SEPARATE OPINION OF JUDGE PAIK

1. In the present proceedings, the Tribunal was, for the first time since its establishment, faced with a situation in which one of the parties, the Russian Federation in this case, did not appear. The Tribunal in paragraphs 46-57 of the Order thus had to examine the implications of the non-appearance of the Russian Federation in the present proceedings and to consider how the proceedings should be conducted in such a situation. Nowhere in the above paragraphs, however, did the Tribunal invoke or make reference to article 28 of the Statute of the Tribunal (hereinafter "the Statute"), the only provision in the Statute dealing with a situation of default of appearance, thus raising doubt about its applicability to the present proceedings. In so doing, the Tribunal apparently followed the practice of the International Court of Justice (hereinafter "the ICJ") in the matter, this being that the ICJ has never made specific reference to its own default provision in proceedings for the indication of provisional measures. In my view, however, a better approach is to apply article 28 of the Statute to the present proceedings in conjunction with article 290, paragraph 5, of the United Nations Convention on the Law of the Sea (hereinafter "the Convention"), under which the request for provisional measures was made by the Applicant. Let me explain why.

2. The rule and procedure to be followed by the Tribunal in the event of the default of one of the parties is provided for in article 28 of the Statute, which reads as follows:

> *Article 28*
> *Default*
>
> When one of the parties does not appear before the Tribunal or fails to defend its case, the other party may request the Tribunal to continue the proceedings and make its decision. Absence of a party or failure of a party to defend its case shall not constitute a bar to the proceedings. Before making its decision, the Tribunal must satisfy itself not only that it has jurisdiction over the dispute, but also that the claim is well founded in fact and law.

Article 28 of the Statute was undoubtedly influenced by, and closely follows, the default provision of the Statute of the ICJ (hereinafter "the ICJ Statute"), as can be

seen from its drafting history (see Myron H. Nordquist (ed.), *UNCLOS 1982: A Commentary*, Vol. V, 1989, pp. 389-390). Article 53 of the ICJ Statute reads as follows:

Article 53

> 1. Whenever one of the parties does not appear before the Court, or fails to defend its case, the other party may call upon the Court to decide in favour of its claim.
> 2. The Court must, before doing so, satisfy itself, not only that it has jurisdiction in accordance with Articles 36 and 37, but also that the claim is well founded in fact and law.

Despite their similarities, there exist some noticeable differences between the two provisions. First, whereas, under article 53 of the ICJ Statute, the appearing party in a case of default may “call upon the Court to decide in favour of its claim”, such a party, under article 28 of the Statute, may “request the Tribunal to continue the proceedings and make its decision”. By allowing the appearing party to request the Tribunal only to continue the proceedings and make its decision (rather than to call upon the Tribunal to decide in favour of its claim), article 28 of the Statute appears to give the Tribunal more latitude in making its decision. In practice, however, it is doubtful if this difference is likely to be of any consequence, because non-appearance even under Article 53 of the ICJ Statute does not entail any special form of proceedings in which a so-called “default judgment” can automatically be granted in favour of the appearing party. Such a default judgment is clearly prohibited by Article 53, paragraph 2, of the ICJ Statute. Second, article 28 of the Statute explicitly provides that absence of a party or failure of a party to defend its case shall not constitute a bar to the proceedings, while the ICJ Statute contains no sentence to that effect. However, this point has been consistently emphasized by the ICJ in default situations it has had to deal with. In fact, article 28 of the Statute is a reflection of the settled jurisprudence of the ICJ on this matter.

On the other hand, the common feature in both provisions is that the Tribunal or the Court, before making its decision, must satisfy itself not only that it has jurisdiction but also that the claim is well founded in fact and law. Even here, however, a subtle difference can be noticed. Whereas Article 53, paragraph 2, of the ICJ Statute states “jurisdiction in accordance with Articles 36 and 37”, article 28 of the Statute states

"jurisdiction over the dispute". It will be seen below if the addition of "over the dispute" after "jurisdiction" in article 28 of the Statute entails any consequence (see the next paragraph of this opinion).

Article 28 of the Statute clarifies and expands the rules and procedures applicable to instances of default in light of the experience gained by the ICJ. By spelling out the right of the appearing party in a more neutral way, this provision avoids apparent tension lurking between Article 53, paragraphs 1 and 2, of the ICJ Statute. It thus further elaborates on the balance achieved in Article 53 of the ICJ Statute between the interest of an appearing party and that of a defaulting party. In that sense, I believe that this provision is an improvement on the corresponding provision of the ICJ Statute.

3. In the 1970s and 1980s, when instances of non-appearance occurred with alarming frequency at the ICJ, it was the subject of acute controversy what action or inaction, at what phase of the proceedings, would bring the default provision of the ICJ Statute into operation. The controversy arose, quite often, in the context of proceedings for the indication of interim measures of protection. Requests for interim measures raised difficult questions whether the default provision applies to such proceedings and, if it does, how that provision should apply. The ICJ has never pronounced on those questions, although some judges have expressed their views in individual opinions. Scholarly opinion was divided. It was submitted by those who opposed the applicability of the default provision that a main difficulty in applying Article 53 of the ICJ Statute to proceedings for the indication of interim measures lay in its paragraph 2, which requires the Court to ensure that it has jurisdiction and that the claim is well founded in fact and law. According to this view, the result would be plainly absurd if the above paragraph were applied to proceedings for interim measures, because the appearing party would then have to meet a more stringent burden of proof for jurisdiction in default proceedings than in normal proceedings for provisional measures in which only a *prima facie* basis of jurisdiction needs to be shown. Such a result would amount to placing appearing States at a great disadvantage in cases of default.

The same concern or difficulty may be raised in respect of applying article 28 of the Statute to proceedings for provisional measures under article 290 of the Convention, which provides that such measures may be prescribed on the basis of *prima facie* jurisdiction. On closer examination, however, this difficulty may prove illusory. For one thing, the term "jurisdiction" has more than one meaning. As Judge Fitzmaurice noted in the *Northern Cameroons* case:

> Thus in the jurisdictional field, there is the substantive or basic jurisdiction of the Court (i.e. to hear and determine the ultimate merits), and there is the possibility of (preliminary) objections to the exercise of that jurisdiction. But also, there is the Court's *preliminary* or "incidental" jurisdiction (e.g. to decree interim measures of protection, admit counterclaims or third-party interventions, etc.) which it can exercise even in advance of any determination of its basic jurisdiction as to the ultimate merits; even though the latter is challenged; and even though it may ultimately turn out that the Court lacks jurisdiction as to the ultimate merits.
> (*Northern Cameroons* case *(Cameroon* v. *United Kingdom), Separate Opinion of Judge Fitzmaurice, I.C.J. Reports 1963*, p. 103)

Then the term "jurisdiction" in the third sentence of article 28 of the Statute can easily be interpreted to refer not only to the jurisdiction to hear and determine the merits of the case but to the jurisdiction to prescribe provisional measures. Indeed, this was the position of the Netherlands when it requested the Tribunal in its final submissions to declare that the Tribunal had jurisdiction over the request for provisional measures (*Final Submissions of the Netherlands (a)*).

Likewise, "claim" can also be understood to be a broad notion, encompassing any demand or assertion made as a right at various stages of proceedings. As such, the term "claim" includes not only a claim on the merits but also a claim to jurisdiction, a claim to compensation, and indeed, a claim to provisional measures (see D.W. Bowett, *Contemporary Developments in Legal Techniques in the Settlement of Disputes*, Vol. 180 (1983), p. 208). There is little reason to confine the term "claim" in the third sentence of article 28 of the Statute to a claim on the central issue of the merits. The term "claim" in the said sentence in the context of proceedings for provisional measures should be understood as a claim to such measures. Again, this was the position of the Netherlands when it requested the Tribunal in its final submissions to declare that the claim was supported by fact and law (*Final Submissions (c) of the Netherlands*). The claim mentioned in the final submissions

obviously refers to the claim to the prescription of provisional measures under article 290, paragraph 5, of the Convention.

The third sentence of Article 28 of the Statute requiring Tribunal to ensure that it has jurisdiction and that the claim is well founded in fact and law in no way intends to set the standard of proof for the existence of jurisdiction or the validity of claim that has to be satisfied by the appearing party in case of default. That sentence is to ensure that the principle of the equality of the parties, despite the default by one of them, continues to apply. It has little to do with the standard of proof applicable to proceedings in case of default. For proceedings for provisional measures, it would be sufficient for the appearing party to show *prima facie* jurisdiction, be it default proceedings or normal adversarial proceedings. As Professor Bowett observed in the context of Article 53, paragraph 2, of the ICJ Statute, “the Court can just as well be ‘satisfied’ that there is a *prima facie* case of jurisdiction as it can be ‘satisfied’ that there is conclusive proof of jurisdiction” (D.W. Bowett, *ibid.*). The addition of the words “over the dispute” after “jurisdiction” in the third sentence of article 28 of the Statute makes no difference in this regard.

There is no reason to exclude the procedure under article 28 of the Statute from proceedings for the prescription of provisional measures. Therefore, Article 28 of the Statute can and should be applied to the present proceedings. Furthermore, it should be applied in conjunction with article 290 of the Convention, as there is no contradiction between them.

4. The applicability of article 28 of the Statute to the present proceedings is *a fortiori* convincing considering its object and purpose. The purpose of the provision on default is well known. It is aimed at enabling the Tribunal to continue its proceedings in the case of default by one of the parties, thus safeguarding the right of the appearing State to the judicial settlement of the dispute, and at the same time protecting the rights of the defaulting State in such proceedings. The first two sentences of the provision embody the notion that default must not obstruct the proceedings, while the third and last sentence ensures the principle of the equality of the parties. Given the above purpose, there is no reason why the provision cannot or should not be applied to proceedings for the prescription of provisional measures.

The rationale behind the provision is as valid for incidental proceedings like the one before the Tribunal as for principal proceedings. The fact that article 28 is the only provision on default in the Statute lends further support to its general applicability to different phases of the case, including the request for provisional measures.

5. Another factor to be considered on the subject of the applicability of article 28 of the Statute to the present proceedings is the fact that procedurally the present case has been conducted on the basis of that provision. By note verbale dated 22 October 2013, the Russian Federation notified the Netherlands and the Tribunal that it did not accept the arbitration procedure under Annex VII of the Convention in regard to the case concerning the vessel *Arctic Sunrise* and that it did not intend to participate in the proceedings before the Tribunal in respect of the request for provisional measures under article 290, paragraph 5, of the Convention. The Registrar of the Tribunal, at the request of the President of the Tribunal, then sent a letter to the Agent of the Netherlands on 23 October 2013, drawing her attention to article 28 of the Statute and requesting any comments the Netherlands might wish to make. As indicated in paragraph 11 of the Order, the Agent of the Netherlands replied that "*in accordance with Article 28 of the Statute of the Tribunal*, the Kingdom of the Netherlands respectfully requests the Tribunal ... to continue the proceedings and make its decision on the Request for Provisional Measures ..." (italics added).

Thus it is clear that the Netherlands invoked article 28 of the Statute in the present proceedings. Apart from the question whether the default provision applies automatically when a situation of default occurs, or upon the invocation of an appearing party, at least in this case, the invocation of article 28 of the Statute by the Netherlands upon the request of the Tribunal should be the basis for the Tribunal to continue its proceedings and make its decision after being satisfied of the existence of jurisdiction and the validity of the claim. Instead of doing so, however, the Order in paragraphs 48-50 referred to the jurisprudence of the ICJ that the absence of a party or failure of a party to defend its case does not constitute a bar to the proceedings, provided that the parties have been given an opportunity of presenting their observation, and pointed out that the Russian Federation was given ample opportunity to present its observation, but declined to do so. Thus the Tribunal apparently based its decision to continue the proceedings upon the fact that the

Russian Federation was given an opportunity to be heard in accordance with the jurisprudence of the ICJ. However, such reasoning is inconsistent with the way the case has been conducted, as has been explained above.

The Netherlands went on to state during the hearing that “Article 28 of the Tribunal’s Statute applies to requests for provisional measures” and that “Article 28 should be read in conjunction with Article 290, paragraph 5, of the Convention” (ITLOS/PV.13/C22/1, p. 9, lines 5-10). In fact, the entire argument made by the Netherlands during the hearing was structured on, and in accordance with, article 28 of the Statute, as can be understood from its final submissions. Given the way the present case has been conducted, and, *inter alia,* considering the explicit statement of non-participation by the Russian Federation and the subsequent invocation of article 28 by the Applicant upon the request of the Tribunal, the total silence of the Order in regard to article 28 of the Statute is estranged from the facts of the proceedings and thus hard to justify.

6. Where there is a statutory provision which envisages a certain situation, that provision should be applied when the situation envisaged arises, unless there is a high degree of uncertainties or ambiguities about its applicability. Some edges of the provision may need to be rounded through the process of interpretation so that it can fit into the situation. Needless to say, the legal regime based on a statute and the jurisprudence of the tribunal entrusted to safeguard that regime cannot be expected to develop unless serious efforts are made to clarify some inevitable uncertainties or ambiguities lurking in many statutory provisions. Bypassing a provision of its own statute and simply relying on the jurisprudence that has been developed on the basis of the provision, though similar, of another statute would hardly be conducive to such development. Instead of ignoring article 28 of its Statute, the Tribunal in the present Order ought to have considered applying it, and to have developed its own jurisprudence on the basis of and within the framework of this provision.

7. As this is the first case before the Tribunal involving the non-appearance of a party, the Tribunal should have taken the opportunity offered to it to clarify a few questions related to article 28 of the Statute, in particular whether and how the provision should apply to proceedings for the prescription of provisional measures.

Had it done so, the Tribunal would have made a substantial contribution to the clarification, and also development, of the international law on dispute settlement. I regret that it did not do so. However, I agree with the conclusion of the Order and thus voted for it.

(signed)

J.-H. Paik