

SEPARATE OPINION OF JUDGE MOSLER

I concur in the opinion that the request to indicate interim measures must be dismissed. Since this is the effect of the operative part of the Order, I voted for it, although I do not share the reasons given by the majority of my colleagues but base the same conclusion on different grounds.

An Order made on the request of an applicant State to indicate interim measures of protection pending judgment is given in incidental proceedings, normally at a very preliminary stage of the pendency of the case before the Court. Furthermore, the definitive decision on jurisdiction and admissibility is reserved to later proceedings, if the parties, as in the present case, disagree on this point. Matters belonging to the substance of the case must not be touched at all. It follows from the provisional character of these proceedings as well as from the need to reach a decision urgently that the reasoning motivating the operative part of the Order is kept brief. Accordingly an opinion differing from the reasons given in the Order is bound to confine itself to similar restrictions.

Subject to this understanding, my reasons are as follows:

1. In my view, the first question arising is that of the jurisdiction of the Court to indicate interim measures in the case submitted by the Greek Application of 10 August 1976 instituting proceedings before the Court. Article 41 of the Statute confers this power on the Court without being, in my interpretation, an independent source of jurisdiction on the same footing and of the same legal quality as Article 36. The various ways there indicated of founding the obligation to take part in proceedings before the Court as a respondent party all depend on the voluntary submission of the State concerned. Article 41 is, however, in so far an autonomous grant of jurisdiction that it permits that the grounds conferring jurisdiction in conformity with the basic Article are to be examined only to the extent that this can be done without endangering the urgency with which a request for interim measures must be considered.

In view of the provisional character of the requested Order and bearing in mind that it in no way prejudices the decisions to be taken in the forthcoming proceedings, it is in my view sufficient that the Court, when it actually indicates interim measures, should have reached the provisional conviction, based on a summary examination of the material before it (including written observations of a party not represented) and subject to any objections which may be raised in subsequent proceedings, that it has jurisdiction on the merits of the case. This amounts to an attempted

definition of the criteria of a positive *prima facie* test. I would add that provisional affirmation of jurisdiction is in my view not a "circumstance" contributing to the necessity of provisional measures in the sense of Article 41, but a precondition of the examination whether such circumstances exist.

If the Court however, as in the present Order, rejects the request because the circumstances are not considered to require interim measures, it examines the legal situation existing between the parties to the dispute and thus, to that extent, also assumes jurisdiction. But in this hypothesis the Court has only to satisfy itself that it does not manifestly lack jurisdiction, since the Order does nothing to interfere with the rights of the respondent party.

2. In the present case the jurisdiction is open to doubt and certainly not manifest. I must therefore examine whether it is, according to the above-mentioned criteria, sufficiently established to justify the indication of interim measures, supposing that circumstances exist which require such measures to be taken in order to preserve the respective rights of either party. Greece asserts that the Court's jurisdiction with regard to the merits of the dispute is founded on two separate grounds, each of them furnishing a sufficient basis: the General Act of Geneva of 26 September 1928 and the Brussels communiqué of 31 May 1975.

- (a) There may be reasonable grounds for maintaining that the General Act of Geneva is still in force between those parties who have not denounced it, but objections to that view are possible and may be raised in the forthcoming proceedings on jurisdiction. Furthermore, Greece's reservation made in 1931 in accordance with Article 39, paragraph 2 (c), of the General Act (Annex IX to the Application), excluding from her undertakings under the Act, *inter alia*, "disputes relating to the territorial status of Greece", gives rise to doubts whether this status comprises the areas of the continental shelf appertaining to the coastal State.

But neither of these problems can be solved, even in a summary manner, in the present incidental proceedings, to the extent necessary to meet the test indicated above and furnish the basis of the Court's jurisdiction at the present stage of the proceedings.

- (b) The same applies to the Brussels communiqué of 31 May 1975. I am not sufficiently convinced, after a summary examination, that it constitutes an agreement to seise the Court "as regards the continental shelf of the Aegean Sea", conferring on either party the right to institute proceedings before the Court.

3. The request must therefore be rejected for the sole reason that the jurisdiction of the Court is not sufficiently established. It must be determined in subsequent proceedings on the basis of Article 36, paragraph 6, of the Statute.

The Court bases its negative decision on the circumstances existing in the present situation, which in its view do not require the indication of

interim measures in order to preserve the rights of either party. It draws this conclusion from an examination first of the consequences of the exploration by *Sismik I* of part of the seabed the appurtenance of which to either Greece or Turkey is at issue between the parties and, secondly, of the danger of an armed conflict involved in military measures taken by Turkey to protect her research vessel and by Greece to monitor the movement of it.

I share the Court's reasoning that the continued exploration of disputed areas of the continental shelf by *Sismik I* does not cause, of itself and seen in isolation, irreparable prejudice to Greece justifying the exercise of the exceptional power granted to the Court under Article 41, even though, in the event of a judgment favourable to Greece, it would constitute an infringement of an exclusive right of the coastal State. But I must express doubts regarding the Court's separation of the infringement of alleged Greek rights to exploration from the military measures, taken by both sides for purposes of the protection or supervision of the vessel, which involve a risk of armed conflict. I consider the military aspect not as a distinct element but simply as an aggravating circumstance additional to the basic element of continued exploration. In my view the Court should have considered that it was part of its overall responsibility to consider the situation as a whole, quite apart from its assessment of the Security Council's resolution and the reactions thereto of Greece and Turkey.

However, having taken the position I have indicated in section 2 of this opinion, I find that the question whether one of these two circumstances, or both in combination, require the indication of interim measures to preserve the rights of either party, loses relevance. I must therefore abstain from making further comments on these points.

(Signed) Hermann MOSLER.
