International Court
of Justice
THE HAGUE

CR 92/6

YEAR 1992

Cour internationale
de Justice
LA HAYE

*Public sitting*

*held on Saturday 28 March 1992, at 3.30 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)*

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VERBATIM RECORD

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ANNEE 1992

*Audience publique*

*tenue le samedi 28 mars 1992, à 15 heures 30, 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*

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COMPTE RENDU

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*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

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*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

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*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:*

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*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 :*

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*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 will now hear the rejoinder of the United Kingdom, in the case brought by Libya against the United Kingdom. I now call on Mr. Rodger.

Mr. RODGER: Mr. President, Members of the Court.

In his reply this morning, Professor Brownlie made reference to the account which I gave on Thursday for this Court, of the crime committed at Lockerbie and of the reasons why the Lord Advocate has taken the initial steps to prosecute two Libyan nationals. Professor Brownlie said that mentioning these matters gave the proceedings an air of unreality, since, he said, the Court is concerned with legal issues under the Montreal Convention.

The purpose of the account which I gave was strictly relevant to the issues before the Court. It was aimed to demonstrate why the United Kingdom approaches the matter on the basis that the Lord Advocate, after a full investigation, has charged these two individuals with committing these crimes in pursuance of the aims of the Intelligence Services of Libya. That is central to our approach and it is a failure of the Applicant's counsel really to address this critical point which lends an air of unreality to what they say.

On any view, Mr. President, the fact that the criminal charges allege complicity of the Libyan Intelligence Services in the attack must be relevant to Libya's claim to try them. It is a trite principle of law that no-one can be judge in his own case. Yet that is, in effect, what Libya demands. As I said on Thursday, if accepted, such an approach would spell the end of the system built up in the 10 conventions to fight terrorism.

On the matter of prima facie jurisdiction, which is the only other matter which I wish to mention, I am, for the most part, content to refer to what I said on Thursday. I add only a few points, in deference to Professor Salmon's reply.

First, I emphasize that the Court is concerned with whether prima facie the Court had jurisdiction when the Application was lodged, on 3 March.

Next, I refer again to what was said in the *South-West Africa* 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."

Further, so far as the matter of the existence of a dispute is concerned, I remind the Court that the dispute must have been one relating to the interpretation or application of the Montreal Convention.

While Professor Salmon this morning cited various communications by Libya and the Libyan juge d'instruction, none of these, prior to the 18 January, ever mentioned the Montreal Convention. In particular, the letter of 8 January (Libyan Document 20), referred to by Professor Salmon this morning, did not refer to the Montreal Convention or proceed as if it were written with regard to that Convention. On the contrary, the Court will notice that the terms of the offer, which is number 2 on page 3 of the document (Libyan Document 20, p. 3, para. 2), for resolving any legal conflict, are wholly inconsistent with the provisions of Article 14(1) of the Montreal Convention.

In these circumstances, it does not do for Libya to assert that these communications point to the existence of a relevant dispute, that is to say, a dispute under the Montreal Convention.

As I stressed in my original submission, the scope of Article 14(1) is very limited. When the Court is being asked to found its jurisdiction on such a limited provision, it must therefore look carefully to make sure that a dispute falling within the terms of that limited provision really existed. For this reason, expressions of an opinion in any cases concerning the identification of a dispute, where the basis of jurisdiction claimed is general, applying to all disputes, or at least wider, applying to a large category of disputes, such cases must be used with caution in this case.

Professor Salmon this morning referred to the *South West Africa* case as showing that the Court avoids a formalistic approach to the question of the existence of a dispute. That passage is well-known of course but the Court will bear in mind the background against which the observations were made. In that case the Court held that even a cursory examination of documents showed that an impasse existed when the Applications were submitted in November 1960 and furthermore that it had actually existed for over six years before that date. That is quite different from the situation in this case. Similarly, when in the *Mavrommatis* case the Permanent Court spoke of flexibility in international relations that was said quite specifically in a context where negotiations were said to have "defined all the points at issue between the two Governments". Again for obvious reasons that is quite simply not the position in this case. In the recent obligation to arbitrate advisory opinion the requirements to articulate the dispute were not dispensed with by the Court. On the contrary, the Court clearly placed great weight on the letter of the Secretary-General explaining exactly what were the legal issues which constituted a dispute.

I have cause to observe that in his elegant way, Professor Salmon suggested that all our arguments in relation to Article 14 were based or are based on Lewis Carroll logic. Since we deny that the Convention applies and yet seek to hold Libya to the terms of Article 14(1).

But, Mr. President, Members of the Court, there is nothing illogical in our approach. It is Libya which choses to assert claims under the Montreal Convention. We simply point out that if Libya tries to found them on the Montreal Convention, Libya cannot ignore the terms of Article 14(1) which are an integral part of the Convention. Libya cannot pick and choose. Libya cannot found on the provisions which suit its case and ask the Court to disregard another provision which does not suit

Libya, but which contains preconditions to the very jurisdiction of the Court which Libya seeks to invoke.

As Professor Salmon remarked we all, I am sure, waited with impatience to see what he would see about the six months' time-limit. In the event he made two initial points. He drew attention in the first place to certain cases on exhaustion of domestic remedies. On that matter I simply observe that the Court is not today considering that kind of question and that no general principle applicable in this case can be derived from the decision cited or from Judge Ago's opinion. With a degree of relish Professor Salmon also referred to a submission on the time-limit in the United States Memorial in the Iran *Hostages* case. Doubtless the United States may wish to address this matter in their Rejoinder, I do not know. For my part, I content myself with observing that in that case the Court did not found its jurisdiction on the particular convention which gave rise to that argument. And indeed the Court expressed no view on the argument. Paragraphs 14 and 21 of the Judgment refer.

Professor Salmon also said that a procedural requirement of the kind which we are concerned with here need only be respected if it serves a purpose. But as I explained in my earlier submissions this time-limit laid down in Article 14(1) does indeed serve an important purpose. The purpose of the six months' time-limit is to ensure that a party cannot prevent third-party settlement by delaying tactics against the organization of an arbitration. Besides this six months' provision is not merely a formal ban on the submission of disputes to the Court. On the contrary, it indicates rather that arbitration is the normal method of third-party settlement of disputes under the Convention with the Court's jurisdiction arising only as a matter of last resort.

When Professor Salmon turned to analyze the text of Article 14 his remarks displayed all the skill not of a magician who has practised for only one day but of an experienced and skillful illusionist. For his interpretation of the words "within six months" would make them disappear altogether. He cited both the French version with the word "*dans*" and the English version with the word "within". And ended up by saying that the word must mean "*pendant*". But if all that the provision says is that if, during (*pendant*) a period of six months after the request, the parties cannot agree on arbitration, then either can go to the Court, then what, I ask, is the point or purpose of mentioning the six months at all? In effect, on that reading, the clause would be indistinguishable from a clause saying simply that if at any time after the request for arbitration the parties are unable to agree then resort may be had to the Court. And that is not what the provision says and effect must be given to the six months' limit.

In the end, in my submission, the point on jurisdiction remains a simple one. Prima facie, having regard to the terms of Article 14(1) the Court had no jurisdiction under that Article as at 3 March when the Application was filed. In these circumstances the Court today has no jurisdiction to indicate interim measures.

My friend, Professor Higgins, will now present further arguments for the United Kingdom Rejoinder.

The PRESIDENT: Thank you, Mr. Rodger. I now call upon Professor Higgins.

Professor HIGGINS: May it please the Court.

It was suggested this morning, and this has already been referred to by the Solicitor-General, that there was an air of unreality about the way we put our case. The reality, said Professor Brownlie, is that "Libya is now accused of relying upon the provisions of an international convention and resorting to the Court". Libya is, of course, perfectly entitled to bring a claim invoking a convention. It will be for the Court in the fullness of time to decide if it has jurisdiction under the terms of that Convention to proceed to the merits.

But we are today dealing with interim measures. And we do say that the request for interim measures serves purposes that make them both unnecessary in the circumstances and inappropriate. And we do say that the request for interim measures meets none of the tests enunciated by the Court for the exercise of its powers under Article 41 of the Statute.

Mr. President, on Thursday we made careful submissions about the relationship between the Security Council and the Court which of course I will not repeat now.

Professor Salmon today stated that the United Kingdom is trying to use the Security Council to prevent the Court from exercising its mission, that was the phrase used. But what is its mission? It is to deal with the jurisdictional issues relating to the matter that Libya has brought before it. There is a dispute as Libya sees it that relates to a series of rights under the Montreal Convention. The Court's mission will be to see *first*, if at this moment, by reference to the date of the Application, there is a prima facie jurisdiction to order the interim

measures requested; *second*, see if those measures are required to protect the effective execution of a possible judgment; and *third*, if the measures, if required, are directed to that end. This is the Court's mission. There is no question of using the Security Council to prevent this mission.

Nor is it correct, as Professor Suy puts it, that we say that the Court loses any parallel competence it has with the Security Council when the Security Council comes to Chapter VII. The Security Council is not dealing with the matters that have been brought before the Court. That is why, in our submission, the Court should not be ordering interim measures to affect political decisions on different matters within the Security Council.

The Security Council has not been dealing with the question of whether there are a series of rights under the Montreal Convention including a right to choose by virtue of invoking the principle *aut dedere, aut judicare* to try one's own intelligency agents rather than extradite them. And it is certainly not considering selected sanctions because it has one view on these legal matters and Libya has another.

The diplomatic history is clear. The demands of the United Kingdom, the United States and France (Tab. 13, United Kingdom bundle of documents) and in that Joint Declaration it stated Libya must surrender for trial, all those charged with the crime and accept complete responsibility for the action of Libyan officials, disclose all it knowns of the crime, including the names of all those responsible and allow full access to all witnesses, documents and other material evidence including all the remaining timers and pay appropriate compensation.

Resolution 731, and the current draft Resolution, are not, as Professor Suy implied, about the issue that Libya has referred to this Court. They are about this package of demands. And that this package of

demands was regarded as appropriate by the Security Council as measures to prevent international terrorism, an agenda item of long-standing and continuing concern, is made evident by the resolution.

Resolution 731 "strongly deplores the fact that the Libyan Government has not yet responded effectively to the above request" and it urges Libya immediately to provide a full and effective response to these requests "so as to contribute to the elimination of international terrorism".

The draft Resolution states in paragraph 3 that "Libya's continued failure to respond fully and effectively to the requests in resolution 731 constitute a threat to international peace and security". And the draft also reaffirms that in accordance with Article 2, paragraph 4, of the Charter

> "Every State has the duty to refrain from organizing, instigating, assisting or participating in terrorist acts in another State or acquiescing in organized activities within its territory directed towards the commission of such acts."

Counsel for Libya says resolution 731 is a mere recommendation. But what is it that Libya is asking of the Court? Is Libya asking the Court today that because resolution 271 is a Chapter VI resolution, the continued failure of Libya could never constitute a threat to peace and that the Security Council could never, therefore, order sanctions and should be stopped by the Court through the mechanism of interim measures and that Members should be stopped from proposing this.

Mr. President, Members of the Court, frequently, orders for sanctions under Chapter VII have been the subject of earlier recommendations under Chapter VI. It is natural to proceed from the one to the other if co-operation is not forthcoming.

Counsel for Libya stated that the handing over of the suspects was not an appropriate measure of adjustment under Article 36(1), that the Security Council is asking for a package of actions as a serious response to terrorism. Is Libya asking the Court to declare that inappropriate under Article 36? That cannot be what interim measures should be used for.

Our submission is really a modest one: that a request for interim measures should follow the legal criteria, formulated by the Court for indicating such measures. This is not, as Professor Suy suggested, to consign all of the Court's jurisprudence to the archives. The jurisprudence indeed shows, as we said in our submissions, that the Court is free to deal with the legal aspects of political matters that might be exercising the Security Council. But in this case, the Court is dealing with claims under the Montreal Convention and the Security Council is dealing with its appreciation of whether Libya's failure to respond to the three demands concerning terrorism constitutes a threat to international peace. There is no jurisprudence that authorizes interim measures over matters not before the Court and which concerns political appreciation by the Security Council, as to whether a failure to heed an earlier resolution, whatever the status of that resolution, could in all the circumstances constitute a threat to peace.

No matter how it is wrapped up, the request for interim measures asks the Court to pronounce now that a decision that the Security Council has yet to take would be illegitimate; even though that decision relates to matters before the Security Council and not before the Court; even though the Security Council is competent to decide if there is a threat to peace; and, even though, indeed, it is under a Chapter VII obligation to do so.

Mr. President, Members of the Court, I say a brief word on the question of illusory rights. It is easy to lose sight of the issue that the Court has to deal with, namely, whether interim measures are required to protect the rights as Libya has formulated them under the Montreal Convention.

Counsel for Libya said this morning:

> "Les parties défenderesses réagissent maintenant en disant puisque la Libye ne veut pas livrer les suspects de sa propre volonté, nous allons entamer une procédure devant le Conseil de sécurité afin de forcer la Libye à abandonner une partie de ses droits souverains." (CR 92/5, p. 10).

Even if the Security Council was dealing with a dispute over Libya's sovereign rights, which it is not, this leads us back to the question, what rights? We need to know that not to decide if the Security Council should be stopped but to see if the Court should properly indicate interim measures, that is to say, if it should properly constrain a State when its jurisdiction has yet to be established and when argument on the merits have yet to be deployed.

We listened carefully to the reformulation this morning of the alleged rights under the Montreal Convention. Although Article 7 is an obligation, it was said to be an alternative obligation *aut dedere aut judicare* which, in turn, supposes the existence of an optional right. But what Article 7 says is that, if you do not extradite, you must submit for prosecution. The right of a complicitous State to prosecute its own security agents and to refuse surrender outside of the Montreal provisions is apparently to be deduced from a combination of the *aut dedere, aut judicare* principle in Article 7 and the recognition that the Convention does not require extradition if it against domestic law.

Even leaving aside the various offers that Libya has made to hand the accused over to other jurisdictions, even leaving that aside, we submit that this tortuous reasoning does not get anywhere near the required prima facie test of a right to which interim measures can attach. As to the Article 11 right, it was insisted that it was not an ancilliary right. Counsel for Libya agreed, and we were interested to hear this, that there was under the Montreal Convention no priority as to permissible jurisdictions and no exclusivity. But somehow there was still a sovereign right to try ones own nationals and, therefore, a right to co-operation under Article 11.

But, once it is conceded that within the Montreal provisions there is nothing which tells us which of several possible jurisdictions shall in fact have competence in a particular case over a trial, Article 11 has to be an ancilliary right that comes into effect once that determination has in fact been made. Again the prima facie test of the existence of the right is not made and no interim measures can attach thereto.

As for the other alleged rights mentioned in the Application, they have receded and no serious further argument was advanced concerning them.

Mr. President, Members of the Court, it is not a question of magicians seeking to cause the vanishing of rights, it is, rather, that one has to be more of an alchemist than counsel for Libya has managed to be in transforming the base metal of obligations into the glittering gold of rights.

A word on rights and the need for measures.

It is also important not to lose sight of the fact that, even if we had rights not obligations, in none of them would interim measures be needed to protect them from irreparable harm, in the sense of impossibility of execution of any judgment. Only an alleged sovereign

right, which we heard invoked this morning, to try ones own nationals and not to surrender them to another State having jurisdiction under general international law, only that even comes within the frame for purposes of interim measures. And on that I would merely respectfully remind the Court of what I said on Thursday "interim measures have no relevance for the protection of these rights, even as formulated by Libya (CR 92/3, p. 56).

As for their imprecision, it was explained by counsel for Libya this morning that that reflected the protection needed against the threat of force and it is to this that I now turn.

We heard this morning of the heavy reality of imminent threats of unilateral use of force by the United Kingdom. If Libya really believes such threats have been made, it has only to go to the Security Council which is exactly the usual forum for addressing claims of threats contrary to Article 2(4) of the Charter.

What is wholly singular is instead to come to the International Court of Justice and to ask for interim measures in a case allegedly concerned with the Montreal Convention on the basis of supposed threats. Libya has chosen neither to take these proposed threats to the Security Council nor to bring a case claiming a violation of Article 2, paragraph 4.

Mr. President, Members of the Court, we would emphasize again that the alleged violation of threats contrary to Article 2, paragraph 4, is not the subject-matter of the dispute before the Court, though Libya could have chosen to make it so.

To go through various newspaper clippings now does not make this the subject matter of this case, and in accordance with the clear jurisprudence in which I addressed the Court the other day, it may therefore not be the subject-matter of provisional measures. Quite simply no nexus exists.

Finally, Mr. President, Members of the Court I would like to make a brief comment on the suggestion floated that *proprio motu* the Court could order interim measures, perhaps to both Parties, calling for no action to aggravate the situation, or for restraint from threats or the use of force.

I will, of course, not repeat my submissions concerning the unavailability of aggravation of a dispute as a separate ground unsustained by the companion ground of protection of the efficacy of a judgement save to say that we have not read the dicta of Judge Lachs, in his opinion in the *Aegean Sea* case, as suggesting otherwise, merely as indicating that where the Security Council may usefully work alongside the principle organs in achieveing United Nations purposes, it should have a certain freedom to do so.

The Court, undoubtedly has powers to indicate measures *propio motu*. This could be for measures where none are asked for, or measures different in terms from those requested. We do submit that this power is still a power to be exercised within the constraints on interim measures presented by Article 41. Only if the Court really believes there are prima facie rights; only if the Court really believes they are in urgent danger of irreparable harm; only if the Court is convinced that the measures are solely directed to the preservation to these rights. Only then should the Court contemplate interim measures even *proprio motu*. Otherwise the Court will open the flood gates to Applicants hopeful of political advantage from any general call that the Court might make.

May it please the Court, we do believe that the proposed constraints over the freedom of sovereign States when jurisdiction is not established, when they have not been pronounced to be in breach of an obligation of international law, should not be indicated without meticulous adherence to the Rules, to the Statute, and to the grounds the Court itself has elaborated in its various Judgeents. And we submit that if these legal tasks are addressed and tactical considerations and allegations not the subject of the application put aside it will be seen that there is no prima facie jurisdiction over the merits; no prima facie rights to which the measures can attach; and no requirement, in all the circumstances, to indicate measures.

May it please the Court, this concludes my submissions by way of rejoinder, and I would ask if you could call the Agent of United Kingdom.

The ACTING PRESIDENT: Thank you, Professor Higgins, I now call upon Mr. Berman, the distinguished Agent of the United Kingdom.

Mr. BERMAN: May it please the Court, I am glad, Mr. President, that counsel for the United Kingdom have been able to make the United Kingdom's rejoinder in brief terms, to the arguments raised by the Applicant this morning. That illustrates that the number of real issues in these proceedings is not great, and that the oral hearings have served their proper purpose which is to expose the essential position of the Applicant and to answer it. In concluding the oral argument, on behalf of my Government, it remains only for me to remind the Court what these proceedings are all about: this request for an indication of interim measures of protection.

The case as it has developed presents a number of unusual features. It is not unusual that the case is highly political, that is more often the situation before this Court than not. It is not even unusual that the case overlaps as to part with an issue of which the Security Council is actively seised. That too has happened in the past and the counsel and the Court have found ways to ensure that their respective functions under the United Nations Charter reinforce and complement one another in the interests of international peace and security.

What makes this case unique, is that it is the first time ever, in the history of the Court, or its predecessor, that a Member State has thought to invoke the procedures of the Court, and not, be it noted, its substantive competence, but its special, urgent and provisional powers to indicate measures of an interim character. To invoke these powers, in order to place a spoke in the wheels of the Security Council, and in short, to prevent it from acting. All that was implicit, no doubt, in the timing of the Application, and the request, and in the phrasing in the measures which was sought, and in the whole prematurity of the proceeding in terms of the jurisdictional clause on which it was based.

That these oral proceedings have served to bring the intention clearly into the light of day, as a result of Professor Suy's admissions on Thursday and their repetition this morning.

I respectfully draw the Court's attention to this situation and to the legal and prudential arguments developed on this matter by Professor Higgins, on behalf of the United Kingdom.

Mr. President, the second special feature of the case is something else to which Professor Higgins has referred, namely the allegations of the threat of unlawful use of force that have been bandied about in Court by counsel for the Applicant.

I would make but two short points on this. I do so as Agent for the Government, and I do so only because it is on those allegations that the Applicant now comes to rest a large part of its case for provisional measures.

First, the evidence of any such threat, and its imminence, sufficient to justify provisional measures, is not merely thin, it is non-existent.

Professor Higgins has already dealt with this, but I add that the imputation made against my Government is a serious one, and it is all the more serious, as it is meant to co-exist with the fact that my Government is presently taking action, together with others, in the Security Council under the United Nations Charter.

The Court should not be asked to take cognisance of imputations of this degree of seriousness on the basis of such patently unconvincing material.

Second, Mr. President, counsel for the Applicant came clean this morning. What Professor Brownlie developed this morning was squarely an allegation that the United Kingdom was in breach of the prohibition on the threat or use of force under the United Nations Charter. As I recollect, he referred to Article 2, paragraph 4, of the Charter. He referred to the Friendly Relations Declaration as constituting an authentic interpretation of the principles of the Charter. He referred to the introductory words to Article 2 as importing an obligation on the Organization as well as the members to act in accordance with the principles of the Charter. He referred to customary law to the extent that that might be different from the Charter.

Well, Mr. President, if that is what Libya alleges, what is its connection with the case before the Court or with the compromisory clause in Article 14, paragraph 1, of the Monteal Convention? And if a threat contrary to the Charter is Libya's complaint, then it has a remedy to hand. The remedy is not in proceedings under the Montreal Convention, it is under the United Nations Charter itself - the instrument which is alleged to have been violated, or to be about to be violated - and the remedy is of course to take the complaint to the Security Council under the Charter and that is precisely what Chapters 6 and 7 of the Charter

are all about. It does not do for counsel to come to Court and complain how difficult it can be for a small State to get a meeting of the Security Council, since as the Court is aware, the issue is at this very moment actively engaging the attention of the Security Council and what the Council has under consideration is the entire complex of Libya's involvement in terrorism and its consequences, including the threat to international peace and security.

A third special feature, Mr. President, is that statements were made in the initial phase of argument about the position of France and it was said that Libya had undertaken to meet the French demands which differed from those of the two Respondent Parties. I have in the meanwhile checked the official statements of the French Government, up to as late as the 24 and 26 March, from which it is plain that the French Government does not share this view but is working in unison with the United Kingdom and the United States in New York, in the Security Council, for compliance with its resolution 731.

I draw attention to the fact however, that France is not a party to the proceedings before this Court, with all the consequences which that entails.

Mr. President, with out respectful gratitude to the Court and its Members for their attention, including their courtesy in agreeing to sit at inconvenient times and over the week-end, I have the honour to present the final submission of the United Kingdom in the present phase of the proceedings, which is as follows:

That the Court should decline to indicate interim measures in the case concerning *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya* v. *United Kingdom)*.

Mr. President, that concludes the oral argument on behalf of the United Kingdom.

The ACTING PRESIDENT: Thank you Mr. Berman, the distinguished Agent for the United Kingdom. This concludes the Court hearing for the rejoinder of the United Kingdom. The Court will now rise for a ten minute break and after that the Court will hear the Rejoinder of the United States in the case brought by Libya against the United States.

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

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