

SEPARATE OPINION OF JUDGE LACHS

While concurring in the Court's principal finding, I do not consider that the second basis on which Greece claims to found the Court's jurisdiction, the Brussels Communiqué of 31 May 1975, has been given its full weight. I agree with the Judgment that there is no known "rule of international law which might preclude [such a] communiqué from constituting an international agreement to submit a dispute to arbitration or judicial settlement" (para. 96).

It may be recalled how this Court has held that an undertaking "given publicly, and with an intent to be bound, even though not made within the context of international negotiations, is binding" (*I.C.J. Reports 1974*, p. 267), inasmuch as, *inter alia*, "parties are free to choose what form they please provided their intention clearly results from it" (*I.C.J. Reports 1961*, p. 31, confirmed in *I.C.J. Reports 1974*, p. 268).

Granted that the question of form is not decisive, what we face in the Joint Communiqué is an international instrument to which the long-established principles apply that no construction may be entertained which would imply that any provision was "not intended to have any definite application" (*American and British Claims Arbitration*, Nielsen report, *Cayuga Indians*, pp. 203 ff., at p. 322; cf. Moore, *International Adjudications, Modern Series*, Vol. IV, p. 478).

These principles embrace a test which the Court has confirmed: "the sole relevant question is whether the language employed in any given declaration does reveal a clear intention" (*I.C.J. Reports 1961*, p. 32, restated in *I.C.J. Reports 1974*, p. 268). On this test, what was visualized in the Joint Communiqué was a joint submission on the basis of a special agreement to be elaborated by the two States.

I am unable to agree with the Judgment that in respect of the Communiqué's legal consequences, it "is for the two Governments themselves to consider those implications and what effect, if any, is to be given to the Joint Communiqué" (para. 108). On the contrary, in so far as the Communiqué is an international instrument, the question of its precise legal implications cannot be regarded as lying within the discretion of either of the Governments concerned. I therefore feel there is justification for considering the matter in some detail.

The text of the Communiqué states that the two Prime Ministers gave

consideration to the problems dividing them and that, as a result of their meeting, they came to certain decisions. On the subject of the continental shelf of the Aegean Sea, they "decided" that the problem should be resolved "by the International Court at The Hague". Here the subject to be dealt with and the institution to be called upon to resolve the dispute were mentioned in clear terms. The remaining part of the Communiqué amply justifies an inference that the representatives of the two Governments were to discuss, *inter alia*, a special agreement.

I therefore feel that the text clearly commits Greece and Turkey to the negotiation of a *compromis*. In my judgment, this is an objective obligation, even though I share the view of Turkey that it remained necessary to create such a special agreement, and that the case should be submitted by both parties and not by one.

The foregoing is confirmed by the particular circumstances in which the Communiqué was drawn up. To these the Judgment refers at length (paras. 100 ff.). An exchange of Notes culminated with the Greek Government "not[ing] with satisfaction that the Turkish Government accept in principle their proposal that the question of the delimitation of the continental shelf of the Aegean Sea be submitted jointly to the International Court of Justice in The Hague" (10 February 1975); there soon followed a statement by Turkey's Prime Minister, in the Grand National Assembly, when he confirmed that: "The object of the talks will be the special agreement (*compromis*) which will define the basis of the case" (3 March 1975).

Next came the meeting of foreign ministers of 17-19 May 1975 at which "initial consideration was given to the text of a special agreement concerning the submission of the [continental shelf problem] to the International Court of Justice" (Application, Ann. III, No. 1). The matter was clinched by the decisions recorded in the Communiqué of Brussels, which in my view connoted a substantive commitment on the part of both States. Had this not been intended, the Communiqué should and could have been limited to a text omitting the second sentence. Thus the circumstances which led up to the Communiqué confirm the legal consequences implicit in its wording.

These consequences "must be considered within the general framework of the security of international intercourse, and the confidence and trust which are so essential in the relations among States" (*I.C.J. Reports 1974*, p. 269).

With this borne in mind, it remains clear that the Brussels Communiqué was not in itself a sufficient title for submission of the dispute to the Court, for the parties agreed that the matter should be referred to the Court jointly, and no other basis of reference can be shown to have been accepted by the Government of Turkey; correspondingly, the modalities of seisin remained to be agreed.

This being so, the Communiqué made it clear that the parties were to

continue negotiations. In general, I find that an obligation to negotiate had been established.

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This leads me to some general reflections on the relationship between negotiations and the functions of this Court. There are obviously some disputes which can be resolved only by negotiations, because there is no alternative in view of the character of the subject-matter involved and the measures envisaged. But there are many other disputes in which a combination of methods would facilitate their resolution. The frequently unorthodox nature of the problems facing States today requires as many tools to be used and as many avenues to be opened as possible, in order to resolve the intricate and frequently multi-dimensional issues involved. It is sometimes desirable to apply several methods at the same time or successively. Thus no incompatibility should be seen between the various instruments and fora to which States may resort, for all are mutually complementary. Notwithstanding the interdependence of issues, some may be isolated, given priority and their solution sought in a separate forum. In this way it may be possible to prevent the aggravation of a dispute, its degeneration into a conflict. Within this context, the role of the Court as an institution serving the peaceful resolution of disputes should, despite appearances, be of growing importance.

Among the considerations to be borne in mind if the Court is to play its part, two are paramount:

The Court may not act on any other basis than the established consent of the States in dispute, whether *ad causam* or by virtue of more general bonds of jurisdiction. The disappointment engendered when the Court finds that it lacks jurisdiction is doubtless bitter for a State which by an application has borne witness to its faith in the judicial path to agreement. But the Court may never overstep the law prescribed it, for it can inspire confidence and gain strength only by acting within its Statute and Rules, and consistently with its vocation.

In the light of the compatibility and complementarity of all means of peaceful settlement as enumerated in Article 33 of the Charter of the United Nations, judicial settlement must be viewed as simply an alternative to the direct and friendly settlement of disputes between States (cf. *P.C.I.J., Series A, No. 22*, p. 13). It is therefore important to rebut any presumption that an alternative to friendly discussion must of necessity be unfriendly, for the adversary image of contentious proceedings continues to obscure the necessary place of the Court in the scheme of pacific settlement. On the contrary, it has repeatedly been stated on behalf of States that, in the words of paragraph 6 of General Assembly resolution 3232 (XXIX):

“... recourse to judicial settlement of legal disputes, particularly referral to the International Court of Justice, should not be considered an unfriendly act between States”.

This has also been stressed by learned bodies.

Recognition of this principle, which consecrates the intrinsic character of the Court, will assist it to discharge the function conferred on it by the Charter as the principal judicial organ of the United Nations.

(Signed) Manfred LACHS.