

SEPARATE OPINION OF JUDGE SHAHABUDDEEN

The Court's Order is based solely on Security Council resolution 748 (1992). That also is the ground of my concurrence with it. But for that resolution, I should have thought that Libya had presented an arguable case for an indication of interim measures. The resolution now makes it unnecessary to explore the legal elements of Libya's request for such measures. In view of the turn of events occasioned by the resolution, I propose, however, to say something on (i) the legal basis of the Court's Order; (ii) the feasibility of an impartial trial in the event of the two accused being surrendered to the Respondent; and (iii) certain implications of the Court's Order.

(i) THE LEGAL BASIS OF THE COURT'S ORDER

Whatever might have been the previous position, resolution 748 (1992) of the Security Council leaves the Court with no conclusion other than that to which it has come. This is the result not of imposition of superior authority — there is none — but of the fact that, in finding the applicable law, the Court must take account of the resolution in so far as it affects the enforceability of the rights for the protection of which Libya is seeking interim measures. The validity of the resolution, though contested by Libya, has, at this stage, to be presumed (see the general principle in *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, *I.C.J. Reports 1971*, p. 22, para. 20). Article 25 of the Charter of the United Nations obliges Libya to comply with the decision set out in the resolution (*ibid.*, pp. 52-53). By virtue of Article 103 of the Charter, that obligation prevails over any conflicting treaty obligation which Libya may have (*Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, *I.C.J. Reports 1984*, p. 440, para. 107). Treaty obligations can be overridden by a decision of the Security Council imposing sanctions (Paul Reuter, *Introduction to the Law of Treaties*, 1989, p. 113, para. 228, and Sir Gerald Fitzmaurice, *The Law and Procedure of the International Court of Justice*, 1986, Vol. 2, p. 431). Hence, assuming that Libya has the rights which it claims, *prima facie* they could not be enforced during the life of the resolution.

Several cases demonstrate, in one way or another, that the Court is not precluded from acting by the mere circumstance that the matter in contest

is also under consideration by another organ of the United Nations (see, *inter alia*, *United States Diplomatic and Consular Staff in Tehran*, *I.C.J. Reports 1980*, p. 22, para. 40; and *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, *Provisional Measures*, *I.C.J. Reports 1984*, pp. 185-186, and, same case, *Jurisdiction and Admissibility*, *I.C.J. Reports 1984*, pp. 433-436). In this case, it happens that the decision which the Court is asked to give is one which would directly conflict with a decision of the Security Council. That is not an aspect which can be overlooked. Yet, it is not the juridical ground of today's Order. This results not from any collision between the competence of the Security Council and that of the Court, but from a collision between the obligations of Libya under the decision of the Security Council and any obligations which it may have under the Montreal Convention. The Charter says that the former prevail.

I have considered the question whether interim measures may be indicated to the extent that the Respondent has allegedly been threatening the Applicant with force, this not being authorized by resolution 748 (1992). It appears to me, however, that whatever was the previous position, the inference to be judicially drawn from the facts as they now stand is that the Respondent, having promoted and supported the resolution, is prepared to follow the course indicated in the resolution and accordingly not to resort to force unless authorized by the Security Council. So on this point the resolution of the Security Council stands in the way, both on the law and on the facts.

(ii) THE FEASIBILITY OF AN IMPARTIAL TRIAL IN THE EVENT OF THE TWO ACCUSED BEING SURRENDERED TO THE RESPONDENT

Libya's challenge to the validity of Security Council resolution 748 (1992) stands deferred to the hearing of its Application on the merits. But the refusal of its request for interim measures has immediate practical effects. These immediate practical effects inevitably invite attention to a point which can scarcely be overlooked in a judicial forum.

As is shown by the material before the Court, the evolution of the controversy between the Parties centred, in a basic sense, on the question of the need for an impartial trial. The United Kingdom contended that such a trial could not be had in Libya for the reason that the offences concerned acts of terrorism carried out by the two accused on behalf of the State of Libya (see Statement of the Permanent Representative of the United Kingdom in the Security Council, 21 January 1992, S/PV.3033, p. 105; and Solicitor General Rodgers, Q.C., Public Sitting of 26 March 1992 (afternoon), CR 92/3, pp. 21-22, and Public Sitting of 28 March 1992 (afternoon), CR 92/6, p. 8). On the other hand, Libya took the position that the United Kingdom has prejudged the case against its two nationals

(Public Sitting of 26 March 1992 (morning), CR 92/2, p. 58, Professor Salmon). To this the United Kingdom has made answer that its prosecuting authorities have merely expressed the view that the evidence is enough to justify the bringing of charges. In the words of the Permanent Representative of the United Kingdom to the United Nations:

“We are not asserting the guilt of these two men before they are tried, but we do say that there is serious evidence against them which they must face in Court.” (S/PV.3033, 21 January 1992, p. 103.)

And, in the words of the Solicitor General for Scotland:

“I pause to observe that it was a recurring theme of the speeches made on behalf of the Applicant this morning that by asking for the accused to be handed over the United Kingdom was somehow violating the principle that their innocence was to be presumed until they had been found guilty.

It is certainly true that my colleague the Lord Advocate has sufficient evidence to justify charging these two men but if they are handed over for trial in Scotland their guilt or innocence will be determined not by the Lord Advocate, nor by the Government of the United Kingdom, but by a jury of 15 ordinary men and women.” (Public Sitting of 26 March 1992 (afternoon), CR 92/3, p. 21.)

Now, it was in evidence before the Court (see paragraph 28 of the Court’s Order) that the formal demands of the United Kingdom and the United States, as publicly addressed to Libya on 27 November 1991, read as follows:

“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.)

These demands were made with specific reference to the charges brought by the Procurator Fiscal on the direction of the Lord Advocate against the two accused. The demands were subsequently endorsed by the Security

Council, being incorporated by reference in its resolutions 731 (1992) and 748 (1992), both of which were promoted and supported by the United Kingdom.

It will be seen that the United Kingdom's third demand, that Libya "must . . . pay appropriate compensation", was not expressed to be contingent on the accused being eventually convicted after a trial. The demand, like the other demands, was specifically stated as a demand which was expected to be complied with "promptly and in full". This could only mean that it was to be complied with forthwith and therefore before any trial could possibly be held. That interpretation is reinforced by operative paragraph 1 of Security Council resolution 748 (1992) by which the Council decided

"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".

Document S/23308 set out the demands referred to above.

Since the ground on which the United Kingdom made its demand for payment of compensation was that Libya had engaged international responsibility for the crimes allegedly committed by its two accused nationals, the making of the demand for payment "promptly and in full" constituted a public and widely publicized announcement by the Respondent State of a prior determination by it, as a State, that the two accused were in fact guilty of the offences charged. As noted above, the Solicitor General for Scotland affirmed to the Court that "their guilt or innocence will be determined not by the Lord Advocate, nor by the Government of the United Kingdom . . .". True, in the sense that guilt is for the courts; but it is nevertheless clear that guilt has already been determined by the United Kingdom as a State.

There is a related aspect. The guilt of the accused, said the Solicitor General, would be determined "by a jury of 15 ordinary men and women". That would happen in Scotland, where this tragic event took place, an event which both Parties agree (as, indeed, does everyone) was a dreadful crime by whomsoever perpetrated. The excellence of the Scottish system of justice has not been put in issue. Yet, the foregoing cannot be without serious implications for an impartial trial. That is important, for, as suggested above, there is a fundamental sense in which it can be said that the question of an impartial trial lies at the root of the entire controversy relating to the Respondent's demand for the surrender of the two accused (see, generally, *Halsbury's Laws of England*, 4th ed., Vol. 9, p. 10, para. 11, as to the prejudicial effect of public statements affirming innocence or guilt; *Archbold's Criminal Pleading, Evidence and Practice*, 40th ed., p. 1670, para. 3468, stating that "a jury are more likely to be swayed by prejudicial

matter than a judge"; Sir J. H. A. Macdonald, *A Practical Treatise on the Criminal Law of Scotland*, 5th ed., 1948, pp. 215-216; and David M. Walker, *The Scottish Legal System*, 1981, pp. 339-340).

(iii) IMPLICATIONS OF THE COURT'S ORDER

Inability under domestic law to act being no defence to non-compliance with an international obligation, in order to make such compliance in a case of this kind a State may well find that, if it is not to breach its internal legal order, it may have not only to legislate in the ordinary way, but to undertake some appropriate measure of constitutional amendment, and to do so speedily. In this case, Libya has expressed doubts whether the stated objective of securing an impartial trial will be achieved if (having taken whatever steps are necessary) it complies with the resolution of the Security Council.

The question now raised by Libya's challenge to the validity of resolution 748 (1992) is whether a decision of the Security Council may override the legal rights of States, and, if so, whether there are any limitations on the power of the Council to characterize a situation as one justifying the making of a decision entailing such consequences. Are there any limits to the Council's powers of appreciation? In the equilibrium of forces underpinning the structure of the United Nations within the evolving international order, is there any conceivable point beyond which a legal issue may properly arise as to the competence of the Security Council to produce such overriding results? If there are any limits, what are those limits and what body, if other than the Security Council, is competent to say what those limits are?

If the answers to these delicate and complex questions are all in the negative, the position is potentially curious. It would not, on that account, be necessarily unsustainable in law; and how far the Court can enter the field is another matter. The issues are however important, even though they cannot be examined now.

(Signed) Mohamed SHAHABUDDEN.
