DISSENTING OPINION OF JUDGE RANJEVA

[Translation]

1. The present request for the indication of provisional measures is, in many respects, an unprecedented case in international adjudication. While the Court cannot reject the request (I), it cannot pass upon it owing to the fundamental change of circumstances following the adoption of Security Council resolution 748 (1992) (II), without for all that refraining, in principle, from the *proprio motu* exercise of its powers under Article 41 of the Statute (III).

I. The Court's Competence to Order Provisional Measures

2. On the basis of general international law, confirmed by the Montreal Convention, the Applicant enjoys the right to choose expressed in the traditional adage: *aut dedere aut judicare*; this right is opposable *erga omnes* and creates the obligation to effectively carry through, in normal conditions, proceedings for the establishment of criminal responsibility in the Lockerbie bombing. However, the Respondent has contested this right of the Applicant by characterizing it as "illusory".

3. On analysis, the Respondent's thesis appears to be contestable inasmuch as it is guilty of confusion. For either the Respondent is questioning the efficacy of the provisions of the Convention relating to extradition, or he is contesting the Applicant's right to effectively exercise his competence in this sphere. If the former is the case, the result would be deplorable; but this would in no way weaken the binding nature of the provisions of the Convention, being as they are binding on all the parties to the said instrument. If the latter is the case, we would be faced with a disregard for the "general principles of law recognized by civilized nations", principles founded upon the equality of States and their equal ability to ensure that obligations under international law are fulfilled.

4. Hence the Court is not seised solely of the question of the Applicant's obligation to extradite two of its nationals suspected, on completion of the preliminary enquiries, of being the authors of the Lockerbie bombing. No Application alleging international responsibility for an act of terrorism has been filed. This Court has therefore rightly limited the subject of its proceedings solely to the question of the Applicant's right to oppose, by judicial means, a possible obligation to extradite its nationals, whom it intends to prosecute, exercising its right thereto under international law and the Montreal Convention.

5. The case-law of the Court, referred to in the case concerning *Passage through the Great Belt* (*I.C.J. Reports 1991*, p. 17, para. 22), justified the indication of provisional measures *in principio litis*. In the particular cir-

cumstances of the case, with respect to both its scope and its nature, the Applicant's right would have been under threat of disappearance had the contrary claim of the Respondent been acted upon. Here, on the contrary, under the Montreal Convention, the Respondents possess the power to prosecute the above-mentioned suspects. This collision of opposing rights, a clash centred upon a question of criminal responsibility, is the cause not only of what may well be irreparable prejudice, but above all of an aggravation of the dispute. Under Article 41 of the Statute, the Court has the power to indicate "provisional measures . . . to preserve the respective rights of either party". Hence it was for the Court, in the interests of the good administration of justice, to decide, bearing in mind the equality of rights of the Parties and the maintenance of international peace and security, to ensure that the legal obligations of the various Parties were respected.

6. The adoption of the recommendation which is the subject of Security Council resolution 731 (1992) does not deprive the Applicant of its right to institute proceedings before the Court to request the indication of provisional measures. On examination, the operative parts of this resolution prove to be an interpretation that this principal political organ of the United Nations gives of the application of the rules in the Lockerbie bombing. The nature of the Security Council does not confer upon its recommendatory acts the legal effects of *res judicata*. It is from the standpoint of international law, of which the Charter and the law of the United Nations form an integral part, that the scope of resolution 731 (1992) must be considered with respect to the request for the indication of provisional measures. In the present case, the Applicant has used a remedy open to every State wishing to request of the Court the legitimate protection of its right to pass judgment. The adage *una via electa* does not apply when it comes to governing two rights of action which are different in nature, namely, one before the Court and the other in the Security Council. In the judicial field, it is the judicial course, based upon international law, which prevails in case of conflict.

7. For these reasons, the Court was in my view empowered to indicate provisional measures for the protection of the rights of all the Parties, rights which were under threat of disappearance. The duty to co-operate and afford legal assistance laid down by the Montreal Convention provided the Court with a suitable framework for determining the object of the appropriate measures. Hence, the request for the Court to indicate provisional measures was well founded, Security Council resolution 731 (1992) notwithstanding.

II. The Fundamental Change in the Legal Circumstances

8. The adoption of the decision to impose sanctions, which are the subject of Security Council resolution 748 (1992), is a given whose effects, under Articles 103 and 25 of the United Nations Charter, could not be ignored by the Court. The absence of action or objection, with respect to

this decision by one of the principal political organs of the United Nations, did not prevent the Court from noting that the first paragraph of the resolution deprived of all effect the provisional measures that the Court might have ordered with respect to all Parties to the dispute. The fundamental change in the legal circumstances since the filing of the Application, without there being any change in the factual circumstances of the case, prevented the Court, the principal judicial organ, from exercising its legal function to settle the dispute between the Parties to the full extent of its powers.

III. THE *PROPRIO MOTU* INDICATION OF PROVISIONAL MEASURES IN GENERAL

9. Although there is no doubt that the adoption of resolution 748 (1992) means that the Court can no longer indicate provisional measures on the basis of the submissions in the request, provisional measures were a possibility under Articles 41 of the Statute and 75 of the Rules concerning the power to indicate *proprio motu* provisional measures. The development of the case-law concerning reference to the above-mentioned provisions is bound up with the relationship between the two terms in the duality: right of the Parties/jurisdiction of the Court. Prior to 1972, priority was granted to questions of jurisdiction, so that the Court interpreted its powers very restrictively. But since the Order of 17 August 1972 for provisional measures the Court made in the *Fisheries Jurisdiction (Federal Republic of Germany* v. *Iceland)* case, the terms of the problem have altered. I quote from that Order:

> "the Court need not, before indicating them [provisional measures], finally satisfy itself that it has jurisdiction on the merits of the case... it ought not to act under Article 41 of the Statute if the absence of jurisdiction ... is manifest." (*I.C.J. Reports 1972*, p. 33, para. 16.)

Limiting consideration of the question of jurisdiction to its prima facie aspect at the stage of requests for provisional measures has led the Court to pay greater attention to the circumstances of the case. The Order of 10 January 1986 for provisional measures in the *Frontier Dispute (Burkina Faso/Republic of Mali)* case thus formally marks the development of a practice of the Court described in the following terms:

> "Considering that, independently of the requests submitted by the Parties for the indication of provisional measures, the Court or, accordingly, the chamber possesses by virtue of Article 41 of the Statute the power to indicate provisional measures with a view to preventing the aggravation or extension of the dispute whenever it considers that circumstances so require" (*I.C.J. Reports 1986*, p. 9, para. 18).

This method of analysis embracing the totality of the circumstances was

enunciated in the Order for provisional measures made on 10 May 1984 in the case concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America)* as follows:

> "Whereas by the terms of Article 41 of the Statute the Court may indicate provisional measures only when it considers that circumstances so require to preserve the rights of either party" (*I.C.J. Reports 1984*, p. 180, para. 27).

Since

> "Whereas the Court has available to it considerable information concerning the facts of the present case, including official statements of United States authorities; whereas, the Court, in the context of the present proceedings on a request for provisional measures, has in accordance with Article 41 of the Statute to consider the circumstances drawn to its attention as requiring the indication of provisional measures, but cannot make definitive findings of fact, and the right of the respondent State to dispute the facts alleged and to submit arguments in respect of the merits must remain unaffected by the Court's decision" (*ibid.*, p. 182, para. 31).

The Court concluded as follows:

> "Whereas in the light of the several considerations set out above, the Court finds that the circumstances require it to indicate provisional measures, as provided by Article 41 of the Statute of the Court, in order to preserve the rights claimed (see *Fisheries Jurisdiction (United Kingdom* v. *Iceland), Interim Protection, Order of 17 August 1972, I.C.J. Reports 1972*, pp. 17-18; *Fisheries Jurisdiction (Federal Republic of Germany* v. *Iceland), Interim Protection, Order of 17 August 1972, ibid.*, pp. 35-36)" (*ibid.*, p. 186, para. 39).

One is therefore inclined to wonder whether the appeals that the Court addresses to the Parties henceforward can only be made in the context of measures related to provisional measures which have been indicated.

10. However, in the light of the relevant holding in the *Passage through the Great Belt (Finland* v. *Denmark)* case, it is clear that the reply must be negative:

> "Whereas, as the Permanent Court of International Justice observed, and the present Court has reiterated,
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> '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; as 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);

whereas, 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" (*I.C.J. Reports 1991*, p. 20, para. 35).

Indeed, by the Order of 29 July 1991, while rejecting provisional measures, the Court invited the parties to negotiate. The Court's appeal to the parties may be subject to criticisms stemming directly from a strict analysis of the concept of judicial function, but the exercise of the judicial function is surely a dynamic part of a wider fundamental obligation, as the following quotation indicates:

"*Article 1*

The Purposes of the United Nations are:

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 for the suppression of acts of aggression or other breaches of the peace, and 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." (Article 1 of the Charter of the United Nations.)

In the light of these observations, the reasons for the Court's concern to ensure that the dispute does not become aggravated or degenerate into conflict become clear. In the two cases referred to, it was armed actions which constituted the factual circumstances. Hence, *proprio motu*, the Court pronounced not only on the wisdom of an appeal it in fact made but also on the extrajudicial forms that the settlement of the dispute might take.

11. In the context of the present case, the circumstances were a source of much greater concern, owing to the direct reference to Chapter VII of the Charter. The question of the opinion of the Security Council was no longer limited to a dispute between the Parties in contention, but concerned the collective security of all States and all peoples. In my view, this new dimension did not permit the Court to ignore the very object of the proceedings to settle the disputes and limit itself to a passive approach to its judicial function. It follows that the Order should refer to the characterization made by the Security Council and draw attention, even in the context of resolution 748 (1992), to general obligations with respect to conduct that tend to limit the aggravation of the dispute.

12. For these reasons, in my opinion, the Court should have pronounced on the merits of the request, the object of which has disappeared owing to the effects of resolution 748 (1992), and should also have acknowledged its inability to rule owing to supervening circumstances external to the dispute and subsequent to the filing of the Application, at the same time calling on the Parties to avoid all escalation. This solution, which although uncomfortable nevertheless accords with the description of the development of the proceedings, seems to me a useful one. For over

and above the present dispute between the Parties, what is at issue here is the right of all States parties to the Montreal Convention and concerned with the suppression and prevention of terrorism against aircraft and the safety of air travel. Also, the new elements in international relations call for greater clarification of United Nations law on the one hand as regards the line of demarcation between the fields respectively covered by Chapters VI and VII of the Charter, as indicated by the work of the General Assembly's Sixth Committee (forty-fifth session) and, on the other hand, a new characterization of situations from the standpoint of the relevant provisions of the Charter. Indeed, as the Court has observed:

> "The political character of an organ cannot release it from the observance of the treaty provisions established by the Charter when they constitute limitations on its powers or criteria for its judgment." (*Conditions of Admission of a State to Membership in the United Nations (Article 4 of Charter), Advisory Opinion, 1948, I.C.J. Reports 1947-1948*, p. 64.)

(Signed) Raymond RANJEVA.