

DECLARATION OF JUDGE NI

The Court is confronted with an extraordinary situation which, however, is not entirely unprecedented. It occurs from the fact that a case is before both the Security Council and the Court.

On 21 January 1992, the United Nations Security Council had adopted a resolution, urging the Libyan Government to provide full account and effective response to the requests of the Council in connection with the destruction of Pan Am flight 103 at Lockerbie, Scotland, on 21 December 1988 and requesting the Secretary-General to seek co-operation of the Libyan Government to provide full and effective response to the requests.

On 3 March 1992, Libya filed two separate Applications against the United Kingdom and the United States of America, requesting this Court to adjudge and declare, *inter alia*, that both the above-mentioned States had breached their legal obligations to Libya under the Articles of the Montreal Convention. On the same day, Libya made two separate requests to indicate provisional measures to enjoin the United Kingdom and the United States of America from taking certain actions.

On 31 March, the Security Council adopted resolution 748 (1992), imposing sanctions, if Libya does not comply before 15 April.

Question arises whether the Security Council and the Court can now exercise their respective functions at the same time in respect of the dispute between Libya on the one side and the United Kingdom and the United States on the other. It can be urged on behalf of the Security Council that under Article 24 of the United Nations Charter, Members of the United Nations confer on the Security Council primary responsibility for the maintenance of international peace and security, in order to ensure prompt and effective action by the United Nations. But on the other hand, it can also be argued that it is provided in Article 92 of the United Nations Charter that the International Court of Justice shall be the principal judicial organ of the United Nations which is given the power, under Article 36 of the Court's Statute, to settle "all legal disputes concerning: (a) the interpretation of a treaty; (b) any question of international law; ...".

In this respect, we are not without guidance from the jurisprudence of the Court. As recently as the 1980s, we have the case of the *United States Diplomatic and Consular Staff in Tehran* and the case of *Military and Paramilitary Activities in and against Nicaragua*. In the former case which was

decided in 1980, resolutions were previously passed by the Security Council and even a fact-finding commission was established by the Secretary-General with the agreement of the two parties. These did not prevent the Court from exercising its judicial functions. The Judgment indicated that in adopting resolution 461 (1979),

“it does not seem to have occurred to any member of the Council that there was or could be anything irregular in the simultaneous exercise of their respective functions by the Court and the Security Council. Nor is there in this any cause for surprise.” (*I.C.J. Reports 1980*, p. 21, para. 40).

In comparing the relations between the Security Council and the General Assembly, and the relations between the Security Council and the Court, the Court had this to say in that Judgment:

“Whereas Article 12 of the Charter expressly forbids the General Assembly to make any recommendation with regard to a dispute or situation while the Security Council is exercising its functions in respect of that dispute or situation, no such restriction is placed on the functioning of the Court by any provision of either the Charter or the Statute of the Court. The reasons are clear. It is for the Court, the principal judicial organ of the United Nations, to resolve any legal questions that may be in issue between parties to a dispute; and the resolution of such legal questions by the Court may be an important, and sometimes decisive, factor in promoting the peaceful settlement of the dispute. This is indeed recognized by Article 36 of the Charter, paragraph 3 of which specifically provides that:

‘In making recommendations under this Article the Security Council should also take into consideration that legal disputes should as a general rule be referred by the parties to the International Court of Justice in accordance with the provisions of the Statute of the Court.’” (*Ibid.*, p. 22, para. 40.)

The Court’s decision in the Nicaragua case is consistent with the reasoning in the *United States Diplomatic and Consular Staff in Tehran* case. The Judgment says:

“Until the Security Council makes a determination under Article 39, a dispute remains to be dealt with by the methods of peaceful settlement provided under Article 33, including judicial settlement; and *even after* a determination under Article 39, there is no necessary inconsistency between Security Council action and adjudication by the Court.” (*I.C.J. Reports 1984*, p. 432, para. 90; emphasis added.)

In the same vein, the Court indicated that “the fact that a matter is before the Security Council should not prevent it being dealt with by the Court and that both proceedings could be pursued *pari passu*” (*I.C.J. Reports 1984*, p. 433, para. 93). The Court went on to say that:

“It is necessary to emphasize that Article 24 of the Charter of the United Nations provides that

‘In order to ensure prompt and effective action by the United Nations, its Members confer on the Security Council *primary* responsibility for the maintenance of international peace and security . . .’

The Charter accordingly does not confer *exclusive* responsibility upon the Security Council for the purpose . . . The Council has functions of a political nature assigned to it, whereas the Court exercises purely judicial functions. Both organs can therefore perform their separate but complementary functions with respect to the same events.” (*Ibid.*, pp. 434-435, para. 95.)

Here the mention of *complementary* functions should not be overlooked. Although both organs deal with the same matter, there are differing points of emphasis. In the instant case, the Security Council, as a political organ, is more concerned with the elimination of international terrorism and the maintenance of international peace and security, while the International Court of Justice, as the principal judicial organ of the United Nations, is more concerned with legal procedures such as questions of extradition and proceedings in connection with prosecution of offenders and assessment of compensation, etc. But these functions may be correlated with each other. What would be required between the two is co-ordination and co-operation, not competition or mutual exclusion.

Having said this, I am now to state my views with respect to the Applicant’s request for provisional measures. I consider that, above all, there is the question of whether Libya can seek legal remedy now under the 1971 Montreal Convention on which Libya primarily relies for its institution of legal proceedings in this Court. The 1971 Montreal Convention provides in its Article 14 (1) that:

“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.”

In determining whether the Court should or should not grant relief now to the Applicant, the Court should first decide on this temporal question of the six-month period for organizing arbitration. The period thus provided cannot be ignored at the pleasure of either Party. There has been no refusal to arbitrate on the part of the Respondents. No negotiation has yet been conducted for this purpose between the Parties. It is clear that, since the Applicant's letter of 18 January 1992 requesting agreement to arbitrate, the six-month period has not yet run out. It is premature for the Applicant to seek a legal remedy now from this Court. This is the threshold question which must first be solved before any other question can be decided upon.

I agree with the majority that the request for provisional measures should be denied. But I consider that it should be denied on the sole ground of non-fulfilment of the temporal requirement provided in Article 14 (1) of the 1971 Montreal Convention without having to decide at the same time on the other issues, such as the existence of rights claimed by the Applicant, irreparable damage, urgency, etc. Consequently, in my view the Applicant will not be prevented from seeking a remedy of this Court in accordance with the provisions of the 1971 Montreal Convention, if the dispute months later still subsists and if the Applicant so desires.

(Signed) Ni Zhengyu.
