

SEPARATE OPINION OF
VICE-PRESIDENT NAGENDRA SINGH

While subscribing to the Court's Order in this particular case, in which it has declined to exercise its powers under Article 41 of its Statute, I find it necessary to emphasize the primordial importance which the jurisdictional issue would have acquired, had the Court found that the circumstances warranted the indication of interim measures. The necessity of competence has an inescapable role in any legal régime associated with a tribunal's exercise of the extraordinary power of dispensation whereby it may grant interim measures of protection. This would particularly appear to be so when the respondent is not present before the Court but has in a written statement challenged its jurisdiction and has invoked Article 36, paragraph 6, of the Statute, thus creating circumstances envisaged by Article 53. The burden on the Court to satisfy itself about its own competence becomes much more important if in such circumstances it wishes to contemplate the granting of interim measures of protection. The Court must then feel a higher degree of satisfaction as to its own competence than can be derived from the positive but cursory test of "prima facie" jurisdiction or the negative test of "no manifest lack" of jurisdiction. The essence of the matter is that if the Court is taking action affecting the rights of either party, even by way of freezing them, it should do so only after reaching a point of satisfaction in regard to its own competence which comprises a clear and distinct possibility of the Court proceeding to render judgment in the case. The purpose of the entire exercise of protecting the rights of the parties *pendente lite* is to be able to implement the Court's judgment when it comes. The acid test of the Court's competence, therefore, is that the judgment must be within clear prospect. This positive test of satisfaction as to distinct possibility appears necessary if the Court is to avoid the regrettable prospect of granting interim measures and then finding later that it cannot ever proceed to judgment in the case. Even though there is the admitted factor of urgency attending the request for interim measures, I feel that the Court has nevertheless to spend the time needed to reach that point of satisfaction as to its own prospective competence prior to exercise of powers under Article 41 of its Statute.

So far as this particular case is concerned, the Court has not found the required circumstances to exist which would warrant the exercise of its powers under Article 41. Hence the question of its own competence, at this stage, does not arise as it would have if it had sought to exercise those

powers. In the latter event it is my assessment that a strict application of the test of the Court's competence in terms of a distinct possibility of jurisdiction, would be necessary and justified.

(Signed) NAGENDRA SINGH.
