SEPARATE OPINION OF JUDGE SHAHABUDDEEN

I have voted for the Order of the Court but would like to explain my approach and reasoning with respect to the point of law whether a State requesting interim measures must establish a prima facie case as to the existence of the right sought to be preserved by the requested measures.

Issue was joined by the Parties on this important question (para. 21 of the Order). If Denmark was right in its submission that Finland was required to show a prima facie case as to the existence of the right sought to be preserved by the requested interim measures but that Finland had not done so, this sufficed to dispose of Finland's request. The ruling of the Court is set out in paragraph 22 of the Order. Having regard to the terms of the ruling, I consider it necessary to state my position. In my view, Finland was obliged to show a prima facie case in the sense of demonstrating a possibility of existence of the specific right of passage claimed in respect of drill ships and oil rigs in excess of a clearance height of 65 metres. Where Denmark's submission fails is on the ground, as I hold, that Finland did in fact succeed in demonstrating that possibility.

The problem presented is this: is it open to the Court by provisional measures to restrain a State from doing what it claims it has a legal right to do without having heard it in defence of that right, or without having required the requesting State to show that there is at least a possibility of the existence of the right for the preservation of which the measures are sought? The Court has never pronounced on the question. Scholarly opinion is divided on it[1]. And, no doubt, as in so many other areas, there

[1] See, for example, Giuseppe Tesauro, "Le misure cautelari della Corte internazionale di Giustizia", *Comunicazioni e studi*, 1975, Vol. 14, p. 873, at pp. 897 ff.; J. G. Merrills, "Interim Measures of Protection and the Substantive Jurisdiction of the International Court", *Cambridge Law Journal*, 1977, Vol. 36, p. 86, at pp. 100-102; J. B. Elkind, "The Aegean Sea Case and Article 41 of the Statute of the International Court of Justice", *Revue hellénique de droit international*, 1979, Vol. 32, p. 285, at p. 333; and Jerzy Sztucki, *Interim Measures in the Hague Court*, 1983, pp. 97, 123, 259, and 260; and compare Dr. E. Dumbauld, *Interim Measures of Protection in International Controversies*, 1932, pp. 160-161; Dr. M. H. Mendelson, "Interim Measures of Protection in Cases of Contested Jurisdiction", *British Year Book of International Law*, 1972-1973, Vol. 46, p. 259, at pp. 315-316, 321; V. S. Mani, "Notes and Comments on Interim Measures of Protection: ICJ Practice", *Indian Journal of International Law*, 1973, Vol. 13, p. 262, at pp. 265, 272; and, also by him, *International Adjudication: Procedural Aspects*, 1980, p. 293.

is need for caution in having recourse to municipal law ideas on the subject.

To indicate interim measures without requiring the requesting State to demonstrate some arguable basis for the existence of the right which is sought to be protected would seem to present a problem of reconciliation with the exceptional character of the procedure — a problem of some delicacy, regard being had to the consensual nature of the Court's jurisdiction. As observed by Dumbauld:

> "Interim measures always constitute an exceptional remedy. They derogate from the usual rule that a plaintiff can not obtain relief until he has thoroughly proved his case, and all defenses and objections of his adversary have been heard and considered." (Dr. E. Dumbauld, *Interim Measures of Protection in International Controversies*, 1932, p. 184.)

No doubt, Dumbauld had that consideration in mind when stating:

> "Indication of interim measures is to be made if the 'Court considers' ('estime') that circumstances so require. It thus appears that a prima facie showing of probable right and probable injury is all that is required." (*Ibid.*, pp. 160-161, para. 9.)

The exceptional character of interim measures, to which Dumbauld drew attention, assumes added significance when it is recalled that it is not settled whether the jurisprudence of the Court allows for compensating a party for any injury suffered in complying with an interim measure should the latter be eventually found to have been unjustified; that point, raised in this case, did not fall for decision and remains undecided.

Possibly the most influential factor contributing to a discernible and perhaps understandable general impression that the Court should not consider whether there is a prima facie case as to the existence of the right claimed is the need to avoid any appearance of prejudgment. That danger must not be overlooked; it is clearly of special importance in the sensitive field of litigation between States. However, that consideration needs to be balanced against the reflection that the State which is sought to be constrained may itself have an interest in showing that the requesting State has failed to demonstrate a possibility of the existence of the right sought to be protected: in this case, for example, it is Denmark, the Respondent, which is raising the question whether the right claimed by Finland, the Applicant, exists. As for the requesting State, any opposition by it to a requirement to establish the possible existence of the right claimed can hardly rest on grounds of prejudgment; for any complaint on such grounds is met by the circumstance that it would *ex hypothesi* have had an

opportunity to meet the requirement. Also, in measuring the danger of prejudgment, it has to be borne in mind that what the Court is considering is not whether the right sought to be preserved definitively exists, but whether the requesting State has shown any possibility of its existence. As general judicial experience shows, that distinction is not artificial; it is real. Certainly, a finding that such a possibility exists clearly falls short of constituting an interim judgment.

It is improbable that the Court is bound by a mere assertion of rights even where these are manifestly incapable of existing in law. If this is conceded, as it is by Finland, some colour is lent to the view that the Court must be concerned with satisfying itself affirmatively of the possible existence of the rights claimed, the required degree of proof being dependent on the character and circumstances of the particular case. I shall approach the matter on the basis of the requesting State happening to be also the applicant in the main proceedings, as in this case.

It seems that the Court has come to adopt a prima facie test of jurisdiction over the merits when deciding whether to indicate interim measures (see *Nuclear Tests (Australia* v. *France), Interim Protection, I.C.J. Reports 1973*, p. 99, at p. 101, para. 13, and p. 102, para. 17; *Nuclear Tests (New Zealand* v. *France), Interim Protection, I.C.J. Reports 1973*, p. 135, at p. 137, para. 14, and p. 138, para. 18; *United States Diplomatic and Consular Staff in Tehran, Provisional Measures, I.C.J. Reports 1979*, p. 7, at p. 13, para. 15, and p. 14, paras. 18 and 20; and *Arbitral Award of 31 July 1989 (Guinea-Bissau* v. *Senegal), Provisional Measures, I.C.J. Reports 1990*, p. 64, at pp. 68-69, paras. 20 and 22). It appears to be also settled that the power of the Court to indicate interim measures is distinct from its jurisdiction over the merits (see Dumbauld, *op. cit.*, pp. 165, 186; M. O. Hudson, *The Permanent Court of International Justice, 1920-1942*, New York, 1943, p. 425; *Anglo-Iranian Oil Co., Preliminary Objection, I.C.J. Reports 1952*, p. 93, at pp. 102-103; *Interhandel, Interim Protection, I.C.J. Reports 1957*, p. 105, at p. 118, *per* Judge Lauterpacht; S. Rosenne, *The Law and Practice of the International Court*, 1965, Vol. 1, pp. 422-423; and Sir Gerald Fitzmaurice, *The Law and Procedure of the International Court of Justice*, 1986, Vol. 2, pp. 533 ff.). This being so, in considering whether it has prima facie jurisdiction over the merits, the Court is not considering whether it has power to indicate interim measures (for this rests on another basis), but is rather considering whether the case is a fit and proper one for exercising that power. In other words, the question whether substantive jurisdiction prima facie exists is germane to the "circumstances" within the meaning of Article 41 of the Statute (see M. O. Hudson, "The Thirtieth Year of the World Court", *American Journal of International Law*, 1952, Vol. 46, p. 1, at p. 22; and *Aegean Sea Continental Shelf, Interim Protection, I.C.J. Reports 1976*, p. 3, at

pp. 15-16, *per* President Jiménez de Aréchaga; cf. Judge Mosler, *ibid.*, at p. 25).

But jurisdiction over the merits is merely one element which the applicant must establish in order to succeed in the substantive case which it has brought — a truth undiminished, in my view, by the importance of that element or by the fact that it may be argued as a preliminary issue. If the applicant cannot make out a prima facie case of substantive jurisdiction, this circumstance shows that it has no possibility of succeeding. Why should the applicant be limited to being required to show a prima facie case in respect of only one of the elements which it must establish if it is to succeed? It is easy to appreciate that proof of the definitive existence of the right claimed cannot be part of the "circumstances" within the meaning of Article 41 of the Statute, but is rather a matter for the merits. It is less easy to accept that this applies to the establishment of a possibility of the existence of the right. It is not suggested that the requesting State should anticipate and meet each and every issue which could arise at the merits. How far it should do so in any particular case will depend on the nature and circumstances of the case. What is important is that enough material should be presented to demonstrate the possibility of existence of the right sought to be protected. I am not certain that this view is necessarily at variance with the position taken in the joint declaration of Vice-President Ammoun and Judges Forster and Jiménez de Aréchaga in the *Fisheries Jurisdiction* cases (*I.C.J. Reports 1972*, p. 12, at p. 18, and p. 30, at p. 36). If it is, I would respectfully differ.

Although the Court, it would seem, has not so far had occasion to respond definitively to the question under examination, it may be useful to consider the way in which the matter has from time to time been treated at the bar of the Court, and sometimes by the Court itself. In brief, while I recognize that other interpretations of the material are not excluded, it would appear that in some cases the shape of the arguments was objectively designed to prove, or to disprove, the possibility of the existence of the right claimed, even where this purpose was not explicitly declared.

In the *Legal Status of the South-Eastern Territory of Greenland* case, President Adatci did indeed indicate to counsel that the merits should not be encroached upon in arguments on interim measures (*P.C.I.J., Series C, No. 69*, pp. 16, 32 and 48). That notwithstanding, the Order later made by the Court had occasion to note that —

> "according to the statement by M. Steglich-Petersen [counsel for Denmark], 'the Norwegian request for provisional measures has no foundation in Article 41 of the Statute and Article 57 of the Rules' — which deal only with the preservation of the rights of one or other Party — seeing that, according to him, Norway possesses no right in the territory in question capable of forming the subject of

> a measure of protection" (*P.C.I.J., Series A/B, No. 48*, p. 277, at p. 282).

It will be seen that, as in the present case, it was the State which was sought to be constrained (Denmark, then as now) which was effectively asserting that the State requesting interim measures had failed to prove the existence of any rights susceptible of being protected by such measures. The decision turned on other considerations, but this does not affect the point now being made as to the way counsel for the respondent understood the requirements of the case.

Some basis seems to exist for thinking that certain aspects of the legal merits were considered in a provisional way by the Court in the case of the *Anglo-Iranian Oil Co., Interim Protection (I.C.J. Reports 1951*, p. 89, at pp. 92-93), and in the *Fisheries Jurisdiction* cases, *Interim Protection (I.C.J. Reports 1972*, p. 12, at p. 15, and p. 30, at p. 33) (see the discussion in Dr. M. H. Mendelson, "Interim Measures of Protection in Cases of Contested Jurisdiction", *British Year Book of International Law*, 1972-1973, Vol. 46, p. 259, at p. 316).

In the *Nuclear Tests* case (*Australia* v. *France*), though not appearing, France had challenged Australia's position on the merits (*I.C.J. Reports 1973*, p. 99, at pp. 104-105, para. 28). Responding to the challenge, Solicitor-General Ellicott, Q.C., made what he described as an "outline statement of the substantive law applicable to the merits of Australia's claim", and added:

> "In my submission this outline should suffice to show the serious and well-founded character of the Australian case in support of its contention that French conduct of nuclear tests in the South Pacific Ocean is not consistent with applicable rules of international law." (*I.C.J. Pleadings, Nuclear Tests*, Vol. I, p. 189.)

Counsel for Australia was endeavouring to combat the French position to the point of showing that, in effect, Australia did have an arguable case on the merits. Now, it is true that the Court confined itself to saying that —

> "for the purpose of the present proceedings it suffices to observe that the information submitted to the Court, including Reports of the United Nations Scientific Committee on the Effects of Atomic Radiation between 1958 and 1972, does not exclude the possibility that damage to Australia might be shown to be caused by the deposit on Australian territory of radio-active fall-out resulting from such tests and to be irreparable" (*I.C.J. Reports 1973*, p. 99, at p. 105, para. 29; and see, *ibid.*, p. 135, at p. 141, para. 30).

Thus the Court did not say that such possible damage to Australia might be violative of some possible right of Australia; and I do not minimize the value of this fact for opposing arguments. It does, however, seem some-

what improbable that the Court could recognize "the possibility" that Australia might be able to show irreparable damage from radio-active fall-out on its own territory resulting from French nuclear tests without at the same time assuming that Australia could also show at least a possibility that such damage was in violation of some Australian right. The argument of counsel to this effect could scarcely have been absent from the mind of the Court when making the statement cited above and proceeding to indicate provisional measures affecting a major French programme.

In the *Aegean Sea Continental Shelf* case, Professor O'Connell, for Greece, conceived his position thus: "We are required only to show that prima facie Greece has rights which are threatened" (*I.C.J. Pleadings, Aegean Sea Continental Shelf*, p. 89). He restated the substance of that understanding on two further occasions (*ibid.*, at pp. 97 and 115).

Reference may also be made to *I.C.J. Pleadings, United States Diplomatic and Consular Staff in Tehran*, at pages 21 ff. and 25 ff., for extensive arguments in support of the substance of the United States claim. Rejecting an Iranian argument that the United States request implied "that the Court should have passed judgment on the actual substance of the case submitted to it", the Court said that —

> "*a request for provisional measures must by its very nature relate to the substance of the case* since, as Article 41 expressly states, their object is to preserve the respective rights of either party; . . ." (*United States Diplomatic and Consular Staff in Tehran, Provisional Measures, I.C.J. Reports 1979*, p. 7, at p. 16, para. 28; emphasis added).

Although it was not to be understood as making any definitive decisions, the Court was clearly concerned to satisfy itself affirmatively that there was a case for holding that the rights sought to be protected by provisional measures did exist in international law and were in fact being violated (*ibid.*, pp. 17-20, paras. 34-43). The particular circumstances of the case may explain the lengths to which the Court went into the merits, but that the Court did at all go into the merits would seem to rest on more general considerations suggestive of recognition that a State requesting interim measures must satisfy the Court that it has an arguable case in favour of the existence of the rights sought to be preserved pending a final decision.

In the case of the *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Provisional Measures*, the Order of the Court carefully set out the relevant circumstances, together with a reference to supporting evidence from Nicaragua, and stated:

> "Whereas the Court has available to it considerable information concerning the facts of the present case, including official statements of United States authorities; whereas, the Court, in the context of the present proceedings on a request for provisional measures, has in accordance with Article 41 of the Statute to consider the circumstances drawn to its attention as requiring the indication of provisional measures, but cannot make definitive findings of fact, and the right of the respondent State to dispute the facts alleged and to submit arguments in respect of the merits must remain unaffected by the Court's decision" (*I.C.J. Reports 1984*, p. 169, at p. 182, para. 31; and see, *ibid.*, pp. 181-182, paras. 29-30).

Of course the Court could not "make definitive findings of fact" at that stage; but it is at the same time improbable that it had not developed an awareness that the "considerable information concerning the facts", which was before it, was sufficient to disclose that Nicaragua did at least have an arguable case on the substance of its claim.

It is not proper mechanically to impute to the Court the positions taken or assumed by counsel, particularly where the Court has not spoken. On the other hand, it is equally not right to seek to appreciate the positions taken by the Court abstracted from their forensic context. As is well known, it is frequently the case that recourse to the arguments of counsel is necessary for an understanding of what in fact a court was doing.

I do not say that all of the cases — and they are not many — speak consistently for the interpretation proposed, or that each of them is equally illuminating; and it would certainly be wrong to overstate the possible supportive value of any of them for that interpretation. But, taking them cumulatively, the general pattern of advocacy employed by counsel, and also the reaction of the Court on some occasions, as in the *United States Diplomatic and Consular Staff in Tehran* case, would appear to be objectively consistent with Judge Anzilotti's understanding of the law as expressed in his dissenting opinion in the case of the *Polish Agrarian Reform and German Minority*, when he said:

> "If the *summaria cognitio*, which is characteristic of a procedure of this kind, enabled us to take into account the *possibility* of the right claimed by the German Government, and the *possibility* of the danger to which that right was exposed, I should find it difficult to imagine any request for the indication of interim measures more just, more opportune or more appropriate than the one which we are considering." (*P.C.I.J., Series A/B, No. 58*, p. 175, at p. 181; emphasis as in the original.)

This dictum was referred to by counsel in two later cases (see *I.C.J. Pleadings, Anglo-Iranian Oil Co.* (Interim Measures), at pp. 415-416, *per* Sir Frank Soskice, Q.C., and *I.C.J. Pleadings, Fisheries Jurisdiction*

(Interim Measures), Vol. I, at pp. 99-100, *per* Sir Peter Rawlinson, Q.C.). In the latter case, counsel remarked:

> "Judge Anzilotti on a preliminary view in that case, and taking into account merely a possible danger to a possible right of the Applicant, was prepared to order the Respondent to suspend a major programme of agrarian reform taking place in its own territory." (*Ibid.*, p. 100.)

Judge Anzilotti was indeed prepared to do so, but only, as counsel recognized, if he was satisfied of "the *possibility* of the right claimed by the German Government, and the *possibility* of the danger to which that right was exposed". Save on the basis of this minimum assurance, he could scarcely have gone as far as to be prepared to "order the Respondent to suspend a major programme of agrarian reform taking place in its own territory".

It is difficult to conceive how it could be otherwise in respect of the major programme of construction taking place in the territory of the Respondent in the present case. Could the Court really have stopped the construction of a multi-billion dollar project by the Respondent in its own territory without first satisfying itself that the requesting State could at least show a possibility of the existence of the right which it was seeking to have protected? It seems to me that only the clearest and most compelling legal authority could oblige the Court to accept that it could properly do so. No authority of that level of cogency is to my mind presented in such literature as there is on the subject. I certainly do not see how anything in the "circumstances" of the case could possibly have led the Court to act in that way. Urgency may justify summary application of, not dispensation with, what appears to me to be a requirement rooted in deep principle.

The fact that the Court has reserved to itself the right under Article 75 of the Rules of Court to exercise its power under the Statute to indicate interim measures *proprio motu* would not seem sufficient to suggest that the Court may exercise that power without first considering whether there is any possibility of the existence of the right sought to be protected.

I may add that, though I appreciate it, I am not persuaded by argument that a requirement for prima facie proof of the possible existence of the right sought to be protected would involve a duplication of the substantive hearing. This might be so if the requesting State was required to meet every issue capable of arising at the merits. However, as suggested above, that is not the position, it being sufficient if enough material is presented to disclose the possibility of the existence of the right claimed. In this case, for example, it is, in my opinion, sufficient that Denmark accepts that Finland has a right of passage through the Great Belt; that Denmark has been aware of the fact that since 1972 to the present Finland has from time to time passed through the Great Belt several drill ships and oil rigs in excess of a clearance height of 65 metres; and that, in full knowledge of this, Den-

mark has never objected to their passage and still does not, as indeed it has affirmed at the hearing. The possibility, thus signified, of the existence of the right claimed may conceivably be negatived by other circumstances; but these matters are for the merits.

Judge Anzilotti's formula, referred to above, appears to be potentially less productive of any risk of prejudgment than the prima facie test, as commonly understood; and I prefer it. But I think that the fine distinctions known to municipal law in this field need not detain enquiry; and that accordingly, for purposes of international litigation, the substance is largely the same whether one speaks of a prima facie test, or of a test as to whether there is a serious issue to be tried[1], or of a test as to whether there is possible danger to a possible right.

My conclusion is that a State requesting interim measures, such as Finland, is required to establish the possible existence of the rights sought to be protected in the sense in which Judge Anzilotti spoke of the Court, by a *summaria cognitio*, taking "into account the *possibility* of the right claimed . . . and the *possibility* of the danger to which that right was exposed". In my opinion, the opposite cannot credibly be argued after the *United States Diplomatic and Consular Staff in Tehran* case. However, for the reasons given above, I think Finland has met that test. It is on other grounds that its request fails.

(Signed) Mohamed SHAHABUDDEEN.

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[1] In one national jurisdiction a revised test as to whether there is a serious issue to be tried has seemingly not wholly displaced the prima facie test, and doubt has been expressed as to whether it greatly affects the results reached by the latter (see *The Supreme Court Practice, 1991*, London, 1990, Vol. 1, Part 1, Order 29/1/2, p. 498; *American Cyanamid Co.* v. *Ethicon Ltd.* [1975] AC 396 HL; *Fellowes and Son* v. *Fisher* [1976] 1 QB 122 CA; *N.W.L. Ltd.* v. *Woods* [1979] 3 All ER 614 HL; *Duport Steels Ltd.* v. *Sirs* [1980] 1 All ER 529 HL; and *Cayne* v. *Global Natural Resources Ltd.* [1984] 1 All ER 225 CA).