

SEPARATE OPINION OF JUDGE TARAZI

[Translation]

I voted in favour of the Order adopted by the Court. I think it necessary, however, to express my separate opinion on two essential points which, in my view, are particularly important:

- (1) the Court's jurisdiction;
- (2) the role of the Court as an organ of the United Nations and its place in the process of peaceful settlement of international disputes.

JURISDICTION OF THE COURT

The jurisdiction which the International Court of Justice possesses in contentious proceedings is not compulsory. It is necessary that States shall have given their prior consent to its being seised. If the respondent does not appear, the Court is under an obligation to ascertain, before any consideration of the merits, whether it is competent to settle the dispute referred to it by the applicant State, in accordance with Article 53 of the Statute.

In the present instance the Court had to consider a request for interim measures of protection, submitted by the Government of Greece. This request, in the eyes of that Government, was intended for the protection of Greece's rights over the continental shelf of the Aegean Sea. The Court was therefore urgently convened by its President, in accordance with the provisions of paragraph 3 of Article 66 of its Rules.

Turkey, the respondent party in the case, has chosen not to respond to the invitation made to it under paragraph 2 of Article 66 of the Rules of Court. Nevertheless the Ministry of Foreign Affairs of Turkey has sent the Registrar of the Court a written communication. That communication raised an objection alleging lack of jurisdiction and called for:

- (a) the rejection of the Greek request for the indication of interim measures of protection;
- (b) the removal of the case from the Court's list.

There we have two quite separate requests. The first was based on a contention that the interim measures of protection were not required by the situation. The second denied the Court's right to pronounce upon the Application of Greece or even to discuss it.

At this stage of the proceedings, the Court had solely to decide whether

the interim measures should or should not be granted. Was it entitled to grant them if it did not possess the power to decide the substantive dispute or if, in other words, it lacked jurisdiction? It has been maintained that, so far as concerns the application of the provisions of Article 41 of the Statute of the Court, the text of which governs the question of interim measures, the Court possesses a special competence which is in some way different from its basic, specific jurisdiction as conferred by Article 36 of that Statute.

This is a theory with which I am unable to agree. Without going into the details of the argument, I feel impelled to declare that the Court is competent only by virtue of Article 36 of its Statute. The power conferred upon it by Article 41 to indicate interim measures when appropriate is merely a corollary of its jurisdiction under Article 36, in accordance with the old legal saw that *qui magis potest minus potest*.

That being so, the situation before the Court was such as to require it to show vigilance in the appraisal of the various elements in the Application, in which Greece had claimed that two diplomatic instruments conferred jurisdiction on the Court: Article 17 of the General Act for the Pacific Settlement of International Disputes, 1928, and the joint communiqué of Brussels of 31 May 1975.

The Court could not, on simple perusal of these two documents, pronounce upon its jurisdiction at the present stage of the proceedings. A more thoroughgoing examination was needed, on account of the complexity and ambiguity of the problems confronting the Court, problems which it could only resolve after written and oral proceedings had taken place in the normal way.

The request that the case be removed from the Court's list could not be acceded to in the present circumstances. According to the consistent jurisprudence of the Court, such removal is decided only in the event that the applicant State does not invoke in support of its Application any legal instrument conferring jurisdiction on the Court but contents itself with leaving the respondent State the possibility of expressing its assent to the proceedings. If, on the other hand, the respondent State responds in the negative, by indicating its refusal to recognize the Court's jurisdiction, the Court orders the case to be removed from its list. Such in my view are the significance and legal scope of the Orders of 12 July 1954 (*Treatment in Hungary of Aircraft and Crew of United States of America*, *I.C.J. Reports 1954*, pp. 99 and 103), 14 March 1956 (*Aerial Incident of 10 March 1953*, *I.C.J. Reports 1956*, p. 6) and of 16 March 1956 (*Antarctica*, *I.C.J. Reports 1956*, pp. 12 and 15).

It is clear that the situation is different in respect of the present case. That is why the Court has not decided to remove it from its list and has reserved its position on the question of its jurisdiction for later consideration.

POWER AND ROLE OF THE COURT IN
THE UNITED NATIONS SYSTEM

I think that the Court was well advised to act as it has. I feel however that particular attention should have been paid to the fact that the proceedings are attended by special circumstances.

At the same time as it requested the Court to indicate interim measures, Greece turned to the Security Council to request it to examine the situation which it had already described in its Application. This was not an example of the simultaneous use of two parallel remedies, inasmuch as the Security Council, unlike the Court, is a political organ. The rule *electa una via* did not have to be applied.

Now, while the oral proceedings were taking place before the Court, the Security Council adopted "by consensus" the resolution of 25 August 1976 by which it, in the main, recommended the parties to continue their negotiations and address themselves, if appropriate, to the Court. There can be no doubt that this was a situation which created a new element requiring to be taken into consideration in the formulation of the Court's Order.

For if it is true and certain that the Court is an independent and judicial organ, and that neither the General Assembly nor the Security Council are able, without the consent of the interested parties, to withdraw from it any case which has been referred to it, it is no less true that it is an integral part of the United Nations, inasmuch as Article 7 of the Charter provides that it is one of the "principal organs of the United Nations" while Article 92 indicates that its Statute is annexed to and "forms an integral part of" the Charter. Such was not the case with the Court's predecessor. The Covenant of the League of Nations did not provide that the Permanent Court of International Justice should be one of its organs. The Court itself had been set up independently of the elaboration and adoption of the Covenant.

That being so, the present Court, while maintaining its independence, should not fail to take into consideration this basic truth, namely that it is an integral part of the United Nations. The Charter, whose genesis marked a new stage in the course of history, features some essential differences in comparison with the provisions of its predecessor, the Covenant of the League of Nations. Those differences were due to the new situation which States and peoples had to face on account of the consequences of the Second World War and of the developments which preceded or triggered its outbreak.

There is no necessity here to consider these differences in detail. One may content oneself with the affirmation that, by virtue of the Charter, the Security Council bears an essential responsibility for the maintenance of peace and security. The Court, if the circumstances so require, ought to collaborate in the accomplishment of this fundamental mission.

It must be recognized that the Court has indeed applied itself to this

task. Several of the paragraphs in the reasoning of the Order recall the Security Council resolution. Nevertheless, I would have thought it necessary to mention this resolution in the operative part.

(Signed) Salah El Dine TARAZI.
