SEPARATE OPINION OF PRESIDENT SCHWEBEL

The issuance of today's Order indicating provisional measures is unprecedented. It is to be hoped that it will not form a precedent, for it departs in critical measure from a basic rule of the judicial process. The Order has been issued on the basis of one party's views, without hearing the other. It is unprecedented in a further respect as well, for it is the first case in which the Court has issued an Order on its own motion, pursuant to Article 75, paragraph 1, of the Rules of Court providing that:

> "1. The Court may at any time decide to examine *proprio motu* whether the circumstances of the case require the indication of provisional measures which ought to be taken or complied with by any or all of the parties."

Whether the Court has acted in correct application of that Rule is open to question. The Rule assumes that the Court may act on its own motion where a party has not made a request for the indication of provisional measures. But the Court's consideration of the matter in this case has only been provoked by Germany's Application and its request for provisional measures. Article 74 of the Rules provides that, where a party makes such a request, the Court shall arrange "a hearing which will afford the parties an opportunity of being represented at it". No such hearings have been held, arranged or contemplated in the current case.

Under Article 75, paragraph l, the Court may issue an order of provisional measures without giving the parties the opportunity to be heard. That is an extraordinary power, to be exercised with the utmost caution. There may be room to question whether sovereign States should be subjected to the Court's restraints *pendente lite* without giving them the opportunity to be heard. But if in extreme circumstances they are to be so subject, then the Court should act in meticulous conformity with its Rules. Its Rules do not contemplate it so acting where a party has — as Germany here — made a request for the indication of provisional measures.

Moreover, the Court has done so on the basis only of Germany's Application. It has no other pleading, no other basis for the indication of provisional measures, before it. Is proceeding in this way consistent with fundamental rules of the procedural equality of the parties?

My doubts are confirmed by a reading of the most authoritative work in the field, Jerzy Sztucki's *Interim Measures in The Hague Court* (1983).

Professor Sztucki concludes that the Court may indicate provisional measures *proprio motu* "without any request for interim measures". He adds that only such a case "qualifies as an action *proprio motu* in the meaning of Article 75 (1) of the present Rules", and he reaches that conclusion after a careful examination of prior versions of the Rules of Court and the pertinent *travaux préparatoires* of all versions (at page 158.) But in this case, the Court has had such a request, and it is on the basis of the contents of Germany's accompanying Application that the Court has acted — all without affording the United States a hearing or the opportunity to present written observations.

Germany could have brought its Application years ago, months ago, weeks ago, or days ago. Had it done so, the Court could have proceeded as it has proceeded since 1922 and held hearings on the request for provisional measures. But Germany waited until the eve of execution and then brought its Application and request for provisional measures, at the same time arguing that no time remained to hear the United States and that the Court should act *proprio motu.*

I do not oppose the substance of the Court's Order, and accordingly have not voted against it. I have profound reservations about the procedures followed both by the Applicant and the Court.

(Signed) Stephen M. SCHWEBEL.