

SEPARATE OPINION OF JUDGE KOOIJMANS

1. I have voted in favour of the operative part of the Judgment since I concur with the Court's finding that it has jurisdiction to entertain the claim as submitted by Libya and that this claim is admissible. I also share the view expressed in the Judgment that a number of the objections submitted by the Respondent do not have an exclusively preliminary character. Since, however, the Judgment does not reflect fully my own considerations I wish to place on record my views on some specific arguments brought forward by the Parties. I will do so rather succinctly with regard to the objections to the jurisdiction of the Court and in a slightly more comprehensive way with regard to the objections to the admissibility of the claim and to the objection that the Libyan claims have been rendered moot, or that Libya is precluded from obtaining the relief it seeks, by the subsequent adoption of Security Council resolutions 748 (1992) and 883 (1993).

I. JURISDICTIONAL ISSUES

2. It would be a truism to contend that the present case is a politically highly sensitive one. As the Court has stated many times before, the fact that a dispute brought before it has serious political overtones does not act as a bar to the Court's entertaining it, nor does the fact that the dispute is being dealt with simultaneously by the Security Council.

In the present case the Respondent has gone further than pointing out merely these elements. It has intimated that Libya has not invoked the Court's jurisdiction under the Montreal Convention in order to settle a dispute which has arisen under that Convention but for other — quite unconnected — reasons.

As it is stated in the written pleading submitted by the United States:

“This dispute does not relate to the Montreal Convention. It relates to Libya's obligations to comply with the decisions of the Security Council . . . the Court ought not allow Libya to abuse the Court's jurisdiction to entertain disputes that do not arise under the Montreal Convention.” (Preliminary Objections of the United States of America, p. 76, para. 3.22.)

3. The Respondent not only denies that there exists a dispute with Libya on the interpretation or application of the Montreal Convention, it also casts serious doubts on Libya's motives to construe such a dispute;

the Court should not allow itself to be lured into such a politically inspired hoax. I have chosen the rather extreme wording of this last sentence on purpose in order to show how easily the Court can be portrayed as an instrument used by one of the parties for extrajudicial purposes. And this risk becomes an acute danger if the impression arises that the Court is used as a pawn in a game of chess where other principal organs of the United Nations play a role.

4. Against this background it seems proper and worthwhile to point out once more what is the function of the Court according to the Charter and its Statute, which forms an integral part of that Charter. This function was described in apposite terms by the Court itself in its Judgment of 20 December 1988 in the *Border and Transborder Armed Actions* case:

“the Court is aware that political aspects may be present in any legal dispute brought before it. The Court, as a judicial organ, is however only concerned to establish, first, that the dispute before it is a legal dispute, in the sense of a dispute capable of being settled by the application of principles and rules of international law, and secondly, that the Court has jurisdiction to deal with it, and that that jurisdiction is not fettered by any circumstance rendering the application inadmissible. The purpose of recourse to the Court is the peaceful settlement of disputes; the Court’s judgment is a legal pronouncement, and it cannot concern itself with the political motivation which may lead a State at a particular time, or in particular circumstances, to choose judicial settlement.” (*Border and Transborder Armed Actions (Nicaragua v. Honduras)*, *Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1988*, p. 91, para. 52.)

5. Whether the eventual finding of the Court on the merits is compatible with binding decisions of other United Nations organs, in particular the Security Council, is quite another matter and in the Court’s view must be considered at a later stage. The first task of the Court after a case is submitted to it is to consider whether the case concerns a legal dispute and whether it has jurisdiction to deal with it. As the Court said in the *Nuclear Tests* cases: “the existence of a dispute is the primary condition for the Court to exercise its judicial function”. The Court went on to say that “it is not sufficient for one party to assert that there is a dispute”, nor, it may be added, is it sufficient that the other party denies that there is a dispute. Referring to what is said in the case concerning *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania (I.C.J. Reports 1950, p. 74)*, the Court stated that “whether there exists an international dispute is a matter for objective determination” by it (*Nuclear Tests (Australia v. France)*, *Judgment, I.C.J. Reports 1974*, p. 271, para. 55).

6. If the Court, therefore, is determining the existence or the non-existence of a legal dispute, it is carrying out its proper judicial function. In this respect it is in my view not relevant that the Respondent does not rely on the Montreal Convention and contends that it has no dispute with Libya concerning its interpretation or application. It is not in dispute between the Parties that the facts of the Lockerbie incident as such may be characterized as an act defined in Article I of the Montreal Convention which would imply that the Convention could be applicable to that incident and — under normal circumstances — would be applicable. The Respondent has stated that this does not mean that no other rules of international law are applicable to these facts and by bringing the situation to the attention of the Security Council as a potential threat to peace and security resulting from State-sponsored terrorism it has relied on the provisions of the United Nations Charter. Under such circumstances the Montreal Convention would not be the only and exclusively applicable instrument as is contended by the Applicant.

7. The resulting difference of opinion is therefore not an abstract disagreement about the applicability of the Montreal Convention, it is a very precise legal dispute about its applicability to the very facts of the case before the Court. The fact that the Security Council by adopting resolution 731 (1992) implicitly denied the Convention's applicability to these facts can in no way detract from the Court's own competence and its own responsibility to determine whether the dispute as submitted by the Applicant is a justiciable dispute within the terms of Article 14, paragraph 1, of the Montreal Convention, the settlement of which is entrusted to the Court. To conclude otherwise would impair the proper function of the Court as it is determined in the Charter and the Statute. By implication the Court has also jurisdiction to entertain the claims by Libya that the Respondent has not respected Libya's rights under Article 7 of the Convention, respectively its own obligations under Article 11, since these are the specific claims submitted by the Applicant. Whether the Court will have to deal with these specific claims will, of course, depend upon the Court's finding on the preliminary question of the Convention's applicability in view of the resolutions of the Security Council.

8. The Court's jurisdiction in my view is confined to the issues just mentioned which are covered by the terms of Article 14, paragraph 1, of the Montreal Convention, viz. the issues of applicability and compliance or non-compliance. In particular the ways and means by which this non-compliance is practised and the question whether these ways and means are at variance with the Charter of the United Nations and with mandatory rules of general international law do not come within the Court's jurisdiction as consensually agreed upon in Article 14, paragraph 1, of the Convention.

9. I, therefore, fully agree with the Court's finding that it has jurisdic-

tion to hear the dispute between the Applicant and the Respondent in accordance with Article 14, paragraph 1, of the Montreal Convention. That I nevertheless have expressed some personal views on the issue of jurisdiction is because I deem it important to point out that in this regard the competences of the Security Council and the Court are separate and clearly distinguishable, and should not be confused, let alone be seen as potentially conflicting with each other. Just as each State is entitled to bring a situation to the attention of the Security Council and the Council is entitled to give its views on that situation and to qualify it as a threat to international peace and security, so each State is entitled to submit to the Court a claim against another State with regard to a dispute which in its opinion is justiciable. It is for the Court and only for the Court to determine whether it is competent to entertain the claim on the basis of the relevant legal provisions.

II. ISSUES OF ADMISSIBILITY AND MOOTNESS

10. Whether the Court, once it has assumed jurisdiction, should carry out its judicial function under all circumstances is quite a different matter. The Respondent has submitted that any rights which Libya might have under the Montreal Convention are in any event superseded by its obligations under Security Council resolutions 748 (1992) and 883 (1993) which were adopted after the date of the filing of Libya's Application. Consequently, any judgment on the merits would be an empty one because it would be neither applicable nor enforceable.

11. It seems to be a question of minor relevance whether this objection must be called an objection to the admissibility and consequently must be rejected since these resolutions were adopted after the date of the filing of the Application which according to the Judgment is the only relevant date for determining the admissibility or whether it must be qualified as an "objection the decision upon which must be determined before any further proceedings" in the sense of Article 79, paragraph 1, of the Rules of Court.

12. It may be questioned whether it is necessary or even possible to give a neat categorization of preliminary objections. S. Rosenne says in this respect:

"All that can be deduced from experience is that it is an individual matter to be appreciated in the light of all the circumstances of each case." (S. Rosenne, *The Law and Practice of the International Court of Justice, 1920-1996*, 1997, p. 883.)

In this respect reference may be made also to the *Northern Cameroons* case where the Court, commenting on the various meanings ascribed by the Parties to, *inter alia*, the term "admissibility" said:

“The Court recognizes that these words in differing contexts may have various connotations but it does not find it necessary in the present case to explore the meaning of these terms. For the purposes of the present case, a factual analysis undertaken in the light of certain guiding principles may suffice to conduce to the resolution of the issues to which the Court directs its attention.” (*Northern Cameroons, Judgment, I.C.J. Reports 1963*, p. 28.)

13. Irrespective of the question whether preliminary objections should be distinguished as to category, this contextual analysis is exactly what the Court has undertaken in the present Judgment. Taking into account all circumstances of the case it has come to the conclusion that the objection that Security Council resolutions 748 (1992) and 883 (1993) have rendered the Libyan claim “moot” is an objection which possesses a preliminary character and falls within the provisions of Article 79 of the Rules of Court. Nevertheless, the Court has concluded that this objection does not have an exclusively preliminary character within the meaning of Article 79, paragraph 7, and, therefore, should be considered at the stage of the merits.

14. I share this view of the Court. I have, however, the feeling that some additional remarks would be appropriate in light of the fact that the Respondent has not denied that this objection may touch upon the merits. It is of the opinion that the case should nevertheless be terminated at the present stage as any judgment on the merits would be without practical effect since the relief sought by Libya cannot be provided by the Court because of the overriding legal effects of the mandatory resolutions of the Security Council. As counsel for the United States said:

“The Court is under no compulsion to pass on the merits of Libya’s claims under the Montreal Convention if it believes, as we do, that those claims are, as a matter of substantive law, superseded by the decisions of the Council, whether or not those claims are valid under the terms of the Convention. Nothing precludes the Court from deciding the case *in substance* on this basis, without having to enquire further into Libya’s assertions under the Convention.” (CR 97/19, p. 47; emphasis added.)

In this respect explicit reference was made to the Court’s finding in the *Northern Cameroons* case, where it said:

“The Court’s judgment must have some practical consequence in the sense that it can affect existing legal rights or obligations of the parties, thus removing uncertainty from their legal relations.” (*I.C.J. Reports 1963*, p. 34.)

15. It seems questionable, however, whether this reference to the *Northern Cameroons* case is correct. The Court’s reasoning was based on the argument that a judgment on the merits would not be a judgment capable of effective application since the decision of the General Assembly (resolution 1608 (XV)) to terminate the Trusteeship over the British Cameroons (which mooted the case between the United Kingdom and the

Republic of Cameroon) was an administrative measure of a determinative and final character. A finding of a breach of law by the Court could not lead to redress as the General Assembly was no longer competent with regard to the Territory pursuant to the termination of the Trusteeship as a result of resolution 1608 (XV) and consequently no determination reached by the Court could be given effect to by the former Administering Authority (*I.C.J. Reports 1963*, p. 35).

16. Even less appropriate seems the reference by the United States to the Court's decision in the 1974 *Nuclear Tests* cases where it found that "the claim of the Applicant (Australia) no longer has any object and that the Court is therefore not called to give a decision thereon". This finding was based on the fact that in the view of the Court the dispute brought before the Court no longer existed, since the Respondent (France) had unilaterally undertaken an obligation which fully met the claim of the applicant State. It deserves notice, however, that the Court ruled that the case could be re-opened if the Respondent would not comply with its commitment (*I.C.J. Reports 1974*, pp. 270 ff.).

17. Both the *Northern Cameroons* case and the *Nuclear Tests* cases make clear that a decision that a claim no longer has any object can only be made within a highly concrete context. It is "the circumstances which have arisen" which bring the Court to the determination that "it does not enter into the adjudicatory functions of the Court to deal with issues *in abstracto*, once it has reached the conclusion that the merits of the case no longer fall to be determined" (*I.C.J. Reports 1974*, p. 272).

18. In the present case circumstances are different: neither is there an administrative measure of a determinative and final character taken by an organ of the United Nations, nor is there a satisfaction of the Applicant's claim. Resolutions of the Security Council taken under Chapter VII of the Charter may have far-reaching legal effects, but they are not irrevocable or unalterable. In the exercise of its function the Security Council is free to confirm, revoke or amend them and consequently they cannot be called "final" even if during their lifetime they may be dispositive of the rights and obligations of member States, overriding rights and obligations these States may have under other treaties. It is generally agreed that the Security Council has full competence under Chapter VII to determine that a factual situation constitutes a threat to international peace and security and that it may take the necessary legally binding measures to counter that threat, but that it has no competence to determine the law, whereas it has been questioned whether the Council can modify the law when applying it to a particular set of facts (see e.g. Malcolm Shaw, "The Security Council and the International Court of Justice: Judicial Drift and Judicial Function", in A. S. Muller *et al.* (eds.), *The International Court of Justice — Its Future Role after Fifty Years*, 1997, pp. 219 ff.).

19. Since Security Council resolutions 748 (1992) and 883 (1993) have authoritatively but *not definitively* and for an indefinite period of time determined the matters at issue, the Court rightly concluded that the objection by the Respondents that the Libyan claims are without objective (moot) does not have “an exclusively preliminary character” and will be considered by the Court when it reaches the merits of the case. By doing so the Court has upheld its function as it is defined in Article 38 of the Statute, viz. “to decide in accordance with international law such disputes as are submitted to it”, at the same time respecting fully the competences which the Security Council has under the Charter.

20. Distinguishing carefully the proper functions of both Security Council and Court in my view is essential for what Judge Lachs called “a fruitful interaction” between these two main organs of the United Nations. These functions are complementary and in that sense can be mutually supportive.

III. CONCLUDING REMARKS

21. One final remark may be made. The Respondent has invoked the concept of “judicial economy” when advocating a dismissal of the case in the preliminary phase. It has warned of proceedings on the merits which will be lengthy, arduous and extremely complicated and added that

“such a difficult and lengthy procedure would . . . be wholly without purpose if in the end the Court concludes that Libya must comply with the Council’s decisions and surrender the two accused persons for trial in the United States or the United Kingdom . . . It is clearly within the power of the Court to avoid unnecessary examination of immaterial and more difficult legal and factual issues.” (Preliminary Objections of the United States of America, pp. 112-113.)

It cannot be excluded that this might be the case indeed, although this is by no means certain as it was in the *Northern Cameroons* case.

22. Judicial economy however may go to the detriment of judicial propriety which asks for a careful weighing of the interests of all parties to the dispute. In this respect it is worthwhile to recall what Judge Read said in his dissenting opinion in the *Anglo-Iranian Oil Co.* case:

“It is impossible to overlook the grave injustice which would be done to an applicant State, by a judgment upholding an objection to the jurisdiction and refusing to permit adjudication on the merits, and which, at the same time, decided an important issue of fact or law, forming part of the merits, against the applicant State. The effect of refusal to permit adjudication of the dispute would be to

remit the applicant and respondent States to other measures, legal or political, for the settlement of the dispute. *Neither the applicant nor the respondent should be prejudiced, in seeking an alternative solution of the dispute, by the decision of any issue of fact or law that pertains to the merits.*" (I.C.J. Reports 1952, p. 149; emphasis added.)

23. It certainly cannot be foreseen that alternative solutions, for example, on the basis of suggestions made by regional organizations or other international or national groupings, will be found and at present that may even seem improbable but neither can it be excluded. The Court should not be seen as standing in the way of any conciliatory effort.

(Signed) P. H. KOOIJMANS.