DISSENTING OPINION OF JUDGE WEERAMANTRY

This application for provisional measures was, as required by Article 74 (1) of the Rules of Court, given priority over all other cases pending before the Court. The oral submissions were concluded on 28 March 1992. Three days later, when the case was at the stage of deliberations, resolution 748 (1992) was adopted by the Security Council. Resolution 748 (1992) covered matters of importance which were *sub judice* before the Court and the impact of that resolution upon the matters before the Court is among the legal questions discussed in this opinion.

Without determining definitively the legal effect of that resolution, the validity of which is disputed by Libya, we must at the present stage of provisional measures act upon the basis of its validity. Article 25 of the United Nations Charter, requiring Members of the United Nations to accept and carry out decisions of the Council, must then be regarded as prima facie applicable to that resolution. In reaching these conclusions, I agree with the views of the majority of the Court but I respectfully dissent from the view that that resolution renders it inappropriate for the Court to issue provisional measures. The reasons for this view are set out in this dissenting opinion. It deals with important questions of law canvassed at some length before us which are of a significance reaching so far beyond the immediate case as, in my opinion, to merit some extended examination.

Two matters argued at some length before us, to which I shall confine my observations, are the question of jurisdiction and the relationship between this Court and the Security Council. The main assertions of fact and the basic contentions of the Parties are sufficiently set out in the Order of the Court and I need not recapitulate them here.

A. Jurisdiction

Article 14 (1) of the Montreal Convention is the foundation of the Court's jurisdiction to entertain this application. It stipulates a six-month period from the date of request for arbitration within which if parties are unable to agree on the organization of the arbitration, any one of them may refer a dispute to the International Court.

The Respondents have contended that the pre-conditions to the jurisdiction of this Court have not been satisfied inasmuch as there is no "dis-

pute" within the meaning of Article 14 (1) and that, in any event, the stipulated six-month period has not elapsed.

At the present stage of proceedings it is inappropriate to give a narrow or restrictive meaning to the word "dispute". I am satisfied prima facie that there is a substantial dispute between the Parties, for Libya relies on the rule of customary international law, *aut dedere aut judicare*, as the governing principle which entitles it to try its own citizens in the absence of an extradition treaty, while the Respondent demands the surrender of the two suspects. Libya declares that it will try them and has invited the Respondent to send its officials and lawyers to observe the trial, arguing that it is thus satisfying its obligations under the Treaty. The Respondent demands that the suspects be tried in its own courts. Libya contends that its domestic law forbids the surrender of its citizens for trial elsewhere and that the Respondent's demand is an infringement of its sovereignty. The Respondent denies that this is a valid excuse for not surrendering them. All of this in my view amounts prima facie at any rate to a dispute, thus satisfying one of the prerequisites of Article 14 (1).

The Respondent's further contention, which is a more substantial one, is that the letter in which Libya first mentioned arbitration was dated 18 January and this case was instituted on 3 March, well before six months had elapsed. It contends therefore that an essential prerequisite to the invocation of the Court's jurisdiction has not been satisfied. This may well be a correct statement of the legal position.

At the same time, there is another view that is plausible and is certainly arguable. That is, that where a party has in anticipation indicated that it will not consider itself bound by mediation or negotiation, the insistence by that party on a waiting period specified as a prerequisite before the matter is taken to the International Court could defeat the purposes of such a provision. Material has been placed before us to the effect that the United States had stated to the Security Council that this was not a difference of approach that could be mediated or negotiated (S/PV.3033, 21 January 1982, p. 7) and that the Security Council must not be distracted by Libyan attempts to convert this issue of international peace and security into one of bilateral differences *(ibid.)*. In other words, the argument placed before us was one of anticipatory repudiation of a consensual obligation.

The question of law before us is this: if, in a hypothetical case, a party refuses negotiation, can such party insist on the six-month period of delay before the matter is brought to this Court? Such insistence can well be a roadblock in the path of a party seeking relief from this Court. The provision can then be construed to mean that a party is free to use other methods than conciliation during this six-month period. Such a construction could well be a negation of the purposes and principles of such a provision, as was cogently stated by Judge Ago in his separate opinion

in the Preliminary Objections phase of the case concerning *Military and Paramilitary Activities in and against Nicaragua*:

> "I am in fact convinced that prior resort to diplomatic negotiations cannot constitute an absolute requirement, to be satisfied even when the hopelessness of expecting any negotiations to succeed is clear from the state of relations between the parties, and there is no warrant for using it as a ground for delaying the opening of arbitral or judicial proceedings when provision for recourse to them exists." (*I.C.J. Reports 1984*, pp. 515-516, para. 4.)

The general principle set out in that passage can be even more pointedly formulated in the context of a specified waiting period such as is stipulated in the Montreal Convention. It can be plausibly argued that there is no purpose in allowing a party who has repudiated conciliation to argue for the rejection of an application on grounds of its non-compliance with procedures which it has itself rejected. A period of freedom from conciliatory and judicial processes would thus be given to the party repudiating, leaving it at liberty to pursue other non-conciliatory procedures, while its opponent is required to stand by without help or remedy.

Such a construction of the Article fits also within theories of interpretation which emphasize that treaty provisions must be so interpreted as not to render nugatory their object and purpose. One cannot without further consideration conclude whether one or the other view should prevail. They both have much to be said for them and we are in a situation where we can only say that the view that the six-month period in Article 14 (1) does not constitute an absolute prohibition is at least an arguable one.

The recitals in the Court's Order in the *Nuclear Tests* cases also bear out this provisional approach to jurisdiction:

> "13. Whereas on a request for provisional measures the Court need not, before indicating them, finally satisfy itself that it has jurisdiction on the merits of the case, and yet ought not to indicate such measures unless the provisions invoked by the Applicant appear, prima facie, to afford a basis on which the jurisdiction of the Court might be founded;
>
> . . . . . .
>
> 17. Whereas the material submitted to the Court leads it to the conclusion, at the present stage of the proceedings, that the provi-

> sions invoked by the Applicant appear, prima facie, to afford a basis on which the jurisdiction of the Court might be founded; and whereas the Court will accordingly proceed to examine the Applicant's request for the indication of interim measures of protection;" (*I.C.J. Reports 1973*, pp. 101, 102).

Applying this reasoning, I would hold that the circumstances invoked by the Applicant appear, prima facie, to afford a basis on which the jurisdiction of the Court might be founded.

If, after the issue of such provisional measures, it appears at a later stage or at the stage of consideration of the merits that the Court has no jurisdiction, then the provisional measures would immediately cease to have effect.

Granted this conclusion in regard to the Court's jurisdiction under Article 14 of the Montreal Convention, the next major question is whether Security Council resolutions 731 (1992) and 748 (1992) present obstacles to the Court's consideration of this matter. This question receives attention in the next section of this opinion.

B. THE COURT AND THE SECURITY COUNCIL

Relevance to the Matters before the Court

This case has raised as perhaps no case has done in the past, certain questions of importance and interest concerning the respective functions of this Court and the Security Council. These matters arose squarely before the Court at the stage of oral submissions in consequence of resolution 731 (1992). This relationship has assumed even more importance subsequent to the close of the oral argument, with the adoption of resolution 748 (1992).

Issues relative to the relationship between the Court and the Security Council were specifically raised by both Parties before us.

Counsel for Libya, Professor Suy, urged that resolution 731 (1992) "flies in the face of the whole of the procedure for the peaceful settlement of disputes provided for in the Montreal Convention" and hence that Libya was entitled to submit to the International Court the legal aspects of the question which were neglected by the Security Council (Public Sitting of 26 March 1992 (morning), CR 92/2, p. 61). He argued further that the right of Libya to exercise its criminal jurisdiction over its own subjects is a fundamental right derived from the sovereignty of the State, a right which cannot be derogated from.

The Agent for the United States, Mr. Williamson, stated as one of his four basic contentions "that the Libyan requests [to the Court] should be denied because the Security Council is actively seised with the issue"

(Public Sitting of 27 March 1992, CR 92/4, p. 16). Counsel for the United States submitted that the Court ought to examine whether its actions would conflict with actions which the Council has taken or is considering (*ibid.*, p. 67), and, while conceding that the Court and the Council may properly exercise their respective functions simultaneously in regard to the same matter, submitted that neither the Charter nor the practice of the Court provides a basis for interfering with the exercise by the Council of its primary responsibility for maintaining international peace and security (*ibid.*, p. 36).

Here, unequivocally presented to the Court, was an invitation to address the issue of the relationship between Court and Council in the context of resolution 731 (1992). Resolution 748 (1992), be it noted, was not before the Court at the stage of argument but later assumed even greater importance than resolution 731 (1992).

In considering an application for provisional measures in the context of resolution 731 (1992) and in the context of the arguments addressed to us, the Court was under the necessity of considering the legal issue of the impact, if any, upon the Court's jurisdiction of the action of the Security Council in adopting resolution 731 (1992). Similar considerations now apply to resolution 748 (1992).

The relationship between the Security Council and the Court, thus firmly embedded within the legal arguments addressed to the Court, requires some preliminary consideration, in the manner appropriate to an application for provisional relief. Definitive findings on these important matters are not necessary at the stage of provisional measures and, of course, are not attempted here. What is sought rather is to outline the general contours of the problem so that the application for provisional measures can be seen against the legal background provided by the Charter of the United Nations. The analysis in the ensuing subheads of discussion is essential as being directly relevant to the application for provisional measures which is now before the Court and to the objections raised thereto on the basis of the organizational structure of the United Nations.

It seems all the more important to set them down having regard to the fact that these considerations have never before in the jurisprudence of the Court arisen in this direct and immediate way and having regard to the advantage the Court has had of a presentation before it on these issues by teams of extremely eminent and experienced international lawyers.

The Court as a judicial body seised of an application for provisional measures was moreover the appropriate forum for examining the legal impact on its determinations, of Security Council resolution 731 (1992). It was contended, on the one hand, that the fact of the Security Council being seised of the matter prevented the Court from granting the relief sought, while, on the other hand, that resolution was impugned as neglecting certain legal considerations which the Security Council was allegedly

bound to consider. These were pre-eminently questions of law which the Court was bound to examine as a prerequisite to considering whether provisional measures were to be issued.

General Observations

Created by the same Charter to fulfil in common the Purposes and Principles of the United Nations, the Security Council and the Court are complementary to each other, each performing the special role allotted to it by their common instrument of creation. Both owe loyalty alike to the same instrument which provides their authority and prescribes their goals. As with the great branches of government within a domestic jurisdiction such as the executive and the judiciary, they perform their mission for the common benefit of the greater system of which they are a part.

In the United Nations system, the sphere of each of these bodies is laid down in the Charter, as within a domestic jurisdiction it may be laid down in a constitution. However, unlike in many domestic systems where the judicial arm may sit in review over the actions of the executive arm, subjecting those acts to the test of legality under the Constitution, in the United Nations system the International Court of Justice is not vested with the review or appellate jurisdiction often given to the highest courts within a domestic framework (see Advisory Opinion of the International Court in *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. 16). At the same time, it is the principal judicial organ of the United Nations, charged with the task, *inter alia*, of deciding in accordance with international law such disputes as are submitted to it (Art. 38 of the Statute of the Court).

An important difference must also be noted between the division of powers in municipal systems and the distribution of powers between the principal organs of the United Nations, for there is not among the United Nations organizations the same strict principle of separation of powers one sometimes finds in municipal systems. As this Court observed in the case concerning *Military and Paramilitary Activities in and against Nicaragua*, municipal law concepts of separation of powers "are not applicable to the relations among international institutions for the settlement of disputes" (*I.C.J. Reports 1984*, p. 433, para. 92). Nor is there a hierarchical arrangement of the organs of the United Nations (Rosenne, *The Law and Practice of the International Court of Justice*, 2nd rev. ed., p. 70), and each principal organ is *par inter pares* (*ibid.*, p. 71).

As a judicial organ, it will be the Court's duty from time to time to examine and determine from a strictly legal point of view matters which may at the same time be the subject of determination from an executive or political point of view by another principal organ of the United Nations.

The Court by virtue of its nature and constitution applies to the matter before it the concepts, the criteria and the methodology of the judicial process which other organs of the United Nations are naturally not obliged to do. The concepts it uses are juridical concepts, its criteria are standards of legality, its method is that of legal proof. Its tests of validity and the bases of its decisions are naturally not the same as they would be before a political or executive organ of the United Nations.

Yet this much they have in common — that all organs alike exercise their authority under and in terms of the Charter. There can never truly be a question of opposition of one organ to another but rather a common subjection of all organs to the Charter. The interpretation of Charter provisions is primarily a matter of law, and such questions of law may in appropriate circumstances come before the Court for judicial determination. When this does occur, the Court acts as guardian of the Charter and of international law for, in the international arena, there is no higher body charged with judicial functions and with the determination of questions of interpretation and application of international law. Anchored to the Charter in particular and to international law in general, the Court considers such legal matters as are properly brought before it and the fact that its judicial decision based upon the law may have political consequences is not a factor that would deflect it from discharging its duties under the Charter of the United Nations and the Statute of the Court.

The judicial function in resolving disputes and other matters duly referred to it and in deciding in accordance with international law as applied and interpreted by the Court is the Court's function and very *raison d'être.* Dr. Rosenne's analysis of the relationship between the principal organs concludes that what lies at the heart of their relationship is that "the will of the Organization is made manifest by the actions of those organs within whose sphere of competence a particular matter lies" (Rosenne, *op. cit.*, p. 69). What pertains to the judicial function is the proper sphere of competence of the Court. The circumstance that political results flow from a judicial decision is not one that takes it out of that sphere of competence. So also:

> "while the Court's task is limited to functions of a legal character, its power of action and decision is subject to no limitation deriving from the fact that the dispute before it might also be within the competence of some other organ. If the maintenance of international peace and security be regarded as the major function of the United Nations as a whole (including the Court), the Charter confers no exclusive competence upon any one principal organ. Even the fact that the Security Council has primary responsibility for the maintenance of

> international peace and security under Article 24 of the Charter is not sufficient to give it exclusive competence over these matters. . . . There is thus no express authority in the Charter or in the Statute for the proposition advanced by Judge Alvarez in the *Anglo-Iranian Oil Co.* case to the effect that, if a case submitted to the Court should constitute a threat to world peace, the Security Council may seise itself of the case and thereby put an end to the Court's jurisdiction." (Rosenne, *op. cit.*, p. 73.)

It is interesting to note that this citation extends the proposition that the Court may consider a matter within the competence of another organ even to the case where a matter is on the agenda of another organ (*ibid.*, note 1).

It follows from the different nature of the two organs that there are many factors relevant to a political decision which a political organ can and would take notice of, but which a judicial organ cannot and would not. It is apposite in this context to cite Kelsen's observation:

> "The Security Council and the General Assembly, in so far as they, too, are competent to settle disputes, are only quasi-judicial organs of the United Nations. This is true even if the interpretation is accepted that recommendations made by the Security Council for the settlement of disputes under Articles 31, 38 or 39 are, as decisions of the Council in accordance with Article 25, binding upon the parties. The Security Council, as pointed out, is not a judicial organ because its members are not independent." (Hans Kelsen, *The Law of the United Nations*, 1950, pp. 476-477.)

The Court's Autonomy

The United States submitted that the organs of the United Nations should act as far as possible in co-operation with each other in common furtherance of the principles and purposes of the United Nations. The United States cited in this context the separate opinion of Judge Tarazi, in the *Aegean Sea Continental Shelf* case, reading as follows:

> "For it is true and certain that the Court is an independent and judicial organ . . . it is no less true that it is an integral part of the United Nations . . .
>
> That being so, the present Court, while maintaining its independence, should not fail to take into consideration this basic truth, namely that it is an integral part of the United Nations. The Charter, whose genesis marked a new stage in the course of history, features

some essential differences in comparison with the provisions of its predecessor, the Covenant of the League of Nations. Those differences were due to the new situation which States and peoples had to face on account of the consequences of the Second World War and of the developments which preceded or triggered its outbreak.

There is no necessity here to consider these differences in detail. One may content oneself with the affirmation that, by virtue of the Charter, the Security Council bears an essential responsibility for the maintenance of peace and security. The Court, if the circumstances so require, ought to *collaborate* in the accomplishment of this fundamental mission." (*I.C.J. Reports 1976*, separate opinion, p. 33 (emphasis added), cited in Public Sitting of 27 March 1992, CR 92/4, pp. 69-70.)

This exposition by Judge Tarazi of the role of the Court sets out with clarity certain central principles:

(1) The Court is an independent organ of the United Nations and should maintain its independence.
(2) The Court is a judicial organ.
(3) The Court is an integral part of the United Nations.
(4) Under the Charter, the Security Council bears essential responsibility for the maintenance of peace and security.
(5) The Court ought to collaborate with the Security Council in the accomplishment of this mission if circumstances so require.

It is clear from a consideration of these requisites that the Court must at all times preserve its independence in performing the functions which the Charter has committed to it as the United Nations' principal judicial organ. It is clear also that in many an instance the performance of those independent functions will lead the Court to a result in total consonance with the conclusions of the Security Council. But it by no means follows from these propositions that the Court when properly seised of a legal dispute should co-operate with the Security Council to the extent of desisting from exercising its independent judgment on matters of law properly before it. Judge Tarazi was anxious to provide for this possibility by the careful insertion of the stress on the Court's independence and the proviso referring to the desirability of collaboration "if the circumstances so require". The judge of the question whether the circumstances so require is surely the Court in the exercise of its independent judgment.

It is to be noted, moreover, that, in the case of the Court, there is no provision similar to Article 12 of the Charter which provides, in regard to the General Assembly, that, while the Security Council is exercising in respect of any dispute or situation the functions assigned to it by the Charter, the General Assembly "shall not make any recommendation with regard to that dispute or situation" unless the Security Council so requests. It is part of the scheme of the Charter that the International Court is not similarly restrained.

The proposition is unexceptionable that where the Security Council is addressing a situation with direct implications for the matter brought before the Court, the Court should examine whether its actions would conflict with the actions that the Security Council has taken or is considering and, where the circumstances permit, should seek to reinforce the actions of the Council.

This is undoubtedly so, but the fact of Security Council action is only one of the circumstances the Court would take into account and is by no means conclusive. Since the Court and the Security Council may properly exercise their respective functions with regard to an international dispute or situation, each must in the exercise of the undoubted authority conferred on it exercise its independent judgment in accordance with the Charter. It follows that their assessment of a given situation will not always be in complete coincidence. Especially where matters of legal interpretation are involved, the Court will naturally zealously preserve its independence of judgment, for to do any less would not be a proper compliance with the requirements of the Charter.

Co-ordinate Exercise of Powers

There have indeed been prior instances where the same matter has come up for consideration before both the Security Council and the Court. Mention may be made in this connection of the following cases where the jurisdiction of both the Court and the Security Council was invoked in one and the same matter: *Aegean Sea Continental Shelf, Interim Protection* (*I.C.J. Reports 1976*, p. 3); *United States Diplomatic and Consular Staff in Tehran, Provisional Measures* (*I.C.J. Reports 1979*, p. 7); *Military and Paramilitary Activities in and against Nicaragua, Provisional Measures* (*I.C.J. Reports 1984*, p. 169).

In all these cases, however, the Court and the Council were approached by the same party, seeking before these different organs the relief appropriate to the nature and function of each. In other words the party approaching these organs was seeking to use them in a complementary manner.

In the present case, the Court and the Council have been approached by opposite parties to the dispute, each claiming a form of relief consistent with its own position. It is this situation which gives special importance to the current case.

It is of relevance to note, in the last of the three cases cited, the Court's observation made in response to the United States' argument that the Court should not consider Nicaragua's request because that request for interim measures was identical with its requests which were rejected by the Security Council. The Court observed that the fact that a matter is before the Security Council should not prevent it from being dealt with by the Court and that both proceedings could be pursued *pari passu* (*Military*

and Paramilitary Activities in and against Nicaragua, I.C.J. Reports 1984, p. 433, para. 93).

In the *United States Diplomatic and Consular Staff in Tehran* case, the Court observed that:

> "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.)

The role of the Court was made even clearer when the Court observed:

> "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 the 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." (*Ibid.*, p. 22, para. 40; see also *Military and Paramilitary Activities in and against Nicaragua, I.C.J. Reports 1984*, pp. 433-434, para. 93.)

The Powers of the Security Council

The submission before us relating to the exercise of Security Council powers in adopting resolution 731 (1992) calls for a brief examination of those powers from a strictly legal point of view.

The plenitude of powers with which the Charter of the United Nations invests the Security Council straddles a wide variety of areas of international action.

It is charged under Article 24 with the primary responsibility for the maintenance of international peace and security and has a mandate from all Member States to act on their behalf in this regard. By Article 25, all Members agree to accept and carry out its decisions.

Chapter VI entrusts it with powers and responsibilities in regard to settlement of disputes, and Chapter VII gives it very special powers when it determines the existence of any threat to the peace, breach of the peace or act of aggression. Such determination is a matter entirely within its discretion.

With these provisions should be read Article 103 of the Charter which

states that in the event of a conflict between the obligations of the Members of the United Nations under the Charter and their obligations under any international agreement, their obligations under the Charter shall prevail. Seeing that Security Council decisions are to be accepted and carried out by all Member States, the obligations thus created are given priority by Article 103 over obligations under any other agreement.

All this amounts to enormous power indeed and international law as embodied in the Charter requires all States to recognize this power and act according to the directions issuing from it.

But does this mean that the Security Council discharges its variegated functions free of all limitations, or is there a circumscribing boundary of norms or principles within which its responsibilities are to be discharged?

Article 24 itself offers us an immediate signpost to such a circumscribing boundary when it provides in Article 24 (2) that the Security Council, in discharging its duties under Article 24 (1), "*shall* act in accordance with the Purposes and Principles of the United Nations". The duty is imperative and the limits are categorically stated. The Preamble stresses *inter alia* the determination of the peoples of the United Nations to establish conditions under which respect for the obligations arising from treaties and other sources of international law can be maintained.

Article 1 (1) sets out as one of the Purposes of the United Nations that it is

> "to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace".

Travaux Préparatoires

That such limitations are real and important appears when one considers the *travaux préparatoires* leading to the adoption of the Charter. They are here referred to for the purpose of showing that the concerns outlined above were indeed a factor leading to the adoption in its present form of the articles giving the Security Council its powers.

In Committee 2 of Commission III which was dealing, at the United Nations Conference on International Organization, San Francisco, with the draft provisions of the Charter relating to the Security Council, on 19 May 1945, Belgium — as if in anticipation of the very problem now presented by the Libyan argument that the Security Council resolution 731 (1992) infringed on essentials of State sovereignty — presented a proposed amendment to the draft.

To quote from the Commission records:

> "The Delegate of Belgium stated that if, as appeared to be the case,

> the power of the Security Council to 'recommend' ('recommander') involved the possibility that a Member of the Organization might be obliged to abandon a right granted to it by positive international law as an essential right of statehood, the Delegation of Belgium wished formally to present its amendment to the Committee. The purpose of the amendment was, in case a party to a dispute considered that a recommendation of the Security Council infringed on its essential rights, to allow the state to request an advisory opinion on the question by the International Court of Justice. If the Court found such rights to be infringed or threatened, then the Security Council would be required either to reconsider the question or to refer the dispute to the General Assembly for a decision. It was not in any sense the purpose of this amendment to limit the legitimate powers of the Security Council. It would, however, be desirable to strengthen the juridical basis of the decisions of the Security Council." (*Documents of the United Nations Conference on International Organization*, San Francisco, 1945, Vol. XII, pp. 48-49.)

The Delegate of the Union of Soviet Socialist Republics opposed the amendment stating: "There should be no question in the minds of any Delegates that the Security Council might wish in any way to infringe the rights of a sovereign state" (*ibid.*, p. 49). Moreover:

> "The Delegate of the United States emphasized the importance of the requirement that the action of the Security Council in dealing with a dispute involving a threat to the peace be taken 'in accordance with the purposes and principles of the Organization'. He referred to Chapter I, paragraph 1, as amended by the sponsoring governments, which states that one of the purposes of the Organization is to bring about the peaceful settlement of disputes 'with due regard for principles of justice and international law' (Doc. 2, G/29, p. 1). He did not interpret the Proposals as preventing any state from appealing to the International Court of Justice at any time on any matter which might properly go before the Court. On the whole, he did not consider the acceptance of the Belgian Amendment advisable, particularly since he believed that the Security Council was bound to act in accordance with the principles of justice and international law." *(Ibid.)*

The Delegate of France, while viewing with great sympathy the ideas in the Belgian amendment, expressed doubt about its efficiency and suggested that the sub-committee on drafting "should endeavor to give the most complete guarantees possible that the Security Council accomplish its task according to law and justice" (*ibid.*, p. 50).

The Delegate of Colombia expressed his warm support of the Belgian amendment.

On 22 May 1945, the Delegate of the United Kingdom stated that he thought the adoption of the Belgian amendment would be prejudicial to the success of the Organization. He submitted that the procedures proposed by the amendment would cause delay at a time when prompt action by the Security Council was most desirable (*Documents of the United Nations Conference on International Organization*, San Francisco, 1945, Vol. XII, p. 65).

The Delegate of South Africa supported this position, emphasizing the importance of the act of faith the small States were making in the acceptance of paragraph 4 (*ibid.*, p. 66). The Delegate of the Byelorussian Soviet Socialist Republic also opposed the Belgian amendment *(ibid.)*.

The Delegate of Belgium then requested a more precise answer to his previously posed question as to whether the term "recommend" in Chapter VIII, Section A, of the draft (corresponding to Chapter VII of the United Nations Charter) entailed obligations for States, parties to a dispute, or whether it meant only that the Council was offering advice which might or might not be accepted *(ibid.)*.

The Delegate of the United States expressed agreement with the views of the Delegate of the United Kingdom and said he had intended to make it clear that in Section A no compulsion or enforcement was envisaged *(ibid.)*.

The Delegate of Belgium stated that since it now was clearly understood that a recommendation made by the Council under Section A of Chapter VIII did not possess obligatory effect, he wished to withdraw the Belgian amendment. The withdrawal was accepted by the Chairman *(ibid.)*.

In another committee of Commission III (the Committee dealing with Structures and Procedures) similar discussions were taking place at the same time. The Delegate for Norway observed on 24 May 1945:

> "The Security Council was vested with enormous powers and little restraint was placed upon their exercise by the Dumbarton Oaks Proposals. The chapters on Purposes and Principles offered no such rules, with the exception of the principle of the sovereign equality of states. He felt that a basic rule of conduct must be formulated as a restraint on the Security Council and as a guarantee that it would not resort to a 'politique de compensation'. Whatever sacrifices the Security Council might require of a nation should not be of such a nature as to impair the confidence of that nation in its future." (*Documents of the United Nations Conference on International Organization*, San Francisco, 1945, Vol. XI, p. 378.)

I quote from the record:

> "The Representative of the United Kingdom, in opposing the Nor-

wegian amendment, pointed out that its purpose was already served by the amended principles in Chapter I, where it was stipulated that the Organization was to 'bring about by peaceful means, *and with due regard for principles of justice and international law*, adjustment or settlement ...' etc. In his opinion, the Norwegian amendment was not a desirable way of stating the case because he considered it inadvisable to limit the Council in its actions, as was in effect proposed, when it was dealing with a lawbreaker." (*Documents of the United Nations Conference on International Organization*, San Francisco, 1945, Vol. XI, p. 378.)

The Norwegian amendment was rejected on the ground that the concurrent revisions of the introductory chapters would provide for such standards as international law and justice (Ruth B. Russell, *A History of the United Nations Charter: The Role of the United States 1940-1945*, 1958, p. 665).

These discussions are useful reminders of the sense in which the powers of the Council were understood and adopted in the drafting of the United Nations Charter. The powers of the Council are subject to Articles 1 and 2 and, in particular, to the guarantees they provide of conformity with international law.

It is important to note also the genesis of Article 1 which sets out the Purposes and Principles of the United Nations.

The Dumbarton Oaks Proposals set out these Purposes as follows:

"1. To maintain international peace and security; and to that end to take effective collective measures for the prevention and removal of threats to the peace and the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means adjustment or settlement of international disputes which may lead to a breach of the peace;

2. To develop friendly relations among nations and to take other appropriate measures to strengthen universal peace;

3. To achieve international cooperation in the solution of international economic, social and other humanitarian problems; and

4. To afford a center for harmonizing the actions of nations in the achievement of these common ends." (*Ibid.*, p. 1019.)

It will be noticed that the phrase "in conformity with principles of justice and international law" which appears in the Charter was absent from these proposals. The addition of this phrase to the Dumbarton Oaks draft was due in no small measure to the fears expressed regarding the enormous powers that would be enjoyed by the Security Council. As Ruth Russell observes in her treatise on the history of the Charter:

"Beginning with the Chinese at Dumbarton Oaks, however, numerous complaints were heard that the Proposals apparently pro-

> vided for no standards of justice or of international law in connection with this purpose. At San Francisco, therefore, in accordance with the agreement made at Dumbarton Oaks, the Big Four officially adopted the Chinese amendment to add that peaceful settlement of disputes must be brought about 'with due regard for principles of justice and international law'." (*Op. cit.*, p. 656.)

The history of the United Nations Charter thus corroborates the view that a clear limitation on the plenitude of the Security Council's powers is that those powers must be exercised in accordance with the well-established principles of international law. It is true this limitation must be restrictively interpreted and is confined only to the principles and objects which appear in Chapter I of the Charter:

> "Le Secrétaire général des Nations Unies, dans une déclaration du 10 janvier 1947, a rappelé ce principe en ces termes: 'les seules restrictions sont les principes et les buts fondamentaux qui figurent au chapitre 1er de la Charte'." (Cot and Pellet, *La Charte des Nations Unies*, 2nd ed., 1991, pp. 462-463.)

The restriction nevertheless exists and constitutes an important principle of law in the interpretation of the United Nations Charter.

The obligation of the Court, as one of the principal organs of the United Nations, to "co-operate in the attainment of the aims of the Organization and strive to give effect to the decisions of other principal organs, and not achieve results which would render them nugatory" (I. S. Rosenne, *The Law and Practice of the International Court*, p. 70) should be read in the light of this clear limitation.

Chapters VI and VII of the Charter

In the light of these observations regarding the nature of a Security Council resolution under Chapter VI, it becomes clear that such a resolution does not impose a binding obligation. As Sir Gerald Fitzmaurice observed of Security Council functions under Chapter VI:

> "under this Chapter, these functions are not of an enforcement character. It is doubtful whether, on a proper reading of these functions, they enable the Council to do more than make *recommendations* with a view to the settlement of any dispute." (Fitzmaurice, "The Foundations of the Authority of International Law and the Problems of Enforcement", 1958, 19 *Modern Law Review*, p. 1, at p. 5; emphasis added.)

The *travaux préparatoires* of the Charter, the Charter itself and the wording of the resolution all point to this conclusion. Consequently the

fact that resolution 731 (1992) had been adopted by the Security Council was not an impediment to the consideration by the Court of the application made to it.

Moreover, whatever the resolution purported to do was required by Article 24 (2) of the Charter to be in accordance with international law. It is not for this Court to sit in review on a given resolution of the Security Council but it is within the competence of the Court and indeed its very function to determine any matters properly brought before it in accordance with international law. Consequently, the Court will determine what the law is that is applicable to the case in hand and would not be deflected from this course by a resolution under Chapter VI.

However, once we enter the sphere of Chapter VII, the matter takes on a different complexion, for the determination under Article 39 of the existence of any threat to the peace, breach of the peace or act of aggression, is one entirely within the discretion of the Council. It would appear that the Council and no other is the judge of the existence of the state of affairs which brings Chapter VII into operation. That decision is taken by the Security Council in its own judgment and in the exercise of the full discretion given to it by Article 39. Once taken, the door is opened to the various decisions the Council may make under that Chapter.

Thus, any matter which is the subject of a valid Security Council decision under Chapter VII does not appear, prima facie, to be one with which the Court can properly deal.

Resolution 731 (1992)

Resolution 731 (1992) expresses the Security Council's deep concern with international terrorism and the illegal activities directed against international civil aviation. It reaffirms previous resolutions calling upon all States to co-operate in preventing interference with civil air travel and all acts of terrorism, recalls its condemnation of the destruction of Pan Am flight 103 and the President's call on all States to assist in apprehension and prosecution of those responsible for this criminal act.

The resolution strongly deplored the fact that the Libyan Government had not responded effectively to earlier requests made by the Governments of France, the United Kingdom, and the United States to co-operate fully in establishing responsibility for the terrorist acts involved in the two air disasters involving Pan Am flight 103 and UTA flight 772. It urged the Libyan Government immediately to provide a full and effective response to those requests, and decided to remain seised of the matter.

There is no *decision* in the resolution addressed to other parties but only

a decision "to remain seized of the matter". Nor is there any indication on the face of the resolution, as there usually is in resolutions under Chapter VII, indicating that the resolution has been adopted under Chapter VII. It will be clear therefore that resolution 731 (1992) which was the resolution before the Court at the hearing of the oral argument did not in any way bar the consideration by the Court of the matters before it. The observations and exhortations it contained were not of a legally binding nature.

Resolution 748 (1992)

Resolution 748 (1992), by way of contrast, is clearly a resolution under Chapter VII and says so on its face. That resolution contains, unlike resolution 731 (1992), a series of decisions addressed to the Libyan Government and to all States.

Article 25 of the Charter, under which all Members of the United Nations agree to accept and carry out all *decisions* of the Security Council in accordance with the Charter imposes a binding legal obligation on all States of compliance with *decisions* of the Security Council. Article 25 is reinforced by Article 103 so that even in the event of a conflict with obligations under any other agreement, the obligations under Article 25 shall prevail.

Without expressing definitive views on the matter at this stage of provisional measures, I take the view that resolution 748 (1992) must be treated as binding on Libya as on all countries in terms of Article 25 of the United Nations Charter and that, in terms of Article 103, the obligations it lays down prevail over the obligations flowing from any other international agreement. In specific terms, this means that Libya is, prima facie, bound by the provisions of that resolution even if they should conflict with the rights Libya claims under the Montreal Convention. In this respect, I am in agreement with the view of the majority of the Court.

However, in my respectful view, it does not necessarily follow that the binding nature of resolution 748 (1992) renders it inappropriate for the Court to indicate provisional measures. I arrive at this conclusion after a careful perusal of all the provisions of resolution 748 (1992). There still seems to be room, while preserving full respect for resolution 748 (1992) in all its integrity, for the Court to frame an appropriate measure *proprio motu* which in no way contradicts resolution 748 (1992), Article 25 or Article 103 of the Charter.

An analysis of resolution 748 (1992) shows that it expresses deep concern with the failure of the Libyan Government to provide a full and effective response to the request in resolution 731 (1992) and contains strong condemnations of international terrorism. It determines, under Article 39 of the Charter, the existence of a threat to international peace and security

and decides to take certain actions under Article 41 of the Charter. All States are required on 15 April 1992 to adopt certain measures set out in the resolution. These measures include diplomatic sanctions and other sanctions of various sorts relating to aircraft and weapons. They are all measures under Article 41 which deals with measures not involving the use of force, and the Council has not moved beyond that Article.

The Montreal Convention

Article 14 (1) of the Montreal Convention is drafted in imperative terms, requiring any dispute concerning the *interpretation* or *application* of the Convention to be submitted to arbitration according to its terms. It will be noted that the section refers not merely to interpretation but goes further into the area of the manner in which that treaty is applied or to be applied.

The Montreal Convention is part of a concerted international response to the problem of terrorism, which has assumed importance in recent decades as a major international problem. Several separate conventions represent the international community's considered response to international terrorism and several of them embody provisions similar to those contained in Article 14, with eventual resort to the International Court.

It has taken around thirty years of multilateral effort to put together this structure of international response, if one goes back to the 1963 Tokyo Convention on Offences Committed on Board Aircraft. Most of these conventions have been ratified by over one hundred States. The UNITAR study, *The United Nations and the Maintenance of International Peace and Security*, 1987 (see p. 418), notes that, as at the time of that study, 132 nations were parties to the Convention on Offences and Certain Acts Committed on Board Aircraft (1969 Tokyo Convention); 127 nations were parties to the Convention for the Suppression of Unlawful Seizure of Aircraft (1971 Hague Convention); and 128 nations were parties to the Convention for the Suppression of Unlawful Acts Against the Safety of Civilian Aviation (1973 Montreal Convention).

Among the Conventions that contain a clause providing for resort to this Court where the dispute between parties cannot be settled by negotiation are the Convention on Offences and Certain Other Acts Committed on Board Aircraft 1963 (Tokyo Convention) — Article 24; the Convention on the Suppression of Unlawful Seizure of Aircraft 1971 (Hague Convention) — Article 12; the Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic

Agents 1973 (New York Convention) — Article 13; the International Convention Against the Taking of Hostages 1979 — Article 16.

Indeed, this pattern can be traced back in international practice to the days of the League of Nations when the 1937 Convention for the Prevention and Punishment of Terrorism, by Article 20, referred disputes on the interpretation or application of the Convention which could not be solved by diplomatic means to the Permanent Court of International Justice (see Richard B. Lillich, *Transnational Terrorism: Conventions and Commentary*, 1982, p. 175).

There is thus a vast body of international support for dealing with such offences within an ordered multilateral structure of negotiation and ultimate judicial settlement.

The Court as a judicial body administering international law cannot at this stage of its enquiries fail to note that Security Council resolution 731 (1992) makes no mention of the Montreal Convention or of the multilateral treaty structure built up to counter international terrorism.

Another aspect of the Montreal Convention is that it does not interfere with the principle of customary international law *aut dedere aut judicare*. Each Contracting State is however placed under a strict obligation, where it does not extradite an alleged offender, to submit the case to the competent authorities for prosecution (Art. 7). The principle *aut dedere aut judicare* is an important facet of a State's sovereignty over its nationals and the well-established nature of this principle in customary international law is evident from the following description:

> "The widespread use of the formula 'prosecute or extradite' either specifically stated, explicitly stated in a duty to extradite, or implicit in the duty to prosecute or criminalize, and the number of signatories to these numerous conventions, attests to the existing general *jus cogens* principle." (M. Cherif Bassiouni, *International Extradition: United States Law and Practice*, 1987, p. 22.)

As with its failure to consider the Montreal Convention, so also resolution 731 (1992) fails to consider this well-established principle of international law.

Conclusion

This very difficult case, arising from an incident so revolting to the global community and so universally condemned, needs to be approached from as many angles as possible.

Judge Lachs, in the *Aegean Sea* case, remarked on the complementarity of all the fora to which States may resort:

> "The frequently unorthodox nature of the problems facing States today requires as many tools to be used and as many avenues to be opened as possible, in order to resolve the intricate and frequently multi-dimensional issues involved." (*I.C.J. Reports 1978*, separate opinion, p. 52.)

He stressed in this context the role of the Court as an institution serving the peaceful resolution of disputes. In the present case, an appeal has been addressed to this Court to use its functions in the overall United Nations scheme, for the purpose of opening up another avenue towards settlement. Judge Lachs put his finger upon one of the principal roles the Court may play when he said, "In this way it may be possible to prevent the aggravation of a dispute, its degeneration into a conflict" *(ibid.)*.

One sees in this passage a key to the role the Court can play in this matter. It is seised of a dispute, it possesses prima facie jurisdiction, a situation of escalating tensions is developing and the Court's good offices are sought by one Party with a view to preserving such rights as it claims until their final determination by the Court.

This Court will not place itself in a position of confrontation with the Security Council where that organ has already exercised its powers in a manner which places obligations upon all United Nations Members. But in areas not covered by its binding decisions under Chapter VII, the Court is free to use its influence and authority to serve the purposes of international peace in which it has as much an interest as any organ of the United Nations. The furtherance and preservation of peace are not the exclusive preserve of one organ but the common goal of all. The Court has power to make an order *proprio motu* and is not limited to the terms in which relief has been sought by the petitioner. There is no impediment which prevents the Court from pursuing that common goal of peace by taking action which in Judge Lachs' words may make it "possible to prevent the aggravation of a dispute, its degeneration into conflict".

A great judge once observed that the laws are not silent amidst the clash of arms. In our age we need also to assert that the laws are not powerless to prevent the clash of arms. The entire law of the United Nations has been built up around the notion of peace and the prevention of conflict. The Court, in an appropriate case, where possible conflict threatens rights that are being litigated before it, is not powerless to issue provisional measures conserving those rights by restraining an escalation of the dispute and the possible resort to force. That would be entirely within its mandate and in total conformity with the Purposes and Principles of the United Nations and international law. Particularly when situations are tense, with danger signals flashing all around, it seems that this Court should make a positive response with such measures as are within its jurisdiction. If the conservation of rights which are *sub judice* comes within the jurisdiction of the Court, as I have no doubt it does, an order restraining damage to those

rights through conflict must also lie within that province. If international law is to grow and serve the cause of peace as it is meant to do, the Court cannot avoid that responsibility in an appropriate case.

I would indicate provisional measures *proprio motu* against both Parties preventing such aggravation or extension of the dispute as might result in the use of force by either or both Parties. Such measures do not conflict with any decision the Security Council has made under Chapter VII, nor with any obligation arising under Article 25, nor with the principle underlying Article 103. The way towards a peaceful resolution of the dispute may thus be preserved before the Parties find themselves on paths from which there may be no return. This action is based on Article 41 of the Statute of the Court and Articles 73, 74 and 75 of the Rules of Court.

(Signed) Christopher Gregory WEERAMANTRY.