DISSENTING OPINION OF JUDGE STASSINOPOULOS

[Translation]

Very much to my regret, I am unable to concur in the Judgment. I therefore avail myself of the right conferred upon me by Article 57 of the Statute of the Court to indicate the reasons for my dissent.

1. The Court has been unwilling to adopt a position as to whether the 1928 General Act has continued in force. It could however, in my view, have done so, since the Applicant has a legitimate interest in learning what the Court considers to be the status of this convention, which was the main basis of jurisdiction relied upon. Moreover, as the Judgment observes:

> ". . . it is evident that any pronouncement of the Court as to the status of the 1928 Act, whether it were found to be a convention in force or to be no longer in force, may have implications in the relations between States other than Greece and Turkey" (para. 39).

In an organized international society, therefore, the settlement of this question, after the three cases already submitted to the Court (*Nuclear Tests* and *Trial of Pakistani Prisoners of War*), would present a more general interest. The fact that the Judgment leaves on one side the question whether the Act remains in force gives rise, on the other hand, to some difficult situations. If the General Act were not in force, the Greek reservation would be without effect and there would therefore be no point in dealing with its substance. Then again, the Court has based parts of its reasoning on a treaty whose contents it has refrained from examining. For example, paragraph 43 of the Judgment says that Turkey's statement about the reservation "must be considered as constituting an 'enforcement' of the reservation *within the meaning of, and in conformity with, Article 39, paragraph 3, of the Act*" (emphasis added).

2. In the event the Court had examined the question of the validity of the General Act, I would have favoured an affirmative conclusion, above all for the following reasons:

3. The parties to the Act have not evinced the will to cease to be parties to it. Quite apart from the formal steps known to classic international law, such as denunciation, one may also consider it possible to deduce the termination of a treaty if that may be clearly and unequivocally inferred from the parties' subsequent conduct. But where it is a question of a treaty *not being used,* not only does customary international law refuse to admit this as a cause of extinction but the Vienna Conference on the Law of Treaties deliberately avoided mentioning desuetude in the 1969 Convention as a cause of extinction of States' international obligations.

The existence and validity of the General Act cannot be denied on grounds of oblivion, for it is impossible to contemplate that the host of treaties binding States could lose their force just because they have not been invoked or put to use.

Since the *Nuclear Tests* cases, so much publicity has been given to the existence of the General Act that it is inconceivable that Turkey could have forgotten to take any action needed to manifest its desire to be bound by that instrument no longer. Since the 1973 dispute wherein Australia and New Zealand were opposed to France, two States, France and the United Kingdom, have taken care to denounce the Act so that it no longer binds them.

Further publicity was given to the General Act by the *Trial of Pakistani Prisoners of War* case, inasmuch as the Court was requested to say to what extent the Act bound India through considerations of State succession.

That being so, Turkey was not unaware of the existence of the Act when Greece instituted the present proceedings. The fact, which Turkey has raised, that it was not alluded to at a certain stage of the talks does not in any way affect the standing of the Act as a conventional instrument providing a direct path of access to the Court. To justify a claim that the Act has ceased to be in force it would be necessary for some radical situation touching its object and mechanism to have arisen. But no such situation capable of casting doubt on the validity of the General Act has come into being.

4. One of the arguments put forward in the Turkish letter of 1976 is that the General Act allegedly failed to survive the League of Nations. Yet right from the time when the Act was drafted it was clearly stated that, unlike the Geneva draft protocol of 1924, it was to have no institutional or structural connection with the League of Nations—chiefly because the intention was to have the General Act function in parallel with the League, attract States not members thereof, and offer alternative machinery to the Geneva organization with its highly politicized atmosphere. The 1928 records of the League Council bear witness that governments, and in particular the British Government, were anxious to dissociate the General Act from the League of Nations. It may likewise be pointed out that the arbitration procedure provided for in the General Act was bound up with the 1907 Hague Convention, and not the machinery of the League.

As for the procedure for judicial settlement instituted by Articles 17 ff. of the Act, that is independent, and the reference to the Permanent Court of International Justice is now governed by Article 37 of the Statute of the International Court of Justice, whereby those provisions continue to be applicable within the framework of the transfer of jurisdiction to the latter.

The provisions relating to the depositary functions of the League Secretariat are to be taken as applying to the Secretariat of the United Nations

by virtue of resolution A/24 (I), adopted by the General Assembly of the latter Organization in 1946. Since then the Secretary-General of the United Nations has exercised those functions.

The General Act provides for the accession of third States to be acquired via a communication to be sent them by the Council of the League. The documents produced by Greece demonstrate that the role of the League of Nations in this connection has its historical explanation in the fact that certain governments wished to make sure that parties to the General Act possessed all the attributes of sovereignty as understood at the time.

In any case, this consideration has no effect on relations between Greece and Turkey within the framework of the General Act, because both acceded to it as member States of the League of Nations.

5. I shall now consider the questions which arise concerning the Greek reservation to the General Act.

INVOCATION OF THE RESERVATION

Having regard to the procedures followed in the present case, are the conditions for the invocation of reservations by reciprocity fulfilled?

Article 39, paragraph 3, of the General Act, which concerns the conditions for activating the reciprocity of reservations, is worded as follows: "If one of the parties to a dispute *[parties en litige]* has made a reservation, the other parties may enforce the same reservation in regard to that party." The use of the words "one of the parties *to a dispute*" instead of just "one of the parties", and of the verb "may", implies that this provision must be interpreted as excluding the supposition that reciprocity comes into play automatically: its implementation is clearly made dependent on the will of the other party to the *litige*. The party in question—meaning a party participating in the proceedings [1]—must, to enforce that reciprocity, express its will before the Court in a formal manner, and in particular in the way laid down in Article 67 of the Rules of Court with respect to preliminary objections.

In the present instance, the Turkish letters of 1976 and 1978 do not constitute a preliminary objection raised in accordance with the formalities laid down in Article 67 of the Rules of Court; those formalities should however be observed, considering that the objection is one so crucial to the interests of the Applicant.

The point is that reciprocity is a mechanism which may operate to the detriment of the State which has made the reservation; it should therefore be subject to at least a minimum of safeguards for that State, to ensure that it cannot be triggered at just any time, without formality. It should not, in

[1] The *Nouveau petit Larousse illustré*, 400th edition, defines *litige* as "*contestation en justice*", i.e., a dispute *before a court*. Hence *parties en litige* means "parties present before a court".

my view, be accepted that reciprocity may take effect unless a State participating in the proceedings raises an objection in accordance with the procedures and within the time-limits laid down. The benefit of reciprocity should thus be refused to a State which is not present in the proceedings.

I well understand the way in which the Court applies certain rules of procedure customary in municipal courts, concerning the procedural situation of parties which fail to appear. I have a deep respect for that system, especially when it is a matter of seeking the truth on the question of the Court's jurisdiction. But since it is here more precisely a matter of permitting a State to enjoy the benefit of reciprocity, it would in my opinion be only proper that this special and concrete right, one likely to harm the interests of the Applicant, should not be regarded as available to a State which not only is absent from the proceedings but has all along declared that it is not, and does not wish to be in any way, a party to the case, when Article 39, paragraph 3, of the General Act refers specifically to the parties "*en litige*".

6. Furthermore, the reservation in question was in my view eliminated, so far as the present case is concerned, by the Brussels Joint Communiqué of 31 May 1975.

I shall be going into the legal nature of that instrument below. For the moment I must simply state that, even if the majority of the Court deny it the character of an international treaty (which is in my view its real character), this communiqué is still an international agreement, created by the merging of wills of two Prime Ministers who decided to submit, be it in principle, the present dispute to the Court. But the least effect of a legal kind which this communiqué must be admitted to have is that Turkey has renounced its right to enforce the reservation; one cannot, even in principle, give consent to the submission of this case to the Court and at the same time retain the right to invoke a reservation which (in Turkey's view) excludes that very case from the Court's jurisdiction. To hold otherwise would be to permit a flagrant self-contradiction, one inadmissible in international relations.

For these reasons, I believe that the way Turkey set about bringing the reciprocity of the reservation into play was irregular and that, as its reliance on that reservation was inoperative, it would be superfluous in consequence to examine its contentions regarding the sense of the reservation.

Interpretation of the Reservation

7. I now come to the question of the interpretation of the reservation. The basic elements of this interpretation were put forward in the Memorial and oral arguments of 1978, and not necessarily in the hectic atmosphere of the crisis which occurred in the summer of 1976, when the Applicant's

main attention was devoted to the factors tending to justify the indication of measures of protection.

8. By way of immediate clarification of the history of the reservation formulated by Greece when it acceded to the General Act in 1931, it should be recalled that two years previously, in 1929, Greece acceded, subject to a reservation, to the optional clause for compulsory jurisdiction of the Court, under Article 36, paragraph 2, of the Statute.

This 1929 reservation removed from the jurisdiction of the Court two categories of disputes:

> "*(a)* disputes relating to the territorial status of Greece, including disputes relating to its rights of sovereignty over its ports and lines of communication;
> *(b)* disputes relating directly or indirectly to the application of treaties or conventions accepted by Greece and providing for another procedure."

This 1929 reservation was formulated following a suggestion by Professor N. Politis, made with a view to protecting Greece against claims by Bulgaria over Thrace and in relation to Bulgarian-speaking minorities. In these circumstances, Greece formulated an *independent* reservation concerning its territorial status, and included in that reservation rights of sovereignty over its ports and lines of communication.

Greece thus sought to exclude from the jurisdiction of the Court *all disputes relating to its territorial status,* being fully aware that Article 36, paragraph 2, of the Statute *relates to legal disputes* involving the State accepting the compulsory jurisdiction of the Court.

9. The form of words used in the reservation inserted in the 1931 instrument of accession by Greece to the General Act is entirely different.

This reservation, which was formulated pursuant to Article 39, paragraph 1, of the General Act, was made up of two parts, namely:

(a) by part *(a),* which relates to the time element, those disputes are excluded which result from facts prior to the accession—a category corresponding to subparagraph *(a)* of paragraph 2 of Article 39 of the General Act;

(b) by part *(b),* Greece's intention was to exclude from the jurisdiction of the Court

> "disputes concerning questions which by international law are solely within the domestic jurisdiction of States, and in particular disputes relating to the territorial status of Greece, including disputes relating to its rights of sovereignty over its ports and lines of communication".

10. What is the meaning of reservation *(b)*? More particularly, does it exclude from the Court's jurisdiction the present dispute, which concerns

the delimitation of the continental shelf of the Aegean Sea? The answer to this question must be a clear negative, for the reasons given below.

The Literal Meaning of the Reservation

11. As is clearly apparent even on an initial reading of the text of the reservation, it excludes from the Court's jurisdiction one single category of disputes, namely those which by international law are solely within the domestic jurisdiction of the States. The reservation singles out for particular mention, *from within this whole category,* disputes relating to the territorial status of Greece which at the same time belong to the group of "disputes concerning questions which by international law are solely within the domestic jurisdiction of States".

Thus the reservation did not exclude two categories of dispute. That would be the case if its text had been drawn up as follows:

(a) disputes concerning questions which by international law are solely within the domestic jurisdiction of States, and
(b) disputes relating to territorial status.

But the text mentions only one category, that is to say disputes concerning questions which by international law are solely within the domestic jurisdiction of States, and, among these, the reservation mentions "in particular *[notamment]*" disputes relating to territorial status.

The drafting is such as to leave no doubt as to the meaning of the reservation. The French word *"notamment"* [1] signifies, according to all literary sources, that it is thought necessary to mention more particularly a special element of a concept already mentioned. The "genus" as a whole had been mentioned, and a part or parcel of that whole is mentioned more particularly. It is as if the text of the reservation read: "I exclude disputes which by international law are solely within the domestic jurisdiction, but I think it necessary to mention, within this category taken as a whole, 'disputes relating to territorial status'."

12. The Greek word, which is used in the Greek text, is the word εἰδικώτερον. In Greek, εἰδικώτερον signifies "more particularly", and it is a comparative adverb, derived from the word εἶδος:

εἶδος	=	species
εἰδικός	=	special (adjective)
εἰδικώτερος	=	more special (comparative adjective)
εἰδικῶς	=	specially (adverb)
εἰδικώτερον	=	more specially or more particularly (comparative adverb).

[1] *Notamment* and *et notamment* have exactly the same meaning, the conjunction *et* having no other significance than *linking* the *genus* to the *species.*

Thus, as I have observed, the group comprising "disputes relating to territorial status", excluded by reservation *(b)*, is not the totality of all disputes relating to territorial status, but only a part of that totality, namely "the disputes relating to territorial status which by international law are solely within the domestic jurisdiction of States". If what is in question is a dispute which relates to territorial status, but which is not by international law solely within the domestic jurisdiction of States, such dispute is not excluded from the jurisdiction of the Court, and that is exactly the case of the continental shelf, the status of which is not a question which by international law is solely within the domestic jurisdiction of States, but is a question governed by international law.

Thus the dispute relating to the delimitation of the Aegean Sea continental shelf, being a dispute which by international law is not solely within the domestic jurisdiction of Greece, is *not excluded* by virtue of reservation *(b)* from the jurisdiction of the Court.

Greece Did not Intend to Exclude Disputes concerning the Continental Shelf

13. Greece, when formulating reservation *(b)*, did not intend to exclude the dispute concerning the delimitation of the Aegean Sea continental shelf. The real intention of Greece in this particular case is made sufficiently clear by the letter from Mr. Politis, who suggested the wording of the reservation, in order to exclude from the jurisdiction of the Court disputes which might arise out of Bulgaria's claims to transit across the territory of Thrace, which went beyond the treaty provisions.

This intention of Greece to protect itself against Bulgarian demands, both territorial and non-territorial, was amply justified, since Bulgaria had clearly indicated that it sought to upset the territorial and political arrangements crystallized in the peace treaties. From Greece's point of view, there was thus a danger that it might find these demands, of a political nature, covered by the procedures of the General Act, since that Act included, in addition to judicial procedures designed for legal disputes, procedures for conciliation and arbitration capable of leading to settlements *ex aequo et bono* for questions of a political nature, like those raised by the claims of Bulgaria. Greece therefore had to take precautions against any challenging of its territorial status as laid down in the treaties. But the Athens Government (in order to contribute towards the atmosphere of appeasement prevailing at the time and to the generalized application, as far as possible, of the peaceful settlement of disputes) did not think fit to make a reservation of all disputes concerning territorial status; it merely reserved those disputes which by international law are solely within domestic jurisdiction. This narrower category included disputes which might arise out of Bulgaria's demands, which were *revisionist in nature in relation to the treaties in force.*

That being so, questions relating to the territorial status of Greece, as defined by the treaties, do not fall within the reservation made to the General Act. What do fall within that reservation are political demands tending to overturn existing commitments.

The Concept of "Territorial Status" Does not Include the Status of the Continental Shelf, Still Less the Delimitation of the Continental Shelf

14. The concept of territorial status does not include the status of the continental shelf. The continental shelf lies below the high seas, which are free; and the specific sovereign rights of the coastal State (the right to explore and exploit the seabed and the subsoil thereof) are of an economic character and, in any case, are not such as to situate the continental shelf in the territory of the State. Third States are not forbidden to engage in activities other than the exploration and exploitation of the continental shelf: they can even use it for military purposes! If, therefore, any third State whatever can deploy weapons and use the bed of the high seas for military purposes, how can one speak of "territory" or of "territorial extension" of the coastal State?

The "status" of the continental shelf could not therefore be considered as falling within the concept of the "territorial status of the State".

Distinction Between "Status" and "Delimitation"

15. In any case, the dispute submitted to the Court by the Greek Government's Application does not concern the "territorial status" of Greece, but the *delimitation* of the continental shelf. Even if the status of the continental shelf were considered to be included in "territorial status" (which I do not concede), the Greek Application still concerns *not the status* but the delimitation of the continental shelf. Status is one thing, delimitation another. Status is the legal situation, the legal condition, the whole set of rules defining a legal situation, whereas delimitation merely concerns the correct application of those rules of international law in order to draw the boundaries of the continental shelf.

Therefore this question of delimitation cannot in any way be regarded as included in something which is quite a different question, that of the determination of the legal status of the continental shelf.

The Reservation Must Be Interpreted Restrictively

16. A final argument of a general nature should be added in favour of this interpretation. It is an argument derived from the principle, which may indirectly be deduced from the case-law of this Court, that reservations

must be interpreted strictly, and not read broadly. Such a restrictive interpretation is required:

(a) because reservations are exceptions to a general rule, and all exceptions, restrictions and limitations of a rule are, as a general principle of law, always interpreted restrictively;

(b) because every reservation constitutes an exception to the general rule of peaceful settlement of disputes adopted by the General Act, and a broad and extensive interpretation of the reservation would operate to the detriment of the general rule of peaceful settlement of disputes.

The Reservation Has Ceased to Operate Since the Brussels Communiqué

17. Finally, and in any event, the Greek reservation has been neutralized by the Joint Communiqué of Brussels of 31 May 1975, as I have already indicated above.

I shall have more to say as to the character of this Communiqué, which constitutes an international agreement giving rise to international rights and obligations. I must at once, however, express my view that from 31 May 1975 onwards, that is from the date of the agreement enshrined in the Joint Communiqué of the two Prime Ministers, the Greek reservation of 1931 has ceased to operate; its interpretation, therefore, has become a moot issue. As I have already stated, it is not legally possible for the Turkish Government to rely before this Court on a reservation which, with the express and deliberate consent of Turkey, has been eliminated so far as the present case is concerned since 31 May 1975.

18. In these circumstances I have the greatest difficulty in following the Court's reasoning in the interpretation which it gives to the Greek reservation. It sets aside the clear grammatical meaning of the French text. Subsequently, in support of its view that the words *"et, notamment,"* do not designate a species within a broader category, the Court picks out a sentence from the Greek text of the *exposé des motifs* of the bill submitted to the Greek Parliament and then immediately refers to the French text, without taking into account the Greek text of the actual law approving the accession, a text which must be taken into consideration *in the very first place* and includes the word εἰδικώτερον; this quite unequivocally means "more specially" in all cases, even if it is placed between two commas.

19. Moreover, in the Greek reservation "territorial status" does not appear merely as an example of a question relating to domestic jurisdiction but implies the firm intention of Greece to exclude from the procedures of the General Act anything which might tend to a revision of its territorial status.

Furthermore, so far as the historical realities of the Balkan peninsula are

concerned, the circumstances in which Greece acceded to Article 36, paragraph 2, of the Statute were not the same as those which induced it to accede to the General Act. As the Agent of Greece pointed out, the political barometer of the region used to change far too rapidly for it to be possible to say that the position in 1931 was the same as in 1929.

20. The argument that Greece renewed its 1929 reservation in 1934 and 1939 without amending it proves absolutely nothing compared with the reasons which caused it to formulate the reservation to the General Act and the clear text of that reservation.

21. Lastly, to conclude consideration of the questions raised with regard to this reservation, I must point out that the concept "territorial and political unity of Greece" relied upon in the Application means that the mainland and insular portions of Greece may in no way be treated differently.

Does the Communiqué of 31 May 1975 Confer Jurisdiction on the Court to Entertain the Present Dispute?

22. The Joint Communiqué issued in Brussels on 31 May 1975, far from being a mere "press release", as Turkey claimed in its letter of 10 October 1978, constitutes an oral international agreement (recorded in writing) reached between the Heads of the two Governments at the summit meeting which took place in Brussels.

In this Communiqué the two Prime Ministers declare very clearly that they "decided" that the problems of the continental shelf "should be resolved by the International Court of Justice".

First of all, the expression "decided" means that a decision had already been arrived at by the merging of the two wills, and not merely an intention to reach an agreement in the future. The expression is therefore a full and complete declaration of intention, which gives rise to international obligations and which is not, moreover, made subject to any condition.

The verb "*doivent* [in the present tense] *être résolus*" means that the jurisdiction of the Court recognized by this Communiqué is considered by the two parties to exist from the moment at which the Communiqué was published, and not from some point in the future. The two parties did not say that the disputes "*devront* [will have to]" or "*devraient* [ought to] *être résolus par la Cour*"; they said "*doivent être résolus par la Cour*". This is an affirmation demonstrative of a decision already taken, and a jurisdiction already conferred. How could the words "*ont décidé* [decided, or have decided]" and "*doivent* [should, or are to be]" be distorted to mean that the decision has not yet been taken and that the disputes should not yet be submitted to the Court, or that all this is merely a prospect to be realized in the future?

This efficacy of the Joint Communiqué is not affected by the fact that Turkey has shown reluctance to conform to the agreement concluded in Brussels, admitting, nevertheless, that the submission of the present

dispute to the Court had been decided "in principle" and that all that remained was for the "terms" for the submission to be determined through negotiations.

An oral agreement can give rise to international commitments; the Court has already had occasion to confirm the lack of strict formal requirements for international commitments and the consistency of oral agreements with international law.

23. Turkey itself was fully aware of the significance of the agreement concluded between the two Prime Ministers in Brussels. The Turkish Prime Minister, Mr. Suleiman Demirel, in his letter addressed to the Greek Prime Minister, Mr. C. Karamanlis (annexed to the Turkish letter of 10 October 1978), stresses that "Turkey is willing and determined to adhere to the Brussels Agreement to the letter". The agreement in question was another one, concerning Cyprus, but from "the letter" of this statement one may infer *(a)* that Turkey considers such decisions to be international agreements, and *(b)* that it considers itself bound by them and reaffirms its will to remain faithful to the implementation of what was decided—faithful implementation "to the letter". What is, then, "the letter" of the decision taken in Brussels on 31 May 1975? It is to be found in the text of the Communiqué: "They decided that those problems should be resolved peacefully by means of negotiations and as regards the continental shelf of the Aegean Sea by the International Court at The Hague."

I conclude that the Joint Communiqué is fully valid as a source of jurisdiction of the Court in pursuance of Article 36, paragraph 1, of its Statute.

Final Observation

24. If any doubt were felt as to the jurisdiction of the Court, I venture to submit that, in the event of such a doubt, the decision should be taken in favour of jurisdiction.

In all fields of law there are general principles designed to facilitate the work of the judge, who is often reluctant to choose between two solutions which seem to him to be equally plausible. These principles then come into play to help the judge to settle difficult and thorny problems to which he sometimes cannot find a solution. Without these general principles, many laws and many institutions, in their totality, would lose a large part of their value. But, thanks to these principles, *"le juge peut maîtriser la loi"*, in the words of the French writers, and a court may thus convert texts which are often modest and spiritless into ideas capable of moulding and stimulating the life of a society.

This role played by general principles is much more important in those fields of law which are characterized by the absence of a stable and rigid system of rules, as is the case with international law.

Thus, in constitutional law, unlike civil law, there being no "code" of

rules, the original source of general principles is to be found in the idea of freedom and democracy and, beyond that, in the Universal Declaration of Human Rights. *In dubio, pro libertate,* as the saying goes: in the event of doubt, the most liberal solution, that which is most conducive to democratic freedom, must be chosen.

In international law, and particularly in the field of international justice, the source of general principles must be sought in the dominant ideas which have led to the establishment of the major international bodies for the purpose of securing peace and the peaceful settlement of international disputes. In case of doubt, an international court must, in my opinion, incline towards the broader scope of its jurisdiction, and the effectiveness of its mission. After two world wars, a supreme appeal was addressed to the civilized nations, calling upon them to conform to higher rules with a view to securing the peaceful settlement of their differences. The broader those rules, the more effective this universal appeal would be.

I therefore venture to put forward the idea that the Court would take a step of historical importance if, in the case of doubt as to its jurisdiction (in this case, with regard to the meaning of the Greek reservation), it allowed itself to be guided by this basic principle of the universality of its jurisdiction, which contributes to the maintenance of peace.

(Signed) Michel STASSINOPOULOS.