

International Court  
of Justice  
THE HAGUE

CR 92/6

YEAR 1992

Cour internationale  
de Justice  
LA HAYE

*Public sitting*

*held on Saturday 28 March 1992, at 3.30 p.m., at the Peace Palace,*

*Vice-President Oda, presiding*

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

*Request for the Indication of Provisional Measures*

*(Libyan Arab Jamahiriya v. United Kingdom)*

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

*Request for the Indication of Provisional Measures*

*(Libyan Arab Jamahiriya v. United States of America)*

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VERBATIM RECORD

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ANNEE 1992

*Audience publique*

*tenue le samedi 28 mars 1992, à 15 heures 30, au Palais de la Paix,*

*sous la présidence de M. Oda, Vice-Président*

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

*Demande en indication de mesures conservatoires*

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

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

*(Jamahiriya arabe libyenne c. Royaume-Uni)*

*Demande en indication de mesures conservatoires*

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COMPTE RENDU

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*Present:*

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

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*Présents:*

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

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

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

*as Agent;*

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

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

*as Counsel;*

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

*as Counsel and advocate;*

Mr. Eric David,

*as Counsel.*

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

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

*as Agent and Counsel;*

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

*as Deputy Agent and Counsel;*

Mr. Charles N. Brower, White & Case,

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

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

*Counsel and Advocates;*

Mr. Robert K. Harris, Département of State,

Mr. Robert A. Kushen, Département of State,

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

Mr. Bryan Murtagh, Département of Justice,

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

*Attorney-Advisers.*

*Le Gouvernement de la Jamahiriya arabe libyenne sera représenté par :*

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

*comme agent;*

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

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

*comme conseils;*

M. Ian Brownlie, Q.C.,

M. Jean Salmon,

M. Eric Suy,

*comme conseils et avocats;*

Mr. Eric David,

*comme conseil.*

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

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

*agent et conseil;*

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

*agent adjoint et conseil;*

M. Charles N. Brower, White & Case,

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

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

*conseils et avocats;*

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

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

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

M. Bryan Murtagh, département de la justice,

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

*avocats-conseillers.*

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

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 will now hear the Rejoinder of the United States in the case brought by Libya against the United States, so I now call on Mr. Williamson, the most senior Agent for the United States.

Mr. WILLIAMSON: Thank you. Mr. President and Members of the Court. Again, may I offer the respects of the United States' Government to the Court and express our appreciation for the dedication and generosity revealed in your devoting this day to this proceeding.

Yesterday, we demonstrated that Libya failed to carry its burden in demonstrating to the Court that the circumstances require the Court to take the extraordinary step of indicating provisional measures.

This morning, we had the Libyan response.

Libya has emphasized and reiterated portions of its initial presentation, but added little substance to it. Emphasis and reiteration, however, cannot substitute for a justification, which Libya has still failed to provide to support its extraordinary request. With the Court's forbearance, I intend to review each of the basic propositions we made yesterday and assess the Libyan response to them. Before doing so, however, I would like to make two general points.

First, to justify provisional measures, Libya must prevail on each of the points at issue. If it fails to meet any of the established criteria, the request should be denied. Moreover, if the established criteria are not demonstrated, no provisional measures should be granted. Were the Court to lower its standards on these criteria, even if only to indicate some general, hortatory measures, the Court would invite applicants routinely to seek provisional measures. This would put at risk the extraordinary nature of interim measures, which are indicated on short notice and without the benefit of thorough pleadings by the parties.

Second, with respect to each of the points at issue, the burden of showing that each criterion is met is on Libya. Repeatedly today, Libya has attempted to shift that burden to the United States. It is Libya that has taken the extraordinary step of asking this Court to convene on an urgent basis to hear its request for provisional measures. Libya, not the United States, carries the burden of justifying that action.

Mr. President, if I may return to our basic propositions.

In the first of our four propositions, we demonstrated that Security Council decision-making is beyond the reach of provisional measures. We pointed out that the United States has a Charter right to bring matters to the attention of the Security Council, and to participate fully in, and vote on, Security Council resolutions under Chapter VII addressing threats to international peace and security.

We made this argument because we understood Professor Suy on Thursday to have requested this Court to order the United States to abstain from any action in the Security Council, which, by virtue of Chapter VII of the Charter, would interfere with Libya's asserted right to try the individuals suspected of bombing Pan Am 103.

This morning, we understood Professor Suy to acknowledge that it would be grotesque to suggest that a Permanent Member cannot speak on an issue before the Council. At the same time, however, he asks this Court to imagine what would be the situation if provisional measures were not indicated and the Security Council used its Chapter VII authority to require Libya, either to surrender the individuals or to face economic sanctions. We are left in some doubt, therefore, about whether in fact Libya now agrees that Security Council decision-making is not an appropriate subject-matter for provisional measures.

Whatever Libya's intention, it has failed to produce any suggestion that action by the Security Council, or members participating in the work of the Security Council, would be an appropriate object of provisional measures. I refer the Court to our statement of yesterday for references to the various provisions of the United Nations Charter concerning the responsibilities and authorities of the Security Council, the right of States to bring matters before it and the right and responsibility of the United States to participate in the work of the Council. Having accepted the Charter framework by becoming a member of the United Nations, Libya cannot now challenge one of the most fundamental aspects of that framework.

Nor can Libya avoid the argument by suggesting that the United States can continue to participate in the work of the Security Council on matters of international peace and security but not, on what Libya asserts is the bilateral issue concerning the surrender of the individuals. Changing the terminology does not change the effect. If the Security Council imposes sanctions on Libya, it will be because the Council believes that Libyan actions constitute a threat to international peace and security.

Mr. President, the legal argument I am now advancing is so fundamental that I would not have imagined it ever being questioned. But since the question has been raised and not satisfactorily withdrawn by Libya, the Court should not miss the opportunity clearly to dispose of it.

To avoid any confusion on so fundamental a point, we respectfully suggest, Mr. President, that when the Court denies the Libyan requests, it make clear that the filing of the Libyan Application in no way affects the authority of the Security Council under Chapter VII to take up any matter in the discharge of its duties under its primary responsibility, assigned to it by Article 24 and performed on behalf of all Members of the United Nations, for the maintenance of international peace and security. Further, it should also make clear that such filing in no way affects the ability of any member of the Security Council, or of any member of the United Nations, for that matter, to participate fully in the work of the Security Council as provided in the Charter.

Let me now turn now to the second of our four propositions. There, we demonstrated that Libya has failed to show that the Montreal Convention provides *prima facie* a possible basis for jurisdiction. This is because the Convention requires as a condition precedent to recourse to the Court that a six-month period lapse in which the parties have been unable to agree on the organization of an arbitration.

In his reply this morning, Professor Salmon referred to the Judgment of the Court in the *Hostages* case in support of Libya's position regarding the six-month provision of Article 14, paragraph 1, of the Montreal Convention. Specifically, he points out that the United States argued, and the Court agreed, that the two-month period provided by the Optional Protocols to the Vienna Conventions could be disregarded. That provision, however, is the contrary of Article 14, paragraph 1. It provides for the resolution of disputes by the Court unless, after a dispute has arisen, the parties affirmatively agree to seek to organize a different means of resolving the dispute, in which event a period of two months is reserved for that process before recourse to this Court is

again available. Thus jurisdiction initially is vested in this Court, subject to being divested, at least for that period of two months, by a subsequent positive agreement of the parties that they will seek another alternative. In the *Hostages* case the United States proved it had not agreed with Iran to seek another forum than this Court and the two-month period thus was found never to have been invoked.

"Articles II and III of the Protocols, it is true, provide that within a period of two months after one party has notified its opinion to the other that a dispute exists, the parties may agree either: (1) 'to resort not to the International Court of Justice but to an arbitral tribunal', or (2) 'to adopt a conciliation procedure before resorting to the International Court of Justice'. The terms of Articles II and III however, when read in conjunction with those of Article I and with the Preamble to the Protocols, make it crystal clear that they are not to be understood as laying down a precondition of the applicability of the precise and categorical provision contained in Article I establishing the compulsory jurisdiction of the Court in respect of disputes arising out of the interpretation or application of the Vienna Convention in question. Articles II and III provide only that, as a substitute for recourse to the Court, the parties may agree upon resort either to arbitration or to conciliation. It follows, first, that Articles II and III have no application unless recourse to arbitration or conciliation has been proposed by one of the parties to the dispute and the other has expressed its readiness to consider the proposal. Secondly, it follows that only then may the provisions in those articles regarding a two months' period come into play, and function as a time-limit upon the conclusion of the agreement as to the organization of the alternative procedure."

Article 14, paragraph 1, of the Montreal Convention, on the other hand, mandates arbitration, subject to divestment in favour of this Court only if within a period of six months the parties have not succeeded in agreeing on the details of that arbitration.

I would note, however, that Professor Salmon's reference to the two-month period envisioned in the Protocols is relevant here in that neither Professor Salmon nor this Court in the *Hostages* case denied that once such period is invoked, it must run its full course before jurisdiction can revert to this Court. Thus the Court in the *Hostages*

case said that the "two months' period ... function[a] as a time-limit upon the conclusion of the agreement as to the organization of the alternative procedure". Similarly, the six months under Article 14, paragraph 1, must elapse before jurisdiction can arise here. Thus Professor Salmon in fact confirms our view.

Although Professor Salmon did not refer to it, I feel it appropriate to make a brief comment on the United States argument in the *Hostages* case that the Court could indicate provisional measures pursuant to the jurisdictional clause in the 1973 Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, despite the fact that a six-month period in the compromissory clause had not elapsed. In oral proceedings, the United States acknowledged the weakness of this argument, despite the existence of factual circumstances much more compelling than those presented in this case. Moreover, the Court did not act on the United States claim to jurisdiction under this provision.

The United States did not reject the Libyan request for arbitration. The simple fact is that the United States has not considered it necessary or appropriate to respond, knowing that the Montreal Convention gave the parties six months to reach agreement on the terms of the arbitration and, more importantly, knowing Libya's apparent engagement with the Secretary-General under resolution 731. United States non-attention to an unclear request for arbitration, in a situation where it was not apparent that the request was maintained and good reason existed to think that it had not been maintained, cannot constitute a "rejection" of the Libyan request, or a waiver of United States rights to the six-month period.

The third of our four propositions was that Libya had failed to meet the criteria for interim measures, because it had not shown that interim measures were urgently needed to protect rights likely to be adjudicated. This single proposition has a number of elements. First, the element of urgency. Second, a demonstration that the measures requested relate to the rights to be adjudicated. Third, a demonstration of the possible existence of the claimed rights (as opposed to a mere assertion that such rights exist). Fourth, a demonstration that the provisional measures would protect the rights of the respective parties. Again, each of these criteria must be met.

Counsel for Libya this morning suggested once again that the Court dispense with urgency as a criterion for provisional measures. It is difficult to understand why the Court's Rules would require the Court to treat provisional measures as a priority matter, and why the Court would make decisions without the benefit of full pleadings, except on a showing of urgency.

Counsel's novel assertion and his peculiar reading of the *Passage through the Green Belt* case is a revealing comment on Libya's inability to demonstrate actual urgency.

The sole evidence Libya has presented is a series of statements by British and American officials refusing to rule any option in or out, the most recent of which, as described to the Court yesterday, included an explicit disclaimer that the use of force was under consideration by the United States. To borrow a phrase from Libya's counsel, there is an "air of unreality" to read into a statement disclaiming consideration of the use of force to be a threat of imminent use of force.

The fact is the United States has not made threats to use force and, contrary to suggestions by Libya's counsel, recourse to the collective security provisions of the UN Charter do not and cannot legally threaten irreparable injury. Significantly, none of the Member States of the United Nations who addressed the Security Council during the debate on resolution 731, including many who could be considered sympathetic to Libya, said anything about a threat of force by the US or the UK. Only Libya raised this spectre. Clearly Libya has not made out any case for urgency, and for that reason its request must be denied.

Even had Libya demonstrated urgency, Libya would need to show that interim measures would serve the function of preserving the rights of the Parties.

We made several points yesterday under this element.

First, only one of the items in Libya's requested judgment is even hypothetically a possible subject for provisional measures. Two of Libya's requested judgments relate to past actions - that Libya has complied with the Montreal Convention and that the United States has breached it. Interim measures are not needed to protect past rights.

Another of Libya's requested judgments - that the United States refrain from all violations of Libyan sovereignty - is patently outside the jurisdiction of this Court, which is founded here exclusively on the Montreal Convention. Libya did not respond to these points.

This means that the only judgment Libya seeks that is even hypothetically suitable for provisional measures is the request that the United States be enjoined from future breaches of the Convention.

However, to sustain its request for provisional measures, Libya must demonstrate at least the possible existence of the right it seeks to protect. In this case, it asserts a right to exclusive prosecution, relying principally on Article 7 of the Montreal Convention. From today's speech, we have learned three new aspects of the Libyan position:

1. Libya concedes that the text of Article 7 does not by its terms establish any such right.
2. Libya concedes that the Convention as a whole does not establish any such priority of jurisdiction.
3. Libya now rests its case not upon the text or structure of the Convention as a whole, but upon a novel principle of interpretation. This principle seems to run as follows: where a treaty creates an obligation for one party it can discharge in one of two ways, other parties are implicitly forbidden from trying to influence how that decision is made; or, from pressing for action consistent with the treaty obligation on the basis of other sources of legal duty, including obligations deriving from the Charter of the United Nations.

It would seem that in invoking this idea, Libya is trying to stand the case on its head. This is *not* a case brought by the United States against Libya for breach of the Montreal Convention for a decision not to extradite. This is a case brought by Libya against the United States for

seeking the transfer of the two suspects. The fact that Libya could discharge an Article 7 duty by prosecuting rather than extraditing has nothing whatsoever to do with whether the United States may seek to obtain jurisdiction instead. As counsel for Libya has conceded, the Convention *simply does not address* this question of allocation of jurisdiction. We conclude, therefore, that Libya has not made the required showing of rights under the Montreal Convention for which it seeks protection.

Libya's counsel also referred today to Article 11 of the Convention, which, in certain circumstances, calls for parties to provide each other assistance in conjunction with criminal proceedings, subject to the law of the requested State. The United States understands that one of the breaches of the Convention Libya alleges is that the United States has not complied with this article. That is a question for the merits. Today we are here to discuss Libya's request for provisional measures. In its request, as we understand it, Libya has not asked the Court to order the United States to provide Libya any such assistance. Even if Libya had done so, there could not possibly be the imminent risk of irreparable harm necessary to justify provisional measures. Suffice it to say, the United States has no intention of destroying the evidence of the crime in its possession.

In light of the more general comments by counsel for Libya today, I would like to make one final point concerning the relationship between the Montreal Convention and the US and UK efforts to acquire jurisdiction over the two suspects. The United States was a leader in the creation of this Convention and its successors. We favour its vigorous application as one of the tools for combatting international terrorism. What we fail to understand is Libya's contention that it should be regarded as the

sole available tool, particularly in cases of State-supported terrorism. Here, the Security Council found Libya's proposal to prosecute its own intelligence agents "deplorable". It would be entirely consistent with the Montreal Convention, and general international law, for Libya to answer the request of the world community by transferring the suspects for trial elsewhere.

Counsel for Libya says that with the exception of the surrender of the individuals, Libya has complied with resolution 731. For our part, we have seen no compliance. In any event, it will be for the Security Council, in the discharge of its function of maintaining international peace and security, to determine whether Libya's actions warrant collective action.

Beyond urgency and the possible existence of the right for which protection is sought, Libya must also show that the interim measures are necessary to protect the "respective rights of either party". In this case, the request for provisional measures is extraordinarily vague. At a minimum it could enjoin the right of the United States to participate fully in the work of the Security Council; literally, it would apply to an even broader range of sovereign United States rights. When such fundamental United States rights are implicated, it would be inconsistent with the preservation of "the respective rights of either party" to grant the requested provisional measures.

Our fourth proposition yesterday was the Court, in exercising its discretion, should strive to support the work of the Security Council. Counsel for Libya did not challenge this proposition, and the ample support for it. Nor did Counsel for Libya deny our argument that Libya intends to draw the Court into conflict with the Council by seeking to enjoin the participation of two members in its work, and by asking the Court to endorse a Libyan right to prosecute individuals where the Council has deplored the suggestion that Libya should prosecute them.

In fact, Libya's reply this morning suggests additional conflicts with the Security Council. Mr. Suy this morning suggested that the Council was acting improperly under Article 36 in adopting resolution 731. Later, Professor Suy suggested that it would be improper

for the Security Council to use its authority under Chapter VII of the Charter to remove Libya's asserted right to try the individuals.

I have two responses. First, the Security Council can, acting under Article 36 of the Charter, recommend that Libya not exercise a treaty right, even if it exists. Second, it is equally clear that the Security Council can, under Chapter VII, order Libya to surrender the individuals. Under Article 25 of the Charter, Members States agree to accept and carry out the decisions of the Security Council. Under Article 103 of the Charter, this obligation overrides any inconsistent treaty. As to Libya's internal law, which Libya has sometimes suggested would preclude the surrender of the individuals, it can not provide a justification under international law for failure to comply with a Security Council decision taken to deal with a threat to international peace and security.

Mr. Suy suggested that we are trying to deny the independence of the Court and the Council. We are not. We are suggesting, however, that they coordinate organs of the same institution, and that, where possible, they should not tug and pull at each other, but should instead collaborate. Professor Suy never responded to this proposition.

Counsel for Libya noted that during the adoption of resolution 731, several States expressed uneasiness over the prospect of requiring a State to surrender its own national for prosecution elsewhere. Some of these States, as Professor Suy pointed out, expressly referred to the Montreal Convention. The fact, however, is that the resolution adopted does not refer to the Montreal Convention. And, the Council did not take up Libya's suggestion to refer the matter to this Court, although the United Nations Charter expressly holds out the possibility of the Security Council seeking the views of the Court (Art. 96) or asking the parties to a dispute to do so (Art. 36). More fundamentally, the Council

will have the opportunity to consider again these arguments when it considers whether to sanction Libya for failure to take concrete steps to distance itself from terrorism. We suspect that Libya's effort to convince this Court to seek to enjoin the United States from bringing this issue up in the Security Council springs from its inability to convince the Council that it has ended its support for terrorism.

Counsel for Libya raises the specter of numerous countries being forced to surrender their nationals if the Security Council is permitted to act. Counsel invites the Court to intervene, through the extraordinary step of an indication of provisional measures, in order to ensure the Council does not violate Libya's notion of the principle of "prosecute or extradite".

Libya's concerns are fanciful. While the Council has the authority to make decisions binding on Members, it is not and does not purport to be a legislative body. A resolution under Chapter VII of the Charter addressed a particular dispute or situation. In this case, the Council acted because of concerns about State complicity. This was explicit, for example, in the statement by the representative from Venezuela. Libya denies complicity. But this is exactly the type of denial that the Security Council is constituted to address.

Libya also denies complicity in the 1986 bombing of the La Belle Disco in Berlin. And it has boldly asserted to this Court that subsequent events have confirmed its innocence. The United States would only note that all the evidence that has been uncovered since our original investigations into the bombing of the La Belle Disco is precisely to the contrary. The Lockerbie investigation disclosed that times identical to the one used in the Pan Am 103 bomb were transferred to the Libyan People's Bureau in East Berlin prior to the bombing of the

La Belle Disco, the same Libyan mission that was instructed from Tripoli to conduct a terrorist attack against Americans, the same mission that advised Tripoli on the eve of the bombing that the attack would be carried out the following morning, and the same mission that reported back to Tripoli afterwards on the great success of their mission. Several Libyan officials remain suspects in the German Government's continuing investigation.

It is for the Security Council to determine whether a State's actions threaten the international peace and security. There is no threat that resolution 731 stands for a new international practice that State's cannot try their own nationals. It stands for the limited proposition that when at least nine members of the Security Council are concerned that a situation of terrorism implicates the State holding the terrorist, the Council may determine that prosecution of the terrorists by the complicitous may not serve international peace and security. It is revealing that Libya considers this precedent threatening.

Mr. President, if I may, let me summarize our four propositions, as follows:

If this Court indicates provisional measures:

- It will have found that, prima facie, it has jurisdiction over a dispute in the face of the clear wording of Article 14, paragraph 1, of the Montreal Convention, that a party does not have the right to take a dispute to this Court until six months have elapsed in which the parties have been unable to agree on the organization of the arbitration. Such a finding would include the conclusion that Libya has overcome the prima facie case that there is no jurisdiction and established a prima facie case that a dispute exists under the Montreal Convention and that the United States has acted in such a way that this Court can infer a positive rejection of the Libyan request for arbitration, notwithstanding the fact that only six weeks had passed between Libya's first serious mention of arbitration and its filing of its Application before this Court, and notwithstanding the evolving position of Libya in its conversations with the Secretary-General.
- It will have found that Libya has a reasonable possibility of proving that the Montreal Convention establishes an exclusive right to prosecute, notwithstanding that Libya has not shown any textual or historical basis for the right it asserts under the Montreal Convention, and it will have found that Libya has a possibility of proving, either that such right is available to a State that has participated in a terrorist act, or that Libya was not involved in the bombing of Pan Am 103.
- It will have found that circumstances require the indication of provisional measures because Libya has demonstrated that (a) such measures are urgently needed, notwithstanding the lack of any proof of a threat of a use of force, beyond an assertion that official failure

expressly to rule out the option of using force constitutes a threat, and (b) that Libya has demonstrated that the provisional measures will serve the function of preserving the rights of both parties, notwithstanding that they do not apply to three of the four judgments Libya seeks and that such measures would conflict with the sovereign rights of the United States, and notwithstanding that the provisional measures would be inconsistent with the United States rights and obligations under the United Nations Charter, as a Member of the Security Council.

- Finally, the Court will have found that it is appropriate for the Court to indicate provisional measures, notwithstanding the fact that its action will be contrary, rather than in collaboration with, the Security Council's attempt to accomplish its mission of maintaining international peace and security.

Mr. President, Members of the Court, one of the most troublesome aspects of the prospect of an indication of provisional measures in this case, is the precedent it will set. It will represent a lowering of the threshold heretofore established by the Court's practice for indicating provisional measures. As I mentioned earlier, that will have the effect of encouraging litigants to include requests for provisional measures more frequently, because it will be easier to get before the Court. While that, in and of itself, is the wrong trend for an extraordinary procedure, in this context it has a much worse effect, because it will encourage the seeking of provisional measures that will put the Court in conflict with the Security Council. This lowering of standards will encourage States that are unsuccessful in the Security Council to fight their political battles in this Court.

Mr. President, I would like to conclude by turning to a statement that Professor Salmon made at the beginning of his reply. I would start by thanking him for his statement of grief for the victims of the Pan Am 103 bombing and by saying that we share the grief for the murder of his son's friend.

Professor Salmon said that it is important that the perpetrators be brought to justice "in full respect for international law".

We agree.

The United States has taken the following actions to bring the perpetrators to justice.

- we conducted a thorough investigation, over three years, before seeking indictments. It is clearly consistent with international law for a State to investigate the murder of its citizens;
- when Libyan nationals were implicated, we asked Libya to surrender them. Counsel for Libya now accepts that there is no priority of jurisdiction concerning terrorists who attack civil aircraft. There was nothing improper in seeking Libya's co-operation in our prosecution of the individuals;
- when Libya declined, the United States took the matter to the Security Council, a clear right under the United Nations Charter;
- we argued to the Security Council that the issue was Libyan supported terrorism and the Council responded by asking Libya to take concrete steps to distance itself from terrorism, including by providing a full and effective response to the United States requests;
- now, we are arguing to the Council that Libya's failure to distance itself from terrorism constitutes a threat to international peace and security, to which the Council should respond.

Far from pursuing justice for the perpetrators in violation of international law, the United States has acted at every step in conformity with the framework of the United Nations Charter. It remains unclear to us what in the process is illegal, or how the Montreal Convention could conceivably preclude any of the steps we have taken. Perhaps Libya will be able to develop an argument if its case goes to the merits, but it clearly has not demonstrated that actions are underway which warrant the indication of provisional measures.

Instead, Libya seems to be suggesting that international law requires that we accept that only a complicitous State can try the perpetrators of this act of terrorism. Applicant responds that Libya is not complicitous but, at the same time, seeks to prevent the Security Council from considering this issue.

Mr. President, I appreciate the attention that the Court has shown, and I reiterate our request that it reject the Libyan Application for provisional measures and indicate no such measures.

To Judge Ajibola, I also send my congratulations and best wishes in his new role.

I hope that having the session today is not an indication of things to come!

To the Registrar and the Registry our profound thanks for all of your help and support.

Finally, on behalf of the Government of the United States I respectfully present the following Submission to the Court:

*"May it please the Court,*

On behalf of the United States of America, to reject the request of the Government of the Great Socialist People's Libyan Arab Jamahiriya for the indication of provisional measures of protection, and not to indicate any such measures."

Mr. President and Members of the Court, I thank you for your attention.

The ACTING PRESIDENT: Thank you, Mr. Williamson, the distinguished Agent of the United States, for your presentation of the Rejoinder and the Submissions.

We have now come to the end of the hearings devoted to the request for the indication of provisional measures which the Libyan Arab Jamahiriya has presented in each of the two cases instituted against the United Kingdom and the United States of America, respectively.

Two Members of the Court wish to put questions to the Parties. So I now call on Judge Schwebel.

Judge SCHWEBEL: Thank you Mr. President. These questions are directed to both Parties in both cases.

1. The Preamble to the Montreal Convention provides that its "purpose" is that "of deterring" unlawful acts against the safety of civil aviation by "any person". In the cases before the Court, the persons accused of having committed such an act are claimed to be persons who are - to quote the United Kingdom terminology - "officers of the Libyan Intelligence Services" who conspired "to further the purposes of the Libyan intelligence services by criminal means ...". Does the Convention cover such an accusation, i.e., of acts of persons in official service carrying out official purposes? Would the trial by a State of persons alleged to be its own officials, and who are acknowledged by that State's counsel to be its own officials, who are alleged to have furthered its own purposes, be the prosecution by a Contracting State which is contemplated by the Montreal Convention?

2. Article 12 of the Montreal Convention provides that: "Any Contracting State having reason to believe that one of the offences mentioned in Article 1 will be committed shall, in accordance with its national law, furnish any relevant information in its possession to those States which it believes would be States mentioned in Article 5, paragraph 1". That is to say, if a Contracting State has reason to believe that an offence such as blowing up an aircraft will occur in the territory of another State, or against an aircraft registered in that other State, it will so inform that other State. Does or does not this provision suggest that the purpose of the Montreal Convention is to cover offences alleged to have been, or to be, carried out by persons in the service of the Contracting State, and who are acknowledged by that State's counsel to be in State service, who allegedly are acting in pursuance of the purposes of that State?

3. Under Article 10 of the Montreal Convention, the Contracting States shall, in accordance with international and national law, endeavour "to take all practicable measures for the purposes of preventing the offences" covered by the Convention. Does or does not this provision suggest that the purpose of the Montreal Convention is to cover offences alleged to have been carried out by persons in the service of the Contracting State, and who are acknowledged by that State's counsel to be in State service, who allegedly were acting in pursuance of the purposes of that State? Thank you, Mr. President.

The ACTING PRESIDENT: Thank you, Judge Schwebel.  
Judge *ad hoc* El-Kosheri wishes to put a question to the Applicant.

Judge *ad hoc* EL-KOSHERI: Thank you, Mr. President.

My question is put to the Libyan Arab Jamahiriya. The submissions related to the provisional measures requested by the Libyan Arab Jamahiriya contemplate only that the Respondents should take or refrain from taking certain actions. Bearing in mind that Article 41 of the Statute refers to the preservation of "the respective rights of either Party", does the Libyan Arab Jamahiriya envisage that the Court could indicate measures to be undertaken, not only by the two Respondent States, but equally by the Libyan authorities?

That is my question.

The ACTING PRESIDENT: Thank you, Judge *ad hoc* Al-Kosheri.

The Agents of the Parties are requested to reply in writing to the questions put to their Governments in accordance with Article 61, paragraph 4, of the Rules of Court, and the time-limit for such replies is fixed with that provision, at 6 p.m. on Thursday 2 April 1992.

That completes the present hearings, held pursuant to Article 74, paragraph 3, of the Rules of Court, on the request by the Libyan Arab Jamahiriya for the indication of provisional measures in the case concerning *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United Kingdom)* and the case concerning *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United States of America)*.

Before closing the proceedings however I wish to extend my thanks to the Agents of all three Parties for the co-operative way in which they have helped the Court to deal with both cases as a matter of practical convenience in one and the same series of hearings. I should however recall here what I stated at the outset, namely, that this procedure will decide, without prejudice to any other action that the Court may or may not take under Article 47 of the Rules.

I request the Agents of the Parties to remain at the disposal of the Court for any further information or assistance it may require. Subject to that reservation, I declare the present hearings closed.

*The Court rose at 5.40 p.m.*

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