

## SEPARATE OPINION OF JUDGE EVENSEN

I agree with the Court's decision to dismiss the request of Guinea-Bissau for the indication, under Article 41 of the Statute, of provisional measures. I likewise agree with the finding of the Court that the Court need not finally establish that it has jurisdiction on the merits of the case before deciding whether or not to indicate such measures. On the other hand, it seems obvious that the Court should "not . . . indicate such measures unless the provisions invoked by the Applicant appear, *prima facie*, to afford a basis" for the Court's jurisdiction in the case. Here the absence at this stage of any challenge to the Court's jurisdiction should be noted.

In its Order of 11 September 1976 in the *Aegean Sea Continental Shelf* case the Court held, *inter alia*, that:

"the power of the Court to indicate interim measures under Article 41 of the Statute presupposes that irreparable prejudice should not be caused to rights which are the subject of dispute . . ." (*I.C.J. Reports 1976*, p. 9, para. 25).

Doubts can obviously be voiced as to whether such irreparable damage could arise if interim measures were not provided for. But in this context, it should be noted that neither Article 41 of the Statute of the Court nor Article 73 of the Rules of Court contain any reference as to "irreparable damage".

In the present case where the underlying interest involves harvesting the marine resources of the maritime areas concerned, guidance may be found in the United Nations Convention on the Law of the Sea concluded on 10 December 1982, although it has not yet entered into force. I shall draw special attention to Part V on the Exclusive Economic Zone and Part VI on the Continental Shelf.

In this relation attention should be drawn to the fact that the Government of Guinea-Bissau and the Government of Senegal signed this fundamental Convention on 10 December 1982 which was the opening date for signatures. Furthermore, both countries have ratified the Convention; Senegal ratified the Convention on 25 October 1984 and Guinea-Bissau ratified the Convention on 25 August 1986.

In Article 74, paragraph 1, of the 1982 Law of the Sea Convention, dealing with *the delimitation of the exclusive economic zone* between States with opposite or adjacent coasts, it is provided — as the main principle — that the delimitation of the zone between States with adjacent or opposite coasts "*shall be effected by agreement*".

Paragraph 3 of this Article lays down provisions relating to certain preliminary safeguards to be taken. It provides:

“Pending agreement . . . the States concerned, in a spirit of understanding and co-operation, shall make every effort to enter into provisional arrangements of a practical nature and, during this transitional period, not to jeopardize or hamper the reaching of the final agreement. Such arrangements shall be without prejudice to the final delimitation.”

Identical provisions are provided for in Article 83 of the Convention on *the delimitation of the continental shelf* between States with opposite or adjacent coasts.

These Articles give expression to a governing principle of international law in this field. They contain guidelines not only with regard to the general obligations of coastal States to establish relevant fisheries regulations, but also indicate the character and contents of such regulations. These provisions entail in practice that coastal States should conclude agreements, where necessary, concerning the allowable catch of fish stocks, the distribution of this catch between the States concerned, the issuance of fishing licences, the character and modes of fishing gear, the protection of spawning grounds, establishing the necessary contacts between the relevant national fisheries authorities and other means for the rational and peaceful exploitation of these vital resources of the oceans.

The Court might possibly have made an appeal to the Parties to comply with these guidelines.

(Signed) Jens EVENSEN.