COMMENT

THE STATUS OF INTERIM MEASURES OF THE INTERNATIONAL COURT OF JUSTICE AFTER THE IRANIAN-HOSTAGE CRISIS

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Unable to arrange direct negotiations with the Government of Iran regarding the release of the American diplomats taken hostage during the seizure of the American embassy in Tehran on November 4, 1979, the United States Government turned to a multitude of international organizations to effect the release of the hostages. The United States requested both the Security Council and the General Assembly to take measures to free the American citizens in Tehran and sought to persuade its North Atlantic Treaty Organization (NATO) allies to launch an economic boycott against Iran. In addition to its appeals to various political organizations, the United States took its cause to the International Court of Justice (I.C.J.). In an unprecedented move, the Court issued an interim measure of protection requiring Iran to surrender the American hostages.[1] Although the order greatly pleased the United States Government, adding legitimacy to its cause, most Americans had little faith in the Court's power to enforce this order. Rather, they believed an effective response would only come in the form of economic or military force initiated by the United States. In light of the skepticism shown toward interim measures of protection, this Comment will closely examine their legal effect on parties and explore the enforcement mechanisms which exist to compel compliance. First, consideration will be given to whether the interim orders are legally binding or serve merely as recommendations. Second, this Comment will study the Charter of the United Nations provisions for enforcement of the Court's decisions, focusing on the effectiveness of these measures and their applicability to interim orders. A final

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1. N.Y. Times, Dec. 16, 1979, § 1, at 1, col. 3.

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section will analyze the impact which the Iranian-Hostage case will have on interim orders and the Court's power to adjudicate.

I. THE NATURE OF INTERIM MEASURES

Article 41 of the Statute of the International Court of Justice authorizes the Court to issue orders "to preserve the respective rights of the parties pending the decision of the Court."[2] Like the preliminary injunction issued by domestic courts, the interim order temporarily prohibits the disputed conduct until the Court can render a final decision on the merits. In the absence of an interim remedy, a party might irreparably interfere with the other party's rights, thereby rendering moot the Court's final decision.[3] The Court's power to render timely judgments often depends upon its capacity to temporarily halt possibly abusive conduct.[4] Diplomats have long recognized the need for preserving the rights of States prior to a final decision, and consequently, have routinely incorporated a mechanism for issuing interim orders into the procedure of international tribunals.[5]

Interim measures differ both procedurally and substantively from final proceedings on the merits. In addition to temporarily preserving the rights of the parties, interim orders provide prompt relief to the wronged party and give the parties a cooling-off period before the proceedings on the merits begin.[6] The advantages of such a judicial tool are readily apparent when one notes the great length of time which the Court takes in reaching a final decision on the merits due to its complicated procedures.

The Court has gradually established requirements which must

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2. 59 Stat. 1055, (1945). The complete text of the statute, which was annexed to the Charter of the United Nations, is set forth at 59 Stat. 1055 (1945), T.S. No. 993 [hereinafter referred to as Statute of the I.C.J.]. *See* note 20 *infra*, and accompanying text.

3. E. K. NANTWI, THE ENFORCEMENT OF INTERNATIONAL JUDICIAL DECISIONS AND ARBITRAL AWARDS IN PUBLIC INTERNATIONAL LAW, 153 (1967).

> A provision that the final judgment is binding becomes pointless if that decision can be negatived by actions of one of the parties in advance of the judgment. It is to prevent such an impasse that the Court is given the power to indicate the interim measures if the circumstances require, since, presumably, 'circumstances' could never require if the final judgment would be of no effect.

4. Goldsworthy, *Interim Measures of Protection in the International Court of Justice*, 68 AM. J. INT'L L. 258 (1974) [hereinafter cited as Goldsworthy].

5. *See* Treaty for the Advancement of Peace of October 13, 1914, between Sweden and the United States, relating to dispute settlement. 38 Stat. 1874 (the Bryan Treaties); Statute of the Central American Court of Justice, [1908] AM. J. INT'L. L. Supp. 231 (1908).

6. Goldsworthy, *supra* note 4, at 258.

be met before an interim order may be issued.[7] A party to a suit may request an interim order[8] or the Court may "initiate measures *proprio motu*."[9] Arguably, however, the party must submit the dispute on the merits to the Court before requesting interim relief.[10] The Court may not grant interim relief where the dispute on the merits is not before the Court.[11] The issuance of an interim order in no way affects the Court's final decision on the merits[12] and does not have the force of *res judicata*.[13] The controversy before the Court must presently affect the requesting party[14] and must threaten to do permanent damage for which the injured party cannot be compensated.[15] Furthermore, interim orders extend only to that conduct which is central to the dispute before the Court. They may not be directed at conduct which lies outside the boundaries of the suit.[16] The requesting party must have a special interest in the

7. For a detailed discussion of these requirements, *see id.*, at 259.

8. Article 66(1) of the Rules of the I.C.J. provides: "A request for indication of interim measures of protection may be filed at any time during the proceedings in the case in the connection with which it is made."

9. Article 66(6) of the Rules of the ICJ.

10. The Court has stated, "it is in principle arguable that such a power [to grant interim orders] on the part of the Court exists only in respect of a dispute already submitted to it." Legal Status of the South-Eastern Territory of Greenland, [1932] P.C.I.J., Serv. A/B, No. 48, at 283-84.

11. Goldsworthy, *supra* note 4, at 266.

12. Although the issuance of an interim order does not affect the final judgment on the merits, the Court has considered proposed rules which would place a heavier burden of proof on parties who violated an interim order. *Infra*, note 58 and accompanying text.

13. Article 66(7) of the Rules states that, "The Court may at any time by reason of change in the situation revoke or modify its decision indicating interim measures of protection."

14. In the Case Concerning the Administration of the Prince von Pless, (Interim Measures of Protection) [1933] P.C.I.J., Serv. A/B, No. 54, 150, Germany brought suit against Poland for imposing taxes on German nationals in violation of certain treaties. Poland agreed to refrain from taxing Prince von Pless until the Court rendered a judgment. In light of this agreement, the Court found Germany's request for an interim measure "ceased to have any object" since Germany was in no immediate danger of being taxed. *See also* the Interhandel Case (Interim Measures of Protection), Order of October 24, 1957, [1957] I.C.J. 105.

15. In Nuclear Tests (Australia v. France), Interim Protection, Order of June 22, 1973, [1973] I.C.J. 99, 105, the Court indicated an interim order which specifically prohibited France from conducting further nuclear explosion tests in the vicinity of Australia on the grounds that such tests might irreparably harm Australia by exposing the continent to radiation. Another example of the Court requiring the possibility of irreparable harm is Fisheries Jurisdiction (United Kingdom of Great Britain and Northern Ireland v. Iceland), Interim Protection, Order of 17 August 1972, [1972] I.C.J. 12.

16. *See* the Case Concerning the Polish Agrarian Reform and the German Minority, [1933] P.C.I.J., Ser. A/B, No. 58. Here, Germany requested that the Court order a temporary prohibition on all Polish Agrarian Reform, whereas the claim before the Court concerned discrimination against Polish nations of German descent by Poland in applying its agrarian reform. The Court found that the request exceeded the scope of the claim and denied the

dispute in order to warrant the issuance of interim orders. In the past, the Court has refused to grant interim measures where the dispute affected only a general right which the requesting party shared with other nations.[17]

International law scholars have struggled with the question of the Court's jurisdiction to impose interim orders. In a proceeding on the merits, the Court determines whether it has final jurisdiction over a matter.[18] However, in the case of interim orders, the urgency of the situation requires the Court to issue an order before it has time to render a decision as to final jurisdiction. Because of this time factor, the Court has developed a shorthand test for determining its jurisdiction in regard to the issuance of interim orders. Under this test, the Court is deemed to have jurisdiction, for purposes of issuing interim orders, when the possibility exists that the Court will have final jurisdiction.[19]

II. THE BINDING NATURE OF INTERIM ORDERS

Before exploring the potential for enforcing interim orders, it is crucial to determine what legal effect they may have. Article 41 of the Statute of the I.C.J. granting interim relief states:

> 1. The Court shall have the power to indicate, if it considers that circumstances so require, any provisional measures

interim order. *See also* Goldsworthy, *supra* note 4, at 271. Nuclear Tests, *supra* note 15, at 99.

17. For example, in the Nuclear Tests Case, Australia requested an interim order (prohibiting further French nuclear tests) on the grounds that nuclear tests threatened to pollute the ocean and infringed on Australia's general right to freedom of the seas. Although the Court granted an interim order in this case because of the possibility that radioactive fallout might reach the territory of Australia, the Court rejected Australia's "freedom of the Seas" argument on the grounds that Australia had no special interests in the endangered international waters beyond those interests shared by other nations. Nuclear Tests *supra* note 15, at 99. In the Fisheries Jurisdiction Case, the Court granted interim orders to protect Britain's right to fish international waters close to Iceland. At first glance, the Court appears to have issued the interim order based upon Britain's general right to freedom of the high seas. However, language in the decision indicates that the Court believed Britain to have a special interest in these waters due to its economic dependence on the catch taken there. Fisheries Jurisdiction *supra* note 15.

18. Article 36(6) states: "In the event of a dispute as to whether the Court has jurisdiction, the matter shall be settled by the decision of the Court."

19. For a discussion of the "possibility" rule, *see* Mendelson, *Interim Measures of Protection in Cases of Contested Jurisdiction*, 46 BRIT. Y.B. INT'L L. 259 (1972-73). Some scholars have questioned the validity of the "possibility" rule. *See* Bernhardt, *The Provisional Measures Procedure of the International Court of Justice Through U.S. Staff in Tehran: Flat Iustitia, Percet Curia*? 23 VA. J. INT'L & COMP. L. (1981).

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.

Commentators and jurists have long argued over the meaning of the words "indicate" and "suggested."[20] These writers generally fall into two camps; those who view interim orders as mere suggestions to the parties involved, and those who argue that they have a legally binding effect. Perhaps the most famous and authoritative statement of the nonbinding view was made by Dumbauld, who wrote: "[T]he Statute confers on the Court a 'power' and not a 'mere faculty' to indicate measures, there is no question of a binding order."[21] The non-binding group concedes the existence of a general duty on the part of the parties before a tribunal to preserve the *status quo*. However, in their opinion Article 41 merely authorizes the Court to make non-binding suggestions as to how the parties can preserve the *status quo*. They contend that since these suggestions emanate from the supreme international tribunal, the parties would be morally, although not legally, obligated to comply.[22]

Hudson best articulated the case for binding measures in the following passage:

> The power conferred on the Court by Article 41 is to "indicate" . . . measures which ought to be taken. The term *indicate*, borrowed from treaties concluded by the United States with

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20. The equally authoritative French version of Article 41 uses the language "a le Pouvoir d indiquer" ("has the power to indicate") in place of the verbs indicate and suggest. Although scholars disagree as to the strength of this phrase, even adherents to the "non-binding" school concede that this language grants the Court greater power than is suggested by the English phrase "shall indicate" which in French is translated as "indiquera."

21. E. DUMBAULD, INTERIM MEASURES OF PROTECTION IN INTERNATIONAL CONTROVERSIES 168 (1932).

22. Nevertheless, as we have seen, the Court does not merely 'suggest' appropriate measures. It would seem that the word 'indicate' expresses exactly the Court's function, which is to *point out* what the parties must do in order to remain in harmony with what the Court holds to be the law. [The] submission of a controversy to the Court implies certain obligations, such as that of not destroying the subject matter of the controversy or anticipating the judgment. Article 41 states what are the duties of the parties. It is the task of the Court to indicate what it is necessary for the parties to do in order to fulfill their obligations under international law; but the parties remain free to observe such indication or not as they choose.

Id. at 169.

Some commentators in the "non-binding" school argue that the parties are under no obligation, moral or legal, to comply with interim measures. B. CHENG, GENERAL PRINCIPLES OF LAW 273 (1953).

> China and France on September 15, 1914, and with Sweden on October 13, 1914 possesses a diplomatic flavor, being designed to avoid offense to 'the susceptibilities of States.' It may have been due to a certain timidity of the draftsmen. Yet it is not less definite than the term *order* would have been, and it would seem to have as much effect. The use of the term does not attenuate the obligation of a party within whose power the matter lies to carry out the measures 'which ought to be taken.' An indication by the Court under Article 41 is equivalent to a delcaration of obligation contained in a judgment, and it ought to be regarded as carrying the same force and effect.[23]

Supporters of this binding view have developed several legal theories which reinforce their interpretation. First, they contend that the duty to preserve the *status quo* while before an international tribunal is a general principle of international law.[24] Consequently, the Court may enforce this duty without any statutory authorization. Under this interpretation, Article 41 merely gives "life and blood to a rule that already exists in principle. These measures are only the practical application of an obligation that already exists in virtue of general international law."[25]

Second, these commentators maintain that the Court has the inherent power to issue binding interim measures.[26] Under this inherent-power theory, States impliedly consent to interim orders

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23. M. O. HUDSON, THE PERMANENT COURT OF INTERNATIONAL JUSTICE 1920-1942 425-26 (1943). Curiously enough, Hudson had taken a contrary position in an earlier volume, 1932, maintaining that the terms "indicate" and "suggest" meant that interim measures lacked any binding force. Perhaps the Court's 1936 revision of its rules altered Hudson's view as to these measures.

24. The Court in Electric Company of Sofia and Bulgaria, [1934] P.C.I.J., ser. A/B, No. 79, at 194, recognized this general principle requiring the preservation of the *status quo*. This assertion that the duty to preserve the *status quo* is recognized as a principle of general law has drawn criticism on the grounds that such a view renders Article 41 superfluous. If a duty to preserve the *status quo* is a general principle of international law, then there is no need for imposing such a duty on the Parties by means of interim orders. For a discussion of this argument, *see* Crockett, *The Effects of Interim Measures of Protection in the International Court of Justice*, 7 CALIF. W. INT'L L. J. 348, 366 (1977).

Some commentators have responded to this criticism, asserting that interim measures would have a useful function despite the existence of a duty at law to preserve the *status quo*. "[T]he order may establish continuing jurisdiction, relieving the applicant from the burden of showing some independent basis of jurisdiction, a burden which would have to be met if the applicant only contended that a general principle of law had been violated." *Id.* at 375.

25. Hambro, *The Binding Character of Provisional Measures of Protection Indicated by the International Court of Justice*, in RECHTSFRAGEN DER INTERNATIONALEN ORGANIZATIONS 151-171 (Frankfurt 1956); *cited in* Nantwi, *supra* note 3, at 153.

26. Hudson, *supra* note 23, at 426.

when they submit to the Court's jurisdiction.[27] Several judges have recently defended this inherent-power theory.[28]

Finally, some supporters of the binding theory argue that States have agreed to adhere to these interim orders by becoming members of the United Nations and agreeing to the terms of its Charter. In these writers' opinion, Article 94(1) of the United Nations' Charter makes interim orders binding upon its members.[29] This Article states that "[e]ach member of the United Nations undertakes to comply with the decisions of the International Court of Justice in any case to which it is a party." In further support of their argument these writers point to Article 92(1) which makes the Statute of the I.C.J. an integral part of the present Charter. They insist that this Article, in conjunction with Article 41 of the Statute of the I.C.J., makes interim measures binding on members of the United Nations.[30] The fact that in the past nations have obligated themselves to obey interim orders by entering into agreements with other nations lends credibility to this voluntary-binding theory. Interim-order agreements most commonly take the form of dispute-settlement treaties wherein the signatories agree to submit to the authority of an international tribunal and agree to obey its orders.[31]

The *travaux preparatoires* of Article 41 does not resolve the question of the binding nature of interim orders. Rather, this his-

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27. The judicial process which is entrusted to the Court includes as one of its features, indeed as one of its essential features, this power to indicate provisional measures which ought to be taken. If a State has accepted the general office of the Court, if it has joined with other States in maintaining the Court, or if it is a party to a treaty which provides for the Court's exercise of its functions, it has admitted the powers which are included in the judicial process entrusted to the Court. It would seem to follow that such a State is under an obligation to respect the Court's indication of provisional measures; in other words, as a party before the Court such a State has an obligation, to the extent that the matter lies within its power, to take the measures indicated.

Id. at 426.

28. *See* the opinion by Judge Negendra Singh in the Nuclear Tests, *supra* note 15, at 99, 109; Judge Sir Gerald Fitzmaurice's separate opinion in Case Concerning the Cameroons (Cameroon v. United Kingdom), Preliminary Objections, Judgment of December 2, 1963, [1963] I.C.J. 97, 103. *See also*, J. STONE, LEGAL CONTROLS OF INTERNATIONAL CONFLICTS 132 (1954).

29. Nantwi, *supra* note 3, at 153. However, most authorities disagree with this reading of Article 94(1); instead, they contend that this language makes only final decisions binding on Charter members. Hambro, *supra* note 25, at 164.

30. Article 41, read in the context of Article 92, does not seem to leave much room for doubt regarding the legal character of the obligation ensuing—at least as far as Members of the United Nations who become parties to litigation before the Court are concerned—from an order for interim measures made by the Court in pursuance of one of the provisions of its Statutes, namely Article 41.

Nantwi, *supra* note 3, at 153.

31. *See* Article 19 of the Locarno Treaties of 1925, 54 L.N.T.S. 219, 225, 337, 351.

tory demonstrates that the Statute's drafters disagreed on this matter. The drafters, in large part, took the language of Article 41 from the so-called Bryan Treaties, a series of dispute settlement treaties between the United States, China, France and Sweden.[32] Some judges criticized the use of such timid terms as "indicate" and "suggested,"[33] but the drafters adopted the language over their complaints because it gave the Court flexibility in determining the effect of its own measures[34] and was less threatening to nation-members' sense of sovereignty.[35] In light of its diplomatic origins, some commentators insist that the language should not be read literally. Rather, they assert that the Court should take diplomatic custom and the drafters' intentions into consideration when interpreting this provision.[36]

The initial proposal submitted to the Advisory Committee of Jurists regarding interim orders contained a provision for sanctioning parties who failed to comply.[37] This desire to provide a mechanism for sanctioning violators of interim orders demonstrates a concern on the part of the committee members that these orders be binding on the parties. Although the Committee on Procedure rejected these specific proposals for enforcement,[38] they attested to the binding nature of interim orders by adopting Rule 57, which entitled the Court to place on record violations of these orders.[39] With the amendment of the rules in 1931, the Court deleted this

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32. P.C.I.J. ser. E, No. 7, of 293. *See* Manin, *Interim Measures of Protection: Article 41 of the I.C.J. Statute and Article 94 of the U.N. Charter*, 10 IND. J. INT'L. L. 359, 369 (1970).

33. Judges von Eysinga, Guerrero, and Rostworowski expressed regret that the power of the Court had been so restricted. P.C.I.J., Ser. D, No. 2 (2d add.), at 184-5.

34. Crockett, *supra* note 24, at 355.

35. Hudson, *supra* note 23 at 425. *See also*, Ser. D, No. 2 (3d add.), at 282.

36. Hudson seems to imply that the language cannot be read literally when he wrote, "[T]he term *indicate*, borrowed from the [Bryan] treaties . . . possesses a diplomatic flavor, being designed to avoid offence to 'the susceptibility of states.' " *Id.* [footnote omitted]. *See also* Manin, *Interim Measures of Protection: Article 41 of the ICJ Statute and Article 94 of the UN Charter*, 10 IND. J. INT'L L. 359, 365 (1970).

> "The term 'indicate' was employed by the Advisory Committee of Jurists of 1920, not because the Committee did not want to clothe the Court with a power of issuing an order which would be binding upon the parties to a case, but because it wanted to follow a diplomatic precedent".

37. Proposal by Mr. Raoul Fernandez of Brazil, P.C.I.J., Process-Verbaux of the Proceedings of the Advisory Committee of Jurists, June 16-July 24th, 1920; *cited in* Dumbauld, *supra* note 14, at 144, n.4.

38. P.C.I.J., Ser. D, No. 2, 290. *See also* Dumbauld, *supra* note 21, at 146.

39. 57 of the Rules (1922). *See* Crockett, *supra* note 24, at 355. ("It is noteworthy that an apparent compromise was reached, as evidenced by the inclusion of a provision in Article 57 of the Rules which allowed the Court to place in the record the fact that a party had failed to comply with interim measures.")

portion of Rule 57.[40] Nevertheless, the Court's discussions during the amendment proceedings indicated that the majority of the judges considered interim orders to be binding.[41]

In summary, neither the Statute of the I.C.J. nor the Court's revisions of its rules have set forth the legal effect which interim orders have on the parties. Despite the absence of a provision in the Statute or the Rules of the Court which proclaims interim orders to be binding on the parties, the judges have taken measures to strengthen these provisional measures.

The rules which define the Court's jurisdiction in the case of interim orders shed some light on the "binding nature" issue. Although these jurisdictional rules do not speak directly to the issue of the binding nature of these orders, the strictness with which jurisdiction is regulated does to some extent indicate the degree of finality attached to such orders. The Court may place stricter jurisdictional requirements on measures which have the effect of law, whereas interim orders that are merely suggestions are less likely to be restricted by rigidly defined jurisdictional requirements. Under this analysis the Court's selection of the "possibility" rule,[42] which grants the Court jurisdiction where the possibility exists that the dispute would come under the Court's final jurisdiction, suggests that the Court views these orders as non-binding.[43] Orders based on such minimal jurisdictional requirements arguably should not carry the weight of a final judgment. Other authorities have criticized this analysis, contending that the "possibility" rule was instituted because of practical considerations and has no bearing on the legal effect of such orders.[44]

Article 41 of the Statute of the I.C.J., which authorizes the issuing of interim orders, is the primary statute dealing with these legal measures. However, in attempts to resolve the "binding nature" debate, commentators have turned to Article 59 of the Statute of the I.C.J., which addresses the Court's power to bind the parties.

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40. Dumbauld, *supra* note 21, at 147.

41. Manin, *supra* note 29, at 365, n.29.

42. For a discussion of the "possibility" rule *see supra* note 19.

43. For a discussion of this jurisdictional argument, *see* Crockett, *supra* note 24, at 357.

44. Even though, at first blush, the minimal jurisdiction requirements suggest that little legal effect should be accorded interim measures of protection, it would appear that the "possibility rule" has not been formulated because of an attitude toward the effect of interim measures. Rather, such a rule is necessitated by specific procedural rules and attitudes relating to the functioning of a court in the unique position of the International Court of Justice.

Id. at 359.

The Article reads: "The decision of the Court has no binding force except between the parties and in respect of that particular case." At first glance, Rule 59 seems to require a final decision in order to bind the parties.[45] The Court's holding in the *Free Zone Case* supports this interpretation. In that case it was held:

> [O]rders made by the Court, although as a general rule read in open Court, due notice having been given to the Agents, have no 'binding' force (Article 59 of the Statute) or 'final' effect (Article 60 of the Statute) in deciding the dispute brought by the Parties before the Court.[46]

It is unclear from this passage whether the Court meant that interlocutory orders could not bind the parties or whether it merely intended to reiterate that interim orders had no *res judicata* effect on the Court. Clearly, under Article 59, final decisions bind the parties, but that language does not necessarily exclude lesser measures from having binding force.[47]

The last source of authority which commentators have relied on in an attempt to resolve this dispute is case law. The Court has "indicated" interim orders in numerous cases, however, since the parties generally follow the orders of the Court, the issue of their binding nature has seldom arisen.[48] Although the Court has failed to issue an opinion as to the legal effects of interim orders, a few of its decisions shed some light on the Court's view of these protective measures.[49]

For example, in the *Fisheries Jurisdiction Case* the Court held that interim orders do not prohibit the parties from concluding their own interim agreement which differs from the terms of the Court's order.[50] The Court's interim order prohibited Iceland from seizing British fishing vessels in the disputed zone and set limits on the British catch in those waters. Subsequent to the order, the parties entered into negotiations concerning an interim agreement. However, during these private negotiations, Britain moved to continue the Court's protective order. The Court refused to bind the parties to the order, stating that:

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45. Goldsworthy, *supra* note 4, at 274.

46. [1929] P.C.I.J., Ser. A, No. 22, at 5.

47. Crockett, *supra* note 24, at 377.

48. In only three cases has a party failed to comply with interim measures. The Nuclear Tests Case, *supra* note 15; The Fisheries Jurisdiction Case, *supra* note 15, and Anglo-Iranian Oil Co. Case, Order 5 July 1951, [1951] I.C.J. 89.

49. For a discussion of the cases in which interim measures were indicated, *see* Crockett, *supra* note 24; Goldsworthy, *supra* note 4; Hudson, *supra* note 23, at 424.

50. [1972] I.C.J. REP. 12.

> [P]rovisional measures indicated by the Court and confirmed by the present Order do not exclude an interim arrangement which may be agreed upon by the Governments concerned, based on catch-limitation figures different from that indicated as a maximum . . . and on related restrictions concerning areas closed to fishing, number and type of vessels allowed and form of control of the agreed provisions.[51]

In effect, the decision entitles the parties to modify interim orders by reaching their own interim agreement. This feature, which enables the parties to negotiate their own agreement, lends credence to the "non-binding" argument.[52] It might be argued that since the purpose of interim orders is to preserve the *status quo*, a separate interim agreement by the parties satisfies the Court's order. The purpose of interim measures is to prevent the parties from rendering the final judgment moot, not to impose certain conditions on the parties. The actual terms of the agreement are therefore less important.[53] Should the parties fail to reach an interim agreement during the negotiations, the Court would most likely reactivate the interim order.

In the *Anglo-Iranian Oil Co. Case*, the parties raised the issue of the binding nature of interim orders. However, neither the Court nor the Security Council, who later heard this case, resolved the issue.[54] The dispute centered around Iran's intention to nationalize a British oil company. In an effort to block Iran's efforts to seize British oil interests, Britain requested, and secured, an interim order which temporarily prohibited Iran from nationalizing the British oil company.[55] However, the Iranian Government ignored the interim order and the case went before the Security Council on the issue of enforcement of the order.[56] Before the Security Coun-

51. *Id.* at 303-04.

52. Crockett, *supra* note 24, at 371.

53. The terms of an interim order in no way have an effect on the final decision on the merits. Dumbauld, *supra* note 21, at 168.

54. For a detailed discussion of the Anglo-Iranian Co. dispute, *see* A. W. FORD, THE ANGLO-IRANIAN OIL DISPUTE OF 1951-1952 (1954).

55. [1951] I.C.J. REP. 89 (issuance of the interim order).

56. In arguing before the Security Council Britain argued that interim orders were binding on the parties.

> Now, it is established that a final judgment of the Court is binding on the parties; that, indeed, is expressly stated by Articles 59 and 60 of the Statute and Article 94, paragraph 1, of the Charter. But, clearly, there would be no point in making the final binding if one of the parties could frustrate that decision in advance by actions which would render the final judgment nugatory. It is, therefore, a necessary consequence, we suggest, of the bindingness of the final decision that the interim measures intended to preserve its efficacy should equally be binding.

cil could take action on the interim order, the Court dismissed the case on the grounds that it had no jurisdiction over the parties with regard to the matter in question.[57]

The evidence is not conclusive on the binding nature of interim orders. Although the Court's Statute lacks language which obligates parties to obey interim order, parts of the *travaux preparatoires* and various statutory interpretations support the view that interim orders bind the parties. Furthermore, the fact that the Court's effectiveness depends on its ability to provide interim relief seems to necessitate a finding that interim orders are binding on the parties.

III. THE ENFORCEABILITY OF INTERIM MEASURES OF PROTECTION

A. Internal Enforcement Mechanisms Within the Court

Assuming that interim measures are binding, the next step is to provide an enforcement mechanism to compel recalcitrant parties to comply with interim orders. The drafters of the Statute of the I.C.J. have possibly created internal enforcement mechanisms which would enable the Court to sanction non-complying parties. These mechanisms range from an increase in the burden of proof

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6 U.N. SCOR (599th mtg.), 20 (1951).

Iran contended that interim orders served merely as a recommendation to the parties.

> What are the provisional measures which the United Kingdom delegation would have the Security Council call upon Iran to obey? They are not a final judgment; in fact, they are not a judgment of any kind. Before a party to a case before the International Court of Justice, to say nothing of a Member of the United Nations that is not a party to the case, is obligated to comply with a decision of the International Court of Justice, that decision must be both final and binding. That is the clear meaning of Article 94 of the Charter.
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> If we look to Article 41 of the Statute of the Court, which confers on the latter power to indicate provisional measures, it appears that these cannot be final since Article 41 states that they are to be suggested "pending the final decision". It is only to the final judgment, however, that the Statute (Article 59) attributes binding force. It is only the final judgment which is a binding decision, and it is only with respect to such binding decisions that Members of the United Nations have, by Article 94 of the Charter, given undertakings of compliance—and then only in cases to which they are parties.
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> The United Kingdom representative [*559th meeting*], indeed, argues that there would be no point in making a final decision binding if one of the parties could frustrate that decision in advance and so render the final judgment nugatory. This is an argument *de lege ferenda* rather than one declaratory of existing law. Indeed, the language of Article 41 itself negatives the inference which the United Kingdom representative would have the Security Council draw. That language is exhortative and not obligatory. The provisional measures indicated by the Court would have binding force only if the parties were found by an arbitration treaty expressly obligating them to respect such measures.

6 U.N. SCOR (560th mtg.), 12 (1951).

57. Anglo-Iranian Oil Co. Case, (jurisdiction) Judgment of 22 July 1952, [1952] I.C.J. 3.

for non-complying parties[58] to the creation of a separate cause of action for the violation of interim orders.[59] The only force behind these internal disciplinary actions is the prestige of the Court and the effect its actions have on world opinion. These sanctions affect non-complying parties only insofar as these parties are willing to submit to them. Where a party has rejected the Court's authority, as Iran recently did during the hostage crisis, these internal sanctions will fail to compel compliance.

The drafters of the Statute of the P.C.I.J. considered inserting enforcement provisions for interim measures into the Statute.[60] For the most part, these provisions imposed a greater burden of proof on violators. The Committee on Procedure rejected these enforcement provisions on the grounds that since "the Court has no power to enforce decisions with regard to interim measures . . . preserving the respective rights of the parties, there was no need to prescribe detailed regulations in regard to the method of indicating such measures."[61] This decision stemmed from the realization that the Court was not the appropriate body for enforcing interim orders. The Court viewed its role as one of "indicating" the interim orders and notifying the League's Council of its action.[62] Enforcing these orders came under the League's jurisdiction.[63]

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58. *Infra*, note 60.

59. No party has brought an action for non-compliance of an interim order, and it is unclear whether the Court would entertain such an action. Should such an action exist, the question remains whether a party has an action for a violation of an interim order where the Court later determines it lacks final jurisdiction. Under the United States federal courts' rule, preliminary injunctions remain operative until which time the Court is found to lack jurisdiction. Consequently, under this rule, a party would continue to have an action for violation of an interim order where the issuing Court is later deemed to lack final jurisdiction. Those who argue for the application of the United States federal rule in the case of the I.C.J. point to the Anglo-Iranian Oil Company case for support. There the Judges wrote that interim measures terminate upon the Court's determination that it lacks jurisdiction. *Supra*, note 54, at 114. This statement suggests that the Court accepts the federal court's view. *See* Crockett, *supra* note 24, at 378-79.

60. The original proposal by Faoul Fernandez to the Committee of Jurists in 1920 regarding interim measures contained penalties for violators. *Supra* note 34. In 1922, Judge Nyholm proposed to the Committee on Procedure that: "In case of non-compliance (non-execution) with the order, the Court shall attach due legal weight to the fact when deciding the principal question in issue. Section 106, Ser. D, No. 2 at 377, stated in Dumbauld, *supra* note 21, at 147.

61. P.C.I.J., Ser. D, No. 2, 302.

62. Manin, *supra* note 33, at 369.

63. The Court at this time believed that notification to the Council that interim measures had been violated would bring a response from the Council. *See* speeches by Judges Negulesco and Urrutia, P.C.I.J., Ser. D, No. 2, (2nd add.), at 193, 195. *See* Manin, *supra* note 32, at 369.

B. United Nations' Enforcement of Interim Orders

The recognition that enforcement of interim orders and final decisions fell outside the scope of the Courts' powers led many legal scholars to the conclusion that enforcement should be carried out by an international organization. The drafters of the Statute of the P.C.I.J. avoided addressing the issue of enforcement, believing that this task was best left to the League of Nations. The United Nations later assumed the responsibility for enforcing the Court's decisions.

Although the Covenant of the League of Nations and the Charter of the United Nations authorized their executive bodies to enforce the decisions of the Court, a controversy developed as to whether these statutory provisions authorized the enforcement of interim orders. Most authorities remain convinced that meaningful enforcement of interim orders depends on whether the United Nations Charter' authorizes the Security Council to enforce these protective orders. In the words of one commentator: "To reach the opposite conclusion [that the U.N. may not enforce interim orders] would be to limit seriously the effectiveness of the Court in its discharge of the judicial powers entrusted to it."[64]

A brief survey of the League's power to enforce interim orders provides a useful background for studying the enforcement power possessed by the United Nations. Article 13(4) of the Covenant of the League of Nations required the Council to propose steps to be taken to give effect to any award or decision rendered by an international tribunal.[65] Since interim measures fall into the category of orders, it is unclear whether they came under the scope of 13(4) which applied to tribunal "awards or decisions." The language of Article 13(4) appears to require that the League take an aggressive role in enforcing the Court's decisions; however, the League sometimes chose to disregard this duty when it felt that enforcement would incite international instability. Although the language of Article 13(4) imposed a mandatory duty on the Council to act *proprio motu* (on its own accord) in order to procure compliance with a tribunal's decision,[66] in practice the Council used its discre-

64. Ford, *supra* note 54, at 93.

65. Article 13(4) states:

> The Members of the League agree that they will carry out in good faith any award or decision that may be rendered . . . . In the event of any failure to carry out such an award or decision, the Council shall propose what steps would be taken to give effect thereto.

66. Oeller-Frahm, *Zur Vollstreckung des Entscheidenungen internationales Gerichts in*

tion in enforcing these decisions.[67] The Council never acted *proprio motu* in an enforcement action under 13(4),[68] instead, in both cases brought under 13(4), the parties instigated the action.[69]

Article 94(2) of the U.N. Charter is the dispositive clause regarding enforcement of the Court's judgments by the United Nations. It states:

> If any party to a case fails to perform the obligations incumbent upon it under a judgment rendered by the Court, the other party may have recourse to the Security Council, which may, if it deems necessary, make recommendations or decide upon measures to be taken to give effect to the judgment.[70]

The inclusion of interim orders under Article 94(2) depends on whether such measures come under the definition of "judgments." Neither the Court nor the Security Council have rendered an opinion as to the status of interim orders under Article 94(2).

The Security Council did entertain debate on the subject in the *Anglo-Iranian Oil Company Case*, in which the British representative insisted that interim measures must be enforced by the United Nations under Article 94(2) in order to give effect to the Court's final decisions.[71] Although the Council never officially decided this

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Volkerrecht, 36 ZEITSCHRIFT FUR AUSLANDISCHES OFFENTLICHES RECHT UND VOLKERRECHT 654, 663 (1976).

67. W. M. REISMAN, NULLITY AND REVISION 704 (1971). In the *Optants* case, the Security Council reneged on its duty to enforce the Court's decisions. For a comprehensive discussion of this case, *see id.*, at 686-98.

68. *Id.* at 702-03.

69. Rhodopian Forests Case, League of Nations Off. J. at 1432-38, 1477 (1934); Optants Case, *supra* note 68.

70. Article 94(2) limits enforcement to I.C.J. judgments, whereas 13(2) of the League of Nations' Covenant authorized enforcement of every decision by the international tribunal. Schachter, *Enforcement of International Decisions*, 54 AM. J. INT'L L. 1, 18 (1960).

Drafters of the Charter in San Francisco did entertain proposals for extending the scope of 94(2), but there is no discussion as to why these proposals were rejected.

71. It may, of course, be argued . . . that Article 94 paragraph 2 of the Charter only applies to final judgments of the Court, and, consequently, not to the decisions of interim measures—just as the Iranian Government seeks to argue that the interim measures indicated by the Court are not binding on the parties and that the Court had no jurisdiction to decree them. I can only point out that the whole object of interim measures—as, indeed, Article 41 of the Statute clearly indicates—is to preserve the respective rights of the parties pending the final decision; in other words, to prevent a situation from being created in which the final decision would be rendered inoperative or impossible of execution because of some step taken by one of the parties in the meantime with the object of frustrating that decision. Now it is clearly established that a final judgment of the Court is binding on the parties; . . . . But, clearly, there would be no point in making the final judgment binding if one of the parties could frustrate that decision in advance by actions which would render the final judgment nugatory. It is, therefore, a necessary consequence . . . of the bindingness of the final decision that the interim measures intended to preserve its efficacy should equally be binding.

enforceability issue, most scholars agree that the "general opinion (within the Security Council) was that the Security Council could only take measures under Article 94(2) in matters relating to final judgments."[72] In this particular case, the Security Council may have felt particularly unsympathetic toward this interim order because it questioned whether the Court had jurisdiction in the case at all.[73] Perhaps, had the Court clearly possessed jurisdiction, the Council would have been more willing to categorize interim orders as final judgments for purposes of Article 94(2).

C. The Scope of the Security Council's Power Under Article 94(2)

1. Discretionary Enforcement Under Article 94(2). Assuming that interim orders come within the scope of Article 94(2), the next area of inquiry is the nature and scope of power granted to the Security Council under Article 94(2). The U.N. provision differs from Article 13(4) of the Covenant of the League of Nations in that the Security Council, the United Nations' executive body, had discretion in enforcing the Court's judgments.[74] This discretionary aspect of Article 94(2) has been criticized on the grounds that judicial decisions should receive equal treatment, rather than selective enforcement according to political considerations.[75] During the drafting process the Cuban delegation submitted a proposal to impose a mandatory duty on the Council to enforce the Court's decisions.

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6 U.N. SCOR (559th mtg.), 20 (1951). For a discussion of this argument, *see* Nantwi, *supra* note 3, at 153.

The Iranian representative argued for a literal interpretation of the Article, contending that the language authorized the Council to enforce only final judgments by the Court.

> Before a party to a case before the International Court of Justice, to say nothing of a Member of the United Nations that is not a party to the case, is obligated to comply with a decision of the International Court of Justice, that decision must be both final and binding. That is the clear meaning of Article 94 of the Charter.

Supra, note 53.

72. Nantwi, *supra* note 3, at 151.

73. It is likely that the indecision of the Council was attributable to the doubts which several Members had regarding the competence of the Court on the merits of the case. In another situation, it may well be that the Members of the Council would consider that they had adequate authority to decide on measures to enforce an interlocutory order, particularly where the preservation of the *res* was considered to be essential to the primary objective of the judicial proceeding.

Schachter, *supra* note 70, at 24.

74. Article 94(2) states: "[T]he other party may have recourse to the Security Council, which may, if it deems necessary, make recommendations. . . ." *See* Schachter, *supra* note 70, at 18.

75. Oellers-Frahm, *supra* note 66, at 663.

The majority of nations rejected the proposal.[76] Opponents of the proposal made several arguments against a mandatory duty.[77] But, the real reason for the opposition appears to have been a mistrust of mandatory adjudication, especially on the part of the superpowers.[78] The discretionary clause eased this apprehension by providing a loophole through which nations could escape mandatory adjudication and compliance. Although the Council's discretion to enforce may weaken the Court somewhat, this discretion does not necessarily detract from international adjudication.[79] On the contrary, the enforcement of international decisions requires careful evaluation of political interests and the accommodation of national concerns.[80] As pointed out above, even the Council of the League, which in theory had a mandatory duty to enforce the Court's decisions, exercised discretion in enforcing the Court's judgments.[81]

2. The Relationship Between Articles 39 and 94(2). An appreciation for the ways in which other provisions in the United Nations' Charter limit the powers granted under Article 94(2) is central to an understanding of the Security Council's power to enforce interim orders. A dispute has arisen as to whether the Council's authority to act under Article 94(2) depends upon its power under Article 39, which requires a threat to world peace. Some authorities contend that the Security Council may act under Article 94(2) only when the situation meets the prerequisites of Article 39.[82] Others insist that this power is independent of other Charter provisions, and, consequently, the Council's competence does not require a threat to world peace.[83] Conditioning the use of Article

76. At the time of the proposal, the only provision of the proposed charter authorizing the Security Council to enforce the Court's judgments was Article 39; but this article applied only when the non-compliance threatened world peace. The Cuban delegation wished "to create a more general means of enforcement of decisions." *See* Reisman, *supra* note 67, at 705. Article 94(2) served as a compromise, giving the Security Council authority, independent of Article 39, to enforce judgments, but this power would be discretionary.

77. It was suggested that the Security Council already had the power to enforce the Court's decisions under Article 39, and consequently, the proposal was superfluous. 3 U.N.C.I.O. 461. *See* Reisman, *supra* note 67, at 706.

78. Reisman, *supra* note 67, at 712.

79. *Id.* at 711. *See* S. ROSENNE, THE INTERNATIONAL COURT OF JUSTICE 104 (1975).

80. *See supra* note 55. *See also* Manin, *supra* note 32, at 369.

81. *See supra* note 66, 67 and accompanying text.

82. Rosenne, *supra* note 79, at 103-05.

83. *See* Schachter, *supra* note 70, at 19; ROSS, CONSTITUTION OF THE UNITED NATIONS 102-03 (1950); BENTWICK AND MARTIN, A COMMENTARY ON THE CHARTER OF THE UNITED NATIONS 167-168 (1950); Sloan, *Enforcement of Arbitral Awards in International Agencies*, 3 ARB. J. 145 (1948).

94(2) on the fulfillment of the prerequisites under Article 39 would severely limit the Council's ability to enforce interim orders and reduce the possibility of effective international arbitration.[84]

Article 94(2) was drafted and implemented in an attempt to create a "respect for the judgments of the Court."[85] This suggests that supporters of Article 94(2) intended to give the Security Council an independent power to enforce the Court's judgments, a power not contingent upon other provisions in the Charter. In fact, at the time of adoption of Article 94(2), many member-states expressed their belief that this Article was independent of Article 39. The Soviet member of the Co-ordinating Committee, Golunsky, articulated this view:

> Mr. Golunsky pointed out that the second paragraph of this Article made a considerable change in the functions of the Security Council. Formerly, the Security Council had jurisdiction only in matters concerned with the maintenance of peace and security. This Article would give the Council authority to deal with matters which might have nothing to do with security.[86]

None of the delegates objected strongly to this interpretation. Only China's delegate rejected Golunsky's conclusion as to the independence of Article 94(2).[87] However, because China's delegate viewed every act of non-compliance as a threat to world peace, he believed the Council had the power under Article 39 to enforce every judgment of the Court.[88]

Pasvolsky, the American delegate on the Co-ordinating Committee cast doubt on this initial interpretation when he testified before the Senate Committee on Foreign Relations during the Charter of the United Nations ratification hearings. He stated that the Council's competence under Article 94(2) depended on whether

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84. Reisman, *supra* note 67, at 711. Another negative aspect of this interpretation is that a requesting party may feel compelled to escalate the dispute in order to qualify for intervention by the Council under Chapter VI. Schachter, *supra* note 70, at 20.

85. Committee IV/1 of the San Francisco Conference stated: "In support of the proposal [94(2)] it was argued that the principle of respect for judgments of the Court was of highest importance to the new international order and ought to be expressly implemented by the Charter. . . ." 13 U.N.C.I.O. 298.

86. 17 U.N.C.I.O. 97. For a restatement of the Soviet's views, *see* Korovin, *The Second World War and International Law*, 40 AM. J. INT'L. L. 742 (1946). It is interesting to note that the American delegate, Pasvolsky, misinterpreted the Soviet delegate to be saying that the powers under 94(2) and Chapter VI were closely related and perhaps repetitive.

87. 17 U.N.C.I.O. 98.

88. Reisman, *supra* note 67, at 708.

the incident triggered Article 39 by threatening world peace.[89] One rationale for this statement is that Pasvolsky wanted to portray the Charter in a favorable light.[90] Realizing the Senate's dislike of unqualified arbitration agreements, perhaps he thought it best to play down any provisions in the Charter which strengthened the Court's power. On the other hand, the United States officials may have truly feared the Court's independent power and wanted to curb its influence by limiting the situations in which its decisions could be enforced by the United Nations.[91]

The *Anglo-Iranian Oil Company* case indirectly raised the issue of the Council's competence under Article 94(2), but this dispute was not addressed by the Council when it considered this case. Believing Article 94(2) to be an independent provision, Britain contended that the Security Council could intervene on the basis of this Article or Article 39.[92] Britain, however, formally based its request solely on Article 39.[93] The fact that the Council in this case focused on the issue of a threat to world peace implies that they viewed their competence under Article 94(2) as being dependent on the triggering Article 39.[94] Although this case suggests an interrelationship between these two articles, it is possible the Council never considered the issue of independent jurisdiction under Article 94(2) because Britain never formally raised the question.

Should the use of Article 94(2) be conditioned on the triggering of Article 39, the Council could nullify the effect of tying these Articles together by finding that non-compliance with the Court's decision as *eo ipso* a threat to international peace.[95] However, in

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89. The Council may proceed, I suppose, to call upon the country concerned to carry out the judgment, but only if the peace of the world is threatened, and if the Council has made a determination to that effect. It is the party, not the Court, that goes to the Council. If it is the aggrieved party, the party which is willing to abide by the determination of the Court when the other party is not willing so to abide. The Council simply handles a political situation which arises out of the fact that the judgment of the Court is not being carried out by one of the parties.

Hearings Before the Senate Committee, Foreign Relations on the Charter of the United Nations, July 9-13, 1945, 79th Cong., 1st Sess. (rev.) at 287 (1945).

90. Reisman, *supra* note 67, at 712-13.

91. *Id.* at 710. "[I]t is clear, however, that in 1945 the controlling elite among the framers wanted to render the tardily proposed enforcement machinery relatively benign."

92. The British diplomat stated: "In these circumstances, and quite apart from the decision of the Court on interim measures, which would alone, we think, justify the Council in taking up this matter, there is a dispute, in our opinion, which should now receive the Council's urgent consideration." 6 U.N. SCOR (559th mtg.), 4 (1951).

93. *Id.*

94. Finding no threat to peace, China suggested that the Council lacked jurisdiction. 6 U.N. SCOR.

95. The Chinese delegate to the Co-ordinating Committee took this position. *See supra*

the past the Security Council has insisted on satisfying the "threat to peace" prerequisite before taking action under Article 39. The Council's unwillingness to expand its authority under Article 39 by eliminating the "threat to world peace" requirement,[96] stems from member-nation's refusal to submit the handling of disputes to international organizations. Consequently, should Article 94(2) be tied to Article 39, the Security Council, in all likelihood, would not take measures to expand the scope of its authority under Article 94(2) by circumventing the "threat to peace" requirement. Given the importance placed on national sovereignty, the Security Council will avoid enforcing the Court's orders unless the Charter clearly authorizes such action and the majority of United Nations members openly support enforcement.

D. Types of Coercive Devises Available for Enforcing Interim Orders

1. A Discussion of the Various Devises. Although a comprehensive study of the various types of enforcement measures falls beyond the scope of this Comment, accurately gauging the Council's ability to enforce interim measures of protection requires an understanding of the various measures and the advantages and limitations of each. In considering the different measures of enforcement, it is important to keep in mind that interim measures of protection serve a different function from that of a final judgment. Consequently, they may require a different mode of enforcement than that used in the case of final decisions.[97] Since there is generally a sense of urgency in cases involving interim orders, the enforcement measure must take effect quickly. Otherwise, the rights will have been violated in the interim.[98] In addition, interim meas-

note 87 and accompanying text. This interpretation produces a slightly different result than would a finding of independent competence. Under Article 39 the Council need not enforce the Court's decision; rather, it could make certain recommendations to the parties different than those contained in the Court's judgment and then enforce its own recommendations, not the judgment of the Court. H. KELSEN, THE LAW OF THE UNITED NATIONS 542 (1950).

96. *See* L. GOODRICH & E. HAMBRO, CHARTER OF THE UNITED NATIONS 266-68 (1949); Reisman, *supra* note 67, at 711.

97. Interim measures of protection preserve the *status quo* during adjudication, whereas a final judgment resolves the dispute.

98. The Anglo-Iranian case illustrates the need for quick enforcement. During the hearings before the Security Council, Britain was forced to abandon its original request for enforcement of the interim measure, because Iran had already begun to nationalize the British Oil Company. Instead, Britain was compelled to seek a lesser degree of protection than indicated in the original order. 6 U.N. SCOR, (560th mtg.) 2 (1951).

ures of protection are issued in situations where the dispute involves irreplaceable rights. In most of these cases neither party is ready to acceed to another form of compensation.[99] These situations may therefore require a greater use of coercion to compel compliance.

The Security Council has at its disposal many of the same measures of enforcement available to individual parties.[100] However, due to the Council's prestige and influence, these measures have greater impact in its hands.[101] These enforcement measures break down into diplomatic, economic, and military categories.

In the past, individual nations were the primary users of diplomatic measures, which included negotiation, diplomatic protest, and finally a rupture in diplomatic relations.[102] The United Nations, however, has employed a variety of diplomatic measures in cases where it disapproved of another nation's behavior, the measure most commonly used being diplomatic censure. Despite the United Nations' general approbation of diplomatic censure, this measure will most likely be ineffective in cases of non-compliance with the Court's interim orders. Diplomatic censure has effect only insofar as a party gives weight to the United Nations' opinion. It is unlikely that a party will respond to mere verbal chastisement by the United Nations when it has already defied the authority of the highest international tribunal. In the *Corfu Channel Case*, the British attempted to go a step beyond diplomatic censure and actually exclude Albania from the United Nations for its definance of the Court's judgment.[103] The propriety of these more extreme diplomatic measures, which result in exclusion or expulsion from international organizations, is questionable since such action inhibits discussion between nations.[104]

Economic measures break down into two general categories:

99. *Supra* note 15 and accompanying text.

100. The Security Council's ability to compel U.N. members to participate in U.N. sanctions against non-complying nations gives the Security Council an advantage over individual nations in the enforcement of the Court's orders. Under Article 25 any action taken by the Security Council under Article 94(2) binds all U.N. members and supercedes any previous international treaties or agreements.

101. Reisman, *supra* note 67, at 240.

102. M. MCDOUGAL & F. FELICIANO, LAW AND MINIMUM WORLD PUBLIC ORDER 27-35 (1961).

103. 10 U.N. SCOR (703rd mtg.), 15 (1955).

104. See the advisory opinion in regard to Admissions [1947-48] I.C.J. 57. *See also* Reisman, *supra* note 67, at 856.

"attachment or freezing of assets" and "the manipulation of trade and foreign aid."[105] The Council has authorized nations to freeze or attach foreign assets under its general powers to preserve the peace.[106] These measures are an appropriate means for enforcing interim measures of protection because of their immediate impact. However, as has previously been pointed out, in many cases involving interim orders, threats of monetary sanctions will not deter parties from encroaching on each other's rights.

While freezing and attachment impose a direct economic hardship, the manipulation of trade is a more indirect means of enforcement. The British effectively employed this form of economic coercion against the Soviets by conditioning a favorable trade agreement upon the payment of Soviet compensation to the British for expropriated property.[107] Export boycotts also constitute trade manipulation, yet experts generally agree that such measures have little effect since they can be easily circumvented by means of "transshipment."[108] A final economic sanction is manipulation of foreign aid to compel compliance. This measure is suspect on practical and moral grounds. First, such action would apply only to lesser developed countries who receive large quantities of aid. Second, cutting off aid to nations who expect and depend upon this help is morally offensive.[109]

In some respects, military enforcement is the most appropriate measure as it can be invoked quickly and it effectively secures the parties' rights. The fact that the Council can use military force only in situations which threaten world peace severely limits the application of this measure.[110] In addition, such action can often escalate into violent confrontations involving many nations. Consequently, neither the Security Council nor individual nations will, in most cases, be willing to take this risk of escalation. For example, in the *Anglo-Iranian Oil Company Case*, international law appeared to

105. Reisman, *supra* note 67, at 852.

106. *See* the Council's resolutions S/RES/216 (1965) November 12, 1956; *and* S/RES/217 (1965), November 20, 1965, calling for an economic boycott against Rhodesia.

107. Nussbaum, *The Arbitration Between Lena Goldfields Ltd. and the Soviet Government*, 36 CORNELL L. REV. 31 (1950).

108. Raj, *Sanctions and the Indian Experience*, in SANCTIONS AGAINST SOUTH AFRICA 197, 201 (Segal, ed., 1964).

109. There is a trend in the U.S. foreign aid program to give the aid to international agencies, such as the International Bank, who do take international policy into consideration when doling out foreign aid. *See* Frank, *Foreign Aid and the Liberal Dissent*, 52 New Republic, January 23, 1965, at 17.

110. *See*, *infra* note 118 and accompanying text.

support military intervention by Britain. However, fearful that the Soviets would enter the conflict, the British Government refrained from such action.[111]

2. Enforcement Devises Available Under Article 94(2). Some commentators maintain the provisions in the Charter of the United Nations severely limit the types of enforcement actions available under Article 94(2) and restrict the situations in which those allowable enforcement techniques may be deployed. Again, Pavolsky's interpretation, which requires a threat to world peace before any action may be taken under Article 94(2), has considerable impact on the kinds of enforcement available under Article 94(2). If the Security Council's competence under Article 94(2) depends upon its power under Article 39 of Chapter VII, then the Security Council may be limited to those enforcement measures specifically authorized in Articles 41 and 42 of Chapter VII.[112] The measures under Article 41 include economic boycotts, interruption of communications, and severance of diplomatic relations,[113] while Article 42 authorizes military action.[114] Some commentators argue that the language of Article 41 does not limit the choice of measures to those specified in the Article. They contend that the provision simply provides a list of suggested measures.[115]

If the Security Council concludes it has independent competence under Article 94(2), then there is no reason for inferring that action under that section is limited to those measures outlined in

111. Ford, *supra* note 51, at 58, 95.

112. Kelsen states:

> [T]he question arises whether the Council can take enforcement measures other than those determined in Chapter VII of the Charter. Although an affirmative answer to this question is not excluded by the wording of Article 94, paragraph 2, it is more plausible to assume that a judgment of the Court can be enforced only by measures taken under Article 41 or 42.

Supra note 95, at 941. Interestingly enough, Kelsen has adopted this position, yet disagrees that the Council has competence under Article 94(2) only when there is a threat to the peace.

113. *Article 41.* The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communications, and the severances of diplomatic relations.

114. *Article 42.* Should the Security Council consider that measures provided for in Article 41 would be inadequate or have proved to be inadequte, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea or land forces of members of the United Nations.

115. The use of the word "may" in Article 41 strongly suggests that this provision is not restrictive. *See* Reisman, *supra* note 67, at 719-20.

Article 41.[116] However, the question arises as to whether it may implement those measures listed under Chapter VII when the situation at hand does not threaten the peace. It is plausible that the drafters intended, by listing these measures, to prohibit their use unless the situation met the prerequisites of Chapter VII. Commentators, however, point to specific language in Article 41 of the Charter, "to give effect to their decisions," and interpret this provision to mean the Council may invoke these measures to compel compliance with any Security Council decision, not merely those made under Chapter VII.[117] Most authorities recognize, however, that the use of armed force under Article 94(2) requires a threat to peace, even if the Security Council is deemed to have independent competence.[118]

D. Procedural Roadblocks in the U.N. to the Enforcement of Interim Orders

The final obstacle facing enforcement of interim orders under Article 94(2) is the veto provision in Article 27(3) enabling any permanent member to block enforcement measures.[119] Just as the veto has greatly limited the impact of Article 39, it will cripple the Security Council's ability to act under Article 94(2) whenever the non-complying party is a permanent member or has the support of such a member. In attempting to circumvent a veto, nations bringing a cause before the Security Council have asserted that the matter falls under the heading of procedure, and therefore should be immune to a veto under Article 27(2).[120] Should the enforcement of interim orders come under the definition of procedure, the veto obstacle would be eliminated.

The *FOUR SPONSORING POWERS* at San Francisco established a two-step process for determining whether a matter is procedural.[121] In the Charter, the drafters categorized certain Council functions as either procedural or substantive. When the Charter does not indicate a particular function, the *FOUR SPONSORING POWERS* stated that: "[T]he decision regarding the preliminary question as to whether or not such a matter is procedural, must be taken by a vote of seven members of the Security Council,

116. Schachter, *supra* note 70, at 21.
117. Kelsen, *supra* note 95, at 541-42.
118. *Id.* at 542; Schachter, *supra* note 70, at 22.
119. Article 27(3).
120. Article 27(2).
121. Repertory, Vol. 11, at 104.

including the concurring votes of the permanent members."[122] In essence, the permanent members have a "double veto" power which enables them to block any attempt to define a matter as procedural. The Charter does not specify whether Article 94(2) is procedural or substantive, and neither the Council nor the Interim Committee assigned to study the problem of voting in the Council has ruled on this issue.[123]

Rule 30 of the Rules of Procedure provides an avenue for avoiding the double veto through its provision that the Council's President, with the support of any nine members, may rule that a matter is procedural.[124] Although Rule 30 provides a possible remedy for dealing with a recalcitrant member who intends to prevent the enforcement of I.C.J. decisions, it is a remedy which depends upon the integrity and wisdom of the President. Should the office be abused, Rule 30 would become a means of ramrodding matters through the Council which should have been decided under the traditional format.

The second sentence of Article 27(3) appears to provide another means for curbing abusive vetoes by requiring that parties to the dispute abstain from voting,[125] the *nemo judex* rule. However, most commentators agree that this provision does not apply to decisions under Article 94(2).[126]

E. The Enforcement of Interim Orders by the General Assembly and Other International Organizations

The debilitating effect of the veto power on the Security Council has induced an aggressive assertion by the Assembly of its power to enforce the Court's decisions. For example, in the

122. *Id.*

123. Report of the Interim Committee to the General Assembly (Jan. 5 - Aug. 5, 1948) General Assembly, 3rd Sess., Official Records, Supp. No. 10, at 3 and 14.

124. D. BOWETT, THE UNITED NATIONS 28 (1964).

125. *Article 27.*

> 3. Decisions of the Security Council on all other matters shall be made by an affirmative vote of seven members including the concurring votes of the permanent members; provided that, in decisions under Chapter VI, and under paragraph 3 of Article 52, a party to a dispute shall abstain from voting.

126. Kelsen, *supra* note 95, at 241. Under the League of Nations, there was disagreement as to the status of the *nemo judex* rule in regard to Article 13(4)—the League's equivalent to 94(2). RICHES, THE UNANIMITY RULE AND THE LEAGUE OF NATIONS (1933). In reviewing the validity of a P.C.I.J. judgment, the League Council applied the *nemo judex* rule, but in the enforcement stage members could again exercise their veto. Finding that this practice inhibited enforcement, the Council often attempted to circumvent the veto by effecting enforcement through a majority "proposal" which was not subject to a veto.

International Status of South-West Africa Case, the Assembly made recommendations under Article 10 for securing South Africa's compliance with an advisory opinion by the Court.[127] This affirmative action by the Assembly differed markedly from the Security Council's inaction in the *Anglo-Iran Oil Company Case*.[128]

Such enforcement measures clearly fall within the competence of the Assembly as defined in Articles 10 and 14 which authorize the Assembly to discuss and make recommendations on any matter within the Charter.[129] The Soviets initially insisted on limiting the Assembly's power of discussion to "any matter within the sphere of international relations which affects the maintenance of international peace and security."[130] However, under considerable pressure from the United States and several other nations, the Soviets agreed to a committee draft enabling the Council "to discuss and make recommendations in respect of any matters within the sphere of international relations."[131] The only restriction on Article 10 and 14 occurs under Article 12(1) which prohibits the Assembly from discussing matters before the Security Council.[132]

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127. [1950], I.C.J. 128.

128. The hesitation of the Security Council in the Anglo-Iranian Oil Company Case thus stands in marked contrast with the care of the General Assembly in its treatment of the problem of South-West Africa to support and uphold the authority of the Court. This anxiety of the General Assembly is not an isolated example, but is part of a clearly defined general tendency, at least in so far as it is concerned with the judicial activities of the Court. . . .

S. ROSENNE, THE INTERNATIONAL COURT OF JUSTICE 113 (1977).

129. Article 10 states:

> The General Assembly may discuss any questions or any matters within the scope of the present Charter or relating to the powers and functions of any organs provided for in the present Charter, and, except as provided in Article 12, may make recommendations to the Members of the United Nations or to the Security Council or to both on any such questions or matters.

Article 14 states:

> Subject to the provisions of Article 12, the General Assembly may recommend measures for the peaceful adjustment of any situation, regardless of origin, which it deems likely to impair the general welfare of friendly relations among nations, including situations resulting from a violation of the provisions of the present Charter setting forth the Purposes and Principles of the United Nations.

Both articles convey essentially the same power to the General Assembly. In fact, it is virtually impossible to determine which article the Assembly acted under. In cases where the General Assembly has made recommendations, generally Article 10 is viewed as having a broader scope than Article 14. Rosenne, *supra* note 128, at 114 & 141-42. *See* L. GOODRICH, E. HAMBRO AND SIMMONS, CHARTER OF THE UNITED NATIONS 111 (3d ed. 1969).

130. U.N.C.I.O., *Documents*, IX, 60.

131. *Id. See generally* Goodrich, *supra* note 129, at 112.

132. Article 12(1) reads: "While the Security Council is exercising in respect of any dispute or situation the functions assigned to it in the present Charter, the General Assembly shall not make any recommendation with regard to that dispute or situation unless the Security Council so requests."

This power of the Assembly to recommend enforcement measures is severely hampered by the non-binding nature of these recommendations.[133] Members may simply disregard the measures proposed by the Assembly under Articles 10 and 14. Despite their non-binding nature, these recommendations still have considerable impact in that they "bring to bear pressure of political and moral character" on the non-complying state.[134] Furthermore, such action by the Assembly puts considerable pressure on the Security Council to take measures under Article 94(2) which do bind United Nations members.

As Rosenne points out, enforcement need not come solely from an organ of the United Nations.[135] Other international and regional organizations provide in their Charters for enforcement of judgments of the ICJ and other international tribunals.[136] Enforcement of interim orders of protection by these organizations face many of the same obstacles which prevent effective enforcement under 94(2) by the Security Council. In the first place, many of the charters refer to the enforcement of final decisions without mention of interim orders.[137] Similarly, these organizations lack effective sanctions for compelling compliance. For many, their sole remedy is either to expel the non-complying party or to cut off the services provided by the organization. Often, such action has little coercive effect and tends to undermine the organization by damaging its internal cohesiveness.

IV. CONCLUSION

Unfortunately, the Iranian-Hostage case has not resolved the questions as to the binding nature of interim orders and their enforceability under Article 94(2) of the United Nations Charter. Although the United States actively sought an interim order from the Court, it did not request a ruling from the Court as to the order's legal effect, nor did the United States attempt to have the order enforced through the Security Council under Article 94(2).

Despite the absence of a resolution of the legal issues concerning interim orders, the Iranian-Hostage case has had an impact on

133. Nantwi, *supra* note 3, at 162.

134. Schachter, *supra* note 70, at 24.

135. S. ROSENNE, THE LAW AND INTERNATIONAL PRACTICE 155 (Vol. 1 (1969)).

136. For a thorough discussion of enforcement by international organizations, *see* Nantwi, *supra* note 3, at 162-75.

137. *Id.*

the international community's perception of interim orders and the Court itself. The failure of the Security Council and members of the United Nations to support actively the interim order has rendered this legal remedy meaningless in the eyes of some nations. This *de facto* reduction of the Court's power has cast doubt on its ability to provide any relief in such crises.

Regardless of the negative effect which the Iranian-Hostage case has had on interim orders, the case may have served to bolster this interlocutory remedy and the Court's prestige in general. The United States' request for an interim order displayed a respect for the Court as a legal body and as a shaper of world opinion. This request reinforced the Court's position as the supreme adjudicator of international disputes. Perhaps, the United States' conduct will encourage other nations involved in international disputes to seek out interim relief, despite the inherent enforcement problems.

The Iranian Hostage case did little to resolve the uncertainty surrounding interim orders. However, the crisis has served to bring this interlocutory remedy to the attention of the world, and, as a result of this publicity, it will most likely be sought with greater frequency. Increased use of these measures will compel the Court and the Security Council to deal with the difficult questions as to the legal effect of interim orders and their enforcement.