DISSENTING OPINION OF JUDGE AJIBOLA

After due and careful reflection, I have decided to write a dissenting opinion on the issue of Libya's request for the Court to indicate provisional measures under Article 41 of the Statute. I think it is necessary for me to write this dissenting opinion on some of the issues that are of primordial significance in the request before us, reflecting some of the reasons upon which my decision is based. The subject-matter of this case is not only unique in nature but is also of fundamental importance in the field of international law.

Needless for me to state the facts of the case herein, other than to say that the catastrophic aerial incident at Lockerbie of 21 December 1988 which resulted in the death of 270 people is the subject-matter of this action brought by the Libyan Arab Jamahiriya (otherwise Libya) against the United States based on the interpretation and application of the 1971 Montreal Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation. An aspect of its uniqueness is the fact that the subject-matter of the case is contemporaneously before the Security Council.

One may go further to state that that alone does not make it unique *ipso facto* because in recent times the issues presented by at least three cases before the Court have at the same time been deliberated upon by the Security Council (cf. *Aegean Sea Continental Shelf (Greece* v. *Turkey), I.C.J. Reports 1976*, p. 3; *United States Diplomatic and Consular Staff in Tehran (United States of America* v. *Iran), I.C.J. Reports 1980*, p. 3; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), I.C.J. Reports 1984*, p. 169). In these three cases the Court and Security Council exercised mutual or in fact "symbiotic" powers and functions. In effect these two main organs of the United Nations as established under Article 7 of the Charter even though exercising their respective powers and functions independently and *pari passu* did so in parallelism. In all three cases, the Court, while supportive of the Security Council, unambiguously confirmed its authority to adjudicate issues within its jurisdiction even where the Security Council is seised of the same matter. For example, while indicating provisional measures in the *United States Diplomatic and Consular Staff in Tehran* case, the Court "endorsed" resolution 457 of 1979, which called for the immediate release of the hostages and further 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 a 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." (*I.C.J. Reports 1980*, p. 22, para. 40.)

Similarly in the Nicaragua case, the Court made the following significant pronouncement on its jurisdiction:

> "The United States is thus arguing that the matter was essentially one for the Security Council since it concerned a complaint by Nicaragua involving the use of force. However, having regard to the *United States Diplomatic and Consular Staff in Tehran* case, the Court is of the view that the fact that a matter is before the Security Council should not prevent it being dealt with by the Court and that both proceedings could be pursued *pari passu*." (*I.C.J. Reports 1984*, p. 433, para 93.)

Admittedly, the Security Council is a political organ, while Article 92 of the United Nations Charter describes the Court as "the principal judicial organ of the United Nations". However, in this case, one is inclined to admit an overlap of function, even though a cursory evaluation may suggest a contrary view. For example, the Montreal Convention on which Libya's Application is based squarely presents the Court with issues of "rights" and "disputes" under international law, involving, in particular, extradition, while the Security Council is dealing with the issue of the "surrender" of two suspects and the problem of international terrorism as it affects international peace and the security of nations — i.e., matters of a political nature.

There is also the issue of different connotations of the word "co-operation". While the Security Council wants Libya to co-operate with the United States by surrendering to her the two suspects in Libya, the Application of Libya seeks the co-operation of the United States in prosecuting the two suspects in Libya under the Libyan Criminal Code and in accordance with Article 11 (1) of the 1971 Montreal Convention.

Assuming for the moment that there were no resolutions or any action whatsoever on this matter in the Security Council, the question is, what would have been the attitude and approach of the Court to the interim measures sought by Libya? In my view, to indicate interim measures in this case, the Court must answer the following preliminary questions in the affirmative:

1. Does the Court have prima facie jurisdiction to entertain this Application?
2. Are there legal disputes between the Applicant and the Respondents in accordance with the provisions of the 1971 Montreal Convention? If so, what are these disputes?
3. Are the "rights" being claimed by the Applicant legal rights sustainable under international law? If so, what are these legal rights?

4. Is this matter urgent to warrant immediate attention of the Court and upon which provisional measures should be pronounced?
5. Has the Court jurisdiction to entertain this matter presently, or was it prematurely brought before the Court having regard to the provisions of Article 14 (1) of the 1971 Montreal Convention upon which the Application is based?
6. Would failure to indicate interim measures result in irreparable harm to the Applicant?

1. On the first question, I have no doubt that the Court has a prima facie jurisdiction to entertain Libya's request for interim measures. It is well-settled jurisprudence of the Court to concede the establishment of prima facie jurisdiction once the Applicant can show that she has an *arguable* case. This view was confirmed in the *Nuclear Tests (Australia* v. *France)* case when the Court observed:

> "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" (*I.C.J. Reports 1973*, p. 101, para. 13).

The Parties do not deny that the 1971 Montreal Convention is a Convention in force which they have entered into and ratified. The issue is one of *pacta sunt servanda* as provided for in Article 26 of the Vienna Convention on the Law of Treaties which came into force in 1980.

2. The second question deals with the issue of legal disputes. From the totality of the oral arguments presented by the Parties, I am convinced that there is a legal dispute concerning the interpretation and application of the 1971 Montreal Convention.

To my mind the legal disputes may be summarized as three:

(a) The United States is demanding the surrender of the two suspects involved in the Lockerbie incident and Libya refuses to comply with this demand. The Applicant argues that under Articles 5 (2), 5 (3), 7 and 8 of the 1971 Montreal Convention she has the option either to extradite or prosecute: *aut dedere aut judicare* (or *aut prosequi*) — and

in the circumstances she has decided to prosecute the suspects on her own soil because her internal criminal law does not permit the "extradition" of Libyan citizens.

(b) The second legal dispute is whether Article 11 (1) of the 1971 Montreal Convention requires the United States to co-operate with Libya's domestic prosecution of the two suspects. Article 11 (1) of the 1971 Montreal Convention provides:

> "Contracting States shall afford one another the greatest measure of *assistance* in connection with criminal proceedings brought in respect of the offences. The law of the State requested shall apply in all cases." (Emphasis added.)

(c) The third dispute may be found in paragraph 5 of Libya's request for the indication of provisional measures, which urges the Court to order the Respondent to "refrain from taking any step that might aggravate or extend the dispute as would surely happen if sanctions are imposed against Libya or force employed". During the oral proceedings, counsel for the Applicant referred to identical statements of Government authorities of both the Respondent and the United Kingdom to the effect that "we have neither ruled any option in or any option out" and which to some extent have been disputed or explained away by the counsel for the Respondent.

3. Next is the question of whether the Applicant has the rights under international law claimed in the Application. To answer this question, the Applicant referred to many of the provisions of the 1971 Montreal Convention, especially Articles 5 (2), 5 (3), 7, 8 and 11 (1). Many of these Articles deal with the issue of *aut dedere aut judicare.* In effect, the Convention recognizes the fact that the internal law of some States prohibits the extradition of its citizens. The hydra-headed problem or conflict of jurisdiction to prosecute which must clearly be borne in mind in this case, is that the two Parties have the right/obligation to prosecute offences listed in the Convention in their respective States. Article 5 (1) enumerates such options thus:

> "Each Contracting State shall take such measures as may be necessary to establish its jurisdiction over the offences in the following cases:
>
> *(a)* when the offence is committed in the territory of that State;
> *(b)* when the offence is committed against or on board an aircraft registered in that State;

(c) when the aircraft on board which the offence is committed lands in its territory with the alleged offender still on board;

(d) when the offence is committed against or on board an aircraft leased without crew to a lessee who has his principal place of business or, if the lessee has no such place of business, his permanent residence, in that State."

General international law recognizes the same options. Hence, the United States of America could establish jurisdiction as the State where the aircraft was registered. However, Libya has the suspects within her jurisdiction and is equally entitled to prosecute the suspects. I am of the view that based on the 1971 Montreal Convention, Libya has a legal right to protect. It is a right recognized in international law and even considered by some jurists as *jus cogens.* I share the view of some of my colleagues, especially Judge Weeramantry, that Libya is *entitled* to prosecute the two accused Libyans if she wants. Even if other rights under Articles 5 (2), 5 (3), 7 and 8 are debatable and arguable as to whether they are rights or obligations, the legal right under Article 11 (1) is an indisputable right under the 1971 Montreal Convention.

4. Next is the issue of urgency. Equally I have no doubt about the urgency of this matter. If I had any doubt in my mind before, the developments in the recent days are all clear indications that there is a need for the Court to take immediate action and to give Libya's request the priority that it deserves as indicated in Article 74 (1) of the Rules of Court.

5. The next question, the timeliness of the Application, is admittedly not as easy as the others that I have dealt with above. Opinions are strongly divided on the issue of the interpretation of Article 14 (1) of the 1971 Montreal Convention. The Court listened to cogent arguments for and against the applicability or non-applicability of this Article, for the time being, from the Applicant and the Respondent. Before I go further, let me quote this provision:

> "Any dispute between two or more Contracting States concerning the interpretation or application of this Convention which cannot be settled through negotiation, shall, at the request of one of them, be submitted to arbitration. If within six months from the date of the request for arbitration the Parties are unable to agree on the organization of the arbitration, any one of those Parties may refer the dispute to the International Court of Justice by request in conformity with the Statute of the Court."

The Respondent forcefully argues that the Applicant failed to exhaust all the stages of negotiation and arbitration before making her Applica-

tion to the Court. It was pointed out, and is clearly indicated in the Article, that the requirements of negotiation and arbitration are mandatory condition precedents that must be complied with before recourse to the Court is available. The Respondent further argued that the Applicant's letter of 18 January 1992 on the issue of negotiation and arbitration was merely six weeks old when the Application was made to the Court on 3 March 1992, and therefore the Application is premature.

The Applicant answers that waiting for the six months prescribed in Article 14 (1) to run its course would be pointless because the Respondent unequivocally refused Libya's 18 January 1992 request for negotiation and arbitration. Reference was made to the statement of the United States of America Representative during the debate on the matter at the Security Council when he said "the issue at hand is not some difference of opinion or approach that can be mediated or negotiated".

From this pronouncement by the Respondent it seems to me, and quite reasonably too, that even if the Applicant had waited until after six months from 18 January, or even longer, her request would have been met by the same refusal. This, to my mind, is a case of anticipatory breach of the provisions of Article 14 (1) on the part of the Respondent and Libya was not obliged to delay her Application until the expiry of six months after 18 January 1992. This view is reflected in some of the past decisions of the Court. A good example is the *South West Africa* cases (*Ethiopia* v. *South Africa; Liberia* v. *South Africa*), where the Court observed:

> "It is immaterial and unnecessary to enquire what the different and opposing views were which brought about the deadlock in the past negotiations in the United Nations, since the present phase calls for determination of only the question of jurisdiction. The fact that a deadlock was reached in the collective negotiations in the past and the further fact that both the written pleadings and oral arguments of the Parties in the present proceedings have clearly confirmed the continuance of this deadlock, compel a conclusion that no reasonable probability exists that further negotiations would lead to a settlement." (*I.C.J. Reports 1962*, p. 345.)

The Court refused to adopt a purely technical attitude to this matter in the same cases when it noted that:

> "it is not so much the form of negotiation that matters as the attitude and views of the Parties on the substantive issues of the question involved. So long as both sides remain adamant . . ." (*Ibid.*, p. 346.)

There is also the issue of whether the word *"within"* as used in Article 14 (1) means *after* or *inside of* six months. The word *"dans"* in the

corresponding French text suggests that demand and refusal within six months triggers the right of recourse to the Court. Moreover, "within" in the *Concise Oxford Dictionary* means "not beyond", or "inside" or "before expiration of" or "in a time no longer than" or "during". If the Convention meant to stipulate *after* it would have explicitly said so.

Given all the points I have dilated upon above, it is my humble opinion that the Application was not prematurely presented to the Court, and the Court has jurisdiction to entertain the same.

6. There remains the issue of irreparable harm. Here again arguments have been advanced on both sides. The point of the United States was that a party should not take action *pendente lite* that would frustrate the Court's later judgment on the merits. Provisional measures are therefore unnecessary, the argument runs, because the Parties are already under an obligation to avoid irreparable prejudice to the potential judgment of the Court, irreparable harms to rights claimed, and irreparable harms to persons and property. To buttress this point torrents of authority were cited from the past Judgments of the Court.

Again, one must pause to note that the test here is not one of "irreparable prejudice" or "irreparable harm" but the *possibility* or the *risk* of such irreparable harm or prejudice. This point has been made in several cases before the Court. The Court in indicating provisional measures in the *Nuclear Tests* case observed thus:

> "29. Whereas for the purpose of the present proceedings it suffices to observe that the information submitted to the Court, including Reports of the United Nations Scientific Committee on the Effects of Atomic Radiation between 1958 and 1972, does not exclude the *possibility* that damage to Australia might be shown to be caused by the deposit on Australian territory of radio-active fall-out resulting from such tests and to be irreparable;
>
> 30. Whereas in the light of the foregoing considerations the Court is satisfied that it should indicate interim measures of protection in order to preserve the right claimed by Australia in the present litigation in respect of the deposit of radio-active fall-out on her territory" (*I.C.J. Reports 1973*, p. 105; emphasis added).

Similar pronouncements can be found in the *Tehran Hostages* case and *Passage through the Great Belt* case.

Two questions are pertinent to the issue under discussion. First, is there a likelihood, or to use the appropriate words "possibility" or "risk" of harm to the Applicant if she is not allowed to prosecute the two suspects

on her own soil? Second, is there a likelihood that the Respondent will use force or coercion if provisional measures are not indicated? From the evidence adduced at the hearings, I am very much inclined to answer these questions in the affirmative, especially when one considers the fact that what is in issue is the *possibility* or *risk* of such irreparable harm or prejudice.

Now, having resolved all of these questions in favour of the Applicant, in relation to the relevant provisions for indication of provisional measures (i.e., Art. 41 of the Statute of the Court) I should proceed to state that the Court should indicate provisional measures in favour of the Applicant only when it "considers that the circumstances" of this case "so require". Similar reference can also be made to relevant parts of Articles 73, 74 and 75 of the Rules of Court.

In my view the request for interim measures must be seen against the background of concurrent actions of the Security Council, and in particular its adoption of resolutions 731 (1992) and 748 (1992). There is therefore need to examine the effect, if any, of resolution 731 (1992) on this case and most importantly to indicate the effect of the recent resolution 748 (1992), passed during the currency of our deliberation on this case.

Before embarking on the bumpy journey of examining the effects of these resolutions in international law, let me pause to examine one aspect of this case that troubles my own sense of justice. Perhaps it is better to deal with this matter fully when the case will be considered on its merits. However, it concerns the two resolutions of the Security Council and their effect on the provisional measures now under consideration.

A point which is uncontested and accepted by both Parties is the desirability, and in fact the need, that the two suspects allegedly involved in this matter be thoroughly investigated and tried. The Applicant believed so, and said so. The Respondent is also eager to try them. The disagreement is only on where they should be tried. To my mind the investigation cannot be completed without the co-operation of both Parties. On completion of investigation, and if a prima facie case is established against the suspects, they will be tried as accused persons before a criminal court or tribunal. Judgment comes after trial and then sentence, if found guilty.

I have stated all these elementary and trite principles of criminal justice to stress the point, that all along, the issue of investigation by the Respondent was being apparently treated in some of the arguments like final judgment. It is obvious that the allegation of terrorism, a very serious and heinous offence, against the two Libyans cannot be sustained unless and until they are tried and found guilty. *A fortiori* the allegation that the State

of Libya is involved in terrorism cannot hold legally until such a time as judgment is given against the two Libyans and it is proved that they were acting for and on behalf of the State of Libya.

A statement dated 27 November 1991, S/23308, was issued by the United States of America, which demanded thus:

> "After the indictments were handed down on 14 November we conveyed them to the Libyan regime. We have also consulted closely with the Governments of France and the United Kingdom and in concert with those two Governments we have the following two declarations to present publicly today.
>
> JOINT DECLARATION OF THE UNITED STATES AND UNITED KINGDOM
>
> The British and American Governments today declare that the Government of Libya must:
>
> — surrender for trial all those charged with the crime; and accept responsibility for the actions of Libyan officials;
>
> — disclose all it knows of this crime, including the names of all those responsible, and allow full access to all witnesses, documents and other material evidence, including all the remaining timers;
>
> — *pay appropriate compensation.*
>
> We expect Libya to comply promptly and in full." (Emphasis added.)

It will be noted that payment of compensation was demanded in the above statement, i.e., "pay appropriate compensation". What worries me is how the State of Libya could be urged to pay compensation when the "suspects" or even to put it higher than that the "accused persons" have not been found guilty by any competent court or tribunal and have not been proved to have acted in complicity with Libya. The presumption of innocence until guilt is established is still an integral part of the due administration of criminal justice the world over.

The significance of this point is that the requests of the United States, referred to above, formed the basis of the requests contained in resolution 731 (1992), especially the preambular paragraph which states:

> "*Deeply concerned* over the results of investigations, which implicate officials of the Libyan Government and which are contained in Security Council documents that include the requests addressed to the Libyan authorities by France, the United Kingdom of Great Britain and Northern Ireland and the United States of America in connection with the legal procedures related to the attacks carried

> out against Pan American flight 103 and Union de transports aériens flight 772"

as well as paragraph 3 of the resolution which

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

What then is the effect of resolution 731 on the Court's authority to indicate interim measures? It has been argued that resolution 731 is merely recommendatory and as such it is not a *decision* of the Security Council. I think I share the view on a careful study of the content of the resolution that the request to surrender the two Libyans cannot be said to be mandatory. Again, the action of the Security Council with regard to this resolution could be placed under Article 36 (1) of the Charter which states that:

> "The Security Council may at any stage of a dispute of the nature referred to in Article 33 or of a situation of like nature, *recommend* appropriate procedures or methods of adjustment." (Emphasis added.)

Undoubtedly all these provisions are within Chapter VI of the Charter which deals with pacific settlement of disputes. Since the issue involves negotiation, enquiry, mediation, conciliation, arbitration or judicial settlement as enumerated in Article 33, it was possible for the Security Council to avail itself of the ultimate invocation and application of Article 36 (3) by referring this matter to the Court. However, the Security Council did not exercise that option. After careful consideration of the content and possible effect of resolution 731, it is my humble opinion and conclusion that it in no way impedes the Court's authority to indicate the interim measures requested by Libya.

Resolution 748 which was adopted while the Court was considering Libya's request for interim measures, is undoubtedly within the power and function of the Security Council since it falls under Chapter VII of the Charter, particularly Article 41.

What then is the legal effect of resolution 748 on the Court's authority to indicate interim measures? There is no doubt that there is an overlap between the powers and functions of the Court and Security Council, which I mentioned earlier in the opinion. The resolution is a *decision* of the Security Council and therefore its effect and validity is even stronger than that of resolution 731 in light of the provisions of Article 25 and Article 103 of the Charter. Article 25 enjoins *Members* to "respect and carry

out the decisions of the Security Council" and Article 103 provides that in any case of conflict of obligations between the Charter and other international agreement, the obligation under the Charter is supreme and shall prevail. Arguably, certain intrinsic defects may invalidate the two resolutions mentioned herein. For example, there is the issue of *nemo iudex in sua causa,* as well as the possible effect of Article 27 (3) of the Charter on the resolutions. Nevertheless, I do not pronounce on their validity here, nor need I do so in order to reach my decision.

However, in view of the provisions of resolution 748 (1992), it is my opinion that the Court should decline to indicate the provisional measures requested by Libya. However, it is also my belief that the Court should indicate provisional measures *proprio motu* under Article 75 of the Rules of Court against both Parties to ensure non-use of force or aggravation or extension of the dispute pending the Court's judgment on the merits.

The Court has the *legal* and *inherent* power to order provisional measures *proprio motu* against *both* Parties independent of any request made by either Party. Such an independent indication of provisional measures is not alien to the jurisprudence of this Court and its predecessor. In the case concerning the *Legal Status of the South-Eastern Territory of Greenland* the Permanent Court of International Justice pronounced:

> "Whereas, on the other hand, the Court must consider whether or not there is ground for proceeding, *proprio motu,* to indicate interim measures of protection in connection with the two applications of July 18th, 1932, *independently* of the Norwegian request to that effect . . ." (*P.C.I.J., Series A/B, No. 48,* pp. 287-288; emphasis added).

Again in the case of the *Electricity Company of Sofia and Bulgaria (Interim Measures of Protection)* the Permanent Court of International Justice ordered interim measures thus:

> "Whereas according to Article 41, paragraph 1, of the Statute,
>
> 'The Court shall have the power to indicate, if it considers that circumstances so require, any provisional measures which ought to be taken to reserve the respective rights of either party';
>
> And whereas, according to Article 61, paragraph 4, of the Rules,
>
> *'The Court may indicate interim measures of protection other than those proposed in the request.'*

> Whereas the above quoted provision of the Statute applies the principle universally accepted by international tribunals and likewise laid down in many conventions to which Bulgaria has been a party — to the effect that the parties to a case must abstain from any measure capable of exercising a prejudicial effect in regard to the execution of the decision to be given and, in general, not allow any step of any kind to be taken which might aggravate or extend the dispute" (*P.C.I.J., Series A/B, No. 79*, p. 199; emphasis added).

The Court in the *Anglo-Iranian Oil Co.* case reached a similar conclusion on the power of the Court to indicate provisional measures *proprio motu* when it declared:

> "Whereas the object of interim measures of protection provided for in the Statute is to preserve the respective rights of the Parties pending the decision of the Court, and whereas from the general terms of Article 41 of the Statute and from the power recognized by Article 61, paragraph 6, of the Rules of Court, to indicate interim measures of protection *proprio motu*, it follows that the Court must be concerned to preserve by such measures the *rights which may be subsequently adjudged by the Court to belong either to the Applicant or to the Respondent.*" (*I.C.J. Reports 1951*, p. 93; emphasis added.)

Even quite recently and with absolute clarity the Court boldly emphasized its power to indicate provisional measures in the case of *Frontier Dispute (Burkina Faso/Republic of Mali)* when it stated:

> "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; emphasis added).

The learned author Sir Gerald Fitzmaurice had this to say on the issue of interim measures on page 542 in *The Law and Procedure of the International Court of Justice*, Vol. II, 1986,

> "*c.* As has been shown above, the power of the Court to indicate interim measures falls into the same category as its *compétence de la compétence.* Both are an exercise of incidental jurisdiction, necessary in the case of the *compétence de la compétence* to enable the Court to function at all, and, in the case of the power to indicate interim measures, to prevent its decisions from being stultified. Now in the case of the Court, its power to determine its own jurisdiction is specifi-

cally provided for by Article 36, paragraph 6 of the Statute. Yet it is established law that this power is part of the inherent powers of *all* international tribunals, irrespective of whether it has been expressly conferred on them or not — a view specifically endorsed by the Court when it said in the *Nottebohm* case (Jurisdiction) . . ."

Such indication of provisional measures will not run against the decision of the Security Council as contained in resolution 748 (1992) since the resolution does not condone the use of any force. Resolution 748 (1992) is quite elaborate and states in clear and unambiguous terms the decision of the Security Council which should be carefully examined here in order to explain my conviction that the Court's indication of interim measures *proprio motu* to enjoin the use of force pending judgment on the merits would not interfere with the functioning of the Security Council.

The first point is that resolution 748 (1992) reaffirms all that is contained in resolution 731 (1992) and as already explained, resolution 731 (1992) falls under Chapter VI of the Charter and in particular Article 36 (1). In effect, all resolution 731 (1992) requested from Libya is that she must comply with the demands of the United States and the United Kingdom as contained in their respective and joint statements on this issue. There is nothing in resolution 731 (1992) to indicate approval, explicit or implicit, by the Security Council of the use of force to ensure Libya's compliance. The preambular paragraphs, while noting the reports of the Secretary-General, restated the Security Council's position on terrorism and how and why the same must be effectively dealt with and reaffirmed the need for all States to refrain from organizing, asserting or participating in acts of terrorism. Again, it should be noted here too that there is nothing suggestive of support for *the use of force* by the Security Council.

As regards the operative part of the resolution, the Security Council made it abundantly clear that it was *acting* under Chapter VII of the Charter. This is an important point to note, because this Chapter deals with "Action with respect to threats to the peace, breaches of the peace, and acts of aggression". Here again, one must ask which Article the Security Council invoked when it adopted resolution 748 (1992) having regard to the content of the *decisions* contained therein. A thorough perusal of the resolution clearly indicates that the Council was acting, as I have said earlier, under Article 41 of the Charter which deals with the issue of economic sanctions.

Article 41 of the Charter directs that:

"The Security Council may decide what measures *not involving the use of armed force* are to be employed to give effect to its decisions,

> and it may call upon the Members of the United Nations to apply such measures. These may include complete or *partial interruption of economic relations* and of rail, sea, *air*, postal, telegraphic, radio, and other means of communication and the *severance of diplomatic relations*." (Emphasis added.)

The emphasized words, when read in conjunction with paragraphs 4 *(a), (b),* 5 *(a), (b), (c),* 6 *(a), (b), (c)* and 7 of resolution 748 (1992), all give the unequivocal indication that the resolution is aimed at imposing economic and commercial sanctions, along with diplomatic restrictions against Libya and explicitly prohibits sanctions "involving the use of armed force". I have elaborated on the content of Article 41 in order to show that although resolution 748 (1992) was adopted by the Security Council under Chapter VII, Article 41 of this Chapter clearly prohibits the use of force.

Libya also confirmed this in her latest observation dated 7 April 1992, on the effect of resolution 748 (1992), when she noted that:

> "the sanctions that the Security Council has adopted against Libya, should it fail to comply with resolution 748 (1992), directly impair Libya's economic, commercial and diplomatic rights".

The conclusion that I have therefore arrived at is that the Court would not impair or impede the full force and effect of resolution 748 (1992) if it were to indicate measures *proprio motu* or even *suo motu* to enjoin both Parties to this dispute from taking any action that may involve the use of force or taking any step which might aggravate or extend the dispute pending the Court's judgment on the merits.

The next point which is equally germane to the issue of resolution 748 (1992) is the question of its validity. At the moment this assertion is neither here nor there and consequently one relies on the decision of the Security Council with regard to resolution 748 (1992) based on its prima facie validity. This issue will be resolved one way or the other when the matter comes up for argument on its merits. I have personally echoed my doubts earlier on this point but one should at the moment let sleeping dogs lie.

Assuming, *arguendo*, that resolution 748 (1992) is valid on its face, the United States in her observation of 7 April 1992 submits:

> "Irrespective of the existence of the novel right Libya claims under the Montreal Convention — a right contrary to the text, structure, purpose and history of the Convention — Libya now has a Charter-based duty to accept and carry out the decisions of the Security

Council in resolution 748 (1992) and other States have a Charter-based duty to seek Libya's compliance. The predicate for Libya's request for provisional measures, therefore, is entirely lacking."

As already indicated, the United States is entitled to this view having regard to other provisions of the Charter, so long as she does not resort to the use of force to ensure compliance with the resolution.

The Parties have based much of their arguments on the issue of *legal rights*. Without doubt, I think that the issue of legal rights is relevant and important to the Application of Libya and that the Applicant must clearly establish these rights to succeed on the merits. That is why Article 41 talks of the preservation of the respective *rights* of either party. However, Article 75 of the Rules of Court does not refer to the issue of *rights* but merely grants the Court the power to indicate provisional measures *proprio motu* against *any* or *all* parties if after due examination the circumstances of the case so require. In my view the Court should exercise the power conferred by Article 75 in this case.

Each case must be decided on its own merits. Situations are always changing. The world is in a state of flux economically and politically. International law has been enriched by its dynamic development from this Court. Even if in the past the measures suggested by me for indication have always been incidental, there is every reason why they should be indicated in this case given the urgent, serious and unique circumstances that it presents. The world is constantly faced with new situations from day to day, and it is imperative that the Court must always rise to the occasion and meet the new demands and challenges of our time as they surface. However, care must be taken that pronouncements, indications, orders and judgments of the Court be given in accordance with international law and one need not emphasize this. (Art. 38 (1) of the Statute of the Court.) In this case, the Court has the power to pronounce on the provisional measures I have suggested, in accordance with the provisions of Article 75 of the Rules of Court. In addition, it is invariably the inherent power of the Court to grant such provisional measures under customary international law.

In conclusion, I believe that the Court should deny Libya's request for interim measures, but should *independently* apply the provisions of Article 75 of the Rules of Court to prevent further escalation, aggravation or extension of the dispute pending judgment on the merits.

Again, I ask myself what is justice in a case of this nature, with regard to

the request for indication of provisional measures, which is before the Court. To me, the fundamental focus and obligation as judges of the Court must be to do justice in accordance with the spirit of Article 1 of the Charter: to maintain international peace and security; to take effective measures to prevent and remove all threats to peace; to suppress all threats of aggression or any form of breaches of peace in any part of the world within the spirit of the Charter and in accordance with international law.

To me, justice requires prompt action to prevent deterioration of peaceful co-existence among nations of the world. No one goes to sleep when the house is burning.

Finally, justice of this case requires that we should act in consonance and within the spirit and content of Article 2 (3) of the Charter, which states:

> "All Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered."

I would therefore indicate provisional measures in this case based on Article 75 of the Rules of Court against both Parties *pendente lite* to prevent the escalation, aggravation or extension of the dispute and in particular the use of force by either or both Parties.

(Signed) Bola AJIBOLA.