The Balancing of Interests and the Granting of Interim Protection by the International Court

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The role of members of the International Court, and indeed of the Court itself, is usually perceived in terms of a duty of judicial impartiality in deciding the issues in dispute between parties to cases brought before the Court. The notion of judicial impartiality is not expressly referred to in the Statute of the Court, except in the context of the solemn declaration required of each member of the Court by Article 20 that "he will exercise his powers impartially and conscientiously".[1] However, this requirement would seem to be inherent in the office of a judge and therefore to be the basis upon which any adjudicative tribunal should operate.

The need for impartiality encompasses the Court's functions in their entirety: a decision that it has jurisdiction as well as a decision on the merits of a dispute. It is part of this conception of the judicial role that the Court, and not the States involved in litigation, should be the arbiter of matters referred to it. This does not mean that the States cannot limit the scope of a reference to the Court to certain aspects of a dispute. In relation to a number of disagreements over the extent of their continental shelf, disputing States have asked the Court to pronounce upon the relevant rules of international law applicable to a particular case, while leaving it to the States themselves to determine the areas of shelf to be allocated to each of them in accordance with the explanation of the applicability of the rules provided by the Court.[2] What it does mean is that the tribunal should have the power to determine its own jurisdiction, to interpret the compromis or arrangements upon which its jurisdiction is based. This inherent principle is in fact spelt out for the International Court in Article 36.6 of the Statute:

> In the event of a dispute as to whether the Court has jurisdiction, the matter shall be settled by the decision of the Court.

Inevitably and appropriately, it extends over all aspects of the Court's authority. In the words of one commentator:[3]

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1 The form of the declaration is provided for in Article 4.1 of the Rules of the Court as follows:

> I solemnly declare that I will perform my duties and exercise my powers as judge honourably, faithfully, impartially and conscientiously.

2 See the terms of the Special Agreements entered into between the parties to each of the following: *North Sea Continental Shelf* cases, ICJ Rep 1969, p 3 at 6; *Tunisia-Libya Continental Shelf* case, ICJ Rep 1982, p 18 at 23; *Libya-Malta Continental Shelf* case, ICJ Rep 1985, p 13 at 16.

3 Shihata IFI, *The Power of the International Court to Determine its Own Jurisdiction* (1965), pp 41-42. For the concept of "incidential jurisdiction", see Sztucki S, *Interim Measures in the Hague Court* (1983), pp 238-9. The similarity between the Court's power under Article 36.6 of the Statute and its power under Article 41 to indicate interim measures was referred to by President de Arechaga

the Court's *competence de la competence* is not limited to verifying in each case whether the Court can deal with the merits. It extends to all incidental judicial powers as well. The Court has, therefore, discussed in many cases such questions as whether or not to allow intervention of a third party in a case pending before it, the exigency and propriety of indicating interim measures of protection, the admissibility of counter-claims, along with the limits of the interpretation of its own judgments. By extending the scope of the power in issue to all matters within the incidental jurisdiction of the Court, the Court has established this power as the most pre-preliminary function the Court undertakes; its exercise being the first occupation of the Court after it is properly seized of a dispute.

Given the all-pervasive authority thus vested in the Court, its impartiality in exercising that authority is of paramount importance to States which have accepted, or are contemplating accepting, the Court's compulsory jurisdiction. Even if an individual State might be reasonably satisfied that all aspects of the merits of a dispute will be fairly assessed, the State could well regard it as inadvisable to accept, or remain subject to, the Court's compulsory jurisdiction if it could not be sure that the same degree of fairness will be extended by the Court to issues arising in relation to the question of whether or not it should exercise its incidental jurisdiction.

To allay the suspicion of States, it is necessary that impartiality should not just appear to be required under the Statute of the Court, but that there should be some guarantee of its operation in the exercise by the Court of its incidental functions. The purpose of this paper is to examine the Court's power to indicate interim measures of protection with a view to discovering whether the Court's approach gives adequate protection to the parties involved.

In reaching a decision on the merits of a dispute, the interests of the parties which the Court has to take into account are those indicated by the parties themselves and directly related to the substance of the dispute. The interests vary with the nature of the dispute and the facts upon which the parties base their pleadings. In relation to the Court's incidental jurisdiction, there are some more obvious interests which operate, to a greater or lesser extent, in all such cases. The difficulty is that, though the interests are apparent enough, their influence has not always been identified with precision by the Court itself.

In the case of interim measures of protection, the Court's authority is bestowed by Article 41 of its Statute:

> 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.

Only limited guidance is provided as to the circumstances which the Court should take into account. Perhaps because of the lack of direction as to what factors are relevant, the Court has appeared to be reluctant to express clearly how it has attempted to balance a number of competing interests. Nevertheless, it is at least apparent that some sort of balancing process is involved in a decision whether to grant or withhold interim measures. On the one hand, in fairness to the State against which the measures are ordered, there is the need to

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in the *Aegean Sea* case, ICJ Rep 1976, p 3 at 15.

show that a basis of jurisdiction exists,[4] and that the conduct complained of is regulated by international law in the sense that it involves a breach of an obligation owed to the State seeking protection.[5] On the other hand, as Article 41 stipulates, there is a need to protect and preserve the interests of the State seeking the measures, interests which are allegedly threatened by the acts of the other party. While this constitutes the raison d'etre of the power granted by Article 41, it has not been allowed to override totally the interests of the State against which the measures are directed.

Relationship to jurisdiction on the merits

The factor which has assumed greatest importance in preserving the interests of the State against which interim relief is sought is the need for the other party to demonstrate, at least to a provisional and limited extent, the existence of some title of jurisdiction on the merits of the dispute. In considering the relationship between jurisdiction on the merits and jurisdiction to indicate interim measures, the Court has accepted that it cannot be expected to determine the former as a precondition for the exercise of the latter.[6] The more difficult question has been that of defining what degree of likelihood there must be of the existence of jurisdiction on the merits before interim measures might be granted.

In the *Anglo-Iranian Oil Company* case, the Court seemed to avoid the issue by concentrating upon the question of whether the substance of the dispute was regulated by international law.[7] Being satisfied that the dispute did relate to an alleged breach of international law, the Court held that it could not accept that a claim based on a complaint relating to a breach of a concession contract "falls completely outside the scope of international jurisdiction".[8] In the absence of any reference by the Iranian Government to the need for some title of jurisdiction on the merits, the issue was not specifically alluded to in the Order

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4 If this were the sole criterion, there would be much to be said in favour of the minority view (Judges Winiarski and Badawi) in the *Anglo-Iranian Oil Company* case ICJ Rep 1951, p 89 at 97, that interim measures should only be granted where "there exist weighty arguments in favour of the challenged jurisdiction".

5 Certainly, in the *Nuclear Tests* case, ICJ Rep 1973, p 99, doubts as to the rights which Australia alleged had been infringed by France may have been a significant factor influencing as many as six of the fourteen members of the Court to vote against the granting of interim measures: see esp the dissenting opinion of Judge Gros at 122; and below p

6 As the Court said in the *Anglo-Iranian Oil Company* case, ICJ Rep 1951 p 89 at 93, "the indication of such measures in no way prejudges the question of the jurisdiction of the Court to deal with the merits of the case". See also the Separate Opinion of Judge Lauterpacht in the *Interhandel* case, ICJ Rep 1957, p 105 at 118; and the *Fisheries Jurisdiction* case; ICJ Rep 1972, p 12 at 15, where the Court said that "on a request for provisional measures the Court need not, before indicating them, finally satisfy itself that it has jurisdiction on the merits of the case".

7 The reason for doing so was that the Iranian Government had objected to the *competence* of the Court to hear a case brought by the United Kingdom in a situation where the exercise of Iranian sovereignty over resources situated in its territory was in issue (at least this appears to be what the Iranian Government meant by its communication, referred to, ICJ Rep 1951 at 92).

8 ICJ Rep 1951 at 93.

made by the Court.[9]

In the *Fisheries Jurisdiction* case,[10] the International Court, for the first time, provided specific guidance on the relationship between the Court's power to indicate interim measures and jurisdiction on the merits when it said that, though it need not "satisfy itself that it has jurisdiction on the merits of the case", nevertheless "it ought not to act under Article 41 of the Statute if the absence of jurisdiction is manifest" [11] However, in concluding that the Exchange of Notes of 1961 between the United Kingdom and Iceland appeared to satisfy this requirement, the Court in fact adopted a somewhat different formula:[12]

> the above-cited provision in an instrument emanating from both Parties to the dispute appears, prima facie, to afford a possible basis on which the jurisdiction of the Court might be founded.

The "manifest" formulation is reminiscent of that employed by Dumbauld,[13] but both versions can be traced to Judge Lauterpacht's Separate Opinion in the *Interhandel* case.[14] However, it is worth mentioning that Judge Lauterpacht expressed what could be regarded as different versions of an appropriate test.

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9 Though it was canvassed extensively by the United Kingdom: see the statement by the Attorney-General, Sir Frank Soskice, ICJ *Pleadings*, pp 410 et seq. In particular, he quoted (at 410) the following passage from Dumbauld E, *Interim Measures of Protection in International Controversies* (1932), p 144:

> Another important principle emphasised in the jurisprudence of the Mixed Arbitral Tribunals is that in order to grant interim measures it is not necessary to decide whether the tribunal has jurisdiction in the main proceedings on its merits, but it suffices that prima facie there is a possibility of a decision in favour of the plaintiff and the tribunal's lack of jurisdiction is not manifest.

In other words, there must be a prima facie case of a breach of international law and no obvious absence of a basis of jurisdiction. The tendency has been, however, to restate this approach in terms of a requirement that there must prima facie be a basis of jurisdiction. This development has occurred glissando and may have been contributed to by the statement of the British case by Sir Frank Soskice (*Pleadings,* p 411) that, should a State seek interim measures where it was apparent that the Court had no jurisdiction on its merits, the Court might wish to "discourage such an abuse of its process. It may wish to satisfy itself that there is a prima facie case for the exercise of its jurisdiction". In the *Fisheries Jurisdiction* case, ICJ *Pleadings,* Vol I, p 105, the Attorney-General, Sir Peter Rawlinson, took the Court's pronouncements in the *Anglo-Iranian Oil Company* case as suggesting "that, in considering a request for the indication of interim measures of protection, the Court does not require the applicant to do more than show that prima facie there are reasonable grounds for believing that the Court posses jurisdiction to deal with the merits". While Mendelson "Interim Measures of Protection in Cases of Contested Jurisdiction", (1972-73) 46 BYIL 262 at 271, did not regard the *Anglo-Iranian* case as relevant to the issue of jurisdiction on the merits, Sztucki, note 3 above, pp 233-4, argued, not altogether convincingly, the contrary view. See also Ford A W, *The Anglo-Iranian Oil Dispute of 1951-1952* (1954), pp 89-90.

10 ICJ Rep 1972, p 12.

11 At 15.

12 At 16.

13 See above note 9.

14 ICJ Rep 1957, p 105.

He first stated[15] that

> Governments which are Parties to the Statute or which have undertaken in some form or other commitments relating to the obligatory jurisdiction of the Court have the right to expect that the Court will not act under Article 41 in cases in which absence of jurisdiction on the merits is manifest.

He then went on to assert that governments should not be discouraged from undertaking obligations for the judicial settlement of disputes because of a fear that interim measures might be ordered "in cases in which there is no reasonable possibility, prima facie ascertained by the Court, of jurisdiction on the merits".[16] In the judge's view, the "correct principle" was as follows:[17]

> The Court may properly act under the terms of Article 41 provided that there is in existence an instrument such as a Declaration of Acceptance under the Optional Clause, emanating from the Parties to the dispute, which prima facie confers jurisdiction upon the Court and which incorporates no reservations obviously excluding its jurisdiction.

It may be plausible to regard this last statement of principle as equivalent to, or as an elaboration of, the earlier assertion about the expectation of States that the Court should "not act under Article 41 in cases in which absence of jurisdiction is manifest". It is less easy to accept that these two pronouncements, as a matter of linguistic interpretation, are identical to the other version whereby the Court should not grant interim measures "when there is no reasonable possibility, prima facie ascertained by the Court, of jurisdiction on the merits".[18]

Be that as it may, when the International Court granted interim protection in the *Nuclear Tests* cases,[19] it shifted its jurisdictional basis entirely to the prima facie test of jurisdiction, and not one connected to any requirement of "no reasonable possibility". In reiterating the familiar proposition that the Court need not, before indicating interim measures, "finally satisfy itself that it has jurisdiction on the merits of the case", the Court provided a modified formulation of the rider: it "ought not to indicate such measures unless the provisions invoked by the Applicant appear, prima facie, to afford a basis on which the jurisdiction of the Court might be founded".[20] This version was repeated by the Court in the *Tehran Hostages* case[21] and in the *Nicaragua* case[22] in which the Court said:

> Whereas on a request for provisional measures the Court need not, before deciding whether or not to indicate them, finally satisfy itself that it has

15 At 118.
16 Ibid.
17 Ibid. On the facts of the case, Judge Lauterpacht regarded the invocation of the Connally amendment reservation by the United States as constituting a circumstance "obviously excluding" the jurisdiction of the Court.
18 Though Mendelson, see note 9 at 277–8, had no difficulty in equating them. Elkind J B, *Interim Protection: A Functional Approach* (1981), p 117, in the context of the *Fisheries Jurisdiction* cases, suggested that the prima facie test was "less liberal" than that based upon the absence of jurisdiction on the merits being "manifest".
19 ICJ Rep 1973, p 99, 135.
20 At 101, 137.
21 ICJ Rep 1979, p 7 at 13.
22 ICJ Rep 1984, p 169 at 179.

> jurisdiction on the merits of the case, or, as the case may be, that an objection taken to jurisdiction is wellfounded, yet it ought not to indicate such measures unless the provisions invoked by the Applicant appear, prima facie, to afford a basis on which the jurisdiction of the Court might be founded.

It does not necessarily follow that, by employing an identical formulation of the test to be applied, the Court was signifying that in each case it was adopting an identical approach. It is open to debate whether the prima facie test requires that the Court might possibly have jurisdiction, or that it must probably have jurisdiction, over the merits as a sine qua non of the granting of interim measures of protection. As Judge Schwebel said in the *Nicaragua* case:[23]

> It is beyond dispute that the Court may not indicate provisional measures under its Statute where it has no jurisdiction over the merits of the case. Equally, however, considerations of urgency do not or may not permit the Court to establish its jurisdiction definitively before it issues an order of interim protection. Thus the Court has built a body of precedent which affords it the authority to indicate provisional measures if the jurisdiction which has been pleaded appears, prima facie, to afford a basis on which the Court's jurisdiction might be founded. Whether 'might' means 'possibly might' or 'might well' or 'might probably' is a question of some controversy. The nub of the matter appears to be that, while in deciding whether it has jurisdiction on the merits, the Court gives the defendant the benefit of the doubt, in deciding whether it has jurisdiction to indicate provisional measures, the Court gives the applicant the benefit of the doubt.

The reason why this benefit of the doubt may appear to operate in favour of the party seeking interim measures of protection is because there are other factors to be taken into account by the Court in determining whether the case is an appropriate one for granting the request for protection. As has already been pointed out,[24] whereas the jurisdictional nexus represents the interest of the party against which interim measures are sought, the other factors relate to the countervailing interests of the party seeking relief. If they exist in sufficient weight, they will inevitably lead to the appearance of the benefit of the doubt over jurisdiction being given to that party.

As to the uncertainties inherent in the prima facie test, it may well be that the formula allows, and has been adhered to because it allows, judges of the Court to veil their differences in a particular case if they wish to do so. It would also have the consequence that any shift in the Court's attitude could be concealed within the now ritualistic formula. That this has in fact occurred is the thesis of Sztucki. This interpretation of the position is dependent upon a reading of the *Nuclear Tests* cases[25] that downplays the significance of the issue of whether the applicant States had legitimate interests of which international law would take cognisance,[26] and of the *Aegean Sea* case[27] which assumes a uniformity of opinion on the need for a jurisdictional nexus despite some differences of

23 ICJ Rep 1984 at 206-207.
24 Above pp 109–110.
25 ICJ Rep 1973, p 9; Sztucki, note 9, pp 244–7.
26 Below p 122.
27 ICJ Rep 1976, p 3; Sztucki, note 9, pp 248-9.

language in the various separate opinions.[28] For example, President de Arechaga, having acknowledged that "Article 41 is an autonomous grant of jurisdiction", went on to say that the possibility of jurisdiction over the merits of a dispute was not thereby rendered irrelevant, but had to be treated "as one among the circumstances which the Court has to take into account in deciding whether to grant the interim measures".[29] In the President's view:[30]

> The essential object of provisional measures is to ensure that the execution of a future judgment on the merits shall not be frustrated by the actions of one party *pendente lite*. In cases in which there is no reasonable possibility, prima facie ascertained by the Court, of jurisdiction on the merits, it would be devoid of sense to indicate provisional measures to ensure the execution of a judgment the Court will never render.

To similar effect were the words of Judge Ruda,[31] and also Judge Mosler,[32] though the latter rejected the idea that the likely existence of jurisdiction on the merits was a relevant circumstance referred to in Article 41, regarding it instead as "a precondition of the examination whether such circumstances exist".[33] At the other end of the spectrum, it is true, a number of members of the Court took

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28 For an analysis of the views of the judges who then made up the Court, see McWhinney E, *The World Court and the Contemporary Law-Making Process* (1979), pp 100-102.

29 ICJ Rep 1976, p 3 at 15.

30 Ibid.

31 ICJ Rep 1976 at 23: "In my view, the Court cannot decide on a request for interim measures of protection, without having first considered, at least prima facie, the basic question of its own jurisdiction to entertain the merits of the dispute. I fully share the views so well expressed by Sir Hersch Lauterpacht on this point in his separate opinion in the *Interhandel* case" (ICJ Reports 1957 at 118-119).

32 I.C.J. Rep 1976 at 24-25. Sztucki, by quoting the following words from Judge Mosler's Separate Opinion, and placing them between the assertions by Judges Morozov and Tarazi (see below) that the power conferred by Article 41 was dependent upon the existence of jurisdiction under Article 36, gave a misleading impression of Judge Mosler's stance. The passage quoted by Sztucki (op cit, p 249) was this (ICJ Rep 1976, p 3 at 24):

> the Court, when it actually indicates interim measures, should have reached the provisional conviction, based on a summary examination of the material before it (including written observations of a party not represented) and subject to any objections which may be raised in subsequent proceedings, that it has jurisdiction on the merits of the case.

What Sztucki omitted was the following sentence from the Separate Opinion which seems to put Judge Mosler very much in the camp of those adhering to the traditional formula, Judge Mosler went on to say (at 24-25):

> This amounts to an attempted definition of a positive prima facie test.

The significance of the reference to the prima facie test as being "positive" is that it is to be contrasted with its negative aspect, which presumably operates at an even lower threshold and must be satisfied for the Court even to assume jurisdiction for the purpose of making any Order at all (in this case, formally rejecting the request for interim measures). As Judge Mosler explained (at 25):

> in this hypothesis the Court has only to satisfy itself that it does not manifestly lack jurisdiction, since the Order does nothing to interfere with the rights of the...party [concerned].

33 Ibid.

the jurisdictional requirement of the grant of protection, not only as a precondition to the exercise of this power, but also as being equated with jurisdiction on the merits. Thus, according to Judge Morozov, the Court "has no right to consider ... the question of interim measures of protection before it satisfies itself that it has jurisdiction in accordance with Articles 36 [or] 37 of the Statute".[34] Similarly, Judge Tarazi rejected the view that, by virtue of Article 41, "the Court possesses a special competence which is in some way different from its basic, specific jurisdiction as conferred by Article 36 of that Statute." As he went on to state: "the Court is competent only by virtue of Article 36 of its Statute. The power conferred on it by Article 41 to indicate interim measures when appropriate is merely a corollary of its jurisdiction under Article 36".[35]

These pronouncements by Judges Morozov and Tarazi could be seen as going further than the joint dissenting opinion of Judges Winiarski and Badawi in the *Anglo-Iranian Oil Company* case in which the latter two members of the Court had claimed that the true rule was to the effect that "if there exist weighty arguments in favour of the challenged jurisdiction, the Court may indicate measures of protection; if there exist serious doubts or weighty arguments against this jurisdiction such measures cannot be indicated".[36] There would seem to be little justification for the view advanced by Judges Morozov and Tarazi. It was based upon an excessive deference towards the concept of State sovereignty, one which regards a State's right to pursue its own ends as paramount, even in a situation where it is prejudicial to the rights of another State which the latter is seeking to safeguard in the proceedings before the Court.

Interesting in this context is the Separate Opinion of Judge Elias in the *Aegean Sea* case. While admitting that "the question of preliminary or incidental jurisdiction" was one of a number of matters raised in connection with the application of Article 41 of the Statute "which require urgent and serious rethinking by the Court",[37] the Judge went on to criticise the Court's narrow approach to the issue of how the actions of both parties might, in the circumstances, aggravate an already tense situation between them. In Judge Elias' own words:[38]

> the apparent acceptance by the majority of the Court that, once any damage resulting from the exploration and/or exploitation by Turkey is capable of being compensated for in cash or kind, Greece cannot be said to have suffered irreparable damage does not seem to me to be a valid one. It means that the State which has the ability to pay can under this principle commit wrongs against another State with impunity, since it discounts the fact that the injury itself might be sufficient to cause irreparable harm to the national susceptibilities of the offended State. The rightness or wrongness of the

34 At 21. Judge Morozov is reported as having said "Articles 36 and 37", but he can only have meant "or", as all that Greece would have had to show was a valid basis of jurisdiction on one of the alleged grounds.

35 At 32.

36 ICJ Rep 1951, p 89 at 97.

37 ICJ Rep 1976, p 3 at 29.

38 At 30.

> action itself does not seem to matter. This is a principle upon which contemporary international law should frown.

Such a criticism is equally valid when applied to the jurisdictional question. To give the State against which interim measures are sought the benefit of a jurisdictional doubt is to place too great an emphasis upon that State's sovereignty.

The same criticism applies with equal force to the test, put forward by Vice-President Nagendra Singh in the same case, that the Court should only grant interim relief if there was "a distinct possibility of jurisdiction" on the merits.[39] Not that it is easy to comprehend what is meant by a "distinct possibility" of the Court having such jurisdiction, though the Vice-President did make clear that it was meant to connote a significantly heavier onus for the State seeking relief to satisfy. As the Judge had earlier said, when a State against which interim measures are sought objects to the jurisdiction, the Court "must then feel a higher degree of satisfaction as to its own competence than can be derived from the positive but cursory test of 'prima facie' jurisdiction or the negative test of 'no manifest lack' of jurisdiction".[40]

On the face of it, therefore, Sztucki's thesis would appear to be difficult to substantiate. However, more significant support is to be found in de Arechaga's extra-judicial outline of the approach of individual judges when he wrote:[41]

> In my experience those theories, attempting to determine the collective criteria followed on this matter, do not reflect accurately the reality nor the way the Court operates at this stage. A formal and collective decision on the jurisdictional issue is not possible; however, this does not prevent discussion of the question. Consequently, before granting interim measures the question of jurisdiction is discussed and each judge, on an individual basis, makes as thorough a study as he is able to make at that stage of the jurisdictional issue and reaches a provisional personal conclusion on this point. He will accordingly vote for or against the request taking into account the views he has formed on the jurisdictional issue. Of course, it is possible that a judge may later change his mind, in the light of further pleadings, but he acts at the stage of interim measures on the basis of the views he holds at the time on the question of jurisdiction. No individual judge is in my experience satisfied with a mere possibility or even a probability of jurisdiction and does not follow a positive or negative test as to the likelihood of jurisdiction. In each subjective view, jurisdiction over the merits must exist before a vote for provisional measures is given. It follows that interim measures will not be granted unless a majority of judges believes at the time that there will be jurisdiction over the merits.

The difficulty with this pronouncement is that it does not just suggest that the members of the International Court, at least during the period from 1970 to 1979 when de Arechaga was a Judge of the Court (the last three years as its President), were using the ritualistic formula as a cloak for a shift in emphasis, but that they were embarking upon something amounting to a concealment of the true position from all those not privy to their private deliberations. Amongst

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39 At 18.

40 At 17.

41 "International Law in the Past Third of the Century", (1978-I) 159 HR 1 at 161.

those undoubtedly misled were the many commentators, who, in good faith, based their theories, referred to at the start of the above passage, upon what members of the Court appeared to be saying.

But should the view of the former President be regarded as the last word on the subject? Is it not at least as plausible that members of the Court would each experience difficulties expressing a precise view on the relationship between the power to indicate interim measures and the issue of jurisdiction on the merits? To them, the comparative safety of the Court's usual formula is an adequate explanation of their own subjective perception of the elements involved in a particular case.

Take, for example, the extrajudicial comments of another member of the Court, who has also served as its President. Judge Elias certainly asserted a very compelling view of the jurisdictional requirement, although regarding it as one of the circumstances which Article 41.1 directs the Court to take into account, in the following passage:[42]

> The Court must satisfy itself that it has jurisdiction to entertain the merits of the application. The issue of *jurisdiction* is accordingly one of the most important of all the relevant circumstances to be taken into account by the Court.

Despite the emphasis placed upon jurisdiction, it should be noted that it is related not to jurisdiction *on the merits*, but to deal with "the merits of the application", the application in question being one "requesting an indication of interim measures".[43] The issue of the relationship with jurisdiction on the merits had already been addressed earlier in the same chapter of his book. Although there is a degree of equivocation in the treatment of the issue, the summary provided is in keeping with the tenor of the Court's own pronouncements, and not with President de Arechaga's "insider's view". As President Elias explained the position:[44]

> In the practice of the Court, the view which has prevailed is that the question of jurisdiction need not be first settled by the Court before the request for an indication of interim measure of protection can be dealt with, so long as the Court is satisfied that, prima facie, it has jurisdiction to begin with. Once the Court acts in the belief that its jurisdiction is manifest, that is, that it does not on the face of it lack the power to deal with the subject matter of the application, the fact that it subsequently decides at a later stage in the proceedings that it does not in fact have such jurisdiction does not render the earlier indication invalid ab initio, but the interim indication ceases forthwith to have effect.

Admittedly there had been pressure for a change in approach from that adopted prior to 1973. Before then the position had been as follows:[45]

> It can be said, however, that both the Permanent Court of International Justice and the International Court of Justice up to and including the *Anglo-Iranian Oil Co.* case and even the *Interhandel* case have followed the

42 Elias T O, *The International Court of Justice and Some Contemporary Problems* (1983), p 80.
43 Ibid.
44 Ibid p 74.
45 Ibid, p 75.

> judicial policy of considering any preliminary objection to jurisdiction as worthy of careful examination and, thereafter, if satisfied that the case should be entertained, of proceeding with the request for interim measures, leaving aside the question as to whether or not the Court might decide at a later phase of the case that it has no jurisdiction after all. Even if no preliminary objection has been raised by a party to the Court's jurisdiction, if it is manifest to the Court that it has no apparent jurisdiction to entertain the merits of the dispute as presented in the application for a request for interim measures, the Court has always exercised the judicial caution to desist from taking any further action on the application.

President Elias acknowledged that, in the course of the three cases in the mid-1970s, the *Fisheries Jurisdiction* cases, the *Nuclear Tests* cases and more significantly the *Aegean Sea* case, the contention was pressed that jurisdiction on the merits was a condition precedent to the granting of interim measures of protection. While not endorsing the validity of this view, President de Arechaga's extrajudicial explanation of the Court's approach does go a substantial way towards accepting it at a provisional level. If members of the Court base their decision to grant interim measures, even upon a (subjective) requirement that there must exist jurisdiction on the merits, the scope of the Court's power is very much restricted. This approach is equally open to the criticism voiced by President Elias in the following observations:[46]

> The new insistence that the Court must first settle the issue of jurisdiction before considering an application for a request for interim measures also overlooks the fact that any court of law must have a *general* inherent jurisdiction to determine whether or not it has jurisdiction in any *specific* case brought before it. It is only by entertaining a case brought before it that a court can decide whether or not there is anything worth considering at all. Unless an application is patently or manifestly devoid of any merit at all..., the Court should be able to decide its own competence to indicate interim measures. ...On the whole, therefore, the Court's power under Article 41 of the Statute to indicate interim measures would be restricted if not entirely denied were the principle to be accepted that the issue of jurisdiction should be settled prior to an application for a request for interim measures to be entertained. It would hamper the normal course of the Court's judicial process.

There is, in any case, a certain lack of logic in President de Arechaga's thesis that there must be a preliminary and subjective finding that jurisdiction on the merits exists, but that it is only one of the circumstances which the Court has to take into account before deciding whether to grant interim measures of protection. If the finding is an essential requirement as he would have us believe then, as the other factors are also to be taken into account, the inference would seem to be that they are of equal importance. In other words, each one of them independently constitutes a sine qua non of the exercise of this power by the Court.

To a point this proposition is tenable. For example, it is obviously necessary that there should be prejudice to the rights of the party seeking protection in order for there to be a need for the Court to exercise its power. However, for

46 Ibid, pp 76-77.

this requirement to be satisfied as a parallel to the jurisdictional issue, there would have to be a measurable degree of prejudice that constitutes the basis for the Court to grant protection. When this aspect of the Court's jurisprudence is examined, it would seem that, far from recognising any objective and precise level of prejudice, the Court's approach would appear to take cognisance of the fact that the degree of prejudice is a variable concept, involving issues of law and of fact.[47] Moreover, there are other factors, which may be taken into account by the Court in deciding whether to grant interim measures, that are not crucial in the Court's assessment of the situation. The principal illustration is provided by matters which tend to exacerbate the dispute before the Court.[48] These have sometimes been specifically referred to in the Court's Order, but on other occasions, when no reference has been made, it may be surmised that the likelihood of aggravation of the dispute was not an influential factor, or perhaps a very minor influence, in the granting of interim measures.

The pattern that emerges is that the way in which these various other factors are perceived involves the Court in a process of balancing the interests of the parties before the Court. There must be prejudice, or the threat of actual prejudice, to the rights of a party seeking protection, but the Court also takes cognisance of the extent of the prejudice that has occurred or is threatened. Once it is recognised that such an assessment takes place, it would be surprising if the degree of prejudice were not, in a borderline case, weighed in the balance with the likelihood of jurisdiction existing to hear the merits of the particular case. On an individual level, if the jurisdictional issue is unclear, it may be a circumstance against the granting of interim measures. But, if the other circumstances strongly favour the exercise of the Court's power under Article 41 of the Statute, it is unlikely that an individual judge would vote against the granting of interim measures simply because the jurisdictional issue was evenly balanced according to his subjective and provisional assessment of the situation (unless, of course, he was a judge who believed that the Court could only act under Article 41 if there was actual jurisdiction on the merits of the case[49]).

But even if one accepts the Sztucki thesis, that, during the 1970s, the Court's practice had moved towards placing primary emphasis upon the jurisdictional issue, it does not follow that the members of the Court have remained wedded to that view. The observations by President Elias are evidence of a reaction to that approach. Moreover, the remarks of Judge Schwebel in the *Nicaragua* case,[50] notwithstanding the fact that the Court later held that it did have jurisdiction to hear the case,[51] can only be seen as a riposte to what the Judge saw as a reversion to the traditional approach which, from his point of view, seemed to favour the interests of the party seeking interim protection.

Infringement of the legal rights of the State seeking protection

The granting of interim measures is thus dependent upon the existence of some basis of jurisdiction on the merits (dealt with in the previous section). However,

47 See below, p 123.
48 See below, p 124.
49 See above p 115.
50 ICJ Rep 1984, p 169 at 206-207; above p 113.
51 ICJ Rep 1984, p 392.

it is clear from the wording of Article 41, which refers to "measures which ought to be taken to preserve the respective rights of either party", that the Court's power is also dependent upon the existence of some right, vested by international law in the State to be protected, which has been, or is likely to be, infringed by the State against which the Order is sought (the issue to be considered in the present section), and which the Court regards as sufficiently deserving of protection (the matter to be discussed in the following section).

The fact that the case has been brought before the International Court is usually sufficient to signify that, if the facts alleged are correct, a breach of an international obligation will be involved. For this reason, the existence of a correlative right will rarely be in issue in relation to the granting of interim measures of protection of that right. It follows that the Court has not had the opportunity to spell out with any certainty the level of likelihood that such a right exists in order for it to exercise its power under Article 41. There have been occasions[52] when the suggestion has been made that the same degree of likelihood that jurisdiction on the merits exists is applicable to a situation where the uncertainty relates to the existence of a right which a party to litigation before the Court claims should be protected.

It will be recalled that, in the *Anglo-Iranian* case, the Court dismissed Iran's objections to the granting of interim measures with the words that it could not "be accepted a priori that a claim based on such a complaint falls completely outside the scope of international jurisdiction".[53] Taken out of context, it might be possible to interpret this statement as relating to the jurisdiction of the Court to deal with the merits of the case.[54] It would then be a question of considering how far this formulation retained any precedential value in light of the approach subsequently adopted by the Court. In presenting the British submissions in the *Fisheries Jurisdiction* cases, the Attorney-General, Sir Peter Rawlinson, considered that, at the time, there existed three views as to the relationship between jurisdiction to grant interim measures and jurisdiction on the merits. The most restrictive was that advanced by Judges Winiarski and Badawi in the *Anglo-Iranian* case.[55] The intermediate formula was provided by Judge Lauterpacht in the *Interhandel* case.[56] The third, "and possibly the widest", was that expressed by the Court in the *Anglo-Iranian* case in the words quoted above, in which "the Court does not require the applicant to do more than show that prima facie there are reasonable grounds for believing that the Court

52 See below p 121.

53 ICJ Rep 1951, p 89 at 93; above p 110.

54 This was the view taken by the United Kingdom in submissions to the Court in the *Fisheries Jurisdiction* case, ICJ *Pleadings*, Vol I, p 105, below fn 57. It may also have been the view of the Federal Republic of Germany, see ibid, Vol II, pp 24, 57–58. In the *Nuclear Tests* cases, New Zealand treated the *Anglo-Iranian* case as relevant in this way on the jurisdictional issue (*Pleadings*, Vol II, p 126), a pitfall avoided in the Australian submissions when it was asserted that in "the *Fisheries Jurisdiction* case the Court for the first time expressly stated the test which it would apply" (ibid, Vol I, p 199).

55 ICJ Rep 1951, p 89 at 98, above p 115; quoted *Fisheries Jurisdiction* cases, *Pleadings*, Vol I, p 106.

56 ICJ Rep 1957, p 105 at 118–119; quoted *Fisheries Jurisdiction* cases, *Pleadings*, Vol I, p 106.

possesses jurisdiction to deal with the merits".[57] In contrast, while the West German submission also adopted the line that the Order in the *Anglo-Iranian* case related to jurisdiction on the merits, it seemed to regard the Court's formulation as entirely consonant with Judge Lauterpacht's Separate Opinion in the *Interhandel* case.[58] That approach is of course at least in part the basis for the Court's subsequent formulation of its attitude towards the jurisdictional nexus between interim protection and the merits in a particular case.

It should be recognised, however, that the Court's Order in the *Anglo-Iranian* case did not relate to jurisdiction in the sense of contrasting it with jurisdiction on the merits, but with the contrast between a matter exclusively within the domain of domestic jurisdiction, as contended for by Iran,[59] and a matter subject to international regulation (jurisdiction) as argued by the United Kingdom. The Court's decision was therefore to the effect that interim measures could be granted because the British complaint related to a matter which fell into the latter category. However, it does not follow from the fact that jurisdiction on the merits by reference to the alleged titles to jurisdiction and "jurisdiction" by reference to the ambit of international law to regulate the conduct of the parties are different issues that they are necessarily subject to different criteria when it cames to the ordering of interim measures. The German reasoning in the *Fisheries Jurisdiction* case could be equally applicable to both.

This view seems to have been accepted by Mani. When dealing with the status of the rights to be protected, he wrote:[60]

> the Court must be satisfied, and it must be shown by the requesting party, that there is prima facie existence of the rights alleged by it which are susceptible of being thwarted or otherwise infringed. For, the object of interim measures is to 'preserve' certain rights. If the rights claimed are not shown to exist, or at least a prima facie case is not made out as to their existence, the interim measures will have nothing to preserve.

In support of this proposition he quoted the Court's statement in the *Anglo-Iranian Oil Company* case that it "must be concerned to preserve by such measures the rights which may be subsequently adjuged by the Court to belong either to the Applicant or the Respondent".[61] He then concluded his brief discussion with the comment: "What is required of the requesting party is a prima facie case as to the existence of the rights alleged".[62] His treatment of the jurisdictional issue also started from the *Anglo-Iranian* case.[63] When he came to deal with the *Fisheries Jurisdiction* and *Nuclear Tests* cases, he was therefore obliged to concede that they seemed "to portend a change in...judicial policy on problems concerning the interactions between substantive jurisdiction and power to indicate interim measures".[64] His interpretation of these cases was

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57 Ibid, p 105.
58 See ibid, Vol II, p 58.
59 See above note 7.
60 Mani VS, *International Adjudication: Procedural Aspects* (1980), p 293.
61 ICJ Rep 1951, p 89 at 93.
62 Mani, op cit, p 293.
63 Ibid, p 301.
64 Ibid, p 302.

that they imposed a criterion similar to that which he had suggested was applicable to the Court's assessment of the existence of the rights to be protected: on the present issue, "the onus in the first instance would be on the applicant party to show prima facie jurisdiction while making a request for interim measures".[65]

While this would be a plausible interpretation of the *Anglo-Iranian Oil Company* case and some of the later authorities on interim protection, it is not reconcilable with the *Nuclear Tests* cases.[66] In that Order, the Court drew a clear distinction between the issue of potential jurisdiction on the merits and that of competence as a matter of international law with regard to the substance of the dispute. On the former issue it endorsed the prima facie basis of jurisdiction requirement. On the latter, however, its approach was totally different. It first set out "the claims formulated by the Government of Australia" which were as follows:[67]

(i) The right of Australia and its people, in common with other States and their peoples, to be free from atmospheric nuclear weapon tests by any country is and will be violated;

(ii) The deposit of radio-active fall-out on the territory of Australia and its dispersion in Australia's airspace without Australia's consent:
  (a) violates Australian sovereignty over its territory;
  (b) impairs Australia's independent right to determine what acts shall take place within its territory and in particular whether Australia and its people shall be exposed to radiation from artificial sources;

(iii) The interference with ships and aircraft on the high seas and in the superjacent airspace, and the pollution of the high seas by radio-active fall-out, constitute infringements of the freedom of the high seas.

The Court continued by explaining that "it cannot be assumed a priori that such claims fall completely outside the Court's jurisdiction, or that the Government of Australia may not be able to establish a legal interest in respect of these claims entitling the Court to admit the Application".[68] By thus invoking the tenor of the Order made in the *Anglo-Iranian* case,[69] the Court was expressly imposing a different standard which an applicant for interim protection must satisfy in showing that its rights under international law had been infringed or threatened from that which the Court applied to the general issue of the relationship between jurisdiction to grant interim measures and jurisdiction on the merits. Whereas, as the Court confirmed, the latter is subject to a requirement that the State requesting protection must show that a matter is prima facie within the Court's jurisdiction on the merits, in the case of the former, the onus is upon the State against which protection is sought to establish that a matter is completely outside the Court's jurisdiction to deal with

65 Ibid.
66 ICJ Rep 1973, pp 99, 135.
67 At 103.
68 Ibid.
69 ICJ Rep 1951, p 89 at 93; above p 110.

it (i) because that matter is not regulated by international law, or (ii) because it is not the subject of a legal interest vested in the State to be protected by the measures taken. The *Nuclear Tests* cases were thus an endorsement of the view that the requirements imposed by the Court in the *Anglo-Iranian Oil Company* case related to the latter two issues and were not intended to be applied to the quite different matter of the relationship between the Court's authority under Article 41 of the Statute and the jurisdiction on the merits in a particular case.

The need for protection

Article 41 divides the basis upon which interim measures are to be granted into two: that they are required by the circumstances; and that are directed at preserving the rights of either party. Within this framework the Court has devised a number of criteria for determining whether a case has been made out for the granting of interim measures:

(i) that no action should be taken prejudicing the rights of the other party in respect of carrying out any decision on the merits which the Court might make;
(ii) that no action should be taken which might aggravate or extend the dispute;
(iii) that no action should be taken which would cause irreparable harm to the other party; and
(iv) that the need for protection is a matter of urgency.

i. *Prejudicing rights*

Of the four criteria which the Court has advanced as a basis for granting interim measures, this is the only one specifically referred to in Article 41. The Court is concerned to ensure that the issues which are in dispute in a case[70] can still be dealt with satisfactorily when the time comes to give a decision on the merits.

If it decides to exercise its power on this basis, the Court might grant a series of Orders designed to prevent specific infractions of the obligations which the State concerned is said to owe,[71] or in the form of a general demand that the

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70 *Polish Agrarian Reform* case (1927), PCIJ Ser A, No 58, p 175.

71 *Sino-Belgian Treaty Denunciation* case (1927), PCIJ Ser A, No 8, pp 7-8. The President of the Court made an Order which read in Part:

I. *As regards nationals:*

(1) a right on the part of any Belgian who may have lost his passport or have committed some offence against the law, to be conducted in safety to the nearest Belgian consulate (cf Treaty of 2 November 1865, Article 10);
(2) effective protection of Belgian missionaries who have peacefully proceeded to the interior of the country; and, in general, protection of Belgians against any insult or violence (cf Treaty of 2 November 1865, Articles 15 and 17);
(3) a right on the part of any Belgian who may commit a crime against a Chinese or any other offence against the law, not to be arrested except through a consul, nor to be subjected, as regards the execution of any penalty involving personal violence or duress, to any except the regular action of Belgian law (cf Treaty of 2 November 1865, Article 19);

II. *As regards property and shipping*:

parties (or one of them) should "ensure that no action is taken which might prejudice the rights of the other Party in respect of the carrying out of any decision which the Court might subsequently render".[72]

ii. *Aggravating the dispute*

(a) *Requiring the parties to refrain from such conduct*

The proposition that the parties must, in addition to avoiding any act that might prejudice the rights of the other party, also refrain from a wider range of acts that might exacerbate a dispute, was asserted by the Permanent Court in the *Electricity Company of Sofia* case:[73]

> the above quoted provision of the Statute applies the principle universally accepted by international tribunals and likewise been 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.

It is interesting to note that the Court regarded these principles (ie the one relating to aggravation of the dispute, as well as that relating to prejudicing the rights of the other party) as general principles of law inherent in, and recognised as part of, the judicial process. It would follow therefore that Article 41.1 was as much an affirmation of the former as it was of the latter, notwithstanding the fact that the latter alone was referred to in the express language of the provision.

The present Court seems to have had no difficulty in including aggravation of a situation in orders for interim measures. In the *Anglo-Iranian Oil Company* case, the United Kingdom complained to the Court about what it alleged were attempts to inflame public opinion against both the Company and the British Government.[74] The Court was prepared to require in general terms that "the Iranian Government and the United Kingdom Government should each ensure that no action of any kind is taken which might aggravate or extend the dispute

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Protection against any sequestration or seizure not in accordance with the generally accepted principles of international law and against any destruction other than accidental (cf Treaty of 2 November 1865, Article 14).
See also the *Tehran Hostages* case, ICJ Rep 1979, p 7 at 19–21.

72 *Anglo-Iranian Oil Company* case, ICJ Rep 1951, 89 at 93; see also *Fisheries Jurisdiction* cases, ICJ Rep 1972, pp 12, 30 at 17, 35.

73 (1939) PCIJ Ser A/B, No 79, p 199.

74 See the text of the interim measures sought by the United Kingdom, ICJ Rep 1951, 89 at 90–91, para (g) of which read:

> The Imperial Government of Iran and the Government of the United Kingdom should ensure that no step of any kind is taken capable of aggravating or extending the dispute submitted to the Court, and, in particular, the Imperial Government of Iran should abstain from all propaganda calculated to inflame opinion in Iran against the Anglo-Iranian Oil Company Limited and the United Kingdom.

submitted to the Court".[75] In keeping with the notion of the measures being interim, it did not apportion blame as the British had requested, a step that might have appeared to be taking a particular view as to the merits of the case.

While this is a factor influencing the Court's approach to determining the scope of an interim order, it will not be of cardinal significance where the conduct complained of in the request for protection is central to the dispute. In the *Tehran Hostages* case, the Iranian government objected to the American request for interim measures which included the release of the hostages and the restoration of the embassy to American control[76] on the ground that such an order would have amounted to a prejudging of the merits.[77] The Court's Order largely took the form of the American request as far as the release of hostages and restoration of the embassy premises were concerned.[78] In dealing with Iran's objection that the grant of interim measures in this form would be tantamount to a judgment on the substance of the dispute, the Court said:[79]

> whereas it is true that in the *Factory at Chorzow* case the Permanent Court of International Justice declined to indicate interim measures of protection on the ground that the request in that case was "designed to obtain an interim judgment in favour of a part of the claim" (...PCIJ Ser A, No 12, p 10); whereas, however, the circumstances of that case were entirely different from those of the present one, and the request there sought to obtain from the Court a final judgment on part of a claim for a sum of money; whereas, moreover, a request for provisional measures must by its very nature relate to the substance of the case since, as Article 41 expressly states, their object is to preserve the respective rights of either party; and whereas in the present case the purpose of the United States request appears to be not to obtain a judgment, interim or final, on the merits of its claims but to preserve the substance of the rights which it claims *pendente lite*.

(b) *Can aggravation alone be a source of the Court's power?*

Despite the attention paid to the aggravation issue in some of the Court's orders, it should be realised that the manner in which it has been dealt with suggests that it is only a factor which is taken into account in assessing whether there is a need to protect the rights of the applicant for interim measures. Those rights are being prejudiced or threatened by conduct which, if persisted with, will, inter alia, exacerbate the dispute and make its settlement and the preservation of the rights in question that much more difficult. It is also noteworthy that, though many of the Court's orders for interim measures follow the wording quoted above from the *Anglo-Iranian Oil Company* case, there is no reference in those orders to the aggravation factor in the explanations given of the bases of the Court's powers to grant interim protection.[80] It would

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75 At 93.
76 ICJ Rep 1979, p 7 at 9.
77 At 11.
78 At 21.
79 At 16.
80 In the *Fisheries Jurisdiction* case, for example, the Court indicated that the United

therefore seem that it cannot be regarded as an essential element in establishing a right to protection. There can be prejudice to the rights of the State applying for protection without further aggravation of the dispute being a consideration in the granting of interim measures.

It would appear unlikely, on this evidence, that exacerbation of a dispute can constitute the sole element in the decision to grant interim measures. Nevertheless, the Court has avoided pronouncing a direct negative to the question of whether it is still possible to read the *Electricity Company of Sofia* case[81] as justifying aggravation of the dispute in itself as a ground for the exercise by the Court of its power. Even in the *Aegean Sea* case in which Greece had pressed the point that "this general power to order interim measures to avoid aggravation or extension of the dispute is separable from and not merely another way of phrasing the idea that interim measures are intended to avoid prejudice in regard to the execution of the decision later to be given",[82] the Court had responded in guarded terms:[83]

> Whereas, independently of its request regarding the preservation of its rights, Greece requested the Court...to indicate interim measures of protection in order to prevent the aggravation or extension of the dispute; whereas, before this request could be entertained, the Court would have to determine whether under Article 41 of the Statute, the Court has such an independent power to indicate interim measures having that object; whereas, however, for the reasons now to be explained, the Court does not find it necessary to examine this point.

In deciding whether the Court has this "independent power", two crucial issues have to be addressed. The first is whether the rights, referred to in Article 41 as deserving of preservation, are limited to those in dispute in the

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Kingdom and Iceland should each "ensure that no action of any kind is taken which might aggravate or extend the dispute submitted to the Court" (ICJ Rep 1972, p 17 at 35; for the *Anglo-Iranian* case, see above fn 75; also the *Nuclear Tests* cases, ICJ Rep 1973, p 106 at 142). The Court, in the *Fisheries Jurisdiction* case, referred to its power to take the measures in question as follows (ICJ Rep 1972, at 16, 34):

> Whereas the right of the Court to indicate provisional measures as provided for in Article 41 of the Statute has as its object to preserve the respective rights of the Parties pending the decision of the Court, and 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 measures which are in issue;
>
> Whereas the immediate implementation by Iceland of its Regulations would, by anticipating the Court's judgment, prejudice the rights claimed by the United Kingdom and affect the possibility of their full restoration in the event of a judgment in its favour.

See also the *Anglo-Iranian* case, ICJ Rep 1951 at 93; cp *Nuclear Tests* cases, ICJ Rep 1973 at 103–104, 140.

81 (1939) PCIJ, Ser A/B, No 79, 199; above p 124.

82 *Pleadings*, p 100. For the emphasis placed by New Zealand on aggravation of the dispute as a basis for the granting of interim measures, see *Nuclear Tests* cases, *Pleadings*, Vol II, pp 116–119.

83 ICJ Rep 1976, p 3 at 12; echoing the *South-Eastern Greenland* case (1932) PCIJ Ser A/B, No 48, p 284.

proceedings. The second is whether Article 41 is indeed the exclusive basis of the Court's authority to indicate interim measures or whether there exists some inherent authority for an international tribunal to grant protection which is more extensive than, and in the case of the Court is not by implication limited by, Article 41.

1. *Are the circumstances limited to those in issue?*

It would appear from the wording of Article 41 that the Court has the widest discretion as to the circumstances which it can take into account, providing they are relevant to establishing that provisional measures are necessary in order "to preserve the rights of either party". The question of whether exacerbation of the dispute is a sufficient basis for the Court to exercise its authority under Article 41 depends upon how the matter is classified. There is no insurmountable obstacle to including aggravation of the dispute as a circumstance encompassed by Article 41, and indeed as the sole circumstance justifying the grant of protection. However, it is also arguable that, although Article 41 refers to "rights" in general, the Court's power is limited to protecting rights in issue before the Court and which may no longer be enforceable by the final judgment if they are not preserved in the interim.

Given the increasing difficulties experienced, certainly during the 1970s, over whether the Court can exercise its power under Article 41 in the absence of more than prima facie evidence as to jurisdiction on the merits, it is likely that, on the issue of what rights can be protected by the exercise of this power, the prevailing view would also be one of caution. Nevertheless it does not necessarily follow, even from this perspective, that the Court's authority is limited exclusively to rights already in issue in the case. If caution is the predominant attitude, an appropriate test might be to limit the Court's competence under Article 41 by reference to the question of whether the rights sought to be protected also fell, prima facie at least, within its jurisdiction on the merits.

If that requirement were satisfied, there would seem to be no logical reason against the granting of interim measures to prevent an extension of the dispute to encompass other rights appertaining to the litigants. The Court is the principal judicial organ of the United Nations,[84] and is therefore equally with the other principal organs obliged to contribute to the achievement of the purposes of the Organisation, including, by Article 1.1 of the Charter, the duty "to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace". If the Court were faced with a dispute between States A and B involving rights (belonging to A) X and (to B) Y, the Court would hardly be fulfilling its role adequately if it were to decline to grant interim protection because the rights that are now threatened are W (belonging to A) and Z (belonging to B). The Court has not had to deal with this situation because it has been able to add on to the protection of rights X or Y a general requirement that the parties should not indulge in conduct that would aggravate or extend the dispute, rather than requiring that certain specific

84 Statute, Article 1; Charter, Article 7.1.

additional rights be respected.

In the *Aegean Sea* case, Greece emphasised the aggravation of the tense situation between the two countries, brought about by Turkish exploration in disputed waters, as a separate basis for the indication of interim measures.[85] The reason why the Court held that it was unnecessary to decide whether this did constitute an independent basis of authority under Article 41 was that the matter had been considered by the Security Council which had[86] urged the two governments "to do everything in their power to reduce the present tensions in the area so that the negotiating process may be facilitated" and called on them "to resume direct negotiations over their differences". In addition, in the preamble to this resolution, the Council expressed itself as being

> *Conscious* of the need for the parties both to respect each other's international rights and obligations and to avoid any incident which might lead to the aggravation of the situation and which, consequently, might compromise their efforts towards a peaceful solution.

The Court therefore adopted the approach that, as the parties appeared to be prepared to abide by the Council's resolution, the matter could be left where it stood. In the words of the Court's Order:[87]

> Whereas both Greece and Turkey, as Members of the United Nations, have expressly recognized the responsibility of the Security Council for the maintenance of international peace and security; whereas, in the above-mentioned resolution, the Security Council has recalled to them their obligations under the United Nations Charter with respect to the peaceful settlement of disputes, in the terms set out in paragraph 39 above; whereas, furthermore, as the Court has already stated, these obligations are clearly imperative in regard to their present dispute concerning the continental shelf in the Aegean; and whereas it is not to be presumed that either State will fail to heed its obligations under the Charter of the United Nations or fail to heed the recommendations of the Security Council addressed to them with respect to their dispute.

Nor is much guidance to be gleaned from the separate opinions delivered in the case. President de Arechaga, it is true, asserted that it was only rights that were *sub judice* in a case which could be the subject of an order for interim protection.[88] Judge Mosler may have been leaning in the same direction when

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85 The second of the two grounds invoked by Greece was expressed by the Court as follows (ICJ Rep 1976, p 3 at 7):

> With respect to the protection of the right claimed by Greece in respect of the alleged obligation of Turkey to abstain from any sort of action which may aggravate or extend the present dispute, on the basis that the activities complained of would, if continued, aggravate the dispute and prejudice the maintenance of friendly relations between the two States.

86 Resolution 395 (1976) adopted by the Security Council on 25 August 1976, text in (1976) 15 ILM 1235.

87 ICJ Rep 1976 at 13.

88 The President said (at 16-17):

> According to general principles of law recognized in municipal systems, and to the well-established jurisprudence of this Court, the essential justification for the impatience of a tribunal in granting relief before it has reached a final decision on its competence and on the merits is that the action of one party *pendente lite*

he commented that he did not consider the military aspect "as a distinct element but simply as an aggravating circumstance additional to the basic element of continued exploration".[89] However, the more obvious interpretation of his words is that they should be related to the preceding sentence in the opinion in which he expressed "doubts regarding the Court's separation of the infringement of alleged Greek rights to exploration from the military measures, taken by both sides for purposes of protection or supervision of the vessel".[90] In other words, in these particular circumstances, the military tension was directly related to, and could not therefore be distinguished from, the infringement of rights at issue in the case.

Four members of the Court drew attention to the significance of the role of the Court in the United Nations system,[91] though no clear picture appeared of their views as to the consequences of relying upon that role in relation to the aggravation issue. The most that can be said in favour of aggravation of the dispute being an independent basis of the Court's authority to grant interim measures is that some of the expressions used by Judge Elias seem to point in that direction. For example, take the following sentence:[92]

> It thus appears that the aggravation or expansion of the dispute must relate to a situation or state of fact which may be worsened by act of one or both parties pending the final decision—that is something done which might frustrate the giving of an effective decision.

This pronouncement does not limit the cause of frustration to preventing the Court's decision operating on the disputed rights, but appears to refer to the possibility of the whole situation being so affected that no judicial resolution of the dispute could be achieved.

Even so, there remains a degree of ambiguity as to whether this latter circumstance can operate as an independent source of the Court's authority, or only as a factor operating on the rights in dispute in the proceedings. The same is also true of the Order in the *Tehran Hostages* case, in which the Court, besides requiring release of the diplomatic personnel and restoration of the embassy and consular premises to United States control,[93] went on to indicate that:[94]

> The Government of the United States of America and the Government of the Islamic Republic of Iran should not take any action and should ensure that no action is taken which may aggravate the tension between the two

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causes or threatens a damage to the rights of the other, of such a nature that it would not be possible fully to restore those rights, or remedy the infringement thereof, simply by a judgment in its favour. The Court's specific power under Article 41 of the Statute is directed to the preservation of rights *sub judice* and does not consist in a police power over the maintenance of international peace nor in a general competence to make recommendations relating to peaceful settlement of disputes.

89 At 26.

90 Ibid.

91 Judge Lachs at 20; Judge Elias at 29-30; Judge Tarazi at 33-34; and Judge Stassinopoulos at 38-39.

92 At 28.

93 See below p 132.

94 ICJ Rep 1979, p 9 at 21.

countries or render the existing dispute more difficult of solution.

While this formula would seem to demonstrate that aggravating the general relations ("tension") between the parties is distinct from actions rendering "the existing dispute more difficult" to resolve, it does not provide any further guidance on whether the former aspect can stand as a sole basis for the indicating of interim measures.

2. *The scope of Article 41*

The alternative possibility (the second of those referred to above[95]) is to take the path indicated by the Permanent Court in the *Electricity Company of Sofia* case[96] and to regard the power to indicate interim measures of protection as part of the inherent authority of a judicial tribunal. The formulation of this power in that case included the proposition that the principle in question was to the effect inter alia that the parties must, "in general, not allow any step of any kind to be taken which might aggravate or extend the dispute".[97] It was also said by the Court that it was Article 41 of the Statute itself which applied this "principle universally accepted by international tribunals".[98]

There are a number of difficulties with this approach. In the first place, there is the problem of explaining the relationship between Article 41 and the existence of an inherent power. For example, does Article 41 have to be interpreted in the light of such a power (which might produce a fairly broad interpretation); or can the power only exist within the confines of Article 41 (which is more likely to achieve a restrictive interpretation)? It may be that, consciously or even subconsciously, this might be a factor in the attitude adopted by individual judges to, for example, the issue of jurisdiction. If Article 41 represents an inherent power, the existence of jurisdiction on the merits is of less significance. On the other hand, if Article 41 is the sole repository of the Court's authority, there might be a stronger argument for limiting its scope by reference to general factors relating to the Court's jurisdiction.

It has already been pointed out that a number of judges have came out in favour of a more stringent requirement of jurisdiction on the merits as a condition precedent to the granting of interim measures of protection. In its most extreme version, this has taken the form of an assertion that the Court must first settle the question of jurisdiction on the merits. It has been contended, in support of this view, that Article 41, being in Chapter III of the Statute headed "Procedure", is subordinate to the provisions of Chapter II dealing with "Competence of the Court", including the jurisdictional rules contained inter alia in Article 36. As Judge Morozov said in the *Aegean Sea* case:[99]

> The key provisions relating to the competence of the Court are those contained in Chapter II of its Statute, and particularly Article 36 and

95 Pages 126–127.

96 (1939) PCIJ Ser A/B, No 79, 199; above p 124.

97 Ibid.

98 Ibid.

99 ICJ Rep 1976 at 21. Article 48 deals with the Court's power to "make orders for the conduct of the case".

> Article 37.
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> Articles 41 and 48 of the Statute are to be found in Chapter III of the Statute under the title 'Procedure'. This means that provisions of that Chapter cannot be regarded as something which may be separated from Chapter II of the Statute, so as to have an independent significance, which could cancel out the above mentioned provisions of Chapter II concerning the competence of the Court.

It may be that the position of Article 41 in the Statute does have some latent significance, but it is not obvious that its significance is the one attributed to it by Judge Morozov. For example, 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.

The question could be raised of whether Article 41 is the sole means of doing so, or whether the principle exists independently of, and additional to, that article. If a power, which might otherwise be implied from its inherent nature, is expressly conferred, the inference would normally be that the power exists only within the confines of the express grant. There is no obvious reason why this interpretation of the situation should not be made here as there is nothing in the text of Article 41 to suggest that it is part of a wider principle.[100] However, the mere fact that Article 41 is an expression of such a general principle strongly supports a broad approach to the construction of that provision. On this basis, as has already been pointed out, there is no need to limit Article 41 by reference to the jurisdictional requirements of Chapter II of the Statute. Nor is there any reason for limiting too strictly the rights which the

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100 As is the case with Article 51 of the United Nations Charter which can only be understood in the light of the rules of customary international law. As the International Court said in the *Nicaragua* case (ICJ Rep 1986, p 3 at 94):

> On one essential point, this treaty itself refers to pre-existing customary international law; this reference to customary law is contained in the actual text of Article 51, which mentions the 'inherent right' (in the French text the 'droit naturel') of individual or collective self-defence, which 'nothing in the present Charter shall impair' and which applies in the event of an armed attack. The Court therefore finds that Article 51 of the Charter is only meaningful on the basis that there is a 'natural' or 'inherent' right of self-defence, and it is hard to see how this can be other than of a customary nature, even if its present content has been confirmed and influenced by the Charter. Moreover the Charter, having itself recognized the existence of this right, does not go on to regulate directly all aspects of its content. For example, it does not contain any specific rule whereby self-defence would warrant only measures which are proportional to the armed attack and necessary to respond to it, a rule well established in customary international law. Moreover, a definition of the 'armed attack' which, if found to exist, authorizes the exercise of the 'inherent right' of self-defence, is not provided in the Charter, and is not part of treaty law. It cannot therefore be held that Article 51 is a provision which 'subsumes and supervenes' customary international law. It rather demonstrates that in the field in question, the importance of which for the present dispute need hardly be stressed, customary international law continues to exist alongside treaty law.

Court is entitled to protect by the indication of interim measures.

iii. *Irreparable harm*

The International Court has used a variety of expressions to signify that the rights or position of the State seeking protection have been sufficiently seriously affected to justify the grant of interim measures. For example, as the following survey of the relevant case law will show, the Court has employed both "irreparable harm" and "irreparable prejudice". It may be that the use of different terminology suggests a degree of uncertainty as to the extent of disadvantage which has to be caused or threatened before the Court will intervene. Alternatively, or perhaps in addition, the Court might be signifying a difference between damage in fact (ie harm) and damage in law (i.e. prejudice to rights). This would fit in with the Permanent Court's assertion in the *Legal Status of South-Eastern Greenland* case[101] that

> the object of the measures of interim protection contemplated by the Statute of the Court is to preserve the respective rights of the Parties pending the decision of the Court, in so far, that is, as the damage threatening those rights would be irreparable in fact or in law.

While this might, in some circumstances, be a helpful distinction to keep in mind, it is still for the party seeking relief to show as a matter of fact that its rights have been or are likely to be infringed. Normally,[102] the degree of harm threatened must be related to those rights. What is regarded as "irreparable" by the Court is thus likely to be a mixed issue of fact as well as law, which together show that a final decision in the case might "prove nugatory and futile if measures of interim protection are not taken at once".[103]

Viewed in this light, the concept of irreparability as used by the Permanent Court in the *Legal Status of South-Eastern Greenland* case, could be regarded as an all-embracing formula. Conduct likely to aggravate or extend the dispute might "in fact" cause irreparable harm to the relations of the parties. This was an important factor in the action taken by the Court in indicating provisional measures in the *Tehran Hostages* case, though it is not easy to assess how it related to the other factors which the Court specified in its Order. The Court referred, in the context of the requirement that "irreparable prejudice should not be caused to rights which are the subject of dispute in judicial proceedings",[104] to a number of more general matters relating to the institution of diplomatic and consular immunities. For example, with regard to the former, the Court stated that:[105]

> there is no more fundamental prerequisite for the conduct of relations between States than the inviolability of diplomatic envoys and embassies, so that throughout history nations of all creeds and cultures have observed reciprocal obligations for that purpose; and ... the obligations thus assumed,

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101 (1932) PCIJ Ser A/B, No 48 p 277 at 284.

102 Subject to the possibility, dealt with above, that aggravation or extension of a dispute might be an independent basis for the grant of interim protection.

103 Dumbauld, note 9 above, p 7.

104 ICJ Rep 1979 at 19.

105 Ibid.

> notably those for assuring the personal safety of diplomats and their freedom from prosecution, are essential, unqualified, and inherent in the representative character and their diplomatic function.

It would seem from this conjunction that the Court regarded that the very importance of diplomatic intercourse to all States, and not just to the United States, was a ground for holding that irreparable prejudice was being caused or threatened. The Court also went on to hold specifically that the continued detention of the diplomatic and other personnel "exposes the human beings concerned to privation, hardship, anguish and even danger to life and health and thus to a serious possibility of irreparable harm".[106] The case thus illustrates both irreparable harm in law (ie to legal rights, though in a very general sense as indicated above) and also in fact (ie in the form of the physical danger to the individuals who were the subject matter of the dispute).

Sometimes the irreparable harm is less easily identified. In the *Fisheries Jurisdiction* cases, the Court attempted to achieve a balance between the rights of the parties. As far as the United Kingdom was concerned, "the immediate implementation [by Iceland] of its Regulations [excluding foreign fishing vessels from designated waters] would, by anticipating the Court's judgment, prejudice the rights claimed by the United Kingdom and affect the possibility of their full restoration in the event of a judgment in its favour".[107] On the other hand, it was "also necessary to bear in mind the exceptional dependence of the Icelandic nation upon coastal fisheries for its livelihood and economic development".[108] Accordingly, the Court made an order designed to allow United Kingdom ships to continue to fish in the contested waters, but restricting the total catch in each year in order to take account "of the need for the conservation of fish stocks in the Iceland area".[109] In this case, there was nothing irreparable in law to the (temporary) loss of the legal right to fish in the waters concerned. However, the harm to the United Kingdom longshore fishing fleet from a total exclusion from Icelandic waters was obvious in fact, and this constituted a sufficient ground for the Court to indicate provisional measures of protection of British interests.

In contrast, in the *Aegean Sea* case, the dispute between Greece and Turkey over continental shelf rights came to a head when, in 1973, Turkey granted concessions for petroleum exploration in areas claimed by Greece, and in further such areas in 1974. Just prior to taking this latter step, Turkey sent a hydrographic vessel, escorted by a large contingent of warships, into the disputed waters. In August 1976, Turkey sent a seismic research ship to carry out a further survey. It was at this point that the Greek government made application to the International Court. In relation to its request for interim protection, Greece contended:[110]

> that the concessions granted and the continued seismic exploration undertaken by Turkey in the areas of the continental shelf which are in dispute threaten to prejudice the exclusive sovereign rights claimed by

106 At 20.
107 ICJ Rep 1972, p 12 at 16.
108 Ibid.
109 At 17.
110 ICJ Rep 1976, p 3 at 9.

> Greece in respect of those areas; and...further...that Turkey's seismic exploration threatens in particular to destroy the exclusivity of the rights claimed by Greece to acquire information concerning the availability, extent and location of the natural resources of the areas; that the acquisition and dissemination of such information without the consent of Greece prejudices its negotiating position in relation to potential purchasers of exploitation licences, thereby permanently impairing its sovereign rights with respect to the formulation of its national energy policy.

While admitting that "Turkey's activity in seismic exploration might...be considered as...an infringement [of Greece's claimed exclusive right of exploration] and invoked as a possible cause of prejudice to the exclusive rights of Greece" if the areas in question were ultimately held to appertain to Greece,[111] the Court also pointed out that the "activities undertaken by Turkey are all of a transitory character...and do not involve the establishment of installations on or above the seabed of the continental shelf"; nor had any suggestion been made that Turkey had "embarked upon any operations involving the actual application or other use of the natural resources of the areas of the continental shelf which are in dispute".[112] Accordingly, the Court held, "the possibility of such a prejudice to rights in issue" in the case did not justify the indication of interim measures of protection: the acquisition of information about the natural resources of areas claimed by Greece did not constitute "a risk of irreparable prejudice to rights in issue before the Court".[113]

Although appearing to accept that there must be some prejudice to the legal rights of the State seeking protection (ie of irreparable prejudice in law), the Court was primarily influenced by the extent of the prejudice (as a matter of fact). This might suggest that irreparability will be assessed primarily as an issue of fact rather than one of law. In the *Nuclear Tests* cases, for example, it is possible to explain the decision to grant protection on the ground that it was not the threatened breach of Australia's right to be free from infringement of its territorial sovereignty which rendered the prejudice irreparable, but the nature of the harm involved in the infraction. As the Court observed:[114]

> the information submitted to the Court, including Reports of the United Nations Scientific Committee on the Effects of Atomic Radiation between 1958 and 1972, does not exclude the possibility that damage to Australia might be shown to be caused by the deposit on Australian territory of radio-active fall-out resulting from such tests and to be irreparable.

Such an interpretation would certainly fit in with the fact or law distinction drawn by the Permanent Court in the *Legal Status of South Eastern Greenland* case.[115] However, there are possible alternative explanations.

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111 At 11.

112 At 10.

113 At 11.

114 ICJ Rep 1973, p 99 at 105. See also the comment of Judge Ignacio-Pinto who, in the course of his Dissenting Opinion, said (at 131):

> I entirely agree with Australia that that country runs considerable risk by seeing atomic fall-out descend upon its territory and seeing its people suffer the harmful effects thereof.

115 PCIJ Ser A/B, No 48, p 277; above p 132.

In the first place, the Court's words cannot be divorced from the circumstances in which they were employed. In the *Nuclear Tests* cases, France had "expressed its conviction that, in the absence of ascertained damage attributable to its nuclear experiments, they did not violate any rule of international law".[116] More specifically it took the view that, even when the potential consequences of the French nuclear tests were taken into account, the levels of radioactivity from all sources in the atmosphere over Australia and deposited on Australian territory would be within the safety guidelines regarded as satisfactory by French scientists. The Australian response was essentially twofold: to contend that it was for Australia to determine the appropriate safety levels for atomic pollution within Australia; and to allege that the fallout from the French tests was irreparable, both in the sense that the contamination was not reversible, and from the point of view that it could not be adequately compensated for in the form of damages.[117]

In terms of a distinction between fact and law, the former aspect was essentially one of fact, whereas the latter was more an issue of law. As to which the Court had in mind, there is no clear way of telling, although it is possible to draw certain inferences. Judge ad hoc Barwick referred to the same UNSCEAR reports as those relied upon by the Court as providing "reasonable grounds for concluding that further deposit in the Australian territorial environment of radioactive particles or matter is likely to do harm for which no adequate compensatory measures could be provided".[118] While it is true that a declaration by a judge might reinforce an argument that is itself adopted by the Court, in this instance, the tenor of the declaration by Judge ad hoc Barwick points towards the reinforcing of the Court's conclusion by invoking an alternative argument to the one adopted by the Court. The probability is, therefore, that the Court regarded the UNSCEAR reports as indicating that the contamination was likely to be irreversible in fact. This interpretation of the Court's attitude is supplemented by the form in which the Australian case was argued. Senator Murphy put the point as follows:[119]

> France cannot undo the damage each explosion may cause to Australia and its people. Once deposited Australia cannot remove the consequences of those deposits. Those consequences are therefore irreversible. To the extent that they infringe legal rights the damage is forever done and the right can never be restored.

From this examination of the Court's observations on irreparability, no very real pattern emerges, so that it is difficult to provide any precise definition of the concept. What may be discerned is a spectrum. At one end are matters which concern the nature of the legal rights involved; at the other are questions of fact. In assessing the issue of irreparability, quite apart from the overall balancing of the interests of the parties involved, the Court would seem to be influenced by the importance of the rights alleged to be infringed, as well as the degree and seriousness of the infraction as a matter of fact. It is probably for this reason that, where it is dealing with a situation which falls towards one end

116 ICJ Rep 1973 at 105.
117 ICJ *Pleadings*, Vol I, pp 166 et seq (Senator Murphy); pp 184 et seq (Mr Ellicott).
118 ICJ Rep 1973 at 110.
119 *Pleadings*, Vol I, p 173.

or the other of the continuous spectrum, the Court may appear in the one case to be treating it as exclusively or primarily as one of law and in the other as one of fact. In cases in which the circumstances fall somewhere in the middle of the spectrum, the Court's judgment is more likely to give the appearance that the matter is a combination of law and fact.

iv. *The issue of urgency*

Where the rights of a State have already been infringed, there is no need for the Court to consider urgency as a factor in deciding whether to grant interim protection of those rights. It is only where the request for interim measures is based upon a threatened infringement, or the threat of a continuing infringement, that urgency is an issue. In this context, it is linked to the degree of likelihood that irreparable harm will be caused to the rights of one (or both) of the parties or to their future relations. Put in another way, it is the imminence of the threat which must be taken into account by the Court.

If the threat is removed, or rendered more remote, one of the purposes of protection is absent. In the *Pakistani Prisoners of War* case, Pakistan requested that the following interim measures be ordered:[120]

(1) That the process of repatriation of prisoners of war and civilian internees in accordance with international law, which has already begun, should not be interrupted by virtue of charges of genocide against a certain number of individuals detained in India.

(2) That such individuals, as are in the custody of India and are charged with alleged acts of genocide, should not be transferred to 'Bangla Desh' for trial till such time as Pakistan's claim to exclusive jurisdiction and the lack of jurisdiction of any other Government or authority in this respect has been adjudged by the Court.

However, once the Pakistan government asked the Court "to postpone further consideration of its request", because of the prospect of negotiations taking place over the disputed issues, the Court no longer had before it "a request for interim measures which is to be treated as a matter of urgency".[121] Accordingly there was no reason why the request should take priority over the need for the Court to "satisfy itself that it has jurisdiction to entertain the dispute" on the merits.[122]

This decision has regularly been cited as illustrating the proposition that "urgency is an essential quality of a request for interim protection".[123] It is certainly true that Article 74 of the Rules of the International Court expresses the need for expedition of the proceedings in a number of ways. By paragraph 1, a "request for the indication of provisional measures shall have priority over all other cases" before the Court. Moreover, paragraph 2 provides that, if the Court is not in session when the request is made, it "shall be convened

120 ICJ Rep 1973, p 328 at 329:

121 At 330.

122 Ibid.

123 Sztucki, note 3 above, p 113; see also Elkind, note 18 above, p 123: "urgency was the essence of a request for interim measures".

forthwith for the purpose of proceeding to a decision on the request as a matter or urgency." Finally, pending such meeting, paragraph 4 empowers the President with a discretion "to call upon the parties to act in such a way as will enable any order the Court may make on the request for provisional measures to have its appropriate effect." However, it is far from certain that it follows ineluctably from these provisions that urgency is an essential and defined quality as Sztucki asserts.[124]

In the *Pakistani Prisoners* case, the matter was no longer so urgent that the Court could not proceed to consider the issue of whether jurisdiction on the merits existed in the circumstances pertaining between the parties. This determination by the Court suggests the existence of a time frame that constitutes a threshold of urgency. Certainly, from one point of view there must be the requisite level of urgency for interim measures to be needed. Commenting upon the jurisdictional nexus point, Elkind had no doubt that urgency was one of the requirements which had to be satisfied before Article 41 could be employed by the Court:[125]

> If the circumstances do not require it, if there is little likelihood of...irreparable injury, if there is no urgency, then the Court cannot indicate such measures no matter how great the likelihood that it will find that it has jurisdiction.

However, even if this threshold of urgency is crossed, so that this requirement for the granting of interim measures is satisfied, it does not follow that urgency ceases to be of relevance to the question of whether or not the Court should exercise its authority under Article 41. There are "degrees of urgency"[126] and these are particularly related to the nature of the threat of harm. Urgency has a direct bearing on the need to protect interests and can also enhance the irreparability factor. But does it relate to the issue of jurisdiction on the merits and, if so, how does it apply? According to Mendelson:[127]

> even if the case is urgent enough to satisfy this test [of the imminence of the anticipated harm to the rights of the applicant], there are still degrees of urgency, and it is submitted that the less imminent the danger seems, the more the Court could demand to be satisfied that it is likely to have jurisdiction over the merits. Conversely, the closer the danger, the more the Court might be justified in dispensing with all but a cursory examination of whether any obvious defect appears 'on the face' of the jurisdictional title....In other words, it may be that, other things being equal, the degree of probability of jurisdiction which the Court requires should be roughly in

124 In the passage from which the above quotation (fn 123) is taken, Sztucki wrote:

> The above-quoted provisions are not merely rules regulating the Court's work and designed to reassure the parties that their requests will be given due attention. First of all, they reflect the understanding that issues submitted to the Court in requests for interim protection are supposed to require urgent treatment; consequently, that urgency is an essential quality of a request for interim protection and that a request lacking that quality is not one for such measures in the meaning of the Statute and the Rules.

125 Note 18 above, p 184. This observation was made in contradiction to Mendelson's "flexible approach", dealt with below at fns 130 and 131.

126 Mendelson, note 9 above at 318; Sztucki, note 3 above, p 117.

127 Note 9 above at 318.

inverse proportion to the degree of urgency.

The last sentence of this passage does not follow from the earlier part. The proposition that the closer the danger the less possible will it be for the Court to undertake an examination of the jurisdictional issue is acceptable enough. In terms of the *Pakistani Prisoners* case, however, once a certain degree of urgency is present, it is not possible to proceed to a proper examination of that issue, and the threshold requirement is satisfied. There is however no logical link between the degree of urgency and the likelihood of the existence of jurisdiction on the merits. It is true that, in the *Nuclear Tests* cases, Judge Gros made the following assertion:[128]

> In the decision which the Court has to take on any request for provisional measures, urgency is not a dominant and exclusive consideration; one has to seek, between the two notions of jurisdiction and urgency, a balance which varies with the facts of each case.

However, too much should not be made of these words. It is clear that there are limits on the scope for such balancing to take place. As Judge Gros went on to say:[129]

> If the jurisdiction is evident and the urgency also, then there is no difficulty, but that is an exceptional hypothesis. When the jurisdiction is not evident, whether there is urgency or not, the Court must take the time needed for such an examination of the problems arising as will enable it to decide one way or the other.

The significance of this pronouncement has to be assessed in light of the fact that Judge Gros was one of the members of the Court who placed great emphasis upon the need for an applicant to establish the existence of jurisdiction on the merits before the Court could grant interim measures. Nevertheless, what he said was evidence of a view that the balancing could only occur within a limited compass once the necessary preconditions for the application of Article 41 were satisfied, the difference in the case of Judge Gros being that he regarded the existence of jurisdiction on the merits as having a principal significance as a precondition.

Summation

The words of Judge Gros raise two major issues:

(i) what interests are in fact balanced? and

(ii) whether the process of balancing is indeed at the heart of an understanding of the Court's approach?

The two are interrelated and cannot be satisfactorily answered in isolation.

It was certainly Mendelson's view that the Court does perceive its task in terms of the balancing of various factors. In his own explanation of the Court's approach:[130]

> There may be other factors, but these—the possibility of a decision in the applicant's favour on jurisdiction and on the merits, the imminence of the anticipated harm, and the magnitude of the interests at stake—are the principle matters to be taken into account by the Court in weighing up the

128 ICJ Rep 1973, pp 99, 135, at 120, 155.

129 Ibid.

130 Note 9 above at 318–319.

> possibility of prejudice to the rights of the parties, which, in turn, is one of the most relevant 'circumstances of the case' to be taken into account when dealing with a request for interim measures. To lay down in advance a hard-and-fast rule for dealing with one of these factors—the possibility of jurisdiction—is to fail sufficiently to take into account the great variability of the others from case to case. If the other circumstances suggest very strongly that interim measures should be indicated, the Court may be justified in indicating them even in the face of substantial—though not overwhelming—doubts as to its substantive jurisdiction. If, on the other hand, the other circumstances make granting the request only marginally preferable to refusing it, the Court may well be justified in examining the question of its jurisdiction more closely and insisting on a greater degree of probability.

Indeed, although Judge Gros seemed to be speaking of only a single aspect of the equation in referring to urgency in the earlier quoted passage, his words should not be interpreted so narrowly. Taken in context of the *Nuclear Tests* cases, they undoubtedly refer to the various matters that render urgent the case for the granting of protection, eg, to use Mendelson's formulation "the imminence of the anticipated harm, and the magnitude of the interests at stake".

The principal objection to Mendelson's theory has been that it concentrates upon competition between the likelihood of jurisdiction on the merits on the one hand and the extent to which circumstances require the granting of protection on the other. It also involves a rejection of treating the jurisdictional issue as a "circumstance" within Article 41. As Elkind wrote:[131]

> The 'flexible approach' can be criticized on a number of grounds. In the first place, the Court already has a wide margin of appreciation with respect to the question of whether the circumstances require interim protection. This discretion is neither logically connected with the question of jurisdiction nor is it connected in the Statute. If the circumstances do not require it, if there is little likelihood of danger to [the] peace or of irreparable injury, if there is no urgency, then the Court cannot indicate such measures no matter how great the likelihood that it will find that it has jurisdiction. It cannot even indicate such measures *after* it has decided that it has jurisdiction.
>
> If, on the other hand, the absence of jurisdiction is manifest, then it cannot indicate such measures, no matter how compelling the other circumstances.
>
> To introduce probability of jurisdiction into the question of 'circumstances' only makes the process more chaotic. Not only does it subject the law to greater uncertainty. But, since the Court could vary the degree of probability which it would accept in the light of other circumstances, it makes the decision a matter of discretion. The question may be a hard one. But it is hardly open to a discretionary solution. Nor is it logically connected with the degree of prejudice which the refusal of interim measures may entail for the parties.

To be fair to Mendelson, he was not for one moment suggesting that a total failure to show any compelling reasons or the existence of any basis of jurisdiction on the merits could be compensated for by conclusive evidence of jurisdiction in the former case and the most compelling danger to the other

131 Note 18 above, p 184.

party in the latter instance. He was only suggesting that, within certain parameters, what the Court in fact did was to allow a process of compensation to operate across the middle range of the spectrum. Within that range the Court does undoubtedly exercise a discretion, and one that is influenced by the factors that have been referred to in the course of the present discussion. In the case of jurisdiction on the merits, it is probable that the scope for discretion is limited. It can exist only within the scope for interpretation contained in the formula employed by the Court.[132]

Viewed in this light, the process of balancing is better regarded as operating at a more abstract level. It is the interests of the litigating States which have to be balanced through the various factors which have been discussed. The issue of jurisdiction on the merits is thus one of the factors which forms part of the balance on one side of the equation. For this reason, the following explanation of the position is to be preferred to that provided by Mendelson:[133]

> A conflict between their respective processual positions and interests is another aspect of the contradiction inherent in the concept of interim protection in international law. An applicant is naturally and legitimately interested in the effectiveness of judicial process and in safeguards with respect to his claims, should the impending judgment be in his favour; and this largely depends on the competence of a tribunal to make urgent interim decisions. This, in turn, speaks for the adoption of a liberal jurisdictional test as a basis for action under Article 41. A respondent is as naturally and legitimately interested in protecting the sphere of his sovereign consent to the jurisdiction of an international tribunal, and freedom of his conduct from interference on the part of an international judicial organ which may turn out to be without jurisdiction. For, there can be no doubt that the question of interference with the conduct of a sovereign State does arise in this context, and the drafters of Article 41 were perfectly aware of that. Thus, the legitimate interests of respondents militate instead for the adoption of a rigorous jurisdictional test as a basis for granting interim protection.

Between these conflicting interests, it is for the Court to reach an appropriate compromise, taking account, in the particular case, of the other factors discussed in this paper that are relevant to the granting or withholding of interim measures of protection.

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132 Above pp 112–113.

133 Sztucki, note 3 above, p 256.