THE RECOMMENDATIONS MADE BY THE INTERNATIONAL COURT OF JUSTICE: A SCEPTICAL VIEW

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'Wovon man nicht sprechen kann, darüber muß man schweigen': Ludwig Wittgenstein, *Tractatus Logico-Philosophicus,* 7.

I. INTRODUCTION

Last year, the *Quarterly* published a valuable study by Dr J d'Aspremont of the cases in which the International Court of Justice has in its judicial pronouncements included recommendations or expressions of concern.[1] As regards recommendations, the cases referred to were, in chronological order, the Orders on the requests for the indication of provisional measures in the set of cases concerning the *Legality of the Use of Force*;[2] the Order on the request for provisional measures in the case concerning *Armed Activities on the Territory of the Congo (DRC v Rwanda)*;[3] the judgment on the merits in the case of *Armed Activities on the Territory of the Congo (DRC v Uganda)*;[4] and the Order of 13 July 2006 on the request for provisional measures in the case of the *Pulp Mills on the River Uruguay*.[5] More details of the passages relied on by Dr d'Aspremont will be found in his paper.

On the basis of his analysis of these cases, the author concludes that:

> [D]espite absence of any textual support [in the Statute and Rules], this practice is not at odds with the rules regulating the administration of justice by the ICJ. It is not required that jurisdiction on the subject-matter dealt with by the recommendation be established as long as the recommendation of the Court does not make a definitive finding of fact or imputability.[6]

As regards the appropriateness of such recommendations, the author considers that they are not objectionable provided they 'remain confined to mere reminders of the

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[1] 'The Recommendations made by the International Court of Justice' ICLQ (2007) 56, 185–198.

[2] For example, *Legality of the Use of Force (Yugoslavia v Belgium)* [1999] ICJ Reports 132 para 19.

[3] [2002] ICJ Reports 249–250 para 93.

[4] [2005] ICJ Reports 158 para 221.

[5] [2006] ICJ Reports para 82. Since the publication of Dr d'Aspremont's article, the Court has issued a further Order in the case, in which it 'reiterated its call to the parties' made in the previous Order: [2007] ICJ Reports para 53. In its Order of 15 October 2008 in the case concerning *Application of the International Convention on the Elimination of All Forms of Racial Discrimination*, the Court did not make any recommendations of the kind here discussed, but did preface its indication of binding measures with the words 'the Court, reminding the Parties of their duty to comply with their obligations under' the Convention. One would not think that either Party, having argued the case at length, and having read the 148 paragraphs of the Order, would need any reminder on this score.

[6] ibid 198.

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obligations of the parties with respect to human rights, humanitarian law and the UN Charter or invitations to engage in negotiations pending the decision of the Court on the merits.'[7]

In some of these cases, the decision of the Court also included passages which were neither findings of law or fact, nor recommendations, but may be classified as expressions of the concern which the Court indicated that it felt at situations, described in the material before it, of a shocking or deplorable nature. Dr d'Aspremont suggests that such expressions of concern by the Court 'are very common',[8] and takes the view that:

> [T]he Court is entitled to formulate that kind of statement regardless of its jurisdiction because they have no legal consequences. Indeed, expressions of concern do not entail any appraisal of the responsibility of the parties nor do they make a definitive finding of facts or imputability. There is therefore no need to establish jurisdiction on the subject-matter to which the recommendation is pertaining. In these hypotheses, the Court is only voicing some concern and nothing precludes it from doing so.[9]

Since the present writer does not find himself able to share these conclusions, and the phenomenon is that of a growing trend, the following remarks, in support of a different view of the matter, may be found of interest. There is considerable overlapping between the cases that include expressions of concern, and those in which the Court formulates recommendations—the one feature apparently justifying the other—and it is submitted that, if they are objectionable or inappropriate, they are so for essentially the same reasons, so they will not here be dealt with as two separate classes of case.

Dr d'Aspremont rightly refers to the practice of including recommendations as a recent one; however, there are some earlier decisions, not mentioned in his article, which may be recalled for the light they throw on the Court's own views as to its powers and functions.

II. THE EARLIER CASES

In the first case in which the Court had to face the vexed problem of the 'sacred trust of civilization' involved in the League of Nations Mandate System, and in particular the Mandate for South West Africa, it declined to accept a suggestion that Article 80, paragraph 2, of the Charter had created a legal obligation for mandatory States to negotiate Trusteeship Agreements for the mandated territories, finding that such a step would be purely voluntary. The Court went on to add: 'It is not for the Court to pronounce on the political or moral duties which these considerations may involve.'[10]

In the *Haya de la Torre* case, the Government of Colombia asked the Court 'to determine the manner in which effect [should] be given to the Judgment of November 20th, 1950' in the *Asylum* case.[11] As the Court recalled, it had by that judgment 'defined the legal relations between Colombia and Peru with regard to matters referred to it by

[7] ibid. [8] D'Aspremont (n 1) 189. [9] ibid 190.

[10] [1950] ICJ Reports 140. Rosenne links this statement with the Permanent Court's attitude in the *Free Zones* case to the problem of determination of the adaptation of the regime of the Zones: *The Law and Practice of the International Court* 96, n 1. Contrast the willingness of the Permanent Court, while 'abstain[ing] from giving an opinion' on certain points, nevertheless to 'make certain reservations in regard to them' (*Mavrommatis Palestine Concessions*, PCIJ Series A, No. 2 24), the difference being that these were legal questions submitted to the Court by the parties.

[11] [1951] ICJ Reports 73.

them relating to diplomatic asylum in general and particularly to the asylum granted to Victor Raúl Haya de la Torre . . .'[12] A question left unsettled in that case was, given the situation of Haya de la Torre as a guest in the Colombian Embassy in Lima, unable to step outside without being arrested, how that situation was to be brought to an end. In the new proceedings, the Court's conclusion, after examining the matter, was that 'the asylum must cease, but . . . the Government of Colombia is under no obligation to bring this about by surrendering the refugee to the Peruvian authorities.'[13] It continued:

> Having thus defined in accordance with the Havana Convention the legal relations between the Parties with regard to the matters referred to it, the Court has completed its task. It is unable to give any practical advice as to the various courses which might be followed with a view to terminating the asylum, since, by doing so, it would depart from its judicial function.[14]

Though the Court speaks of 'advice', what it was in fact being asked for was a 'recommendation'. Its reaction was clear and definite: it is not part of the 'judicial function' to make recommendations of this kind. In the *Asylum* case it had in fact gone perhaps as far as was appropriate in this direction, with its comments on the merits of the practice of asylum 'as it may arise from agreements between interested governments inspired by mutual feelings of toleration and goodwill.'[15]

A second decision that supplies a possible benchmark indicating the point beyond which the Court was not prepared to go, in the sense of making recommendations or comments in a judgment or order, is the Judgment of 24 May 1980 in the case of *United States Diplomatic and Consular Staff in Tehran*. In its statement of the facts of the case the Court recalled that on 24–25 April 1980 the United States had carried out an abortive military operation in Iranian territory intended to rescue the hostages being held there.[16] Towards the end of its judgment, the Court stated that it considered 'that it cannot let pass without comment' this incursion into the territory of Iran. What is striking about the comment that it in fact made is the context in which it is placed: the Court emphasized that the operation had been carried out after the hearings on the merits of the case (accelerated at the request of the US Agent), and while the Court was engaged in preparing its judgment:

> The Court therefore feels bound to observe that an operation undertaken in those circumstances, from whatever motive, is of a kind calculated to undermine respect for the judicial process in international relations; and to recall that in paragraph 47, 1 B, of its Order of 15 December 1979 the Court had indicated that no action was to be taken by either party which might aggravate the tension between the two countries.[17]

The Court continued:

> At the same time, however, the Court must point out that neither the question of the legality of the operation of 24 April 1980, under the Charter of the United Nations and under general international law, nor any possible question of responsibility flowing from it, is before the Court. It must also point out that this question can have no bearing on the evaluation of the conduct of the Iranian Government over six months earlier, on 4 November 1979, which is the subject-matter of the United States' Application. It follows that the findings reached by the Court in this Judgment are not affected by that operation.[18]

[12] ibid 77.
[13] ibid 82.
[14] ibid 83.
[15] [1950] ICJ Reports 286.
[16] [1980] ICJ Reports 17–18, 32.
[17] [1980] ICJ Reports 42 para 92.
[18] [1980] ICJ Reports 42–43 para 93.

On the one hand, the Court links its implied reproof to the idea of a breach of the Order indicating provisional measures (not at that time regarded as binding, as this passage itself indicates), and on the other it treats the operation as a *procedural* irregularity. It is hardly respectful toward the Court for a party to employ self-help and so to anticipate its judgment, whatever the justification for immediate action (which in the circumstances the Court indicated that it fully understood). The principle is similar to that stated in Article 52, para 3 (*b*), of the International Law Commission's Articles on State Responsibility, forbidding recourse to counter-measures if 'the dispute is pending before a court or tribunal which has the authority to make decisions binding on the parties.'[19] What is conspicuously absent is any observation suggesting that the parties 'must act in conformity with their obligations under the United Nations Charter and other rules of international law',[20] even though the action of the United States was prima facie an outrageous assault on the territorial integrity of Iran.[21] On the contrary, the Court is extremely careful to explain why it cannot say anything of the kind; because the matter 'is not before the Court', ie is within neither the jurisdiction nor the *petita*.

The *Haya de la Torre* case is not mentioned in Dr d'Aspremont's article. The *Diplomatic and Consular Staff* case is mentioned as an example of an expression of concern, by reference to the Court's statement in its Order indicating provisional measures that 'continuance of the situation the subject of the present request exposes the human beings concerned to privation, hardship, anguish and even danger to life and health and thus to a serious possibility of irreparable harm.'[22] This paragraph however finds its justification in the final phrase, since one of the conditions for the grant of provisional measures is a demonstration of the likelihood of 'irreparable harm'; it is very different from the Court's observations in the more recent cases, which are simply 'at large'.

Dr d'Aspremont does refer a number of times to a paragraph in the Court's Order on the request made for provisional measures in the case of *Passage through the Great Belt* which he regards as, if not a precedent, at least an early example of resort by the Court to recommendations. In that Order the Court said:

> Whereas, as the Permanent Court of International Justice observed, and the present Court has reiterated, 'the judicial settlement of international disputes, with a view to which the Court has been established, is simply an alternative to the direct and friendly settlement of such disputes between the Parties; as consequently it is for the Court to facilitate, so far as is compatible with its Statute, such direct and friendly settlement . . .' *(Free Zones of Upper Savoy and the District of Gex, P.C.I.J., Series A, No. 22*, p. 13; see also *Frontier Dispute, I.C.J. Reports 1986*, p. 577, para. 46); whereas, pending a decision of the Court on the merits, any negotiation between the Parties with a view to achieving a direct and friendly settlement is to be welcomed;[23]

[19] Note however that the ILC contemplated not only that the tribunal in question would have the power to indicate provisional measures, but also that an order for such measures would be complied with, which of course was not so in the *Tehran* case: see Crawford, *The International Law Commission's Articles on State Responsibility* 124, para (8), *sub* Article 52.

[20] *Legality of the Use of Force, Yugoslavia v Belgium* [1999] ICJ Reports 132 para 19.

[21] The United States of course invoked self-defence and Article 51 of the Charter; but it is doubtful, at least, whether an attack on a diplomatic mission constitutes an 'armed attack' for that purpose: see Simma (ed) *The Charter of the United Nations: A Commentary*, Article 51 MN 26 fn 87.

[22] [1979] ICJ Reports 20 para 42.

[23] [1991] ICJ Reports 20 para 35.

On the face of the text, this is clearly not, as has been suggested, 'calling upon a party to negotiate' (except perhaps by implication); the initiative is left squarely in the hands of the parties.[24] Nor is it a recommendation; in fact the Court appears to have consciously chosen not to make one, since that course was urged in the separate opinion of Judge Tarassov, who would have wished the Court to spell out what the aim of negotiations should be.[25] The background to the case, as revealed in the argument addressed to the Court on the request for provisional measures, is also revealing on the question why the Court chose to include paragraph 35 in its Order. Both parties indicated that they favoured seeking a peaceful solution to the dispute through negotiations, but while Finland wanted to have the point of law—the extent of its rights of passage through the Belt—settled by the Court as a preliminary to negotiations over the modalities of its exercise, Denmark had offered 'to co-operate with Finland in finding mutually acceptable ways and means' in which the practical problem of passage of Finnish oil rigs could be resolved, eg by dismantlement and re-assembly of the very high rigs.[26] When the Court declined to indicate provisional measures, the parties did in fact settle the dispute very much on these lines, contrary to the confident prophecy of Judge Oda that they would be unable to do so without a ruling from the Court.[27]

One other decision that may be mentioned as containing something resembling a recommendation is the judgment of the Chamber in the *Land, Island and Maritime Frontier Dispute*. At the outset of its delimitation of the land boundary, the Chamber noted that it was possible that the line it would be obliged to draw on the basis of law would result in some nationals of the one party finding themselves residing, and holding property, in what turned out to be the territory of the other. The Chamber observed that it has 'every confidence that such measures as may be necessary to take account of this situation will be framed and carried out by both Parties, in full respect for acquired rights, and in a humane and orderly manner.'[28] It will however be noted that the Chamber did not suggest that there was a *duty* to act in this way, a question outside its competence; and it avoided any patronising tone, as might have resulted from expressing this sentiment in the form of a recommendation of the kind found in the later cases under study.

A. The Implications of the LaGrand *Decision*

Before going further, attention may be called to a recent development which has perhaps contributed to making the idea of a judicial recommendation a more attractive one. The ruling in the Judgment in the *LaGrand* case that an Order indicating provisional measures creates a binding legal obligation on the party or parties to which the

[24] See Dr d'Aspremont's paper 194. Something much more like an invitation to negotiate is found in other cases in separate opinions of individual judges: eg the opinions of Judge Lachs in *United States Diplomatic and Consular Staff in Tehran* [1980] ICJ Reports 49, and in *Military and Paramilitary Activities in and against Nicaragua* [1986] ICJ Reports 171–173.

[25] '. . . to search for the best technical possibilities which may fully guarantee that 'the erection of the bridge . . . will, in conformity with international law, allow for the maintenance of free passage for international shipping' in the relevant area: [1991] ICJ Reports 23.

[26] See *Passage through the Great Belt* ICJ Pleadings 226 (Mr Lehmann, Denmark).

[27] See the separate opinion of Judge Oda [1991] ICJ Reports 26–27; for this reason he was opposed to the inclusion of para 35.

[28] [1992] ICJ Reports 400–401 para 66.

measures are addressed has attracted a considerable measure of approval;[29] and it has at least the merit of settling a long-standing controversy, if in a direction perhaps against the weight of past practice. One consequence or implication of the decision may however not have been fully thought out. If provisional measures are by their very nature binding, is it open to the Court, on a request for measures, to indicate something less, by way of a recommendation or non-binding directive, of the kind which was formerly thought (by many scholars) to result from an indication of measures? If the Court, for whatever reason, holds that it should not impose a duty on a party to take or to refrain from taking some specific action, but considers that such action or abstention is highly to be recommended pending judicial settlement of the dispute, what is it to do? Presumably it cannot incorporate such a suggestion in the operative part of an Order, since according to the *LaGrand* interpretation, the operative part creates an obligation in the same way as the operative part of a judgment. The answer would seem to be a recommendation in the reasoning. If this is so, the increased popularity of recommendations by the Court, at least in Orders dealing with requests for provisional measures, may be put down to an unforeseen consequence of the *LaGrand* ruling.

B. The Criticism of Judge Buergenthal

As Dr d'Aspremont notes, one judicial voice has been raised to doubt not merely the wisdom, but also the propriety, of the Court including recommendations or expressions of concern in its decisions. In the case of *Armed Activities on the Territory of the Congo (Congo v Uganda)*, the Court made an Order on 10 July 2002 by which it rejected the Congo's request for provisional measures on the ground of lack of prima facie jurisdiction (and rejected Rwanda's request for removal of the case from the list). It included four paragraphs in that Order which went further than in any previous case to indicate, not the Court's judicial findings, but its feelings of concern and its desire to 'emphasize' the duties of the parties.[30]

[29] Which the present writer has been unable to share: see the criticisms in 'The Law and Procedure of the International Court of Justice, Part Twelve' 72 BYBIL (2001) 111–126.

[30] '54. Whereas the Court is deeply concerned by the deplorable human tragedy, loss of life, and enormous suffering in the east of the Democratic Republic of the Congo resulting from the continued fighting there;

55. Whereas the Court is mindful of the purposes and principles of the United Nations Charter and of its own responsibilities in the maintenance of peace and security under the Charter and the Statute of the Court;

56. Whereas the Court finds it necessary to emphasize that all parties to proceedings before it must act in conformity with their obligations pursuant to the United Nations Charter and other rules of international law; including humanitarian law; whereas the Court cannot in the present case over-emphasize the obligation borne by the Congo and Rwanda to respect the provisions of the Geneva Conventions of 12 August 1949 and of the first Protocol additional to those Conventions, of 8 June 1977, relating to the protection of victims of international armed conflicts, to which instruments both of them are parties; . . .

93. Whereas, whether or not States accept the jurisdiction of the Court, they remain in any event responsible for acts attributable to them that violate international law; whereas in particular they are required to fulfil their obligations under the United Nations Charter; whereas the Court cannot but note in this respect that the Security Council has adopted a great number of resolutions concerning the situation in the region . . . [the Court continues by enumerating these and quoting passages from them]' [2002] ICJ Reports 240–241, 249–250.

Judge Buergenthal in his opinion explains that he disagreed with the inclusion of these paragraphs, though not objecting to 'the high-minded propositions they express', because 'they deal with matters the Court has no jurisdiction to address once it has ruled that it lacks prima facie jurisdiction to issue the requested provisional measures.'[31] He states roundly that:

> The Court's function is to pronounce itself on matters within its jurisdiction and not to voice personal sentiments or to make comments, general or specific, which, despite their admittedly 'feel-good' qualities, have no legitimate place in this Order.[32]

More specifically, Judge Buergenthal contends that any expression of concern by the Court at the tragic events in the Congo 'in a formal Order of the Court presupposes that the Court has the requisite jurisdiction to deal with that subject-matter', which in the instant case it did not have.[33] He questions whether there is any point in the Court's stating the obvious fact that it is 'mindful of the purposes and principles of the United Nations Charter and of its own responsibilities in the maintenance of peace and security under the Charter', and draws attention to the fact that those responsibilities 'are not general': 'they are strictly limited to the exercise of its judicial functions in cases over which it has jurisdiction.'[34] In the instant case, there was, in Judge Buergenthal's view, a further objection relating to the terms in which the Court had couched its remarks. These 'might be deemed to lend credence to the factual allegations submitted by the Party seeking the provisional measures.' Furthermore:

> In the future, they might also encourage States to file provisional measures requests, knowing that, despite the fact that they would be unable to sustain the burden of demonstrating the rquired prima facie jurisdiction, they would obtain from the Court some pronouncements that could be interpreted as supporting their claim against the other Party.[35]

In the subsequent case of *Pulp Mills on the River Uruguay*, the Court included a paragraph in which it 'stressed the necessity' of the parties complying with certain obligations relating to the settlement of disputes;[36] Judge Buergenthal voted in favour of the Order, and presumably did not regard this paragraph as objectionable, or at least not to such extent that he found it necessary to indicate objections in a separate opinion. While the opinion of Judge Buergenthal in the *Armed Activities* case constitutes a useful summary of the reasons why recommendations by the Court may be thought improper or undesirable, it does not seem necessary to enquire into the nature of any possible distinction that the Judge might have seen between that case and the *Pulp Mills* case.

[31] ibid 257 para 2. [32] ibid 258 para 4. [33] ibid para 5.
[34] ibid para 6. [35] ibid 259 para 9.
[36] 'Whereas, notwithstanding the fact that the Court has not been able to accede to the request by Argentina for the indication of provisional measures ordering the suspension of construction of the mills, the Parties are required to fulfil their obligations under international law; whereas the Court wishes to stress the necessity for Argentina and Uruguay to implement in good faith the consultation and cooperation procedures provided for by the 1975 Statute, with CARU constituting the envisaged forum in this regard; and whereas the Court further encourages both Parties to refrain from any actions which might render more difficult the resolution of the present dispute;'.

C. The Response to Judge Buergenthal, And Critique Thereof

Dr d'Aspremont does not consider these objections well-founded. On the question of jurisdiction, he proposes a distinction:

> [J]urisdiction must be established for the subject matter dealt with in the operative provisions of the judgments. Conversely, the subject matters touched upon in the reasons in point of law—where recommendations are to be found—must [*sic*: need?] not fall within the jurisdiction of the Court as they do not make a final finding of facts or imputability. Accordingly, there is no need that the Court's recommendations rest on an apparent basis for jurisdiction over the merits.[37]

Simply as a matter of logic, this is surely not sufficient. Even if it is accepted that matters 'touched upon' in the reasoning of a judicial decision need not all be within the Court's jurisdiction, there must be a definable class of matters which can properly be 'touched on' in this way; otherwise the Court would be free to make, in a decision, any observations that occurred to it on any matter of international interest, however unrelated to the case before it, provided it was careful not to make in that respect any 'final finding of facts or imputability'. Nor is it difficult to find the necessary definition, to discern what is the criterion for determining the propriety of mention of any particular subject; the purpose of the part of a decision that precedes the operative clause is to meet the requirement of Article 56 of the Statute that the judgment is to 'state the reasons *on which it is based*'. The Members of the Court might well feel gravely concerned by the events in the Congo recounted to them in the context of the case; but unless that concern carried consequences for the determination of the rights and obligations of the parties[38]—that is to say, the rights and obligations in issue in the case—mention of it would have no place in the reasoning of a decision, whether a judgment or an order on provisional measures. For that reason it is already a tendentious use of language for a judicial pronouncement to state that *the Court* feels concern, where that concern has no legal consequences; as a Court, it has no business feeling such concern, however deplorable the situation, and however strong the feelings of its Members as individuals.[39]

It may also be questioned whether there is any example in the practice of international tribunals to support the distinction proposed by Dr d'Aspremont between what may be the subject of the operative clause of a decision, and what may be included in the reasoning. The *Tehran* case is significant in that regard. There the Court did mention in the *motifs* of its judgment the incident of the abortive rescue operation; but it did so, first in relation to a question of procedural propriety, and secondly (and in terms of

[37] D'Aspremont (n 1) 192.

[38] As was the case in the *Diplomatic and Consular Staff* case, noted above, where the references to the suffering of the hostages pointed to the existence of the risk of irremediable harm, required for the indication of measures.

[39] A technical point that is not without interest is the following. The Statute of the Court provides for majority decisions in the exercise of the Court's judicial function. If the Court, in making a recommendation or expressing concern is not exercising jurisdiction, nor making findings of fact or imputability, it is not discharging the judicial function, and may (it could be argued) only act in this way as an entity if its position is unanimously adopted—which was singularly not the case in the *Armed Activities* case. There was formerly (and may still be) a convention within the Court that a question could only be put to the parties as a question *by the Court*, under Article 49 of the Statute and Article 61, para 2, of the Rules of Court, if all participating judges consented. Is there here perhaps a parallel?

importance, perhaps primarily) to explain why it could *not* comment on the issue, in view of its lack of jurisdiction. This is not an element to be relied on in support of the idea that the Court is free, in the motivation of its decisions, to comment on matters outside the jurisdiction it is exercising; rather the reverse. Even where the Court has found in favour of jurisdiction (or jurisdiction is not disputed), the proper content of the reasoning part of its judgment is to be defined as exclusively what is needed to lead up to and support the operative clause; and where the Court finds that it lacks jurisdiction (or, in the case of a provisional measures phase, that prima facie jurisdiction has not been shown, so that measures cannot be indicated), there is even less justification for saying anything not required on this basis.

There is here a wider issue; or the point may perhaps be expressed in wider terms. No principle of international law is more clearly established than that which provides that an international court or tribunal has jurisdiction over a dispute only to the extent that this has been created by the consent of the parties; but there are limits to the creative power of consent. The consent of the parties confers jurisdiction in terms of defining what issues the Court may examine and resolve. It does not however confer on a tribunal competence to do anything in relation to the dispute that goes beyond the powers of the tribunal under its constitutional instrument. This was the basis of the decision of the Permanent Court in the *Free Zones* case, that it was not free to give a decision that would depend on the prior approval of the parties, even though the parties were in agreement that this should be done.[40]

The essential point is that while the specific jurisdiction of the Court is conferred by consent of the parties, its competence in the wider sense—what it can do and how it can do it—is determined by the principle of speciality. It is for this reason that for Dr d'Aspremont to state that 'nothing precludes' the Court from making public expressions of concern[41] reveals a mistaken approach to the question, which is whether there is anything that *empowers* the Court to do so, given that it is not a recognized component of the judicial function. The Court is an organ of an international organization; like any other such organ, and indeed like the organization itself, it has the powers conferred on it by the relevant constituent instruments, expressly or by implication, and no others.[42] Its function is, in the classic words of Article 38 of the Statute, 'to decide in accordance with international law such disputes as are submitted to it.' Dr d'Aspremont addresses the problem whether jurisdiction, in the sense of the *depositum* entrusted to it by the parties to a case, that which has been 'submitted to it', is required for the Court to make recommendations, or to express its concern, and argues

[40] Cf also the discussion in the case of the *Continental Shelf (Libya/Malta)* of the question whether the parties to a case may agree to ask for revision or interpretation of a judgment in a manner other than that laid down in the Statute: (n 47). While this article was in the press, the ICJ delivered its judgment on the preliminary objections in the case concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*, in which it discussed the wider question of the relationship between consent of the parties to a case and the powers of the Court under its constitutional instrument—a question also examined in the dissenting opinion of Judge Owada in that case.

[41] D'Aspremont (n 1) 190.

[42] See the discussion in the Advisory Opinion given on the request of the WHO in the case of *Legality of the Use by a State of Nuclear Weapons in Armed Conflict* [1996-I] ICJ Reports 78–79 para 25. It is here contended (paraphrasing that passage) that a power for the Court to make recommendations 'could not be deemed a necessary implication' of the Statute 'in the light of the purposes assigned to it' by the States party to the Statute or the Charter.

that it is not. He does not squarely address the more fundamental question whether making recommendations or expressing concern can be said to a power involved in 'deciding' disputes.

A similar confusion was identified by the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia in the *Tadič* case in its reference to 'a narrow concept of jurisdiction reduced to pleas based on the limits of its scope in time and space and as to persons and subject-matter (*ratione temporis, loci, personae and materiae*).' The Chamber continued:

> But jurisdiction is not merely an ambit or sphere (better described in this case as 'competence'); it is basically—as is visible from the Latin origin of the word itself, *jurisdictio*—a legal power, hence necessarily a legitimate power, 'to state the law' (*dire le droit*) within this ambit, in an authoritative and final manner. This is the meaning which it carries in all legal systems. Thus, historically, in common law, the *Termes de la ley* provide the following definition: 'jurisdiction' is a dignity which a man hath by a power to do justice in causes of complaint made before him.' (Stroud's Judicial Dictionary, 1379 [5th ed. 1986]).[43]

Furthermore, by limiting the supposed power to make recommendations by excluding anything that would involve 'a final finding of facts or imputability', Dr d'Aspremont may be thought to be overturning his own case; since reaching a final finding of fact or of law (including imputability) is, in a nutshell, what the Court has been created to do. The point was in fact made by Judge Buergenthal in his opinion in the *Armed Activities* case: he pointed out that the Court's 'responsibilities in the maintenance of peace and security under the Charter', which had been invoked in the Order as justifying the Court's comments, are 'not general', but are 'strictly limited to the exercise of its judicial functions' (by virtue of the principle of speciality) 'in cases over which it has jurisdiction.'[44]

Judge Koroma has suggested that the Court has an implied power, and indeed a duty, to make recommendations where appropriate, inasmuch as it has 'a positive obligation to contribute to the maintenance of peace and security and to provide a judicial framework for the resolution of a legal dispute.'[45] As Dr d'Aspremont comments, 'this aspect of [the judge's] declaration is unconvincing. The Court's contribution to international peace and security is constituted by its strictly judicial activity; as it noted in the *Nicaragua* case, the primary responsibility in this domain being with the Security Council, the Court 'has no specific responsibility under the Charter for dealing with such matters.'[46]

Dr d'Aspremont notes the recommendation made by the Arbitral Tribunal in its Decision in the *Rainbow Warrior* case; and this is not without relevance, as pointing to the possible existence of a power to make recommendations, inherent in international tribunals, which could consequently, it might be said, be regarded as appertaining to the Court without infringement of the principle of speciality. However, while the Tribunal in that case did assert that 'the power of an arbitral tribunal to address recommendations to the parties to a dispute . . . has been recognized in previous

[43] ICTY, *Tadič*, Appeals Chamber, Decision of 2 October 1995, 43, para 10.
[44] [2002] ICJ Reports 258 para 6.
[45] *Legality of the Use of Force (Yugoslavia v Belgium)* [1999] ICJ Reports 143.
[46] *Military and Paramilitary Activities in and against Nicaragua (Jurisdiction)* [1984] ICJ Reports 438 para 102.

arbitral decisions', it did not cite any authority for this;[47] and it buttressed its chosen course of action by noting that one party had in fact asked for a recommendation to be made, and the other party had not objected, or suggested that there was no power to do so.[48] This is however only relevant if the existence or otherwise of the power of a tribunal to make recommendations is treated as a question of jurisdiction in the narrow sense, i.e. as something derived from the consent of the parties. It is suggested in this study that that is not so.[49] However, where the question of a recommendation has been raised by the parties, and tacitly or otherwise accepted by both, the question of the legal validity, and therefore the legal effect, of such a recommendation, becomes academic. There might be said to be an obligation of good faith to consider implementation of the recommendation,[50] but this could also be seen as part and parcel of the general obligation of peaceful settlement of disputes, so that the source of the recommendation would have less legal significance than its intrinsic usefulness.

Another, and perhaps more promising, approach, is to assimilate possible recommendations to decisions *ex aequo et bono*, which the Court is expressly authorized by Article 38, paragraph 2, of the Statute to take if the parties agree. Rosenne suggests that the deliberate abstention by the Court from making any recommendation as to the termination of the asylum in the *Haya de la Torre* case was a consequence of the 'rigid requirements' imposed by the Statute 'upon the power of the Court to decide *ex aequo et bono*'.[51] There remains of course the distinction that a decision *ex aequo et bono* is obligatory, and a recommendation is not.

Against this background, the question, also raised in the declaration of Judge Buergenthal, whether a recommendation (or indeed an expression of concern) may be objectionable as prejudging the merits becomes merely a subsidiary reason why, in a particular case, a particular recommendation or expression is undesirable, quite apart from its constituting an *excès de pouvoir* on the part of the Court. Here it is possible to take the view that Judge Buergenthal was over-sensitive. On the principal question, whether the recommendations were a proper exercise of the judicial function, the mere fact that no other judge expressed agreement with Judge Buergenthal need not carry weight with scholars; the question is whether the reasoning in the Order in support of the controversial paragraphs is or is not sound. The degree of risk of prejudice to the merits is one for more subjective interpretation, in the light of the material and argument presented to the Court, and the other Members of the Court presumably saw no problem, though only one, Judge ad hoc Dugard, expressly stated, in his separate opinion, his approval of the controversial paragraphs.[52]

[47] Para 128 of the Decision of 30 April 1990, *UNRIAA*, Vol XX 274. It has been suggested that this part of the decision is a novelty, whose value as precedent might be questionable: see *Société française de droit international, Colloque du Mans*, 1990, Rapport du Professeur Decaux, cited in Charpentier, 'L'affaire du *Rainbow Warrior*: la sentence arbitrale du 30 avril 1990', AFDI XXXVI (1990) 407 fn 19.

[48] ibid.

[49] In the case of the *Continental Shelf (Libya/Malta)*, a question arose whether the provisions in the Statute giving the Court power to interpret a judgment could be excluded or varied by agreement of the parties. In the event, it proved unnecessary to deal with the issue; but see the interesting comments of Judge Ruda in his separate opinion [1985] ICJ Reports 232–235.

[50] In this sense, Scott Davidson in (1991) 40 ICLQ 456.

[51] *The Law and Practice of the International Court of Justice, 1920–2005*, Vol II 574 (§ II.159).

[52] [2002] ICJ Reports 271 para 13.

III. CONCLUSION

It may be argued that even if recommendations, of a strictly impartial and non-binding nature, may be beyond the powers of a judicial body like the International Court, they do no harm and may in some circumstances encourage the parties in the way they should go. Certainly the actual instances discussed in this paper and that of Dr d'Aspremont, while in principle undesirable, may be thought harmless, if sometimes oddly drafted.[53] There is however a principle at stake. States confer considerable power on courts and tribunals enabled to give binding decisions; the principle *extra compromissum arbiter nihil facere potest* entails a responsibility on the judge or arbitrator only to speak where he is authorized to do so. In this sense, the observation of Wittgenstein cited as epigraph is relevant in the judicial as in the philosophical sphere.

It is possible to see the attraction, in the absence of even prima facie jurisdiction, and therefore of any power to influence events in a situation of appalling human suffering, and of apparent grave breaches of international law, of appearing to do *something* in face of such situation. Paradoxically, it is precisely in such conditions, of the absence of jurisdiction, that Members of the Court might be moved to abandon or temper judicial caution, in the confidence that no unguarded expression would come back to plague them at a later stage of the case, by raising unforeseen legal issues, since there would by definition be no such later stages. Setting aside all arguments of judicial empowerment or formal propriety, however, the present writer may not be alone (with Judge Buergenthal) in feeling that empty gestures, *des coups d'épée dans l'eau*, are beneath the dignity of the principal judicial organ of the United Nations.

[53] For example, in the *Legality of the Use of Force* cases, the Court emphasized that 'all parties appearing before it must act in conformity with the United Nations Charter and other rules of international law' (*Yugoslavia v Belgium* [1999] ICJ Reports 132 para 19); does that mean that States not so appearing are not under the same duty?