

SEPARATE OPINION OF JUDGE MOROZOV

I accepted the operative part of the Order of the Court but I am unable to share the reasoning of the Order.

Reference is made in the Order to Articles 41 and 48 of the Statute, as well as to Article 66 of the Rules of Court, as arguments to prove that the Court allegedly has a right to consider the request for the indication of interim measures of protection before it has considered and settled the question of its jurisdiction.

But these references in reality are based neither on the Statute of the Court nor on its Rules of Procedure.

The key provisions relating to the competence of the Court are those contained in Chapter II of its Statute, and particularly Article 36, paragraph 1, thereof: "The jurisdiction of the Court comprises all cases which the parties refer to it and all matters specially provided for in the Charter of the United Nations or in treaties and conventions in force." The same principle is embodied in Article 37 of the Statute.

Articles 41 and 48 of the Statute are to be found in Chapter III of the Statute under the title "Procedure". This means that provisions of that Chapter cannot be regarded as something which may be separated from Chapter II of the Statute, so as to have an independent significance, which could cancel out the above-mentioned provisions of Chapter II concerning the competence of the Court.

As has been stated in the Order (para. 8) the Turkish Government "suggested that the Greek request for interim measures be dismissed and, in view of the lack of jurisdiction, asked the Court to remove the case from the list . . ."

After such a request had been made, it was the primary duty of the Court to consider the question of its jurisdiction.

It is not my intention to express a view now, *pro* or *contra*, on the question of jurisdiction inasmuch as the question has not been considered or settled by the Court.

It is however important to stress that the Court has no right to consider either the question of appointment of a judge *ad hoc* under Article 31, paragraph 3, of the Statute, or the question of interim measures of protection, before it has satisfied itself that it has jurisdiction in accordance with Articles 36 and 37 of the Statute.

The reference in the Order to Article 48 adds nothing to the matter, since that Article merely provides for the right of the Court to "make orders for the conduct of the case . . ."; it does not permit avoidance of the key provisions of Articles 36 and 37 of the Statute.

The reference to Article 66 of the Rules of Court also cannot be used as an argument to prove that the request for interim measures of protection allegedly has priority over the question of jurisdiction. Article 66 merely establishes that such a request "shall have priority over all other cases", but not over all stages of the case concerned. The provision that "the decision thereon shall be treated as a matter of urgency" means only that at the moment a request for interim measures is made consideration of all *other* cases should be interrupted.

Thus neither the Statute nor the Rules of Court contain any provisions which provide that the request for interim measures of protection has any priority over the question of jurisdiction.

The precedents afforded by cases in which the Court has sometimes made Orders on the question of interim measures of protection contrary to its Statute and Rules cannot be regarded as having any value in the argument.

I should like to conclude by reference to paragraph 13 of the Order, in which we find: "and whereas the non-appearance of one of the States concerned cannot by itself constitute an obstacle to the indication of interim measures of protection . . ."

This conclusion also is not in accordance with the Statute, for two reasons. First: though, if the State concerned could be qualified as a party (which is not so in this case), and does not appear before the Court, or fails to defend its case, the other party may in accordance with Article 53 of the Statute call upon the Court to decide in favour of its claim, yet paragraph 2 of the same Article lays down as a decisive condition that the Court in such a situation must satisfy itself that it has jurisdiction.

Secondly, the filing by one side of an Application cannot of itself create a case, and therefore the State against which the Application is brought could be regarded as a party within the meaning of the Statute only after settlement of the question of the Court's jurisdiction.

(Signed) Platon MOROZOV.