SEPARATE OPINION OF JUDGE TARAZI

[Translation]

I voted in favour of the operative paragraph of the Judgment. At the same time, given the complexity of the problems the Court had to consider in order to ascertain whether it had jurisdiction, I find myself impelled to present certain ideas which were not included in the grounds given for the decision.

My observations will not concern the Geneva General Act of 1928, which I regarded as incapable of conferring jurisdiction on the Court to decide the dispute. But the Government of Greece had maintained there was another legal instrument on which the seisin of the Court could be founded, namely the Brussels Joint Communiqué of 31 May 1975, agreed between the Prime Ministers of both countries, Greece and Turkey.

The oral proceedings also revealed the existence of another legal instrument binding the two States, one exceeding the Brussels Joint Communiqué in importance. This is the Greco-Turkish Treaty of Friendship, Neutrality, Conciliation and Arbitration signed at Ankara on 30 October 1930, the instruments of whose ratification were exchanged at Athens on 5 October 1931 and which was published in the *League of Nations Treaty Series*. In its letter of 10 October 1978 the Government of Turkey did not deny the existence or validity of this treaty. The Government of Greece, while acknowledging its existence, did not, in the course of the oral proceedings, think fit to avail itself of it in order to found the jurisdiction of the Court.

Despite this attitude on the part of Greece, it was nevertheless incumbent on the Court to ascertain by all means in its possession whether there was any link between the provisions of the Brussels Joint Communiqué and those of the 1930 Greco-Turkish Treaty and draw the necessary logical conclusion therefrom. The purpose of my separate opinion is to try to explain this original situation. I therefore propose to consider the following points:

1. The legal nature of the Brussels Joint Communiqué and the legal obligation to which it gives rise.
2. The power which the Court possesses to make use of the provisions of the 1930 Greco-Turkish Treaty in its research directed to ascertaining whether it has jurisdiction.
3. The necessary conclusion to be drawn in the event of there being a link between the Brussels Joint Communiqué and the 1930 Greco-Turkish Treaty.

1. The Legal Nature of the Brussels Joint Communiqué

The Joint Communiqué adopted by the Prime Ministers of Greece and Turkey contains the following words:

> "They [the two Prime Ministers] decided that those problems [pending between the two countries] should be resolved peacefully by means of negotiations and as regards the continental shelf of the Aegean Sea by the International Court at The Hague."

Perusal of this text reveals that the Joint Communiqué contains three elements:

(a) the element of "decision" or, in other words, the placing on record of the agreement reached by the parties on the solution of the issues in dispute between them;
(b) the element of specification, with prominence having been given to the dispute concerning the continental shelf of the Aegean Sea;
(c) the element of choice of method for the solution of the dispute in question, by the designation of the International Court of Justice as the organ to be entrusted with its decision.

It has, however, been alleged that the Brussels Joint Communiqué was devoid of legal value and could not have the consequence of conferring jurisdiction on the Court.

This view is contradicted by the prevailing tenets of legal theory today. The philosophy of law has made considerable progress since the end of the Second World War. The attachment to verbal and technical formalism still to be found in works published in what is known for convenience as the "inter-war period" is no longer appropriate. What matters today is the search for the agreement between the parties and the ascertainment of their common will. This is a fact which is plainly attested by paragraph 1 of Article 2 of the 1969 Vienna Convention on the Law of Treaties, which reads as follows:

> "For the purposes of the present Convention:
>
> *(a)* 'treaty' means an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments *and whatever its particular designation*;" (emphasis added).

This provision was no novelty. Islamic law had already provided that "in conventions, one must consider the intention of the parties and not the literal meaning of the words and phrases employed" (in Arabic: " *'Al ibratou fil 'ouqoud lil makasidi wal ma'ani, la lil alfazi wal mabani"*) [1].

[1] See George A. Young, Second Secretary of the British Embassy at Constantinople: *Corps de droit ottoman*, Vol. VI, Oxford, Clarendon Press, 1906, p. 178.

The French Civil Code provides, in Article 1156, "that one must seek in conventions what was the common intention of the contracting parties, rather than confine oneself to the literal meaning of the terms".

Hence the Brussels Joint Communiqué does not have to be denied all legal value because it was not given the form of a treaty or convention. It should moreover be observed that the modern era is characterized, in the field of international relations, by the increasing number of joint communiqués which are issued following the meetings of heads of State, heads of government and foreign ministers. These communiqués generally include statements falling into either or both of the following categories:

(a) either the expression of a given specific attitude to one or more issues under discussion within the international or world community: thus a position might be adopted with regard to disarmament, the Middle East crisis, the right of the Palestinian people to self-determination, racial discrimination, etc.;
(b) or an undertaking to do or not do a given thing or consent to the performance of a certain obligation.

It emerges from this classification that the matters comprised in the first category are of an essentially political nature and are only sanctioned by law if included in a subsequent legal instrument or instruments.

As for the undertakings in the second category, they may, in the light of recent developments in international law and practice, be regarded as having created obligations incumbent upon the States concerned, from the moment of the adoption of the joint communiqué.

This view is corroborated by concrete examples. There are the well-known declarations issued by the allied powers of the anti-Hitler coalition after the Second World War. It must be added that some unilateral declarations have had the effect of creating legal obligations. Such was the significance of the Truman Proclamation on the continental shelf. The better to illustrate my thought, I wish to provide two typical examples of unilateral declarations which produced legal effects.

It will be recalled that Egypt, though occupied by British troops since 1881, had remained a vassal of the Ottoman Empire. In 1914, by means of a unilateral declaration, the United Kingdom "decided" to put an end to these ties of vassalage and place Egypt under a British protectorate for the duration of the war. On 28 February 1922 Lord Allenby, the British High Commissioner in Cairo, communicated to Sultan Fuad a "declaration" whereby His Majesty's Government put an end to the protectorate and recognized the independence of Egypt subject to four reservations.

The declaration of 28 February 1922 took full effect. In order to remove

the reservations it contained, the Egyptian Government had to enter into laborious negotiations with the British Government; these resulted on 26 August 1936 in the signing in London of the Anglo-Egyptian Treaty of Alliance [1].

Syria and Lebanon had since 1920 been under French mandate in accordance with the provisions of paragraph 4 of Article 22 of the Covenant of the League of Nations. The purpose of the treaties concluded by France with Syria in Paris on 9 September 1936, and with Lebanon in Beirut on 13 November 1936, was to end the mandate and pave the way for the admission of the two countries to membership of the League. However, as the French parliament had not ratified either treaty, the mandate was still in force in both countries on 3 September 1939, the day the Second World War broke out.

It was during the War that an important event occurred. On 8 June 1941 the Free French forces, acting in concert with their allies, penetrated into Syria and Lebanon in order to loosen the hold of what was known as the Vichy Government over these two States. On the same day General Catroux, with the aid of leaflets showered from the air, proclaimed the independence of both States in the name of General de Gaulle, the leader of *la France libre et combattante.* What General Catroux said was substantially this: "We have come in order that the mandate shall end."

This unilateral declaration of independence was twice reiterated. General Catroux proclaimed it solemnly on 27 September 1941 in the presence of the President of the Syrian Republic, and on 26 November 1941 before the head of the Lebanese Government. At the same time he attached to it certain reservations the most important of which concerned the obligations incumbent upon the French Government by virtue of the Mandate Agreement. In his eyes, solely the League of Nations or such organization as might replace it could release France from those obligations.

Thanks to the initial declaration proclaimed by General Catroux on 8 June 1941 the Syrian and Lebanese Governments were invited to participate in the San Francisco Conference and thus signed the Charter of the United Nations. Article 77 of this Charter provides for territories under League of Nations mandate to be placed in United Nations trusteeship. Article 78, however, stipulates that: "The trusteeship system shall not apply to territories which have become Members of the United Nations, relationship among which shall be based on respect for the principle of sovereign equality."

In this way Article 78 of the Charter disposed of the reservation General Catroux had expressed regarding France's international obligations. This point clearly emerges from the commentary on the Charter written by Leland M. Goodrich, Edvard Hambro and Anne Patricia Simons, which has this to say on Article 78:

[1] See André Gros, "Le statut international actuel de l'Egypte", *Revue de droit international,* 1937.

> "Of particular relevance was the situation of Syria and Lebanon, both of which had been Class A mandated territories under the League of Nations. They had been declared independent in 1941, subject to the conclusion of treaties redefining French rights in the area. At the time of the San Francisco Conference, these treaties had not yet been concluded; nonetheless, both countries were invited to participate in the Conference and became original members of the United Nations [1]."

Thus unilateral or joint declarations can be sources of law. The Permanent Court of International Justice held this to be so in its Judgment of 5 April 1933 in the *Legal Status of Eastern Greenland* case:

> "The Court considers it beyond all dispute that a reply of this nature given by the Minister for Foreign Affairs on behalf of his Government in response to a request by the diplomatic representative of a foreign Power, in regard to a question falling within his province, is binding upon the country to which the Minister belongs." (*P.C.I.J., Series A/B, No. 53,* p. 71.)

Hence we are able to affirm that the decision to refer the question of the Aegean continental shelf to the International Court of Justice is a decision of a legal, not a political nature. There are therefore legal effects attaching to it. What are those effects? In other words, can the Brussels Joint Communiqué of 31 May 1975 be equated to a special agreement and is it sufficient in itself to found the jurisdiction of the Court?

It would, I feel, be going too far to argue that this is so. The communiqué did not define in precise and concrete fashion the questions the Court would be called on to decide. The only obligation it lays upon the parties is to negotiate and to agree upon the text of the special agreement. Such is the conclusion I have reached in this regard.

2. The Powers of the Court in the Present Proceedings

As neither of the Parties concerned has denied the existence or validity of the 1930 Greco-Turkish Treaty, it is necessary to consider its effects on the present proceedings.

Article 21 of the Treaty provides that, if the procedure for conciliation between the parties breaks down, either or both of them may turn to the Permanent Court of International Justice. The Court has not thought fit to

[1] See Leland M. Goodrich, Edvard Hambro and Anne Patricia Simons, *Charter of the United Nations,* New York and London, 1969, p. 487.

consider this basis of jurisdiction because Greece, the applicant State, has preferred not to avail itself of it, and Turkey, the respondent State, has chosen to remain absent throughout the proceedings.

I would summarize my position on this point by stating:

(a) In the exercise of its judicial function, the Court should be guided by all the juridical means it is able to discover in the course of its investigations. Professor Gaston Jèze has rightly declared that "the act performed by a court of law is a manifestation of will, in the exercise of a legal power, the purpose of which is to determine a (general or particular) legal situation or to ascertain facts, with the force of legal truth [1]".

(b) So long as it does not encroach upon a State's freedom to refuse its jurisdiction, the International Court of Justice is under an obligation to explore the question of its competence. That, at all events, was the opinion expressed by Judge Basdevant on the occasion of the Judgment of 6 July 1957 in the *Certain Norwegian Loans* case:

> "When it is a matter of determining its jurisdiction and, above all, of determining the effect of an objection to its compulsory jurisdiction, the principle of which has been admitted as between the Parties, the Court must, of itself, seek with all the means at its disposal to ascertain what is the law." (*I.C.J. Reports 1957*, p. 74.)

3. RELATIONSHIP BETWEEN THE JOINT COMMUNIQUÉ AND THE TREATY

After having thus analysed the situation which emerges from the pleadings, oral arguments and documents contributed to the case-file, I would like briefly to summarize the consequences arising out of it:

(a) the Brussels Joint Communiqué of 31 May 1975 has laid upon both parties a legal obligation to negotiate the special agreement whereby the Court would be seised of their dispute;

(b) as Turkey has refused to acknowledge that the Brussels Joint Communiqué has any legal effect, a "dispute" has arisen between Greece and Turkey;

(c) this dispute should be settled in accordance with the Greco-Turkish Treaty of 30 October 1930;

(d) that Treaty provides first for recourse to conciliation and, should that fail, for the possibility of turning to this Court;

(e) as matters stand, the Court would have to declare Greece's Application instituting proceedings inadmissible, on the ground of having been submitted prematurely.

I should be satisfied with opting for inadmissibility. But, as I have already said, Turkey, the respondent State, has not put in an appearance. It

[1] Gaston Jèze, *Les principes généraux du droit administratif*, 3rd ed., Vol. I, Paris 1924, p. 48.

has chosen not to participate in the proceedings. In that situation, the provisions of paragraph 2 of Article 53 of its Statute enjoin the Court to examine the question of its jurisdiction. As the case stands at present, it could not declare the action inadmissible before having examined that question. Such are the reasons which have led me to concur in the operative paragraph of the Judgment.

(Signed) S. TARAZI.