

JOINT DECLARATION OF JUDGES EVENSEN, TARASSOV,
GUILLAUME AND AGUILAR MAWDSLEY

[Translation]

We agree fully with the decision of the Court, but wish to make some additional comments on it.

1. Before the Security Council became involved in the case the legal situation was, in our view, clear. The United Kingdom and the United States were entitled to request Libya to extradite the two Libyan nationals charged by the American and British authorities with having contributed to the destruction of the aeroplane lost in the Lockerbie incident. For this purpose they could take any action consistent with international law. For its part, Libya was entitled to refuse such an extradition and to recall in that connection that, in common with the law of many other countries, its domestic law prohibits the extradition of nationals.

2. In so far as general international law is concerned, extradition is a sovereign decision of the requested State, which is never under an obligation to carry it out. Moreover, in general international law there is no obligation to prosecute in default of extradition. Although since the days of Covarruvias and Grotius such a formula has been advocated by some legal scholars, it has never been part of positive law. This being so, every State is at liberty to request extradition and every State is free to refuse it. Should it refuse, a State is not obliged to prosecute.

3. Ten international conventions adopted under the aegis of the United Nations or the specialized agencies since 1970 have nevertheless modified the legal situation between the parties to those conventions.

The Montreal Convention of 23 September 1971 for the Suppression of Unlawful Acts Against the Safety of Civil Aviation is one of the conventions mentioned. Libya, the United Kingdom and the United States are parties to it.

The Convention provides, in Article 7, that

“The Contracting State in the territory of which the alleged offender is found shall, if it does not extradite him, be obliged, without exception whatsoever and whether or not the offence was committed in its territory, to submit the case to its competent authorities for the purpose of prosecution.”

In Article 5 the Convention deals with jurisdictional questions for the purpose of facilitating prosecution. In Article 8 the Convention makes extradition easier, but without creating any obligation in that regard.

Thus, the Montreal Convention, which in our opinion was applicable in

this case, did not prohibit Libya from refusing to extradite the accused to the United Kingdom or the United States. It implied merely that, in the absence of extradition, Libya had to submit the case to its competent authorities for the purpose of prosecution.

4. This situation was not, in the present case, considered satisfactory by the Security Council, which was acting, with a view to combating international terrorism, within the framework of Chapter VII of the United Nations Charter. By resolution 731 (1992) of 21 January 1992 (para. 3), the Council urged "the Libyan Government immediately to provide a full and effective response" to the requests for the surrender of the accused made by the United Kingdom and the United States. Subsequently, by resolution 748 (1992) of 31 March 1992, it decided "that the Libyan Government must now comply without any further delay with paragraph 3 of resolution 731 (1992) regarding the requests" in question.

This being so, the Court, pronouncing on a request for the indication of provisional measures submitted by Libya in order to preserve the legal situation existing prior to the adoption of the Security Council resolutions, was fully justified in noting the changes that had occurred in that situation and holding, accordingly, that the circumstances of the case were not such as to require the exercise of its power to indicate such measures.

(Signed) Jens EVENSEN.

(Signed) Nikolai TARASSOV.

(Signed) Gilbert GUILLAUME.

(Signed) Andrés AGUILAR MAWDSLEY.