

## DECLARATION OF JUDGE BUERGENTHAL

1. Although I agree with the Court's decision to deny Uruguay's request for provisional measures in this case, I regret that in doing so the Court assumed that its power under Article 41 of its Statute is limited to only one type of provisional measures.

2. The Court has the power, in my opinion, to indicate two distinct types or categories of provisional measures. By focusing only on one type, the Court has missed an opportunity in this case to fully address the legal implications of extrajudicial coercive measures as far as its power to indicate the second type of provisional measures is concerned.

3. The first type of provisional measures order requires a finding that there is an urgent need for the Court to indicate such measures because of the risk of irreparable prejudice or harm to the rights that are the subject of the dispute over which the Court has prima facie jurisdiction. This was the type of provisional measures order the Court refused to grant Argentina last July because it found that Argentina had failed to demonstrate that it would suffer irreparable harm or prejudice to the rights in dispute between the Parties if the order were not indicated at that stage of the proceedings. And this is the ground upon which the Court relies in declining to indicate the provisional measures requested by Uruguay in the present case.

4. But in my view this is not the only ground that may justify the grant of provisional measures. As early as 1939, the Permanent Court of International Justice, invoking Article 41 of its Statute, which was identical to the wording of Article 41 of the Statute of this Court, indicated two types of provisional measures when it required Bulgaria to "ensure that no step of any kind is taken capable of prejudicing the rights claimed by the Belgian Government or of aggravating or extending the dispute submitted to the Court" (*Electricity Company of Sofia and Bulgaria, Order of 5 December 1939, P.C.I.J., Series A/B, No. 79*, p. 199). In asserting its power to order the aforementioned provisional measures, the Permanent Court of International Justice emphasized, moreover, that Article 41 of its Statute

"applies the principle universally accepted by international tribunals . . . to the effect that the parties to a case must abstain from any measure capable of exercising a prejudicial effect in regard to the execution of the decision to be given and, in general, not allow

any step of any kind to be taken which might aggravate or extend the dispute” (*P.C.I.J., Series A/B, No. 79*, p. 199).

5. The International Court of Justice has over the years adopted provisional measures similar to the one the Permanent Court of International Justice indicated in the above case. Thus, for example, in the *Burkina Faso/Republic of Mali* case, the ICJ Chamber declared that

“the Court or, accordingly, the chamber possesses by virtue of Article 41 of the Statute the power to indicate provisional measures with a view to preventing the aggravation or extension of the dispute whenever it considers that circumstances so require” (*Frontier Dispute (Burkina Faso/Republic of Mali), Provisional Measures, Order of 10 January 1986, I.C.J. Reports 1986*, p. 9, para. 18).

The Chamber then entered provisional measures that called on both Governments to

“ensure that no action of any kind is taken which might aggravate or extend the dispute submitted to the Chamber or prejudice the rights of the other Party to compliance with whatever judgment the Chamber may render in the case” (*ibid.*, pp. 11-12, para. 32 (1) (A).)

In the *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria)* case, the Court repeated verbatim the conclusion of the Chamber that

“the Court possesses by virtue of Article 41 of the Statute the power to indicate provisional measures with a view to preventing the aggravation or extension of the dispute whenever it considers that circumstances so require” (*I.C.J. Reports 1996 (I)*, pp. 22-23, para. 41).

Again, in the *Congo v. Uganda* case, the Court quoted the language from the *Cameroon v. Nigeria* case (para. 44) and indicated the following provisional measures, *inter alia*:

“Both Parties must, forthwith, prevent and refrain from any action, and in particular any armed action, which might prejudice the rights of the other Party in respect of whatever judgment the Court may render in the case, or which might aggravate or extend the dispute before the Court or make it more difficult to resolve.” (*Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), Order of 1 July 2000, I.C.J. Reports 2000*, p. 129, para. 47 (1).)

6. These are only a few of similar pronouncements by this Court that are predicated on the assumption that it has the power under Article 41 to order provisional measures to prevent a party to a dispute before it from interfering with or obstructing the judicial proceedings by coercive extrajudicial means, unrelated to the specific rights in dispute, that seek

or are calculated to undermine the orderly administration of justice in a pending case. In fact, it was its right to be free from such interference that Uruguay has sought to vindicate when it claimed that it was entitled to have its rights under the 1975 Uruguay River Statute determined in these proceedings without being subjected to extrajudicial economic coercion.

7. It is undisputed that the Court has no jurisdiction over the blockading of the bridges as such, since the 1975 Uruguay River Statute under which the Court appears to have *prima facie* jurisdiction with regard to the present litigation deals only with the régime of the River Uruguay. The Court must nevertheless be deemed to have the requisite powers vested in courts generally, powers that in my view find expression in Article 41 of its Statute, to ensure that the orderly adjudication of cases pending before it is not aggravated or undermined by extrajudicial coercive measures resorted to by one party to the dispute against the other. That, moreover, is what the Court appears to have asserted in the aforementioned cases when it claimed the power to indicate provisional measures to prevent the aggravation of the dispute.

8. It is true that the Court has tended to combine the two types of provisional measures in one single paragraph in the *dispositif* when indicating such measures, and that it has thus far not had occasion to indicate the second type of provisional measures in a case in which the first type was not also indicated. That does not necessarily prove that it lacks the power to do so, although it has given rise to the suggestion that the second type of provisional measures is merely ancillary to the first and that the Court consequently lacks the power under Article 41 to grant the second independently of the first.

9. This, basically, is the approach the Court adopts in the instant case. Thus, in paragraph 31 of the Order, the Court notes that its

“power . . . to indicate provisional measures under Article 41 of the Statute has as its object to preserve the respective rights of each party to the proceedings ‘[p]ending the final decision’, providing that such measures are justified to prevent irreparable prejudice to the rights which are the subject of the dispute”.

In the next paragraph of the Order, the Court emphasizes that its power “to indicate provisional measures can be exercised only if there is an urgent necessity to prevent irreparable prejudice to such rights, before the Court has given its final decision”. Having laid this groundwork, the Court concludes that all three provisional measures requested by Uruguay (para. 13 of the Order) cannot be granted because Uruguay has failed to show that the actions attributed by Uruguay to Argentina pose an imminent threat of irreparable prejudice to Uruguay’s rights in dispute.

10. The foregoing findings are based on the conclusion that the Court lacks the power under Article 41 to indicate any provisional measures in a case in which there has been no showing of an imminent risk of irreparable prejudice to the subject-matter in dispute between the parties, that is, the subject-matter over which the Court has at least *prima facie* jurisdiction. Thus, for example, in paragraphs 40 and 41 of its Order the Court makes the following findings with regard to Uruguay's first provisional measure request:

“40. Whereas the Court, having heard the arguments of the Parties, is of the view that, notwithstanding the blockades, the construction of the Botnia plant progressed significantly since the summer of 2006 with two further authorizations being granted and that it is now well advanced; whereas the construction of the plant is thus continuing;

41. Whereas the Court, without addressing whether the road-blocks may have caused or may continue to cause damage to the Uruguayan economy, is not convinced, in view of the foregoing, that those blockades risk prejudicing irreparably the rights which Uruguay claims in the present case from the 1975 Statute as such”.

The Court denies the second and third provisional measures requested by Uruguay on the same grounds.

11. In my view, these rulings by the Court fail to take the language of Article 41 into account and the inherent powers of judicial institutions generally. Article 41 reads as follows:

“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.”

This language permits a less restrictive interpretation, an interpretation that finds expression in the Court's repeated assertions that it

“possesses by virtue of Article 41 of the Statute the power to indicate provisional measures with a view to preventing the aggravation or extension of the dispute whenever it considers that circumstances so require”.

The fact that the Court, as it emphasizes in paragraph 49 of its Order, has in all these prior cases also indicated the first type of provisional measures, does not detract from the wording of Article 41 of the Statute, which makes the decision whether or not to indicate provisional measures dependent upon the “circumstances” that may require it. These circumstances may involve an imminent threat of irreparable prejudice to the rights in dispute. But, independently thereof, no compelling reason has been advanced by the Court why they may not also apply to situations in which one party to the case resorts to extrajudicial coercive measures, unrelated to the subject-matter in dispute, that aggravate a dispute

by seeking to undermine or interfere with the rights of the other party in defending its case before the Court. In such situations the test would not be whether there is an imminent threat of irreparable harm to the subject-matter of the dispute, but whether the challenged actions are having a serious adverse effect on the ability of the party seeking the provisional measures to fully protect its rights in the judicial proceedings.

12. While it cannot be denied that the blockades of the bridges have caused considerable economic harm to Uruguay, which is most regrettable, the record before us does not demonstrate that these actions have seriously undermined the ability of Uruguay effectively to protect its rights generally in the judicial proceedings pending in this Court.

*(Signed)* Thomas BUERGENTHAL.

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