

DECLARATION OF JUDGE HERCZEGH

[Translation]

Having voted against paragraphs 2 (a) and (b) and 3 of the operative part, I feel obliged to supply the explanations that follow:

1. I share the conclusion of the Court that there exist disputes between the Parties concerning the interpretation and application of Article 7 — read jointly with Article 1, Article 5, paragraphs 2 and 3, Article 6 and Article 8 — and Article 11 of the Montreal Convention, which disputes must be decided in accordance with Article 14, paragraph 1, of the Montreal Convention. The Court consequently has jurisdiction to hear these disputes.

2. On the other hand, I am unable to concur with the Court's decision declaring the Application of Libya to be admissible and dismissing the objection of the Respondent that Security Council resolutions 748 (1992) and 883 (1993) are determinative for all disputes over which the Court might have jurisdiction, my reason being that the aforesaid resolutions were adopted subsequent to the filing of the Application. The Court stated, in the case concerning *Border and Transborder Armed Actions (Nicaragua v. Honduras)*, that “[t]he critical date for determining the admissibility of an application is the date on which it is filed” (*I.C.J. Reports 1988*, p. 95, para. 66). However, in the same case and in the same paragraph, the Court expressed itself as follows:

“It may however be necessary, in order to determine with certainty what the situation was at the date of filing of the Application, to examine the events, and in particular the relations between the Parties, over a period prior to that date, and indeed during the subsequent period. Furthermore, subsequent events may render an application without object, or even take such a course as to preclude the filing of a later application in similar terms.” (*Ibid.*)

It emerges from the Court's above reasoning that the date of filing of an application for determining its admissibility certainly constitutes a very important factor, but that it must be contemplated in the light of relevant prior and subsequent events.

Among the events prior to the filing of Libya's Application, special mention must be made of Security Council resolution 731 (1992) adopted on 21 January 1992. True, that resolution does not specify under which chapter of the United Nations Charter it was adopted. Having the character of a recommendation, it does not create legally binding obligations for Members of the United Nations. It should be taken all the more into

consideration, however, given that the two Security Council resolutions 748 (1992) and 883 (1993), adopted this time under Chapter VII of the Charter, make explicit reference to resolution 731 (1992) and essentially echo its content.

With regard to events subsequent to the filing of Libya's Application, it has to be pointed out that it was rendered without object by the two mandatory Security Council resolutions. The Application ought therefore to have been dismissed. It will be observed that the Court is ruling on admissibility several years after the Application has been rendered without object. To regard that Application today as admissible springs, in my view, from a formalism quite alien to the jurisprudence of the Court. In the *Northern Cameroons* case, the Court stated as follows:

“Whether or not at the moment the Application was filed there was jurisdiction in the Court to adjudicate upon the dispute submitted to it, circumstances that have since arisen render any adjudication devoid of purpose.” (*I.C.J. Reports 1963*, p. 38.)

In the *Nuclear Tests (Australia v. France)* case, it affirmed that it “sees no reason to allow the continuance of proceedings which it knows are bound to be fruitless” (*I.C.J. Reports 1974*, p. 271, para. 58).

The Court has further concluded that the objection raised by the Respondent is not an objection to the jurisdiction of the Court or to the admissibility of the Application, but “another objection” said not to possess an exclusively preliminary character (cf. Rules of Court, Art. 79, paras. 1 and 7). I regret that I am unable to concur with the Court's line of argument, which goes like this: by seeking to obtain a decision not to proceed to judgment on the merits, which would immediately terminate the proceedings, the Respondent

“is requesting, in reality, at least two others which the decision not to proceed to judgment on the merits would necessarily postulate: on the one hand a decision establishing that the rights claimed by Libya under the Montreal Convention are incompatible with its obligations under the Security Council resolutions; and, on the other hand, a decision that those obligations prevail over those rights by virtue of Articles 25 and 103 of the Charter . . . The objection raised . . . on that point has the character of a defence on the merits.” (Paragraph 50 of the Judgment.)

The upholding of a preliminary objection undoubtedly has effects as to *enjoyment* of the rights that the Applicant claims to possess in its relations with the Respondent, without the *existence* or *content* of those rights being questioned. The indirect consequences of upholding an objection cannot be regarded as determinative of the exclusively preliminary character or otherwise of such an objection, within the meaning of Article 79, paragraph 7, of the Rules of Court. In this case, the Court is not

required to adjudicate upon the interpretation or application of Articles 7 and 11 of the Montreal Convention. The question whether the rights and obligations of the Parties, in the circumstances of the case, are governed by the United Nations Charter and by resolutions adopted by virtue of Charter provisions has no effect on the provisions of the Montreal Convention for the interpretation or application of which the Court has jurisdiction; the objection consequently possesses an exclusively preliminary character. There can be no doubt that the obligations of Members of the United Nations under the Charter — including the obligations that Security Council decisions create in regard to them — prevail over their obligations contracted under other international agreements. At the close of the provisional measures phase, the Court, in its Order of 15 April 1992, arrived at just such a finding (*I.C.J. Reports 1992*, p. 15, para. 39).

My conclusions are as follows: the Court has jurisdiction to hear the disputes existing between the Parties as to the interpretation or application of the relevant provisions of the Montreal Convention; the Libyan claims ought to have been deemed to be governed by the mandatory resolutions of the Security Council; and the preliminary objection raised by the Respondent in this respect, and which possesses a purely preliminary character, ought to have been upheld. Libya's Application, having become without object, ought therefore to have been dismissed.

(Signed) Géza HERCZEGH.