DISSENTING OPINION OF JUDGE THIERRY

[Translation]

Article 41 of the Statute of the Court 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",

while Article 75, paragraph 2, of the Rules of Court is to the effect that

> "When a request for provisional measures has been made, the Court may indicate measures that are in whole or in part other than those requested, or that ought to be taken or complied with by the party which has itself made the request."

These provisions are perfectly clear. They leave the Court a great deal of latitude in the exercise of its judicial function in the sphere of provisional measures. This is apparent from the condition to be fulfilled in order that such measures may be indicated, and from their aim, their object, and their nature.

Only one condition has to be fulfilled in order that measures may be taken. (It is important not to confuse the condition with the object of the measures.) This single condition is that the measures be required by the circumstances. But, if the circumstances actually require such measures, they "ought" to be taken (Art. 41).

The measures have also a single aim. It is defined by Article 41 in a simple and straightforward manner that deserves the most careful attention. The aim of the measures is the preservation and therefore the protection *"du droit de chacun"*. Article 41 could have been formulated differently and more restrictively. It could, for example, have referred to the rights (in the plural[1]) of the parties, or to the rights claimed by the parties. This is not the case. The expression *"droit de chacun"* goes further. It invites the Court to exercise, in adopting provisional measures, its judicial function to the full.

But while the aim of the measures is the protection *"du droit de chacun"*, they can have different objects, as shown by the case-law of the Permanent Court of International Justice and of the present Court, depending on the circumstances of the cases which have been brought before them and on which they have pronounced. The object of the measures may be to prevent the aggravation of the dispute — this is obvious. They may

[1] The English version of Article 41 ("to preserve the respective rights of either party") differs substantially from the French version.

be directed to preventing irreparable damage. Their object may be to preserve the exercise by the Court of its judicial function by preventing the parties from anticipating the subsequent decision of the Court on the merits. The latter concern has often been expressed by the Court. These objectives can be envisaged separately, but they are complementary. Regardless, however, of the immediate object of the measures, their aim is, in any event, the preservation *"du droit de chacun"*.

Finally, so far as their nature or substance is concerned, the measures may be diverse and, except for the need that they be suited to the circumstances and for their provisional character, there is no limit to the power of the Court to select the appropriate remedies. The measures may be the ones that the party asking for them requests; but they may be different "in whole" or in part, without it being necessary to rely in this respect on Article 75, paragraph 1, of the Rules of Court, which concerns the case where the Court acts *proprio motu*, that is to say, without having received a request for provisional measures.

Such are, in brief outline, the fundamental rules, deriving from the Statute and Rules of Court, that govern the power of the Court to indicate provisional measures.

In the present case the Court has not considered that it should make use of its power to indicate such measures, as requested by Guinea-Bissau. This negative decision is, in my opinion, regrettable and I cannot, much as I would have liked to do so, associate myself with it. The reasons for this position are, in brief, the following.

It appears to me that:

(1) the circumstances required that provisional measures be indicated and hence they ought to have been indicated;

(2) there was no legal obstacle in this case to the exercise by the Court of its power and the fulfilment of its obligation;

(3) the measures should have had as their object to bring the Parties to the negotiating table, on the basis of the intention of Senegal as conveyed by its counsel, in order to prevent a recurrence of the incidents that motivated Guinea-Bissau's request and, by the same token, the aggravation of the dispute.

I shall not deal with the question of prima facie jurisdiction, with regard to which I share, in essence, the opinion of the Court.

I. The Circumstances Required that Provisional Measures Be Indicated

An examination of the circumstances involves a review of the facts that have given rise to the request for provisional measures. The Senegalese authorities had boarded fishing vessels (a Chinese and a Japanese one) in the maritime area where the rights of the Parties are the subject of the

principal or fundamental dispute dividing them. These facts — it should be noted — are not disputed by Senegal. There is room for different opinions as to their gravity. Counsel for Guinea-Bissau took pains not to exaggerate in this respect. But it is impossible to question their importance in connection with the dispute and with the interests of Guinea-Bissau. They are such as to lead to an aggravation of the dispute, to provoke reactions on the part of Guinea-Bissau. According to the information made available to the Court, such reactions have already occurred and are liable to repeat themselves. To use common parlance, "things are getting out of hand". In legal terms one can say that the incidents in question are jeopardizing the neighbourly relations between two States called upon to co-operate with each other in the exploitation of the maritime resources of the areas off their coasts, in conformity with the norms of international law. In short, although the circumstances do not require measures of the type the Security Council may take in connection with the maintenance of peace or for the settlement of disputes "the continuance of which is likely to endanger the maintenance of peace", they do call for provisional measures such as those that have been indicated by the Court in various cases where it has been requested to do so.

Such are the measures required by the circumstances if one considers that the incidents that have occurred are not altogether minor and without incidence on the rights of the Parties. By virtue of Article 41 of the Statute of the Court, if they are required by the circumstances the measures *ought* to be taken.

Given their provisional nature, such measures cannot, provided they are properly conceived, produce any negative effects on the rights of the Parties. On the other hand, the denial of a request for them involves some risk of aggravation of the dispute. It is therefore only if decisive legal reasons existed for not indicating provisional measures that a request for them should have been denied. But there are no such reasons here.

II. There Is, in This Case, No Decisive Legal Reason against the Indication of Provisional Measures

A *non possumus* must, whenever the circumstances require the Court to indicate provisional measures, be very solidly grounded. Legal reasons that are compelling and incontrovertible are necessary if the dictates of prudence are to be justifiably set aside.

Two arguments have been advanced in this connection, based on case-law rather than on the terms of Article 41 of the Statute. The first, which was commented upon at length at the hearings but not adopted by the Court in the reasoning of its Order, relates to the absence of an *irreparable damage*. The boarding of vessels has not, it is alleged, caused damage of this nature that would have justified the indication of provisional measures. The second argument, which, on the contrary, the Court specifi-

cally cites as the basis of its decision, is grounded on the alleged absence of a sufficiently close connection between the legal interest underlying Guinea-Bissau's principal request, namely, that the arbitral award of 31 July 1989 be declared null and void or inexistent, and the legal interest on which it has based its request for provisional measures, relating to the situation in the maritime area wherein it claims rights. These are the two arguments to which we must address ourselves.

The existence of irreparable damage (however defined) which has already been sustained is obviously not the precondition for granting provisional measures. These measures are intended (among other things) to *prevent* irreparable damage, i.e., to ensure that it does not occur. To require the existence of irreparable damage as the condition for the indication of provisional measures would be virtually an absurdity because, if the harm has already been done (i.e., irreparable damage has been caused), the provisional measures would not serve any useful purpose. Provisional measures are intended to counter the *risk* of any irreparable damage occurring. This is indeed the very clear meaning of the relevant jurisprudence, first expressed in 1927 by the Permanent Court of International Justice in the case concerning the *Denunciation of the Treaty of 2 November 1865 between China and Belgium* (*P.C.I.J., Series A, No. 8*, p. 7) and, more recently, by the Court in the *Fisheries Jurisdiction* case (*I.C.J. Reports 1972*, p. 16, para. 21). The commentators have however created an unfortunate confusion between the risk of irreparable damage and the damage resulting from events which have already taken place. A risk is by definition a matter of chance, and it is dangerous to rely for a decision on the absence of a risk or on its improbability. Moreover, the risk of irreparable damage must be viewed in the light of the situation of the State which is in danger of sustaining it. As is well known, Guinea-Bissau is a small State having very limited resources. To be deprived of maritime biological resources, and *a fortiori* of other maritime resources to which it might be entitled, can constitute an irreparable damage for that State. In that connection, the risk of irreparable damage in the present case can thus be regarded as comparable to the risk incurred by the applicant States in the cases where measures were actually indicated by the Court. In the *Anglo-Iranian Oil Co.* case for example, irreparable damage would have been caused by the removal and sale of certain quantities of petroleum belonging to that company, while in the *Fisheries Jurisdiction* cases, the irreparable damage would have resulted from the exclusion of the British and German fishing fleets from the zone affected by the Icelandic regulations. It may well be questioned whether the damage in those cases was really "more irreparable" than that which Guinea-Bissau is threatened with.

It is likewise in the light of Guinea-Bissau's situation that the relationship between the Application and the subsidiary request must be viewed. The Application by Guinea-Bissau relates to the validity or the legal existence of the award of 31 July 1989; the request for the indication of provisional measures relates to rights which are the subject-matter of that award and which that award determines, at least with respect to the terri-

torial sea, the contiguous zone and the continental shelf. It is, however, clear that Guinea-Bissau is defending only one right in the whole process of litigation on which it has embarked. This is the right to an equitable delimitation of maritime areas, and in particular of the continental shelf and the exclusive economic zone adjacent to its coasts and to those of Senegal. It is with a view to such an equitable delimitation, of which it feels it has been deprived by the 1960 agreement concluded by an exchange of letters between France and Portugal, that an Arbitration Agreement was concluded in 1985. Since however, in the view of Guinea-Bissau, the award rendered by the Tribunal is not valid, the question of the delimitation of the maritime frontier remains open. In the event (which it cannot rule out) of the Court pronouncing the nullity of the award, the question of the maritime frontier will have to be settled either by an agreement between the Parties — an eminently desirable solution — or by new arbitral proceedings, or else by the Court itself if it is seised of the matter. It is therefore in order to preserve the rights which would flow from the decision of the Court on the merits (i.e., on the validity of the award) that Guinea-Bissau has submitted a request for the indication of provisional measures. For indeed, if the Court renders a decision favourable to Guinea-Bissau, the question of whether the 1960 agreement can be opposed to it would be reopened and, by the same token, that of whether it is possible to oppose to it the definition of its maritime boundary and of its rights with regard to the territorial sea, the contiguous zone and the continental shelf on the one hand and to the exclusive economic zone on the other. It follows that the Court's decision on the merits will directly affect the respective rights of the Parties in the maritime zones in question. It is this effect that paragraph 26 of the Order disregards inasmuch as it merely notes that the Court is not called upon, for the moment, itself to determine the maritime boundary between Senegal and Guinea-Bissau.

Thus at every stage, that of the Arbitration Agreement, that of the arbitration proceedings, that of the challenging of the award or that of the request for the indication of provisional measures, it is the same rights of which Guinea-Bissau is trying to ensure the recognition, with a persistence which its economic condition explains and justifies. Accordingly, neither the "insufficiently irreparable" character of the damage incurred, nor the absence of a substantial and fundamental connection between the Application and the request, justifies the Court in abstaining from indicating the provisional measures which the circumstances require.

III. The Provisional Measures Which Should Have Been Indicated by the Court

As we have emphasized from the outset, the Court, by virtue of Article 41 of its Statute and Article 75, paragraph 2, of its Rules, possesses a complete freedom of choice with regard to the measures which it can indicate for the preservation *"du droit de chacun"*.

Guinea-Bissau has requested the Court to invite the Parties to abstain in the disputed area "from any act or action of any kind whatever, during the whole duration of the proceedings until the decision is given by the Court".

The Court could reasonably have considered that the foregoing formula required amendment. It would have been going too far to prohibit all activities in the area and, in a manner of speaking, to "freeze" them throughout the duration of the proceedings, which could be lengthy. Other formulas should therefore have been sought which would have laid stress, on the one hand on the need to prevent the aggravation of the dispute and on the other on the duty of the Parties not to anticipate the decision of the Court on the merits. That last consideration is important, particularly from the standpoint of the exercise by the Court of its judicial function.

At all events, great attention should have been paid to the statement made at the close of argument on the instructions of the Agent for Senegal. That statement, by counsel for Senegal, was worded as follows:

> "Now I would only add on the instructions of the Agent for Senegal, that the Court has the assurance of Senegal that until such time as this unfortunate dispute is resolved, Senegal, for its part, will use all diplomatic means available to it to negotiate with Guinea-Bissau an arrangement which will preclude incidents prejudicial to a peaceful resolution of the matter."

The Court should have relied on that declaration to determine the provisional measures required by the circumstances.

Can there be anything more in conformity with the mission of the Court, when it is seised of a request for the indication of provisional measures, than to rely on the convergence of that request with the intentions expressed by the other Party, in order to invite both of them to exercise moderation and encourage them to undertake negotiations with the aim, initially, of preventing any aggravation of the dispute?

Such a decision would, in my opinion, have been in perfect harmony with the spirit and the letter of Article 41 of the Statute and Article 75 of the Rules of Court.

(Signed) Hubert THIERRY.