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YEAR 1992

Public sitting

held on Friday 27 March 1992, at 10 a.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

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VERBATIM RECORD

ANNEE 1992

Audience publique

tenue le vendredi 27 mars 1992, à 10 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 today will hear the statement by the United States in the case brought by Libya against the United States. I therefore call upon Mr. Williamson, Agent for the United States of America.

Mr. WILLIAMSON: Thank you Mr. President and Members of the Court. I wish to open my presentation by conveying the highest regards of the United States Government to the Court and confirming its recognition of and support for the Court as the principal judicial organ of the United Nations. It is my privilege and honor to appear before you for the first time, and to represent my Government in this case.

The Socialist People's Libyan Arab Jamahiriya (which, if I may, I will hereafter refer to as "Libya" or the "Government of Libya") has come to this Court seeking provisional measures to protect an asserted "right" to prosecute two individuals charged in an attack on Pan-Am 103, a civilian airliner. Libya claims that this right needs urgent protection against United States coercion.

It is clear, however, that unilaterial U.S. action is not what concerns Libya.

On 21 January, the United Nations Security Council considered materials provided by the United States, the United Kingdom and France implicating Libyan agents in not just the bombing of Pan-Am flight 103, but also the bombing of UTA flight 772. Over four hundred and forty-one persons from 32 countries were killed in the two terrorist attacks. The Council also considered Libyan denials of involvement, Libyan offers to prosecute, and Libyan claims that the issue should be handled under the Montreal Convention. The Council responded with the unanimous adoption of Security Council resolution 731.

Resolution 731 makes clear that the issue presented by the bombings of Pan-Am 103 and UTA 772 is part of a broader pattern of support for international terrorism, not an isolated case of criminal activity. The Council called on Libya, "so as to contribute to the elimination of international terrorism", to provide a full and effective response to the requests of the United States, France and the United Kingdom, including the request of the United Kingdom and the United States that Libya hand over the two individuals, and the requests of all three Governments that Libya "commit itself concretely and definitively to cease all forms of terrorist action and all assistance to terrorist groups" and that it "promptly, by concrete actions, prove its renunciation of terrorism".

Before outlining the speeches to be made on behalf of my Government, I feel compelled to respond to the suggestion made yesterday by the Agent for Libya that the United States has approached this issue as a North-South issue or a great power-small country dispute. Resolution 731 was adopted unanimously. The 15 members of the Security Council, reflecting an economic and geographic cross-section of the United Nations' membership, all agreed that the Libyan response to the U.S., U.K. and French requests was deplorable. Let me read to you some of the preambles and operative paragraph 2 of resolution 731, which, as I recall, were not referred to in Libya's presentation. In two preambles, the Council noted that it was:

> "*Deeply concerned* over the results of investigations, which implicate officials of the Libyan Government ... in connection with the legal procedures related to the attacks carried out against Pan American flight 103 and Union de transports aériens flight 772;
>
> and
>
> *Determined* to eliminate international terrorism."

In operative paragraph 2, the Council:

> "*Strongly deplores* the fact that the Libyan Government has not yet responded effectively to the [U.S., U.K. and French] requests to cooperate fully in establishing responsibility for the terrorist acts referred to above against Pan American flight 103 and Union de transports aériens flight 772."

Thus, resolution 731 makes clear that, far from being a bilateral issue between the United States and Libya, or a North-South issue or a big power-small country dispute, the bombing of Pan-Am 103, and terrorism generally, is a matter of international concern.

Yesterday, the Agent for Libya and his counsel also suggested that the dispute is limited to a question of the surrender of two individuals. They suggested that Libya has otherwise met the U.S. demands, and has acceded to the French requests in full. The Security Council will have to decide whether Libya has provided a full and effective response. For our part, Libya has satisfied none of the U.S. requests.

Most Importantly, Libya has failed to take concrete steps to distance itself from terrorism. As for the assertion that Libya has acceded to the French request, I would note to the Court that France has joined the United States and the United Kingdom in seeking a new Security Council resolution imposing sanctions on Libya because of is failure to comply with Resolution 731. Mr. President, the Security Council is seised of the matter. The Secretary-General undertook several efforts to secure compliance with the resolution but on March 3, the day Libya filed its Application with this Court, he reported that Libya was still not in compliance with the resolution. The Council is now considering whether to impose sanctions on Libya for failure to comply with Resolution 731.

Having had its arguments rejected by the Security Council, Libya now brings those same arguments to the World Court. It is the first example in the history of this Court of a State trying to use the Court to undo the work of the Security Council. One of Libya's counsel argued that Libya's Application to the Court and request for provisional measures is "complementary" to Security Council consideration of the matter. This is an astounding use of the word "complementary" in view of the remainder of counsel's presentation. Libya's counsel did affirm that Libya was not seeking to enjoin Security Council consideration under Chapter VI of the U.N. Charter of

the matters it is attempting to bring before the Court. He made it clear, however, that Libya is asking the Court to order the United States and the United Kingdom to abstain from taking any action in the Security Council that would interfere with the asserted rights of Libya. In other words, the U.S. and the U.K. are not to play any rôle in any response by the Security Council under Chapter VII to Libya's rôle in the bombing of Pan Am 103, if such response would interfere with Libya's asserted rights.

This is an extraordinary proposition. It is flatly inconsistent with Article 35 of the Charter, which permits any member of the United Nations to bring any dispute to the attention of the Security Council, and with Article 27, concerning U.S. membership in the Security Council. It clearly is aimed at restricting, not complementing, Security Council consideration of the matter.

Libya's Application for provisional measures invites the Court into conflicts with the Council. First, as will be shown in greater detail later, it asks this Court to proceed on the basis that Libya has the sole right to prosecute the two individuals, when the Council has unanimously deplored the Libyan suggestion that Libyan prosecution constitutes an effective response to the U.S. request. Second, apparently because of imminent Security Council consideration of the

inadequate Libyan response, Libya suggests to this Court that it must take the extraordinary step of indicating provisional measures that would significantly interfere with that consideration.

Mr. President, apart from imminent Security Council action, Libya has advanced only one other possible justification for its request for provisional measures. It attempts to weave together from statements in which U.S. officials did not "rule out any option" that the U.S. threatened the use of force to coerce Libya to surrender the accused individuals. As we will show later, Libya's counsel has misdescribed those statements - the United States has made no such threat. We have acted unilaterally on the basis of our evidence of Libyan involvement in yet another act of terrorism against U.S. nationals. Instead, we have worked through the Security Council on a collective response. Now, anticipating the Council's next steps, Libya seeks to enjoin us from working through the Council.

Mr. President, 196 Americans were killed in the terrorist attacks on Pan Am 103 and UTA 772, blatant and obscene violations of international law. I am sure, therefore, that you can understand the outrage of the United States and, I am certain, of the 32 other States whose nationals were murdered, at the thought of Libya trying to use this Court to shield itself from international condemnation. We are confident that the Court also will not be used in this way.

Mr. President, this morning, after reviewing the facts and context of the situation, the United States will demonstrate that the Libyan request for provisional measures is baseless and should be denied. We will demonstrate four basic propositions, each of which provides an independent basis for denying the Libyan request.

First, we will demonstrate that is it wholly inappropriate for Libya to ask this Court to constrain or otherwise interfere with the Security Council in the exercise of its primary responsibility under the United Nations Charter for the maintenance of international peace and security, or with the United States in bringing issues before the Council. The U.S. response to the bombing of Pan Am 103 has been focused on obtaining an end to Libyan support of terrorism by working through the UN Security Council. As Libya's representatives now acknowledge, Libya seeks to enjoin the United States from seeking further Council action. This portion of our argument will be presented by Assistant Legal Adviser for United Nations Affairs, Bruce Rashkow.

Second, we will demonstrate that Libya has not met the jurisdictional threshold to bring the case before the ICJ. The provisions of the Montreal Convention precondition this Court's jurisdiction on a failure of the parties to agree on arbitration within six months of a State's request for arbitration. Even if one assumes that Libya made adequate request for arbitration through its

January 18 letter [Libyan Document 23] and the statement by its Permanent Representative to the United Nations (with the further assumption that he was authorized to speak for Libya), only six weeks elapsed between the Libyan "request" for arbitration and its application to this Court.

Accordingly, *prima facie*, the Montreal Convention does not provide a possible basis for the Court's jurisdiction. This portion of our argument will be presented by former Deputy Legal Adivser Charles Brower, who incidentally headed the United States delegation to the conference that produced the Montreal Convention.

Third, we will demonstrate that Libya's request does not satisfy the established criteria of this Court for taking the extraordinary step of indicating provisional measures. In so doing, we will show that Libya's claim of threatened U.S. coercion is completely unsubstantiated and does not approach the Court's long standing standards of urgency, or the restriction of provisional measures to the protection of the respective rights of the parties; that Libya's asserted exclusive right to prosecute is illusory, whereas, in contrast, the U.S. rights challenged by Libya's request for interim relief are well-established and clear; and that therefore the Court can only fulfill its function of preserving the rights of the parties by denying Libya's claim for interim measures. Assistant Legal Adviser for Near Eastern and South Asian Affairs, Jonathan Schwartz, will present this portion of our argument.

The last point to be demonstrated, i.e. that the Libyan requests should be denied because the Security Council is actively seized with the issue, will be presented by Deputy Legal Adviser Alan Kreczko. I will conclude the United States argument with a brief statement.

Before turning to these legal arguments, I would aks the Court to allow Mr. Kreczko to present the factual context in which the Libyan application has been filed.

THE ACTING PRESIDENT: Thank you Mr. Williamson, Mr. Kreczko has the floor.

II. FACTUAL BACKGROUND

Thank you Mr. President and Members of the Court,

It is an honour to appear for the first time before this Court. I will discuss the facts of this case in some detail in order to demonstrate why the United States decided that this matter could not be handled as a simple criminal matter under the Montreal Convention, but instead needed to be referred to the Security Council as a matter of international terrorism.

The Bombing of Pan Am 103

As the Solicitor General for Scotland described in detail yesterday, on 21 December 1988, Pan Am Flight 103, and American-registered carrier, exploded over Lockerbie, Scotland. 270 people were killed: 11 residents of the Scottish town of Lockerbie and 259 passengers and crew, including 189 nationals of the United States of America. Also among the murdered passengers were nationals of the United Kingdom, Sweden, France, Italy, Japan, India, Switzerland, Canada, Israel, Argentina, Ireland, Hungary, South Africa, Germany, Spain, Jamaica, the Philipines, Belgium, Trinidad and Bolivia. The victims included students, families, business persons and government officials. The United Nations itself lost a most distinguished official, Mr. Bernt Carlsson, the Commissioner for Namibia.

It was immediately apparent that the explosion was the result of terrorism. The act has ben universally recognized as among the most egregious terrorist atrocities. It constituted a blatant violation of the fundamental human right to life. On 30 December 1988 the President of the Security Council issued a statement on behalf of the Council which expressed outrage and strongly condemned the bombing of Pan Am 103 and called on all States to assist in the prosecution of those responsible for this criminal act. On 10 July 1990 the Heads of State of seven industrialized countries published a declaration noting with deep concern the bombing of Pan Am 103 and UTA Flight 772, and demanding that those governments which provide support to terrorists end such support immediately (Document 1).

Criminal Investigation and Findings

Immediately following the bombing of Pan Am 103, the largest and most thorough criminal investigation was launched. It involved hundreds of investigators and the cooperation of more than 25 States.

After three years of investigation, the United States, with the United Kingdom, had amassed evidence to justify application to their judicial systems for indictments and warrants for the arrest of two Libyan nationals Abdul Basset Ali Al-Megrahi, a senior Libyan intellegence official, and Lamen Khalifa Fhimah, the former manager of the Libyan Arab Airlines office in Malta. The evidence directly links the two Libyan officials to the suitcase containing the bomb and to its insertion into the baggage system leading to Pan Am 103. The evidence also links Al Megrahi to the Swiss company that manufactured the sophisticated electronic timers used in the Pan Am 103 bombing.

On 14 November 1991, a United Stated grand jury found the evidence sufficient to indict the two Libyan officials on multiple charges which include conspiracy and murder. Details of the charges are set out in the annex to Security Council document S/23317.

I would emphasize here that an indictment in the United States is not a finding of guilt, but of sufficient cause to arrest. When the two accused are surrendered to the United States, they will be tried in a system which not only espouses, but also respects, fundamental human rights. The accused will be entitled to counsel and to a jury trial open to the public, will be protected against self-incrimination and will be presumed innocent until proved guilty beyond a reasonable doubt.

The Bombing of UTA Flight 772

While the investigation into the bombing of Pan Am 103 was ongoing, on 19 September 1989, the French aircraft UTA Flight 772 exploded over south eastern Niger. 171 passengers and crew members were killed in the incident, including seven Americans and nationals of Algeria, Cameroon, Canada, Central African Republic, Chad, Congo, France, Greece, Italy, Mali, Morocco, Senegal, Switzerland, the United Kingdom and Zaire.

On 30 October 1991, a French magistrate issued arrest warrants against four named Libyan officials for their role in the bombing of UTA Flight 772, and sought two other senior Libyan officials for questioning.

Libyan Involvement

The United States determined that the Pan Am 1033 bombing was a coordinated effort by Libyan officials at the highest level, and part of a long pattern of Libyan behaviour.

We were convinced of Libyan responsibility based on Al-Megrahi's central and continuing role in Libyan intelligence operations and on his close association with Libyan Government officials who have been implicated in other terrorist acts.

Moreover, at the scene of the plane's wreckage, investigators found fragments of a circuit board conclusively identified as having come from one of only 20 digital timers manufactured by a Swiss firm exclusively for the Libyan Government.

Further, the bombing fit into a pattern of Libyan terrorism. The United States is on public record of its conviction that Libya was involved in such acts of terrorism as the assassination in 1980 of a Libyan dissident in Italy; the 1985 attacks on the Rome and Vienna airports that killed 19 people; the 1986 bombing of the LaBelle discotheque in West Berlin; and a 1988 attack on the Greek cruise ship *The City of Poros*. We would be pleased to provide the Court additional information on these and other examples of Libyan-supported terrorism.

The United States is not alone in its conclusion that Libya was involved in these and other terrorist acts. A number of other States have taken action against Libya because of its support for terrorism. In March 1990, the Government of Ethiopia expelled two Libyan diplomats accused of planting a bomb that exploded in the Hilton Hotel in Addis Ababa. In response to evidence of Libya's involvement in the Labelle Disco bombing, the Foreign Ministers of the 12 European Community (EC) countries, meeting in emergency session in The Hague on 21 April 1986, agreed that each of the 12 countries would reduce the number of Libyan diplomats accredited to it, restrict the number of Libyans in Western Europe, tighten visa requirements for Libyans, and keep Libyans in their countries under close surveillance. In subsequent weeks the European Community Governments cut off military sales to Libya and prevented their skilled nationals from servicing Libyan equipment. They expelled over 100 Libyan diplomats and significantly reduced economic and commercial ties to Libya.

Mr. President, we bring this background to the attention of the Court not to debate it with Libya, but to explain why the United States did not treat the indictment of two individuals simply as a matter of criminal activity. In our view, Libya had already established a clear pattern of publicly denouncing terrorism while simultaneously supporting it.

Requests to Libya

On 21 November 1991, the United States transmitted to Libya, through its protecting power, copies of the grand jury indictment describing in detail the charges and evidence against the two Libyan officials. Along with the indictment, a U.S. cover note was transmitted which stated:

> "As part of an acceptable Libyan response, the Government of the United States demands that the Government of Libya transfer Abdel Basset Ali Al-Megrahi and Lamen Khalifa Fhimah to the United States, in order to stand trial on the charges contained in the indictment." (Document 2.)

On 27 November 1991, the Libyan Foreign Ministry acknowledged receipt of the document and stated it had translated the document and transmitted it to the Libyan Justice Ministry for examination and action (Document 2).

That same day, the American, British and French Governments in separate and joint statements called upon Libya to comply with requests already described to the Court, including the demand that Libya concretely and definitively commit itself to cease all forms of terrorist action and all assistance to terrorist groups (S/23306, S/23307, S/23308 and S/23309). The Government of France's explicit endorsement of the U.S. demands rebuts the inference, which counsel for Libya sought to create yesterday, that France may have thought improper the U.S. and U.K. request that the individuals be surrendered.

The United States goes to the Security Council

In the face of the continuing Libyan denial of responsibility and refusal to turn over the accused, the United States consulted with other countries. On the basis of those consultations, the United States decided to seek collective action in the Security Council to confront the threat to international peace and security represented by the two bombings of civil aircraft and Libya's continued sponsorship of international terrorism.

To repeat, the United States saw the fundamental question posed by the bombing of Pan-Am 103 as how to respond to Libya's support for international terrorism. The United States did not, however, act unilaterally on its determination. Instead it sought a collective response in the Security Council.

Libya's communications to the Security Council

However, even before the United States brought the issue to the Security Council, Libya had been putting its case directly to the Security Council.

Libya advanced to the Council that the issue was a narrow one of establishing individual responsibility for a criminal act. Libya pled its case in several letters sent to the United Nations Secretary-General between 17 November 1991 and 18 January 1992:

Its letter of 17 November 1991 (Annex to S/23226) categorically denied any involvement with the Pan-Am 103 bombing or that the Libyan authorities had any knowledge of its perpetrators.

Its letter of 20 November 1991 (Annex to S/23416) informed the Council that it had appointed a judge to inquire into the accusations, and had requested that the United States and United Kingdom nominate lawyers to monitor the fairness and propriety of the inquiry.

Its letter of 8 January 1992 (Annex to S/23396) stated that the two judges appointed to conduct the inquiry had contacted the competent judicial authorities of the United States, the United Kingdom and France, which refused to respond to the judges' requests for the records of the investigation.

Its letter of 17 January 1992 (Annex to S/23436), transmitted a copy of the resolution adopted by the Council of the Arab League, *inter alia*, urging the Security Council to resolve the conflict by negotiation, mediation and judicial settlement under Article 33 of the United Nations Charter.

Finally, its letter of 18 January 1992 (S/23441) stated that its examining magistrate had instituted judicial procedures to ascertain the presence of the two suspects, had initiated a preliminary inquiry, and had issued an order for the two suspects to be taken into custody on a tentative basis. The note complained that the United States and France had failed to co-operate with its investigations. The note then, for the first time, invoked the Montreal Convention, and referred to arbitration under Article 14(1).

UN Security Council Action

On 21 January, the Security Council considered the matter. At that time, it had before it all the claims that Libya is now making: that Libya should prosecute the individuals; that Libya could not extradite the individuals; that the United States had not co-operated with Libya's investigation; and that the matter should be handled pursuant to the Montreal Convention and referred to arbitration or to the World Court.

The Security Council also had before it the requests of the United States, France and the United Kingdom, and their claim that the bombings should be addressed by the Security Council as part of a larger problem of international terrorism.

The Security Council's answer was clear. The Council unanimously adopted resolution 731. Mr. Williamson read from the preamble and operative paragraph 2.

In addition to "deploring" Libya's response to the United States and United Kingdom and French requests, in resolution 731 the Council "urges the Libyan Government to immediately provide a full and effective response to those requests so as to contribute to the elimination of international terrorism".

Though Libya had placed the Montreal Convention before the Council, resolution 731 makes no reference to it. Instead, resolution 731 endorses the requests of the three Governments. Resolution 731 indicates that the Security Council did not regard the Montreal Convention as determining its decisions in controlling terrorism on the facts of the present case.

The remarks of the State representatives to the Security Council make it clear that they considered the issue to be the problem of

international terrorism. I will quote from three. (All quotations from S/PV 3033.)

The Representative of India stated:

> "I should stress here that the Council is specifically addressing the question of international terrorism . . . p. 94.) My delegation believes, therefore, that determined Security Council action should send out the message that terrorists, and international terrorists even more, will not find safe haven anywhere but will be flushed out and punished for their misdeeds." (P. 95.).

The Representative of Russia stated:

> The threat constituted by acts of terrorism against civil aviation to international security and stablity must consolidate the efforts of the international community to produce the necessary measure of reaction to this transnational challenge. We supported the resolution just adopted by the Security Council in the belief that this is a step in that direction." (P. 89.)

The Representative or Venezuela stated:

> "There can be no doubt that the decision taken unanimously by the Security Council confers legitimacy and representativeness on this resolution, the premise of which is limited strictly to acts of terrorism involving State participation." (P. 99.)

Resolution 731, therefore, marks a categoric rejection of the Libyan position that the bombing of Pan Am 103 and UTA 772 should be handled by Libya as simply a criminal matter and makes clear instead the issue is State supported terrorism. Counsel for Libya refers to the statements of certain States prior to the adoption of resolution 731 that the individuals might be tried in a third State rather than Libya or the United States. Counsel maintains that these statements indicated that resolution 731 does not require surrender to the United States. We have two comments on this. First, the Security Council will decide what constitutes a full and effective response to the United States demands. Second, the remarks of even these States indicates that the right asserted here by Libya - trial in Libya - was not accptable.

Subsequent Developments

Resolution 731 requested the Secretary-GEneral to seek the co-operation of the Libyan Government to provide a full and effective response to the United States, British and French requests and stated that the Council would remain seised of the matter.

In his first report on his efforts (S/23574, dated 11 February 1992), the Secretary-General indicated that the Libyan Representative had indicated a readiness to co-operate fully with the Security Council and had invited the Secretary-General to create a mechanism for the implementation of resolution 731. In his second report (S/23672, dated 3 March), the Secretary-General reported contradictory comments by Libyan officials on the possibility of handing over the Libyan citizens, and concluded:

> "From the foregoing, it will be seen that while resolution 731 (1992) has not yet been complied with, there has been a certain evolution in the position of the Libyan authorities since the Secretary-General's earlier report of 11 February 1992."

The Secretary-General stated that the Counsel may wish to consider this in deciding on its future course of action.

On 24 March, the Libyan Ambassador to the United Nations indicated that the individuals would be surrendered to the Arab League. That commitment, however, was unfulfilled, despite the visit by an Arab League delegation to Tripoli on 25 March.

Faced with Libyan non-compliance, the United States has started consultation with other members of the United Nations Security Council about a second Security Council resolution. On 20 March, the United States Government indicated that it would ask the Security Council to impose limited, mandatory sanctions on Libya, including an air embargo, until Libya complies with the provisions of resolution 731. The Council is currently considering this proposal.

The record of the Security Council's efforts is important in several respects:

- First, it is relevant to Libya's request for arbitration. Within three days of Libya's request for arbitration, the Security Council had adopted a recommendation for the resolution of the dispute. Three weeks later, the Secretary-General reported that Libya was ready to co-operate fully with the Security Council and had invited the Secretary-General to create a mechanism for its implementation. After another three weeks, the Secretary-General was reporting contradictory Libyan positions but stating that the Libyan position was evolving.
- Second, the record demonstrates that the Security Council process is still unfolding and, if Libyan statements could be taken at face value, that the situation might be on its way to resolution.
- Third, and most clearly, the record shows that Libya failed to convince the Security Council that Libyan prosecution of the individuals was appropriate in the facts of this case. Libya now asks this Court to protect that alleged "right".

Moreover, ostensibly to protect these claimed "rights" Libya has asked this Court to enjoin the United States from taking any action, including going to the Security Council, to coerce Libya to surrender the accused individuals and to ensure that no steps are taken that would prejudice the rights of Libya with respect to these legal proceedings.

The Libyan request should be rejected for failure to meet the criteria of Article 41 of the Court's Statute, concerning the indication of provisional measures. The United States would demonstrate today that for four independent reasons the circumstances do not call for the indication of provisional measures.

- First, Security Council decision-making including United States participation in it is not an appropriate object of provisional measures.
- Second, the Montreal Convention does not provide prima facie a possible basis for jurisdicton.
- Third, there is no urgent risk of irreparable damage to rights likely to be adjudicated.
- Fourth, the Security Council remains actively seised of the situation.

The United States will demonstrate today that for four independent reasons, the circumstances do not call for the indication of provisional measures:

First, Security Council decision-making, including U.S. participation in it, is not an appropriate object of provisional measures.

Second, the Montreal Convention does not provide, *prima facie*, a possible basis for jurisdiction.

Third, there is no urgent risk of irreparable damage to rights likely to be adjudicated.

Fourth, the Security Council remains actively seized of the situation.

Mr. President, with the Court's permission, Mr. Rashkow will present our views on the first proposition, that Security Council decision-making is not an appropriate object of provisional measures. Thank you.

The ACTING PRESIDENT: Thank you Mr. Kreczko. The Court would like to give the floor to Mr. Rashkow.

Mr. RASHKOW: Thank you Mr. President. Before I begin, I would like to say what a great privilege and honour it is for me today to represent my Government before this Court.

Mr. President, Members of the Court, may it please the Court.

In its Request for provisional measures Libya asks the Court to enjoin the United States from taking any action against Libya calculated *to coerce or compel Libya* to surrender the accused individuals to any jurisdiction outside of Libya and to ensure that no steps are taken that would prejudice *in any way* the rights of Libya with respect to the legal proceedings that are the subject of Libya's Application. (Request p. 3.)

Until yesterday, my Government was at a loss to understand exactly what Libya meant by these sweeping and vague requests. Quite frankly, we did not believe that Libya *intended to request the Court* to interfere with the exercise by the Security Council of its primary responsibility for the maintenance of international peace and security, including the authority of the Council to impose economic or other sanctions.

Nonetheless, as we learned yesterday morning, that is exactly what Libya is proposing. As counsel for Libya has explained, Libya is asking this Court to order the Respondents to refrain from undertaking *any initiative in the Security Council* that would interfere with the asserted rights of Libya.

Libya's Request is formally framed in terms of the actions of the United States and the United Kingdom. However, let there be no mistake, this request is aimed directly at the Security Council. Indeed, yesterday Libya's counsel severely criticized the Security Council for adopting resolution 731 and contemplating a further resolution imposing sanctions under Chapter VII of the Charter. Counsel for Libya critized the Council in adopting resolution 731 as having paid insufficient attention to procedures for the peaceful settlement of disputes, of ignoring important elements of international law and of improperly attempting to modify what Libya's counsel described as a code of international law for the elimination of terrorism. In any event, an order enjoining a Member of the Security Council from freely participating in the vital work of the Council necessarily conflicts with the responsibilities of that Member and interferes with the work of the Security Council.

Not surprisingly, Libya has offered no support for this extraordinary proposal. As a review of the Charter and the practice of this Court demonstrates, such a proposal is entirely contrary to the system established under the Charter for dealing with threats to international peace and security.

Pursuant to Article 24, the Security Council has primary responsibility for the maintenance of international peace and security.

The special responsibility of the Council in such matters was recognized in the very first case in which this Court was called upon to consider a matter being addressed simultaneously by both bodies. In the *Agean Sea* case, where the Court incorporated the substance of a Security Council resolution on the matter before the Court into its order on interim measures (*Agean Sea Continental Shelf, Interim Protection, Order of 11 September 1976, I.C.J. Reports 1976*, p. 12), Judge Tarazi, in his concurring Opinion asserted that

> "One may content oneself with the affirmation that, by virtue of the Charter, the Security Council bears essential responsibility for the maintenance of peace and security" (*I.C.J. Reports 1976*, p. 33).

Subsequently, in the case *Nicaragua* v. *United States*, while affirming the purely judicial function that the Court may perform in regard to *a matter that is simultaneously* before the Council, the Court emphasized the primary responsibility of the Council (under Article 24) for the maintenance of international peace and security (*Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Jurisdiction and Admissibility, Judgement, I.C.J. Reports 1984*, p. 434).

Under Article 2 of the Charter, Libya, as a Member of the United Nations, has agreed to assist the United Nations in any action it takes in accordance with the Charter (Article 2(5)). Moreover, pursuant to Article 24, Member States expressly agree that in carrying out its duties to maintain peace and security, the Council acts on behalf of its members.

Having agreed, under Article 24, that the Security Council, in carrying out its primary responsibility for maintaining international peace and security, acts on its behalf, Libya cannot be heard to ask this Court to enjoin the Unites States, or other Members of the Council, from fulfilling this fundamental responsibility under the Charter.

Apparently, Libya wishes to suggest that paragraph 3 of Article 36 of the Charter creates an affirmative duty on the Council to refer the present matter to the Court. Article 36 provides that the Security Council may, at any stage of a dispute or situation that is likely to endanger the maintenance of international peace and security, recommend appropriate procedures or methods of adjustment. Counsel for Libya has referred to the third paragraph of Article 36, which provides that the Council should take into consideration that legal disputes should, as a general rule, be referred by the parties to the Court. Of course, this provision *requires no such decision by the Council.* Moreover, as counsel for Libya has observed, the Security Council had before it, when it adopted resolution 731, Libya's argument that this matter should be addressed to the Court and not to the Council. The adoption of resolution 731, by a unanimous vote, represents the considered decision of the Council as to the appropriate measures to take in the circumstances.

Mr. President, the provisional measures requested by Libya would enjoin the United States from bringing any matter relating to jurisdiction over the individuals accused of participating in the bombing of Pan Am 103 to the Council, for action by the Council under Chapter 7 of the Charter. Under Article 35, any member of the United Nations may bring any dispute or any situation of the kind referred to in Article 34 to the attention of the Security Council or the General Assembly.

Libya, by its request for provisional measures, would have this Court deprive the United States of its right under the Charter to take the matter under consideration today to the Council, in direct contravention of Article 35 of the Charter.

Conceivably, Libya is also asking the Court to order the United States to abstain from speaking or even voting in the Council on such a matter, notwithstanding its right and responsibility under the Charter to do so.

Counsel for Libya analyzed the questions of the competence of both the Security Council and the Court simultaneously to address the same matter and the extent to which the conclusion arrived at by one organ can influence the examination of the same matter by the other organ.

Mr. President, I submit that the authorities advanced by counsel for Libya do not support the conclusion that the Court has the power to enjoin members of the Security Council from fulfilling their fundamental responsibility under the Charter in regard to threats to international peace and security.

Much of the analysis presented by counsel for Libya addresses the authority of the Court to exercise its judicial function in regard to a matter simultaneously before the Court and the Council. The United States agrees that the Council's functions are of a political nature and the Court exercises purely judicial functions, the United States also agrees that the Court and the Council may properly exercise their respective functions simultaneously in regard to the same matter. It is difficult to see, however, how the fact that two organs have independent competences can be twisted into an argument that permits one organ to interfere in the work of the other. I would think Security Council would be astounded at the proposition that this Court could enjoin a State from going to the Council or from participating in the work of the Council as a member of the Council.

Counsel for Libya appears to argue that the Court has the power to interfere with the work of the Council in order to promote the peaceful settlement of disputes, pointedly remarking in the course of that discussion that recourse to the Court is not to be considered an unfriendly act. These remarks could be construed to suggest that recourse to the Security Council, as a means for resolving a dispute or situation, is not a friendly act. If that is Libya's view, my government and, we believe, the international community would strongly disagree. Recourse to the Security Council is no more an "unfriendly act" than recourse to this Court.

Mr. President, I ask the Court to remember that in Resolution 731 the Security Council affirmed that acts of international terrorism have a deleterious effect on international relations and jeopardize the security of States. The Council requested the Secretary General to undertake certain actions on its behalf to obtain Libya's compliance with the requests of the United States, United Kingdom and France as described in the Resolution. The Council decided it would remain seized of the situation and is currently considering that situation.

Pursuant to Article 39, the Security Council has responsibility to determine the existence of any threat to peace and to make recommendations to decide what measures to be taken in accordance with Articles 41 and 42 to maintain international peace and security. Article 41 authorizes the Court to decide what measures not involving the use of force are to be employed to give effect to its decisions. Such measures may include complete or partial interruption of economic and of rail, sea, air and other means of communication and the severance of diplomatic relations.

Mr. President, it is clear that neither the Charter nor the practice of the Court provides a basis for interfering with the exercise by the Council of its primary responsibility for maintaining international peace and security. It is equally clear that the Montreal Convention does not, and could not, provide a basis for such action by this Court in this matter.

Mr. President, that concludes my presentation. With your permission, I would like to call on my colleague, Mr. Brower, who will discuss the failure of Libya to establish the jurisdiction of the Court to indicate the request of provisional measures.

The ACTING PRESIDENT: Thank you Mr. Rashkow, next speaker is Mr. Brower.

Mr. BROWER:

IV. LIBYA'S REQUEST DOES NOT MEET THE COURT'S CRITERIA FOR THE INDICATION OF PROVISIONAL MEASURES

Mr. President and Members of the Court:

It is indeed a great honour for me to appear before the Court as counsel and advocate for my country in this proceeding.

I may say also that I could not have imagined this development when 20 years ago last autumn I had the privilege of heading the U.S. delegation at the diplomatic conference in Montreal that fashioned the Convention which brings us here this week.

Under Article 41 of the Statute of the Court, the Court, of course, has "the power to indicate, if it considers that circumstances so require, any provisional measures which ought to be taken to preserve the respective rights of either party".

The Court itself has identified two criteria which must be met before it will indicate provisional measures.

- First, the provisions of the intrument must, *prima facie*, provide a basis for jurisdiction;
- Second, provisional measures must be necessary to preserve rights likely to be adjudicated from urgent, irreparable harm.

The Libyan request, in the sumbission of the United States, fails to meet either of these criteria. I will address the issue of jurisdiction and following that Mr. Schwartz will address the second issue regarding urgency and irreparable harm.

A. THE REQUESTED PROVISIONAL MEASURES SHOULD NOT BE INDICATED BECAUSE LIBYA HAS NOT PRESENTED A PRIMA FACIE CASE THAT THE PROVISIONS OF THE MONTREAL CONVENTION PROVIDE A POSSIBLE BASIS FOR JURISDICTION

Specifically, I intend to elaborate the proposition that the Court "ought not to" indicate provisional measures as requested by the Applicant inasmuch as "the provisions invoked by the Applicant [do not] appear, prima facie, to afford a basis on which the jurisdiction of the Court might be founded" (*Passage through the Great Belt (Finland* v. *Denmark)*, *I.C.J. Reports 1991*, p. 15).

In summary, the position of my Government is that *prima facie* this Court lacks jurisdiction because Article 14(1) of the Montreal Convention, which I may remind the Court, forms the sole basis of jurisdiction upon which the Applicant relies here, on its face provides that the same jurisdiction cannot attach unless and until six months have elapsed following a request for arbitration, without the parties having been able to agree on the organisation of that arbitration, whereas the Application here, of course, was filed but 45 days - one and-a-half months - after Libya had (in the words of its Application (p. 4)) "invited the United States to agree to arbitration in accordance with Article 14(1)". Further, in our view, even were the six-month waiting period subject to being disregarded, as the Applicant contends, in the event that the putative respondent has expressely refused to arbitrate, no allegation is made by the Applicant here that would support such a conclusion in this case.

* * *

Mr. President and Members of the Court, it is established beyond cavil in the decisions of the Court that in order to indicate provisional measures under Article 41 of the Statute, the Court "need not ... finally

satisfy itself that it has jurisdiction on the merits of the case" (*Passage through the Great Belt (Finland* v. *Denmark), Provisional Measures, I.C.J. Reports 1991*, p. 15). Nonetheless, it is equally well established that the Court "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" (*id.*).

These words are taken from the Court's most recent decision on such a matter and are precisely the words commonly used by the Court on this point in its Orders on requests for provisional measures, beginning with the Order in the *Fisheries Jurisdiction* case.

In practice, in all of those cases the Court was called upon to determine whether the instruments relied upon by the applicant to establish the jurisdiction of the Court *prima facie* conferred such jurisdiction on the Court. Thus in the *United States Diplomatic and Consular Staff in Tehran* case, for example, the Court ruled that it was:

> "manifest from the information before the Court and from the terms of ... the two protocols that the provisions of these Articles furnish a basis on which the jurisdiction of the Court might be founded ..." (*I.C.J. Reports 1979*, p. 14).

This practice is also well described in the statement of Judge Sir Hersch Lauterpacht, in his separate opinion in the *Interhandel* case:

> "The Court may properly act under the terms of Article 41 provided that there is in existence an instrument such as a declaration of acceptance of the optional clause, emanating from the Parties to the dispute, which *prima facie* confers jurisdiction upon the Court and *which incorporates no reservation obviously excluding its jurisdiction.*" (*I.C.J. Reports 1957*, p. 119, emphasis added.)

Thus, the plain language of the instruments invoked is taken by the Court at face value and the Court to date has always resisted attempts to go behind them at the provisional measures stage.

In the present proceedings, however, I think it is important to stress that the Court is confronted by precisely the converse circumstance: Article 14 of the Montreal Convention, the sole basis of supposed jurisdiction, *prima facie* precludes jurisdiction under the circumstances of this case, and it is the Applicant who, in order to sustain jurisdiction, invites the Court to go behind that Article. I remind the Court that Article 14(1) provides as follows:

> "Any dispute between two or more Contracting States concerning the interpretation or application of this Convention which cannot be settled through negotiation shall, at the request of one of them, be submitted to arbitration. If within six months from the date of the request for arbitration the Parties are unable to agree on the organization of the arbitration, any one of those Parties may refer the dispute to the International Court of Justice by request in conformity with the Statute of the Court."

Note well the stages through which dispute settlement must be addressed, progressively: settlement through negotiation first; then, if that cannot be effected, the dispute *shall* be submitted to arbitration, which, of course, thus is exclusive; and only if organization of the arbitration is not completed within six months from the date of the request for arbitration is it contemplated that a party *may* refer the dispute to the Court.

Thus the plain language of Article 14(1) unequivocally provides a six-month period in which to organize an arbitration before this Court's jurisdiction may be invoked. The requirement that arbitration be requested, and that six months have passed, is not a mere formality, it is a clear prerequisite to the Court's jurisdiction.

I submit that the logic behind the adoption of such a six-months' provision further supports its strict application. The automatic right, following a six-month waiting period, to come to this Court patently is designed to prevent fustration by dilatory conduct of the basic provision for settlement of disputes. This studied reinforcement of the right to attempt to organize an arbitration inferentially enhances that right's entitlement to respect. Were this Court, however, within the prescribed six-month period, to enter into an examination of the conduct of a party requested to arbitrate, as the Applicant urges, the exclusive character of the prescribed arbitration necessarily would be impaired. A party,

once having requested arbitration, could be tempted too readily to shift to invocation of the jurisdiction of this Court, which, after all, the parties themselves had agreed, in Article 14(1), was to be engaged only as a last resort.

It must be remembered always that the Applicant itself has consented to a treaty which expressly contemplated that disputes "concerning the interpretation or application" thereof might not be formally confronted until a period of six months had passed and a tribunal had been organized. This delay necessarily included the possibility that for the same period of six months no tribunal would be available to entertain a request for indication of provisional measures. This is the agreement of the Montreal Convention. Having chosen its course, the Applicant must now be required, by this Court, to adhere to it.

I would suggest that, against this background, the solicitousness this Court has consistently, and I might add, appropriately, demonstrated to protect the integrity of the arbitral process, once the parties have agreed to it, notably in the *Ambatielos* case, and more recently in the *Maritime Delimitation between Guinea-Bissau and Senegal* arbitral award case, should lead the Court to reject the suggestion of the Applicant that the Court disregard the six-month provision of Article 14(1).

In light of this analysis it should not be surprising that the judges of this Court, whose opinions have expressed a view on this issue, have agreed that a convention with this form of compromissory clause does require that a period of six months elapse before jurisdiction can arise.

Thus, as was noted yesterday afternoon, the late President of this Court, Judge Nagendra Singh, referring to a parallel clause in the 1973 Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, stated in the case between *Nicaragua and the United States* that "a *lapse of six months* from the date of the request for arbitration [is] is a *condition precedent* for referring the dispute to the International Court of Justice" (Separate Opinion of Judge Singh, *I.C.J. Reports 1984*, p. 446 (emphasis added)). In addition, Judge Morozov stated in the *Hostages* case that recourse to the Court is available under the same clause and I quote, again, "only if the other party in the course of six months *has not accepted a request to organize an arbitration*" (Separate Opinion of Judge Morozov, *I.C.J. Reports 1989*, p. 53 (emphasis added)).

In the case before the Court, Libya of course filed its Application on March 3rd which, I have noted, was just 45 days after it had, in its words "invited the United States to agree to arbitration" on January 18 - this clearly fails to meet the six month obligatory prerequisite.

I submit that Libya has implicity acknowledged the *prima facie* bar to jurisidiction posed by the six month requirement of Article 14(1). The Permanent Representative of Libya to the United Nations in New York in his statement to the Security Council session of January 21, 1992 that, as we know, culminated in adoption of

Resolution 731, expressly referred to Article 14 of the Montreal Convention and made the following statement which was recited in part yesterday. I quote:

> "Today, before the Council, my country requests that both those countries [the Respondents here] be invited to enter promptly into negotiations with Libya on proceedings leading to arbitration and an arbitration panel. To ensure the speedy settlement of the dispute, we consider that a short and fixed deadline be set for those proceedings, after which, if no agreement is reached on arbitration, the matter would be brought before the International Court of Justice."

The Permanent Representative continued:

> "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 expires ..." (UN Doc. S\PV.3033 (1992), p. 23.)

Clearly this suggestion of the Libyan Permanent Representative for such a "short and fixed deadline", after which one could go to the Court, must be premised - there is no other possibility - must be premised on the assumption that in the absence thereof Libya could not proceed here prior to the passage of six months following its invitation to arbitrate.

I submit that Libya further acknowledges the *prima facie* ban posed by the six month proviso of Article 14(1) when it asks this Court to determine that it is inapplicable and does so on the basis of a complex, wholly speculative, I should say tendentious, and inaccurate reading of United States statements and actions. In doing

so, of course, the Applicant asks the Court to do what the Court has steadfastly declined to do in the past at the provisional measures stage, and to go behind the instrument itself.

It should be noted that in urging that the six month proviso of Article 14(1) be disregarded by the Court, Libya has restricted itself, however, to one argument and one argument alone. It urges this Court to infer that the United States effectively rejected the Libyan invitation to arbitration and it first does so by citing in its Application the failure of the United States "to respond formally" to Libya's proposal (Application, p. 4) and "the total lack of any positive response" (*ibid.*, pp. 6-7) to that proposal by the United States. The fact that the United States did not formally respond one way or the other within 45 days of Libya's invitation, however, can in no way be construed as a refusal to arbitrate.

This is especially so given the surrounding undisputed facts of Libya's actions which, as the presentation by my colleague Mr. Kreczko has intimated, were sometimes ambiguous, often contradictory and, we submit, patently opportunistic. Libya's unrefined invitation to arbitration came, of course, on January 18. This was fully two months after the Respondents here had called for the surrender of the two Libyan nationals and the Court will by now have well understood that it came precisely on the eve of, and I suggest in anticipation of, the Security Council's adoption January 21 of Resolution 731.

Following adoption of the Resolution, namely on February 11, 1992 - less than a month later - the Secretary-General, acting as requested by that Resolution, reported that Libya had indicated that a mechanism should be created for the implementation of Resolution 731, which itself, of course, related also in part to the two nationals. The Secretary-General reported also that Libya had expressed its readiness to cooperate fully with the Security Council and with the Secretary-General, and that Libya had invited the Secretary-General to call upon the parties to set up the mechanism for the implementation of Resolution 731 (UN Doc. S\23574 (1992)).

Then, following still more diplomatic activity, the Secretary-General reported on March 3 that in the meantime Libyan authorities appeared prepared, among other things, to consider surrendering the two suspects to French authorities or to the authorities of third countries, referring specifically to Malta or any Arab country, once existing constitutional hurdles would be overcome. Attached to the report of the Secretary-General were two letters from the Foreign Minister of Libya regarding that matter. Those letters themselves contained other proposals for addressing the requests contained in Resolution 731 regarding specifically the surrender of the two Libyan suspects, as well as other matters. For example, the letters proposed mechanisms for involving the United Nations in determining whether there is sufficient evidence to turn the suspects over to a third party for trial. In concluding his report of March 3, the Secretary-General stated, and I quote, "it will be seen that while

Resolution 731 has not yet been complied with, there had been a certain evolution in the position of the Libyan authorities since the last report" (UN Doc. S\23672, p. 3). It was that very day, of course, March 3 that the present Application was filed with the Registrar of this Court.

As the Court will readily appreciate, Libya's position in these proceedings thus is that the six month proviso of Article 14(1) of the Montreal Convention could apply only if, and only to the extent that, the United States actively negotiated over an arbitration regime with Libya at the same time both parties were dealing with the Secretary-General in regard to Resolution 731 and including the two Libyan nationals.

It should be remarked that in the midst of all of these events, at no time following the adoption of resolution 731 on 21 January 1992, at no time did Libya, either through a protecting power or through the Secretary-General, ever renew its "invitation" to the United States for arbitration under the Montreal Convention or make any proposals whatsoever to the United States for the organization of a possible arbitration. Under these circumstances it simply cannot, in our submission, be inferred that the United States definitively refused arbitration, or that the parties would be unable to agree on the organization of an arbitration within six months (assuming one had been properly requested), or that the United States had in any manner whatsoever waived its right to the six month period to which it is entitled under Article 14(1) of the Convention and upon which it had conditioned its consent to the Court's jurisdiction in becoming a party to the Montreal Convention.

In an attempt, finally, to portray the United States not as having implicitly rejected arbitration but as having expressly rejected the invitation to arbitration, Libya refers (Application, p. 4) to one thing. That one thing is the statement of the United States made in the Security Council in conjunction with the adoption of resolution 731 on 21 January of this year. This statement of the United States Permanent Representative was stressed yesterday both by Professor Brownlie and by Professor Salmon. Professor Salmon characterized that statement at page 46 of the text and I will now attempt to join the ranks of the linguists who have stood here yesterday, he described this, and the French expression was "*fin de non-recevoir péremptoire*", I might add

this was translated in the English as a "peremptory dismissal". That is the linchpin of the case presented by Libya for disregard of the six-month waiting period required by Article 14(1).

The statement to which Libya refers, however, does not even address Libya's proposal to arbitrate under the Montreal Convention which, as we know, had been advanced but a day or two prior to the adoption of resolution 731. That statement was made upon the adoption of resolution 731 and presented the official views of the United States Government as to the nature and importance of resolution 731 as a whole. When read in context, it is utterly clear that it addresses the role of the Security Council in confronting what the Permanent Representative described as the "extraordinary situation" of a State and its officials being implicated in terrorism, and the effects of such conduct on international peace and security. The statement bears recitation and I therefore quote:

> "The issue at hand is not some difference of opinion or approach that can be mediated or negotiated. It is, as the Security Council has just recognized, conduct threatening to us all, and directly a threat to international peace and security. The mandate of the Security Council requires that the Council squarely face its responsibilities in this case. It must not be distracted by Libyan attempts to convert this issue of international peace and security into one of bilateral differences." (United Nations Document S/PV.3033, p. 79.)

I respectfully submit that the fact that this statement was indeed made in a broad political context was confirmed in the statement made yesterday morning by the last speaker for the Applicant. Mr. Suy made the following statement with the indulgence of those whose native language I am about to employ, I will recite it in the French which is the only official text available to us (at p. 22 of his text):

> *"La résolution 731 (1992) n'a pu obtenir l'unanimité que parce que les membres y voyaient une manifestation d'une action générale de l'ONU contre le terrorisme international d'ailleurs parfaitement louable et en conformité avec la politique de la Libye."*

And it is in that context that the United States Permanent Representative concluded:

> "The resolution makes it clear that neither Libya nor indeed any other State can seek to hide support for international terrorism behind traditional principles of international law and State practice. The Council was faced in this case with clear implications of Government involvement in terrorism as well as the absence of an independent judiciary in the implicated State. Faced with conduct of this nature, the Council had to act to deal with threats to international peace and security stemming from extremely serious terrorist attacks, and did so with firmness, dignity, determination and courage. The Council's action thus sends the clearest signal that the international community will not tolerate such conduct." (*Ibid.*, p. 80.)

*

In conclusion, Mr. President, and Members of the Court, let me summarize as follows:

- Prima facie, Article 14(1) of the Montreal Convention requires that a period of six months elapse following a request for arbitration as a precondition to any jurisdiction of this Court.
- The Application here was filed but 45 days after Libya's "invitation" to the United States to arbitrate, however.
- Therefore, Article 14(1) does not "appear, prima facie, to afford a basis on which the jurisdiction of the Court might be founded".
- Particularly in light of the fact, as the Secretary-General noted, that Libya's position was evolving, and in view of Libya's own suggestions that a mechanism be established for the transfer of the two accused, no allegation made here by the Applicant could

support a finding that any request for arbitration was rejected, or that for any other reason it could be concluded definitively as of 3 March 1992, that the parties would be in the words of the Convention "unable to agree on the organization of the arbitration" within the required six months.

Therefore the Court "ought not to" indicate provisional measures as requested by the Applicant.

I thank you, Mr. President and Members of the Court, for your kind attention and I give the podium now to my colleague, Mr. Schwartz.

The ACTING PRESIDENT: Thank you for your statement, Mr. Brower. The Court will rise for a break of ten minutes. After that I give the floor to Mr. Schwartz.

The Court adjourned from 11.45 a.m.to 12.05 p.m.

The ACTING PRESIDENT: Please be seated. Mr. Schwartz is the next speaker.

Mr. SCHWARTZ: Thank you, Mr. President. It is indeed an honour to appear before the Court today. I hope to be able to reward your courtesy by helping to clarify one question posed by the request, whether the provisional measures sought are in fact urgently required to protect rights likely to be adjudicated by the Court.

This is a question distinct from the Court's *prima facie* jurisdiction. Libya's request must be denied, unless Libya can also demonstrate that provisional measures are necessary to protect rights at imminent risk of irreparable injury. It is our contention that Libya has not discharged this burden.

Intermim measures have been characterized by the Court as an "exceptional" power (*Aegean Sea Continental Shelf*, *I.C.J. Reports 1976*, p. 11; see also *Passage through the Great Belt (Finland* v. *Denmark), Provisional Measures (Separate Opinion of Judge Shahabuddeen), I.C.J. Reports 1991*, p. 29). As Judge Lachs wrote in the *Aegean Sea Continental Shelf* case, the Court "must take a restrictive view of its powers in dealing with a request for interim measures" (*Aegean Sea Continental Shelf (Separate Opinion of Judge Lachs), I.C.J. Reports 1976*, p. 20). Such measures are more exceptional in international than in municipal law; as stated by two distinguished former Members of this Court "they may easily be considered a scarcely tolerable interference in the affairs of a sovereign State". Here I refer to the joint statement of Judges Winiarski and Badawi Pasha in the *Anglo-Iranian Oil Co.* case (*Anglo-Iranian Oil Co., Interim Protection, Order of 5 July 1951 (Dissenting Opinion of Judges Winiarski and Badawi Pasha), I.C.J. Reports 1951*, p. 97).

With this concern in mind, the Court has refrained from indicating interim measures unless there is a demonstrated urgency to the request, and the requested measures are necessary to preserve from irreparable injury rights that are likely to be adjudicated.

1. The interim measures requested are not urgently needed

I will first address the issue of urgency.

The Court has consistently held that a requesting State must actually establish that it faces a serious possibility of irreparable harm or prejudice to its rights, (case concerning *Passage through the Great Belt (Finland* v. *Denmark), I.C.J. Reports 1991*, p. 16; *Frontier Dispute, Provisional Measures, Order of 10 January 1986, I.C.J. Reports 1986*, p. 8, 10; *United States Diplomatic and Consular Staff in Tehran, I.C.J. Reports 1979*, p. 19; *Nuclear Tests (Australia* v. *France), Interim Protection, Order of 22 June 1973, I.C.J. Reports 1973*, p. 139; and *Fisheries Jurisdiction (Federal Republic of Germany* v. *Iceland), Interim Protection, Order of 17 August 1972, I.C.J. Reports 1972*). Central to this analysis is the question of urgency. I recognize that counsel for Libya suggested to the contrary yesterday, but the priority the Court's Rules assign to dealing with provisional measures presupposes that there is a need to act urgently (Rules of Court, Art. 74). So too do the Rules' allowance for a request to be made "at any time" (Rules of Court, Art. 73). In the case *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America)*, the Court's Order expressly held that urgency was a "requirement" for provisional measures (*I.C.J. Reports 1984*, p. 179).

The Court's recent decision in the *Passage through the Great Belt (Finland* v. *Denmark)* is not to the contrary. There the Court perceived that Denmark's contested bridge could not obstruct Finland's claimed right of passage prior to a final judgment, so there was clearly no urgency to the request. There was no suggestion in the Court's opinion that it intended to abandon its consistent jurisprudence that interim measures are appropriate only to deal with actions that are ongoing or expected to take place imminently. I refer in my written transcript to the relevant cases (*Sino-Belgian Treaty* case, the *Anglo-Iranian Oil Co.* case, the *United States Diplomatic and Consular Staff in Tehran* case, the *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America)* case, the *Fisheries Jurisdiction* cases and the *Nuclear Tests* cases. Illustrative is the *Trial of Pakistani Prisoners of War* case, where the Court declined to indicate provisional measures simply because Pakistan requested a delay in the Court's consideration of the matter. The requirement of urgency had not been met by the moving party (*Trial of Pakistani Prisoners of War, Interim Protection, Order of 13 July 1973, I.C.J. Reports 1973*, p. 330).

For Libya to prevail on its request, therefore, it must make a convincing evidentiary showing of urgency, and not rest on mere allegations or speculation that some harm might occur. As previously described, the United States has had some difficulty understanding what imminent actions Libya is seeking to enjoin. In its written request, Libya asserted that "the United States is threatening Libya with impending economic sanctions and other actions, including the possibility of recourse to the use of armed force". This was cited as justification for considering its request as a matter of "extreme urgency" (Request,

p. 3). Yesterday we heard from Libya's representatives about purported United States threats to use force, but nothing about United States sanctions. Instead, counsel referred to United States efforts in the Security Council. We must assume, therefore, that Libya's submission relies on the Council proceedings and the purported threat of force.

With respect to the Security Council proceedings, Libya's allegation is correct. The United States and other countries are currently asking the Council to impose sanctions for Libya'a failure to take concrete steps to end its support for terrorism. However, as described by Mr. Rashkow, action in the Council, including participation by member States, is not a proper subject of preliminary measures. Thus, although there may be urgency regarding United States efforts in the Council, there cannot be any legal harm to be avoided through provisional measures.

That leaves Libya's assertion that the United States has engaged in a "progressively more explicit" campaign of threats to use military force. The sole evidence cited consits of public statements that no options have been ruled in or out. There was also a reference yesterday to the views of journalists and third country officials. With respect, the Libyan charge is baseless. What the record shows is that the United States has been working peacefully in the Security Council on a concerted response to Libyan support for terrorism. Resolution 731 and current efforts on a new resolution evidence this.

Libya cites a 12 February 1992 *Washington Times* report of an interview with Vice-President Quayle as support for its charge. What counsel for Libya omitted in its recitation from this article was the following sentence: "The Vice-President would not specify what steps

would be taken but emphasized he was not saying the United States was contemplating military force." The Court will find this article as item 40 in Libya's document submission.

Libya cites two other newspaper reports for the proposition that foreign governments may have believed United States military action against Libya was possible. I cannot speak for other governments, but it is of relevance that Libya, itself, seems to have taken a contrary view.

On 27 December 1991, Reuters reported that "Qaddafi, referring to the U.S. air attack on Libya ordered in 1986 by President Ronald Reagan and backed by British Prime Minister Margaret Thatcher, said he did not believe their successors - George Bush and John Major - would launch such a strike."

On 9 January 1992, Reuters reported that "A [Libyan] Foreign Ministry spokesman was quoted by the Libyan news agency JANA as saying the country was confident the row with the West over alleged Libyan involvement in terrorism would not reach the level of confrontation." These reports are in the United States submission of documents, numbers 4 and 5.

Libya has not identified any developments since these reports - other than Vice-President Quayle's statement, referred to a moment ago - to explain why it now perceives a threat of force to obtain the two suspects.

Libya has certainly shown nothing to bring this case within the scope of the Court's earlier Orders addressed to ongoing military conflicts (*United States Diplomatic and Consular Staff in Tehran*, *I.C.J. Reports 1979*, p. 7; *Frontier Dispute* case, *I.C.J. Reports 1986*, p. 3; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America)* case, *I.C.J. Reports 1984*, p. 169).

Apparently, therefore, it is not the imminence of United States unilaterial action, military or otherwise, but the steady resolve of the United Nations that has driven Libya to this proceeding.

2. *The interim measures requested would not serve the function of preserving the rights of the parties*

The second portion of my presentation addresses the requirement in the Court's Statute that provisional measures must preserve the *respective* rights of the parties. Apart from the lack of demonstrated urgency, the Libyan request should be denied because it fails to satisfy this fundamental standard. It is useful to recall, in this regard, that Article 41 states that provisional measures are "*to preserve the respective rights of either party*" (emphasis added).

This wording shows a concern that the rights of both Parties are to be considered. This is appropriate, given that the objective of provisional measures, as stated in the *Anglo-Iranian Oil Company* case is "to preserve by such measures the rights which may be subsequently adjudged by the Court to belong *either* to the Applicant or the Respondent" (*Anglo-Iranian Oil Co., Interim Protection, Order of 5 July 1951, I.C.J. Reports 1951*, p. 89; emphasis added). The fact that provisional measures are decided before the Court has confirmed its jurisdiction or adjudicated the merits reinforces the need for care in assessing the effect of any measures on the rights of each Party.

Three considerations are essential in determining whether Libya's proposed measures would satisfy this statutory standard: first, do the measures, in fact, relate to rights claimed in the Application; second, has Libya established the possible existence of the rights it claims under the Montreal Convention, and, third, would the requested measures preserve the rights of the United States?

(a) *The measures do not relate to three of the four basic rights claimed in the Application*

With respect to the first criterion - whether the requested measures relate to the rights claimed in the Application - it is necessary to recall the judgments requested by Libya. First, it requests the Court to determine that Libya has complied with the Montreal Convention and that the United States has not (Application, p. 9, IV (*a*), (*b*)). This clearly cannot be a proper subject for provisional measures. When an application seeks a declaration about a pre-existing legal situation, no actions during the pendency of the proceeding could possibly prejudice such a judgment (see *Polish Agrarian Reform and German Minority, Order of 29 July 1933, P.C.I.J., Series A/B, No. 58*, p. 175; *Arbitral Award*

of 31 July 1989, Provisional Measures, Order of 2 March 1990, I.C.J. Reports 1990, p. 64; *Legal Status of the South-Eastern Territory of Greenland, Orders of 2 and 3 august 1932, P.C.I.J., Series A/B, No.* 48, p. 286-287).

Libya's Application next requests a two-part judgment that the United States is under a legal obligation to cease its alleged breaches of the Montreal Convention and "to cease and desist ... from the use of any and all force or threats against Libya, including the threat of force against Libya, and from all violations of the sovereignty, territorial integrity, and the political independence of Libya" (Application, p. 10). The latter part of this requested judgment, dealing broadly with the use of force and "all violations" of Libya's sovereignty and territorial integrity, cannot be the subject of provisional measures. It is patently outside the scope of the compromissory clause relied upon by Libya. Jurisdiction under Article 14 of the Montreal Convention, if it existed, would relate only to disputes over the interpretation or application of that convention. This would not provide a basis for addressing, let alone enjoining, any and all possible actions that might comprise a threat or use of force or violate the sovereignty of a State. And, as Judge Jiménez de Aréchaga observed in the *Aegean Sea* case:

> "The Court's specific power under Article 41 of the Statute is directed to the preservation of rights 'sub-judice' and does not consist in a police power over the maintenance of international peace ..." (Separate opinion of Judge de Aréchaga, *I.C.J. Reports 1976*, p. 16.)

That leaves Libya's request for the Court to determine that the United States has an obligation *in the future* to cease certain alleged breaches of the Montreal Convention. While this request conceivably could be the subject of provisional measures, it should be denied because the Montreal Convention does not contain the "right" Libya is claiming against the United States.

(b) *Libya has not established the possible existence of the rights it claims against the United States under the Montreal Convention*

The United States appreciates that at this preliminary phase it is impossible for the Court to enter into a detailed consideration of the merits. It should not be sufficient, however, for Libya simply to assert the existence of alleged rights under the Montreal Convention. That would mean the mere citation to treaty provisions, no matter how baseless, would permit an applicant to use the Court as an instrument to frustrate the exercise of rights held by other States. As Judge Shahabuddeen observed in the *Great Belt* case: "It is improbable that the Court is bound by a mere assertion of rights." (Separate opinion of Judge Shahabuddeen, *I.C.J. Reports 1991*, p. 30.) Instead, as he suggested, Libya must show the possible existence of the rights it asserts (*idem.*, p. 36).

When we examine Libya's assertion of rights, we see that neither the text, the purpose, nor the history of the Montreal Convention supports Libya's contention.

With respect to the text, I would draw the Court's attention to the careful exposition provided yesterday by learned counsel for the United Kingdom. Suffice it to say that Article 7 of the Convention, which Libya's counsel told the Court lies at the heart of Libya's Application, nowhere mentions any rights.

Libya has apparently confused its *duty* to extradite or prosecute suspects under this Article with the vested *right* to be the only Party to exercise jurisdiction. In fact, the Convention does not address how to sort out which State should be given priority in exercising jurisdiction in a given case. Under international law, several States may have authority to prosecute – here, the States whose nationals were

killed, the State of registry of the aircraft, the State where the offence occurred, and the State where the suspects are in custody. The purpose of the prosecute or extradite formula is to ensure that one of these States will exercise authority to prosecute, but it does not dictate which. The negotiating history of the Montreal Convention confirms this (I *ICAO*, International Conference on Air Law, Minutes and Documents, pp. 61-62 (1971)). There an effort to create such a priority of jurisdiction failed, as did a similar effort in The Hague Hijacking Convention negotiations (I *ICAO*, International Conference on Air Law, Minutes and Documents, pp. 70-74 (1970)).

According to the Libyan interpretation, the Montreal Convention nevertheless would implicitly vest in a State holding terrorists the sole right to prosecute, even if that State was complicitous in the terrorist act, in violation of Article X of the Convention. This would convert the Convention's obligation to ensure effective prosecution into an absolute right of a complicitous State to block prosecution. The current situation demonstrates the transparent defects in the Libyan position. The Security Council has found in resolution 731 that Libya's proposal to carry out the criminal prosecution of the two suspects is deplorable. It is untenable to propose that the Convention allows no other recourse.

Libya's Application and Request can be construed as going further, to assert a second Montreal Convention right, again wholly implicit, to stop other States from even seeking jurisdiction over the offenders by peaceful means through the Security Council or otherwise. Libya provides no textual basis for this asserted right. Aside from labeling such measures as "illegal" (Request, p. 2, para. 3), Libya fails to identify what it is referring to or what the source of illegality might be. Certainly, nothing in the text or history of the Convention is addressed to any such alleged right.

Interpreting the Convention to have these startling effects would be very troubling and not only to the parties to this Convention. Its provisions are similar to those in a wide array of modern treaties dealing with war crimes, terrorism, human rights and drug trafficking.

Mr. SCHWARTZ: I list a number of them in the written transcript for the Court's reference (Fourth Geneva Convention of 1949, 75 *U.N.T.S.* 287; Hague Hijacking Convention of 1970, 22 *UST* 1641; Internationally Protected Persons Convention of 1973, 1035 *U.N.T.S.* 167; Convention on the Physical Protection of Nuclear Material of 1979, *T.I.A.S.* No. 11080; Hostages Convention of 1979, *T.I.A.S.* No. 11081; Torture Convention of 1984, *S. Treaty Doc.* No. 100-20, 100th Cong., 2nd Sess. (1988); Convention for the Suppression of Unlawful Acts of Violence Against the Safety of Maritime Navigation of 1988, *S. Treaty Doc.* No. 101-1, 101st Cong., 1st Sess. (1989); United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988, *S. Doc.* No. 101-4, 101st Cong., 1st Sess. (1989)). The legal regime these conventions create is one that assures effective prosecution - not one that guarantees complicitous States a claim against all other parties to insist upon exclusive jurisdiction.

To the best of our knowledge, no party to these Conventions have ever claimed the rights Libya asserts. It can be assumed that, were such implicit rights now to be discovered, the Parties would have to reassess their adherence and new obstacles would be posed for those Conventions that have not yet entered into force. The United States would submit, therefore, that Libya's "mere assertion of rights" cannot provide a foundation for the extraordinary remedy of provisional measures.

C. The measures requested would conflict directly with long-standing sovereign rights of the United States, and thereby radically transform the status quo

I mentioned three criteria that should be employed in determining whether proposed measures would preserve the respective rights of the parties. It has been seen that most of the elements of the judgment requested in Libya's Application would not be preserved by provisional measures, and that Libya has not shown a credible possibility that the Montreal Convention confers the rights it wishes to preserve. That leads to the third criterion - whether the proposed measures would preserve the rights of the United States.

As described by Mr. Rashkow, Libya's provisional measures request, clarified during Libya's oral presentation, seeks to block the United States from invoking its right of recourse to the Security Council to consider the question of Libya's continuing support for international terrorism. But bringing to the Council threats to international peace and security is a fundamental right of all parties under the UN Charter. It would seem crystal clear, therefore, that the measures requested would not preserve the rights of the United States. Libya's request could be understood to affect an even broader range of US sovereign rights. Taken literally, the request would apply to any lawful action by the United States where the subjective motivation was to influence Libya's policy on whether to transfer the two suspects for prosecution. On this reading, Libya's request would require the

Court to address virtually any action taken by the United States in its relations with Libya during the pendency of the case. I will not attempt to address this limitless range of hypotheticals, but reserve the right for my Government to respond to any further Libyan submissions with a specific content.

In this connection, my Government would like to associate itself with the remarks by learned counsel for the United Kingdom yesterday concerning the absence of any precedence in this Court for purely general provisional measures. Where the requesting State fails to establish the need for specific relief, it would be highly anomalous to indicate general restrictions on the other party.

Libya's request for provisional measures, in sum, calls upon the Court to give preeminence to a novel, undefined, wholly implicit construction of the Montreal Convention to bar ongoing, well-established sovereign prerogatives of the United States. A keen observer of the Court noted that provisional measures have not been granted in the past to applicants seeking to protect such unprecedented claims against established rights; rather "the respective applicants relied on recognized legal status of more or less long standing; and sought judicial relief against the respective respondents who unilaterally attempted to alter or violate that status to the detriment of the applicants" (J. Sztucki, *Interim Measures in the Hague Court*, (1983)). I refer to Mr. Sztucki's book. The provisional measures Libya has requested, however they are construed,

would not preserve the status quo prevailing between the parties, but would work a radical transformation of their rights during the pendency of the case. In such circumstances, it cannot be said that the indication of provisional measures would, in the words of the Statute, "preserve the respective rights of the parties". For this reason, and because Libya has not demonstrated any urgency to its request, Libya's request should be denied.

I thank the Court for its attention; it has been an honor to appear before you today.

I would now ask the Court to call upon Mr. Kreczko to continue our presentation.

The ACTING PRESIDENT: Thank you Mr. Schwartz. So I give the floor to Mr. Kreczko.

V. As the Security Council is actively seised of the situation, the Court should not indicate provisional measures

Mr. KRECZKO: Thank you Mr. President.

Under Article 41 of the Court's Statute, the Court decides the question of interim measures on the basis of whether "the circumstances so require". In most cases, the exercise of that discretion is based on information relating to the jurisdiction of the Court, the urgency of

the requested measures, and the nature of the rights to be protected. As we have already explained, Libya has failed to meet these established criteria.

In this case, an additional circumstance is present. Here the Security Council, a co-ordinate principal organ of the United Nations, simultaneously is addressing a situation with direct implications for the matter brought before this Court. In such circumstances, the Court ought to examine whether its actions would conflict with the actions that the Council has taken or is considering and, where circumstances permit, should seek to reinforce the actions of the Council.

This Court has clearly decided that it and the Security Council may properly exercise their respective functions with regard to the same international dispute or situation (*Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Jurisdiction and Adminissibility Judgment, I.C.J. Reports 1984*, p. 435; *United States Diplomatic and Consular Staff in Tehran, Judgment, I.C.J. Reports 1980*, pp. 21-22; *Aegean Sea Continental Shelf, Interim Protection, Order of 11 September 1976 I.C.J. Reports 1976*, p. 28 (Separate Opinion of Judge Elias)).

Counsel for Libya apparently argues that this independent authority should be used to interfere with the Security Council. The

Court's practice, however, is to the opposite. In the *Hostages* case, the Court gave prominence to the actions of the Council and entered a judgment reinforcing them (*I.C.J. Reports 1980*, pp. 21-23).

In the *Aegean Sea* case, the Court, in declining to indicate provisional measures, expressly took note of the action of the Security Council in regard to the matter before the Court (*I.C.J. Reports 1976*, p. 12) and it relied upon the obligations of the parties to that dispute as members of the United Nations to respect their obligations under the Charter (*I.C.J. Reports 1976*, pp. 12-13). In addition to the Court's opinion, Judge Jiménez de Aréchaga, Judge Lachs, Judge Elias and Judge Tarazi each affirmed in separate opinions the importance of the Security Council's action.

In reaching the decision to indicate the requested provisional measures, the Court drew attention to the special responsibility of the Security Council for the maintenance of international peace and security:

> "Whereas both Greece and Turkey, as members of the United Nations, have expressly recognized the responsibility of the Security Council for the maintenance of international peace and security; whereas, in the above mentioned resolution, the Security Council has recalled to them their obligations under the Charter with respect to the peaceful settlement of disputes, in the terms set out in paragraph 49 above; whereas, furthermore, as the Court has already stated, these obligations are clearly imperative in regard to the present dispute concerning the continental shelf in

> the Aegean; and Whereas it is not to be presumed that either State will fail to heed the recommendation of the Security Council addressed to them with respect to their present dispute." (*I.C.J. Reports 1976*, p. 13.)

As former President Jiménez de Aréchaga noted in his Separate Opinion, the Court, based upon the action taken by the Council, found that interim measures were not required with respect to military actions by the parties or steps which might extend of aggravate the dispute (Separate Opinion of Judge Jiménez de Aréchaga, *I.C.J. Reports 1976*, p. 16). Other judges confirmed the deference that was given the Council's actions. In his Separate Opinion, Judge Lachs noted the prominence given the Security Council's resolution in the reasoning of the Court's Order (Separate Opinion of Judge Lachs, *I.C.J. Reports 1976*, p. 20). Judge Elias underlined the significance of incorporating the substance of the resolution into the order (Separate Opinion of Judge Elias, *I.C.J. Reports 1976*, p. 30). Judge Tarazi explained the Court's approach eloquently:

> "For it is true and certain that the Court is an independent and judicial organ ... it is no less true that it is an integral part of the United Nations ...
>
> That being so, the present Court, while maintaining its independence, should not fail to take into consideration this basic truth, namely that it is an integral part of the United Nations. The Charter, whose genesis marked a new stage in the course of history, features some essential differences in comparison with the provisions of its predecessor, the Covenant of the League of Nations. Those differences were due to the new situation which states and peoples had to face on account of the consequences of the Second World War and of the developments which preceded or triggered its outbreak.
>
> There is no necessity here to consider these differences in detail. One may contend oneself with the affirmation that, by virtue of the Charter, the Security Council bears an essential responsibility for the maintenance of peace and

> security. The Court, if circumstances so require, ought to *collaborate* in the accomplishment of this fundamental mission." (Separate Opinion of Judge Tarazi, *I.C.J. Reports 1976*, p. 33 (emphasis added).)

In view of the substantial time devoted by counsel for Libya to discussing whether Resolution 731 was a binding Security Council decision, I would note that the Court's support for the work of the Security Council in the *Aegean Sea* case came in the context of a non-binding recommendation by the Council.

Mr. President, these cases reflect that the Court will strive to reinforce the efforts of the Security Council in the exercise of its responsibilities. As Professor Rosenne has written the Court, in its capacity as a principal organ of the United Nations

> "must cooperate in the attainment of the aims of the Organization and strive to give effect to the decisions of the other principal organs, and not achieve results which would render them nugatory" (I.S. Rosenne, *The Law and Practice of the International Court* 70 (1965).)

In the past cases, the State requesting provisional measures has made parallel requests for assistance from the Security Council. As counsel for Libya acknowledged, this is the first case where the Applicant to the Court is simultaneously the object of the Security Council's action. Counsel for Libya summarily dismisses this as a technical, procedural difference, which does not modify the nature of the Court's responsibility under the Charter. However, the difference is much more dramatic. Where the same State goes as Applicant to the Council and the Court, these two organs of the United Nations are being called upon to assist each other in achieving the same objectives. In such a situation, the Court can address the legal aspects of those objectives and the Council can address the political and security aspects without significant risk of conflicting action.

Perhaps in realization that this Court will look, in appropriate circumstances, to support the work of the Security Council, counsel for Libya argues that it is asking the Court to "complement" the work of the Security Council. It is difficult, however, to rationalize the use of the word complement - and the statement that the Council and the Court can act in parallel - with Applicant's request that the Court enjoin the United States from participating in the work of the Council.

In fact, Applicant invites the Court into two conflicts with the Security Council. Most starkly, it would have the Court enjoin a member of the Council from participating fully in its work when the Council is actively considering taking action under Chapter VII of the United Nations Charter.

Second, in passing resolution 731, the Council had before ti the arguments of Libya, repeated today, that Libya should prosecute the individuals, and that any contrary suggestion should be arbitrated under

the Montreal Convention or referred to the International Court of Justice. The Council deplored these positions as a failure of Libya to respond effectively to the requests of the United States, France and the United Kingdom. Whether or not the Council endorsed the United States request for prosecution over other options, such as prosecution in a third State, will be determined by the Council. However, it is clear that the Council was not satisfied with the Libyan suggestion that Libya prosecute the individuals. Yet this is exactly the alleged right that Libya asks this Court to protect.

Libya's counsel suggests that the imposition of sanctions on Libya for the refusal to extradite could modify a whole legal system, based on the principle of prosecute or extradite, and asks by what right the Council can do so. Libya's statement of the issue is erroneous. First, if the Council imposes santions, at least at the request of the United States, it will be because Libya's failure to take concrete actions to distance itself from international terrorism, including by surrendering the two individuals, constitutes a threat to international peace and security. Second, such a decision would confirm, not conflict with, the existing international order. Existing international instruments clearly confirm that support for terrorism is unlawful and that international terrorism can threaten peace and security. It is Applicant who would modify the existing legal order by converting multilateral instruments designed to provide for effective prosecution of terrorists into grants of immunity - including fromm Security Council action - to terrorists who can make it back to their sponsoring State. Nothing in the conventions against terrorism compels such a result.

Pursuant to resolution 731, the Council remains seized of the situation arising from Libya's refusal to take concrete steps to end its support for terrorism. The Court should not lend itself to this attempt by Libya to frustrate the action that the Security Council may take in the exercise of its responsibility to maintain international peace and security. As Elsen observed in his treatment of litispendence between the Court and Council:

> "Even though the situation can involve many interesting justiciable issues, adjudication by the Court, pending proceedings in the Council, could unnecessarily complicate and aggravate the situation. Accordingly, in such a situation instead of promoting the peaceful settlement of disputes the Court could endanger the maintenance of international peace and security, the very backbone of the organization." (T. Elsen, *Litispendence Between the International Court of Justice and the Security Council* 69 (1986).)

For exactly these reasons, the United States urges the Court, in the exercise of its discretion under Article 41, to reinforce the actions of the Council, as it did in the *Aegean Sea Case* and other cases, and to avoid any action that could be construed by Libya or other States as conflicting with the actions that the Security Council has taken in resolution 731, or with the Security Council's authority to take other action under the Charter to implement that resolution.

CONCLUSION

Thank you, Mr. President and with your permission Mr. Williamson will now present our concluding remarks.

The ACTING PRESIDENT: Thank you Mr. Kreczko, so I now call on the Honourable Agent to the United States Mr. Williamson to present the conclusion of the United States.

MR. WILLIAMSON: Thank you again, Mr. President and Members of the Court, that completes my government's formal response to Libya's request for provisional measures. In closing, let me recall the context in which these proceedings have been instituted and the consequences should Libya's request be granted.

The sabotage of Pan Am Flight 103 was perhaps the most horrific example of a terrorist attack against citizens of my country during the last decade. I must say, reading page after page after page of the names of the innocent victims of that barbaric act forces one to share, if only in a small way, in the terrible grief of their families and friends.

Acts such as the destruction of Pan Am Flight 103 have wider reverberations. It affects all of us. In boarding a plane, wishing relatives well on their own travel, watching aircraft flying overhead, one now inevitably thinks of the risk that callous individuals have silently placed deadly explosives on board. Even the most stringent security precautions at airports are insufficient to put us at ease.

We all have the right to safety when we travel - individually, as air carriers and as governments. We also have a right, a human right, to be free of the scourge of State-sponsored terrorism. The world community cannot stand idly by when a State embarks on a policy of supporting such heinous acts, as we believe Libya has done for many years.

It is for that reason that when the investigation into the Pan Am 103 tragedy established its underlying cause, the United States, in concert with the United Kingdom and France, decided to act in a comprehensive way. A number of requests were put to the Libyan Government to afford it the opportunity to renounce its previous policies and demonstrate, in a concrete way, that its support for terrorism had come to an end.

What was Libya's response? It denied responsibility for past terrorism, but declared it would stop supporting terrorism. It asserted it could not comply with the requests, but then said it could. It proposed trials of the accused in this Court and in third countries and in non-existent courts. Finally, when it realized the intention of the three Governments to proceed to the Security Council, it insisted, for the first time, that a dispute had arisen under the Montreal Convention and that the dispute should be referred to arbitration.

The Security Council, in resolution 731, adopted unanimously, found these Liyan responses "deplorable". It expressed its "deep concern" over the results of the investigations into the attacks carried out against Pan Am 103 and UTA 772 implicating Libya and urged Libya "immediately to provide a full and effective response to those requests so as to contribute to the elimination of international terrorism".

What, Mr. President, has Libya done subsequently? It has advised the Secretary-General of the United Nations that it is prepared to implement the resolution. We thought that it had, more recently, advised the Security Council that it had decided to turn the suspects in the Pan Am 103 bombing over to the Arab League, but apparently not. In any event, nothing has happened. In consequence, the Security Council is currently considering mandatory sanctions under Chapter VII to induce Libya to comply with its earlier resolution.

Mr. President, instead of complying, Libya is pursuing this action in this Court. It has asked for the extraordinary relief of provisional measures. What would they be based upon? As we understand it, a completely novel "right" to exclude the possibility of any other State exercising criminal jurisdiction over the suspects, Libya's own intelligence agents. What would the measures be geared to achieve? As

we understand it, effectively to halt the Security Council's deliberations on the pending resolution. Such a proposal is, simply put, preposterous, given the Council's primary responsibility under the Charter for international peace and security.

When one considers that such a preposterous proposal lies at the heart of Libya's request, that Libya's request meets *none* of the criteria *all* of which must be met for the indication of provisional measures that Libya is in effect asking this Court to find a right that even a State sponsor of terrorism could assert and that Libya is asking this Court to act contrary to, rather than in collaboration with, another principal UN organ, we are led to the conclusion that Libya's real objective must be simply to have a proceeding of some kind in this Court to point to as part of a political initiative against the proposed Council's sanctions resolution.

With respect, the Court should not allow itself to be used in this way. Libya's request to the Court for provisional measures is not only inconsistent with the jurisprudence of the Court related to provisional measures, but if granted, it could do damage to the functioning of the UN Charter's system for the maintenance of international peace and security. The Court can be assured that providing Libya the relief it seeks will be portrayed as support for Libya's defiance of Security Council resolutions. On the other hand, denying Libya's request, and reaffirming the importance of compliance with the Council's resolutions, would give welcome support to the broad-based effort to channel threats to peace into the Council.

Mr. President, Members of the Court, on behalf of myself and the other members of the United States delegation, I want to tahnk you for providing us this opportunity to appear before you.

As our formal submission, on behalf of the United States, I ask the Court to deny the pending request for provisional measures.

Thank you.

The ACTING PRESIDENT: Thank you, Mr. Williamson.

Now the initial presentation of the United States is completed.

Upon the request of the Applicant and then the Respondent in each case, the Court needs to have a second round of the oral pleadings in both cases. The Court will meet tomorrow for this purpose. The time to start will be announced in due course as it depends upon negotiations still in progress.

The Court adjourns.

The Court rose at 12.55 p.m.
