradition of Libyan nationals and that therefore there is no basis in Libyan law or under the Montreal Convention for the extradition of the accused. The same line was taken in a letter dated 2 March 1992 from Mr. Bisharri to the Secretary-General. In particular, he states that the Libyan authorities could find nothing that would enable them to respond to the requests made by these States other than by violating the law. The Libyan authorities cannot bypass this legal obstacle or violate the rights of citizens protected by the law.

Now let us turn to the further report by the United Nations Secretary-General, dated 3 March 1992 (Doc. 10). In paragraph 4 of that report, the Secretary-General records Colonel Qadaffi as saying that while there are constitutional obstructions to the handing over of Libyan citizens, those obstructions might be overcome. Once that was done, the accused persons could be handed over to France, Malta, any Arab country, or even, in the event of some unspecified improvement in bilateral relations, to the United States. Similarly, in a letter dated 27 February 1992, which forms Annex I to the same report, Mr. Bisharri envisages that the accused might be handed over under the Secretary-General's personal supervision to a third party, while stressing that they should not be handed over again.

Once more, we find Libya saying one thing at one moment and something completely different when it suits its own purposes at another time. Putting the matter shortly, contrary to what is implied by Libya in its pleadings, there is plainly no insuperable difficulty under Libyan

law which will prevent the Libyan Government from surrendering the accused for prosecution in Scotland or in the United States. Equally plainly, there is nothing in the Montreal Convention to prevent it. All that is lacking is a decision by the Libyan Government to take this step.

Mr. President, it would seem that recent events bear me out. The last few days have seen the surprising offer, by Libyan representatives abroad, that Libya was contemplating handing over the two accused to the League of Arab States at its Headquarters in Cairo, from where they would be handed over to the United Nations Sectretary-General, who would in turn, presumably, hand them over to the judicial authorities of either the United Kingdom or the United States of America for trial. It now seems that this offer has fallen by the wayside. It was, however, regarded seriously enough that the Arab League set up a committee, including four Foreign Ministers and the Secretary-General, to travel to Tripoli at Libyan invitation. It is no doubt a great pity that they returned to Cairo yesterday morning empty-handed. Indeed, they might never have left home if the disavowal in the letter to the President, which was read to you this morning, had been known to them on Tuesday.

Mr. President, Members of the Court, what are we then to take from this wriggling, from the twisting and turning by Libya? Surely the only proper inference must be that Libya will say anything, however inconsistent, which may help postpone the day when it will have to accept responsibility for its actions. That is, I fear, the true purpose of the Application to this Court and of today's Request for Interim Measures, to the detail of which I now turn.

II. No potential jurisdiction of the Court

In this part, the first submission of the United Kingdom is that Libya has failed to show a potential basis for the jurisdiction of the Court. Although the relevance of jurisdiction at the provisional measures stage was once the subject of much debate, the test is now clearly established in the jurisprudence of the Court. As the Court has repeatedly stated, most recently in the case concerning *Passage through the Great Belt*,

> "on a request for provisional measures the Court need not, before deciding whether or not to indicate them, finally satisfy itself that it has jurisdiction on the merits of the case, yet it ought not to indicate such measures unless the provisions invoked by the Applicant appear, prima facie, to afford a basis on which the jurisdiction of the Court might be founded" (*I.C.J. Reports 1991*, p. 15, para. 14).

In the present case, the only basis for jurisdiction which has been advanced is Article 14(1) of the Montreal Convention, which has already been quoted to the Court and which is of course before it. So that is the only possible basis for jurisdiction. Note also how limited any such jurisdiction would be. The provision confers jurisdiction only in respect of disputes concerning the interpretation or application of the Montreal Convention, and nothing else. It is therefore a prerequisite of this Court having jurisdiction that such a dispute be shown to exist.

But while it is necessary that there should be a dispute, the existence of a dispute is not by itself sufficient to found the Court's jurisdiction. The provision on which Libya relies differs from the jurisdictional provisions on which reliance has been placed in most of the provisional measures requests to come before the Court in that Article 14(1) requires a State which wishes to bring such a dispute

before the Court to complete a number of essential steps before it can refer the dispute to the Court. Looking at Article 14(1) you will see that:

(1) the first step is that there must be an attempt in good faith to resolve the dispute through negotiation. Only if the dispute "*cannot* be settled through negotiation" can a State proceed to the next stage laid down by Article 14;

(2) the second step required by the Article is that the dispute be submitted to arbitration at the request of one of the parties. The parties are then given a period in which to agree upon the organization of the arbitration;

(3) it is only if the parties are unable to agree upon the organization of the arbitration "within six months from the date of the request for arbitration", only then is there a power to refer the dispute to the Court.

In their submissions this morning, counsel for Libya all but ignored these provisions of Article 14(1) instead of trying to show that Libya had complied with these three requirements, which I would stress are essential preconditions of the Court having any basis for jurisdiction in this case, instead of doing that counsel for Libya sought to address the completely different question of whether the Montreal Convention conferred upon Libya jurisdiction over the two accused. That of course is a question which relates to the merits of the Application that has no relevance to whether or not Article 14(1) provides a prima facie basis for the jurisdiction for this Court on the Libyan Application.

Counsel for Libya also tried to fall back upon an argument that there is a general duty to settle disputes by peaceful means. That self-evident proposition cannot be employed as a substitute basis for the

jurisdiction of the Court if, as the United Kingdom submits, Libya has failed to comply with the essential requirements imposed by Article 14(1) then there can be no prima facie basis for the jurisdiction of the Court. It is to those requirements, therefore, that I turn, since they must be examined in detail.

In summary, in this part of the argument, the United Kingdom submits that, prior to filing its Application on 3 March, Libya manifestly failed:

(*a*) to establish or define a dispute falling within Article 14(1); or

(*b*) to comply with the further requirements of a provision in Article 14(1).

I emphasize again that the cirtical date in respect of both of these submissions is the date on which the Application to this Court was filed.

A. Libya has failed to establish the existence of a dispute concerning the Montreal Convention

The United Kingdom submits that Libya has failed to establish that there existed, prior to 3 March 1992, a dispute between the Parties concerning the interpretation or application of the Montreal Convention. The existence of such a dispute, and a sufficient definition of the issues in dispute, are fundamental jurisdictional requirements under Article 14.

Because the United Kingdom does not believe the Montreal Convention to be in issue, it has never raised with Libya questions regarding its interpretation or application. The demands made by the United Kingdom, to which I have already referred, are based not upon the Montreal Convention but upon Libya's wider international legal obligations. these issues have now been considered by the Security Council, which has taken action upon them by adopting resolution 731 urging Libya to make a full and effective response.

What is in issue between Libya and the United Kingdom is the implementation of Security Council resolution 731. But this is not a matter which is a dispute concerning the interpretation or application of the Montreal Convention.

If, therefore, Article 14(1) of the Montreal Convention is to provide a prima facie basis upon which jurisdiction might be based in the present case, it can only be because there exists a dispute between Libya and the United Kingdom regarding the interpretation or application of the Convention, which is separate from and distinct from the questions concerning the implementation of resolution 731.

In its recent opinion in the case concerning the *Obligation to Arbitrate* (*I.C.J. Reports 1988*, p. 12, para. 27), the Court confirmed that "whether there exists a dispute is a matter for objective determination" (a point which it had made earlier in the case concerning the *Interpretation of Peace Treaties*, *I.C.J. Reports 1950*, p. 74) and it repeated the definition of a dispute laid down by the Permanent Court in the *Mavrommatis Palestine Concessions* case, the definition being as "a disagreement on a point of law or fact, a conflict of legal views or of interests between two persons" (*P.C.I.J., Series A, No. 2*, p. 11).

In its opinion in the case concerning the *Obligation to Arbitrate* the Court also confirmed a passage from the Judgment in the *South West Africa* cases, which is particularly apposite in the present case:

> "It is not sufficient for one party to a contentious case to assert that a dispute exists with the other party. A mere assertion is not sufficient to prove the existence of a dispute any more than a mere denial of the existence of the dispute proves its non-existence. Nor is it adequate to show that the interests of the two parties to such a case are in conflict. It must be shown that the claim of one party is positively opposed by the other." (*I.C.J. Reports 1962*, p. 328).

But prior to its Application to the Court, Libya failed to identify the existence, or to define the subject-matter, of any dispute between itself and the United Kingdom under the Montreal Convention.

Between 14 November 1991 of last year, when the Lord Advocate made his public statement regarding the issue of arrest warrants for the two accused, between that date and 18 January 1992, when Libya wrote to the United Kingdom Government suggesting arbitration (UN Doc. S/23441, Doc. 16), Libya addressed a number of communications to the United Kingdom Government, to the United Nations Secretary-General and to the President of the Security Council (see D5 and 6, K1-11). I refer amongst others to Documents 3, 5, 6, 11 and 12 in the United Kingdom bundle. Not one of these communications mentioned the Montreal Convention.

As I have already pointed out, the very first time that Libya referred to the Convention was in its letter of 18 January 1992. In it Libya maintained that it had established its jurisdiction in respect of the two suspects under Articles 5(2) and 5(3) of the Convention. Libya also stated that it had referred the matter to its prosecuting authorities in accordance with Article 7 of the Convention and had called upon the United Kingdom (amongst others) to co-operate but had received no response. The letter then asserted that the response of the United Kingdom and the United States had made a negotiated settlement impossible and proposed arbitration, relying expressly upon Article 14(1).

The letter of 18 January did not expressly assert the existence of a dispute between Libya and the United Kingdom, although such an assertion is presumably implicit in the reference to Article 14 of the Convention. More seriously, it gave very little indication of what Libya perceived to be the content of that dispute.

If, to paraphrase the Judgment in the *South West Africa* cases, it must be shown that the claim of one party regarding the interpretation or application of the Montreal Convention is positively opposed by the other, the letter of 18 January shows nothing of the kind. The United Kingdom has never, before this application to the Court, seen the claim sufficiently articulated to enable it to decide whether it had indeed any "positive opposition", and thus to make this known to Libya. In its Judgment in the *Mavrommatis Palestine Concessions* case, the Permanent Court recognized that "before a dispute can be the subject-matter of an action at law, its subject-matter should have been clearly defined by means of diplomatic negotiations" (*P.C.I.J., Series A, No. 2*, p. 15). The present Court took the same approach in the case concerning the *Obligation to Arbitrate*, when it emphasized that the subject-matter of the dispute between the United Nations and the United States under the Headquarters Agreement had been clearly defined in the letters sent by the Secretary-General to the United States Government.

In her speech, my friend Professor Higgins, will develop further argument on Libya's failure to identify a dispute.

B. Libya failed to meet the Convention requirements for instituting proceedings before the Court

The United Kingdom also submits that even if there is a dispute between Libya and itself regarding the interpretation or application of the Montreal Convention, Libya failed by the critical date, that is to say before making its Application to the Court, it failed to complete the essential steps required by Article 14(1).

These steps are preconditions to the Court having jurisdiction. As the Court pointed out in the *South West Africa* cases, it must be assessed whether at the date the Application was filed those conditions were met. If they had manifestly not been satisfied at that date, Article 14(1) cannot provide a prima facie basis for the Court's jurisdiction.

1. Failure to settle the dispute through negotiations

The first precondition is that there had been a failure to settle the dispute through negotiation. The requirement that only a dispute which cannot be resolved through negotiation may be referred to other means of settlement is found in the dispute settlement provisions of many treaties. It is not a mere formality. Article 14(1) is expressly drawn in terms which refer not to disputes which *have not* been settled, but to disputes which *cannot* be settled, through negotiation. It is not open to the Applicant in the present case simply to dispense with that requirement.

In its Application (p. 3) Libya maintains that it had made various diplomatic overtures before the United Nations Security Council and elsewhere before it concluded that the dispute could not be settled through negotiation. At the present stage of the present proceedings, the United Kingdom wishes to make only two points in response to that assertion.

First, it is true that the Court has held, for example in the case concerning the *US Diplomatic and Consular Staff*, that a State is not obliged to persevere with attempts at negotiation once it has become clear that those attempts are bound to fail. However, it is submitted that, in that case, the subject-matter of the dispute had been clearly

identified at a very early stage. The same was true of the dispute in the *Applicability of the Obligation to Arbitrate* case. In the present case, however, the subject-matter of the dispute had not been made clear.

Counsel for Libya this morning referred to the passage in the *Mavrommatis Palestine Concessions* case, to which the Permanent Court stated that negotiation need not be protracted. But in that case the Permanent Court reached the conclusion that there had been no need for further negotiations between the two Parties, precisely because the very points in issue between the two States had already been extensively considered in correspondence between the United Kingdom and Mr. Mavrommatis. There is no equivalent of that prior ventilation of the dispute in the present case.

Secondly, the second point we wish to make at this stage is that, although the Court held in the *South West Africa* cases that, in certain circumstances, discussions in the various United Nations organs could take the place of more traditional direct negotiations, so that Liberia and Ethiopia were not required to go through the motions of direct talks with South Africa, the Court added:

> "But though the dispute in the United Nations and the one now before the Court may be regarded as two different disputes, the questions at issue were identical." (P. 345.)

The United Kingdom submits, however, that that is very far from being the case here. If there is a dispute between the United Kingdom and tLibya which falls within Article 14(1) of the Montreal Convention, it is very different from the subjects considered in the debates in the Security Council and the consultations initiated by the Secretary-General. Neither the debates nor the consultation process did anything to clarify the subject-matter of any Article 14 dispute.

2. Libya failed to make a proper request for arbitration

The second of the three preconditions in Article 14 is that the dispute should have been submitted to arbitration at the request of one of the Parties. The Libyan Application maintains that Libya made a request for arbitration, within the meaning of Article 14(1), in its letter of 18 January. But this letter is defective as a request under Article 14(1) because it does not attempt to define the dispute which Libya is alleging to exist between itself and the United Kingdom. The letter does not accuse the United Kingdom of violating any specific provisions of the Convention. Nor does it suggest what questions might be referred to arbitration. It is in our submission essential that a party seeking arbitration must formulate the issues upon which it believes there to exist a dispute and which it wishes to have arbitrated. A mere call *in abstracto* for arbitration, without formulating the issues, is not a valid request for arbitration under Article 14(1). This is especially the case where, as here, previous communications had done nothing to establish the existence of a dispute or to clarify its nature.

3. The six month period stipulated in Article 14(1) has not expired

It is also submitted that Libya had failed to comply with the third precondition laid down by Article 14(1), namely that a dispute may be referred to the Court only if the parties to the dispute are unable to agree upon the organization of an arbitration "within six months from the date of the request for arbitration" - French text: "dans les six mois qui suivent la date de la demande d'arbitrage". Libya acknowledges that its request for arbitration was made only on 18 January 1992, so that the six month period stipulated in Article 14(1) had not expired when the Application was lodged with the Court on 3 March and, indeed, has still

not yet expired. In the debate in the Security Council which preceded the adoption of resolution 731 the Libyan representative himself admitted that recourse to the Court would be possible only by agreement or after the expiry of the arbitration deadline. He said;

> "My country expresses its willingness to conclude immediately, with any of the parties concerned, an *ad hoc* agreement to have recourse to the International Court of Justice as soon as the short deadline for reaching agreement on arbitration expires, or at any other convenient and near date should the countries concerned agree to go beyond the arbitration stage and the proceedings of an arbitration panel." (S/PV 3033, p. 23.) [Doc. No. 18]

By contrast with what was said then, Libya now argues that it was not obliged to wait for six months, because the United Kingdom has rejected arbitration and it is clear, it says, that no agreement will be reached. The argument is misconceived in the absence of a valid request for arbitration under Article 14(1). Nevertheless, the United Kingdom submits further that this argument is in any case based upon a misunderstanding of Article 14(1).

First, the Libyan argument runs contrary to the plain meaning of the text of Article 14(1). That text gives the parties to a dispute six months from the date of a request for arbitration in which to agree upon the organization of an arbitration. What Libya is asking the Court to do - and this at the provisional measures stage - is to go behind that text and hold that there is an implied power for a party (presumably either party) to refer the dispute to the Court before that six month period had expired.

Secondly, the Libyan argument ignores the context of the six month provision. It is not a formal or technical barrier to the submission of disputes to the Court but an integral part of the scheme of Article 14(1), under which disputes are to be dealt with by arbitration

only if they cannot be resolved through negotiation. Arbitration is envisaged as the normal means of third party settlement of disputes under the Convention, with application to this Court being kept as a method of last resort.

Since the Montreal Convention makes no provision for a standing arbitral tribunal but leaves the parties to a dispute to agree upon all aspects of the establishment of a tribunal and of the organization of the arbitration, thee is an obvious risk that the parties will be unable to agree upon some aspect of the arbitration, so that either the reference to arbitration will be frustrated or the proceedings will become unduly protracted. Article 14(1), therefore, imposes a deadline; if the parties cannot agree within the six months, either party may refer the dispute to the Court. The purpose of this provision is to discourage delaying tactics and to increase the likelihood of the parties coming to an agreement regarding arbitration. Its purpose is not to put in place a purely formal hurdle which a party must jump before it can take a case to the Court. This interpretation is reinforced by the fact that Article 14(1) allows *either* party to a dispute - not just the party which originally requested arbitration - to refer a dispute to the Court once the six month period has expired.

Dispute settlement provisions which create more than one layer of settlement procedures frequently include a time-limit in terms similar to those of Article 14(1). Thus, in the Advisory Opinion on the *Interpretation of Peace Treaties*, the Court had to consider a clause which provided that:

> "any dispute concerning the interpretation or execution of the Treaty, which is not settled by direct diplomatic negotiations, shall be referred to the Three Heads of Mission acting under Article 35 ... Any such dispute not resolved by them within a period of two months shall, unless the parties to the dispute mutually agree upon another means of settlement, be referred at the request of either party to the dispute to a commission ..." (*I.C.J. Reports 1950*, p. 65.)

Responding to a question about whether the States concerned were under an obligation to set the machinery of the Commission in motion, this Court noted that there was a dispute concerning the treaty which had not been settled by negotiation or by the Heads of Mission and that the United Kingdom and the United States "after the expiry of the prescribed period" had requested that the dispute be referred to the Commission. It seems to have been assumed that such a request could be made only after the two month period had expired.

Similarly, in his Opinion in the case concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America)*, Judge Nagendra Singh considered the dispute settlement provisions of the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, 1973 (the wording of that provision is substantially the same as that of Article 14(1) of the Montreal Convention). Judge Nagendra Singh commented that under the 1973 Convention "a lapse of six months form the date of the request for arbitration was a condition precedent for referring the dispute to the International Court of Justice".

Libya seeks to get round the provisions of Article 14(1) by arguing that the United Kingdom has rejected arbitration. Libya refers, and has referred today, to a statement by the United Kingdom representative to the Security Council. But when the text of his remarks is examined, those remarks do not bear out Libya's assertion. What the Ambassador actually said, in the course of the debate which preceded the adoption of resolution 731, was as follows:

> "The letter dated 18 January concerning a request for arbitration under Article 14 of the Montreal Convention is not relevant *to the issue before the Council*. The Council is not, in the words of Article 14 of the Montreal Convention, dealing with a dispute between two or more Contracting Parties concerning the interpretation or application of the Montreal Convention. What we are concerned with here is the proper

> reaction of the international community to the situation arising from Libya's failure, thus far, to respond effectively to the most serious accusations of State involvement in acts of terrorism." (S/PV 3033, p. 104; D 14.)

This statement merely confirms that the issues before the Security Council did not turn on the interpretation or application of the Montreal Convention. In the face of this statement, Libya was surely obliged to assert the existence of a separate, defined dispute under the Convention, if that was its true position.

Yet six weeks later, when it filed its Application, Libya still had failed to define the subject of the dispute on which it claims to have sought arbitration. It had buried its mention of arbitration amidst a welter of proposals - all of which it put to the Secretary General - for international commissions, inquiries and "mechanisms" in the context of resolution 731. What Libya is really seeking to do is to be allowed in its application to the Court to take in one stride what is envisaged in Article 14(1) as three separate and sequential steps.

Here, for the first time, Libya attempts to set out (though still with little precision) what it alleges to be its dispute regarding the interpretation or application of the Montreal Convention. It then asks the Court to assume that negotiations were futile (though it has never put this dispute to negotiation), that it has submitted the dispute to arbitration (though it has never before set out what issues it wanted to arbitrate), and that agreement on arbitration would never be reached, (though Libya had made no proposals to allow such agreement) and all this so that it could disregard the clear and express requirements of Article 14(1). It is little wonder, perhaps, that these requirements received such scant attention this morning.

Conclusion

For all these reasons, then, the United Kingdom submits that Article 14(1) manifestly does not provide a basis for the jurisdiction of the Court, and that the Court should, therefore, on that ground alone, refuse to indicate provisional measures.

It is always necessary, I would respectfully submit, to bear in mind the warning given by Sir Hersch Lauterpacht in his separate Opinion in the *Interhandel* case, when he said that:

> "Governments ought not to be discouraged from undertaking, or continuing to undertake, obligations of judicial settlement as a result of any justifiable apprehension that by accepting them they may become exposed to the embarrassment, vexation and loss, possibly following upon interim measures, in cases where there is no reasonable possibility ... of juristiction on the merits." (*I.C.J. Reports 1957*, p. 118.)

The need to respect this maxim is all the more powerful when, as here, there are other strong arguments against the indication of provisional measures. The submissions of the United Kingdom regarding those other arguments will be put by Professor Higgins.

The ACTING PRESIDENT: Thank you Mr. Rodger. The Court now rises for a break for ten minutes.

The Court adjourned from 4.25 p.m. to 4.40 p.m.

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

Professor HIGGINS: Mr. President, Members of the Court, it is no mere formality when I say that it is the greatest honour to appear before this Court and on behalf of my country. My task this afternoon is to make the submissions related to Parts III and IV of our case. Part III concerns Article 41 of the Statute and our submission that the interim measures sought by Libya should not be granted as they do not meet the requirements of Article 41.

If a party seeks interim measures when, as in this case, the Court's jurisdiction over the merits has yet to be determined and is likely to be contested, a series of interlocking requirements must be met. The Court must satisfy itself that it has *prima facie* jurisdiction under whatever instrument is said to provide the basis for jurisdiction over the dispute. It must also determine whether the conditions of Article 41 of the Statute are met, the first of which are that the circumstances require the indication of provisional measures, and the second of which is that measures may only be indicated to protect the rights of the parties.

Now the sequence in which the Court should go through these interlocking gates is open to dispute. Over the years different views have been taken by different Members of this Court, some contending that there is always present an incidental jurisdiction to decide if circumstances require at all provisional measures. Only if the answer is in the affirmative need the Court then determine if, by reference to the

existence of *prima facie* jurisdiction over the merits it may proceed to order them. Others have taken the view that the Court must first establish its *prima facie* jurisdiction over the merits in order to proceed at all to any consideration of the requirements of Article 41.

If *prima facie* jurisdiction must first be established before any consideration of the criteria of Article 41 arises, and if the Court accepts the submissions of the Solicitor-General that no *prima facie* jurisdiction under the Montreal Convention exists, there would be no need to proceed further. The *Aegean Continental Shelf* case suggests the Court found that the interim measures were not needed and "having reached this conclusion it was not necessary for the Court to make any determination as to the prospects of its jurisdiction with regard to the merits, even on a *prima facie* basis". This sequence of handling the relevant factors leaves the question of jurisdiction entirely reserved for full argument and a future judgment. Of course, this possibility entails as its *sine qua non* the view that Article 41 is an autonomous grant of jurisdiction to the Court, on which different views have been expressed over the years by different Members of the Court.

THE RIGHTS

A. The rights to be protected must not be illusory

Article 41 provides for the protection of rights when circumstances so require and I turn first of all to the rights.

For purposes of having sufficient jurisdiction to contemplate provisional measures when substantive jurisdiction has not yet been established, the Court must of course satisfy itself that it has *prima facie* jurisdiction under the relevant instrument and not that the applicant has a *prima facie* prospect of success on the merits.

But when the Article 41 requirements come into play, the matter presents itself differently. The Court is now deciding whether measures are required to preserve the rights of a party. At this phase the reference must, of course, be in a general sense to the rights as formulated by the party concerned and yet to be tested on the merits. However, the right must still not be illusory, or manifestly without foundation.

The phase of interim measures is an inappropriate time for the deploying of the case on the merits. Any yet, in the words of Judge Shahabuddeen in the *Passage through the Great Belt (Finland* v. *Denmark)* (*I.C.J. Reports 1991*, p. 28):

> "is it open to the Court by provisional measures to restrain a State from doing what it claims it has a legal right to do without having heard it in defence of that right, or without having required the requesting State to show that there is at least a possibility of the existence of the right for the preservation of which the measures are sought?"

Judge Shahabuddeen notes that the Court has never had occasion to pronounce on this question, but suggested that "enough material should be presented to demonstrate the possibility of the right sought to be protected". And, while making clear that the Court did not formally pronounce on the matter, he believes that in the *United States Diplomatic and Consular Staff in Tehran* (*I.C.J. Reports 1979*, pp. 17-20, paras. 34-43) "the Court was clearly concerned to satisfy itself affirmatively that there was a case for holding that the rights sought to be protected by provisional measures did exist in international law and were in fact being violated" (p. 25).

The United Kingdom respectfully supports this perspective and, for that reason, will briefly indicate why Libya's claimed rights under the Montreal Convention are in fact illusory.

B. The rights claimed by Libya are illusory

In Part III of its Application, Libya accuses the United Kingdom of violating rights which Libya claims arise from five provisions of the Montreal Convention - Articles 5(2), 5(3), 7, 8(2) and 11 - and Members of the Court may, for this section of my submissions, find it convenient to have the Montreal Convention before them.

As to Article 5, paragraph 2, in paragraph III(b) of its Application, Libya contends that Article 5(2) of the Montreal Convention confers on Libya the right to take such measures as may be necessary to "establish its jurisdiction" over the offences listed in Article 1, in any case where the alleged offender is present in its territory and it does not extradite him. The Application claims that the United Kingdom is attempting, in violation of Article 5(2), to preclude Libya from establishing its jurisdiction in the present case.

This argument, it submitted, is based on a complete misunderstanding of Article 5(2). That provision imposes upon each party to the Convention a *duty* to ensure that its law provides for jurisdiction over the offences listed in Article 1, irrespective of where, or by whom, they were committed, so that a State has the capacity under its own law to try an offender if it does not extradite him. The text of Article 5(2) makes clear that what is involved is the *creation* of jurisdiction, and not its *exercise* in an individual case.

Once that is appreciated, it becomes clear that nothing the United Kingdom has done or could do in the future is capable of affecting anyone's rights or duties under Article 5(2).

In any event, as the Solicitor General has informed the Court, Libya has itself admitted that the basis for the jurisdiction of the Libyan courts in the case of the Lockerbie suspects is nothing to do with the Montreal Convention. The Libyan authorities have asserted jurisdiction

over the two men on the basis of their nationality, relying on Article 6 of the Libyan Penal Code of 1953, a provision wholly unconnected with Article 5(2) of the Montreal Convention of 1971.

Article 5(3)

Libya also claims a right under Article 5(3) to exercise criminal jurisdiction in accordance with its national law. Yet all that Article 5(3) says is that: "This convention does not exclude any criminal jurisdiction exercised in accordance with national law." Article 5(3) is quite clearly a saving provision, designed to do nothing more than make clear that any basis for criminal jurisdiction which already existed in the law of a State prior to the adoption of the Montreal Convention - such as that provided by Article 6 of the Libyan Penal Code - is not excluded or superseded by the other provisions of the Convention.

Article 5(3) does not address the question of which State should exercise jurisdiction when more than one has a basis for doing so. Nor does it preclude a State from demanding the surrender of a suspect. Nor does it prohibit demands for surrender when the national State is reasonably believed itself to have been involved in the acts in question.

Article 7

In paragraph III (*c*) of the Application, Libya accuses the United Kingdom of trying to prevent Libya from fulfilling its obligations to submit the case to its competent authorities for the purpose of prosectuion under Article 7 of the Convention which counsel for Libya this morning described as the cornerstone of Libya's rights. The Application itself states, however, that Libya has already submitted the case to its competent authorities. Therefore on its own argument Libya has discharged its obligation under this provision and indeed the United Kingdom has never suggested that Libya is in violation of

Article 7 and nor would Libya be in breach of that provision if she were now to surrender the two accused for trial elsewhere. In any event, Article 7 stipulates obligations for Libya, but no rights for Libya arise thereunder.

Article 8, paragraph 2

Libya's submission regarding Article 8(2) of the Convention (para. III (e) of the Application) is not easy to follow. Libya accuses the United Kingdom of violating this provision by seeking the surrender of the two accused and refers in this context to Article 493 (A) of the Libyan Code of Criminal Procedure which, it states, prohibits Libya from extraditing one of its nationals. The exact nature of this prohibition is unclear, as Libya has on more than one occasion told the Secretary-General that it would be willing to extradite the two accused to a third State or to the Arab League, or even, in certain circumstances, to the United States. And I simply remind the Court of what the Solicitor General has said on that matter.

In any event, it is difficult to see what rights Libya might have under Article 8(2) which could be in issue in the present proceedings. Article 8 of the Convention deals with extradition. Article 8(1) provides that offences under the Convention shall be deemed to be extraditable offences. And Article 8(2) then goes on to provide:

> "If a Contracting State which makes extradition conditional on the existence of a treaty receives a request for extradition from another Contracting State with which it has no extradition treaty, it may at its option consider this Convention as the legal basis for extradition in respect of the offences. Extradition shall be subject to the other conditions provided by the law of the requested State."

And Article 8(3) then stipulates that Contracting States which do not make extradition conditional upon the existence of a treaty shall recognize the offences under the Convention as extraditable offences between themselves. Article 8, paragraph 4 addresses jurisdictional issues in the context of extradition proceedings.

In other words, Article 8(2) is another enabling provision. It provides a mechanism by which extradition may be effected, if the States concerned wish to make use of it. The United Kingdom has not, however, sought the extradition of the two accused under Article 8(2) - indeed, it has not sought their *extradition* (in the technical sense of the term) at all - but has instead maintained that Libya should, for reasons unrelated to the Montreal Convention, surrender the two accused.

The United Kingdom reserves the right to develop this argument, in particular, more fully at the merits phase of the proceedings, in the event that such a phase should ever be reached.

Article 11

Finally, paragraph III (*f*) of the Application claims that Libya has a right, under Article 11 of the Convention, to receive assistance from the United Kingdom in connection with the criminal proceedings brought by Libya.

In view of the United Kingdom Article 11 is an ancillary provision which comes into operation when it has been accepted that trial should take place in a particular State and that State requires assistance. But whether trial can only take place in Libya is exactly the issue before this Court. In the event that proceedings should be held on the merits of the present Application, the United Kingdom will wish to argue, *inter alia*, that Article 11(1) does not confer upon Libya a right to require full evidence, the disclosure of which might seriously prejudice the possibility of criminal proceedings ever being brought in the United Kingdom.

C. There must exist a nexus between the rights to be protected and the interim measures sought

Article 41 of the Statute is to be read with the relevant Rules of Court. The current Rules provide, in Article 73, that the request for provisional measures "shall specify the reasons therefor, the possible

consequences if it is not granted, and the measures requested". Now the 1972 Rules (Art. 66, para. 1) provide that the request "shall specify ... the rights to be protected". The purpose of the variation in wording was to ensure that elements not specifically provided for in the 1966 Rules - the *reasons* and the *possible consequences* - are brought to the fore. The Court continues to need to satisfy itself as to the necessity to protect the rights, and this it cannot do unless it is clear what the alleged rights consist of. Although the parties are no longer required in terms to specify either the case to which the request relates, or the rights to be protected, nothing we submit should be read into that. Although the *procès-verbaux* for the new Rules have not been published, these requirements are inherent in the procedure.

In the Court's jurisprudence there has been a dual element to the requirement of nexus.

In the first place, the measures sought must relate to the subject-matter of the dispute and not to issues that do not constitute the true subject-matter. That principle is clearly illustrated in the *Aegean Sea Continental Shelf* case (*I.C.J. Reports 1976*, p. 3). In that case Greece asked the Court to adjudge and declare that specified Greek islands were entitled to a portion of continental shelf that appertained to them; and what was the course of the boundary between the portions of the continental shelf appertaining to Greece and Turkey in the Agean Sea (*I.C.J. Pleadings, Aegean Sea*, p. 11). In the request for provisional measures, Greece asked the Court to direct the Governments of Greece and Turkey (1) to refrain from exploration and seismic activity and (2) to refrain from taking military measures or actions. The subject matter of the dispute was not unlawful military actions. And it mattered not that Greece had, in explaining what rights it saw as in need of protection, included reference to "the rights of Greece to the performance by Turkey of its undertakings contained in Article 2, paragraph 4, and Article 33 of the Charter of the United Nations".

The Court held that its power under Article 41 "presupposes that irreparable prejudice should not be caused to rights which are the subject of dispute in judicial proceedings" (Order of 11 November 1976, para. 25). The Court noted (Order of 11 November 1976, para. 34) that the right to have Turkey refrain from military measures "is not the subject of any of the several claims submitted to the Court by Greece in its application", whereas it follows that this request does not fall within the provisions of Article 41 of the Statute.

The significance is this. Merely to invoke a right in some part of one's application does not make that claimed right the subject-matter of the dispute. And, if it is not the subject-matter, it does not fall within the provisions of Article 41.

In the present case, the claims of Libya are to be found at Section III(*a*)-(*g*) of its Application. There is no claim concerning the use of force, and no dispute about Libya and the United Kingdom's respective rights in relation thereto. The adding of a half paragraph which refers to the "use and threat of force" in paragraph C of the Judgment Requested (IV(C)), does not serve to transform the subject-matter of the dispute into one about the use of force. Further, the subject-matter of the dispute is not about alleged "coercion" or "threats" by the United Kingdom. The application instituting proceedings makes no such claim, offers no relevant evidence and presents no relevant law on "coercion" by the United Kingdom though today we have heard some allegations for the first time this morning. The claim is clearly about alleged violations of the Montreal Convention, as specified in Section III(*c*)-(*g*). The relief sought by Libya under Section 7(*a*) of its Request for Interim Measures ("to enjoin the United Kingdom from taking any action against Libya calculated to coerce or compel Libya to surrender the accused individuals to any jurisdiction outside of Libya") that is, in the words of the Court in the *Aegean Sea* case "not the subject of any of the several claims" - and should be rejected.

A difference element of this principle of nexus is illustrated by the *Polish Agrarian Reform and German Minority* case in front of the Permanent Court (*P.C.I.J., Series A/B, No. 58*, p. 178). In that case, Germany had claimed that Poland had violated its obligations under the Minority Treaty. The German request for interim measures asked the Court

to indicate that Poland should not engage in various activities related to the expropriation of German minority estates. The Permanent Court found that the requested measures concerned future cases of application of the contested Polish law, whereas the claims were of existing infractions (p. 178). The Court would not order the interim measures because they could not "be regarded as solely designed to protect the subject of the dispute and the actual object of the principal claim".

And so they cannot in the present case. If the dispute in the present case, as formulated by Libya, is that the United Kingdom is in breach of the Montreal Convention, the relief sought in paragraphs 7(*a*) and 7(*b*) is not solely directed to that end. In fact, it is directed against the Security Council being able to take measures it thinks appropriate with regard to the matter on its agenda relating to international terrorism.

The requirement of nexus has recently been affirmed by the Court in the *Guinea Bissau* case (case concerning the *Arbital Award of 31 July 1989*, *I.C.J. Reports 1990*, p. 64) and its application to the present case, in our submission, makes the relief sought unavailable under Article 41.

Necessary in the circumstances

Mr. President, Members of the Court, I turn to necessary in the circumstances, the other requirement of Article 41. If the Court has sufficient jurisdiction and if the applicant State has identifiable rights on the merits and proposes measures which have the appropriate nexus with the subject-matter of the dispute, the Court still has to "consider that circumstances so require" under Article 41.

And, there is clearly an important role for the discretion and appreciation of the Court here. It is for the Court to decide whether

circumstances so require and there is nothing in the Statute or Rules that limits what factors it may properly take into account.

The Court will no doubt want to consider the circumstances of the case against the background of the various criteria that it and the Permanent Court have evolved over the years.

(a) *Irreparable damage*

In determining whether the circumstances require the ordering of provisional measures, the Court has used the test of "irreparable harm or damage". There appear to be three main ways in which the concept has been used: (1) irreparable prejudice to the potential judgment of the Court, (2) irreparable harm to rights claimed, (3) irreparable harm to persons and property. These concepts, to a degree, overlap with each other.

The Court has frequently expressed the idea that "the essential object of provisional measures is to ensure that the execution of a future judgment on the merits shall not be frustrated by the actions of one party *pendente lite*" (Judge Jiménez de Aréchaga, *Aegean Sea* case, *I.C.J. Reports 1976*, p. 16). Where no such urgent danger is perceived, circumstances will not require the indication of provisional measures.

A reference is often made in the Court's Orders to the requirement that, I quote now the *Anglo-Iranian Oil Company* case where the Court said that "no action is taken which might prejudice the rights of the other party in respect of the carrying out of any decision on the merits which the Court may subsequently render" (*I.C.J. Reports 1951*, p. 890 at 93-94). Essentially the same formula has been used in the *Fisheries Jurisdiction* case (*I.C.J. Reports 1972*, pp. 17-18); in the *Nuclear Tests* case (*I.C.J. Reports 1973*, p. 142); in the *Nicaragua* v. *United States* case (*I.C.J. Reports 1984*, p. 187); and in the

Burkina Faso v. *Mali* case (*I.C.J. Reports 1986*, p. 12). In this last case, the Chamber referred to the importance of avoiding prejudice to "the right of the other party to compliance with whatever judgment the Chamber may render in the case". This was the test that the Permanent Court had earlier applied in the *Electricity Company* case (*P.C.I.J., Series A/B, No.* 79, p. 199).

This key test has also been referred to in various cases where the Court did not grant interim measures - either because this element was missing, or for other reasons. I may refer to the *Interhandel* case, where the Court spoke sternly of the need for requested measures of protection to "relate to the concern of the Court to preserve the rights which may subsequently be adjudged by the Court to belong either to the Applicant or to the Respondent" (*I.C.J. Reports 1957*, p. 111).

So the preservation of the integrity and efficacy of the judgment would certainly seem to be the central element in the Court's consideration of whether circumstances require the indication of interim measures. And taking this as the key test, the United Kingdom makes the following submissions. There are no circumstances that jeopardize - still less urgently jeopardize - any rights claimed by Libya in the sense that a judgment in Libya's favour would be without effect.

It is first necessary to remind the Court what these legal rights are claimed to be. Libya claims that it has the following rights, which the United Kingdom is denying to it: the right to establish jurisdiction under Article 5, paragraph 2 of the Montreal Convention; an obligation under Article 7 to submit the matter to its competent authorities; the right to exercise criminal jurisdiction under Article 5, paragraph 3; and the right to receive co-operation in the exercise of national jurisdiction under Article 11, paragraph 1. The Court has already heard the submissions that Libya's insistence that these are rights, and/or rights grounded on the Montreal Convention, is totally misconceived.

But even if, *arguendo*, Libya has the claimed rights under the Montreal Convention, then this is still not a right in which there is a prospect of irreparable harm in the sense required by the Court. Regarding Article 5, paragraph 2, the United Kingdom has not prevented

Libya from establishing its jurisdiction (indeed, it has clearly already done so). No rendering of a Court judgment on this point is remotely in view, and interim measures have no role whatever to play regarding that claim. As for Libya's Article 7 claim, we merely note that interim measures are directed towards protecting rights and Libya speaks of an obligation, not a right. No interim measures are needed to protect any appropriate judgment of the Court on this point. Again, it is impossible to see that there is a danger of irreparable harm to the Court's ability to pronounce effectively on Libya's alleged rights under Article 5, paragraph 3, to exercise criminal jurisdiction (even ignoring that any such right does not stem from the Montreal Convention, but from customary international law, as reflected in Libyan law). As to its claimed rights under Article 11, to receive co-operation in the exercising of national jurisdiction, there can be no suggestion that this would not be available upon a judgment favourable to Libya, save through the indication now of interim measures. It is not easy to see, in any event, how interim measures would assist the International Court and the International Court is aware of the importance the United Kingdom attaches to its judicial determinations.

Nor in the present case is it possible to see that "irreparable harm" could be occasioned, in the sense that concerned the Court in the *Hostages* or *Nuclear Test* cases, to any of the rights claimed by Libya. Where persons may die or be incarcerated, as in the *Hostages* case, or where they may suffer from radiation or unknown genetic effects - then indeed one understands the notion that nothing will protect against the prejudice. But even if there *is* a potential right under the Montreal Convention and even if it is a right to exclusive

competence over the accused, that surely is not in the same category as these examples. Any judgment would not in these circumstances depend upon interim measures to render it effective.

The *Hostages* and *Nuclear Tests* cases are the classic examples of the Court viewing irreparable harm as relating to the safety of persons and property. But the difference of approach is more apparent than real, because in both cases unlawful harm to nationals formed the very subject-matter of the dispute. Here the dispute is said by Libya to be about its rights under the Convention. Not only are suggestions of "threats" and "use of force" by the United Kingdom purely speculative, but interim measures prohibiting them have no role to play in preventing irreparable damage to the rights as claimed. The circumstances of this case are far removed from the view taken in the *Hostages* and *Nuclear Tests* cases as to the need to protect against that form of harm.

That leads to a related - but different point. The indicating of interim measures before jurisdiction is established necessarily entails constraints upon a state over whom jurisdiction is uncertain, and which has not yet been shown to be acting unlawfully, and which has not yet been able to deploy its case on the merits. In exercising its powers under Article 41, the Court should consider, in the circumstances of the case, the balance between the rights of the Parties. Where the right claimed is protection against death or genetic disaster, the balance may go one way. But where the right is a proclaimed right to sole jurisdiction, it may be asked whether the balance does not tip differently. And in this particular case, it should also be borne in mind that the interim measures requested would protect this proclaimed right to exclusive jurisdiction in circumstances where the international community has reason to believe that Libya itself was directly implicated

in ordering acts of terrorism. (It is interesting to recall, Mr. President, Members of the Court, that in the *Pakistan Prisoners of War* case (*I.C.J. Reports 1973*, p. 328), a claim was made by Pakistan for sole jurisdiction over nationals accused of genocide, and sought interim measures to protect their repatriation to a third country. The measures were not indicated due to a perceived lack of urgency.)

B. Urgency

It is well established that interim measures may not be granted under Article 41 as we have said unless there is an immediate prospect of irreparable damage to the rights in dispute. In both the *Interhandel* case (*I.C.J. Reports 1957*) and the *Pakistan Prisoners of War* case, no interim measures were ordered because of lack of urgency.

Professor Brownlie suggested, this morning, that there was probably no substantive requirement in law, however, to show urgency and he further submitted that urgency nonetheless did exist in this case. And I would like to take each of these points briefly in turn.

As to the requirement of urgency in law we believe urgency be a substantive requirement in the ordering of interim measures. Article 41 and the interpretation given to it is to be read in the context of the relevant rules. Rule 74, paragraph 1, refers to a request for interim measures having priority over all other cases. And Rule 74, paragraph 2, requires the Court to be convened forthwith for the purpose of proceeding to a decision as a matter of urgency.

Why should the case have priority? Why should the Court reach its decision as a matter of urgency if the alleged irreparable harm is not in fact urgent and imminent? It can make no sense. Further, Libya's own Application made as a matter or urgency - how can a State apply as a matter or urgency in relation to a non-urgent matter.

As to the existence or urgency in fact, various alleged threats were deployed before the Court this morning. But Libya has addressed no real evidence in support of its allegation that the United Kingdom is threatening to use force against it. All that Professor Brownlie was able to do this morning was to quote a remark by the Minister of State at the Foreign and Commonwealth Office in a parliamentary debate that said "I have ruled nothing in and I have ruled nothing out".

The Court will however wish to look at the Minister's statement in its entirety. In response to an intervention by another Member of Parliament the Minister said "I have never made any reference to the use of force. I have said here and elsewhere that we seek to persuade the Government of Libya to comply with our request that the two people should be brought to trial before the courts, either of Scotland or the United States. We hope that we shall secure a United Nations resolution underpinning that request. We hope that the Government of Libya will comply. Clearly if they do not we shall have to consider our next step. I have not suggested force. I have ruled nothing in and I have ruled nothing out. Now it surely cannot be alleged in any sense that wherever a Statesman keeps his options open and declines to disclose his hand in public that this amounts to a threat, still less a threat to use force which requires the Court to put all other cases aside to meet in urgent session to indicate interim measures.

The Order in the *Great Belt* case (*I.C.J. Reports 1991*, p. 23) indicates clearly that urgency has a specific meaning in the context of interim measures - it is tied in to the prospect of the disappearance of rights that cannot be compensated before the substantive issues come on for adjudication. Urgency of that legal character is not lightly to be presumed and in cases such as the *Hostages* and *Fisheries Jurisdiction* urgency arose from the fact that the offending acts had already occurred and were continuing.

There is no urgent prospect of the disappearance of a right held by Libya. Instead, there is a prospect of ongoing debates in the Security Council, that may or may not lead to certain actions being taken in that body. The Court does not know what actions the Security Council would take, and should not base its Order on speculative possibilities, speculative possibilities regarding decisions not yet taken are not the test of urgency required for an Order of interim measures.

So the United Kingdom has made no threat to use force. The United Kingdom will of course continue to abide by international obligations including its obligation under Article 2, paragraph 4, of the Charter. The Applicant does not come anywhere near showing the Court that there is a real risk of imminent danger from unilateral sanctions if the Court should not indicate interim measures.

Indeed, the Applicant has been so sparing in its indication of reasons why interim measures should be granted that its Request it submitted is in danger of falling outside of Article 73 of the Rules altogether: the Request does not, as required by that Article, contain anything regarding the "possible consequences if it is not granted".

IV. Further reasons why the Court should not indicate the interim measures sought

I turn to Part IV of our submissions. The further reasons beyond Article 41 of the Statute why the Court should not indicate the interim measures sought.

Article 41 of the Statute provides the basis for its ancillary jurisdiction "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". But the wording of this provision is not determinative of the matter. As we have seen, it is necessary also, in the case of contested jurisdiction, for the Court to determine that it does have the jurisdiction necessary to determine whether it considers that the circumstances of the case require provisional measures to be taken.

But even beyond that, there is a further matter. Even if the Court has prima facie jurisdiction over the merits sufficient to allow it to proceed to a determination of the interim measure requested, and even if the test for determning whether circumstances require provisional measures is met, it may still be inappropriate for the measure to be indicated. Article 41 confers on the Court the necessary power, but this provision is not conclusive *per se* as to the propriety of the Court exercising it. As the International Court stated in the *Northern Cameroons* case:

> "there are inherent limitations on the exercise of the jurisdiction function within the Court, which the Court as a Court of Justice, can never ignore" (*I.C.J. Reports 1963*, Preliminary Objections, p. 29).

Former President Judge Jiménez de Aréchaga has suggested, in his separate opinion in the *Aegean Sea Continental Shelf* case *(Interim Measures)* (*I.C.J. Reports 1976*, p. 16) that Article 41 provides the basis for the Court's power to act, but that the Court still has to take circumstances

into account in deciding whether to grant the interim measures and in the present case we submit that there are many factors of critical importance that make the interim measures sought by Libya totally inappropriate, and further make clear that the circumstances do not require that they be granted.

A. The interim measures sought by Libya we say are vague, imprecise and unsuitable to be indicated as Orders of the Court

The measures sought are specified in paragraph 7 of Libya's Request for Interim Measures. Paragraph 7(*a*) speaks of enjoining the United Kingdom from taking "any action against Libya calculated to coerce or compel Libya to surrender the accused individuals". What exactly is covered by "any action"? Does it cover diplomatic activity? Does it cover, for example, briefings of the press? Does it require the United Kingdom to desist from supporting the activity of the Secretary-General which is directed towards securing compliance with Security Council resolution 731? How is the line to be drawn between actions designed to persuade Libya, and actions designed to coerce Libya? Who is to test this entire ongoing state of Anglo-Libyan relations, to see whether subsequent events, such as interdiction of trade, etc., are the product of unsatisfactory relations or are "calculated to coerce"?

The measures sought in paragraph 7(*b*) are so imprecise as to be meaningless. It is not clear to whom it is directed, the United Kingdom or the world at large.

It does not enjoin the United Kingdom against taking certain steps, but requires it to ensure that no steps are taken. It is not clear by whom these steps may not be taken, nor how the United Kingdom is meant to ensure that they are not taken. What if a third country seeks to compel Libya to surrender the accused to it for trial in an appropriate jurisdiction? Do the requested interim measures require something of the United Kingdom in that event? Or is paragraph 7(*b*) addressed to that unknown third party itself? And, as if all that were not sufficiently confused, what are the steps that might be thought to prejudice Libya's right with respect to legal proceedings.

The objective of interim measures is to preserve the rights of the parties *pendente lite*. This cannot be done if it is uncertain to whom the protective measures are addressed, what measures are in fact prohibited and if constant auto-interpretation by the United Kingdom or constant guidance by the Court would be required to decide whether any particular action would or would not fall within the Orders. No national Court would grant injunctive Orders of this imprecision, and we belive the International Court should not either.

The practice of the Permanent Court and the International Court supports this contention. There have now been ten cases in which interim measures have been ordered. In all save one of them the measures ordered have been extremely specific, leaving the party to whom they were addressed in no doubt as to what was required of it. In the *Sino-Belgian Treaty* case (*Denunciation of the Treaty of 2 November 1865 between China and Belgium, P.C.I.J., Series A, No. 8*), the provisional measures contained specific and detailed directives, broken down by reference to Belgian nationals, property and judicial

safeguards. In the *Anglo-Iranian Oil Co.* case (*I.C.J. Reports 1951*, p. 93 f.), the measures indicated referred to the entitlement of the Anglo-Iranian Oil Company to carry on operations *pro tem* free of interference. And as if to emphasize the need for specificity, the Court ordered the establishment of a board of supervision and went into considerable details as to how it was to be composed and operated. In the two *Fisheries Jurisdiction* cases (*I.C.J. Reports 1972*, p. 12) the Orders were also detailed with metric tonnage of catch being specified. In the *Nuclear Tests* case (*I.C.J. Reports 1973*, p. 99), France was ordered "to avoid nuclear tests causing the deposit of radioactive fall-out on Australian territory". In the *United States Diplomatic and Consular Staff in Tehran*, (*I.C.J. Reports 1979*, p. 7), the Orders were again specific, covering the protection to be afforded to the diplomatic premises and the immediate duty to release all hostages. In the case concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America)* (*I.C.J. Reports 1984*, p. 169), the Court made specific indications applicable to the United States, namely, that it should cease and refrain from action restricting, blocking or endangering access to or from Nicaraguan ports, and in particular the laying of mines. And finally, in the *Frontier Dispute* case, where after military hostilities both Burkina Faso and Mali agreed that provisional measures should be indicated, Orders were given about ceasefires, troop withdrawals and the administration of the disputed areas.

In only one case has there ever been a generalized and unspecific Order of the category now sought by Libya. In the *Electricity Company of Sofia and Bulgaria* case (*P.C.I.J., Series A/B, No.* 79, p. 194), the

Court indicated "The State of Bulgaria should ensure that no step of any kind is taken capable of prejudicing the rights claimed by the Belgian Government or of aggravating or extending the dispute submitted to the Court." This Order is completely out of character with the general practice of the Court. Professor Sztucki, in his book *Interim Measures in The Hague Court"* (1983, p. 76), comments on this and suggests that its brief and general terms may be explained by the unparalleled expedition of the granting of those Orders - the very day following the hearing. In any event since 1939 the practice has been in favour of specific Orders.

The United Kingdom submits that the measures requested by Libya in paragraph 7(a) and (b) lack the necessary clearness and precision that was required by the Court in the *Polish Agrarian Reform and German Minority* case (*P.C.I.J., Series A/B, No. 58), and should not be granted.*

(b) Libya's assertion that interim measures are needed to prevent an aggravation of the dispute is incorrect in law and unacceptable in its factual content

In paragraph 5 of its Request for Interim Measures Libya states that interim measures are required "to cause the United Kingdom to abstain from any action capable of having a prejudicial effect on the Court's decision in the case and to refrain from taking any step that might aggravate or extend the dispute, as would surely happen if sanctions are imposed against Libya or force employed".

In the submission of the United Kingdom, insofar as the aggravation of a dispute is a ground for granting interim measures at all, it has no separate existence beyond the ground specified in Article 41, that is to say "to preserve the respective rights of either party" pending final decision. In the Legal Status of the South-Eastern Territory of Greenland. (*P.C.I.J., Series A/B, No.* 48, p. 277), Norway had sought

by decree to place territory claimed by Denmark under its sovereignty. Both States filed applications with the Court and Norway sought interim measures to prevent what it called "regrettable events and unfortunate incidents". Interim measures were refused, primarily because the Court felt there was no reason to suppose that such incidents would occur. In any event, the feared incidents would not affect Norway's rights under any judgment that the Court might give. The Court on that occasion left open, in quite specific terms, the question of whether it was competent to issue interim measures "for the sole purpose of preventing regrettable events and unfortunate incidents" (p. 284).

In a series of subsequent cases, the *Electricity Company of Sofia and Bulgaria* case (*P.C.I.J., Series A/B, No. 79*, p. 194), the *Anglo-Iranian Oil Co.* case (*I.C.J. Reports 1951*, p. 89), the *Fisheries Jurisdiction* case (*I.C.J. Reports 1972*, p. 12), and the *Nuclear Tests* case (*I.C.J. Reports 1973*, p. 99), the Court issued orders which included indications to avoid actions which might aggravate or extend the dispute submitted to the Court. But in the submission of the United Kingdom, this did not dispose of the question of whether this is a separate ground for ordering interim measures, because in fact interim measures were also squarely based on the need to conserve the capacity for the judgment of the Court to be carried out. This interpretation is in effect supported by the fact that the matter was regarded by the Court as still open when it once again came upon it in the *Aegean Sea Continental Shelf* case (*I.C.J. Reports 1976*, p. 3). Professor O'Connell had argued for Greece that the competence "to order interim measures to avoid aggravation or extension of the dispute is separable from, not merely another way of phrasing the idea that interim

measures are intended to avoid prejudice in regard to the execution of the decision later to be given" (CR 76/1, 25 August 1976, p. 70 f.). The Court found no risk of irreparable prejudice and therefore declined to order the interim measures. It said it had no need to decide whether it had an independent power to order measures to prevent the aggravation or extension of the dispute (p. 12, para. 36).

Two points may be made. First, although the Court said it had no need to decide the issue, it could have issued interim measures on this basis had it chosen to do so. Second, had the fact that Orders including such terms been made in three previous cases settled the matter, the Court would not have treated it as still open. Since that time interim measures directed at preventing the aggravation or extension of the dispute have been issued in three more cases - the *Hostages Case*, the *US Nicaragua* case and the *Frontier Dispute* case. But in each case they have appeared alongside Orders directed to avoiding prejudice in regard to the execution of a later Judgment. Just as in the period up to *Eastern Greenland* case, the issuing of orders to prevent the aggravation of the dispute did not determine whether the Court has competence to make this the sole basis for such interim measures so the subject case-law does not determine whether there is such a separate discrete basis for interim measures. The United Kingdom contends there is not. There is not one single case - not even *Burkina Faso* v. *Mali* where interim measures to protect an aggravation of the dispute had been issued - save as a companion clause to interim measures to protect State parties rights against irreparable harm. Their purpose is to support that other, central provisions. They serve a general function in that the Court cannot at the time of ordering interim measures foresee the

future circumstances that could prejudice the efficacy of the Court's judgment. The point is convincingly put by Sztucki in his book where he says this:

> "Every action capable of prejudicing the rights at issue will certainly aggravate the dispute, but the opposite is not necessarily true - certain actions likely to aggravate a dispute such as propaganda campaigns, hostile demonstrations, etc., need not necessarily be prejudicial to such rights."

So we say that general prevention of the aggravation of the dispute is not the object of interim measures as conceived in Article 41.

The non-independent basis of interim measures for the prevention of aggravation of the dispute is emphasized by the fact that nearly always this provision is directed to both Parties. Only in the *Electricity Company* case and in the *Nicaragua/US* case was that measure directed to the Respondent State alone. Even in a case such as the *Hostages* case, where the unlawfulness of the acts complained of was so apparent at an early stage as to secure a broad order for interim measures, the part of the Order that refers to the aggravation of the dispute was directed to both Parties. Further, the supporting role that such an Order plays to the central Order to avoid acts that would impair the later judgment, is evidenced by the fact that in the *Anglo-Iranian Oil* case the Court denied the Applicant's request that Iran should "abstain from all propaganda calculated to inflame opinion in Iran" (Pleadings, *Anglo-Iranian Oil Co.* case, p. 52).

Finally on this point, the United Kingdom must firmly reject the notion that actions it has so far taken or that may be under contemplation constitute an aggravation of the dispute. They are rather actions directed at the compliance by Libya with its international obligations. Far from aggravating the dispute they are, in the absence of acknowledgement by Libya of its responsibility in this matter, the best means for concluding this controversy in such a way as to satisfy

the prohibition against international terrorism. We find it breathtaking to assert that, by referring a matter to the Security Council in accordance with the Charter provisions, a State could be aggravating a dispute.

Mr. President, Members of the Court, I turn to my next heading that:

C. *THE RELIEF SOUGHT IS DESIGNED TO FETTER THE SECURITY COUNCIL IN THE EXERCISE OF ITS PROPER POWERS*

The Solicitor General has already drawn attention to the long-standing interest of the Security Council in international terrorism because of its impact on international peace and security, and indeed under Article 37 of the Charter, where the continuation of a dispute is likely to endanger the maintenance of international peace and security, the parties are under a duty to refer it to the Security Council.

Libya apparently now takes the view that if the matter is a legal one then it is to be resolved by the International Court and that the Security Council can have no role to play. This has been refined today by Professor Suy who acknowledges a Chapter VI role for the Security Council on this matter but rejects the possibility of a Chapter VII role.

The United Kingdom believes that Libya is attempting to secure, by the route of interim measures, the de-legitimising of the Security Council's proper interest in this matter. The Security Council is fully entitled to concern itself with issues of terrorism and the measures needed to address acts of terrorism in any particular case or to prevent it in the future. The International Court is not in any general sense an appeal tribunal available to Member States who have not been able to make their views prevail in the Security Council. Mr. President, Members of the Court, the United Kingdom submits that the interim measures do seek improperly to interfere with the Security Council.

Paragraph 7(*b*) of the Application for Interim Measures asks the Court to indicate measures - I repeat it very briefly - "to ensure that no steps are taken which would prejudice in any way the rights of Libya with respect to the legal proceedings that are the subject of Libya's Application".

Although the Security Council is not mentioned in terms, the Applicant's unmistakable intention in seeking these measures is to interfere with the exercise by the Security Council of its Charter functions, and today Professor Suy has let the cat out of the bag. Let me remind the Court what he said, and I quote from the text we have received:

> "L'initiative des Parties défenderesses de situer le différend au niveau du chapitre VII de la charte et de préparer au sein du Conseil de sécurité des actions collectives contre la Libye est de nature à mettre en danger les droits de la Libye sans nier le droit du Conseil de sécurité de s'occuper de cette affaire dans le cadre du chapitre VI. La Libye demande à la Cour d'ordonner aux Parties défenderesses d'abstenir d'entreprendre toute initiative au sein du Conseil de sécurité visant à porter atteinte aux droits de juridiction dont la Libye demande la reconnaissance à la Cour."

The Security Council has already called on the Applicant to respond effectively to the demand of the three Governments and it must therefore be for the Council itself to decide what would constitute an effective response. There is no doctrine of United Nations law that says a matter that starts as a situation under Chapter VI may not eventually be regarded as a threat to international peace under Chapter VII. That is for the Security Council to decide and the whole purpose of Libya's request for interim measures is to avoid that possibility. The Security Council is, of course, given the primary responsibility for the maintenance of international peace and security under Article 24 of the Charter. Although it is a primary and not exclusive responsibility, the key importance of that provision is underlined by the explanation it

contains that this was done "in order to ensure prompt and effective action by the Security Council". Further, the Security Council shall by virtue of Article 33, paragraph 1, call where necessary upon the Parties to settle their disputes, and under Article 36, paragraph 1, the Security Council may where a dispute, the continuation of which is likely to endanger the maintenance of international peace and security, recommend appropriate procedures.

The Security Council is, of course, given the primary responsibility for the maintenance of international peace and security under Article 24 of the Charter. Although it is a primary and not exclusive responsibility, the key importance of that provision is underlined by the explanation it contains that this was done "in order to ensure prompt and effective action by the Security Council". Further, the Security Council shall, by virtue of Article 33(1), call where necessary upon the parties to settle their disputes; and under Article 36(1) the Security Council may, where a disputethe continuation of which is likely to endanger the maintenance of international peace and security, recommend appropriate procedures. This is exactly what the Security Council has done in resolution 731.

The Libyan submissions have sought to sew the idea that by passing resolution 731, there is somehow a violation of the obligation to settle disputes peacefully. But there is no dispute in the Security Council over the Montreal Convention. There is rather an insistence on certain action to combat terrorism and resolution 731 is exactly the vehicle for resolving peacefully that problem.

There is something else I should properly bring to the attention of the Court. Professor Suy claimed this morning that in a draft resolution circulating among members of the Security Council, it was to be determined that Libya's refusal to hand over the two suspects represented

a threat to international peace and security. We have been unable to find any trace of this wording in the draft and, as I have explained, the occasion for further action in the Security Council is Libya's failure to respond promptly and effectively to the set of requirements laid out by the Security Council in its earlier resolution.

Under Chapter VII, the Security Council's powers are more significant still and, where it determines the existence of any threat to the peace, breach of the peace or act of aggression (Article 39), it may decide upon diplomatic or economic measures to give effect to its decisions. And, indeed, Article 42 makes it clear that it is for the Security Council to decide whether economic and diplomatic measures "would be inadequate or have proved to be inadequate" and, if so, it may take the necessary military action. The assessments by the Security Council either of the threat to peace or that economic and diplomatic measures are required to give effect to its decisions, or that these measures are inadequate, these are assessments given alone to the Security Council to make. The jurisdictions of the Security Council and International Court are parallel and not mutually exclusive, but that does *not* mean that each possesses every competence of the other. They do not. And clearly these matters of political appreciation are for the Security Council alone.

As the International Court said in its Advisory Opinion in the *Namibia* case, "the Court does not possess powers of judicial review or appeal in respect of decisions taken by the United Nations' organs concerned".

The United Kingdom submits that it would be completely inappropriate for the Court to indicate interim measures in any form that could be construed as striking at the Security Council in the exercise of its

competences under Chapters VI and VII of the Charter. But the relief sought in paragraph 7(b) of Libya's application seems evidently to be inviting the Court down that road. Only the Security Council can decide what further measures may be necessary to give effect to its decisions.

It is not simply a commonplace to note that the Court is a principal organ of the United Nations. The Dumbarton Oaks proposals show that the most careful attention was given to the character and status of this new Court within the United Nations and the ways in which it should differ from that of the constitutional relationship between the Permanent Court and the League (see especially, *UNCIO*, Vol. 13, p. 381 and Vol 14, pp. 72ff). The Statute forms an integral part of the UN Charter (Article 92). The implications of the mutual relations of these various principal organs were not deeply analysed at San Francisco. But the analysis of Professor Shabtai Rosenne on this issue is poverfully persuasive: at the heart of the relationship, he said, is the reality that "the will of the Organization is made manifest by the actions of those organs within whose sphere of competence a particular matter lies" (*The Law and Practice of the International Court*, 2nd rev. ed. at p. 69). The Charter does not create a hierarchical relationship between the principal organs. Rather "it imposes limitations on their activities ... *ratione materiae*" (*ibid.*, p. 70). It is clear that matters related to the security of nations, in the sense of political assessments as to how best to deal with them, are still within the competence *ratione materiae* of the Security Council. The point is not - and Mr. President, this is an important distinction - the point is not that the International Court may not indicate interim measures relating to legal issues concerned with peace and security when the Security Council is also seized of some facet of the matter. It is clear from the

Hostages and *Aegean Sea* cases that it can. Rather, the point is that the International Court should not, through the exercise of its interim measures jurisdiction, interfere with the Security Council in doing what it is expressly required to do under the Charter.

It will be recalled that, on the 4 December 1979, the Security Council unanimously passed resolution 457 (1979) calling for the immediate release of the American hostages held in Teheran. The Court, in its Order of 15 December 1979, unanimously granted interim measures which included the call that Iran should ensure the immediate release of the prisoners held. The Court had no hesitation about acting upon a matter which was also before the Security Council. The Court acted under Article 41 in a way that closely paralleled the efforts of the Security Council, acting within *its* own competence. And in the *Aegean Sea* case, the Court decided not to grant interim measures exactly because the purposes for which they were requested were already being secured by the Security Council.

Each of the organs must exercise that proper jurisdiction in a way that supports the objectives of the Charter and respects their common status as principal organs. For example, the Security Council should not choose in relation to any particular dispute to pass any resolution which contradicts any binding decision of the Court on that matter. And the Court will not allow its jurisdiction to be used as an appeal court from the political assessments made by the Security Council.

It necessarily follows that the Court should never, when exercising its jurisdiction to indicate interim measures under Article 41 of its Statute, do so if the result would be to interfere with the Security Council in the exercise of its duties and powers under Chapter VI or VII of the Charter or even run the risk of doing so. Above all, the Court should never indicate interim measures designed to protect a State against the decisions of the Security Council.

D. The relief seeks to preclude the Security Council from acting in relation to the wider dispute

It is not the position of the United Kingdom that because there is a separate issue before the Security Council, the International Court may not properly concern itself with the Application instituting proceedings filed by Libya on 3 March 1992. In the *Hostages* case Iran had claimed that the issues before the Court were in reality part of a wider dispute between the countries, and that therefore the Court lacked competence to deal with them. That contention was rightly rejected by the Court and no such comparable contention is being made by the United Kingdom. Rather, we draw to the Court's attention the fact that the Application instituting proceedings filed by Libya makes claims relating to alleged violations of the Montreal Convention. Whether the Court has substantive jurisdiction over the merits under Article 14(1) of that Convention - and indeed, whether Libya asserts real or non-existent rights arising under that instrument - that remains for the Court to determine under its own procedures. The fact that a different issue is before the Security Council is irrelevant to that future determination of jurisdiction by the Court.

But what is relevant, it is respectfully submitted, is the appreciation that interim measures should not be indicated which are intended to and would have an impact upon this separate dispute. There is before the Security Council, as has already been explained, a situation concerning international terrorism, and issues arise as to what Libya is required to do under general international law both in respect of the events surrounding the Lockerbie massacre and the prevention of terrorism in the future. These are not the issues that Libya has chosen to bring to the Court; but the interim measures are an attempt to interfere with the Security Council in relation to these different matters.

And that reality is not avoided by the wording of paragraph 7 (*b*) of the Request for the Indication of Provisional Measures. That clause asks the Court to entail that no steps are taken that would prejudice Libya's rights with respect to the legal proceedings. But 7 (*a*) seeks to enjoin the United Kingdom from taking action calculated to achieve the surrender of the accused individuals to any jurisdiction outside Libya. And a parallel request is made so to enjoin the United States.

The United States, France and the United Kingdom informed the Security Council that they had presented specific demands to Libya for the surrender for trials of the accused; the disclosure of all information; the acceptance of responsibility for acts of State intelligence officers (see S/23308, Ann., p. 2 (D3)). These countries have also demanded that Libya "concretely and definitively ... cease all forms of terrorist action and all assistance to terrorist groups. Libya must promptly, by concrete actions, prove its renunciation of terrorism" (see S/23309, Ann., p. 3 (D4)).

The requests referred to in resolution 731 are a package. Taken together, they are what is needed to provide an effective contribution to the elimination of terrorism - the establishment of guilt or innocence in front of the appropriate courts of Scotland or the United States and, in the case of UTA Flight 772, in front of the appropriate courts of France; the acceptance of responsibility; the making of reparations; the cessation of support for terrorism; and the public and real renunciation of terrorism.

As these elements are an integral whole, any interim measures directed at enjoining either the United Kingdom or the United States in respect of any one of these elements has no object unless they are aimed at interfering with future action by the Security Council. Moreover the Court has no power to enjoin the Council as such, or to enjoin other

members of the Council or other members of the United Nations who are not parties in this case before the Court. This is a further reason we submit why the Court should not act in the manner requested by the Applicant. Moreover, the relief sought by Libya under paragraph 7 (a) of its Request is inconsistent with Libya's own duties under Article 24 of the Charter. That Article provides that: "Member States agree that in carrying out its duties the Security Council acts on their behalf."

Conclusion

May it please the Court: we understand well why Libya has instituted an application for interim measures. It is not because there are rights in dispute between Libya and the United Kingdom which are in urgent danger of being irreparably harmed. We have shown the Court that the rights Libya founds itself on in the Montreal Convention are in fact illusory; that until the application to the Court, they had never constituted the subject-matter of a dispute between the Parties; and that Libya's alleged rights are in any event in no danger of irreparable harm. No, Libya's real reason for seeking an Order for interim measures is entirely different. It is tactical. Libya seeks tactical advantages in relation to other international fora that may follow from an application for interim meausures - regardless of whether the measures are warranted, and regardless of whether they are granted. Interim measures heighten the political impact of judicial proceedings. They attempt to dictate the agenda for the State against whom they are sought, by determining its priorites and by endeavouring to limit its options. And, of course, Libya will hope that its interim measures application will also establish a presumption in favour of the Court's competence, which the Court has yet substantively to decide.

To succeed in its Application for interim measures Libya has to succeed in every one of the following:

(1) it must show prima facie jurisdiction over a dispute;

(2) it must show that its claimed rights are not illusory;

(3) it must show that its proposed interim measures are properly directed towards protecting the rights that are the subject of the dispute;

(4) it must show that the Court's judgment is in danger of being rendered without effect unless the United Kingdom is restrained by interim measures;

(5) it must show that, this irreparable harm to effective judgment is urgent;

(6) it must show that, even if all the tests of prima facie jurisdiction and all the tests of Article 41 are met, it is appropriate for the Court to indicate the measures requested.

If Libya fails in any one of the above, interim measures may not be awarded. The United Kingdom submits that Libya fails on every head and asks the Court to decline to indicate interim measures.

May it please the Court, that concludes the submissions for the United Kingdom.

The ACTING PRESIDENT: Thank you, Professor Rosalyn Higgins. I now understand that the presentation by the United Kingdom in the case by Libya against the United Kingdom is completed. Tomorrow the Court meets at 10 o'clock to hear the presentation of the United States in the case brought by Libya against the United States.

The Court will adjourn until tomorrow morning at 10 o'clock.

The Court rose at 6.10 p.m.