

SEPARATE OPINION OF
PRESIDENT JIMÉNEZ DE ARÉCHAGA

I concur in the Order of the Court for the reasons stated therein. I wish, however, to add a few general comments on the question of the jurisdiction of the Court with respect to the merits of the dispute and its relation to the power of the Court under Article 41 of the Statute.

Article 41 constitutes the basis of the Court's power to act with respect to a request for interim measures. It is a provision which has been accepted by all parties to the Statute and in such acceptance lies the element of consent by States to this special form of jurisdiction. It has been described as incidental jurisdiction because it is one which the Court is called upon to exercise as an incident of proceedings already before it. It may be compared from this point of view with the jurisdiction granted by Article 36, paragraph 6, of the Statute, according to which "in the event of a dispute as to whether the Court has jurisdiction, the matter shall be settled by the decision of the Court". Both forms of incidental jurisdiction must normally be exercised before jurisdiction over the merits is finally determined.

The fact that Article 41 is an autonomous grant of jurisdiction to the Court, independent from its jurisdiction over the merits of the dispute, does not signify that the prospects of the Court's jurisdiction with regard to the merits are irrelevant to the granting of interim measures. They are, on the contrary, highly relevant, but they come into play at a different level and at a subsequent stage: not as the basis for the Court's power to act on the request, but as one among the circumstances which the Court has to take into account in deciding whether to grant the interim measures.

The essential object of provisional measures is to ensure that the execution of a future judgment on the merits shall not be frustrated by the actions of one party *pendente lite*. In cases in which there is no reasonable possibility, *prima facie* ascertained by the Court, of jurisdiction on the merits, it would be devoid of sense to indicate provisional measures to ensure the execution of a judgment the Court will never render.

But the possibility of jurisdiction over the merits is only one among other relevant circumstances. There are others to be taken into consideration—such as the questions whether provisional measures are necessary to preserve the rights of either party and whether the acts complained of are capable of causing or of threatening irreparable prejudice to the rights invoked. According to general principles of law recognized in municipal systems, and to the well-established jurisprudence of this Court, the essential justification for the impatience of a tribunal in

granting relief before it has reached a final decision on its competence and on the merits is that the action of one party "*pendente lite*" causes or threatens a damage to the rights of the other, of such a nature that it would not be possible fully to restore those rights, or remedy the infringement thereof, simply by a judgment in its favour. The Court's specific power under Article 41 of the Statute is directed to the preservation of rights "sub-judice" and does not consist in a police power over the maintenance of international peace nor in a general competence to make recommendations relating to peaceful settlement of disputes.

Before interim measures can be granted all relevant circumstances must be present—including the possibility of jurisdiction over the merits. However, to refuse interim measures it suffices for only one of the relevant circumstances to be absent. From this point of view all the circumstances of the case—including that relating to the possibility of jurisdiction over the merits—are placed on the same level: none has a logical priority with respect to another. In view of the wide measure of discretion granted by Article 41, the Court is entirely free to determine in each case which of the relevant circumstances it will examine first.

In the present case the Court has found that interim measures were not required in view of two circumstances: the existence of appropriate means of reparation or satisfaction, with respect to the first Greek complaint, and the action taken by the Security Council, with respect to military actions or steps which might extend or aggravate the dispute. Having reached this conclusion it was not necessary for the Court to make any determination as to the prospects of its jurisdiction with regard to the merits, even on a *prima facie* basis. The question of jurisdiction over the merits could thus be left entirely unprejudiced, as was done in similar cases by the Permanent Court in the *Prince von Pless* (*P.C.I.J., Series A/B, No. 54*, p. 153) and *Polish Agrarian Reform* (*P.C.I.J., Series A/B, No. 58*, p. 179) cases and by this Court in the *Interhandel* (*I.C.J. Reports 1957*, p. 111) and *Trial of Pakistani Prisoners of War* (*I.C.J. Reports 1973*, p. 330) cases.

The question of the Court's jurisdiction thus remains entirely reserved for a future judgment, after giving the parties full opportunity to plead the important and delicate questions of law which have been raised in this respect.

(Signed) E. JIMÉNEZ DE ARÉCHAGA.
