

DECLARATION OF ACTING PRESIDENT ODA

I concur with the Court's Order in that I believe the request for the indication of provisional measures should be declined. I wish, however, to add that I am not in agreement with the Court's taking United Nations Security Council resolution 748 (1992) as its sole ground in this matter.

I

I do not deny that under the positive law of the United Nations Charter a resolution of the Security Council may have binding force, irrespective of the question whether it is consonant with international law derived from other sources. There is certainly nothing to oblige the Security Council, acting within its terms of reference, to carry out a full evaluation of the possibly relevant rules and circumstances before proceeding to the decisions it deems necessary. The Council appears, in fact, to have been acting within its competence when it discerned a threat against international peace and security in Libya's refusal to deliver up the two Libyan accused. Since, as I understand the matter, a decision of the Security Council, properly taken in the exercise of its competence, cannot be summarily reopened, and since it is apparent that resolution 748 (1992) embodies such a decision, the Court has at present no choice but to acknowledge the pre-eminence of that resolution.

However, to base the Court's Order solely on that *non possumus* ground is to leave open the possibility that the Court, prior to the adoption of resolution 748 (1992), might have indicated provisional measures, and indeed to suggest that an analysis of the legal factors could have led the Court to a decision incompatible in its effects with the Security Council's actions. If this was not the case, and lest the Court be blamed for not having given its decision last month, it would have been preferable to say so. Accordingly, I wish to present my own view of the matter as a Member of the Court.

Before doing so, however, I feel bound to point out that Security Council resolution 748 (1992) was adopted in line with the Council's determination to eliminate international terrorism, the extradition of the two Libyan accused serving basically as a convenient focus for that determination, and that, three days of public hearings at the Court having taken place between 26 and 28 March (a Saturday) 1992, the members of the Security

Council could have been no less aware of the urgency of the Court's procedure as of the minimum time required for it to be able to deliver a considered decision. When the Council, following of course the logic of its own timetable and purposes, adopted its resolution on 31 March 1992, a mere three days after the hearings, it must therefore have acted in full cognizance of the impact of its own decision on that which still fell to be taken by the Court as well as of the possible consequences of the latter.

II

The Respondent asked that the Court should decline to indicate provisional measures on the ground that the Court lacked jurisdiction in this case, since the requirements of Article 14, paragraph 1, of the Montreal Convention had not been fulfilled. However, through the Court's jurisprudence it is established that, if the Court appears *prima facie* to possess jurisdiction, it may (if it thinks fit) indicate provisional measures, and this rule has always been interpreted most generously in favour of the applicant, lest a denial be needlessly prejudicial to the continuation of the case. Thus the possibility of indicating provisional measures may be denied *in limine* only in a case where the lack of jurisdiction is so obvious as to require no further examination of the existence of jurisdiction in a later phase.

In the present case, there does not seem to exist any convincing ground for asserting that the Court's jurisdiction is so obviously lacking. The Respondent's argument whereby the Court's jurisdiction is denied through the non-lapse of the six-month period would appear too legalistic, if one were to find that no room remained to negotiate on the organization of arbitration in the face of a categorical denial of the possibility of an arbitration.

III

In my view it is important to bear in mind that the rights susceptible of protection in a given case must lie within the scope of the object stated in the Application. Now, on the one hand, Libya instituted proceedings against the United States in respect of a dispute over the interpretation and application of the 1971 Montreal Convention. On the other hand, it is a matter of general international law that, while no State (unless by virtue of any convention) is obliged to extradite its own nationals, any State may exercise criminal jurisdiction over crimes committed in its own territory or may claim criminal jurisdiction over acts done abroad by aliens which are prejudicial to its security or certain offences recognized by the community of nations as of universal concern. This does not necessarily relate to the rights granted by the Montreal Convention, which are the subject of

the present case and fall to be clarified in the merits phase. The rights of which Libya claims protection in its request for interim measures cannot, thus, be assumed to constitute rights under the Montreal Convention and to fall within the scope of the Application, but are rather sovereign rights under general international law.

To make this distinction clear, I must point out that, although a State which has jurisdiction in respect of criminal proceedings against any person who happens to be in a foreign territory is free to request the territorial sovereign to extradite that person (a principle admittedly supported by the Montreal Convention), the immediate question put by Libya is whether or not the coercive reinforcement of that request could be deemed contrary to international law. This, to repeat, relates to protection of sovereign rights under general international law but not to the interpretation and application of the Montreal Convention, which is the subject-matter of the present case. The claim on the ground of the violation of sovereign rights would have instituted a totally different litigation, and whether or not the Court has jurisdiction to deal with that issue is certainly a different matter.

This analysis may seem over-technical, but is not so in relation to the apparent object of Libya's Application, which is to seek a declaratory judgment concerning the application and interpretation of the Montreal Convention. This point, in my view, cannot be verified at once but should be examined at a later stage.

IV

At all events, this mismatch between the object of the Application and the rights sought to be protected ought, in my view, to have been the main reason for the Court to decline to indicate provisional measures. On that basis, the Court would have come to the same negative conclusion, even before 31 March 1992, the date on which Security Council resolution 748 (1992) was adopted.

(Signed) Shigeru ODA.