DISSENTING OPINION OF JUDGE BEDJAOUI

[Translation]

1. In accordance with its commendable practice in that regard, the Court has given a very neutral title to the case brought before it. The title refers blandly to the "interpretation and application of the 1971 Montreal Convention arising from the aerial incident at Lockerbie". What occurred is not a mere "incident" but an abominable bombing that took 270 lives and demands the apprehension, prosecution and severe sentencing of its perpetrators, whoever they may be. But whatever the legitimate indignation that this detestable outrage may have aroused, its perpetrators must be brought to book only in strict conformity with international legality.

2. The examination by the Court of this international legality is a complex matter. This is due, to begin with, to the fact that the Court finds itself at the very first stage of the proceedings, the one concerning solely the indication of provisional measures. The Court therefore must, *ex hypothesi*, refrain at this stage from pronouncing on the merits, that is, on this international legality. The present phase allows it only to entertain a provisional and merely prima facie idea of the case, pending later consideration of the merits in a fully comprehensive way. The complexity of the situation is, moreover, due primarily to the fact that the cases are being dealt with simultaneously by two different organs, the Security Council and the International Court of Justice. It is not the first time that these two principal organs of the United Nations simultaneously exercise, with respect to a single case, their respective competences under the Charter (see, for example, the case concerning *Diplomatic and Consular Staff in Tehran* or the one concerning *Military and Paramilitary Activities in and against Nicaragua*). But, if the concomitant exercise of concurrent but not exclusive powers has thus far not given rise to serious problems, the present case, by contrast, presents the Court not only with the grave question of the possible influence of the decisions of a principal organ on the consideration of the same question by another principal organ, but also, more fundamentally, with the question of the possible inconsistency between the decisions of the two organs and of how to deal with so delicate a situation.

3. As its title indicates, the dispute of a legal nature brought before the Court concerns essentially the interpretation and the application of the 1971 Montreal Convention. The Court is asked to determine whether the Applicant, Libya, is under an international legal obligation to extradite two of its nationals, who are alleged to be the perpetrators of the Lockerbie bombing, in order that they be delivered up to the American and British judicial authorities. The two Respondent States, the United Kingdom

and the United States, assert that such an obligation exists, whereas Libya contests this view, which clearly demonstrates the existence between the three States of a well-defined legal dispute. But pending its decision on the merits, the Court has been asked by Libya to indicate such provisional measures as may be required to ensure that its final decision is not deprived of effectiveness as a result of a measure or action taken by the Parties in the meantime.

4. But in parallel with this very precise legal dispute, the United Kingdom and the United States have brought before the Security Council another dispute involving the Libyan State, which they accuse of being implicated in terrorism in general and in the Lockerbie bombing in particular. This dispute is quite different from the first one. For the first dispute concerns the extradition of two Libyan nationals and is being dealt with, legally, by the Court at the request of Libya, whereas the second dispute concerns, more generally, State terrorism as well as the international responsibility of the Libyan State and is being dealt with, politically, by the Security Council, at the request of the United Kingdom and the United States.

5. With regard to the role of the Court, as a judicial organ, with respect to the first dispute, the Court is in no way requested in the present proceedings to pass judgment on State terrorism and the international responsibility of Libya, particularly since the two Respondent States have presented no counter-claim in response to the Libyan Application. The second dispute, concerning the international responsibility of Libya, has been resolved in a strictly political way, the chief elements of the solution being the finding that Libya is responsible, a demand of compensation for the families of the victims and the imposition of an obligation concretely to renounce terrorism, whereas a judicial solution, which necessarily sets higher procedural standards, would have required, as a preliminary, the production of evidence, adversary proceedings and respect for due process of law.

6. Libya was fully within its rights in bringing before the Court, with a view to its judicial settlement, the dispute concerning extradition, just as the United Kingdom and the United States were fully within their rights in bringing before the Security Council, with a view to its political settlement, the dispute on the international responsibility of Libya. The respective missions of the Security Council and the Court are thus on two distinct planes, have different objects and require specific methods of settlement consistent with their own respective powers. Such a situation, involving two distinct procedures before two principal organs of the United Nations having parallel competences, is, I might add, not an unusual one, as I observed in paragraph 2 above. But the difficulty in the present case lies in the fact that the Security Council not only has decided to take a number of political measures against Libya, but has also demanded from it the *extradition of its two nationals. It is this specific demand of the Council that creates an overlap with respect to the substance of the legal dispute with which the Court must deal, in a legal manner, on the*

basis of the 1971 Montreal Convention and international law in general. The risk thus arose of the extradition question receiving two contradictory solutions, one legal, the other political, and of an inconsistency between the decision of the Court and that of the Security Council.

7. Such an inconsistency between the decisions of two United Nations organs would be a matter of serious concern. For it is as a rule not the Court's role to exercise appellate jurisdiction in respect of decisions taken by the Security Council in the fulfilment of its fundamental mission of maintaining international peace and security, no more than it is the role of the Security Council to take the place of the Court, thereby impairing the integrity of its international judicial function. But, at this stage of provisional measures requested by Libya, the present case compels us to confront this possibility of inconsistent decisions inasmuch as one of the Security Council's demands creates a "grey area" in which powers may overlap and a jurisdictional conflict comes into being. For the facts of this case give the Court the power to indicate provisional measures to preserve the possible right of the Applicant to refuse the extradition of two of its nationals, whereas the Security Council has just taken a decision that is mandatory under Chapter VII of the Charter calling for the extradition of these two individuals.

* * *

8. All the necessary conditions appear to me to have been fulfilled in order that the Court should have the power to indicate provisional measures at the request of the Applicant, pending a decision on the merits. First of all, no one doubts that the Court has before it a legal dispute concerning very precise questions of law arising from the interpretation and application of the 1971 Montreal Convention. Moreover the Court's competence is established on the basis of Article 14, paragraph 1, of that Convention. This Article subjects the submission of the matter to the Court to an initial requirement, namely, that prior negotiations between the Parties should have taken place. This requirement has been satisfied fully. The brief analysis I made earlier of the duality and non-identity of the disputes submitted *pari passu* to the Court and the Security Council shows that the negotiations sought with a view to settling the question of the extradition were essentially and in view of their nature destined never to become a reality. Since Libya refused to extradite its nationals and proposed substitute solutions (surrender of the two suspects to the United Nations, to the Arab League, to the judicial authorities of a third country, or to an international judicial or arbitral body, whereas the United Kingdom and the United States only offered Libya the choice between an extradition that as a matter of principle was not negotiable or the adoption of sanctions by the Security Council), it was obvious that the very notion of a negotiating process was meaningless in such a context. The case-law of the Court's predecessor is enlightening in this regard:

> "Negotiations do not of necessity always presuppose a more or less lengthy series of notes and dispatches; it may suffice that a discussion should have been commenced, and this discussion may have been very short; this will be the case if a dead lock is reached, or if finally a point is reached at which one of the Parties definitely declares himself unable, or refuses, to give way, and there can therefore be no doubt that *the dispute cannot be settled by diplomatic negotiation.*" (*Mavrommatis Palestine Concessions, P.C.I.J., Series A, No. 2,* p. 13.)

This view is shared by the present Court, as shown by its relevant holdings in the *Diplomatic and Consular Staff in Tehran* and the *Military and Paramilitary Activities in and against Nicaragua* cases.

9. Article 14, paragraph 1, of the 1971 Montreal Convention subjects the possibility of seising the Court to the fulfilment of a second and prior requirement, by virtue of which Libya would have had to await the expiration of a six-month time-limit during which it had to seek a settlement of the dispute by means of arbitration. There are several reasons why in the present case this requirement does not stand in the way of the Court being seised. It should first be noted that in response to the request for arbitration made by Libya the Permanent Representative of the United Kingdom to the United Nations stated that that request was "not relevant", since this makes it obvious that the decision by the United Kingdom and the United States to bring the matter to the Security Council so as to obtain from it a political solution foreclosed, from the outset, any possibility of an arbitral solution. The request for arbitration therefore appeared to be fundamentally inappropriate and inconsistent with the political measures which the Security Council was expected to take and were later taken. Accordingly arbitration was inherently and as a matter of principle ruled out, no matter how long Libya were to wait. The six-month time-limit was altogether meaningless inasmuch as it was inconsistent with the type of political settlement chosen by the two Respondent States, seeing that they opted for submission of the matter to the Security Council last January. The United Kingdom's characterization of arbitration as "not relevant" is not merely a rejection of this mode of settlement, but a categorical assertion of the inherent incompatibility between the arbitration requested and the political solution involving sanctions that was expected from the Security Council. And the fact that Libya subsequently made new proposals other than arbitration is less a sign of a certain inconsistency than an indication of the impossibility of arbitration, an impossibility of which Libya thus took note. Moreover Article 14, paragraph 1, of the 1971 Montreal Convention provides that it is "*within* six months" following the date of the request for arbitration that the Court may be seised at the instance of either one of the Parties. This means that it is not necessary to wait until this time-limit has expired completely, but that, on the contrary, it is possible to seise the Court "during" this six-month period, or "within" or "in

the course of" the period and never after its expiration. Libya is accordingly entitled to apply to the Court at any time prior to the expiration of the six-month time-limit. Thus the *ratione temporis* requirement laid down in the Convention should be interpreted in favour of Libya, both at the level of a literal interpretation of the text and by reference to its spirit and its purpose, on the one hand, and the context of this case, on the other. And, to borrow a passage that also dealt with a question of time-limit in connection with an agreement to arbitrate,

> "the terms of Articles II and III . . . make it crystal clear that they are not to be understood as laying down a precondition of the applicability of the precise and categorical provision [of an article of a treaty] establishing the compulsory jurisdiction of the Court" (*I.C.J. Reports 1980*, p. 25, para. 48).

10. There remains to be discussed the question of competence *ratione personae*. It has been contended that the 1971 Montreal Convention does not confer jurisdiction on the Court in this case since what we have here is not the actions of individuals but an instance of State terrorism. This contention calls for an answer at three different levels. In the first place, Article 1 of the 1971 Montreal Convention removes all doubt on this score to the extent that it refers to "any person" committing certain "acts" characterized as "offences". This means that the Convention applies very broadly to "any" person, whether that person acts on his own account or on behalf of any organization or on the instructions of a State. The most that can be said is that if the person that committed the offence acted as the organ of a State, the Convention could prove to be, not inapplicable, but rather ineffectual to the extent that the State that would opt not for extraditing but for prosecuting the suspects itself, before its own courts, would be judging itself, which, obviously, would not be a satisfactory solution. In the second place, and as has already been pointed out, the question of international responsibility of the State for unlawful acts of this nature has been entrusted to the Security Council and does not by any means constitute the substance of the dispute submitted to the Court concerning the existence or otherwise of an international obligation to extradite nationals. Thirdly, and in any event, it is important not to overlook the nature of the present phase of the proceedings and to note that

> "on a request for provisional measures the Court need not, before deciding whether or not to indicate them, finally satisfy itself that it has jurisdiction on the merits of the case . . ., yet it 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" (*Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Order of 10 May 1984, I.C.J. Reports 1984*, p. 179, para. 24).

Such is the case here and the Court is prima facie competent.

11. Needless to say, the Court may exercise jurisdiction in this case and indicate provisional measures, by virtue of Article 41 of its Statute, only if it considers that the circumstances so require in order that the rights of each of the Parties be preserved. It is therefore important that the rights capable of being protected should be identified. It has been maintained in this regard that such rights are non-existent or illusory or at any rate, given the imprecision of the request, insufficiently determined. I cannot share this view. In its final submissions, Libya presented two series of requests; one sought an injunction against the United Kingdom and the United States in order that they abstain from coercing Libya into extraditing its nationals, while the other sought to protect the rights of Libya in connection with the proceedings instituted by its Applications. The rights whose protection by means of provisional measures Libya is requesting are, in the first place, treaty rights which prima facie the Applicant is entitled to exercise just as much as any other party to the 1971 Montreal Convention. These rights are primarily the one the Applicant has to establish its jurisdiction over the alleged perpetrators of the bombing (Art. 5, para. 2, of the Convention); the right to apply Libyan law to the prosecution of the suspects (Art. 5, para. 3); the right to submit the case to its own criminal courts (Art. 7); the right, coupled with the corresponding obligations, to grant every procedural safeguard to the alleged perpetrators and protect them from the hasty judgments of public opinion or the mass media; the right, finally, to claim and obtain co-operation and judicial assistance from the other States concerned (Art. 11). The rights to be protected are, in the second place, those that the Applicant, as well as any other State, derives from the United Nations Charter or general international law (respect for the sovereignty, the territorial integrity, the political independence of the State, non-recourse to the threat or the use of force).

12. The rights in question are neither non-existent, nor illusory, nor indeterminate. Article 7 of the 1971 Montreal Convention, the provision that gave rise to the most discussion and is at the heart of the Libyan Application, categorically imposes on every State party to the Convention the obligation either to extradite or to prosecute before its courts the alleged perpetrators of an offence, in keeping with the traditional option to which the maxim *aut dedere aut judicare* refers. Without entering into the merits of the case, I would point out that, as is well known, there does not exist in international law any rule that prohibits, or, on the contrary, imposes the extradition of nationals. All that the régime laid down by the Montreal Convention does is to complement general international law by, on the one hand, rendering the various national laws applicable and, on the other hand, imposing on States an "obligation to take action", in accordance with their internal law, by either extraditing or arranging for prosecution before their own courts. This option is now valid, if not under general international law, at least between all the States parties to the 1971 Montreal Convention. This being so, it has been contended that the right to be protected here is illusory, since what we are dealing with is rather an obligation. But could it possibly be that a State is not authorized to claim

the right, which it derives, fundamentally, from its sovereignty, not to be hindered in the fulfilment of its international duty? Furthermore, it has been maintained that the 1971 Montreal Convention does not confer on a State party any right under Article 7 that it does not already possess by virtue of general international law, so that even if the 1971 Montreal Convention did not exist or Libya had not become a party to it Libya would remain free to deny extradition by virtue of international law. From this observation, which is correct, an erroneous conclusion has been drawn, namely, that the treaty right to be protected is non-existent, or illusory, inasmuch as Article 7 does not confer an additional right on a State. But is it conceivable that a right recognized by general international law and confirmed by an international convention would cease to exist altogether and no longer be entitled to protection as a result merely of its confirmation, which, on the contrary, would, it appears, strengthen it? In truth, this line of reasoning is based on the implicit view that in this case the Court could only apply the 1971 Montreal Convention, to the exclusion of general international law, whereas, obviously, the Court's Statute and its general mission spontaneously oblige it to apply that law.

13. The Court indicates provisional measures only to the extent that the rights recognized prima facie are threatened with disappearance. In the present case it does not appear necessary to dwell at great length on the irreparable nature of the prejudice that would result from the disappearance of these rights before the Court's decision on the merits. If the Applicant State is subjected to coercive measures, irrespective of their nature, with a view to bringing about its consent to the extradition of its nationals, notwithstanding that express provisions of its constitution or its laws prohibit it from doing so, can this mean anything other than that it has been compelled to waive a right recognized prima facie and that it has been forced to violate its own legislation? It is therefore clear that if this right is not protected by provisional measures, the possibility that it may disappear purely and simply cannot be rejected, so that, from this viewpoint, the prejudice would be irreparable in that the right that has been lost could not thereafter be restored. The threat of disappearance of this right was so real that it subsequently became a reality with the adoption of resolution 748 (1992), which in effect put an end to it!

14. As regards the question of urgency, which is another element the case-law of the Court traditionally takes into account in deciding whether or not to indicate provisional measures, it is abundantly clear that this urgency does exist in the case in point. Libya is asked to reply "immediately", or "without any further delay" to the requests of the two Respondent States, particularly as regards the extradition of its nationals.

15. On the basis of all the foregoing, I have reached the conclusion that all the conditions exist in the present case for the Court to indicate provisional measures. There is no doubt that this power, which the Court enjoys under Article 41 of its Statute, is wholly discretionary and that the Court must undertake an independent assessment of the "circumstances" in

order to ascertain whether they "require" the indication of provisional measures. But this examination is anything but arbitrary. If the case-law has gradually established the criteria and conditions which have to be fulfilled, here is the very proof that its appreciation does not possess this unpredictable and subjective character.

And even supposing the requests of the Applicant State still seemed imprecise, it is for the Court to indicate such provisional measures as it may deem to be more precise and more in conformity with the requirements of the case and the needs of the circumstances. Article 75, paragraph 2, of the Rules of Court authorizes the Court to "indicate 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". This Article therefore gives to the Court very broad scope, which, in this case, might even have extended to ordering the Applicant State to place the two presumed authors of the offence under the provisional authority and custody of a third State, of an international or regional organization, or even, why not, under the authority of the Court . . .

* * *

16. The Court has not ordered any of the provisional measures that the examination of the case should, in my view, have dictated to it and this is why, regretfully, I continue to have reservations about its decision. It is true that the legal dispute concerning extradition and of which the Court is seised is related to another dispute, dealt with politically by the Security Council, and relating in a broader sense to the international responsibility of the Applicant State. And in paragraphs 6 and 7 of this opinion, I pointed to the existence of an overlapping or "grey area" between the respective competences of the Security Council and the International Court of Justice, since the Council found it necessary to include in its requests to Libya a request for extradition, with which the Court is also dealing. In fact, the two Orders of the Court are limited to taking account of Security Council resolution 748 of 31 March 1992, which lays down sanctions taking effect against the Applicant State on 15 April if it has not, *inter alia*, extradited its two nationals. Hence, each of the two Orders contains an operative paragraph which is nothing more than a rejection of the request for provisional measures. This rejection does not appear to stem from the actual merits of the case and the intrinsic value of the Application, but rather from considerations and decisions external to the case, which could pose the problem of the integrity of the legal function. The two Orders do not appear to be an expression of the Court's discretionary power to refrain from indicating provisional measures; on the contrary, they are a result of a power "constrained" by a decision of the Security Council which, among other things, concerned the very object of the legal dispute submitted to the Court.

* * *

17. A procedural point needs to be made at the outset. Within the context of the political approach that the Security Council was perfectly entitled to adopt in dealing with the wider case of the international responsibility of a State, the Council adopted resolution 731 of 21 January 1992 under Chapter VI of the Charter and resolution 748 of 31 March 1992 under Chapter VII. It is important to establish the relationship between these resolutions and the legal dispute submitted to the Court. When the Court was seised of the Libyan Applications on 3 March, resolution 731 (1992), the first one, had already been adopted and the Parties had discussed it at length before the Court. Resolution 748 of 31 March 1992, on the other hand, was outside the purview of the case since it did not yet have any legal existence when the proceedings before the Court came to an end on 28 March 1992. A binding resolution of such importance, which had been notified to all States and was opposable to each of them, was naturally known to them. But it is one thing to know of that resolution and even to implement it, and another to "rely" on it before an international court. Unless formal (and adversary) procedures were instituted by the Parties to the dispute, the Court, it would appear, was not obliged to take into account a resolution passed after the closure of the proceedings and to apply it, retroactively as it were, to the case which had been submitted to it. The Court nevertheless deemed it better itself to take the initiative of eliciting the observations of the Parties on this point, during the deliberations. Regardless of the opinion one may have on the merits of this procedure, the fact is that resolution 748 (1992), which was adopted subsequent to the closure of the oral proceedings before the Court, was considered by it.

* * *

18. It seems that the Court was right not to allow itself at any time to be tempted to pronounce on the validity of the way the Security Council had intended to deal with the case of the international responsibility of a State for terrorist activities, which is wider than the dispute here. Leaving aside the thorny problem of the possible jurisdiction of the Court as regards contentious proceedings on the legality of the decisions of the Security Council, and also the fact that, in any case, the exercise of this possible jurisdiction would be premature at the present stage of a request for the indication of provisional measures, all that needs to be borne in mind is that the Court has not been seised of this vast dispute, brought before the Security Council. The Court was therefore right to refrain from reviewing the exercise by the Security Council of its exclusive power to deal with this case politically, that is to say, without regard to the norms and procedures applicable in a judicial institution such as the Court. Since the Court is unable to forget that it has not been seised, or, moreover, that it finds itself at a stage where it is refraining from dealing with the merits, it cannot apply its judicial criteria in order to assess in any way the legality of this political way of dealing with the matter, even if the view is held that at least

two facts should have prompted the Security Council to be especially circumspect about condemning Libya: on the one hand, the police enquiry seemed to have hesitated for a long time between a number of other avenues and, on the other hand, General Assembly resolution 41/38 of 20 November 1986 had cleared Libya, after the event, of unlawful acts for which, however, it paid in 1986 by the bombing of its territory at Tripoli and Benghazi.

19. The fact remains that the Court has refused, in a manner quite beyond reproach, to follow one of the Parties in criticizing the action of the Security Council, which had not considered requesting the Court for an Advisory Opinion that could have provided it with guidance before the adoption of resolution 731 of 21 January 1992. The fact that the Council refrained from doing this may be regrettable, but there is, alas, no provision in the Charter making it mandatory to consult the Court. On the contrary, everything indicated that the Council intended throughout to deal politically with a political case, whereas

> "the Court . . . has conceived of its advisory jurisdiction as a judicial function, and in its exercise of this jurisdiction it has kept within the limits which characterize judicial action. It has acted not as an 'academy of jurists' but as a responsible 'magistrature'" (Manley O. Hudson, *The Permanent Court of International Justice, 1920-1942*, p. 511).

By the same token, it was not possible to exercise a judicial review of the Council's action when, by adopting its resolution 731 (1992), it had placed itself firmly within the bounds of Chapter VI of the Charter relating to the peaceful settlement of disputes, but had shown a preference for certain methods of settlement over others. Thus, it did not encourage the States which had seised it to refer the matter to the Court, whereas Article 36, paragraph 3, of the Charter apparently imposed upon it a certain duty to

> "take into consideration that legal disputes should as a general rule be referred by the parties to the International Court of Justice in accordance with the provisions of the Statute of the Court".

20. Similarly, it is hard to see how the Security Council could be censured for having moved from Chapter VI, under which resolution 731 (1992) was adopted, to Chapter VII, the basis of resolution 748 (1992), thus discretionarily characterizing a situation as likely to threaten international peace and security. However, we know that, in the case of the *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, certain judges had objected to the way the Security Council had exercised its discretionary power to deal with a "situation . . . under the head of the maintenance of international peace and security" (*I.C.J. Reports 1971*, dissenting opinion of Judge Gros, p. 340, para. 34):

> "that is another attempt to modify the principles of the Charter as regards the powers vested by States in the organs they instituted. To assert that a matter may have a distant repercussion on the maintenance of peace is not enough to turn the Security Council into a world government."

Another judge also stated in the same case, in relation to Article 24 of the Charter, that it

> "does not limit the *occasions* on which the Security Council can act in the preservation of peace and security, provided the threat said to be involved is not a mere figment or pretext" (*I.C.J. Reports 1971*, dissenting opinion of Judge Sir Gerald Fitzmaurice, p. 293, para. 112).

Further on, the same judge added that certain

> "limitations on the powers of the Security Council are necessary because of the all too great ease with which any acutely controversial international situation can be represented as involving a latent threat to peace and security, even where it is really too remote genuinely to constitute one. Without these limitations, the functions of the Security Council could be used for purposes never originally intended . . . [There was] no threat to peace and security other than such as might be artificially created as a pretext for the realization of ulterior purposes." (*Ibid.*, p. 294, para. 116.)

21. These opinions appeared at a time when the Court was to discuss the consequences of the termination of South Africa's mandate over Namibia, decided upon by the General Assembly and "confirmed" by the Security Council. What matters here is obviously not the case in itself, but the discussion, symptomatic as well as topical, set in motion concerning *the limits* which can be assigned to the action of the Security Council and the desire expressed by certain judges to avoid a situation where it "exceeds its competence" (*ibid.*, dissenting opinion Fitzmaurice, p. 295, para. 116 *in fine*). Generally speaking, the question of the validity of the resolutions of the principal United Nations organs with respect to the Charter and/or international law has been the subject of numerous studies and prestigious authors have, in the past, questioned the legality of some of these resolutions (see, for example, Hans Kelsen, *The Law of United Nations*, London, 1951, pp. 195, 197 *et seq.*, 287 *et seq.* and *passim*). But in the present case, how can the Court, which is not seised of the wider dispute, dispute the fact that the Security Council is responsible for qualifying international situations and that it can place itself within the purview of Chapter VII of the Charter, even if no small number of people may find it disconcerting that the horrific Lockerbie bombing should be seen *today* as an *urgent* threat to international peace when it took place *over three years ago*?

* * *

22. Hence, if the simple but essential distinction made at the beginning of this opinion is borne in mind, between the quite specific juridical dispute submitted to the Court and the much wider political dispute brought before the Security Council, it becomes perfectly understandable that, given its functions and powers, the Court has no alternative but to refrain from entertaining any aspect whatever of the political solutions arrived at by the Security Council. The Court's attitude in this respect continues to be defensible *so long as* no aspect of these political solutions adopted by the Council sets aside, rules out or renders impossible the juridical solution expected of the Court. It is clear that, in this case, it is the judicial function itself which would be impaired. Indeed, this is what is happening here in the area where these two disputes overlap, where the solution arrived at by the Council to the question of the extradition of two individuals deprives a solution found by the Court of all meaning.

23. Such a situation, in which, on the basis of the inherent validity of the case, the Court should have indicated provisional measures solely in order to protect a right that the Security Council annihilates by its resolution 748 (1992) when the case is *sub judice*, is not satisfactory for the judicial function. It is even less so when one of the two Respondents, the United States of America, asks the Court quite simply to refrain from exercising its judicial duty and to bow to the Security Council "in order to avoid any conflict" with it. In a letter of 7 April 1992, the Agent of the United States of America, in reply to the letter of 4 April by which the Court invited the Respondent to make observations on the consequences of resolution 748 (1992) for the present proceedings, had stated that *"in order to avoid any conflict with the Security Council the Court should decline the request to indicate provisional measures in this case"* (emphasis added). Precisely the same thing was demanded of the Court by one of the United States counsel during the hearings, that is to say, *before resolution 748 (1992) came into force.* "The Court", he said, "*ought* to examine whether its actions would conflict with the actions that the Council has taken or *is considering*..." (Public Sitting of 27 March 1992, CR 92/4, p. 67; emphasis added). Such invitations clearly made to the Court to refrain from exercising its judicial function independently are puzzling. In the past the Security Council awaited the Court's decision. In the *Anglo-Iranian Oil Co.* case, the Council, before which the matter had been brought in 1951 by the United Kingdom, which was asking it to take measures against Iran, postponed discussion until the Court's decision. Also today, in the Security Council, a number of member States, whether or not they voted for resolutions 731 (1992) and 748 (1992), have expressed their deep conviction that it is necessary to allow the Court to perform its task and, in fact, they are expecting the Court to lay down international legality.

* * *

24. Security Council resolution 748 of 31 March 1992 states, in paragraph 1, "that the Libyan Government must now comply without any further delay with paragraph 3 of resolution 731 (1992) regarding the requests" that the two Respondents had made to it and, in particular, the request for extradition, which is the whole subject of the present proceedings. This is where the "conflict" lies. During the hearings, the Applicant State had already raised the question of the constitutional validity of resolution 731 of 21 January 1992 in general terms, resolution 748 (1992) not yet having come into force (Public Sitting of 26 March 1992 (morning)). This question of validity is liable to raise two major problems, at once serious and complex, namely, whether the Security Council should, in its action, firstly respect the United Nations Charter and secondly respect general international law.

25. The first problem is perhaps the less difficult of the two. Simplifying a great deal, one could say that it would not be unreasonable to state that the Security Council must respect the Charter, on the one hand because it is the act to which it owes its very existence and also and above all because it serves this Charter and the United Nations Organization. The *travaux préparatoires* of the San Francisco Conference showed the degree of concern aroused by this problem and it transpires therefrom that the spirit of the Charter is indeed to prevent the Security Council from diverging in any way at all from that Charter.

But over and above the spirit of the Charter, the actual text points the same way. Article 24, paragraph 2, of the Charter expressly states that "in discharging [its] duties, the Security Council shall act in accordance with the Purposes and Principles of the United Nations". In that case, one of the questions which would arise would be whether one organ can act in a way which renders the role of the other impossible. And this applies as much to the Security Council as to the Court itself, inasmuch as it is true that the Charter lays down that each of the United Nations organs should carry out its task fully, and not abdicate any part of it, in order to assist in the accomplishment of the purposes and principles of the United Nations. Now, Article 92 of the Charter states that the Court is the principal judicial organ of the United Nations and Article 36 of the Court's Statute, which is an integral part of the Charter, confers upon the Court the power to settle "all legal disputes concerning: *(a)* the interpretation of a treaty; *(b)* any question of international law; . . .".

26. The second problem, relating to respect for international law by the Security Council, is a more acute one. In laying down that the Council shall act in accordance with the "Purposes and Principles of the United Nations", Article 24 of the Charter (which I have already cited) refers to Article 1, paragraph 1, which provides that the action of the Security Council (as that is essentially what is referred to in the context of that Article) is to take measures "in conformity with the principles of justice and international law". Of course, the Council must act in accordance with the "principles of justice" — a relatively vague expression — just as it should also draw inspiration from other principles of a political or other nature.

However, is not the essential point of concern to us here the fact that the Council is bound to respect "the principles of international law", an expression that holds a more precise meaning for international lawyers? A former judge of the Court, Sir Gerald Fitzmaurice, said with reference to such a principle that:

> "This is a principle of international law that is as well-established as any there can be, — and *the Security Council is as much subject to it* (for the United Nations is itself a subject of international law) as any of its individual member States are." (*Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971*, dissenting opinion, p. 294, para. 115; emphasis added.)

27. However, in so far as the question of the validity of resolution 731 (1992) and, more particularly, of resolution 748 (1992) may arise with respect to the Charter or with respect to international law, one also needs to take account of the fact that the Court cannot, at this preliminary stage of the proceedings, decide on substantive issues in the two cases. This means that the situation is, in my view, one that must be summed up as follows: on the one hand, I consider that the rights alleged by Libya do exist prima facie and that all the conditions normally laid down by the Court for the indication of provisional measures have been met in this case, so that those rights may be preserved in accordance with Article 41 of the Statute of the Court. Moreover, it is on this point that I have reservations about the two Orders of the Court — even though the Court, in its statement of reasoning, does not completely set aside the possibility of indicating provisional measures, judging from paragraph 40 of the Order ("whatever the situation previous to the adoption of that resolution [i.e., 748 (1992)]"). However, from another standpoint, Security Council resolution 748 (1992) has annihilated those rights of Libya, without it being possible for the Court, in this phase of provisional measures or, in other words, of a preliminary examination prima facie, to take it upon itself to give a premature decision on the substantive issue of the constitutional validity of that resolution, so that the resolution benefits from a presumption of validity and must be considered prima facie as both lawful and binding[1]. I am accordingly in agreement with the majority of the Court on this second point.

---

[1] Unless one supposes that resolution 748 (1992) has as its object, or effect, not to withdraw a right from an Applicant State, but to prevent the exercise, by the Court itself, of the judicial function with which it has been invested by the Charter, in which case one might be led to ponder seriously over the lawfulness of that resolution, even at this stage of provisional measures. It would, indeed, be manifestly incompatible with the Charter for an organ of the United Nations to prevent the Court from accomplishing its mission, or for it actually to place the Court in a state of subordination which would be contrary to the principle of separation and independence of the judicial from the executive power, within the United Nations.

28. Accordingly, and as the Court has stated, Libya, as a Member State of the United Nations, appears bound to accept and apply Security Council resolution 748 (1992), which is taken to be lawful and binding at this stage of the proceedings, even though Article 25 of the Charter does not overlook the need for it to accord with the Charter (in an ambiguous form of words which may seem to impose that conformity with respect to both the resolution and its acceptance by Member States).

29. The situation thus characterized, with rights which deserve protection by the indication of provisional measures but have also been annihilated by a Security Council resolution that should be deemed prima facie to be valid, does not fall completely within the framework of Article 103 of the Charter, but in fact goes slightly beyond it. That Article, which gives precedence to obligations under the Charter (i.e., Libya's obligation to comply with resolution 748 (1992)) as compared to obligations "under any other international agreement" (here the 1971 Montreal Convention) is aimed at "obligations" — whereas we are dealing with alleged "rights" such as, in my view, are protected by provisional measures — and, in addition, does not cover such rights as may have other than conventional sources and be derived from general international law.

30. Subject to this minor nuance, it is clear that the Court could do no more than take note of that situation and hold that, at this stage of the proceedings, such a "conflict", governed by Article 103 of the Charter, would ultimately deprive the indication of provisional measures of any useful effect. However, the operative part of the two Orders places itself at the threshold of the whole matter and decides that the Court, in the circumstances of the case, is not required *to exercise its power* to indicate provisional measures. I take the rather different view that the facts of the case do indeed justify the effective exercise of that power, while I would point out that its *effects* have been nullified by resolution 748 (1992). This means that I arrive, concretely, at the same result as the Court, albeit by means of a quite different approach, but also with the important difference that I am not led to reject the request for provisional measures, but rather to say that its *effects* have ceased to exist. Moreover, I subscribe to the opinion of the majority, according to which the Court

> "cannot make definitive findings either of fact or of law on the issues relating to the merits, and the right of the Parties to contest such issues at the stage of the merits must remain unaffected by the Court's decision" (para. 38)

and, in addition, "the decision given in these proceedings in no way prejudges any [of the] question[s] [raised before the Court . . . including the question relating to its jurisdiction to deal with the merits]", leaving "unaffected the rights of the Government of Libya and the Government of the United Kingdom to submit arguments in respect of any of these questions" (para. 42).

* * *

31. That said, I would like to return to the opinion I expressed earlier that it should have been imperative for the Court to indicate provisional measures on the basis of the facts of the case submitted to it — even if the *effects* of that decision might have been negated by resolution 748 (1992). I would add that, even if the majority had been in some doubt — which I personally do not share — as to the capacity of the Applicant State to have satisfied one or the other prerequisite for the indication of provisional measures, the Court still had the option of itself indicating, *proprio motu*, any provisional measures which it might have considered more appropriate than those requested of it by the Applicant State. That would have been in conformity not only with Article 41 of the Statute and Article 75 of the Rules, but also with the Court's jurisprudence. Thus in the case concerning the *Frontier Dispute (Burkina Faso/Republic of Mali), Provisional Measures*, the Court held 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*" (*Order of 10 January 1986, I.C.J. Reports 1986*, p. 9, para. 18; emphasis added).

32. This is a case-law which, instead of focusing on a review of each prerequisite to the indication of provisional measures, gives pride of place to a comprehensive analysis of the "circumstances" of the case, it being decided, on that basis, to indicate those measures in the general terms of an exhortation to all the parties not to aggravate or extend the dispute. The provisional measure thus taken, in the form of an exhortation, does not in any way depend upon the indication of other, more specific provisional measures. The exhortation is an independent measure which is not necessarily connected or linked to any others, so that, even though the Court might have been justified, in the present case, in finding that there had been a failure to satisfy a given prerequisite for the indication of certain specific measures, it at least had the option of indicating a general, independent measure, in the form of an appeal to the Parties to refrain from aggravating or extending the dispute or of an exhortation to them to collaborate in a search for settlement out of court, either directly or through the intermediary of the Secretariat of the United Nations or the Secretariat of the Arab League — which, moreover, is what is currently being attempted.

33. Such is the wide range of what is available in the relevant holding in the case concerning the *Frontier Dispute (Burkina Faso/Republic of Mali)*, which was extended, in an interesting fashion, by the recent decision in the case concerning *Passage through the Great Belt (Finland* v. *Denmark)*. In the latter case, the Court began by recalling its decision in the *Free Zones* case, in which it had held that:

> " 'the judicial settlement of international disputes, with a view to which the Court has been established, is simply an alternative to the direct and friendly settlement of such disputes between the Parties; . . . consequently it is for the Court to facilitate, so far as is compatible with its Statute, such direct and friendly settlement . . .' (*Free Zones of Upper Savoy and the District of Gex, P.C.I.J., Series A, No. 22*, p. 13; see also *Frontier Dispute, I.C.J. Reports 1986*, p. 577, para. 46.)"

The Court went on to say that:

> "pending a decision of the Court on the merits, any negotiation between the Parties with a view to achieving a direct and friendly settlement is to be welcomed" (*Passage through the Great Belt (Finland* v. *Denmark), Provisional Measures, Order of 29 July 1991, I.C.J. Reports 1991*, p. 20, para. 35).

34. What is more, regard being had to the seriousness of the circumstances of this case, would not an indication of a provisional measure of that kind have been an elegant way of overcoming the deadlock brought about by the opposition between, on the one hand, the more specific provisional measures that the Court might have indicated on the basis of the Applicant's requests and, on the other hand, Security Council resolution 748 (1992), which would, in any event, have negated them? It would have been an elegant way of getting around a major difficulty and, at the same time, a very advantageous way of promoting a settlement, for the good of all concerned, along lines that it in fact seems to be taking . . .

I accordingly regret that the Court was not able to indicate either specific provisional measures at the request of the Applicant State, or general measures *proprio motu*, in order to make its own positive contribution to the settlement of the dispute. It follows that, when all is said and done, my only course of action is to vote against the two Orders.

(Signed) Mohammed BEDJAOUI.