SEPARATE OPINION OF JUDGE WEERAMANTRY

This case focuses attention on the question of the binding nature of provisional measures more sharply and urgently than almost any other in the history of this Court or of the Permanent Court of International Justice. As the Court stresses in its Order delivered today, "the present perilous situation demands . . . immediate and effective implementation" of the measures contained in its Order of 8 April 1993 (para. 59). Today's Order also has my full support.

The important question of the binding nature of provisional measures is veiled in some obscurity as both academic and judicial writing speak upon it with an uncertain voice. As this case pre-eminently demonstrates, the matter urgently needs examination for, so long as present uncertainties continue, the Court is hampered in the full discharge of the judicial functions entrusted to it by the United Nations Charter and the Statute of the Court.

THE FACTUAL BACKGROUND

I note preliminarily the concern the Court has expressed regarding the sufferings of the people of Bosnia-Herzegovina which, despite several resolutions of the Security Council, are such as to "shock the conscience of mankind and flagrantly conflict with moral law and the spirit and aims of the United Nations" (para. 52). The Court's apprehensions at the time of the Order of 8 April of an aggravation or extension of the dispute before it, far from being alleviated, have been "deepened by the persistence of conflicts on the territory of Bosnia-Herzegovina and the commission of heinous acts in the course of those conflicts" (para. 53).

This opinion will deal with so much of the factual material placed before it as is pertinent to a consideration of the question of law under discussion and of the urgency of the need for its resolution. This examination becomes necessary in the light of the provision of Article 41 of the Statute of the Court that the Court shall have the power to indicate provisional measures "if it considers that circumstances so require". The examination of facts that follows takes place only within the ambit of that phrase.

The ensuing brief statement regarding the facts will show that, given the highest standards of caution demanded for making a provisional assessment for the purpose of interim measures, these standards are satisfied in this case by the material placed before the Court. The essential facts are recounted in the barest outline, so that the question of law addressed in this opinion may be seen in its proper and realistic context. This examination of the facts being of a purely provisional nature, does not involve any definitive findings nor does it affect the decision on the merits that will need to be made at a later stage of this case.

The Applicant has placed before the Court information from a diversity of independent sources in support of its contention that, after the date of the Court's Order of 8 April 1993, there has been a continuing series of acts which constitute a clear violation of that Order. This material can be classified into three groups — accounts and descriptions carried by the international media, statements emanating from neutral and independent observers, and statements issued by the Respondent Government and by the Government of the Republic of Serbia.

For the purpose of the provisional assessment which follows, it is not necessary to take into account the first group of materials. The plethora of reports placed before the Court, which were carried by well-known international media, dealt with shelling, destruction of ancient mosques, supplies from Yugoslavia to the Serbs in Bosnia, and murder, rape and torture on an extensive scale. However, since, in a complex international situation such as this, media reports by themselves may be an uncertain guide, they have not been taken into account in this assessment. This approach stems also from the natural caution that needs to be exercised in judicial fact-finding, even though it be of a provisional nature.

In the second category are statements emanating from disinterested sources such as officials of the Office of the United Nations High Commissioner for Refugees (UNHCR), the Chairman of the United States Senate's Committee on European Affairs, Helsinki Watch, an EC mediator, the Director of the United States Bureau of Refugees Program, and various United Nations officials. The acts referred to in these statements, all of them subsequent to the Court's Order of 8 April this year, include the massacre of women and children in a "heinous policy ... nothing short of genocide" (Chairman of United States Senate's Committee on European Affairs, 9.4.93); the shelling of Srebrenica with shells set to explode in mid-air to wreak the greatest havoc on people caught in the open (UNHCR official, 13.4.93); the wounding of large numbers of civilians, resulting in bodies and parts of bodies, some in gruesome condition, being loaded onto ox carts and wheelbarrows after such an attack (Canadian United Nations official, 15.4.93); atrocities committed in Bosnia-Herze-

govina by Serbian military and paramilitary forces (Second Report of Helsinki Watch, 17.4.93); the shelling of Sarajevo with an intensity such that United Nations officials logged 1,200 shells exploding by mid-morning (United Nations officials in Sarajevo, 4.7.93); the bombing of mosques as a prelude to "ethnic cleansing" campaigns (UNHCR official, 9.5.93); the presence of 1.4 million refugees in Bosnia whose food supplies, already at starvation levels, would be cut in half by the fighting (UNHCR, 1.7.93); the reduction of a town of 6,000 people to 50 people wandering around (UNHCR official, 10.5.93); the killing of 1,400 children and the wounding of 13,000 more (United Nations officials in Sarajevo, 5.7.93); the involvement of the Yugoslav National Army in at least part of the shelling of Srebrenica (Chairman of United States Senate's Committee on European Affairs, 20.4.93); the passage of supplies to the Bosnian Serbs through Belgrade (EC mediator, 19.4.93); assistance to the Bosnian Serbs by helicopter missions flown from Yugoslavia (military specialist at King's College, London, 24.6.93); and the rape of women numbered in the tens of thousands (Helsinki Watch, 8.6.93). The items set out above represent only a portion of the material placed before the Court. Some of these statements are accompanied by circumstantial details, sometimes of a lurid nature, to which it is not necessary for present purposes to refer. Cumulatively, the material in this second category is more than adequate to justify a provisional finding sufficient for the purposes of this request.

The third category of materials consists of statements in official communiqués issued in the period 8-11 May 1993 by the Respondent Government and the Government of the Republic of Serbia. These are contained at pages 43-49 of the second request for the indication of provisional measures, dated 27 July 1993.

Among the statements contained in the first communiqué of the Republic of Serbia is the description of the current conflict in Bosnia-Herzegovina as a "just battle for freedom and the equality of the Serbian people". The Republic states that it has provided aid in "funds, fuel, raw materials, etc." to the Serb Republic in Bosnia at great sacrifice to itself. There is also a statement that the Republic of Serbia has been

> "unreservedly and generously helping the Serb Republic in spite of the enormous problems it had to face due to sanctions introduced

against it by the UN Security Council" (second request by Bosnia, p. 43).

This information must be read with the communiqué issued by the President of the Republic of Serbia, released by the Yugoslav telegraph service on 11 May 1993 and carried by the BBC in its summary of World Broadcasts on 13 May (second request by Bosnia, p. 46). This asserts that in the past two years the Republic of Serbia has made massive efforts and substantial sacrifices to assist the Serbs outside Serbia. The communiqué continues: "Most of the assistance was sent to people and fighters in Bosnia-Herzegovina." The international sanctions are described as brutal, and solidarity is expressed with the Serbs in Bosnia-Herzegovina. Sufficient reason exists, according to the communiqué, to halt the war as "Most of the territory in the former Bosnia-Herzegovina belongs now to Serb provinces." The communiqué reiterates that the Serbs in Bosnia-Herzegovina have achieved most of what they wanted owing to the "great deal of assistance" they received from the Republic of Serbia.

The communiqué, issued by the Federal Government of Yugoslavia (*ibid.*, p. 44), expresses its "indignation and profound concern" that the Republic of Sprska (i.e., of the Serbs in Bosnia) had decided not to accept the Vance-Owen Plan but to leave it to a referendum among the Serb people of Bosnia-Herzegovina. In view of this, the Federal Republic announces that it will reduce its future aid to the Republic of Sprska "exclusively to contingents of food and medicaments".

Such material placed by the Applicant before the Court must naturally cause grave concern regarding the Respondent's compliance with the Court's Order of 8 April. It is not difficult in the light of this material to reach a provisional finding that the conditions of Article 41 are satisfied for the activation of the Court's provisional measures jurisdiction.

By way of contrast to the range and independence of the sources cited by the Applicant in support of its assertions of fact, the assertions of fact by the Respondent lack that basis of wide and impartial support but depend mainly upon a report compiled by the Yugoslav State Commission for War Crimes and Genocide. There can be no doubt regarding the considerable sufferings currently being undergone by the Serbian people in Bosnia-Herzegovina and this must necessarily be of deep concern to the Court. Yet the matter under examination is non-compliance with the Court's Order of 8 April, and there is an insufficiency of independent material sufficient to show such a non-compliance by Bosnia.

IS THE ORDER OF 8 APRIL 1993 LEGALLY BINDING?

Against the background of the foregoing summary of the bases for a provisional finding, this opinion proceeds to consider the legal question of the binding nature of provisional measures. As a learned writer on the subject of interim measures has observed of the inter-war literature on the subject, it presents "the picture of an extremely colourful — not to say confusing — mosaic of opinions"[1]. Such a picture is not in the interests of international justice.

The problem is not an easy one. On the one hand, there is the lack of an opportunity for a definitive finding of fact and, on the other, the compelling need for a steadying hand to be applied to prevent irreversible damage to a party. These are powerful considerations to be balanced against each other and call for consideration from a variety of perspectives, not the least of which is the importance of achieving the purposes of international justice which the Court was created to fulfil. This is thus a question whose importance transcends the matter presently before the Court, important though it be.

(a) *Binding Nature of a Provisional Order as Distinguished from its Enforceability*

As the lack of mechanisms for enforceability sometimes clouds discussions of the binding nature of the orders of this Court, a consideration of the binding nature of provisional measures must start with the clear distinction that exists between the question of the legal obligation to comply with an order and the question of its enforcement[2]. The fact that an order cannot be enforced does not in any manner affect its binding nature, for the binding nature of an order is inherent in itself. It imposes a positive obligation recognized by international law. Whether such an order is complied with or not, whether it can be enforced or not, what other sanctions lie behind it — all these are external questions, not affecting the internal question of inherent validity.

In the *Anglo-Iranian Oil Co.* case, this Court, having ordered interim

[1] Jerzy Sztucki, *Interim Measures in the Hague Court: An Attempt at a Scrutiny*, 1983, p. 283.

[2] See *ASILS International Law Journal*, Vol. 9 (1985), p. 176; and see Jerome B. Elkind, *Interim Protection: A Functional Approach*, 1981, p. 157, for an instance cited by the author of a blurring of these issues even in learned discussion.

measures, subsequently held it had no jurisdiction on the merits[1], but, in the meantime, the United Kingdom, the applicant in the case, took the matter to the Security Council, seeking enforcement under Article 94 of the Charter. This attempt failed and, through a blurring of the distinction here being made, this failure at *enforcement* became "the focal point for commentary on various aspects of interim measures, and particularly on the question of whether there is a *duty of compliance*"[2]. The Court, while enjoining the parties, went out of its way to point out that those measures "in any case retain their own authority"[3]. It is to be noted also that decisions of the Security Council as to whether it will enforce an order or not are not determinative of the question whether the order imposes a legal duty[4].

Even in domestic law, the positivistic view that a sanction is essential to its validity has long been left behind. Modern research, both jurisprudential and sociological, has shown the inherent validity of a law to be independent of the existence of a sanction to enforce it. This is doubly so in regard to international law.

Indeed, it scarcely needs mention that in international law the Austinian view that a sanction is necessary to the existence of a rule of law, or of a legal prescription, has always been particularly inappropriate. The treatment of provisional measures as not imposing legal obligations because the Court has no power of enforcement is thus untenable. Viewed in this light, a provisional measure, no differently from a final order, if pronounced by a court according to due forms and processes and within its jurisdiction, is inherently valid and as such carries with it a duty of compliance.

When this Court, duly acting within its authority and jurisdiction, indicates provisional measures, it is in the expectation that those measures will be complied with, in accordance with international law. Their violation must therefore be viewed with great concern. The question of the obligation to comply must at all times be sharply distinguished from the question of enforceability.

---

[1] *Anglo-Iranian Oil Co., Interim Protection, I.C.J. Reports 1951*, p. 89; and *Anglo-Iranian Oil Co., Judgment, I.C.J. Reports 1952*, p. 114.

[2] C. H. Crockett, "The Effects of Interim Measures of Protection in the International Court of Justice", *California Western International Law Journal*, Vols. 6-7 (1975-1977), p. 350; emphasis added.

[3] *Anglo-Iranian Oil Co., Interim Protection, I.C.J. Reports 1951*, p. 94.

[4] See Crockett, *op. cit.*, p. 376.

(b) *Binding Nature of Provisional Orders as Resulting from the Inherent Authority of a Judicial Tribunal*

The function of a judicial tribunal, once an issue has been brought to it, is to take the necessary steps according to law towards reaching a decision in accordance with the principle of the equality of parties. This presupposes that the issue brought to it, once committed to the court, must as far as possible be preserved in that form, free of interference by unilateral action of a party, until the determination made by the court. It means also that the principle of equality cannot be disturbed by the superior force available to one party, wherewith to impair or interfere with the subject-matter until determination. It is thus inherent in the authority of that tribunal that, ancillary to the power of judgment, it must have power to issue incidental orders to ensure that the subject-matter of the suit is preserved intact until judgment.

Such a power would of course be completely negatived if a party were under no legal obligation to obey such an order and were therefore free to disregard it. In certain cases, as one writer puts it, this could "make a mockery of the jurisdiction on the merits" [1]. The anomaly is even greater where the unilateral action of a party is of such an order as to destroy the subject-matter which is in litigation before the court. Even stronger is the case where such action threatens to destroy or undermine the very existence of a party.

To take the view that a court seised of a matter has no power to act in the face of a unilateral threat to the subject-matter by one of the parties before it would appear then to result in the contradictory situation of the court on the one hand having jurisdiction to hear a case and on the other being denied the effective and necessary authority to discharge the task which has thus been validly entrusted to it. To view procedural measures as not binding on the parties is to enable the ground to be cut under the feet not only of the opposite party but also of the court itself. A reasonable construction, in total context, of the judicial powers entrusted to the court does not seem capable of sustaining such a meaning. The rule under discussion has been described as a "principle of institutional effectiveness" [2].

[1] J. Peter A. Bernhardt, "The Provisional Measures Procedure of the International Court of Justice through *U.S. Staff in Tehran: Fiat Iustitia, Pereat Curia?*", *Virginia Journal of International Law*, Vol. 20, No. 3 (1980), p. 303.

[2] V. S. Mani, "Interim Measures of Protection: Article 41 of the ICJ Statute and Article 94 of the UN Charter", *Indian Journal of International Law*, Vol. 10 (1970), p. 362.

Support for the universality of such a conceptual approach is to be found in *Electricity Company of Sofia and Bulgaria.* This Order recites:

> "Whereas the above quoted provision [Article 41 (1)] of the Statute 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" (*P.C.I.J., Series A/B, No. 79,* p. 199).

The Court has also expressed concern that its Judgment should not be anticipated by unilateral action of a party. In the *Aegean Sea Continental Shelf* case, it observed:

> "Whereas the power of the Court to indicate interim measures under Article 41 of the Statute presupposes that irreparable prejudice should not be caused to rights which are the subject of dispute in judicial proceedings and that the Court's judgment should not be anticipated by reason of any initiative regarding the matters in issue before the Court" (*I.C.J. Reports 1976,* p. 9, para. 25).

Any interpretation of the relevant provisions of the Charter, the Statute or the Rules in a sense that provisional measures do not impose legal obligations on the party at whom they are directed thus does not accord with the structural framework of judicial power.

Conceptual reasons such as this persuaded Hambro, one of the early Registrars of this Court, to the view that the power to act by way of provisional measures is a part of judicial power already existing in principle, apart from specific provisions to that effect. In his words:

> "The Court in exercising its authority under Article 41 does only in effect give life and blood to a rule that already exists in principle."[1]

The same author argues that, under general principles of international law, all States parties to an international dispute *sub judice* are under an absolute obligation to abstain from all acts that would nullify the result of the final judgment or aggravate or extend the dispute[2].

---

[1] Edvard Hambro, "The Binding Character of the Provisional Measures of Protection Indicated by the International Court of Justice", in *Rechtsfragen der Internationalen Organisation, Festschrift für Hans Wehberg zu seinem 70. Geburtstag,* 1956, p. 167.

[2] *Ibid.,* p. 168.

Hence, Hambro reaches the conclusion that:

> "it 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" [1].

This argument is taken yet further by other scholars who argue that the binding nature of interlocutory injunctions and similar measures is a rule universally recognized and as such may even be considered to be a "general principle of law recognized by civilized nations" under Article 38 (1) *(c)* of the Court's Statute[2]. It is of interest that some influential early writers on this topic shared this view. Thus Dumbauld[3] and Niemeyer[4] saw the duty to observe interim provisional measures as existing independently of the Statute and as therefore lying upon the party in question even if the Statute had contained no such provisions dealing with this matter.

Niemeyer describes it as a basic normative principle *(Norm-Grundsatz)* that:

> "from the moment that, and as long as, a dispute is submitted to judicial decision and one is awaited, the parties to the dispute are under an obligation to refrain from any act or omission the specific factual characteristics of which would render the normative decision superfluous or impossible" (translation)[5].

Account must, however, be taken of the fact that a number of eminent writers, including A. Hammarskjöld, another early Registrar, have expressed a strongly contrary view[6]. Among the factors weighing with them are their stress upon the word "indicate", the lack of enforceability and the location of Article 41 in the Chapter of the Statute dealing with

---

[1] Hambro, *op. cit.*, pp. 165-167.

[2] See, for example, Elkind, *op. cit.*, p. 162. Elkind, indeed, makes this proposition the central theme of his treatise on the subject — see Chapter 2 of Elkind's work in which he cites Anglo-American, Roman, Soviet and Hindu law in support of this proposition.

[3] *Interim Measures of Protection in International Controversies*, 1932, pp. 173-177.

[4] *Einstweilige Verfügungen des Weltgerichtshofs, ihr Wesen und ihre Grenzen*, 1932, pp. 15-16.

[5] "Sobald und solange ein Streit einer richterlichen Entscheidung unterworfen und eine solche zu erwarten ist, haben sich die streitenden Parteien jeder Handlung und jeder Unterlassung zu enthalten, deren Faktizität die normative Entscheidung überflüssig oder unmöglich machen könnte." (*Op. cit.*, p. 16.)

[6] See A. Hammarskjöld, "Quelques aspects de la question des mesures conservatoires en droit international positif", in *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, Vol. V (1935), p. 5.

procedure and such matters as the language of the Court — thus suggesting that it was not of importance in a substantive sense.

However, such considerations, each of which may no doubt be separately answered [1], seem to be outweighed by the conceptual factors already outlined and the linguistic and other considerations which follow.

The importance of the conceptual considerations discussed above becomes apparent when, from a practical standpoint, one looks at the gravity of causes for which the provisional measures jurisdiction of the Court is used — prevention of irreparable prejudice or injury; of action in a manner so as to render the final judgment nugatory; of destruction of the subject-matter; and of aggravation of the dispute. The gravity of each of these reasons reinforces the view that the Court's power, once exercised, cannot still leave the parties free to act as though unrestrained.

The view that provisional orders are part of the inherent authority of a judicial tribunal is thus one which is sustainable on general principle, on practical necessity, and on the basis of a not inconsiderable body of authority. Principles that may be invoked in support of such a view include the principle of equality of parties, the principle of effectiveness, the principle of non-anticipation by unilateral action of the decision of the Court, and also the wide and universal recognition of the enjoining powers of courts as an inherent part of their jurisdiction.

(c) *Binding Nature of Provisional Measures as Resulting from the Terminology of the Charter, the Statute and the Rules of Court*

The language of Article 41 of the Statute uses the word "indicate" rather than "order" in relation to provisional measures, thus opening up discussion as to whether it is less binding in its nature than other decisions.

---

[1] In relation to the argument that the positioning of Article 41 in the procedural portion of the Statute in some way weakens its power, Professor Greig points out that:

> "it could even more strongly be argued that Article 41 is placed under the heading procedure because the governing principle is not to be found in Chapter II, but as part of the Court's inherent incidental jurisdiction. Article 41 is, therefore, as set out in the Permanent Court's judgment in the *Electricity Company* case, an expression of that principle and the means of giving effect to it." (D. W. Greig, "The Balancing of Interests and the Granting of Interim Protection by the International Court", *Australian Year Book of International Law*, Vol. 11 (1991), p. 131.)

It is useful to examine this question from the standpoint of the other relevant terminology which appears in the Statute and the Rules of Court. There are several avenues along which this linguistic examination can be approached.

(i) *The word "indicate"*

The original draft of Article 41, in French, prepared by Mr. Raoul Fernandes, used the word "ordonner"[1] which too appeared as "order" in the English translation. Mr. Fernandes' suggestion that such order should be supported by effective penalties did not meet with the approval of other members of the Advisory Committee such as Elihu Root, de Lapradelle and Lord Phillimore, and a new draft was submitted wherein the words "pourra ordonner" were replaced by "pouvoir d'indiquer" with an English translation reading "power to suggest". At the Fifth Meeting of the Sub-committee, Mr. Huber of Switzerland insisted on a stronger term than "suggest" and the word was replaced by "indicate"[2].

This drafting history shows that the Court's power goes beyond mere suggestion or advice, but carries some connotations of obligation. Indeed, the French word "indiquer" probably goes even further in this direction than the English word "indicate", for one of the meanings of "indiquer" is "to draw up (a procedure, etc.); to dictate, prescribe, lay down a line of action, etc.)"[3].

(ii) *The word "ought"*

To be noted first of all is the fact that, within the context of Article 41 itself, one finds the word "ought" being used in reference to the provisional measures that are indicated. The word "ought" carries the connotation of an obligation, and takes the matter further in the direction of a duty being imposed than does the word "indicate" taken by itself. A reference to the French version of the Statute rather strengthens this conclusion, for it uses the word "doivent" which carries the implications of "should" or "ought" in the sense of the existence of a duty[4]. Indeed, a perusal of standard dictionaries shows that the word "devoir", whether used as a verb or as a noun, carries heavy overtones of duty or obligation, as in "it is your duty to honour your parents" or "do your duty come what may" (for the verb) or *(a)* "duty" as to do one's duty; *(b)* "obligation" as the obligations of a citizen (for the noun). Though these meanings do not by themselves

[1] P.C.I.J., Advisory Committee of Jurists, *Procès-Verbaux of the Proceedings of the Committee, June 16th- July 24th, 1920*, 28th meeting, Annex No. 3, p. 609.
[2] *Documents of the 5th Meeting of the Third Committee*, Annex 16, p. 172.
[3] *Harrap's Standard French and English Dictionary*, Vol. 1, p. I:18.
[4] *Ibid.*, p. D:53.

convey the idea of a *legal* duty, it is clear that both the English "ought" and the French "doivent" considerably reinforce the word "indicate".

Approaching the matter from another angle, another writer observes:

> "In Hohfeldian terms a legal right imports a correlative legal duty. Thus the word 'ought' in the phrase 'measures which ought to be taken to preserve the respective rights of either party' would seem to refer to a legal duty." [1]

This argument of correlative connotations assumes relevance also in relation to the word "power".

(iii) *"Mesures conservatoires"*

Further reinforcement is given to this stronger meaning when we see that the expression "provisional measures" in English is again weaker than the French expression "mesures conservatoires", which gives more emphasis than the English phrase to the importance of preserving the subject-matter without damage. While the English words taken by themselves may seem to stress the provisional aspect of these measures, the French expression stresses more clearly what the whole exercise is about — namely the preservation intact of the subject-matter of the case. Indeed, in the English translation of Mr. Fernandes' original draft, the words "mesures conservatoires" were correctly translated as "protective measures" [2], but while the expression "mesures conservatoires" remained constant through altered French versions of the provision and still remains in Article 41, the English translation switched to the weaker expression "provisional measures" which of course does not exactly parallel the French text.

The discrepancy between the English and the French texts was the subject of comment at a meeting of the judges of the Permanent Court when they discussed the amendment of the Rules relating to provisional measures. Sir Cecil Hurst noted the phraseology "mesures conservatoires" and "interim protection" in the two versions and expressed a doubt as to whether the two expressions exactly corresponded [3]. The Registrar then drew attention to the different expressions used in English in Article 41 of the Statute and Article 57 of the Rules as they then existed,

[1] Elkind, *op. cit.*, p. 153.
[2] See Elkind, *op. cit.*, p. 44.
[3] *Acts and Documents concerning the Organization of the Court, Second Addendum to No. 2*, p. 253.

for the rendering into English of the expression "mesures conservatoires"[1].

(iv) *The word "power"*

Perhaps more conclusive than all of these in reinforcing this interpretation of something more than a mere moral duty, is the use at the commencement of the Article of the word "power". If all that Article 41 enables the Court to do is give exhortations to parties, which are of a non-binding nature, the use of the word "power" in enabling the Court to do so is difficult to understand. One needs power to impose a binding obligation but one does not need "power" to give exhortatory advice. One cannot see the Statute as solemnly investing the Court with special power under Article 41 if the sole object of that power was to proffer non-binding advice, which the parties were perfectly free to disregard. A word with such heavy connotations as "power" must clearly have been meant to give the Court an authority it did not otherwise have — an authority to impose on parties an obligation which, without such a word, would not be binding on them.

Power, in the language of analytical jurisprudence, means that those on whom that power is exercised are under a duty to comply with the exercise of that power, for, if no duty were to result, there would be no need for the exercise of "power". The well-known Hohfeldian analysis of rights, which has received wide acceptance, classifies liability as the jural correlative of power[2], thus indicating that, when a legal power is exercised, a legal liability ensues to comply with that exercise of power. Such considerations lead to the conclusion that "indications" issued under Article 41 carry more than a merely moral duty to comply with the measures indicated[3].

(v) *The description of less significant measures as orders*

Another approach to the question is along that of the interesting argument adduced by Hambro that orders made by the Court under Article 48 of its Statute, which are described as orders in the Article itself, and which relate to comparatively minor matters such as the form and time in which each party must conclude its arguments are undoubtedly enforceable under Article 53 of the Statute. Hence, the "much

[1] *Acts and Documents concerning the Organization of the Court, Second Addendum to No. 2*, p. 253.

[2] On the Hohfeldian analysis and the many writers upon it, see *Salmond on Jurisprudence*, 12th ed., 1966, p. 225.

[3] Elkind, *op. cit.*, p. 153.

more solemn and serious orders under Article 41" should be binding as well[1].

A misunderstood passage in this context is the following from *Free Zones of Upper Savoy and the District of Gex:*

> "[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 . . ." (*P.C.I.J., Series A, No. 22*, p. 13.)

The Court was there merely giving expression to the principle that "an order has no binding force *on the Court* in its ultimate decision on the merits"[2].

(vi) *The undertaking to comply with "decisions" of the Court in terms of Article 94 of the United Nations Charter*

By Article 94 (1) every Member of the United Nations undertakes to comply with the *decisions* of the Court in any case to which it is a party. When the Court decides to indicate provisional measures is it making a decision?

An indication that provisional measures are treated as a decision by the Court itself is their description as such in Articles 74 (2), 76 (1) and 76 (3) of the Rules of Court. As Hambro argues, interim measures are certainly treated as decisions by these Articles[3].

Also to be noted is that the French expression "pour statuer d'urgence", appearing in the French version of Article 74 (2) of the Rules of Court, conveys the idea of making a decision or judgment. In Articles 76 (1) and 76 (3), however, the French version uses the same word "décision".

One notes in this context the statement of one of the most eminent writers on the jurisprudence of the Court who, in discussing whether the obligation derived from Article 94 (1) of the Charter is wide enough to embrace interlocutory orders, has observed that "the word 'decision' in the Charter refers to all decisions of the Court, regardless of their form"[4]. This would include provisional orders as well.

---

[1] Hambro, *op. cit.*, p. 170.
[2] See Crockett, *op. cit.*, p. 377, emphasis added.
[3] Hambro, *op. cit.*, p. 170.
[4] Shabtai Rosenne, *The Law and Practice of the International Court*, 1985, p. 125; see, also, Rosenne, *The International Court of Justice*, 1957, p. 82, to the same effect.

In this context, it is to be noted that Judge Elias has also expressed the view that an indication of preliminary measures has the same force as a judgment since it is at least an interim judgment[1]. This supports the view that provisional measures have been treated by the Court as a judgment.

Many routes of internal analysis of the relevant instruments thus lead to the same conclusion, namely, that an indication of provisional measures by the Court is not merely a formula of exhortation but a *decision* exercised under the *powers* of the Court which imposes an *obligation* on the party to whom they are directed, which is of a legal and binding nature.

Nor does this conclusion, reached upon a purely linguistic analysis of the phraseology used in the Court's instruments, lead to a conclusion which is other than one eminently suited to the purpose and the function of the judicial process, especially as it is exercised at the highest international level through the International Court.

(d) *Binding Nature of Provisional Measures as Inferred from Decisions of the Court*

We are not on clear ground here, but there is much that is suggestive of the Court's implicit acceptance of the binding nature of provisional measures, quite apart from the Court's treatment of provisional measures as "orders" or "decisions" in its internal practice.

In *Nuclear Tests*, for example, the Court recited without comment the pleadings of the Australian Government that

> "in the opinion of the Government of Australia the conduct of the French Government constitutes a clear and deliberate breach of the Order of the Court of 22 June 1973" (*Nuclear Tests (Australia* v. *France), I.C.J. Reports 1974*, p. 259, para. 19).

While this was, of course, the position of Australia and not of the Court, the selection of this averment and its reproduction without adverse comment leaves room for inferring that the Court gave that position its tacit endorsement. As Sztucki observes:

> "the Court is responsible for its own selection of quotations and for supplying them with, or leaving them without, a commentary. The quoted passage from the Court's order can therefore be inter-

[1] Taslim O. Elias, *The International Court of Justice and Some Contemporary Problems*, 1983, p. 79.

preted as a tacit and indirect endorsement of the applicant's position."[1]

The marked lack of affirmative decisions of the Court on this matter is another factor attracting attention to the importance of a consideration of this question. There is a paucity also of dicta of judges of the Court in separate opinions, declarations or dissents.

Among other judicial dicta to the same effect, we should note the declaration of Judge Ignacio-Pinto in *Fisheries Jurisdiction*[2] where, with reference to interim measures ordered by the Court, he viewed certain later incidents involving numerous clashes in the disputed fishery zone as acts which "constitute so many flagrant violations on either side" of the operative part of the Orders in question.

The Permanent Court commented in the *Polish Agrarian Reform* case that the interim measures requested would result in a general suspension of agrarian reform in so far as concerns Polish nationals of German race[3]. The implication of such an observation could well be that in the Court's view the interim measures sought would have a legally binding effect.

The often-quoted statement of the Permanent Court in *Free Zones of Upper Savoy and the District of Gex* that such order had "no 'binding' force ... or 'final' effect ... in deciding the dispute brought by the Parties before the Court"[4] does not have the conclusive effect it is sometimes represented as having, as pointed out earlier in this opinion. That statement was restricted to the impact of those measures on the final order. Clearly an interim order does not have a binding force or final effect upon the eventual decision of the dispute as it is clearly interlocutory and provisional.

From the recent jurisprudence of this Court, perhaps the case of *Military and Paramilitary Activities in and against Nicaragua* could best be cited as indicative of a duty lying on a party to take "seriously into account" provisional measures indicated by the Court and "not to direct its conduct solely by reference to what it believes to be its rights"[5].

---

[1] Jerzy Sztucki, *op. cit.*, pp. 272-273.

[2] *Fisheries Jurisdiction (United Kingdom* v. *Iceland), Interim Protection, I.C.J. Reports 1973*, p. 305.

[3] *P.C.I.J., Series A/B, No. 58*, p. 178.

[4] *P.C.I.J., Series A, No. 22*, p. 13.

[5] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), I.C.J. Reports 1986*, p. 144, para. 289.

(e) *Binding Nature of Provisional Measures as Inferred from Extra-judicial Writings of Judges of the Court*

Judges of this Court, writing extra-judicially, have contributed much to the view that provisional orders are binding.

Judge Jessup, in his foreword to an academic work which reaches the conclusion that such orders are binding, has given that conclusion the weight of his support by observing that the author "weighs the pros and cons and soundly concludes that such orders are binding"[1].

Sir Gerald Fitzmaurice observes:

> "The whole logic of the jurisdiction to indicate interim measures entails that, when indicated, they are binding — for this jurisdiction is based upon the absolute necessity, when the circumstances call for it, of being able to preserve, and to avoid prejudice to, the rights of the parties, as determined by the final judgment of the Court. To indicate special measures for that purpose, if the measures, when indicated, are not even binding (let alone enforceable), lacks all point . . ."[2]

Judge Lauterpacht, while strongly of the view that the Statute did more than impose a purely moral argument, also expressed some reservations:

> "It cannot be lightly assumed that the Statute of the Court — a legal instrument — contains provisions relating to any merely moral obligations of States and that the Court weighs minutely the circumstances which permit it to issue what is no more than an appeal to the moral sense of the parties. At the same time, the language of Article 41 of the Statute precludes any confident affirmation of the binding force of the measures issued by it under that Article . . ."[3]

Judge Hudson of the Permanent Court in his treatise wrote that the word "indicate" "is not less definite than the term *order* would have been, and it would seem to have as much effect"[4].

---

[1] Philip C. Jessup, Foreword to Elkind, *op. cit.*, p. XIII.
[2] Fitzmaurice, *The Law and Procedure of the International Court of Justice*, Vol. II, 1986, p. 548.
[3] Sir Hersch Lauterpacht, *The Development of International Law by the International Court*, 1958, p. 254.
[4] Manley O. Hudson, *The Permanent Court of International Justice, 1920-1942*, 1943, p. 425.

AN HISTORICAL OVERVIEW

This has thus far been a strictly legal analysis. However this Court cannot lose sight of the human factor which looms large, particularly in a case such as that which is now before the Court. It is an aid to this necessary dimension in the appreciation of a legal problem to take a glance at the great historical processes that brought this Court into existence. The Permanent Court, set up in the aftermath of the most devastating conflict the world had seen, embodied the aspirations of a war-torn generation anxious to put behind them the horrors of international lawlessness and to enthrone international law. They sought to achieve this through a Court operating internationally on the model of the superior courts which ensured the rule of law at a domestic level.

Despite strong contentions in favour of a jurisdiction more closely modelled on the analogy of a Supreme Court, the Statute of the Court drafted by the Advisory Committee of Jurists did not give the Court the full judicial powers normally associated with a court of superior jurisdiction. Worthy of recall in this context is the speech of Mr. Lafontaine of Belgium, regarding the jurisdiction of the proposed court. This speech was made at the 20th plenary meeting of the First Assembly on 13 December 1920 on the occasion of the presentation of the report of Committee III on the Permanent Court of International Justice. He lamented the failure of the proposed Statute to vest the Court with fuller jurisdiction.

The speaker reminded the Committee that an expectant world had been "long ago told that the creation of an International Court would be the only effective antidote to the dread supremacy of force" [1]. His speech is deeply relevant to contemporary discussions of the powers of this Court.

> "In such circumstances I feel how poor a thing is my eloquence. We need a Demosthenes, a Mirabeau, a Jaurès on this platform. I call upon you to listen to the sound that comes to you from beyond these walls, a great moaning like to that of the sea. It is the voices of the mothers and the wives who are mourning for those whom they have lost. It is the voice that rises from the peoples, the working masses who are weary of the miseries and of the plagues which are striking them and continue to strike them.... It is the voice of those who are sleeping buried on the battlefield, who have given their youth and sacrificed hope and joy in order that there might be justice in the world.
>
> Nevertheless, we have obtained in the Statute submitted to you the

[1] *Documents concerning the Action Taken by the Council of the League of Nations under Article 14 of the Covenant and the Adoption by the Assembly of the Statute of the Permanent Court*, 1920, p. 232.

> means of accepting a compulsory jurisdiction of the Court. I hope that those who sign the Protocol, I trust that all the Delegations here present, will accept the provisions of Article 36."[1]

These are poignant words — words whose poignancy matches that of the circumstances before us. They highlight the very problem now before the Court.

That jurisdiction, though not as complete as many had desired when the Statute of this Court was first formulated, has yet been worked, through nearly 70 years of jurisprudence, to evolve a not insubstantial body of international law which has served a valuable role in preserving international peace. To give to those powers, incomplete as they are, a meaning which attenuates them further by denying the Court the authority to conserve its own jurisdiction through provisional measures of a binding nature, when another equally sustainable interpretation is possible, is a step away from the idealism which gave birth to the Court.

Moreover, times have changed since the era, more than 70 years ago, when for the first time in world history an international court was created. Manley O. Hudson captured the pressures of those times when he wrote in his treatise:

> "The term *indicate*, borrowed from treaties concluded by the United States . . . possesses a diplomatic flavor, being designed to avoid offense to the 'susceptibilities of States'. It may have been due to a certain timidity of the draftsmen."[2]

There was then a natural hesitancy in taking on this new jurisdiction which was as yet untried. That natural hesitancy in that incipient phase of the Court's jurisdiction led to weak interpretations which have left their legacy to this day. Many decades of creative work since then enable a more confident interpretation of the powers of the Court.

The words under examination, as shown in the earlier part of this opinion, are thus, in accordance with accepted rules of legal construction, clearly capable of bearing the meaning that they impose a legal obligation[3]. That is an interpretation supported also by sound legal principle

---

[1] *Documents concerning the Action Taken by the Council of the League of Nations under Article 14 of the Covenant and the Adoption by the Assembly of the Statute of the Permanent Court*, 1920, p. 233.

[2] Manley O. Hudson, *op. cit.*, p. 425.

[3] As Hudson observed in continuation of the passage already cited:

> "An indication by the Court under Article 41 is equivalent to a declaration of obligation contained in a judgment, and it ought to be regarded as carrying the same force and effect." (*Op. cit.*, p. 426.)

and by the universal acceptance of nations. It is a principle which the Court, at this stage of its jurisprudence, can confidently assert. It should of course be clear at all times that the Order is only provisional, is not a final finding of fact and leaves untouched the matters that await the final decision of the Court upon the merits.

To view the Order made by the Court as anything less than binding so long as it stands would weaken the régime of international law in the very circumstances in which its restraining influence is most needed.

* * *

For the reasons set out, the provisional measures ordered by the Court on 8 April 1993 imposed a binding legal obligation on the Respondent. Non-compliance with that Order endangers the very subject of the dispute before the Court and can cause irreparable harm to the Applicant. This irreparable harm is not in regard to rights and duties such as are often the subject of litigation, for we are here dealing with matters under the Genocide Convention, touching the very existence of a people. An interpretation which imposes anything short of a binding legal obligation upon the Respondent is out of tune with the letter and spirit of the Charter and the Statute.

(Signed) Christopher Gregory WEERAMANTRY.