Peace, Justice, and Provisional Measures

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The present paper was the basis of an oral presentation at the Conference held on 23 September 2013 to mark the centenary of the Peace Palace; the title of that Conference was “The ICJ in the Service of Peace and Justice”. I took that title as my cue, or as my point of reference; and on that basis the question that occurred to me was this: in the context of the international legal system, in what sense can the Court be said to be in the service of peace, other than through its work of dispensing justice? In other words, is the Court not rather operating in the service of peace *through* justice? This may appear to be no more than a verbal quibble, but it is related in my thinking to some decisions taken by the Court, in which the Court has reacted to situations brought to its attention in which peace has been threatened or broken, some involving ongoing armed hostilities.

When Andrew Carnegie was contemplating the benefaction that created the Peace Palace, his friend Andrew Dickson White¹ wrote to him on the subject. He offered the idea of “[a] temple of peace where the doors are open, in contrast to the Janus-temple, in times of peace and closed in cases of war”.² In that connection, however, may I digress for a moment to recount here an incident from my initial period of service with the Court (1968–1994). In December 1971 I attended, in a very junior capacity, a meeting between the Vice-President of the Court and the agents of two States parties to a case before the Court.³ That very day, open warfare had been declared between those two States, India and Pakistan. The meeting proceeded in perfect tranquillity; so far as I can recall, no allusion was made by anyone to the hostilities. The doors of the temple of peace remained open to States who were, at that moment, active belligerents.

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² Letter from Andrew Dickson White to Andrew Carnegie, 5 August 1902.

That was, sadly, by no means the last occasion on which the Court has been faced with, or aware of, a situation of armed hostilities, or involving the risk of such hostilities, between the parties to a case before it. The most recent was when it was asked to indicate provisional measures in the case concerning interpretation of the Temple judgment, and that decision will be the focus of my remarks. Let me be frank: when I first read a summary account of this decision, the cynical thought occurred to me: ‘Now that the Court has discovered that its provisional measures are more than just recommendations, it is going into the peace-making business in competition with the Security Council!’ An unworthy suspicion, perhaps; and on closer consideration, the developments in the Court’s jurisprudence do not justify such a crude assessment; but development there has been, and the purpose of this paper is briefly to consider them.

By way of preliminary: it is of course well settled in the Court’s case-law that for the Court to indicate provisional measures under Article 41 of its Statute, a first condition is that the existence of jurisdiction over the dispute must be at least prima facie established. Where the main proceedings consist of a request for interpretation under Article 60 of the Statute, as in the Temple (Interpretation) case, that article in itself supplies the jurisdictional element—provided, of course, that the requirements of that text are satisfied. Secondly, even if the existence prima facie of a title of jurisdiction is shown, the only rights that can be protected by provisional measures are the rights asserted in the main proceedings, the rights which the Court thus has prima facie jurisdiction to declare or protect. If a request for provisional measures automatically gave

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5 See for example the dictum in Fisheries Jurisdiction: “[…] on a request for provisional measures the Court need not, before indicating them, finally satisfy itself that it has jurisdiction on the merits of the case, yet it ought not to act under Article 41 of the Statute if the absence of jurisdiction on the merits is manifest”. Fisheries Jurisdiction (Federal Republic of Germany v. Iceland), Interim Protection, Order of 17 August 1972, ICJ Reports 1972, p. 33, para. 16.

6 See Arbitral Award of 31 July 1989 (Guinea-Bissau v. Senegal), Provisional Measures, Order of 2 March 1990, ICJ Reports 1990, p. 64. The proceedings were brought to obtain a ruling from the Court on the “existence and validity” of the award (which related to a maritime boundary); the provisional measures requested were however directed to restraining Senegal from alleged activities in the disputed area, which, it was suggested, were such as to prejudice the Court’s judgment. The Court dismissed the request for measures, not for lack of jurisdiction, but on the ground that “the alleged rights sought to be made the subject of provisional