E. Employer Violations

In a study conducted under the Democracy Development Project of the Trade Union Congress of the Philippines (TUCP), the Asian-American Free Labor Institute (AAFLI), and the United States Agency for International Development (USAID), problems arising out of complaints pertaining to remittances of employers' contributions were enumerated as follows:

- lack of information and education on the Social Security System, which left many members with inadequate knowledge of their rights as SSS members;
- procedural delays in remittances, by virtue of branches with ill-equipped or non up-to-date records;
- improved access but limited and slow service, as there are no immediate answers or decisions to queries at branch offices;
- weak monitoring, as not all companies have computerized their SSS reports/data;
- tedious litigation processes, considering workers find it very difficult to pursue their respective complaints at the appropriate courts; and
- workers' lack of financial resources.

VIII. OUTLOOK

As can be perceived from the discussion above, the central issue should delve into an appreciation of the IMF/WB and UNDP/ILO proposals on the nature of the System's pension fund operations and management. At the moment, the tussle is between these two schools of thought.

Issues of coverage, benefit enhancement, income redistribution schemes, and investments priorities are just as important. The labor sector should be prepared for any discussion on the finer points of these matters.

At the end of the day, however, a holistic approach in addressing the problems of the workforce cannot be avoided. At the protest-marred WTO Ministerial Conference in Seattle, ILO Secretary-General Juan Somavia outlined four strategic ILO objectives, namely: the campaign for observance of fundamental principles and rights at work; the promotion of employment; grant of social protection; and the promotion of social dialogue between the three social partners.[169]

[169] Press release, *ILO calls for new multilateral initiative to address social implications of globalization*,ILO 99/42 (visited Dec. 1999) <http:/www.ilo.org>.

PROVISIONAL REMEDIES IN THE WORLD COURT: THE ICJ IN THE 21ST CENTURY*

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INTRODUCTION

> The Judges of the International Court of Justice sit in the favoured city of The Hague as members of the world's most senior international court, the principal judicial organ of the United Nations, **the Court with the richest history, the broadest material jurisdiction, the most refined jurisdictional jurisprudence**; they sit in a World Court which since 1922 has issued **scores of judgments that have successfully settled international disputes and contributed to the shaping and reshaping of international law**.
>
> - Judge Stephen M Schwebel
> President
> International Court of Justice

The grave responsibility of 'shaping and reshaping international law' is never as vital and vibrant than when the Court is presented with a request to indicate provisional measures. Such request can be made at varying levels of urgency, demonstrated by no less than *Interhandel*[1] and *The Legality of the Use of Force in Yugoslavia*,[2] two cases that stand at opposite extremes of a jurisprudential time-line.

There was *Interhandel*, in 1957, where the Court ruled there was no "urgency" to the request of Switzerland for interim protection, as the United States had assured the Court that it was "not taking action to fix a time schedule for the sale" of the shares in controversy.[3] And then came the case involving the

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[1] Interhandel (U.S. v. Switz.), 1958 I.C.J. 105 (Order of Oct.24, 1957), *reprinted in* 52 AM. J. INTL. L. 325 (1958).

[2] Legality of the Use of Force (Yugo. v. Belg.), 1999 I.C.J. (Order of June 2).

[3] *Interhandel*, 1958 I.C.J. 105 (Order of Oct.24, 1957).

Legality of the Use of Force in Yugoslavia in 1999, where, notwithstanding a refusal to indicate interim measures, the Court emphasized its deep concern for "the human tragedy ... and the continuing loss of life and human suffering ... that raised very serious issues of international law."[4]

But in every instance, the procedure relating to provisional measures rests squarely upon the pure discretion, prudent judgment and sense of justice of the fifteen men and/or women who make up the Court at any given time. It constantly draws from its rich history and jurisprudence, while building its own *corpus* of doctrines, tradition, and judicial perspectives. Always, however, the Court must return to the statutory bases of its competence and authority.

The power of the Court to suggest provisional remedies is statutorily reflected in the Statute of the International Court of Justice. Under the first paragraph of Article 41 of the Statute, the Court has the power to indicate, if the circumstances so require, provisional measures that ought to be taken to preserve the respective rights of either party.[5]

From the general language of the Statute, it is apparent that the grant of the said power to the Court is broad both in scope and in character. Such sweeping authorization provides the Court with ample maneuverability to enhance the preservation of the probable rights of parties, but consistent with the accepted principle that a request must not be "designed to obtain an interim judgment in favour of a part of the claim."[6] Thus, it is equally the rule that the request for provisional measures does not imply a need for the Court to pass judgment on the actual substance of the case submitted to it.[7]

The procedure for requesting the Court to indicate provisional measures may be found in Articles 73-78 of the ICJ Rules of Court. Any request would normally have to be triggered by the filing of a written application made by a party at any time during the course of the proceedings in the case in connection with which the request is being made.[8] It is necessary that the request specifies the reasons therefor, the possible consequences if it is not granted, and the measures requested from the Court.[9]

Pursuant to due process requirements in the Court, the Registrar of the ICJ is then to immediately transmit a certified copy of the request to the other party.[10]

4 *Legality of the Use of Force*, 1999 I.C.J. (Order of June 2).

5 Statute of the International Court of Justice, art. 41 (1).

6 The Case of the Factory at Chorzów, 1927 P.C.I.J., (Ser. A) No. 12, at 10 (Order of Nov. 21).

7 U.S. Diplomatic and Consular Staff in Tehran (U.S. v. Iran), 1980 I.C.J 7 (Order of Dec.15, 1979), *reprinted in* 74 AM. J. INTL. L. 266, 273 (1980).

8 ICJ Rules of Court, art. 73 (1).

9 ICJ Rules of Court, art. 73 (2).

10 ICJ Rules of Court, art. 73 (2).

A date is subsequently fixed for the conduct of a hearing in which the parties will be afforded the opportunity to present their observations on the pending request.[11] In the meantime, pending the meeting of the Court, the President may call upon the parties to act in such a way as will enable any Court order to have its appropriate effects.[12]

After the hearing and deliberation on the issues, the Court has the power to grant the request for provisional measures or to indicate measures, in whole or in part, other than those requested by a party. Moreover, the Court may indicate measures to be taken or complied with even by the party which itself made the request.[13]

The foregoing procedure, however, in no way precludes the Court from examining *motu proprio* whether the circumstances of the case require the indication of provisional measures that ought to be taken or complied with by any or all of the parties.[14]

The Permanent Court of International Justice was requested to indicate interim measures in six cases. It granted the request only in two, *i.e., Denunciation of the Treaty of 2 November 1865 between China and Belgium*[15] and *Electricity Company of Sofia and Bulgaria*.[16] As of 1995, the International Court had received fourteen (14) requests for an indication of provisional measures; of this number, the Court indicated provisional measures in seven (7) occasions,[17] refused to do so in six (6) cases,[18] and granted the withdrawal of one request.[19] Since then, it has

11 ICJ Rules of Court, art. 74 (3).

12 ICJ Rules of Court, art. 74 (4).

13 ICJ Rules of Court, art. 75 (2).

14 ICJ Rules of Court, art. 75 (1).

15 1927 P.C.I.J. (Ser. A) No. 8 (Orders of Jan.8, Feb.15 and June 18).

16 1939 P.C.I.J. (Ser. A/B) No. 79, 194 (Order of Dec.5).

17 *See* Anglo-Iranian Oil Co. (U.K. v. Iran), 1951 I.C.J. 89 (Order of July 5); Fisheries Jurisdiction (U.K. v. Ice.), 1972 I.C.J. 12 (Order of Aug. 17); Nuclear Tests (Austl. v. Fr.), 1973 I.C.J. 99 (Order of June 22), *reprinted in* 67 AM. J. INTL. L. 781 (1973); U.S. Diplomatic and Consular Staff in Tehran, 1980 I.C.J 7 (Order of Dec.15, 1979), *reprinted in* 74 AM. J. INTL. L. 266, 273 (1980); Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.), 1984 I.C.J. 169 (Order of May 10), *reprinted in* 78 AM. J. INTL. L. 750, 757 (1984); Frontier Dispute (Burk. Faso v. Mali), 1986 I.C. J. 3 (Order of Jan.10); and the Genocide Convention (Bosn. & Herz. v. Yugo.), 1993 I.C.J. 325 (Order of Sept.13).

18 *See Interhandel*, 1958 I.C.J. 105 (Order of Oct.24, 1957); Aegean Sea Continental Shelf (Greece v. Turk.), 1976 I.C.J. 3 (Order of Sept.11); Arbitral Award (Guinea-Bissau v. Sen.), 1990 I.C.J. 64 (Order of Mar.2); Passage through the Great Belt (Fin. v. Den.), 1991 I.C.J. 12 (Order of July 29); and the Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. U.K.), 1992 I.C.J. 3 (Order of Apr.14).

indicated provisional measures in three cases;[20] however, the Court refused to indicate provisional measures in all the cases filed by Yugoslavia against ten (10) NATO member states who participated in the bombing of Yugoslavia.

The power of the Court to indicate provisional measures stems from its "incidental jurisdiction"[21] and is thus more of a matter of procedure. As a matter of fact, Article 41 from which the Court derives the extraordinary power is classified under the Statute's chapter on procedure. It does not go, therefore, into the very competence of the Court to be seised of the issue or matter put in question by the parties. It is essential at the very outset to take the matter of provisional measures outside the ambit of substantive jurisdiction which is defined by Articles 36 (1) and 36 (2) of the ICJ Statute.

This is a study of the Court's power to indicate provisional measures and it must necessarily begin with a discussion of the issue of jurisdiction.

JURISDICTION

Jurisdiction is always a key issue in international adjudication.[22] In most cases brought before the ICJ, there will often be an attempt by the respondent to question the competence of the Court *vis-à-vis* the subject matter of the case.[23] But it is a jurisprudentially established principle that the question of jurisdiction is somehow collateral in the proceedings to consider whether there may be an indication of provisional measures. An indication of provisional measures thus does not constitute a conclusive finding that the Court does have jurisdiction over the main case.[24] In fact, a favorable decision on a request for provisional measures is only founded on a *prima facie* finding of jurisdiction.

19 *See* Border and Transborder Armed Actions (Nicar. v. Hond.), 1988 I.C.J. 69 (Judgment of Feb.15).

20 *See* The LaGrand Case (F.R.G. v. U.S.), 1999 I.C.J. 9 (Order of Mar.3); The Breard Case (Para. v. U.S.), 1998 I.C.J. 248 (Order of Apr.9); and the Land and Maritime Boundary Between Cameroon and Nigeria (Cameroon v. Nig.), 1996 I.C.J. 13 (Order of Mar.15).

21 J.G. Merrills, *Interim Measures of Protection in the Recent Jurisprudence of the International Court of Justice*, 44 INT'L & COMP. L. Q. 91 (JAN. 1995) [hereinafter Merrils].

22 *Id.*

23 *See Legality of Use of Force*, 1999 I.C.J. (Order of June 2); *Fisheries Jurisdiction*, 1972 I.C.J. 12 (Order of Aug.17); Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahr.), 1995 I.C.J. 6 (Judgment of Feb.15); East Timor (Port. v. Austl.), 1995 I.C.J. 90 (Judgment of June 30); Aegean Sea Continental Shelf (Greece v. Turk.), 1978 I.C.J. 3 (Judgment of Dec.19); and Monetary Gold Removed from Rome in 1943 (Italy v. Fr.; U.K. v. U.S.), 1954 I.C.J. 19 (Judgment of June 15).

24 *Anglo-Iranian Oil Co.*, 1951 I.C.J. 89 (Order of July 5).

The *Anglo-Iranian Oil Co. Case* gave the Court its first opportunity to articulate an order on provisional measures. The dispute resulted from Iran's unilateral decision to terminate, pursuant to its oil nationalization program, a concession contract which entered into force on 29 May 1933, between the Anglo-Iranian Oil Company (a British Company) and the Government of Iran.

Under the 1933 concession, the Iranian Government granted to the company the exclusive right to search for and extract petroleum as well as to refine or treat in any other manner and render suitable for commerce the petroleum secured by the company. Further, the company was also granted the non-exclusive right to transport petroleum, to refine or treat it in any other manner, and to render it suitable for commerce, as well as to sell it in Persia and to export it.

Subsequently, in May 1951, the Iranian Oil Nationalization Law was implemented, creating a Board with the mandate of immediately nationalizing and dispossessing the Anglo-Iranian Oil Company. This Act also provided for the disposition of all revenue in favor of Iran. Pursuant to the provisions of the agreement, the company tried to settle the controversy through arbitration, but the Iranian Government contended that the nationalization policy was a question of sovereignty that was beyond arbitration. When diplomatic efforts failed to resolve the situation, the United Kingdom filed an *Application Instituting Proceedings in the Anglo-Iranian Oil Company Case*.[25]

In the proceedings regarding Britain's request for provisional measures, the Iranian Government observed that there was a want of competence on the part of the United Kingdom to refer the dispute to the Court because it pertained to the exercise of sovereign national rights that were exclusively within Iran's national jurisdiction. Thus, Iran concluded that this was not subject to any of the methods of settlement under the UN Charter. On the other hand, the position of the United Kingdom rested on the established right of diplomatic protection under international law.[26]

In indicating provisional measures, the Court made a sweeping determination that "it cannot be accepted *a priori* that a claim based on such a complaint falls completely outside the scope of international jurisdiction."[27] The liberal ruling of the Court was founded on the alleged violation of international law on the part of Iran and the possible denial of justice which, according to Britain, would follow from a refusal to go to arbitration. The landmark implication of the ruling in this case could not but be the Majority's position that for as long as there is some "possibility" of jurisdiction, an *a priori* exclusion of jurisdiction is not favored.

25 Published by the ICJ, 1951, General List, No. 16.

26 *Anglo-Iranian Oil Co.*, 1951 I.C.J. 89 (Order of July 5).

27 *Id.*

The position of the Court was reiterated in 1973 when, in indicating provisional measures in the *Fisheries Jurisdiction Case*, the Majority ruled that the requirement of the Statute is only a "possible basis on which the jurisdiction of the Court might be founded."[28] In this case, there was a dispute between the United Kingdom and Iceland on the latter's proposed extension of its fisheries jurisdiction to a zone of 50 nautical miles. Essentially, the application of the United Kingdom was founded on an Exchange of Notes between the two countries on 11 March 1961, a violation of which was being claimed by the United Kingdom if Iceland adopted its proposal. On the other hand, Iceland contended that the said instrument was not of a permanent nature and that in fact, it was already inapplicable, its object having been fulfilled.

The Court thus ruled that the Exchange of Notes invoked by the applicant afforded sufficient "possible basis" for the exercise of jurisdiction. It may also be noted that the Court even went to the extent of clarifying that it ought not to act under Article 41 of the Statute only "if the absence of jurisdiction on the merits is manifest."[29] [underscoring supplied]

In the *Nuclear Tests Case*, the Court again adhered to the heart of its decision in *Anglo-Iranian*, declaring that "it cannot be assumed *a priori* that such claims fall completely outside the purview of the Court's jurisdiction."[30] Then, it went on to use language that became even more general than that in the *Fisheries Jurisdiction* order, stating that the materials submitted to it lead to the conclusion that the provisions invoked by Applicant "appear, *prima facie*, to afford a basis on which the jurisdiction of the Court might be founded."[31] This criterion has now ecome the benchmark of most, if not all, subsequent cases involving a request for provisional measures.[32]

In his 1974 treatise on interim measures of protection in the ICJ, however, Professor Peter J. Goldsworthy of the University of Sydney Law School underscored the alternative view of requiring only the "mere possibility of jurisdiction on the merits."[33] He posited the view that the trend of the Court's jurisprudence has had very little regard for the "image and [to the] best interests of the Court."[34] Professor Goldsworthy also felt that the decisions requiring

[28] *Fisheries Jurisdiction* , 1972 I.C.J. 12 (Order of Aug.17).

[29] *Id.* at ¶15.

[30] *Nuclear Tests*, 1973 I.C.J. 99 (Order of June 22).

[31] *Id.* at 780.

[32] *See Breard*, 1998 I.C.J. 248 (Order of Apr.9); *Arbitral Award*, 1990 I.C.J. 64 (Order of Mar.2); *Military and Paramilitary Activities in and against Nicaragua*, 1984 I.C.J. 169 (Order of May 10); and *U.S. Diplomatic and Consular Staff in Tehran*, 1980 I.C.J 7 (Order of Dec.15, 1979).

[33] Peter J. Goldsworthy, *Interim Measures of Protection in the International Court of Justice*, 68 AM. J. INTL. L. 258, 263 (1974) [hereinafter Goldsworthy].

[34] GRIEG, INTERNATIONAL LAW 515 *cited in* Goldsworthy, *supra* note 34, at 263.

mere probability of jurisdiction went against the established practice of the Mixed Arbitral Tribunals.[35]

The liberal disposition of the Court even dates back to the 1957 case of *Interhandel*. While the Court eventually rejected Switzerland's request for the indication of provisional measures, it did so on the basis of an apparent lack of the element of urgency. One of the *whereas clauses*, however, is instructive as to how the Court would have resolved the request had there been some adequate degree of urgency.[36]

In principle, the Court found jurisdiction to admit the request for indication of provisional measures as both the Applicant and the Respondent had "accepted the compulsory jurisdiction of the Court on the basis of Article 36, paragraph 2 of the Statute."[37] This was its position notwithstanding the contention of the United States that it had made a reservation that purportedly excluded from its Declaration (accepting ICJ jurisdiction) matters essentially within its domestic jurisdiction as determined by the United States.

At the hearing, the validity of the reservation was challenged by the Swiss co-agent, who also took the position that the Court should not, at that stage, adjudicate "upon so complex and delicate a question as the validity of the American reservation."[38] The Court, however, did not deal with the question as it found the American objection to have been filed under the rules on *Preliminary Objection*, and thus ruled that the examination of such a contention required the application of a different procedure.[39]

Nevertheless, some twenty-five years later, the Court had the occasion to finally rule on the issue. In the *Fisheries Jurisdiction Case*, Iceland questioned the reliance of the United Kingdom on a 1961 Exchange of Notes that the latter relied on as a basis for jurisdiction in a dispute that involved Iceland's fisheries area. Iceland contended in a letter to the Court that the agreement was not permanent, and since its object and purpose had been fully achieved, it was no longer

[35] *See Anglo-Iranian Oil*, 1951 I.C.J. 89 (Order of July 5) (dissenting opinions of Judges Winiarski and Badawi Pasha). Note that tribunals generally awarded interim protection as long as "want of jurisdiction is not manifest." *See* DUMBAULD, INTERIM MEASURES OF PROTECTION IN INTERNATIONAL CONTROVERSIES (1932).

[36] This impelled Judge Wellington Koo to make the following declaration: "I agree with the decision of the Court not to indicate provisional measures in the case, but regret that I do not share the reasons upon which it is based. In my view, the Court has no jurisdiction to deal with the request for such measures."

[37] *Interhandel*, 1958 I.C.J. 105 (Order of Oct.24, 1957).

[38] *Id.*

[39] Judge Wellington Koo wrote in his separate declaration that even if it had been filed as a preliminary objection, the Court should have treated it as being directed nevertheless at the Court's jurisdiction to indicate provisional measures.

applicable. Declining to even preliminarily examine the contention, the Court merely stated that such an argument "will fall to be examined by the Court in due course."[40]

In the *Nuclear Tests Case* less than a year later, the Court was faced with the same dilemma. Australia, assailing the atmospheric nuclear tests being conducted by France in the Pacific Ocean, relied on the General Act of 1928[41] and on the declarations of both parties under Article 36 (2) of the ICJ Statute. France, on the other hand, argued that being an integral part of the League of Nations system, the General Act of 1928 was no longer in force. Moreover, it invoked the "national defense reservation" it made in its 1966 Declaration on the acceptance of compulsory jurisdiction.

Australia insisted that the General Act of 1928 was still in force as to the parties of that Act and that "it is questionable whether nuclear weapon development falls within the concept of national defense"[42] as used in the reservation of France.

As in *Interhandel* and the *Fisheries Jurisdiction* cases, and notwithstanding that the Court's jurisdiction was directly placed in question, the Court indicated provisional measures, stating only that:

> Whereas the material submitted to the Court leads it to the conclusion, at the present stage of the proceedings, that the provisions invoked by the Applicant appear, *prima facie*, to afford a basis on which the jurisdiction of the Court might be founded; and whereas the Court will accordingly proceed to examine the Applicant's request for the indication of interim measures of protection.[43]

Regardless of how contentious jurisdiction may be especially for States who are normally jealous of any derogation of national sovereignty, it seems clear that the Court has adopted a liberal stance towards interpreting the requirement of the Statute's Article 41 with regard to a *prima facie* showing of jurisdiction.[44] It has consistently adhered to the "possible basis" test and required "manifest lack of jurisdiction" for cases in which it declined to grant an indication of provisional measures.

[40] *Fisheries Jurisdiction*, 1972 I.C.J. 12 (Order of Aug.17).

[41] General Act of 1928 for the Pacific Settlement of International Disputes.

[42] *Nuclear Tests*, 1973 I.C.J. 99 (Order of June 22, ¶ 16).

[43] *Id.* at ¶ 17.

[44] Professor Goldsworthy warns that *the Court cannot afford to reach decisions, even on applications for interim measures of protection which suggest support for rules which are too far advanced for community acceptance.* Goldsworthy, *supra* note 34, at 263.

Clearly, it has adopted the following standard for determining the presence of jurisdiction in an application for interim measures, to wit:

> On a request for provisional measures **the Court need not, before indicating them, finally satisfy itself that it has jurisdiction** on the merits of the case, and yet ought not to indicate such measures **unless the provisions invoked by the Applicant appear, *prima facie*, to afford a basis on which the jurisdiction of the Court might be founded.**[45]

What the Court's jurisprudence does not normally clarify, however, is how it makes the determination that the materials submitted to it do afford a *prima facie* basis for the exercise of jurisdiction. It is thus instructive to examine some of the more recent orders issued by the Court with respect to interim measures of protection, if only to get a sense of the Majority's views on this very critical aspect of international law.

The earlier cases, as should have been apparent in the discussions above, seemed to have favored what one publicist referred to as merely "*formal* possibility of jurisdiction."[46] For as long as the applicant is able to point to some provision in a treaty or to some declaration, the Court took it as affording *prima facie* basis for the exercise of jurisdiction; thus it was in *Interhandel*, a special treaty in *Fisheries Jurisdiction*, and a treaty and declaration in *Nuclear Tests*. And in the more recent *La Grand Case*, the Court merely relied on the invocation by Germany of the Optional Protocol of the Vienna Convention on Consular Relations.

In the *Nicaragua Case*, the question of jurisdiction became a point of argument again. Nicaragua relied on the declarations of the parties under Article 36 (2) of the Statute. Both declarations had been questioned. The American declaration contained a reservation as to disputes arising from multilateral treaties, and those involving Central American States. But the second reservation was made a mere three days before Nicaragua filed its application, and there was a provision in the US declaration that termination had to have six-months advance notice.[47] On the other hand, there was a question as to whether Nicaragua did ratify the Protocol of Signature of the Statute of the Permanent Court.

Finding that the Applicant had "indicated a subsisting title of jurisdiction, namely the United States' acceptance of compulsory jurisdiction,"[48] the Court

[45] *Nuclear Tests*, 1973 I.C.J. 99 (Order of June 22, ¶ 13).

[46] Goldsworthy, *supra* note 34, at 265.

[47] There was also a controversy as to this provision because the Americans insisted that the notice requirement was only with regard to termination, but not to suspension/modification.

[48] *Military and Paramilitary Activities in and against Nicaragua*, 1984 I.C.J. 169 (Order of May 10).

declined to make a final determination as to the questions on the two declarations. Instead, it found that the "two declarations do nevertheless appear to afford a basis on which the jurisdiction of the Court might be founded."[49]

In recent cases, however, some members of the Court seem to be swinging back to a more conservative view of jurisdiction. The first break that was noted[50] was in the *Nuclear Tests Case* where Judge Nagendra Singh expressed the belief that "even at this preliminary stage of *prima facie* testing the Court has to examine the reservations ... to the treaty."[51] But until such time that the Court is afforded the chance to squarely reshape its existing jurisprudence, its traditional rulings continue to apply. And clearly, under existing jurisprudence, the Court's rulings are mainly anchored on its understanding of the function of provisional measures.

FUNCTION OF PROVISIONAL MEASURES

It is thus important to contextualize the role and function of an indication of provisional measures. Note, however, that a clear understanding of such is not apparent from the general provisions of Article 41 of the Statute, which broadly grants to the Court the "power to indicate, if it considers that circumstances so require, any provisional measures which ought to be taken to preserve the respective rights of either party."[52] Neither are the Rules of the Court helpful, as these merely spell out in more general detail the procedures. Thus, the substantive bases for the Court's decisions on whether or not to indicate provisional measures in the *interim* have remained in the realm of jurisprudential policy.

Conceptually, it has been quite easy to define the function – at least – of interim protection. It is to safeguard the rights which are in dispute, pending the Court's decision on the merits.[53] As early as 1951, in the *Anglo-Iranian Oil Case*, the Court clearly defined the function of provisional measures as concerned with the preservation of "the rights which may be subsequently adjudged by the Court to belong either to the Applicant or to the Respondent."[54]

It is interesting that while clearly only one party may ask for the indication of provisional measures, in one case, a party questioned a unilateral application arguing that "provisional measures are by definition intended to protect the interests of the parties."[55] In dismissing such a hypothesis, the Court pointed to

[49] *Id.* at 759.

[50] Goldsworthy, *supra* note 34, at 266.

[51] *Nuclear Tests*, 1973 I.C.J. 99 (Order of June 22).

[52] Statute of the ICJ, art. 41 (1).

[53] Merrils, *supra* note 21, at 100.

[54] *Anglo-Iranian Oil Co.*, 1951 I.C.J. 89 (Order of July 5).

[55] *US Staff in Tehran*, 1980 I.C.J 7 (Order of Dec.15, 1979).

Article 41 of the Statute which clearly belies such a position and held that the whole concept of an indication of provisional measures implies a request from one of the parties for measures to preserve its own rights against action by the other party calculated to prejudice those rights *pendente lite*.[56]

On the whole, however, the Court has situated its power to indicate interim protection within the context of international justice and the need to preserve the feasibility of an effective final disposition of the merits of the case. While it has conceded that it is not precluded from indicating measures merely by reason that the request is unilateral, the Court has likewise emphasized that it "must at all times be alert to protect the rights of *both the parties in proceedings before it.*"[57] [underscoring supplied]

Consequently, in indicating provisional measures, the Court "has not infrequently done so with reference to both parties." For indeed, "apart from the general object of preserving the parties' rights as finally determined by the Court, the object is to do so in the interests of both parties equally."[58] Thus, when the Court indicates provisional measures in any given case, it must consider the rights of each of the parties, and ensure that it maintains a fair balance in the protection of those rights.[59]

With the foregoing considerations of the function and character of provisional measures, it is not seldom for the Court to be confronted with a dilemma involving a request for provisional measures and the possibility of prejudging the merits of the case.

At the outset, an essential peripheral issue is the question of jurisdiction. When the Court grants a party's request to indicate provisional measures, it actually makes a provisional finding that its jurisdiction may be seised by the facts and issues involved. It is imperative to emphasize, however, that the "indication of such measures in no way prejudges the question of the jurisdiction of the Court to deal with the merits of the case and leaves unaffected the right of [the other party] to submit arguments against such jurisdiction."[60] This doctrine found operation in the *Anglo-Iranian Oil Co. Case* where the Court had initially found *prima facie* evidence of jurisdiction, thereby leading to the indication of provisional measures, but subsequently found that it lacked the jurisdiction to decide the case on the merits.

[56] *Id.*

[57] *Id.* at 274.

[58] 2 SIR GERALD FITZMAURICE, THE LAW AND PROCEDURE OF THE INTERNATIONAL COURT OF JUSTICE 544.

[59] *Breard*, 1998 I.C.J. 248 (Order of Apr. 9).

[60] *Anglo-Iranian Oil Co.*, 1951 I.C.J. 89 (Order of July 5). The same doctrine was reiterated in the case involving the US Diplomatic and Consular Staff in Tehran.

Turning now to the relationship between a request for provisional measures and the main claim, it is important to underscore that the decision of the Court on the request – whether for or against indicating provisional measures – does not in any way prejudge questions relating to the merits of the case themselves.[61]

The indication of interim protection is always provisional in nature and does not in any way prejudge the findings that the Court might make in relation to the merits of the case.[62] In the *Nicaragua Case*, the Court clearly defined the character of interim protection under its Statute, thus: "[it] cannot make definitive findings of fact, and the right of the respondent State to dispute the facts alleged and to submit arguments in respect of the merits must remain unaffected by the Court's decision [on the request for interim protection]."[63]

On the other hand, the reverse is equally true, that a denial of the request for provisional measures in no way prejudges the merits of the main claim. This was the doctrine enunciated by the Court in denying Finland's request in the *Passage through the Great Belt Case*.

Two recent cases would probably illustrate some of the more fundamental tensions that permeate this whole issue of the interim protection and the possibility of prejudging the merits of a main claim. In the *Case Concerning the Land and Maritime Boundary Between Cameroon and Nigeria*,[64] the conflict revolved around Nigeria's alleged aggression in the Bakassi Peninsula resulting in its occupation of Cameroonian localities, to the great prejudice of Cameroon.

While the Cameroon application involved a claim for reparation and the delimitation of their land and maritime boundaries, it also later requested that provisional measures be indicated after hostilities broke out between the two parties. After the observations of the parties were heard by the Court, it issued an order recommending, among others, that "both parties should ensure that the presence of any armed forces in the Bakassi Peninsula does not extend beyond the positions in which they were situated prior to 3 February 1996."[65]

While most of the Judges were able to join the majority in the other provisional measures indicated, there were some contrary opinions as regards the recommendation to withdraw all troops to the pre-3 February 1996 positions. It is peculiar, however, that the dissents did not really pertain to the issue of

[61] *US Staff in Tehran*, 1980 I.C.J 276 (Order of Dec.15, 1979).

[62] *Breard*, 1998 I.C.J. 248 (Order of Apr.9).

[63] *Military and Paramilitary Activities in and against Nicaragua*, 1984 I.C.J. 760 (Order of May 10).

[64] *Land and Maritime Boundary Between Cameroon and Nigeria*, 1996 I.C.J. 13 (Order of March 15).

[65] *Id.*

prejudging the merits of the case but were more related to the possibility of implementation. We shall revert to those dissents later in this paper, but at this point it is important to consider the separate opinion of Judge Ajibola.

Judge Ajibola posited the view that the Court had prejudged the merits of the case. He argued thus:

> Although this was denied by Cameroon (CR 96/4, p. 67), there was no indication of the specific place that the Cameroonian armed forces were occupying. An indication was given in one of Cameroon's maps as to the location of the Nigerian armed forces since 3 February 1996 and since 16 and 17 February 1996, and no location of Cameroon's forces was indicated. However, Nigeria claimed that her forces were all the time positioned at those locations. If, *arguendo*, these locations were occupied by the Nigerian armed forces before 3 February 1996, to indicate a provisional measure that Nigeria should withdraw from such places which it claims to be its territory would clearly be prejudging the issue.[66]

However, the Court was not convinced. It counter-argued that "the Court possesses, by virtue of Article 41 of the Statute, the power to indicate provisional measures with a view to prevent the aggravation or extension of the dispute whenever it considers that circumstances so require."[67] And from "the elements of information available to it, the Court [took] the view that there [was] a risk that events likely to aggravate or extend the dispute may occur again, thus rendering any settlement of that dispute more difficult."[68]

It dismissed all objections of prejudging the merits of the case with the standard paragraph as to how "the present proceedings in no way prejudges the question ... relating to the merits themselves and leaves unaffected the right of the Governments of Cameroon and Nigeria to submit arguments in respect of those question[s]."[69]

It bears noting that this case bore some "striking similarities" with the 1986 case on the *Frontier Dispute between Burkina Faso and the Republic of Mali*.[70] In that case, a Chamber of the Court also asked the two Governments to withdraw their troops behind specific geographic lines that were to be determined within

[66] *Land and Maritime Boundary Between Cameroon and Nigeria*, 1996 I.C.J. 13 (Order of March 15) (Separate Opinion of Judge Ajibola).

[67] *Land and Maritime Boundary Between Cameroon and Nigeria*, 1996 I.C.J. 13 (Order of March 15).

[68] *Id.* at ¶ 42.

[69] *Id.* at ¶ 44.

[70] *Frontier Dispute*, 1986 I.C. J. 3 (Order of Jan.10).

20 days by agreement and, failing that, by the Chamber itself. In eerily familiar language, the Chamber had argued that the measures were "for the purpose of eliminating the risk of any future action likely to aggravate or extend the dispute."[71]

In his Declaration, however, Judge Mohamed Shahabuddeen distinguished the two cases by drawing attention to the absence of any evidence that may help the Court identify a specific and clear physical benchmark for the withdrawal. While the same problem confronted the ICJ Chamber in the *Frontier Dispute* Case, he argued that there was nevertheless an alternative solution available as appeared in para. 27 and para. 32 (1) (D) of the Order.

The lasting implication, if any, of these two cases is adequately captured by the declaration of Judge Raymond Ranjeva:

> [T]he indication of measures that may have a military character does not form part of a general regulatory function, which neither the Charter nor the Statute has conferred upon the Court. Such decisions represent, on the one hand, measures required by the circumstances of the case which are evaluated by the Court in the exercise of its discretionary power and, on the other hand, a contribution by the Court to ensuring the observance of one of the principal obligations of the United Nations and of all its organs in relation to the maintenance of international peace and security.[72]

If the Court in the *Frontier Dispute* and *Cameroon v. Nigeria* cases has really made a lasting contribution to international law, it remains to be evaluated from the perspective of whether it had indeed furthered the interests of international peace and security.

The second case involving allegations of "prejudging the issue" was the 1998 case of a Paraguayan National, Mr. Angel Francisco Breard, who was arrested in 1992 by the authorities of the Commonwealth of Virginia in the United States. He was charged, tried, convicted of culpable homicide and sentenced to death by a Virginia court in 1993, without having been informed of his consular rights under the Vienna Convention on Consular Relations. Neither did the Commonwealth of Virginia advise the Paraguayan consular officers of Mr. Breard's detention and trial.

When Paraguay found out the case of Mr. Breard, it immediately tried to exhaust all diplomatic and judicial remedies available to it. Its petitions, however, remained pending with the Courts even when the Virginia court had already set an execution date of 14 April 1998. Thus, on 3 April 1998, after having filed its

[71] *Id.*

[72] *Land and Maritime Boundary Between Cameroon and Nigeria*, 1996 I.C.J. 13 (Order of March 15) (Declaration of Judge Ranjeva).

application for the voiding of Mr. Breard's conviction, Paraguay submitted an urgent request for the indication of provisional measures in order to protect its rights.

The United States opposed the request for provisional measures arguing, among others, that the fair balance in protecting the rights of both parties would not be struck if interim protection was granted, and that the "measures requested by Paraguay would prejudice the merits of the case."[73] Judge Shigeru Oda also vigorously opposed the indication of provisional measures, saying that the "request for provisional measures should not be used by applicants for the purpose of obtaining interim judgments that would affirm their own rights and predetermine the main case."[74]

Nevertheless, the Court unanimously voted to indicate provisional measures in this case. The fundamental foundation of such an indication was the reality that Mr. Breard's execution "would render it impossible for the Court to order the relief that Paraguay seeks and thus cause irreparable harm to the rights it claims."[75] It was for the same humanitarian consideration that Judges Schwebel and Oda joined – albeit with disquiet[76] and with great hesitation[77] – the unanimous majority.

Just last year, the Court was again faced with the same set of facts in the *LaGrand* Case, this time involving a German national. It appeared that in 1982, the authorities of the State of Arizona in the United States detained Messrs. Karl and Walter La Grand. As in the *Breard* Case, they were tried, convicted and sentenced to death without the benefit of consular visitation or advice as provided in the Vienna Convention. Karl LaGrand was executed on 24 February 1999 despite all appeals for clemency and diplomatic interventions at the highest levels; on the other hand, Walter La Grand has been scheduled for execution on 3 March 1999. Thus, on the same day, Germany filed in the Netherlands an urgent request for provisional measures similar to that in the *Breard* Case.

Again, notwithstanding the reservations of Judges Schwebel and Oda on the procedure and the substance of the request, both Judges joined the majority on "solely humanitarian grounds."[78]

In view of the specific function of provisional measures, the Court has evolved a line of cases that pertain to the twin requirements of urgency and irreparable prejudice.

[73] *Breard*, 1998 I.C.J. 248 (Order of Apr. 9, ¶ 21).

[74] *Breard*, 1998 I.C.J. 248 (Order of Apr. 9) (Declaration of Judge Oda, ¶ 7) [hereinafter Oda].

[75] *Breard*, 1998 I.C.J. 248 (Order of Apr. 9, ¶ 37).

[76] *Breard*, 1998 I.C.J. 248 (Order of Apr. 9) (Declaration of Judge Schwebel, ¶ 1).

[77] Oda, *supra* note 75, ¶ 1.

[78] Oda, *supra* note 75.

TWIN REQUIREMENTS OF URGENCY AND IRREPARABLE DAMAGE

While the Court grapples with the issue of whether it has preliminary jurisdiction to entertain the request that provisional measures be indicated, it is not the only question that it must reply to in deciding on the request. If the applicant is able to establish some probable basis for jurisdiction, the Court then moves to an examination of the two requirements of urgency and irreparable damage.

In the main, urgency is an integral component of any request for the indication of provisional measures. The Court has consistently ruled that provisional measures are "only justified if there is urgency."[79] Thus, in *Interhandel*, the Court refused to indicate provisional measures in favor of Switzerland with respect to contested shares of stock in a corporation, which shares of stock were allegedly illegally appropriated by the United States Government. In denying the request, the Court relied on the assurances made by the United States Government that it was "not taking action at the present time to fix a time schedule for the sale of such shares."

In 1991, in *Passage through the Great Belt*, the Court likewise denied an application for provisional measures filed by Finland. In this case, the dispute between Finland and Denmark revolved around a project of the latter to construct a fixed traffic connection for both road and rail traffic across the strait of the Great Belt, one of the Danish Straits connecting the Baltic with Kattegat. The constructions involved a low-level bridge over the West Channel and a high-level suspension bridge over the main channel (East), with clearance for passage of 65 meters above mean sea level.

Finland claimed that the construction of the East Channel Bridge would permanently close the Baltic for deep draught vessels over 65 meters in height, as well as Finland-constructed drill ships and oil rigs. Arguing urgency and irreparable damage, Finland contended that the Danish construction would "mean an end to Finnish commercial activity in the field of production of such craft [oil rigs and drill ships], as well as in respect of the production of ships of reasonably foreseeable design requiring more than such clearance."[80]

It is important to note that the existence of Finland's right of passage through the Great Belt was not challenged; rather, the dispute was over the nature and extent of that right, including its applicability to certain drill ships and oil rigs. And it was stated by Denmark, and not contested by Finland, that, according to the planned schedule for construction of the East Channel bridge, "no physical

[79] *See LaGrand*, 1999 I.C.J. 9 (Order of March 3); *Passage through the Great Belt*, 1991 I.C.J. 12 (Order of July 29).

[80] *Passage through the Great Belt*, 1991 I.C.J. 12 (Order of July 29, ¶ 3).

hindrance for the passage through the Great Belt will occur before the end of 1994," and by that time the case could have been finally decided by the Court so that no indication of provisional measures is required.[81]

Consequently, the Court found that the circumstances were not such as to require the exercise of its power under the Statute to indicate provisional measures.

In the more recent case of *LaGrand* where the Court did accede to Germany's request for the indication of provisional measures, we are given an unquestionable example – albeit a controversial one – of an instance where there is an "extreme urgency,"[82] calling for an immediate decision on the part of the Court. It will be recalled that Mr. LaGrand's execution was scheduled for the afternoon of 3 March 1999 and Germany filed its application with the Court the day before the scheduled execution – taking advantage of Europe's time difference with that of North America – and getting an Order indicating provisional measures just hours before the set execution.

The foregoing cases establish the important definition of urgency, jurisprudentially declared by the Court in *Passage through the Great Belt*, as being a situation where there is the possibility of an "action prejudicial to the rights of either party ... [being] taken before [a] final decision is given."[83] Apparently, even in its conception of "urgency," the Court chooses to confine itself within the context of the specific circumstances of the case with particular emphasis on the possibility of irreparable hurt.

Turning now to the second requirement, the Court has held in a long line of cases that an equally important threshold question is the presence or absence of possible irreparable prejudice.[84] The classic example in jurisprudence today would again be the *Vienna Consular Convention Cases*, where Paraguay in 1998 and Germany in 1999 were running against time as they tried to secure separate indications of provisional measures with respect to the impending executions of their respective nationals by the United States authorities.

[81] *Id.* at ¶ 24.

[82] *LaGrand*, 1999 I.C.J. 9 (Order of March 3, ¶ 21).

[83] *Passage through the Great Belt*, 1991 I.C.J. 12 (Order of July 29, ¶ 23).

[84] *See LaGrand*, 1999 I.C.J. 9 (Order of March 3); *Breard*, 1998 I.C.J. 248 (Order of Apr. 9); *Genocide Convention*, 1993 I.C.J. 325 (Order of Sept.13); *Nuclear Tests*, 1973 I.C.J. 99 (Order of June 22); *US Staff in Tehran*, 1980 I.C.J 7 at 276 (Order of Dec.15, 1979).

In both cases, the Court found that the executions "would cause irreparable harm to the rights"[85] claimed by the applicant. The requirement of irreparable prejudice is inextricably linked with the Court's objective of preserving the respective rights of the parties to ensure that a final decision on the merits would remain effective and enforceable. This is the import of its decisions in *Breard* and *LaGrand*. This was also the main consideration in cases like *Cameroon v. Nigeria*,[86] where the Court was asked to fix the delimitation of the two countries' land and maritime boundaries.

Note, moreover, that there are two strains in jurisprudence with respect to irreparable damage. First, the Court has been quite concerned with the protection of human life. In the case concerning the *United States Diplomatic and Consular Staff in Tehran*,[87] the Court had based its decision to indicate provisional measures on the presupposition that "irreparable prejudice should not be caused to rights which are the subject of dispute in judicial proceedings." Particularly, it referred to:

> [T]he rights of its (US) nationals to life, liberty, protection and security; the rights of inviolability, immunity and protection for its diplomatic and consular officials; and the rights of inviolability and protection for its diplomatic and consular premises.[88]

In the *Nicaragua Case*, the Court again alluded to the rights of Nicaraguan citizens to life, liberty and security, as well as the right to be free at all times from the use or threat of force against them.[89] And in the *Nuclear Tests Case*, the decision of the Court was similarly founded on "the right of Australia and its people, in common with other States and their peoples, to be free from atmospheric nuclear weapon tests by any country."[90]

On the other hand, the Court has also recognized the importance of isolating economic or property rights from the possibility of irreparable damage. In the *Fisheries Jurisdiction Case*, the Court recognized the "exceptional dependence of the Icelandic nation upon coastal fisheries for its livelihood and economic development."[91] Consequently, it indicated provisional measures only after a

[85] *See LaGrand*, 1999 I.C.J. 9 (Order of March 3, ¶ 24); *Breard*, 1998 I.C.J. 248 (Order of Apr. 9, ¶ 37).

[86] *Land and Maritime Boundary Between Cameroon and Nigeria*, 1996 I.C.J. 13 (Order of March 15).

[87] *US Staff in Tehran*, 1980 I.C.J 276 (Order of Dec.15, 1979).

[88] *Id.*

[89] *Military and Paramilitary Activities in and against Nicaragua*, 1984 I.C.J. 760 (Order of May 10).

[90] *Nuclear Tests*, 1973 I.C.J. 99 (Order of June 22).

[91] *Fisheries Jurisdiction*, 1972 I.C.J. 12 (Order of Aug.17).

consideration of the economic implications of the request and fixing an allowable average catch for the United Kingdom based on the present situation concerning fisheries of different species in the Iceland area. It bears pointing out that in a later order[92] in the same case, the Court noted that according to the Government of Iceland, "to freeze the present dangerous situation might cause irreparable harm to the interests of the Icelandic nation."

Had it found preliminary basis for jurisdiction in the case concerning *Legality of the Use of Force*, the Court would most likely have indicated provisional measures as a reflection of its deep concern for the "human tragedy, the loss of life, and the enormous suffering in Kosovo ... and the continuing loss of life and human suffering in all parts of Yugoslavia."[93]

Thus, Judge Ajibola concludes in *Cameroon v. Nigeria*, "evidently those indications of provisional measures whether simply for the preservation of rights, the avoidance of an aggravation or extension of the dispute or an act such as might cause irreparable harm or prejudice to the parties have always had an *element of protection and preservation of human life and/or property*."[94] [emphasis supplied]

FACTORS CONSIDERED BY THE COURT

While the Court's jurisprudence has emphasized the function of provisional measures as well as the twin requirements of urgency and damage, it is important to remember, however, that there are other contributing factors that flow from particular rulings. And foremost of those collateral factors would be the circumstances surrounding the request for interim protection.

STATE OF AFFAIRS

It must be emphasized that the power of the Court to indicate provisional measures is strictly contingent on a finding that the circumstances so require.[95] As with the other requisites for indicating interim protection, the criteria for such a finding remains exclusively within the domain of established jurisprudence, supplemented by the learned treatises of the most highly qualified publicists in international law.

When the Court does indicate provisional measures in any given case, it takes pain in clearly discussing the factual bases for its conclusion that "the circumstances so require." In the early case of the *Interhandel*, the Court emphasized that "in order to decide what action should be taken in pursuance

[92] *Id.*

[93] *Legality of the Use of Force*, 1999 I.C.J. (Order of June 2, ¶ 15).

[94] *Land and Maritime Boundary Between Cameroon and Nigeria*, 1996 I.C.J. 13 (Order of March 15) (Declaration of Judge Ajibola).

[95] Statute of the ICJ, art. 41 (1).

of the request, it must, in accordance with Article 41 of the Statute, ascertain what is required by the circumstances."[96]

It is clear from jurisprudence that there must be some empirical handle on which the Court may base its decision whether to indicate provisional measures as requested by either or both parties. To a certain extent, the proceeding on a request for the indication of provisional measures is largely circumstantial. More importantly, aside from the need to satisfy the jurisprudential requisites, what controls in the end is the appreciation of the factual milieu by the Court as well as its characterization of the events and circumstances that surround the request.

More than anything else, for example, the Court was apparently guided in its grant of provisional measures in the *Fisheries Jurisdiction Case,*[97] by the "exceptional dependence of the Icelandic nation upon coastal fisheries for its livelihood and economic development,"[98] and the need to "reflect the present situation concerning fisheries of different species in the Iceland area."[99] As such, the measures indicated appeared to be a balancing of the interests of both Iceland and Britain, with the Court going to the extent of fixing the annual catch that may be undertaken by British vessels in the Sea Area of Iceland.

In *Nicaragua,* the Court highlighted the factual circumstances that led the Republic of Nicaragua to argue that there was an urgent need for provisional measures as "the lives and property of Nicaraguan citizens, the sovereignty of the State and the health and progress of the economy are all immediately at stake."[100] And so in light of the foregoing, the Court found that the circumstances required it to indicate provisional measures in order to preserve the rights claimed by the Republic of Nicaragua.[101]

In the *Nuclear Tests Case,*[102] Australia was able to draw a scenario where the atmospheric nuclear explosions carried out by France in the Pacific was able to produce wide-spread radioactive fall out on Australian territory and elsewhere in the Pacific. It attributed to the tests the rise in measurable concentrations of radionuclides in foodstuffs and in man, as well as in additional radiation doses in the area. It also highlighted the anxiety and concern of the Australian people. It also helped, however, that the Court found that "for the purpose of the present

[96] *Interhandel,* 1958 I.C.J. 105 (Order of Oct.24, 1957).

[97] *Fisheries Jurisdiction,* 1972 I.C.J. 12 (Order of Aug. 17).

[98] *Id.* at ¶ 23.

[99] *Id.* at ¶ 26.

[100] *Military and Paramilitary Activities in and against Nicaragua,* 1984 I.C.J. 760 (Order of May 10, ¶ 32).

[101] *Military and Paramilitary Activities in and against Nicaragua,* 1984 I.C.J. 760 (Order of May 10, ¶ 39).

[102] *Nuclear Tests,* 1973 I.C.J. 99 (Order of June 22).

proceedings, it suffices to observe that the information submitted to the Court, ... does not exclude the possibility that damage to Australia might be shown to be caused by the deposit on Australian territory of radioactive fall out."[103]

Consequently, the Court was satisfied that it should indicate interim measures of protection in order to preserve the right claimed by Australia in the present litigation.[104]

Finally, in the *Diplomatic Hostages Case,* where US diplomatic and consular staff were held hostage, the Court, in granting provisional measures, clearly emphasized the following:

> No State is under any obligation to maintain diplomatic or consular relations with another, yet it cannot fail to recognize the imperative obligations inherent therein, now codified in the Vienna Conventions of 1961 and 1963, to which both Iran and the United States are State parties.
>
> Continuance of the situation the subject of the present request exposes the human beings concerned to privation, hardship, anguish and even danger to life and health and thus to a serious possibility of irreparable harm.
>
> The Court cannot fail to take note of the provisions of the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, of 1973, to which both Iran and the United States are parties.

As in the other cases cited, the Court ruled that the circumstances required it to indicate provisional measures as provided by Article 41 of its Statute.

From the specific set of facts that are peculiar to the case, the Court then examines the essential relationship between the main claim of the Applicant and the provisional measures being requested in the *interim*.

RELATION BETWEEN MAIN CLAIM AND THE MEASURES REQUESTED

Professor Merrills emphasizes that "since the purpose of proceedings for interim protection is to preserve the rights which are in dispute, such proceedings are, by their nature, ancillary to the main claim."[105] The provisional measures that any applicant should request, therefore, must, as closely as possible, hew to

[103] *Id.* at ¶ 29.

[104] *Id,* at ¶ 30.

[105] Merrills, *supra* note 21, at 100.

the decision that it asks the Court to make on the merits of its primary claims. An applicant State will not be allowed by the Court to use the procedure under Article 41 of the Statute in order to secure provisional redress from an otherwise legitimate act by another State. Nor will the Court allow the indication of provisional measures that are, by any stretch of the imagination, absolutely incompatible with the main claim of the Applicant.

Already, in the practice of the Permanent Court of International Justice, it has been quite clear that interim protection will not be indicated if it "cannot ... be regarded as solely designed to protect the subject of the dispute and the actual object of the principal claim."[106]

Essentially, it was this general issue relating to provisional measures that bothered Judge Oda in the cases of *Breard* and *LaGrand*. Judge Oda consistently posited the view that "provisional measures are granted in order to preserve *rights of States* exposed to an imminent breach which is irreparable and these *rights of States* must be those to be considered at the merits stage of the case."[107] Invoking the established doctrine, he reiterated the need for such rights involved in the request for interim protection to be the primary subject-matter of – or at least be directly related to it – the original application.

Consequently, Judge Oda could not understand how the failure to notify the German government of the *LaGrand Cases* as required by the Vienna Convention on Consular Relations, appeared to be directly related – at least – to the request for a suspension of the set execution. Judge Oda vaguely concluded that the purpose of provisional measures is to preserve the *rights of states* exposed to an imminent breach which is irreparable. And to him such a situation did not prevail as it was not possible to revert to the *status quo ante* because the Court could not act as a court of criminal appeal, and even with consular assistance, it appeared that the US judicial result would have been no different.

It is worth noting, parenthetically, the rather cynical view that Judge Oda takes with regard to the applications against the United States in the *Breard* and *LaGrand* cases. While he urged States to be liberal in their resort to the Court, he deplored the "use of the Court for such matters as the above under the pretext of the protection of human rights."[108]

But as is apparent from a close reading of the two Vienna Consular Convention cases, it was really a matter of erring – if indeed – on the side of preserving human life. Thus, notwithstanding their deep reservations about the direction that the Court was taking in jurisprudence, both Judges Schwebel and Oda still voted with the majority in indicating provisional measures in the two

[106] *Polish Agrarian Reform and the German Minority, Publication* A/B no. 58, at 178.

[107] *LaGrand*, 1999 I.C.J. 9 (Order of March 3) (Declaration of Judge Oda, ¶ 5).

[108] *LaGrand*, 1999 I.C.J. 9 (Order of March 3) (Declaration of Judge Oda, ¶ 7).

instances. In another case, however, the Court found the opportunity to actually discuss this issue clearly and ultimately had the occasion to delimit the scope of Article 41.

In the *Arbitral Award Case*,[109] Guinea-Bissau requested the Court to order Senegal, by way of provisional measures, to abstain from activities of any kind pending the case. The antecedents to the case are: In 1960, France and Portugal defined the maritime boundary between Senegal and Guinea-Bissau. After independence, the two States disputed the boundary, submitting it to an Arbitration Tribunal in 1985. After the award in 1989, a new dispute arose over the language thereof. Guinea-Bissau applied to the Court for a finding that the award was void. Pending the case, Senegal committed certain acts of sovereignty with respect to the disputed area, forcing Guinea-Bissau to file the request for the indication of provisional measures.

Clearly, the main claim only involved the rights of Guinea-Bissau with respect to the correct interpretation of the award; thus, the dispute which seized the Court was not the dispute over the maritime delimitation brought before the Arbitration Tribunal. Guinea-Bissau, however, argued that provisional measures may still be requested "in the context of judicial proceedings on a subsidiary dispute, to protect rights in issue in the underlying dispute."[110] It claimed that the basic dispute concerned the claims to the control, exploration and exploitation of specific maritime areas, and that the interim protection requested would lead towards preserving the integrity of such maritime areas; thus, the link required between the application and the request for provisional measures is arguably present.

The Court denied the request for interim protection. It reviewed the main application and found that in instituting the proceedings, Guinea-Bissau asked that the 1989 award be declared "inexistent." Thus, the application was not asking the Court to "pass upon the respective rights of the Parties in the maritime areas in question.... And a decision of the Court that the award is inexistent or null and void would in no way entail any decision that the Applicant's claim in respect of the disputed maritime delimitation are well founded, in whole or in part."[111]

The foregoing doctrine embodies the traditional principle that provisional measures "should have the effect of protecting the rights forming the subject of the dispute submitted to the Court."[112]

[109] *Arbitral Award*, 1990 I.C.J. 64 (Order of March 2, 1990).

[110] *Id.* at ¶ 25.

[111] *Id.* at ¶ 26-27.

[112] *Polish Agrarian Reform*, cited in *Arbitral Award* (Separate Opinion of Judge Shahabuddeen).

It is important, however, to examine the arguments of Guinea-Bissau more closely, as its position proposes a more liberal view of the applicable jurisprudence than that which the Court has appreciated in its decision. At the outset, it may be advisable to quote with some extent the cerebral dissertation of the Applicant's Counsel:

> Provisional measures always relate to the basic interest and are justified by them; and, in the second place, they must be declared admissible by reference to these interests even if the Tribunal is seised of a subordinate dispute or one of the second order.
>
> As is the case with the interests of the parties, decisions taken on subordinate disputes and disputes of the second order have no intrinsic value. Their value is due only to the contribution they make to the final solution of the basic dispute. What needs to be safeguarded are the practical conditions of this final solution, peace with respect to the basic conflict, and, equally, the interests of the parties that are the object of the conflict, because should the practical conditions of the final solution be impaired, the same will be true of the decision on the subordinate dispute, because if peace is jeopardized the procedural stage at which one finds oneself is of no consequence.
>
> The fact that provisional measures are not conceived as a provisional anticipation of a possible final decision and that they are regarded as being based first of all on the interest of the international community itself is the justification that the link essential is the link between the measures contemplated and the conflict of interests underlying the question put to the Court, whether the latter is seised of a main dispute or a subsidiary dispute, on the sole condition that the decision by the Court on questions of substance which are put to it are a necessary prerequisite of the settlement of the conflict of interests to which the measures relate, as implicitly recognized by the PCIJ in *Denunciation of the Treaty of 2 November 1865* and by this eminent Court itself in the case concerning the *Anglo-Iranian Oil Co.*[113]

Judge Shahabuddeen disagreed with the learned position of Professor Miguel Galvao Teles arguing that there was something inherently different between this case and the two cases cited by Guinea-Bissau. As to the *Denunciation of the Treaty of 2 November 1865*, it followed that "there being no denial that Belgium and its nationals had rights under the treaty if still in force, the existence of those rights would be directly affected by a determination that China had no right of denunciation."[114]

[113] CR 90/1, p.32, as cited in *Arbitral Award* (Separate Opinion of Judge Shahabuddeen).

[114] *Arbitral Award*, 1990 I.C.J. 64 (Order March 2) (Separate Opinion of Judge Shahabuddeen).

The Court was faced with the same question in the *Fisheries Jurisdiction Case*. In that case, the reader will recall the request of Britain to ask Iceland to refrain from implementing its proposal to extend its exclusive fisheries zone to 50 nautical miles around it. The Government of Iceland insisted that the application was only with regard to the legal position of Britain and itself, and could not possibly attach to the economic position of private fishermen or other interests. Apparently, Iceland wanted to question an alleged lack of a connection between the main application and the request for interim protection.

Recall that in its main Application, Britain instituted proceedings in which it asked the Court to adjudge as illegal the extension of fisheries jurisdiction by Iceland. As such, Iceland was arguing that the Court could not possibly indicate measures in the *interim* that would benefit private enterprises such as a prohibition on Iceland from implementing its proposed extension against British fishermen.

The Court disagreed. It ruled that by asking for a declaration of invalidity as regards the proposed extension by Iceland, the British Government was in fact requesting the Court "to declare that the contemplated measures of exclusion of foreign fishing vessels cannot be opposed by Iceland to fishing vessels registered in the United Kingdom."[115] Consequently, the Court found that the request for provisional measures designed to protect the rights of private fishers was "directly connected with the Application."[116]

The decision of the Court, however, did not escape a strongly worded dissent from Judge Padilla Nervo who maintained that "the request for measures of protection ... have as their real object the protection of the interests, financial or economic, of private fishing enterprises rather than the 'rights' of the United Kingdom."[117]

Returning to the arguments of Guinea-Bissau, Judge Shahabuddeen also disputed the invocation of the *Anglo-Iranian Oil Co. Case*. Recall that provisional measures were granted in order to protect the interests of the British company; recall further, however, that the main claim of Britain merely pertained to the duty of Iran to submit any dispute to arbitration. Even Judge Shahabuddeen conceded that "this situation seems a little closer to the thesis of Guinea-Bissau." However, he goes on to distinguish the two cases.

On the other hand, Judge Thierry wrote a dissenting opinion, arguing that the decision of the Court regarding the request for interim measures was a restrictive view of Article 41 of the Statute. He posited that the 'single condition'

[115] *Fisheries Jurisdiction*, 1972 I.C.J. 12 (Order of Aug. 17, ¶ 13).

[116] *Id.* at ¶ 14.

[117] *Fisheries Jurisdiction*, 1972 I.C.J. 12 (Order of Aug.17) (Declaration of Judge Padilla Nervo).

for indicating provisional measures is that these must be required by the circumstances. He believed that the circumstances of the case did require the indication of provisional measures.

Again, in 1993, the Court had the occasion to delimit the scope of Article 41 in no ambiguous terms. In the *Genocide Convention Case*, Bosnia-Herzegovina sought an order "which could have covered a range of matters, including alleged acts of genocide, but concerned also with Yugoslavia's support for hostile military and paramilitary activities, with Bosnia-Herzegovina's right of self-defense and with the corresponding rights of other States. Yugoslavia, for its part, by way of counterclaim asked the Court to instruct the Bosnian authorities to comply with the latest cease-fire and to take various other measures."[118]

However, the only *prima facie* basis of jurisdiction that the applicant was able to prove was Article XI of the Genocide Convention. Thus, the Court concluded that it had to "confine its examination of the measures requested, and of the grounds asserted for the request for such measures, to those which fall within the scope of the Genocide Convention."[119]

Necessarily, of the many measures requested by the parties the Order indicating provisional measures strictly confined itself to the elements of their requests that were consistent with the issue of genocide.

DUE PROCESS

The Court, throughout the years, has not found any problem with the absence of counsel for one of the parties. In the *Tehran Case*, for example, the Government of Iran was not represented by counsel during the public sitting in which both Governments (US and Iran) were afforded the opportunity to present their observations on the American request for the indication of provisional measures.

Noting that the Government of Iran did not have a representative at the hearing, the Court nevertheless held that the "non-appearance of one of the States concerned cannot by itself constitute an obstacle to the indication of provisional measures."[120] This is the settled doctrine according to the jurisprudence of the Court and of the Permanent Court of International Justice.[121]

Interestingly, in the *Nuclear Tests Case*, the French Government took the position that the Court could not decide on the request for the indication of provisional measures as France was not represented at the hearings held on the

[118] Merrills, *supra* note 21, at 102.

[119] *Genocide Convention*, 1993 I.C.J. 325 (Order of Sept.13).

[120] *U.S. Diplomatic and Consular Staff in Tehran*, 1980 I.C.J 7 (Order of Dec. 15, 1979, ¶ 13).

[121] *Fisheries Jurisdiction*, 1972 I.C.J. 12 (Order of Aug.17, ¶ 11).

matter. The Court took note of France's position but reiterated the rule that its non-appearance was not an obstacle to interim protection. The requirement of due process, said the Court, was limited to affording the parties "an opportunity of presenting their observations on the request for the indication of provisional measures."[122]

This doctrine goes way back to the practice of the Permanent Court of International Justice when, in 1939, it granted interim protection in the case regarding the *Electricity Company of Sofia and Bulgaria* notwithstanding the *ex parte* nature of the proceedings.

The jurisprudence of the Court, therefore, demonstrates that the due process requirement in the international plane is in no measure different from that as understood in municipal law. It merely pertains to the "opportunity to be heard," but if such an opportunity is not availed of, then a subsequent proceeding or decision is not tainted in any way, whether in procedure or in substance.

COMPLEX QUESTION

When *Interhandel* went before the Court in 1957, Switzerland argued for the jurisdiction of the Court by challenging, among others, the self-determining reservation being invoked by the United States as to matters essentially within its domestic jurisdiction. The Co-Agent of the Swiss Government further stated that "in its examination of a request for the indication of interim measures of protection, the Court would not wish to adjudicate 'upon so complex and delicate a question as the validity of the American reservation.'"[123]

The Court, however, did not need to respond to the position of Switzerland anymore as it denied the request based on the finding that there was no urgency to indicating provisional measures. Thus, that issue remained undisturbed until some time later.

It came up again in the *Fisheries Jurisdiction Case* between Iceland and the United Kingdom. It will be recalled that Britain was questioning Iceland's proposed extension of its exclusive fisheries jurisdiction to a zone of 50 nautical miles around Iceland. The jurisdiction of the Court was questioned by Iceland in that it asserted that the Exchange of Notes relied upon by the British as a source of jurisdiction was no longer applicable and had in fact been terminated by the fulfillment of its purpose and object. In its Order indicating provisional measures, however, the Court refused to settle the validity of said Exchange of Notes and ruled instead that the controversy will eventually "fall to be examined by the Court in due course."[124]

[122] *Nuclear Tests*, 1973 I.C.J. 99 (Order of June 22, ¶ 12).

[123] *Interhandel*, 1958 I.C.J. 105 (Order of Oct.24, 1957).

[124] *Fisheries Jurisdiction*, 1972 I.C.J. 12 (Order of Aug.17, ¶ 19).

In the *Nuclear Tests Case*, there was also a complex question as to the basis of the Australian claim of jurisdiction for the Court. It will be recalled that the Application was founded on the following provisions:

1. Article 17 of the General Act of 1928, read together with Article 31, paragraph 1, and 37 of the Statute of the ICJ.
2. Alternatively, Article 36, paragraph 2, of the Statute of the ICJ and the respective declarations of Australia and France made thereunder.

The General Act of 1928 was questioned by the French government on the ground that since it was an integral part of the League of Nations system, it had "lost its effectivity and fallen into desuetude."[125] However, in response to a question during the oral observations, the Agent for Australia argued that their request for provisional measures were based primarily on Article 41 of the Statute of the Court, and only subsidiarily on the General Act of 1928 in the event that the Court should "find itself able, on the material [now] before it, to reach the conclusion that the General Act is still in force."[126]

Granting the request for the Court to indicate provisional measures, it ruled that it was not in a position to make a final determination on the points raised by the parties at the provisional measures stage of the proceedings. As such, the Court informed both parties that the request would thereby be examined only in the context of Article 41 of the Statute.

PROSPECT OF SUCCESS ON THE MERITS

There is a bit of controversy as regards the view of some writers that a State requesting for interim protection must not only prove some basis for jurisdiction, but must also "substantiate the right it claims to a point where a reasonable prospect of success in the main case exists."[127] In the *Passage through the Great Belt Case*, the Court was squarely faced by this issue when Denmark, "while acknowledging that there is a right of free passage through the Danish Straits for merchant ships of all States, denie[d] that there [was] such a right of passage for structures up to 170 meters high."[128]

It does not eventually appear in the Order as to what the Court's thinking on this particular issue really is. Rather, it dismisses the Danish position in a brief paragraph, in which the Court noted the 'unchallenged' existence of a right of passage through the Great Belt; and as the dispute was over the nature and extent of that right, the Court concluded that "such a disputed right may be

[125] *Nuclear Tests*, 1973 I.C.J. 99 (Order of June 22).

[126] *Id.* at ¶ 18.

[127] *Passage through the Great Belt*, 1991 I.C.J. 12 (Order of July 29, ¶ 21).

[128] *Id.*

protected by the indication of provisional measures under Article 41 of the Statute, if the circumstances so require.[129]

It is important to remember here, that while the Court did not indicate provisional measures, it was due to the absence of "urgency" under the circumstances. And while it may have made a conclusion as to the possibility of interim protection, it did not go to the extent of disavowing the doctrine espoused by Denmark.

Perhaps bothered by the uncertainty of the Court's position on the Danish argument, Judge Shahabuddeen discusses the matter extensively in his separate opinion. Right from the beginning, Judge Shahabuddeen establishes his position that "Finland was obliged to show a *prima facie* case in the sense of demonstrating a possibility of the specific right claimed."[130] He argues that a contrary view would present a problem of reconciliation with the delicate character of the procedure as interim protection "derogate from the usual rule that a plaintiff cannot obtain relief until he has thoroughly proved his case."[131] Moreover, he relates this issue to the still undecided question of whether a party who secures interim protection is liable for any injury suffered by the other party, if the measure is eventually found to be unjustified.

He then proceeded to pointing out cases in which the Court seemed to have embraced a *prima facie* test of jurisdiction on the merits in deciding whether to indicate interim protection or not.[132] Judge Shahabuddeen particularly referred to pages 21ff. and 25ff. of *ICJ Pleadings, United States Diplomatic and Consular Staff in Tehran*, for extensive arguments in support of the American claims. He pointed out the declaration of the Court *to wit*:

> *A request for provisional measures must by its very nature relate to the substance of the case*, since, as Article 41 expressly states, their object is to preserve the respective rights of either party.[133]

He concluded that for the Court to "go into the merits would seem to rest on more general considerations suggestive of recognition that a State requesting interim measures must satisfy the Court that it has an arguable case in favor of the existence of the rights sought to be preserved."[134]

[129] *Id.* at ¶ 22.

[130] *Passage through the Great Belt*, 1991 I.C.J. 12 (Order of July 29) (Separate Opinion of Judge Shahabuddeen).

[131] E. DUMBAULD, INTERIM MEASURES OF PROTECTION IN INTERNATIONAL CONTROVERSIES 184 (1932).

[132] *Nuclear Tests*, 1973 I.C.J. 99 (Order of June 22); *US Diplomatic and Consular Staff in Tehran*, 1980 I.C.J 7 (Order of Dec. 15, 1979); *Arbitral Award*, 1990 I.C.J. 64 (Order of March 2); and *Anglo-Iranian Oil Co.*, 1951 I.C.J. 89 (Order of July 5).

[133] *US Diplomatic and Consular Staff in Tehran*, 1980 I.C.J 7 (Order of Dec. 15, 1979).

[134] *Passage through the Great Belt*, 1991 I.C.J. 12 (Order of July 29) (Separate Opinion of Judge Shahabuddeen).

RATIONAE PERSONAE V. RATIONAE MATERIAE

The Court usually does not need to establish its jurisdiction *rationae personae* as its competence is normally open to all States party to the statute and all UN members are parties to the Statute. In general, therefore, when cases come before the Court it need not satisfy jurisdiction *ratione personae* anymore, but only jurisdiction *rationae materiae*. This is because almost all States are parties to the Statute of the Court.

In the *Genocide Convention Case*, however, resolutions of both the United Nations Security Council and General Assembly recognized the need for the successor States of the former Yugoslavia to reapply for membership in the United Nations. At the outset, therefore, over and beyond the regular question of *jurisdiction rationae materiae*, there was also the question of whether the respondent could still be regarded as a party to the Statute.[135]

THE LAGRAND CASE

The *LaGrand Case* has introduced a new controversy to the Article 41 power of the court. It will be recalled that notwithstanding that Germany became aware of the facts of the case on 24 February 1999, it did not file the request for provisional measures until the night before the day (3 March 1999) on which Mr. LaGrand was scheduled to be executed. Germany justified the delay with the reasoning that since their knowledge, they had been working on the diplomatic level.

Thus, without any further proceeding, especially the holding of oral hearings, the Court granted Germany's request for an indication of provisional measures on the very same day that the request was received at the Registrar's. The Order was founded on Article 75, paragraph 1, of the Rules of Court which provided that the Court may "at any time decide to examine *proprio motu* whether the circumstances of the case require the indication of provisional measures which ought to be taken or complied with by any or all of the parties."

Although they voted with the majority in the end, both Judges Oda and Schwebel filed separate opinions on the issue. Judge Oda's views on the matter have already been sufficiently discussed in another section of this paper; but Judge Schwebel's opinion, which directly attacks the use of Article 75, paragraph 1 of the Rules, should merit a brief discussion.

Judge Schwebel argues that the rule "assumes that the Court may act on its own motion where a party has not made a request for the indication of provisional measures."[136] In that case, as the proceedings were provoked by Germany's request

[135] The Court ultimately found that it had jurisdiction *rationae personae* as Yugoslavia was party to a compromissory clause under Article VI of the Genocide Convention relied on in that case by Applicant, Bosnia-Herzegovina.

[136] *LaGrand*, 1999 I.C.J. 9 (Order of March 3) (Separate Opinion of Judge Schwebel).

for provisional measures, he believed that Article 74 of the Rules was more applicable, and under the same rule, it was essential to hold a public hearing on the matter. To him, the crux of the matter was that "no such hearings have been held, arranged or contemplated."[137] He further invokes the 'authoritative' work of Professor Jerzy Sztucki[138] where the latter concluded that "the Court may indicate provisional measures *proprio motu* only without any request for interim measures."

In *LaGrand*, as mentioned earlier, the Court did vote to indicate provisional measures. But as Judge Schwebel described his affirmative vote, it may simply have been because they did not oppose the substance of the Order, albeit with "profound reservations about the procedures followed both by the Applicant and the Court."[139]

CONCLUSION

The rich and lively jurisprudence – though eclectic at times – need no further elaboration as this writer has already done so in the text of this paper. This part, therefore, will attempt to situate the Court in the beginning of a new era in international legal policy, by examining the role and function of interim protection in a world that continues to be permeated by violence, intolerance, and conflict.

It is an especially encouraging development that there had been a growing diversity of cases being submitted to the Court for dispute settlement, as well as for the possibility of indicating provisional measures. It is an immensely a positive phenomenon that all ten States of the North Atlantic Treaty Organization who participated in the bombing of Yugoslavia were brought to the Court. More recently, Pakistan filed an application against India attempting to hold the latter internationally liable for the shooting down of the Pakistani naval aircraft last year. And before General Pinochet was allowed by Britain to return home, Chile informed the Court and the international community of its intention to bring a case against Spain.

All these led Judge Schwebel, then President of the Court, to express his hope to the UN General Assembly Plenary Session last year that this trend will "in turn promote wider adherence to the compulsory jurisdiction of the Court."[140] If indeed States become more liberal in resorting to the Court, expect a corresponding increase in requests for interim protection.

Provisional measures provide not only a remedy for maintaining the *status quo* or restoring the *status quo ante*, but more importantly, it is an essential tool to ensure that either or both parties do not take any action which might aggravate or extend the dispute. As such, it may weave itself into the general fabric of

[137] *Id.*

[138] INTERIM MEASURES IN THE HAGUE COURT (1983).

[139] *LaGrand*, 1999 I.C.J. 9 (Order of March 3) (Separate Opinion of Judge Schwebel).

[140] Judge Stephen Schwebel, Address at the *UNGA Plenary Session* (26 Oct. 1999).

attaining international peace and security in the third millennium. It may present itself as a form of *confidence-building measure* (CBM), where, during the effectivity of the measures, both parties are allowed to ease the tension and reconsider some of the more peaceful alternatives to resolving their dispute.

The Court may do well to be mindful that the Statute authorizes it to indicate 'any provisional measures.' It should thus be more inclined in the future to utilize such a power to contribute to efforts at bringing a dispute to a peaceful resolution. While it must remain faithful to the statutory and jurisprudential parameters of its power to indicate provisional measures, its interpretation of surrounding circumstances in a case should not be unduly restrictive as to embody an *a priori* bias against granting interim protection.

While Judge Schwebel betrayed an ineluctable excitement that the Court has been "far busier than ever before," this writer hopes that the Court does not tackle with reluctance or conservatism the diversity of issues and States that have come before the Court. The Court, in the third millennium, must stand for something, and it cannot mean anything more to the peoples of the world if it unreasonably belabors the often controversial issues of jurisdiction and standing. As the 'most senior international court,' it must not shirk from the responsibility of policy making. For none who deal with law, however defined, can escape policy when policy is defined as the making of important decisions that affect the distribution of values.[141]

There are, however, a few important considerations for the Court as regards interim protection measures in the 21st century. *First*, the Court must remain cognizant that it is dealing with sovereign and equal States of the international community. Always, these States will be jealous of their sovereignty and would not welcome any measure that seriously impairs its territorial integrity or impinges on its absolute national prerogatives. The procedure and substance of any interim protection process, therefore, should take into account the varying sensibilities of the parties as well as the implications of the Court's proposed action on sovereignty equation.

The sensitivity of the Court is further required by the reality that the 'binding force' of an indication of provisional measures has yet to be established. While Rosenne believes that an indication of provisional measures is an obligatory decision "under conventional and customary international law,"[142] it remains unclear whether a State may actually be compelled to follow the measures indicated by the Court. Consequently, an indication of provisional measures should be a balanced and prudent package that would voluntarily impel all the parties to accept it as an integral component of maintaining the peace.

In his seminal book *Development of International Law by the International Court*, Sir Hersch Lauterpacht clearly articulated the need to be sensitive to the nuances of the attitude of States. Unlike in the municipal law context, the Court

[141] Judge Stephen Schwebel, Address at the *UNGA Plenary Session* (26 Oct. 1999).

[142] *Cited in* DUMBAULD, INTERIM MEASURES OF PROTECTION IN INTERNATIONAL CONTROVERSIES 141.

deals with sovereign nations that guard their sovereignty and territorial integrity with extreme sensitivity and even 'irrational' jealousy. But note that a provisional measure must not only be acceptable to the parties; it must also be feasible under the prevailing circumstances.

Second, the Court must always bear in mind the feasibility of the provisional measures being indicated. This was the crux of the learned dissents of Judges Shahbuddeen, Weeranmantry, Shi, and Vereshchetin in the case involving the *Land and Maritime Boundary between Cameroon and Nigeria*. Recall that in that case, the Court indicated provisional measures to the effect that both States should withdraw their forces to where they were prior to the incidents on 3 February 1996.

Judge Shahabuddeen welcomed the Order issued the Court but cautioned that provisional measures should "be framed in self-executing terms, in the sense that it should contain all the legal elements required for its interpretation and application."[143] He argued that there should have been a clear physical benchmark or as in the *Frontier Dispute Case*, an alternative solution. He believed that in this case, there was not only an absent physical benchmark for monitoring compliance but also no similar alternative solution available. In fact, he concluded, the provisional measure may only provide a basis for a new dispute if the parties are unable to agree as to what positions were occupied by each prior to 3 February 1996.

Judges Weeramantry, Shi and Vereshchetin, in a joint declaration, thought that the provisional measure indicated by the Court left it to both Cameroon and Nigeria to determine as to where their troops actually were before 3 February 1996. Unfortunately, they would write, the positions that each would take might well be overlapping and contradictory, such that confusion would reign on the ground. Arguing that the Court's Order may well have contained an internal contradiction, they pointed out that even the Court itself did not really know what the pre-3 February 1996 positions of the two countries were.

If we are to emphasize feasibility, therefore, it brings us to the important *third point*, which is the importance of grafting the measures to be indicated into the greater context of all efforts to resolve the dispute between the parties.

At the outset, it appears that the Court has resolutely ruled on the question of the relevance of other actions or procedures in a proceeding involving a request for interim protection. In the *Frontier Dispute Case*, the Chamber held that it was faced with the "duty under Article 41 of the Statute to ascertain for itself what provisional measures ought to be taken." This notwithstanding that the Parties had already reached an agreement on a cease-fire.

Subsequently, in *Nicaragua*, the United States argued against interim protection in view of the political process and the regional procedure (Contadora process). The United States further pointed out that since the case involved

[143] *Land and Maritime Boundary between Cameroon and Nigeria*, 1996 I.C.J. 13 (Order of March 15) (Declaration of Judge Shahabuddeen).

allegations of illegal use of force, the proceedings at the UN Security Council and the Organization of American States should have priority. Nevertheless, the Court made an order for provisional measures without answering the various issues raised by the United States.

The Court may therefore wish to consider what its predecessor, the PCIJ, said in the *Free Zones Case*:

> The judicial settlement of international disputes with a view to which the Court has been established, is simply an alternative to the direct and friendly settlement of such disputes between the Parties; as consequently it is for the Court to facilitate, so far as is compatible with its Statute, such direct and friendly settlement.

The question of interim protection should thus be viewed from the viewpoint of promoting a diplomatic solution to the matter at bench. As such, it takes on more relevance if treated as more of a confidence building measure than a small procedural victory for the party requesting it.

As the Court moves from the 20th to the 21st century, it remains to be told by the story of humanity whether the Court will leave a lasting imprint on history by way of clearly 'shaping and reshaping international law.' Its legacy will not be measured by the interim protection orders that come out of The Hague; rather, the Court shall be judged for its contributions to its already rich history. This power of the judgment on the merits is better appreciated in light of its predecessor's timeless ruling in the *Legal Status of the South-Eastern Territory of Greenland*:[144]

> Whereas, having regard to the character of the alleged rights in question, considered in relation to the natural characteristics of the territory in issue, even measures calculated to change the legal status of the territory could not, according to the information now at the Court's disposal, affect the value of such alleged rights, once the Court in its judgment on the merits had recognized them as appertaining to one or other of the Parties....

Articulating what he called the 'judicial perspective of The Hague,' Judge Schwebel described the twentieth century as one of "great achievement and profound loss."[145] The rich contributions of the Court and its predecessor tribunals to the jurisprudence of international law are clearly integral to the century's great achievements. At the same time, the Court may have had something to do with the 'profound losses' during those times when it was bound by jurisdictional shackles.

On the whole, indeed, it may be said that the jurisprudence of the Court was, and continues to be, intertwined with the destiny of humanity.

[144] PCIJ, (Ser. A/B) , No. 48, at 288.

[145] Schwebel, Address before the UNGA.

ISLAM AND THE 1987 PHILIPPINE CONSTITUTION: AN ISSUE ON THE PRACTICE OF RELIGION*

EDILWASIF T. BADDIRI *

ABSTRACT

Islam was in the Philippines long before the inception of the Republic of the Philippines. It has been an unrecognized integral part of Philippine culture and history for over ten centuries. Today, more than ten percent of the Philippine population embrace the Islamic faith. The Muslim People, however, have never felt they were part of it and have always aspired for independence despite their long union with the Philippines. This isolation of the Muslim People is the result of the non-recognition of the Islamic concept of practice of religion. Essentially, the Muslim People's aspiration of their right to self-determination is but an assertion of their right to practice their religion. Moreover, this aspiration has been communicated in the most prominent form of expression – armed struggle.

The existence of movements seeking a separate State for the Muslim People of the Philippines must be recognized and studied. These movements began the moment foreign colonizers attacked the Muslim People and their Islamic faith, and they continue to persist today. The problem is there, but where is the answer? The history of the Philippines is besieged with the so-called Muslim problem. Yet, no administration has brought an effective solution to the problem.

The root of this problem is the government's lack of sensitivity to the Islamic concept of practice of religion and the perceived attack on the Islamic way of life. The previous Philippine Governments under Marcos, Aquino, and Ramos tried to provide for solutions but were hampered by well-entrenched Constitutional principles. Thus, the Muslim struggle continues.

In order to bring forth an effective solution, the distinct Islamic principles on practice of religion must be recognized. The most important principle is that of *Din wa Dawla* or unity of Religion and State which is the contraposition of separation of Church and State principle as well as the Non-Establishment Clause. These Constitutional principles constitute a bar to the present Administration's task of effectively responding to Muslim People's aspirations. It is, therefore, necessary that there be a constitutional accommodation of the Islamic concept of practice of religion.

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