OBSERVATIONS OF THE GOVERNMENT OF TURKEY ON THE REQUEST BY THE GOVERNMENT OF GREECE FOR PROVISIONAL MEASURES OF PROTECTION [1]

OBSERVATIONS DU GOUVERNEMENT DE LA TURQUIE SUR LA DEMANDE EN INDICATION DE MESURES CONSERVATOIRES PRÉSENTÉE PAR LE GOUVERNEMENT DE LA GRÈCE [2]

[1] See p. 576, *infra*.
[2] Voir ci-après p. 576.

(1) The Government of Greece on 10 August 1976 through its agent Mr. Nicolas Karandreas, Ambassador of Greece at The Hague, submitted to the Court an Application instituting proceedings against Turkey and a Request for the indication of provisional measures of protection.

(2) On 10 August 1976, the Application and the Request in question were transmitted to the Turkish Ambassador in The Hague with the communication of the Registrar of the Court numbered 59.142.

The Turkish Ambassador by letter dated 12 August 1976 informed the Court of the receipt by him of the above-mentioned documents with the understanding that this would commit neither himself nor his Government. The Application together with its Annexes and the Request were transmitted by him to Ankara and were received by the Turkish Ministry of Foreign Affairs on 12 August 1976.

(3) The contents of the Application and the Request and Annexes have been duly noted.

(4) The decision of the Court to hold an oral hearing on 25 August 1976 for the consideration of the Greek Request for provisional measures of protection was communicated by the Registrar through telephone to the Turkish Ambassador in The Hague on 18 August 1976. This was transmitted by the Turkish Ambassador at the same date to the Turkish Ministry of Foreign Affairs.

(5) The Government of Turkey has to state with respect and regret that this notification was given such short notice that it has not been possible within the period allowed to carry out the required consultations, take the necessary governmental decisions and give instructions to its representatives and Counsel. Nevertheless, so that the Court may be informed that, in the view of the Turkish Government, the Greek Request is without merit, Turkey is submitting the present written observations without commitments.

(6) As clearly and explicitly stated by the Foreign Minister of Turkey before the United Nations Security Council on 19 August (S/PV.1950, 13 August 1976) it should be made certain at the outset that there is no threat whatsoever of any use of force on the part of Turkey and no urgency in the situation as contended by Greece in paragraph 5 of the Request.

(7) The Request by Greece is in any event unjustified as will be explained below. Moreover, a complaint by Greece against Turkey made by letter dated 10 August 1976 (S/12167) concerning the continental shelf areas of the Aegean Sea was placed on the agenda of the Security Council at the request of Greece on 10 August 1976.

The Security Council after hearing the statements of the Foreign Ministers of Greece and Turkey on 12 and 13 August 1976 adjourned the debate on the item and has not since resumed its consideration.

(8) Not only is the application premature having regard to the Security Council proceedings but also having regard to the fact that, while Turkey has throughout been willing and anxious to engage in meaningful negotiations with Greece, Greece has persistently failed and refused, while going through the motions of formal discussions, to engage in any negotiations on the substance of the matter. Greece has also refused to consider at present Turkish proposals for joint exploration and exploitation or for some arrangement for exploration and exploitation under the auspices of some regional organization. In fact, it appears that the main objective of Greece is to delay and if

possible prevent exploration and exploitation of areas of the Turkish continental shelf beneath the waters of the Aegean Sea, which are by hypothesis high seas. Furthermore since 1963 Greece has either conducted or has contracted research work to be done in the same regions of the Aegean where Turkey is carrying out similar activities only since 1974. Even at this moment when the Court is asked to consider the Greek Request, Greek research ship *Nautilus* is doing research in the Eastern Aegean outside Greek Territorial Waters.

(9) Greece has not even been willing to try to agree on the definition of the Aegean Sea for the purpose of the negotiations. The motive for this refusal is now clear from the attempt in the Greek Application to limit its case to the islands as defined in paragraph 29 of the Application. Paragraph 31 of the Application says : "The dispute is confined to the continental shelf adjacent to the said islands and does not concern any other part of the Aegean Sea or seabed thereof." Without entering into the question of the merits at this stage of the proceedings, it may be noted that this statement is both ambiguous and arbitrary. It is ambiguous because it does not state what areas are claimed to be adjacent to the islands and it is arbitrary because it attempts to isolate any question relating to the islands from the question of the continental shelf of the Aegean Sea as a whole. Furthermore, it may be noted in this connection that Greece by limiting the scope of the case submitted to the Court is obscuring the fact that Greece and Turkey are adjacent States in the sense that they have a common mainland boundary.

(10) As Greece has failed and refused to participate in meaningful negotiations even to the extent of attempting to agree on a definition of the area in question, it is manifest having regard to the observations of the International Court of Justice in paragraph 85 of its judgment in the *North Sea Continental Shelf* case (*I.C.J. Reports 1969*, pp. 46-47) that the present Application is premature. In subparagraph *(a)* of that paragraph, the Court said :

> "*(a)* the parties are under an obligation to enter into negotiations with a view to arriving at an agreement, and not merely to go through a formal process of negotiation as a sort of prior condition for the automatic application of a certain method of delimitation in the absence of agreement ; they are under an obligation so to conduct themselves that the negotiations are meaningful, which will not be the case when either of them insists upon its own position without contemplating any modification of it."

(11) In any event, the Request for interim measures of protection should be rejected because :

(a) it is clear that the Court has no jurisdiction to entertain the present Application ; and

(b) the measures requested are not required for the protection of the rights claimed by Greece.

(a) Lack of jurisdiction

(12) Both the Permanent Court of International Justice and the present Court have consistently considered the question of jurisdiction before undertaking to examine whether provisional measures are required. The practice is best summarized in a statement by Sir Hersch Lauterpacht :

"Accordingly, the Court cannot, in relation to a request for indication of interim measures, disregard altogether the question of its competence on the merits. The correct principle which emerges from these apparently conflicting considerations and which has been uniformly adopted in international arbitral and judicial practice is as follows : The Court may properly act under the terms of Article 41 provided that there is in existence an instrument such as a Declaration of Acceptance of the Optional Clause, emanating from the Parties to the dispute, which *prima facie* confers jurisdiction upon the Court and which incorporates no reservations obviously excluding its jurisdiction." (*Interhandel* case, *I.C.J. Reports 1957*, pp. 118-119.)

(13) The Court applied such standards in the two most recent cases in which interim measures were requested. In the *Fisheries Jurisdiction* case the Court regarded the exchange of Notes between the Governments involved as sufficient basis on the question of jurisdiction for the purpose of indicating interim measures. (United Kingdom *v.* Iceland, *I.C.J. Reports 1972*, p. 12). In the *Nuclear Tests* case the Court thought that there were sufficient prospects for its competence (Australia *v.* France, *I.C.J. Reports 1973*, p. 99). It appears that in both cases the Court acted on the assumption that there was a clear *prima facie* basis for the jurisdiction of the Court because no negative element was present in the agreements which could have affected their attribution of jurisdiction. There has been some criticism of the practice of the Court in the sense that it has been too ready to indicate interim measures without first being adequately satisfied on the question of jurisdiction. See for example the dissenting opinions of Judges Winiarski, Badawi Pasha in the *Anglo-Iranian Oil Co.* case (*I.C.J. Reports 1951*, pp. 96, 97), by Judge Padilla Nervo in the *Fisheries Jurisdiction* case (*I.C.J. Reports 1972*, pp. 21 and foll.), by Judges Forster, Gros, and Petrén in the *Nuclear Tests* case (*I.C.J. Reports 1973*, pp. 1, 11 and foll., 1, 20 and foll. and 1, 24 and foll.). While in basic agreement with the jurisprudence of the Court, Judge Jiménez de Aréchaga commented :

"This situation places upon each Member of the Court the duty to make, at this stage, an appreciation of whether – in the light of the grounds invoked and of the other materials before him – the Court will possess jurisdiction to entertain the merits of the dispute." (*I.C.J. Reports 1973*, p. 107.)

Likewise, Judge Nagendra Singh said :

"It is true that neither of the aforesaid provisions spell out the test of competence of the Court or of the admissibility of the Application and the Request, which nevertheless have to be gone into by each Member of the Court in order to see that a *possible* valid base for the Court's competence exists and that the Application is, *prima facie*, entertainable. I am, therefore, in entire agreement with the Court in laying down a positive test regarding its own competence, *prima facie* established, which was enunciated in the *Fisheries Jurisdiction* case and having been reiterated in this case may be said to lay down not only the latest but also the settled jurisprudence of the Court on the subject." (*I.C.J. Reports 1973*, pp. 108-109.)

The Turkish Government shares these views. It is of the opinion, that in the present instance, the Court lacks *prima facie* jurisdiction for two reasons.

First, Greece is not entitled to rely upon any valid agreement between the two States involved conferring competence on the Court in the present matter. The General Act of 1928, invoked by Greece, is no longer in force. Nor is it applicable as between Greece and Turkey. It is significant that at no time during the exchanges of documents and discussions concerning the continental shelf areas of the Aegean Sea has any Greek representative made any mention of the General Act of 1928.

(14) Greece also alleges that the two Governments, by the joint communiqué of Brussels of 31 May 1975, jointly and severally accepted the jurisdiction of the Court in the present matter, pursuant to Article 36 (1) of the Statute of the Court. As the scope of the "matter" concerning the continental shelf of the Aegean Sea has never been agreed between Greece and Turkey, it is impossible to see how "the present matter" which is expressly limited by paragraph 31 of the Application to "the said islands" could have been the subject-matter of an agreement for submission to the Court by unilateral application. In any event, the joint communiqué could not have the effect of such an agreement : examination of the text shows that the intention was quite different. The whole sentence says : "They decided that these problems should be settled pacifically by negotiations and concerning the continental shelf of the Aegean Sea by the International Court of Justice." This is far from amounting to agreement by one State to submit to the jurisdiction of the Court upon the unilateral application of the other State. Moreover, the subject-matter "the continental shelf of the Aegean Sea" is manifestly different from the continental shelf of the "said Islands", to which the present Application relates. Further it is clear that there was no commitment to submit to the Court without a special agreement because the following paragraph said in this connection that the two Prime Ministers had decided to accelerate the *meeting of experts concerning the question of the continental shelf of the* Aegean Sea. Thus priority was given to negotiations concerning the continental shelf of the Aegean Sea and nothing was said in this connection even about the negotiation of a special agreement for submission to the International Court of Justice.

(15) It is evident that a joint communiqué does not amount to an agreement under international law. If it were one it would need to be ratified at least on the part of Turkey. Such ratification would require, as a fundamental condition well known to the Greek Government, formal approval by the Turkish Parliament.

(16) That the Greek Government is fully aware of the need for a special agreement for the purpose of seizing the Court of questions concerning the continental shelf of the Aegean Sea is amply demonstrated by the persistent efforts of Greece to secure the negotiation of such an agreement. This appears both from the Greek Notes and from the position taken during the discussions between representatives of the two Governments. This effort on the part of Greece has continued even after the joint communiqué of 31 May 1975 on which reliance is placed for the purposes of the present Application. See for example the Greek Note-verbale of 2 October 1975, Annex IV to the Greek Application ; Greek Note-verbale 19 December 1975, Annex IV : "Le gouvernement hellénique considère, puisqu'une négociation est de toute façon nécessaire pour procéder à la rédaction de l'instrument destiné à saisir la Cour internationale de Justice" ; Greek Note-verbale, 22 May 1976, page 2, Annex V to the Greek Application ; Statement of the Greek delegation at the meeting of experts *in Bern of 19 and 20 June 1976, page 3, Annex VI to the Greek* Application.

Second, the awareness of the Greek Government that Turkey has not accepted the jurisdiction of the Court in the present case is further demonstrated by the Greek reliance on the General Act. Even assuming that the General Act were still in force, and applicable as between Greece and Turkey, it would be subject to a clause that would exclude the Court's competence. In her accession of 14 September 1931, Greece made a reservation excluding from the procedures described in the General Act :

> "*(b)* Disputes concerning questions which by international law are solely within the domestic jurisdiction of States and in particular disputes relating to the territorial status of Greece, including disputes relating to its rights of sovereignty over its ports and lines of communication."

This reservation, that conforms with Article 39 of the General Act, manifestly covers the sovereign rights recognized by international law to each coastal State over the continental shelf areas that appertain to it. As the Court said in the *North Sea Continental Shelf* cases :

> "the rights of the coastal State in respect of the area of continental shelf that constitutes a natural prolongation of its land territory into and under the sea exist *ipso facto* and *ab initio*, by virtue of its sovereignty over the land, and as an extension of it in an exercise of sovereign rights for the purpose of exploring the seabed and exploiting its natural resources. In short, there is here an inherent right. In order to exercise it, no special legal process has to be gone through, nor have any special legal acts to be performed. Its existence can be declared (and many States have done this) but does not need to be constituted. Furthermore, the right does not depend on its being exercised." (*I.C.J. Reports 1969*, p. 22, para. 19.)

These sovereign rights over the continental shelf areas clearly affect the territorial status of both States involved within the meaning of the Greek reservation *(b)*. Under Article 39, paragraph 3, of the General Act it is stated that : "If one of the parties to a dispute has made a reservation, the other parties may enforce the same reservation in regard to that party." In conformity with this provision, Turkey opposes reservation *(b)* to the Greek Application.

(b) *The measures requested are not required*

The measures requested by the Greek Government are not required and therefore ought not to be indicated by the Court for the following reasons :

(18) First, in the *Nuclear Tests* case, the Court says :

> "by the terms of Article 41 of the Statute the Court may indicate interim measures of protection only when it considers that circumstances so require in order to preserve the rights of either party." (Australia *v.* France, *I.C.J. Reports 1973*, p. 103, para. 24.)

Exploration by Turkey of the kind of which complaint is made by Greece cannot be regarded as involving any prejudice to the existence of any possible rights of Greece over continental shelf areas in the Aegean Sea. The sovereign rights over the continental shelf (including the exclusive right to exploration) that may exist are not taken away or diminished by exploration.

(19) Second, even if one were to assume that there were rights of Greece to be protected, an order of the Court indicating provisional measures should only preserve these rights and should not in any way grant the rights claimed in the application. As Judge Gros recalls in the *Nuclear Tests* case :

> "In the case concerning the *Factory at Chorzów*, the Permanent Court of International Justice refused to indicate provisional measures because the request could be regarded as designed to obtain an interim judgment in favour of a part of the claim formulated in the Application and that, consequently, 'the request [was] not covered by the terms of the provisions of the Statute and Rules' (*P.C.I.J., Series A, No. 12*, p. 10). Here we have a condition of general scope for the interpretation of Article 41 of the Statute of the Permanent Court of International Justice, which was identical to the present Article 41, and the recognition of a procedural requirement operating in regard to interlocutory jurisdiction. For it would indeed, by definition, be contrary to the nature of interlocutory proceedings if they enabled the dispute of which they were only an accessory element to be disposed of." (Australia *v.* France, *Nuclear Tests* case, *I.C.J. Reports 1973*, p. 123.)

Judge Forster added :

> "The interim measures requested by Australia are so close to the actual subject-matter of the case they are practically indistinguishable therefrom. Ultimately the only alternatives are the continuance or the cessation of the French nuclear tests in the Pacific. This is the substance of the case, upon which, in my opinion, it was not proper to pass by means of a provisional Order, but only by a final judgment." (Australia *v.* France, *Nuclear Tests* case, *I.C.J. Reports 1973*, p. 113.)

This statement applies in the present case, since the Greek Request for intereim measures amounts to an application for the enforcement of the very rights Greece is purporting to place in issue in its Application.

(20) Third, in the *Fisheries Jurisdiction* case (United Kingdom *v.* Iceland), the Court stated :

> "the right of the Court to indicate provisional measures as provided for in Article 41 of the Statute has as its object to preserve the respective rights of the Parties pending the decision of the Court, and presupposes that irreparable prejudice should not be caused to rights which are the subject of dispute in judicial proceedings and that the Court's judgment should not be anticipated by reason of any initiative regarding the measures which are in issue" (*I.C.J. Reports 1972*, p. 16).

The Court repeated this statement almost word for word in the *Nuclear Tests* case (Australia *v.* France, *I.C.J. Reports 1973*, p. 103, para. 20). This statement means that provisional measures may be indicated only when one of these two situations arises : either the damage that is caused to one party is irreparable in the sense that it cannot in the future be remedied by the payment of a sum of money ; or the execution of the eventual judgment of the Court will be made impossible by the actions undertaken by the State against which the interim measures are requested. It is evident that neither of these two situations is present in this case. Even if one were to admit that the exploration conducted by Turkey did cause any harm to the rights of Greece, there would be no reason why such prejudice could not be compensated and one fails to see how it could possibly affect the execution of any judgment that the Court might give in the present case. This is amply demonstrated by the *South-Eastern Territory of Greenland* case where the Court said :

> "Whereas, having regard to the character of the alleged rights in question, considered in relation to the natural characteristics of the

territory in issue, even 'measures calculated to change the legal status of the territory' could not, according to the information now at the Court's disposal, affect the value of such alleged rights, once the Court in its judgment on the merits had recognized them as appertaining to one or other of the Parties, and as, in any case, the consequences of such measures would not, in point of fact, be irreparable ;" (*P.I.C.J., Series A/B, No. 48*, 1932, p. 288).

(21) Fourth, it is customary for the Court to mention at the outset of its Orders on interim measures not only Article 41 of its Statute, but also Article 48, under which the Court shall make all arrangements connected with the taking of evidence. See for example the *Fisheries Jurisdiction* case (United Kingdom *v.* Iceland, *I.C.J. Reports 1972*, p. 12 and pp. 17-18) and the *Electricity Company of Sofia and Bulgaria* case (*P.C.I.J., Series A/B, No. 79*, 1939, pp. 194 and 199). That means that interim measures should be designed to promote the satisfactory conduct of the proceedings before the Court and particularly to ensure that the parties are enabled to present all relevant evidence. In the present instance, the exploration activities undertaken by Turkey will serve to gather evidence that might be relevant to the case in connection with the delimitation of the continental shelf areas that appertain to Greece and Turkey. (See for example, paras. 95-97 of the judgment in the *North Sea* case, *I.C.J. Reports 1969*, pp. 51-52.)

(22) Fifth, in the *Interhandel* case, the Court rejected the first and the third requests submitted by the Swiss Government on the ground that those two requests were too vague and could not properly be granted by an Order indicating interim measures (*I.C.J. Reports 1957*, p. 105). This decision entails that the party requesting interim measures must show in concrete and precise terms not only the necessity of these measures but also describe their content in an exact way.

(23) The Request by Greece fails to satisfy this test.

The first part of the Request would require Greece and Turkey to "refrain from all exploration activity or any scientific research". The breadth of this claim is obvious and it clearly goes beyond any possible rights of either party over the continental shelf areas and falls short from being sufficiently specific for the purposes of the present case. The first part of the Request is also too vague as to the areas to which it applies. It refers to two different categories of areas : on one part, continental shelf areas "adjacent to the islands" ; on the other part, areas "otherwise in dispute in the present case". It is impossible from either the Application or the Request to identify those areas with precision.

(24) The second part of the Request calls on the parties to "refrain from taking further military measures or actions which may endanger their peaceful relations". In present circumstances, this general demand goes far beyond anything related to the case. From the Turkish point of view there is no threat whatever of the use of force. Naturally, however, Turkey would consider itself obliged to protect its vessels on the high seas in the event of an armed attack by another State. This part of the request is objectionable not only on the ground that it is too broad and vague but also because it is untrue and offensive in suggesting by the use of the word "further" that Turkey is guilty of taking military measures or actions which may endanger the peaceful relations between Greece and Turkey in the continental shelf areas of the Aegean Sea.

(25) Sixth, in the *South-Eastern Territory of Greenland* case, the Court

dismissed the Norwegian Government's request for interim measures on the ground that the declarations of both parties "taken together, are indicative of the existence in responsible circles in both countries of a state of mind and of intentions which are eminently reassuring". (*P.C.I.J., Series A/B, No. 48*, 1932, p. 286.)

As was said before, Turkey has no intention of taking the initiative in the use of force. Evidently, Greece could not invoke her own possible resort to force to request provisional measures prohibiting it. In these circumstances, it is patent that Greece is not entitled to the indication of interim measures for which she has asked.

(26) In the light of the lack of jurisdiction of the Court as explained in paragraphs 12 to 17 above and for the reasons stated in paragraphs 18 to 25 above, considered both individually and collectively, the Greek request is without merit. Therefore, the Turkish Government respectfully suggests that the Greek Request be dismissed and at the same time in view of the lack of jurisdiction asks the Court to remove the case from its list.