

DISSENTING OPINION OF JUDGES WINIARSKI
AND BADAWI PASHA

[*Translation*]

However justified the interim measures of protection formulated in this Order may appear, we are of opinion that the Court should not have indicated them, on grounds of principle which it is our duty to indicate briefly.

The question of interim measures of protection is linked, for the Court, with the question of jurisdiction ; the Court has power to indicate such measures only if it holds, should it be only provisionally, that it is competent to hear the case on its merits. Article 41 of the Statute empowers the Court to indicate interim measures of protection "if it considers that circumstances so require". The provisions of this Article presuppose the competence of the Court ; this Article is to be found in the Chapter of the Statute headed "Procedure", it refers to "the parties" : there must therefore be proceedings within the meaning of the Statute and there must be parties.

Clearly, it could not be claimed that, in the event of a challenge of its jurisdiction, the Court should finally pronounce on this question before indicating interim measures of protection ; in such a case as this the request might well become pointless ; but the Court must consider its competence reasonably probable.

Article 41 naturally raises a different question for the consideration of the Court, the question whether the circumstances require provisional measures to be taken, and, from this point of view, the power of the International Court of Justice is not in substance different from that of a national tribunal. President Anzilotti, in a dissenting opinion (in the Polish Agrarian Reform case, in 1933) went so far as to say that if the *summaria cognitio*, which was characteristic of a procedure of that kind, enabled the Court to take into account the possibility of the right claimed and the possibility of the danger to which that right was exposed, a request for interim measures of protection should be granted. But as interim measures of protection are exceptional in character and in derogation of general rights, the tribunal ought to examine the situation as a whole ; thus, for instance, in the countries where there is power to grant a temporary injunction, in cases where the measures asked for would involve particular hardship on the respondent, a judge will only grant it if the right of the applicant appears to him to be clear ; thus, too, if it seems to him to be very probable that the applicant will fail in the proceedings, he will refuse to grant the relief asked for. The question of the jurisdiction of the national tribunal does not in practice arise ; the application is made to the

competent tribunal ; if the tribunal has no jurisdiction it will not order interim measures. But, in municipal law, there is always some tribunal which has jurisdiction.

In international law it is the consent of the parties which confers jurisdiction on the Court ; the Court has jurisdiction only in so far as that jurisdiction has been accepted by the parties. The power given to the Court by Article 41 is not unconditional ; it is given for the purposes of the proceedings and is limited to those proceedings. If there is no jurisdiction as to the merits, there can be no jurisdiction to indicate interim measures of protection. Measures of this kind in international law are exceptional in character to an even greater extent than they are in municipal law ; they may easily be considered a scarcely tolerable interference in the affairs of a sovereign State. For this reason, too, the Court ought not to indicate interim measures of protection unless its competence, in the event of this being challenged, appears to the Court to be nevertheless reasonably probable. Its opinion on this point should be reached after a summary consideration ; it can only be provisional and cannot prejudge its final decision, after the detailed consideration to which the Court will proceed in the course of adjudicating on the question in conformity with all the Rules laid down for its procedure.

We find it difficult to accept the view that if *prima facie* the total lack of jurisdiction of the Court is not patent, that is, if there is a possibility, however remote, that the Court may be competent, then it may indicate interim measures of protection. This approach, which also involves an element of judgment, and which does not reserve to any greater extent the right of the Court to give a final decision as to its jurisdiction, appears however to be based on a presumption in favour of the competence of the Court which is not in consonance with the principles of international law. In order to accord with these principles, the position should be reversed : if there exist weighty arguments in favour of the challenged jurisdiction, the Court may indicate interim measures of protection ; if there exist serious doubts or weighty arguments against this jurisdiction such measures cannot be indicated.

In order to minimize the seriousness of this question, there have been invoked before the Court examples taken from the practice of the Mixed Arbitral Tribunals. But these tribunals, as joint organs of two States, differ both as to their character and as to their procedure from an international tribunal, and, therefore, from the International Court of Justice, and there is, consequently, nothing to be learned from their precedents.

There were also invoked precedents of the Permanent Court of International Justice ; these precedents, however, in no way support the argument put forward. Interim measures of protection were requested in six cases ; the requests were granted in only two. In the Belgian-Chinese case (in 1927), the President first refused, then

granted, and, finally, revoked the interim measures of protection. In his Order, the President was careful to say: "Provisionally, pending the final decision of the Court either on the question of its jurisdiction or on the merits." In revoking these measures the President pointed out what were the circumstances: "the time-limit allowed for the filing of the Counter-Case has not expired, the Respondent has not had an opportunity of indicating whether he accepts the Court's jurisdiction in the case". In the case concerning the Electricity Company of Sofia and Bulgaria (in 1939), Bulgaria objected to the jurisdiction of the Court. The objection was considered by the Court and allowed in part; as to the remainder, the Court held itself competent. It was only after this finding that the Court indicated interim measures of protection, and then in very general terms.

There are certainly cases in which the objection to the jurisdiction is regarded as a mere ground of defence, and in which the party overruled in its objection continues to take part in the proceedings. But in this case the facts are quite different. Iran affirms that it has not accepted the jurisdiction of the Court in the present matter and that it is in no way bound in law; it has refused to appear before the Court and has put forward reasons for its attitude. The Court ought therefore to decide, in a summary way and provisionally, for the purpose of arriving at the decision which it must take on the question of interim measures of protection, which is the more probable of the two conclusions which it may finally come to on the question of its jurisdiction.

In this connection, a consideration, entirely summary in character, of the various grounds upon which the Government of the United Kingdom alleges that the Court has jurisdiction, leads us to the provisional conclusion that if Iran does not accept the jurisdiction of the Court in pursuance of the suggestion made by the United Kingdom in paragraph 20 of the Application ("Alternatively, whether or not the Court has the right to exercise jurisdiction in this case the Government of the United Kingdom expects that Iran will agree to appear before the Court voluntarily"), the Court will at the time of its final decision be compelled to hold itself without jurisdiction in this case and that, in these circumstances, interim measures of protection should not have been indicated.

(Signed) B. WINIARSKI.

(Signed) BADAWI PASHA.