

JOINT DECLARATION OF JUDGES GUILLAUME AND
FLEISCHHAUER

[English Original Text]

Article 79, paragraph 7, of the Rules of Court — Objection of mootness having an exclusively preliminary character.

Actions of the United States in order to obtain the surrender of the suspects — Last substantive submission of Libya directed against these actions — Jurisdiction of the Court in this respect only to the extent that the actions in question would be contrary to the Montreal Convention.

We feel prompted to make the following joint declaration with regard to the Judgment of today's date on the preliminary objections raised by the United States in the case concerning questions of interpretation and application of the 1971 Montreal Convention arising from the aerial incident at Lockerbie:

I

We voted against the third conclusion in the *dispositif* that

“the objection raised by the United States according to which the claims of Libya became moot because Security Council resolutions 748 (1992) and 883 (1993) rendered them without object does not, in the circumstances of the case, have an exclusively preliminary character”.

We find that that conclusion is wrong and that it sets a potentially dangerous precedent as it undercuts the object and purpose of Article 79 of the Rules of Court.

The conclusion is wrong for the following reasons.

This case is about the Montreal Convention. What is in dispute between the Parties is the applicability of the Convention to the Lockerbie incident and the observation of the obligations flowing from its provisions in the aftermath of the incident. The case is not about the Security Council resolutions 748 (1992) and 883 (1993) which were adopted by the Council on 31 March 1992 and 11 November 1993 respectively, i.e., after Libya had submitted its Application on 3 March 1992. Libya's substantive submissions as contained in its Application and its Memorial concern the applicability of the Montreal Convention and the compliance of the Parties with particular provisions of that instrument in the handling of the Lockerbie incident. Were it otherwise, the Court would not have jurisdiction; the only base for jurisdiction in this matter is Article 14, para-

graph 1, of the Montreal Convention which confers on the Court jurisdiction over “any dispute between two or more Contracting States concerning the interpretation or application” of the Convention.

The United States as Respondent claims, as a matter of preliminary objection, that “Libya’s claims have become moot because Security Council resolutions 748 (1992) and 883 (1993) have rendered them without object” (Judgment, para. 45). The aim of the objection is to obtain a decision from the Court that there is no ground for proceeding to judgment on the merits. This is an exclusively preliminary objection. The Court could — and should — have decided on it without thereby passing judgment — if only in part — on the merits of Libya’s claims.

Had the Court rejected — in whole or in part — the preliminary objection in question, then it would now turn — in so far as the preliminary objection was rejected — to the merits of the Libyan submissions and examine them one by one within the limits of its jurisdiction. The outcome of that examination would in no way be predetermined by the previous examination of and decision on the objection of the United States.

Had the Court, on the other hand, accepted the objection raised by the United States, then the Court would have effectively ended the case. It would, however, have done so without deciding on the merits of any of the submissions presented by Libya or predetermining them. The Court would have left the Montreal Convention completely aside. It would have based its decision exclusively on a new element, extraneous to the Montreal Convention and not related to it — the Security Council resolutions. In adopting resolutions 748 (1992) and 883 (1993), which contain decisions made under Chapter VII of the Charter and binding under Article 25, the Security Council has not taken a position with regard to the Montreal Convention; in no way has it decided whether the provisions of the Convention are applicable to the Lockerbie incident, nor has it decided or taken position on the question whether the provisions of the Convention have been complied with by the Parties. Rather, in the exercise of its primary responsibility for the maintenance of international peace and security, the Council found it necessary to impose certain obligations on Libya. In accordance with Article 103 of the Charter, those obligations override all other obligations of the Parties, irrespective of whether the latter obligations were contested between the Parties or whether they had been complied with or not. The lack of connection between the Security Council resolutions and the position of the Parties under the Montreal Convention precludes the evaluation of the objection of the United States as a defence on the merits; it also prohibits the Court from stating, as it does, that the objection “does much more than ‘touch[ing] upon subjects belonging to the merits of the case’ ” (Judgment, para. 49) or that it is “‘inextricably interwoven’ with the merits” (*ibid.*).

Because this is so, the third conclusion of the *dispositif* of the Judgment seems to run counter to the jurisprudence of the Court concerning

the application of Article 79 of the Rules of Court since their 1972 revision. The Court, with one exception (*Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984, p. 392*), has always dealt with preliminary objections in the first phase of the proceedings and has indeed favoured a restrictive interpretation of the notion “not exclusively preliminary” in the interest of speedy and economical disposal of the objections (*ibid., Merits, Judgment, I.C.J. Reports 1986, pp. 29 ff.*).

The Judgment seeks to justify its third conclusion by declaring that accepting the preliminary objection of the United States would have meant taking “a decision establishing that the rights claimed by Libya under the Montreal Convention are incompatible with its obligations under the Security Council resolutions” (para. 49). It adds that acceptance of the objection raised by the Respondent would have constituted “a decision that those obligations prevail over those rights by virtue of Articles 25 and 103 of the Charter” (*ibid.*). This might be true, but it is beside the point for the decision to be taken now on the preliminary objection of the United States. Defining the meaning and the effect of the resolutions of the Council and comparing those resolutions with the submissions of Libya regarding the Montreal Convention in no way means taking position on the rights and obligations of Libya under the Convention.

That acceptance of the preliminary objection of the United States would have brought the case to an end is also not in itself an argument against its exclusively preliminary character: the ending of a case is the intention of every preliminary objection. This is so in the case of objections of the kind of those dealt with in the third conclusion of the *dispositif*. The Court has in the past had occasion to deal with such objections and has considered them separate from the merits; it dealt with them even before turning to jurisdiction and admissibility (*Nuclear Tests cases (Australia v. France), Judgment, I.C.J. Reports 1974, pp. 259-272*, and (*New Zealand v. France), Judgment, I.C.J. Reports 1974, pp. 457-478*). In this connection it has also to be pointed out that if the Council terminated, with effect *ex nunc*, the measures prescribed by resolutions 748 (1992) and 883 (1993), the position of the Parties under the Convention would still exist, unchanged.

The third conclusion of the *dispositif* runs counter to the object and purpose of Article 79 of the Rules of Court and sets a dangerous precedent for the future handling of that provision for the following reasons.

When the Court, in 1972, adopted the text which later became Article 79, it did so for reasons of procedural economy and of sound administration of justice. Court and parties were called upon to clear away preliminary questions of jurisdiction and admissibility as well as other preliminary objections before entering into lengthy and costly proceed-

ings on the merits of a case. Of course, provision had to be made for objections that did not possess “in the circumstances of the case, an exclusively preliminary character” (Art. 79, para. 7). In order to make the necessary determinations the Court, “whenever necessary, may request the parties to argue all questions of law and fact, and to adduce all evidence, which bear on the issue” (Art. 79, para. 6). The interpretation given by the Court in the present case to the notion “not exclusively preliminary character” is, however, so wide and so vague that the possibility of accepting a preliminary objection becomes seriously restricted. Thereby the Judgment acts counter to the procedural economy and the sound administration of justice which it is the intent of Article 79 to achieve.

II

We would also like to state that we have voted in favour of the first conclusion of the *dispositif* on jurisdiction of the Court over the case on the following understanding relating to the last of the substantive submissions presented by Libya in its Application and its Memorial.

In the version submitted to the Court in the Libyan Memorial this submission concerns an alleged legal obligation of the United States

“to respect Libya’s right not to have the [Montreal] Convention set aside by means which would in any case be at variance with the principles of the United Nations Charter and with the mandatory rules of general international law prohibiting the use of force and the violation of the sovereignty, territorial integrity, sovereign equality and political independence of States” (Judgment, para. 33).

We recognize that there is a legal dispute between the Parties concerning this point. That dispute, however, falls under Article 14, paragraph 1, of the Montreal Convention and therefore within the jurisdiction of the Court only if, and in so far as, it concerns the interpretation and application of one or more of the provisions of the Convention. The dispute does not fall under Article 14, paragraph 1, and the jurisdiction of the Court if it concerns the interpretation and application of Article 2, paragraph 4, of the Charter of the United Nations. That is spelled out in paragraph 35 of the Judgment, but not so explicitly in the *dispositif*; that is why we wish to make our position on the matter quite clear.

(Signed) Gilbert GUILLAUME.

(Signed) Carl-August FLEISCHHAUER.