DISSENTING OPINION OF JUDGE STASSINOPOULOS

[Translation]

To my great regret, I am unable to associate myself with the Order. Exercising therefore the right conferred upon me by Article 57 of the Statute, I venture to indicate the reasons for my dissent.

The request by Greece for the indication of interim measures of protection must be viewed, first of all, from the angle of two indisputable principles of the international law of the sea.

The first principle is that the coastal State exercises over the continental shelf *sovereign rights* of exploration and exploitation of the natural resources; those rights are *exclusive* in the sense that none may carry on any research, exploration or exploitation activities without the consent of that coastal State. This principle, crystallized by Article 2 of the 1958 Geneva Convention on the Continental Shelf, was reaffirmed in very clear terms by the Court in its *North Sea Continental Shelf* Judgment (*I.C.J. Reports 1969*, p. 22).

The second principle is that islands possess their own continental shelf in the legal sense of that term. Here I venture to recall the basic provision of Article 1 of the 1958 Geneva Convention:

> "For the purpose of these articles, the term 'continental shelf' is used as referring . . . *(b)* to the seabed and subsoil of similar submarine areas adjacent to the coasts of islands."

The norm-creating character of Articles 1 and 2 of this Convention was repeatedly confirmed by the Court's above-mentioned Judgment on the *North Sea Continental Shelf* (*ibid.*, pp. 22, 39 and 42).

In my view it is necessary always to bear in mind these two principles, which constitute the *law in force*, in assessing the merits of the request for the indication of interim measures of protection in the present case.

Now the exercise by Greece of its exclusive sovereign rights over its continental shelf, as determined by the two above-mentioned principles, has been immutable, imperturbable and continuous from all time, and ever since the appearance of the very concept of the continental shelf in the domain of international law. Turkey never protested against that exercise and never claimed any rights whatever over the Greek continental shelf. It was only in 1973 that it suddenly published in its Official Gazette a map showing areas of the Aegean Sea in respect of which Turkey claimed rights. At practically the same time Turkey granted exploration licences in respect of those same areas and began exploration work. That means that Turkey, instead of waiting for the question which it had itself

raised to be settled by the appropriate means, in accordance with Article 33 of the Charter of the United Nations, attempted to make good its own claims by material acts undertaken with no other title than those claims themselves. This manner of proceeding provides a classic example of taking the law into one's own hands (*"voie de fait"*) and is certainly not sufficient in law to justify describing these areas, which always incontestably belonged to Greece, as "areas in dispute" or "contested".

In 1976, the exploration activities carried on by the Turkish vessel *Sismik I* are part of a large-scale programme which has even been extended since the Court has had to concern itself with the present situation. As a result of those activities, Greece and Turkey have found themselves engaged in military preparations on a considerable scale, and the aggravation of the situation could lead to a very real threat to peace.

Faced with that situation, which has been steadily deteriorating, Greece has filed in the Court an Application with a view to the delimitation of the continental shelf of the Aegean Sea and a request for the indication of interim measures of protection pending the pronouncement of this eminent international tribunal on the merits of the case.

Greece's request is founded on Article 33 of the General Act of 1928 and on Article 41 of the Statute of the Court. Both these texts confer on the Court the power to indicate interim measures of protection. But they differ, in particular, in the weight and scope of the powers conferred on the Court for that purpose.

The wording of Article 33, paragraph 1, of the General Act is more imperative from the Court's standpoint:

> "1. In all cases where a dispute forms the object of arbitration or judicial proceedings, and particularly if the question on which the parties differ arises out of acts already committed or on the point of being committed, the Permanent Court of International Justice, acting in accordance with Article 41 of its Statute, or the Arbitral Tribunal, shall lay down within the shortest possible time the provisional measures to be adopted. The parties to the dispute shall be bound to accept such measures."

As for Article 41, paragraph 1, of the Statute, it provides that the Court "shall have the power to indicate, if it considers that *circumstances so require*, any provisional measures which ought to be taken to preserve the respective rights of either party" (emphasis added). In my view, the notion of the "circumstances" which the Court has to take into consideration comprises in the first instance the *nature* of the rights whose protection is in contemplation. And on that point the texts of Article 33 of the General Act and Article 41 of the Statute are identical. By this I mean that, when the Court finds itself faced with an infringement of rights appertaining to the sovereignty of a State, it is bound to give this circumstance the highest degree of consideration in relation to the indication of the measures requested.

Having made that point, I venture to recall that the Court has indicated interim measures of protection in many cases where the rights to be protected did not appertain to the sovereignty of the State in question. In the present case, on the other hand, I have the impression that this is the first time that the Court has refused to indicate interim measures of protection when confronted with a dispute involving infringements of sovereign rights.

In its jurisprudence the Court has defined the conditions which in its view have to be fulfilled if interim measures are to be indicated. Central among these conditions are the following concepts: preservation of the rights of the parties, irreparable prejudice, and aggravation or extension of the dispute.

The concept of preserving the rights of the parties is always featured in the Orders made by the Court, whether they indicate or do not indicate interim measures of protection. On the other hand, the concept of irreparable prejudice has not always been explicitly mentioned in the reasoning of the Court. Such was for example the case in *Anglo-Iranian Oil Co.* (where interim measures were indicated) and *Interhandel* (where they were not). I would add that the concept of irreparable prejudice is not taken by the Court in a literal sense. The prejudice is considered in relation to the situation in which it takes place.

In the present case, there is grave and irreparable prejudice to sovereign rights as such, for we know that, according to the Court, the coastal State possesses such rights over the continental shelf *ipso facto* and *ab initio*, that Article 2 of the Geneva Convention, when it speaks of exclusivity, confers an absolute right and that, consequently, any infringement of that absolute right constitutes an irreparable prejudice. I consider equally irreparable the prejudice caused by the gathering of information on the resources of the Greek shelf and the possibility of disclosing them, which would raise an insurmountable obstacle to their exploitation by Greece.

Furthermore, the material fact of exploring the continental shelf by means of explosions constitutes an aggravating circumstance if the evolution of international law in this respect is taken into account.

Indeed Part III of the Revised Single Negotiating Text of the United Nations Third Conference on the Law of the Sea (A/CONF.62WP. 8/Rev.1/Part III (6 May 1976)), which according to the Chairman of the Third Committee has taken account "of all the proposals and amendments submitted and results reached during this session of the conference", includes, in Article 60, paragraph 2, subparagraph *(b)*, a very clear ban on carrying out research or exploration of the continental shelf by means of explosives.

This prohibition postulates the risk of irreparable damage to the natural resources of the continental shelf.

But it concerns cases where the research is carried out with the authori-

zation of the coastal State. How could the continental shelf be preserved from adverse effects in the case of unlawful exploration, as in the present instance, constituting a veritable *voie de fait*? And the acts intended to promote Turkey's achievement of its own claims with respect to the Greek shelf are, as I have said above, nothing other than *voies de fait*. Again I must emphasize this view of the matter.

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I find myself also in disagreement with that part of the Order which deals with Security Council resolution 395 (1976).

The Court is the principal judicial organ of the United Nations, one of its five principal organs. It contributes, with the means placed at its disposal by the Charter and its Statute, to the settlement of legal disputes between States.

In the present case, we are confronted with a legal dispute (delimitation of the continental shelf) the resolution of which will enable the parties to improve their mutual relations.

The political aspect of the case has been referred to the Security Council. This organ worked out a resolution in accordance with the elements at its disposal.

As for the Court, it has been seised of another fundamental aspect of the same question. Given the urgency of the situation and its aggravation, the Court should have exercised its powers in full. It is not necessary to mention here the difference there is between a dispute or a situation referred at one and the same time to the Security Council and the General Assembly, and two applications of which one is made to the political organs of the United Nations and the other to its judicial organ. In the first instance, Article 12 of the Charter prohibits the General Assembly in principle from making any recommendation for so long as the Security Council is exercising its functions under the Charter with regard to the dispute or situation. But there is absolutely nothing, whether in the Charter or in the Statute, to prevent the Court from making a finding in its own particular domain in cases where another organ of the United Nations is concerning itself with the political aspects of a case.

In a daily deteriorating situation, the indication *to both parties* that they should avoid any act that might aggravate or extend the dispute would have been justified within the framework of the powers conferred on the Court by Article 33 of the General Act and Article 41 of its Statute. Furthermore, since the Court had decided upon the solutions adopted in paragraphs 34-41 of the Order, while concluding in paragraph 42 that—

> ". . . it is not necessary for the Court to decide the question whether Article 41 of the Statute confers upon it the power to indicate interim measures of protection for the sole purpose of preventing the aggravation or extension of a dispute",

it was necessary in my opinion for the Court to extend that solution to the other ground of the request, that is to say, the question of irreparable prejudice relied on therein, and not to concern itself with that matter. Instead of that, the Court has said that it was not requisite to indicate the measures requested because there was no irreparable prejudice (para. 33). Yet one should not lose sight of the fact that the activities of *Sismik I* and the irreparable prejudice to which they give rise are central to the case and are closely bound up with the creation of the situation which is aggravating and extending the dispute. It is not surprising that these two factors, closely linked as I have said, were presented together before the Security Council, since the explorations of *Sismik I* were the cause of the aggravation of the situation.

Now, in my view, the Court ought to have decided in like manner on each of the two different grounds of the request for the indication of interim measures of protection and ought not to have considered the question of irreparable prejudice separately, arriving at the conclusion embodied in paragraph 33. If the Court had followed that course, the answer given on both heads would have been identical, which in my opinion would correspond to the real situation and constitute a fair and calming solution for both parties.

The Question of Jurisdiction

So far as jurisdiction is concerned I think that, before proceeding to consider the request for interim measures, or any request, the Court must satisfy itself, by an extremely summary examination, that it has prima facie jurisdiction to deal with the merits of the case. Not only does that rule emerge from the Court's jurisprudence, but it also constitutes a general principle governing all analogous institutions.

I would refer in this connection to the practice of municipal administrative tribunals. When an appeal is made to an administrative tribunal on the ground of action *ultra vires*, that does not have any suspensory effect on the act complained of; in other words, the mere filing of the appeal does not prevent that act from being carried out. This is natural, because otherwise the functioning of the administration could be seriously harmed and its activities paralysed. However, in municipal systems of law, there is statutory provision for the unusual event that the performance of the act complained of, if it were to take place pending the pronouncement of the competent tribunal on its validity, would be likely to cause the applicant irreparable prejudice. In such event, it is possible to obtain a stay of execution. Such stay of execution has never been refused on account of doubts as to competence to deal with the substantive appeal.

The Greek application is founded on Article 17 of the General Act of 1928 and on the joint Greco-Turkish communiqué of 31 March 1975.

So far as the General Act is concerned, although the Court, in the *Nuclear Tests* cases, did not make any direct pronouncement as to the French contention that it had fallen into desuetude, it nevertheless

considered the General Act as prima facie in force for the purposes of the interim measures phase. Moreover, recent action by the Secretary-General of the United Nations, the depositary of the General Act, proves that it is still in force.

Greece also founds the jurisdiction of the Court on the communiqué of 31 May 1975. This constituted an undertaking on the part of both parties. It is a factor which is also sufficient to ascertain that the Court has at least prima facie jurisdiction.

Finally, reservation *(b)*, mentioned in Greece's instrument of accession to the General Act (see para. 19 of the Order) is no obstacle to the force of the General Act, for the three following reasons:

(a) as appears from the letter by Mr. Politis, which has been laid before the Court, the purpose of that reservation was to remove from the sphere of applicability of the General Act such disputes as might arise regarding the possible aspirations of another State to have a free zone, or a zone of special régime, within the territory, of the Greek State;

(b) at the time when that reservation was formulated, the concept of the continental shelf did not yet exist in the field of international law;

(c) the literal sense of the term "territorial status" excludes, in my view, any construction according to which it might comprehend the continental shelf.

For those reasons, I am of the opinion that the jurisdiction of the Court to adjudicate upon the merits of the case does exist, at least prima facie.

(Signed) Michel STASSINOPOULOS.