

QUESTIONS OF INTERPRETATION AND APPLICATION OF THE 1971 MONTREAL CONVENTION ARISING FROM THE AERIAL INCIDENT AT LOCKERBIE (LIBYAN ARAB JAMAHIRIYA *v.* UNITED STATES) (PROVISIONAL MEASURES)

Order of 14 April 1992

In an Order issued in the case concerning Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya *v.* United States of America), the Court found, by 11 votes to 5, that the circumstances of the case were not such as to require the exercise of its power under Article 41 of the Statute to indicate provisional measures.

The Court was composed as follows: Vice-President Oda, Acting President; President Sir Robert Jennings; Judges Lachs, Ago, Schwebel, Bedjaoui, Ni, Evensen, Tarassov, Guillaume, Shahabuddeen, Aguilar Mawdsley, Weeramantry, Ranjeva, Ajibola; Judge *ad hoc* El-Kosheri.

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The voting on the Order of the Court on the request for the indication of provisional measures made by Libya in the above case was as follows:

IN FAVOUR: Vice-President Oda, Acting President; President Sir Robert Jennings; Judges Lachs, Ago, Schwebel, Ni, Evensen, Tarassov, Guillaume, Shahabuddeen, Aguilar Mawdsley;

AGAINST: Judges Bedjaoui, Weeramantry, Ranjeva, Ajibola; Judge *ad hoc* El-Kosheri.

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Acting President Oda and Judge Ni each appended a declaration to the Order of the Court; Judges Evensen, Tarassov, Guillaume and Aguilar Mawdsley a joint declaration.

Judges Lachs and Shahabuddeen appended separate opinions; and Judges Bedjaoui, Weeramantry, Ranjeva and Ajibola and Judge *ad hoc* El-Kosheri appended dissenting opinions to the Order.

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In its Order, the Court recalls that on 3 March 1992 the Libyan Arab Jamahiriya instituted proceedings against the United States in respect of "a dispute . . . between Libya and the United States over the interpretation or application of the Montreal Convention" of 23 September 1971, a dispute arising from the aerial incident that occurred over Lockerbie, Scotland, on 21 December 1988 and that led to a Grand Jury of the United States District Court for the District of Columbia indicting, on 14 November 1991, two Libyan nationals, charging, *inter alia*, that they had "caused a bomb to be placed aboard [Pan Am flight 103] . . . , which bomb had exploded causing the aeroplane to crash".

The Court then recites the history of the case. It refers to the allegations and submissions made by Libya in its Application in which it asks the Court to adjudge and declare:

"(a) that Libya has fully complied with all of its obligations under the Montreal Convention;

(b) that the United States has breached, and is continuing to breach, its legal obligations to Libya under articles 5 (2), 5 (3), 7, 8 (2) and 11 of the Montreal Convention; and

(c) that the United States is under a legal obligation immediately to cease and desist from such breaches and from the use of any and all force or threats against Libya, including the threat of force against Libya, and from all violations of the sovereignty, territorial integrity, and the political independence of Libya."

The Court also refers to Libya's request (filed, like the Application, on 3 March 1992, but later in the day) for the indication of the following provisional measures:

"(a) to enjoin the United States from taking any action against Libya calculated to coerce or compel Libya to surrender the accused individuals to any jurisdiction outside of Libya; and

(b) to ensure that no steps are taken that would prejudice in any way the rights of Libya with respect to the legal proceedings that are the subject of Libya's Application."

The Court further refers to the observations and submissions presented by both Libya and the United States at the public hearings on the request for the indication of provisional measures held on 26, 27 and 28 March 1992.

The Court then takes note of the joint declaration issued on 27 November 1991 by the United States of America and the United Kingdom following on the charges brought by a Grand Jury of the United States District Court for the District of Columbia against the two Libyan nationals in connection with the destruction of Pan Am flight 103, and which reads:

"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."

The Court also takes note of the fact that the subject of that declaration was subsequently considered by the United Nations Security Council, which on 21 January 1992 adopted resolution 731 (1992), of which the Court quotes, *inter alia*, the following passages:

"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 [S/23308], in connection with the legal procedures related to the attacks carried out against Pan American flight 103 and Union de transports aériens flight 772,

...

2. *Strongly deplors* the fact that the Libyan Government has not yet responded effectively to the above requests to cooperate fully in establishing responsibility for the terrorist acts referred to above against Pan American flight 103 and Union de transports aériens flight 772;

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

The Court further notes that on 31 March 1992 (three days after the close of the hearings) the Security Council adopted resolution 748 (1992), stating, *inter alia*, that the Security Council:

“ ...

Deeply concerned that the Libyan Government has still not provided a full and effective response to the requests in its resolution 731 (1992) of 21 January 1992,

Convinced that the suppression of acts of international terrorism, including those in which States are directly or indirectly involved, is essential for the maintenance of international peace and security,

...

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

...

Acting under Chapter VII of the Charter,

1. *Decides* that the Libyan Government must now comply without any further delay with paragraph 3 of resolution 731 (1992) regarding the requests contained in documents S/23306, S/23308 and S/23309;

2. *Decides also* that the Libyan Government must commit itself definitively to cease all forms of terrorist action and all assistance to terrorist groups and that it must promptly, by concrete actions, demonstrate its renunciation of terrorism;

3. *Decides* that on 15 April 1992 all States shall adopt the measures set out below, which shall apply until the Security Council decides that the Libyan Government has complied with paragraphs 1 and 2 above;

...

7. *Calls upon* all States, including States not members of the United Nations, and all international organizations, to act strictly in accordance with the provisions of the present resolution, notwithstanding the existence of any rights or obligations conferred or imposed by any international agreement or any contract entered into or any licence or permit granted prior to 15 April 1992;”.

The Court observes that document S/23308, to which reference was made in resolution 748 (1992), included the demands made by the United States of America and the United Kingdom in their joint declaration of 27 November 1991, as set out above.

After having referred to the observations on Security Council resolution 748 (1992) presented by both Parties in response to the Court’s invitation (as well as by the Agent of the United States in an earlier communication), the Court goes on to consider as follows:

“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 such measures, but 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;

Whereas both Libya and the United States, as Members of the United Nations, are obliged to accept and carry out the decisions of the Security Council in accordance with Article 25 of the Charter; whereas the Court, which is at the stage of proceedings on provisional measures, considers that *prima facie* this obligation extends to the decision contained in resolution 748 (1992); and whereas, in accordance with Article 103 of the Charter, the obligations of the Parties in that respect prevail over their obligations under any other international agreement, including the Montreal Convention;

Whereas the Court, while thus not at this stage called upon to determine definitively the legal effect of Security Council resolution 748 (1992), considers that, whatever the situation previous to the adoption of that resolution, the rights claimed by Libya under the Montreal Convention cannot now be regarded as appropriate for protection by the indication of provisional measures;

Whereas, furthermore, an indication of the measures requested by Libya would be likely to impair the rights which appear *prima facie* to be enjoyed by the United States by virtue of Security Council resolution 748 (1992);

Whereas, in order to pronounce on the present request for provisional measures, the Court is not called upon to determine any of the other questions which have been raised before it in the present proceedings, including the question of its jurisdiction to entertain the merits of the case; and whereas the decision given in these proceedings in no way prejudices any such question, and leaves unaffected the rights of the Government of Libya and the Government of the United States to submit arguments in respect of any of these questions;

For these reasons,

THE COURT,

By eleven votes to five,

Finds that the circumstances of the case are not such as to require the exercise of its power under Article 41 of the Statute to indicate provisional measures.”

Declaration of Vice-President Oda, Acting President

Acting President Oda appended a declaration concurring with the Court’s decision but expressing his view that it should not have been based solely on the consequences of Security Council resolution 748 (1992), since this suggested the possibility that, prior to the adoption of the resolution, the Court could have reached legal conclusions with effects incompatible with the Council’s actions, and the Court might in that case be blamed for not having acted sooner. As it happened, the Security Council, applying its own logic, acted with haste in adopting its new resolution

before the Court could have reached a considered decision, a fact of which it must have been aware.

Acting President Oda is satisfied that the Court possessed jurisdiction *prima facie*, despite the six-month rule in article 14 (1) of the Montreal Convention, since the circumstances had appeared to leave no room to negotiate the organization of an arbitration.

However, the essential right of which the protection was claimed, that of not being forced to extradite one's own nationals, was a sovereign right under general international law, whereas the subject-matter of Libya's Application consisted of specific rights claimed under the Montreal Convention. Given the principle that the rights sought to be protected in proceedings for provisional measures must relate to the subject-matter of the case, this meant that the Court would in any case have had to decline to indicate the measures requested. Such a mismatch between the object of the Application and the rights sought to be protected ought, in the view of the Acting President, to have been the main reason for taking a negative decision, which would have been appropriate no less before than after the adoption of resolution 748 (1992).

Declaration of Judge Ni

Judge Ni, in his declaration, expresses his view that, according to the jurisprudence of the Court, the fact that a matter is before the Security Council should not prevent it from being dealt with by the Court. Although both organs deal with the same matter, there are differing points of emphasis. In the instant case, the Security Council, as a political organ, is more concerned with the elimination of international terrorism and the maintenance of international peace and security, while the International Court of Justice, as the principal judicial organ of the United Nations, is more concerned with legal procedures such as questions of extradition and proceedings in connection with prosecution of offenders and assessment of compensation, etc.

Concerning Libya's request for provisional measures, Judge Ni refers to the provisions in the 1971 Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation on which Libya relies. According to article 14 (1) of that Convention, any one of the parties to a dispute may invoke jurisdiction of the International Court of Justice if within six months from the date of the request for arbitration no agreement is reached on the organization of the arbitration. In this case, Libya's proposed arbitration by a letter of 18 January 1992, only one-and-a-half months had elapsed before Libya instituted proceedings in the International Court of Justice on 3 March 1992.

Judge Ni considers that Libya's request should be denied on the sole ground of the non-fulfilment of the six-month-period requirement, without having to decide at the same time on the other issues. Consequently, Libya will not be prevented from seeking a remedy of the Court in accordance with the provisions of the 1971 Montreal Convention, if, months later, the dispute still subsists and if the Applicant so desires.

Joint declaration of Judges Evensen, Tarassov, Guillaume and Aguilar Mawdsley

Judges Evensen, Tarassov, Guillaume and Aguilar Mawdsley, in a joint declaration, expressed their complete agreement with the decision of the Court, but made some

additional comments. They stressed that, before the Security Council became involved in the case, the United States and the United Kingdom had been entitled to request Libya to extradite the accused and, to that end, to take any action consistent with international law. For its part, Libya was entitled to refuse such extradition and to recall in that connection that, in common with the law of many other countries, its domestic law prohibits the extradition of nationals.

The authors then showed that, in this particular case, that situation was not considered satisfactory by the Security Council which was acting, with a view to combating international terrorism, within the framework of Chapter VII of the Charter of the United Nations. The Council accordingly decided that Libya should surrender the two accused to the countries that had requested their surrender.

Under those circumstances, Judges Evensen, Tarassov, Guillaume and Aguilar Mawdsley take the view that the Court, pronouncing on a request for the indication of provisional measures submitted by Libya in order to preserve the legal situation existing prior to the adoption of the Security Council resolutions, was fully justified in noting the changes that had been made to that situation by those resolutions. It was also fully justified in holding that, as a consequence, the circumstances of the case were not such as to require the exercise of its power to indicate such measures.

Separate opinion of Judge Lachs

The present cases, and the necessity for the Court to take an early decision on an interlocutory request, have brought out into the open problems of jurisdiction and what is known as *sub judice*. In fact, the Court is the guardian of legality for the international community as a whole, within and without the United Nations. There is no doubt that the Court's task is "to ensure respect for international law . . ." (*I.C.J. Reports 1949*, p. 35). It is its principal guardian. In the present case, not only has the wider issue of international terrorism been on the agenda of the Security Council but the latter adopted resolutions 731 (1992) and 748 (1992). The Order made should not be seen as an abdication of the Court's powers. Whether or not the sanctions ordered by resolution 748 (1992) have eventually to be applied, it is in any event to be hoped that the two principal organs concerned will be able to operate with due consideration for their mutual involvement in the preservation of the rule of law.

Separate opinion of Judge Shahabuddeen

In his separate opinion, Judge Shahabuddeen thought that Libya had presented an arguable case for an indication of provisional measures but that Security Council resolution 748 (1992) had the legal effect of rendering unenforceable the rights claimed by Libya. The decision of the Court, he said, resulted not from any collision between the competence of the Security Council and the competence of the Court, but from a collision between the obligations of Libya under the resolution of the Security Council and any obligations which Libya had under the Montreal Convention. Under the Charter, the obligations under the resolution of the Security Council prevailed.

Judge Shahabuddeen noted that the Respondent's demand for the surrender of the two accused Libyan nationals was based largely on the view that an impartial trial could not be had in Libya. However, the Respondent's demand

that “Libya . . . must pay appropriate compensation . . . promptly and in full” presupposed a determination by the Respondent that the accused were guilty, since the responsibility of the Libyan State was premised on the guilt of the accused. Consequently, there was an issue as to possible prejudgment of the case by the Respondent.

Dissenting opinion of Judge Bedjaoui

Judge Mohammed Bedjaoui proceeds from the idea that there exist two altogether distinct disputes, one legal, the other practical. The former concerns the extradition of two nationals and is dealt with, as a legal matter, before the International Court of Justice at the request of Libya, whereas the latter concerns the wider question of State terrorism as well as the international responsibility of the Libyan State and, for its part, is being dealt with, politically, before the Security Council at the request of the United Kingdom and the United States.

Judge Bedjaoui considers that Libya was fully within its rights in bringing before the Court, with a view to its judicial settlement, the dispute concerning the 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 situation should, in the opinion of Judge Bedjaoui, be summarized as follows: he is of the view, on the one hand, that the rights claimed by Libya exist *prima facie* and that all of the conditions normally required by the Court for the indication of provisional measures are fulfilled in this case so that these rights may be preserved in accordance with Article 41 of the Statute of the Court. And it is on this point that Judge Bedjaoui expressed reservations with regard to the two Orders of the Court. But it should also be noted that Security Council resolution 748 (1992) has annihilated these rights of Libya, without it being possible, at this stage of provisional measures, of, in other words, a *prima facie* pre-examination, for the Court to take it upon itself to decide prematurely the substantive question of the constitutional validity of that resolution, for which reason the resolution benefits from a presumption of validity and must *prima facie* be held to be lawful and binding. He is therefore in agreement with the Court as to this second point.

The situation thus characterized, with rights that deserve to be protected through the indication of provisional measures but which are almost immediately negated by a resolution of the Security Council that deserves to be considered valid *prima facie*, does not fall precisely within the bounds of Article 103 of the Charter; it exceeds them somewhat.

Subject to this nuance, it is clear that the Court could not but take note of the situation and hold that at this stage of the proceedings such a “conflict”, governed by Article 103 of the Charter, resulted, in effect, in any indication of provisional measures being ineffectual. But the operative parts of the two Orders remain at the threshold of the whole operation inasmuch as the Court states therein that, having regard to the circumstances, there is no reason for it to *exercise its power* of indicating provisional measures. The qualification made by Judge Bedjaoui is that in the present case the effective exercise of this power was justified; but he also observes that the *effects* of that exercise had been nullified by resolution 748 (1992). Judge Bedjaoui therefore arrives, concretely, at the same result as the Court, via an entirely different route but also with the important

nuance mentioned, as a result of which he does not reject the request for interim measures but, rather, declares that its *effects* have disappeared.

That said, Judge Bedjaoui is of the view that the Court could not have avoided ordering provisional measures on the basis of the circumstances of the case submitted to it, even though the *effects* of such a decision were negated by resolution 748 (1992). It should be added that, even assuming that the majority entertained some doubt, which he personally did not share, as to whether the requesting State could fulfil one or another of the prerequisites to an indication of provisional measures, the Court could have made use of the power to indicate itself any provisional measure that it would have considered to be more appropriate than those sought by the requesting State.

Consequently, the Court could have decided to indicate provisional measures in the very general terms of an exhortation to all the Parties not to aggravate or extend the dispute. Thus, assuming that the Court would in this case have been justified in considering that one or another prerequisite to the indication of certain specific measures was lacking, it had at least one resource, namely, to adopt a general, distinct, measure taking the form of an appeal to the Parties not to aggravate or extend the dispute, or of an exhortation addressed to them to come together for the purpose of settling the dispute amicably, either directly, or through the Secretariat of the United Nations or that of the Arab League, thus conforming to what is nowadays established practice.

Moreover, given the grave circumstances of the present case, would an indication of a provisional measure of this nature not have been an elegant way of breaking out of the impasse arising from the opposition between, on the one hand, the more specific provisional measures that the Court should have ordered to meet the wishes of the requesting State and, on the other, Security Council resolution 748 (1992), which would in any event have negated the effects of such an order? This would have been an elegant way of sidestepping the main difficulty, and also a really beneficial way of doing so, in the interests of everyone, by assisting in the settlement of the dispute through methods that appear likely to be used.

Judge Bedjaoui therefore regrets that the Court was unable to indicate either specific provisional measures of the kind sought by the requesting States, or, *proprio motu*, general measures, a way that would have enabled it to make its own positive contribution to the settlement of the dispute. This is why, in the last analysis, he could not but vote against the two Orders.

Dissenting opinion of Judge Weeramantry

Judge Weeramantry, in his dissenting opinion, expressed the view that the circumstances invoked by the Applicant appeared *prima facie* to afford a basis for the Court’s jurisdiction.

The opinion draws attention to the unique nature of the present case in that it is the first time the International Court and the Security Council have been approached by opposite parties to the same dispute. This raised new questions which needed to be discussed in the light of the respective powers of the Council and the Court under the Charter of the United Nations and in the light of their relationship to each other.

After an examination of the relevant Articles of the Charter and of the *travaux préparatoires* of Articles 24 (2) and (1) in particular, the opinion concludes that the Court is not debarred from considering matters which the Security Council has considered under Chapter VI. Furthermore, the Security Council, in discharging its duties, is required to act in accordance with the principles of international law.

The Court is a coordinate body of the Security Council and, in its proper sphere of determining disputes, examines and decides questions of international law according to legal principles and judicial techniques. In regard to matters properly before it, the Court's function is to make judicial decisions according to law and it would not be deflected from this course by the fact the same matter has been considered by the Security Council. However, decisions made by the Security Council under Chapter VII are *prima facie* binding on all Members of the United Nations and would not be the subject of examination by the Court. Judge Weeramantry concludes that resolution 731 (1992) is only recommendatory and not binding but that resolution 748 (1992) is *prima facie* binding.

The opinion concludes that provisional measures can be indicated in such a manner as not to conflict with resolution 748 (1992) and indicates such measures *proprio motu* against both Parties preventing such aggravation or extension of the dispute as might result in the use of force by either or both Parties. This action is based on Article 41 of the Statute and Articles 73, 74 and 75 of the Rules of Court.

Dissenting opinion of Judge Ranjeva

In his dissenting opinion, Judge Ranjeva considers that the present dispute goes beyond the framework of relations between the Parties to the dispute and concerns the right of all States bound by the Montreal Convention. Given his right to choose, in accordance with the principle *aut dedere aut judicare*, the Applicant was justified in requesting the Court to indicate provisional measures; this right was incontestable until the date of the adoption of resolution 748 (1992). The fundamental change of circumstances that occurred subsequent to the filing of the Application, without any alteration in the factual circumstances of the case, prevented the Court from exercising its legal function to the full extent of its powers.

But, contrary to the opinion of the majority of the Members of the Court, Judge Ranjeva considers that, bearing in mind the development of case-law relating to the application of Articles 41 of the Statute and 75 of the Rules, as well as the autonomous nature of an appeal by the Court to the Parties in relation to the indication of provisional measures (case concerning *Passage through the Great Belt (Finland v. Denmark)*), [the Court could indicate] measures consisting, among other things, of an appeal to the Parties enjoining them to adopt a line of conduct which would prevent the aggravation or extension of the conflict. For such was the posture of the Court in the *Military and Paramilitary Activities in and against Nicaragua (Nicara-*

gua v. United States of America) and the *Frontier Dispute* cases.

In the view of Judge Ranjeva, the new dimensions of the problem meant that the Court was unable to limit itself to a passive approach to its legal function, which, in a dynamic sense, falls within the scope of the fundamental obligation set out in Article I, paragraph 1, of the Charter of the United Nations, namely, the maintenance of peace within the context of its role.

Dissenting opinion of Judge Ajibola

Judge Ajibola, in his dissenting opinion, regrets that the Court, by a majority decision, declined to indicate provisional measures even though Libya established sufficient warrant for its doing so under the applicable provisions of the Court's Statute and Rules.

He strongly believes that, even if the Court concluded that such measures should be declined because of the possible effect of Security Council resolution 748 (1992), the resolution did not raise any absolute bar to the Court's making in its Order pronouncements clearly extraneous to the resolution and definitely not in conflict with it.

He goes on to stress the Court's powers, especially under Article 75 of its Rules, to indicate provisional measures *proprio motu*, quite independently of the Applicant's request, for the purpose of ensuring peace and security among nations, and in particular the Parties to the case. It should therefore, *pendente lite*, have indicated provisional measures based on Article 41 of the Statute and Articles 73, 74 and 75 of the Rules of Court, with a view to preventing any aggravation or extension of the dispute which might result in the use of force by either Party or by both Parties.

Dissenting opinion of Judge ad hoc El-Koshi

Judge *ad hoc* El-Koshi, in his dissenting opinion, focused mainly on the legal reasons which led him to maintain that paragraph 1 of Security Council resolution 748 (1992) should not be considered having any legal effect on the jurisdiction of the Court, even on a *prima facie* basis, and accordingly the Libyan request for provisional measures has to be evaluated in conformity with habitual pattern as reflected in the established jurisprudence of the Court. In the light of the rules relied upon in the recent cases, he came to the conclusion that the Court should act *proprio motu* to indicate measures having for effect:

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