THE EFFECTS OF INTERIM MEASURES OF PROTECTION IN THE INTERNATIONAL COURT OF JUSTICE

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Article 41 of the Statute of the International Court of Justice provides that the Court has the power to indicate interim measures[1] of protection to preserve the respective rights of the party-states pending final judgment on the merits.[2] Through a series of holdings from the predecessor Permanent Court of International Justice, which was given substantially the same power, and from holdings of the present Court and through the formulation of Court rules[3] applied to interim measures, many problematic matters relating to the Court's powers under article 41 have been settled. Examples of such matters include the purpose of interim relief and jurisdictional prerequisites.

There remains, however, the unanswered question of whether there is a legal duty of compliance with a court order imposed under article 41. To one familiar with the similar preliminary injunction pendente lite of the Anglo-American legal system and unfamiliar with the procedure and practice of international arbitral and judicial tribunals, it might be surprising that such a doubt exists. It would be expected, after a period of forty-three years (accounting for the lives of both Courts), that the question would have been resolved, or that in the absence of judicial or legislative resolution, a consensus of opinion would exist with regard to such a seemingly fundamental matter. Obvious analogies between interim measures and preliminary injunctions would call for an opinion that the former, like the latter, are binding upon the parties. Yet, such a conclusion is probably unwarranted in that one reason the term "provisional measures" was chosen by the framers of the Statute of the Permanent Court, could well have

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1. On the subject of interim measures generally, *see* Goldsworthy, *Interim Measures of Protection in the International Court of Justice*, 68 AM. J. INT'L L. 258 (1974) [hereinafter cited as Goldsworthy].

2. Article 41 is contained in chapter III (Procedure) of the Statute of the International Court of Justice. See text accompanying note 28.

3. The text of the recently amended (May 10, 1972) Rules of Court may be found at 67 AM. J. INT'L L. L. 195 (1973).

been specifically to avoid the suggestion of a dominancy of Anglo-American legal institutions at the expense of other systems within which the injunction was unknown.[4] The similarities and the differences existing between the various aspects of interim measures and preliminary injunctions afford a basis for illustrating and, hopefully, dissolving certain misconceptions which surround the nature of interim relief in the International Court.

During the past four years, the Court has been occupied to a considerable degree with requests for the indication of interim measures. In both of the recent *Fisheries Jurisdiction Cases*,[5] which involved the United Kingdom and West Germany as applicants disputing Iceland's extension of its exclusive fishery zone, the Court ordered specific measures to obtain as to fish catch limitations, and prohibitions against interference with British and German fishing vessels in the disputed zone. The cases presented an ideal opportunity for a decision on whether there was a duty of compliance with the measures. The Court first found it had jurisdiction[6] because it was clear that Iceland had not conformed to the measures; the Court then held in its judgment on the merits[7] that the Icelandic extension was not opposable to the applicants. West Germany did maintain in its submissions, that Iceland was under an obligation to make compensation for illegal interference pendente lite with its fishing vessels. However, the Court found that this submission was too abstract for adjudication,[8] even though it could have been based on the interim protection order.

Prior to these cases, the Court had no opportunity to speak directly to the question of the binding effect of interim measures. The Permanent Court of International Justice indicated measures in two cases. In the first,[9] the Court subsequently revoked its order at the

4. *See* E. DUMBAULD, INTERIM MEASURES OF PROTECTION IN INTERNATIONAL CONTROVERSIES 144 (1932) [hereinafter cited as DUMBAULD]. Article 41 was based upon Roman law concepts. In the Phillimore report on article 12 of the League of Nations, certain objections were noted to the inclusion of a power to issue "injunctions". Among these was the assumed general unfamiliarity with the injunction and its lack of importance in other legal systems. It is probable that the report had an influence upon the advisory committee of jurists which drafted the Statute of the Court.

5. United Kingdom v. Iceland, (Interim Protection), [1972] I.C.J. 12; Federal Republic of Germany v. Iceland (Interim Protection), [1972] I.C.J. 30. The interim protection orders in the two cases involved the same basic issues, and differed only as to the maximum limits on catches.

6. [1973] I.C.J. 3, 23; [1973] I.C.J. 49, 65.

7. United Kingdom v. Iceland, (Judgment), [1974] I.C.J. 3, 34; Federal Republic of Germany v. Iceland, (Judgment), [1974] I.C.J. 175.

8. [1974] I.C.J. 175, 204-05.

9. Denunciation of the Treaty of 2nd November, 1865, between China and Belgium, [1927], P.C.I.J., ser. A, No. 8, at 6.

request of the Applicant.[10] In the other,[11] the merits were never reached because of the advent of the Second World War, which marked the virtual demise of the Permanent Court. In three other cases, requests for relief were refused.[12]

Prior to the *Fisheries Jurisdiction Cases*, the International Court of Justice had ordered interim measures in the case of the *Anglo-Iranian Oil Company*,[13] but subsequently held that jurisdiction on the merits did not obtain. In the meantime, the United Kingdom, the applicant in the case, attempted to secure enforcement of the measures through the Security Council under article 94 of the Charter,[14] but such efforts were unsuccessful.

That scenario has always been the focal point for commentary on various aspects of interim measures, and particularly on the question of whether there is a duty of compliance. However, such an approach has failed to separate clearly the question of legal binding effect and possible methods of enforcement of a Court order under article 41. Apart from this confusion, the commentary on the binding nature of interim measures has been sketchy and inconclusive. Three general positions have been maintained: 1) that there is no obligation to comply with interim measures;[15] 2) that there is only a moral duty to comply;[16] and 3) that there is a legal duty of compliance.[17] The reasons supporting any one view, however, are frequently different. The inconclusiveness of the writers probably stems partly from the fact that the Court has never conclusively pronounced the legal effects of interim measures.

In light of this, a great amount of speculation is perhaps unwarranted. Rather, what is intended here is an examination of the various factors which have been considered relevant to the determination of whether interim measures of protection are binding in law, as well as

10. *Id.* at 9.

11. The Electricity Company of Sophia and Bulgaria, [1939] P.C.I.J., ser. A/B, No. 79, at 194, 197.

12. Legal Status of the Southeastern Territory of Greenland, [1932] P.C.I.J., ser. A/B, No. 48; Administration of the Prince von Pless, [1933] P.C.I.J., ser. A/B, No. 54; Polish Agrarian Reform and the German Minority, [1933] P.C.I.J., ser. A/B, No. 58.

13. [1951] I.C.J. 89, 93.

14. *See generally* text at section VI.

15. *See, e.g.*, B. CHENG, GENERAL PRINCIPLES OF LAW 273 (1953) [hereinafter cited as CHENG]. The interim measure is merely a "judicial suggestion".

16. *See, e.g.*, DUMBAULD, *supra* note 4, at 169.

17. *See, e.g.*, the conclusion in Hambro, *The Binding Character of the Provisional Measures of Protection Indicated by the International Court of Justice*, in RECHTS FRAGEN DER INTERNATIONAL ORGANIZATIONS, FESTSCHRIFT FUR HANS WEHBERG 152, 166 (1956) [hereinafter cited as Hambro]. The article presents an excellent exposition of many of the matters considered herein.

an exploration of other factors which should be considered. The primary concern is to evaluate those factors and to point out other considerations which arguably preclude a finding that interim measures impart a legal duty of compliance.

I. PRELIMINARY CONSIDERATIONS

Under the Rules of the Court,[18] a party to a dispute may request that interim measures be indicated at any time during the proceedings, although the request normally is made contemporaneously with the filing of the application, or soon thereafter. Under the Rules, the request is treated as a matter of urgency, having priority over all other cases. Measures may also be ordered by the Court on its own motion. If measures are indicated, they may be modified or revoked. Thus, an indication of interim measures, unlike a judgment, is not res judicata.[19] This does not mean, of course, that while the order remains unrevoked or unmodified, it could not alter the legal rights and duties of the parties.

Although the Court has never characterized the effects of interim measures, it may be concluded, somewhat negatively, that measures are intended to have some effects. For example, in the *Fisheries Jurisdiction Case* the Court noted that the measures would cease to have effect at the time the final judgment was rendered.[20] This might mean, however, that the indication merely imputed a moral obligation of compliance.[21]

18. Article 66 of the Revised Rules deals with interim measures. *See* note 3 *supra*.

19. *Cf.* Free Zones Case, [1929] P.C.I.J., ser. A, No. 22, at 5, 13; *see* Hambro, *supra* note 16, at 163.

20. The Court further held that although the measures lapsed because the power of the Court was exercisable only pendente lite, the parties were "not at liberty to conduct their fishing activities in the disputed waters without limitation." [1974] I.C.J. 3, 202. There is a strong inference that the measures, while operative, had the effect of so limiting the amount of catches.

There was no mention in the companion *United Kingdom* case of the effect of the rendition of the judgment on the earlier indicated measures; however, the United Kingdom and Iceland had entered into a provisional arrangement regarding the catches after the indication of the measures of protection relating to catches. For further discussion on this point, *see* text accompanying notes 72-77 *infra*.

21. The expression "moral duty to comply" or "moral obligation", is used herein in a very broad sense. If, because of the surrounding circumstances and acts of the parties, it may be concluded reasonably that a party *should* comply with a court order, such conclusion being based upon any considerations other than law, or those of a political nature, then a moral duty to comply with such order may be said to exist. For example, although the indication of interim measures might not alter the legal obligations of a party, the fact that the International Court of Justice has issued the order, may create ipso facto a moral duty.

The purpose of interim measures is simply to preserve and protect the respective rights of opposing parties, pending the final decision on the merits. This purpose includes the prevention of an extension or aggravation of the dispute. The "rights" which may be protected by interim measures are those which the Court could adjudge as belonging to one or the other of the parties.

The Court indicates measures only when the "circumstances" so require. These circumstances obviously will be different from case to case. Yet, the Court considers whether the circumstances are propitious; the circumstances must be of a legal character and subject to legal criteria.[22] The Court will not consider as a "circumstance" a legally irrelevant factor.

In order to exercise its power under article 41, the Court need only be convinced of the possibility of its having jurisdiction over the merits.[23] One writer has concluded that this rule is justified because an interim measure is nothing more than a "judicial suggestion".[24]

The Permanent Court maintained that general principles of law[25] dictate that parties to a case before an international tribunal "must abstain from any measure capable of exercising a prejudicial effect in regard to the execution of the decision to be given and, in general, not allow any step of any kind to be taken which might aggravate or extend the dispute."[26] Article 41 of the Statute applies this universal principle. It has been suggested that in light of this overriding principle, interim measures are superfluous and do not involve a duty of compliance.[27] As will be demonstrated, certain logical difficulties arise if this view of the effect of the general principle is accepted. This is particularly the case with regard to those instances in which the Court orders specific measures to obtain, rather than framing its order in the form of a restatement of the general purposes of interim measures of protection.

22. This principle is inferable from the Revocation of Interim Protection in the *Sino-Belgian* case, [1927] P.C.I.J., ser. A, No. 8, at 9, 10.

23. This rule was first clearly laid down in *Anglo-Iranian Oil Co., (Interim Protection)*, [1951] I.C.J. 89. There the Court decided that it had jurisdiction over the request when it did not appear a priori that the Court lacked jurisdiction over the merits.

24. CHENG, *supra* note 15.

25. *See* Goldsworthy, *supra* note 1, at 260-61. The duty of maintaining the status quo may well be a rule imposed by customary international law, as well as, or rather than a general principle of law implied in article 38(1)(c) of the Statute of the Court.

26. Electricity Company of Sofia and Bulgaria, [1939] P.C.I.J., ser. A/B, No. 79, at 199.

27. *See* CHENG, *supra* note 15.

II. THE STATUTORY BASIS OF INTERIM MEASURES

Any comment on the question of the nature of interim measures must include an examination of the terminology of article 41, which probably is considered the most serious barrier to attributing full legal effect to such measures. Article 41 reads as follows:

> 1. The Court shall have 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.
>
> 2. Pending the final decision, notice of the measures suggested shall forthwith be given to the parties and to the Security Council.[28]

The curious terms employed, "indicate" and "suggested", do not ordinarily evince obligation. The terms "prescribe" and "order" were considered in the deliberations of the advisory committee of jurists who formulated the statute, but were rejected.[29]

It has been observed that "indicate", although usually connoting a mere form of suggestion, also may mean "to point out", with the result that the Court's power is one to "point out" to the parties what international law requires in order to conform to the general duty not to aggravate the dispute pendente lite.[30] Such an interpretation still would not answer the question of mandatory compliance, as there may still exist only a moral obligation of compliance. Additionally, the wording of article 41(2) reveals that "indicate" is used synonymously with "suggest".[31] Thus, if the words were intended to be used in their ordinary signification, there is a strong inference that in no sense are measures issued pursuant to article 41 meant to be binding.

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28. In the Rules of the Court, the term "interim measures of protection" is utilized. In the Statute of the Permanent Court of International Justice, the word "reserve" instead of "preserve" was used; in article 41(2), the reference was to the "Council", that is, the Council of the League of Nations. Otherwise, the provision has remained unchanged. In many respects, the Courts may be treated as the same organization, for the Statute has remained substantially unchanged. However, the Permanent Court did not enjoy as high a status vis-a-vis the League of Nations as does the International Court in relation to the United Nations of which it is the "principal judicial organ". *See* U.N. CHARTER art. 92.

29. For an excellent discourse on the preparatory work of the statute, see DUMBAULD, *supra* note 4, at 144.

30. Goldsworthy, *supra* note 1, at 274.

31. *But cf.* the equally authoritative French text of article 41, which employs forms of the verb "indiquer" in both paragraphs. The preparatory work tends to demonstrate that it was the intention of the drafters to substitute "indicated" for "suggested" in article 41(2). The failure to do so was apparently a mere oversight. *See* DUMBAULD, *supra* note 4, at 145 n.3.

However, an "ordinary meaning rule" cannot be presumed to apply to the interpretation of the phraseology and terminology of article 41. The terminology of international law and the practice of international tribunals is rooted in diplomatic practice and diplomacy in general where a certain term may or may not be intended to mean what it means in ordinary usage. In such a case, a term might well be given an interpretation different from one which would likely flow from a municipal judge or practitioner. In diplomacy, if a choice is presented, the phrase or term carrying the least onerous connotation is usually chosen so long as that choice accommodates the parties' intentions. It has been observed often that the terminology of article 41 was based upon like provisions of the Bryan Treaties[32] and a similar provision in the Statute of the Central American Court of Justice.[33] The very reason that the Bryan provision was selected is probably because of the diplomatic flavor of the language.

In addition, one must consider the circumstances which attended the formulation of the Statute of the Court. Besides the practice of arbitral tribunals which had developed in regard to interim relief, and the powers afforded to the Central American Court, there were no other precedents applicable to a truly international court. The considerations which motivated the committee of jurists to adopt a particular term or provision were different from those which play a part in establishing an ad hoc or permanent arbitral tribunal, where the parties and the problems before the tribunal are fewer in number and, in the case of permanent arbitral tribunals, are of less magnitude in scope. The Central American Court, although a court of law, could hardly be considered a weighty precedent, because it dealt with a limited number of problems of states in a distinctive region.

Thus, one must observe that generally there was a lack of helpful and useful precedents to guide the drafters who must have been unclear as to many matters that came before them for possible inclusion in the Statute. Since the best way of resolving a certain question concerning the Court's powers was unclear because of lack of precedent or otherwise, it would have been unwise to obstruct the natural and

32. *See, e.g.*, in the Treaty for the Advancement of Peace of October 13, 1914, between Sweden and the United States, relating to dispute settlement. Article 4 reads in part as follows:

> In case the cause of the dispute should consist of certain acts already committed or about to be committed, the Commission shall as soon as possible indicate what measures to preserve the rights of each party ought in its opinion to be taken provisionally and pending the delivery of its report.

38 Stat. 1874.

33. For the text of the Convention, *see* [1908] AM. J. INT'L L. Supp. 231 (1908).

logical development of the Court's jurisprudence by the arbitrary grant or denial of a power whose significance was not fully understood or at least not fully agreed upon. It was obviously better that the Statute's drafters allow the Court the necessary flexibility to resolve such matters as they arise, rather than denying a power that might have proved essential to the successful functioning of the Court.

In light of this, the committee rejected a proposal[34] that an express compliance provision concerning interim measures be included in the Rules. It is unclear whether the proposal was defeated on the basis that the Statute, as worded, could not support such a provision, or for other reasons perhaps of a more practical nature. It is noteworthy that an apparent compromise was reached, as evidenced by the inclusion of a provision in article 57 of the Rules which allowed the Court to place in the record the fact that a party had failed to comply with interim measures.[35] On the other hand, there was never a provision to the effect that the measures were *not* binding. Perhaps the absence of any provision relating to compliance is best explained, as suggested above, on the assumption that it was better to leave unstated those matters upon which experts disagreed.

Another possible interpretation of the Statute suggests that the absence of an express provision should not, apart from the preparatory work, be taken too seriously because it is clear that a judgment is binding. The Court could be said to have the *inherent* power to render binding judgments, and express provision that judgments are binding would not cause those judgments to become more binding. However, there is no provision in the Statute which expresses this position.

There is some evidence that an arbitral tribunal would have an inherent power to render binding interim measures of protection. A fortiori, such a power would reside in an international court, absent a limitation upon such power. Although the mentioned disagreements within the advisory committee, as well as the inclusion of article 41, militate against the inherency of such a power; a more current view promoted by a member of the Court lends some cogency to this position.[36] If one assumes the Court to have at least the power to issue

34. This was the so-called Nyholm proposal. For a discussion of its history, see DUMBAULD, *supra* note 4, at 146-47.

35. The original rule 57 provided that "[A]ny refusal by the parties to conform to the suggestion of the Court . . . with regard to such measures, shall be placed on record."

36. See the declaration of Judge Nagendra Singh in the *Nuclear Tests Case, Australia v. France (Interim Protection)*, [1973] I.C.J. 99, 109. *See also* Judge Sir Gerald Fitzmaurice's separate opinion in the *Northern Cameroons Case*, [1963] I.C.J. 97, 103.

interim protection orders absent article 41, then the approach to an interpretation of article 41 will be a critical factor. In other words, a restrictive interpretation could lead to the conclusion that article 41 was imposed as a limitation upon any inherent power the Court would otherwise have. This conclusion is supported by the committee's rejection of both the compliance provision and the stronger terms "prescribe" and "order". Under a liberal interpretation, article 41 could be viewed as a mere restatement of the supposed inherent powers of arbitral tribunals. It then would not be a difficult step to conclude that interim measures were binding. From the absence of a provision directing compliance with a judgment, the fact that some members of the advisory committee were ostensibly of the opinion that article 41 could be used as a basis for a binding order, and the climate attending the formulation of the Statute and Rules; it is clear that there was no certain understanding at the time of the Court's formation concerning the binding nature of the interim measure orders which the Statute empowered the Court to make.

The practice of the Court to date indicates that it has favored a liberal interpretation of the language of article 41. For example, the Court at an early date held that it was empowered to render declaratory judgments, although there is no express provision in the Statute to that effect. Likewise, the Court's interpretation of its jurisdiction on a *forum prorogatum* theory supports this conclusion. [37] In connection with interim measures, it is significant that although rule 57 was repealed,[38] the Court nevertheless took note of the failure of Iceland to observe the measures in the *Fisheries Jurisdiction Cases*.[39] Moreover, even though the Statute does not expressly provide that a party may request interim measures, the Court has so provided under its general rule making power. This list of examples, which could be extended considerably, demonstrates that the Court has not been led by the Statute into a strict constructionist stance for interpreting the binding effect of interim measures.

37. On *forum prorogatum*, see *Minority Schools in Upper Silesia*, [1928] P.C.I.J., ser. A, No. 15; *Corfu Channel Case, (Preliminary Objection)*, [1948] I.C.J. 15. *See generally* 2 S. ROSENNE, THE LAW AND PRACTICE OF THE INTERNATIONAL COURT 344-63 (1965).

38. Under the original rules of 1922, rule 57 directed that a refusal to conform to an indication was to be made a matter of record. That directive was repealed in 1931, as a part of an extensive reexamination and amendment of the rules. For the text of the rules and explanatory comments, *see* 1 M. HUDSON, WORLD COURT REPORTS 77, 89 (1934).

39. United Kingdom v. Iceland, [1974] I.C.J. 3, 17; Federal Republic of Germany v. Iceland, [1974] I.C.J. 175, 188.

It appears from this brief review that the use of certain words and the absence of a compliance provision, although perhaps presenting ambiguities, do not and should not preclude an interpretation that interim measures are binding in international law.

III. JURISDICTION TO INDICATE INTERIM MEASURES OF PROTECTION

The issue of whether the Court has jurisdiction to indicate interim measures has been resolved under a rule which confers jurisdiction even if there exists only the possibility of jurisdiction over the merits. This rule is explained on the basis that an indication of interim measures is merely a "judicial suggestion".[40] This meager jurisdictional basis does suggest a corresponding lack of effect in orders issued pursuant to article 41.

There is a continued strong school of dissent to the majority's "possibility rule".[41] The dissenting position believes the Court should satisfy itself that jurisdiction as to the merits is "reasonably probable" before acting under article 41, either in entertaining requests for, or in the actual indication of measures. This approach is urged as being more consistent with the nature of the international adjudication of disputes. If jurisdiction is solely derived from the consent of the parties, and if there is a distinct possibility that the Court will determine at a later phase of a case that jurisdiction as to the merits is lacking, then, according to this view, vexation will be incurred in the interim by the party who successfully objects to the Court's jurisdiction. Moreover, the vexation would be irremediable because of the nonappealability of a Court order. The binding legal force of interim measures is implicit in this view.[42] It is highly doubtful that vexation in any other but the legal sense has been taken into consideration.

In the United States federal courts, which are empowered to issue the analogous but prima facie binding preliminary injunction, a rule similar to that promoted by the dissenting position is applied: the court must find that jurisdiction over the merits is "probable" before issuing

40. *See* note 15 *supra*, and accompanying text.

41. *See* the Joint Dissenting Opinion in *Anglo-Iranian Oil Co.* in which Judges Winiarksi and Badawi Pasha expressed opposition to the "possibility rule". *Anglo-Iranian Oil Co.*, [1951] I.C.J. 89, 96; *see also* Goldsworthy, *supra* note 1, at 263.

42. "Measures of this kind in international law are exceptional in character to an even greater extent than they are in municipal law; they may easily be considered a scarcely tolerable interference in the affairs of a sovereign State." *Id.* at 97. The reasoning was followed by Judge Padilla Nervo in his Dissenting Opinion to the interim order in *Fisheries Jurisdiction*, [1972] I.C.J. 12, 21.

the injunction pendente lite.[43] If on appeal the higher court finds that jurisdiction was not probable, the injunction will be set aside and is void *ab initio*.[44] There are, however, exceptions to this rule which illustrate why a judicial tribunal such as the International Court would utilize a possibility rule instead. In the United States system, if a question as to the merits is determined at the preliminary injunction phase to be grave and difficult, the lower court may legitimately issue an injunction pendente lite which binds the parties, even where jurisdiction is found on appeal to be lacking. Additionally, the court can issue *ex parte* a binding temporary injunction where the threat to the subject matter of the suit is imminent and substantial, before determining a doubtful question of jurisdiction.[45]

Certain of the same considerations which demand these exceptions weigh heavily on the International Court when it is faced with a request under article 41. Under the Rules, a request for interim measures is regarded as a matter of urgency. If the Court were required to determine whether its jurisdiction on the merits were probable, experience has shown that such a question could take months to decide. Further, when a jurisdictional question is raised in the Court, it will be regarded as a "grave and difficult" question. Actually, all jurisdictional questions which have been raised could be so classified. This treatment results from the Rules of the Court and from a self-imposed limitation dating from the early years of the Permanent Court. If it is at all feasible, the Court shall not prejudge in any preliminary phase the merits of the dispute in any way.[46] If the possibility of prejudgment should exist, the jurisdictional question shall be joined to the merits.[47]

This reveals a striking difference between the respective procedures in the United States federal courts and the International Court. In the former, there is no hesitancy to delve into the merits at the preliminary injunction phase, absent the exceptional circumstances discussed above. The danger of prejudging the merits, or of inappropriately restraining a party is obviated by the provisions for an appeal and a review of any decision on the merits. If the International Court

43. *See, e.g.*, A. H. Bull Steamship Co. v. Nat'l Marine Eng'r Beneficial Ass'n, 250 F.2d 332 (2d Cir. 1957). See also the views expressed by Harlan, J., in his dissenting opinion in *United States v. First Nat'l City Bank*, 379 U.S. 385, 390 (1965), and authorities cited therein.

44. *Id.*; *cf.* United States v. Shipp, 203 U.S. 563, 573 (1906); United States v. UMW, 330 U.S. 258, 292 (1946).

45. *See, e.g.*, American Federation of Musicians v. Stein, 213 F.2d 679 (6th Cir. 1954); Carter v. United States, 135 F.2d 858 (5th Cir. 1943).

46. *See* German Interests in Polish Upper Silesia, [1925] P.C.I.J., ser. A, No. 6.

47. *See, e.g.*, The Losinger & Co. Case, [1936] P.C.I.J., ser. A/B, No. 67, at 15.

were obliged to find that its jurisdiction as to the merits was reasonably probable, the danger of encroaching on the merits could become so pronounced that the Court would be faced with the dilemma of either considering the merits or delaying a request for interim measures until a later phase of the case such as the preliminary objection stage. The Court has always been a paragon of circumspectness with respect to jurisdictional and other procedural questions. It is highly unlikely that it would depart from that standard by addressing itself prematurely to the merits. However, if relief were postponed, the very purpose of interim relief would be rendered meaningless because the Court might find that there were no longer any rights to protect.

Even though at first blush the minimal jurisdiction requirements suggest that little legal effect should be accorded interim measures of protection, it would appear that the "possibility rule" has not been formulated because of an attitude toward the effect of interim measures. Rather, such a rule is necessitated by specific procedural rules and attitudes relating to the functioning of a court in the unique position of the International Court of Justice.[48]

IV. THE CASES: ATTITUDES OF THE COURT

Although article 59[49] of the Statute of the Court may be interpreted as preventing the operation of the rule of stare decisis, the Court

48. The preceding discussion is a practical justification for the use of the "possibility rule". The legal basis, however, for the rule is discussed by the Court in the interim measures phase of the case of *Interhandel*, [1957] I.C.J. 105. The interim measures phase is viewed by the Court as being distinct from later phases of the case. This may well follow from the Statute which places article 41 in the chapter entitled "Procedure". Thus, the Court need not be convinced of its jurisdiction over the merits to order interim relief. Judge Fitzmaurice was of the opinion that the power to indicate interim measures was an inherent power, and fell within the "incidental" jurisdiction of the Court along with other powers which were essential to the Court's functioning as a court. *See* Northern Cameroons Case, (Separate Opinion), [1963] I.C.J. 97.

One must question, however, whether the adoption of the "possibility rule" tends to show that the power to indicate interim relief is not an inherent power. In the first place, the inclusion of an express provision does not necessarily call for such a conclusion. For example, article 36(6) of the Statute provides that the Court may determine its own jurisdiction. Nevertheless, this *competence de la competence* is clearly an inherent power. In the second place, although the Court has not adopted a possibility test as to the exercise of any of its other inherent powers, it appears that the interim measures phase is sui generis. For example, it would be inappropriate to apply such a test to the power of determining the Court's jurisdiction, and equally inappropriate to apply it to the inherent power to issue a judgment.

49. Article 59 reads: "The decision of the Court has no binding force except between the parties and in respect of that particular case." Article 38(1)(d) provides that the Court in deciding disputes, shall apply judicial decisions with the admonition that such application is subject to article 59.

nevertheless has frequently cited the reasoning and holdings of previous cases to support or distinguish its decisions, and has found it necessary to reconcile what appear to be conflicting decisions. The Court clearly has attempted to render consistent decisions.

This section will review the interim measures cases in order to ascertain whether a discernible attitude has existed in the Court with regard to the binding effect of interim measures. The issue has never been expressly decided. However, if the cases clearly show that the measures are not intended to be binding, it is unlikely that the Court will depart from that stance when, if ever, it finds it necessary to determine the question directly.

A. The Permanent Court of International Justice

In the Permanent Court of International Justice, there was a marked hesitancy to indicate interim measures. If measures were not clearly binding, it is difficult to understand the reluctance to indicate them. On the other hand, if the measures imparted some obligation of compliance, legal or otherwise, then perhaps the hesitancy may be explained.

The cases where requests for interim measures have been denied may be divided into two broad categories. The first group is comprised of those cases in which the "circumstances" did not require an indication. The second group includes those cases where the request was not directed to preserving rights which may have been subsequently adjudged as belonging to a party, that is, requests having a purpose considered to be illegitimate.

As to the first group, the Permanent Court in the first case where article 41 was applied[50] laid down the rule that circumstances are to be judged by legal criteria.[51] This does not mean that the Court may not take into consideration a wide variety of factors in determining whether the circumstances are appropriate. What the rule does imply is that not all of the circumstances surrounding a case are necessarily considered relevant. To be sure, what is and is not relevant is difficult to delimit; circumstances obviously vary from case to case. However, it is still possible to generalize "relevance" to a certain degree, particularly in regard to the circumstance of whether the parties were previously bound to maintain the status quo.

50. Denunciation of the Treaty of 1865 between China and Belgium, [1927] P.C.I.J., ser. A., No. 8, at 6.

51. *Id.* at 11.

If the court order imposes an obligation upon the parties, the central question is whether the obligation is a legal one in the sense that a failure to comply would subject the recalcitrant party to damages at law. If the obligation is only a moral one and if the parties were already morally bound to maintain the status quo, then there would be no reason to issue an article 41 order. A fortiori, if the parties were legally bound, there would be no necessity of ordering interim relief, regardless of its binding nature.[52]

Thus, if the Court indicated interim measures in a situation otherwise involving only a moral obligation, such a response would be strongly supportive of classifying the effect of interim measures as legally binding. On the other hand, if the Court denied a request where the parties were only morally bound, the value of such a case to the topic under investigation is questionable. Such a case could indicate that the requested measures would impose no higher obligation on the parties. However, it could as easily show that the circumstances were legally sufficient to remove any necessity of indicating interim measures.

In the case of the *Denunciation of the Treaty of 1865*,[53] involving a dispute between Belgium and China over the latter's unilateral abrogation of treaty obligations, the Court originally indicated interim measures at the request of the Belgian government. There was no evidence that the parties were under any obligation relating to protection of the subject matter. Subsequently, the Court revoked its order following the conclusion of an interim agreement between the parties. The agreement provided expressly for the protection that the Court had ordered to obtain. This circumstance was held to remove the necessity for the interim measures.

Since the parties became legally bound to maintain the status quo, there was arguably no necessity for the imposition or continuation of any court ordered obligation regardless of its character. Nevertheless, the Court's original and subsequent orders contain some intriguing material relating to the effect of the measures.

The rights that the Belgian government was seeking to protect were, according to the Court, such that an infraction of those rights

> could not be made good simply by the payment of an indemnity or by compensation or restitution in some other material form . . . . [T]his being so, the object of the measures of

52. For discussion of whether under customary law the parties are bound to maintain the status quo pendente lite, *see* notes 25-27, 30 *supra*, and accompanying text.

53. [1927] P.C.I.J., ser. A., No. 8, at 6.

> interim protection to be indicated in the present case must be to prevent any rights of this nature from being prejudiced.[54]

This excerpt may be interpreted as indicating the Court's intent to afford Belgium a remedy which would impart legal consequences at least as cogent as a final judgment providing for the payment of an indemnity, compensation or restitution if Belgium's rights were infringed. The Court, immediately prior to the above quoted passage, recited the fact that the parties were subject to the optional clause, whereby the Court had compulsory jurisdiction over disputes relating to the nature and extent of reparation to be made for a breach of an international obligation.[55] However, because of the nature of the rights that were being adjudicated, a remedy other than reparations was necessary which could have imparted legal consequences different from those in a final judgment.

In its order revoking the measures,[56] the Court noted that the original order had been based upon the alleged rights given by the denounced treaty; because the parties had agreed to replace that treaty with an interim regime, the treaty could not

> serve as a basis for any claim *enforceable at law* and put forward on the ground of some violation of these rights during the period for which the new regime agreed upon between the parties might be applicable.[57]

At first glance, one may conclude that the Court was only addressing itself to the question of damages for breach of a treaty obligation, rather than the failure to comply with the interim measures. Obviously, Belgium could have demanded damages for such a breach. However, there was no submission at all relating to damages in the Belgian application,[58] and it is doubtful that the Court would comment upon an issue that had not been raised by the parties.

In sum, the case would seem to stand for the proposition that the Court was affording to the applicant a remedy cognizable by the Court and enforceable under the jurisdiction of the Court. By juxtaposing the Court's jurisdiction under the optional clause against the effects of a contingent violation of the rights, it may be asserted that the Court, by indicating interim measures, would continue its protective jurisdiction and would allow a remedy for any violation of these rights, even if such a remedy differed from those recognized under article 36(2).

54. *Id.* at 7.
55. *Id.*
56. *Id.* at 9.
57. *Id.* at 10.
58. *Id.* at 4.

The Court also noted that

> measures of protection, indicated by the Court as being for purely legal reasons rendered necessary by circumstances, cannot be dependent, as regards their applicability, upon the position of negotiations that may be in progress between the Parties.[59]

Thus, the order could only be revoked finally and in its entirety. The meaning of the quoted passage is unclear. It could mean that moral considerations were irrelevant. On the other hand, in view of later developments, the better view is that the "legal reasons" relate to the purpose of interim relief. The reason the Court exercises its power under article 41 is to preserve and protect alleged rights; whether such rights need protection is a matter which the Court, and only the Court, may determine.

In the case of the *Legal Status of the Southeastern Territory of Greenland*,[60] Norway's application for interim measures of protection was denied, and the Court refused to act *ex propiro motu*. The request was made to prevent Denmark from taking any measures of violence against Norwegian nationals in the territory, sovereignty to which was at issue in the underlying case. The Court noted first that the sovereign rights for which Norway was contending could not be affected adversely by the acts which Norway sought to prevent.

The Court next turned to the question of whether these acts could be the object of an interim protection order on the basis that one of the purposes of article 41 was to prevent regrettable incidents. The Court found that the circumstances were such that it was doubtful whether the acts would occur. Among the circumstances considered relevant were certain unilateral declarations made on behalf of each of the parties.

> [T]hese declarations, taken together, are indicative of the existence in responsible circles in both countries of a state of mind and of intentions which are eminently reassuring. . . . [T]hese intentions having been officially proclaimed before the Court, the latter must not and cannot presume that the

59. *Id.* at 11.

60. [1932] P.C.I.J., ser. A/B, No. 48, at 243. In this case, the Court admitted judges ad hoc to sit in the interim measures phase. If judges ad hoc were habitually admitted, this conceivably would have a bearing on the Court's attitude as to the effect of interim measures. In other words, if the measures are not binding, there would be little reason to admit judges ad hoc. However, the urgency factor, which will be of varying import in each case, would seem to deemphasize the relevance of the admission of or refusal to admit judges ad hoc to the question of effect. *Cf.* Hambro, *supra* note 17, at 162.

> two Governments concerned might act otherwise than in conformity with the intentions thus expressed . . . .[61]

Although the matter is not entirely free of doubt, it would appear that no legally binding relationship had arisen to prevent the parties from engaging in the acts in question. If the Court had simply denied the Norwegian request, this case would present an argument in favor of a finding that interim measures are not binding in law. However, the Court went on to note that the circumstances also included the General Act for Conciliation, Judicial Settlement and Arbitration which was in force between the parties and had as its object the prevention of extending or aggravating the dispute, the same object as the Norwegian request.[62]

In deciding not to act *ex propiro motu*, the Court considered as relevant the above-mentioned unilateral declarations, as well as the fact that any acts which were designed to change the legal status of the territory would not be irreparable. The inference is that if such acts were irreparable, interim measures would have been issued to insure an appropriate remedy at law in the same vein as the case of the *Denunciation of the Treaty of 1865*. This view finds further support in the relevance which the Court attached to the circumstance that the parties were both bound by the General Act for Conciliation, Judicial Settlement and Arbitration, under which the parties agreed to abstain from measures likely to aggravate or extend a dispute pendente lite. Under this treaty, the parties could seek, and the Court was conferred jurisdiction to enforce, an adequate remedy at law for acts or threats of the sort at issue in the matter.

Once again, it seems reasonable to draw the inference that the Court was equating the effect of an indication of interim measures with the stated effect of the compromisory clause of the General Act; that is, either would afford the parties a legal remedy under the continuing jurisdiction of the Court.

In the case of the *Administration of the Prince von Pless*, [63] Germany brought suit against Poland for alleged violation of certain treaty obligations respecting Upper Silesia. The German government subsequently requested an indication of interim measures to cause Poland to abstain from executing certain constraints against the Prince of Pless for nonpayment of income taxes. The Court later was informed that Poland had "annulled" the warrant of execution against

61. *Id.* at 286-87.
62. *Id.* at 287.
63. [1933] P.C.I.J., ser. A/B, No. 54.

the subject property. Additionally, the Court noted that Poland had declared that there would be no attempt to collect the taxes until the final judgment was rendered, and that Germany had declared that it was in agreement with the course adopted by Poland. Because of these circumstances, the Court ruled that the request for interim measures had "ceased to have any object."[64]

If the Polish government had persisted in its efforts to collect the taxes, the circumstances would have been appropriate for the indication of measures. The Polish declaration standing alone did not create an obligation flowing to Germany. However, by agreeing to this course of action, which was tantamount to withdrawing its request, Germany may be said, under principles of estoppel, to have entered into a legal relationship with Poland. If Poland had proceeded with collection after Germany's reliance, Poland could have been regarded as being in breach of an international legal duty owed to Germany.

The Court in its decision did not show the same concern for the existence or absence of legal remedies available under the jurisdiction of the Court as it had in the two previous cases. There were intimations in the opinion that the Court was not acting upon the German request at all, but rather upon the finding that the German request, for all practical purposes, had been withdrawn.

Finally, in the case of the *Electricity Company of Sofia and Bulgaria*,[65] the Court indicated interim measures at the request of the Belgian government directed against the respondent, Bulgaria. There was nothing in the opinion of the Court showing that the parties were bound to maintain the status quo either morally or by express agreement. Neither was there any intimation that the Court was affording a remedy at law where none existed previously. Rather, the Court for the first time noted that article 41(1)

> applies the principle universally accepted by international tribunals and likewise laid down in many conventions to which Bulgaria has been a party—to the effect that the parties to a case must abstain from any measure capable of exercising a prejudicial effect in regard to the execution of the decision to be given and, in general, not allow any step of any kind to be taken which might aggravate or extend the dispute.[66]

64. *Id.* at 154.
65. [1939] P.C.I.J., ser. A/B, No. 79, at 194.
66. *Id.* at 199.

This interpretation of article 41(1) is perhaps the most direct statement concerning the obligatory effect of interim measures; the parties are required by a general principle of law to maintain the status quo pendente lite. Even in light of this clear expression, the question of whether the Court's indication is superfluous remains to be considered. The quoted passage does indeed go far in supporting the view that article 41 is itself superfluous and that the Court would be able to indicate interim relief in its absence with all of the effects recognized under international law in general.

It is somewhat curious that the Court did not deny interim measures in this case since it recognized a general duty under article 41, and since Bulgaria, because of its past committments, would clearly be bound whether the duty were one imposed by "general principles of law recognized by civilized nations" or customary international law. As stated above, if the parties were legally bound to observe the purposes of article 41 relief, there would appear to be no necessity in indicating interim measures. The action of the Court, then, suggests that a crucial circumstance would be the existence of an express agreement between parties, which would bind the party against whom measures are directed. Additionally, the inference may be drawn that acts mandated by the obligations of the parties in respect to the maintenance of the status quo must be supervisable by the Court. Such would not necessarily be the case if the party were only bound under general principles of law. In other words, one may conclude from this case, as well as the *Sino-Belgium* and *Greenland* cases, that the Court views the effect of interim measures differently than it does those following from the general duty.[67]

Nothing in these Permanent Court cases poses a serious obstacle to the position according binding legal effect to interim measures. Rather, some of the cases raise the inference that indication of interim measures is intended to afford a legal remedy under the jurisdiction of the Court, or at least to create generally an obligation carrying legal consequences for failure to comply. On the other hand, the lack of clarity in the cases would not preclude a finding that only a moral obligation is imposed. Perhaps the most that can be concluded with any certainty is that the reluctance of the Permanent Court to act was indicative that some type of obligation was intended.

B. The International Court of Justice

The International Court appears to have departed from the Permanent Court's reluctance to indicate interim measures. However, the

67. *See* The Losinger & Co. Case, [1936] P.C.I.J., ser. A/B, No. 67.

four cases in which measures were indicated have been marked by the nonparticipation of the respondent in the proceedings, except for terse communiques in some instances. In spite of this deficiency, the Court did examine various issues as thoroughly as possible *ex propiro motu*.

In the *Anglo-Iranian Oil Co.* case,[68] the Court, at the request of the United Kingdom, awarded interim measures relating to the proposed Iranian expropriation of the assets of the company. The parties were under no type of express obligation to maintain the status quo, and there is no suggestion in the opinion of the Court that a legal remedy was being afforded to the United Kingdom.

However, the Court did order very specific measures to obtain, including one calling for the establishment of a board to see that the measures were carried out. The Court inplied that such an order was *ex abundante cautela* in that the measures "retain their own authority."[69] The implication is that the other measures carried with them a legally cognizable obligation of compliance. Because the Court found that it lacked jurisdiction over the merits, these measures lapsed.

In the *Interhandel* case,[70] the applicant, Switzerland, requested an interim measure which would prohibit the respondent, the United States, from taking any action which would change the ownership of shares of the Interhandel Company. Such a measure, if granted, would go directly to the underlying issue on the merits of the case. The ownership of the shares was at the time the subject of litigation, to which the United States was a party in the United States courts. In denying the request, the Court concluded that the

> sale of those shares can only be effected after termination of a judicial proceeding . . . of which there is no indication as to its speedy conclusion. . . . [The] sale is therefore conditional upon a judicial decision rejecting the claims of Interhandel.[71]

The Swiss request was apparently premised on the assumption that the sale of the shares was imminent. However, the Court relied on a statement of the United States government to the effect that sale of the shares was not presently contemplated. In the unlikely event that these assurances were breached and the shares sold before termination of the United States action, the status quo would be upset, and the applicant left virtually remediless. However, the reasoning of the Court did not shut the door to a future Swiss request, should the

68. [1951] I.C.J. 89.
69. *Id.* at 94.
70. [1957] I.C.J. 105.
71. *Id.* at 112.

situation become precipitous. The Court's reliance on the moral obligation of the United States might imply that the indication of interim measures would itself impose only a moral obligation on the respondent to preserve the status quo. On the other hand, the Court's apparent preparedness to reexamine the situation in case the circumstances should change, suggests that the question of interim measures was not foreclosed, and that interim measures could be ordered later as a greater obligation applied to more demanding circumstances. This view permits the case as a whole to live comfortably with the view that interim measures are legally binding.

In the *Fisheries Jurisdiction Case*,[72] the United Kingdom request for the indication of interim measures was granted in both general and specific terms. These terms included the imposition of a maximum on the catches of British fishing vessels in the disputed area and a provision that Iceland should not enforce its regulation in regard to the unilateral extension of the Icelandic fishery zone against British vessels in the area. Similar measures were indicated at the request of West Germany in the companion case.

At the time the measures were indicated there was no evidence that Iceland had assumed any express obligation with respect to maintenance of the status quo. Subsequently, negotiations commenced between the parties with a view to reaching an interim agreement relating to certain matters in issue. While negotiations were in progress, the United Kingdom in an extraordinary move petitioned the Court to affirm that the interim measures continued.[73] The Court, in complying with the request, noted that its original order of interim protection did not preclude an interim agreement even though it might differ from the Court order.[74]

The Court stated that the

> provisional measures indicated by the Court and confirmed by the present Order do not exclude an interim arrangement which may be agreed upon by the Governments concerned, based on catch-limitation figures different from that indicated as a maximum . . . and on related restrictions concerning areas closed to fishing, number and type of vessels allowed and form of control of the agreed provisions. . . . [T]he Court, pending the final decision, and in the absence of

72. [1972] I.C.J. 12.

73. United Kingdom v. Iceland, (Continuance of Interim Protection), [1973] I.C.J. 302. A similar action was taken in the German phase. *Id.* at 313. However, no provisional agreement was concluded between Germany and Iceland.

74. *Id.* at 303, 313.

> the such interim arrangement, must remain concerned to preserve, by the indication of provisional measures, the rights which may subsequently be adjudged by the Court to belong respectively to the Parties. . . .[75]

If the parties may depart from the court order, a view to which the Court apparently subscribed, then the order is not, in a sense, binding in law. If it were strictly binding, the Court alone would have power to revoke its own order. In this instance, the Court contemplated an *agreement* as a limited exception able to displace the order. This is not inconsistent with the purpose of interim measures, which is to preserve the subject matter pendente lite, a goal furthered by an interim agreement the parties might reach concerning the subject matter of the dispute. The Court did not imply that anything less than an agreement entailing the duty to comply would suffice. Rather, it stated that absent the interim agreement, the interim measures would continue.

An interim agreement was in fact reached which provided for a lower maximum on catches. In its final judgment on the merits, the Court did not characterize the effect of the interim agreement, or state whether the agreement had the effect of displacing the conflicting portion of the order which dealt with catch limitations. The measures may well have been rendered ineffective by the interim agreement, but the fact remains that such nullification was never declared even though the Court had the power to do so. Perhaps the very silence of the Court on this specific point should be taken as an indication that the measures lapsed. The Court may well have been concerned with the ruling in *Denunciation of the Treaty of 1865*, which held that the Court can only revoke such an order in its entirety; in *Fisheries Jurisdiction*, only the portion of the order relating to catches was covered by the parties' agreement.

It is also reasonable to conclude that the measures did not lapse at all, at least not until the rendition of the final judgment. There is, for example, a reference in the final judgment to the fact that Iceland had failed to comply with the measures, which tends to show that their operative effect had not lapsed.[76] Although a somewhat anomalous

75. *Id.* at 303-04.

76. There is nothing in the Statute or Rules authorizing the Court to take such notice. Significantly, the remark is found in the opinions in both cases where the Court is recounting the history of the disputes. Although the United Kingdom had maintained, as had West Germany, that the acts of the Icelandic patrol boats directed against her vessels was illegal, such submission was withdrawn. Certainly in *United Kingdom v. Iceland*, there was no necessity in recounting Iceland's recalcitrance toward the protective orders for purposes of the judgment. Because there was no necessity, it is doubtful that the Court would make such a remark unless it viewed the measures as binding as a

situation would exist where inconsistent obligations are working upon the parties, the Court's concern with its jurisdiction to oversee the preservation of the status quo could explain its silence.

As to the issue of bindingness per se, the following passage from the final judgment strongly implies that the Court views interim measures as requiring a legal obligation of compliance:

> An analysis of the [parties'] agreement, in the light of its object and purpose, reveals that it comprised two sets of obligations:
>
> (a) those obligations of a transitory character . . . by which the fishing vessels of the other contracting party were allowed to fish for a transitional period within areas of the outer 6 miles of the 12-mile fishery zone. Those provisions clearly have attained their objective and may be considered to have expired . . . ;
>
> (b) other obligations . . . which do not have a transitional character since for them . . . the parties did not provide any limitation *ratione temporis*.
>
> It is possible that today Iceland may find that some of the motives which induced it to enter into the 1961 Exchange of Notes have become less compelling or have disappeared altogether. But this is not a ground justifying the repudiation of those parts of the agreement the object and purpose of which have remained unchanged. Iceland has derived benefits from the executed provisions of the agreement. . . . Clearly it then becomes incumbent on Iceland to comply with its side of the bargain. . . . Moreover, in the case of a treaty which is in part executed and in part executory, in which one of the parties has already benefited from the executed provisions of the treaty, it would be particularly inadmissible to allow that party to put an end to obligations which were accepted under the treaty by way of *quid pro quo* for the provisions which the other party has already executed.[77]

The question of the exact legal effect of the Court's order remains. It may be that as long as the indication of interim measures is outstanding, the Court has jurisdiction to decide disputes relating to violation of the measures. On the other hand, it may well be that an independent basis of jurisdiction may be required, a violation of

matter of law. The Court in exercising its functions, is not concerned with the morality or political behavior of the parties.

77. [1973] I.C.J. 4, 62.

interim measures being shown to support an independent claim for reparation for an unlawful act.

In the companion case, *Federal Republic of Germany v. Iceland*,[78] the situation of the parties was virtually the same except in two important instances. First, no interim agreement between the parties was reached, and second, Germany submitted that Iceland should be held in principle to be under an obligation to compensate Germany for interference with its fishing vessels in the disputed areas of Iceland's fishery zone. Germany contended as the basis of this submission that certain acts of harrassment by Icelandic coastal patrol boats were unlawful under international law. However, those acts were also clear violations of interim measures previously indicated.

The Court, with surprising ease, noted first that it had jurisdiction to deal with the submission as it was a dispute relating to Iceland's extension of its fisheries jurisdiction,[79] and thus fell within the compromissory clause of an Exchange of Notes between the parties, upon which the Court's main jurisdiction had been held to obtain. The compromissory clause simply provided that any dispute relating to the extension of the fishery zone could be referred to the International Court of Justice at the request of either party.

As discussed above, the Court's jurisdiction to indicate interim relief and the Court's jurisdiction to decide the underlying dispute are founded upon different bases. If the Court finds that the former jurisdiction obtains, and if interim measures are legally binding, would it not follow that the Court could then entertain a claim for reparations for violation of the measures without the necessity of an independent basis of jurisdiction? Several of the previously discussed cases support the hypothesis that the Court had this in mind when measures were indicated. The question arises whether the Court's statements in connection with the West German submission destroy this hypothesis since the Court held that its jurisdiction for claims relating to acts clearly in violation of the protective order was founded upon the Exchange of Notes.

One need not assume that the *basis* of relief which West Germany submitted was solely the indication of the relevant measure. Rather, the basis was, albeit vaguely, "international law". Besides the Court's protective order, the general duty to maintain the status quo pendente lite under rules of international law may have been utilized to show the unlawfulness of the act. Moreover, the Court's conclusion that its

78. [1974] I.C.J. 175.
79. *Id.* at 203.

jurisdiction was based on the fact that the submission fell within the compromissory clause, did not preclude independent jurisdiction based on the Court's protective order. Since the German submission was abstract, it would have been untoward for the Court to have stated expressly that its jurisdiction obtained on that basis. However, considering the relative ease with which the Court did find jurisdiction, this may well have been in mind.

Finally, it should be noted that the Court did not make any statement relating to the basis of relief. Judge de Castro was of the opinion that the unlawfulness of Iceland's acts could have been based either on the fact that they occurred pendente lite or on the basis of the Court's protective order.[80] In other words, a violation of an interim measure would carry with it the responsibility of reparation. However, in his view, an independent basis of jurisdiction must clearly be shown, and the compromissory clause of the Exchange of Notes was too remote to establish such jurisdiction.

One may not quarrel with his finding that Iceland's acts upset the status quo. Such acts may well be quite remote from the underlying dispute, and as a matter of fairness, it does not seem unreasonable to require an independent basis of jurisdiction. However, where the Court has previously indicated interim relief, it is difficult to understand how these acts could be considered remote to the underlying dispute over which the Court has jurisdiction. Where parties have referred a dispute to the Court by consenting to its jurisdiction, the parties must be deemed aware of the possibility of related indications of interim measures. On the other hand, where one party merely alleges that certain acts were unlawful simply because they took place pendente lite, the principle that the Court only has jurisdiction if the parties consent thereto looms large.

Neither *Fisheries Jurisdiction* case appears to present any obstacle to concluding that there is a legal duty of compliance. Rather, *United Kingdom v. Iceland* strongly supports the position that interim measures may be viewed as substitutes for express agreements to maintain the status quo. The Court did not say that an agreement would have changed the circumstances so that the interim measures would not be appropriate, but even if this is the correct interpretation, the Court certainly did not indicate that a unilateral assertion would be sufficient to alter the circumstances.

80. *See* Federal Republic of Germany v. Iceland, (Separate Opinion), [1974] I.C.J. 225, 226.

The other broad category of cases in which requests for interim measures were denied were those in which the purpose of the request was found to be incompatible with article 41. These cases likewise pose no obstacle to a finding of a legal duty of compliance.

In the *Case Concerning the Factory at Chorzow*,[81] Germany's request for interim measures was denied because the request was found to be for an illegitimate purpose, that is, the award of an interim judgment.

The only other case falling clearly within this category provides an even better example of how the Court has dealt with this problem. In the case of the *Polish Agrarian Reform and the German Minority*,[82] the Court stated:

> [T]he essential condition which must necessarily be fulfilled in order to justify a request for the indication of interim measures should have the effect of protecting the rights forming the subject of the dispute submitted to the Court . . . .[83]

Germany contended that Poland was in breach of a certain treaty obligation by having applied its agrarian reform to persons of the German minority. On the other hand, the requested interim measures were aimed at securing a general suspension of the reform *in futuro* with respect to all members of the German minority. Thus, the Court concluded the measures were not designed solely to protect the rights which were the subject matter of the underlying action.

It can be inferred from the Court's opinion that the measures would have had not only some effect, but a substantial *legal* effect. The Court understood that the "interim measures asked for *would* result in a general suspension of the agrarian reform."[84] If the only effect envisioned were a moral one, the choice of "may" or "might" would seem to have been more appropriate.

This case best illustrates the most probable reason for the reluctance of the Court to indicate measures; since the measures impart legal consequences, the Court must be cautious before enforcing its power.

V. INTERIM MEASURES AS STATEMENTS OF GENERAL DUTY

In the case of *Electricity Company of Sofia and Bulgaria*,[85] the Permanent Court noted that article 41 was an application of a general

81. [1927] P.C.I.J., ser. A, No. 12, at 9.
82. [1933] P.C.I.J., ser. A/B, No. 58, at 175.
83. *Id.* at 177.
84. *Id.* at 178 (emphasis added).
85. [1939] P.C.I.J., ser. A/B, No. 79.

principle of law to the effect that parties to a dispute are bound to maintain the status quo pendente lite. Since the parties are already under a duty imposed by international law to preserve the status quo, it would not seem unreasonable to conclude that interim measures are superfluous.[86]

Another view which attempts to reconcile this principle with interim measures holds that the order of the Court is not legally binding, but imposes a moral obligation upon the parties to comply because the status of the Court demands at least some degree of respect.[87] Under this view, the order is characterized as a special type of advisory opinion; the Court advises the parties of what may be required to fulfill the duty imposed by international law, but such advisory statements are not binding, unlike the general duty to maintain the status quo. Since interim measures are not legally binding[88] according to this position, one must conclude that the measures cannot even raise a presumption that a general duty demands exactly what the Court orders. For if a presumption were created by virtue of the order, then this would clearly accord legal effect to interim measures. Alternatively, if the order does not even raise a presumption, the advisory opinion label must be one devoid of substance.

In characterizing the order as an advisory opinion, certain logical difficulties arise regarding orders and portions of orders framed only in general terms. Such orders would contribute no content to the general duty which they purport to specify. A case might arise where the applicant is contending in the alternative that damages are forthcoming on the basis of either the general duty or the Court's order. If the order is not binding, the Court's decision could well be to the effect that the respondent was not bound "to preserve and protect the subject matter," but is nevertheless liable in damages because by doing a certain act, the general duty to preserve the status quo had been violated. The incongruity of this position would be brought into even sharper focus if a state specifically pleaded the Court's order as its sole basis for relief.

If the Court were to specify what the parties should or should not do, this special form of an advisory opinion would give specific content to what, in the Court's opinion, was mandated by the "general duty". Yet here the result of the above hypothetical case could prove to be even more curious and embarrassing. The Court may be compelled to hold in a declaratory judgment that the recalcitrant party was

86. *See* text accompanying notes 65-67, *supra*; *cf.* CHENG, *supra* note 15, at 140-41, 273.

87. DUMBAULD, *supra* note 4, at 169.

88. *See generally* DUMBAULD, *supra* note 4.

not "legally bound", for example, to limit its fish catches to a specific tonnage; yet because that party failed to do so, the other party is entitled to damages because the general principle requiring maintenance of the status quo was violated. Again if the order alone were urged as the basis of relief, the applicant would lose. Under this view, the state against whom interim measures were directed could not rely on those measures as a statement of its duty, and yet it would act at its peril if it were not to so rely.

For this reason, it is doubtful that the Court would attribute the characteristics of an advisory opinion to its order.[89] The alternatives therefore are reduced to finding that the order is either a nullity or it imposes a legal or moral obligation. If the order is viewed as binding in law, one is still confronted with an overlapping "general duty". It would appear, however, that a reconciliation can be deduced quite easily. It is not unusual for a party to be legally required to do a certain act where the basis of the duty emanates from two independent sources. In addition, the Court could attribute effects to its orders which differ from those attributed to the general principle.

Electricity Company of Sophia and Bulgaria,[90] supports this proposition. The Court in that case recognized that the parties were under a duty to maintain the status quo, yet the Court indicated interim measures. The inference is that the effects were considered to be different. As discussed above, the order may establish continuing jurisdiction, relieving the applicant from the burden of showing some independent basis of jurisdiction, a burden which would have to be met if the applicant only contended that a general principle of law had been violated. Even if an independent basis of jurisdiction were held to be required, the applicant's burden would be lighter where the basis of relief was the violation of the order.

VI. DEGREE OF FINALITY

Even though interim measures may not entail a duty of compliance, the parties may stipulate through an agreement that measures are binding upon them.

Under article 94(1) of the Charter of the United Nations, states are understood to agree to comply with "the decision" of the Court in cases to which they are parties. Additionally, any failure to comply with a "judgment" may lead to sanctions imposed by the Security Council.[91]

89. *See* section VIII, *infra*.
90. [1939] P.C.I.J., ser. A/B, No. 79.
91. Article 94 reads:

By virtue of the failure of the respondent, Iran, to observe the specific measures indicated in *Anglo-Iranian Oil Company*, the applicant, United Kingdom, sought Security Council action under article 94. Although the Security Council did not act, no decision was made indicating the Council's position on whether interim measures fall within the purview of article 94. Security Council treatment of the matter was inconclusive, and as such, the case stands alone.[92]

It is likely that a decision of the Security Council not to act under article 94 would be motivated more by political than legal considerations, and its decisions would not be binding upon the Court in determining the legal effect of interim measures generally, although such a decision might have an impact upon an advisory opinion of the Court as to whether interim measures fall within article 94. If interim measures do fall within article 94, then they must be attributed a substantial legal effect. However, even if they do not fall within article 94, one may not conclude from that fact alone that a legal duty of compliance is precluded.

As the Court pointed out in *Anglo-Iranian Oil Co.*, the measures retain their own authority.[93] This would imply that interim measures have some effect regardless of their enforceability under article 94. If interim measures were found not to fall within article 94, a potentially effective means of enforcement would be lost. However, such a finding would require a strained interpretation. Although an indication of interim measures may be a "decision" in a general sense, it is hardly the "decision of the Court" anticipated in article 94. Likewise, it is hardly a "judgment". Both of these terms are obviously used in reference to the final decision or judgment on the merits.[94]

Under article 59 of the Statute of the Court, "the decision has no binding force except between the parties to the case." Since the Statute is an integral part of the Charter, there is no reason to believe that the terms "judgment" and "decision" have any different meaning there than they do under article 94. While it is clear that the relevant provisions of the Statute refer at least to the final decision on the

1. Each Member of the United Nations undertakes to comply with the decision of the International Court of Justice in any case to which it is a party.
2. If any party to a case fails to perform the obligations incumbent upon it under a judgment rendered by the Court the other party may have recourse to the Security Council, which may, if it deems necessary, make recommendations or decide upon measures to be taken to give effect to the judgment.

92. Much has been written about this aspect of the Anglo-Iranian dispute. *See, e.g.*, A. FORD, THE ANGLO-IRANIAN OIL DISPUTE OF 1951-1952, 124 *et seq.* (1954).

93. [1951] I.C.J. 89, 94.

94. Hambro, *supra* note 17, at 164.

merits,[95] there is little reason to conclude that article 59 states that only such decisions have binding force, although it has been so interpreted by some writers.[96] An interim measure would not have to be interpreted as a decision under article 59 to be binding. It is an order, and obviously orders may have substantial legal effects, even though they differ from final decisions.[97] Nevertheless, because interim measures are issued through orders, the position has been maintained that because of this fact, interim measures are not binding. This view is based upon a misinterpretation of a passage in an order in the *Free Zones Case*,[98] where the Court said:

> [O]rders made by the Court, although as a general rule read in open Court, due notice having been given to the Agents, have no "binding" force (Article 59 of the Statute) or "final" effect (Article 60 of the Statute) in deciding the dispute brought by the Parties before the Court. . . .[99]

The Court does indicate in the *Free Zones Case* opinion that an order would not be binding upon the parties.[100] However, a close reading of the statement reveals that the Court was merely expressing the rule that an order has no binding force *on the Court* in its ultimate decision on the merits of the dispute. In other words, under article 60 of the Statute, only the judgment on the merits has *final* effect. It has been observed that orders indicating interim measures may be modified or revoked, and thereby are not res judicata. However, the question is whether such an order has binding force on the *parties* in the absence of such modification. The binding effect of the interim order on the parties is entirely independent of the order's effect on the issuing court. The finding with respect to the binding effect of interim measures on the parties is simply irrelevant to a determination of the Court's powers in entertaining a final judgment which follows on the heels of an interim order.[101]

95. Article 59 is included in the section of the Statute pertaining to final judgments. Curiously, the word "judgment" is employed in every article of that section, except in article 59.

96. For a discussion of this view, *see* Goldsworthy, *supra* note 1, at 274.

97. *E.g.*, orders setting time limits. The subject matter of such orders is clearly procedural as it relates to the internal functioning of the Court. However, this should not call for a denigration of orders indicating interim measures when one recalls that article 41 falls under the heading of "Procedure" in the Statute.

98. [1929] P.C.I.J., ser. A, No. 22, at 5.

99. *Id.* at 13.

100. *Id.*

101. Other determinants, besides the Charter, of the legal effect of interim measures would be provisions of bilateral or multilateral conventions. The General Act for the Pacific Settlement of Disputes, article 33, provides that the parties agree to comply with interim measures indicated by the Permanent Court. This may be taken as a belief on the

VII. TERMINATION OF EFFECT

Whatever operative effects interim measures have, an obligation to comply ends with a finding that the Court has no jurisdiction, or upon the rendition of the final decision. It is not clear, however, whether the measures are void *ab initio* in a case where the Court finds that it does not have jurisdiction of the merits, and whether, in the case of rendering a final judgment, the measures could not furnish the Court jurisdiction in some instances. The effect of "lapse" in both of these areas is important to the question of whether the Court may entertain a claim for damages arising from violation of interim measures.

In the *Anglo-Iranian Oil Co.*[102] case, the Court, on finding jurisdiction lacking, stated that the interim measures lapsed "upon the delivery of this Judgment."[103] However, it is merely speculative to

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part of the parties that no duty of compliance otherwise existed. It may, on the other hand, merely be an expression of what is implicit in article 41 of the Statute, or an effort to clear up the ambiguities discussed above, which inhere in the effect of interim measures. For text of General Act, see 93 L.N.T.S. 345, 357. For other examples, see 6 HACKWORTH DIGEST INT'L L. 117-18 (1943).

In the *Nuclear Tests* case, involving a dispute between Australia and France over the latter's detonation of nuclear devices in the South Pacific, Australia requested interim measures of protection ordering France to desist from such activity. The Australian request was based upon article 41 of the Statute and article 33 of the General Act, to which both of the disputants were allegedly parties.

Article 33(1) of the General Act provides:

> In all cases where a dispute from the object of . . . judicial proceedings, and particularly if the question on which the parties differ arises out of acts already committed or on the point of being committed, the Permanent Court of International Justice, acting in accordance with Article 41 of its Statute, . . . shall lay down within the shortest possible time the provisional measures to be adopted. The parties to the dispute shall be bound to accept such measures.

Because the General Act was also being urged as a basis for the jurisdiction of the Court as to the merits, and because France contended it was not bound by the General Act, the Court determined whether interim measures were appropriate solely from the standpoint of article 41. The question arises as to whether, if a provision such as article 33(1) were applicable, the approach of the Court would be different from the situation which exists when only article 41 is applicable.

This is related to the question whether the effect of interim measures should be viewed differently in the case where the parties have submitted a dispute to the Court by special agreement, as opposed to a case where jurisdiction is disputed.

It seems that the Court would not utilize such a distinction as a justification for attributing different legal effects to interim measures. The Court has made it clear that the sole criterion for determining its jurisdiction is the consent of the parties thereto. In other words, there is no difference in theory between the various methods the parties may choose to place a dispute under the Court's jurisdiction. *But cf.* 2 O'CONNELL, INTERNATIONAL LAW 1094 (2d ed. 1970). *See* Hambro, *supra* note 17, at 161. Moreover, even though a dispute is referred to the Court by special agreement, a party is not precluded from contesting the Court's jurisdiction although such action would be highly unlikely. *Cf.* Case of the Monetary Gold Removed from Rome in 1943, [1954] I.C.J. 19.

102. Anglo-Iranian Oil Co. Case, (Preliminary Objection), [1952] I.C.J. 93.

103. *Id.* at 114.

assert that this statement was meant as a formal adoption of the practice, familiar in United States courts, of regarding a preliminary injunction as remaining operative until the finding on jurisdiction is made.[104] If measures were to remain operative until the judgment on jurisdiction or the final judgment is rendered, this might seem to encourage frivolous claims. The history of the Court indicates that frivolous claims have not often confronted the Court. In the event frivolous claims are brought, the Court must determine prior to any indication of measures that its lack of jurisdiction is not "manifest"; most frivolous claims could be disposed of under that rule.

Finally, it may be posited that parties to the Statute of the Court have accepted the Court as an arbiter of disputes and have agreed to be subject to all of its inherent powers and must abide with the exercise of them until the Court determines through the appropriate processes and procedures the issues presented to it, whether procedural or substantive. The Court has made clear that its jurisdiction to indicate interim measures is, for all practical purposes, independent of its jurisdiction over the merits. Jurisdiction to indicate measures would appear to be more closely related to the inherent power of an international tribunal to determine its own jurisdiction than to the doctrine that jurisdiction is conferred through the consent of the parties.[105]

There is one exceptional case, however, in which interim measures may have no effect at all and would be void *ab initio* regardless of their basis in the inherent power of the Court. Such a case would arise where the Court determines that it has no jurisdiction because there is no "dispute". This follows from the language of article 41 and the qualification that a dispute must exist before measures can be indicated even under the inherent power of international tribunals. In other words, if there is no "dispute", there is no "case". Again, in most instances this issue of whether there is a dispute could be treated and decided under the Court's "possibility" rule. But even where this is not feasible, the Court should treat the issue, if it arises, as "pre-preliminary" and decide it at least provisionally before ordering interim measures.

In the case where a state X request for measures is granted but state X loses on the merits of the dispute to state Y, an even stronger case can be made that state X might still have an action against state Y on the basis of violation by state Y of the interim measures. In this hypothetical situation, the Court would have jurisdiction of the under-

104. *See* United States v. UMW, 330 U.S. 258, 290 (1946). *See also* Carter v. United States, 135 F.2d 858, 861 (5th Cir. 1943).

105. *See* note 48, *supra*.

lying dispute. Moreover, the purpose of interim measures is not to preserve the subject matter in favor of only the winning party, but also to preserve it in order for the Court to be able to render a final decision. Thus, the measures protect both the applicant and the respondent.[106]

106. Assuming that an indication of interim measures imposes a legal obligation of compliance, the consequences of a failure to comply with the order must be examined. Doubtlessly, an interim measure could be utilized as a basis for holding that a particular act in violation of the measure was illegal. For example, in the German phase of *Fisheries Jurisdiction*, the illegality of the action of Icelandic patrol boats could be proved by showing that such acts were in violation of the interim order.

In examining the question, Hambro was of the opinion that when a party fails to observe the measures, such party would be liable for damages caused by the failure to comply. Hambro's position appears to be that the other innocent party would be entitled to damages if an injury could be shown, the burden of proof being on the recalcitrant party. *See* Hambro, *supra* note 17, at 170. The indication of interim measures is clearly for the benefit of the parties and logically would impose a duty of mutual benefit. However, a case might arise where an order has been violated without any ascertainable injury having been suffered by the other party. Since the measures are not only for the benefit of the parties, but also of the Court, it would appear that some remedial action could still be taken. In the previous hypothetical situation, there would be no obstacle to the Court's imposing any of the following forms of punishment: 1) imposition of a fine; 2) reduction of the amount of damages that the winning recalcitrant party is entitled to; 3) increasing the amount of damages due the innocent winning party. In the case of a declaratory judgment, the first option could be utilized and the fine awarded to the innocent party.

Hambro also takes the position that if the winning party, either on the jurisdictional question or the merits, has complied with the interim measures directed primarily against such party, then the Court should require the losing but innocent party to compensate the winning party for any damages that the winning party had suffered by complying with the measures. *Id.* at 170-71. This position is somewhat difficult to accept. In the first place, the measures are for the benefit of the Court and for the benefit of each party whether it wins or loses. Secondly, it is somewhat novel to suggest that a party be paid for complying with a duty that the law imposes, and which of necessity will limit the freedom of action of that party.

Hambro's suggested rule is justified in part on the basis that it will prevent frivolous, light hearted claims. *Id.* at 171. If a request were frivolously made, it is submitted that interim measures never would be indicated, even if the respondent had nothing at all to do with the proceedings. Moreover, if the claim as to jurisdiction were frivolous, even the Court's "possibility rule" would preclude the indiciation of interim measures. *See* text following note 104, *supra*.

As to the jurisdictional question, that is, where the Court decides it has no jurisdiction over the merits and has previously directed interim measures against the party who successfully challenges such jurisdiction, it is incorrect to infer that such party would have won on the merits. Moreover, the party who wins on the jurisdictional issue has accepted in some form the Court, as well as the fact that the jurisdiction to indicate interim measures is distinct in many respects from jurisdiction as to the merits.

To be sure, a hypothetical case could be devised that would support the Hambro rule of compensation. For example, state *A* seises the Court of a dispute with state *B* which is not a member of the United Nations, not a party to the Statute, and which in no other way has manifested its consent to the jurisdiction of the Court. If the Court indicates interim measures and state *B* complies therewith to its detriment, it would seem that the only fair result should be to require state *A* to compensate state *B* when

VIII. THE COURT'S SELF-IMAGE, JUDICIAL AND INSTITUTIONAL

Based upon the above observations, the Court could conclude that interim measures are legally binding upon the parties. Some of the barriers to this position could be cleared with ease, others with considerable agility. On the other hand, the Court could find just as easily and consistently with previous decisions, that measures are not legally binding.

In view of the previous work of the Court, it is certain that a legalistic approach will be followed on any issue. This does not mean that the Court is blind as to extralegal considerations, but such considerations have been recognized by the Court only in legal contexts. This feature is most clearly evidenced in the Court's advisory function. In deciding whether it should undertake a function which is clearly discretionary under the Statute, the Court has been influenced greatly by its relationship to the United Nations of which it is an integral part. The declaration of an advisory opinion represents the participation of the Court in the work of the United Nations as a whole, and a request "in principle, should not be refused."[107] Although there are certain political overtones to this function of the Court, the Court has made it clear that its judicial character must always be preserved.[108]

One may dismiss immediately the suggestion that the Court would characterize the indication of interim measures as an advisory opinion. While the rendering of an advisory opinion does fulfill a valid purpose in light of the status of the Court in the United Nations, the issuing of protective measures relates solely to the Court's judicial

the Court decides it has no jurisdiction over the merits. Yet this case will remain hypothetical. The Court would not indicate interim measures in the first place, for it is clear that even under the "possibility rule", the Court would hold that it lacked jurisdiction to indicate interim measures. Consider a similar action on the part of the Court, except that state *B* is a party to the Statute but has not filed a declaration under article 36(2), nor is there any basis for jurisdiction under article 36(1). It is almost certain that the Court would not indicate interim measures, even though it may be said that there is the "possibility" that the Court, under a *forum prorogatum* theory, may be able to secure jurisdiction of the underlying dispute. *Cf.* Treatment in Hungary of Aircraft and Crew of United States of America (U.S.A. v. U.S.S.R.), [1954] I.C.J. 103. However, some act of the respondent, which would reasonably justify the possibility of jurisdiction *forum prorogatum* may be brought to the attention of the Court. In such a case, if the Court indicated interim measures, the respondent, on the basis of the previous discussion, would not be entitled to relief where it complies with the jurisdictional issue. Because of its act, such party should be held to have accepted the possibility that the Court would indicate interim measures.

107. Interpretation of Peace Treaties, [1950] I.C.J. 65, 71.

108. *See, e.g.*, Judgments of the Administrative Tribunal of the I.L.O., [1956] I.C.J. 77, 84.

function. The criteria applied to the granting of an advisory opinion, which is not binding, would not be applicable to the indication of interim measures. The Court's status as a coequal organ of the United Nations necessarily precludes it from assuming a superior role to the other organs. Although article 41(2) directs the Court to communicate a notice of the indication of interim measures to the Security Council, it is clear that the indication in no way binds the Council. Conversely, because of the equality, a finding by the Security Council that such an indication did not fall within the ambit of article 94, would have no effect upon the Court, except perhaps as a matter of fact in rendering an advisory opinion.

One must not lose sight of the fact that in addition to the Court's role as a "principal organ" in its own right, it is also the principal *judicial* organ of the United Nations.[109] The Court has been as to its judicial functions extremely cautious and protective. It frequently has stated the opinion that the Court is a court of law or of justice. What emerges from this continuing characterization is that the Court will not imply, as to its judicial function, limitations upon its powers, or purposely restrict the legal efficacy of its acts unless there is an express prohibition in the Statute or in the Charter. When considering the functions of the Court as the principal judicial organ of the United Nations, the stress must be upon the word "judicial".

This basic factor has also played an important role in several decisions of the Court. For example, in the *Case Concerning the Northern Cameroons*,[110] the Court refused to exercise its jurisdiction because, according to the Court, its judgment on the merits would have no legal effect. The Court stated:

> The function of the Court is to state the law, but it may pronounce judgment only in connection with concrete cases where there exists at the time of adjudication an actual controversy involving a conflict of legal interests between the parties. The Court's judgment must have some practical consequence in the sense that it can affect existing legal rights or obligations of the parties, thus removing uncertainty from their legal relation. No judgment on the merits in this case could satisfy these essentials of the judicial function.[111]

In the *Case of the Free Zones*[112] the Court said:

109. U.N. CHARTER art. 92.
110. [1963] I.C.J. 15.
111. *Id.* at 33-34.
112. [1932] P.C.I.J., ser. A/B, No. 46, at 96.

> After mature consideration, the Court maintains its opinion that it would be incompatible with the Statute, and with its position as a Court of Justice, to give a judgment which would be dependent for its validity on the subsequent approval of the Parties.[113]

In its advisory opinion in *Eastern Carelia*, it was observed that the Court, "being a Court of Justice, cannot, even in giving advisory opinions, depart from the essential rules guiding their activity as a Court."[114]

The above excerpts from *Free Zones* and *Northern Cameroons* apply specifically to judgments, but the generality and broadness of these pronouncements could easily be applied to indications of interim measures.

These considerations regarding the Court's status would weigh heavily in any determination the Court might make concerning the legal effect of interim measures. If the language of article 41 can be overcome, and it appears that it could be, the above declarations suggest that the Court will not permit its judicial pronouncements to be void of legal effect.[115] Having acted under article 41, or by virtue of its inherent powers, the Court, when faced with the characterization of the legal effect of interim measures, would likely feel compelled to accord binding legal consequence to its indication.

IX. CONCLUSION

In the final analysis, the International Court of Justice is itself the only potential arbiter of the legal effect to be accorded interim meas-

113. *Id.* at 161.

114. [1923] P.C.I.J., ser. B, No. 5, at 29.

115. [I]t would not be in conformity with the august character of the Court as an "organ of international law" and as the "principal judicial organ of the United Nations" . . . to make any decision that the parties were free to respect or to ignore according to their own pleasure.

Hambro, *supra* note 17, at 165-66. It is somewhat remarkable that Hambro alone has considered this to be a relevant factor in interpreting the legal effect of interim measures of protection. This writer's position differs on this point from Hambro only in respect to the ultimate resolution of the question. In his opinion, "it is not the Court's own jurisprudence which decides whether the measures impose legally binding obligations on the parties." *Id.* at 154-55.

The attempt here has been to suggest objectively the better view as to interpretative problems, and the weight to be accorded various factors. However, if the International Court of Justice decided in a case that measures were not binding per se, would not that decision settle the question, in spite of article 59 of the Statute? To be sure, there is the possibility that the Court in acting under article 41 or its supposed inherent powers, purposely may not impose an obligation of compliance. For example, in a number of interim orders the exhortative word "should" is found instead of "shall" or "must", or their equivalent. This feature could be utilized by the Court to find the order nonbinding.

ures. Such a determination could be achieved through an advisory opinion or contentious case involving either a declaratory judgment or a claim for damages or restitution.

Considering the attitude of the Court in its previous declarations in similar cases, it may be concluded that interim measures have some effect. Although they are not res judicata, they do enrich or diminish a party's legal position so that a party's affirmative action aimed at relief and recognized as valid under international law would be justified, or monetary or restitutionary liability for a violation of an order indicating interim measures would be entailed. To hold that interim measures have no legal effect would be tantamount to rendering them nullities.

It is clear that the award of interim measures has no legal effect on the Security Council of the United Nations and, by the same token, the practice of the Council under article 94 of the Charter would have no bearing upon the legal effect of awards issued by the Court.

Although the Court is not a political organ, and although it does not make political decisions, it cannot be unmindful of the role it plays in international relations.

The Court will base any decision it makes on law; this has been expressly recognized in relation to questions raised by interim measures. However, if such measures were declared to be nothing more than judicial suggestions, the efficacy of utilizing the Court, and the stature of the Court would be sorely impaired. The Court of course is concerned with the extent of its influence, for it does and should take into consideration the international political effect of its legal decisions.

If there were only a minimal legal justification for according binding legal effect to interim measures, there is no doubt of the decision which the Court would reach. However, in light of the above discussion, it appears that there are many factors substantiating the position that consequential legal effects attend interim measures.