INTERIM RELIEF IN CASES OF CONTESTED JURISDICTION

TWO CASES IN THE INTERNATIONAL COURT OF JUSTICE: NUCLEAR TESTS CASE *AUSTRALIA* v. *FRANCE*

AEGEAN SEA CONTINENTAL SHELF CASE *GREECE* v. *TURKEY*

Introduction

Article 41 of the Statute of the International Court of Justice reads as follows:

1. The Court shall have the power to indicate, if it considers that circumstances so require, any provisional measures which ought to be taken to preserve the respective rights of either party.

2. Pending the final decision notice of the measures suggested shall forthwith be given to the parties and to the Security Council.[1]

This case note discusses the ways in which this Article has been interpreted by the International Court of Justice in two recent cases: the *Nuclear Tests Case* and the *Aegean Sea Case*.[2] A brief examination of the earlier case-law on Article 41 will be followed by an outline of the disputes leading to these two cases.

After a brief summary of the findings, the various judgments are discussed under three headings of jurisdiction, prejudice to the rights of the parties and referral to the Security Council in cases involving interim measures. The main issue is that of jurisdiction. The basic rule of international law is that jurisdiction is based on consent: therefore the granting of interim measures in cases where consent is uncertain (i.e. where the jurisdiction is challenged) poses a fundamental problem. Where does the Court found its jurisdiction to grant interim relief? It has been suggested that the signing of the United Nations Charter by the parties grants the Court an incidental or inherent jurisdiction to indicate interim measures of protection without "the specific consent of the parties, but upon some objective fact, such as the existence of proceedings' before the Court".[3] If this is so, and some writers disagree, it would seem unreasonable for the Court to be able to grant interim

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[1] Although article 41 of the Statute mentions "provisional measures" the Court in its Orders usually refers to "interim measures" of protection.

[2] *Nuclear Tests. Australia* v. *France, Interim Protection,* Order of 22 June, 1973, I.C.J. Reports 1973, 99. *Aegean Sea Continental Shelf Interim Protection,* Order of 11 September 1976, I.C.J. Reports 1976, 3.

[3] Rosenne, *The Law and Practice of The International Court* (1965), p. 424.

relief in cases where it was patently obvious there was no likelihood of jurisdiction on the merits. There is need of some test of likelihood of jurisdiction on the merits before interim relief may be granted.

This case note discusses the views of the various members of the Court on the question of jurisdiction in such cases and the test to be applied, while also examining the issues of prejudice to rights and the simultaneous referral of a matter to the Security Council.

Earlier Case Law

In 1951 the International Court of Justice received its first request for interim measures in the *Anglo-Iranian Oil Company Case.*[4] Here the United Kingdom protested over the nationalization of a British Company by the Government of Iran without adequate compensation. In this case interim measures were granted. The Court decided that since the claim based on such a compaint did not fall *"a priori . . .* completely outside the scope of international jurisdiction",[5] interim measures could be granted. This case illustrated that the Court could indicate interim measures before it had decided the question of its jurisdiction on the merits, which Iran was challenging. The Court deferred consideration of that question. About a year later the Court held that it lacked jurisdiction on the merits. Accordingly it was also held that the order for interim measures ceased to be operative upon the delivery of that judgment. This case has generally been taken to affirm that the Court may indicate interim measures unless there is a manifest lack of jurisdiction on the merits.[6]

In 1957 the question was again raised in the *Interhandel Case.*[7] Here Switzerland claimed restitution of certain assets of a Swiss company vested in the United States of America during World War II as enemy property. It was decided that interim relief could not be granted as the United States gave an assurance that it was not taking action at that time to fit a schedule for the sale of the shares in question. Later the Court found that the Swiss application was inadmissible as local remedies had not been exhausted. Judge Hersch Lauterpact laid down the much quoted *prima facie* test of jurisdiction in cases involving interim measures. He pointed out in his Separate Opinion that the action of the Court under Article 41 does not in any way prejudice the question of its competence on the merits and that the Court need not at that stage satisfy itself that it has jurisdiction on the merits or even that its jurisdiction is probable.[8] He said governments have the right to expect that the Court will not apply Article 41 where jurisdiction is manifestly lacking.

The Court may however properly act under the terms of Article 41

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[4] *Anglo-Iranian Oil Co. Interim Measures,* I.C.J. Reports 1951, 89.

[5] *Ibid.*

[6] However Dr. M. Mendelson in Interim Measure of Protection in Cases of Contested Jurisidiction *British Year Book of International Law* 1972-73 p. 271-72 argues that this case did not decide that the test of manifest lack of jurisdiction is sufficient, rather he claims it affirms a *prima facie* test.

[7] *Interhandel Interim Measures,* 1975 I.C.J. Reports.

[8] *Id.* at 118.

providing there is an instrument emanating from the parties to the dispute which *prima facie* confers jurisdiction on the Court and which incorporates no reservations obviously excluding its jurisdiction.

The two *Fisheries Jurisdiction Cases*[9] in 1972 again raised the issue of interim measures. They concerned Iceland's claim to a fishing zone of 50 nautical miles around its coastline. The British Government requested interim measures to protect its fishing industry. Iceland contested the jurisdiction of the Court. The Court decided to indicate interim measures in this case, noting in paragraph 15[10] of the order that the Court need not finally satisfy itself at that stage of the case that it has jurisidiction on the merits. However it pointed out that the absence of jurisdiction must not be manifest. In paragraph 17 it stated that if there is a provision in an instrument which appears *prima facie* to afford a possible basis of jurisdiction, interim measures may be indicated.[11] This in no way prejudged the question of jurisdiction on the merits. Later the Court in these cases did hold it had jurisidiction to deal with the merits. This line of cases can only be regarded as the likely approach by the Court in subsequent cases. Article 59 of the Statute of the Court makes it clear that no former decision is binding on a later one.

Article 59 reads:

> The decision of the Court has no binding force except between the parties and in respect of that particular case.

Despite Article 59 the Court has shown a tendency to follow its own decisions and the situation of the test of jurisdiction in interim measures cases involving contested jurisdiction seemed well settled after the *Fisheries Cases*. The wide divergence of opinion expressed in the *Nuclear Test Case* and the *Aegean Sea Case* has made the position far from certain and, it is submitted, thereby undermined to some extent the usefulness of Article 41 in the encouragement of the peaceful settlement of disputes.

Nuclear Tests Case: The Dispute

In 1963 the French Government announced its proposal to move its atomic test site from the Sahara where it had been the subject of United Nations resolutions of the General Assembly calling for cessation of tests in that area.[12] The new test site was to be in the Pacific Ocean, the main firing sites being Muroroa Atoll and Fangataufa Island which are part of French Polynesia. Between July 3, 1966 and July 28, 1972 twenty

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[9] *United Kingdom* v. *Iceland*, 1972 I.C.J. Reports 12. *Federal Republic of Germany* v. *Iceland*, 1972, I.C.J. Reports 30. These cases covered basically the same issues.

[10] *Id.* at 15.

[11] *Ibid.* M.H. Mendelson *op. cit.* p. 281 suggests that the Court here is laying down the two extremes. He points out, echoing Judge Petrén in the *Nuclear Tests Case*, 1973 I.C.J. Report at 125-26, that no firm indication is given whether the Court would be prepared to grant provisional interim measures in *all* cases lying between these two extremes.

[12] Resolution 1376 (XVI) 20 Nov. 1959. Resolution 1652 (XVI) 24 Nov. 1961.

nine tests involving nuclear explosions in the atmosphere were conducted by the French Government in this area, including the explosion of several hydrogen bombs. Throughout this period the Australian Government made repeated diplomatic protests and representations to the French Government deploring the tests and suggesting that consultation should take place regarding safety precautions. In 1973 the Australian Government indicated to the French Government that it considered the tests unlawful and that, unless the French Government would give full assurances that no future tests would be carried out, the Australian Government would pursue international legal remedies. The French Government asserted the legality of the tests and gave no indication of any intention to cease them. After discussions in 1973 it was clear to the Australian Government that the French Government would not agree to cease testing in the atmosphere, nor would it join Australia and New Zealand in an application to the International Court of Justice.

The Australian and New Zealand Governments made application to the International Court of Justice on May 9, 1973 asking the Court to declare that the carrying out of such tests was not consistent with the rules of international law and to order that the French Government cease to carry out such tests. At the same time Australia and New Zealand requested the Court to indicate interim measures of protection that the French Government desist from any further tests until the judgment of the case.[13] The French Government was not represented as it considered the Court was manifestly not competent to hear the case.

The Findings

By eight votes to six the Court indicated interim measures. The Order stated the Governments of France and Australia should ensure no action of any kind was taken to aggravate the dispute or prejudice the rights of the other party. In particular France should avoid nuclear tests causing the deposit of radio-active fallout on Australian territory.

The Court noted that it need not finally satisfy itself that it had jurisdiction on the merits of the case, yet ought not indicate provisional measures unless the provisions invoked by the applicant appear *prima facie* to afford a basis upon which jurisdiction might be founded.[14] The material submitted by Australia was found to afford such a *prima facie* basis.

The Court also said that the power to indicate interim measures presupposes that irreparable prejudice will be caused to the right of either of the parties if the measures are not indicated.[15] The Court took into account the report of the United Nations Scientific Committee on the Effect of Atomic Radiation, which did not exclude the possibility of such damage to Australia, to decide that there was a possibility of irreparable

[13] For the purpose of this casenote the applications by Australia and New Zealand will be considered as one as they covered the same question of law.

[14] *Nuclear Tests, Interim Protection,* Order of 22 June, 1973, I.C.J. Reports 1973 99, 101.

[15] *Id.* at 103.

prejudice to Australia's right if the tests continued. It was on these bases that the Court indicated interim measures of protection.

The Aegean Sea Case: The Dispute

In 1973 Turkey granted exploration rights to its State-owned Company, the Turkish State Petroleum Company, to explore areas of the continental shelf over which Greece claimed exclusive rights. The areas concerned were said by Greece to be part of the continental shelf appertaining to Greek Islands in the Aegean Sea. The shelf areas of these islands are outside Greece's territorial waters and in Turkey's view Greece did not possess sovereign rights over these areas of the continental shelf. Greece claimed to base her rights over the disputed areas on an interpretation of Article 1 (b) of the 1968 Geneva Convention on the continental shelf and on customary international law. Turkey, however, claimed that no areas of continental shelf appertained to the Greek Islands.

After prolonged negotiations the dispute was finally precipitated by the Turkish announcement on July 13, 1976 that a Turkish research vessel *MTA Sismik I* would undertake seismic work in the disputed areas. It was stated that, although the vessel would not be accompanied by warships, nevertheless all necessary measures would be taken to detect any attack against the vessel and respond immediately. On August 6, 7 and 8 the *MTA Sismik I* was observed in seismic exploration of the disputed areas.

Both sides then made military preparations and Greece simultaneously commenced proceedings in the International Court of Justice and referred the matter to the Security Council of the United Nations. Greece asked the Court to indicate interim measures of protection to direct that both sides refrain from all exploration activity and scientific research pending final judgment, and to order that both sides refrain from taking further military measures or actions which might endanger peaceful relations.[16]

The Findings

The Court noted the non-appearance of Turkey and stated that such non-appearance cannot, of itself, constitute an obstacle to the indication of interim measures.[17] It pointed out that the possibility of prejudice of the exclusive rights of one party is not sufficient in itself to justify recourse to the exceptional power under Article 41.[18] This power is conferred on the Court only if it considers that circumstances so require and presupposes the risk of irreparable prejudice to the rights in issue.

It was decided that the alleged breach by Turkey, if it were established, was one capable of reparation and therefore the Court was unable to find risk of irreparable prejudice.

Greece's request was also dismissed on the ground that the United

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[16] 1967 I.C.J. Reports 4-5.
[17] *Id.* at 9.
[18] *Id.* at 11.

Nations Security Council was seised of the dispute, had discussed the question and had adopted a resolution urging the Governments of both Greece and Turkey to do everything in their power to reduce tension in the area so that the negotiating process would be facilitated. The Court therefore decided it was unnecessary for it to take action.

Similarly the Court found it unnecessary to pronounce on the likelihood of its jurisdiction on the merits. It did not allow the matter to be struck off its list, as Turkey had requested, and later made an Order fixing the time limits for the written proceedings on the question of jurisdiction.[19]

The Main Issues: Jurisdiction

It is a fundamental rule of international law that the jurisdiction of an international tribunal depends upon the consent of the parties. Rosenne points out however that this rule is not applicable in the exercise of the incidental jurisdiction of the Court derived from the Statute.[20] The question of whether the incidental jurisdiction of the Court is entirely different from the general rules as to jurisdiction to deal with the merits of the case has plagued the Court and is still not resolved.

If the request for interim measures is preceded by a finding that the Court has jurisdiction on the merits, there is no problem. If in a preliminary finding it is decided that the Court is without competence, the matter is struck from the list. The difficulty arises when a request is made for interim measures and because of the urgency of the situation the Court is unable to hold a preliminary enquiry as to jurisdiction. The *Nuclear Tests* and *Aegean Sea Cases* illustrate the difficulty in reconciling the concepts of incidental jurisdiction and jurisdiction by consent. The Court must investigate whether it is likely to have jurisdiction on the merits and use this likelihood as a basis for deciding whether it has jurisdiction to grant interim relief.

The *Anglo-Iranian Case,* the *Fisheries Jurisdiction Cases* and the Lauterpact test in the *Interhandel Case* seemed to have settled the question in the sense that if the applicant could make out a *prima facie* case that the Court has jurisdiction to deal with the merits, this *prima facie* finding is sufficient to found the incidental jurisdiction of the Court.

In the *Aegean Sea Case* the Court stated it was unnecessary, for the reasons stated above, to decide the question of jurisdiction. Some judges disagreed with this approach and stated their opinions on the jurisdiction issue.

It is submitted that by an analysis of the judgments in the *Nuclear Tests* and *Aegean Sea Cases* and a comparison of the various opinions, an increasing reluctance can be shown in the members of the Court to make

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[19] *Id.* at 13. 1976 I.C.J. Reports 42.
[20] Rosenne *op. cit.* p. 355.

use of the inherent jurisdicton of the Court. There appears to be a movement away from what was considered the settled test of jurisdiction in such cases, to a position requiring a greater certainty of jurisdiction than a *prima facie* test. This change is seen in the number of judges who question the concept of incidental jurisdiction or its application.

In the *Nuclear Tests Case* Judge Forster in his dissenting judgment asserted that the Court does not have two distinct kinds of jurisdiction.[21] He stated that there are some cases in which the Court's jurisdiction is so very probable that the Court can rapidly decide to indicate provisional measures, whereas in cases like the one at hand, a thorough examination is needed before jurisdiction or want of it can become apparent. In his opinion the jurisdiction point should have been solved before the making of the Order, the Court requiring "absolute certainty"[22] of jurisdiction to overstep France's challenge to jurisdiction. In the *Aegean Sea Case* Judge Forster agreed with the majority that interim relief ought not be granted.

In the *Nuclear Tests Case* Judge Jiménez de Aréchaga voted in favour of the indication of interim measures. In his additional comments to the Court's decision he stated that a request for interim measures should not be granted if it is clear even on a *prima facie* appreciation that there is no possible basis on which the Court could be competent on the merits.[23] Here Judge Jiménez de Aréchaga may be merely defining the outer limits of a test of probability, and may agree that interim measures should not be given in all cases where there is some possibility, no matter how small that jurisdiction may exist on the merits. This test suggests that the Court may indicate interim measures if it does not manifestly lack jurisdiction.[24]

In the *Aegean Sea Case* Judge Jiménez de Aréchaga, now President of the Court, concurred with the majority decision. In a separate opinion he added some general comments on the question of jurisdiction. He sees the acceptance of Article 41 by all parties to the Statute as constituting the necessary consent to give rise to a special form of jurisdiction independent of the jurisdiction on the merits of the case.[25] While he considers the two forms of jurisdiction autonomous, jurisdiction on the merits is relevant to the granting of interim measures. It is relevant not as a basis for the Court's power to act upon the request, but as one among the circumstances the Court must take into account in deciding whether to grant interim measures.

In his opinion all circumstances including that relating to the possibility of jurisdiction on the merits are placed on the same level: none has a logical priority over another. To refuse interim measures it suffices

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[21] 1973 I.C.J. Reports 111.
[22] *Id.* at 113.
[23] *Id.* at 107.
[24] See n. 6.
[25] 1976 I.C.J. Reports 16.

for the Court to find any one of the relevant circumstances absent. Since the Court found in this case that there was no danger of irreparable damage and the matter had been referred to the Security Council, it was considered unnecessary to look at the issue of jurisdiction. On the strict approach to inherent jurisdiction such an argument can be supported.

Judge Nagendra Singh, in the *Nuclear Tests Case,* supported the reasoning of the Court stressing that the Court must be satisfied of its own jurisdiction, even though only *prima facie,* before taking action under Article 41. If a possible basis exists but needs further examination, there is danger of irreparable damage and urgency, then these factors are, in his opinion the "raison d'etre" of interim relief.[26] He endorses the *Fisheries Jurisdiction Cases.*[27]

In the *Aegean Sea Case* he appears to endorse a stricter test. Judge Nagendra Singh, now Vice President of the Court, states that the Court must 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 "manifest lack".[28] In his opinion the "acid test" of the Court's competence is that the judgment must be "within clear prospect", a test of "satisfaction as to distinct possibility".[29]

It is submitted with respect that such an acid test merely serves to confuse the issue. The tests of "manifest lack" and *prima facie* jurisdiction are capable of being applied to new circumstances with a minimum of controversy about their meetings. The subjective evaluation of whether or not judgment is within clear prospect, while undoubtedly demanding a greater certainty than the *prima facie* test, would be extremely difficult to apply with certainty.

Judge Gros, in dissent in the *Nuclear Tests Case,* warned that the Court must be careful lest by a request for interim measures a forum of compulsory jurisdiction be introduced *vis-à-vis* States which do not accept any bond with the Court.[30] When the jurisdiction is not evident, Judge Gros asserts that the Court must take the time needed to examine jurisdiction. He notes that the *Fisheries Jurisdiction Cases* seemed to have consolidated the law but reiterates the importance of examining each case on its merits. The circumstances of the *Fisheries Jurisdiction Cases* were very different from those in the case at hand.[31]

Judge Petrén, in dissent in the *Nuclear Tests Case* asserts that the Court has a duty of making as sure as possible that it possesses jurisdiction.[32] He claims that the *Fisheries Cases* merely laid down the two extremes between which the likelihood of jurisdiction must lie, in order for interim measures to be indicated. In the case at hand he did not

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[26] 1973 I.C.J. Reports 110.
[27] *Id.* at 108.
[28] 1976 I.C.J. Reports 18.
[29] *Ibid.*
[30] 1973 I.C.J. Reports 120.
[31] *Id.* at 122.
[32] 1976 I.C.J. Reports 129.

find it probable that any of Australia's propositions would afford jurisdiction and therefore was not in favour of granting interim measures.[33]

Judge Ignacio-Pinto took a different line on the jurisdiction issue in his dissenting judgment in the *Nuclear Tests Case*. He stated that there must be a clear and definite legal basis for the request for interim measures. In the present case he saw no existing legal right which Australia asked the Court to protect.[34] In his opinion the question of the illegality of nuclear tests exceeds the competence of the Court and on this basis the Court has no jurisdiction to grant interim relief.[35]

Judge Morozov was unable to share the Court's reasoning in the *Aegean Sea Case*. He outlined the most extreme view concerning the requisite jurisdiction to grant interim relief. In his opinion the jurisdiction to grant interim measures is an integral part of the general jurisdiction of the Court.[36] In this respect he agrees with Judge Forster. However, he takes the argument further. In Judge Morozov's view the Court has no power to consider even the appointment of *ad hoc* judges under Article 31, or the question of interim measures until it has satisfied itself that it has jurisdiction on the merits. He claims there is no value in any arguments based on precedent. The Court must always first settle the matter of jurisdiction.

It is submitted that for the Court to agree to this line would make Article 41 unworkable. The time taken to settle the question of jurisdiction would so undermine any question of urgency as to make the remedy of dubious value.

Judge Mosler gave a separate opinion in the *Aegean Sea Case*. In his view there is no independent source of jurisdiction under Article 41. However there is an autonomous quality about the Court's jurisdiction when using that Article. The grounds conferring jurisdiction in such a case need only be examined to the extent that it can be done without endangering the urgency with which a request must be accompanied.[37] Judge Mosler claims that the Court should have reached the provisional conviction that it has jurisdiction. This, he asserts, is an attempted definition of a positive *prima facie* test, adding that provisional affirmation of jurisdiction is, in his view, not a "circumstance" under Article 41, but a precondition of the examination whether such "circumstances" exist.

It is submitted, with respect, that such a test is stricter than Judge Lauterpact's original *prima facie* test. Judge Mosler's test requires a conviction that the Court possesses jurisdiction. It states that the grounds to be examined are dependent on the urgency of the situation. It can be argued that the urgency of the situation ought not dictate the certainty

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[33] 1973 I.C.J. Reports 126. This "probability" test would put the situation in Case 8 or Case 9 of Mendelson's spectrum far beyond that where interim measures could be granted.

[34] *Id.* at 130.

[35] *Id.* at 133.

[36] 1976 I.C.J. Reports 21.

[37] *Id.* at 24.

of jurisdiction required by the Court before it is competent to proceed.

Judge Tarazi in the *Aegean Sea Case,* following the line taken by Judges Forster, Mosler and Morozov states that the Court is only competent by virtue of Article 36.[38] The power conferred under Article 41, is in his opinion merely a corollary of the power under Article 36. In the case at hand he argues the Court should have made a thorough going examination of the documents in order to pronounce on jurisdiction.[39]

Judge Stassinopoulos, the Greek *ad hoc* judge, dissenting from the Court's decision in the *Aegean Sea Case* says that the Court need only satisfy itself by an extremely cursory examination that it has *prima facie* jurisidiction to deal with the merits of the case.[40] He sees such a rule as emerging from the Court's jurisprudence and also as constituting a general principle governing all analogous situations in municipal law. In the *Aegean Sea Case* he asserts that jurisdiction did exist, at least *prima facie.*

Judge Ruda in the *Aegean Sea Case*[41] and the Australian *ad hoc* Judge Barwick in the *Nuclear Test Case*[42] both support the *prima facie* test. Rosenne[43] is of the opinion that there is no difficulty if the Applicant has indicated *prima facie* that the Court has jurisdiction, even if the jurisdiction is contested.

Prejudice to the Rights of the Parties

The concepts of irreparable damage and prejudice to the rights

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[38] *Id.* at 32. *Article* 36 reads as follows:

1. The jurisdiction of the Court comprises all cases which the parties refer to it and all matters specially provided for in the Charter of the United Nations or in treaties and conventions in force.

2. The states parties to the present Statute may at any time declare that they recognize as compulsory *ipso facto* and without special agreement, in relation to any other state accepting the same obligation, the jurisdiction of the Court in all legal disputes concerning:

a. the interpretation of a treaty;
b. any question of international law;
c. the existence of any fact which, if established, would constitute a breach of an international obligation;
d. the nature or extent of the reparation to be made for the breach of an international obligation.

3. The declarations referred to above may be made unconditionally or on condition of reciprocity on the part of several or certain states, or for a certain time.

4. Such declarations shall be deposited with the Secretary-General of the United Nations, who shall transmit copies thereof to the parties to the Statutes and to the Registrar of the Courts.

5. Declarations made under Article 36 of the Statute of the Permanent Court of International Justice and which are still in force shall be deemed, as between the parties to the present Statute, to be acceptances of the compulsory jurisdiction of the International Court of Justice for the period which they still have to run and in accordance with their terms.

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

[39] *Ibid.*
[40] *Id.* at 39.
[41] *Id. at* 23.
[42] 1973 I.C.J. Reports 110.
[43] *Op. cit.* 424.
[44] 1976 I.C.J. Reports 27.

of the parties are considered together here. Judge Elias in the *Aegean Sea Case* states that prejudice to rights can consist of the physical destruction or disappearance of the subject matter of the dispute. It also includes damage incapable of reparation. Judge Stassinopoulos in the same case makes a distinction.[45] He says that, while the concept of preserving the rights of the parties is always featured in the Orders made by the Court whether interim measures are indicated or not, the concept of irreparable prejudice has not always been explicitly mentioned.

Judge Forster in the *Nuclear Test Case* asserts that France has the right, that of every State, to undertake any action on its own territory appropriate for ensuring its immediate or future national security. He does not consider the question of irreparable damage to Australia; however he states that in exercise of this right each State remains responsible for any consequent injury to third parties.[45]

Judge Jiménez de Aréchaga[46] in the *Nuclear Tests Case* sees no need to determine the extent of the damage from radio-active fallout or the establishment of the rights of the parties. He sees such matters as pertaining to the merits and constituting the heart of the eventual substantive decision.[47] In this case he states that jurisdiction is one, perhaps the most important, among all the circumstances to take into account.[48]

Yet in the *Aegean Sea Case* President Jiménez de Aréchaga agreed with the majority and stated that all relevant circumstances must be present before interim measures could be granted.[49] He stated that all circumstances are on the same level, that none has logical priority over any other. In the case at hand the Court decided that the existence of appropriate means of reparation plus the action by the Security Council obviated the need for interim measures.

It is submitted that this approach broadens the bases for refusal of interim relief. It also allows the Court solely on its inherent jurisdiction to look to a matter which is part of the merits of the case, namely the damage to be caused, without establishing any likelihood of jurisdiction on the merits at all.

Judge Nagendra Singh[50] in the *Nuclear Tests Case,* sees the sole justification for the exercise of the inherent powers under Article 41 as that of such prejudice that the judgment when it comes would be meaningless.

Judge Barwick also notes that the material before the Court gave reasonable ground for concluding that further nuclear tests were likely to cause harm for which there could be no adequate compensation.[51]

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[45] 1973 I.C.J. Reports 114.
[46] *Id.* at 108.
[47] *Ibid.*
[48] *Ibid.*
[49] 1976 I.C.J. Reports 16.
[50] 1973 I.C.J. Reports 109.
[51] *Id.* at 110.

Judge Gros[52] argues that if the subject matter of the claim is non-existent what rights are to be preserved? In his opinion the question of jurisdiction must be settled first before it can be decided whether there is any right to be prejudiced. Judge Ignacio-Pinto in the *Nuclear Tests Case* agrees with Judge Gros on this point.[53]

Judge Mosler in the *Aegean Sea Case*[54] distinguishes between the infringement of a right and the irreparable prejudice needed under Article 41. In his opinion the exploration of *Sismik I* did not cause irreparable damage to Greece justifying the use of Article 41 even though in the event of a judgment favourable to Greece it might constitute an infringement of the exclusive rights of a Coastal State.

Judge Elias disapproves of the Order of the Court in the *Aegean Sea Case* on this point.[55] He disagrees with the concept that even if the applicant has the rights claimed, they could necessarily be compensated for in cash or kind if the other side was found to be ultimately in the wrong. This means that the State which has the ability to pay can, under this principle, commit wrongs against another State with impunity. The rightness or the wrongness of the action itself does not seem to matter. In Judge Elias' opinion this is a principle on which international law should frown: might should no longer be right in today's inter-State relations.

Reference to the Security Council

The question is only relevant to the *Aegean Sea Case* where Greece had simultaneously taken the dispute to the International Court of Justice and the Security Council. The Court's refusal to indicate interim measures relying on the referral to the Security Council received support among the Judges.

Judge Elias states that the Court's urging that the States heed the recommendations of the Security Council was along the right lines.[56]

Judge Mosler states that the Court should have considered that it was part of its overall responsibility to consider the situation as a whole, without reference to the Security Council's resolution.[57] Judge Lachs agrees.[58] In his view the Court does not arrogate any powers excluded by Statute when otherwise than by adjudication it assists, facilitates or contributes to the peaceful settlement of disputes. The Security Council's resolution did not dispense the Court, an independent judicial organ, from expressing its own view on the serious situation in the disputed area.

Judge Tarazi[59] notes that the referral to the Security Council was

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[52] *Id.* at 122.
[53] *Id.* at 131.
[54] 1976 I.C.J. Reports 26.
[55] *Id.* at 27-28.
[56] *Id.* at 29.
[57] *Id* at 26.
[58] *Id.* at 20.
[59] *Id.* at 33.

not an example of two parallel remedies. The rule *electa una via* did not have to be applied. In Judge Tarazi's opinion the Court ought to collaborate with the Security Council in the accomplishment of international peace. In his opinion the resolution should have been mentioned in the operative part of the order.

President Jiménez de Aréchaga[60] disagrees with this approach. In his view the Court's specific power under Article 41 is directed to the preservation of rights *subjudice* and does not consist in a police power over the maintenance of international peace, nor in general competence to make recommendations relating to the peaceful settlement of disputes.

Rosenne[61] claims it would be salutary that in principle, unless it was absolutely imperative, political organizations refrain from placing on their agenda disputes for which they have recommended judicial settlement. Equally those States which have themselves instituted proceedings in the Court should not subsequently, while proceedings are pending, introduce the same dispute in a political organ. It is submitted that if this were a rule of law it would avoid anomalies such as occurred in the *Aegean Sea Case.* This is not a situation of true *lis pendens*[62] and it is submitted that the Court was under a duty to consider the matter *subjudice* without any reference to the political organ of the United Nations.

Conclusion

Interim measures are a vital part of the effective settlement of disputes by recourse to international law. The length of time which elapses before final judgment and even before judgment is given on the issue of the Court's jurisdiction makes it imperative that some avenue exists for the indication of interim relief in urgent situations where irreparable harm is being done to the rights of the parties.

Reliance on international law for the settlement of disputes can only be effective if confidence is shown by States in the use of interim measures. The history of compliance is not encouraging. In the *Anglo-Iranian Company Case,* the *Fisheries Jurisdiction Cases* and the *Nuclear Tests Case,* the Orders for interim measures were ignored by the parties contesting the Court's jurisdiction. In cases where jurisdiction is not contested the Order is unlikely to be disregarded. However, in cases of contested jurisdiction the Order is likely to be disregarded as the basic competence of the Court is challenged.

It is submitted that an analysis of the judgments in the *Nuclear Tests Case* and the *Aegean Sea Case* demonstrates a polarization of the Court. On one hand stand Judges Morozov, Forster and Tarazi who deny that Article 41 founds any autonomous jurisdiction in the Court. In their opinion the Court must be certain of its jurisdiction under Article 36

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[60] *Id.* at 16.

[61] *Op. cit supra* n. 3, p. 86.

[62] See Dan Ciobano, "Litispendence between the International Court of Justice and the Political Organs of the United Nations" in L. Gross (ed.). *The Future of The International Court of Justice* (1976).

before interim measures can be granted. Consent must be established before Article 41 can be used.[63]

On the other hand stand Judges Jiménez de Aréchaga, Petrén and *ad hoc* Judge Stassinopoulos, who see Article 41 as providing an independent source of jurisdiction for the Court. Judge Nagendra Singh in the *Nuclear Tests Case* tended to support the latter group, however, in the *Aegean Sea Case* he has endorsed a stricter test. Judge Mosler, while stating that there is no independent source of jurisdiction under Article 41, considers that there is an autonomous quality about it. This polarization of opinion impedes the practical usefulness of Article 41.

It is submitted that the uncertainty of the question of the basis of jurisdiction under Article 41 and the wide divergence of opinion on the elements necessary for jurisdiction to grant interim relief has led to a situation where Article 41 is practically unworkable. Between the two clear areas of manifest lack of jurisdiction and certainty of judisdiction there lies a middle ground where it is almost impossible to foretell whether there is sufficient likelihood of jurisdiction on the merits to found an indication of interim relief.

It is submitted that a strict test must be adduced. The practical advantage of a strict test is that it would provide a yardstick by which all States could measure their cases and give guidance in the preparation of matters coming before the Court. It would make it more difficult for States to conscionably ignore the Court's orders and yet would not bind the discretion of the Court to look to the circumstances of each case.

It is not suggested that the adoption of the *prima facie* test will ensure compliance with interim orders — the *Nuclear Tests Case* is clear evidence that this is not necessarily so. It is argued that a strict, easily applied test will bring an element of certainty. The record of non-compliance with Orders for interim measures may explain why so many of the judges have felt that the time has come to tighten up the conditions for the granting of such Orders.

It is submitted that the question of the power of the Court's jurisdiction under Article 41 is not easily answered. However the traditional *prima facie* test of jurisdiction can be applied to both schools of thought. If the jurisdiction is inherent or incidental then the *prima facie* test uses this jurisdiction to ensure that the Court does not grant interim relief in cases where it is unlikely to have jurisdiction on the merits. If the other view is correct and the Court does not possess inherent jurisdiction then the *prima facie* test can be seen as drawing on the likelihood of the jurisdiction on the merits to found the jurisdiction to grant interim relief.

Article 41 raises the question of whether the circumstances require provisional measures to be taken. In this sense the power of the Court

[63] This group falls within Cases 1 and 2 on Mendelson's scale.

is analogous to that of a domestic tribunal in granting an interlocutory injunction. The analogy is not strict as the likelihood of jurisdiction which is a "circumstance" under Article 41, does not usually arise in the domestic tribunal. Yet a parallel may be drawn. Interim measures, like interlocutory injunctions, are exceptional forms of relief and involve a derogation of general rights. The tribunal must look at the situation as a whole. If the measures asked for are likely to cause hardship or it seems improbable that the applicant is likely to succeed in the final proceedings the relief will be refused. The *prima facie* test of the likelihood of success on the merits is a test used in domestic common law. In Australia the *Beecham Group*,[64] *Ashburton Oil*[65] line of cases has firmly established the *prima facie* test[66] in this country.

Dr. Mendelson[67] has suggested that the Court should adopt a flexible test. He suggests that the certainty of jurisdiction which the Court requires should be roughly in inverse proportion to the degree of urgency. Such a test would acknowledge the discretionary nature of the remedy but it would also contribute even further to the uncertainty surrounding this area. Such a test goes beyond the idea that the "circumstances" are equal and complementary. It is submitted that the consent of the parties is neither more nor less likely depending on the urgency of the dispute between them. Such reasoning could lead to the situation where because of the extreme urgency of a situation interim measures could be granted where there was patently very little likelihood of jurisdiction on the merits.

It has been suggested[68] that the solution to this problem lies in the modification of the United Nations Charter to allow States to contract out of the principle of inherent jurisdiction by special declaration. This, it is submitted, would compound the problem. It would encourage non-compliance and non-participation and remove Article 41 into a region of theoretical as well as practical ineffectiveness.

The solution lies in an accepted recognized test of likelihood of jurisdiction which is acceptable to the Court, and strenuously applied to inject an element of confidence into the use of Article 41. Such a test was assumed to be settled law by the *Fisheries Jurisdiction Cases*. The divergence of a minority of the Court in the *Nuclear Tests Case* and the ignoring of the question altogether by the majority in the *Aegean Sea Case* has led, it is submitted, to a situation of complete confusion over the test, if any, to be applied. On either jurisdiction line, that favouring a separate jurisdiction under Article 41 and that favouring no separate

[64] *Beecham Group Ltd.* v. *Bristol Laboratories Ltd.* (1968) 118 C.L.R. 618.
[65] *Asburton Oil N.L.* v. *Alpha Minerals* (1971) 123 C.L.R. 614.
[66] The English divergence seen in *American Cyanamid Co.* v. *Ethicon Ltd.* (1975) A.C. 396 has laid down a slightly more liberal test of "serious question to be tried".
[67] *Op. cit.* p. 318.
[68] P. Goldsworthy, "Interim Measures of Protection in the International Court of Justice" (1976) 68 *American Journal of International Law* 258.

jurisdiction, a test of the likelihood of jurisdiction under Article 36 is necessary. The *prima facie* test is applied effectively in domestic law, it is supported by a number of members of the Court. It is submitted that this is the proper test to be applied to decide the likelihood of jurisdiction on the merits in cases which fall in the twilight of contested jurisdiction.

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