

DISSENTING OPINION OF JUDGE EL-KOSHERI

1. To any human being, what happened over Lockerbie was a horrible event which requires that those responsible for it be punished and justice duly rendered in conformity with the applicable legal rules. With that end in view, the facts should be clearly established in their true chronological sequence in order to demonstrate the nature and scope of the case pending before the International Court of Justice, as well as to provide a clear distinction between the legal reality and the political aspects which are entrusted under the United Nations Charter to another principal organ of the international organization: the Security Council.

2. According to the documents filed in the present case, the first relevant factual element occurred on 14 November 1991, when a Grand Jury of the United States District Court for the District of Columbia handed down an indictment charging two Libyan nationals with causing a destructive device to be placed on board Pan Am flight 103, which device exploded and led to the crash at Lockerbie, Scotland. On the same day, the Lord Advocate of Scotland announced the issue of warrants for the arrest of the same two Libyan individuals, charging them with involvement in the destruction of Pan Am flight 103. Four days later, on 18 November 1991, the Libyan authorities issued a statement indicating that the indictment documents had been received and that, in accordance with the applicable rules, a Libyan Supreme Court Justice had already been assigned to investigate the charges; the statement also, *inter alia*, asserted the Libyan judiciary's readiness to co-operate with all legal authorities concerned in the United Kingdom and the United States.

3. On 27 November 1991, the Governments of the United States and the United Kingdom issued a joint declaration to the Government of Libya demanding, *inter alia*, the surrender for trial of the two individuals charged with the Lockerbie incident. On the following day, 28 November 1991, the Libyan Government issued a communiqué in which it was stated that the application made by the United States and the United Kingdom would be investigated by the competent Libyan authorities, who would deal with it seriously and in a manner that would respect the principles of international legality, including, on the one hand, Libya's sovereign rights and, on the other, the need to ensure justice both for the accused and for the victims. In the meantime, the Libyan investigating judge took steps to request the assistance of the authorities in the United Kingdom and the United States, offering to travel to these countries in order to review the evidence and to co-operate with his American and British counterparts.

4. Since these offers were either explicitly rejected in public (parliamentary debates) or ignored, remaining without response, two identical letters were addressed on 17 January 1992 to the United States Secretary of State and the British Secretary of State for Foreign Affairs. In these letters, the Secretary of the People's Committee for Foreign Liaison and International Co-operation drew the attention of his counterparts to the fact that Libya, the United States and the United Kingdom were all parties to the 1971 Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, commonly known as the Montreal Convention. He then indicated that as soon as the charges had been made against the two accused, Libya had exercised its jurisdiction over them in accordance with Libyan national law and Article 5 (2) of the Montreal Convention. This was done by adopting certain measures to ascertain the presence in Libya of the accused, by instituting a preliminary enquiry into the matter and by notifying the States mentioned in Article 5 (1) of the Convention that the suspects were in custody. The letters went on to note that Article 5 (3) of the Montreal Convention did not exclude any criminal jurisdiction exercised in accordance with national law and that, the alleged offenders being present in Libyan territory, Libya had, in accordance with Article 5 (2) of the Convention, taken the necessary measures to establish its own jurisdiction over the offenders characterized in Article 1 (1), subparagraphs (a), (b) and (c) and Article 1 (2). Recalling that Article 7 provided that the Contracting Party in whose territory the alleged offender is found shall, if it does not extradite him, submit the case to its own competent authorities for the purpose of prosecution, the two letters indicated that Libya had already submitted the case to its judicial authorities and that an examining magistrate had been appointed. The letters then observed that the judicial authorities of the United States and the United Kingdom had been requested to co-operate in the matter, but that there had been no official response to these requests. Instead, the United Kingdom and the United States had threatened Libya while not ruling out the use of armed force.

5. In these circumstances, and bearing in mind the provisions of Article 33 (1) of the United Nations Charter, the Libyan letters of 17 January 1992 called upon the United States and the United Kingdom to agree to an arbitration of the dispute in accordance with Article 14 (1) of the Montreal Convention and to meet with the representative of Libya as soon as possible in order to elaborate the details of such an arbitration (the English translation of the original Arabic text of these letters appears in Security Council document S/23441 as an Annex to the letter of 18 January 1992 from the Permanent Representative of Libya to the President of the Security Council requesting circulation thereof in connection with Libya's calls for the implementation of Article 14 of the Montreal Convention).

6. The above factual survey of the correspondence exchanged during

the period between 14 November 1991 and 18 January 1992 demonstrates beyond any doubt that prior to the adoption of Security Council resolution 731 (1992), Libya had not only invoked the need to arbitrate a dispute relating to the application and interpretation of the Montreal Convention in compliance with Article 14 (1) thereof but also informed the Security Council about the existence of that dispute in compliance with Article 33 (1) of the Charter (in Chapter VI) which requires that:

“The parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice.”

7. The dispute referred to in the two letters of 17 January 1992 is precisely the one now submitted to the Court, which, by virtue of Article 92 of the United Nations Charter, is “the principal judicial organ of the United Nations” and thus exercises a function fundamentally different in nature and operating methods from that conferred upon the Security Council by Article 24 of the Charter. In essence, the Security Council is charged with “primary responsibility for the maintenance of international peace and security” (Art. 24, para. 1) and has in this respect to “act in accordance with the Purposes and Principles of the United Nations” (Art. 24, para. 2, which thus necessarily refers to Chapter I, entitled: “Purposes and Principles”, Arts. 1 and 2).

8. Accordingly, a basic distinction has to be drawn between the claimed “dispute” of a legal character which Libya submitted to the Court in the present proceedings, introduced on 3 March 1992, and the political issues pertaining to State-sponsored acts of terrorism commonly known as “State terrorism” (for the exact definition of “terrorisme d’Etat”, Judge Gilbert Guillaume justly indicated that this usually means: “la violence organisée par l’Etat lui-même, selon ses propres normes de droit, en vue de faire régner la terreur sur son territoire” (*Recueil des cours de l’Académie de droit international de La Haye*, Vol. 215 (1989-III), p. 297), expressing his preference for distinguishing that type of unlawful activity from the “soutien apporté par les Etats aux activités terroristes” (*ibid.*, p. 299)). The undertaking to eliminate all forms of terrorism, whether by private persons and groups or in the form of State terrorism and State-sponsored terrorism, falls necessarily within the scope of the Security Council’s functions and powers. Thus Security Council resolutions 731 (1992) of 21 January 1992 and 748 (1992) adopted on 31 March 1992, mainly addressed the enquiry into Libya’s possible involvement in sponsoring terrorist activities such as those which led to the destruction of the Pan Am plane over Scotland in 1988 and the UTA plane over Niger in 1989.

9. Clearly, the case filed by Libya in the Registry of the Court on 3 March 1992 relates to "Questions of Interpretation and Application of the 1971 Montreal Convention", legal questions arising in relation to the aerial incident at Lockerbie, and this case remains the only matter submitted to the Court, since the two Respondent States (the United Kingdom and the United States of America) have not introduced any counter-claims pertaining to the alleged involvement of the Libyan Government in directing or assisting the two suspects and the State responsibility ensuing as a result thereof. The mere fact that the two suspects are civil servants in Libya does not automatically render them "organs" or "agents" for whose actions the Libyan Government become *ipso jure* internationally responsible. To establish such responsibility from a legal point of view, adequate evidence must be provided:

First: that the two suspects were truly the authors of that horrible massacre; and,
Second: that they committed their crime upon orders from their governmental supervisors or at least with the knowledge and acquiescence of those persons.

Only then could the criminal activity in question be legally attributable to the Libyan Government, and State responsibility be established. In other words, unless the two basic elements indicated above are fulfilled the involvement of the Libyan Government remains an allegation without legal effects, and there can always be a certain degree of doubt about either the culpability of the two suspects or the involvement of the Libyan Government (as the persons concerned may, for whatever motives, have acted on their own initiative).

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10. Taking into account the above-stated basic legal premises, the relevance of Security Council resolutions 731 (1992) and 748 (1992) to the present court proceedings should be carefully analysed.

11. To begin with resolution 731, adopted on 21 January 1992, its wording and the discussion that took place during the meeting at which it was adopted (doc. S/PV. 3033) reveal that it constitutes a Chapter VII "recommendation" under Article 39 of the Charter, i.e., one pertaining to the maintenance of international peace and security.

12. The text of the resolution itself, as well as the interventions of those who participated in the debates, clearly indicates unanimous, general and deep concern at the "worldwide persistence of acts of international terrorism in all its forms", particularly "illegal activities directed against international civil aviation", and the Security Council's determination "to eliminate international terrorism". Specifically, with regard to the attacks carried out against Pan Am flight 103 and UTA flight 772, the Council

expresses a deep concern “over results of investigations, which implicate officials of the Libyan Government”, and after strongly deploring “the fact that the Libyan Government has not yet responded effectively to the above requests [of France, the United Kingdom and the United States of America] to co-operate fully in establishing responsibility for the terrorist acts” in question, the Council, in a key paragraph:

“3. *Urges* the Libyan Government immediately to provide a full and effective response to those requests so as to contribute to the elimination of international terrorism.”

13. By so acting, the Security Council politically condemned the Libyan Government in two ways:

- (i) by endorsing the requests of the three big Powers, which included the demand by two of them that the two Libyan suspects be surrendered;
- (ii) by considering that a full and effective response to those requests would contribute to the elimination of international terrorism, and thus conduce to the restoration of international peace and security.

14. At the same time, the Security Council totally ignored Libya’s plea regarding the pacific settlement under Chapter VI of the dispute already existing about the application and interpretation of the Montreal Convention, of which the President of the Security Council had, as previously mentioned, been informed on 18 January 1992. The Libyan delegate reiterated his country’s position in this respect during the 21 January meeting of the Security Council, stating:

“I repeat that the investigation in Libya has unfortunately not yet made any progress owing to the lack of cooperation on the part of other parties and their refusal to transmit the dossiers of their investigations. In practical terms, this can only mean either that no investigation was actually conducted or that, as we have noted, the investigation was grossly deficient.

I should like to state once again that this dispute is of a purely legal nature, which should lead the Council to recommend its settlement through the divers legal channels that are available, not only within the framework of the United Nations Charter but also under the provisions of more relevant international conventions, such as the aforementioned Montreal Convention of 1971. On the basis of that Convention, particularly its article 14, and to solve the question raised about a conflict of competence, my country has taken concrete and practical measures and, in official communications addressed to both the United States of America and the United Kingdom, has requested that the dispute be referred to arbitration. Today, before the Council, my country requests that both those countries be invited

to enter promptly into negotiations with Libya on proceedings leading to arbitration and an arbitral 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.

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 on arbitration expires, or at any other convenient and near date should the countries concerned agree to go beyond the arbitration stage and the proceedings of an arbitration panel.

In that light, how can this dispute be considered a political one? We do not believe that it is, for Chapter VI of the Charter also sets forth concrete methods of reaching a peaceful settlement. The Council has been guided by those methods in earlier instances. The matter should not be handled in the light of any considerations other than those set forth in the Charter. Libya has never threatened any country. It cannot behave in such a way as to endanger peace and security. Indeed, Libya is being threatened by super-Powers, just as armed aggression was unleashed against it in 1986. Libya is still being subjected to an economic boycott, disinformation campaigns and psychological pressure.

In conclusion, the legality of the Council's work is subject to its observance of the provisions of the Charter of the Organization and to its proper implementation of those provisions. It is inconceivable that this could be achieved through the participation of the parties to this dispute in the voting on the present draft resolution. To disregard the legal nature of the dispute and treat it as a political matter would constitute a flagrant violation of the explicit provisions of Article 27, paragraph 3, of the Charter.

The Council has two choices: it can respect the Charter and follow moral principles and international law, or it can respond to this unjust request by the United States of America and the United Kingdom, which want to use the Council as a cover for military and economic aggression against a small country that is striving to free itself from economic backwardness. We are fully confident that the members of the Council — indeed, all Members of the United Nations — will uphold the principles enshrined in the Charter and international law and respect the principles of justice and equity that my country is asking to be applied and abided by.” (Provisional Verbatim Record of the Security Council meeting held on 21 January 1992, doc. S/PV.3033, pp. 22-25.)

15. The Security Council's avoidance of treating the legal aspects of the problem debated before the adoption of resolution 731 (1992) could have been due to various reasons, including a desire to exclude recourse to Article 27, paragraph 3, of the Charter, which would have prevented the United Kingdom and the United States of America from participating in the voting, since "in decisions under Chapter VI . . . a party to a dispute shall abstain from voting", or simply concern to remain in the political arena without dwelling on the legal issues raised by Libya, since they logically fell within the jurisdiction of the International Court of Justice.

16. Whatever may be the reasons, the issue of the application and interpretation of the Montreal Convention was clearly left outside the scope of resolution 731 (1992). Hence, when faced with a continuous negative attitude blocking the prospect of negotiations with the United Kingdom and the United States of America, whether with a view to amicable settlement or to the conclusion of an arbitration agreement as provided for in Article 14(1) of the Montreal Convention, Libya had no other alternative but to resort to the International Court of Justice in implementation of that same provision. In doing so, the Libyan Government lawfully exercised a right, and cannot be blamed for acting in that manner. It has become axiomatic to state that the unilateral invocation of the Court's jurisdiction should never be regarded as an unfriendly act, as witness the specific declaration issued by the Institut de droit international in 1959, to the effect that "recourse to the International Court of Justice or to another international court or arbitral tribunal can never be regarded as an unfriendly act towards the respondent State" (*Annuaire de l'Institut de droit international*, Vol. 48-II, 1959, p. 381), as well as paragraph 6 of United Nations General Assembly resolution 3232 (XXIX) of 12 November 1974, according to which: "recourse to judicial settlement of legal disputes, particularly referred to the International Court of Justice, should not be considered as an unfriendly act between States".

17. Moreover, on a number of occasions the legal aspects of a given dispute have been submitted to the International Court of Justice with requests to indicate provisional measures notwithstanding the fact that the political organs of the United Nations were seized with the other aspects of the same dispute (*Anglo-Iranian Oil Co. (United Kingdom v. Iran)*, *Interim Protection*, *I.C.J. Reports* 1951, pp. 89-98; *United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran)*, *Provisional Measures*, *I.C.J. Reports* 1979, pp. 7-21; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, *Provisional Measures*, *I.C.J. Reports* 1984, pp. 169-207; *Aegean Sea Continental Shelf (Greece v. Turkey)*, *Interim Protection*, *I.C.J. Reports* 1976, pp. 3-40).

18. Such parallel co-existence once permitted Judge Petrén to emphasize: "The natural distribution of roles as between the principal judicial

organ and the political organs of the United Nations . . ." (Separate opinion in the Advisory Opinion of 12 June 1971 concerning the *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, *I.C.J. Reports 1971*, p. 127). No overlapping could normally be envisaged, so long as the basic criterion of demarcation remains that explicitly stated by the Court in the same Advisory Opinion, according to which :

"the Court as the principal judicial organ of the United Nations . . . acts only on the basis of the law, independently of all outside influence or interventions whatsoever . . . A court functioning as a court of law can act in no other way." (*Ibid.*, p. 23, para. 29.)

19. However, the appearance on the scene of the new Security Council resolution 748 (1992) on 31 March 1992, just three days after the closing of the hearings on Libya's request for provisional measures, is unprecedented and raises an important issue about its implications for the present proceedings.

20. Resolution 748 (1992) not only reaffirmed resolution 731 (1992) of 12 January 1992 but added *inter alia* that :

"the failure by the Libyan Government to demonstrate by concrete actions its renunciation of terrorism and in particular its continued failure to respond fully and effectively to the requests in resolution 731 (1992) constitute a threat to international peace and security".

21. Acting under Chapter VII of the Charter, the Security Council decided that: "the Libyan Government must now comply without any further delay with paragraph 3 of resolution 731 (1992) regarding the requests contained in documents S/23306, S/23308 and S/23309", otherwise the sanctions provided for in paragraphs 4, 5 and 6 shall become effective as of 15 April 1992.

22. Evidently, resolution 748 (1992) of 31 March 1992 falls within the category of decisions under Chapter VII which enjoy as a general rule a binding character, in the sense that non-compliance with them is considered a threat to peace and creates new obligations for all parties concerned.

23. Nevertheless, it has to be noted that there are doctrinal authorities who maintain that the Members of the United Nations are not "obliged" to carry out all decisions of the Security Council. In his analysis of Article 25 of the Charter, Hans Kelsen wrote :

"It seems, however, as if Article 25 does not mean that the Members are obliged to carry out all decisions of the Security Council since, according to its wording, they agree to accept and carry out

decisions of the Security Council 'in accordance with the present Charter'." (Hans Kelsen, *The Law of the United Nations — A Critical Analysis of its Fundamental Problems*, London, 1950, p. 95.)

"The meaning of Article 25 is that the Members are obliged to carry out these decisions which the Security Council has taken in accordance with the Charter." (*Ibid.*)

"The term 'decision' may be interpreted to mean . . . only decisions which, in accordance with the provisions of the Charter under which they are adopted, are binding upon the Members." (*Ibid.*, p. 293.)

24. The case-law of the Court and the opinions expressed by a number of Judges provide that concept with some support. It has to be remembered, in connection with the Advisory Opinion on Namibia previously referred to, that the Governments of France and South Africa objected that both the General Assembly and the Security Council had acted *ultra vires* in the Namibia question. The Court ruled in this respect that:

"Undoubtedly, the Court does not possess powers of judicial review or appeal in respect of the decisions taken by the United Nations organs concerned . . . However, in the exercise of its judicial function and since objections have been advanced the Court, in the course of its reasoning, will consider these objections before determining any legal consequences arising from those resolutions." (*I.C.J. Reports 1971*, p. 45, para. 89.)

25. In effect, the Court there exercised the important function of ascertaining that the resolutions in question had been taken in conformity with the rules of the Charter, and as a result of that exercise it declared that:

"In examining this action of the General Assembly it is appropriate to have regard to the general principles of international law . . ." (*Ibid.*, p. 46, para. 94.)

"The Court has therefore reached the conclusion that the decisions made by the Security Council in paragraphs 2 and 5 of the resolutions 276 (1970), as related to paragraph 3 of resolution 264 (1969) and paragraph 5 of resolution 269 (1969), were adopted in conformity with the purposes and principles of the Charter and in accordance with its Articles 24 and 25. The decisions are consequently binding on all States Members of the United Nations, which are thus under obligation to accept and carry them out." (*Ibid.*, p. 53, para. 115.)

26. By entering upon this type of legal scrutiny in order to satisfy itself of the conformity of the Security Council's decisions, or parts thereof, not only with the rules enshrined in the provisions of the Charter, but also with "the purposes and principles of the Charter", the Court implied that

it was perfectly conceivable that it could reach a negative decision, were it to detect any violation of the Charter or departure from the Charter's purposes and principles.

27. Furthermore, alluding to General Assembly resolution 171 (II) of 14 November 1947, recommending the reference to the Court of a point of law "relating to interpretation of the Charter", Judge Gros stated in his dissenting opinion that: "it would have seemed particularly appropriate to have exercised unambiguously the Court's power to interpret the Charter . . ." (*I.C.J. Reports 1971*, p. 332, para. 19); and

"It used not to be the Court's habit to take for granted the premises of a legal situation the consequences of which it has been asked to state . . . How indeed can a court deduce any obligation from a given situation without first having tested the lawfulness of the origins of that situation?" (*Ibid.*, pp. 331-332, para. 18.)

28. A survey of the opinions expressed in that case by other Judges reveals that many of them were eager to indicate their deep attachment to the right of ensuring that the Court exercises its function as the guardian of legality throughout the United Nations system.

29. In his separate opinion, Judge Ammoun emphasized:

"the International Court of Justice owed it to itself to discharge its own obligations by not closing its eyes to conduct infringing the principles and rights which it is its duty to defend" (*ibid.*, p. 72, para. 3).

30. Judge Petréñ also declared in his separate opinion:

"So long as the validity of the resolutions upon which resolution 276 (1970) is based has not been established, it is clearly impossible for the Court to pronounce on the legal consequences of resolution 276 (1970), for there can be no such legal consequences if the basic resolutions are illegal . . ." (*Ibid.*, p. 131.)

In another separate opinion, Judge Onyeama stated:

"In exercising its functions the Court is wholly independent of the other organs of the United Nations and is in no way obliged or concerned to render a judgment or opinion which would be 'politically acceptable'. Its function is, in the words of Article 38 of the Statute, 'to decide in accordance with international law'.

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when . . . decisions bear upon a case properly before the Court, a correct judgment or opinion could not be rendered without determining

the validity of such decisions, the Court could not possibly avoid such a determination without abdicating its role of a judicial organ.

.....
 I do not conceive it as compatible with the judicial function that the Court will proceed to state the consequences of acts whose validity is assumed, without itself testing the lawfulness of the origin of those acts." (*Ibid.*, pp. 143-144.)

31. In response to a question about the Court's power to pronounce as to the invalidity or nullity of resolutions of the General Assembly and Security Council, and with reference to a dictum of Judge Morelli's in a previous case (*I.C.J. Reports 1962*, p. 223) concerning a resolution initiated by a manifest *excès de pouvoir*, Judge de Castro envisaged the interplay of two principles:

"1. The principle of division of powers — the Charter set up three organs, each having sovereign powers in the sphere of its competence . . . ;

.....
 2. The principle of 'legal-ness' — the Court, as a legal organ, cannot co-operate with a resolution which is clearly void, contrary to the rules of the Charter, or contrary to the principles of law." (*I.C.J. Reports 1971*, p. 180.)

32. Finally, the dissenting opinion of Judge Sir Gerald Fitzmaurice provided a profound analysis of the various presentations, which can be summarized as follows:

- (i) the Security Council, even when acting genuinely for the preservation or restoration of peace and security, has a scope of action limited by the State's sovereignty and the fundamental rights without which that sovereignty cannot be exercised (*ibid.*, p. 226);
- (ii) the relevant circumstances sufficed to render resolution 2145 invalid and inoperative (*ibid.*, p. 280, para. 91);
- (iii) Article 25 cannot render binding a decision not taken "in accordance with the present Charter" (*ibid.*, p. 293, para. 113);
- (iv) even when acting under Chapter VII of the Charter, the Security Council has no power to abrogate or alter existing rules (*ibid.*, p. 294, para. 115);
- (v) the United Nations (with all its organs, including the Security Council) is itself a subject of international law, and subject to it, no less than its individual Member States (*ibid.*, p. 294, para. 115);
- (vi) a political organ is not competent to make the necessary legal determination on which the justification for each action must rest. This can only be done by a legal organ competent to make such determination, otherwise the resolution may have to be considered *ultra vires* and hence invalid (*ibid.*, pp. 299-301).

33. In the light of the statements emanating from the above-mentioned authorities, it is possible to consider that the Security Council, when adopting paragraph 1 of resolution 748 (1992), impeded the Court's jurisdiction freely to exercise its inherent judicial function with regard to issues on which argument had been heard just a few days before, and that by doing so the Security Council committed an act of *excès de pouvoir* which amounts to a violation of Article 92 of the Charter, which entrusted the International Court of Justice with the mission of being "the principal judicial organ of the United Nations".

34. In order properly to discharge its main function, the Court must have full liberty to exercise its adjudicating powers and to form its own opinion on the issues under consideration without any limitation.

35. As was rightly stated by Judge Morelli:

"Any limitation . . . would be unacceptable because it would prevent the Court from performing its task in a logically correct way. . . .

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This freedom can however be understood only as subordinated both to the rules of law and logic by which the Court is bound and also to the objective which the Court must pursue, which is the solution of the question submitted to it." (Separate opinion, Advisory Opinion of 20 July 1962 concerning *Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter)*, I.C.J. Reports 1962, pp. 217-218.)

36. The *ultra vires* character of paragraph 1 of resolution 748 (1992) appears even more serious considering that a number of delegates at the Security Council meeting of 31 March 1992 are reported to have warned those pushing for a hasty adoption of the draft then under discussion against the negative effects of such failure to observe due respect for the Court's credibility and the integrity of its judicial function.

37. According to the Provisional Verbatim Record, Mr. Jesus of Cape Verde pointed out that:

"It would be more appropriate if the Council were to act after the International Court of Justice — which is now seized of this matter — had decided . . ." (Doc. S/PV.3063, p. 46.)

38. The President for the month of April, Mr. Mumbengegwi of Zimbabwe, reminded the Council that:

"The Charter provides that disputes of a legal nature should, as a general rule, be referred by the parties to the International Court of Justice . . .

By taking the Chapter VII route while this case is still pending before the World Court, the Security Council is risking a major institutional crisis. Such an institutional crisis, which is clearly avoidable, would not only undermine the prestige, credibility and integrity of

the entire Organization but would also sap international confidence in the Security Council's capacity to execute, in a judicious and objective manner, its mandate as provided for in the Charter. We are convinced that it would have been in the best interests of international tidiness for the Security Council to await the outcome of the judicial proceedings at the International Court of Justice." (Doc. S/PV.3063, pp. 52-53.)

39. The Indian representative, Mr. Gharekhan, among others, stressed that:

"The considered opinion of the International Court of Justice on the legal aspects of the issues involved can only serve the cause of international law and peace." (*Ibid.*, p. 58.)

40. It is clear that those wise warnings were ultimately inspired by the respect due to the United Nations Charter, in its letter and spirit, but unfortunately the appeal for supremacy of "the rule of law" went unheeded in an atmosphere dominated by emotional political pressures.

41. In order to avoid the present situation, it would have been more appropriate for certain members of the Security Council to take guidance from the precedent established by the Council of the League of Nations when it decided that it could not accept a petition because the subject-matter was before the Permanent Court of International Justice, and postponed consideration of the question until that Court had given its decision in the *Minority Schools* case (Shabtai Rosenne, *The Law and Practice of the International Court*, Vol. I, Leyden, 1965, p. 83).

42. Doubtless the Court itself, the principal judicial organ of the United Nations, was not the target of the Council's haste; the adoption of resolution 748 (1992) without waiting for the Court's ruling on the request for provisional measures seems to have been more intended to put the maximum pressure possible on Libya to forfeit its claim to invoke sovereign rights under Article 1, paragraph 2, Article 2, paragraph 7, and Article 55 of the Charter. Yet the entire Organization is based on the principle of the sovereign equality of all its Members, and the exercise of domestic jurisdiction in matters such as extradition imposes on all other States, as well as on the political organs of the United Nations, an obligation to respect such inherent rights, unless the Court decides that such exercise is contrary to international law, whether customary or conventional.

43. It is important to remember in this respect what Max Huber, the former President of the Permanent Court of International Justice, declared when acting as sole arbitrator in the *Island of Palmas* case:

"Sovereignty in the relation between States signifies independence. Independence in regard to a position of the globe is the right to exercise therein, to the exclusion of any other State, the functions of a State." (Myres McDougal and Michael Reisman, *International*

Law in Contemporary Perspective; the Public Order of the World Community: Cases and Materials, Mineola, New York, Foundation Press, 1981.)

44. Upholding the same basic concept of sovereignty as is protected under the United Nations Charter, the United States courts ruled that:

“The right of a foreign power to demand extradition of one accused of crime and the correlative duty to surrender him exists only when created by treaty, and in the United States, in the absence of statutory or treaty provision thereof, no authority exists in any branch of the government to surrender a fugitive criminal to a foreign government.” (*Ramos v. Diaz*, 179 F. Sup. 459 (S.D. Fla. 1959), reproduced by McDougal and Reisman, *op. cit.*, at p. 1498.)

45. Moreover, in the *Asylum* case, the Court strongly emphasized that: “A decision with regard to extradition implies only the normal exercise of the territorial sovereignty.” (*I.C.J. Reports 1950*, p. 274.)

46. It would be hard to believe that under contemporary international law the rights of a foreign fugitive are more protected than those of an accused citizen, or that what is a legal act of the United States Government becomes an illegal act for the Libyan Government, unless we are supposed to be living on Orwell’s *Animal Farm*, where some animals are more equal than others.

47. For all the above-stated considerations, I am of the opinion, with all due respect, that paragraph 1 of Security Council resolution 748 (1992) should not be considered to have any legal effect on the jurisdiction of the Court, even on a *prima facie* basis, and accordingly that the Libyan request for provisional measures has to be evaluated in accordance with the habitual pattern reflected in the established jurisprudence of the Court.

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48. Without going into an extensive analysis of all the precedents related to the granting or denial of provisional measures and the relevant circumstances which led the Court to act one way or another, it seems sufficient within the present context to refer essentially to the rules relied upon in the most recent cases in which a request for provisional measures was considered.

49. On the basis of Article 41 of the Statute, the Court may exercise its independent jurisdiction to indicate provisional measures once satisfied that “the provisions invoked by the Applicant appear, *prima facie*, to

afford a basis on which the jurisdiction of the court [on the merits] might be founded" (*Passage through the Great Belt, Provisional Measures, Order of 29 July 1991, I.C.J. Reports 1991*, p. 15, para. 14).

50. In conformity with said established rule, I do believe that the provisions of Article 14, paragraph 1, of the Montreal Convention invoked by the Applicant appear to afford a prima facie basis on which the jurisdiction of the Court might be founded. Here the basis is clearly stronger than in the *Anglo-Iranian Oil Co.* case which produced the Order of 5 July 1951 granting interim measures of protection (*I.C.J. Reports 1951*, pp. 93-94), though offering less outright justification than in the case concerning *United States Diplomatic and Consular Staff in Tehran*, when the Court adopted the Order of 15 December 1979 (*I.C.J. Reports 1979*, pp. 14-15).

51. With regard to the existence of a dispute between the Applicant and the Respondent which concerns the "interpretation or application" of the 1971 Montreal Convention, I am bound to note that, once one applies the criteria unanimously established by the Court in the Advisory Opinion of 26 April 1988 concerning the *Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947* (*I.C.J. Reports 1988*, p. 32, para. 49) while taking into consideration the wide difference of opinion between the Parties as reflected in the oral proceedings, there cannot be the slightest doubt about the existence of a dispute pertaining to the scope, applicability and interpretation of various provisions in the Montreal Convention.

52. In the present phase of the proceedings, the Parties raised a number of issues pertaining to determination of the questions whether the dispute can "be settled through negotiation", whether there has been a rejection of a Libyan offer to arbitrate the dispute, and what might be the legal effect of the six-month period contemplated by Article 14, paragraph 1, of the Montreal Convention.

53. Recalling the famous dictum of the Permanent Court of International Justice in the *Mavrommatis Palestine Concessions* (*P.C.I.J., Series A, No. 2*, p. 13), the Court's Order in the case concerning *United States Diplomatic and Consular Staff in Tehran* (*I.C.J. Reports 1979*, pp. 32-34, paras. 52-56), and taking into account all the relevant circumstances as reflected in the documents submitted by the Parties, I am of the opinion that it would be safe to conclude that the United Kingdom and the United States were not at any time, whether before or after seising the Security Council, interested in settling the dispute through negotiations or through recourse to arbitration. The Libyan notes of 8 January and 17 January 1992 were totally ignored, rendering those two methods of peaceful settlement practically useless and inoperative. Thus there was no meaningful reason to wait for the lapse of the six-month period, particularly when the wording of "within" or "dans" which figures in the text of Article 14, paragraph 1, of the Montreal Convention does not clearly render this

time element a mandatory requirement which bars recourse to the Court before its expiration.

54. The exercise by the Court of its power to indicate provisional measures is subject, according to the wording of Article 41, to the Court's determination that "circumstances so require". In this respect, the established jurisprudence of the Court with regard to the implications of this phrase has recently been formulated in the following terms:

"Whereas the power of the Court to indicate provisional measures under Article 41 of the Statute of the Court has as its object to preserve the respective rights of the parties pending the decision of the Court, and presupposes that irreparable prejudice should not be caused to rights which are the subject of dispute in judicial proceedings" (*Passage through the Great Belt (Finland v. Denmark)*, Provisional Measures, Order of 29 July 1991, I.C.J. Reports 1991, p. 16, para. 16).

55. Without going into details which are at present not needed in the light of the Order rendered by the Court, the principles underlining the adoption of the Montreal Convention include the rule *aut dedere, aut judicare* (or *aut dedere, aut punire*, as the case may be in view of the stage reached, which has been explained by Judge Guillaume in his course at the Hague Academy of International Law, *RCADI, op. cit.*, Chap. IV, pp. 354-371). The rule in question necessarily implies confirmation of the deeply rooted principle of general international law according to which no State can be obliged to extradite any persons, particularly its own citizens, in the absence of a treaty explicitly providing for such extradition. In particular, the provisions of Article 7 read with Article 8 (2) of the Montreal Convention entitle any Contracting State to refuse extradition in all cases not subject to an existing extradition treaty. This has been confirmed, through approval by more than 130 Contracting States, as a sovereign right recognized by general public international law. Accordingly, under the Montreal Convention, no other State or group of States can be considered entitled to force another State to extradite, and this applies particularly with regard to its own citizens when their extradition is prohibited under the State's domestic legal system.

56. Neither the United Kingdom nor the United States enjoys in this respect any right other than those enjoyed by all other Contracting States, including Libya: hence, if either country is faced in the future with a similar situation where their authorities are requested to extradite, the same rule of *aut dedere, aut judicare* will apply. In other words, no irreparable prejudice could be caused to the conventional rights acquired by the respective Parties to the present proceedings if the rule *aut dedere, aut judicare* is fully implemented. On the contrary, irreparable prejudice to Libya

would ensue if it is forced to deliver to another State its own citizens, since the State's sovereign right recognized under the Montreal Convention would then suffer total eclipse and extinction. Such deprivation of the State's sovereignty could not be remedied at any later stage by the Court, and that is a sure test of the irreparability of the prejudice. In a nutshell, once a forced surrender takes place, the present case related to the interpretation and application of the Montreal Convention will become meaningless, since there will be no more legal issue to be adjudicated. But this will not have occurred through due application of law.

57. For all the above-stated considerations, I was and remain of the opinion that the circumstances of the present case required the indication of provisional measures, particularly since there was extreme urgency for the Court to act in order to avoid the coming into force of the sanctions adopted by the Security Council under certain paragraphs of resolution 748 (1992), a decision taken by the Security Council in the exercise of its powers under Chapter VII, hence outside the scope of the legal issue pending before the Court.

58. With regard to what provisional measures could be considered appropriate, taking into account all the relevant circumstances of the present case, it has to be noted that under Article 41 of the Statute of the Court the determination of the measures to be indicated should establish a balance between the "respective rights of the parties". In the exercise of its powers and in conformity with Article 75 of its Rules the Court may decide to indicate *proprio motu* measures "that are in whole or in part other than those requested, or that ought to be taken or complied with by the party which has itself made the request".

59. In this respect, special attention has to be focused on the interesting precedent established as a result of the Order of January 1968 rendered by the Chamber of the International Court of Justice formed to deal with the case concerning the *Frontier Dispute (Burkina Faso/Republic of Mali)*. In considering the indication *proprio motu* of provisional measures the Chamber declared:

"18. Considering that, independently of the requests submitted by the Parties for the indication of provisional measures, the Court or, accordingly, the chamber possesses by virtue of Article 41 of the Statute the power to indicate provisional measures with a view to preventing the aggravation or extension of the dispute whenever it considers that circumstances so require;

19. Whereas, in particular . . . the principal judicial organ of the United Nations, with a view to the peaceful settlement of a dispute, in accordance with Article 2, paragraph 3, and Article 33 of the Charter of the United Nations . . . there can be no doubt of the Chamber's

power and duty to indicate, if need be, such provisional measures as may conduce to the due administration of justice; . . ." (*I.C.J. Reports 1986*, p. 9.)

60. I am of the opinion that the Court should have acted in that sense, in the light of the special circumstance of the present case characterized by the fact that the two Libyans suspected to be the authors of the Lockerbie massacre could not possibly receive a fair trial, neither in the United States or in the United Kingdom, nor in Libya.

61. With all my sense of deepest admiration for the judicial system of the oldest contemporary democracy, the country of Magna Carta (1215) and the Bill of Rights (1688), I seriously doubt, nevertheless, that the two Libyan suspects could have a fair trial in the United Kingdom. As justly observed by Professor Mauro Cappelletti, even in the field of civil litigation:

"One is tempted to believe that the proposition that even in England certain procedural rights and guarantees are, and have long since, been considered basic to a fair administration of justice, has no juridical meaning at all." (*Fundamental Guarantees of the Parties in Civilian Litigation*, ed. Mauro Cappelletti and Denis Tallon, Milan, 1973, p. 70.)

62. Concerning criminal proceedings, the world legal community cannot easily forget that both the European Commission and Court of Human Rights concluded that the United Kingdom had violated Article 3 of the European Convention on Human Rights by inflicting inhumane and degrading treatment on prisoners suspected of terrorism, in the sense of arousing "feelings of fear, anguish and inferiority capable of humiliating and debauching them and possibly breaking their physical or moral resistance"; and for using the so-called "five techniques" causing "at least intense physical and mental suffering as well as leading to acute psychiatric disturbance during interrogation" (Judgment of 18 January 1978, case of *Ireland v. The United Kingdom*, *Publications of the European Court of Human Rights, Series A, Judgments and Decisions*, Vol. 25, pp. 59-94). I have no doubt at all that the British Government took this condemnation to heart and has done its utmost to eliminate all such inhumane methods. Nevertheless, bearing in mind the heinous nature of the crimes imputed to the Libyan suspects, one may still understand the suspicion in some minds that fairness might have limits in their respect.

63. In the United States of America an even more disturbing factor would result from the extraordinary impact of the mass media and the role it plays in rendering almost impossible the conduct of fair trial by jury, as witness the public debates aroused as a result of what happened in a number of recent cases. Such situation is in clear conflict with the requirement for "a fair and public hearing by an independent and impartial tribunal"

provided for under Article 10 of the 1948 United Nations Universal Declaration of Human Rights; and equally Article 14, paragraph 1, of the 1966 United Nations Convention on Civil and Political Rights, which emphasizes the existence of "special circumstance where publicity would prejudice the interests of justice".

64. At the same time, in view of the fact that the two Libyan suspects were or are still working for the Government of their country, and that their trial could eventually lead to the emergence of a subsequent case of State international responsibility against Libya, I feel that this factual situation constitutes sufficient grounds to doubt that the interest of both the United States and the United Kingdom in ensuring a fair trial could be adequately safeguarded in case the trial were conducted in Libya. Whatever may be the merits of the Libyan judicial system under normal circumstances, the need for an even-handed and just solution leads me to consider, within the special context of the present case, that the Libyan domestic courts could not be the appropriate forum. This conclusion derives logically and necessarily from the fundamental legal principles, deeply rooted in the legal traditions of the major systems, particularly Islamic law (Weeramantry, *Islamic Jurisprudence, an International Perspective*, MacMillan Press, 1988, pp. 76-77 and 79-81), according to which *nemo debet esse iudex in propria sua causa*.

65. Under the above-mentioned special circumstances of the dispute between the Parties, and in the exercise of the Court's inherent power for the peaceful settlement of disputes, to ensure the proper administration of justice, and in view of preventing the aggravation and extension of the dispute, I am of the opinion that the Court could have indicated *proprio motu* provisional measures to the effect that:

- Pending a final decision of the Court, the two suspects whose names are identified in the present proceedings should be placed under the custody of the governmental authorities in another State that could ultimately provide a mutually agreed and appropriate forum for their trial.
- Moreover, the Court could have indicated that the Parties should each of them ensure that no action of any kind is taken which might aggravate or extend the dispute submitted to the Court or likely to impede the proper administration of justice.

(Signed) Ahmed Sadek EL-KOSHERI
