

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

The United States demand for the surrender of the two accused Libyan nationals is based largely on the view that an impartial trial could not be had in Libya. However, the material before the Court raises an issue as to possible prejudgment of the case by the United States. The United States demand that Libya "must . . . pay appropriate compensation . . . promptly and in full" presupposes a determination by the United States that the accused are guilty, since the responsibility of the Libyan State is premised on the guilt of the accused. My reasoning is set out in a separate opinion appended by me to the Order made today by the Court in the companion case brought by Libya against the United Kingdom.

(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 SHAHABUDEEN.
