SEPARATE OPINION OF JUDGE SHAHABUDDEEN

I have voted for the Order made by the Court but would like to consider a little more specifically than the Court has done Guinea-Bissau's principal argument (referred to in paragraph 25 of the Order) on the particular point on which the decision has turned against it. Guinea-Bissau seemed to be contending for a more liberal view than that adopted by the Court of the kind of link which should exist between rights sought to be preserved by provisional measures and rights sought to be adjudicated in the case. The argument has given me some difficulty.

Accepting that the cases "have shown the need for a clear connection between the object of the incidental request and that of the principal one", Guinea-Bissau correctly submitted that the "establishment of the connection is necessary inasmuch as the subject of the request is to protect the *rights in dispute*, not other rights that are beyond the scope of the proceedings" (CR 90/1, p. 27, 12 February 1990). These propositions reflect the traditional principle that provisional measures "should have the effect of protecting the rights forming the subject of the dispute submitted to the Court" (*Polish Agrarian Reform, P.C.I.J., Series A/B, No. 58*, p. 177).

In this case, it is clear that the maritime rights of the Parties, which are sought to be preserved by the requested provisional measures, will not be determined by a determination of the dispute pending before the Court as to the existence and validity of the award. In the result, as it has been argued in the Court's Order, the provisional measures requested are not directed to the preservation of the rights of the Parties in that particular and somewhat specialized dispute. Indeed, when the traditional principle is pressed to its logical conclusion, it is difficult to conceive of circumstances which could ground an indication of provisional measures relating to the substantive rights sought to be determined by an arbitral award where the dispute in the main case relates only to the existence and validity of the award.

Guinea-Bissau sought to overcome this problem by contending, in effect, for a more liberal view of the applicable principles than that on which the Court has acted. As I understand its case (CR 90/1, pp. 28-39), its argument is that, although the rights sought to be preserved by the requested provisional measures are not themselves part of the rights which form the subject of the specific dispute relating to the existence and validity of the award, the two sets of rights are logically linked, and that this link is such as to justify the Court in exercising its competence under Article 41 of the Statute to indicate provisional measures "if it considers the circumstances so require". The link has been presented within a theor-

etical framework in which the dispute as to the actual maritime rights of the Parties is regarded as a principal or first-order dispute and the dispute as to the existence and validity of the award is regarded as a subordinate or second-order dispute. To do justice to Professor Miguel Galvao Teles's arguments on the point, it is necessary to reproduce the following passages from his oral submissions:

> "Now, save, possibly, in so far as measures relating to evidence are concerned, provisional measures always relate to the basic interests and are justified by them; and, in the second place, they must be declared admissible by reference to these interests even if the Tribunal is seised of a subordinate dispute or one of the second order." (CR 90/1, p. 32.)
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> "As is the case with the interests of the parties, decisions taken on subordinate disputes and disputes of the second order have no intrinsic value. Their value is due only to the contribution they make to the final solution of the basic dispute. What needs to be safeguarded, at any procedural stage, are the practical conditions of this final solution, peace with respect to the basic conflict, and, equally, the interests of the parties that are the object of the conflict, whatever the procedural stage reached, because, should the practical conditions of the final solution be impaired, the same will be true of the decision on the subordinate dispute or the dispute of the second order, because if peace is jeopardized the procedural stage at which one finds oneself is of no consequence." (*Ibid.*, pp. 33-34.)
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> "The fact that provisional measures are not conceived as a provisional anticipation of a possible final decision and that they are regarded by the Statute and the Rules as being based first of all on the interest of the international community itself — in the enforcement of judicial decisions and in peace — is the justification that the link essential for the admissibility of measures is the link between the measures contemplated and the conflict of interests underlying the question or questions put to the Court, whether the latter is seised of a main dispute or of a subsidiary dispute, a fundamental dispute or a secondary dispute, on the sole condition that the decision by the Court on questions of substance which are put to it are a *necessary prerequisite* of the settlement or the status of the settlement of the conflict of interests to which the measures relate, as implicitly recognized by the Permanent Court of International Justice in the case concerning the *Denunciation of the Treaty of 2 November 1865 between China and Belgium*, and by this eminent Court itself in the case concerning the *Anglo-Iranian Oil Co.*" (*Ibid.*, p. 37.)

In the first case so cited by learned counsel for Guinea-Bissau — the *Denunciation of the Treaty of 2 November 1865 between China and Belgium (P.C.I.J., Series A, No. 8)* — provisional measures were indicated to preserve the rights of Belgium and its nationals under a treaty although the formal relief sought in the substantive case was only a judgment that

China was "not entitled unilaterally to denounce the Treaty . . .". However, the issue so presented in the substantive case was not a purely theoretical one, for China had in fact denounced the treaty (*P.C.I.J., Series A, No. 8*, p. 5). It followed that, there being no denial that Belgium and its nationals had rights under the treaty if still in force, the existence of those rights would be directly affected by a determination that China had no right of denunciation. In this respect, the Order of Court read:

> "Whereas the Chinese Government has declared the aforementioned Treaty to have ceased to be effective, whilst the Belgian Government, on the other hand, maintains that it is still in force, and as, consequently, the situation secured by the Treaty to Chinese nationals resident in Belgium has undergone no modification, whilst the corresponding situation of Belgian nationals in China has been altered in virtue of the abovementioned Presidential Order" (i.e., the Order issued by the President of the Republic of China relating to the denunciation of the Treaty. *Ibid.*, p. 6. See also *P.C.I.J., Series E, No. 3*, p. 127.)

It seems, therefore, that the Court approached the matter on the footing that the rights sought to be preserved by the requested provisional measures were part of the rights which formed the subject of the dispute as to whether China had a right of denunciation and would be directly affected by a determination of the latter.

In a sense, the position in that case seemed similar to that in the *Fisheries Jurisdiction* case *(United Kingdom* v. *Iceland), Interim Protection* (*I.C.J. Reports 1972*, p. 12) in which it was clear that the British fisheries rights sought to be preserved by the requested provisional measures would be directly affected by the ultimate decision in the case even though the formal reliefs sought in the latter were declarations which related not to those rights themselves, but only, in substance, to the question whether Iceland's claim to an exclusive fisheries zone of 50 miles was valid in international law (*I.C.J. Pleadings, Fisheries Jurisdiction*, Vol. 1, p. 10, para. 21; and the argument of Sir Peter Rawlinson, *ibid.*, pp. 98 ff.). Paragraphs 13 and 14 of the Order of Court in that case reasoned the position this way:

> "13. Whereas in the Application by which the Government of the United Kingdom instituted proceedings, that Government, by asking the Court to adjudge that the extension of fisheries jurisdiction by Iceland is invalid, is in fact requesting the Court to declare that the contemplated measures of exclusion of foreign fishing vessels cannot be opposed by Iceland to fishing vessels registered in the United Kingdom.

14. Whereas the contention of the Applicant that its fishing vessels are entitled to continue fishing within the above-mentioned zone of 50 nautical miles is part of the subject-matter of the dispute submitted to the Court, and the request for provisional measures designed to protect such rights is therefore directly connected with the Application filed on 14 April 1972" (*I.C.J. Reports 1972*, p. 15).

In the second case relied on by Guinea-Bissau, namely, the *Anglo-Iranian Oil Co., Interim Protection* (*I.C.J. Reports 1951*, p. 89), provisional measures were indicated for the protection of the company's property rights, although the United Kingdom's primary claim was only for a declaration that Iran was under a duty to submit the dispute to arbitration. This situation seems a little closer to the thesis of Guinea-Bissau. However, three observations may be made. First, in the absence of provisional measures, the execution of a possible decision by the Court that Iran was under a duty to submit to arbitration in respect of the property rights claimed by the company could be prejudiced (see the language used in the *Electricity Company of Sofia and Bulgaria* case, *P.C.I.J., Series A/B, No. 79*, p. 199). Secondly, if the Court held that Iran was under such a duty, the arbitration would presumably follow on the Court's judgment and so constitute, together with the decision of the Court, a connected series of proceedings leading to a definitive determination of the dispute concerning the substantive property rights. This perhaps explains why, in its main application, the United Kingdom also requested a declaration that Iran was additionally "under a duty ... to accept and carry out any award issued as a result of such arbitration" (*I.C.J. Pleadings, Anglo-Iranian Oil Co.*, p. 18, para. 21 *(a)*). And, thirdly, the United Kingdom had in any event sought, if only alternatively, a declaration from the Court as to the substantive property rights of the company (*ibid.*, pp. 18-19, para. 21 *(b)*).

These cases suggest that the approach taken by Guinea-Bissau is subject to a limiting factor represented by the reflection that the situation created by an indication of provisional measures should be consistent with the effect of a possible decision in the main case in favour of the State applying for such measures. This was obviously the position in the two cases cited by Guinea-Bissau. But here, if provisional measures were indicated to restrain the Parties from carrying out any activities in the area in question, the situation so created would not be consistent with a possible decision in favour of Guinea-Bissau on the issue of the existence or validity of the award. As pointed out by the Court, such a decision would not determine the actual rights of the Parties in the area in question. In the particular circumstances of this case, all that would happen if Guinea-Bissau succeeded would be that the original dispute would resume without any machinery being automatically instituted to resolve it, and with each Party being at liberty to act within the limits allowed by international law

in the light of the merits of its position as it exists independently of the award. This liberty of action, arising from the situation so created by a decision in favour of Guinea-Bissau on the question of the existence or validity of the award, would be actually inconsistent with the situation created by an indication of provisional measures restraining the Parties from carrying out any activities, instead of being consistent with it as in the normal case. The real analogy seems to be with cases in which a request for provisional measures was refused on the ground that the measures sought were intended to preserve rights which did not form part of the rights which were the subject of the substantive dispute (see the cases of the *Polish Agrarian Reform and German Minority* (*P.C.I.J., Series A/B, No. 58*, p. 178), and the *Aegean Sea Continental Shelf, Interim Protection* (*I.C.J. Reports 1976*, p. 11, para. 34)).

For these reasons, I feel unable to consider that the interesting and learned arguments of Guinea-Bissau on the point in question could lead to a result other than that reached by the Court.

(Signed) Mohamed SHAHABUDDEEN.