Provisional Measures in the World Court: Binding or Bound to Be Ineffective?

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Abstract: Does the International Court of Justice have the power to indicate legally binding provisional measures? On the basis of the provisions of the UN Charter and the Statute of the International Court of Justice, it seems unlikely that the Court is bestowed with such a power. An alternative argument, which regards interim protection as a general principle of law, thus giving it binding force, is also not without difficulties. The situation seems to be clearer, however, when states declare in a treaty their intention to be bound by the provisional measures indicated by the Court. The argument considering provisional measures as a 'moral obligation' will be examined as well.

1. INTRODUCTION

Pursuant to Article 41 of the Statute of the International Court of Justice, the Court is endowed with the competence to indicate provisional measures of protection. The aim of these measures is to protect the respective rights of the parties to a dispute until the Court reaches a final judgment. The procedure for the indication of provisional measures is laid out in Articles 73 to 78 of the 1978 Rules of Procedure of the Court (Rules of the Court).[1]

Some introductory remarks are due. In the first place, a terminological discrepancy should be noted. Although the Statute of the Court uses the expression 'provisional measures', a different terminology was favoured by

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1. Rules of the Court, reproduced *in* 17 ILM 1286 (1978).

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the former Rules of the Court. Following the Rules of the Permanent Court of International Justice, the 1946 Rules of Court referred in Article 61 to 'interim measures of protection'. When the Rules were amended in 1978, the terminology was brought into conformity with the Statute of the Court.

Additionally, it would be useful to distinguish between the legal consequences of binding provisional measures and the ones of non-binding interim protection. In the first case, non-compliance with the measures would involve the breach of an international obligation and, therefore, the international responsibility of the recalcitrant state. State responsibility leads to a duty to make reparation.[2] Another possibility for the injured state to respond to a violation of provisional measures could be by the use of the concept of lawful counter-measures.[3] On the other hand, if no binding legal force is attributed to provisional measures, and provided the acting state breaches no other international obligation, the injured state has no such remedies at its disposal.

The present paper aims at investigating a potential legal basis for the legally binding character of provisional measures indicated by the Court. In case of a negative answer, alternative bases to ensure respect for provisional measures will be considered. Section 2 deals with relevant provisions of the UN Charter and the Statute of the Court. Section 3 will then elaborate on other relevant sources of law. Section 4, finally, will discuss case-law with regard to provisional measures.

2. RELEVANT PROVISIONS OF THE CHARTER AND STATUTE

The only provision in the Statute of the Court explicitly dealing with interim protection is Article 41. No such provision can be found in the UN Charter. Article 41 is further amplified by Articles 73 to 78 of the 1978 Rules of the Court. Furthermore, in the debate, Articles 59 of the Statute and 94(1) of the UN Charter are frequently referred to.[4] The present Sec-

2. *See* Art. 1 of the ILC Draft Articles on State Responsibility, 1980 YILC, Vol. II, Part Two, at 30-34; *see also* the Judgment of the Permanent Court in the Chorzow Factory case (Germany *v.* Poland), 1928 PCIJ Rep. (Ser. A) No. 17, at 29.
3. The requirements for their exercise can be found in the Naulilaa case (Portugal *v.* Germany), 2 RIAA 1012 (1928), and in the Air Services Agreement case (France *v.* United States), 18 RIAA 416 (1978).
4. *See* S. Rosenne, The Law and Practice of the International Court 141 (1985); M. Mendel-

tion discusses the impact of these 'constitutional' provisions on the legal force of interim measures of protection.

2.1. Article 41 of the Statute of the Court

Article 41 reads:

1. The Court shall have the power to indicate, if it considers that circumstances so require, any provisional measures which ought to be taken to preserve the respective rights of either party.
2. Pending the final decision, notice of the measures suggested shall forthwith be given to the parties and to the Security Council.

An examination of Article 41 reveals two expressions with potential consequences on the binding force of provisional measures, 'to indicate' and 'ought to be taken'. The ordinary meaning of the verb 'indicate' does not infer any kind of obligation. Some writers maintain the view that to *'indicate', apart from a mere suggestion, could also mean 'to point out'*.[5] Nevertheless, this did not lead Dumbauld to believe that provisional measures possess a binding character.[6] This is a position most writers would agree with, considering the formulation of Article 41 as one of the biggest obstacles to the attribution of binding force on provisional measures.[7] This conclusion should not be modified by the fact that the Court has a 'power' to indicate provisional measures. Dictionary interpretation defines the second relevant phrase ('ought to') as also implying nothing stronger than a moral obligation, and holds it to be synonymous with 'should'.[8] To im-

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son, *Interim Measures of Protection and the Use of Force by States*, *in* A. Cassese (Ed.), The Current Legal Regulation of the Use of Force 343 (1986); C. Crockett, *The Effects of Interim Measures of Protection in the International Court of Justice*, 6-7 California Western International Law Journal 375-377 (1975-1977); J. Bernhardt, *The Provisional Measures Procedure of the International Court of Justice Through US Staff in Tehran:* Fiat Justitia, Pereat Curia?, 30 VJIL 605 (1980); J. Elkind, Interim Protection. A Functional Approach 159-161 (1981); and K. Oellers-Frahm, *Interim Measures of Protection*, *in* R. Bernhardt (Ed.), 1 Encyclopedia of Public International Law 71 (1981).

5. *See* E. Dumbauld, Interim Measures of Protection in International Controversies 169 (1932); and J. Goldsworthy, *Interim Measures of Protection*, 68 AJIL 274 (1974).
6. *See* Dumbauld, *supra* note 5, at 168-169.
7. *See* Mendelson, *supra* note 4, at 340; *see also* L. Gross, *Some Observations on Provisional Measures*, *in* Y. Dinstein (Ed.), International Law at a Time of Perplexity, Essays in Honour of S. Rosenne 307 (1989); Crockett, *supra* note 4, at 353; and Goldsworthy, *supra* note 5, at 273-274.
8. *See* Collins Cobuild English Language Dictionary 1018 (1987); *cf.* Elkind, *supra* note 4, at 153.

pose a legal obligation, words as 'shall' or 'must' are more suitable.

Furthermore, Article 41 finds its place in Chapter 3 of the Statute, a chapter dealing with the procedure before the Court. In this sense, Article 41 could be seen as a procedural order by the Court and, in such a case, it would have no other effect than the possible sanctions for violating an ordinary procedural injunction, such as an order fixing a deadline.[9] On the other hand, Chapter 3 of the Statute also contains provisions on the binding nature and final effect of judgments made by the Court.[10] Placement in the Chapter on procedure would therefore not necessarily lead to a preclusion of binding legal effect to provisional measures indicated by the Court. Additionally, a study of the *travaux préparatoires* points to the direction that the drafters did not intend to vest the Court with the power to order legally binding interim protection.[11]

2.2. The Rules of the Court

To support the carrying out of its functions, the Court drafted Rules of Procedure. Even though they are adopted by the Court and not by the member states, they are generally regarded as part of conventional international law.[12]

In 1978, the Court altered significantly the regulation of provisional measures, on the basis of experience gained.[13] In particular, Rule 66, the only Rule dealing with the matter at the time, was elaborated into a comprehensive system. Of special importance to the present research is Rule 78. It reads that "[t]he Court may request information from the parties on any matter connected with the implementation of any provisional measures it has indicated". This newly introduced Rule relied to a large extent on the practice of the Court in the two *Fisheries Jurisdiction* cases.[14] Curiously

9. *See* A. Hammerskjöld, *Quelques Aspects de la Question des Mesures Conservatoires en Droit Internationale Positif*, 7 ZaöRV 25-27 (1935). According to this author, the only possible sanction is a negative inference in the Court's consideration of evidence.
10. *See* Arts. 59 and 60 of the Statute of the Court.
11. The President of the Committee stated in his report that "[g]reat care must be exercised in any matter entailing the limitation of sovereign powers"; *see* the *Procès-Verbaux* of the Proceedings of the Committee, LN Doc 1920, Vol. 2, June 16th-July 24th, at 735.
12. *See* S. Rosenne, The Law and Practice of the International Court 544 (1985). Support for this view can be found in the Turkey and Iraq Frontier case, Advisory Opinion, 1927 PCIJ Rep. (Ser. B) No. 12, at 31.
13. *See* S. Rosenne, Procedure in the International Court 149 (1983).
14. Fisheries Jurisdiction cases (UK *v.* Iceland; Germany *v.* Iceland) (Provisional Measures),

enough, the provision finds no support in the Statute. Furthermore, it remains questionable whether or not a failure to comply with a request made under Rule 78 could be accompanied by any sanction. However, Rule 78 is generally regarded as an endeavour to strengthen the authority attached to the indication of provisional measures.[15]

2.3. Articles 59 and 94

Article 59 of the Statute restricts the effect of decisions of the Court to the parties to the dispute. The wording of Article 94(1) of the UN Charter has a similar bearing. Before examining whether an indication of provisional measures would have to observe the limitation of Articles 59 and 94(1), the character of such measures should be discussed.

Starting with the *Sino-Belgian Treaty* case,[16] all indications of provisional measures were titled 'orders'. Even though both Articles 59 and 94(1) use the term 'decision' instead of the term 'judgment', which is generally favoured in neighbouring Articles, the Court in its practice has used the latter two terms interchangeably. Furthermore, among legal scholars it appears to be widely accepted that the terms 'decision' and 'judgment' are synonymous.[17]

Can an order indicating provisional measures really qualify as a 'decision', in the meaning of Article 59 Statute and 94(1) Charter? It is a well established principle of international law that final decisions of the Court are legally binding upon the parties.[18] According to Articles 59 and 60 of the Statute, a judgment has a binding nature and is final. These features taken together are usually qualified as *res iudicata*. Do provisional measures possess the same characteristic of finality? On the basis of Article 76 of the Rules of the Court, an order indicating provisional measures is suitable for

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Order, 1972 ICJ Rep. 12 and 30, respectively.

15. *See* Rosenne, *supra* note 13, at 157. *See also* Mendelson, *supra* note 4, at 343; and J. Sztucki, Interim Measures in the Hague Court 270 (1983).
16. Sino-Belgian Treaty case (China *v.* Belgium), 1927 PCIJ Rep. (Ser. A) No. 8, at 6.
17. *See* H. Mosler, *Chapter XIV, The International Court of Justice, in* B. Simma (Ed.), The Charter of the United Nations, a Commentary 1003-1004 (1994). *See also* A. Pillepich, *Article 94, in* J.-P. Cot & A. Pellet (Eds.), La Charte des Nations Unies 1275 (1985); Rosenne, *supra* note 12, at 627-628; *see also* the Dissenting Opinion of Judge Jessup in the South West Africa cases (Second Phase) (Ethiopia and Liberia *v.* South Africa), 1966 ICJ Rep. 330.
18. L. Goodrich, E. Hambro & A. Simons (Eds.), Charter of the United Nations, Commentary and Documents 555 (1969).

modification as well as revision, and therefore lacks a definitive character. It has also been rightly noted that the pressing circumstances and urgent character of an order indicating provisional measures cannot be reconciled with the characteristics of a judgment.[19] Therefore, including such an order in the scope of Articles 59 and 60 of the Statute and Article 94(1) of the Charter would require an 'over-stretching' of those provisions to their breaking point.

3. ALTERNATIVE BASES FOR A BINDING EFFECT OF PROVISIONAL MEASURES

3.1. Bilateral and multilateral treaties

Following the classical enumeration of the sources of international law presented in Article 38(1) of the Statute of the Court, we will start our quest for potential alternative legal bases for the binding force of provisional measures by looking at international treaties, other than the UN Charter and the Statute.

According to international law, states possess the freedom of imposing legal obligations upon themselves to any desirable extent. This also applies to obligations relating to judicial dispute settlement. Sztucki identified four multilateral and 49 bilateral treaties on the peaceful settlement of disputes, concluded between 1925 and 1965, in which the parties express their intention to be bound by provisional measures indicated by the Court.[20] Some of these treaties are still in force. Such clauses usually take the following form: "the parties to the dispute shall be bound to accept the provisional measures indicated". Similar provisions also exist in contemporary treaties, although on a very limited scale. One of the rare examples can be found in Article 290(6) of the 1982 UN Convention on the Law of the Sea, which stipulates that "[t]he parties to the dispute shall comply promptly with any provisional measures prescribed under this article".[21] The consequences of such provisions are straightforward. Provided that the *prima facie* jurisdiction in the case was based on such a clause, non-compliance with interim

19. *See* Bernhardt, *supra* note 4, at 608.
20. *See* Sztucki, *supra* note 15, at 261.
21. For the text of the Convention, *see* 21 ILM 1261 (1982).

measures entails a breach of a treaty obligation and, therefore, a violation of international law.

In the absence of such a clause, however, state practice does not support the existence of a customary obligation to respect provisional measures. Examples of state practice will now be examined, and it will be demonstrated that in cases before the Court there seems to be no ground for supporting the existence of a customary obligation.

3.2. The practice: provisional measures before the World Court

The Permanent Court of International Justice was requested to indicate provisional measures six times and agreed to do so only twice. The cases in which the Permanent Court declined the request for provisional measures do not provide clarity on the question of their binding force. The two cases in which it actually indicated interim protection, the *Sino-Belgian Treaty* case[22] and the *Electricity Company of Sofia and Bulgaria* case,[23] may be more illuminating in this respect. In the first case, the Court attempted to maintain the *status quo pendente lite* by referring to the 'general duty' of the parties to the dispute.[24] A statement made by the Court in its Order of 5 December 1939, in the *Electricity Company* case, seems to confirm the legally binding character of provisional measures by regarding their indication as a general principle of law.[25] Therefore, in their small number, cases before the Permanent Court do not to exclude the possibility of a legally binding effect.

The successor of the Permanent Court, the International Court of Justice, was requested to indicate provisional measures 18 times, and did so in nine instances. In the *Anglo-Iranian Oil Co.* case, the Court Order does not seem to suggest that the indication of provisional measures creates a legal remedy for the United Kingdom.[26] The Court dismissed that case on the grounds of lack of jurisdiction and, therefore, the Court did not pronounce an opinion on the issue of compliance of the parties with the interim measures it had indicated. Interesting for our purposes, however, is the statement that the provisional measures "ceased to be operative".[27]

22. *See* Sino-Belgian Treaty case, *supra* note 16, at 6 *et seq.*
23. Electricity Company of Sofia and Bulgaria case, 1939 PCIJ Rep. (Ser. A/B) No. 79, at 194.
24. See Sino-Belgian Treaty case, *supra* note 16, at 7 and 9.
25. Electricity Company of Sofia and Bulgaria case, *supra* note 23, at 199.
26. Anglo-Iranian Oil Company case (United Kingdom *v.* Iran), Order, 1951 ICJ Rep. 89.
27. Anglo-Iranian Oil Company case (United Kingdom *v.* Iran) (Jurisdiction), Judgment, 1952

Unfortunately, the term 'operative' is not clarified further.

In the *Fisheries Jurisdiction* cases,[28] in the parallel Orders of 17 August 1972, the Court indicated that the applicants (United Kingdom and Germany)

> should furnish the Government of Iceland and the Registry of the Court with all relevant information, orders issued and arrangements made concerning the control and regulation of the fish catches in the area.[29]

This pronouncement constituted the basis for the new Rule 78 of the amended Rules of the Court of 1978, and can be interpreted as an attempt to strengthen the authority of an order indicating provisional measures. On a request by the applicants to confirm the continuation of the interim measures indicated, the Court held that the measures should "remain operative".[30] Once more, the Court left the meaning of the word 'operative' undetermined. In its final Judgment on the merits, the Court addressed the respondent's reaction to the measures indicated for the first time.[31] Although a certain 'moral' disapproval can be traced in the statement of the Court in respect of Iceland's failure to comply with the Order, Iceland was not held to have breached an international obligation.

Two opinions formulated by individual judges in the course of this case are relevant for the question at hand. Judge Ignacio-Pinto speaks of "violations" of the Orders.[32] The term 'violation' seems to point in the direction of a legal obligation. In his Separate Opinion to the case between Germany and Iceland, Judge de Castro seemed to regard the protection offered by provisional measures as an alternative to treaty obligations, and therewith accredited a legal effect to interim measures.[33]

In the *Hostages* case, the Court also seized the opportunity to pronounce on the behaviour of the parties following the indication of provisional measures.[34] The Court observed that "it is a matter of deep regret

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ICJ Rep. 114.

28. Fisheries Jurisdiction cases, *supra* note 14, at 12 and 30.
29. *Id.*, at 18 and 35.
30. Fisheries Jurisdiction case (Federal Republic of Germany *v.* Iceland) (Jurisdiction), Judgment, 1973 ICJ Rep. 304 and 315.
31. Fisheries Jurisdiction case (Federal Republic of Germany *v.* Iceland) (Merits), Judgment, 1974 ICJ Rep. 16-17 and 188.
32. Fisheries Jurisdiction case, *supra* note 30, at 305 and 316 (Judge Ignacio-Pinto, Separate Opinion).
33. Fisheries Jurisdiction case, *supra* note 31, at 226 (Judge de Castro, Separate Opinion).
34. United States Diplomatic and Consular Staff in Tehran (United States *v.* Iran) (Merits),

that the situation which occasioned these observations has not been rectified since".[35] As in the *Fisheries Jurisdiction* cases, these pronouncements indicate a strong moral disapproval but do not go as far as finding a breach of a legal obligation. When the Court commented on a US military action in Iran, it stated that "no action was to be taken by either party which might aggravate the tension between the countries".[36] Proponents of the theory which regards interim protection as a general principle of law could interpret the passage on the general restraint as a confirmation of their view. However, no legal qualifications can be deduced from it, only the Court's disapproval of the American action becomes clear.

An interesting statement is to be found in the *Nicaragua* case, where the Court decided that the parties should take the Court's indications "seriously into account".[37] The Court clearly avoided to attribute a legally binding force to interim protection, but strongly urged the parties to comply with the measures indicated.

On 8 April 1993, the Court also indicated provisional measures in the *Genocide* case.[38] Soon afterwards, the applicant sought to re open the question of interim measures, since it held the opinion that the respondent had not complied with the first Order. In a second Order, the Court quoted the *Nicaragua* case to the effect that the Court's indication should be taken "seriously into account".[39] By quoting the *Nicaragua* case, the Court may be heading towards a more unequivocal position on provisional measures: even though interim protection is not legally binding, the Court strongly urges states to comply with the measures.

Moreover, several individual judges have even gone so far as to attribute a legal effect to provisional measures. In his Separate Opinion to the *Genocide* case, Judge Ajibola derived this power from the Statute and the Rules.[40] In the same case, Judge Weeramantry stated that a binding

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Judgment, 1980 ICJ Rep. 35.

35. *Id.*, at 42.
36. *Id.*, at 43.
37. Military and Paramilitary Activities in and Against Nicaragua (Nicaragua *v.* United States) (Merits), Judgment, 1986 ICJ Rep. 144.
38. Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina *v.* Federal Republic of Yugoslavia (Serbia and Montenegro)), Order of 8 April 1993, 1993 ICJ Rep. 3; *see also* the Order of 13 September 1993, 1993 ICJ Rep. 325.
39. *See id.*, Order of 13 September 1993, at 349.
40. *Id.*, at 406 (Judge Ajibola, Separate Opinion)

legal character of provisional measures is in accordance with the "letter and spirit of the Charter and the Statute".[41]

Finally, in the case concerning the *Land and Maritime Boundary Between Cameroon and Nigeria*, the indications in the Order of 15 March 1996 do not provide any clarity on the question whether the parties are legally bound to observe these measures.[42]

In general, the record of states in complying with interim measures indicated by the Court is poor. A Court order indicating provisional measures seems to be most effective when both states favour a judicial settlement of their dispute.[43] If, on the other hand, one of the parties does not agree to the proceedings before the Court, compliance with the orders becomes scarce. The cases dealt with by the Permanent Court are, unfortunately, not very helpful in creating a clear overall picture. However, in the *Anglo-Iranian Oil Co.* case,[44] state parties for the first time declared their position on the binding character of provisional measures.[45] As Iran explicitly refused to comply with the Order, the UK appeared before the Security Council with a complaint about this failure to obey the measures indicated.[46] The British representative began by stating that "[i]t is, therefore, a necessary consequence, we suggest, of the bindingness of the final decision that the interim measures intended to preserve its efficacy should equally be binding".[47] In the same intervention the representative, either alternatively or subsidiarily to a legally binding effect, admitted that interim measures "are a clear expression of opinion by the highest international judicial tribunal".[48]

None of the other members of the Security Council supported a legal effect of provisional measures. According to the Iranian representative, the only binding decision whereby members of the United Nations (under Article 94 of the Charter) give undertakings of compliance, is the final judgment.[49]

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41. *Id.*, at 389 (Judge Weeramantry, Separate Opinion).
42. Land and Maritime Boundary Between Cameroon and Nigeria (Cameroon *v.* Nigeria) (Provisional Measures), Order of 15 March 1996, at 11 (not yet reported).
43. This was the case in the Frontier Dispute case (Burkina Faso *v.* Mali), 1986 ICJ Rep. 554.
44. Anglo-Iranian Oil Company case, *supra* note 26.
45. See Sztucki, *supra* note 15, at 279.
46. UN Doc. S/2357, at 1-2 (1951).
47. *Id.*, at 20.
48. *Id.*, at 21.
49. UN SCOR, 6th year, 560th Meeting (15 Oct. 1951), at 12.

In the *Fisheries Jurisdiction* cases,[50] the applicants made several references to the behaviour of Iceland following the order indicating provisional measures.[51] The position on the legal effect is not unequivocally reflected in these statements.[52] Iceland contended that it did not regard the order of the Court as binding, "since the Court has no jurisdiction in the case".[53] However, when the Court did in fact rule that it had jurisdiction, Iceland still did not comply with the measures indicated. In the *Nuclear Tests* cases, the Court included a statement by the applicant states, pronouncing the French conduct in breach of the provisional measures.[54] Numerous statements to this effect were made by Australia and New Zealand. It could be inferred that the applicants regarded interim protection as legally binding. France simply dismissed the Order on account of lack of jurisdiction and then just ignored the measures.

An interesting point in the *Hostages* case is the fact that the applicant acted in violation of the bilateral measure of 'non-aggravation'. This is even more peculiar if the oral statement of the agent of the United States during the proceedings on the merits is considered. He developed an argument on a similar line as the United Kingdom in the *Anglo-Iranian Oil Co.* case.[55] The difference between word and act hampers the formulation of the applicant's position on the legal effect of provisional measures.

In its application against the United States, Nicaragua requested the Court to indicate further interim protection, in order to secure compliance with the first Order.[56] The formulation of this request did not express the view that the order was legally binding. Even though the request contained a proposed sanction, this sanction was of a procedural nature and, therefore, did not contain an international obligation.[57]

The *Genocide* case was of a different nature. The applicant state accused the respondent of violating a treaty obligation. In the Order of 8 April

50. Fisheries Jurisdiction cases, *supra* note 14.
51. *See* Sztucki, *supra* note 15, at 278.
52. *Id.*, at 277.
53. *Id.*, at 278, n. 305.
54. Nuclear Tests case (New Zealand *v.* France), 1974 ICJ Reps. 258-259 and 462.
55. Reproduced *in* Sztucki, *supra* note 15, at 279.
56. Nicaragua case, *supra* note 37, at 144.
57. Nicaragua asked that: "until such time the United States ceases and desists from all activities that do not comply with the Order of 10 May 1984, the facilities of the Court shall not be available to the United States for the purpose of rendering a decision in its favour in any other pending or future case, and the United States shall not be permitted to invoke the Court's aid in any matter". *Id.*.

1993,[58] the Court indicated that Yugoslavia should take all measures possible to prevent the commission of the crime of genocide. Thus, the Court merely reiterated an international obligation laid down in a treaty. Consequently, there was no need for the applicant to address the legal effect of provisional measures itself, as the measure was already binding as a substantive international obligation. The respondent did not deny a legal effect of the measures indicated in the Order of 8 April 1993.

In conclusion, despite a certain reluctance of the Permanent Court to indicate interim protection, its cases did not preclude a legal effect being attributed to provisional measures. In none of the cases before the International Court of Justice a reference to a legally binding character of provisional measures was made. Nevertheless, a few developments in the jurisprudence with respect to interim protection are well worth noting. Starting with the *Fisheries Jurisdiction* cases, the Court made a pronouncement on the behaviour of states following the indication of provisional measures.[59] Although the Court did not explicitly attribute any binding force on those measures, it mentioned a strong moral obligation of the parties to respect them. Furthermore, starting with the *Hostages* case,[60] practically all Court orders indicating provisional measures were adopted virtually unanimously. Although this does not strengthen the binding force of these measures, once more their 'moral' authority is accentuated.

By emphasizing the 'moral' element, the Court is slowly trying to get parties to show respect for its orders indicating provisional measures. This is exemplified in both the *Nicaragua* and the *Genocide* cases in which the Court called upon the parties, to take the interim measures "seriously into account".[61] In the second order in the latter case, the Court even went further by demanding "immediate and effective implementation" of the measures indicated in the first order.

3.3. Provisional measures as a general principle of law

In most cases before international tribunals, a 'time-gap' arises between the bringing of the application by the parties and its final decision. During this

58. Genocide case, Order of 8 April 1993, *supra* note 38, at 24.
59. Fisheries Jurisdiction cases, *supra* note 14.
60. Hostages case, *supra* note 34.
61. Nicaragua case, *supra* note 37; and Genocide case, *supra* note 38.

time-gap, the parties usually have the opportunity to harm or affect the subject-matter or to aggravate the dispute. To prevent this from happening, interim measures of protection could be indicated or ordered by the tribunal to safeguard the *status quo pendente lite*.[62] The necessity of interim protection for the reasons described enjoys universal acceptance by the principal legal systems and can be considered as a general principle of law in the sense of Article 38(1.c) of the Statute of the Court.[63]

This assumption, however, begs the question of the relationship between this general principle and Article 41 of the Statute. If, according to the general principle, after the institution of proceedings states have a general duty to abstain from actions which might prejudice the outcome of the dispute, Article 41 could then be regarded as setting out the procedure by which this duty is to be implemented.[64] If Article 41 is indeed seen as embodying a general principle of law, it should be possible to attribute legal effect to interim measures without recourse to this article. On the basis of Article 38(1.c), a general principle of law is a source of international law and can therefore create legal obligations. However, the latter would be in conflict with the intention of the drafters of the Statute and the states adopting it. If they did not want measures of interim protection to be binding, would it be justified to set aside this purpose by using "municipal law analogies or functional interpretations"?[65] Nothing prevents the Court from applying an international obligation which stems from two or more different sources, when, for instance, one of these sources were to be inapplicable due to a jurisdictional deficit. However, in practice the Court has been very reluctant to base its pronouncements on general principles of international law.[66]

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62. Art. 41 of the Statute of the Court refers to preserving 'rights' rather than a factual *status quo*. In the present article, the term *status quo* is used in a broad sense, encompassing situations of both fact and law.
63. Already in 1932, and after examining legal provisions in France, Austria, England, United States, Russia, Spain, the Netherlands, Denmark, Norway, and Sweden, Niemeyer concluded that the principle of interim protection is a fundamental principle. *See* H. Niemeyer, Einstweilige Verfugungen des Weltgerichtshofs, ihr Wesen und ihre Grenzen 22-24 (1932).
64. *See* Elkind, *supra* note 4, at 163; *see also* E. Hambro, *The Binding Character of the Provisional Measures of Protection Indicated by the International Court of Justice*, *in* W. Schätzel & H. Schlochaur (Eds.), Rechtsfragen der internationalen Organisation, Festschrift für Hans Wehberg 156 (1956).
65. *See* Mendelson, *supra* note 4, at 349.
66. *See* H. Waldock, *General Course on Public International Law*, 106 HR 54 (1962).

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3.4. Indicated interim protection as a 'moral obligation'?

In the 1931 debate on the amendment of the Rules of Procedure of the Permanent Court, three judges characterized provisional measures as "morally binding".[67] Dumbauld, for example, stated that

> [t]hough not formally binding, such a decision is of great weight, as being the solemn pronouncement of a learned and august tribunal acting in the course of its official duty.[68]

The idea of provisional measures as a 'moral obligation' could offer an interesting middle solution in the question of their binding force, and it clearly finds support in the recent case law of the International Court of Justice.

The relation between the general duty of states to maintain the *status quo* in the 'time-gap' and Article 41, was already touched upon earlier. As stated above, Article 41 could enhance the general principle; however, an order under Article 41 could not possess a binding effect. In such a case, it could then be regarded simply as a 'moral obligation'.

In practice, the Court imposes on the parties a general duty not to harm evidence related to the dispute. The Court could then point out to the parties, using the power of Article 41, what the evidence consists of in this particular case. Since in this view interim protection has no legal effect, it cannot raise the assumption that the order contains exactly what the general duty demands. Such an assumption could lead to the conclusion that interim measures are binding. On the other hand, if the moral obligation cannot refer to the general principle, it would be without substance.

It is not hard to see the difficulties in this approach. Suppose one of the parties destroys part of the evidence. Would the other party be able to find a legal remedy for this? The injured party may bring up a case in which it contends to have suffered damage as a result of a violation of the Court order or, alternatively, on the basis of violating the general duty. The Court may have to decide that the recalcitrant state was not legally bound to abstain from harming the evidence, but is, however, liable to pay the damages as a result of violating the general principle. If the applicant would

67. *See* the statements of Judges Fromageot, Hurst, and Rolin-Jaequemyns, 1931 PCIJ Publications (Ser. D) No. 2, Add. 2, at 183-184.

68. *See* Dumbauld, *supra* note 5, at 169.

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base its claim solely on the Court order, the outcome would probably not be favourable. Another difficulty arises if the Court order only reflects the general principle without indicating the specific contents. A pattern similar to the one indicated above might occur. One could state that regarding interim protection indicated by the World Court as a moral obligation is the middle course between attributing absolutely no binding force to them and vesting them with legally binding effect. However, the approach described is not without difficulties.

4. CONCLUSION

The discussion so far seems to preclude the possibility of attributing legally binding force to the provisional measures indicated by the World Court. The developments noted in the Court's practice appear to support the view that the Court is shifting towards a 'moral obligation' theory. Whether this is the first step to attributing legal effect to interim protection remains to be seen. If several individual opinions of Judges are considered, the debate continues unabated before and even within the Court itself, and perhaps today's dissent will constitute tomorrow's majority. For one thing, the Court seems to be developing a more consistent attitude towards provisional measures, a fact supported by the virtually unanimous support of recent orders. A more consistent attitude is likely to create a stronger authority and, hopefully, a more regular pattern. To the question of whether provisional measures are bound to be ineffective one cannot answer with certainty but can certainly note those encouraging developments towards attaching effect to them.

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